IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

JAMES SNOW, Reg. No. N-50072,	)	
PETITIONER,	)	No. 13 CV 3947
v.	)	
	)	Hon. Judge Elaine E. Bucklo
MICHAEL LEMKE, Warden, Superintendent, or authorized person having custody of petitioner,	)	
RESPONDENT.	)	

REPLY BRIEF IN SUPPORT OF JAMES SNOW'S PETITION FOR A WRIT OF HABEAS CORPUS

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INTRODUCTION

In his Memorandum in Support of his Petition for a Writ of Habeas Corpus, Jamie Snow gave this Court a detailed review of the facts of his case, the evidence presented to the trial court, the evidence presented in his two post-conviction petitions, and the arguments why his petition should be granted. He explained how he, an innocent man, was done in by police and prosecutors who lost sight of their obligations and made a case against him despite the cost, and by his own attorney who failed in every aspect of his duties to give counsel a meaningful defense.

Respondent's focus on summarizing the "facts" at trial without addressing all of the new evidence in Mr. Snow's case illustrates the merits of Petitioner's claims perfectly. At trial, the State presented what at the time seemed like a compelling account of Mr. Snow's guilt, and Respondent's answer essentially rehashes the facts as they were presented at trial. Yes, Mr. Snow was arrested in Missouri on a totally unrelated case and brought back to Illinois to face prosecution in that case. Yes, police bringing him back to Illinois falsely testified that Mr. Snow's inquiries about that unrelated case were about this case, even though they testified, to the contrary, at Mr. Snow's trial on the unrelated case that his statements were about the unrelated case. Yes, the State put Mr. Snow in lineups related to their investigation of Mr. Little's murder in 1993, lineups in which *no one identified Mr. Snow*. Yes, eight years after Mr. Little was killed, the State was able to convict Mr. Snow by presenting then-all-but-unchallenged testimony from a purported eyewitness and the testimony of numerous people claiming that Mr. Snow confessed to them. All of that is true. And, at trial, all of that evidence seemed compelling. It convinced a jury of Mr. Snow's guilt. It resulted in his conviction and in his sentence of natural life.

Respondent focuses on those facts because from there, everything goes downhill for his arguments. The State could not build a case against Mr. Snow until eight years after Bill Little

was killed. Early lineups yielded no identification of Mr. Snow and in fact had witnesses like Danny Martinez failing to identify him despite numerous opportunities to point him out of lineups and arrays. The State only made its case when, years later with new investigators trying to make a case, they found a number of unreliable people who were looking for deals and happy to cooperate with the State in response to threats or in exchange for help in their own criminal cases.

What extensive post-conviction investigation into Mr. Snow's case has revealed is that the State's evidence at trial, which then seemed insurmountable, is the proverbial house of cards. Danny Martinez, the eyewitness who seemed so credible, is now wholly contradicted by the first officer at the scene, Jeffery Pelo, and by numerous witnesses who aver that Martinez told them Mr. Snow was not the person he saw at the scene. Carlos Luna, who purportedly corroborated Martinez's identification, has averred that he did not see Mr. Snow. And the State's litany of people who were eager to testify at trial that Mr. Snow confessed to them have come forward themselves, or been shown by other evidence, to be people who were testifying in exchange for assistance or because of threats. Mr. Snow has shown that some of the same people who specifically denied at trial they were receiving any help from the State were in fact receiving deals or assistance. The multitude of such witnesses at trial seemed overwhelming, but ten times zero is still zero, and Mr. Snow's post-conviction investigation has shown that zero is the amount of credence the jury would have given these witnesses if they knew anything about their true motivations.

Mr. Snow presented all of this evidence, including dozens of new affidavits from witnesses, to the state courts in two rounds of post-conviction litigation and appeals. He argued persuasively to those courts that he should receive post-conviction relief on several different

constitutional grounds. Those courts ignored him, issued opinions that at times did not even give reasons for the denial of his claims, and conducted no fact-finding. Mr. Snow has never had any court examine the veracity of his claims, and because the state courts unreasonably ignored the merits of his evidence from both a legal and a factual perspective, this Court should now grant him a review and consideration of his new evidence.

Indeed, as Petitioner explained in his memorandum and in his initial habeas petition, this is a case that continues to yield evidence of violations of Mr. Snow's constitutional rights.[1] Mr. Snow continues to investigate his case, and to this day continues to find new evidence that proves his innocence and proves that the State wholly abandoned its obligations under *Brady* to produce exculpatory evidence to him. Respondent focuses on the facts from trial because the State's best case against Mr. Snow was made at his trial. Since then, every development has demonstrated that the evidence presented at that trial is unreliable, in many instances fabricated, and resulted from wholesale violations of Mr. Snow's constitutional rights. Respondent has not presented any persuasive argument why this Court should not grant Mr. Snow the relief he seeks. This Court should grant Mr. Snow a new trial, or at minimum an evidentiary hearing to allow him an opportunity to finally present his evidence to a court.

ARGUMENT

I. None of Petitioner's Claims Are Procedurally Defaulted

Respondent's first argument can be easily dispatched. None of Petitioner's claims have been procedurally defaulted, as each was fairly presented through all three levels of Illinois state court review and therefore properly exhausted. *O'Sullivan v. Boerckel*, 526 U.S. 838, 847-48 (1999). Respondent's sole contention is that certain of Petitioner's claims were not raised in

[1] *See* Pet.'s Mem. at 20 n.8 & 9.

Petitioner's Petition for Leave to Appeal filed with the Illinois Supreme Court seeking leave to appeal the denial of his original post-conviction petition. Answer at 13, 46. In his answer, Respondent does not articulate how those claims were not raised in Petitioner's petition for leave to appeal, and in fact, this argument is inaccurate.

Petitioner raised as claims with his petition for relief the entirety of his post-conviction petition that was rejected by the circuit court and the appellate court. State Court Record, Ex. X[2] at 9, 12-14, 20. Petitioner was limited by the Illinois Supreme Court rules to the filing of a petition for leave to appeal of 20 pages in length (*see* Supreme Court Rule 315(d)), and so his argument and presentation of his claims was necessarily limited, but he specifically sought review of the entirety of his post-conviction petition, while focusing his arguments on certain claims. He specifically addressed and argued the ineffectiveness of his counsel, *see* State Court Record, Ex. X at 12-18, and the violation of his rights under *Brady v. Maryland*, 373 U.S. 83 (1963), *id.* at 18-19.

The Seventh Circuit has cautioned that courts "avoid hypertechnicality" in applying exhaustion standards. *Chambers v. McCaughtry*, 264 F.3d 732, 738 (7th Cir. 2001) (quoting *Verdin v. O'Leary*, 972 F.2d 1467, 1474 (7th Cir. 1992)). For this reason, a petitioner satisfies the exhaustion requirement despite "variations in the legal theory or factual allegations urged in its support." *Picard v. Connor*, 404 U.S. 270, 277-78 (1971). There is no question that Petitioner raised the substance of his ineffective assistance of counsel and *Brady* claims to the Illinois Supreme Court such that the Illinois Supreme Court was "alerted" to the federal nature of the claim. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004).

Although not directly argued by Respondent, Respondent may take issue with the relative brevity of Petitioner's filing with the Illinois Supreme Court. Because the Supreme Court denied

[2] "State Court Record" refers to the exhibits filed by Respondent with his Answer.

his petition for appeal, Petitioner never had the opportunity to fully brief his arguments before the Illinois Supreme Court. In relevant part, the Illinois Supreme Court Rule 315 directs petitioners seeking leave to appeal to file with the Illinois Supreme Court "the points relied upon in asking the Supreme Court" to review the judgment and "a short argument . . . stating why review by the Supreme Court is warranted." If a petition for leave to appeal is granted, then a petitioner is allowed leave to file a merits brief setting forth more fully why he should prevail on appeal. Here, Mr. Snow's petition for leave was denied and so he was never able to file a brief setting out more fully the bases for relief. Given the limitations of the Illinois Supreme Court Rules, he nevertheless provided the Illinois Supreme Court with "a meaningful opportunity to pass upon the substance of the claims" now presented in his habeas petition. *Rodriguez v. Scillia*, 193 F.3d 913, 916 (7th Cir. 1999).[3]

II. Ground 1: Mr. Snow Should Prevail on His Ineffective Assistance of Counsel Claim

As a general matter, Respondent's Answer errs in three main ways. First, instead of focusing on the last reasoned state court decision, Respondent cherry-picks favorable language from an amalgam of state court decisions and occasionally cites to language out of context to make it seem as if a court were addressing a claim that it was not actually addressing. Respondent even cites to state court decisions *pre-dating Petitioner's post-conviction petitions filed in 2010 and 2013*. *See* Answer at 18 & 30 (citing to April 2, 2001 trial court order [State

[3] Petitioner has not procedurally defaulted any of his claims. In the event this Court concludes that Petitioner has procedurally defaulted any aspects of his claims, however, this Court can nevertheless consider the merits of Petitioner's claims if the Court finds that Mr. Snow has established cause and prejudice with respect to any defaulted claims, or that the failure to review any such claims results in a fundamental miscarriage of justice. *Barksdale v. Lane*, 957 F.2d 379, 385 (7th Cir. 1992). Here, Mr. Snow has satisfied both exceptions. First, he has cause for any failure to fully exhaust any issues since the Illinois Supreme Court Rules limiting his prayer for leave to appeal to 20 pages while requiring him to apprise the Supreme Court of the facts of the case, the procedural history, and any and all claims for relief is an external factor that prevented him from raising any claims he was unable to raise, and the merits of his claims demonstrate the prejudice. Second, Mr. Snow has proven his actual innocence as required to make a showing of a fundamental miscarriage of justice. *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992). As demonstrated in his petition and briefings to this Court, Mr. Snow has demonstrated that he did not kill Bill Little, and that the State's entire case against him is a fabrication.

Court Record, Ex. GG] addressing whether different counsel should have been appointed for preparation of Mr. Snow's post-trial motions, not whether any counsel had been ineffective under *Strickland*), 24-25, 30 (citing to August 20, 2004 appellate court order on direct appeal [State Court Record, Ex. Q]), 19 & 25 (citing to May 27, 2015 appellate court order [State Court Record, Ex. DD]'s discussing whether leave to file a successive post-conviction petition should be granted on *Brady* claim). This is impermissible. There is only one relevant state court decision for review under AEDPA: the last state court to address the merits of a particular claim. *Ylst v. Nunnemaker*, 501 U.S. 797, 806 (1991); *see also Thomas v. Clements*, 789 F.3d 760, 766-67 (7th Cir. 2015); *Eichwedel v. Chandler*, 696 F.3d 660, 671 (7th Cir. 2012); *Sutherland v. Gaetz*, 581 F.3d 614, 616 (7th Cir. 2009). The last state court decision to adjudicate Petitioner's ineffective assistance of counsel claim on the merits was the decision of the Circuit Court of McLean County entered on April 21, 2011 dismissing Petitioner's Amended Petition for Post-conviction Relief. On this claim, the circuit court held simply that the Petitioner's claim did not meet the *Strickland* standards, "[m]ost of what is complained of is trial strategy," and Petitioner was not prejudiced. Ex. B at 3.[4] Respondent does not address Petitioner's argument that the state court's decision was both *contrary to* and an unreasonable application of *Strickland*.

As the Seventh Circuit explained in *Thomas*, "In *Woolley* [*v. Rednour*, 702 F.3d 411, 421 (7th Cir. 2012)], we held that 'Unless a state-court opinion adopts or incorporates the reasoning of a prior opinion, AEDPA generally requires federal courts to review one state decision.'" 789 F.3d at 766 (internal quotation marks omitted) (holding that *Strickland* claims are divisible and providing AEDPA deference only on a prong that the last reasoned state court decision reached and applying *de novo* review to the other prong); *see also id.* at 767 ("Had Congress intended us

[4] Petitioner's citations to exhibits are to the exhibits submitted with his Petition and Memorandum. *See* List of Exhibits to Petition for Writ of Habeas Corpus – Person in State Custody [Dkt. 2] (listing Exhibits 1-43); Dkt. 42 (Memorandum of Law with Exhibits A-I).

to give deference to an amalgamation of adjudications, it could have used different language.") (internal quotation marks omitted). "In conducting federal habeas review under AEDPA, we look to the last reasoned state court opinion addressing each claim." *Ruhl v. Hardy*, 743 F.3d 1083, 1091 (7th Cir. 2014).

Second, Respondent supplies reasons for trial counsel's failure to investigate and cross-examine witnesses that simply are not in the record before the state court. The circuit court dismissed Petitioner's post-conviction petition without an evidentiary hearing, and the appellate court affirmed. Under that posture, this Court must take Petitioner's affidavits at face value and assume them to be true. *Campbell v. Reardon*, 780 F.3d 752, 761 (7th Cir. 2015); *Mosley v. Atchison*, 689 F.3d 838, 849 (7th Cir. 2012); *Pole v. Randolph*, 570 F.3d 922, 942-43 (7th Cir. 2009) ("We do not know why Pole's counsel declined to call him to the stand because there has been no hearing on Pole's claim of ineffective assistance and Pole has submitted no affidavit from his trial counsel. … Without knowing counsel's reasoning in this case, we will assume that counsel's performance was deficient and move on to the second part of the analysis."). Instead, Respondent impermissibly speculates about trial counsel's strategy and assumes that it was strategic despite the absence of evidence in the record on counsel's reasoning.

Third, Respondent ignores one of Petitioner's primary arguments: that Petitioner's trial counsel failed to investigate and speak with key witnesses, and that "[c]ounsel has a duty to perform a reasonable pretrial investigation *before* committing to a defense strategy." *Campbell*, 780 F.3d at 763; *see also id.* at 764-65; *see also Stitts v. Wilson*, 713 F.3d 887, 892 (7th Cir. 2013); *Mosley*, 689 F.3d at 848. *Strickland v. Washington*, 466 U.S. 668 (1984), does not provide for a balancing test in assessing counsel's performance. Respondent attempts to excuse trial counsel's utter failure to investigate by pointing instead to other things that counsel did in the

defense of the case. But that is not how performance of counsel is assessed. The first prong of *Strickland*'s test is clear:

> A convicted defendant making a claim of ineffective assistance must identify *the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.* The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.

466 U.S. at 690 (emphasis added); *see also id.* at 691 ("counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."); *see also Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986) ("Counsel's performance at trial, while generally creditable enough, suggests no better explanation for this apparent and pervasive failure to "make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."); *Elmore v. Ozmint*, 661 F.3d 783, 861 (4th Cir. 2011) ("Lamentably akin to defense counsel in *Kimmelman* and *Rompilla* [*v. Beard*, 545 U.S. 374 (2005)], Elmore's lawyers disregarded their professional obligation to investigate critical prosecution evidence, thereby engendering 'a breakdown in the adversarial process that our system counsel on to produce just results.' As in *Kimmleman* and *Rompilla*, the failure to investigate cannot be excused by the lawyers' other efforts (which in any event, were meager and superficial.") (internal citation omitted); *Johnson v. Secretary, DOC*, 643 F.3d 907, 931 (11th Cir. 2011) ("The question under *Strickland* is not whether Johnson's trial counsel's overall performance at the sentence stage was exemplary or even average, but whether he conducted an adequate background investigation or reasonably decided to end the background

investigation when he did."); *Silva v. Woodford*, 279 F.3d 825, 842 (9th Cir. 2002) ("an attorney's failure to investigate … can amount to constitutionally deficient performance."). Here, Petitioner has raised numerous specific acts and omissions of trial counsel that were not the result of reasonable professional judgment—indeed, the failure to investigate was not the result of "judgment" at all.

Harrington v. Richter, 562 U.S. 86 (2011), the case cited by Respondent for his contention that counsel's failure to investigate may be excused by an adequate "overall performance" (*see* Answer at 18), is not to the contrary. *Harrington* did not involve a trial counsel's failure to investigate; instead, it concerned an asserted "single error" of trial counsel of failing to introduce a defense expert in response to prosecution expert testimony. *See* 562 U.S. at 110-11. Moreover, in this case, Petitioner has asserted far more than a "single error" of trial counsel. *See* Pet.'s Mem. at 35-55. And, even if "overall performance" of counsel were the touchstone, trial counsel's "overall performance" did not indicate "active and capable advocacy." *See Harrington*, 562 U.S. at 111. Respondent asserts that counsel "effectively impeached all of the important witnesses, including each of the eyewitnesses," Answer at 19, but this fails to appreciate that trial counsel could not have effectively impeached witnesses that he did not even attempt to interview or investigate, in order to learn information to use in a cross-examination.

A. Trial Counsel Failed to Investigate and Cross-Examine Danny Martinez

Contrary to Respondent's assertion, the state appellate court did not find with respect to Petitioner's ineffective assistance of counsel claim that trial counsel "thoroughly cross-examined" Martinez. The May 27, 2015 appellate decision from which Respondent quotes (*see* Answer at 19) concerned whether Petitioner should have been granted leave to file his successive post-conviction petition raising additional *Brady* claims in 2013, not his ineffective assistance of

claim claim raised in his 2010 amended post-conviction petition. *See People v. Snow*, 2015 IL App (4th) 140721, ¶ 24. The last reasoned state court decision on Petitioner's claim regarding counsel's failure to investigate and cross-examine Danny Martinez was the April 21, 2011 circuit court decision dismissing Petitioner's ineffective assistance claim without a hearing. *See* Ex. B. In that decision, the state court dismissed all of Petitioner's ineffective assistance of counsel claim with the sweeping statement, "[m]ost of what is complained of is trial strategy," *id.* at 3, without addressing any of Petitioner's specific assertions of error in particular.

As Petitioner discussed in his memorandum, trial counsel's failure to investigate was contrary to *Strickland*, and this Court should review this claim *de novo.* Pet.'s Mem. at 39. Even if this Court were to review this claim under AEDPA standards, there is simply nothing in the record to support the state court's decision that trial counsel's failure to investigate and use available evidence from Jeffery Pelo or police interview tape of Pelo to cross-examine Danny Martinez was "trial strategy." *See id.* Pelo's affidavit makes clear what was not clear from his trial testimony: that Martinez could not possibly have seen Mr. Snow exiting the gas station because Pelo would also have seen Mr. Snow, and he did not. Mr. Snow's trial counsel did not speak with Pelo prior to trial, and if he had, he would have learned this crucial information that could have been used at trial to discredit Martinez. Dkt. 1 at 15. Trial counsel also did not make use of Pelo's interview statement, to either elicit favorable testimony from Pelo or discredit Martinez. *Id.*; Ex. 2; Ex. 3 at 2.[5] Despite this clearly exculpatory information from a police officer, trial counsel did not make any use of this information or even attempt to interview Pelo.

[5] In his interview with the police, Pelo stated, "In the Clark station parking lot was an older car, blue, with a male putting air in the tires as I was watching it I was watchin the front of the station. There was no, couldn't see and movement or anything inside. Ran the license plate number of the blue vehicle that was in the lot. One of the dispatchers was givin me a hard time about running the plate cuz leads was down, and *the male walks from his car towards the station stops looks back towards his car, turns walks towards the station some more; stops and turns around and goes back to his vehicle got in it*, can't remember if he was backin out of the lot or did a little u-turn and drove out of the lot." Ex. 3 at 2 (emphasis added).

Contrary to Respondent's contention, trial counsel did not elicit this information from Pelo at trial. On cross-examination, Pelo testified that he saw Martinez walk towards the gas station after he put air in his tires, and Pelo said, "**I don't remember seeing him turn around.** I remember him walking towards the station and then I remember him getting back in his car as he was coming back to get in his car." Vol. II, R. 123-24 (emphasis added). Pelo also denied keeping his eyes on the front of the station the whole time he was there. *Id.* at 126. However, in his affidavit, Pelo stated, "From the time I arrived across the street to the time I entered the gas station, my gaze was never off the front of the station for more than a few seconds." Ex. 1 ¶ 12. He further averred that he is

> absolutely positive that from the time I arrived at the Empire and Linden intersection in response to the 1090 call to the time that I eventually entered the gas station, no one other than Bill Little was either in the gas station or entered or exited the gas station. I had a clear, unobstructed view of the gas station door and was focusing on the station because I was concerned about the 1090 call and the fact that I couldn't see anyone inside. Had someone left the gas station, I would have seen them.

Id. ¶ 17. This testimony was not elicited from Pelo by trial counsel because counsel did not interview Pelo before trial or make use of the police interview of Pelo. As a result, the prosecutor was able to explain away Pelo's failure to see Mr. Snow in her closing by arguing that Pelo was looking all around the area and then got into a "distracting argument" with the dispatcher over whether to hold the license plate number. Vol. XI, R. 39-40.

Not only did the prosecutor take advantage of trial counsel's failure to interview Pelo or use his police interview to establish that he absolutely would have seen Mr. Snow if Martinez were telling the truth, the prosecutor tried to shape Pelo's testimony to conform with Martinez's. As Pelo averred in his affidavit:

> Right before Jamie Snow's trial I had a few meetings with prosecutor Tina [sic] Griffin and Detective Katz. They talked with me about my testimony. I had never been told exactly what Danny Martinez said happened, but I knew there was some kind of

> discrepancy between his version of events and mine. I had told Griffin and Katz what I told Barkes, that no one could have left the gas station while I was on the scene. Through Griffin's questions in preparing me to testify, she implied that she wanted me to say the opposite. I told Griffin that I would not lie. She told me that she was not asking me to lie, but she instructed me to only answer the questions I was asked.

Ex. 1 ¶ 25.

Respondent is not correct when he asserts that "[t]rial counsel explained his strategic reasons for not further impeaching Martinez." Answer at 25. There is no such explanation in the record. Respondent cites to counsel Riley's unsworn statement to the trial court during a hearing on post-trial motions about why he thought that Martinez was adequately impeached on cross-examination. But that was not a hearing on any ineffective assistance of counsel claims. That hearing was held on Mr. Snow's *pro se* request for new counsel to represent him in litigating his post-trial motion. *See* Pet.'s Mem. at 14-15; Vol. XII, R. 12-16, 40-141. Moreover, neither Riley nor Picl *testified* at that post-trial hearing (they only engaged in dialogue with the judge); that hearing took place after trial and before Mr. Snow obtained the affidavit from Pelo that he attached to his 2010 amended post-conviction petition; and Riley's statements must be rejected as a post-hoc rationalization because counsel never found out *prior to trial* what Pelo's testimony would be, *see Wiggins v. Smith*, 539 U.S. 510, 527-28 (2003). The only issue before the trial court at that hearing was whether Mr. Snow was entitled to appointment of different counsel for preparation of post-trial motions, not whether any of his counsel had committed ineffective assistance of counsel. C. 760; Vol. XII, R. 40-141. Mr. Snow's ineffective assistance of counsel claim raised in his 2010 amended post-conviction petition simply were not raised at the April 5, 2001 hearing, because he had not yet obtained the dozens of affidavits that he later obtained with the assistance of undersigned counsel to support his claims. *See* Vol. XII, R. 40-141.

Furthermore, Respondent has failed to address numerous aspects of trial counsel's ineffectiveness with respect to Pelo and Martinez. First, police reports available to counsel showed that Martinez failed to pick Mr. Snow out of mug shot books in 1991 and 1993, and he actually identified two other people but not Mr. Snow. Group Ex. 7. Thus, trial counsel's performance was deficient not only because he failed to interview Pelo and elicit exculpatory information from him that would have contradicted Martinez, but it was deficient because he failed to use available police reports of Martinez's interviews with the police to challenge Martinez on his identification of Mr. Snow. The state court's decision otherwise was both contrary to and an unreasonable application of *Strickland*.

Second, Petitioner obtained an affidavit from William Hendricks, who averred that he, Martinez, and Mr. Snow knew each other well, Martinez knew what Mr. Snow looked like, and Martinez told Hendricks that Jamie was not the guy in the composite sketch. Ex. 4. Trial counsel failed to investigate this or call Hendricks to impeach Martinez on this point. This was crucial because Martinez's testimony made it seem like he did not know Jamie Snow at all. Trial counsel never testified about why they did not call William Hendricks or what investigation they did with respect to him, if any. Hendricks swore that he never spoke with trial counsel about what Martinez said to him, and so, given the posture of this petition (in which there was no evidentiary hearing in state court and the facts alleged must be taken as true), the state court could not reasonably have concluded that a decision not to call Hendricks was "trial strategy."

Third, trial counsel did not use Officer Paul Williams' inquest testimony and initial case report to discredit Martinez. *See* Pet.'s Mem. at 42-43; Group Ex. 6.[6]

[6] Respondent also does not respond to Petitioner's arguments that trial counsel failed to call Detective Crowe to impeach Martinez; failed to elicit helpful testimony from Dennis Hendricks that Martinez told Hendricks that he did not think Snow was involved; and failed to cross-examine Martinez about how the police had been pressuring him through Mrs. Little. *See* Pet.'s Mem. at 43.

Respondent tries to argue, as the State did in the state courts, that Martinez was not a star witness, seemingly to imply that counsel could have been effective in failing to discredit him, or that Mr. Snow's significant evidence that Martinez's testimony is incredible is somehow irrelevant to whether Mr. Snow was prejudiced by his counsel's ineffectiveness. Answer at 24 n.4. That the state courts on appeal recognized that Martinez's testimony had problems is different from how the jury received Martinez's testimony. The State argued in closing that Martinez came "face to face" with Mr. Snow in the gas station parking lot, that Luna had the same view as Martinez, and that Martinez's testimony was corroborated by Luna and by other evidence. Vol. XI, R. 45-46. Respondent can characterize Martinez's testimony however he wishes, but there was only one witness who squarely put Mr. Snow *at the scene of the murder*, and that was Martinez. Without Martinez and Luna, the State's case relied only on Mr. Snow's supposed confessions. There can be no doubt that an eyewitness was a critical part of the State's presentation to the jury.

B. Trial Counsel Failed to Call Thomas Sanders to Discredit Carlos Luna

Respondent conjures reasons for why trial counsel did not call Thomas Sanders, a sketch artist who spoke with Carlos Luna shortly after the crime, to impeach Luna. *See* Answer at 26. There is nothing in the record indicating that any decision by counsel not to call Sanders was a strategic one, or that it would have been harmful or fruitless to the defense to call Sanders, since Sanders could have testified that Luna could not describe facial features sufficiently for Sanders to do a composite. Respondent's speculation about trial counsel's possible reasons for not calling Sanders, *see* Answer at 26, is just that—speculation. Thus, the state court's decision that this was "trial strategy" was contrary to and an unreasonable application of *Strickland*.

The state court's decision that there was no prejudice to Mr. Snow was also an unreasonable application of *Strickland*. Luna and Martinez were the two supposed eyewitnesses. The fact that trial counsel managed a cross-examination of Luna does not make up for the fact that trial counsel failed to call an independent police employee witness (Sanders) to show that Luna's testimony was entirely wrong. The only question that trial counsel raised about Luna at trial was the distance from which Luna saw Mr. Snow (approximately 200 feet). Contrary to Respondent's assertion otherwise, Luna never testified at trial that he could not see the man well enough to describe facial features. *See* Vol. III, R. 81-83 (describing what the man was wearing but not stating that he could not see the man's facial features). Thus, it is not true that Sanders' testimony "would have added nothing," as Respondent claims. *Id.* If Sanders had been called to testify, it would have helped explain *why* Luna could not make an identification from that distance: Luna could not see any facial features sufficient to do a composite sketch. In co-defendant Susan Powell's trial, Sanders was called by the defense to impeach Luna, and his testimony was used effectively—Powell was acquitted. Clearly, the jury thought that Luna provided important testimony—the only question the jury sent in during deliberations was about the distance from which Luna saw Mr. Snow. *See* Vol. XI, R. 185-88.

C. Trial Counsel Failed to Investigate, Interview, or Adequately Cross-Examine Steven Scheel

The state court's decision that trial counsel's failure to interview Steven Scheel was trial strategy is both contrary to and an unreasonable application of *Strickland*, for the same reasons as apply to counsel's investigative failures above. Because it is contrary to *Strickland*, this Court should apply *de novo* review. *Mosley*, 689 F.3d at 851.

Respondent claims that "[c]ounsel's cross-examination demonstrates that counsel knew Scheel's relationship with petitioner, criminal history, and prior statements. That is, counsel

knew enough to strategically decide whether further investigation (interviewing Scheel) was necessary." Answer at 27. This is sheer conjecture, because there is nothing in the record showing that trial counsel interviewed Scheel or made any effort to interview Scheel, or made any kind of reasoned, strategic decision not to interview Scheel and learn what he had to say. Given that Petitioner was never given an evidentiary hearing in which could call witnesses, such as his trial counsel, and ask what their reasons were—if any—for not interviewing Scheel. Thus, even under AEDPA review, the state court's decision that this was "trial strategy" was objectively unreasonable.

Respondent claims that there was no prejudice, but there can be no serious dispute that if trial counsel had interviewed Scheel and learned that his testimony was coerced and fabricated by the police, this clearly would have cast Scheel's testimony and the testimony of the other "confession" witnesses in an entirely different light. The cross-examination that trial counsel could have conducted with this knowledge of police coercion and fabrication would have been different in kind, not merely degree, from the cross-examination actually conducted.

Respondent argues that trial counsel pursued a reasonable strategy to explain the "confession" witnesses. *Id*. at 21-22. But again, this is pure speculation about what trial counsel did and what trial counsel was thinking when they chose to argue what they did. Because there was never a hearing held on Petitioner's claims, there is nothing in the record to support any decision by the state court that trial counsel's approach was "strategic." Given that Petitioner's post-conviction petitions were dismissed without a hearing and the dismissal affirmed by the state appellate courts, this Court must take Petitioner's affidavits at face value and assume them to be true. *Campbell*, 780 F.3d at 761. Moreover, as *Strickland* instructs, no decision of counsel

can be "strategic" if the decision is made without adequate investigation and all relevant information about what witnesses may say.

D. Trial Counsel Failed to Investigate and Present Evidence that Would Have Contradicted Dawn Roberts

Dawn Roberts has now recanted her trial testimony, averred that Mr. Snow never made a toast to Billy Little, and stated that one of the detectives questioned her aggressively and repeatedly asked her the same questions hoping to get different answers. Ex. 12 ¶¶ 6-7. Mr. Snow's attorneys never met with Roberts, and if they had, she would have told them what was in her affidavit. *Id.* ¶ 9. Tina McCombs corroborates Roberts. Ex. 13.

Respondent surmises that trial counsel "had enough information to reasonably choose not to interview Roberts, and their performance was not deficient" as a result. Answer at 29. Respondent also guesses that trial counsel was "presumably aware" of McCombs' new testimony as set forth in her affidavit that Petitioner submitted with his post-conviction petition. *See id.* at 30. This is, again, complete speculation about what trial counsel knew and why they did what they did. It is axiomatic that counsel could not have made a strategic decision about whether to interview Roberts or elicit certain testimony from her if they never interviewed her in the first place. *See Strickland*, 466 U.S. at 690-91 ("counsel has a duty to make reasonable investigations to or make a reasonable decision that makes particular investigations unnecessary."). McCombs averred in her affidavit that she had not talked to Petitioner's attorney on the day of the trial, that she was subpoenaed to testify but was dismissed without testifying, she did not know why she had been subpoenaed to testify, and she did not talk to Mr. Snow about testifying (and so he would not have known what exculpatory things she had to say). *See* Ex. 13 ¶¶ 7-8. Given that Petitioner never had an evidentiary hearing, and the state courts summarily dismissed his petitions without a hearing, the facts as set forth in his affidavits must be assumed to be true.

The state court's decision that this failure was not prejudicial to Petitioner, *see* Ex. B at 3, was also objectively unreasonable. Roberts's testimony shows that the police were pressuring her to falsely implicate Mr. Snow, and that Mr. Snow did not make the inculpatory statement that she had attributed to him at trial. If the new evidence from Roberts and McCombs had been elicited by trial counsel, there is a reasonable probability that the outcome of the trial would have been different, especially when this evidence is viewed cumulatively with other new evidence.

E. Trial Counsel Failed to Impeach Karen Strong with Mark Huffington

Mark Huffington could have been called by the defense to impeach Karen Strong's testimony. *See* Ex. 14 (Huffington's December 21, 2009 Affidavit). Huffington swore that Mr. Snow's attorneys never interviewed him, and that if they had, he would have told them about his conversation with Strong, and he would have testified to this at trial. *Id.* ¶¶ 10-11.

Respondent cites to two different state court decisions—both decided *prior to Petitioner's submission of the new affidavit from Huffington with his 2010 post-conviction petition*. *See* Answer at 30 (citing to August 20, 2004 appellate court decision on direct appeal and April 9, 2001 trial court decision on *pro se* motion for new counsel). Neither of these are the last reasoned state court decision for purposes of AEDPA review. The relevant state court decision, simply said that "most" of what Petitioner complains about is "trial strategy," with no further discussion. *See* Ex. B.

Although Huffington did not become known as a potential witness until after Strong testified at trial, trial counsel could have called him to testify as a defense witness after Strong testified in the State's case in chief. The Respondent does not rebut this. The state court's determination that this was trial strategy was contrary to *Strickland* and objectively unreasonable when counsel did not even attempt to interview Huffington to see if he might be a better witness

than McCown, or if his testimony might serve to corroborate and strengthen McCown's. As the cases discussed above establish, without interviewing a witness, counsel could not make an informed decision about whether his testimony would be cumulative or unhelpful. *See Mosley*, 689 F.3d at 849. Respondent's speculation that "[c]alling Huffington to further rebut Strong would have been risky, *as counsel had no way to know what Huffington would have said*," Answer at 31 (emphasis added), completely misses the point. Of course counsel could have found out what Huffington would have said—he could have interviewed him or sent an investigator to interview him after Strong's testimony and before deciding to call him as part of the defense case. The state court's determination that Mr. Snow was not prejudiced by counsel's failure to investigate and interview Huffington was objectively unreasonable.

F. Trial Counsel Failed to Investigate and Use Available Evidence about Deals and Favorable Treatment Given to Witnesses

Trial counsel had failed to investigate and use publicly-available evidence that several of the State's witnesses (Kevin Schaal, Bruce Roland, and Jody Winkler) had received deals in exchange for their testimony against Mr. Snow. There was nothing in the record before the state court that indicated that trial counsel made any strategic decision whatsoever not to investigate Schaal, Roland, or Winkler's backgrounds, or that counsel decided that such investigation would be harmful, counterproductive, or a waste of time. The state court's decision that counsel's failure was "trial strategy" was contrary to and an unreasonable application of *Strickland*.

With respect to Schaal, Respondent claims that the proffered impeachment (that Schaal actually received a downward departure in his federal case in exchange for his testimony against Snow) would have been "cumulative." Answer at 32. This is simply not the case. At trial, Schaal testified that he had no idea whether his federal sentencing was at all related to his cooperation in Mr. Snow's case. Vol. VI, R. 64. Thus, testimony that Schaal *had in fact received favorable*

treatment in his own criminal case in exchange for testifying against Snow could not possibly have been "cumulative."

With respect to Roland, available information not used by trial counsel showed that Roland had received light sentences and favorable consideration in exchange for his testimony against Mr. Snow. *See* Group Ex. 16. Respondent argues that "[c]ounsel did not need to connect the dots by proving that Roland—veteran to criminal sentencing—knew that cooperating might benefit him." Answer at 33. Not only is this guesswork about why counsel did not use available information about favorable treatment given to Roland, but it misses the point. The available evidence showed not only that Roland believed that his testimony against Mr. Snow *might* benefit him, but that he did, in fact, receive light sentences on his pending felonies, special treatment such as bond, a favorable deal that ignored multiple charges, and permission to leave the State of Illinois. *See* Group Ex. 16.

With respect to Winkler, Respondent mischaracterizes the record. At trial, Winkler was asked, "For your cooperation and your testimony in his prosecution are you expecting or hoping to receive anything?", and he answered "No." Vol. V, R. 119. Winkler also specifically denied getting any leniency or consideration in disposing of his pending charges:

> Q: Did you in the disposition of the charges that you were in custody for at that time and after you cooperated with them and gave them information, did you receive any leniency or consideration in disposing of your pending charges?
> A: No

Id. at 127; *see also id.* at 128-30. Trial counsel failed to obtain available information that Winkler had actually received a much lighter sentence than he was eligible for. If trial counsel had investigated and obtained this information, he could have cross-examined Winkler using that information instead of having nothing to confront Winkler with when Winkler simply denied receiving any favorable treatment in exchange for his testimony.

The state court's determination these errors did not prejudice Snow was objectively unreasonable. If the jury had heard that Schaal, Roland, and Winkler had self-interested motives for testifying against Mr. Snow, there is a reasonable probability that the outcome would have been different. *See United States v. Bagley*, 473 U.S. 667, 683 (1985) (the "possibility of a reward gave [the witnesses] a direct, personal stake in respondent's conviction."). Trial counsel's deficient performance prejudiced Mr. Snow because it allowed the State to argue in closing that these witnesses had no incentives to lie. Vol. XI, R. 52-53, 56, 62-64.

G. Trial Counsel Failed to Investigate and Use Evidence from Darren Smart

Respondent attempts to minimize the significance of Darren Smart's new affidavit. But Smart claims in his affidavit that Mr. Snow never made any inculpatory statements to Mary Jane Burns, and this completely contradicts Burns's testimony. *See* Ex. 19. Although Burns stated at trial that the other inmate present was Darren Smart or another inmate; in her statement to the police, she said it was Darren Smart. Ex. 18 (Burns Statement) at 5 ("I believe it was Darren that said—well if you know who did it then why aren't you saying …."). Trial counsel could have used Burns' pretrial statement to the police to impeach her, and he could have interviewed Smart and called him to impeach Burns. Trial counsel's failure to do so fell below an objective standard of reasonableness. The state court determined that this error constituted "trial strategy," but there was no evidence in the record that could have made this an objectively reasonable conclusion. Despite Respondent's attempt to fill in the gaps of trial counsel's decision-making, there is nothing in the record supporting that counsel had any strategic reasons for failing to investigate and present evidence from Darren Smart to impeach Burns.

The state court's determination that this error was not prejudicial was also objectively unreasonable. Not only would Smart have told Mr. Snow's counsel that the conversation with

Burns never took place, but he would have told them that the detectives had already visited him and asked him about this conversation and that he denied it took place. *See* Ex. 19. There is a reasonable probability that if Smart had been interviewed and called to testify, the result of the trial would have been different.

H. Trial Counsel Failed to Use Available Evidence to Impeach Detectives Thomas and Bernardini

The fact that Mr. Snow was arrested on another, unrelated crime was already elicited by the State during its direct examination of the detectives, *see* Vol. VI, R. 118:4-7, 120:18-20, 125:9-15; Vol. VII, R. 37, as well as trial counsel, Vol. VI, R. 136:4-7. Given that this information had already been placed before the jury, there was no strategic reason why Mr. Snow's trial counsel would not have tried to establish that any statements made by Mr. Snow pertained to the unrelated case and not the murder for which Mr. Snow was being prosecuted. Trial counsel could have, but failed to, cross-examine Detective Thomas on the fact that he testified one way about Mr. Snow's statements in the grand jury on Freedom Oil and testified another way in Mr. Snow's trial on the Clark gas station murder. Trial counsel's statements to the trial court at the post-trial motion hearing about why they did not call Thomas were not under oath. *See* Vol. XII, R. 105. There is a reasonable probability that if trial counsel had cross-examined the detectives on this point, it would have resulted in a different outcome.

I. Lead Trial Counsel Frank Picl Admitted Failing to Investigate Cases Outside of Court Because of His Alcoholism, Gambling, and Mental Illness

As discussed in Petitioner's Memorandum, Frank Picl suffered from serious personal and professional problems at the time of his trial which contributed to his deficient performance in failing to investigate, interview witnesses, and conduct other out-of-court preparation. Petitioner's other trial counsel, Patrick Riley, had only a secondary role in Petitioner's defense

because he could not speak. Respondent argues that the state court reasonably concluded that Picl's alcoholism and mental illness did not cause him to perform deficiently because "Picl was effective at trial, and there is no evidence that any alcohol use impaired him in preparing a defense." Answer at 24.

Respondent's argument both misses the point and mischaracterizes the evidence. The evidence, as provided in the state court record, *see* Pet.'s Mem. at 26-28, 53-54, is that Picl himself admitted that, due to his alcoholism, gambling, and mental illness, he did not do any work outside of the courtroom but continued to try cases anyway. C. 3705-06. Picl admitted that all he needed to do as a defense attorney to prepare for a case was "react." *Id.* at C. 3710. Respondent fails to address Petitioner's argument: Picl's own admissions corroborate Petitioner's claim that Picl did not make any strategic decisions about what witnesses to interview and what pieces of evidence to investigate. Picl himself admitted that he did not think he needed to do anything outside of the courtroom as part of his job as a trial lawyer.

Furthermore, ineffective assistance of counsel is not determined only by looking at trial counsel's in-court performance. Merely standing up in court and cross-examining witnesses on the fly without having interviewed or attempted to interview any of the witnesses or done any pretrial investigation does not an effective (or even adequate) attorney make. Picl's in-court performance was severely hampered by the fact that he failed to investigate and interview key witnesses in order to find out what they had to say so that he could elicit helpful testimony and conduct an adequate cross-examination. Out-of-court acts or omissions—such as a failure to investigate—can constitute ineffective assistance of counsel, and Respondent ignores this well-established principle.

II. Ground 2: The Cumulative Effect of Trial Counsel's Errors Prejudiced Mr. Snow

The state courts did not address Mr. Snow's claim that trial counsel's objectively unreasonable errors, viewed cumulatively, caused him prejudice. *See* Exs. B, C. This Court should review this claim *de novo*. Respondent does not assert otherwise. *See* Answer at 37. As discussed above, each of the errors of counsel outlined above fell below an objective standard of reasonableness. Even if the Court does not find that any individual error prejudiced Mr. Snow, the combined effect of these errors certainly did.

III. Ground 4: Mr. Snow Should Prevail on His *Brady* Claims

Respondent does not dispute that the state appellate court addressed only some of the *Brady* claims that Petitioner raised. *See* Answer at 37. On the claims that the state appellate court addressed, this Court should review it under the strictures of § 2254(d)(1). But on the claims that the state appellate court did not address, this Court should review it *de novo*.

A. Threats to Steven Scheel and Fabrication of His Testimony

Steven Scheel has recanted his trial testimony and explained that it was the product of police pressure, he had been fed information by the police and prosecutors, he had been coached by the State (police and prosecutors), and he testified against Snow because he was afraid. The state appellate court found that the first prong of *Brady* had been met and addressed only the prejudice prong, finding that Mr. Snow was not prejudiced because Scheel was only one of many State witnesses. *People v. Snow*, 964 N.E.2d 1139, 1153 (Ill. App. Ct. 2012).

Respondent does not address Petitioner's argument that the state court mischaracterized the record. Answer at 38-39. The state court characterized the new Scheel testimony as Scheel having been "coached" by the State. *See Snow*, 964 N.E.2d at 1153 ("Regarding Scheel, defendant asserts the State failed to disclose it coached Scheel's testimony by giving him details.

Those details concern what defendant was wearing at the party where defendant confessed to Scheel he killed Little."). But the new evidence is not merely that Scheel was "coached" on what Mr. Snow wore. The record before the state court shows that: the State had pressured Scheel into giving false testimony, erased portions of an audio-taped interview when Scheel gave answers they didn't like to their questions, failed to disclose statements Scheel made that Mr. Snow did not tell him that he had committed a robbery/murder at the Clark station, told him Scheel was lying and telling him that they wanted him to say that Mr. Snow had confessed to him, and told him details about what Mr. Snow was supposedly wearing that evening. *See* Ex. 10. This evidence shows that the police knew Mr. Snow was innocent and tried in various ways to get Scheel to falsely testify against Mr. Snow. The state court ignored this.

The withholding of this exculpatory evidence prejudiced Mr. Snow because, in its closing argument, the State argued that Scheel had no motive to lie. Vol. XI, R. 62-63. The State was only able to make this argument because it had withheld evidence of its own misconduct that provided reason for Scheel to lie.

Second, the state court's finding that Mr. Snow was not prejudiced because there were other witnesses who testified against Mr. Snow, was objectively unreasonable. *See Snow*, 964 N.E.2d at 1153. Although there were other "confession" witnesses, if the jury had heard that Scheel was coerced and pressured to testify falsely against Mr. Snow, it would have cast the testimony of these other witnesses in a wholly different light. *See* Pet.'s Mem. at 59-60. Trial counsel tried to suggest that the police had pressured or offered incentives to these witnesses to testify against Mr. Snow, but without evidence of police misconduct, this argument did not obtain much traction. The Respondent's citation to Illinois Rule of Evidence 404(b) to argue that Mr. Snow could not have admitted evidence of "other crimes" of the State is inapposite and

misses the point. *See* Answer at 39. The point is: if the State had disclosed the material, exculpatory evidence discussed above, it would have destroyed Scheel's testimony and cast the testimony of all the other "confession" witnesses in a wholly different light. Trial counsel could have argued effectively and with force that the reason why so many witnesses had come forward to implicate Mr. Snow is because of police misconduct. There is a reasonable probability that the jurors would have believed that if the State used those tactics on Scheel, they were likely to have used them on the other "confession" witnesses as well.

Respondent does not address Petitioner's argument that this is especially the case when the *Brady* violations alleged by Mr. Snow are viewed cumulatively, as they should be. *See* Pet.'s Mem. at 60-61. Nor does Respondent address Petitioner's argument that the state appellate court's determination that Mr. Snow had not shown prejudice because Scheel was only one of many witnesses who testified against Mr. Snow was also contrary to the Supreme Court's decision in *Kyles* because it did not consider Mr. Snow's evidence cumulatively. *See Kyles v. Whitley*, 514 U.S. 419, 440 (1995). Since it was contrary to *Kyles*—clearly established Supreme Court law—this Court should review this claim *de novo*.

B. Deals with and Pressure on Witnesses

1. Ed Palumbo

Palumbo avers in his affidavit that Mr. Snow submitted to the state courts that he testified falsely at trial because the police and prosecutor told him that if he did not testify, he would be placed in segregation in prison, be charged with perjury, or get time in prison for not cooperating. Ex. 24 ¶¶ 4-5. Palumbo also swears that after he testified against Mr. Snow, ASA Reynard told him that Snow had not committed this crime, and that someone else had but "since they couldn't get that other person Jamie would have to do." *Id.* ¶ 8.

Respondent claims that AEDPA deference should apply to this claim, *see* Answer at 40, but the state appellate court did not discuss this claim concerning Palumbo's new testimony. *See Snow*, 964 N.E.2d at 1151-53. Thus, this court must review Petitioner's *Brady* claim relating to Palumbo's testimony *de novo*. "Where … the state court's adjudication of the claims was not on the merits, a federal habeas court reviews the claims *de novo*." *Cone v. Bell*, 556 U.S. 449, 472 (2009). The new evidence provided by Palumbo is clearly exculpatory. There is also a reasonable probability that, if the evidence had been disclosed to Mr. Snow or his counsel, the outcome of the trial would have been different. *See* Pet.'s Mem. at 61-63.

Even if AEDPA deference applies, the state court could not (contrary to Respondent's suggestion, *see* Answer at 40) have found Palumbo "incredible" on the basis of *his own affidavit*, without having conducted an evidentiary hearing. Given that Petitioner was never afforded a hearing on this claim or any of his other claims, the facts as presented must be taken as true, and the reasonableness of the state court decisions (if AEDPA applies) assessed in light of that.

2. Danielle Prosperini's Testimony about Bruce Roland

The State's withholding of the exculpatory and impeachment evidence testified to by Danielle Prosperini violated Mr. Snow's right to due process. As Petitioner has argued, any procedural default of his claims relating to Danielle Prosperini's affidavit should be excused. *See* Pet.'s Mem. at 63-65. Since the state courts did not address Mr. Snow's claims relating to Prosperini's affidavit on the merits, this Court should review them *de novo*, not under AEDPA.

The evidence described by Prosperini is clearly exculpatory or impeachment material under *Brady*. And the withholding of this evidence prejudiced Petitioner for reasons previously discussed. *See id.* at 65. Respondent's only argument in response to the Prosperini affidavit is that it supposedly contradicts police reports in the case. *See* Answer at 41. But no evidentiary

hearing was ever held, and thus the state court could not and did not make any credibility determinations about Prosperini. Likewise, this Court cannot simply "reject" Prosperini's affidavit (as Respondent urges) without a hearing.

3. Kevin Schaal, Bruce Roland, Jody Winkler, and Bill Moffitt

The State also failed to disclose that Schaal, Roland, Winkler, and Moffitt received favorable treatment for their testimony against Snow. *See* Exs. 5, 15, 16, 17, 26. The state appellate court was the last court to address these *Brady* claims.

With respect to Schaal, Winkler, and Roland, Respondent fails to appreciate that Petitioner has raised *Brady* claims with respect to these witnesses in the alternative to his ineffective assistance of counsel claims. If the information concerning favorable treatment provided by the State to Schaal, Winkler, and Roland was available prior to trial, trial counsel should have obtained it and used it to cross-examine these witnesses. *See* Pet.'s Mem. at 48-50. If it was not available prior to trial, then it was nevertheless information that the State had in its possession and should have disclosed as part of its *Brady* obligations. *See id*. at 65-68. And, with respect to Bruce Roland, Respondent does not address Petitioner's argument that the state appellate court mischaracterized the record before it concerning whether there was an agreement (even if tacit) between the State and Roland. *See id.* at 66-67.

With respect to Bill Moffitt, Respondent argues only that Moffitt had already been impeached on cross-examination by trial counsel and admitted that he was not an honest and truthful person." *See* Answer at 40-41. But the fact that Mr. Snow has now presented evidence that Moffitt had told Hendricks that he got a time cut in exchange for testifying against Mr. Snow, *see* Ex. 5, is specific exculpatory evidence that should have been disclosed to Mr. Snow and would have made a difference in cross-examination. Getting a witness to admit on cross-

examination that he received specific favorable consideration in exchange for testimony against the defendant is different in kind from the more general cross-examination that counsel conducted. In its supplemental opinion on rehearing, the state appellate court did not address this claim on the merits. *See Snow*, 964 N.E.2d at 1159. This Court should review this claim *de novo*.

The state appellate court (the last court to address this claim on the merits) did not address the prejudice prong of Petitioner's *Brady* claim concerning deals/favorable treatment with Schaal, Roland, Winkler, or Moffitt. *See id.* at 1152. Thus, this Court must review the prejudice prong of these claims *de novo*. *See Wooley*, 702 F.3d at 421-22.

Petitioner has shown that there is a reasonable probability that if this information had been disclosed, the outcome of his trial would have been different because it would have shown that Schaal, Roland, Winkler, and Moffitt had incentives to lie. This is particularly true considering all of the alleged *Brady* violations cumulatively. The State argued strenuously in closing that none of these witnesses had reasons to lie. *See* Vol. XI, R. 64. Evidence of favorable treatment they had received would have shown that to be false.[7]

C. Danny Martinez's Statements in or Prior to 1994 that Mr. Snow Was Not the Person He Saw

Mr. Snow presented to the state court new evidence showing that Martinez actually told the police that Snow was *not* the person he saw outside the gas station where Little was killed. This information was never produced to Mr. Snow at any point before he obtained it via FOIA in 2012. *See* Ex. 36. This evidence consists of a polygrapher's notes and worksheets of polygraph exams taken in this case dating from 1994 in which Martinez indicated that Snow was not the

[7] Respondent does not address Petitioner's argument that other facts and witnesses (Randy Howard, Dan Tanasz, Mark McCown, David Arison, and Leigh Denison) support and corroborate Snow's claim that the police had pressured and threatened witnesses to testify against him. *See* Exs. 5, 28-33. Thus, Petitioner relies on the arguments made in his Memorandum. Pet.'s Mem. at 68.

person he saw. *See* Ex. 37 at 1. Respondent has not addressed Petitioner's argument that because the state courts denied Mr. Snow leave to file his successive post-conviction petition which raised this new evidence relating to Martinez, he needs to show cause and prejudice to excuse procedural default, and that Petitioner has shown cause and prejudice. *See* Pet.'s Mem. at 69-71; Answer at 43-44.

Nor has Respondent addressed Petitioner's argument that because the state court did not address this claim on the merits, this Court's review of it is *de novo*. Respondent does not argue that the fact that Martinez told the State that Mr. Snow was not the person he saw in the parking lot, was not exculpatory but only argues that the withholding did not prejudice Petitioner. *See* Answer at 43-44.

If the State had not withheld this evidence, there is a reasonable probability that the outcome of the trial would have been different. At trial, Martinez was able to explain away the prior times that he saw Mr. Snow's photo in photo arrays or that he saw Mr. Snow in a lineup by saying that he didn't have good lighting, that he was focusing on other things, implying that it was only when Mr. Snow was specifically brought to his attention, and the first time that Mr. Snow was specifically brought to his attention, that he was able to identify Mr. Snow as the person he saw. Vol. II, R. 173-76, 179-82, 191. The fact that there is now evidence that Martinez specifically told police sometime *prior to 1994* that Mr. Snow was *not* the person who he saw outside, completely contradicts Martinez's testimony about seeing Mr. Snow on television and recognizing him for the first time. And it contradicts the implication that Mr. Snow had never been brought to his attention first. It also shows that police discussed Mr. Snow with Martinez before 1994. If this exculpatory information had been disclosed, trial counsel could have

impeached Martinez with it, as well as call police officers to impeach Martinez. They could have argued that this supported the theory that police were manipulating witnesses.

In *Smith v. Cain*, 132 S. Ct. 627 (2012), the Supreme Court rejected an argument about an eyewitness similar to those made by Respondent here. In *Smith*, the single eyewitness against the defendant at trial testified that he had been "face to face with Smith" at the scene of the crime, and "no other witnesses and no physical evidence implicated Smith in the crime." *Id.* at 628. Smith was convicted, and when he sought post-conviction relief in the state courts, he obtained files from the police investigation of his case, which revealed that the State had withheld police notes of statements by the eyewitness that contradicted his testimony identifying Smith as the perpetrator. *Id.* The withheld notes indicated that the eyewitness "could not … supply a description of the perpetrators other then [*sic*] they were black males." *Id.* at 629 (internal quotation marks omitted). The notes also indicated that the eyewitness could not identify anyone because he could not see their faces. The state post-conviction courts had rejected Smith's *Brady* claims, but the Supreme Court held that the undisclosed evidence was "plainly material" because the eyewitness's testimony was the only evidence linking Smith to the crime and his undisclosed statements directly contradicted his testimony. *Id.* at 630.

In so holding, the Supreme Court rejected the arguments advanced by the State of Louisiana and the dissent about why the jury "might have discounted [the eyewitness's] undisclosed statements." *Id.* Those arguments "merely leave[] us to speculate about which of [the eyewitness's] contradictory declarations the jury would have believed." *Id.* The fact that "the State's argument offers a reason that the jury *could* have disbelieved [the eyewitness's] undisclosed statements, but it gives us no confidence that it *would* have done so." *Id.* Thus, the Court reversed Smith's conviction and granted him a new trial. The same reasoning applies here.

D. Impeachment Evidence Relating to Steven Scheel

The State withheld reports of polygraph exams of Steven Scheel that were impeaching of his testimony at trial. *See* Pet.'s Mem. at 71-72. Respondent does not respond to Petitioner's argument that this *Brady* claim was raised by Mr. Snow in his successive post-conviction petition, but the state courts did not address it because they had denied him leave to file his successive post-conviction petition, and that Mr. Snow meets the cause and prejudice test for excusing procedural default. *See id.*

Respondent also does not address the fact that because the state courts did not review Petitioner's *Brady* claim relating to the withholding of Scheel's polygraph reports on the merits, this Court should engage in *de novo* review of this claim. *See* Answer at 44-45. Here, the first prong of *Brady* cannot reasonably be disputed: the polygraph reports were exculpatory and impeaching. The fact that trial counsel conducted a cross-examination of Scheel that elicited other information does not mean that the failure of the State to disclose the exculpatory polygraph reports was not a *Brady* violation or that it was not material. Trial counsel could have used the polygraph reports not only to cross-examine Scheel about his answers, but they could have called an independent third-party witness, Craig Hansen (the polygraph examiner), to testify and impeach Scheel. *See* Pet.'s Mem. at 71-72.

E. Polygraph Examination Results of Bruce Roland

The unredacted polygraph report relating to Bruce Roland, *see* Ex. 42, which was never disclosed to trial counsel, contained exculpatory and impeaching evidence showing that Roland was not telling the truth. As with Petitioner's other claims raised in his successive post-conviction petition, the state courts did not review this claim on the merits because the circuit court had denied leave to file the successive petition and the state appellate court affirmed. Any

procedural default of this claim should be excused because Petitioner meets the cause and prejudice standard. Respondent does not address this. *See* Answer at 45.

Regardless of the admissibility of polygraph reports themselves, if this information had been disclosed, trial counsel would have been made aware that Roland's story about wanting to be a "good citizen" was false and focused on Roland more carefully and may have found other impeaching evidence about Roland. The withholding of this polygraph report, especially viewed together with the other *Brady* violations and trial counsel errors discussed above, caused Mr. Snow "actual and substantial disadvantage" and infected his trial with error of constitutional dimensions. Given that the state courts did not review this claim on the merits, this Court should review it *de novo*. The withheld unredacted polygraph report of Roland is exculpatory and impeaching, and there is a reasonable probability that the outcome of the trial would have been different. Pet.'s Mem. at 72-73.

F. Pattern of Misconduct by Police and Prosecutors

New evidence surfaced after Mr. Snow was convicted demonstrating a pattern of misconduct by the McLean County State's Attorney's Office and the Bloomington Police Department. Group Ex. 34 (*Beaman*) [Dkt. 3-12]; Group Ex. 35 (*Drew*) [Dkt. 3-13]. Respondent does not address Petitioner's argument that the state appellate court did not address this claim, *see* Ex. C, and that, therefore, this Court should review this claim *de novo*. A pattern of misconduct by the same police and prosecutors which is withheld by the State can support a *Brady* claim. Evidence is considered "material" if there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682.

Respondent's only argument about this claim is that this pattern and practice evidence is not material because it is not admissible. *See* Answer at 42-43. But this is not the definition of materiality under *Brady*. *See Bagley*, 473 U.S. at 682. The *Brady* doctrine encompasses any information, directly admissible or not, that would be favorable to the accused in preparing his defense, including information useful to preparation or investigation that may lead to admissible evidence or have some meaningful impact on defense strategy. Information that may lead to admissible evidence can constitute material evidence under *Brady*. *See United States v. Wigoda*, 521 F. 1221, 1227 (7th Cir. 1975); *Wood v. Bartholomew*, 516 U.S. 1, 6-7 (1995) (analyzing whether withheld information "might have led [defendant's] counsel to conduct additional discovery that might have led to some additional evidence that could have been utilized."); *Bagley*, 473 U.S. at 683 (holding that under the applicable materiality standard, the court "may consider directly any adverse effect that the prosecutor's failure to respond might have had on the *preparation or presentation* of the defendant's case.") (emphasis added); *United States v. Lozada*, 1993 WL 384519, at *5 (N.D. Ill. Sept. 28, 1993) ("*Brady* evidence must be material to guilt or innocence. Furthermore, the material requested by the defendant must be, or must at least lead to, relevant evidence in order to be considered *Brady* material."); *see also* Dkt. 41 (Notice of Supplemental Authority, discussing *Wearry v. Cain*, 136 S. Ct. 1002, 577 U.S. __ (2016) (per curiam)). The Seventh Circuit cases cited by Respondent suggesting otherwise (*see* Answer at 42) could not have overruled *Wigoda*.[8] *Wigoda* has never been overruled, and no panel of the Seventh Circuit could have overruled it. *See Brooks v. Walls*, 279 F.3d 518, 522 (7th Cir. 2002).

[8] Although *United States v. Morales*, 746 F.3d 310, 315 (7th Cir. 2014), suggested in dicta that the "existing rule" in the Seventh Circuit is more restrictive, it did not discuss (much less overrule) *Wigoda*, which predates all of the cases cited in *Morales* for the restrictive rule. None of the other cases cited by Respondent, *United States v. Salem*, 578 F.3d 682 (7th Cir. 2009); *Jardine v. Dittman*, 658 F.3d 772 (7th Cir. 2011); *United States v. Silva*, 71 F.3d 667 (7th Cir. 1995), discussed *Wigoda*, either. (Both *Silva* and *Salem* are, in any event, distinguishable.) And, in *United States v. Dimas*, 3 F.3d 1015 (7th Cir. 1993), the Seventh Circuit cited to *Wigoda* for the proposition that material evidence under *Brady* includes evidence that *leads to* admissible evidence.

Moreover, even if the proffered evidence about prosecutorial and police misconduct has to be admissible in order to be "material" under *Brady*, it would have been admissible. This evidence is not merely propensity evidence. *See* Pet.'s Mem. at 74 (citing cases). *See People v. Wilson*, 824 N.E.2d 191, 196 (Ill. 2005) ("This court has repeatedly held that evidence of other crimes is admissible if it is relevant for any purpose other than to show the defendant's propensity to commit crimes. For instance, other-crimes evidence is admissible to show *modus operandi*, intent, identity, motive or absence of mistake.") (internal citations omitted). Illinois courts have held that such pattern and practice evidence can be relevant and admissible. *See People v. Tyler*, 39 N.E.3d 1042, 1072-77 (Ill. App. Ct. 2015); *People v. Patterson*, 735 N.E.2d 616, 643-45 (Ill. 2000) (finding that other acts of police misconduct and torture may be admissible); *People v. Whirl*, 39 N.E.3d 114, 133-34 (Ill. App. Ct. 2015). Such evidence also affects the credibility of the police officers involved. *See People v. Jakes*, 2 N.E.3d 481, 488 (Ill. App. Ct. 2013) ("The State's Attorney's office here, as in *Fair*, has much better access than the defense to evidence concerning the alleged official misconduct. The evidence of Kill's and Boudreau's misconduct in other cases can alter the relative credibility of Jakes, Jones, Kill and Boudreau in their testimony both at trial and at the hearing on the motion to suppress the statement Jakes signed."); *People v. Almodovar*, 984 N.E.2d 100, 114 (Ill. App. Ct. 2013) ("we find that defendant's allegations that Detective Guevara influenced witnesses to provide identifications are relevant to whether witnesses in the case at bar were similarly influenced, since such allegations, if true, would damage Detective Guevara's credibility."). As the Illinois appellate court has explained, "While evidence of other bad acts is not admissible to prove a propensity to commit those acts, such evidence is admissible for any other relevant purpose. For example, evidence of other acts of brutality could be used to prove a course of conduct on the

part of the officers and could be used to impeach these officers' credibility." *People v. Reyes*, 860 N.E.2d 488, 505 (Ill. App. Ct. 2006) (internal citations omitted).

Here, the undisclosed evidence cast doubt on Detective Katz, who was one of the main investigating detectives in Mr. Snow's case, as well as ASA Reynard, one of the trial prosecutors. In *Drew*, the state appellate court found that Drew's constitutional rights had been violated because Detective Katz was not credible in denying that undisclosed benefits were provided. Group Ex. 35-1 at 17. The court also found that both the ASA and Katz urged the main witness to lie about the underlying events. *Id.* Similarly, in *Beaman v. Souk*, 863 F. Supp. 2d 752, 756-57 (C.D. Ill. 2012), ASA Reynard had failed to disclose exculpatory evidence. The misconduct found to exist in *Beaman* and *Drew* is similar enough that it would be admissible to "prove a course of conduct on the part of the officers and could be used to impeach these officers' credibility." *Reyes*, 860 N.E.2d at 505.

IV. Ground 5: The Above Errors, Cumulatively, So Infected Mr. Snow's Trial that They Violated His Right to Due Process under the Fifth and Fourteenth Amendments

Contrary to Respondent's argument otherwise, Petitioner did not procedurally default his cumulative error argument. Petitioner presented this argument to the Illinois Supreme Court as well as he could given the posture of his petition for leave to appeal as discussed in Section I *supra*. *See* State Court Record, Ex. EE at 14 (arguing cumulative error).

A cumulative error claim is no more than a request of a court that it consider prejudice cumulatively for constitutional purposes. Put another way, a court may conclude that a petitioner's constitutional rights were violated in a particular way, but that a petitioner was not prejudiced by any particular violation. A cumulative error claim asks a court to consider prejudice cumulatively, as many smaller constitutional violations can collectively prejudice a

petitioner sufficiently to require a remedy. *See Alvarez v. Boyd*, 225 F.3d 820, 824 (7th Cir. 2000); *Williams v. Washington*, 59 F.3d 673, 682 (7th Cir. 1995). Neither the circuit court nor the appellate court ever found that Petitioner's constitutional rights were violated, and so Petitioner had no reason to argue the cumulative error claim in any more detail in his petition for leave to appeal than he did. Had Petitioner's petition for leave to appeal been granted, Petitioner would have argued this issue as an aspect of his constitutional claims in greater detail. The Illinois Supreme Court's pleading rules recognize that that a party need only raise in his petition for leave to appeal those issues necessary to reverse the ruling of an appellate court. *Caveney v. Bower*, 207 Ill.2d 82, 86-87 (Ill. 2003) (finding a party properly raised an issue in his petition for leave to appeal by cursorily referencing, then addressing in more detail as appropriate in his brief, and finding that "the State did all it reasonably could be expected to do with respect" to the issue). For the reasons Petitioner has argued, his cumulative error argument should be reviewed *de novo* because it was not addressed by the state appellate court, and it is meritorious. *See* Pet.'s Mem. at 76.

V. The Court Should Grant a Certificate of Appealability if It Declines to Grant the Petition

This Court should grant a certificate of appealability if it finds that Petitioner has made a "substantial showing of the denial of a constitutional right." *Thomas v. Williams*, 2016 WL 2909376, at *4, __ F.3d __ (7th Cir. May 18, 2016); 28 U.S.C. § 2253(c)(2). To meet this standard, Petitioner "must show that reasonable jurists would find the district court's assessment of the constitutional claim and any antecedent procedural rulings debatable or wrong." *Lavin v. Rednour*, 641 F.3d 830, 832 (7th Cir. 2011); *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). "Obtaining a certificate of appealability 'does not require a showing that the appeal will

succeed,'" *Welch v. United States*, 126 S. Ct. 1257, 1263-64 (2016) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003)).

For the reasons discussed above, Petitioner's ineffective assistance of counsel and *Brady* claims have merit; and at the very least, he has made a substantial showing of the denial of his constitutional rights. Thus, if the Court declines to grant the petition, Petitioner respectfully requests the issuance of a certificate of appealability.

CONCLUSION

For the foregoing reasons, and those described in Petitioner's Petition for Writ of Habeas Corpus and Memorandum in Support, Petitioner James Snow respectfully requests that this court grant his petition, vacate his conviction, and order the state court to retry him within 60 days or release him. In the alternative, Petitioner requests an evidentiary hearing before this court so that a full factual record may be developed in order to determine *de novo* whether Petitioner's constitutional claims have merit.

Respectfully submitted,

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