2011 WL 10642667 (Ill.App. 4 Dist.) (Appellate Brief)
Appellate Court of Illinois, Fourth District.

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,
v.
James SNOW, Petitioner-Appellant.

No. 4-11-0415.
August 22, 2011.

On Appeal from the Eleventh Judicial Circuit, McLean County Circuit Court
Circuit CT. No. 99 CF 1016
Honorable Judge McMillen, Presiding
Oral Argument Requested

Brief and Argument for Petitioner-Appellant

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NATURE OF THE CASE

Petitioner James Snow appeals from a judgment granting the State's motion to dismiss his post-conviction petition, and denying his motions for discovery, to supplement the record, and for ballistics testing. No question is raised on the sufficiency of the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether the circuit court erred in granting the State's motion to dismiss Snow's petition, where he presented substantial evidence supporting his claims.

2. Whether the circuit court erred in denying his motion for ballistics testing.

3. Whether the circuit court erred in denying his motions to supplement the record with evidence of his innocence and his attorney's ineffectiveness, and in denying his motion for discovery to further support his claims.

JURISDICTION

James Snow, Petitioner-Appellant, appeals the dismissal of his amended post-conviction petition, the denial of his motion for discovery, the denial of his motions to supplement the record and the denial of his motion for ballistics testing. The judgments being appealed were entered on April 21, 2011 and May 9, 2011. Notice of appeal was timely filed on May 19, 2011. Jurisdiction therefore lies in this Court pursuant to Article VI, Section 6 of the Illinois Constitution and Supreme Court Rule 651(a).

STATEMENT OF FACTS

I. Pre-Trial Investigation and Snow's Arrest Eight Years After the Crime

On March 31, 1991, the evening of Easter Sunday, William Little was shot and killed during an apparent robbery of the Clark Oil gas station at Empire and Linden in Bloomington. Little was apparently working at the cash register when someone entered
***2** the station shot him, and took the register's plastic bill tray insert. (R.59-63, 69.) [1]

The physical evidence collected at the scene did not connect Snow to this crime. Of all the prints developed from the scene, none matched Snow. Shoe prints were also lifted, and none of those were connected to Snow. (R.7-42, 44-47, 50-55, 56.) Snow was not charged with this crime until September of 1999, over 8 years later. (C.20-23.)

II. Snow is Convicted at Trial and Unsuccessfully Appeals

The State's evidence against Snow at trial fell into two different tracks –testimony from scene witnesses connecting Snow to the scene of the crime, and testimony from numerous individuals claiming that Snow made incriminating statements to friends and acquaintances after the crime occurred. The evidence presented at trial led to Snow's conviction, and his challenge on direct appeal was unsuccessful.

A. The State Presents Evidence from Purported Scene Witnesses

The State presented evidence from several witnesses with some connection to the crime scene, whose collective testimony appeared to connect Snow to the crime scene.

About 15 minutes after a customer left the gas station, a sergeant in the Bloomington Police Department received a call from an alarm company indicating that the Clark station's silent alarm was activated. (R.5-8, 94-96.) Officer Jeffery Pelo testified that he was on patrol when he received a call to go to the Clark station. He stopped his car and pulled behind the building across the street, approaching the gas ***3** station on foot. While still across the street, he saw someone in the parking lot putting air into car tires. Pelo called dispatch to relay the license plate number of the car. As Pelo spoke to dispatch he saw the man, who he later identified as Danny Martinez, walk toward the station, then turn back within 15 or 20 feet of the station door. Martinez then turned around, went back to his car, and drove away. (R.101-02, 111-12, 118, 123-25, 130.)

After Pelo watched Martinez drive away, a truck pulled into the gas station parking lot, and Pelo told the people in the truck to wait. He then looked toward the gas station and saw a foot sticking out from behind the counter. He entered the station and found Bill Little on the floor with no pulse. The cash register was open without its insert. (R.103-05, 131.) This testimony was corroborated by Paul Williams, the second officer to arrive at the scene, who himself testified that as he approached the Clark station, he saw Officer Pelo go in and out of the station, and saw a car by the pump. (R. 140-42, 150-53.)

The prosecution's star witness, Danny Martinez, provided critical testimony against Snow. He claimed that after coming home from a family Easter dinner, he went to the gas station to get drinks and put air in his tires. (R.155-59, 186.) He testified that he heard two “bangs” while filling his tires. Afterward, he started walking toward the station and noticed a man walking backwards out the gas station door. He then claimed he heard his engine about to quit, and turned back around, and that when he turned back toward the station he was within one to three feet of the man. (R.159, 161-62, 186-89.) Martinez's testimony claimed that although he only saw the man for a few seconds, he ***4** noticed the man's eyes - he would “never forget those eyes.” (R.160, 193, 202.) Martinez testified that as he started to walk back toward the station, Pelo told him to stop, and then told him to move his car and go home. According to Martinez, he told Pelo about the man he had encountered. (R.162-63, 198.) Pelo contradicted this testimony, testifying that he did not talk with Martinez until later, when Martinez was on his own property. (R.126.)

Martinez testified about how he came to identify James Snow as the man who purportedly came out of the gas station that night. Police did interview Martinez later, and at that time Martinez described the man he had seen as 5‘7” to 5‘8” with a long, light tan jacket, ball cap, a goatee and long brownish hair with stubble. (R.170-71, 194-95, 199, 201-03.) However, Martinez also admitted that the composite drawing prepared from his description, which ran in the newspaper, did not show any facial hair. (R.112, 115, 171-72.) He also admitted that just a few days after the murder, he was unable to identify the man in a series of photographs he reviewed. On October 22, 1991, he looked through two books of photos and said that a certain photograph looked like the person he had seen except the person at the station didn't have long hair. (R.207-08.) Finally, he looked at an in-person lineup on June 21, 1991, a lineup that **included** Snow, and yet he could not identify anyone. (R.173, 175, 191.) Martinez claimed this was because “of the darkness of the room and the distance from where we were from.” (R.173.) Snow's public defender testified that Martinez identified two other people in the lineup, but neither was Snow. (R.7-11, 14, 25.)

***5** Martinez ultimately identified James Snow, eight years later, as the person he saw in the parking lot. According to Martinez, he saw Snow's photograph in the newspaper after Snow's arrest, and claimed that, although he didn't tell prosecutors or police, he told his wife that he saw that man coming out of the station. He didn't call the police because he “knew at that time no matter what I was going to be called as a witness.” (R.200, 210.) Then, a few months before trial, he asked to look at the photograph of the prior lineup and at that time identified Snow, saying that he recognized his eyes. (R. 174-76, 179-82.) Martinez also made an in-court identification. (R.177.)

Another eyewitness also claimed that he saw Snow at the Clark station. On Easter Sunday of 1991, Carlos Luna, who was 14 years old, lived on Empire Street. According to his testimony, about 8:15 p.m. he saw a white male walking out of the gas station. Luna admitted that he saw the man for no more than five seconds. (R.80-82, 112-14.) A defense investigator also testified,

without contradiction, that Luna would have viewed this man from a distance of over 200 feet. (R.116-27.) At trial, also Luna testified that the man was wearing a waist-length coat, but he originally told the police it was an ankle-length coat. (R.91-92.)

Luna did purportedly identify Snow (in position 6) in a lineup in June of 1991, although the officer conducting the lineup testified that Luna picked number 6 because of "the shape of his face and his hair." This officer testified that Luna never said he was certain it was number 6, and that he never mentioned that the person he saw had unique eyes, or nose, or a scar, moustache or beard. (R.18-26.) According to Luna's testimony, he "imagined everyone [sic] of them doing it and he came to mind and fit the picture." ***6** (R.89.) He responded affirmatively when asked if Snow was the one that "fit the image." (Id.) He testified that at the time of the lineup he thought Snow was the person, and at the time of his testimony he thought Snow was the person. (*Id.* at 112.) Snow's public defender, who witnessed the lineup, testified that Carlos Luna thought Snow looked like the person that he saw, but "there was no positive identification." (R.7-11.) Luna was not asked to identify Snow in court. Luna also testified that he did not see Danny Martinez, someone that he knew, in the gas station parking lot when he looked outside and saw a man walking away. (R.109.) Geraldo Gutierrez testified that he was at the Clark station between 7 and 8, and that when he went inside to pay for a gas purchase he saw a customer that was 6' to 6'1" with long hair, a gold earring, a black leather motorcycle jacket, and a "fresh" chin scar. He made a composite drawing, and this drawing was published in the paper in 1991. (R.8-19, 30, 112, 115.) Gutierrez was not able to identify this person. (R.9-24, 32, 36-37.)

B. Witnesses Testify that Snow Confessed to the Crime

In addition to this scene testimony, the State presented testimony from individuals, many of whom had one or more felony convictions, that Snow had made various inculpatory statements to them about his involvement in Bill Little's murder.

Randall Howard, who testified that he was Snow's best friend, testified that when he picked Snow up at the bus station a day or two after Easter, 1991, Snow told him, "Man, bro, I fucked up. I shot this kid." (R.49-50.) Howard testified that he did not believe Snow was serious. (R.50, 54, 64.) Steven Scheel testified that he saw Snow at a party in April 1991, after not seeing him for several years. (R.62-63, 134.) He said that ***7** as he and Snow were "catching up," Snow told him that he had robbed the Clark station and shot Bill Little. (R.63, 139.) Scheel admitted that he never contacted anyone about this. (R.143-46.)

Dan Tanasz testified in conversations with Snow between 1995 and 1997, Snow told him he could not return to Illinois because he was "involved in a robbery or something like that." (R.78-82, 105.) He claimed that Snow had also told him that he had shot someone, although Tanasz admitted that he'd been drinking during these conversations, did not call the police after, and did not know if Snow was "full of BS." (R.86-92, 96.) Snow denied making these statements to Tanasz. (R.106.)

Ed Palumbo, who was incarcerated at the time of his testimony, claimed that a few days after Mr. Little died, he saw Snow on the street and Snow asked him if he had seen the paper. When Palumbo asked what the paper said, Snow purportedly said, "Boom, boom. Gun goes off. Kid dies." (R.118-23, 130-33.) Palumbo claimed that Snow also told him that "the kid was a smart ass so he shot him." and supposedly made other statements about the robbery and shooting. (R.126-27.) Palumbo admitted that he did not call police when he heard these statements, and denied being promised anything by the prosecutor in exchange for his testimony. (R.147-48.) Snow himself testified that he had not made these statements to Palumbo, and in fact had told Palumbo that he had seen Palumbo's name in the paper. (R.157-58.)

Shannon Schmidt Wallace testified to corroborate Palumbo, testifying that Palumbo told her about Snow's comments about what was in the newspaper. (R.71-76.) On cross-examination, she testified that she originally failed to tell police this ***8** information (and in fact specifically denied it) because her memory "improved" after speaking with detectives again in 1999. (R.83-86, 88.)

Dawn Roberts testified that she met Snow in 1992 when she was 16. She testified that in 1993 or 1994, Snow was at her trailer along with two other people, and the group discussed the composite drawings around town. According to Roberts, Snow told the group to take down composite drawings that were hung up around town and bring them to Snow. She stated that she took a drawing to Snow's house, and that she heard Snow tell someone else that the composite drawing was of him. (R.30-37, 40.)

She also recalled a time in the summer when Snow poured out beer at a group event and made a toast to Billy Little. (R.35-37.) Snow denied this. (R.75-77, 185.)

William Gaddis testified that in March 1991 he went to his brother's apartment and saw Snow and other individuals there looking as though they had been crying. (R.16-20, 28.) When he asked who died, someone said, “Jamie shot a boy at a gas station or shot that boy at the gas station.” (R.20-21.) Gaddis never told the police about this until Detective Dan Katz contacted him in 1999. (R.42, 48-50.) Gaddis' stepbrother testified that Gaddis had a bad reputation for truth. (R.88-93.)

Bill Moffitt, who was incarcerated at the time of trial, claimed that he was a cellmate with Snow in prison in October of 1994, and that during their first night as cellmates Snow told him that he had robbed a gas station and shot the attendant. Moffitt claimed that Snow made references to a “BL.” (R.100-04, 118, 121.) He also claimed that he and Snow talked about what happened for the week's time they were both in Joliet, but he admitted that he did not call the police until 1995, after he knew there was a ***9** reward. (R.116-17, 122.) Snow denied this conversation. (R.80-82.)

Edward Hammond testified that he'd known Snow for 25 years, and that he ran into him in 1995 at Centralia Correctional Center. Hammond had several prior felony convictions in the 1990s. (R.131-34.) He claimed that while at Centralia Snow told him that he “killed the kid” and that he knew he wasn't going to be caught. (R.68, 136, 154.) According to Hammond, Snow told him that he had an accomplice who had taken care of the gun. (R.136-37, 144.) Hammond admitted he did not contact the police or prison authorities after these purported conversations, but he denied being promised anything in exchange for his testimony. (R.142-44, 146.) Snow presented testimony that Snow and Hammond were in different yards while incarcerated, although it was possible that inmates could go to other yards to meet, (R.64-74), and testimony that Hammond did not know Snow. (R.19-21.)

Jody Winkler also testified about purported conversations he had with Snow in Florida, where both worked for the same tree service company and where Winkler lived in Snow's garage apartment. (R.112, 119-20.) At the time of his testimony, Winkler had a litany of felony convictions. (R.111.) He testified that he and Snow had a conversation at the beach when Snow said that he had “done it”. (R.114-15.) On cross-examination, Winkler admitted he was a regular crack user in Florida and was “on the run” from his own charges there. He also admitted that when contacted by Bloomington police, he asked what he would get in exchange for cooperation, although he denied receiving anything in exchange for his testimony. (R.121-27.)

***10** Ronnie Wright claimed that he had a conversation in Florida with Snow in which Snow said that he had shot someone during an armed robbery in Bloomington. (R.177-78, 186.) He claimed that he and Snow were in the county jail in 2000 when Snow told him to “forget” what they'd talked about before. (R.179, 182.)

Kevin Schaal, who was also incarcerated with Snow, testified that he had conversations with Snow about this crime, although Snow did not directly implicate himself in these conversations. (R.51-53.) Schaal also testified that Ronnie Wright was a “crack head” and that Wright had been beaten up by Snow in a fight. (R.96-101, 104.) Wright acknowledged that he had “spats” with Snow, but denied Snow had beaten him up. (R.176, 183-84.) Snow also denied having these conversations, and testified that it was possible that Ronnie Wright read discovery materials about his case at the county jail. (R.118-21, 190-91, 223.)

Bruce Roland testified that in 1994, he had a brief conversation with Snow at the Logan Correctional Center. (R.68, 82-84, 94-95.) During this conversation, Snow allegedly told him that he shot Bill Little because he would not give him a free pack of cigarettes, and because he was afraid Bill Little would identify him. (R.85, 91, 93.) Roland also claimed that Snow told him that before the robbery he was “partying” at Brian Whitmer's house just up the street. Members of the Whitmer family, however, disputed this. (R.87, 129-39, 95-104, 28-37.) Snow also denied having any conversations with Roland, and testified he had never even met him. (R. 100-01.) For his part, Roland was a multiple felon who could not identify Snow in court. (R.79-81.) Roland admitted that he did not go to the police, even after being released from prison, ***11** until he was arrested for a DUI. (R.89-90, 97.)

Karen Strong testified that she lived with Mark McCowan on Easter of 1991. She testified that McCowan returned to their house between 10:00 pm. and midnight with Snow, and that she then rejected McCowan's request for Snow to stay with them. (R.4-10.) On rebuttal, she testified that McCowan told her Snow was in trouble because he shot the “Little kid” during a robbery. She did not tell the police this information until shortly before Snow's trial. (R.7-9, 14-15.)

Mary Jane Burns, a former McLean County Correctional Officer, testified that she spoke with Snow in the jail and Snow told her that he thought he knew who committed the murder. (R.16-23.) According to Burns, Snow told her that he was in a car that pulled over behind the Clark station, and another male in the car walked to the gas station when Snow got out to be sick. Burns claimed that Snow told her he believed the other person in the car did the murder. (R.23-24.) Snow testified that he had a conversation with Ms. Burns but never told her that he was in a car by the Clark station or that he knew who did the murder, but rather just tried to explain to her how he could be a suspect in the murder. (R. 127.)

Timothy Powell testified that a few weeks before the Clark station robbery, he was in the car with his sister, Susan Claycomb Powell, Snow, and Snow's wife when Snow stated he was going to rob the Freedom gas station, but he did not. He did direct Susan Claycomb Powell to drive to a home near the Clark station, and then to the Clark station itself. According to Powell's testimony, Snow went into the station and then returned to the car. (R. 199-205.)

***12 C. Snow Presents a Limited Defense**

Snow's lawyers did present some defense for him. First, Dennis Hendricks, a friend of Snow's, testified that William Gaddis' story about coming upon a room of people crying about Bill Little's death was absolutely false. (R.31-32, 41-52.)

Snow's wife also testified that she was with Snow on Easter Sunday of 1991, and that after going to her mother's house for Easter they returned home. She said there were never any composite drawings in her house, that Timothy Powell's testimony was false, and that she was with Snow when he ran into Ed Palumbo but Palumbo's account of a conversation was false. (R.62-69, 70-72.) The State rebutted this testimony with testimony from Bridget Logsdon that Snow's wife told her that “she knew he did it,” though Logsdon acknowledged that she overheard this in another conversation and that she did not contact the police after hearing this comment. (R.46-49.)

Mark McCowan testified that he was not with Snow on Easter Sunday of 1991 and that he never spoke with Karen Strong about the Little homicide. He said William Little's death never came up in Florida, and that Snow never said he ever shot anyone. (R.5-7, 12-13, 22, 25, 64.) Susan Claycomb also denied ever stopping at the Clark gas station with Snow. (R.30-32, 39.) In addition to his testimony described above, Snow denied being the person who robbed the Clark station and killed Bill Little. He said at that time he had a large cast on his right arm and said that on Easter of 1991 he had facial hair, without earrings (his ears were not pierced), and had no wound or scar on his chin. (R.56.)

***13** Snow was convicted of first degree murder and ultimately sentenced to life.

D. Post-Trial Motions are Unsuccessful

Even in pretrial proceedings, Snow expressed concern about his attorneys and their level of preparedness, complaining that his two counselors had missed court dates and had failed to confer with him. (C.528.) After counsel was late in filing a witness list for Snow, he again complained about his representation, and counsel filed an unsuccessful motion to withdraw. (C.656-57, 675.)

During trial there were additional issues with defense counsel. Defense counsel submitted a late list of defense witnesses, but the trial court barred these witnesses from testifying because the defense had either not laid a foundation for the testimony or had not disclosed discovery related to these witnesses. (R.81-85, 151, 155.)

Snow's post-trial concerns questioning the effectiveness of his counsel ultimately became part of post-trial proceedings on ineffective assistance of counsel that raised counsel's failure to call witnesses to impeach Danny Martinez, and many of the confession witnesses. (C.765-74.) The trial court rejected these claims, finding that these witnesses would not have changed the outcome at trial, and accepted trial counsel's contention about his strategy in failing to call these witnesses. (Id.)

E. Direct Appeal is Unsuccessful

Mr. Snow's direct appeal was similarly unsuccessful. Snow's counsel on direct appeal argued that petitioner should have received a *Krankel* hearing, that the evidence was insufficient to convict, that Snow should have been allowed to present an expert in eyewitness identification, that his right to due process was violated by various evidentiary ***14** rulings and errors, and that he should not have received a life sentence. Appellate counsel argued defense counsel was ineffective for failing to impeach witnesses, having certain witnesses excluded for failing to file a discovery order, failing to present Detective Crowe, and failing to preserve issues for appeal. Each of these claims failed.

III. POST-CONVICTION PROCEEDINGS

On Snow filed two separate post-conviction petitions *pro se* raising a number of claims, including actual innocence, ineffective assistance of counsel, and due process violations. (C.871, C.1278.) With the assistance of prior counsel, he also filed another amended petition. (C.1559.) After present counsel became involved, counsel filed a further amended petition presenting the new evidence and claims described below.

A. Evidence Concerning Scene Witnesses

Mr. Snow's amended post-conviction petition presented evidence outside the record concerning witnesses who were present at the scene.

1. Jeffery Pelo

Snow presented a new affidavit from Jeffery Pelo, the first responding officer on the scene, who averred that as he approached the Clark gas station on the night of Bill Little's murder, he saw Danny Martinez squatting by his car. (A.23.) He then saw Danny Martinez stand up, walk toward the station, pause and look back. (*Id.*) He then walked toward the station, and within seconds walked back to his car. (*Id.*) Pelo further avers that as Martinez was walking in the parking lot, “I was constantly looking between him, the surroundings, and the front of the station. 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 ***15** for more than a few seconds.” (*Id.*) Pelo's affidavit states:

I am absolutely positive that from the time I arrived at the Empire and Linden intersection in response to the 1090 [hold up/ panic alarm] 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.

(Id.)

This affidavit also states that when Martinez left the gas station he drove west on Empire, away from his home, and that Martinez did not leave at Pelo's direction. *(Id.)*

Jeffrey Pelo's affidavit recalls his conversations with Detective Katz and prosecutor Tina Griffin. In his affidavit he explains that he told Katz and Griffin that no one could have left the gas station while he was at the scene, but Griffin implied that he should say the opposite. (A.24.) According to Pelo, he expected Snow's attorney to inquire into this area further during his cross-examination of Pelo. *(Id.)*

This affidavit and Jeffery Pelo's account of what occurred is corroborated by the police radio tapes of this incident that were disclosed to Snow through discovery in this case. (A.24.) These tapes support Officer Pelo's version of events in the affidavit.

2. Evidence About Danny Martinez

Danny Martinez was clearly a central witness to the State's case, and Snow's post-conviction petition presented a number of pieces of evidence outside the record related to Martinez and his testimony.

First, Snow presented evidence that Martinez knew Snow prior to the trial. Billy Hendricks presented an affidavit that he grew up with Danny Martinez and was friends ***16** with Martinez and his brother, and that Snow hung out with them "all the time." (A.73.) He also averred that he worked with Martinez during the time this crime was under investigation, and had numerous conversations about the case with Martinez about the case. According to Hendricks, Martinez told him that the composite sketch that came out, "wasn't Jamie, James doesn't look like that. I know what Jamie looks like." (A.73-74.) In all these conversations, Martinez never told Hendricks that he thought Snow was involved. (A.74.) Hendricks' affidavit also explains that Martinez told him that the mother of the victim had been to his home and was very good friends with Martinez's union head. (A.74.) Hendricks did not give this information to Snow previously because he did not know that it was relevant to the case. (A.75.)

Like his brother Billy, Dennis Hendricks has also providing an affidavit stating that he grew up with Martinez, and that he ran into him at a bar sometime before Snow's trial. (A.78.) During this meeting, Martinez told him that "he hadn't been able to pick Jamie out of a lineup and that he didn't think Jamie was involved." (*Id.*) Like Billy, Dennis remembered that he, Danny, and Snow used to play sports together. (*Id.*)

Snow's post-conviction petition also presented transcripts of police interview tapes done during the Bloomington Police Department investigation in which Officer Pelo told investigators that he was watching Martinez at the time Martinez claimed he was looking at the man who came out of the gas station, and that Martinez left the lot without being ordered to do so and before the other truck pulled into the parking lot. (A.81.) Similarly, inquest testimony from Paul Williams reflects that Williams was present outside the front of the gas station from the time that Pelo arrived across the ***17** street, and that Williams also never observed any movement inside the station or see anyone exit the station. (A95-98.)

Police reports not referenced at Mr. Snow's trial contain further evidence contradicting Martinez's trial testimony. (A. 104-30.) These records reflect that Martinez looked at police mug books the morning after Mr. Little's death and told police the person he saw outside the station was one of two photographs. (A.104.) Nothing in the records indicates either of these photographs was of Snow. Gutierrez also identified one of these people as the suspect. (*Id.*)

In October of 1991, Danny Martinez looked through the suspect books for this case, and identified two people that he knew, neither of which were Snow. (A. 107.) Snow's photograph was in these books at the time Martinez identified the other two photographs. (C.1928.) A transcript of a March 4, 1999 interview with Martinez also indicates Martinez told police that the victim's mother contacted Martinez. (A.125.)

3. Carlos Luna Retracts His Identification of Snow

Carlos Luna, the only witness to identify Snow in a lineup in 1991, testified that he identified Snow because of the shape of his face and his hair." (R.18-26.) In a new affidavit attached to Mr. Snow's post-conviction petition, Luna explained that he identified Snow because he best fit the description of who he saw and because he thought the police "had caught the right person." (A.413-15.) He stated unequivocally in this affidavit that "I can not say I am sure that Snow is the person who I observed." (A.415.) This is corroborated by testimony from the Bloomington Police Department sketch artist who testified at

Snow's co-defendant's trial and who testified that he did not make a ***18** composite sketch from information Luna gave him because "he didn't have enough to work with." (A. 143.)

B. Evidence Concerning Purported Confessions

Mr. Snow's post-conviction petition also presented numerous affidavits and evidence related to the witnesses who testified about purported inculpatory statements.

1. Ed Palumbo Testified Hoping to Receive a Deal

First, Snow presented an affidavit from Ed Palumbo explaining that at the time he testified against Snow, he was trying to receive a deal from police on other charges. (A. 149.) He also averred that he testified in part because "the Bloomington Police and state's attorney told me if I didn't testify I would be put in segregation in prison, be charged with perjury or get five years in prison for not cooperating." (*Id.*) The prosecutor told him "if there was any prison I wanted to go to he would see what he could do." (A. 150.) He further avers that after he testified, prosecutor Charles Reynard "told me that Snow didn't do this, someone else had, but since they couldn't get that other person Jamie would have to do." (*Id.*)

2. Dawn Roberts Recanted Her Trial Testimony

Dawn Roberts testified that Snow told her to take down composite sketches around town that looked like him, but in a new affidavit she stated that Snow had nothing to do with her actions. (A.31-32.) She also explained that Snow never made a toast to William Little, but rather made a toast to Tina McCombs' brother whose name was Billy and who had recently passed away. (*Id.*) An affidavit from Tina McCombs confirms that this was the nature of the toast Snow made. (A.32.)

***19 3. Randy Howard was Pressured to Testify**

Randy Howard has provided a new affidavit stating that he gave the police information about the case because "he was sick of them" and just wanted to get them out of his home. (A.32.) He also avers that he recognized individuals on the grand jury as going to school with him and Snow. His affidavit also contains an account of a conversation he overheard with the bailiff in which the bailiff revealed that Snow was "gonna fry this time" because he had robbed the home of two of the jurors. (A.32-33.)

4. Bill Moffitt Received a Deal for His Testimony

Dennis Hendricks provided an affidavit explaining that while he was serving time in prison he had a conversation with Bill Moffitt, a witness who testified Snow confessed to him. (A.77.) In this conversation, Moffitt told Hendricks that he "got a time cut" in exchange. *(Id.)*

5. Ronnie Wright Has Recanted His Testimony

Ronnie Wright also signed an affidavit that was the subject of counsel's first motion to supplement the record. (A.476.) Wright denied receiving a deal in exchange for his testimony, but he firmly recanted his trial testimony, stating that Snow never told him he had any involvement in this crime. (A.477.) Wright admitted that he read Snow's legal paperwork when both were in the McLean County Jail and was able to learn details about the case to aid his testimony. (A.478.) He testified falsely against him because of a fight he and Snow had in jail. (*Id.*) According to Wright, "[a]ll of the testimony implicating Snow that I gave at the trial was a lie. I was mad at Jamie and wanted to get even." (A.481.)

***20 6. Steven Scheel Has Also Recanted His Trial Testimony**

Steven Scheel, who also testified that Snow made inculpatory statements to him, also admitted to a defense investigator that his testimony was false and the product of police pressure, and that certain of the testimony he gave was specifically coached by the prosecutor and police. He told a defense investigator that "he felt guilty because he knew that he was part of the reason that Snow has been serving all this time in prison for a crime of which he was innocent." (A.34.) He also said that he gave that testimony because "the Bloomington Police and the McLean County State's Attorney pressured him to cooperate and he was afraid what would happen if he did not say what they wanted him to say." (*Id.*) As a parolee, he was worried that he needed to cooperate. (*Id.*) Scheel told the defense investigator that his trial testimony was coached and that police and prosecutors fed him additional details to use in his testimony. (A.35.)

7. Dan Tanasz Recanted His Trial Testimony

Snow's post-conviction petition also includes an affidavit from Dan Tanasz, who stated that, in contradiction to his trial testimony, Snow never told him that he was involved in a murder or robbery. (A35-36.) He also said that while he was waiting to testify he was given a newspaper with a headline article about the trial. (A.36.)

8. Jody Winkler Received a Deal For His Testimony

Jody Winkler, another witness who testified about purported Snow inculpatory statements, testified that he did not receive a deal for his testimony, but information from his sentencing calls this into question – he received a significantly shorter sentence on pending forgery charges than the sentence for which he was eligible. (A. 36.) Further, ***21** Dave Arison submitted a sworn affidavit that Jody Winkler had a reputation for untruthfulness. (*Id.*)

9. Several Sources Discredit Karen Strong

Karen Strong, another of the witnesses who testified about inculpatory statements, is discredited by evidence Snow presented in his petition. Mark McCowan avers Strong had a cocaine arrest at the time of this trial and that her then-boyfriend also had legal troubles, and that her testimony was part of "working off' this arrest. (A.37.) He further explains that Strong did not get along with Tammy Snow, Snow's then-wife, and that Strong had a physical altercation with Tammy in 1989. (*Id.*) Mark Huffington, a lifelong friend of Strong, avers that Strong told him she did not know anything about the case other than that Mark McCowan woke her up the night of Bill Little's death. (A.38.)

10. Bruce Roland and Kevin Schaal Received Deals for Testifying

Sentencing records for Bruce Roland, not referenced at Snow's trial, reflect that at the time of trial Roland had several pending felony convictions on which he seemingly received light sentences and special considerations, such as bond, a favorable deal that ignored his multiple charges, and permission to leave the State of Illinois. (A.39.)

Kevin Schaal testified at trial that he had no idea whether his federal sentencing in Florida shortly before his testimony was at all related to his cooperation in Snow's case. However, sentencing documents from that case, which also were not referenced at trial, reflect that the federal district court granted Schaal a downward departure in his case "to recognize defendant's substantial assistance pursuant to Rule 5k1.1." (A.40.)

Additional sentencing documents that Snow later obtained and with which he ***22** sought to supplement the record further demonstrate that Schaal received a deal. (A.813.) The federal government's motion for a downward departure indicates that immediately after Schaal's arrest he began to cooperate, and that he was contacted by "State Attorneys from the State of Illinois regarding his testimony in a murder trial" in which he "has provided valuable information" and "has agreed to testify in that trial if called upon to do so." (A.855-56.) Mr. Schaal was then sentenced to the minimum sentence because of his substantial assistance. (A.864.) At Schaal's sentencing hearing, his attorney specifically told the Court that Schaal should receive

a downward departure because Schaal had "attempted to meet with prosecutors in Illinois regarding a state murder case," had offered information, offered to testify, and continued to provide assistance. (A.868-71.)

11. Darren Smart Rebuts Mary Jane Burns' Testimony

Mary Jane Burns, who testified that Snow made inculpatory statements to her while at the McLean County Jail, told police that Snow had this conversation with her in front of two other inmates, one of whom was Darren Smart. (A.40.) Smart has submitted an affidavit, however, completely refuting this testimony, and stating that he told detectives as much when they came to see him before Snow's trial. (A.418.)

12. Grand Jury Testimony Contradicts Police Testimony

Detectives Russell Thomas and Mike Bernardini testified about comments Snow purportedly made to them after he was arrested on April 24, 1991, and implied in their testimony that these comments related to Bill Little's murder. Snow was actually arrested on this date for an unrelated crime, however, and in grand jury testimony, Detective Thomas made this clear, testifying about those comments as specifically ***23** applying to this unrelated crime. (A.40-41.)

13. Leigh Denison Said That He Was Threatened to Claim Snow Confessed to Him

Also in Snow's motion to supplement he presented an affidavit from Leigh Denison, a friend of Snow's who lived with him in Florida. (A.823.) In 1998, two detectives from the Bloomington Police Department visited and threatened to charge him as an accessory if he did not say that Snow had committed this crime. (A.823-24.) When he told them at Snow had never told him anything about this crime, they told him "that if I do not lie they will charge me as an accessory." (A.824.)

C. Evidence of a Pattern of Misconduct by Police and Prosecutors

In addition to the new affidavits and evidence from witnesses with information about Snow's case, Snow also presented evidence of a pattern of misconduct police and prosecutors Specifically, Snow argued that in two recent post-conviction cases from Bloomington, Illinois courts have found that exculpatory evidence was withheld from McLean County defendants, and on that basis have reversed convictions and granted those defendants new trials.

In *People v. Beaman,* Case No. 94 CF 476, the Illinois Supreme Court found that Alan Beaman's constitutional rights were violated when prosecutors from the Office of the McLean County State's Attorney failed to disclose exculpatory evidence that a "Doe" suspect was a viable alternative suspect. (A.191-210.) Beaman was granted a new trial and was not re-prosecuted for this crime. Charles Reynard, the same State's attorney who prosecuted Snow's case, was also involved in Beaman's prosecution. (A211-39.)

In *People v. Drew,* Case No. 98 CF 790, the circuit court and appellate court ***24** found that Eric Drew's constitutional rights were violated when prosecutors failed to disclose the full extent of consideration and assistance with other criminal cases that the key witness in his case had received from the McLean County State's Attorney and the Bloomington Police Department, specifically Detective Dan Katz. (A.241) The court in that case found the state's attorney involved in the case and Detective Dan Katz were both "incredible" in their denials that undisclosed benefits were provided. (A.256.) The court also found the main witness credible when he claimed that both the State's Attorney and Detective Katz "urged him to lie about the events surround [the] shooting." (A.261.) Drew was later granted a new trial and was recently released from prison after entering a plea deal with the State.

D. Evidence of Trial Counsel's Ineffectiveness

The final component of the evidence Snow presented in his post-conviction petition relates to the performance of his trial counsel. At trial Snow was represented both by Frank Picl and by G. Patrick Riley, although Mr. Riley suffered a stroke that limited his ability to speak during trial. Frank Picl played a lead role in Snow's trial. Snow presented evidence from Frank Picl's 2006 felony conviction and disbarment indicating Picl was beset by significant personal problems during his representation of Snow and received several other sanctions for problems related to client representation during the precise time period that Picl represented Snow, including failure to file appellate documents for clients. (A397-412.) Picl pled guilty in 2006 to theft and **financialexploitation** of an **elderly** person for actions relating to his representation of an **elderly** client. (A.486.) He originally tried to plead guilty but mentally ill but ultimately ***25** merely pled guilty. (*Id.*) In the words of his own attorney at his sentencing hearing, Picl was an alcoholic, a gambling addict, and was mentally ill. (A.519.) According to witnesses, his personal problems were precipitated by a separation from his spouse in 1998-2000. (A.689.) Friends noticed his depression beginning in 2000. (A.691-92.)

At his sentencing hearing, both professional and lay witnesses testified about Picl's personal problems. Dr. Sohee Lee testified to treating Picl for depression starting in October of 2000. (A.640.) Snow's pretrial hearings were in the months immediately surrounding this date, and his trial took place in early 2001. Picl told Dr. Lee at that time that he had stressors from personal problems and from "struggling with his professional activity." (*Id.*) Dr. Lee and other professionals diagnosed Picl as bipolar, obsessive-compulsive, and possibly attention-deficient. (A.655, 711-12, 737.) *Id.* at 22.)

The testimony of Dr. Jane Valez is perhaps most relevant to Snow's post-conviction petition. Dr. Valez testified that she tested Picl in 2005 and 2006 and concluded that "he was suffering from enough different combinations of illnesses that he was unable to function and think clearly and rationally." (A.785.) She further concluded that Picl had been affected by his illnesses "most of his adult life." (*Id.*) According to Dr. Valez, Picl admitted that after he moved out and quit drinking for a period of several months, "he began drinking due to the stress of a murder trial." (A.791.)

Picl's sentencing hearing reveals a complicated picture of Picl's professional capacity. On the one hand, several witnesses testified to the great service that Picl provided them in the past, and witnesses testified that Picl "he has a very long history of being able to do quite well at things that really interest him." (A.658, 724.) On the other ***26** hand, however, Dr. Grant testified that Picl "certainly had significant impairment in his capacity to function as an attorney, and it's been progressively deteriorating over the years." (A.716.) Dr. Grant further explained that in the period from 2000-05:

I think that there was a deterioration of his function in not filing income taxes which had occurred before, in not filing briefs, in getting in trouble with courts because he was not doing things that he had done before, and as nearly as I can determine from the history, the beginnings of bad judgments and risky behaviors.

(A.740.)

Shirley Hannon, Picl's legal secretary from 1989 to 2003, testified Picl's work began to suffer when he started having problems beginning in 1999-2000. (A.562-63.) This was around the time of Snow's trial. In her view, "[t]he last two or three years his attention to his work schedule was poor." (A.566.) Jerry Lindsey testified that he "has been aware for the last 25 or 30 years that [Picl] had a severe drinking problem" and that he "had always expected at some point in place and time to read... that a client would have accused him of misrepresentation because of being intoxicated." (A.550-51.)

Picl himself made a statement at his sentencing hearing attempting to explain his impairment and detailing his period of decline. He dated his own period of impairment as beginning 10 or 15 years prior to his sentencing (1991-96), and said "I can't for the life of me figure out what the hell I did to my life in the last ten years." (A.694-97.) To deal with his divorce, he "looked for the answer in all the right places in a tavern." *(Id)* Beginning in the late 1990s, he had trouble with appellate briefs. He finally closed his office because he "couldn't stand to look at all the undone work." (A.699.) According to Picl, the one area where he did not have trouble was in the courtroom, because as a ***27** defense attorney in a courtroom, all I'm required to do in almost

every case is react." (A.704.) Outside of physically being present in court, "I had all the time in the world to drink, and I did. It wasn't just daily drinking. It was four to six to eight to ten hours of drinking." (*Id.* at A.700, 703-04.)

Maureen Kevin, an experienced drug and alcohol counselor who participated in Snow's defense team, also provided an affidavit relaying her personal experiences with Picl during trial, which included her professional opinion that Picl was an alcoholic at the time of sentencing and that he drank during Snow's trial. (A.827-29.)

IV. Snow Moves for Ballistics Testing

While the State's motion to dismiss was pending, Snow made a motion for ballistics testing. (A.434.) He asked for the opportunity to use the IBIS database to compare bullets found in the victim to the national ballistics database in an effort to identify the firearm used to kill the victim, and therefore the true perpetrator. (A.435.) His motion was denied by the Court on May 9, 2011 without explanation. (A.920.)

V. The Lower Court Dismisses Snow's Post-Conviction Petitions

Using the evidence described above, Snow raised several claims in his post-conviction petition, including claims (1) that he is actually innocent of the crime for which he was convicted; (2) that his trial counsel was ineffective; (3) that his right to due process was violated under *Brady v. Maryland*, because the jury considered extraneous information, and by the admission of an unreliable identification; and (4) cumulative error. (A.6-7.) In a four page opinion, the lower court denied the post-conviction petition in its entirety. (A.916-19.) The lower court rejected Snow's actual innocence ***28** claim because the evidence was not new, would not have changed the result on retrial, and was incredible. (A.917-18.) It denied Snow's due ineffective assistance of counsel claim, ruling that Snow "fully litigated" this issue at sentencing and on appeal, that counsel's decisions were trial strategy and would not have changed the outcome, and that the evidence of Picl's other problems "is not evidence of his ineffective assistance." (A.918.) It dismissed Snow's due process claims as "speculation." *(Id.)* Finally, it rejected the cumulative error claim as "a request for this Court to act as the jury in this case, rehear the same evidence and reach a different conclusion." (A.919.) Snow asked the Court to clarify the denial of his motions to supplement the record and for ballistics testing, which the Court did on May 9, 2011, (A.920), and this appeal followed. (A.921.)

STANDARD OF REVIEW

Snow's petition was dismissed at the second stage of post-conviction proceedings upon the State's motion to dismiss. At the second stage, "the circuit court is concerned merely with determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity which would necessitate relief under the Act." *People v. Edwards*, 197 I11.2d 239, 265 (2001) (quoting *People v. Coleman*, 183 I11.2d 366, 380 (1998)). On that score, a defendant must make a "substantial showing" of a constitutional violation. *People v. Gomez*, No. 2-09-0766, 2011 WL 1196925, at *2 (2d Dist. March 28, 2011). For purposes of determining whether that standard has been met, the Court must accept as true all well-pled facts contained in the petition and accompanying affidavits. *See Coleman*, 183 I11.2d at 380-81. Moreover, "[w]hen the petitioner's claims are based on matters outside the record, it is not the intent of the Act ***29** that such claims be adjudicated on the pleadings." *People v. Whitfield*, 217 Ill.2d 177, 207 (2005); *see also Coleman*, 183 I1*l*.2d at 380-81 (credibility assessments are "not intended for a second-stage dismissal hearing, where a trial court is foreclosed from fact finding and all well-pleaded facts are taken as true"). This Court reviews a second-stage dismissal *de novo*. *People v. Dent*, No. 1-08-3192, 2011 WL 1227824, at *2 (1st Dist. March 31, 2011). Similarly, the denial of Snow's motion for ballistics testing is also reviewed *de novo*. *People v. Pursley*, 407 Ill. App.3d 526, 529 (2d. Dist. 2011).

ARGUMENT

James Snow is entitled to an evidentiary hearing to prove that he did not commit the crime for which he is serving the remainder of his life in prison. The case against him for the murder of William Little, a high-profile case that garnered significant attention

in Bloomington, was solely about the word of witnesses against Snow. No physical evidence has ever connected Snow to this crime, despite the presence of fingerprints, shoe prints, and blood at the scene. And although law enforcement arrived at the gas station shortly after the alarm was pulled, they did not see Snow there. Instead, Snow was convicted based on the testimony of two types of witnesses, purported eyewitnesses and several people who claimed Snow confessed to them. These witnesses testified as Snow sat stun-belted and shackled at defense counsel table, which the jury and witnesses saw during this trial. These witnesses produced a conviction.

After literally years of post-conviction litigation, first as a *pro se* litigant, then with appointed counsel, and finally with the assistance of the Exoneration Project at the University of Chicago Law School, James Snow filed a 50-plus page post-conviction ***30** petition that included thirty-odd exhibits, seventeen new affidavits from witnesses, and significant evidence from outside the record relating to sentencing proceedings, the related proceeding of his co-defendant, and police reports detailing the police's eight-year investigation into this crime. This petition presents new evidence from the responding police officer at the scene specifically discrediting Danny Martinez. It presents a new affidavit from the other eyewitness testifying he cannot identify Snow as the man he saw at the scene. It presents numerous affidavits from purported confession witnesses recanting their testimony and explaining they only testified against Snow because of pressure from the state and their desire to improve their own legal situations. This evidence is corroborated by sentencing documents and testimony reflecting such deals were given, and by evidence in other cases of a pattern of misconduct by police and prosecutors. Finally, this petition presents new evidence that his trial counsel was an alcoholic who drank during his trial, failed to conduct a meaningful investigation of Snow's case, and was unconcerned about his own failure to prepare because he felt once he came to the courtroom he could do his job simply by "reacting." This evidence is new and it fundamentally alters the heft of the evidence in Snow's case.

Inexplicably, the lower court dismissed this petition without any type of evidentiary hearing in four short pages. The ruling boils down to this: the lower court summarily concluded this evidence is incredible, would not have made a difference, and somehow could have been raised before. Each of the lower court's reasons for fails. This case is one that cries out for an evidentiary hearing, and the lower court's opinion completely misses the mark. Far from asking the court to substitute its judgment, Snow ***31** is asking for a hearing at which he can present his significant new evidence supporting his constitutional claims, evidence the jury never had an opportunity to hear because witnesses had not yet recanted or because his attorney failed to present the evidence in the first place. Further, Snow is entitled to ballistics testing and for discovery to further support his claims prior to such a hearing. The only just result is for this Court to reverse the lower court's dismissal and to remand this case back for an evidentiary hearing.

I. THE LOWER COURT ERRED IN DISMISSING SNOW'S POST-CONVICTION PETITION WITHOUT AN EVIDENTIARY HEARING

A. The Lower Court Applied the Wrong Standard of Review

First, a common error throughout the lower court's analysis is the application of an incorrect standard of review. At various points in the court's decision the court rejects evidence from Snow because it is not credible. (A.616-19 ("[t]he facts... contain no credible evidence"; "[t]here is no evidence to corroborate this statement"; new affidavits have no "corroborating evidence to back up their changed story").) The gist of the court's opinion is that it does not find Snow's evidence believable, which is clearly not the purview of the court in second-stage proceedings. *Whitfield*, 217 I11.2d at 207; *Coleman*, 183 I11.2d at 380-81. If this evidence, on its face, makes a substantial showing that Snow is innocent or that his other claims have merit, then he should receive a hearing to adjudicate these claims, but this court did not follow that standard. On this basis alone, the court's ruling should be reversed.

Moreover, the court states several times its view that the evidence presented is not new because it "merely question[s] evidence presented at trial and provides no new evidence," because it would require the court to "re-evaluate the same evidence," and that ***32** Snow has improperly asked the court to "reconsider the evidence." Again, this analysis misunderstands the court's responsibilities in reviewing a motion to dismiss. Although the Act does not allow a court to simply reconsider the very same

evidence presented at trial, it does require a court to reevaluate evidence at trial when compared with the new evidence to determine if the new evidence would change the outcome. In that sense, asking the court to question the evidence presented at trial in light of new evidence is entirely appropriate, and is the function of the court in second-stage proceedings. And, as demonstrated below, had the court applied the appropriate standard of review, the court would have granted Snow an evidentiary hearing.

B. The Lower Court Improperly Dismissed Snow's Actual Innocence Claim

The Illinois Supreme Court has recognized that "no person convicted of a crime should be deprived of life or liberty given compelling evidence of actual innocence," that that ignoring an actual innocence claim violates Illinois due process safeguards. *People v. Washington*, 171 Il1.2d 475, 487-89, 665 N.E.2d 1330, 1336-37 (1996). In order to prevail on his free-standing actual innocence claim, Snow must present supporting evidence that is new, material, non-cumulative, and that would likely change the result upon retrial. *Id.* at 171 Il1.2d at 489, 665 N.E.2d at 1336. The lower court ruled that Snow's evidence was conclusory, immaterial, incredible, and not new. (A.617-18.) Each of these conclusions is incorrect as a matter of law.

1. Jeff Pelo's Affidavit is New, Material and Non-Cumulative

The biggest piece of evidence supporting Snow's actual innocence disputes the State's main eyewitness, Danny Martinez, whose dramatic testimony that he could "never ***33** forget" Snow's eyes were the centerpiece of the State's case. The affidavit from Jeff Pelo, the first officer to respond to the gas station after the alarm sounded, presents new evidence augmenting his trial testimony in critical respects. First and foremost, his affidavit makes clear that Danny Martinez could not have seen Snow exiting the gas station. Given the timeline described by Martinez and Pelo, had Martinez seen Snow leaving the gas station Pelo would have seen him as well, and Pelo saw no one at the scene at that time other than Little and Martinez. (A.23.) This evidence is new - it is not clearly from any of Pelo's prior statements that this would be his testimony, and he specifically avers that prosecutors told him to keep this opinion out of his trial testimony. (A.24.) Given Pelo's affidavit alone, the result on retrial would be different.

This is particularly true given the significant amount of evidence that corroborates Pelo's new account of events; this other evidence catches Martinez lying about other aspects of the case and calls his credibility and reliability into question. The other officer who arrived at the scene after Pelo also did not see anyone else at the scene. (A.95-98.) New evidence demonstrates that Martinez and Snow were childhood friends who hung out "all the time," yet Martinez failed to acknowledge this at any point in the investigation and somehow failed to recognize Snow until eight years later. (A.73.) Martinez told other friends specifically that the person he saw was not Jamie Snow. (A.73-74, A.78.) He received communications from the victim's mother during the time the case was pending. (A. 125.) Martinez actually identified other individuals as being the person he saw at the scene before he identified Snow. (A. 104.) When coupled with this additional evidence, and particularly considering the holes in Martinez's testimony at ***34** the time of trial, this new evidence would have changed the result on retrial.

2. Carlos Luna's Affidavit is New, Material and Non-Cumulative

Moreover, Carlos Luna's identification of Snow is also eviscerated by his new affidavit. At trial Mr. Luna testified that from down the street from the gas station he observed a man walking out from the gas station, although he did not see Danny Martinez in the parking lot. In his affidavit presented with Snow's petition, he clarifies that he is not sure he identified the right person, is not sure he could identify the face of the person that he saw, and that he identified Snow because he "best fit the description" and because "[a]s a 14 year old I thought the police had caught the right person." (A.413-15.)

This evidence is also new, since it provides new information about the strength of Luna's identification, and although other witnesses at trial testified about the circumstances of that lineup, this evidence comes from Luna himself and is in that way non-cumulative and material. This affidavit, plus all of the evidence in Snow's Amended Petition discrediting Martinez, makes

clear that there is not a single witness providing a credible identification of Snow as being at the scene of the crime. This, plus the lack of physical evidence connecting him, leaves his conviction based solely on testimony about his purported confessions, testimony which is also undercut by new evidence.

3. New, Material, Non-Cumulative Evidence Shows Snow Did Not Confess Involvement in the Crime

Because evidence of actual innocence must be considered in context, the evidence discrediting the purported eyewitness identification of Snow as being at the scene must be considered in context with the other evidence used to convict him, namely testimony about purported inculpatory statements Snow made to other people. Here too, Snow has ***35** presented evidence from a number of sources, including new affidavits from witnesses, specifically recanting those statements, otherwise discrediting them, and demonstrating that the totality of the evidence supports Snow's innocence.

For starters, Snow has presented affidavits from Dawn Roberts, Dan Tanasz and now Ronnie Wright admitting that their trial testimony was false. (A.31-32, A.476-78, A.35-36.) Snow has also presented a detailed affidavit from investigator Larry Biela that Steven Scheel told Mr. Biela that his trial testimony was false. (A.34-35.) These affidavits, as recantations, are newly-discovered evidence which is non-cumulative material, would have changed the result at trial, and which is deserving of an evidentiary hearing to resolve. *See, e.g., People v. Barnslater,* 373 III.App.3d 512, 524, 869 N.E.2d 293, 304, (1st Dist. 2007.) The lower court's opinion does not address any of these affidavits in particular, simply concluding in the aggregate that these affidavits are not new or would not change the result, but each of these affidavits specifically says that the witness's trial testimony that Snow made incriminating statements to them is false.

Similarly, Snow presents evidence that several of witnesses, including Kevin Schaal, Ed Palumbo, Bill Moffitt, Jody Winkler, Karen Strong, and Bruce Roland, all testified in exchange for actual or hoped-for consideration from the State, facts which were not elicited at trial, Snow presents specific evidence from Schaal's federal sentencing documents demonstrating a deal took place. (A.813, 841-42, 855-56.) Ed Palumbo himself avers about his own motive for testifying. (A. 149-50.) Other evidence comes from admissions by those witnesses to third parties that they received consideration or hoped to receive consideration. The court's conclusion that this is ***36** insufficient is incorrect. The Post-Conviction Act allows petitioners to make allegations based on evidence they do not possess as long as the petitioner states why the evidence is not attached to the petition. 725 ILCS 5/122-2. Here, Snow has done so with respect to evidence about deals given to several witnesses. (See Sect. III.B, *supra.*) He has presented the evidence that he has that supports the existence of those deals, and has simultaneously filed a motion for discovery which sets forth what evidence he believes exists that supports his claims. This is the appropriate way to proceed under the Act.

4. Snow Has Presented New, Material, Non-Cumulative Evidence of a Pattern of Misconduct

As set forth in Snow's petition, several witnesses have provided new affidavits alleging misconduct on the part of the Bloomington Police and the Office of the McLean County State's Attorney, specifically that exculpatory evidence was withheld from defendants, including evidence about other suspects and evidence of consideration provided to key witnesses. (A.191-261.) The lower court's opinion does not address this evidence at all, and neither the lower court nor the State has offered any reason why evidence of such a pattern is not relevant in Snow's case. Indeed, it is, and is part of what this Court should consider in evaluating whether Snow has met his burden to show actual innocence. As other courts have held, pattern evidence of this type, even evidence of only one other instance of misconduct, is relevant to show *modus operandi,* intent, plan, motive, or to impeach a witness' credibility. *See People v. Banks,* 192 III. App.3d 986, 994, 549 N.E.2d 766, 771-72 (1st Dist. 1989). This pattern of misconduct is relevant here and contributes to Snow's actual innocence claim.

***37 5. Snow Demonstrated Sufficient State Involvement**

At oral argument on the State's motion to dismiss, the State argued that Snow's actual innocence claim should fail because he had not alleged that the State had any role in the false testimony which witnesses later recanted. This is factually incorrect, as

Pelo's affidavit claims that the states attorney told him to keep information out of his testimony, recanting witnesses testify that they testified falsely because of pressure from the state, and at least one witness averred that the prosecutor specifically told him that he knew Snow was innocent. Regardless, although the lower court's decision did not hinge on this argument, it bears repeating here that there is no state action requirement for actual innocence claims.

The right against conviction for a crime of which someone is actually innocence does stem from the due process clause of the Illinois Constitution. *See, e.g.*, *People v. Washington*, 171 Ill.2d 475, 487-88 (1996). All that is required to make such a claim is to present supporting evidence that is new, material, non-cumulative, and that would likely change the result upon retrial. *Id.* at 489. In resolving free-standing actual innocence claims, the Supreme Court has never alluded to any "state involvement" requirement. *See, e.g.*, *People v. Morgan*, 212 Ill.2d 148 (2004) (discussing the requirements for actual innocence claims in the context of recantation affidavits without any indication of a state involvement requirement); *People v. Ortiz* 235 Ill.2d 319, 333 (2009) (also discussing the requirements for actual innocence claims without reference to a state involvement requirement).

***38** *People v. Brown*, 169 I11.2d 94 (1996), does not compel a different result. In that case, the Court held that a due process claim for the knowing use of perjured testimony requires a showing that the State was involved in the use of the testimony, either by the knowing use of such testimony or by lack of diligence in uncovering the falsity of the testimony, *Id.* at 106, but this strand of due process law, is not applicable to actual innocence claims. *Washington*, the seminal Illinois case on actual innocence claims, found the right to bring a free-standing claim of actual innocence stemmed from the due process clause of the Illinois Constitution, but it did so in a case in which the Court specifically noted that Washington "*can claim no state action with regard to the evidence he now relies upon for post-conviction relief Id.* at 487. This is reason that the Court in *Washington* examined the Illinois Constitution to find a free-standing claim of actual innocence - it wanted to determine whether there was a right against the conviction of the innocent to protect those defendants where they had no other constitutional claims It is a claim of innocence that stands alone, apart from other constitutional violations, including a due process violation for the knowing use of perjured testimony.

C. The Lower Court Erred in Dismissing Snow's Ineffective Assistance Claim

As strong as Snow's actual innocence claim in this case is, his ineffective assistance of counsel claim is stronger. This is because there are numerous trial errors which made a difference in Snow's case and which are set forth in the Amended Post-Conviction Petition, including that counsel

1. failed to use Jeffery Pelo's interview transcript, the police reports concerning Danny Martinez, and testimony from Dennis Hendricks and William ***39** Hendricks as guides to elicit testimony from Pelo and to discredit Martinez's testimony about what happened in front of the gas station (A.24, 81, 95-98, 104-30);

2. failed to call Thomas Sanders, whose testimony was readily available from Susan Claycomb's trial, to demonstrate that Carlos Luna's "identification" of Jamie Snow was completely weak (A.143);

3. failed to speak to Steve Scheel, who told Larry Biela that had counsel spoken to him in advance, would have exposed the reasons for his testimony (A.34-35);

4. failed to file a motion to suppress Martinez's inherently suspect identification (A.107);

5. failed to investigate the report from Randall Howard that someone on the jury knew Jamie Snow and had a reason to have animus against him (A.32-33);

6. failed to investigate Karen Strong's reasons for providing false testimony against Jamie Snow (A.37-38);

7. failed to investigate available evidence that witnesses in this case received deals in exchange for their testimony, and to use that evidence to impeach those witnesses. Counsel further failed to ask for and develop evidence that would impeach witnesses who claimed Jamie Snow confessed to them while they were incarcerated together (A.39-40, 813-71);

8. failed to investigate and present evidence that Dawn Roberts' testimony about toasts was flawed, and that the only toasting Jamie Snow did to any "Billy" was a respectful toasting for Tina McWhorter's brother Billy who had died shortly before (A.31-32);

***40** 9. failed to use the testimony of Charlie Crowe to impeach Martinez by exposing how many other people he'd identified for this crime, and clearly explaining that when given the perfect opportunity to identify Mr. Snow as the person he claimed he saw, he was unable to do so (C.1928);

10. failed to expose evidence that the victim's mother had been contacting the key witness in this case, Danny Martinez, possibly at the behest, direction, or with the consent of the Bloomington Police Department (A.125);

11. failed to use available discovery to impeach testimony by Detectives Thomas and Bernardini who falsely implied at Jamie's trial that he had admitted some involvement in this crime (A.40-41); and

12. failed to investigate and present evidence from Darren Smart impeaching Mary Jane Burns. (A.418.)

Snow also pled that to the extent any of the other evidence he presented was deemed not new, then the failure to present it was due to the error of defense counsel.

To show ineffective assistance of counsel, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that the result of the proceedings would have been different absent counsel's errors. *Strickland*, 466 U.S. at 687; *People v. Weir*, 111 I11.2d 334, 337, 490 N.E.2d 1, 2 (1986). The errors alleged here are significant, yet the lower court dismisses then in a terse few sentences concluding that they were either matters of trial strategy or wouldn't have made a difference, and conclusorily stating that Snow already fully litigated his ineffective assistance claims. (A.618.) For the reasons stated below, ***41** this decision should be reversed and remanded for an evidentiary hearing'.

1. These Claims are Not Barred by Res Judicata

This *res judicata* argument is the easiest to resolve. First, the lower court concluded all of these claims were subject to *res judicata*, which is clearly incorrect. The bulk of these claims were not raised on direct appeal, so to the extent they should have been raised but were not, this is due to the ineffective assistance of appellate counsel, a claim Snow also raised. Second, these claims raise factual issues not on the face of the trial record - these claims largely do not concern trial performance issues that even could have been raised on direct appeal, and as such the rules of *res judicata* do not apply. *People v. Taylor*, 237 I11.2d 356, 372 (2010). Snow did raise some issues regarding these witnesses in his post-trial motions, but he did not receive a *Krankel* hearing and had no opportunity to put on the record the evidence from these witnesses that supported his ineffective assistance claim. Further, Snow could not have raised ineffective assistance of counsel claims based on evidence not in the record or that he did not know existed. As Snow contended in his Amended Petition, to the extent that Snow could have raised these claims on direct appeal, his appellate counsel was ineffective in failing to do so and thus, under *People v. Pitsonbarger*, 205 I11.2d 444, 458, 793 N.E.2d 609, 620-621 (2002), his failure to do so should be excused and he should be allowed to raise them now.

2. These Errors Were Not the Result of Trial Strategy

Further, these errors were not the product of trial strategy. This is true partly because no reasonable trial strategy would have excluded compelling evidence of Snow's innocence, *People v. King*, 316 Ill. App.3d 901, 904-05 (1st Dist. 2000), would have ***42** failed to interview critical witnesses, *People v. Makiel*, 358 Ill. App. 3d 102, 107 (1st Dist. 2005) ("An attorney who fails to conduct reasonable investigation, fails to interview witnesses, and fails to subpoena witnesses cannot be found to have made decisions based on valid trial strategy."), or would have failed to impeach the State's most important witnesses. *People v. Skinner*, 220 Ill. App. 3d 479, 484 (1st Dist. 1991) (holding that it is ineffective assistance to fail to impeach the State's chief eyewitness); *People v. Garza*, 180 Ill. App. 3d 263, 269-70 (1st Dist. 1989) (failure to impeach sole eyewitness with major discrepancies in testimony held to be ineffective assistance).

Second, we know that this was not trial strategy in Snow's because of the significant new evidence that Snow's trial counsel was suffering from significant alcohol addiction and other personal problems at the time of trial. Counsel himself admitted this during his own sentencing hearing and claimed that although he did an excellent job in court, outside of his physical presence in court he drank not only daily, but between four to ten hours of drinking per day. (A.700, 703-04.) "When the adversarial process breaks down –when, for example, counsel is denied, or utterly fails to contest the State's case, or, because of attendant circumstances, finds it impossible to provide adequate representation – then prejudice may be presumed" under the *Strickland* test. *People v. Hattery* 109 Ill. 2d 449, 469 (1985); *see also United States v. Cronic*, 466 U.S. 648, 660-61 (1984).

Third, Snow's ineffective assistance of counsel claim requires an evidentiary hearing to resolve. If the State wants to present evidence that counsel was using a specific trial strategy in failing to present this evidence, then a hearing is necessary to ***43** evaluate that testimony and to determine if trial counsel is credible in so claiming. The credibility of the underlying witnesses needs to be evaluated in order to determine the strength of this evidence. Finally, if the State wants to argue that *res judicata* applies to specific pieces of evidence, then a hearing is necessary to determine what, if any, specific pieces of evidence should have been presented earlier. Analyzing *Strickland* in the context of attorney failures not clear from the record requires a court to analyze information outside the record, which is possible only in a post-conviction context and which is why numerous courts have concluded that the post-conviction venue is the best (and often only) forum in which to resolve these issues. *See, e.g.*, *People v. Coleman*, 391 Ill.App.3d 963, 975, 909 N.E.2d 952, 963 (4th Dist. 2009) (internal citations omitted). Snow deserves a hearing to make a record on these.

D. The Lower Court Erred in Denying Snow's Brady Claim

A critical claim in Snow's petition is that his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963) were violated because exculpatory information was withheld from him. The lower court dismissed this claim in one sentence, stating that Snow based his claims on "speculation" and does not raise a constitutional question. (A.618.) This ruling ignores the significant evidence of a *Brady* violation that the affidavits and evidence Snow has presented raise, and demonstrates once again the lower court's failure to fully consider Snow's pleadings. This court should grant Snow an evidentiary hearing on this claim as well.

It is well-settled that the prosecution has a duty to disclose evidence that is materially favorable to a criminal defendant; the failure to do so violates due process. ***44** *Brady*, 373 U.S. at 87; *Giglio v. United States*, 405 U.S. 150, 154-55 (1972). "Materially favorable" evidence not only includes exculpatory evidence, but also evidence that is impeaching of a prosecution witness, especially where the prosecution's case depends on that witness's credibility. *U.S. v. Bagle's* 473 U.S. 667, 676 (1985), *Giglio's* 405 U.S. at 154-55 (1972). In Snow's case, credibility was the key issue for each and every prosecution witness. He has made a substantial showing, as is required, that there is a reasonable probability that had the evidence been disclosed the outcome of his trial would have been different. *Kyles v. Whitley* 514 U.S. 419, 434 (1995) (quoting *Bagley's* 473 U.S. at 682). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.*

As set forth in his petition, Jeffery Pelo shared with the prosecutor and police his belief based on what he observed at the scene that "no one could have left the gas station while I was on the scene," but the prosecutor did not disclose this information to the defense and instead instructed Pelo not to reveal this information during his testimony. (A.24.) The prosecution and police

failed to disclose that they coached Steve Scheel with details that would make his testimony against Snow seem more credible. (A.34.) They failed to disclose that witnesses were given deals or pressured to testify, clear *Giglio* material, and allowed to go uncorrected specific testimony from witnesses who denied that they had received consideration, including Jody Winkler, Bruce Roland, and Kevin Schaal, and failed to disclose that their *modus operandi* in this case was visiting witnesses and offering deals in exchange for testimony. (See Sect. III.B, *supra.*) Neither ***45** the State nor the lower court provides any argument why any of this evidence is not new, or how Snow could have known any of this information to make use of it at trial. In addition, it is far from speculative - it is based on specific evidence from affidavits and court sentencing documents. Snow is entitled to an evidentiary hearing on this claim.

E. The Lower Court Erred in Denying Snow's Other Due Process Claims

In addition to his claim under *Brady v. Maryland,* Snow presented two other due process claims, that his right to due process was violated by the jurors' belief that Snow committed a crime against a juror in the past, and that Martinez's identification of Snow was so unreliable as to violate Snow's right to due process. Again, the lower court summarily concluded these claims were speculative and insignificant. (A.618.)

Snow's claim about the jury's belief that he had committed a past crime is speculative in that it is supported by the affidavit of Randall Howard who learned of this information from a bailiff. (A.32-33.) However, as argued *supra* with respect to other claims, it is supported by all the evidence that Snow had at the time he filed his petition. The Post-Conviction Act allows for this approach, and contemplates that well-alleged claims be given a hearing and potentially discovery so that a claimant can further prove such claims. Here, Snow has adequately pled facts that, if true, would lead to a clear and significant due process violation. *People v. Holmes,* 69 Ill.2d 507, 372 N.E.2d 656 (1978). He has made a substantial showing of this claim as best as he can. He is entitled to a hearing and discovery to further prove these claims.

Similarly, all of the evidence outside the record, when considered with Danny Martinez's testimony about his identification of Snow, clearly demonstrate that his ***46** identification was inherently unreliable and suggestive. *See, e.g., People v. Rodriguez,* 387 Ill.App.3d 812, 829, 901 N.E.2d 927, 943 (1st Dist. 2008). That this identification formed the most critical part of his conviction violated his right to due process, and this claim should also be addressed at an evidentiary hearing.

F. The Lower Court Erred in Denying Snow's Cumulative Error Claim

Although a claim of cumulative error is a common pleading, nowhere perhaps is it more applicable than in Snow's case. As Snow has demonstrated, there are numerous ways in which his trial was deficient and in which error contributed to his wrongful conviction. These errors come from disparate aspects of the trial, including Snow's claim in his *pro se* pleadings that he was denied his right to due process by being visibly shackled and forced to wear a stun belt during proceedings, elements of his trial visage that both witnesses and the jurors could see. (C.1280.) Cumulatively there is a substantial showing of a violation of Snow's constitutional rights and a showing that these cumulative errors impacted the outcome of his trial.

II. THE LOWER COURT ERRED IN DENYING SNOW BALLISTICS TESTING

While the State's motion to dismiss was pending, Snow filed a motion for ballistics testing that the lower court denied without comment or analysis on May 9, 2011. (A.920.) The State never presented significant argument below arguing against such testing. This Court should reverse this denial and remand this case not just for an evidentiary hearing, but so that this ballistics testing can also take place.

Snow seeks the opportunity to test bullets recovered from the scene against the IBIS database in order to determine if that database can provide evidence of the true ***47** perpetrator of this crime. Illinois law allows petitioners to receive a court order directing ballistics evidence to be compared to ballistics evidence already within the IBIS database in order to determine if there

is a match. Illinois law provides that a petitioner must be granted the opportunity to receive IBIS testing when the following conditions are met:
(a) The evidence to be tested was "secured in relation to the trial which resulted in [petitioner's] conviction." 725 ILCS 5/116-3(a);

(b) The evidence "was not subject to the testing which is now requested at the time of trial," or can be subjected to new testing not scientifically available at the time of trial that provides a reasonable likelihood of more probative results. 725 ILCS 5/116-3(a)(1) & (2);

(c) "[I]dentity was the issue in the trial which resulted in [petitioner's] conviction." 725 ILCS 5/116-3(b)(1);

(d) The chain of custody is sufficient to establish that the evidence to be tested "has not been substituted, tampered with, replaced, or altered in any material aspect." 725 ILCS 5/116-3(b)(2);

(e) Testing has the potential to produce "new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence." 725 ILCS 5/116-3(c)(1);

(f) The requested testing "employs a scientific method generally accepted within the relevant scientific community." 725 ILCS 5/116-3(c)(2); and

(g) Reasonable notice of the motion is served upon the State. 725 ILCS 5/116-3(a)(2).

Here, all of these requirements are met. The bullets used to kill the victim were collected as part of the police investigation. (A.438.) To Petitioner's knowledge, the bullets that were found in the victim in this case have never been compared with ballistics evidence within the IBIS database. Even if some testing has previously been done, however, ballistics testing using the current IBIS database has never been done and was not a possibility at the time of trial, meaning Snow satisfies either (a)(1) or (a)(2), which ***48** is all the law requires. *See People v. Pursley* 407 Ill. App.3d 526, 531 (2d Dist. 2011). Third, there can be no dispute that identity was the issue at Snow's trial. Fourth, the chain of custody here is undisputed. Fifth, as the parties in *Pursley* and other cases recognize, and as the post-conviction ballistics testing statute implicitly recognizes, IBIS testing is widely accepted in the scientific community. *Pursley*, 407 Ill.App.3d at 530.

Finally, IBIS testing has the scientific potential to produce new and non-cumulative evidence of actual innocence such that the requirements of 725 ILCS 5/116-3(c)(1) are met. Snow's case presents the precise kind of fact pattern where ballistics testing could identify the true perpetrator of this crime. *Pursley* and other cases explain that the term "scientific potential" in this analysis is important. Materiality for this section does not require that the results of an IBIS search exonerate the defendant, but merely that they "significantly advance" the petitioner's claim. *People v. Savory* 197 I11.2d 203, 213 (2001); *Pursley*, 407 Ill. App.3d at 530-32. It appears from all available evidence that no one but the perpetrator(s) and the victim of this crime were in the gas station when Mr. Little was killed. Snow's conviction is therefore based solely on the claims from third parties, many now recanted, that Snow confessed to others that he committed this crime. If there is a known individual connected to that firearm then that would be obvious new, non-cumulative evidence supporting Snow's innocence. Gas station robberies such as the one for which Snow was convicted are frequently part of a pattern of crimes, and there were other strings of gas station robberies that occurred in Bloomington around this same time. IBIS testing has the potential to connect this crime ***49** to other strings of robberies or to other crimes that have occurred in Bloomington since Snow was convicted. For that reason, this Court should grant Snow ballistics testing.

CONCLUSION

Ever since his conviction in the present case, Snow has been fighting to prove his innocence and to have a fair day in court. Through counsel and on his own as a pro se litigant, Snow developed significant evidence of his innocence, as set forth in the post-conviction pleadings he has presented to this Court. Despite the long pendency of this post-conviction proceedings below, Mr. Snow has yet to have his fair day in court. He presented a compelling and extensive petition to the lower court, only to have it summarily rejected without significant analysis. The lower court did not give this petition the time of day. That the lower court believed Snow was just asking for the trial evidence to be re-reviewed demonstrates that the lower court did not fully understand or appreciate what Snow had filed. Snow is entitled to have the decision of the lower court reversed and remanded back for stage three evidentiary hearings at which he be given discovery as he requested. He is entitled to have his motions to supplement granted. And, he is entitled to ballistics testing as set forth in this opening brief.

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

Footnotes

1 Citations to the record are as follows: references to the Appendix are designated as “A.”; references to the Common Law Record as “C.”; and references to the Report of Proceedings as “R.”

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