SIXTH DIVISION
March 30, 2012

No. 1-10-3350

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County.
	)	
v.	)	No. 96 CR 25384
	)	
BERNARD WILLIAMS,	)	Honorable
	)	Joseph M. Claps,
Petitioner-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE ROBERT E. GORDON delivered the judgment of the court.
Justice Lampkin concurred in the judgment.
Justice Garcia dissented.

ORDER

¶ 1 ***Held*:** When a defendant claims actual innocence and produces an affidavit of an eyewitness to the shooting who was not available at trial that shows defendant was not the shooter at the second stage of a postconviction proceeding, the trial court errs in failing to advance the case to a third-stage evidentiary hearing.

¶ 2 Defendant Bernard Williams appeals from the second stage dismissal of his petition for postconviction relief. Defendant was convicted after a bench trial of first degree murder and three counts of aggravated battery with a firearm. After a direct appeal, and on remand, the trial

court determined that two of his convictions for aggravated battery did not cause severe bodily harm and ordered those two convictions to be served concurrently. Defendant is currently serving a 50-year term for first degree murder, one consecutive 10-year term for one of the aggravated battery counts, and two concurrent 10-year terms on two of the aggravated battery counts in the Illinois Department of Corrections.

¶ 3 His petition sets forth a claim of actual innocence, and is supported by two affidavits: (1) an affidavit from Eric Smith, an eyewitness who did not testify at trial; and (2) an affidavit from Noel Zupancic, an investigator with the Office of the Public Defender, who interviewed Martin Nash, the only eyewitness identification witness to testify at trial.

¶ 4 The trial court dismissed defendant's postconviction petition without a third-stage evidentiary hearing, finding that: (1) in light of "Smith's initial identification of [defendant] as one of the shooters, [Smith's] current affidavit is inconclusive as to [defendant's] actual innocence"; and (2) "[Nash's] statements [in the investigator's affidavit] are a recantation of his trial testimony and not sufficient to support [defendant's] actual innoncence claim." For the reasons discussed below, we reverse.

¶ 5 BACKGROUND

¶ 6 I. Pretrial Proceedings

¶ 7 On October 26, 1998, defendant chose to have a bench trial and waived his right to a jury, while his codefendant Deangelo Johnson chose to have a jury trial. In addition, the prosecutor indicated that he intended to file a motion *in limine* to permit the testimony of a gang crime specialist from the Chicago Police Department. The prosecutor stated that the intended victim of

the crime was "Puff," whose "real name is Eric Smith." The prosecutor stated that the State's theory of the case was that Smith was the leader of a gang named "Dog Pound," and that the shooters were members of a rival gang, called the "Traveling Vice Lords." After hearing argument on the intended motion, the trial court held that, after the evidence was received and if it supported the State's contention that gang rivalry was the motive, then the State could renew its motion.

¶ 8 On October 26, 1998, the State also moved to preclude codefendant Johnson from calling two psychiatrists from testifying in support of his claim that his confession was coerced. Both doctors had previously testified at the suppression hearing concerning codefendant's low IQ. The trial court ruled that codefendant had a right to put those issues before the jury.

¶ 9 II. Evidence at Trial

¶ 10 In opening statements, defense counsel questioned the identification evidence against defendant, and the State claimed that this was an act of gang violence. The prosecutor stated that the intended victim was "Puff," or Eric Smith, and that the shooters were members of the Traveling Vice Lords while Smith was the leader of a renegade group of Traveling Vice Lords. First, we will provide a short summary of the evidence. Then, we will provide a more detailed discussion of each side's case.

¶ 11 In sum, the evidence in the record reveals the following undisputed facts. At approximately 4:45 p.m., on August 23, 1996, Gary Thomas was shot and killed as he stood on the sidewalk in front of "Wash's Place," a tavern located on the south side of the 4200 block of Madison Street in Chicago. Three other people were shot and wounded, but they were unable to

identify the shooter. At the time of the shooting, Thomas was standing in front of the tavern with fellow gang member Eric Smith and Smith's friend, Marvin Nash.[1]

¶ 12 At trial, Nash testified that he observed two men wearing black-hooded sweatshirts approach their group and that Smith told him that the two men were from a rival gang. Nash testified that, when the two men were within 20 feet of the group, the two men pulled out handguns from underneath their sweatshirts and shot at them. At trial, Nash identified defendant as one of two shooters involved in the shooting,[2] and Nash was the only event witness to implicate defendant in the shooting. At the time of trial, Nash was incarcerated on an unrelated offense.

¶ 13 Chicago police detective Kriston Kato testified that he and his partner were assigned to investigate Thomas' murder and that they located Smith approximately one week following the shooting and interviewed him. After speaking with Smith, Kato sought to arrest defendant. Kato did not testify about the substance of his conversation with Smith. Kato testified that he also met with Nash and showed him a group of five photographs, one of which was a photograph of defendant. Nash identified defendant as one of the shooters.

¶ 14 Smith did not testify at trial. At trial, detective Kato testified that, on September 11, 1996, he intended to conduct a line-up, and so he left his offices to search for Smith, but that he

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[1] Marvin Nash has an alias of Martione Powell and is identified as Nash in the appellate briefs, but as Powell by the trial court.

[2] Codefendant Johnson was tried separately, received a jury trial, and was found guilty.

could not find him, and that at 5 a.m., he returned to his offices to report that he could not find him. Again, on September 12, 1996, Kato testified that he left his office "attempting to locate Smith" but again could not find him. Kato testified that he had been unable to locate Smith since September 2, 1996. Later, at argument on defendant's postconviction petition, both the State and defense counsel informed the trial court that they were unable to locate Smith for trial. Specifically, the prosecutor conceded that "the People could not find him," but argued that defendant had a separate responsibility to look.

¶ 15 The handgun used in the shooting was never recovered; and there was no physical evidence connecting defendant to the shooting.

¶ 16 A. State's Case

¶ 17 The State's first witness was Rita Thomas, the wife of the deceased, who identified her husband's body.

¶ 18 The State's second witness was Lucinda Birmingham, who testified that, on August 23, 1996, at approximately 4:30 p.m., she left a store on West Madison and headed home, walking down Madison and toward Keeler. While walking down the street, she was also scratching off some lottery tickets. She stopped and hugged a friend named Charles Mitchell. After she walked away from him, she heard "some noises" and "maybe shots." Then she realized that she had been shot in the leg, and she "just fell over in the vacant lot" next to Wash's Tavern. Birmingham testified that "[p]eople were running over" her and, in particular two "young men maybe ran over the top of [her]." Describing the two young men, Birmingham testified: "One seemed to be dressed in black. One of the young men looked to have his hair braided up in some

type of French braids." The men appeared to be 18 or 19 years old.

¶ 19 On cross-examination, Birmingham clarified that the man dressed in black was wearing a black t-shirt and black jogging pants. She testified that they were not wearing either hooded shirts or baseball caps. She explained that, by French braids, she meant "braids that are rolled up coming down singularly one at a time." She observed that one of them had muscular arms.

¶ 20 The State's third witness was Crystal Pope, who testified that at approximately 4:45 p.m. on August 23, 1996, she was walking with her cousin, Charles Pope, on Kostner heading toward Madison. Pope testified that, after she stepped off the curb to cross Madison, her cousin saw that her left arm was bleeding and he told her that she had been shot. At first, she did not feel anything, but then she fell. Charles Pope then pulled her back to the sidewalk. She then lay on the sidewalk, going in and out of consciousness. At the time, Crystal was a sophomore in high school. The bullet passed through her left arm and entered her body, near the lower part of her spine, where it still is.

¶ 21 The State's fourth witness was Officer Patrick Conroy, of the Chicago Police Department, who testified that, at approximately 4:45 p.m. on August 23, 1996, he observed a man laying in the middle of Madison who had been shot and whom he later learned was Gary Thomas. A large crowd had gathered. The officer tried to talk to the victim but he could not respond. The officer observed numerous shell casings on the sidewalk.

¶ 22 On cross-examination, Officer Conroy testified that, while on the scene, he spoke with Lucinda Birmingham who provided the following description of the offenders: two black

men; approximately 18 or 19 years old; both wearing black t-shirts and dark or black jogging pants; both with guns; and one with braids. The description provided by Birmingham was the only description that the police had on August 23, 1996, of the offenders.

¶ 23 The State's fifth witness was Martin Nash, the only event witness at trial to implicate defendant in the shooting. Nash testified that, in May 1998, he pled guilty to a felony narcotics charge, in exchange for which he received a sentence of four years in the Illinois Department of Corrections. Nash also received probation for a burglary charge in 1985. On August 23, 1996, Nash drove with his 10-year old son from Rockford, Illinois, where he was living and working, toward Wash's Place on Madison, between Keeler and Kildare. At approximately 4:45 p.m., he observed three of his friends standing in front of Wash's Place, and he and his son joined them. The three friends were: Eric Smith, who is called "Puff"; Irving Young who is called "Pokey"; and another man who was called "Buster." Nash later learned that Buster's real name was Gary Thomas. Nash testified that Smith was the leader of a gang called "Dog Pound."

¶ 24 Nash testified that Smith looked towards Keeler and then exclaimed: "Man, look, here come those m*** f*** n***s; man, m*** f*** travelers." Nash understood Smith to be referring to a gang called the Traveling Vice Lords. When Nash looked towards Keeler, he observed two men walking towards them, who were dressed in black hooded-sweatshirts and black leather gloves. Nash testified that "in the neighborhood if somebody fixin' to do something to somebody, that's the dress." The two men were approximately 19 to 21 years old. In the courtroom, Nash identified defendant and codefendant as the two men he had observed.

¶ 25 Nash testified that, when he first observed the two men, they were approximately 20

feet away. The two men reached under their shirts and by their waists; and they both pulled out guns and aimed their guns toward Nash's group. Then they started shooting. At first, Nash started to run, but then he turned and saw that his son was in shock and still standing there, so he ran back to his son. When he ran back toward his son, the two men were still firing. Puff ran down the street toward Kildare; and Pokey ran inside Wash's Place. Buster said he was hit, and then he stumbled and fell.

¶ 26 Nash testified that he grabbed his son and tried to carry him, toward a back alley near Wash's Place. Nash was running from Madison to the back alley, which ran east and west, just as Madison does. The alley is between Keeler and Kildare. As he entered the alley, he made a right turn towards Kildare. At that moment, he saw the two shooters in the alley running toward Keeler. Nash and the shooters were running in opposite directions in the alley. After Nash reached Kildare, he went to Madison and placed his son in his van and drove down the street, where he saw Buster laying in the street. Nash went to find Buster's wife and drove her to the hospital.

¶ 27 Nash testified that, on September 2, 1996, the police showed him a group of five photographs and he recognized two of them as the shooters. On September 11, 1996, Nash viewed a line-up and he recognized two people.

¶ 28 On cross-examination, Nash did not remember telling the detectives on September 11, 1996, that he was a member of the Dog Pound gang, and he denied being a member of that gang. He testified that he had a teardrop tattoo under his right eye, and that it was "for all the brothers that was killed." He acknowledged that gangs use this symbol too. Nash admitted that he sold

drugs, but he never sold drugs on the corner where the crime occurred.

¶ 29 On cross-examination, Nash admitted that he was present when the police arrived at the scene, but he did not tell them at that time what he had seen. However, when he was at the hospital with Buster's wife, he observed the police again and then he informed them that he had observed the shooters. He told the police that Puff knew they were Traveling Vice Lords, and Nash testified that Puff probably knew who they were because they were trying to kill him. Nash testified that he had never seen the shooters before the day of the offense.

¶ 30 Nash testified that he told the police at the hospital that the shooters wore black-hooded sweatshirts and that the hoods came down when they started running. Nash also testified that, when the shooting started, he observed a woman scratching lottery tickets who was then shot. Nash testified that one of the shooters had braids in his hair and, in court, he identified the one with braids as codefendant Johnson. Nash denied telling the police that one shooter was between five-feet five and five-feet eight, and the other shooter was between five-feet six and five-feet nine. He claimed to have told the police that the shooters were five-feet seven and six-feet five.

¶ 31 Nash testified that the shooters' sweatshirts covered their arms, which contradicted the testimony of Birmingham, who testified she observed that one of the two men had muscular arms.

¶ 32 The State's sixth witness was Detective Kriston Kato, with the Chicago Police Department, who testified that, on September 2, 1996, he and his partner, Detective Sam Cerone, located a witness that they had been looking for, namely, Eric Smith. After interviewing Smith,

they were looking for defendant. On the evening of September 2, 1996, Detective Kato, with Detectives Cerone and Patricia Warner, met with Martin Nash. The detectives showed Nash five Polaroid photographs, and Nash picked out one photograph, which was the one of defendant. Detective Kato testified that Nash picked out only one photograph, which contradicted Nash's trial testimony that he had picked out two photographs.

¶ 33 Kato testified that, on September 11, 1996, at a little after midnight, he and other officers located defendant driving a vehicle on Kilbourn, and defendant was arrested. The vehicle contained two passengers who identified themselves as Donald Ware and Shawn Harris. In court, Kato identified "Donald Ware" as codefendant Johnson. All three occupants of the vehicle were transported back to the police station, where they were interviewed by Kato and his partner Cerone. First, they interviewed defendant whom, Kato testified, identified the other two men as his alibi. Then they interviewed Shawn Harris and, after his interview, codefendant Johnson became a suspect. The detectives then interviewed codefendant Johnson, whose statement was not admitted against defendant.

¶ 34 Kato testified that, after his interview of Johnson, he intended to conduct a line-up. As he result, he left his offices to look for witnesses Smith and Nash, but he could not locate either one. At 5 a.m., Kato returned to the station and informed the three men that he was unable to locate the two witnesses and that he was then leaving. At 4:30 in the afternoon of September 12, 1996, Kato returned to the station, and went out to look again for Smith and Nash. Kato was able to locate Nash, but not Smith, and Nash was brought back to the station to view a line-up.

¶ 35 Kato testified that, at 6 p.m., Kato conducted a five-person lineup. Out of the five

people, three were suspects: defendant; codefendant; and Shawn Harris, the third and remaining occupant of defendant's vehicle. Only two people in the line-up were described by Kato as "fillers." Kato testified that, after the line-up, Kato had a conversation with defendant in which Kato confronted defendant with the fact that defendant had been identified in the line-up. After speaking with defendant, Kato then spoke again with codefendant Johnson.

¶ 36 Kato testified that, on September 12, 1996, he again left his offices to go looking for Smith but he could not find him. Kato testified that he had been unable to locate Smith since September 2, 1996.

¶ 37 The State's seventh witness was Charles Mitchell, whom Lucinda Birmingham had testified that she had hugged right before the shooting started. Mitchell testified that he was 40 years old, and that in April 1997 he had pled guilty to a felony narcotics charge, for which he received two years of probation. Mitchell testified that he was currently in jail, due to violation of that probation. On August 23, 1996, at approximately 4:45 p.m., he was in a vacant lot drinking a beer. The vacant block was located in the 4200 block of Madison. At that time, he observed a friend whom he knew then only as "Buster," but whom he now knows to be Gary Thomas. Then Lucinda Birmingham walked into the vacant lot, gave him a hug and walked off. Buster had left before Birmingham entered. Then Mitchell heard a lot of shooting, and he looked down at his left pants leg, and he observed that it had a hole in it, with some blood, and he realized that he had been shot. Then he ran home, where his mother told him to go back out, so he would be taken to the hospital. Then he returned to Madison where he had been shot and waited for an ambulance. After 30 minutes, an ambulance took him to the hospital, where they

cleaned his wound, confirmed that the bullet had gone through his leg and released him.

¶ 38 The State's eighth witness was Dr. Barry Lifschultz, a forensic pathologist with the Cook County Medical Examiner's Office, who testified that he performed the autopsy on the body of Gary Thomas on August 24, 1996, and concluded that he died as a result of a gunshot wound.

¶ 39 The State's ninth witness was Thomas Reynolds, a forensic investigator with the Chicago Police Department, who testified that he and his partner, Inspector Majewski, were assigned to process the crime scene on August 23, 1996, where they took photographs and recovered nine-millimeter cartridge casings and two fired bullets.

¶ 40 The State's 10th witness was Brian Mayland, a forensic firearms examiner specializing in firearms identification and employed by the Illinois State Police, who examined the cartridge casings and fired bullets recovered in this case. Specifically, he received four exhibits: a fired bullet; another fired bullet; four nine-millimeter cartridge casings; and another nine-millimeter cartridge casing. After examination, he determined that the four nine-millimeter cartridge casings were all fired from the same gun; but that the one nine-millimeter casing was fired from a different gun. He could not say whether the recovered bullets came from the casings that were recovered.

¶ 41 The State then re-called Detective Kato, who testified that he and Detective Cerone spoke with defendant, who Kato identified in court, at approximately 1 a.m. on the morning of September 11, 1996, at the police station. Kato testified that he introduced himself and informed defendant of his rights. Defendant told Kato that he wished to speak with Kato and Cerone.

Defendant told Kato that "he had no knowledge of the shooting, and no knowledge of any of the names [Kato] gave him and he stated that he was with Donald Ware, [and] Deshawn Harris at the Brickyard Mall at the time." Defendant also specifically told Kato that he did not know Puff or anyone from the Dog Pound. Kato's conversation with defendant lasted approximately 20 minutes.

¶ 42 After the conversation, upon the detectives' returning to the station that afternoon, a line-up was held where Nash positively identified defendant. At approximately 6:30 p.m., Kato and Cerone again spoke with defendant. Kato re-advised defendant of his *Miranda* rights and defendant acknowledged he understood them and wished to speak with the detectives. Kato informed defendant that he had been identified as one of the shooters. After Kato confronted defendant with the line-up identification, defendant "still denied it but he stated that he did in fact know Puff and he was having problems with him. Puff had shot at him on several occasions. And that also, that he believed that Donald Ware may be involved in the shooting because of *** Donald Ware's gang affiliation and that [defendant] lied about being with Donald Ware and Shawn Harris at the time, stated he was with a girlfriend at the time of the shooting." Defendant informed Kato that "Donald Ware" was a member of the Traveling Vice Lords and that at the time, the Traveling Vice Lords were "at war" with the Dog Pound over territory.

¶ 43 Kato and Cerone returned to the station at approximately 8 p.m. the same night, after having left to search for Smith, when Kato was informed that defendant wanted to speak with him. Kato went to the interview room with Detective Patricia Warner, where Kato again informed defendant of his rights. At that time, defendant told Kato "that Puff had shot at him on

3 different occasions, and that he heard on the street that Puff and the Dog Pound were going to rob him at his house and that after *** Puff and the Dog Pound robbed him, he was going to burn his house down. And at that time he said he was going to not take that any more." Defendant then told Kato "that he then obtained a 9 millimeter handgun and he drove around looking for Puff or any of the Dog Pound members. And that on Madison in front of a liquor store, he observed several of the Dog Pound people and he pulled his car over, on foot approached them and as he got approximately 30 feet from them, he started shooting at them. He said he shot at Puff and another Dog Pound member named Elroy. He shot at them, everybody ran. He then ran to his car and left the scene." Kato asked defendant who else was involved and defendant stated that "he would rather not say because that person was in another gang." Defendant also told Kato that he threw the gun away on his way home.

¶ 44 After leaving the interview room, Kato informed felony review and Assistant State's Attorneys (ASAs) Sue Ziegler and Bill Dorner arrived at the police station, where they were apprised of the investigation to that point. At approximately 10 p.m., Kato and the ASAs entered the interview room where defendant was located. Defendant informed them that he had already spoken with Kato about the incident and that he wanted an attorney present if he was speaking with the ASAs. The conversation was terminated at that point.

¶ 45 On cross-examination, Kato acknowledged that his conversations with defendant were not recorded and that he did not have handwritten notes concerning them.

¶ 46 The State's 11th witness was Bill Dorner, one of the ASAs who spoke with defendant at approximately 10 p.m. on September 11, 1996. Dorner testified that upon entering the

interview room with Ziegler and Kato, the ASAs introduced themselves to defendant, told him who they were and why they were there, and read him his *Miranda* rights. Defendant told Dorner that "he had already talked to the detective and told him his participation and that he didn't want to talk to [Dorner] until he had an attorney present." The ASAs then terminated the interview and left the room.

¶ 47 After Dorner's testimony, the State rested its case.

¶ 48 B. Defense Case

¶ 49 Defendant took the stand in his own defense. Defendant's testimony was limited. He denied that he told Kato that he attempted to shoot Smith. Instead, he testified that he only told Kato that he knew his *Miranda* rights and had an attorney, but no detectives or ASAs gave defendant the use of a telephone to contact his attorney.

¶ 50 On cross-examination, defendant denied being a member of the Traveling Vice Lords. Defendant also denied knowing an individual named Puff or Smith, denied being angry with him, and denied that the Dog Pound shot at defendant's house on three occasions. Defendant testified that each time Kato and Cerone attempted to speak with him, he refused to speak with them and told them he wanted his attorney to be present.

¶ 51 After defendant's testimony, the defense rested.

¶ 52 C. State's Rebuttal

¶ 53 On rebuttal, the State presented the testimony of detective Patricia Sawczenko, formerly known as Patricia Warner. Sawczenko testified that defendant requested to speak with Kato at approximately 8 p.m. on September 12, 1996, and stated that "he wanted to tell them the

truth now." When detectives Kato and Cerone returned to the police station approximately 10 minutes later, Sawczenko informed them of what defendant had told her.

¶ 54 Sawczenko accompanied Kato into the interview room and spoke with defendant. Kato read defendant his rights and defendant responded that he understood each right. Defendant then told Sawczenko and Kato that "his earlier admission about being involved with drugs and gangs was [not] true, he was not involved with them. He then stated that Puff and the Dog Pound had shot at him on 3 different occasions prior to this incident. *** He then said that he had heard from people on the street that Puff was going to come over to his house and rob him and then burn his house down." Defendant then told Sawczenko and Kato "that he went to a friend's house and obtained a 9 millimeter handgun and went out looking for Puff and members of the Dog Pound"; defendant did not state who accompanied him at that point.

¶ 55 Sawczenko testified that defendant then stated that he drove around in his vehicle until he located Puff and other members of the gang standing in front of a lounge on the 4200 block of West Madison. Defendant "then said that he parked his car, he got out of the car and he approached on foot and he was about 30 feet away from the people and he pulled out his gun and started firing in their direction." Defendant told them that after he was finished shooting, he ran back to his vehicle, dropped his gun in an alley, and drove away. Defendant stated that "he thought he had shot Puff but then he had heard later that he didn't hit Puff, he hit somebody else accidentally and killed him." Sawczenko testified that defendant did not wish to tell them who else was involved "because he was a member of another gang."

¶ 56 On cross-examination, Sawczenko admitted that she had not taken any notes at the

time of the conversation with defendant and that the only way it was memorialized was through a supplemental report prepared by Kato at a later time.

¶ 57 After closing arguments, the court found defendant guilty of first degree murder and three counts of aggravated battery with a firearm. The court sentenced defendant to 50 years in the Illinois Department of Corrections for the first degree murder and three 10-year terms for the three aggravated batteries, with all sentences to be served consecutively for a total of 80 years in the Illinois Department of Corrections.

¶ 58 II. Direct Appeal

¶ 59 On direct appeal, this court remanded the case to the trial court to determine whether two of the three convictions for aggravated battery included severe bodily harm. *People v. Williams*, 335 Ill. App. 3d 596, 597 (2002). On remand, the trial court found that two of the convictions did not cause severe bodily harm and ordered those two convictions to be served concurrently.

¶ 60 III. Procedural History of Postconviction Proceedings

¶ 61 On December 5, 2001, defendant filed a *pro se* petition for postconviction relief. After the petition advanced to the second stage and counsel was appointed, counsel filed a supplemental petition which included an actual innocence claim. The actual innocence claim was supported by two affidavits: (1) an affidavit from Eric Smith, an eyewitness who did not testify at trial; and (2) an affidavit from Noel Zupancic, an investigator with the Office of the Public Defender, who interviewed Martin Nash, the only eyewitness identification witness to testify at trial.

¶ 62 The State filed a motion to dismiss, which the trial court granted, finding that the *pro se* postconviction petition was untimely filed. On appeal, this court found that the defendant's *pro se* postconviction petition was timely filed and that appointed counsel's supplemental petition was also timely filed as a supplement to the first petition. We remanded the case to the trial court to consider defendant's actual innocence claim. *People v. Williams*, No. 1-07-3102 (Mar. 12, 2010) (unpublished order under Supreme Court Rule 23).

¶ 63 On remand, the trial court considered defendant's actual innocence claim and dismissed defendant's postconviction petition a second time, without a third-stage evidentiary hearing. The trial court found that: (1) in light of "Smith's initial identification of [defendant] as one of the shooters, [Smith's] current affidavit is inconclusive as to [defendant's] actual innocence"; and (2) "[Nash's] statements [in the investigator's affidavit] are a recantation of his trial testimony and not sufficient to support [defendant's] actual innocence claim."

¶ 64 IV. Smith's Affidavit

¶ 65 The affidavit from Eric Smith, dated April 22, 2005, stated, in pertinent part, as follows:

> " *** 2. On August 23, 1996, at around 4:00 p.m. I was in the area of a bar called 'Watts' on Madison [Street] on Chicago's west side when shots were fired; ***
>
> 4. In August of 1996 I had known [defendant] for two or three years from seeing him in the neighborhood;
>
> 5. When the shots were being fired on August 23, 1996, I could see that

neither of the two people shooting weapons looked like [defendant];

***

7. I did not testify as to these facts at [defendant's] trial because neither defense attorneys nor prosecutors asked me to testify;

8. I came forward to state these facts at this time because previous to this time, nobody approached me about this matter; ***."

¶ 66 V. Noel Zupancic's Affidavit

¶ 67 The second affidavit was from Noel Zupancic, an investigator with the Office of the Public Defender, who interviewed Nash, the only eyewitness identification witness who testified at trial and identified defendant as the shooter. At the time of the interview, Nash was incarcerated on an unrelated matter.

¶ 68 The affidavit of investigator Noel Zupancic stated, in pertinent part, as follows:

"1. I am an investigator with the Law Office of the Cook County Public Defender;

2. I spoke with [Martin Nash], on Thursday, December 15, 2005;

3. The conversation with [Nash] took place at Illinois Department of Corrections Logan Correctional Center where [Nash] was incarcerated ***;

4. I spoke with [Nash] *** regarding client [defendant];

5. [Nash] stated in summary that he was high on heroin and cocaine at the time of the shooting and [his] identification in [defendant's] case;

* * *

12. [Nash] stated in summary that the police suggested [to him] two guys when he made the identification [of defendant];

13. [Nash] stated in summary that he was given two bus tickets to return home to Rockford, Illinois after talking to the police;

* * *

16. [Nash] stated in summary that he went to [the State's Attorney's office in the Cook County Criminal Courthouse located at] 26th and California [Streets] in Chicago on three different occasions to speak with an assistant State's Attorney (ASA) there;

***

18. [Nash] stated in summary that the ASA told him in summary that she just needed his help with this case and she would give him anything for his help;

19. [Nash] stated in summary that on three different occasions, the ASA sent him to the victim/witness office on the first floor at [the Cook County Criminal Courthouse];

20. [Nash] stated in summary that on three different occasions, he received envelopes with cash inside from the victim/witness office at [the Cook County Criminal Courthouse];

21. [Nash] stated in summary that he does not know the dollar amount

in cash he received each time or in total.

22. [Nash] stated in summary that he never told the ASA or the victim/witness office that he was a junkie, but he is sure they could tell he was a junkie.

23. [Nash] stated in summary that he later was locked up on his own case.

24. [Nash] stated in summary that after he was locked up, the ASA did not help him anymore;

25. [Nash] stated in summary that he made a deal with the ASA regarding his case;

26. [Nash] stated in summary that he testified the way he did because of the deal;

27. [Nash] stated in summary that he lied [about defendant] when he testified;

28. [Nash] stated in summary that what comes around goes around because he is now locked up for someone lying on him.

29. [Nash] stated in summary that he will not help [defendant] because nothing can be done to help [Nash].

30. [Nash] stated in summary that he will not sign an affidavit regarding what he told me."

¶ 69 VI. The Trial Court's Dismissal Order

¶ 70 After reading these affidavits and hearing argument, the trial court dismissed defendant's postconviction petition. During arguments, both the State and defense counsel informed the trial court that they were unable to locate Smith for trial. Specifically, the prosecutor conceded that "the People could not find him," but argued that defendant had a separate responsibility to look.

¶ 71 Concerning Smith's affidavit, the trial court found that it constituted newly discovered evidence because "Smith was not available at trial and his statements could not have been discovered through due diligence." However, the trial court found that Smith's affidavit would not change the result on retrial, because "[c]oupled with Smith's initial identification of [defendant] as one of the shooters, [Smith's] current affidavit is inconclusive as to [defendant's] actual innocence."

¶ 72 Concerning Zupancic's affidavit, the trial court found that it was also not so conclusive that it would change the result on retrial because "[a]s a general rule, hearsay affidavits are insufficient *** [and] newly discovered evidence 'which merely impeaches a witness' will typically not be of such conclusive character to justify postconviction relief." The court also found that Nash's "statements are a recantation of his trial testimony" and, therefore, unreliable. The court further found that "Zupancic did not state whether or not she was available to testify to her interview" and that Nash "is unwilling to cooperate and is therefore considered unavailable to testify." The trial court concluded that Nash's statements are "not sufficient to support [defendant's] actual innocence claim."

¶ 73 This appeal follows.

¶ 74 ANALYSIS

¶ 75 On appeal, defendant claims that the trial court erred in dismissing his postconviction petition at the second stage because he made a substantial showing of actual innocence.

¶ 76 I. Post-Conviction Hearing Act

¶ 77 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2008)) provides that a defendant may challenge his or her conviction or sentence for violations of federal or state constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006) (citing *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005)). To be entitled to postconviction relief, a defendant bears the burden of showing that he or she suffered a substantial deprivation of his or her federal or state constitutional rights in the proceedings. 725 ILCS 5/122-1(a) (West 2008); *Pendleton*, 223 Ill. 2d at 471 (citing *Whitfield*, 217 Ill. 2d at 183); *People v. Evans*, 186 Ill. 2d 83, 89 (1999); *People v. Lacy*, 407 Ill. App. 3d 442, 455 (2010).

¶ 78 In noncapital cases, the Act provides for three stages. *Pendleton*, 223 Ill. 2d at 471–72. At the first stage, the trial court has 90 days to review a petition and may summarily dismiss it, if the trial court finds that the petition is frivolous and patently without merit. 725 ILCS 5/122–2.1(a)(2) (West 2008); *Pendleton*, 223 Ill. 2d at 472. If the trial court does not dismiss the petition within that 90-day period, the trial court must docket it for further consideration. 725 ILCS 5/122–2.1(b) (West 2008); *Pendleton*, 223 Ill. 2d at 472.

¶ 79 In the case at bar, defendant's petition proceeded to the second stage. At this second stage, the trial court may appoint counsel if defendant is indigent. *Hobson*, 386 Ill. App. 3d at

230- 31. Appointed counsel may make any amendments that are "necessary" to the petition previously filed by the *pro se* defendant. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). After defense counsel has made any necessary amendments to the petition, the State may move to dismiss it. *Pendleton*, 223 Ill. 2d at 472 (discussing 725 ILCS 5/122–5 (West 2000)). See also *Perkins*, 229 Ill. 2d at 43. If the State moves to dismiss, the trial court may hold a dismissal hearing, which is still part of the second stage. *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998).

¶ 80 II. Standard of Review

¶ 81 At the second stage of a postconviction proceeding, the trial court is prohibited from engaging in any fact-finding, and all well-pleaded facts must be taken as true at this point in the proceeding. *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998). "[W]hen a petitioner's claims are based upon matters outside the record, the Postconviction Act does not intend such claims be adjudicated on the pleadings." *People v. Snow*, 2012 IL App (4th) 110415 ¶15.

¶ 82 However, a *pro se* petitioner is not entitled to a third-stage evidentiary hearing as of right. *Coleman*, 183 Ill. 2d at 381. To advance to the third stage, a petitioner must make a "substantial showing," which can be accomplished by relying on the record in the case or by supplying supporting affidavits. *Coleman*, 183 Ill. 2d at 381. If the allegations contained in the petition are based upon matters of record, then no other support is needed. *Coleman*, 183 Ill. 2d at 381.

¶ 83 A dismissal of a postconviction petition without an evidentiary hearing is reviewed *de novo* on appeal. *People v. Edwards*, 195 Ill. 2d 142, 156 (2001) (citing *Coleman*, 183 Ill. 2d at

389). *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 84 III. Actual Innocence Claim

¶ 85 The wrongful conviction of an innocent person violates due process under the Illinois Constitution of 1970 (Ill. Const. 1970, art. I, § 2), and thus, a defendant can raise in a postconviction proceeding a freestanding claim of actual innocence based on newly discovered evidence. *People v. Ortiz*, 235 Ill. 2d 319, 334 (2009); *People v. Washington*, 171 Ill. 2d 475, 489 (1996).

¶ 86 In *Ortiz*, our supreme court held that, to assert a claim of actual innocence based on newly discovered evidence, a defendant must show that the evidence was (1) newly discovered; (2) material and not merely cumulative; and (3) of such a conclusive character that it would probably change the result in trial. *Ortiz*, 235 Ill. 2d at 333-34; *People v. Orange*, 195 Ill. 2d 437, 450-51 (2001) (citing *People v. Molstad*, 101 Ill. 2d 128, 134 (1984)). We will consider each of these requirements in turn.

¶ 87 IV. Newly Discovered Evidence

¶ 88 A. Smith's Affidavit

¶ 89 With respect to Smith's affidavit, the trial court dismissed defendant's postconviction petition, holding that, while Smith's statements were newly discovered and unavailable at trial, they were not of such a conclusive character that it would probably change the result.

¶ 90 First, the State argues that the trial court erred when it found that Smith's affidavit

was newly discovered. The *Ortiz* court defined newly discovered evidence as "evidence [1] that has been discovered since the trial and [2] that the defendant could not have discovered sooner through due diligence." *Ortiz*, 235 Ill. 2d at 334. On appeal, the State does not argue that Smith's statements were actually discovered before trial, so the first part of the "newly discovered" definition is satisfied. *Molstad*, 101 Ill. 2d at 134 (the State does not dispute that the affidavits were prepared after the guilty verdict, so the first part of the definition is satisfied). The State argues only about the second "could have been discovered" part.

¶ 91 In the case at bar, the record itself supports defendant's claim that Smith's statement could not have been discovered sooner through due diligence. The record contains representations by the State and the police that they were aware that Smith was a witness, that they were out there looking for him, and that they could not find him.

¶ 92 On this appeal, the State argues that defendant was not allowed to rely on the State's representations, and that defendant was required to conduct his own search. Nowhere do our cases require a party to engage in an act of futility; and the State fails to explain why it thinks that defendant would do a better job than the police.

¶ 93 At the oral argument before us, the prosecutor admitted that "it is clear that he evaded police to avoid testifying." Referring to Smith's "claim in his affidavit that nobody was looking for him, nobody ever asked him," the prosecutor conceded "that's simply not true, and it's clear from the evidence of record, that it isn't true." If, as the State claims, Smith succeeded in evading the police to avoid testifying, it is difficult to understand how an arrested defendant

could have found him.

¶ 94 This is at least the second time that the prosecution has conceded the efforts made to locate Smith. Before the trial court, the prosecutor conceded not only that the State had tried to find Smith, but that the defense had tried as well. If the defense had made the opposite concession – that no effort was made – we have no doubt that he would have been held to it on appeal.

¶ 95 The State is reading into *Ortiz* a requirement that simply is not there. A defendant must show only that he "could" not have discovered the evidence sooner. Certainly, one way of showing this is by showing all the acts the defense undertook to find the evidence. But the State does not explain why a defendant cannot also satisfy this showing by showing that the police, who are far better equipped and trained than the average defendant, were out there looking for the evidence and could not find it. Nowhere in *Ortiz* did our supreme court require a defendant to duplicate police efforts, and we decline to read into the opinion what is simply not there.

¶ 96 In fact, in *People v. Molstad*, 101 Ill. 2d 128 (1984), our supreme court held that a defendant did not have to engage in due diligence where it appeared to be futile. In *Molstad*, the State argued, as the State does in our case, that evidence was not newly discovered. *Molstad*, 101 Ill. 2d at 134. Rejecting this claim, our supreme court held that "no amount of diligence could have forced the codefendants to violate their fifth amendment right to avoid self-incrimination." *Molstad*, 101 Ill. 2d at 135. Thus, our supreme court found the evidence to be "newly discovered," without any discussion of the actions undertaken by the defendant to obtain it, because any such actions would probably have been futile. *Molstad*, 101 Ill. 2d at 135.

Although *Molstad* is different from the case at bar, it proves the point that we are citing it for: that we do not require a defendant to undertake apparently futile acts.

¶ 97 At this second stage, where defendant is required to make only a showing and is allowed to rely on the record to make that showing, there is no question that this defendant made enough of a showing of "newly discovered" to advance to the third stage. A defendant must show only that the evidence "could" not have been discovered earlier, which can be accomplished either by showing his own diligent acts or by showing simply that the evidence could not have been discovered. In the case at bar, defendant's explanation at the second stage hearing was a sufficient showing to advance to a third-stage hearing.

¶ 98 At the oral argument before us, the prosecutor cited in support *People v. Harris*, 206 Ill. 2d 293 (2002). Our case has almost nothing in common with *Harris*, in which our supreme court held that defendant failed to make any showing why his brothers' statements should be considered "newly discovered" evidence. In *Harris*, defendant made a claim of actual innocence based, in large part, on a new alibi provided by his brothers that he was with them at the time of the offense. *Harris*, 206 Ill. 2d at 300. Defendant claimed that his brothers' affidavits were "newly discovered" simply because they were "dated after the time of trial." *Harris*, 206 Ill. 2d at 301. Defendant made no claim that he could not find his brothers or that he did not know where they were. *Harris*, 206 Ill. 2d at 301. Our supreme court rejected his argument stating that "the mere fact that these affidavits are dated after the time of trial does not render the evidence newly discovered." *Harris*, 206 Ill. 2d at 301.

¶ 99 In the case at bar, defendant is not arguing that the fact of a post-trial date, by itself,

makes the affidavits "newly discovered." Ours is not a case, as it was in *Harris*, of close-knit family members. In our case, defendant claims that he did not know where Smith was; and that even the police could not find him.

¶ 100 At oral argument, a question was raised that maybe the police were not looking that hard. That is the type of factual inquiry which is best explored at an evidentiary hearing. Factual determinations can take place only at the third stage. *People v. Morris*, 335 Ill. App. 3d 70, 77 (2002) ("factual disputes *** can only be resolved by an evidentiary hearing"); *People v. Coleman*, 183 Ill. 2d 366, 381 (1998) ("our past holdings have foreclosed the circuit court from engaging in any fact-finding at a [second stage] dismissal hearing"); *People v. Snow*, 2012 IL App (4th) 110415 ¶15 (the trial court is "prohibited from engaging in any fact finding" at the second stage). We cannot deny defendant an evidentiary hearing based on the factual speculation that, in spite of Detective Kato's trial testimony that the police had made several attempts to find Smith and in spite of the concession made by the prosecutor at the oral argument before us, the police were not really trying. All defendant had to do at this second stage is make a substantial showing, and that he has done.

¶ 101 In essence, the State argues that its efforts do not count. This is not a game between medieval contestants, where the potentially innocent are forced to jump meaningless hurdles or they lose. The State wins whenever justice is done. For these reasons, we find that defendant has made a substantial showing that Smith's affidavit was newly discovered.

¶ 102 B. Investigator's Affidavit

¶ 103 In regard to Zupancic's affidavit, the trial court found it to be "not sufficient to support [defendant's] actual innocence claim" and we agree. Zupancic's affidavit only contains hearsay regarding what Nash told him, *i.e.*, that Nash falsely testified. As a general rule, a petition supported only by hearsay affidavits and mere conclusions does not state sufficient facts to require an evidentiary hearing. *People v. Morales*, 339 Ill. App. 3d 554, 565 (2003) (citing *People v. Cole*, 215 Ill. App. 3d 585, 588 (1991)). Defendant acknowledges the general rule against hearsay affidavits, but argues that we should apply the exception to the rule set forth by the Illinois Supreme Court in *People v. Sanchez*, 115 Ill. 2d 238 (1986).

¶ 104 In *Sanchez*, the defendant in a capital case filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 1991)), which was supported by an investigator's hearsay affidavit. The affidavit stated that material facts were known to a witness, but that the witness' affidavit could not be procured due to the witness' invocation of the fifth amendment. *Sanchez*, 115 Ill. 2d at 283.

¶ 105 The Illinois Supreme Court declined to apply the rule against hearsay affidavits "inflexibly" in that capital case. In reaching its conclusion, the supreme court examined Illinois Supreme Court Rule 191 (eff. July 1, 2002), which governs affidavits in proceedings brought under sections 2-1005 (summary judgment), 2-619 (involuntary dismissal), and 2-301(b) (special appearances) of the Code. 735 ILCS 5/2-1005, 2-619, 2-301(b) (West 2008). The supreme court found that Rule 191(b) provides an exception to the general rule against hearsay affidavits in situations where "material facts which ought to appear in the affidavit are known only to persons

whose affidavits affiant is unable to procure by reason of hostility or otherwise." Ill. S. Ct. R. 191(b) (eff. July 1, 2002); *Sanchez*, 115 Ill. 2d at 285. The supreme court reasoned that while Rule 191 does not explicitly include affidavits in support of petitions under section 2-1401, the reasoning behind the rule's exception was equally applicable in that setting and used the rule as support for its conclusion. *Sanchez*, 115 Ill. 2d at 285.

¶ 106 The case at bar is distinguishable from *Sanchez*. First, this court has declined to extend the reasoning in *Sanchez* to a noncapital case, such as the car at bar. See *People v. Perkins*, 260 Ill. App. 3d 516, 520 (1994) ("Because different concerns are at issue in [this noncapital case], we do not feel as compelled to part with the well-established rule that hearsay affidavits are insufficient to support a petition for relief from judgment."). Second, *Sanchez*, concerns a petition for relief from judgment under section 2-1401 of the Code. We find no cases, nor does defendant point us to any, where this exception was applied to an affidavit attached to a postconviction petition.

¶ 107 Moreover, recantation of testimony, as the trial court found, "is regarded as inherently unreliable." *People v. Morgan*, 212 Ill. 2d 148, 155 (2004). See also *People v. Steidl*, 177 Ill. 2d 239, 260 (1997) ("the recantation of testimony is regarded as inherently unreliable, and a court will not grant a new trial on that basis except in extraordinary circumstances"); *People v. Chew*, 160 Ill. App. 3d 1082, 1086 (1987) (stating that newly discovered evidence which merely impeaches a witness will typically not justify postconviction relief). Nash's recantation made while incarcerated is highly suspect. See, *e.g.*, *People v. Askew*, 273 Ill. App. 3d 798 (1995) (on the use of threats by other prisoners to obtain "jail house" affidavits); see also *People v. Morales*,

339 Ill. App. 3d 554, 564 (2003) (finding affidavit of incarcerated gang member who was occurrence witness "suspect at best"). In addition, Nash's alleged statements to Zupancic show that he is motivated by his own self-interest when he informed Zupancic that "he will not help [defendant] because nothing can be done to help [Nash]" and, as a result, would not sign an affidavit to his statements. Thus, the trial court properly found that Zupancic's affidavit was insufficient to support defendant's actual innocence claim. However, since we have determined that Smith's affidavit constitutes newly discovered evidence, we continue our analysis of whether defendant is entitled to a third-stage evidentiary hearing.

¶ 108 V. Material and Not Cumulative

¶ 109 Second, the State does not argue in its brief against defendant's contention that the affidavits provide material and not cumulative evidence. Evidence is considered cumulative when it does not add anything to what was previously before the jury. *Ortiz*, 235 Ill. 2d at 335. Taking the facts alleged in defendant's petition as true, the evidence from both Smith and Nash that they observed the shooter and defendant was not the shooter was certainly material evidence, not cumulative. Both Smith's and Zupancic's affidavits concern the ultimate issue of whether defendant was the shooter. There was no testimony before the jury that defendant may not have been the shooter. The only witness who testified at the trial that defendant was the shooter was Nash. Zupancic's affidavit claims that Nash lied when he testified. There was no physical evidence presented at trial to implicate defendant. Thus, the affidavits constitute material evidence, not cumulative evidence.

¶ 110 VI. Probably Change the Result

¶ 111 Third, the evidence must be so conclusive that it would probably change the result on retrial.

¶ 112 In his dissent, Justice Garcia concludes that a statement by defendant at trial is inconsistent with a statement made by Smith in his affidavit. Specifically, Justice Garcia writes: "At trial, the defendant testified that he 'denied knowing an individual named Puff or Smith.' [Cite to majority opinion omitted.] Smith, however, attests to knowing the defendant 'for two or three years from seeing him in the neighborhood.' [Cite to majority opinion omitted.] One or the other lied under oath."

¶ 113 However, there is no inherent inconsistency between Smith's assertion that he could recognize defendant "from seeing him in the neighborhood" and defendant's trial testimony that defendant did not recognize the names Puff or Smith.

¶ 114 Concerning Smith's affidavit, the trial court found it "inconclusive as to [defendant's] actual innocence." However, there were only two eyewitnesses who observed the shooter, Nash and Smith. None of the victims who testified at trial were able to identify the shooter. Nash testified that defendant was the shooter, and his testimony was crucial to the trial court's finding of guilt beyond a reasonable doubt. The newly discovered evidence presented in Smith's affidavit directly contradicts Nash's testimony. In his affidavit, Smith stated that he was present at the shooting, that he knew the defendant, that he observed the shooter, and that defendant was not the shooter. Taking the facts alleged in defendant's petition and Smith's affidavit as true, there is a question of Smith's credibility which can only be assessed at a third-stage evidentiary

hearing under the facts of this case.

¶ 115 In the case at bar, where there is no physical evidence, and the case is based on the sole identification of a possibly recanting witness and a confession that defendant refused to provide the ASA, and the intended victim is now coming forward to say that defendant was not his attacker, defendant is at least entitled to a chance at an evidentiary hearing. After all, at this stage, all we are giving the defendant is a chance. This is not a get-out-of-jail free card. Defendant must still prove what he has shown.

¶ 116 CONCLUSION

¶ 117 We reverse the judgment of the circuit court of Cook County in dismissing defendant's postconviction petition at the second stage and remand for a third-stage evidentiary hearing.

¶ 118 Reversed and remanded.

¶ 119 JUSTICE GARCIA, dissenting:

¶ 120 The defendant contends he is entitled to a third-stage evidentiary hearing premised on the affidavits from Eric Smith and investigator Noel Zupancic, who interviewed Martin Nash, a key witness at the defendant's trial. I agree with the majority that the affidavit of investigator Zupancic adds nothing to the substantial showing the defendant must make to merit a third-stage postconviction evidentiary hearing. My disagreement with the majority stems from my view that Martin Nash's trial testimony renders Eric Smith's attestations in his affidavit neither newly discovered nor of such a conclusive character that his testimony would probably change the trial result for purposes of the defendant's actual innocence claim. See People v. Ortiz, 235 Ill. 2d 319 (2009).

¶ 121 Eric Smith was present at the time of the shooting, which gave rise to the defendant's convictions. He was known to both the State and the defense as a possible witness for purposes of trial. We are provided no information that shows the defendant acted diligently in any efforts he undertook to compel Eric Smith to testify at trial. See People v. Orange, 195 Ill. 2d 437, 451 (2001). Without a showing of due diligence, Smith's affidavit does not constitute newly discovered evidence. People v. Jones, 66 Ill. 2d 152, 157 (1977).

¶ 122 Nor is Smith's attestations in his affidavit that the defendant was not one of the shooters enough to make likely a change in the defendant's conviction following his trial. As the majority's decision points out, the defendant's testimony at trial is at odds with Smith's attestations under oath as set forth in his affidavit. At trial, the defendant testified that he "denied knowing an individual named Puff or Smith." Supra at ¶ 50. Smith, however, attests to knowing

the defendant "for two or three years from seeing him in the neighborhood." Supra at ¶ 65. One or the other lied under oath.

¶ 123 Nor did the defendant ever assert an allegation of actual innocence in his pro se postconviction petition, as the State pointed out at oral argument. According to the State, the actual innocence claim came about through the zealous advocacy of his appointed counsel.

¶ 124 On de novo review, I agree with the circuit court that the attached affidavits, even taken together, do not make a substantial showing of actual innocence to justify a third-stage evidentiary hearing on the defendant's postconviction petition.

¶ 125 Accordingly, I dissent.