No. _____

22-5923 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

_____

MICHAEL L. BERRY — PETITIONER
(Your Name)

vs.

THE PEOPLE OF THE STATE OF ILLINOIS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

APPELLATE COURT OF ILLINOIS, THIRD DISTRICT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

MICHAEL L. BERRY #R49782
(Your Name)

5835 STATE ROUTE 154
(Address)

PINCKNEYVILLE, ILLINOIS 62274
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

WHETHER THE THIRD DISTRICT APPELLATE COURT WRONGLY REJECTED PETITIONER'S MOTION TO FILE A SUCCESSIVE POST-CONVICTION PETITION CLAIMING ACTUAL INNOCENCE BASED ON THE PROFFERED EVIDENCE OF DR. GEOFFREY LOFTUS, A LEADING EXPERT ON EYEWITNESS IDENTIFICATIONS, WHICH DISCUSSED FACTORS QUESTIONING THE WITNESS' IDENTIFACATION OF PETITIONER.

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[✓] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[✓] reported at 2022 IL App (3d) 200082-U; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the THIRD DISTRICT APPELLATE court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[✓] For cases from **state courts:**

The date on which the highest state court decided my case was June 24, 2022
A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

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COMPELLING REASONS FOR GRANTING REVIEW

This Court recognized in *People v. Lerma*, 2016 IL 118496, ¶ 24, the value of expert testimony regarding the reliability of eyewitness identification testimony in preventing the "single greatest source of wrongful convictions in the United States." In the instant case, tried before a jury prior to *Lerma*, a shooting victim identified Michael Berry as his assailant even though he observed the shooter in a poorly lighted stairwell for only "a quick glance" and even though the witness earlier said a different person shot him.

The Third District wrongly rejected Berry's motion for to file a successive post-conviction petition claiming actual innocence based on the proffered evidence of Dr. Geoffrey Loftus, a leading expert on eyewitness identifications, which discussed factors questioning the witness' identification of Berry. The Third District, without discussing the facts surrounding the identification evidence, simply found the expert evidence would merely impeach a witness and thus would not be of such conclusive character to justify post-conviction relief. *Berry*, 2022 IL App (3d) 200082-U, ¶¶ 13-15, citing *People v. Smith*, 177 Ill.2d 53, 82-83 (1997), and *People v. Harris*, 154 Ill.App.3d 308, 319 (1st Dist. 1987).

This Court should allow leave to appeal and find, consistent with *People v. Martinez*, 2021 IL App (1st) 190490, that expert evidence regarding eyewitness identification may provide the basis for a colorable claim of actual innocence. This Court should further establish that the general rule of *Smith* and *Harris* that evidence that merely impeaches a witness cannot constitute the basis for post-conviction relief does not restrict courts' ability to consider post-conviction claims of actual innocence brought under the principles of *Lerma*.

STATEMENT OF FACTS

Michael Berry was found guilty by a jury of attempt murder and unlawful use of a weapon (UUW) by a felon in the shooting of Earlzell Lewis at an apartment complex in Joliet on July 27, 2007. (C 70-72) The trial court sentenced Berry to consecutive prison terms of 50 years for attempt murder, which included a 25-year add-on for personal discharge of a firearm, and 10 years for UUW by a felon. (C 307, R 1074-75)

The victim Earlzell Lewis and his friend Trevale Shorts were walking through the apartment complex where they encountered Frank Banks, who was known as "Nitty." (R 298-99, 300, 395-96) Lewis and Nitty had a history of animosity. Shorts and Nitty got into a physical confrontation. (R 302, 397) The petitioner Michael Berry and Jamar Julian came out of an apartment and broke up the fight. (R 505, 529, 594-96) Nitty asked the petitioner to get him a gun so he could shoot Shorts, but Berry refused. (R 305, 306-07, 500, 599)

Lewis testified that he believed Berry was carrying a weapon because of the way he was holding his pants. (R 401) After Berry refused to provide a gun to shoot Shorts, Lewis remained in front of building number 1005 with Berry and Nitty, while Shorts ran home to building number 1003. (R 403-04) Lewis testified that Berry told Nitty, "We need somebody our own age, somewhere around that area. I can't remember the exact words." (R 403) Lewis looked at Berry and smiled. "I was stuttering. I was like, okay, if you need somebody to shoot – I felt it was directed toward me. I smiled like okay." (R 403)

Lewis walked away, entered building number 1005, and went downstairs to his friend James' apartment so he could call his older brother to pick him up.

(R 404-06) James did not have a phone, so Lewis left James' apartment less than a minute after he arrived and started to exit the building the way he entered, when he heard Nitty's voice say, "Smoke that nigger." (R 406-11, 433) Lewis turned and saw a man at the top of the stairs standing "slightly behind the door" and holding a gun. (R. 409, 411-12, 418) Lewis heard two gunshots and felt the second bullet strike him in the right side of the face. (R 413, 415) Though he saw the shooter for only "a quick glance" of "less than two seconds" before turning to flee, Lewis testified that the shooter was Berry. (R 412-13, 442)

Lewis ran to a nearby Auto Zone store. (R 314, 356) Trevale Shorts and Lewis' friend Bianca Ellis followed Lewis to the Auto Zone. (R 320-22, 357-58) Shorts asked Lewis who shot him and he answered, "Nitty did it," referring to the nickname for Frank Banks. (R 320, 323, 331) Ellis asked Lewis "if Nitty did it," and Lewis shook his head yes. (R 359) Lewis admitted at trial he answered, "Nitty, Nitty" when Ellis asked who shot him. (R 417) Lewis said he had heard Nitty's voice and did not know the petitioner's name. (R 417-18) Lewis told police at the hospital there were two perpetrators but did not name them. (R 418-19) Lewis later identified Nitty and Berry in separate photo lineups. (R 419; Pl.Ex. 27, 29)

Jamar Julian testified that he was with Berry when he broke up the fight and he went back into the apartment building with Nitty and Berry. (R 579-80, 589-90, 594) Julian went into a second-floor apartment while he believed Nitty and Berry went to a third-floor apartment. (R 600-02) After a few minutes, he heard gunshots. (R 602) Julian testified he did not see Berry with a gun at any time. (R 633-34, 639) In a recorded statement to police on the day of the

shooting, Julian said that after the shooting, Berry came into the second-floor apartment and told Julian to get rid of a gun. (R 642, 656) At trial, Julian testified that portion of his recorded statement was not true and that he made that statement under intense questioning by police. (R 641, 657)

Raisa Woods testified that at the time of the shooting she was the girlfriend of Frank Banks, known as "Nitty." (R 522) Woods said she saw Berry with a gun on the day of the shooting. (R 507, 534) Woods testified that on the day of the shooting she was in her sister's third-floor apartment when Berry and Julian left to break up a fight involving Nitty. (R 505) Woods heard three gunshots about 15 or 20 minutes later. (R 509-10, 520) A few minutes later, Berry and Julian returned to the apartment and Berry washed his hands, changed his clothes, and placed a black revolver on a table. (R 511-12) Woods admitted that she did not initially tell police about the Berry's actions, including that he had a gun after she heard gunshots. (R 543-45)

Berry gave a videotaped statement to police in which he denied shooting Lewis. Berry said he went outside to break up the fight between Nitty and Shorts. (R 738-39) Berry said that after he heard gunshots, he went to a different apartment building to buy marijuana. (R 739-41) Berry said he did not own a gun and did not see who shot Lewis. (R 741)

Berry did not testify and presented no evidence. (R 769)

On direct appeal, Berry argued: 1) he was not proven guilty beyond a reasonable doubt; 2) the jury instructions were defective where the definition instruction for attempt murder did not include personal discharge of a firearm language while the issues instruction for attempt murder included personal

discharge of a firearm as an element of the offense. Berry argued this allowed the jury to find him guilty of attempt murder without finding the personal discharge element in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000); and 3) prosecutors made prejudicial statements in closing arguments. The Appellate Court affirmed Berry's convictions and sentences. *People v. Berry*, 2011 IL App (3d) 091048-U.

Berry, on October 28, 2013, filed a post-conviction petition. (C 428-49) The trial court on December 23, 2013, summarily dismissed the petition. (C 467-69) The Appellate Court affirmed the dismissal of the petition. *People v. Berry*, 2015 IL App (3d) 140050-U.

On August 16, 2019, Berry, through privately retained counsel, filed a motion for leave to file a successive post-conviction petition and the successive petition. (C 512-16, 517-27) Berry filed an amended petition on August 20, 2019, (Sec C 46-65), and refiled the motion and petition on December 11, 2019. (C 534-38, 539-59)

The successive petition raised an actual innocence claim and argued that due process requires that Berry be given the opportunity to present expert testimony regarding the eyewitness identification by the shooting victim, Earlzell Lewis. (C 544-47) The petition includes a report by Dr. Geoffrey R. Loftus, an expert on human perception and memory, presenting Dr. Loftus' proffered testimony regarding Lewis' identification of Berry as the person who shot him. Dr. Loftus' nine-page report was attached to the petition. (C 550-58) Dr. Loftus' report says he would have testified regarding: 1) a general theory of perception and memory; 2) circumstances under which memory fails, and the

consequences of memory failures for eyewitness testimony; 3) effects of low lighting on perception and subsequent memory; 4) effects of attention on memory; 5) effects of stress on perception and memory; 6) effects of duration on perception and memory; 7) effects of expectations on perception and memory; 8) effects of inferences on memory; 9) why Lewis may at trial have expressed a strong but potentially false memory of Berry as the shooter; and 10) scientific evidence concerning the relation between confidence and accuracy. (C 552-56)

Dr. Loftus stated he would not issue a judgment about whether a witness' identification testimony is correct or incorrect. Rather, the testimony would discuss scientific bases of relevant aspects of perception and memory to assist jurors in assessing the reliability of eyewitness identification testimony. (C 551) However, specific to the instant case, Dr. Loftus concluded:

> To summarize Points 7 and 8, Mr. Lewis may have either misperceived the shooter as Mr. Berry based on expectations or may have inferred the shooter to have been Mr. Berry after. In either case, Mr. Lewis could have used then his prior knowledge of Mr. Berry's appearance to construct a strong, confidence-inducing memory of Mr. Berry as the shooter – a memory that he eventually used as a basis for confidently identifying Mr. Berry as the shooter at trial.
>
> In short, Mr. Lewis's identification of Mr. Berry as the shooter at trial would therefore have been likely based on a strong memory of Mr. Berry as the shooter. However, and critically, Mr. Lewis's memory of Mr. Berry as the shooter had likely not, as he believed, been constructed based on his perceptions of the actual shooter operating during the actual shooting (carried out, as described, under poor conditions for perceiving and memorizing), but rather had been either false to begin with based on Mr. Lewis's expectations (see Point 7 above) or had been reconstructed after the fact, based on inferences (see Point 8 above). (C 555-56)

On January 23, 2020, Judge Daniel D. Rippy denied leave to file a successive petition. The court stated from the bench, "I understand that the defendant has reached out to an expert witness. However, I do not find that I – that that would fundamentally change the course of the finding at trial. So I'm going to deny the request for leave to file a successive post conviction." (Sup R 4-5)

On appeal, the Third District treated the proposed successive petition as raising a claim of actual innocence. The Court found the proffered testimony of Dr. Loftus would merely impeach Lewis' identification of Berry and does not affirmatively establish Berry's innocence or warrant scrutiny of all evidence presented at trial. The Court found the trial court did not err in denying Berry's motion for leave to file a successive post-conviction petition. *People v. Berry*, 2022 IL App (3d) 200082-U, ¶¶ 12-15.

ARGUMENT

The Third District wrongly denied Michael Berry's request to file a successive post-conviction petition raising an actual innocence claim when it found new expert evidence questioning the reliability of Earlzell Lewis' trial identification of Berry would merely impeach the eyewitness. Berry should have been permitted to file a successive petition under *People v. Martinez*, 201021 IL App (1st) 190490, in which the First District found a similar actual innocence claim was legally sufficient to preclude second-stage dismissal of a post-conviction petition.

Shortly after he was shot in the face in a poorly lighted stairwell by an assailant whom he had observed for only "a quick glance," Earlzell Lewis told two friends he was shot by a person different than the petitioner Michael Berry. (R 412-13, 442, 320, 323, 331, 359) Rather than identifying Berry as his assailant, Lewis told his friends he was shot by "Nitty," the nickname of Frank Banks. (320, 323, 331, 359) Yet at trial, Lewis identified Berry as the shooter, and a jury found Berry guilty of attempt murder. (R 412-13, 442, C 70-72) Berry was convicted on the basis of flawed and unreliable eyewitness testimony. No other witness saw the shooting and there was no physical evidence linking Berry to the shooting.

Testimony from an expert on the reliability and fallibility of eyewitness identifications would have had a significant impact on the weight of Lewis' testimony and on the outcome of Berry's jury trial. In fact, in a report attached to Berry's proffered successive post-conviction petition, Dr. Geoffrey Loftus, a leading scholar on perception and memory and an expert on eyewitness identifications, outlined several factors that likely affected the reliability of Lewis' identification of Berry as the person who shot him.

The circuit court and the appellate court denied Berry's request to file a

successive post-conviction that would mark the first meaningful opportunity for Berry to present expert testimony that could have informed jurors of the factors affecting the reliability of Lewis' eyewitness identification. In 2016, after the conclusion of Berry's direct appeal and initial post-conviction petition proceedings, this Court significantly changed the legal landscape in Illinois by recognizing the validity and admissibility of such expert testimony. *People v. Lerma*, 2016 IL 118496, ¶ 24. This recognition of the legitimacy of expert testimony regarding eyewitness identification and Dr. Loftus' report of factors that cast doubt on Lewis' in-court identification provides a sufficient basis for Berry to bring an actual innocence claim in a successive post-conviction petition.

The Third District erred by affirming the denial of Berry's motion for leave to file a successive petition. The Court found the proffered testimony of Dr. Loftus would merely impeach Lewis' identification of Berry and, thus, does not affirmatively establish Berry's innocence or warrant scrutiny of all evidence presented at trial. *People v. Berry*, 2022 IL App (3d) 200082-U, ¶¶ 12-15. But the cases cited by the Third District in support of its ruling pre-date *Lerma* and involved post-trial motions for new trials. And the reviewing court disregarded the more recent case of *People v. Martinez*, 201021 IL App (1st) 190490, where the First District found a similar actual innocence claim based on a post-trial report by Dr. Loftus was legally sufficient to preclude second-stage dismissal of a post-conviction petition. Because of this conflict between *Martinez* and the instant case, this Court should grant leave to appeal and establish that a post-*Lerma* challenge to eyewitness identification based on expert opinion presents a colorable post-conviction claim of actual innocence.

Post-Conviction Principles

The Post-Conviction Hearing Act provides a procedural mechanism for a criminal defendant to claim that a substantial violation of his federal or state constitutional rights occurred at the proceedings which resulted in his conviction. *People v. Griffin*, 178 Ill.2d 65, 72-73 (1997). The Act generally contemplates the filing of only one post-conviction petition. *People v. Ortiz*, 235 Ill.2d 319, 328 (2009). Successive petitions are disfavored and cannot be filed without first obtaining leave of court. *People v. Edwards*, 2012 IL 111711 (2012), ¶ 29. But leave to file a successive petition will be granted when a petitioner sets forth a colorable claim of actual innocence based on newly discovered evidence. *Edwards*, 2012 IL 111711 (2012), ¶¶ 23, 31. Evidence in support of a claim of actual innocence must be newly discovered, material and not merely cumulative, and of such conclusive character that it would probably change the result on retrial. *Edwards*, 2012 IL 111711, ¶ 32. Leave to file a successive petition raising actual innocence should be denied only when it is clear from the petition and supporting documentation that, as a matter of law, the petition cannot set forth a colorable claim of actual innocence. *People v. Robinson*, 2020 IL 123849, ¶ 44. A petitioner who is merely seeking leave to file a successive petition on actual innocence grounds need not conclusively prove his claim. *Edwards*, 2012 IL 111711, ¶ 24 (requiring petitioner to set forth only a colorable claim of innocence to obtain leave to file). The standard for alleging a colorable claim of actual innocence falls between the first-stage pleading requirement for an initial petition and the second-stage requirement of a substantial showing. *Robinson*, 2020 IL 123849, ¶ 58.

A circuit court's denial of leave to file a successive post-conviction petition is reviewed *de novo*. *Robinson*, 2020 IL 123849, ¶ 40.

Actual Innocence

Michael Berry argued below that the trial court erred by denying him leave to file a successive post-conviction petition seeking to present expert testimony from Dr. Geoffrey Loftus, who reviewed the instant case and prepared a report assessing factors that influenced Earlzell Lewis' identification of Berry as the shooter and calling into question the reliability of Lewis' identification. (C 550-58) Berry argued Dr. Loftus' report formed the basis for a colorable claim of actual innocence where, after his initial post-conviction petition was unfavorably resolved, this Court in *People v. Lerma*, 2016 IL 118496, significantly changed the legal landscape in Illinois by recognizing the validity and admissibility of expert testimony regarding eyewitness identification.

Berry's claim satisfies the elements of the test to establish a colorable claim of actual innocence. First, the evidence at issue must be newly discovered. "Newly discovered evidence is evidence that was discovered after trial and that the petitioner could not have discovered earlier through the exercise of due diligence." *Robinson*, 2020 IL 123849, ¶ 47 Dr. Loftus' report, attached to Berry's proffered petition, constitutes newly discovered evidence. At the time of Berry's trial and prior to *Lerma*, the exclusion of such expert testimony was common practice in Illinois. *Lerma*, 2016 IL 118496, ¶ 24. *Lerma* shifted the legal landscape by recognizing research concerning eyewitness identifications "is well settled, well supported, and in appropriate cases a perfectly proper subject for expert testimony." *Lerma*, 2016 IL 118496, ¶ 24.

The First District found in *Martinez* that an expert report by Dr. Loftus constituted newly discovered evidence in the context of a post-conviction actual innocence claim. In that appeal, the reviewing court found Dr. Loftus's report constituted newly discovered evidence because Illinois courts routinely barred eyewitness expert testimony at the time of petitioner's trial. "It would have done little good for defendant to procure Dr. Loftus's report at the time of trial." *Martinez*, 2021 IL App (1st) 190490, ¶ 113. The same is true here, where obtaining Dr. Loftus' report at any point prior to *Lerma* "would have done little good" for Berry because such expert testimony only gained legal footing in Illinois upon the issuance of *Lerma*. *Martinez*, 2021 IL App (1st) 190490, ¶ 113. As was the case in *Martinez*, Dr. Loftus's report here constitutes newly discovered evidence in light of *Lerma*.

Further, Dr. Loftus' report is material and not merely cumulative. Evidence is material if it is relevant and probative of the petitioner's innocence. *Robinson*, 2020 IL 123849, ¶ 47. Evidence is considered cumulative when it adds nothing to what was already before the jury. *Ortiz*, 235 Ill.2d at 335. Dr. Loftus's report is material where it directly addresses the central issue before the jury – whether Lewis' eyewitness identification of Berry is reliable and trustworthy. *Ortiz*, 235 Ill.2d at 336. Since this new evidence "goes to the ultimate issue in the case and, if believed, would 'produce new questions to be considered by the trier of fact' that concern defendant's guilt," it satisfies the materiality requirement. *People v. White*, 2014 IL App (1st) 130007, ¶ 24 (quoting *People v. Molstad*, 101 Ill.2d 128, 135 (1984)).

Similarly, Dr. Loftus' report is not cumulative to any evidence offered by

either party at trial. Dr. Loftus's report would provide the jury on retrial with a science-based framework for analyzing and determining the reliability of Lewis' identification testimony. Because Dr. Loftus's report is not merely cumulative to the trial evidence but instead adds to what was before the fact finder, Berry has satisfied the second requirement of the actual innocence test.

Finally, Dr. Loftus' report is of such conclusive character that it would probably change the result on retrial. *Robinson* provides guidance on how to apply the "conclusive character" inquiry:

> Ultimately, the question is whether the evidence supporting the postconviction petition places the trial evidence in a different light and undermines the court's confidence in the judgment of guilt. . . . The new evidence need not be entirely dispositive to be likely to alter the result on retrial. . . . Probability, rather than certainty, is the key in considering whether the fact finder would reach a different result after considering the prior evidence along with the new evidence.

Robinson, 2020 IL 123849, ¶ 48 (citations omitted); *Martinez*, 2021 IL App (1st) 190490, ¶ 115.

The Third District in this case found Berry's claim "merely impeaches Lewis's testimony" and thus is insufficient to call into question the outcome of the case. *Berry*, 2022 IL App (3d) 200082-U, ¶ 15. The Court cited *People v. Smith*, 177 Ill.2d 53, 82-83 (1997), and *People v. Harris*, 154 Ill.App.3d 308, 319 (1st Dist. 1987), in support of its finding that newly discovered evidence which merely impeaches a witness will not typically be of such conclusive character to justify post-conviction relief. *Berry*, 2022 IL App (3d) 200082-U, ¶ 15. The Court did not evaluate the proffered expert testimony of Dr. Loftus as it applies to Berry's case, but rather simply rejected Berry's actual innocence claim based on

the general rule from *Smith* and *Harris*. Those cases are distinguishable, however, where each involved post-trial attempts in motions for new trial to bring in new evidence from lay witnesses, and they were reviewed by an abuse of discretion standard. *Smith*, 177 Ill.2d at 82-83; *Harris*, 154 Ill.App.3d at 319.

In contrast, expert evidence such as proffered by Dr. Loftus in this case goes beyond mere impeachment of a witness. Notably, both *Smith* and *Harris* were decided before this Court recognized in *Lerma* that there has been "a dramatic shift in the legal landscape, as expert testimony concerning the reliability of eyewitness testimony has moved from novel and uncertain to settled and widely accepted." *Lerma*, 2016 IL 118496, ¶ 24. Studies have shown that eyewitness testimony is not as reliable as previously thought. In fact, "[e]yewitness misidentification is now the single greatest source of wrongful convictions in the United States, and responsible for more wrongful convictions than all other causes combined." *Lerma*, 2016 IL 118496, ¶ 24, citing *State v. Dubose*, 699 N.W.2d 582, 591-92 (Wis.2005) (collecting relevant studies).

> In other words, in the 25 years since [*People v. Enis*, 139 Ill.2d 264 (1990)] we not only have seen that eyewitness identifications are not always as reliable as they appear, but we also have learned, from a scientific standpoint, why this is often the case. Accordingly, whereas *Enis* allowed for but expressed caution toward the developing research concerning eyewitness identifications, today we are able to recognize that such research is well settled, well supported, and in appropriate cases a perfectly proper subject for expert testimony.

Lerma, 2016 IL 118496, ¶ 24. Given this new recognition of the importance of expert evidence regarding eyewitness identification testimony, the *Smith* and *Harris* rules regarding impeachment must give way to new legal landscape

identified in *Lerma*.

In this case, Dr. Loftus's report places the trial evidence in a different light and undermines the court's confidence in the judgment of guilt because it directly casts doubt on Lewis' eyewitness identification of Berry. (C 550-56) If jurors had heard Dr. Loftus explanation of factors that can adversely affect eyewitness identification, there is a substantial probability that the outcome of Berry's trial would have been different. As such, Berry should have been granted leave to bring a successive post-conviction petition arguing actual innocence.

The report stated Dr. Loftus would not issue a judgment about whether a witness' identification testimony is correct or incorrect. (C 551) Rather, Dr. Loftus' testimony would present relevant concepts for jurors to consider when evaluating the reliability of eyewitness identification testimony. Dr. Loftus' report details several red flags that are known in the scientific community that may have affected the reliability of Lewis' testimony but which may be counterintuitive to an average lay juror. *Lerma*, 2016 IL 118496, ¶ 23

First, Dr Loftus notes that Lewis saw the shooter standing atop a dark stairwell. Under such conditions, a person generally has limitations on detecting the fine detail that is necessary to encode a person's appearance and likely limited Lewis' perception of the shooter. (C 553) Dr. Loftus also would have discussed the impact that divided attention can have on the reliability of eyewitness identification. During the shooting, Lewis would have been focused on trying to avoid being hurt, seeking help, and looking for escape routes, while the identity of the shooter would have received lesser attention. And, research has shown the impact of "weapon focus," or the inclination to pay attention to

a weapon rather than other potentially relevant aspects of the scene, such as the appearance of the person wielding the weapon. (C 554) These factors directly implicate Lewis' ability to observe the shooter and Lewis' degree of attention.

Relatedly, Dr. Loftus would testify that, "contrary to popular belief, mental functioning during a high-stress experience is poorer than mental functioning during a moderate-stress experience." (C 554); see *Enis*, 139 Ill.2d at 288; *Lerma*, 2016 IL 118496, ¶ 26. Dr. Loftus could disabuse the jury of the widespread, but incorrect, idea that "a vivid and accurate representation of a highly stressful event, replete with many details is 'stamped into a witness's memory.'" (C 554)

Lewis testified that he saw the shooter for only "a quick glance" of "less than two seconds" before turning to flee. (R. 412-13, 442) Dr. Loftus would present research showing that only a fraction of the duration comprising an event is available to a witness for memorizing what will later be relevant. (C 554-55) Numerous factors can limit this "functional duration," such that "[e]ven if an event itself lasts several seconds, the witness's functional duration for perceiving and memorizing the perpetrator's appearance can, therefore, be as low as zero." (C 555)

And, significantly here, Dr. Loftus would testify on the effects of Lewis' expectations on his perceptions and memory. The report noted that Lewis testified he believed Berry was carrying a weapon when he encountered Berry prior to the shooting. (R 401) "This would have fostered an expectation on Mr. Lewis's part that the person shooting him was the one whom he believed to have had the gun, specifically Mr. Berry." (C 555)

Finally, Dr. Loftus said that Lewis' confidence in his identification of Berry is not necessarily indicative of reliability. Confidence cannot be used as an index of accuracy where, as in this case, the circumstances for forming and maintaining the original memory are poor, and where there are apparent sources of false and biasing post-event information. (C 556) Dr. Loftus summarized:

> Of most relevance to the case at hand is that Mr. Lewis may well have begun with perceptions and initial memories of the important aspects of the scene, *viz.*, whether or not Mr. Berry had a gun to begin with and the shooter's identity that were fragmented and incomplete – and yet, at the time he testified at trial, had a reconstructed memory that include a strong representations of Mr. Berry having a gun beforehand and having been the shooter. (C 553)

In light of these serious questions about the reliability of Lewis' identification of Berry as the shooter, it would be in the interest of justice and fundamental fairness to permit Berry to proceed with his claims raised in his successive post-conviction petition. Berry has a due process right to be proved guilty beyond a reasonable doubt of the charged offenses and this new evidence made possible by *Lerma*'s changed legal landscape sheds new light on his claim of innocence. Indeed, this case cannot be distinguished from *Lerma*, where "[t]here [was] no physical evidence tying defendant to the crime, and defendant neither confessed nor made any other type of incriminating statement." *Lerma*, 2016 IL 118496, ¶ 26. Dr. Loftus' science-based expert testimony "would certainly undermine" the reliability of Lewis' identification of Berry and would aid the jury in making that fact-determination. *Martinez*, 2021 IL App (1st) 190490, ¶ 116.

In contrast to *Martinez*, this appeal is taken from the denial of leave to file a successive petition, meaning that Berry needed only to make a colorable claim of actual innocence. Unlike the petitioner in *Martinez,* who made a confession to police, Berry never implicated himself in the shooting of Lewis. *Martinez*, 2021 IL App (1st) 190490, ¶ 117. Thus, Berry actually presents a stronger case for further post-conviction proceedings than the *Martinez* petitioner. Where, as in *Martinez*, Dr. Loftus's prospective testimony calls into question the evidence most central to the State's conviction of Berry, and thus "places the trial evidence in a different light, undermining the court's confidence in the judgment of guilt," Berry has satisfied the conclusive-character prong of the actual innocence test. *Robinson*, 2020 IL 123849, ¶ 48; *Martinez*, 2021 IL App (1st) 190490, ¶ 115-17.

As noted, leave to file a claim of actual innocence should be denied only where it is clear from a review of the petition and supporting documentation that, as a matter of law, the petition cannot set forth a colorable claim of actual innocence. *Robinson*, 2020 IL 123849, ¶ 44. Berry's actual innocence claim, based on the report of Dr. Loftus and considered in light of *Lerma* and *Martinez*, satisfies this test. Berry has presented a colorable claim of actual innocence.

In sum, this Court should allow this petition and find Berry has made a colorable claim of actual innocence sufficient to warrant filing of his successive post-conviction petition. Berry respectfully requests this Court reverse the circuit's order denying Berry leave to file a successive post-conviction petition and remand this cause for further post-conviction proceedings, commencing with the appointment of counsel.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Michael L. Berry

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