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

JAMES SNOW, N50072,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 13 C 3947
	)	
MICHAEL LEMKE,[1]	)	The Honorable
	)	Elaine E. Bucklo,
Respondent.	)	Judge Presiding.

ANSWER TO HABEAS CORPUS PETITION

[1] Randy Pfister is now Warden of the Stateville Correctional Center. As petitioner's physical custodian, Warden Pfister is the only proper respondent in this case and should be substituted. *See* Habeas Corpus Rule 2(a); Fed. R. Civ. P. 25(d); *Bridges v. Chambers*, 425 F.3d 1048, 1049-50 (7th Cir. 2005).

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BACKGROUND

Introduction

After a ten-day trial, a McLean County, Illinois, jury convicted James Snow of murdering Billy Little. More than a dozen witnesses testified that petitioner confessed to the murder or made other inculpatory statements to them. Three eyewitnesses testified, and one identified petitioner. Other witnesses testified about petitioner's various inculpatory actions, including his flight to Missouri, Florida, and Ohio to avoid apprehension, hiding in an attic for five hours while his wife and infant child waited outside in a squad car, and threatening to fire his attorney rather than participate in a lineup.

Petitioner claims that the McLean County State's Attorney orchestrated a symphony of perjury to convict an innocent man, thus violating *Brady* and denying petitioner due process. Petitioner also argues that his trial counsel, who thoroughly cross-examined and impeached each important State's witness, and whose representation was commended by the trial court, was ineffective for not further impeaching some of the State's witnesses.

Many of petitioner's grounds for relief are procedurally defaulted because he failed to raise them in the Illinois Supreme Court. The state appellate court reasonably rejected many of petitioner's claims — including some of the defaulted claims — so habeas relief on those claims is barred by 28 U.S.C. § 2254(d). And petitioner cannot prevail on his a *Strickland* or *Brady* claims under any standard of review. Accordingly, this Court should deny the petition.

Trial

The crime

Billy Little — an eighteen-year-old Clark gas station attendant — was shot and killed during an attempted armed robbery around 8:15 p.m. on Easter 1991. A panic button under the cash register was pressed at 8:18 p.m. Exh. B at 94 (testimony of Jim Cox). Officers responded within a few minutes, but no suspects were apprehended. *Id.* at 137-53 (testimony of Paul Williams).

Petitioner's confessions and additional evidence of guilt

A few days before Little's murder, petitioner was riding in a car with Tim Powell and made a joke about robbing a Freedom gas station in Bloomington. Exh. E at 200. He then asked Powell to stop at the Clark station where Little was later murdered. *Id.* at 202. Petitioner entered the station and returned empty handed several minutes later. *Id.*

The night of Little's murder, petitioner's friend, Mark McCowan,[2] asked his girlfriend, Karen Strong, if petitioner could stay in their apartment. Exh. G at 9 (testimony of Karen Strong). McCowan later told Strong that petitioner needed a place to stay because petitioner had shot Billy Little during an armed robbery. Exh. J at 9. McCowan also mentioned that Susan Claycomb Powell drove the getaway car. *Id.*

Within days, petitioner told two long-time friends that he was Little's killer. Exh. C at 123-26 (testimony of Ed Palumbo); Exh. E at 49 (testimony of Randall

[2] This answer uses "McCowan," which is how the witness spelled his name at trial. *See* Exh. I at 5 (testimony of Mark McCowan).

Mark Howard). Shortly after one of the confessions, petitioner recanted, assuring his friend, "No, I'm just joking." Exh. E at 50. Petitioner also remained silent at a party when a friend implicated him in the crime. Exh. D at 19 (testimony of William Gaddis). In April 1991, petitioner confessed to another friend that he had killed Billy Little. Exh. E at 139 (testimony of Steven Scheel).

Less than a month after the Little's murder, petitioner — who had lived nearly his whole life in Bloomington — moved his family to Missouri. Exh. I at 19, 50 (testimony of James Snow). Missouri police arrested petitioner on April 23, 1991, but only after they discovered him hiding in his sister's attic for more than five hours while his wife and newborn daughter waited in a squad car. Exh. G at 66-68 (testimony of Steven Ray Parker); Exh. H at 111 (testimony of Mitchell Lesley Autumn Snow); Exh. I at 164. Petitioner was arrested for his role in a different armed robbery, but he knew that he was suspected in Little's murder. Exh. H at 114; Exh. I at 165.

Two officers transported petitioner back to Bloomington. On the drive, petitioner suggested he was willing to share information about the Billy Little murder in exchange for a deal. Exh. F at 120-21 (testimony of Russell Thomas). The officers refused to talk about petitioner's crimes on the drive. *Id. at* 122; *see also* Exh. I at 167. During a formal interview upon their arrival in Bloomington, petitioner again indicated that he might have information about the Billy Little murder, but he wanted a promise of leniency before he incriminated himself. Exh. F at 130; *see also* Exh. G at 46-47 (testimony of Michael Bernardini).

Petitioner was scheduled to appear in a June 1991 lineup, but he initially refused to participate. *Id.* at 182; Exh. J at 19-20 (testimony of Charles Crowe). Petitioner testified that he hesitated only because he wanted to ensure that his attorney, Richard Koritz, would be able to witness the lineup. Exh. I at 72-73. But Koritz testified that petitioner refused to participate even after they first spoke, and petitioner threatened to fire him. Exh. H at 19 (testimony of Richard Koritz). After officers advised him that he would be forced to participate, petitioner relented. Exh. J at 20-21.

After the lineup, petitioner spent two years in Florida before returning to Bloomington in 1993. Exh. I at 73. At a gathering of friends in Bloomington, he "toasted" Billy Little by pouring a drink on the ground for him. Exh. F at 35 (testimony of Dawn Roberts). And he instructed people to take down composite drawings of Billy Little's killer, noting that the drawing was "of him." *Id.* at 33, 35. When Mark McCowan expressed concerned about the composite drawings, Snow told McCowan not to worry because McCowan was not the one pictured. *Id.* at 35.

In 1994, petitioner pleaded guilty to obstruction of justice for convincing his then-girlfriend to lie to investigators about a different armed robbery in which petitioner was implicated. Exh. I at 196.

While serving his sentence for obstruction of justice in the Illinois Department of Corrections, petitioner confessed separately to fellow inmates William Moffitt, Edward Hammond, and Bruce Roland. IDOC records confirmed that these inmates were housed in the same institutions as petitioner at the

relevant times. Petitioner told Moffitt that he shot a store clerk with the initials "B.L." during a botched armed robbery. Exh. D at 101-04. Petitioner feared that he would be identified because there was a car in the parking lot when he left the gas station. *Id.* at 104. Petitioner also mentioned the composite drawings posted around Bloomington. *Id.*

Petitioner told Hammond that he "shot the kid" during the Clark station robbery. *Id.* at 136 (testimony of Edward Hammond). He also mentioned knocking something over when leaving the Clark station. *Id.* at 136. This detail is consistent with an overturned stool found near the victim's body. Exh. C at 18 (testimony of Edward Kallal).

Finally, petitioner told Roland that he and Mark McCowan robbed the Clark station. Exh. F at 85 (testimony of Bruce Roland). Earlier in the evening, petitioner tried to get free cigarettes from Little, but Little refused. *Id.* Petitioner returned, planning to steal cigarettes and money. *Id.* When Little resisted, petitioner shot him. *Id.* Petitioner also mentioned that "Stretch" (McCowan) was with him at the time of the murder, but he did not specify McCowan's role in the crime. *Id.* at 87. In addition to these confessions, petitioner told Kevin Schaal that he was in prison because he helped hide a friend in an attic in Missouri, and that his friend was hiding because he had murdered someone. Exh. F at 45 (testimony of Kevin Schaal).

Upon petitioner's release from IDOC in 1996, he moved to Florida. Exh. I at 95. Some friends from Bloomington were there too, and petitioner — often drunk or

high — told them about his crimes. He told Dan Tanasz that he could not return to Illinois because of a robbery. Exh. D at 82-83 (testimony of Dan Tanasz). And in a separate conversation, he told Tanasz that he had shot someone. *Id.* at 86. Petitioner told Jody Winkler that he committed the Clark station murder. Exh. E at 114 (testimony of Jody Winkler). And he told Ronnie Wright the same. *Id.* at 178 (testimony of Ronnie Wright).

In September 1999, petitioner learned that he had been indicted for murder, so he sold his car and moved to Ohio with his girlfriend. Exh. I at 112-13, 143. When a fugitive recovery team located him on September 29, petitioner told the officer that his name was David Arison and presented Arison's birth certificate. Exh. D at 57 (testimony of Robert Ondecker). When the officer asked petitioner to reveal a tattoo on his leg, petitioner bent over as if he were going to comply with the request, but then fled and hid under a porch where he was apprehended about twenty-five minutes later. *Id.* at 60-61.

While in custody awaiting trial, petitioner told a correctional officer that he thought he knew who committed the Billy Little murder. Exh. G at 23 (testimony of Mary Jane Burns). He explained that he, Susan Claycomb Powell, and two other individuals were driving around Bloomington around the time of the murder. *Id.* at 22. Petitioner felt ill, so he asked Susan to pull into an alley by a Clark gas station, where petitioner exited and started vomiting. *Id.* at 23-24. At the same time, the other man in the car exited and started walking down the alley. *Id.* at 24. Petitioner believed that the unidentified man killed Billy Little. *Id.* at 23-24.

Eyewitnesses

Carlos Luna, who lived across the street from the Clark station, testified that on the night of the murder, he looked out his bedroom window and saw a man walking away from the Clark station holding a large object under his coat. Exh. C at 85-87 (testimony of Carlos Luna). Luna viewed a lineup in June 1991 and identified petitioner as the participant who "best fit the picture" of the man he had seen. *Id.* at 85-89. An officer advised him that he did not have to make any identification if he was not sure. Exh. H at 15; Exh. J at 22. Luna responded that he thought petitioner was the man he saw leaving the Clark station. Exh. J at 22. Luna did not identify petitioner at trial.

Danny Martinez testified that he was filling his car's tires outside the Clark station on the evening of the murder. Exh. B at 158. He heard two loud bangs and thought his car was backfiring. *Id.* at 159. After filing his tires, Martinez left his car running and walked toward the gas station. *Id.* He heard the car stall, so he turned around. *Id.* Upon turning back toward the station, Martinez was face-to-face with another man, one to three feet away. *Id.* The man then walked into an alley behind the gas station. *Id.* at 162. The man did not appear to be carrying anything. *Id.* at 201.

Martinez helped create a composite drawing of the man he saw, but he failed to identify petitioner in a lineup. *Id.* at 190-92, 196. Martinez did not identify petitioner until 1999, when he saw a picture of petitioner in the newspaper. *Id.* at 176. He again identified petitioner at trial. *Id.* at 177.

The first officer on the scene, Jeff Pelo, testified that upon arriving he saw Martinez filling his tires. *Id*. at 101, 118 (testimony of Jeff Pelo). He also saw Martinez walk toward the gas station and return to his car, just as Martinez described. *Id*. at 123. But Pelo did not see anyone else on foot. *Id*. Later in the evening, Martinez told Pelo that he had seen someone exit the station and leave on foot by way of the alley. *Id*. at 133.

Gerardo Gutierrez testified that he purchased $3.00 worth of gas at the Clark station about an hour before the murder. Exh. E at 12. When he entered the station to pay, he saw a man smoking near the attendant. *Id*. at 13, 22. The attendant seemed nervous and dropped Gutierrez's money. *Id*. at 13. Gutierrez did not identify petitioner. *Id*. at 24.

Petitioner's defense

Petitioner presented an alibi defense. He testified that he was at home with his wife for the entire evening of Easter 1991. Exh. I at 53. He further testified that he had a cast on his arm at the time of the murder. *Id*. at 55. Petitioner denied confessing to Ed Hammond, William Moffitt, Ed Palumbo, Bruce Roland, Dan Tanasz, Jody Winkler, Ronnie Wright, Randall Howard (even jokingly), or Steve Scheel. *Id*. at 57-63, 80-93, 100-10, 118-120. He denied trying to stay at Mark McCowan's apartment on Easter 1991. *Id*. at 64. He denied "pouring one out" for Billy Little or telling Dawn Roberts to take down composite drawings of Billy Little's killer. *Id*. at 75-77. He denied telling Kevin Schaal that he (petitioner) was in trouble for helping a friend hide out in Missouri. *Id*. at 94. He denied

discussing his theories about the Billy Little murder with correctional officer Mary Jane Burns. *Id.* at 127. He denied being at a party where William Gaddis was present. *Id.* at 60. He claimed that when he offered to give information to Detectives Thomas and Bernardini, he was talking about a different crime. *Id.* at 69. Finally, he denied ever being inside the Clark station in his life. *Id.* at 83.

Petitioner's wife testified that they were home together on the night of the murder, and petitioner never left. *See* Exh. H at 70 (testimony of Tammy Snow); Exh. I at 53. However, she had previously testified at a grand jury hearing that she did not know whether petitioner was gone for more than an hour on the night of the murder. *Id.* at 77. She also gave a tape-recorded statement to police in August 1999. Exh. J at 54, 57 (testimony of Dan Katz). When an officer asked her where petitioner was on Easter 1991, she said she could not remember the details. *Id.* at 54. Bridget Logsdon testified that she overheard petitioner's wife at a bar in summer 1999 talking about the Billy Little investigation, and petitioner's wife said she knew petitioner "did it." *Id.* at 52 (testimony of Bridget Logsdon).

Mark McCowan testified that he was not with Snow on Easter 1991, and he never spoke with his girlfriend about the Billy Little murder. Exh. I at 6-7. He also contradicted Dawn Roberts's testimony about petitioner and McCowan discussing composite drawings of petitioner. *Compare id.* at 7 (McCowan was never with Roberts and petitioner together), *with* Exh. F at 33-35 (Roberts twice witnessed McCowan and petitioner discuss composite drawings).

Conviction and post-trial proceedings

The jury found petitioner guilty of first degree murder. Exh. L at 5. Petitioner filed a post-trial motion asserting that he was denied effective assistance of counsel. *See* Exh. Q at 1 (*People v. Snow*, No. 4-01-0435 (Ill. App. Ct. Aug. 20, 2004)). After an extensive hearing, *see* Exh. L at 40-141, the court denied petitioner's motion and counsel's motion to withdraw, CL4 at 47-61. Specifically, the court found that "[petitioner's] attorneys competently cross-examined and impeached every one of the State's proffered witnesses." Exh. GG at 60. The court sentenced petitioner to natural life in prison. *Id*. at 63.

Direct Appeal

Petitioner raised seven claims on appeal, including a claim that trial counsel was ineffective for failing to further impeach Danny Martinez, Ronnie Wright, Dawn Roberts, and Gerardo Gutierrez. Exh. N at 75-86 (petitioner's brief). The appellate court affirmed, holding that the proposed additional impeachment would have been cumulative (and in some cases harmful). Exh. Q at 28-30. On November 24, 2004, the Illinois Supreme Court denied petitioner's ensuing petition for leave to appeal (PLA). Exh. S.

Postconviction Proceedings

Petitioner filed a pro se postconviction petition in May 2004. He filed a counseled amended petition in January 2010, arguing, *inter alia*, that

(1) he was actually innocent;

(2) trial counsel was ineffective for not further impeaching Danny Martinez, Carlos Luna, Steve Scheel, Randall Howard, Karen Strong,

Dawn Roberts, Russell Thomas, Michael Bernardini, Mary Jane Burns, Ed Palumbo, Bill Moffit, Ronnie Wright, Steve Scheel, Jody Winkler, and Kevin Schaal;

(3) he was denied due process when the State withheld exculpatory evidence, including

(a) Pelo's statement that "no one could have left the gas station while I was on the scene";

(b) police disclosure of facts to Scheel during the investigation;

(c) purported deals given to Winkler, Roland, and Schaal;

(d) Darren Smart's contradiction of Mary Jane Burns's testimony; and

(e) the lead prosecutor's admission to one of the prosecution witnesses that he knew petitioner was innocent.

See generally Exh. HH.

On petitioner's motion, a Schuyler County judge was assigned to the postconviction proceedings. *People v. Snow*, 964 N.E.2d 1139, 1145 (Ill. App. Ct. 2012). The trial court dismissed the petition. Exh. II. Petitioner appealed, raising the arguments above, among others. Exh. U. The appellate court affirmed, *People v. Snow*, 964 N.E.2d 1139, 1158 (Ill. App. Ct. 2012) (Exh. X), and the Illinois Supreme Court denied petitioner's ensuing PLA on May 30, 2012, Exh. DD.

In May 2013, petitioner filed a motion for leave to file a successive postconviction petition, which the trial court denied. The appellate court affirmed, Exh. DD, and the Illinois Supreme Court denied petitioner's ensuing PLA, Exh. FF.

Federal Habeas Proceedings

On May 28, 2013, petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, alleging that

(1) trial counsel was ineffective for failing to

(i) use available information to further impeach Martinez;

(ii) call Thomas Sanders to further impeach Luna;

(iii) interview Scheel to prevent him from perjuring himself;

(iv) interview Roberts to prevent her from perjuring herself;

(v) call Mark Huffington to further impeach Strong;

(vi) investigate and present evidence that Schaal, Roland, and Winkler received consideration for their testimony;

(vii) call Darren Smart to further impeach Burns;

(viii) further impeach Thomas and Bernardini with Thomas's grand jury testimony; and

(ix) present any claims raised in the habeas petition and not raised at trial;

(2) trial counsel's cumulative errors denied him effective assistance of counsel;

(3) appellate counsel was ineffective for failing to raise any claims raised in the habeas petition and not raised on direct appeal;

(4) the State violated *Brady* by withholding

(i) evidence that the State provided details of the crime to Scheel;

(ii) evidence of deals with Palumbo, Moffitt, Schaal, Roland, Scheel, and Winkler to testify and pressured other witnesses to testify;

(iii) evidence of a pattern of misconduct by the Bloomington Police Department and the McLean County State's Attorney's Office;

(iv) evidence that State's Attorney Reynard knew petitioner was innocent and told Palumbo that he was prosecuting petitioner because he could not charge the true perpetrator;

(v) documents indicating that Martinez told police in 1994 that petitioner was not the man he saw at the gas station;

(vii)[3] Scheel's polygraph results; and

(viii) Roland's polygraph results; and

(5) the withheld evidence, taken together, violated due process.

Doc. 1 at 13-29.

RESPONSE TO PETITION

I. Grounds 1(ii), (iii), (iv), (vi), and (vii) and Grounds 4(i), (iii), and (iv) are procedurally defaulted.

To avoid procedural default, "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). In Illinois, this includes presenting the relevant issue to the state supreme court in a PLA. *Id.* Moreover, "the failure to alert the state court to a complaint about one aspect of counsel's assistance will lead to a procedural default" of that particular complaint. *Stevens v. McBride*, 489 F.3d 883, 894 (7th Cir. 2007).

To fairly present a claim, a petitioner must put "both the operative facts and the controlling law" before the state court. *Anderson v. Benik*, 471 F.3d 811, 814

[3] The petition does not include a Ground 4(vi). For consistency, the answer adopts petitioner's numbering.

(7th Cir. 2006). And he may not do so only by citation to external documents. *Baldwin v. Reese*, 541 U.S. 27, 32 (2004); *see also Lockheart v. Hulick*, 443 F.3d 927, 929 (7th Cir. 2006) ("[A] petition must *contain* each contention, and not just point to some other document where it might be located.").

Petitioner did not fairly present Grounds 1(ii), 1(iii), 1(iv), 1(vi), 1(vii), 4(i), 4(ii), 4(iii), or 4(iv) to the Illinois Supreme Court. *See* Exh. Y at 19-21 (postconviction PLA) (arguing that counsel was ineffective, but mentioning only counsel's failure to impeach Martinez); *id.* at 21-22 (arguing that the State violated *Brady*, but mentioning only the State's failure to disclose alleged "deals" with witnesses and not mentioning any particular witness); *see also* Exh. EE at 21-2 (successive postconviction PLA) (raising Grounds 4(v), 4(vii), and 4(viii)). Accordingly, these claims are defaulted.

Petitioner cannot avoid the defaults unless he shows "cause and prejudice" or that a "fundamental miscarriage of justice" would result from enforcing them because petitioner is actually innocent. *Boerckel*, 526 U.S. at 854 (quotation marks omitted). Petitioner has argued neither, and this Court should not raise the arguments for him. *See Crockett v. Hulick*, 542 F.3d 1183, 1193 (7th Cir. 2008) (declining to consider exceptions to default where petitioner did not argue them). Regardless, neither exception applies.

In particular, petitioner cannot excuse his defaults under the miscarriage of justice exception. To show actual innocence, petitioner must put forth "new reliable evidence — whether it be exculpatory scientific evidence, trustworthy eyewitness

accounts, or critical physical evidence" — that makes it "more likely than not that no reasonable juror would have convicted him." *Schlup v. Delo*, 513 U.S. 298, 324, 327 (1995).

Petitioner has presented no such evidence. His new evidence consists entirely of impeachment evidence and recantations from State's witnesses. And even considering this new evidence, a reasonable juror could find petitioner guilty of Little's murder.

Carlos Luna testified he saw a man of about petitioner's height and with similar hair leaving the Clark station around the time of the crime. Exh. C at 81, 91-92. He identified petitioner in a lineup as the man who "fit the image" of the man he saw on the night of Little's murder. In a post-trial affidavit, Luna clarified that he was not sure if petitioner was the man he saw, but petitioner was the "best fit" in the lineup. Doc. 2-8 at 3.

William Gaddis saw petitioner among friends the day after the Billy Little murder, and when someone mentioned that petitioner "shot a boy at a gas station," petitioner held his head down and did not respond. Exh. D at 19. Gaddis has not recanted his trial testimony.

Randall Howard testified that petitioner confessed to him, "I fucked up. I shot this kid," only to recant shortly thereafter. Exh. E at 49-50. Petitioner also told Howard that the composite drawings looked "just like [petitioner]." *Id.* at 56. Howard agreed that "the one does look just like him." *Id.* Howard did not recant his trial testimony. Doc. 3-6.

Bill Moffitt testified that petitioner confessed to him while the two were prison cellmates. Exh. D at 99-105. Petitioner worried that someone had seen him because there was a car in the gas station parking lot. *Id*. at 104. Petitioner said he should have fled to Missouri (which he in fact did). *Id*. at 105. Moffitt did not recant his trial testimony. Petitioner's friend Dennis Hendricks submitted a post-trial affidavit stating that Moffitt said he testified against petitioner in an effort to get a sentence reduction. Doc. 2-5.

Correctional officer Mary Jane Burns testified that petitioner admitted — contrary to his trial testimony — that he was riding around with friends the night of Little's murder, and he thought one of those friends committed the crime. Exh. G at 23-24. Darren Smart submitted a post-trial affidavit that contradicts a collateral aspect of Burns's prior consistent statement to authorities. *Compare* Doc. 2-21 at 7 (Burns telling authorities Smart was present when petitioner told her his theory of the case), *with* Doc. 2-22 (Smart asserting he was not present for such a conversation).

There is no dispute that petitioner moved his family to Missouri within weeks of Little's murder, despite having lived in Bloomington nearly his whole life. Exh. I at 19, 50. There is likewise no dispute that when police tried to arrest him in Missouri, petitioner's sister denied consent to enter, petitioner refused to leave the house even though his wife and newborn daughter were waiting in a squad car, and a SWAT team ultimately found petitioner hiding in his sister's attic five hours after the police had arrived. Exh. G at 66-68; Exh. H at 111; Exh. I at 164.

There is no dispute that petitioner, upon learning of his imminent arrest in September 1999, moved from Florida to Ohio. Exh. I at 112-13, 143. And there is no dispute that petitioner used a false name, showed false identification, and fled when police tried to arrest him in Ohio. Exh. D at 57, 60-61. Finally, there is no dispute that petitioner refused to participate in a lineup shortly after the murder until officers and his attorney informed him that he would be forced to participate. Exh. I at 182; Exh. H at 19; Exh. J at 19-20.

Moreover, a reasonable juror could reject the witnesses' recantations and petitioner's proposed impeachment evidence. Recantation affidavits provided more than a decade after trial — such as those petitioner presents — are rightly viewed with skepticism. *Cf. McQuiggin v. Perkins*, 133 S. Ct. 1924, 1936 (untimeliness "bear[s] on the credibility of evidence proffered to show actual innocence"); *Mendiola v. Schomig*, 224 F.3d 589, 593 (7th Cir. 2000) (noting "the persuasive influence of a skilled advocate asking leading questions" may lead to recantation).

Accordingly, petitioner cannot excuse his defaults based on actual innocence.

II. Trial counsel was not constitutionally ineffective.

To prove he was denied effective assistance of counsel, petitioner must show (1) "that counsel's representation fell below an objective standard of reasonableness" and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). Counsel "'need not be perfect, indeed not even very good, to be constitutionally adequate.'" *McAfee v. Thurmer*, 589 F.3d

353, 356 (7th Cir. 2009) (quoting *Dean v. Young*, 777 F.2d 1239, 1245 (7th Cir. 1985)).

Trial counsel here surpassed the constitutional adequacy bar. Indeed, the trial court reviewed petitioner's myriad post-trial complaints and concluded that "[t]he performance of trial counsel in this case was not just competent, but excellent." Exh. GG at 14.

Grounds 1(i), 1(v), and 1(viii) were adjudicated on the merits in state court. As such, this Court may not grant relief on those grounds without finding that the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," § 2254(d)(1), or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(d)(2).

A. Ground 1: Counsel's overall performance was not deficient.

In considering a *Strickland* claim, courts "assess counsel's work as a whole, and it is the overall deficient performance, rather than a specific failing, that constitutes the ground of relief." *Pole v. Randolph*, 570 F.3d 922, 934 (7th Cir. 2009) (quotation marks omitted). As such, "it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." *Harrington v. Richter*, 562 U.S. 86, 111 (2011).

Trial counsel's performance was constitutionally satisfactory. Counsel faced an unusual case. Individually, none of the State's witnesses was especially

damaging. But taken together, they formed a compelling case for petitioner's guilt. Counsel effectively impeached all of the important witnesses, including each of the eyewitnesses. And counsel effectively pursued a defense theory that would have allowed the jury to find reasonable doubt without concluding that more than a dozen State's witnesses perjured themselves.

(i) Counsel effectively cross-examined and impeached the three eyewitnesses.

The state appellate court found that trial counsel "thoroughly cross-examined" Martinez. Exh. DD at 3 (*People v. Snow*, No. 4-14-0721 (Ill. App. Ct. May 27, 2015)). This statement of fact is presumed correct, and the presumption stands because petitioner has not rebutted it with clear and convincing evidence. *See* 28 U.S.C. § 2244(e)(2).

Regardless of presumption, the record establishes that the appellate court was right. Counsel showed that Martinez's account was inconsistent with Officer Pelo's. Martinez testified that he was walking toward the gas station building while petitioner was backing away from it, and when Martinez turned back toward the station after looking at his car, he stood face-to-face with petitioner, within three feet of him. *Id.* at 188. Pelo testified that he saw Martinez walk toward the gas station and then turn around and return to his car. *Id.* at 123. But Pelo did not see anyone else on foot. *Id.* Martinez's account cannot be squared with Pelo's, and counsel emphasized that fact in closing argument. Exh. K at 118 ("I think the only way that all of this can be reconciled is to believe Jeff Pelo . . . So what's the bottom line with these eyewitnesses? They're wrong.").

Martinez also testified that he saw petitioner "face to face" and that he would "never forget" petitioner's eyes. Exh. B at 160. But when pressed on cross-examination, Martinez could not state petitioner's eye color. *Id*. at 194. Moreover, he acknowledged failing to identify petitioner in a lineup, and that he had asked two other men to step forward for a closer look. *Id*. at 191-92. Martinez further acknowledged that the composite drawing based on his descriptions of the man he saw did not include facial hair, even though he testified that the man had two days' stubble. *Id*. at 194-95.

Counsel similarly impeached Luna, the witness who lived across the street from the Clark station. Luna did not positively identify petitioner during a lineup, Exh. C at 85-89, and did not identify him at trial. Indeed, Luna could not identify which composite drawing he said looked like the man he saw. *Id*. at 105. And he offered no description of the man's face, only his clothing, height and hair. *Id*. at 81, 91-92. A defense investigator testified that Luna's window was more than 200 feet from the front door of the Clark Station. Exh. G at 125.

Gutierrez, who testified that he saw Billy Little in a tense situation with a man in the Clark station an hour before the murder, likewise did not identify anyone. Exh. E at 24. He described the man he saw as having a "really remarkable injury on his chin," *id*. at 16, which no other witness mentioned. Otherwise, Gutierrez's memories of the evening were unclear, as he testified on cross-examination. *Id*. at 33.

(ii) Counsel effectively cross-examined the confession witnesses and pursued a reasonable strategy to explain the apparent confessions.

Counsel's real challenge was explaining the more than one dozen witnesses who testified about petitioner's inculpatory statements (and inculpatory silence). To be sure, counsel could — and did — show that many of these witnesses had selfish reasons to testify against petitioner. *See, e.g.*, Exh. E at 145-47 (Scheel reported confession only after he was arrested and charged with aggravated criminal sexual abuse and aggravated criminal sexual assault); *id.* at 183 (Wright reported confession only after he and petitioner got into a fight); Exh. F at 89-90 (Roland reported confession only on his attorney's advice after he was charged with DUI); Exh. C at 118 (Palumbo acknowledging possibility that he spoke with police in hope it would shorten his sentence); Exh. E at 127 (Winkler acknowledging that he asked for sentencing leniency in exchange for his cooperation); Exh. F at 56 (Schaal acknowledging that he cooperated in hopes of sentencing leniency); *cf.* Exh. D at 117 (Moffitt denying testifying in exchange for sentencing leniency); *id.* at 145-46 (Hammond denying testifying in exchange for sentencing leniency).

But with so many independent accounts of petitioner's inculpatory statements, counsel could not rely on creating reasonable doubt by discrediting every single witness's testimony. Counsel therefore pursued an alternative defense that would have allowed the jury to find reasonable doubt without concluding that more than a dozen State's witnesses had perjured themselves. Namely, petitioner was the type of person to brag to his friends (who were, by and large, also criminals)

about committing crimes, even if he did not commit them. This theory was amply supported:

- Howard testified that petitioner confessed but then immediately said "No, I'm just joking." Exh. E at 50.

- Palumbo acknowledged on cross-examination that he had previously described petitioner as "a big bragger" and that he "didn't know whether [petitioner's confession] was true or whether it was just Jamie being Jamie and running his mouth." Exh. C at 141-42.

- Scheel acknowledged on cross-examination that he had previously stated he did not take petitioner's confession seriously. Exh. E at 146.

- Schaal acknowledged on cross-examination that petitioner is "the type of person who tells a small fib to make himself feel like part of the group." Exh. F at 54.

- Tanasz acknowledged on cross-examination that petitioner made inculpatory statements while "everyone was sitting around BSing," and petitioner may have been just bragging. Exh. D at 90, 96.

- Tim Powell acknowledged on cross-examination that petitioner was "just blowing off steam" and "talking real big" when he said he was going to rob the Freedom station. Exh. E at 203.

- Roland testified on cross-examination that petitioner bragged about having "a big name" due to Billy Little killing. Exh. F at 95.

In addition to counsel's approach, petitioner testified that more than a dozen witnesses had testified falsely against him. Exh. I at 58-59 (Palumbo); *id.* at 60-61 (Gaddis); *id.* at 61 (Howard); *id.* at 63 (Scheel); *id.* at 64 (Strong); *id.* at 70 (Bernardini and Thomas); *id.* at 76-77 (Roberts); *id.* at 80-86 (Moffitt); *id.* at 86 (Palumbo); *id.* at 91-93 (Hammond); *id.* at 94 (Schaal); *id.* at 100-01 (Roland); *id.* at 105-06 (Tanasz); *id.* at 109-11 (Winkler); *id.* at 118-24 (Wright); *id.* at 127 (Burns).

Counsel also delivered an effective closing argument. He highlighted the eyewitnesses' weaknesses. Exh. K at 112-18. He emphasized inconsistencies between the State's theory and the minimal physical evidence. *Compare id.* at 119, *with* Exh. F at 84 (no cigarettes missing, contrary to Bruce Roland's testimony that petitioner told him he robbed Clark station and stole cigarettes); *see also* Exh. K at 106-07 (remarking on lack of physical evidence). He argued that many of the State's witnesses were convicted felons and experienced liars. Exh. K at 122-29 (highlighting impeachment of Gaddis, Winkler, Wright, Gutierrez, Palumbo, Moffitt, Hammond, Scheel, Roberts, and Roland based on criminal history and reputation for dishonesty). He questioned why Detectives Thomas and Bernardini did not arrest petitioner for Little's murder if petitioner made apparently inculpatory statements to them. *Id.* at 130-32. And, finally, he addressed petitioner's flight and failure to participate in a lineup by explaining petitioner was afraid to go to prison for something he did not do. *Id.* at 129-30, 136-37. Taken as a whole, counsel's performance was not deficient under *Strickland*.

(iii) The state court reasonably concluded that any impairments did not cause counsel to perform deficiently.

Petitioner alleges that he received ineffective assistance of counsel because one of his attorneys, Frank Picl, may have been abusing alcohol at the time of trial and another, Patrick Riley, had suffered a stroke 12 months before trial. Doc. 1 at 21. Even if both attorneys were impaired — and they were not — that would not be enough to show deficient performance. *See, e.g.*, *Frye v. Lee*, 235 F.3d 897, (4th

Cir. 2000) ("[I]n order for an attorney's alcohol addiction to make his assistance constitutionally ineffective, there must be specific instances of deficient performance attributable to alcohol."). Thus, the state court's rejection of this claim, Exh. Q at 10, was reasonable.

There is no evidence that Riley's stroke or Picl's alleged alcohol abuse rendered their performance deficient. Before appointing Riley, the trial court consulted with other judges who had observed Riley since his stroke. Exh. L at 97. And Riley stated that the only residual impairments from his stroke were a cracking voice and poor handwriting. *Id.* at 96-97. Picl was effective at trial, and there is no evidence that any alcohol use impaired him in preparing a defense. Accordingly, the state court reasonably concluded that any impairments did not cause counsel to perform deficiently, and § 2254(d) bars relitigating that allegation.

B. Ground 1(i): The state court reasonably held that counsel was not ineffective for failing to further impeach Martinez.

The state appellate court held that counsel was not ineffective for failing to further impeach Martinez.[4] Exh. Q at 29-30; *see id.* at 10-11. Because that conclusion was reasonable, petitioner's claim fails on habeas review. 28 U.S.C. § 2254(d).

As discussed above, trial counsel thoroughly impeached Martinez and demonstrated that Martinez's eyewitness account was inconsistent with Officer

[4] Martinez was not a "star witness," no matter how many times petitioner asserts it. *See* Doc. 1 at 14; Doc. 42 at 46; Exh. AA at 12. Indeed, on two different rounds of appeal, the state appellate court noted the weakness of Martinez's testimony. Exh. Q at 27 ("Martinez's identification of [petitioner] was questionable"); Exh. DD at 3 ("Martinez . . . was not a 'star' witness").

Pelo's. Section II.A(i), *supra*. The appellate court agreed. Exh. DD at 3 (counsel "thoroughly cross-examined" and otherwise impeached Martinez). As did petitioner's counsel on direct appeal. Exh. N at 56 ("If Martinez had actually seen someone leave the station, Officer Pelo would also have seen a person, and he did not"); *id*. at 56-59 (discussing litany of weaknesses revealed during Martinez's cross-examination).

Trial counsel explained his strategic reasons for not further impeaching Martinez: "[I]t's been my practice developed over many years when you've done damage to a witness, if you keep pounding away at it, sometimes you end up pounding yourself in the thumb. I thought Martinez was very badly damaged when he finally left off the stand." Exh. L at 54. The appellate court agreed with the trial court that counsel's strategy was reasonable. Exh. Q at 10-11, 29-30. And that conclusion was itself reasonable. Habeas relief is therefore barred by § 2254(d).

For the same reasons, petitioner cannot show that trial counsel's performance prejudiced him. Martinez was thoroughly impeached. There is no reasonable probability that further impeachment would have changed the outcome of petitioner's trial.

C. Ground 1(ii): Counsel was not ineffective for failing to call Thomas Sanders to further impeach Luna.

Petitioner argues that trial counsel was ineffective for failing to call Thomas Sanders, a sketch artist who testified at petitioner's codefendant's trial, to testify that he could not create a sketch based on Luna's description. Doc. 1 at 16-17. Because the state appellate court did not adjudicate the merits of this aspect of

counsel's performance, it is reviewed "as law and justice require." *Campbell v. Smith*, 770 F.3d 540, 546 (7th Cir. 2014). Petitioner's claim fails because counsel's performance was neither deficient nor prejudicial.

There is no dispute that counsel was aware of Sanders's potential testimony: one of petitioner's lawyers had observed Sanders testify at his codefendant's earlier trial. Exh. L at 56. And Sanders's testimony would have added nothing to Luna's impeachment. Luna never described the facial features of the man he saw walking away from the Clark station. *See* Exh. C at 81, 91-92 (describing only the man's hair, height, and dress). Moreover, petitioner's investigator testified that Luna saw the man from more than 200 feet away. Exh. G at 125.

In other words, the jury already knew that Luna could not describe the man's facial features; Sanders's testimony on that point would have added nothing. Indeed, calling Sanders would have risked reminding the jury that Martinez and Gutierrez's composite sketches resembled petitioner so much that petitioner asked friends to remove them and mentioned them to Roberts, Palumbo, Howard, and McCowan. Exh. C at 126 (Palumbo); Exh. E at 45 (Howard); Exh. F at 32-35 (Roberts and McCowan). Accordingly, counsel's decision not to call Sanders was not deficient performance. And, for the same reasons, there is no reasonable probability that petitioner would have been acquitted had Sanders testified.

D. Ground 1(iii): Counsel was not ineffective for failing to interview and further impeach Scheel.

Scheel testified that petitioner confessed to him at a party in Bloomington. Exh. E at 139. Counsel impeached Scheel through multiple approaches. He

emphasized Scheel's convictions for aggravated criminal sexual abuse and aggravated criminal sexual assault. Exh. E at 141-42. He questioned why Scheel did not contact authorities after hearing petitioner's confession. *Id.* at 143. He noted the oddity of petitioner confessing to Scheel when the two had not communicated since petitioner was nine years old. *Id.* at 152. And perhaps most importantly, counsel confronted Scheel with Scheel's prior statement that he did not believe petitioner's confession. *Id.* at 146.

Petitioner submits an affidavit from his investigator stating that Scheel told the investigator that police pressured Scheel to perjure himself at petitioner's trial, but if counsel had interviewed him before trial, he would have told the truth. Doc. 2-10. Though this interview happened more than six years ago, *id.* at 1, and though petitioner has been represented by present counsel since Scheel's 2009 interview, petitioner has failed to secure an affidavit from Scheel himself.

Based on the investigator's hearsay affidavit, petitioner argues that trial counsel was ineffective for failing to interview Scheel and cross-examine him about police interference with his testimony. Doc. 1 at 17. Petitioner has not shown deficient performance or prejudice.

Counsel'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. Counsel's decision was not unreasonable, and therefore they were not deficient for failing to interview Scheel. Moreover, given

Scheel's impeachment at trial, there is no reasonable probability that further impeachment would have caused petitioner to be acquitted, and therefore counsel's performance did not prejudice petitioner.

E. Ground 1(iv): Trial counsel was not ineffective for failing to further impeach Roberts.

Petitioner argues that trial counsel should have interviewed Roberts and called Tina McCombs to rebut Roberts's testimony that petitioner poured a beer on the ground in honor of Billy Little. Doc. 1 at 18. But counsel was not ineffective for choosing not to call McCombs or interview Roberts.

Roberts

Roberts submitted an affidavit partially recanting her trial testimony. She testified that she was present at a party where petitioner poured a beer on the ground and said, "This is to Billy Little." Exh. F at 36. She further testified that she overheard petitioner and McCowan talking about composite drawings of Little's killer, and petitioner admitted that the drawing was of him. *Id.* at 34-35. Petitioner instructed Roberts to remove the composite drawings from public places. *Id.* at 33. When she did, there were other copies of the drawings on petitioner's kitchen table. *Id.* at 38. Roberts was impeached by her two convictions for obstruction of justice and two juvenile adjudications for forgery. Exh. F at 36.

In her affidavit, Roberts maintained that she removed multiple composite drawings "because [petitioner] was [her] friend." Doc. 2-12 at 3. She also did not recant her testimony that there were other composites on petitioner's kitchen table. Roberts claimed that she told petitioner about removing the composite drawings,

but petitioner did not instruct her to do so. *Id*. She further stated that petitioner poured a beer on the ground and said, "This is for Billy." *Id*. at 1. She now realizes that petitioner must have meant "Billy McWhorter." *Id*.

Counsel already had a basis to impeach Roberts: four convictions and juvenile adjudications for crimes involving dishonesty. Exh. F at 36; *see also* Exh. K at 129 (counsel emphasizing Roberts's dishonesty in closing argument). And counsel had spoken with McCombs, who lived with Roberts during the relevant timeframe. Doc. 2-13 at 2. They therefore had enough information to reasonably choose not to interview Roberts, and their performance was not deficient.

Moreover, there is no reasonable probability that interviewing Roberts would have changed the outcome of petitioner's trial. First, Roberts's statement that she would have changed her trial testimony had counsel interviewed her is dubious. But even if Roberts testified consistently with her affidavit, it would not have created a reasonable probability of acquittal. She did not recant her testimony that petitioner had posters with the composite sketches on his kitchen table. *Compare* Exh. F at 38, *with* Doc. 2-12. And she admitted removing multiple posters "because [petitioner] was [her] friend," implying that the drawings appeared to depict petitioner. Doc. 2-12 at 3. Accordingly, any failure to interview Roberts did not prejudice petitioner.

McCombs

McCombs submitted an affidavit stating that she would have testified that she and Roberts went to a cookout at petitioner's home where Dennis Hendricks,

not petitioner, made a toast to Billy McWhorter. Doc. 2-13 at 1. Counsel was presumably aware of this potential testimony, as McCombs had been subpoenaed for trial. *Id.* at 2.

Counsel's choice not to call McCombs was reasonable trial strategy. Her testimony did not contradict Roberts's. She would not (and could not) have testified that petitioner never toasted Billy Little, only that Hendricks toasted Billy McWhorter. Moreover, she would have undercut petitioner's own testimony that he never hung around with Roberts. *See* Exh. I at 77. For the same reasons, counsel's choice not to call McCombs did not prejudice petitioner.

F. Ground 1(v): The state court reasonably held that counsel was not ineffective for failing to call Mark Huffington to impeach Strong.

Karen Strong, McCowan's live-in girlfriend, testified that McCowan asked if petitioner could stay at their apartment on the night of the crime. Exh. G at 9. Petitioner asserts that counsel should have interviewed and called Mark Huffington, Strong's friend, to impeach her. Doc. 1 at 18-19. But the state appellate court reasonably held that counsel's performance was not deficient. Exh. Q at 10-11, 29-30; *see also* Exh. GG (order on motion to withdraw at 7).

Huffington submitted an affidavit stating that Strong previously contradicted her trial testimony. Doc. 2-14. But counsel did not learn of Huffington until after Strong had testified. Exh. GG (order on motion to withdraw at 7). And petitioner has not presented any reason why counsel should have known of Huffington — let alone interviewed him — before trial.

Counsel impeached Strong through McCowan's testimony that he never asked Strong whether petitioner could stay at their apartment. Exh. I at 7. Calling Huffington to further rebut Strong would have been risky, as counsel had no way to know what Huffington would have said. *See* Exh. L at 79 (counsel asking, "Mark Huffington, how were we supposed to use him if he pops up after [Strong] testifies at trial?"). Counsel was acutely aware of this risk, as other apparently promising witnesses had in fact provided damaging testimony. *See id.* at 69 (counsel noting that petitioner personally added Burns to his potential witness list, but her testimony was damaging to petitioner). Accordingly, the state appellate court reasonably concluded that counsel was not deficient for failing to call Huffington.

G. Ground 1(vi): Counsel was not ineffective for declining to further impeach Schaal, Roland, and Winkler.

Petitioner asserts counsel was constitutionally ineffective for failing to further impeach Schaal, Roland, and Winkler. Counsel's cross-examination and impeachment were constitutionally adequate.

(i) Schaal

Schaal was not a cooperative State witness. His most damaging testimony was that petitioner admitted being "there," but Schaal claimed to be unsure what "there" meant with regard to the Billy Little murder. Exh. E at 170. Indeed, the State impeached Schaal with his prior statement that petitioner told him "[petitioner] was present when this murder occurred." Exh. F at 50.

On cross-examination, Schaal admitted being only "partly truthful" with investigators before trial. *Id.* at 56. He also acknowledged that he was testifying

against petitioner because he wanted leniency in his pending federal sentencing. *Id.* at 54-56. Indeed, Schaal testified that the federal agent who arrested him promised to "try to help" if Schaal cooperated in the Billy Little investigation. *Id.* at 54-55.

Petitioner complains that counsel did not also impeach Schaal with evidence that Schaal knew he had in fact received sentencing leniency for cooperating in the Billy Little investigation. Doc. 1 at 19. But such impeachment would have added little, as Schaal had already acknowledged that he was testifying to get sentencing leniency and had strong reason to believe he would get it. Because the proffered impeachment would have been cumulative, counsel's failure to use it was neither deficient nor prejudicial.

(ii) Roland

Roland failed to identify petitioner in court. *Id.* at 80. He nevertheless testified that petitioner confessed to him while the two were housed in the Logan Correctional Center in 1994. Petitioner bragged that he had a "big name" because of the Billy Little investigation. Exh. F at 84. He later told Roland that he had killed Little because Little would not let him steal a pack of cigarettes. *Id.* at 85. Petitioner took some money and a pack of cigarettes and then ran. *Id.*

On cross-examination, Roland admitted that he first reported petitioner's confession on his lawyer's advice, while he was facing sentencing for a DUI in 1999. *Id.* at 90. Roland was experienced with the criminal justice system, having at least two prior convictions. *Id.* at 80.

Petitioner complains that counsel was ineffective for not further impeaching Roland with a police report discussing a conversation between a Bloomington Police Department officer and Roland's DUI attorney. Doc. 1 at 19. Roland's attorney wanted a deal in exchange for Roland's testimony, but the officer advised that he "would not make any promises or guarantees," though the state's attorney's office "had a history of taking the person's cooperation into consideration at sentencing time." Doc. 2-16 at 1.

Counsel's failure to use this police report does not render his performance constitutionally inadequate. Roland admitted the suspicious timing of his statement to police. Counsel did not need to connect the dots by proving that Roland — a veteran to criminal sentencing — knew that cooperating might benefit him. In fact, using the police report may have harmed petitioner's case, as the report confirmed that the police and state's attorney's office refused to promise any consideration for Roland's testimony. Counsel's failure to use the police report to impeach Roland was therefore neither deficient nor prejudicial.

(iii) Winkler

Winkler testified that petitioner confessed to him while the two were living in Florida. Exh. E at 115. On cross-examination, Winkler admitted that he had a crack cocaine habit at the time petitioner confessed. *Id.* at 120-21. When Winkler first spoke to police, he had been charged with forgery. *Id.* at 111, 126-27. He asked the officers whether he would get some benefit for cooperating in the Billy Little investigation, but he received no such benefit. *Id.* at 127.

Petitioner complains that counsel should have impeached Winkler with his forgery conviction and sentence. Doc. 19. Winkler entered a negotiated plea, receiving a four-year prison term. Doc. 2-20 at 1. Forgery is a Class 3 felony, 720 ILCS 5/17-3(d), which for Winkler carried a statutory minimum two-year sentence and a maximum ten-year sentence, 720 ILCS 5/5-4.5-40; 730 ILCS 5/5-8-2; 730 ILCS 5/5-5-3.2(a)(3), (12). There was no mention at sentencing of Winkler's cooperation in the Billy Little investigation. *See* Doc. 2-20 at 3-12.

The mere fact that Winkler pleaded guilty to a sentence less than the statutory maximum would have been minimally impeaching, especially in light of Winkler's admissions that he (1) cooperated in hopes of getting a deal and (2) had a crack cocaine habit. Counsel's failure to use Winkler's plea was neither deficient nor prejudicial.

H. Ground 1(vii): Counsel was not ineffective for failing to call Darren Smart to further impeach Mary Jane Burns.

Correctional officer Mary Jane Burns testified that petitioner told her at the jail in April 2000 that he believed he knew who committed the Billy Little murder. Exh. G at 22-23. Petitioner said he was drinking and riding around with Susan Powell and another couple on the night of the crime. *Id.* at 23-24. Petitioner asked Susan to pull over so he could get sick, and he told Burns he believed the other man in the car robbed the Clark station while petitioner was getting sick. *Id.* at 24. Burns testified that Lindsey Caldwell or Darren Smart was also present for this conversation. *Id.* at 22. On cross-examination, Burns acknowledged that neither she nor her supervisor made a written report of petitioner's statement. *Id.* at 28-29.

At trial, petitioner did not deny having this conversation with Burns, but testified that she must have misunderstood what he said. Exh. I at 127. Now petitioner asserts that trial counsel was ineffective for not calling Darren Smart to testify that he never heard the conversation to which Burns testified. Doc. 1 at 20; Doc. 2-22.

Smart's affidavit would not have impeached Burns's trial testimony, as Burns did not assert that Smart was present for petitioner's statement. Exh. G at 22 (testifying that Burns or another inmate was present). Smart's affidavit contradicts only Burns's prior consistent statement, in which she reported that Smart and another inmate were present for petitioner's statement. *See* Doc. 1 at 20; Doc. 2-21 at 7. But using Burns's prior consistent statement would have risked increasing Burns's credibility and undercut counsel's efforts to impeach Burns by showing her failure to report petitioner's statement. Counsel's reasonable strategic decision not to impeach Burns on a collateral point of her prior consistent statement was therefore neither deficient nor prejudicial.

I. Ground 1(viii): The state appellate court reasonably held that counsel was not ineffective for failing to impeach Thomas and Bernardini with Thomas's grand jury testimony.

Officers Thomas and Bernardini testified that petitioner indicated he knew information about the Billy Little murder but would not tell them without assurances of a deal. Exh. F at 120-21, 129-30; Exh. G at 37, 46-47. Petitioner states that trial counsel was ineffective for failing to impeach them with Thomas's grand jury testimony in another armed robbery case indicating that petitioner said

he had information about that crime. Doc. 1 at 20; *See* Doc. 2-23 at 13. The state appellate court affirmed the trial court's judgment holding that counsel was not ineffective for not trying to impeach Thomas and Bernardini with Thomas's grand jury testimony. Exh. Q at 9-10, 29-30; Exh. GG at 11-13; *see also* Exh. L at 103-07. That conclusion was reasonable.

Counsel subpoenaed and spoke with Thomas before deciding not to impeach him with his grand jury testimony. Exh. L at 106-07. Counsel did not think the impeachment would be effective, and the defense did not want to highlight petitioner's involvement in another armed robbery near the time of the Billy Little murder. *Id*. at 105 ("I wasn't going to get . . . anywhere further I felt with questioning these professional police officers. . . . [T]he last thing I wanted to do was . . . develop some sort of extended colloquy about . . . the defendant asking or admitting involvement in other armed robberies."). Counsel's strategic decision was reasonable, and therefore the state appellate court reasonably held that counsel's performance was not deficient.

Moreover, counsel's strategic choice did not prejudice petitioner. Thomas's grand jury testimony did not contradict his or Bernardini's trial testimony. Neither officer denied that petitioner indicated knowledge of other crimes, and petitioner may well have tried to trade information about more than one of his crimes. Accordingly, counsel's performance did not prejudice petitioner.

J. Grounds 1 and 2: Any deficient performance did not prejudice petitioner.

As discussed in Section II.A, *supra*, counsel's overall performance was not deficient. If this Court finds any deficiency, it should nevertheless deny petitioner's *Strickland* claim because he failed to show prejudice. There is no reasonable probability that petitioner's proposed further impeachment of these witnesses, who were all amply impeached, would have changed the outcome of his trial.

III. Grounds 4 and 5: Petitioner was not denied due process under *Brady*.[5]

Due process requires that the State give a criminal defendant any evidence within its control that is material and favorable to the defendant. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Evidence is material under *Brady* only if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 676 (1985).

Grounds 4(i), 4(ii), 4(iv), 4(v), 4(vii), and 4(viii) were adjudicated on the merits in state court. As such, this Court may not grant relief on those grounds without finding that the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," § 2254(d)(1), or "resulted in

[5] Petitioner notes ongoing state court litigation potentially related to his *Brady* claim. *See* Doc. 42 at 20. Any claims raised for the first time in that litigation are unexhausted. And this Court, in assessing petitioner's claims under AEDPA, may not consider any evidence not before the state court that adjudicated the relevant claim on the merits. *Cullen v. Pinholster*, 563 U.S. 170, 181-82 (2011).

a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(d)(2).

A. Grounds 4(i) and 4(ii): The state court reasonably held that the State did not violate *Brady* by failing to disclose coaching of Scheel or pressure on him to testify.

Scheel testified that petitioner confessed to him at a party in Bloomington. Petitioner claims that the Bloomington Police Department and McLean County State's Attorney's Office pressured Scheel into falsely testifying against petitioner, fed him details to support his testimony, and failed to disclose these facts to petitioner. Doc. 1 at 22; *see also* Doc. 2-10. The state appellate court rejected this claim, holding that any error did not prejudice petitioner because even if Scheel had been fully discredited, there is no reasonable probability that petitioner would have been acquitted. *Snow*, 964 N.E.2d at 1153.

Scheel's credibility was undermined by (1) his convictions for aggravated criminal sexual assault and criminal sexual abuse; (2) his failure to report petitioner's confession to authorities; (3) the fact that petitioner confessed upon seeing Scheel for the first time since they were both nine years old; and (4) Scheel's prior statement that he did not believe petitioner's confession. Exh. F at 141-52. The appellate court reasonably held, therefore, than any additional impeachment of Scheel would not have been material. *Snow*, 964 N.E.2d at 1153.

Petitioner argues that the jury could have considered the State's alleged bad acts involving Scheel as evidence of bad acts involving other witnesses. Doc. 42 at 68 ("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."). That argument is foreclosed by Illinois law. *See* Ill. R. Evid. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible . . . to show action in conformity therewith."). Because petitioner's proffered evidence was inadmissible, the state court's materiality determination was reasonable, and § 2254(d) bars relief.

B. Ground 4(ii): The state courts reasonably held that the State did not violate *Brady* by withholding evidence of pressure put on various witnesses.

Petitioner claims the State violated *Brady* by withholding evidence that the State pressured or offered incentives to Palumbo, Moffitt, Schaal, Roland, and Winkler to testify. The state courts reasonably rejected these claims. *See* Exh. HH at 2 (postconviction trial court rejecting Palumbo and Moffitt claims); *Snow*, 964 N.E.2d at 1152 (postconviction appellate court rejecting Winkler and Schaal claims); Exh. DD at 4 (successive postconviction appellate court rejecting Roland claim).

(i) Winkler and Schaal

The state appellate court held that the State did not violate *Brady* by withholding evidence about Winkler and Schaal's purported deals because the evidence was publicly available at the time of trial. *Snow*, 964 N.E.2d at 1152. That holding was reasonable.

The State does not violate *Brady* by failing to produce documents that are reasonably available to a defendant. *Bell v. Bell*, 512 F.3d 223, 234-35 (6th Cir.

2008). Here, the only evidence petitioner cited then (and cites now) about Schaal's and Winkler's purported deals are documents that were publicly available before trial. *See* Doc. 2-15 (Schaal); Doc. 2-20 (Winkler). The state appellate court therefore reasonably held that failure to produce this evidence did not constitute a *Brady* violation. Moreover, for the reasons discussed in Section II.G(i) and (iii), *supra*, there is no reasonable probability the evidence would have resulted in acquittal, and it was therefore not material under *Brady*.

(ii) Palumbo and Moffitt

Because petitioner did not present *Brady* claims regarding Palumbo and Moffitt to the state appellate court, the postconviction trial court is the last court to have adjudicated these claims on the merits. *See* Exh. HH at 2 (order); *see also* Exh. HH at 180 (petition).

Petitioner cites an affidavit from Palumbo asserting that police pressured him to testify, Doc. 3-2 at 1, and an affidavit from Dennis Hendricks asserting that Moffitt acknowledged receiving a deal to testify, Doc. 2-5 at 1-2. The state court found petitioner's allegations factually inadequate and specifically found Palumbo not credible. *Id*. at 2-3. The state court could have reasonably found Hendricks's hearsay affidavit regarding Moffitt likewise incredible. Hendricks testified on petitioner's behalf at trial, Exh. H at 28-49, and he is a multiple-time convicted felon. *Id*. at 28-29.

Moreover, Moffitt was impeached through cross-examination. Specifically, he admitted that he was not "an honest and truthful person." Exh. D at 107.

Moreover, he acknowledged multiple convictions for aggravated criminal sexual assault, aggravated battery, and forgery. *Id.* at 99-100. There is no reasonable probability that further impeachment would have resulted in petitioner's acquittal. Accordingly, the postconviction trial court reasonably rejected petitioner's *Brady* claim on materiality grounds.

(iii) Roland

The state appellate court on successive postconviction review reasonably held that the State did not violate *Brady* by failing to disclose a deal with Roland.

The only evidence of a deal with Roland is a 2012 affidavit from Roland's ex-wife, Danielle Prosperini. Doc. 3-5. She accused a Bloomington police detective of flirting with her and pressuring her to help make sure Roland perjured himself. *Id.* at 2-3. Her affidavit is contradicted by the police report petitioner submitted, which stated that an officer advised Roland's lawyer that the state's attorney's office "would not make any promises or guarantees." Doc. 2-16 at 1. This Court should therefore reject Prosperini's affidavit.

Even if this Court accepts the affidavit, the state appellate court reasonably concluded that there is no reasonable probability that the impeachment evidence would have led to acquittal. The jury knew that Roland had an incentive to testify against petitioner. On cross-examination, he admitted that he first reported his conversation on his lawyer's advice while he was facing sentencing for a DUI in 1999. *Id.* at 90. And Roland was experienced with the criminal justice system,

having at least two prior convictions. *Id.* at 80. Moreover, he was but one of many witnesses who described petitioner's confessions.

C. Ground 4(iii): The State did not violate *Brady* by withholding evidence of a pattern of misconduct.

Petitioner argues that the State violated *Brady* by failing to turn over evidence of a pattern of misconduct by the police department and state's attorney's office — specifically, two *Brady* violations in unrelated cases. *See* Doc. 42 at 33 (noting State's Attorney's Office's failure to disclose "Doe" suspect in *People v. Beaman*, 229 Ill. 2d 56 (2008), and Dan Katz's urging a witness to lie in *People v. Drew*, No. 4-08-0011 (Ill. App. Ct. Dec. 4, 2008)).

But only admissible evidence may be material under *Brady*. *Jardine v. Dittmann*, 658 F.3d 772, 777 (7th Cir. 2011); *United States v. Salem*, 578 F.3d 682, 686 (7th Cir. 2009); *United States v. Silva*, 71 F.3d 667, 670 (7th Cir. 1995); *but see United States v. Morales*, 746 F.3d 310, 314-15 (7th Cir. 2014) (noting circuit split and questioning Seventh Circuit's rule).

In Illinois, "[e]vidence of other crimes, wrongs, or acts is not admissible . . . to show action in conformity therewith." Ill. R. Evid. 404(b). Under Rule 404(b), "[p]attern evidence *is* propensity evidence, and it is inadmissible unless the pattern shows some meaningful specificity or other feature that suggests identity or some other fact at issue." U*nited States v. Miller*, 673 F.3d 688, 699 (7th Cir. 2012) (applying federal version of Rule 404(b)). Because this "pattern of misconduct" evidence has no purpose but to show propensity, it is admissible "bad acts" evidence

and thus not material under *Brady*. Accordingly, any evidence withheld about a pattern of misconduct did not constitute a *Brady* violation.

D. Ground 4(iv): The State did not violate *Brady* by withholding evidence that Reynard allegedly knew petitioner was innocent.

Petitioner alleges that the State failed to disclose that McLean County State's Attorney Reynard admitted that he was prosecuting petitioner despite knowing petitioner was innocent. Doc. 1 at 26. This claim is based on Palumbo's affidavit stating that Reynard admitted after Palumbo testified that "someone else had [murdered Billy Little], but since they couldn't get that other person [petitioner] would have to do." Doc. 3-2 at 2.

The postconviction trial court rejected this assertion, finding it incredible. Exh. HH at 3. This Court must accept that finding unless petitioner rebuts it by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). He has not and cannot do so. Indeed, it is facially implausible that a sitting State's Attorney would admit to a State's witness — in the middle of trial — that he was knowingly prosecuting an innocent man for murder. Regardless, Reynard's statement would not be admissible at trial and therefore is not material under *Brady*. *Jardine*, 658 F.3d at 777.

E. Ground 4(v): The state court reasonably held that the State did not violate *Brady* by withholding evidence of Martinez's prior statement.

Petitioner alleges that the State withheld a polygraph report stating that Martinez "says [petitioner] is not the person he saw." Doc. 1 at 26; *see also* Doc. 3-17 (polygraph report). The state appellate court reasonably held that the

evidence of Martinez's statement was not material under *Brady*. Exh. DD at 3-4. Specifically, the court found that Martinez was "thoroughly cross-examined, was not a 'star' witness, and was impeached in other ways." *Id.* at 3. The court further noted the "large amount of evidence" against petitioner. *Id.*

Moreover, the court correctly noted that the note in the polygraph report is "vague, cryptic, and highly condensed." *Id.* The state court could have reasonably concluded that the note added nothing to the evidence that Martinez failed to identify petitioner weeks after the murder and provided an account inconsistent with Pelo's testimony. *See* Exh. B at 188-195; *see also* Section II.A, *supra.* Because of the various and ample evidence against petitioner, as well as counsel's thorough impeachment of Martinez, the state court reasonably concluded that there was no reasonable probability that additional impeachment from the polygraph notes would have resulted in acquittal. Accordingly, § 2254(d) bars relief.

F. Ground 4(vii): The state court reasonably held that the State did not violate *Brady* by withholding Scheel's prior inconsistent statement.

Petitioner alleges that the State violated *Brady* by withholding a polygraph report documenting Scheel's statement that petitioner did not confess to killing Billy Little. Doc. 1 at 27; *see also* Doc. 3-19 (polygraph report). The state appellate court reasonably concluded that the withheld evidence was not material under *Brady*. Exh. DD at 4-5.

Scheel made both prior consistent statements and prior inconsistent statements. *Compare* Doc. 3-19 (petitioner did not confess), *with* Doc. 3-20

(petitioner confessed). Indeed, counsel impeached Scheel with a prior inconsistent statement. Exh. E at 146 (Scheel admitting that he stated he did not believe petitioner's confession). The jury also learned about Scheel's convictions for aggravated criminal sexual abuse and aggravated criminal sexual assault, his failure to report petitioner's confession, and that when petitioner confessed to Scheel, they had not spoken to each other since they were nine years old. *Id.* at 141-43, 152. And, as the appellate court noted on the first round of postconviction review, Scheel was "one of the many witnesses that testified [petitioner] in some way acknowledged killing Little." *Snow*, 964 N.E.2d at 1153.

The state court thus reasonably held that there is no reasonable probability petitioner would have been acquitted had the State turned over Scheel's prior inconsistent statement, and this Court should deny habeas relief on the claim. 28 U.S.C. § 2254(d).

G. Ground 4(viii): The state court reasonably held that the State did not violate *Brady* by withholding Roland's polygraph results.

Petitioner claims the State violated *Brady* by withholding the examiner's conclusions on Roland's polygraph examination. Doc. 1 at 27-28; *see also* Doc. 3-22. But inadmissible evidence is not material under *Brady*. *Jardine*, 658 F.3d at 777. And a polygraph examiner's conclusions are inadmissible in Illinois. *People v. Baynes*, 430 N.E.2d 1070, 1079 (Ill. 1981). Accordingly, the state appellate court reasonably held that the State did not violate *Brady* by withholding the polygraph

examiner's conclusions, *see* Exh. DD at 4, and habeas relief is unavailable. 28 U.S.C. § 2254(d).

IV. Ground 5: Petitioner's cumulative error claim is defaulted and without merit.

Petitioner did not raise a cumulative error claim based on the claims in his habeas petition in the Illinois Supreme Court. *See* Exh. X; Exh. EE; *see also* Section I, *supra* (showing petitioner did not present many of his individual claims to the Illinois Supreme Court). Accordingly, this claim is defaulted. *Boerckel*, 526 U.S. at 845. Default aside, the claim lacks merit. Even taken together, any constitutional errors did not infect petitioner's trial such that habeas relief is warranted.

V. This Court should deny a certificate of appealability.

Upon denying the petition, this Court also should decline to certify any claim for appeal. See Habeas Corpus Rule 11(a) ("The district court must issue or deny a certificate of appealability [CA] when it enters a final order adverse to the applicant.").

If the Court resolves a claim on procedural grounds, a CA should be denied unless petitioner shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

If the Court applies § 2254(d) to resolve a claim, a CA should be denied unless reasonable jurists could debate the district court's application of § 2254(d),

even if reasonable jurists could debate the underlying constitutional issue. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) ("We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason.").

Because no reasonable jurist could debate that each of petitioner's claims is defaulted, barred by § 2254(d), or without merit, no CA should issue.

Conclusion

This Court should deny the petition for a writ of habeas corpus and decline to issue a certificate of appealability.

May 6, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2016, I electronically filed respondent's Answer with the Clerk of the United States District Court for the Northern District of Illinois, using the CM/ECF system, which will provide notice to all parties of record.

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