

No.

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF
ILLINOIS,

Respondent-Appellee,

-vs-

CHRISTOPHER COLEMAN,

Petitioner-Appellant.

) Petition for Leave to Appeal

) from the Appellate Court of

) Illinois, Third District,

) No. 3-10-0419.

)

) There heard on Appeal from the

) Circuit Court of the Tenth Judicial Circuit,

) Peoria County, Illinois, No. 94 CF 764.

)

) Honorable

) Michael E. Brandt,

) Judge Presiding.

PETITION FOR LEAVE TO APPEAL

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INTRODUCTION

There is no more significant post-conviction claim one of actual innocence, which questions the factual accuracy of the verdict. Something has gone very wrong, then, when a post-conviction petitioner cannot obtain a new trial even after five newly discovered witnesses have all admitted their own guilt of the crime and completely exculpated the petitioner—especially where the underlying conviction was based solely on impeached eyewitness testimony. The lower courts’ misunderstanding of the role of the trial judge at a post-conviction evidentiary hearing, combined with the courts’ less-than-rigorous treatment of the facts, led to this unjust result. Christopher Coleman should be afforded the opportunity to offer his weighty new evidence of innocence to a jury, and this Court is the only remaining tribunal with the power to ensure that this happens.

PRAYER FOR LEAVE TO APPEAL

Christopher Coleman, Petitioner-Appellant, petitions this Court for leave to appeal, pursuant to Supreme Court Rules 315 and 612, from the judgment of the Appellate Court affirming the denial of his petition for *post-conviction* relief.

HISTORY IN THE APPELLATE COURT

In a decision dated August 25, 2011, the Appellate Court, Third District, affirmed the denial of Coleman’s petition for post-conviction relief after an evidentiary hearing, despite compelling newly discovered evidence of innocence. Coleman filed a petition for rehearing, which was denied on September 30, 2011.

POINTS RELIED ON FOR REVIEW OF THE JUDGMENT BELOW

In order to establish his own innocence of criminal charges arising out of a 1994 Peoria home invasion and sexual assault, Christopher Coleman discovered and produced testimony from all six of the actual offenders (one at trial and five after trial)—including four actual perpetrators whom the police had never arrested or questioned, and who had never previously testified in any proceeding. Each of these offenders admitted his own guilt and testified that Coleman was not part of the crime. Coleman also offered supporting testimony from three other men who, like Coleman, were once mistakenly implicated in the crime.

The outcome of the hearing should have been controlled by this Court’s decision in *People v. Molstad*, 101 Ill. 2d 128 (1984). In that case, this Court ordered a new trial based on *affidavits* from the defendant’s five codefendants, who came forward for the first time after trial and stated that the defendant did not participate in the crime.

In the case at bar, the circuit court acknowledged that the five newly discovered witnesses “essentially testified that the defendant was not present and did not participate in the event at all.” Appendix B, p. 4. Instead of granting a new trial, however—as this Court did in *Molstad*—the circuit court identified some credibility issues and inconsistencies in the witnesses’ testimony, and on that basis ruled that the evidence was not of such conclusive character as would probably change the result on retrial. Appendix B, p. 5. The Appellate Court did little independent analysis and held that the circuit court’s ruling was not against the manifest weight of the evidence. Appendix A, p. 18.

The decisions below should not stand for two reasons. First, neither opinion does justice to voluminous newly discovered evidence adduced at the post-conviction hearing.

Coleman presented eight witnesses: five offenders who did not testify at trial and who admitted guilt and exculpated him, and three non-offenders who testified that they, like Coleman, were misidentified by the victims. The two offenders who were arrested at the crime scene in 1994 did not name their cohorts at that time, but by 1995 they had done so—although the police never investigated these other offenders and the cohorts certainly did not volunteer to come forward. Fifteen years later, these four cohorts reluctantly appeared in court, admitted their own roles, and testified that Coleman was not there.

The police investigation, however, went in the wrong direction from the very beginning. Because the two arrestees would not name their co-offenders, the police came up with the names and photographs of three men (including Coleman) and a young boy from a nearby housing project who, in the officers' estimation, were the type of people who might have been involved. The primary eyewitness identified *all four* of the photos—which should have been a clue that something was amiss, because it defies probability that the police would correctly guess all four offenders based only on their general suspicion of certain housing project residents. Indeed, two of the men were exonerated before trial, and the boy (now a man) vociferously denies guilt. The remaining suspect from the original group of four is Christopher Coleman. If the police were wrong about the other suspects, it follows that they were wrong as well about Coleman—yet this aspect of the case is not discussed at all in the lower court decisions.

The opinions below also contain little analysis of the closely balanced nature of the evidence at the trial—which included alibi evidence, testimony by a convicted codefendant that Coleman was innocent, and Coleman's own exculpatory testimony. Neither opinion mentions that the primary eyewitness admitted making at least one other

misidentification, and that both victims who identified Coleman at trial (one of whom had not even seen the offender's face) failed to identify him at the grand jury hearing.

Christopher Coleman was sentenced to 60 years in prison, far more than the two codefendants who were arrested on the scene and had no choice but to plead guilty. (One was sentenced to 12 years, and the other—the actual rapist—was sentenced to only 15 years.) A case of this magnitude and with this sentencing disparity merits the reviewing courts' careful consideration of both the original evidence and the new evidence. Neither court below engaged in this type of analysis, as evidenced by the dearth of details and the many factual errors, particularly in the circuit court's order. Indeed, any careful review of the evidence would have compelled the conclusion that a new trial was necessary.

The second reason for granting review is that this case demonstrates a need for this Court to clearly define the role of the circuit court in evaluating evidence of actual innocence at a post-conviction evidentiary hearing. To justify a new trial, newly discovered evidence of actual innocence must be of such character as would probably change the result on retrial. *E.g., People v. Washington*, 171 Ill. 2d 475, 489 (1996). No Illinois appellate decision has addressed the critically important question of exactly what the trial court's role is in resolving credibility issues in this process.

It cannot be true that a post-conviction court should simply substitute its own assessment of the credibility of the witnesses for that of a jury, as the circuit court did in this case. This is especially true where, as here, the post-conviction judge was not the trial judge, and thus there was no basis to compare the credibility and demeanor of the new witnesses to those of the trial witnesses. A much more reasonable approach would be for the post-conviction court to assess whether a jury might *reasonably* (though not

necessarily) believe the witnesses' testimony, and whether the testimony, if believed, would result in a different verdict; if so, a new trial should be ordered. This Court should step in to provide the necessary guidance so that trial courts can reach just results.

Here, nothing in the circuit court's order or in the record suggests that it would be *unreasonable* for a jury to believe the testimony of the five newly discovered actual offender witnesses. Their testimony, if believed, would clearly require a not-guilty verdict. Accordingly, under any rational rule for the evaluation of post-conviction evidence of actual innocence, this newly discovered evidence justifies a new trial.

STATEMENT OF FACTS

I. Trial Evidence

In the early morning of August 22, 1994, several men invaded the Peoria home of three adult sisters—Bertha Miller, Myre Lott, and Angela Stimage—and Bertha's two 17-year-old daughters, Tequilla and T.M. R. 52, 69. The scene was chaotic; the offenders' faces were covered, as were the victims' heads much of the time. R. 54-55, 70-71. The offenders beat and cut the victims. R. 54-57, 145-47, 168. Two offenders took T.M. to a bathroom; one forced her to remove her clothes and the other sexually assaulted her. R. 169-70. Stimage heard the noise from upstairs and called the police. R. 186.

After the police entered the house, some of the offenders began jumping from a rear second-floor window. R. 60, 135. The first two jumpers escaped. R. 151, 189. The third one, James Coats (the rapist), was apprehended after he jumped, and another offender, Robert Nixon, was arrested inside the house. R. 137, 151.

Tequilla testified that two of the men took off their scarves in the living room, and that she recognized one of them as Coleman, whom she slightly knew but had not seen

for two years. R. 26-27, 73-74. She later identified a photograph of Coleman and picked him out of a lineup. R. 80-82. At the grand jury hearing, however, she did not mention recognizing Coleman. R. 103-05. Tequilla originally identified Elbert Nickerson as an offender, but the day before trial she retracted her identification of Nickerson and the State dropped charges against him. R. 106-07, 261. At trial, Tequilla maintained that a man named Mark Roberson was another one of the offenders. R. 108. (Roberson was arrested but released without charging after the police verified his alibi.)

Bertha Miller did not see the faces of the offenders but claimed to be able to identify Coleman by his voice and his walk, which was “kind of crooked like.” R. 144, 156. At the grand jury hearing, however, Bertha testified that “I didn’t know at the time that was [Coleman].” R. 164.

Anthony Brooks, who was 13 years old at the time of trial and on juvenile probation that required him to cooperate in the prosecution, testified that he was at the home invasion with James Coats, and Robert Nixon, and Mark Roberson—but that Coleman was not there. R. 240-41. Brooks testified that he falsely implicated Coleman to the police because the detective threatened Brooks with never seeing his family again. R. 248. (Later, as an adult, Brooks would deny any involvement in the crime.)

For the defense, Coleman’s girlfriend, another friend, and Coleman himself all testified that Coleman was asleep with his girlfriend in a friend’s apartment at the time of the crime. R. 285-87, R. 292-93, 297-98.

Robert Nixon, who had already pleaded guilty, testified for the defense that Coleman was not there. R. 271-72. Nixon named the other offenders: “Merk” (Robert McKay), Lamont Lee, “Bug” (James Coats), “Drey,” and “Rob.” R. 273-75.

II. Post-Conviction Evidence

James Coats refused to testify at Coleman's trial, but at the post-trial hearing (in 1995) he testified that he went to the Miller home with Robert Nixon, Lamont Lee, "Dray," and Robert McKay to get drugs or money; Christopher Coleman was not there. R. 378-80. A 13-year-old youth was not with them. R. 380-81. At the post-conviction hearing, James added that his brother Rob Coats was also at the crime. R. 526-29, 541.

The four offenders who had never been arrested or charged in this case—Rob Coats, Robert "Merk" McKay, Lamont Lee, and Deondre "Dre" Coleman—all testified at the post-conviction hearing that they participated in the Miller home invasion and that Christopher Coleman was not involved. None of these men was anxious to share his story. Deondre Coleman initially disobeyed a subpoena before appearing in court. R. 598, 601. Rob Coats also disobeyed a subpoena and did not testify until after he was arrested. R. 728, 736, 793-94. Even at the post-conviction hearing, Coats refused to testify until the court ordered him to do so. R. 738-45, 752-53. Robert McKay failed to appear after an initial subpoena was served. R. 797, 799. Lamont Lee refused to sign an affidavit prior to the post-conviction hearing. C. 587-89.

Each of these four men admitted his own guilt and testified that Christopher Coleman did not participate in the crime. Their accounts were consistent with many of the facts of the crime as reported by the witnesses and the police. For instance, the offenders testified that they covered their faces during the crime; that they forced the residents to lie on the floor during the home invasion; that two of them left early, before the police arrived; that after the police arrived, they herded the victims upstairs; that a gun was hidden in an upstairs bedroom; and that three of them jumped out of the back

second story window, with two escaping and one (James Coats) being captured after injuring himself. In addition, as stated previously, Robert Nixon had identified these five men in 1995 as his co-offenders. Each witness also testified that offender Robert McKay walked with a limp, as Christopher Coleman does. Summaries of their testimony follow.

Rob Coats admitted going from the Warner Homes housing project to the Millers' house with his brother James Coats, Lamont Lee, Robert Nixon, "Merk" (who walks with a limp), and Deondre Coleman, to buy marijuana. R. 733, 747-48, 769, 778-79.

Christopher Coleman (who also walks with a limp) did not go with them, nor did "Junior" (Elbert Nickerson), Mark "Fats" Roberson, or "Smurf" (Anthony Brooks). R. 749-52. Rob had been smoking marijuana that day, as had a couple of the other men, but he still knew that Christopher was not there. R. 766-67, 792.

The men entered the house after Rob's brother James climbed in through a rear window and opened the back door for them. R. 753-54. Inside, the offenders robbed the occupants. R. 754. Rob was the only one with a gun. R. 755. Everyone in the group put something over their faces. R. 755. Rob went into the living room and "[p]ut the people down at gunpoint." R. 756-57. After that, Rob went through the house searching for money. R. 757, 782. He tried to go into the bathroom but could not because Lee was holding the door from the inside. R. 756.

At some point, the police knocked at the door. R. 757. Lee answered and "told them everything was cool" and said they were having a party. R. 757-58. They all then went upstairs. R. 758. Rob did not recall Merk or Deondre being in the house at that time. R. 758, 784. Once upstairs, Rob "stuffed my gun in the box and I jumped out the window." R. 759. Lamont Lee and James Coats also jumped out the window. R. 759. The

police chased Rob, but he escaped and ran back to the Warner Homes. R. 760. When he got there, Christopher Coleman was being arrested. R. 793.

Robert McKay, whose nickname is “Merk,” testified that he walks with a limp as a result of a 1993 injury. R. 803. On August 22, 1994, he was hanging out in the Warner Homes with Lamont Lee, Deondre Coleman, Robert Nixon, Robert Coats, and later James Coats, drinking and smoking marijuana (as was Lee). R. 804-06, 817-18. R. 819. They decided to go to the house at 1540 Millman Street to buy marijuana. R. 804, 806. Christopher Coleman had been with them earlier, but he did not go to Millman Street; instead, he went inside with his girlfriend. R. 806-07.

When the men arrived at the house, they decided to rob it. R. 808. Once inside, McKay found money and marijuana that a woman pointed out to him in a bedroom; he then left. R. 809, 822-23. Deondre, who had also gone inside, left with him. R. 809, 822. The other men were still in the house. R. 809, 824. McKay went back to the Warner Homes, where he later saw the police taking Christopher out of a building. R. 810.

Lamont Lee testified that on the morning of the home invasion, he was with Robert Nixon, James Coats, Rob Coats, and Robert “Merk” McKay (who walks with a limp) at the Warner Homes. R. 566, 568, 591. Christopher Coleman was not with them; he and his girlfriend had already gone inside for the night. R. 568, 575-76, 592. Lee, who had been smoking marijuana that day, said he did not see Christopher’s brother Deondre Coleman that night, although he had probably seen Deondre earlier in the day; Deondre had not lived in Peoria long and Lee did not know him as well as he knew Christopher. R. 565, 568, 581-83.

Lee knew that a lady named Bertha lived at the house where the crime occurred, and he thought they would find money or drugs there because that was “the word at the time.” R. 569, 590. Lee testified that James Coats entered through a back window and then opened the door. R. 570. There were seven or eight occupants inside the house. R. 572. The offenders had one or two guns, which got passed around, but some of them might have pretended they had guns. R. 570, 588. Most of the offenders’ faces were covered to their eyes. R. 571. Lee searched throughout the house for drugs and money but did not find any, although the Coats brothers and McKay did. R. 585-86.

The police knocked at the front door but ended up coming in through the back. R. 572. Everyone went upstairs and someone “threw a gun in the closet or something.” R. 572-73. Lee, McKay, and Rob Coats got away, but James Coats and Nixon were left behind and arrested. R. 573. Lee jumped out a second-floor window and escaped from the police by running away. R. 574. James Coats jumped after Lee but “broke his ankle or something.” R. 587. Lee later went back to the Warner Homes and saw the police at Christopher’s apartment. R. 574-75, 592-93.

Deondre Coleman. Deondre Coleman is Christopher Coleman’s half-brother; they have different mothers but the same father. R. 603. Deondre lived in San Diego for 14 or 15 years until the end of 1992, when he moved to Peoria. R. 603-04, 623. On the night of the home invasion, he was hanging out at the Warner Homes with Robert Nixon, “Merk” (Robert McKay), Rob Coats, “Bug” (James Coats), and a man whose name he could not remember but whose photograph he identified (Lamont Lee). R. 605-08. Merk had a limp, as does Christopher. R. 609. Christopher, however, was not present. R. 624.

Deondre testified that the group walked to the home on Millman Street to buy marijuana. R. 610, 625. When they arrived, however, McKay said they were going to rob the place. R. 610, 626. Deondre did not want to participate in a robbery, so he stayed outside, across the street, where he could see the front of the house but not the back. R. 609-11. Because the other men went around to the back of the house, Deondre could not tell who went in the house or what happened. R. 611. Deondre left after a few minutes; McKay caught up with him, and they returned to the Warner Homes, where Deondre paid McKay for a sack of marijuana. R. 611-12, 637.

The next day, Deondre heard that his brother Christopher had been arrested for the robbery. R. 638. Deondre told Nixon, McKay, and Rob Coats that he was going to testify on his brother's behalf, because he knew his brother was not involved. R. 639. Two or three days later, in a Warner Homes parking lot, someone shot Deondre in his spinal cord, his back, and his leg. R. 612, 640. Deondre spent a week in the hospital and stayed in Peoria for another month. R. 640-41. After that, an aunt moved him to Detroit, where he lived for the next nine years, including during Christopher's trial. R. 613, 642. It took him a year and a half to learn to walk again. R. 644-45.

At the scene of the crime, James Coats and Robert Nixon refused to tell the police who their escaped cohorts were. R. 844. Because one of the victims thought she recognized the offenders from the Warner Homes, the police compiled a photo array of possible suspects from that housing project, consisting of Christopher Coleman, Anthony Brooks, Mark Roberson, and Elbert Nickerson. R. 845-46. Tequilla Miller viewed the photo lineup and identified *all four of the photos*. R. 847. The police then arrested 12-year-old Anthony Brooks and questioned him with no parent or relative present (even

though his relatives were present at the station and asked to see him). R. 838, 847-50.

After Brooks initially denied involvement, whereupon the detective said he did not believe the denial, Brooks confessed to the crime and identified the same four photographs that the police had shown to Tequilla. A month later, Brooks returned to the police station with a relative and told the detective he was not involved in the home invasion—but again the detective said he did not believe Brooks. R. 851.

Mark Roberson testified at the post-conviction hearing that he was not part of the crime and that the police arrested him but let him go after they confirmed his alibi. R. 830-32. Elbert Nickerson testified that he was not involved in the crime and that he left the state after the charges against him were dropped. R. 688-89, 705. Anthony Brooks testified that he was not present for the crime, and that the only reason he confessed and identified photographs was because he was a scared little boy. R. 660-62, 672-72.

ARGUMENT

I. Christopher Coleman Is Entitled To A New Trial Because The Newly Discovered Evidence, If Believed, Would Compel Acquittal, And A Reasonable Jury Would Likely Have Believed It.

A free-standing claim of innocence based upon newly discovered evidence implicates substantive and procedural due process rights under the Illinois Constitution. Ill. Const. 1970, art. I, § 2; *People v. Washington*, 171 Ill. 2d 475, 487-89 (1996). To justify a new trial based on a claim of innocence, a defendant must present evidence that: (1) was discovered after trial and could not have been discovered sooner through the exercise of due diligence; (2) is material and not simply cumulative; and (3) will probably change the result on retrial. *People v. Molstad*, 101 Ill. 2d 128, 134-36 (1984); *see also Washington*, 171 Ill. 2d at 489.

This Court's decision in *People v. Molstad* is particularly instructive. The defendant in *Molstad* was convicted of aggravated battery and criminal damage to property. *Molstad*, 101 Ill. 2d at 130. At trial, an eyewitness identified the defendant as being part of a group who attacked the victim and damaged his car. *Id.* at 131. The witness was familiar with the defendant, having met him several times prior to the incident. *Id.* at 133. The defendant maintained that he was home at the time of the attack, and his alibi was corroborated by his parents. *Id.* at 132. After he was convicted, the defendant filed a post-trial motion for a new trial based on *affidavits* (not live testimony) from five codefendants, all of whom stated that the defendant was not present during the attack. *Id.* The trial court denied the motion for a new trial. *Id.* at 131.

This Court reversed, holding that the trial court erred in denying the defendant a new trial. *Id.* at 136. This Court held that even though the defendant had been aware of the identities of his codefendants, their post-trial affidavits were newly discovered evidence because “no amount of diligence could have forced the codefendants to violate their fifth amendment right to avoid self-incrimination . . . if the codefendants did not choose to do so,” and therefore he could not have produced their testimony at trial. *Id.* at 134-35. This Court found that the evidence was not merely cumulative because “[i]t is difficult to see how the admission of the five affidavits would not produce new questions to be considered by the trier of fact. The testimony of the codefendants goes to an ultimate issue in the case: Who was present at the time of the attack. . .?” *Id.* at 135. Finally, this Court stated that even though the eyewitness testimony was sufficient to support the conviction, the new evidence would likely produce a different result on retrial: “Of course, this does not mean that Molstad is innocent, merely that all of the

facts and surrounding circumstances, including the testimony of the codefendants, should be scrutinized more closely to determine the guilt or innocence of Molstad.” *Id.* at 136.

Similarly, in this case, the circuit court erred in denying Coleman’s petition, because the testimony of five additional offenders who were at the scene of the crime, coupled with the testimony of three additional men who, like Coleman, were erroneously implicated, constituted newly discovered evidence that would probably produce a different result on retrial.

As the Appellate Court noted, the circuit court focused on “focused on the fact that each witness was in prison at the time of their testimony, had extensive criminal records, and were admittedly consuming alcohol and illegal substances prior to the incident.” Appendix A, p. 16. The fact that the witnesses had criminal records, however, is hardly a reason to disbelieve their testimony, given that they were admitting criminal conduct in this case. (In point of fact, Deondre Coleman did not have a criminal record, and Rob Coats was not in prison at the time he testified.) Moreover, their consumption of alcohol and/or marijuana that night did not, they testified, impair their ability to remember the basic facts of the event; they all agreed that Coleman was not there.

The Appellate Court also commented on the only significant conflict in the testimony, concerning the role of Christopher’s half-brother Deondre Coleman. Appendix A, pp. 16-17. It is true that the testimony regarding Deondre’s participation somewhat differed, but the discrepancies are easily explainable and not remotely fatal to the innocence claim. Deondre had moved to Peoria fairly recently and was not as well known to the other men as Christopher, who had lived there all his life. R. 565, 604. Deondre himself admitted that he was in the group that went to the Miller home, but he maintained

that did not wish to rob it, so he waited outside. R. 609-11. He testified that he left after short time and that McKay caught up with him. R. 611-12.

Rob Coats's testimony was consistent with Deondre's; when specifically asked, Rob testified that he did not recall Deondre going to the back door or being inside the house. R. 755, 772-73, 776. James Coats did not assign a specific role to Deondre; he just testified that Deondre was in the group. R. 526. Likewise, at trial, Robert Nixon testified that "Drey was in the group. R. 273-75. Only McKay specifically testified that Deondre went inside the house. R. 822. Lamont Lee, on the other hand, testified that Deondre was not in the group at all. R. 568. This confusion is understandable given that Deondre played a peripheral role in the offense and by all accounts (except Lee's) left early, before the police arrived. Just as the many inconsistencies and doubtful aspects of the prosecution witnesses' trial testimony did not preclude a guilty verdict, this single inconsistent aspect of the post-conviction witnesses' testimony does not defeat the innocence claim, when the offenders all testified without variance that Christopher Coleman was not present at the crime scene—which is the ultimate issue in this case.

The Appellate Court remarked on an issue that "troubled" the circuit court, namely, that "not one of the accomplices testified that a female was sexually assaulted during the home invasion." Appendix B, p. 17. This is simply a non-issue. The fact that a sexual assault occurred was not in dispute—DNA evidence showed that James Coats was the rapist (R. 236-37)—and none of the offenders was asked about it at the post-conviction hearing, not even by the State or the court.

It should be added that while space does not permit a detailed analysis of the circuit court's order, it contains numerous additional factual and legal errors, which

contributed to the erroneous ruling. Two examples follow. First, the circuit court observed that Tequilla and Bertha Miller had not recanted their identifications of Coleman, and distinguished this Court's decision in *Ortiz* on that basis. R. 557, fn 2. This was a curious comment, given that courts often consider recantations to be unreliable.

Erroneous eyewitness identifications are the single greatest cause of wrongful convictions. *E.g.*, David E. Aaronson, *Proposed Maryland Jury Instruction on Cross-Racial Identification*, 3 Crim. Law Brief 2 (Spring 2008). In this case, there are numerous risk factors associated with mistaken identifications. For instance, Tequilla did not initially tell police that Coleman was one of the offenders, even though she claimed to have known him previously. R. 102-03. Tequilla also failed to mention Mr. Coleman's name at the grand jury hearing, and Bertha told the grand jury, "I didn't know at the time that was him." R. 103-05, 164. Yet by the time of trial, they were both "positive" about their identifications. Witness certainty, however, does not correlate to witness accuracy. When Tequilla viewed the photo array compiled by the police, *all* of subjects in the array were suspects. R. 847. Tequilla dutifully identified *all* of these suspects, even though the State now apparently concedes that at least two of them (Mark Roberson and Elbert Nickerson) are innocent. These are only some of the factors that cast doubt on the identification testimony that resulted in Coleman's conviction.

Tequilla and Bertha Miller's failure to recant their identifications does not preclude the possibility that Coleman is innocent, nor should it prevent Coleman from receiving a new trial based on newly discovered evidence of innocence. Indeed, in *Molstad*, an eyewitness who knew the defendant identified him as being at the crime

scene, and this testimony had not been recanted when this Court ordered a new trial.

Molstad, 101 Ill. 2d at 133.

II. The trial court's role in evaluating newly discovered evidence of innocence should not be to decide the ultimate question of guilt or innocence, or even the credibility of witnesses, but rather to act as a gatekeeper; thus, where newly discovered evidence, if believed, would result in acquittal, the trial court's role should be to determine whether or not it a reasonable jury *could* believe the evidence.

As stated previously, the third prong of the test for granting a new trial based on newly discovered evidence of actual innocence is whether the new evidence is “of such a conclusive character that it would probably change the result of retrial.” *People v. Ortiz*, 235 Ill. 2d 319, 336 (2009) (quoting *People v. Harris*, 206 Ill. 2d 293, 301 (2002)). A decision granting a new trial based on newly discovered evidence “does not mean that [defendant] is innocent, [but] merely that all of the facts and surrounding circumstances, including the testimony of [the defendant's] witnesses, should be scrutinized more closely to determine the guilt or innocence of [defendant].” *Id.* at 337 (quoting *Molstad*, 101 Ill. 2d at 136).

Applying this test, this Court found in *Molstad* that a different result was probable on retrial; though the evidence was still conflicting, the finder of fact would now have to balance the testimony of the State's eyewitness against the defendant's denial that he was present, the testimony of his parents that he was with them at the time of the crime, *and the testimony of five other individuals who admitted guilt and claimed that the defendant was not present.* 101 Ill. 2d at 135-36. Similarly, in *Ortiz*, relief was granted based the testimony of a single new witness, but this Court considered all of the evidence that would be presented at retrial, including the lack of physical evidence tying the defendant to the crime (which is also true here), the earlier recantations of prosecution witnesses,

and the new eyewitness account. 235 Ill. 2d at 337. Finding that the evidence of the petitioner's innocence would be stronger on retrial, this Court ordered a new trial. *Id.*

Here, the circuit court found that Coleman's newly discovered evidence did not meet the third prong of the newly discovered evidence standard, and the Appellate Court affirmed on that basis. Appendix A, p. 18. It is difficult to reconcile this result with the record in this case, unless the court simply decided that it did not believe the testimony of the newly discovered witnesses—and based on the trial court's order, this is likely what happened. Yet the witnesses' criminal records and testimonial inconsistencies, which were emphasized by the trial court, are the types of issues that *juries* (or trial judges at bench trials) are charged with resolving. *See, e.g., People v. Tenney*, 205 Ill. 2d 411, 428 (2002) (“[I]t is the function of the jury as the trier of fact to assess the credibility of the witnesses, the weight to be given their testimony, and the inferences to be drawn from the evidence. It is also for the trier of fact to resolve conflicts or inconsistencies in the evidence. . . . [T]his court will not substitute its judgment for that of the jury on questions involving the weight of the evidence or the credibility of the witnesses.”).

The newly discovered testimony of the actual perpetrators was clearly conclusive in character. Their testimony was not mere impeachment; it completely exonerated Christopher Coleman. Their testimony was not recantation evidence. The witnesses were all reluctant to testify, demonstrating that they had not conspired with Coleman to give false testimony (and of course, there was absolutely no evidence to that effect.) *Compare People v. Barrow*, 195 Ill. 2d 506, 541 (2001) (third-party statements that a prosecution witness said he lied at trial was not “conclusive”); *People v. Morgan*, 212 Ill. 2d 148, 155

(2004) (recantation testimony is not conclusive enough to warrant a new trial except under exceptional circumstances).

It is helpful to compare the standard for granting a new trial based on evidence of actual innocence to the standard for granting a new trial based on a *Brady* violation. Where the prosecution has failed to disclose exculpatory evidence to the defense prior to trial, there must be a new trial if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense. *Strickler v. Greene*, 527 U.S. 263, 280-82 (1999). This is nearly identical to the third prong of the test for granting a new trial based on actual innocence.

It is beyond dispute that that if the *prosecution* had suppressed the testimony of the five admitted perpetrators who exculpated Coleman, a new trial would be required, notwithstanding their criminal backgrounds or the collateral inconsistencies in their accounts. Here, it was not the prosecution that prevented these witnesses from testifying at Coleman's trial, but rather the witnesses' refusal to voluntarily put themselves in jeopardy of prosecution, and their Fifth Amendment privilege against compelled self-incrimination. But the harm to Coleman was no less great than if their absence from trial had resulted from a *Brady* violation, and the remedy should be no different.

Determining whether there is a "reasonable probability" of a different outcome does not require a post-conviction court to reach its own conclusions regarding the credibility of the newly discovered witnesses. That is the function of the jury. Instead, the post-conviction court should first determine whether the new evidence is conclusive in *character* (and it was here, because it was completely exonerating and was not inherently unreliable), and then separately evaluate whether or not a reasonable jury *could* credit the

testimony of the five new witnesses in view of *all* of the other evidence at trial. While there is a place for credibility determinations in this process, it is not identical to the process of a finder of fact reaching a verdict. Such was the error of the circuit court in this case, and this Court could do much to advance the cause of justice by providing a cogent roadmap for post-conviction courts to evaluate evidence of actual innocence.

CONCLUSION

In denying Christopher Coleman a new trial, the lower courts either applied an erroneous standard for granting a new trial based on actual innocence, or applied the correct standard erroneously. Either way, this Court should grant leave to appeal, and Christopher Coleman respectfully so requests.

Respectfully submitted,

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