2014 IL App (2d) 141059-U
No. 2-14-1059
Order filed October 12, 2016
Modified upon denial of rehearing November 15, 2016

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Respondent-Appellee,	)	
v.	)	No. 93-CF-1991
JOHN HORTON,	)	Honorable Joseph G. McGraw,
Petitioner-Appellant.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justice Burke concurred in the judgment.
Justice Jorgensen specially concurred.

ORDER

¶ 1 *Held*: Defendant failed to establish a colorable claim of actual innocence in his successive post-conviction petition. However, the trial court erred in denying defendant leave to file a successive post-conviction petition alleging that the State violated its discovery obligations pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). Because the pleadings and record establish a *Brady* violation, we reverse defendant's convictions and we remand for a new trial. We also address evidentiary issues regarding the admissibility of statements against penal interest that will likely arise on retrial. Finally, we denied defendant's request to assign a different judge on remand.

¶ 2 Following a jury trial, petitioner John Horton (hereinafter referred to as defendant) was convicted of first degree murder (720 ILCS 5/9-1(a)(1) (West 1992)) and armed robbery (720 ILCS 5/18-2(a) (West 1992)). He was sentenced to natural life imprisonment. On direct appeal this court affirmed defendant's convictions and sentence. *People v. Horton*, No. 2-95-1165 (1997) (unpublished order under to Supreme Court Rule 23). (*Horton I*). Defendant filed a *pro se* post-conviction on July 22, 1998, which the trial court summarily dismissed. Defendant did not appeal from that dismissal.

¶ 3 Still *pro se*, defendant filed two more post-conviction petitions in 2003, which were also summarily dismissed. In a consolidated decision, this court affirmed the second and third summary dismissals. *People v. Horton*, No. 2-03-1129, 2-03-1388, cons. (unpublished order under Supreme Court Rule 23) (*Horton II*).

¶ 4 On September 2, 2013, this time with the benefit of counsel,[1] defendant filed a "Motion for Leave to File a Successive Post-Conviction Petition," which included the proposed successive petition and voluminous exhibits. Defendant's successive petition alleged five constitutional violations: (1) newly discovered evidence proved defendant was actually innocent; (2) at trial, the State violated its discovery obligation under *Brady v. Maryland*, 373 U.S. 83 (1963); (3) defendant's trial attorneys were ineffective; (4) defendant's attorney on direct appeal was ineffective; and (5) defendant's sentence of life without parole violated the Eighth Amendment (U. S. Const., amend. VIII) because the trial court failed to adequately consider defendant's youth at his sentencing hearing.

[1] Defendant is represented by counsel from the Center on Wrongful Convictions of Youth at Northwestern University School of Law. We granted leave to the Innocence Network Incorporated, to file an *amicus curiae* brief in support of defendant.

¶ 5 On October 11, 2013, defendant's counsel, along with a Winnebago County assistant State's Attorney, appeared before the trial court. The assistant State's Attorney said that the State had a conflict of interest because one of the assistants in the office was related to defendant, so the trial court entered an order requesting that the State's Attorney's Appellate Prosecutors designate an attorney to serve as special prosecutor. An attorney from the Appellate Prosecutor's office filed his appearance and, over defendant's objection, was granted leave to file a written objection to defendant's request to file a successive post-conviction petition. In its written objection, the State argued that defendant had not set forth a colorable claim of actual innocence. It also alleged that defendant had not demonstrated cause for his failure to bring the claim in his initial post-conviction proceedings, and that prejudice resulted from that failure as required under section 1(f) of the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1(f) (West 2010). After considering the pleadings and the arguments of the parties, the trial court denied defendant's request for leave to file a successive post-conviction petition as to all of his claims. Defendant timely appealed.

¶ 6 I. BACKGROUND

¶ 7 The facts of this case are summarized in this court's Rule 23 order affirming defendant's convictions and sentence in *Horton I*. However, a detailed presentation of the trial evidence, as well as new information furnished in defendant's proposed successive post-conviction petition, is necessary for a discussion of defendant's claims that his constitutional rights were violated. The original record on appeal did not include the court file in case number 93-CF-2027, *People v. Clifton English*, which the trial court took judicial notice of during the hearing on defendant's motion for a new trial on August 30, 1995. On this court's own motion the record on appeal has been supplemented with that file. See Ill. S. Ct. R. 329 (eff. Jan. 1, 2006).

¶ 8 The record reflects that on September 22, 1993, Detective Bruce Scott of the Rockford police department received an anonymous tip that defendant had made statements that he committed an armed robbery and murder at McDonald's restaurant on Charles Street. On September 24, 1993 at 3:30 p.m. defendant went to the Rockford police department to clear up any suspicion that he may have been responsible for the McDonald's armed robbery and murder. Defendant was questioned for several hours before signing a typed confession at 1:47 a.m. on September 25, 1993, and admitted that he committed the crimes. Defendant was 17 years old at the time and his criminal history consisted of three minor traffic offenses.

¶ 9 A. Motion to Suppress

¶ 10 Before trial, defendant filed a motion to suppress his confession, alleging that his statements were not voluntarily given. At the hearing on the motion, Detective William Doner testified that defendant said that he went to the police station to talk to detectives "who were talking about him." During questioning by the police, defendant acknowledged that he had made claims that he had committed the McDonald's armed robbery and murder, but he said that he was only bragging. Defendant told the police that his cousin, Clifton "Buddy" English, was the person who robbed the McDonald's and murdered one of its customers. Defendant acknowledged that he owned the Tec .22-caliber firearm used in the crimes, but he said that his cousin Clifton English was the gunman. He told the police that he was at the house of a friend, Garlyn Wilks, at the time of the armed robbery and murder, and that his brother, Larry Horton, had driven him there.

¶ 11 Detective Doner testified that the police officers urged defendant to be truthful. Doner said that defendant was interviewed by five different detectives. Before confessing, defendant was told that his brother Larry repeatedly denied even seeing him the night of the armed robbery

and murder. He was also told that Clifton English was interviewed and denied any involvement. Defendant was told that Larry had turned over the gun, and that defendant needed to be truthful and to give the police the version of events that had actually taken place. At 11:05 p.m., while defendant was being interviewed by Detective Robert Redmond and Detective Bruce Scott, Detective Howard Forrester opened up the door to the interview room and slid a file similar to the one taken in the armed robbery on the table and said, "explain this" and left the room. At that point, Redmond told defendant that he knew defendant was involved and that he should be truthful. Redmond asked defendant whether he went into the restaurant and shot the customer intentionally, or if it was an accident, and if it was an accident that it was important for defendant to tell the police his side of the story. Defendant then admitted that he committed the McDonald's armed robbery and murder. As Redmond suggested, defendant said he accidentally shot the McDonald's customer.

¶ 12 For the next two hours and forty-five minutes Redmond typed a four page statement as Detective Bruce Scott elicited details from defendant. During his oral statement defendant told the police that he threw the McDonald's file folder out of a car window on 11th Street near Railroad Avenue. This detail was not included in the typed statement. At 1:47 a.m. defendant read and signed the statement. He was then charged with armed robbery and murder and transported to the Winnebago County Jail.

¶ 13 Redmond further testified that on September 25, 1993, he and Detective Scott visited defendant in jail. Defendant told them that he did not want to speak to them without someone else being present. In response, he and Scott told defendant that they were there to talk about his cousin, Clifton English. They then talked for 15 to 20 minutes.

¶ 14 Defendant did not call any witnesses during the motion to suppress and, after hearing the parties' arguments, the trial court denied the motion. This court affirmed the trial court's denial of defendant's motion to suppress in *Horton I*.

¶ 15 B. Motions *In Limine*

¶ 16 Prior to trial defense counsel disclosed that its defense would constitute: (1) the alibi that defendant had furnished to the police; and (2) proof of Clifton English's responsibility for the McDonald's armed robbery and murder. The evidence for the latter defense included statements made by English in the days following the McDonald's armed robbery and murders, English's possession of the murder weapon after the murder, other armed robberies that Clifton English had committed, and English's physical appearance, which was similar to the descriptions given by eyewitnesses.

¶ 17 The State filed a motion in *limine* to bar statements that Clifton English allegedly made to Larry Horton (defendant's brother and English's cousin), Felisha Horton (defendant's sister and English's cousin), Kristina Sholes (the mother of English's child), Larry Turner (English's friend), and William Taylor (English's friend). In their motions the State alleged that the statements English allegedly made to these people: (1) bore no indicia of reliability; (2) were not made spontaneously to close acquaintances after the crime; (3) were not corroborated by the evidence; and (4) the State would have no opportunity to cross-examine English. The motion referenced an "attached memorandum of law," which was not included in the record. The State told the court that it had been informed by Clifton English's attorney that he would invoke his Fifth Amendment privilege against self-incrimination if called to testify in defendant's trial. According to the State, English was awaiting sentencing for an unrelated murder and armed robbery at the Bombay Bicycle Club Restaurant. The State requested that the trial court conduct

an examination of English outside the presence of the jury to see if he would invoke the Fifth Amendment. The trial court agreed, but determined that a ruling on the motion would be premature until English was called. On March 14, 1995, prior to jury selection, the trial court directed the parties to "Hunter's Illinois Horn Book, paragraph 60.35." The following discussion then took place:

> "MR. FUENTY [Defense Counsel]: Judge, just to clarify this, are you in a position to rule on this at this time?
>
> THE COURT: Well, I am just going to make a statement about it so I want the record to show people how I am thinking.
>
> And it's entitled declarations against penal interest. It states, second paragraph, four factors would provide considerable assurance, that considerable assurance is key word in the case law, that hearsay declarations against penal interest will be reliable are: one, whether the statement was made spontaneously to close acquaintance (*sic*) shortly after the crime occurred. Two, whether the statements was (*sic*) corroborated by other evidence. Three, whether the statement was self-incriminating and against the declarant's interest. And four, whether the declarant was available for cross-examination. And they cite *Chambers v. Mississippi*, a United States Supreme Court case.
>
> Then it goes on to say, "The absence of any one or more of those factors results in the exclusion of the statement as inadmissible hearsay. And then if you go over to the pocket part of the same paragraph, you have this statement, "The admission of a declaration against penal interest turn (*sic*) to *(sic*) whether the statement is supported by sufficient indicia of trustworthiness. No one factor is (*sic*) prerequisite to its admissibility."

MR. KARNER [assistant State's Attorney]: Just so we are clear, Judge, the Court has to consider the totality of the circumstances and engage in a balancing test. And one factor alone will not support or exclude the evidence.

THE COURT: I understand that. And the Court's determination on the issue of admissibility will be affirmed in the absence of clear abuse of discretion the Court improperly exclude (*sic*) testimony. 'The declarant made admission to a family member who was related to the defendant that he had stabbed the victim. The family had no bias,' and it goes on and give all sorts of examples in the pocket part supplement.

I also commend to your reading the case of *People v. Edgeston*. And I quote, and that's 157 Ill. 2d 201, and I cite from 244. 'Defendant next argues that the trial court erred (*sic*) precluding him from calling a witness at the second phase of the sentencing hearing who would have established reasonable doubt by testifying that just after the instant offense he heard Sullivan admit to shooting someone.' Now, here's the important part. 'At the close of the defense case, during the guilt phase of the trial, defendant sought to introduce the testimony of Lee Lilly. The defendant made an offer of proof that if called as a witness, Lilly would testify that he was near Alice Williams' car following the King shooting and heard Sullivan say 'I just shot some nigger.' The Court ruled that since Sullivan was unavailable as a witness because of his invocation of the Fifth Amendment privilege, Lilly's testimony was inadmissible. Lilly was again called by the defense as a mitigation witness during the penalty phase of the sentencing. When the State objected, defendant argued that he was attempting to put on evidence of residual doubt through Lilly's testimony that Sullivan indicated it was he who shot King. The Court relying (*sic*) upon certain cases excluded the proffered testimony. The trial court's

ruling was correct. I commend those cases to you and those paragraphs of Hunter's Handbook.

I commend those cases to you and those paragraphs of Hunter's Handbook. Now, in regards to the motion, it is premature. I think you people have a good idea of where I am coming from and how I am thinking. I cannot tell the State or the defendant how to try their case or what witness to call at the time. But, I do have the power to rule upon an objection when they are made, and I will do so.

MR. KARNER: Judge, I would ask the Court, until the Court rules on the motion in limine, that the Court requires counsel, both sides, to refrain from making any reference to that in opening statements. Until—I mean, it would be improper to comment in opening statement on evidence that there isn't a good faith basis for getting in, and that would—

THE COURT: That is an age-old problem, Mr. Karner, that I have fought for some 30 years, and I know exactly where you are coming from. I cannot stop people from saying, or Judge Ito cannot stop some of these people from saying what they are going to say."

¶ 18 The State also moved *in limine* to bar evidence that the police recovered firearm ammunition in English's residence including a .22-caliber bullet. The trial court denied the motion as to the .22-caliber bullet because it was the same caliber as the murder weapon, but granted the motion as to other ammunition.

¶ 19 Next, the State moved to bar evidence of English's convictions for armed robbery that occurred prior to the McDonald's murder and armed robbery. The State also sought to bar evidence of the attempt armed robbery of the same McDonald's that occurred the morning of

murder and armed robbery. Specifically, the State said, "At approximately 1:20 in the morning on September 19, a person whom we believe to be Clifton English attempted to rob that store but was unsuccessful." Assistant State's Attorney Mark Karner argued that any other offenses that occurred before the offenses currently being tried were irrelevant. The defense objected, stating that a store manager, Patrick Kenny, who heard the offender's voice, thought it was the same person who had robbed the store a year prior. The trial court reserved ruling on these motions.

¶ 20 The State moved *in limine* to bar evidence of the printing on the shopping bag that the murder weapon was recovered from. The State argued that the murder weapon was found in a bag that had the word "Logli" on it, and that when he was out of custody English lived in close proximity to the Logli grocery store in Machesney Park. Therefore, it contended, jurors might improperly draw an inference that somehow English was connected to the murder weapon because it was found in a Logli bag around five days after McDonald murder and armed robbery. The State claimed that the logo on the bag was "hearsay." It requested that the bag be barred only if English invoked the Fifth Amendment. The trial court denied the motion.

¶ 21 The State next sought to bar evidence of English's guilty plea in case number 93 CF 2027 (the Bombay murder case). At the same time the State also moved to introduce English's conviction for those offenses if English testified but objected to allowing the jury to hear the factual basis for that guilty plea. The court reserved ruling on this motion.

¶ 22 Returning to the motion to exclude English's hearsay statements, the State argued that once the defense commented on them in opening statement it could not "unring the bell." The court denied the State's request to have this issue resolved before opening statements, but said that English would be called first to determine whether he planned to invoke the Fifth Amendment, and after that, certain rulings would follow.

¶ 23 The State moved to exclude statements by English to Felisha Horton where he told Felisha about some other armed robberies that he had committed. The court again said that a ruling would be premature because if English chose not to testify the issue would be moot.

¶ 24 On March 16, 1995, trial resumed. The State renewed its motion to bar any reference to English during opening statements since any reference would be unfairly prejudicial. The State also objected to any reference to the Bombay murder case, which the trial court granted. Next, the State said it would not be offering evidence of the September 19, 1993, early morning attempt armed robbery of the same McDonald's restaurant and it would excise any reference to that offense from defendant's confession in their case-in-chief. The State acknowledged that those references would be relevant if English testified.

¶ 25 The defense sought to bar the introduction of a black bandana recovered from defendant's sister's house because it did not match the description given by witnesses as being "green or blue" or "green with a white star." Again, the court reserved ruling.

¶ 26 C. The State's Opening Case

¶ 27 During opening statement, defense counsel told the jury that the question in this case was going to be "who did it?" Counsel told the jury that witnesses would describe the offender as 28 to 32 years old, 5 foot 10 inches to 5 foot 11 inches tall and weighed between 210 and 230 pounds. At the first mention of English by defense counsel, the State objected. The objection was overruled. Defense counsel then told the jury that they would hear evidence about what English did and said. Counsel told the jury that English had borrowed the gun from defendant the Saturday before the McDonald's murder and armed robbery. He said that defendant did tell stories to his friends to impress them, but that he learned information about the crime from English. When defendant heard that the police were asking questions about his possible

involvement in the McDonald's crimes he went to the station to tell them what he knew. Defendant told the police that his cousin, English, committed the crimes. English also told his cousins Larry and Felisha Horton that he committed these crimes. English told Larry that he "shot the guy in the head" because "he thought he was a rent-a-cop and shot him in the mother-fucking head."

¶ 28 Defense counsel also told the jury that English confessed to his ex-girlfriend and the mother of his child, Kristina Sholes, that he committed these offenses. English also told Sholes that he thought the guy was a rent-a-cop and provided other details of the crimes to her.

¶ 29 The State's first witness, Victor Castaneda, was the father of the victim, Arthur Castaneda. Mr. Castaneda testified that Arthur was 26 years old at the time of his death. Over objection, he said that Arthur was one of his four children. Arthur was a musician who worked for Disney on Ice. On the night of his murder he played in a benefit for a young boy who had cancer.

¶ 30 Rockford Police Sergeant Steven Johnson testified that on September 19, 1993, he responded to the McDonald's within two minutes of the 911 dispatch. He and around 20 officers searched the surrounding area by foot and in patrol cars. The area searched included "yards and garbage cans and storm drains, and then it was expanded all the way from Charles Street to Broadway and from 24th to 20th Street." The search was commenced within 10 to 20 minutes of Sergeant Johnson's arrival.

¶ 31 Mary Casey testified that she was a manager of the McDonald's in question. On the night of the offense she was dressed in civilian clothes because she was off duty. Shortly before 10 p.m. she looked to the west side door and saw a black man come "through the door and left his hand up. He had a gun and he shot it." The gun was in the man's right hand. Casey said the

man was wearing a dark hooded coat with the hood up. He wore a dark bandana over his mouth to his nose. Casey did not recall the exact color of the bandana. The man wore gloves and ordered people into the back room. She told the police that she did not think she could identify the offender. Therefore, on direct examination she was not asked to describe the offender's height, weight or age.

¶ 32 Casey told everyone to be calm. Once in the back room, known as the crew room, the offender asked for a manager to open the safe. Casey told the offender she was the manager. The offender grabbed Casey by the arm and took her into the office, across a small hallway. She opened the safe and the offender recovered two tan envelopes with partitions that contained cash.

¶ 33 Casey identified two of the State's exhibits; both were the type of pouch that was taken from the safe by the offender. She clarified that she actually took the pouches from the safe and handed them to the offender. The offender asked Casey if that was all there was, and she told him that there was money in the tills but he said he did not want it. The man left. Casey waited for a minute before looking in the crew room and giving an "I am okay" gesture. She then called 911. Casey was shown a firearm that she said looked like the type used by the offender. She guessed that both the pouches contained around five hundred dollars total.

¶ 34 On cross-examination Casey said that the man was 28 to 32 years old, 5 foot 10 or 5 foot 11 inches tall and weighed 210 to 230 pounds. The offender wore green army "boot camp" type pants. She said the man spoke in a calm, deep voice. The man had blotchy pigmentation around his eyes. She described him as having a dark complexion. Casey estimated that she was with the offender for around five minutes. She told the police that the man appeared to have thick facial hair where his scarf ended. She tried to be as accurate as possible in describing the offender because she knew that it was important.

¶ 35 Robert Heral testified that he was at the McDonald's restaurant with his wife eating when he heard a bang. He looked up and saw a man waving a gun and yelling for everyone to get in the back. Heral described the man as 5 foot 9 inches or 5 foot 10 inches in height, and weighed 180 to 190 pounds. He said the offender wore a black knit cap and dark clothes or at least a dark jacket. The man also wore a bandana or something over his face. Heral said that while the offender and the manager were in another room he heard the offender tell her, "you have got twenty seconds, bitch."

¶ 36 On cross-examination Heral said that he told the police the offender was in his early twenties. He also acknowledged that he told police that "he was wearing a knit-type black winter hat with little designs that looked green-ish gold like the New Orleans Saints." After Heral's testimony concluded the State requested a rule to show cause against a subpoenaed State witness, Lynn Hollingshed. The State told the court that Hollingshed left the court house after indicating his disapproval with assistant State's Attorney Karner and with the necessity of testifying in court that day. The trial court issued a rule to show cause.

¶ 37 Jackie Warner testified that she was at the McDonald's in the drive through lane with her boyfriend at the time of the armed robbery. When no one responded to their order and they could not see anyone inside, Warner joked, "I bet they're being robbed." She then looked behind her and saw a black man running off into the distance. The man looked at her and her boyfriend while he slowly jogged away. He had a gun in his right hand and a brown paper bag in his left hand. The bag was folded and looked like the size of a letter. Warner said that the man was wearing a hooded sweat shirt and dark colored pants. On cross-examination, Warner said that she told the police that the man was approximately 35 years old, six feet tall and weighed between 225 to 250 pounds.

¶ 38 Denise Davis testified that she was defendant's ex-girlfriend. She was 17 years old when she dated defendant. She said that she was no longer dating defendant at the time of the armed robbery and murder, but they were friends. A week and a half to two weeks before the McDonald's offenses she was in her car with defendant along with Alisa Bennet and Carol Hobson. Defendant asked her to stop at his cousin "Buddy's" house. Davis said that Buddy's real name was Clifton English and that English lived behind the Logli's grocery store in Love's Park. She drove defendant to English's house, and he went inside the house. When defendant came out of the house he was carrying something wrapped in a white cloth, which turned out to be a gun that looked like an Uzi. Defendant told them the gun was a Tec-22, a .22-caliber handgun. Davis then drove defendant to his sister's house, where he would sometimes spend the night. She saw defendant with the gun later that night before the McDonald's armed robbery and murder. They were at defendant's sister's house on Fourth Avenue along with Garlyn and Alisa. She did not know Garlyn's last name but she knew he was a friend of defendant's. While defendant was handling the gun a bullet fell out and Davis picked it up. Defendant said to her, "now if anything happens with that bullet your fingerprints will be on it."

¶ 39 Davis testified that on September 20, 1993, at around 8:15 a.m. she "beeped"[2] defendant and he called her back. Defendant told Davis that he did not call her back the night before because he was at his mother's house and he was not near a phone. Defendant told Davis that "some stuff happened with the gun last night." Davis asked defendant what happened, and he asked her if she had read the papers. Davis told him she had not, and defendant said, "well, go read it." Later, she met with defendant outside his house on College Avenue. She told defendant

[2] In 1993 people carried pagers that would emit a signal when another person called the pager number by telephone.

that she overheard a conversation between his friends Carl Hobson and Damian Jordan. Later that night she was talking to defendant on the telephone and he asked her why she was "running off at the mouth" about the McDonald's shooting. She was angry with defendant for accusing her of talking about the McDonald's crimes. Later that day she and defendant met at Damian's house and defendant apologized for yelling at her and he told her he knew she was not the one talking about the crimes because "she didn't know any details." Davis said she asked defendant why he shot the victim, and defendant said that because he thought the victim was a "cop." She also asked defendant where the money was because she wanted some. Defendant told her that by the time he got to his sister's house after the crimes he only had three dollars on him. Defendant thought the bags were open and the money fell out while he was running.

¶ 40 Davis also testified that she did not go to the police with this information because she did not believe defendant. The State then impeached Davis with a statement that she had earlier made to assistant State's Attorney Karner before trial. Specifically, Davis was asked, "Do you recall telling [the State] that the reason you didn't report it was because if you reported a crime every time you saw one, you would be going to the police all the time?" Defense counsel's objection was overruled, and Davis admitted that she made that statement.

¶ 41 On cross-examination Davis testified that defendant's cousin, Clifton English, was in his mid-twenties and defendant was 17 years' old at the time of the offenses. Davis said that she broke up with defendant before the offenses because he was dating Melissa Pappas. She reiterated that she did not believe defendant when he said he committed the McDonald's crimes and that he was bragging to build up a reputation. On re-direct examination Davis acknowledged that her opinion that defendant was "bragging" about committing the offenses was not included in a four-page statement that a police officer typed up and that she had signed.

¶ 42 Forensic expert testimony established that a shell casing recovered from the McDonald's restaurant and the bullet slug recovered from Arthur Castaneda's body were fired from the gun recovered from the attic of defendant's sister's house. The gun, a Tec-22 and the clip, along with ammunition, were found inside two brown paper bags from Logli's grocery store. Latent fingerprint examination on the bags yielded one print that did not match either Clifton English or defendant. There were no latent fingerprints found on the gun.

¶ 43 Lynn Hollingshed testified that he was 17 years' old at the time of trial and was a student at Roosevelt High School. Hollingshed said he was a friend of defendant's and met him through a mutual friend, Carl Hobson. He had known defendant since grade school. Hollingshed said that about a month before his September 24, 1993 written statement to the police, defendant approached him and asked him if he knew where to get a gun. He told defendant that he knew a guy, Vance Patterson, who was selling a Tec-22 for $250. Hollingshed gave defendant Patterson's phone number.

¶ 44 Hollingshed said that in early 1993 he was at Carl Hobson's house along with Carl's little brother, "Mikey", and three white girls named Trish, Dawn and Heather. Defendant told him that he needed a quicker way to "find" money. The topic of the McDonald's restaurant at 2715 Charles Street came up and defendant said that "they" had tried to rob it before. The defense objected, and outside the presence of the jury, moved for a mistrial based upon the reference to other crimes. The trial court denied the motion, but cautioned the State to get off the subject matter and to correct it, if it needed to be corrected, the best way it could.

¶ 45 The State then asked Hollingshed the following question:

Q: Don't talk about what other people said that those other people did, okay? Yes or no, did the defendant tell you in reference to that McDonald's that he would get it one day?

A: Yes.

¶ 46 Next, the State asked Hollingshed if he talked to defendant on Monday, September 20, 1993. Hollingshed said that at 2:00 a.m. that day, defendant called him at Carl Hobson's house and asked him about a white guy who Hollingshed knew who was interested in buying defendant's Tec-22 for $400. Defendant asked Hollingshed for the guy's phone number. Hollingshed testified that he did not give defendant the guy's phone number and that he (Hollingshed) wasn't getting "hooked in it."

¶ 47 Hollingshed testified that he talked to defendant on the telephone later that afternoon when defendant called Carl's house again. Carl answered the telephone and handed it to Hollingshed. Defendant said, "I shot somebody." Hollingshed said, "yeah, right, quit lying." Defendant told him to read the newspaper. Carl went and got the newspaper. Hollingshed told the defendant that the only shooting reported in the newspaper was the McDonald's shooting. Defendant said, "that's the one." Hollingshed said that he and defendant did not talk about selling defendant's gun again.

¶ 48 Over defense counsel's objection, the State confronted Hollingshed with his typed statement to the police that he signed on September 24, 1993. The State asked him, "[d]idn't you say that the defendant said, 'what's the dude's name that wants to buy the gun,' and you said, 'I ain't telling you because I ain't fixing to get hooked into this?'" Hollingshed said, "yeah." He said that he asked defendant how much money he got from the armed robbery and that defendant

"did not say." He never gave defendant the phone number of the guy who wanted to buy the Tec-22.

¶ 49 Hollingshead stated that a few days before he gave the police a statement he was driving around with some friends, Mike Hobson and Tory Taylor, when he saw defendant at his mother's house at 323 Alliance. At that time defendant was in possession of the Tec-22. Hollingshed testified that State's Exhibit 114, the gun recovered from the attic of defendant's sister's house, looked like the one he saw defendant with on September 21, 1993.

¶ 50 On cross-examination Hollingshed testified that although Vance Patterson wanted $250 for the Tec-22, he knew it was only worth $150 because the gun jammed. When he was at Carl's home with Trish, Dawn, Heather, Tory Taylor, Mickey Hobson and defendant, another person was present. He thought the other person was "Buddy." When defendant said he shot someone Hollingshed thought he was bragging. When he saw defendant after the McDonald's shooting defendant was wearing a jacket and it was nighttime. Defendant was with a girl named Melissa. He noticed the gun when defendant was getting ready to get into a car parked about five feet away and next to the car Hollingshed was in. The gun was in defendant's coat. This occurred at defendant's house. Defendant was with Tory Taylor and Mickey Hobson when this happened. Hollingshed admitted that he did not know all of the dates when everything happened. However, he knew that he spoke to the police on September 24, 1993, and that he had seen defendant with the gun three days before.

¶ 51 On re-direct examination the State asked Hollingshed, "[y]ou do know, as you sit there, that you talked to [defendant] at 2 o'clock the Monday morning after the McDonald's [shooting]?" and Hollingshed answered, "yes." Defense counsel objected to the question as leading, which the trial court sustained. The State continued:

"Q: What was the date and the time, or the day of the week and the time that the defendant called you on the first occasion, asking you about the white guy who wanted to buy the Tec-22?

A: I think it was Monday, 2:00 in the morning.

Q: Was there an article in the paper that day about the McDonald's?

A: Yes."

¶ 52 The banter back and forth about the dates of the conversations and observations continued through re-cross examination, re-direct examination and re-recross examination.

¶ 53 Rockford Police Department Detective Greg Lindmark testified that he participated in the execution of a search warrant at defendant's home located at 323 Alliance in Rockford. Lindmark identified a pair of black sweat pants he recovered from an upstairs bedroom of the house. He also identified a pair of white tennis shoes he recovered, also from an upstairs bedroom. The warrant was executed on September 24, 1993.

¶ 54 Forensic pathologist Dr. Larry Blum performed the autopsy on the body of Arthur Castaneda. A single intermediate gunshot wound to the head, which entered the left temple area just beside the left eyebrow, caused Castaneda's death. Dr. Blum estimated that the gun was fired less than two feet away from Castaneda's head. The bullet was recovered and given to a Rockford detective.

¶ 55 Detective Redmond was the State's final witness. His testimony regarding defendant's confession was substantially similar to the testimony that he gave at the hearing on the motion to suppress. After Redmond told defendant that the best thing to do was to tell the truth, defendant confessed to the crimes. Defendant described walking into the McDonald's with the gun in his right hand. He said there was a man in there that he went to grab and the gun went off.

Redmond asked defendant what clothing he was wearing. Defendant said he wore a pair of black windbreaker-type pants, a dark colored shirt and blue and white cross-trainer Nike tennis shoes. He stayed in some bushes outside of McDonald's for a period of time before entering. He covered his face as he came out of the bushes. There was a woman standing by the counter as he entered the restaurant. She looked at a man off to his right as he entered the restaurant. Based on the way the man was dressed defendant said he thought he might be a manager or an employee. Defendant said he thought if he grabbed the man that the lady would not do anything. He had his Tec-22 in his right hand and reached for the man with his left hand when the gun went off. He yelled at everyone to go to the back of the restaurant. Although he yelled, many people just stared at him. He told that the he was not "playing," and grabbed the lady he described as the manager by the arm and had the gun pointed at her side. He told her he wanted the money, and at that point he obtained two pouches or folders that apparently contained money. He then ran out of the McDonald's, went through some yards and ended up by Church Hill park. He took off his shirt, jacket and bandana. He still had the folders/pouches and his gun. The folders/pouches got caught on a gate as he ran through yards. He kept running until he got to his sister's residence on 4th Avenue, where he hid the folders/pouches and the gun under a couch. His brother Larry came home a short time later and gave defendant a ride to Garlyn Wilks' house to borrow clothes. Larry then drove him to his house on Alliance Avenue, where he spent the night. Redmond testified that he then showed defendant a diagram to have defendant explain how he went into the store and where the people he mentioned were located. Defendant did so, and later signed the diagram.

¶ 56 Redmond testified that at 12:10 a.m. on September 25th, he began to type defendant's statement. After reading the statement to ensure that it was correct, defendant signed the four-

page typed statement at 1:51 a.m. Redmond testified that he obtained additional details from defendant after he signed the statement. Defendant said that he purchased the gun from Vance Patterson for $100 three or four weeks before the armed robbery and murder. He also said that he threw the file folders out of a car as he drove south on 11th Street between railroad tracks and Broadway. Defendant said that he did not know the gun was loaded. Defendant said that he did not know the gun was cocked, and he also said that his finger was not on the trigger. He said he was about one and a half feet from Castaneda when the gun fired. These additional details were not added to the typed statement.

¶ 57 Defense counsel requested that the typed statement be published to the jury prior to cross-examination. The trial court denied the request.

¶ 58 On cross-examination Redmond acknowledged that several detectives had interviewed defendant before he did so. The interview room was a nine foot by seven foot room with one door, a low table and three chairs. There were no pictures or windows on the walls, and no video equipment or tape recorder. No court reporter was present for the interview. Redmond said that he went into the room to tell him that the information defendant had provided regarding Clifton English "had been checked out."

¶ 59 Redmond said that he took notes during the interview, as did Detective Scott. He took down notes "verbatim" and destroyed the notes after the statements were prepared. Although the police department had video equipment, he had never videotaped an interview. The area where defendant allegedly threw out the folders/pouches was searched the following weekend. He did not ask defendant what happened to the gun after he hid it under the couch. By that time, he said, the gun had been recovered. Redmond acknowledged that he told defendant that he had spoken to Clifton English and that English said he was not involved in the armed robbery or

murder at McDonald's. He also acknowledged that he asked defendant whether he intentionally shot the gun at McDonald's or if it was accidental.

¶ 60 On re-direct examination Redmond said that in the history of the Rockford Police Department video or audio taping had not been used for interviews, and they do not have enough equipment to do six or eight simultaneous interviews. He explained that the typed statement method allows a suspect to make any corrections or deletions to their statement. The decision to not video or audio tape is not to conceal something from the jury, the lawyers, or the court.

¶ 61 Following re-cross examination the State asked that the typed statement be published to the jury. The trial court agreed, and the portions of defendant's statements about the attempt armed robbery on the morning of September 19, 1993, were redacted. The following portions of defendant's signed statement were read into the record:

> "THE COURT: You may proceed.
>
> MR. KARNER: On Sunday Buddy dropped the gun off at my sister's house at about 1 or 2 p.m. He said it would be at his crib. I sat at the house until about 9 p.m. I left walking. I had my Tec-22 with me. I was wearing some black windbreaker pants, a black shirt, a dark gray zip up jacket, and blue and white cross trainer tennis shoes. I had a blue bandana to cover my face in my pocket. When I left I was walking. I was going to go over to a girl's house named Carol who lives one block away from Chuchchill (*sic*) Park. I just kept walking and walked up to McDonald's. I went up to 9th Avenue and turned toward Charles Street on a drive type thing that goes over to McDonald's from 9th Avenue. I came up right behind McDonald's. I got up to the bushes behind McDonald's and sat in the bushes for a little while. I could not see much of anything inside from where I was at. I put on my bandana before I came out of the bushes. I came out of the

bushes and walked fast over to the side of the building. I walked up and went into the door. I think there were some people right in front of the door; they looked at me as I was coming through the door. When I got all the way in I saw a lady standing by the counter and she had a McDonald's uniform on. She looked at me and then looked at the guy that was to my right side. I had turned and look (*sic*) at him; I guess was a white guy. I had the gun in my right hand; I figure the guy was sitting next to me worked there. I figure (*sic*) he was a manager because he was dressed like he worked there. I thought if I grabbed him she would not do anything. As soon as I turned toward him, I was going to grab him and the gun went pow. As I turned I had my gun in my right hand. I was reaching to grab the guy with my left hand, the gun was pointed right at his head and it went off. It scared me. And I looked to the woman and yelled at her to go to the back. I think there was about 15 or 20 people in the place including the employees. I yelled once and everyone was just looking at me. I yelled again, go to the back, I am not playing. I then yelled again, go to the back. Some people did not move. Some people went to the back with the other people. When I came back out they were gone. When I went around the counter I got the people in the back. I had grabbed the manger by her arm and we went in the back. I said open the safe and I had the gun to the lady's side. Since the gun had gown (*sic*) I was not holding the trigger, I was holding the bottom of the handle part. I was nervous. And there was a big white guy and I thought he was going to try something. The manager opened up the safe. She handed me these brown pouches like a folder. That's when I made an exit and went out the same door I came in. I ran to the back behind McDonald's through the bushes. I went through the yards and I ended up on the street by Chruchchill (sic) Park. I had the folders in my hand. I looked across the

park and saw a police car. I took off running again. And I was running through the yards and I slug (*sic*) everything out of the folder. When I finally got home I only had five dollars. Before I saw the police car I took off my bandana and my coat and my shirt. I kept the gun in my hand. These pouches were in my hand and I remember one time they caught on a gate. I did not think that they had come open. I did not know that money was falling out. I knew there was money in there because it was thicker when the lady had given it to me. The five dollar bill that was left was half out of the folder. I ran to my sister (*sic*) house. I put the gun and the folders under the couch. My brother Larry came home. I did not tell him what I had done. I just asked him for a ride home. I had him stop at a friend of mine's name (*sic*) Garlyn Wilkes. I got some clothes from him for school; I did not tell him what I had done either. My brother took me home and he left and I laid (*sic*) down in the bed. Monday I called Lynn and asked him if he could get rid of the Tec. He had told me before that some dude wanted to buy it. When I called him I asked him does his friend still want it, I wanted to get rid of it because of what happened. I did not tell him anything about what happened. Last night I heard form Antrone that the police had picked him and Damian up and asked them about the McDonald's thing. He told me the police were looking for me to talk about it, to talk to me about it. Today I got a ride from Melissa and a friend of hers and they brought me to the police station. End of statement."

¶ 62 The State then rested. The defense then called Clifton English, outside the presence of the jury, to determine whether he intended to testify at defendant's trial or not. English testified that, on the advice of his lawyer, he would invoke the Fifth Amendment. Defense counsel argued that English could not plead the Fifth with regard to answering questions that were not

incriminating, such as where he lived. In response, the State argued that an answer to that type of questions might actually be incriminating, since ammunition was recovered at English's house and he was a convicted felon. After the court honored English's requested to invoke the Fifth Amendment with regard to several questions that related to the McDonald's offenses, defense counsel asked him if he had pled guilty to the murder of Steven Seller (The Bombay murder case). The trial court took judicial notice of that case and honored English's request to "plead the Fifth." The trial court said that with respect to "any conceivable question" English would be protected by the Fifth Amendment. The State denied the defendant's request to grant Clifton English immunity.

¶ 63 The State then requested that the court grant its motion *in limine* regarding the statements allegedly made by Clifton English. The defense requested that English be brought before the jury for the purpose of asking his name and weight and other non-incriminating questions. The trial court denied this request. The State asked to modify its motion *in limine* to also preclude the admission of statements English made to defendant. The State then commented:

> "Judge, just in granting our motion, we would ask the court to make the following findings: that the court engaged in a balancing test under the totality of the circumstances and find there was no indicia of trustworthiness in the alleged statement (*sic*) made by Clifton English."

¶ 64 The defense argued that it would be unfair to allow the State to have "citizen type" witnesses testify to statements of defendant, yet preclude the same type of evidence offered by the defense regarding English's statements. Counsel said that all of the people listed were close to English and that the circumstances were such that these statements were reliable. The State countered by arguing that, while these people are close to English, they are direct close relatives

of the defendant. The State commented, "[t]his is evidence that has been manufactured by his family that has substantial prejudice to the jury and to our case and is *not trustworthy at all*." (Emphasis added.) Defense counsel responded that the State's broad statement that the statements were unreliable was not grounds for exclusion. The State countered, saying that the reasons the statements were unreliable were because both Larry Horton and defendant lied "two and three times" to the police, and there was no physical evidence that corroborated those statements at all. Defense counsel argued that whether there was corroboration was for the jury to decide.

¶ 65 The trial court then listed the four factors discussed in *Chambers v. Mississippi*, 410 U.S. 284 (1973):

> "First, whether the statement was made spontaneously to a close acquaintance shortly after the crime occurred. Two, whether the statement was corroborated by other evidence. Three, whether the statement was self-incriminating and against declarant's interest. And four, whether the declarant was available for cross-examination."

¶ 66 The trial court then said it would "start with the last one, number four, whether the declarant was available for cross-examination. It said that Clifton English had "foreclosed himself from cross-examination by the State because of exercising the constitutional right to the Fifth Amendment. This would seem, then, to foreclose the hearsay statements. The trial court referred to *People v. Bell*, 96 Ill. App. 3d 857 (1981), for the proposition that "the absence of any *one* or more of these four factors results in the exclusion of the hearsay as being inadmissible." The court commented that "if the State can't cross-examine him, then it goes out the window." It then provided another citation to *People v. Edgeston*, 157 Ill. 2d 201 (1993), a case over which it had presided at trial, and read a passage into the record. The passage it read discussed a trial

court's exclusion of hearsay, which was offered to show "residual doubt" at the penalty phase of a death penalty case. The court went on to state that it found the first and fourth factors discussed in *Chambers* had not been met. With respect to the first factor, the court said, "[c]ontrary to defendant's assertion, this was long after five days, and more, it's like 30 days." The court reserved ruling as to whether this ruling would apply to statements English allegedly made to defendant, depending upon whether defendant "testified to those matters" and if an objection was made.

¶ 67 After the court's ruling on the admissibility of English's statements the defense made an offer of proof. Felisha Horton would testify that Clifton English was sitting in a car in her driveway on September 21, 1993, when she came home. English followed her into her home at 1411 Fourth Avenue. English told her that he was the one that went into the McDonald's on the Sunday before and shot a guy "in the mother-fucking head." English told Felisha that he thought the man he shot was a "rent a cop," and all he got was five hundred dollars from the robbery. English told her that he used a Tec-22, and that at the time of the robbery "he parked in a cubbyhole a block over." Felisha Horton made a report to the police about English's statements.

¶ 68 Larry Horton would testify that on September 21, 1993, he went to English's home. English began to sing a song that included a lyric that said "always look a man in the eye before you kill him." English slid a copy of Monday's paper with a front page article about the armed robbery and shooting at the McDonald's in front of Larry. Larry responded, "that's fucked up." English told Larry that he did it and that he got $400 from the crimes. Larry stayed about one half hour longer, and as he was about to leave English told him to wait. English handed Larry a brown paper bag and said, "take this with you." The bag contained the Tec-22 gun. Larry took the gun and placed it in the attic of his sister's house. Larry is the cousin of Clifton English, who

he called "Buddy." Larry was interviewed by the police on September 24, 1993, and told the police what English had said to him.

¶ 69 Kristina Sholes would testify that she is English's ex-girlfriend and mother of his child. On September 29, 1993, English came by her house. She was outside and English told her that he was "running from murder" and that everyone had turned against him. They were making statements about him committing the McDonald's shooting. He then told Sholes that he did commit the armed robbery and murder at the McDonald's. He said that it was "like a movie that keeps going over and over in his mind." He described the look on people's faces and the way the air smelled. He said he thought the man he shot was a "rent-a-cop" who he thought was going to pull a gun, so he shot him. Sholes talked to the police on the same day that English came to her house, and she told the police what English had said to her.

¶ 70 The State responded with its own offer of proof. It told the court that Sholes "set the gears in motion for Clifton English's arrest in the Bombay Bicycle Club Restaurant murder." The State claimed that that there was a "gross disparity in the details [Sholes] told police and what she told the public defender's investigator." The State argued that Sholes told the police that defendant and Clifton English committed the McDonald's armed robbery and murder together.

¶ 71 The State also said that there were contradictions regarding the date and time that Larry Horton went to English's house and who was present when the statements were made. According to the State, defendant's sister did not tell the police about Clifton English until two days after defendant's arrest. It argued that defendant's sister's statement was not corroborated by physical evidence.

¶ 72 The trial court asked for Clifton English's case number (93 CF 2027), and asked what count to which English had pled guilty. The trial court read that count of the indictment, which alleged that English had committed first degree felony murder of Steven Sellers on August 19, 1992. The court again took "judicial knowledge" of the Bombay murder case. The court noted that English had entered a plea of guilty *but had not yet been sentenced*. The court said, "[t]he logic of self-incrimination is obvious to me, and should be obvious to everybody." The court, however, did not make any further comments about the State's motion to exclude English's statements and took up the matter of the State's exhibits.

¶ 73 The defense objected to the introduction of a number of the State's exhibits, including a bandana (State's Exhibit 125) and a pair of black pants (State's Exhibit 127). The defense argued that there was no foundation for these exhibits. With respect to the pants, the defense argued that they did not match the "dark green army-type" description of the pants worn by the perpetrator as recounted by the witnesses. In response, the State said that the exhibits were "tied up with the defendant's own words." The defense made the same objection to the tennis shoes, *i.e.*, that there was no nexus to the offense and the tennis shoes had no probative value. Defense counsel reminded the court that the witnesses described defendant's shoes as "worn work boots."[3] The trial court overruled the defense's objections and admitted the exhibits into evidence.

¶ 74 The State moved to admit the signed typed statements of Lynn Hollingshed and Denise Davis. The trial court admitted Hollingshed's statement as substantive evidence of what

[3] None of the witnesses at trial testified as to what type of shoes the offender wore. The search warrants for the house on Alliance and Fourth Avenue listed "dark work boots" in the clothing description provided by witnesses.

defendant asked Hollingshed when defendant said, "[w]hat's the dude's name that wants to buy this gun ***" in the 2:00 a.m. telephone call on September 20, 1993. The court indicated that the parties could argue the statement's significance but it would not go to the jury. The court made the same ruling regarding Denise Davis's statement. The State rested and the defense moved for a directed verdict, which the court denied.

¶ 75 D. The Defense's Case

¶ 76 Dessie Mims testified that she was Garyln Wilks' mother. Mims said that her son and defendant were very close friends and that defendant was like a member of the family. She said that at 10:00 p.m. on September 19, 1993, she was at home with Garlyn and her daughter when defendant came by the house to borrow some clothes from Garlyn. Earlier, at about 9:30 a.m., she had left the house and walked two blocks to meet her daughter who had just gotten off of work. When Mims got back home she went upstairs to bed. Garlyn had just arrived home as she was going up the stairs. She heard someone knocking on the door and heard voices. Mims said she recognized the voices as Garlyn's and defendant's. Garlyn came upstairs, got a set of clothes for defendant and went back downstairs. She could see the roof of the car that defendant arrived in from her bedroom. She was sure that she heard defendant's voice.

¶ 77 On cross-examination Mims said that she recalled police officers coming to her house on September 24, 1993, but she did not recall their names. A detective asked to speak to her son but he was not home. She answered all of the questions the police asked. Mims denied telling the police that she did not realize the visitor she heard was defendant until the next day. She reiterated that she knew when she heard the voice that it was defendant's voice. She also denied telling the police that "it had to be sometime after 8:00 p.m." when someone knocked on her

door. Mims acknowledged that when Garlyn came upstairs she asked who was knocking at the door and he said it was defendant. She said she asked because at first she did not hear anybody.

¶ 78 Garlyn Wilks testified that he was 17 years old and was defendant's friend. He said that on September 19, 1993, at 10:00 p.m. defendant came by his house to borrow clothes. Defendant's brother Larry brought defendant to his house and remained in the car while defendant went inside.

¶ 79 On cross-examination, Wilks said that he recalled speaking to a police officer after his mother paged him (presumably on September 24, 1993). He did not recall telling the officer that the only thing he could say was that it was sometime later in the evening that defendant came to his house. Instead, he told the police that defendant came to his home at 10:00 p.m. and he left Wilks' house around 10:15 p.m. on September 19, 1993.

¶ 80 Michelle Jackson testified that on Sunday, September 19, 1993, she was working at the Charles' Street McDonald's. Just before 10:00 p.m., she was mopping the floor toward the west entrance. There was a customer near the entrance who was reading a newspaper and eating. Jackson described the man as "Italian." She then saw a man come in and put on a blue scarf. She explained that there were two doors to pass through before entering the restaurant, an outer door and an inner door. Jackson saw the man's face before he put the scarf on. Jackson said that after the man entered the restaurant, "he extended his right hand and shot the customer and then started demanding us to go to the back crew room." She said that she knew defendant before the armed robbery and murder, and that defendant was not the man that she saw that evening at McDonald's. When she first saw the offender come through the doors he was about 10 feet away from her and she could see that he had a little black dot, perhaps a birthmark, under his left

eye. This description was included in Jackson's written statement to the police on September 20, 1993.

¶ 81 On cross-examination Jackson testified that she knew defendant through a friend, Rachel Ibarra. She learned about defendant's arrest through the newspaper. She called the police to report that they had arrested the wrong person, but she could not recall the name of the officer that she spoke to. Jackson acknowledged that she spoke to the State's Attorney's office and reported that she had been threatened about potentially testifying in this case. She did not tell assistant State's Attorney Karner that they had the wrong person. She said she knew two of defendant's brothers but she could not recall when she last saw them. Jackson denied speaking to defendant's brothers about this case.

¶ 82 The defense then sought to call two witnesses who had not been specifically listed in defendant's discovery answer. One of the witnesses the defense proposed to call was Carl Hobson. The defense believed that Hobson's testimony would rebut Lynn Hollingshed's testimony. Assistant State's Attorney Karner objected, and said that the defense has had Hollingshed's statement since September or October of 1993, and called the defense strategy "trial by ambush." Defense counsel argued that they should be allowed to call Hobson because he would be a rebuttal witness and that in their discovery answer they noted that they may call any witness listed by the State. The trial court asked whether there were any other witnesses who fell in the same category as Hobson. In response, the defense said that they intended to call Melissa Pappas to rebut Hollingshed's testimony regarding defendant displaying the firearm.

¶ 83 The trial court ruled that the defense could call either Hobson or Pappas, but not both of them, as a discovery sanction. In response to the State's allegation of "trial by ambush," the defense argued that the State committed a discovery violation by not disclosing to the defendant

that Michelle Jackson stated that she had been threatened. Assistant State's Attorney Karner said he did not disclose information about the threat because he "felt it was in [Jackson's] best interest not to disclose that to the defense because thinking reasonably that maybe the defendant had something to do with that threat." The defense then made a motion for a mistrial, which the court denied.[4]

¶ 84 When the trial resumed on March 21, 1995, the trial court considered the State's motion to preclude defendant from testifying that Clifton English told him he committed the armed robbery and murder. After a lengthy discussion of case authority, the trial court said:

> "I understand your point, Mr. Public Defender. But the declarant is not available to testify; for the State to cross-examine the declarant on the statements that your client will make are hearsay. They can't cross-examine them because of the invocation of Mr. English of his Fifth Amendment right. And I am going to deny your request."

¶ 85 The defense later clarified that if called to testify, defendant would testify that he had an early morning discussion with Clifton English (presumably on the morning after the armed robbery and murder) and that a number of the facts defendant provided to the police were based on what English had told him. Assistant State's Attorney Karner then withdrew his objection to the Clifton English statements (apparently referring to the statements to defendant only). The defense then moved for reconsideration of the court's ruling as it pertained to the other witnesses to Clifton English's statements. The court denied the motion to reconsider.

¶ 86 The parties stipulated that on September 24, 1993, the police recovered a .22-caliber bullet from Clifton English's residence pursuant to a consensual search.

---

[4] In *Horton I* this court found that the trial court erred in precluding the defense from calling Pappas but determined that the error was harmless.

¶ 87 Carl Hobson testified that he had known defendant for about five years and Lynn Hollingshed for about four years. Hobson denied receiving a telephone call from defendant at 2:00 a.m. on September 20, 1993. On cross-examination Hobson said that he did not know that he would be testifying until two weeks ago when Hollingshed came over to his house and said "they" needed to talk to him (apparently referring to defense investigators).

¶ 88 Larry Horton testified that he is defendant's brother. On Tuesday, September 21, 1993, he was at Clifton English's house. English lived at 264 Winona Drive in Machesney Park, Illinois. English's home was located behind a Logli grocery store. On that day he had a conversation with English. English then gave Horton a small gun in a Logli's grocery bag. Horton identified State's Exhibit 114 as the gun English gave to him. Horton put the gun in the trunk of his car and later put it in the attic of his sister's house on Fourth Avenue. He identified photographs of the attic that the Sate had introduced. Horton identified the State's Exhibit 125, the black bandana, and said that it belonged to him and that he used it to cover his head. Horton then tried on the bandana, showing how it fit and how he tucked it under with a knot. Horton said that defendant was left-handed.

¶ 89 On cross-examination Horton acknowledged that he wanted to help his brother. He agreed to come to the police station on September 24, 1993. He denied telling Detective Scott that he swore to God he never saw a gun. He also denied telling his brother where he put the gun or that he had picked it up. The police asked him about a gun that he picked up from English and he told them where the gun was located. After he told the police where the gun was, they told him that they had a warrant to search his sister's house and they could kick the door down, he told the police "well, here's the door key, there's no need to knock the door in." He never denied seeing the gun. On re-direct, Horton was shown a three-page statement that he gave to the police

on September 24, 1993, where he told the police he knew about the gun and where it was located. The defense rested.

¶ 90 E. The State's Rebuttal Case

¶ 91 Detective William McDonald testified that at 6:30 p.m. on September 24, 1993, he went to the home of Dessie Mims and Garlyn Wilks. McDonald said that Mims told him that on September 19, 1993, she went to bed at 8:00 p.m. and that "sometime that evening she had heard a conversation downstairs with her son and somebody else." He asked Mims to be more specific about what time she heard her son speaking to someone else, but she said she could not be more specific about the time. Mims told him that she learned the identity of the other person speaking to her son the next day, September 20, 1993. At McDonald's request Mims telephoned her son, Garlyn Wilks. McDonald told Wilks that he was investigating an incident and he wanted to know the last time Wilks saw defendant or Larry Horton. Wilks asked McDonald why he wanted to know.

¶ 92 McDonald did not ask Wilks what time he saw defendant on September 19, 1993. After he asked Wilks several times about the last time he saw defendant or Larry Horton, Wilks said he did not know if he wanted to give McDonald that information. All Wilks would say was that he saw defendant and Larry Horton later in the evening on September 19th.

¶ 93 On cross-examination McDonald acknowledged that he did not ask Mims for a written statement and he did not write his report immediately after speaking to Mims. McDonald said, "I am not brain dead. I can remember for a couple of days." McDonald said he only spoke to Wilks for two or three minutes. He did not tell Wilks that defendant had been arrested. Instead, he told him that defendant was being investigated. Wilks told McDonald that he and defendant were good friends and that defendant had come over to borrow clothes on September 19, 1993.

Garlyn described the clothes. McDonald did not make arrangements for Wilks to come to the police station to give a statement.

¶ 94 Michelle Jackson was recalled by the State to establish that on September 24, 1993, she was shown a photo lineup by two detectives who came to her home. She acknowledged that when she was shown the lineup she told the detectives that she did not recognize anyone. The photo lineup contained a photo of defendant. Jackson acknowledged that she had spoken to defendant on the telephone four or five times since September 24, 1993.

¶ 95 On cross examination Jackson testified that the detective who showed her the lineup told her that they were investigating the McDonald's armed robbery and murder. She was asked to look at the photos and see if the man who committed the offense was in any of the photographs. Jackson told them that he was not. Jackson said that the night before her rebuttal testimony two detectives came to her house and told her that they were taking her downtown to ask her some questions. She was not told why she was being taken downtown, and she told the detectives that she did not want to go. She told the detectives that she was five months' pregnant and that she was sick. The detective took her downtown and interviewed her in a room for two to three hours. She vomited during the interview. During the interview Jackson maintained that her testimony that defendant was not the gunman was the truth.

¶ 96 On re-direct examination Jackson said she told her friend Karen Williams that defendant was wrongfully charged. She also called the police and told them that they had arrested the wrong person. She told the defense attorney that defendant was not the gunman when he came to her house to interview her. She was expecting assistant State's Attorney Karner to come to her house and interview her the Sunday before the trial began, but he did not show up.

¶ 97 Detective Redmond was re-called to testify that he showed Michelle Jackson a photo lineup on September 24, 1993, and she said that she did not recognize anyone in the photos. Redmond said that he participated in the Jackson's interview, which took place on March 20, 1995, the day before trial resumed. According to Redmond, Jackson voluntarily rode to the police station with him and Detective Bruce Scott. She became ill during the interview, but after using the restroom she returned. Jackson was at the station from shortly after 5 p.m. until 8:00 p.m. Jackson signed a statement at 7:45 p.m. that evening.

¶ 98 Detective Bruce Scott testified that on September 24, 1993, he interviewed Larry Horton at the Rockford police station. When Scott asked Horton if he knew anything about a gun belonging to his brother, Horton said that he did not know anything about a gun. Later that night, after a search warrant had been issued for 1411 Fourth Avenue, Horton gave the police a key to the house and told the police where the gun was located.

¶ 99 F. Closing Argument

¶ 100 During the State's closing argument assistant State's Attorney Karner told the jury that defendant's signed confession was evidence of guilt if they believed that statement. Karner argued that the testimony of Mary Casey, Dr. Blum and other witnesses corroborated the signed confession. Karner argued that Denise Davis was with defendant when he picked up the gun. Next, Karner argued that within four hours of the murder and armed robbery defendant was on the phone with Lynn Hollingshed telling him that he had to get rid of the gun. Karner contended that Denise Davis and Lynn Hollingshed proved that defendant possessed that gun the Saturday before and the Sunday immediately following the crimes. He stressed that Hollingshed brokered the transaction that put the gun into defendant's hand. Also, a week or so before the McDonald's crimes defendant said, "I need a quick way to get some money" and, when referring to the

Charles Street McDonald's, he said "I am going to get it one day." Next, Karner discussed the conversations between Hollingshed and defendant about defendant's need to sell the gun. He told the jury that Hollingshed "did something constructive" and did not give defendant the name of the person interested in the gun because he did not want to get involved. Karner argued that the "confession," combined with various witnesses he had referred to, proved that defendant was guilty beyond a reasonable doubt. He said that although the State is not required to prove motive, there was a motive in this case, and that was to get money. Karner also argued that there was a motive to kill Castaneda because, as defendant told Denise Davis, he thought the victim was a cop.

¶ 101 Defense counsel argued that the eyewitness testimony established defendant was not the person who murdered Mr. Castaneda. He argued that the physical and clothing descriptions did not match that of defendant. Counsel stressed the "boot camp type pants," the "heavy facial hair" described by Mary Casey as well as the dark complexion and the blotches underneath the offender's eyes. Counsel argued that the jury had looked at defendant for a week at that point, and it was not him. He argued that the age and weight descriptions given by the witnesses showed that the offender was not defendant. He stressed that Michelle Jackson, who saw the person's entire face, testified that the offender was not defendant.

¶ 102 Defense counsel also argued that defendant's confession was not reliable because he was interrogated by mature men who were professionals, and that defendant went to the police station to straighten things out, something a killer would not do. Counsel reminded the jury that they only had a "brief glimpse at the interrogation of [defendant]." He asked them to consider the interrogation of Michelle Jackson. Counsel contented that there was evidence of her statement,

but no evidence as to how it was taken because there was no recording. He said the police had a theory and they molded the evidence to fit that theory.

¶ 103 Counsel said that defendant's alibi witnesses were not making things up to cover up for defendant. Defendant's alibi was "iron clad" because it would be a physical impossibility for defendant to have committed the offense. The police searched everywhere for blocks and found none of the money that defendant said had fallen out of the McDonald's pouches. Defendant was trying to "build a reputation" when he talked to Denise Davis and Lynn Hollingshed, and that even they did not take defendant seriously. Counsel argued, "you know [defendant] read the paper because [he] asked, did you read the paper?" Also, the police made suggestions to defendant about the crimes, at least one of which ended up in his statement, that the killing was accidental.

¶ 104 Counsel argued that the bandana the State introduced belonged to Larry Horton, who put it on in front of the jury and it fit. He argued again that the pants the State introduced could not have been the pants the killer wore, and there was no proof that those pants even belonged to defendant. Counsel reminded the jury that the pouches that defendant said he threw out a car window were never recovered, and the police never asked defendant what happened to the gun after he hid it under the couch. The evidence showed that English had the gun most of the time, and that English gave the gun to Larry Horton on the Tuesday after the murder and the gun was in a Logli's grocery bag. The reason the gun was in the Logli's bag and was given to Larry Horton was because "Buddy" used it in the murder.

¶ 105 Assistant State's Attorney Karner began his rebuttal argument by saying, "it's become apparent that the defense has resorted to a lie in a big time of trouble."[5] Defense counsel

[5] The State's closing argument is relevant to our discussion of defendant's *Brady* claim.

objected, and the trial court told the jury that if anything was not predicated on the evidence that argument could be disregarded. Karner then said that the defense theory was not supported by a shred of evidence, and that the defense resorted to "accusing the police of manufacturing or manipulating evidence." Karner argued that Michelle Jackson obstructed justice and lied to the jury. The trial court overruled defense counsel's objection and again left it for the jury to decide whether the evidence supported that remark.

¶ 106 The attack on Jackson's credibility continued for ten pages of transcript. Karner also commented on the integrity of defense counsel, saying "[t]hey wanted to keep it quiet because they knew Michelle Jackson couldn't withstand the scrutiny of an investigation." Defense counsel repeatedly objected to these remarks, and each objection was overruled. Karner said, "[w]hy would they not want that information to get out? Information that is exculpatory, that sets their guy free." Karner argued that the defense had offered a "bologna cheap-shot accusation against the police, hoping that you will somehow get mad at the police and blame them."

¶ 107 Regarding defendant's confession, Karner argued that defendant chose to go to the police station because he knew the police had talked to his friends. Karner said, "[b]y the way, we are talking about what you observed. [Defense counsel] got up here in opening statement and made a lot of promises to you about what the evidence was going to show." Defense counsel objected to this remark. The court noted it had made certain rulings and said, "[n]ow, get on with it." Karner argued that the defense accused the police of depriving defendant of his rights and asked, "[w]here's the evidence?" Karner argued that the lack of a video or audio tape was a red herring.

¶ 108 Karner asked the jury to ask themselves why an innocent person would falsely admit to murder. He also asked why the police would falsely accuse someone and let the true killer go for

free. He argued that to buy their defense the jury had to believe something that was not in evidence. He said, "[y]ou know Detective Redmond, you make your own judgment."

¶ 109 Regarding the reliability of defendant's confession, Karner told the jury that there were four categories of evidence that proved beyond a reasonable doubt that defendant's confession was valid. Karner wrote these categories on a chalk board as he argued. He said the first category was the "volume of detail." The second category was the gun. Karner said, "[w]e heard Lynn Hollingshed testify about the phone call he got four hours after the robbery, at 2:00 in the morning, with the defendant wanting to get rid of the gun." Karner also argued, "if defendant did not possess the gun, how does he know something happened to the gun the night before, like he tells Denise Davis?"

¶ 110 Karner next argued that Lynn Hollingshed was the next category to show that the confession was valid. He told the jury that they should "understand the context of Lynn Hollingshed's testimony, he is the defendant's pal***so he is here to do as much help for him as possible." Karner reminded the jury about Hollingshed's testimony about purchasing the gun, the statement by defendant that he would rob the McDonald's one day, the statement by defendant that he needed a quicker way to get money, and the two conversations with defendant on Monday. Karner claimed that Hollingshed lied when he testified that he thought defendant was bragging. He told the jury, "[w]e know Lynn Hollingshed took the defendant seriously" because Hollingshed "refused to give defendant the name of the customer who wanted to buy the Tec-22 because he did not want to get involved. He did not want to 'get hooked into murder.'"

¶ 111 Karner continued and said that the fourth category was Denise Davis. He reminded the jury the defendant had three conversations with Davis. Defendant told Davis on Monday that

"there was a problem with the gun." The second conversation was about Davis "running off at the mouth." The third conversation was when defendant said he did it.

¶ 112 In his final summation, Karner stated, "[d]on't forget about Arthur Castaneda, he is as much (*sic*) of this case as the defendant is. He is entitled to justice just as much as the defendant." Karner told the jury that the proceedings were "a search for the truth and not an opportunity for deception," and that the truth was that defendant was guilty of first-degree murder and armed robbery.

¶ 113 The record reflects that the jury retired to deliberate at 2:10 p.m. on March 22, 1995. During their deliberations, the jury sent a note to the court which read:

> "Dear Judge Nielson,
>
> Would it be possible for us to obtain a copy of the statement of confession of John Horton? We need to verify details. Thanks, Jeanine Nuez, jury foreman."

¶ 114 Defense counsel objected to the statement going back to the jury because the statement had been redacted and the court's earlier ruling was that the statement would not go back. Karner responded that it was within the court's discretion, but that the statement would have to be redacted. The trial court directed the bailiff to tell the jury that they had all the evidence that they needed to arrive at a decision, and that their request was denied. The jury returned their verdict at 11:54 p.m. on March 24, 1995. Defense counsel did not ask for the jury to be polled.

¶ 115 Unbeknownst to the parties or the court, the record reflects that there were additional contacts between the bailiff and the jury concerning the status of their deliberations. These contacts were made a part of defendant's motion for a new trial. It was uncontested that the bailiff was told that the jury was hung and unable to reach a verdict. It was also uncontested that the bailiff, rather than informing the court of the jury's concern, told the jury, "[t]welve

reasonable people should be able to reach a verdict." In *Horton I* this court held that "while we do not condone the actions of the bailiff, we do not find that the remarks denied defendant a fair trial."[6]

¶ 116 G. Post-Trial Motions

¶ 117 Defendant filed several post-trial motions including a 46-paragraph motion for a new trial, a motion for substitution of judge for cause, and a separate motion for new trial based upon newly discovered evidence. The latter motion included an attached, notarized affidavit from Clifton English wherein he averred that he, and not defendant, was responsible for the McDonald's murder and armed robbery.

¶ 118 The motion for substitution of judge for cause was heard and denied by Judge Agnew on August 24, 1995. The next day, the case was again before Judge Nielsen. The defense argued that during the course of the trial Clifton English had communicated by letter with the Rockford Police Department and the Winnebago County State's Attorney's Office. The defense argued that this information was *Brady* material that had not been produced. Assistant State's Attorney Karner said, "[j]udge, we will produce."

¶ 119 On August 30, 1995, the trial court heard arguments on defendant's motion for a new trial. With respect to the statements of Clifton English to Felisha Horton, Larry Horton, Kristina Sholes and William Taylor, the defense argued that it had laid a proper foundation pursuant to *People v. Bowel*, 111 Ill. 2d 58 (1986) and *Chambers v. Mississippi*, 410 U.S. 284 (1979). The defense argued that English's refusal to testify and therefore his unavailability to be cross-

[6] The fact that the jury was deadlocked during their deliberations is relevant to our analysis of defendant's *Brady* claim.

examined was just one factor for the court to consider. In ruling on the motion the trial court again recited the four *Chambers* factors and said:

> "The *absence of any one* of those four or more of those four factors result in the exclusion of the statement as inadmissible hearsay. *Bell*, 96 Ill. App. 3d 867." (Emphasis added.)

¶ 120 The trial court denied defendant's 46-paragraph motion for a new trial. The parties reported that the State had not filed a written response to defendant's request for *Brady* material, but that Karner had tendered a one-page "written communication" from English "that's the subject of this case." The document was a letter that was marked Defendant's Exhibit 1, and was entered into the record. The letter, signed by Clifton English and dated June 8, 1995, is a confession by English that he and his wife, Tammy (Buresh) English, were involved in the murder and armed robbery at McDonald's on September 19, 1993, and not defendant. English claimed that he called assistant State's Attorney Karner and left him a "memo" about the fact that defendant did not commit the crimes. English also said that he had a guard at the prison where he was currently incarcerated tell Karner that defendant did not commit these crimes. English claimed that his lawyer lied to him and told him that "he was going to take care of it." English said, "I am not going to let my cousin go down for something I did." In the letter he then asked for someone to come to the prison and see him and give him something to sign. The trial court said that it had not read the letter, but to make it a part of the record.[7]

[7] This letter, which is dated June 8, 1995 and undercuts the State's argument that English waited until after he was sentenced to confess to the McDonald's murder and armed robbery, is never mentioned in *Horton I*.

¶ 121 The defense argued that the signed and notarized confession by English was newly discovered evidence. It argued that at the time of trial English refused to testify on the advice of his attorney because he was awaiting sentencing in the Bombay murder case. Counsel explained that the defense's attempts to speak with English on numerous occasions were prevented by English's lawyer. The defense relied on *People v. Molstad*, 101 Ill. 2d 128 (1984), where the Illinois Supreme Court held that affidavits of five co-defendants (of a defendant who had presented an alibi defense) each one stating that the defendant was not present at the time of the offense, was newly discovered evidence warranting a new trial. In *Molstad*, the testimony was not available at trial because such testimony would have incriminated the co-defendants who were tried and convicted along with Molstad. *Id*. at 134-35.

¶ 122 Assistant State's Attorney Karner responded to defense counsel's argument and said:

> "Judge, Clifton English this newly, quote, unquote, discovered evidence is nothing but a strategic attempt by a lying, convicted murderer to assist his cousin of (*sic*) evading responsibility for a heinous crime. This does not meet the legal standard that is applicable to this case. Our position is that it is not of such a conclusive character that it would probably change the result at trial."

¶ 123 Karner argued that English could have helped his cousin at trial, but made a "personal decision" to refuse to testify. He said that "*it was only after* Clifton English [was] sentenced to 80 years in the penitentiary for the crime of first-degree murder that he [decided] that he [was] going to clear his conscience and admit to the murder." (Emphasis added.) Karner stressed that that English's sentence was relevant and said, "Clifton English *is a walking dead*, he has *no future* in this world." (Emphasis added.) Karner argued English "[was] going to be in prison for the next 40 years" so he decided to help his cousin. He argued that the State's affidavit reflected

that English had denied involvement on September 24, 2993, when he was interviewed and said that he was at home with his girlfriend, now wife Tammy Buresh English, during the time the McDonald's crimes occurred. Karner also argued that English's affidavit lacked detail and it could "fit any one of a hundred armed robberies and murders." Citing *People v. Berberena*, 265 Ill. App. 3d 1033 (1994), the trial court denied defendant's motion for a new trial based upon newly discovered evidence. The trial court again took judicial notice of the court filed in case number 93-CF-2027, *People v. Clifton English*.

¶ 124 H. Sentencing

¶ 125 The State presented victim impact evidence from Arthur Castaneda's father. The defense presented evidence from witnesses who knew defendant and attested to his good character. The State argued that defendant had "done some bad things" based upon the typed statement defendant gave to the police regarding the attempt armed robbery of the McDonald's the morning of the armed robbery and murder. The State then said, "and we know *from Lynn Hollingshed* that the *defendant was dealing drugs*." (Emphasis added.) The defense objected, and the court overruled the objection.

¶ 126 The court commented on defendant's age only once, noting that due to his age defendant was not eligible for the death penalty. The court told defendant that Castaneda had to struggle, and said, "you, on the other hand, said I am going to take a gun and I am going to do it the easy way." The court characterized defendant as an "outlaw" and imposed and a sentence of natural life. Defendant's motion to reconsider was denied.

¶ 127 I. Direct Appeal

¶ 128 On direct appeal defendant raised seven claims of error. Appellate counsel did not challenge the exclusion of Clifton English's pre-trial statements claiming responsibility for the

armed robbery and murder at the McDonald's. Instead, defendant's appellate attorneys argued that the trial court abused its discretion in denying defendant's motion for a new trial based on newly discovered evidence, the English affidavit. In rejecting defendant's claim, this court stated:

> "At the hearing on the motion, the State argued that the evidence was not of such conclusive character that it would probably change the result at trial. We find the State's argument to be persuasive. English's confession in this case was *inherently unbelievable*. (Emphasis added.) On September 24, 1993, shortly after the McDonald's incident, Rockford police detectives interviewed English and he denied any involvement in the incident. On August 18, 1994, English pleaded guilty to murder in another case and was sentenced to 80 years in prison. Despite his earlier denial of involvement in the McDonald's incident, two years later he confessed to the crime. *At the time of his confession, English might have believed he had little to lose by confessing* to the McDonald's shooting and robbery. (Emphasis added.) Thus, the trial court could have viewed English's 'confession' as an attempt to avoid the adverse verdict rendered against his cousin, defendant." *Horton I*, pp. 27-28.

¶ 129 Defendant also raised the issue of the bailiff's *ex parte* communication with the jury. In rejecting this claim, we said, "[w]hile we do not condone the actions of the bailiff in his remarks to the jury, we do not find that the remark denied defendant a new trial." *Horton I*, p. 24.

¶ 130 This court rejected defendant's claim that the trial court erred in precluding defendant from calling English to the stand to testify to his physical features, commenting that "[b]ecause English was a black man whose stature was similar to that described by the eyewitnesses, the

jurors could have unfairly speculated that English was a suspect in the incident, therefore creating doubt of defendant's guilt." *Horton I*, p. 14.

¶ 131 Finally, on direct appeal this court rejected defendant's claim that his sentence of natural life was an abuse of discretion. This court said mitigating evidence, including defendant's young age, was before the trial court and "[w]here such evidence is before the court, it is presumed that the sentencing judge considered the evidence." *Horton I*, pg. 26 (citing *People v. Burke*, 164 Ill. App. 3d 889, 901 (1987).

¶ 132 J. Three Post-Conviction Petitions

¶ 133 Defendant filed his first *pro se* post-conviction petition on June 2, 1998, raising 14 claims of error. Throughout the 43-page petition, defendant cited to pages of the trial transcript. The record contains no written order disposing of the petition as required by section 122-2.1 of the Post-Conviction Hearing Act. 722 ILCS 5/122-2.1(a)(2) (West 1998). Instead, it appears that on July 22, 1998, the court dismissed the petition in open court and ordered that a copy of the docket sheet be sent to defendant at the Joliet Correctional Center, where defendant was incarcerated. On September 15, 1998, defendant filed a request for an extension of time to amend his *pro se* post-conviction petition. On October 14, 1998, the trial court denied the request. Defendant did not appeal from that order.

¶ 134 On July 28, 2003, defendant filed a second *pro se* post-conviction petition raising claims that were not raised in his first petition, but had been raised on direct appeal. This petition was summarily dismissed by the trial court on September 9, 2003. Defendant filed a notice of appeal on October 7, 2003. While that appeal was pending defendant filed a third *pro se* post-conviction petition on October 27, 2003, which was dismissed by written order on November 18, 2003. Defendant again appealed.

¶ 135 This court consolidated the appeals of defendant's second and third post-conviction petitions. Defendant abandoned his appeal of the dismissal of his third petition, which had raised an *Apprendi v. New Jersey*, 530 U.S. 466 (2000) claim. This court found that defendant could not satisfy the "cause" prong of the cause-and-prejudice tests and noted that defendant was clearly aware of the "alleged constitutional deprivations when he filed his first petition." *Horton II*, p. 4.

¶ 136 K. Fourth Post-Conviction Petition

¶ 137 On September 2, 2013, now with the benefit of counsel, defendant filed a 59-page motion for leave to file a successive post-conviction petition, along with the proposed successive petition, and four volumes of exhibits. In the petition defendant argued that it was timely filed because he had "advanced a cognizable actual innocence claim." As to his "non-innocence" claims, defendant argues that the delay in bringing the claims was not due to his culpable negligence.

¶ 138 Among the documents attached to defendant's petition were Rockford police department reports summarizing police interviews of Clifton English and his girlfriend, Tammy Buresh. English and Buresh lived together in a residence at 264 Winona Drive in Machesney Park, Illinois, behind a Logli grocery store. English was picked up at 8:30 p.m. on September 24, 1993, and voluntarily accompanied detectives to the Rockford police station. English consented to the search of his vehicle, residence and garage. Several rounds of ammunition were found inside the English home and garage, including the .22-caliber bullet admitted at defendant's trial.

¶ 139 English was questioned about his possible involvement in the attempt armed robbery of the McDonald's in the early morning of September 19, 1993, as well as the armed robbery and murder later that day. Detectives told English "it was clear that he had been involved and also

had knowledge of the robbery to McDonald's on September 19, 1993." English denied any involvement and provided a detailed alibi. English told the police that he got off work at 4 or 5:00 p.m. on September 19, 1993, and went home. English said Buresh got home from work at 10 or 10:30 p.m. and they then "got acquainted with the neighbors."

¶ 140 The detectives then interviewed Buresh, who said that what English said was not true. First, they did not meet the neighbors until the following Wednesday. Buresh said she worked all evening on September 19, 1993, at the Forest Hills Country Club. She also said the time cards at her work would substantiate that. She told police she arrived home at 1:00 or 1:30 a.m. on September 20, 1993, and that English was asleep. Buresh told the detectives that she was pregnant with English's child. She said that money "had been tight" and English's work for a roofing company was seasonal, and she had been putting in extra hours to pay bills before the child arrived.

¶ 141 Detectives reviewed the case with assistant State's Attorney Weber, who told police "there was not enough evidence to authorize charges against Clifton English." English was driven home by police at 2:00 a.m. on September 25, 1993.

¶ 142 In defendant's motion before this court now he asserts that there is new evidence of his actual innocence that consists of:

> "1. Sworn statements of Clifton English in the years following defendant's sentence, including a "detailed, notarized and corroborated confession" given on February 19, 2013; two statements by English to a Department of Corrections employee in 2008; a letter dated February 14, 2006 to the former Winnebago County State's Attorney from English in which he confesses to the instant offenses and stated that he was alone at the time of the McDonald's offenses.

2. Statements from witnesses who would testify that defendant never made the statements that Lynn Hollingshed claimed he made.

3. Defendant's medical records showed that defendant suffered from a knee injury in a car accident two months before the McDonald's offenses and therefore could not have been seen "running" from the scene as witnesses described."

¶ 143 Defendant supplemented his petition with an affidavit from eyewitness Robert Heral, who stated that he had read a newspaper article about the case on September 15, 2013, and that at the time of trial he did not think defendant could have been the offender because he was "lighter skinned" than the offender who was "stockier and bigger-built" than defendant.

¶ 144 Defendant's "cause-and-prejudice" claims consisted of the following:

"1. The State violated its *Brady* obligation by suppressing evidence that Hollingshed had been adjudicated delinquent for burglary, aggravated assault and resisting arrest, and he was on probation for those offenses at the time of trial. In the petition defendant also alleged that Hollingshed was a suspect in a shooting that occurred on August 28, 1993, in which Hollingshed was identified as the person who shot at a man during a traffic altercation. In support of the *Brady* claim, defendant attached a copy of the State's Attorney's Official Statement of Facts in *People v. Hollingshed*, case number 95 CF 1593, where the State provides Hollingshed's criminal history to the Department of Corrections. Defendant also refers us to *People v. Tory Taylor*, 186 Ill. 2d 439 (1999), where Hollingshed's actions during the August 28, 1993 shooting are described in detail.

2. Regarding defendant's claim of ineffective assistance of trial counsel, defendant attached affidavits of eight witnesses who, if called as witnesses, would have contradicted Hollingshed's testimony."

Defendant alleged that appellate counsel on direct appeal was ineffective for failing to challenge the exclusion of English's pre-trial statements to family members and close acquaintances.

Defendant claimed that the trial court failed to adequately consider his youth, and under *Miller v. Alabama*, 132 S.Ct. 2455 (2012), he is entitled to a new sentencing hearing.

Defendant also contended that the trial judge who denied him leave to file a successive post-conviction petition has "prejudged" his case and on remand a new judge should be assigned.

¶ 145 L. Hearing on Defendant's Motion to File

¶ 146 At the hearing on defendant's motion to file a successive post-conviction petition counsel argued that the detailed 2013 confession of Clifton English, together with his confessions to Department of Corrections employees, including a psychiatrist and other evidence was "material and not merely cumulative and of such conclusive character that it would probably change the result on retrial." Counsel said that Robert Heral's affidavit was new evidence that supported defendant's claim of actual innocence. According to Heral, he did not know he was permitted to speak to trial counsel about his concerns and therefore defendant could not have discovered this information sooner. Likewise, counsel argued than an affidavit from Dr. Christine Ward, an orthopedist, opined that defendant's knee injury from a car accident months before the offense "could prevent an individual from running for two months or more."

¶ 147 Post-conviction counsel argued that appellate counsel was ineffective for not recognizing that the case authority the trial court relied upon in excluding the English pre-trial statements against penal interest had been overruled years earlier by the Illinois Supreme Court. Post-

conviction counsel argued that the case the trial court repeatedly referenced, *People v. Bell*, 96 Ill. App. 3d 857 (1981), was overruled in 1986 by *People v. Bowel*, 111 Ill. 2d 58, 68 (1986). The defense also cited *People v. Kokoraleis*, 149 Ill. App. 3d 1000 (1986), an opinion from this court. Counsel argued that the trial court's error in excluding English's statements "cut the legs out from underneath" the defense and appellate counsel should have seen this. Counsel recited the relationships of the various witnesses and the details English provided. Counsel noted that it specifically knew from the jury forewoman that the jury wanted to hear "more from Clifton English."

¶ 148 As to ineffective assistance of trial counsel, the defense argued that the witnesses who would have contradicted Hollingshed were all local, within the subpoena power of the court and should have been called as defense witnesses.

¶ 149 Defense counsel argued that defendant has established cause for failure to bring the ineffective assistance of trial and appellate counsel sooner because, as a 17 year old with no criminal history, he was "ill equipped to find constitutional or legal error at his trial or on his appeal." Counsel argued that "trained legal professionals who should have known better" missed the *Chambers* issue.

¶ 150 The defense contended that the State relied heavily on the testimony of Lynn Hollingshed, who the prosecutor referred to in both opening and closing statements. Hollingshed's prior adjudications and probationary status provided motive for him to give favorable testimony to the State. The defense only found out about Hollingshed's background because one of defendant's post-conviction attorneys, Joshua Tepfer, represented a co-defendant of Tory Taylor in an unrelated case.

¶ 151 The August 28, 1993 shooting involving Taylor and Hollingshed was investigated by Detective Pozzi, who was also responsible for finding Hollingshed to interview him regarding the McDonald's crimes. Counsel argued that it was clear that "Hollingshed's role as the shooter" raised the possibility that he either received or expected favorable treatment in exchange for his statements and testimony against defendant. Counsel said that had the jury known these facts they would have known that Hollingshed's testimony lacked credibility. The suppressed evidence would have also undermined the strength of defendant's confession and therefore the outcome of defendant's trial would have been different.

¶ 152 Finally, defense counsel argued that this court has held that *Miller v. Alabama*, 567 U.S. 132 S. Ct. 2455 (2012), applies retroactively and that while defendant's sentence was not a mandatory life sentence, other courts have applied *Miller* to a discretionary sentence. See *People v. Luciano*, 2013 IL (2d) 110792, ¶ 57.

¶ 153 The State argued that the Clifton English confession was not new, despite the additional details provided in the 2013 affidavit. The State pointed out that the appellate court had labeled Clifton English's confession as "inherently unreliable' and "repeatedly telling an inherently unreliable story doesn't make it unreliable (*sic*)." Regarding defendant's injured knee and the affidavit of Bob Heral, the State maintained that neither piece of evidence qualified as new.

¶ 154 Regarding defendant's cause and prejudice claims, the State first argued that defendant could not establish a *Brady* violation. The State argued that "they can impeach Lynn Hollingshed all day long. The appellate court says he's just cumulative." The State contended that this same reasoning applied to defendant's claim of ineffective assistance of trial counsel because Hollingshed was "certainly not a key pillar in this case."

¶ 155 Next, the State argued that defendant could not establish prejudice resulting from appellate counsel's failure to challenge the trial court's ruling that barred English's pre-trial admissions because the appellate court had "already told us that Clifton English's confessions [were] inherently unreliable." This case was a typical post-conviction case, where Clifton English was going to "take one for the team of the family, [admit] to doing the crime because *we know* Clifton English is serving an 80-year sentence on a murder rap." (Emphasis added.)

¶ 156 The court asked the State whether the trial judge did a "*Chambers* analysis." The special prosecutor said that he couldn't tell from the appellate court decision. The court then asked the State:

> "Okay. Because when you say that they concluded that English's testimony was unreliable, I'm wondering what the context for that determination, if they had the benefit of a proffer by the trial court, trial counsel, that these are the witnesses, this is what they would say. Even though the trial court excluded that evidence, I'm just curious if they had the benefit of that or not."

¶ 157 The special prosecutor then directed the trial court to pages 26 through 28 of *Horton I*, where this court upheld the trial court's denial of defendant's motion for a new trial based upon newly discovered evidence.

¶ 158 The court ruled that defendant's actual innocence claim was barred by *res judicata* and waiver. The court noted that defendant had raised the confession of Clifton English in his initial appeal and in subsequent post-conviction petitions. The court said that the confession was "the foundation for the actual innocence claim, and it's because his foundational claim fails, and it is because his foundational claims fails (sic) that the rest of the actual innocence claim is barred." The court noted that with respect to the medical records and testimony, due diligence had not

been shown and this claim was also waived. The court ruled that the Heral affidavit was not "new" because Heral testified at trial, was subject to cross-examination, and Heral's proposed testimony would not have changed the outcome of the trial.

¶ 159 The court rejected the remaining cause and prejudice claims. As to the *Brady* claim, the court said that even if it believed that the State withheld the information, it was "not exculpatory as required in a *Brady* claim and *would not* have affected the outcome of the trial." (Emphasis added.) The court added that defendant failed to show valid cause and prejudice as required. The court then ruled that defendant had not shown ineffective assistance of trial counsel because the decision not to call witnesses to impeach might have been based on the criminal backgrounds of those witnesses. The court also said that those witnesses would have been cumulative and therefore did not create a reasonable probability that the result of the trial would have been different.

¶ 160 Regarding the claim of ineffective assistance of appellate counsel, the court said, "[t]he Second District reviewed the defendant's claims *de novo* and thus had the complete trial records." The court noted that the trial judge had cited to *Bell*, but it excluded English's statements "under propositions one and four." The court then confused the trial judge's ruling excluding English's pre-trial admissions with this court's analysis of English's confession, stating:

> "Furthermore, as stated previously, the court found that the, quote, 'newly discovered' evidence of Clifton English would not have changed the result of the trial. Specifically, the court stated that the Clifton English confession in this case was inherently unbelievable, even with the proffers of Felicia Horton, Larry Horton, Kristina Sholes and John Horton himself, citing to the record."

¶ 161 Quoting directly from *Horton I*, the trial court then referred to this court's explanation that the trial judge might have viewed English's confession "as an attempt to avoid the adverse verdict rendered against his cousin." The court said, "[t]he Second District found the trial court did not error (*sic*) in denying (*sic*) the State's motion and did not error (*sic*) in denying defendant's motion for new trial." The trial court held that "defendant here has failed to overcome the strong presumption that appellate counsel's representation was not sound appellate strategy." The court also found that defendant's ineffective assistance claims were waived because he had not shown any objective factors that impeded his efforts to raise the claims earlier.

¶ 162 Finally, the trial court rejected defendant's claim that he was entitled to a new sentencing hearing. It ruled that *Miller* did not provide for collateral relief where a juvenile's natural life sentence was imposed as a result of an exercise of discretion as opposed to a mandatory life sentence. The court noted that the pre-sentence report included defendant's age and that the trial judge was presumed to have considered any evidence of mitigation before it. The court also denied defendant's post-conviction discovery motion.

¶ 163 M. The Clifton English Case File No. 93 CF 2027

¶ 164 During the course of the trial and during hearings on defendant's post-trial motions the trial court took judicial notice of Clifton English's case file, No. 93 CF 2027 (the Bombay murder case). The records on appeal in defendant's direct appeal (*Horton I*) and his appeal from the dismissal of his second and third post-conviction petitions (*Horton II*) did not contain the English court file. In his opening brief, defendant pointed out that the Illinois Department of Corrections' website shows that English is serving a 66-year sentence and not an 80-year sentence, as the State had represented at various times, including its argument in response to

defendant's motion to request to file a successive post-conviction petition. The State does not address this discrepancy in its brief. On this court's own motion, with notice to the parties, we ordered the record in this case to be supplemented with the case file in *People v. English*, No. 93 CF 2017.

¶ 165 The English record reflects that Clifton English was arrested in the Bombay murder case on September 29, 1993, after he had been the subject of a court-ordered eavesdropping device worn by Tammy Buresh. The State's discovery answer listed many of the same witnesses that were listed or called in defendant's case, including Larry Horton, Tammy Buresh, Detectives Redmond and Forrester and Kristina Sholes. The prosecutor in the English case was also assistant State's Attorney Mark Karner. Because the public defender was representing defendant, private counsel was appointed to represent Clifton English. On December 2, 1993, the State announced that it would seek the death penalty in English's case.

¶ 166 On December 21, 1993, the State filed an application for a subpoena for the production of a journalist's notes of an interview conducted with English that was published in an article in the Rockford Register Star on December 12, 1993. A copy of the article was attached to the motion. In the article, English stated, "Horton's family gave police information about the Bombay killing in an attempt to make things easier for the teenage Horton." English also said, "[r]ight now, I'm mad because blood is supposed to be thicker than water."

¶ 167 On October 18, 1994, English waived his right to a jury trial and entered a plea to one count of first degree murder (felony murder predicated on armed robbery). The docket sheet shows that there were "open plea negotiations submitted" that the trial judge accepted (apparently referring to the State's withdrawal of its intent to seek the death penalty). The trial judge ordered a pre-sentence report to be completed within 20 days. The record shows that the

pre-sentence report was sent to the State and English's attorney on November 8, 1994. The sentencing hearing was repeatedly continued. On January 12, 1995, the hearing was set for March 19, 1995. The docket sheet shows that on March 2, 1995, Karner appeared and, on the State's motion, took the case off the March 19, 1995, call. The cause was then continued to April 21, 1995 at 9:30 a.m. for a sentencing hearing. (Defendant's trial began on March 14, 1995, and ended on March 22, 1995.)

¶ 168 On June 14, 1995, English was finally sentenced to 80 years' imprisonment in the Illinois Department of Corrections. In the Official Statement of Facts filed on June 16, 1995, and submitted by assistant State's Attorney Karner to the Department of Corrections, the State noted that when interviewed by detectives on September 28, 1993, Tammy Buresh said, "[d]uring their relationship they were broke and the defendant frequently said that he could make a 'hit.' She knew this was in reference to committing a robbery." The official statement also referred to defendant's confession to Kristina Sholes that he committed the Bombay murder and that Tammy Buresh drove him to the restaurant.

¶ 169 The record shows that on June 19, 1995, Clifton English filed a *pro se* motion to withdraw his plea in the Bombay murder case. In a supplemental *pro se* motion to withdraw his plea, English alleged that his lawyer told him that the State wanted an open plea "for 20-40 and will drop the death penalty and [he] would not get life." English also asserted that he was not eligible for an extended term. In a July 13, 1995, *pro se* motion to reduce his sentence, English alleged that at the time of his arrest he had a job as a roofer and he was supporting his family.

¶ 170 The record indicates that little or no action was taken on English's *pro se* pleadings. On August 3, 1995, the docket shows that Karner was present on behalf of the State and Peter Nolte, defendant's appointed counsel, was also present. On defendant's motion, the cause was

continued to September 7, 1995 at 9:00 a.m. for status. On that date, neither party appeared. English wrote numerous letters to the clerk of the court and to the trial court trying to find out the status of his motion. On May 21, 1996, the clerk of the court wrote English and informed him that no ruling had yet been made on his motion, and suggested that English contact "[a]ttorney Peter Nolte for further assistance." On July 11, 1996, English filed a motion to proceed *in forma pauperis* and requested free transcripts. This motion was heard and denied on July 25, 1996 with Karner present for the State.

¶ 171 The docket sheets show no action on English's *pro se* motions to withdraw his plea and reduce his sentence was taken until February 13, 1998, and on that date the matter was continued to April 1, 1998. The docket entry for April 1, 1998, states, "[d]eft's motion for withdrawal of guilty plea and reduction of sentence is heard and denied for want of jurisdiction."

¶ 172 On October 10, 1998, English filed a *pro se* post-conviction petition alleging, in part, that his attorney misrepresented the sentence he would receive by telling him he would get 40 years and he received an 80 year sentence. On March 18, 1999, the court appointed counsel for defendant. New counsel, Patrick Brown, was appointed on April 8, 1999. The docket entry for June 10, 1999, states in part, "[m]atter continued for status on Deft's motion to vacate guilty plea (filed but never ruled upon)." Finally, on June 19, 2003, defendant's motion was resolved "by agreement of the parties, the sentence herein is reconsidered and reduced to 66 years D.O.C."

¶ 173 II. ANALYSIS

¶ 174 The Post-Conviction Hearing Act provides an opportunity for an imprisoned defendant to assert that his or her federal or state constitutional rights were substantially violated in his or her trial or at sentencing. 725 ILCS 5/12201(a) (West 1998); *People v. Pitsonbarger*, 205 Ill. 2d 444, 445 (2002). A post-conviction proceeding is a collateral attack on a prior conviction and

sentence; it is not a substitute for a direct appeal. *People v. Davis*, 2014 IL 115595, ¶ 13. A post-conviction proceeding allows inquiry into constitutional issues that were involved in the original proceedings (plea, trial or sentencing) "that have not been, and could not have been, adjudicated previously on direct appeal." *People v. Towns*, 182 Ill. 2d 491, 502 (1998). "Accordingly, issues that were raised and decided on direct appeal are barred from consideration by the doctrine of *res judicata*, issues that could have been raised but were not are considered forfeited." *Davis*, 2014 IL 115595, ¶ 13 (quoting *People v. Ortiz*, 235 Ill. 2d 319, 329 (2009)).

¶ 175 It is well-settled that the Post-Conviction Hearing Act contemplates the filing of a single post-conviction petition. 725 ILCS 5/122-1(f) (West 1998). As a result, a defendant faces "immense procedural default hurdles when bringing a successive post-conviction petition. Because successive petitions impeded the finality of criminal litigation, these hurdles are lowered in very limited circumstances." *Davis*, 2014 IL 115595, ¶ 14 (citing *People v. Tenner*, 206 Ill. 2d 381, 392 (2002)). Our supreme court has identified two bases upon which the bar against successive petitions will be lowered. *People v. Sanders*, 2016 IL 118123, ¶ 24. The first is when the defendant satisfies the "cause-and-prejudice" test. *Id.*; 725 ILCS 5/122-1(f) (West 2002).

¶ 176 Cause is established by a showing that some objective factor external to the defense impeded the defendant's ability to raise the claim in the initial post-conviction proceedings. *People v. Coleman*, 2013 IL 113307, ¶ 82. In order to establish prejudice, "the defendant must show the claimed constitutional error so infected his trial that the resulting conviction violated due process." *Pitsonbarger*, 205 Ill. 2d at 464.

¶ 177 A defendant must obtain leave of the trial court prior to filing a successive post-conviction petition. "Section 122-1(f) does not provide for an evidentiary hearing on the cause-

and-prejudice issue and, therefore, it is clear that the legislature intended that the cause-and-prejudice determination be made on the pleadings prior to the first stage of post-conviction proceedings." *People v. Smith*, 2014 IL 115946, ¶ 33. A defendant "must establish cause and prejudice as to each individual claim asserted in a successive petition." *Pitsonbarger*, 2015 Ill. 2d at 463. "Well-pleaded factual allegations of a post-conviction petition and its supporting evidence must be taken as true unless they are positively rebutted by the record of the original trial." *Sanders*, 2016 IL 118125, ¶ 48. Leave of court to file a successive petition should be denied only when it is clear that after considering the successive petition and supporting materials, "the the claims alleged by the petitioner fail as a matter of law or where the successive petition with supporting documentation is insufficient to justify further proceedings." *Smith*, 2014 IL 115946, ¶ 35 (citing *People v. Edwards*, 2012 IL 111711, ¶ 29).

¶ 178 The second basis upon which the bar to successive post-conviction petitions may be relaxed is for a fundamental miscarriage of justice claim, also referred to as an actual innocence claim. In *People v. Washington*, 171 Ill. 2d 475 (1996), our supreme court held that "as a matter of Illinois constitutional jurisprudence that a claim of newly discovered evidence showing a defendant to be actually innocent of the crime for which he was convicted is cognizable as a matter of due process." *Id*. at 488. The fundamental miscarriage of justice exception requires that defendant demonstrate actual innocence. "The evidence of actual innocence must be: (1) newly discovered; (2) not discoverable earlier through the exercise of due diligence; (3) material and not merely cumulative; and (4) of such conclusive character that it would probably change the result on retrial." *Sanders*, 2016 IL 118123, ¶ 24 (citing *People v. Edwards*, 2012 IL 111711, ¶ 32 and *People v. Morgan*, 212 Ill. 2d 148, 154 (2004)). Under this exception, "leave of court should be granted where petitioner's supporting documentation raises the probability that 'it is

more likely than not that no reasonable juror would have convicted the petitioner in light of the new evidence.'" *Edwards*, 2012 IL 111711, ¶ 24 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). In *Edwards*, our supreme court noted that the United States Supreme Court has emphasized that such claims must be supported "with new reliable evidence—whether it be exculpatory, scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Edwards*, 2012 IL 111711, ¶ 32.

¶ 179 In *Schlup v. Delo*, 513 U.S. 298 (1995), the United States Supreme Court stated that in evaluating a claim of "actual innocence," a reviewing court is allowed "to consider the probative force of relevant evidence that was either excluded or unavailable at trial." *Id*. at 327-28. The court went on to say, "[t]he habeas court must make its determination concerning the petition's innocence 'in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have been available only after the trial." *Id*. (quoting 38 U. Chic. L. Rev. at 160).

¶ 180 Since there are no factual issues at the request to file stage, the questions involved are legal, requiring the reviewing court to make its own independent assessments of the allegations of the petitions and its supporting documentation. This suggests *de novo* review. Our supreme court noted in *Edwards* that "[g]enerally, decisions granting or denying leave of court are reviewed for abuse of discretion." *Edwards*, 2012 IL 111711, ¶ 30. The court went on to note that leave of court to file under the fundamental miscarriage of justice exception should be denied "only in cases where, as a matter of law, no colorable claim of actual innocence has been asserted. This suggests *de novo* review." *Id*.

¶ 181 With respect to cause-and-prejudice claims, our supreme court applied *de novo* review to the issue of the statutory construction of section 112-1(f) of the Act. 725 ILCS 5/122-1(f) (West

2002); *People v. Smith*, 2014 IL 115946, ¶ 21. The court did not definitively say which standard of review applies to the denial of a leave to file a successive petition based upon a cause-and-prejudice claim. However, the court stated that "leave of court to file a successive post-conviction petition should be denied when it is clear, from a review of the successive petition and the documentation submitted by the petitioner, that the claims alleged by the petitioner fail as a matter of law or where the successive documentation is insufficient to justify further proceedings." *Id*. ¶ 35 (citing *Pitsonbarger*, 205 Ill. 2d at 463). Illinois appellate courts have applied a *de novo* review to the denial of requests to file successive post-conviction petitions based upon cause-and-prejudice claims. *People v. Crenshaw*, 2015 IL App (4th) 131035 ¶ 38; *People v. Gillespie*, 407 Ill. App. 3d 113, 124 (2010). Accordingly, we will review *de novo* the trial court's denial of defendant's motion for leave to file his successive post-conviction petition as to each of his claims. We address defendant's claims in the order presented to the trial court.

¶ 182 A. Fundamental Miscarriage of Justice

¶ 183 Defendant's actual innocence claim revolves around the February 19, 2013, sworn, detailed confession of Clifton English to the September 19, 1993, McDonald's armed robbery and murder. Defendant argues that the details in English's 2013 confession provide so many indicia of reliability that it must be considered new. He claims that the trial court erroneously equated English's repeated and corroborated post-1995 confessions with English's brief post-trial affidavit that was discounted, in part, because it lacked detail. Defendant argues that in addition to the details provided by English, other evidence supports the claim that English, and not defendant, is the perpetrator. This other evidence includes: (1) eyewitness accounts of the physical characteristics of the perpetrator more closely resembles English; (2) English is right-handed whereas defendant is left handed; (3) the McDonald's manager Patrick Kenney believed

the same person committed a 1992 armed robbery of the McDonald's and the instant 1993 offenses, and English also confessed to the 1992 armed robbery; (4) English was a career criminal who committed a similar armed robbery and murder, whereas defendant had no record of conviction; and (5) English gave a false alibi on September 24, 1993, when the police questioned him. English's future wife, Tammy Buresh, told the police that contrary to what English stated, she was not with him the night of the armed robbery and murder at the McDonald's, and her work records at Forest Hills Country Club would substantiate that information.

¶ 184 Here, the State argues that Clifton English's 2013 confession, as well as the other confessions by English over the years, are not "newly discovered." The State also argues that this court's holding in *Horton I* is *res judicata* and bars re-litigating the reliability of English's post-trial confession.

¶ 185 We agree with the State that Clifton English's 2013 confession is not new. To qualify as newly discovered evidence, the evidence must have been unavailable at trial and could not have been discovered sooner through due diligence. *People v. Coleman*, 2013 IL 113307, ¶ 96. The record reflects that Clifton English fully cooperated with defendant's efforts to obtain a new trial. The details that defendant claims are new could have been, and should have been, included in defendant's post-trial motion, or at the very least, in his original *pro se* post-conviction petition (ineffective of assistance of trial counsel for failure to obtain details). Re-packaging English's confession in support of defendant's actual innocence claim undermines any suggestion of diligence. We also note that none of the "other evidence" corroborating English's confession is new. This "other evidence" certainly does add to defendant's claim that he is innocent. However, the claim's foundation is English's confession. The cases relied on by defendant for

his argument that he should be allowed to go forward with his claim involved affidavits from witnesses who were new and could not have been discovered sooner. See *People v. Ortiz*, 235 Ill. 2d 319, 335 (2009) and *People v. Williams*, 392 Ill. App. 3d 359 (2009). We therefore hold that defendant has failed to establish that English's 2013 confession satisfies the "newly discovered" element of a colorable actual innocence claim.

¶ 186 Post-conviction petitions are subject to the doctrine of *res judicata*, so that all issues actually decided on direct appeal or in the original post-conviction petition are barred from being re-litigated in subsequent petitions. *People v. Blair*, 215 Ill. 2d 427, 443 (2005). That doctrine applies to all claims of actual innocence insofar as the claims are not new or predicated upon new evidence. See *People v. Ortiz*, 235 Ill. 2d 319, 332 (2009). In *Horton I* this court held that "English's confession in this case was inherently unbelievable." This holding bars re-litigation of the reliability of English's confession, whether or not new details are added. *People v. Turner*, 206 Ill. 2d 381, 393 (2002).

¶ 187 We note that this court's holding in *Horton I* was due, at least in part, to this court's acceptance of the State's argument that English "pleaded guilty to murder in another case and was sentenced to 80 years in prison." The State *never* informed either the trial judge or this court that English had filed a motion to withdraw his guilty plea. The doctrine of *res judicata* may only be relaxed where a claim is based upon facts that do not appear on the face of the trial record. See *People v. Easley*, 192 Ill. 2d 307, 318 (2010). The State's argument created the impression that English had accepted his fate and had nothing to lose by confessing to the McDonald's armed robbery and murder, and in the process help his young cousin avoid a murder conviction. There are circumstances when the failure to make a disclosure is the equivalent of an affirmative misrepresentation. Rule 3.3 of the Illinois Rules of Professional Conduct (eff. Jan. 1,

2010). In the present case, post-conviction counsel was aware of the fact that English was serving a 66 year sentence and not the 80 year sentence that the State argued on direct appeal and at the hearing on the motion for leave to file the successive post-conviction petition. It appears that neither party bothered to review the English file in the Bombay murder case, despite the fact that the trial court took judicial notice of that file. While we have the power to raise un-briefed issues on appeal, we refrain to do so where "it would have the effect of transforming this court's role from that of jurist to advocate. *People v. Givens*, 237 Ill. 2d 311, 328 (2010). One would expect that post-conviction counsel would have at least asked Clifton English how his sentence was reduced from 80 to 66 years.

¶ 188 Defendant's argument that Bob Heral's affidavit is new fails. The facts related by Heral, which must be taken as true, were well known to defendant. The perpetrator was heavier, older and had a darker complexion than defendant. At trial, defense counsel emphasized this discrepancy during closing argument. Evidence "is not newly discovered when it presents facts already known to a defendant at or prior to trial, though the source of the facts may have been unknown, unavailable or uncooperative." *People v. Collier*, 387 Ill. App. 3d 630, 637 (2008). Furthermore, Heral's information is cumulative to the testimony of Mary Casey, who described the perpetrator as having a "dark" complexion and Michelle Jackson's testimony that defendant was not the armed robber and murderer. See *People v. Morgan*, 212 Ill. 2d 148, 154 (2004) (newly discovered evidence must be material and non-cumulative).

¶ 189 Defendant argues that medical evidence establishing that he could not have run from the scene is new because post-conviction counsel first learned about the car accident from other affiants, not defendant himself. After defendant confirmed this information, post-conviction counsel found the records to corroborate the fact that defendant had suffered a knee injury prior

to the McDonald's armed robbery and murder. Defendant explains that he did not bring the information about his knee injury forward sooner because he was "ignorant of the process—being an innocent teenager" without experience in the criminal justice system. Ignorance of the law does not justify the delay. See *People v. Evans*, 2013 IL 113471, ¶ 13 (citing *People v. Lander*, 2015 Ill. 2d 577, 588 (2005) and *People v. Boclair*, 202 Ill. 2d 89, 104-05 (2002)).

¶ 190 In sum, we agree with the State that the evidence defendant offers to support his claim of actual innocence is not new within the framework of the fundamental miscarriage of justice exception. We also agree with the State that this court's decision in *Horton I* is *res judicata* to defendant's claim that English's 2013 confession raises "the probability that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." See *People v. Edwards*, 2012 IL 111711, ¶ 33.

¶ 191 B. Cause-and-Prejudice

¶ 192 Next, defendant argues that the trial court erred in denying defendant's request to file his claim that the State violated its discovery obligation under *Brady v. Maryland*, 373 U.S. 83 (1963). He argues that Lynn Hollingshed has provided "crucial evidence" for the State. However, the State suppressed evidence that Hollingshed "had tremendous motive" to curry favor with the State. Specifically, Hollingshed: (1) had two prior juvenile adjudications; (2) was on juvenile probation at the time of his trial testimony; and (3) had been identified, yet never charged, as the gunman in a shooting just weeks prior to when his cooperation in this case began. Defendant argues that he has established cause for his failure to file his *Brady* claim sooner. Post-conviction counsel discovered Hollingshed's involvement in the 1993 shooting by sheer luck because he represented Tory Taylor, who was convicted of aggravated discharge of a firearm under the theory of accountability for the August 28, 1993 shooting in which

Hollingshed was named as the shooter. *People v. Taylor*, 186 Ill. 2d 439, 443 (1999). Post-conviction counsel could not access Hollingshed's juvenile records and proceedings because they are confidential. See 705 ILCS 405/1-8 (West 2012). Post-conviction counsel discovered Hollingshed's juvenile record by examining an adult criminal file from 1996 that included pre-trial bond reports and an Official Statement of Facts by the State's Attorney's Office that listed Hollingshed's prior adjudications.

¶ 193 The State maintained in its brief that "is is questionable whether defendant has shown cause where the only evidence in support of Hollingshed having prior juvenile adjudications is contained in a State's Attorney's Statement from another, later case involving Hollingshed." At oral argument before this court the State withdrew this argument and acknowledged that defendant had established cause for the purpose of filing his *Brady* claim. As to Hollingshed's involvement in the shooting, the State argues that defendant did not carry his burden by "speculating that an agreement existed" between Hollingshed and the State in this case. It argues that Hollingshed might have received leniency in the shooting case "in exchange for his work with the police on some other matter, unrelated to defendant's case." The State's "cause" argument has a hollow ring. "A rule thus declaring 'prosecutor may hide, defendant must seek' is not tenable in a system constitutionally bound to accord defendants due process." *Banks*, 450 U.S. at 696. We find as a matter of law that defendant has established cause.

¶ 194 As to the prejudice prong, the State does not dispute that Hollingshed provided important testimony. However, the State argues that Hollingshed's testimony was cumulative to the testimony of Denise Davis. Also, defendant's confession was deemed to be voluntary, therefore defendant cannot show that it is reasonably probable that the result of the proceeding would have been different had the suppressed impeachment been disclosed.

¶ 195 We reject the State's suggestion that defendant is required to show an explicit or implicit offer of leniency. In *Triplett*, our supreme court made it clear that a defendant need not show that there has been a promise of leniency before inquiring into a witness' possible bias, interest or motive. *Triplett*, 108 Ill. 2d at 476. "Further, defense counsel is entitled to inquire into such promises or expectations whether based on fact or imaginary." *Id*. at 486 (quoting *People v. Freeman*, 100 Ill. App. 3d 478, 481 (1981)). The fact that a witness is a minor or that no formal charges have been filed does not operate to restrict the permissible scope of cross-examination necessary to develop matters that tend to impeach a witness' fairness or impartiality. *Triplett*, 108 Ill. 2d at 477 (citing *People v. Merz*, 122 Ill. App. 3d 972, 977 (1984)). In the instant case, the shooting that Hollingshed was involved in occurred on August 28, 1993. See *People v. Taylor*, 186 Ill. 2d 439, 442 (1999). The Rockford police were well aware of Hollingshed's involvement. He was identified as the passenger in a vehicle who, during a traffic altercation, exited the vehicle and fired two shots in the direction of the victim; one bullet "whizzed by Edward Dawson's ear." *Id*. at 443.

¶ 196 In order to establish a *Brady* violation, defendant must make a showing that: (1) the undisclosed evidence is favorable to the accused because it is either exculpatory or impeaching; (2) the evidence was suppressed by the State either willfully or inadvertently; and (3) the accused was prejudiced because the evidence was material to guilt or punishment. *People v. Beaman*, 229 Ill. 2d 56, 73-74 (2008) (citing *People v. Burt*, 205 Ill. 2d 28, 47 (2007)). "Évidence is material if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed." *Id*. (citing *People v. Harris*, 206 Ill. 2d 293, 311 (2002)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985) (superseded by constitutional

amendment on other grounds). In making the materiality determination we must consider the cumulative effect of all the suppressed evidence rather than considering each item of evidence individually. *Beaman*, 229 Ill. 2d at 74. When a reviewing court finds a *Brady* violation, "the constitutional error cannot be found harmless." *Id*. In applying the materiality standard the suppressed evidence must be evaluated in the context of the entire record. *United States v. Agurs*, 427 U.S. 97, 112 (1976) (overruled on other grounds).

¶ 197 Information that "may cast doubt on the credibility of a State witness tends to negate the guilt of the accused and must be disclosed." *People v. Sharrod*, 271 Ill. App. 3d 684, 688 (1995). This information encompasses both probationary status and juvenile adjudication of a testifying witness. *Id*. (citing *People v. Redmond*, 146 Ill. App. 3d 259 (1986)). Likewise, the fact that a witness is under investigation or has pending charges may be used to impeach the witness by showing that he or she is motivated to assist the prosecution in order to receive leniency from the State. *People v. Godina*, 223 Ill. App. 3d 205, 210 (1991). The "exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *People v. Triplett*, 108 Ill. 2d 463, 482 (1985) (quoting *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974)).

¶ 198 Illinois Supreme Court Rule 412(c) (eff. March 1, 2001), which incorporates *Brady's* requirements, places no limits on the type of material that might negate the guilt of the accused. The rule requires that the State make a good-faith effort to identify by description or otherwise any material disclosed pursuant to this section. After carefully examining the entire record we find that the State failed to disclose Hollingshed's record of adjudication, his probationary status and the fact that he was a suspect in a shooting investigation.

¶ 199 The State argues that given that there was other evidence of the same nature and strength as Hollingshed's testimony, coupled with defendant's confession, there is no prejudice demonstrated. The State directs our attention to *People v. Harris*, 2013 IL App (1st) 111351 and *People v. Wingate*, 2015 IL App (5th) 130189 as support for its position.

¶ 200 In *Harris*, the State failed to disclose that a non-testifying witness had recanted her identification of defendant outside of a liquor store where shootings had occurred. The appellate court upheld the trial court's dismissal of the *Brady* claim in *Harris* noting that: (1) the witness was not an eyewitness; (2) two eyewitnesses identified the defendant; (3) the defendant was in possession of the distinctive type of weapon and ammunition used in the murder; and (4) the defendant fled and lived under an assumed name. *Harris*, 2013 IL App (1st) 111351, ¶ 53. The appellate court also stated that the recantation was "not exculpatory or even 'favorable' to Harris. If no witness placed Harris in the parking lot several minutes after the shootings, it would not make it less likely that he was, in fact, the shooter." *Harris*, 2013 IL App (1st) 111351, ¶ 57. The State's reliance on *Harris* is misplaced. The *Brady* claim in that case did not involve multiple sources of impeachment evidence of an important witness.

¶ 201 The State cites *Wingate* for the proposition that evidence that merely impeaches does not generally justify post-conviction relief. *Wingate*, 2015 IL App (5th) 130189, ¶ 24. However, *Wingate* is not on point here because in that case, the claim was an actual innocence claim based upon newly discovered evidence. *Id.* ¶ 20. The very point of defendant's *Brady* claim is that the suppressed evidence could have been used to impeach a crucial state witness.

¶ 202 It is not enough for defendant to establish that the State suppressed impeachment evidence. He must establish that prejudice resulted because Hollingshed was a material witness

and that had the suppressed evidence been disclosed there is a reasonable probability that the result of the trial would have been different. *Beaman*, 229 Ill. 2d at 74.

¶ 203 The verdict in this case was already of questionable validity. On direct appeal, this court found error by the trial court in excluding Melissa Pappas from testifying. *Horton 1* at p. 16. This court also stated, "[w]hile we do not condone the actions of the bailiff in his remark to the jury, we do not find that the remark denied defendant a fair trial." *Horton I*, p. 24. In addition to these errors, it is clear that the jury was concerned with the details of defendant's confession. As the United States Supreme Court stated in *Agurs*, "[i]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Agurs*, 427 U.S. at 113.

¶ 204 Defendant argues that Hollingshed's testimony was crucial to the State's case and not merely cumulative, as the State argues. We agree with defendant. Hollingshed's testimony was cumulative to Denise Davis' testimony *only* in one aspect, as this court noted in *Horton I*. Both Davis and Hollingshed provided testimony "to having seen defendant with the Tec-22." *Horton I*, pp. 16-17. This testimony related to seeing defendant with the gun weeks before, as well as the night before, the McDonald's armed robbery and murder. Hollingshed testified that he arranged defendant's purchase of the murder weapon weeks before the McDonald's armed robbery and murder. Hollingshed was the only witness to testify to seeing defendant with the gun after the shooting. Hollingshed was the only witness to testify that defendant said he planned to rob the McDonald's. He was also the only witness to testify to the September 25, 1993, telephone call at 2:00 a.m. in which defendant asked for the name and number of the person interested in buying the gun.

¶ 205 The way the State argues the witness' credibility sheds light on the materiality of the undisclosed impeachment evidence. See *Banks v. Dretke*, 540 U.S. 668, 702 (2004). The State painted Hollingshed as defendant's "pal" who, if anything, would try to help defendant. Denise Davis, on the other hand, had a possible bias against defendant as his ex-girlfriend. At the time of the McDonald's shooting defendant was dating someone else, Melissa Pappas. The importance of Hollingshed's testimony is reflected in the fact that the State obtained a rule to show cause for contempt against Hollingshed when he failed to honor the State's subpoena. Defendant points out that during closing and rebuttal argument the State referred to Hollingshed 19 times. The State referred to Hollingshed as one of the "pillars" of the State's case.

¶ 206 The damage to the State's case would not have been confined to the credibility of Lynn Hollingshed. The use of a convicted felon who was suspected of shooting at a person in an ongoing investigation would have provided an opportunity to challenge the thoroughness and integrity of the officers and their failure to even consider Clifton English as an alternative suspect. See *Kyles v. Whitley*, 514 U.S. 419, 445-47 (1995). The State chose a very clever trial strategy in the presentation of defendant's confession. Only Detective Redmond testified to defendant's statements. Redmond spoke to defendant for the first time shortly after 11:00 p.m., seven hours after the interrogation began. This strategy prevented the defense team from establishing through cross-examination the interview methods employed by the police leading up to defendant's typed confession. The State, knowing that many of the details in defendant's typed confession were inconsistent with eyewitness accounts, told the jury that they could believe the confession because they could believe Hollingshed and Davis.

¶ 207 We are not required to suspend our common sense when evaluating the effect the impeachment of Hollingshed might have had on the jury's verdict. See *People v. Jimerson*, 166

Ill. 2d 211, 227 (1995). The State on one hand points to the "inculpatory statements to Hollingshed and to Denise Davis" as reason for rejecting defendant's actual innocence and on the other hand argues that Hollingshed's testimony is cumulative of the State's evidence. The State cannot have it both ways. Hollingshed was a crucial State witness. The State repeatedly refers to defendant's "voluntary" confession as reason to reject defendant's *Brady* claim. The fact that the trial court ruled that defendant's confession was voluntarily given and that this court affirmed that ruling does not diminish defendant's right to challenge the credibility or weight to be given the confession by a jury. *People v. Gilliam*, 172 Ill. 2d 484, 511-13 (1996). Like in *Kyles*, "[b]ecause the State withheld evidence, its case was much stronger and the defense case much weaker, than the full facts would have suggested." *Kyles v. Whitley*, 514 U.S. at 429. For example, the only witness who placed the murder weapon in defendant's hands after the murder was Hollingshed. This testimony contradicted Larry Horton's testimony that English had the gun after the shooting. The gun was recovered where Larry Horton told the police they would find it, not where defendant said he hid the gun, under a couch. These and other troubling details were reflected in the jury's request for a copy of defendant's confession and in the fact that they reported being deadlocked.

¶ 208 Defendant presented the same alibi defense that he provided to the police the night of his arrest. The testimony of Dessie Mims and Garyln Wilks was, at best, slightly impeached by Detective McDonald who failed to obtain a written statement from Mims or Wilks and wrote his report from memory days later. Michelle Jackson, the only witness who saw the offender's face, testified that defendant was not that person. Despite being sick and being grilled for three hours by detectives, Jackson refused to change her testimony. Jackson insisted that she called the police shortly after defendant's arrest to tell them that defendant was innocent.

¶ 209 In evaluating the potential effect of the suppressed evidence, we examine the entire record, including arguments of counsel. During rebuttal argument assistant State's Attorney Karner told the jury that the defense had "resorted to a lie, in a big time of trouble." The trial court, over objection, allowed this remark to stand. It is clearly improper for a prosecutor to express personal beliefs or opinions regarding the credibility of witnesses. *People v. Lee*, 229 Ill. App. 3d 254, 260 (1992). Our supreme court has made it clear that "comments denigrating defendant's witnesses must be strongly condemned." *People v. Moss*, 205 Ill. 2d 139, 171 (2001). The comments by Karner attacking Michelle Jackson and accusing her of obstructing justice were highly improper, yet the trial court permitted these remarks to stand. See *People v. Lyles*, 106 Ill. 2d 373, 391 (1985) ("Generally, a prosecutor may not express his personal opinion about defendant's case***or make personal attacks against the defendant's attorney.") (abrogation on other grounds recognized in *People v. Canon*, 353 Ill. App. 3d 1009 (1986)). Karner also challenged defense counsel's integrity, telling the jury that "they" wanted to keep Michelle Jackson's testimony quiet because she "couldn't withstand the scrutiny of an investigation." Karner argued that the defense offered a "bologna cheap shot" against the police. It is improper for a prosecutor to accuse defense counsel of attempting "to create reasonable doubt by confusion, misrepresentation or deception." *Id*. at 83. The trial court, by allowing these and other improper remarks to stand, gave the jury the false impression that they were appropriate, which amplified the prejudicial effect of the remarks. See *People v. Hope*, 116 Ill. 2d 265, 278 (1986).[8] The fact that the State resorted to such remarks is a reflection of the fact that its evidence was far from overwhelming.

[8] We note that in his initial post-conviction petition defendant raised the claim that he was denied a fair trial due to prosecutorial misconduct during closing argument, as well as

¶ 210 Under *Brady*, defendant is not required to show that the outcome of the trial would have been different, as the trial court here remarked. Defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence there would have been enough left to convict. Instead, defendant need only show that had the suppressed evidence been disclosed there existed a "reasonable probability of a different result." *Banks*, 540 U.S. at 698-99 (2004) (quoting *Kyles* 514 U.S. at 434). We find that defendant has established a *Brady* violation, *i.e.*, there is a reasonable probability that the result of defendant's trial would have been different had the impeachment evidence been disclosed.

¶ 211 We recognize that in his successive petition and his brief before this court defendant requests an opportunity to move forward with his petition in the trial court. However, we have determined *de novo* that the State violated *Brady*, which can never be harmless. *Beaman*, 229 Ill. 2d at 81 (citing *People v. Coleman*, 183 Ill. 2d 366, 393 (1988)). While ordinarily at this juncture in the case we would remand the case with directions to the trial court to allow defendant leave to file his *Brady* claim, a hearing is unnecessary and would be a waste of judicial time and resources. The State admits in their brief that Hollingshed was involved in the Dawson shooting but speculates that he may have received leniency for cooperating in some other matter. The State cannot disavow that admission, particularly where a member of the Appellate Prosecutors' Office was the special prosecutor assigned to argue against defendant's request to file a successive post-conviction petition. See *Jimerson*, 166 Ill. 2d at 228. As we have stated, a *Brady* violation cannot be found to be harmless. *Kyles*, 514 U.S. at 436; *Beaman*, 229 Ill. 2d at 81. There are no factual disputes that could alter the outcome. Therefore, "[u]nder the unusual

---

ineffective assistance of appellate counsel for failing to raise this issue on direct appeal. Defendant did not appeal the dismissal of that petition.

circumstances of this case, we find that defendant is entitled to a new trial." *Jimerson*, 166 Ill. 2d at 230-31 (a finding that a witness committed perjury in denying an inducement to testify entitled the defendant to a new trial instead of sending the case back for a third stage evidentiary hearing).

¶ 212 C. Remaining Claims

¶ 213 Given the fact that we have held that defendant is entitled to a new trial we need not address defendant's remaining claims of ineffective assistance of trial and appellate counsel, or his claim that he is entitled to a new sentencing hearing. However, when appropriate, a reviewing court may address issues that are likely to recur on remand in order to provide guidance to the lower court. *Cf. People v. Johnson,* 2013 IL App (2d) 110535, ¶ 60 (addressing issue likely to arise at trial on remand). For that reason, we will address defendant's claim that the trial court erred in granting the State's motion in *limine* to exclude the pre-trial statements of Clifton English.

¶ 214 A trial court's ruling on a motion in *limine* is an interlocutory order that is subject to reconsideration by the trial court at any time prior to or during trial. *People v. Bennett*, 329 Ill. App. 3d 502, 515 (2002). We agree with defendant that the trial court erred in following *People v. Bell*, 96 Ill. App. 3d 857 (1981), for the proposition that the absence of one of the *Chambers* factors results in exclusion of evidence. In *Bowel*, our supreme court rejected the State's argument that the presence of all four factors are conditions of admissibility. *Bowel*, 111 Ill. 2d at 67. We trust that if this issue is raised on remand the trial court will properly exercise its discretion in ruling on the admissibility of the statements against interest, now guided by Illinois Rule of Evidence 804(b)(3) (eff. Jan. 1, 2011) as well as pertinent case authority. We also feel compelled to note that it strikes us as being disingenuous for the State to rely on statements of

Clifton English to Kristina Sholes and Larry Horton on the one hand to obtain a conviction in the Bombay Bicycle Club Murder case, and on the other hand to call them liars when they say that English also confessed to the McDonald's murder. See *People v. Tenny*, 205 Ill. 2d 411, 440 (2002).

¶ 215 Finally, defendant requests that we order a different judge to hear this case on remand. We have carefully reviewed the record and, while we found error in the trial court's ruling regarding the *Brady* claim, we find no expression of prejudice toward defendant. In the exercise of our discretion we decline defendant's request. The trial court's order appointing a special prosecutor from the Office of the State's Attorney's Appellate Prosecutor will continue to be in effect, subject to the pleasure of the Attorney General. 725 ILCS 210/4.01 (West 2016).

¶ 216 D. The State's Petition for Rehearing

¶ 217 The State has filed a petition for rehearing pursuant to Supreme Court Rule 367(b) (eff. Aug. 15, 2016). In the petition it first argues that we have misapprehended its concession at oral argument that defendant had established cause with respect to his *Brady* claim that Hollingshed's prior juvenile adjudications and probation status had been suppressed by the State. We made clear in our earlier analysis that the State's concession was limited to the filing of this *Brady* claim. *Supra*, ¶ 193. To be clear, our determination that defendant is entitled to a new trial due to the State's *Brady* violation would not change even if we were to find that there was a factual issue regarding Hollingshed's juvenile adjudications and probation status. Given the importance of Hollingshed's testimony, in the context of the entire record, the suppression of Hollingshed's involvement in the *Dawson* shooting alone established a *Brady* violation.

¶ 218 With respect to the *Dawson* shooting, the State claims that it was not "in a position to admit" that the witness Hollingshed and the shooter in the *Dawson* incident were one and the

same person. The State seeks to take back its "implicit admission" to this fact because "it was understood that a determination of the factual issues would be made at an evidentiary hearing." We reject this argument. The State had an obligation to disclose Hollingshed's involvement in the *Dawson* shooting before trial. If appellate counsel had any uncertainty regarding this issue, the time to resolve that uncertainty has long since passed. The State cannot take back its admission by arguing that it was somehow limited by the requirement that we take all well pleaded facts as true. The State had an obligation to investigate defendant's *Brady* claims and, contrary to its argument, it *was* in a position to resolve any factual disputes. As in *Jimerson*, the State's purported disavowment is "particularly disingenuous." *Jimerson*, 166 Ill. 2d at 228.

¶ 219 The State next argues that *People v. Wrice*, 2012 IL 111860, dictates that this case be remanded for an evidentiary hearing. We disagree. In *Wrice*, there were issues of fact to be resolved regarding the defendant's claim that his confession was physically coerced. *Id.* ¶ 85. Our supreme court made clear that where the defendant satisfied "cause-and-prejudice" for the purpose of filing his claim that his confession was coerced, "the defendant is yet required to establish the allegations set forth in his postconviction petition." *Id.* Unlike in *Wrice*, there are no factual issues regarding the State's suppression of Hollingshed's involvement in the *Dawson* shooting. Like in *Jimerson*, the record before us, together with the State's admission, "provides us with ample evidence that defendant's right to due process was violated, and this violation undermines the reliability of the defendant's trial." *Jimerson*, 166 Ill. 2d at 231.

¶ 220 The State also takes issue our reference to Illinois Supreme Court Rule 412(c) (eff. March 1, 2001), which has been amended since defendant's trial to require that the State identify *Brady* material by description. The State then contends that "no reasonable presumption of nondisclosure" arises from the fact that the record "does not affirmatively show disclosure." We

reject this incredibly weak contention. The United State's Constitution requires that prior to trial, the prosecution must turn over to the defense all exculpatory evidence in its actual or constructive possession. Failure to do so is a violation of the Fifth and Fourteenth Amendments. See U.S. Const. amend. V, XIV. The State's suggestion that there is no obligation to make a record that it has fulfilled its statutory (S.Ct. R. 412(c) (eff. March 1, 2001)) and common law discovery obligations is absurd. The 2001 amendment to Rule 412(c) adding the "specific identification" language did not add a new requirement. As the Special Supreme Court Committee on Capital Cases explained, "[t]he purpose of the specific-identification requirement is to *reinforce the duty to disclose* and reduce the chance of pretrial or trial error with respect to this type of evidence." (Emphasis added.) Ill. S. Ct. R. 412(c), Special Supreme Court Committee on Capital Cases (adopted March 1, 2001).

¶ 221 Reviewing the record to confirm or refute a claim regarding discovery compliance is not a new or novel concept. For example, in *People v. Vargas*, 116 Ill. App. 3d 787 (1983), this court examined the court file to resolve the defendant's claim that his due process rights were violated by the State's suppression and nondisclosure of the requested evidence (the tape of a phone call to the police where the victim misidentified the defendant). In that case, examination of the record revealed that "there was some compliance with defendant's request" in the form of a computer printout summarizing the telephone conversation. *Id*. at 793. Defense counsel was able to "bring out the conversation on cross-examination," which minimized any prejudice. *Id*. at 794. Although this court affirmed the defendant's conviction, it strongly condemned the conduct of the prosecution, saying "[w]ere it not for the overwhelming evidence of defendant's guilt in this case, we would be compelled to reverse." *Id*. at 796. Unlike in *Vargas*, there is nothing in the record to even remotely suggest that the State complied with its *Brady* obligations.

For all these reasons we deny the State's petition for rehearing upon modification of the minor changes contained within this order. *Supra,* ¶ 29.

¶ 222 III. CONCLUSION

¶ 223 The trial court erred in denying defendant's request to file his cause-and-prejudice claim that the State violated its discovery obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). The record, taken together with the State's admission in its brief, clearly establishes that the State is guilty of a *Brady* violation. Under the unique circumstances of this case, defendant's convictions are reversed and this case is remanded for a new trial.

¶ 224 Accordingly, the judgment of the circuit court of Winnebago County is reversed and this cause is remanded for a new trial.

¶ 225 Reversed; remanded.

¶ 226 JUSTICE JORGENSEN, specially concurring:

¶ 227 I agree with the ultimate outcome here, reversing defendant's conviction and remanding for a new trial based upon the State's *Brady* violation. To be clear, reversing outright and remanding for a new trial, where defendant moved only for leave to file his claim in a successive postconviction petition (as opposed to proceedings concerning the treatment of an initial postconviction petition, as in *Jimerson*), is an extraordinary and possibly unprecedented remedy. However, I agree with the remedy here because, under the unique facts of this case, the State does not affirmatively assert that the *Brady* information was, in fact, disclosed, and that, coupled with appellate counsel's admission, as relied upon by the majority, reflects that there is nothing that the State could present at second- or third-stage postconviction proceedings that would change the finding that there was a *Brady* violation. Therefore, under these exceptional facts, the State is in no way prejudiced by our decision to "skip" those postconviction stages.

¶ 228 I write separately, however, because this court was simply asked to consider whether defendant should have been granted leave to file his successive postconviction petition and, with respect to defendant's actual innocence claim, the majority concludes that defendant did *not* satisfy the requirements to even file that claim. The majority views the evidence that defendant presented to support his claim as simply re-packaging English's confession, and, therefore, insufficient to overcome the *res judicata* bar to filing the claim in a successive petition. I disagree, and I would have held that the evidence was sufficiently new to allow defendant to file his actual innocence claim. In essence, I would have held that, here, the evidence was new in that it was more fulsome and filled in gaps in ways that defendant could not have done so previously in his *pro se* capacity. See, *e.g.*, *People v. Williams*, 392 Ill. App. 3d 359, 369, 371 (2009).

¶ 229 Further, setting aside whether the evidence was sufficiently new, I would also have found that this record warrants relaxing any *res judicata* bar to the claim (*supra* ¶ 187), based upon principles of fundamental fairness. See, *e.g.*, *People v. English*, 2013 IL 112890, ¶ 22 (in a postconviction setting, "the doctrines of *res judicata* and forfeiture are relaxed where fundamental fairness so requires[.]"). Viewing the history of this case and the evidence presented under the unique circumstances here, I would have relaxed *res judicata* so as to allow defendant's claim to be filed. See *Williams*, 392 Ill. App. 3d at 371 ("In summary, given the *pro se* status of defendant in his initial two postconviction petitions, the gravity of the offenses in this case, and the affidavits attesting to defendant's actual innocence, fundamental fairness requires that defendant's postconviction claims receive full consideration on their merits.").

¶ 230 In sum, I would have held that, even if there were not a *Brady* violation, defendant was entitled to proceed on his petition with respect to his actual innocence claim. In the end, my

position here is presented as a special concurrence, not a dissent, because we are remanding for a new trial and defendant's actual innocence evidence may be offered there. Although our reversal here is based solely on a discovery violation, it is my hope that those reading this decision will take note of the *numerous* outrageous errors and missteps that occurred in this case. I believe that the evidence that defendant presented to support his actual innocence claim is *significant*. The fact that a majority of this court held that it was not sufficiently *new* for successive postconviction purposes should *not*, in my view, be taken as a commentary on the strength of that evidence.