No. 08-2080

IN THE APPELLATE COURT OF THE STATE OF ILLINOIS
FOR THE FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, v. THADDEUS JIMENEZ, Petitioner-Appellant.	)	Appeal from the Circuit Court of Cook County, Criminal Division Circuit No. 93-CR-14710 The Honorable Stanley Sacks Presiding Judge Notice of Appeal Filed: July 23, 2008 Date of Order Appealed From: June 26, 2008

APPELLANT'S OPENING BRIEF

Steven A. Drizin
Joshua A. Tepfer
Northwestern Univ. School of Law
Bluhm Legal Clinic
Center on Wrongful Convictions
357 E. Chicago Ave.
Chicago, IL 60611
(312) 503-8576

Stuart J. Chanen
Rachel M. Vorbeck
Patrick C. Harrigan
Aaron M. Chandler
Katten Muchin Rosenman LLP
525 West Monroe Street
Chicago, IL 60661
(312) 902-5200

POINTS AND AUTHORITIES

NATURE OF THE CASE

Thaddeus Jimenez, Petitioner-Appellant, appeals from a judgment summarily dismissing his petition for post-conviction relief.

No issue is raised concerning the charging instrument. However, an issue is raised concerning the sufficiency of the post-conviction pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether the Circuit Court erred in summarily dismissing the Petition where it states the gist of a constitutional claim that Jimenez is actually innocent based on the recantation testimony of two of the State's key eyewitnesses.

2. Whether the Circuit Court erred in summarily dismissing the Petition where it states the gist of a constitutional claim that the exclusion of a third party's taped confession to the murder violated Jimenez's due process rights.

3. Whether the Circuit Court erred in summarily dismissing the Petition where it states the gist of a constitutional claim that Jimenez's due process rights were violated because police used unduly suggestive lineup procedures to obtain pretrial identifications from the State's key eyewitnesses.

4. Whether this Court should assign this case to a different judge on remand because Judge Stanley J. Sacks has pre-judged the merits of the Petition, which would substantially prejudice Jimenez on remand.

JURISDICTION

Thaddeus Jimenez, Petitioner-Appellant, appeals the summary dismissal of his petition for post-conviction relief. The circuit court entered the judgment on appeal on June 26, 2008. (App. 1.)[1] Jimenez timely filed a Notice of Appeal on July 23, 2008. (App. 184.) This Court therefore has jurisdiction over this appeal pursuant to Article VI, Section 6 of the Illinois Constitution and Supreme Court Rule 651(a).

STATUTE INVOLVED

The statute involved is the Post-Conviction Hearing Act, 725 ILCS 5/122-1 *et seq*. (West 2004), a copy of which is included in the Appendix to the brief. (App. 31.)

STATEMENT OF FACTS

On October 4, 1994, Thaddeus Jimenez ("Jimenez"), a member of the Simon City Royals street gang, was found guilty of the first degree murder of Eric Morro after a jury trial. The Illinois Appellate Court, First District, Fifth Division, reversed and remanded the case for a new trial, holding that the trial court's refusal to allow defense counsel to *voir dire* jurors regarding possible prejudice against gang members was reversible error. *People v.*

---

[1] The citations in this brief are to the following: documents in the Appendix ("App."); the report of proceedings ("R."); or the Supplemental Record ("Supp.".). The Supplemental Record includes the records on appeal for both of Jimenez's previous direct appeals, and unless otherwise noted, all citations to the Supplemental Record are to the record for the direct appeal from Jimenez's second trial, case no. 98-0247. Citations to the Supplemental Record in this brief utilize the lettering scheme shown on the transcripts (e.g., "Supp. A-5").

Jimenez, 284 Ill. App. 3d. 908, 915 (1st Dist. 1996). In November 1997, Jimenez was re-tried and convicted by a jury of first degree murder in a trial presided over by the Honorable Judge Stanley J. Sacks. On January 18, 2000, this Court affirmed his conviction. *People v. Jimenez*, No. 1-98-0247 (unpublished order under Ill. S. Ct. R. 23) (1st Dist. 2000).

On April 4, 2008, with the assistance of attorneys from the Center of Wrongful Convictions at Northwestern University School of Law and Katten Muchin Rosenman LLP, Jimenez timely filed the instant post-conviction petition ("Petition"). In support of his Petition, Jimenez attached an affidavit and transcript from Larry Tueffel ("Tueffel"), a member of the Simon City Royals, and Tina Elder ("Elder"), both of whom were State's witnesses at trial who identified Jimenez as Morro's shooter. (App. 125, 118.) Both Tueffel's and Elder's affidavits recanted their trial testimony, with Tueffel specifically stating that a person named "Carlos" shot Morro. (App. 137.)[2] Both affidavits also describe the suggestive lineup procedures police used to obtain Tueffel's and Elder's pretrial identifications. As set forth more fully below, the Petition states three constitutional claims based on this new evidence: (1) that Jimenez is actually innocent, (2) that Jimenez's right to due process was violated when, at his second trial, the trial court excluded the tape-recorded confession of a third party, Juan Carlos Torres, to Morro's murder;

2 In the Petition, Jimenez originally referred to Juan Carlos Torres as "Individual A" and redacted Torres's name from the exhibits to the Petition. Because Judge Sacks's written order identifies Juan Carlos Torres by name, Jimenez will now refer to him by his name as well.

and (3) that Jimenez's right to due process was violated when police used unduly suggestive lineup procedures to obtain Tueffel's and Elder's identifications. (App. 36-60.) On June 26, 2008, in a written order, Judge Sacks summarily dismissed the Petition, concluding that this new evidence was unlikely to "change the result of this case on retrial" and that the Petition was "frivolous and patently without merit." (App. 19.)

THE OFFENSE: THE SHOOTING OF ERIC MORRO

On February 3, 1993, at approximately 6:30 p.m., 18-year-old Eric Morro ("Morro") was walking eastbound on the 3100 block of Belmont Avenue in Chicago with his 14-year-old friend Larry Tueffel when they were approached from behind by two other boys. (Supp. R-157.) One of the boys, 12-year-old Victor Romo ("Romo"), asked Morro about a debt Morro owed to someone named Leo. (Supp. R-157.) Morro told Romo to mind his own business and kept walking down the street. (Supp. R-158.) Following this exchange, directly in front of a Honey Baked Ham store located at 3018 W. Belmont Avenue, Romo grabbed Morro and pushed him against a wall. (Supp. R-159.) Morro threw a punch at Romo but missed him. (Supp. R-159.) Romo's companion then pulled out a small caliber handgun from his pocket, prompting Morro to yell "Triangle killers" at the assailants, a reference to the Triangle Brothers street gang, a rival gang of the Simon City Royals. (App. 65; Supp. A-40.) The gunman then placed the gun barrel directly on Morro's upper left chest and fired a single shot, killing Morro. (Supp. R-169.)

Romo and the shooter – whom Romo would later identify as Juan Carlos Torres – immediately fled, running west on Belmont. (Supp. C-29.) Tueffel ran in the opposite direction, through a lot just east of the Honey Baked Ham store. (Supp. R-160.) It was "dark out" at the time (Supp. R-50), and the incident "happened very fast." (Supp. R-98.)

JUAN CARLOS TORRES CONFESSES TO THE MURDER AFTER JIMENEZ IS ARRESTED

Sometime in the early morning of February 4, 1993, Chicago police officers arrested Jimenez and charged him with Morro's murder. (App. 74.) That same day, with the Chicago police closing in on Romo, Romo told his father, Ezequiel Romo ("Ezequiel") about the shooting and identified Juan Carlos Torres as the boy who had killed Morro. (Supp. P-8.)

Romo's father then made arrangements to meet Juan Carlos Torres at a local restaurant to talk about the shooting. (Supp. P-10.) Ezequiel chose to secretly record the conversation because he wanted to capture Torres's candid description of the crime to prevent Torres from later falsely inflating his son's role in the shooting. (Supp. P-8, P-10, P-22.) Ezequiel took pains to make sure that Torres did not know he was being recorded, wearing the tape

recorder in his inside jacket pocket.[3] (*Id.* at 10-17.) During his discussion with Ezequiel, Juan Carlos Torres confessed to having a gun at the scene, (Supp. C-43), and to shooting Morro, stating, "I had to do it." (Supp. C-44.) Torres also noted that the police had "pinned the blame on the, the other gang boy . . . he is in jail. . . then think he's the one that did it." (Supp. C-44.) Torres also explained that he shot Morro in self-defense and fled the scene, stating "he hit me close to the nose and then . . . so then I had to do it" and "when I fired the shot I ran." (Supp. C-50.)

On February 10, 1993, Ezequiel brought Romo to Chicago Police Area 5 headquarters, where Ezequiel informed detectives that Morro's killer was a boy named Juan Carlos Torres and that the shooting was in self-defense. (App. 78.) After detectives read Romo his *Miranda* warnings, Romo denied knowing Jimenez, and told detectives that he was with his friend Juan Carlos Torres on the day of the shooting, but he did not know that Juan Carlos Torres had a gun until Torres shot Morro. (*Id.*) Police then took a photograph of Romo and showed it to Tueffel, who confirmed that Romo was with the shooter. (App. 79.) Detectives then went to the home of Juan Carlos Torres, where they questioned him in the presence of his family and he denied being

---

[3] In 1993, such one-way taping was legal and such tape-recordings were admissible. *People v. Beardsley*, 115 Ill. 2d 47, 53-58 (1986); *People v. Herrington*, 163 Ill. 2d 507, 508-11 (1994). One-way taping did not become illegal until the legislature amended the eavesdropping statute in 1994. 720 ILCS 5/14-1(d)*; People v. Nestrock*, 735 316 Ill. App. 3d 1, 6-8 (2d Dist. 2000); s*ee also People v. Rodriguez*, 313 Ill. App. 3d 877, 887 (2d Dist. 2000) (holding "the admissibility of a recording allegedly made in violation of the eavesdropping statute is governed by the language of the statute in effect at the time of the recording").

at the crime scene or owning a jacket similar to the one witnesses described the shooter as wearing. (*Id.*) Juan Carlos Torres had curly hair (Supp. C-33), and thus matched the description given by several of the witnesses in the case. Despite this fact, Detective Bogucki did not take a photograph of Juan Carlos Torres. (Supp. A-63.) There is no evidence in the record to suggest that police made any attempt to corroborate Juan Carlos Torres's alibi, requested to see his jacket, or arranged a lineup in order to show Juan Carlos Torres to the witnesses in the case.

Approximately one month later, on March 8, 1993, police received a copy of Juan Carlos Torres's tape-recorded confession from Assistant State's Attorney Gina Savini, who had received it from Romo's defense attorney. (App. 97.) The police report documenting receipt of this evidence suggests that law enforcement may never have actually listened to the tape, as the report erroneously describes the tape as containing "an alleged ***telephone*** confession from Juan Carlos Torres concerning the murder" and notes that "the conversation was ***allegedly*** taped in Spanish" and . . . "***[a]llegedly*** . . . contained an admission by . . . Juan Carlos Torres that he shot the victim." (*Id.*) (Emphasis added.)

After the police received the tape, the only investigation police conducted was to re-interview Juan Carlos Torres, once again at his home, and again in the presence of his family. The report of this interview indicates Juan Carlos Torres "denied ever making such admission" and denied ever

having "a ***telephone*** conversation with Victor's father. " (*Id.*) (emphasis added.)

After these denials, the police conducted no additional investigation of Juan Carlos Torres. There is no evidence in the record that police made any efforts to investigate Juan Carlos Torres's whereabouts at the time of the shooting; to question any witnesses about Juan Carlos Torres; to search Torres's home for any of the clothing witnesses described the shooter as wearing or for the murder weapon; or to investigate whether Juan Carlos Torres was affiliated with the Triangle Brothers, the street gang that Eric Morro referred to when he yelled "Triangle killers" at the assailants just before he was shot. (App. 65; Supp. A-40.)

THE TRIAL: JUAN CARLOS TORRES'S TAPED CONFESSION EXCLUDED

No jury ever heard Juan Carlos Torres's tape-recorded confession to Eric Morro's murder. Two trial court judges excluded the confession on hearsay grounds. At the second trial, at a hearing on Jimenez's motion to admit evidence of Juan Carlos Torres's confession, Judge Sacks excluded the tape-recorded confession after applying the factors in *Chambers v. Mississippi*, 410 U.S. 284 (1973), reasoning that "[t]he only other evidence which may corroborate to some extent that Torrez [sic] supposedly shot whoever got shot in this case is the testimony of Romo, the juvenile Romo." (Supp. P-74.)

A. JIMENEZ'S DEFENSE.

Jimenez's defense at both trials (1994 and 1997) was that he was misidentified as the shooter, and that the real shooter was Juan Carlos Torres. Jimenez also presented the alibi testimony of as many as five different family members and friends that he was at his grandmother's house at the time of the murder. (*See* Supp. Record of case no. 94-4358 at C-119-29, C-159-160, C-163, C-176, C-188, C-199, C-204.) Specifically, they testified that Jimenez was home at the time of the shooting, both doing his homework (*id*. at C-126, C-170, C-190) and playing video games with his cousins. (*Id*. at C-121-22, C-125, C-128, C-159, C-189, C-199-200.)

Jimenez also presented the testimony of co-defendant Romo, who was with the shooter prior to the incident and at the scene. Romo testified that the shooter was not Jimenez, but rather Juan Carlos Torres. (Supp. A-53.) In addition to testifying at both Jimenez's 1993 and 1997 trials that Juan Carlos Torres was the shooter, Romo had also identified Juan Carlos Torres as Morro's killer under oath at his own juvenile trial in 1993. (App. 156-182.)

B. STATE'S CASE-IN-CHIEF.

The State did not introduce any physical evidence linking Jimenez to the murder, and its case was based entirely on witness testimony. To show motive, the State presented Shawn Cosmen who testified that earlier in the afternoon on the day of the shooting he witnessed a verbal altercation between Jimenez and Morro. (Supp. C-7.) Cosmen testified that Jimenez

had been flashing a gang sign, leading Morro to tell Jimenez to take "it somewhere else." (Supp. C-10.) Cosmen also testified that Jimenez cursed and threatened Morro, saying "you'll get yours" before walking away. (Supp. C-14.)

The State also presented the testimony of four eyewitnesses to the murder, each of whom are discussed below.

1. Phil Torres.

Phil Torres, the stepbrother of Shawn Cosmen (Supp. R-144), testified that, at the time of the shooting, he was leaning out of the window of his third-floor apartment on Belmont Avenue, which was approximately 25 feet above and 45 feet down the sidewalk in front of the Honey Baked Ham store where the shooting occurred. (Supp. R-96, R-113.) Torres testified that the shooting took place at night, and that it was dark outside, although the sidewalk was illuminated by streetlights. (Supp. R-133.) During the incident, Phil Torres was not looking down the street at Eric Morro and the boy who shot him, but was looking straight down at the sidewalk beneath his window, engaged in a conversation with Tina Elder. (Supp. R-94, R-114-15, R-138.) Phil Torres had a criminal record. He had been convicted of three separate offenses: possession of cannabis with intent to deliver, theft, and burglary, and had an additional pending burglary charge at time of the first trial. (Supp. B-82-83, appeal no. 94-4358.)

During his initial police interview within hours of the shooting, Phil Torres never mentioned Jimenez, even though he knew him well at the time. (Supp. R-134, R-147-48, R-154.) Phil Torres described the shooter as having "spiked" hair (Supp. R-145-46), and erroneously claimed that the offenders had been walking westbound, not eastbound, down Belmont, prior to the assault. (App. 72.)

After Phil Torres left the police station, he went to his mother's house. (Supp. R-122.) When he got there, he spoke with Shawn Cosmen, his step-brother. (Supp. R-149-50.) Cosmen told Phil Torres about the altercation between Jimenez and Morro a few hours before the murder. (Supp. C-8.) At 1:00 a.m., Phil Torres called Detective Bogucki from his mother's house and told the detective that, "after . . . sp[ea]k[ing] with family members," he was "finally able to remember what [he] really saw." (Supp. R-122, R-140.) It was at that point that Phil Torres, for the first time, named Jimenez as the shooter. (Supp. R-123.)

The next day, police officers contacted Phil Torres to ask him to view a lineup. Phil Torres identified Jimenez as the shooter at the lineup. (Supp. A-51, A-52.) He later identified Jimenez at trial.

2. Larry Tueffel.

The State also presented Tueffel's testimony. Tueffel was Eric Morro's friend, had been standing beside Morro when he was shot, and had the best opportunity of any of the State's eyewitnesses to observe the crime. (Supp. R-

156-60.) Tueffel also knew Jimenez well from the neighborhood. (Supp. R-134.) At the scene, Tueffel stated that he didn't recognize the shooter, but described the shooter's clothing and the fact that he had "curly black hair." (Supp. S-57-58; App. 68.) Jimenez did not have black curly hair; Juan Carlos Torres did. (Supp. C-33.)

When police took Tueffel from the scene to the police station, he, like Phil Torres, made no mention of the name Jimenez or "T.J." (Supp. R-165.) Tueffel's descriptions of the incident and offenders did not match Phil Torres's. (Supp. A-44.) He told Detective Bogucki that the shooter was a boy he believed to be named "Frankie": a white/Hispanic male, 13 to 14 years old, approximately 5'3" and 100 pounds, wearing a blue, three-quarter length Georgetown Starter jacket. (App. 68.) Tueffel also identified the boy with the shooter as "Victor." (Supp. R-187, R-188.) Tueffel reported that, during the altercation, Morro yelled "Triangle killers" at the assailants, a derogatory reference to the Triangle Brothers street gang. (App. 68.) Jimenez was a member of the Simon City Royals, not a member of the Triangle Brothers. (Supp. R-154.) Tueffel advised the police that he believed that Victor and the other offender were members of the Triangle Brothers gang. (*Id.*; Supp. S-40.) Sometime before 1:00 a.m., Tueffel returned to his home. (Supp. R-169.)

At 1:00 a.m. on February 4, 1993, Phil Torres called Detective Bogucki and identified Jimenez. (Supp. R-123.) A few hours later, at approximately 3:30 or 4:00 a.m. (Supp. R-181), Detective Bogucki drove to Tueffel's house,

woke him up, and took the 14-year-old, without his parents, back down to the police station. (Supp. R-165.) When Tueffel began by repeating his account of the crime, Detective Bogucki interrupted him and accused him of lying. (Supp. S-24, R-169.) Insisting that Tueffel was not telling the truth, Detective Bogucki told Tueffel that there were witnesses who had painted a different picture of how the shooting had occurred. (Supp. R-159.)

Eventually, Detective Bogucki informed Tueffel that Phil Torres had named Jimenez as the shooter. (Supp. S-24, S-38, App. 73.) After being told this information, 14-year-old Tueffel revised his account of the crime to mirror precisely Phil Torres's version of events. (Supp. R-169.)

After Tueffel changed his story to match what he had been told Phil Torres said, Detective Bogucki headed directly to Jimenez's grandmother's house to take Jimenez into custody. (Supp. A-46.) Shortly thereafter, Tueffel identified Jimenez in a lineup and, subsequently, identified him at trial. (Supp. A.-51, Supp. R-154.)

3. Sandra Elder and Tina Elder.

The State also presented the testimony of Sandra Elder ("Sandra") and her daughter Tina Elder ("Elder"). Between the time of Sandra's initial police interview and her testimony at trial, she repeatedly changed her story about where she was when the shooting occurred and what she saw that night:

- ***Sandra changed her story about where she was when Morro was shot,*** variously placing herself on the south side of Belmont Avenue

and in the middle of traffic on Belmont at the time of the incident. (App. 72.) At trial, Sandra would place herself in a third location at the time she allegedly observed the shooting – on the north side of Belmont. (Supp. A-7.)

- ***Sandra changed her story about how the incident began***. When asked by the police in the initial interview which way the perpetrators were walking prior to the shooting, Sandra stated that they were walking westbound on Belmont and passed the victim, who was walking eastbound. (App. 72.) Later, at Jimenez's trial, however, she changed her story to conform to other witnesses and stated that the perpetrators were walking eastbound prior to the attack, the same direction as the victim and Tueffel. (Supp. A-10, 11.)

- ***Sandra changed her story about what occurred after the incident ended.*** When police asked Sandra during her initial interview which way the two perpetrators ran after the shooting, she told police that they "fled W/B [westbound] toward Whipple." (App. 72.) At trial, however, Sandra testified that she could not say which way the assailants ran after the shooting "because [she] was tending to Morro." (Supp. A.27.)[4]

Sandra consistently stated, however, that prior to the shooting, she had been drinking with her husband at Wally's Lounge, a bar located on the south side of Belmont Avenue across the street from the Honey Baked Ham store. (Supp. A-5-7.)

Sandra has also stated that she did not notice Morro and the other boys until after the punch had been thrown (Supp. A-26), and she acknowledged that the shooter's back was toward her during and after the portion of the incident that she had been able to witness. (Supp. S-29.)

---

[4] In November 2006, Sandra changed her story yet again, stating that when she exited Wally's bar, she saw Victor Romo walking – not running – on the south side of Belmont, eastbound toward Sacramento. (App. 120-22.) Significantly, no other witness has ever indicated that Victor was at any time on the south side of Belmont Avenue or that he fled the scene to the east.

Nonetheless, at the scene, she gave Detective Bogucki two descriptions: one offender was 5'5" and 120 pounds, and the second offender had a waist-length blue nylon jacket and short curly hair. (Supp. S-28, S-29.)

Thus, both Tueffel and Sandra described, at various times, an offender with "curly" hair. (Supp. S-57-58, S-28.) Again, Jimenez did not have curly hair, but Juan Carlos Torres did. (Supp. T-28; Supp. C-33.)

Finally, Sandra and Phil Torres were close friends. After driving to the police station ***with Phil Torres*** for the lineup, Sandra was also able to provide a much more detailed description of the shooter – a description that matched Phil Torres's description. (Supp. R-86; A-27-30.) At the lineup, however, Sandra still could not settle on one offender. Sandra "picked out two people as looking too close alike, one of which was Jimenez." (Supp. A-52.)

Tina Elder was also good friends with Phil Torres. At the time of the incident, Elder was standing on the Belmont Avenue sidewalk underneath Phil Torres's third-floor window, looking up at him while the two conversed. (Supp. R-80.) She had her four-year-old daughter with her at the time. (*Id.*) Immediately after the shooting, Elder ran for cover into Phil Torres's building in order to protect her daughter. (App. 118.) Elder was not at the scene when investigators arrived. The day after the shooting, Elder traveled to the police station in the same car with Phil Torres and her mother, Sandra.

(Supp. R-87, R-124.) At the station, Elder, along with Phil Torres and Tueffel, identified Jimenez as the shooter. (Supp. R-88.)

THE NEW EVIDENCE JIMENEZ PRESENTED IN THE PETITION

A. LARRY TUEFFEL'S RECANTATION.

In an affidavit and transcript attached to Jimenez's Petition, Tueffel has now recanted his testimony implicating Jimenez in the shooting and confirmed that it was Juan Carlos Torres who killed Eric Morro. (App. 125-46.) Moreover, Tueffel has provided a detailed explanation for his false testimony implicating Jimenez, describing a scene in which a nervous and scared 14 year-old boy was roused from his sleep and removed from his home by two detectives in the middle of the night and brought, without his parents, to a station house interrogation room. Tueffel now explains that the officers who came for him screamed at him and insisted he was lying until, finally, he broke down and agreed to implicate Jimenez. (App. 136, 141.)

In addition, Tueffel also offers new evidence regarding the suggestive lineup procedure used by the police to get him to identify Jimenez. Tueffel states that police did not ask him to identify the shooter but, instead, asked him to "pick out the person . . . they asked me if T.J. was in the lineup. And I said 'yeah' and pointed him out." (App. 140.)

B. TINA ELDER'S RECANTATION.

Like Tueffel, Tina Elder has now recanted her trial testimony in an affidavit attached to the Petition. (App. 118-19.) Specifically, she now

reveals, that "[i]n reality," she is "not certain of who the shooter of Morro was." (App. 119.). Moreover, after being shown a picture of Juan Carlos Torres for the first time, she has "doubt that [her] prior identification of Thaddeus Jimenez was correct." (*Id*.)

Like Tueffel, Tina's affidavit also provides new evidence of a suggestive lineup procedure the police used to obtain her identification of Jimenez. Immediately prior to observing the lineup in which she identified Jimenez, Tina was directed by a police officer to sit at a desk on which there were only two photographs – one of the victim Eric Morro and one of Jimenez, whom she would see in the lineup room only a few moments later. (*Id*.)

C. CURRENT POSTURE.

As explained above, Judge Sacks summarily dismissed Jimenez's post-conviction claims, concluding that "the newly discovered evidence consisting of the recantations of Larry Tueffel and Tina Elder are [not] of such a conclusive nature that they would change the result of this case on retrial" and that the Petition was "frivolous and patently without merit." (App. 19.) In reading his opinion from the bench, Judge Sacks emphasized that he had rejected the recantations because his "thoughts are pretty clear as to what [he] thinks about Thaddeus Jimenez' case." (R. 28.) Jimenez now appeals.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN SUMMARILY DISMISSING THE PETITION BECAUSE IT STATES THE GIST OF A CONSTITUTIONAL CLAIM THAT JIMENEZ IS ACTUALLY INNOCENT BASED ON THE RECANTATION TESTIMONY OF THE STATE'S TWO KEY EYEWITNESSES.

There is no question that the circuit court should have docketed this case based on the recantations of Larry Tueffel's ("Tueffel") and Tina Elder ("Elder"). All three of the people standing right next to Eric Morro when he was shot – 12 year-old Victor Romo, 14 year-old Larry Tueffel, and the shooter Juan Carlos Torres himself – have now identified Juan Carlos Torres as the person who murdered Eric Morro. Victor Romo, who was adjudicated delinquent for his role in the shooting, has never wavered from his testimony that Juan Carlos Torres was the shooter through three separate trials. (App. A-175, Supp. C-25-29, Supp. D-10, appeal no. 94-4358) Juan Carlos Torres confessed to the murder in a tape-recorded conversation just days after the crime. (Supp. P-10.) And now, in his sworn recantation, the State's key eyewitness, Tueffel, identifies "Carlos" as the person who murdered Morro and testifies that Jimenez was not present at the crime (as he repeatedly told police from the beginning). (App. 132.) Tueffel also explains why he falsely identified Jimenez, providing for the first time details about the suggestive lineup police used to extract his false identification and the pressure he felt to name Jimenez during a pre-dawn interrogation without his parents present. (App. 136, 141.)

Tueffel's recantation and Romo's testimony corroborate completely

Juan Carlos Torres's taped confession that he shot Eric Morro but escaped responsibility because "the police had pinned the blame on [ ] the other gang boy . . . he is in jail. . . they think he's the one that did it." (Supp. C-44.) Additionally, Tina Elder, another key State witness, has recanted and reveals that she, too, was subjected by police to a highly suggestive lineup. "[I]n reality," she now says, she is "not certain of who the shooter of Morro was." (App. 118.)

In light of Tueffel's and Tina Elder's recantations, which the court must take as true at this stage of the post-conviction proceedings, Jimenez has stated the gist of a constitutional claim of his actual innocence, and the circuit court erred in summarily dismissing the petition.

A. THE LEGAL STANDARDS GOVERNING A POST-CONVICTION PETITION AT THE FIRST STAGE: TUEFFEL'S AND TINA ELDER'S RECANTATION TESTIMONY IS NEWLY DISCOVERED EVIDENCE, BOTH HIGHLY MATERIAL AND NONCUMULATIVE.

This Court reviews the dismissal of a post-conviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 389 (1998); *People v. Edwards*, 197 Ill. 2d 239, 247 (2001).

The Post-Conviction Hearing Act ("Act") provides for a three-stage process to evaluate post-conviction petitions. *See generally* 725 ILCS 5/122-1 (West 2008). At the first stage, the circuit court may not summarily dismiss a petition unless it is "frivolous or patently without merit." 725 ILCS 5/122-2.1(a)(2). At this stage, "the circuit court determines whether the petition *alleges* a constitutional infirmity." *People v. Smith*, 326 Ill. App. 3d 831, 839

(1st Dist. 2001) (emphasis in original). In making this determination, the court must take all well-pleaded facts as true, liberally construing them in the petitioner's favor unless the allegations are positively rebutted by the record. *Edwards*, 197 Ill. 2d at 244 (2001); *People v. Reyes/Solache*, 369 Ill. App. 3d 18 (1st Dist. 2006) (quoting *Smith*, Ill. App. 3d at 839). When a petition presents a gist of a constitutional claim, it is docketed for second-stage review, and the State is allowed to respond. 725 ILCS 5/122-2.1(b); *Edwards*, 197 Ill. 2d at 245. The court then determines whether the petition makes a substantial showing of a constitutional violation. *Edwards*, 197 Ill. 2d at 245. If a petitioner makes that showing, the petition advances to the third stage, where the court conducts an evidentiary hearing. *Id.* at 246. Until the third stage, the court is absolutely prohibited from engaging in fact-finding or making any credibility determinations. *Coleman*, 183 Ill. 2d at 385; *People v. Marshall*, 375 Ill. App. 3d 670, 674 (1st Dist. 2007).

A petitioner's claim that he is actually innocent of the crime for which he stands convicted presents a constitutional claim under the due process clause of the Illinois Constitution cognizable under the Act. *People v. Washington*, 171 Ill. 2d 475, 489 (1996); Ill. Const. 1970, art. I, § 2. In order to warrant relief, the petitioner's supporting evidence must be "new, material, noncumulative and, most importantly, of such conclusive character as would probably change the result on retrial." *Washington*, 171 Ill. 2d at 489 (internal quotations omitted). Ultimately, this Court has wisely

concluded that, as a rule, it is never proper to dismiss a petitioner's innocence claim based on newly discovered evidence at the first stage because doing so "could lead to a miscarriage of justice." *People v. Mack*, 336 Ill. App. 3d 39, 44-45 (1st Dist. 2002) (quoting *People v. Boclair*, 202 Ill. 2d 89, 102 (2002)). Instead, the State should be given the opportunity to review the claim and consider whether to object. *Mack*, 336 Ill. App. 3d at 45 ("[A] defendant's claim of actual innocence cannot be reviewed when a circuit court enters a summary dismissal *sua sponte*, because the State does not have the opportunity to review the claim." (quoting *Boclair*, 202 Ill. 2d at 102)).

Further, the Illinois Supreme Court in *People v. Coleman* specifically rejected the notion that courts are permitted to pre-judge recantations without an evidentiary hearing even at the second stage of proceedings, much less at the first stage:

> The State insists that recantation testimony has historically been deemed "unreliable" and that courts will usually deny a new trial in such cases where the court is not satisfied that such testimony is true. . . . In our view, the State's reliability argument is premature here, given the case's procedural posture [as a second-stage proceeding]. Defendant's allegations, supported by Lockett's affidavit, have not been refuted or denied. The original trial record, although regular on its face, does not controvert the charges that perjured evidence was used [to convict defendant] and that favorable evidence was suppressed with knowledge by the State. In fact, there has been no determination of the veracity of these allegations. . . . ***As we have discussed earlier in this opinion, the Act contemplates that factual and credibility determinations will be made at the evidentiary stage of the post-conviction proceeding, and not at the dismissal stage. We will therefore assume the truth of the allegations*** . . .

183 Ill. 2d 366, 390-91 (1988) (emphasis supplied).

Jimenez's Petition, based on Tueffel's and Elder's recantations, easily satisfies the foregoing standards. Tueffel, who was standing right next to Eric Morro when Morro was shot, is unequivocal in his recantation testimony that "Carlos" shot Morro and that Jimenez (whom Tueffel knew well) was not present (App. 137, 143), just as Tueffel repeatedly told police in the hours following the shooting. (App. 137-141.) Tueffel also explains that his false identification of Jimenez was due to the police brow-beating him and then engineering a lineup that would ensure a false identification. (*Id*.)

Like Tueffel, Elder has also recanted her trial testimony and, critically, has provided a second, independent account of a suggestive lineup procedure police used to extract her false identification of Jimenez. Specifically, Elder now reveals that immediately prior to observing the lineup in which she identified Jimenez, she was directed to sit at a desk on which there were only two photographs – one of Eric Morro, her recently murdered friend, and one of Jimenez, whom she would see in the lineup room only a few moments later. (App. 119.)

These recantations, taken as true, are more than sufficient to state a gist of a claim that Thaddeus Jimenez is actually innocent of the murder of Eric Morro. They are newly discovered evidence both highly material to the ultimate issue of who shot Morro and noncumulative in that the recantations directly contradict Tueffel's and Elder's prior trial testimony and corroborate Jimenez's trial alibi testimony, and, in the case of Tueffel's recantation,

directly corroborate Torres's taped confession. *See Morelli v. Ward*, 315 Ill. App. 3d 492, 499 (3d Dist. 2000) (victim recantation of testimony accusing deputy sheriff of domestic violence was new evidence because "there is nothing in the record to suggest that [the deputy] knew or could have known that [the witnesses were] willing to recant . . . "); *People v. Evans*, 369 Ill. App. 3d 366, 382 (4th Dist. 2006) (evidence is "material" if it addresses the "ultimate issue" in the case); *People v. Ortiz*, No. 1-06-1314, 2008 WL 4163892, at *8 (1st Dist. Sept. 8, 2008) (recantation evidence not cumulative where it "would create new questions in the mind of the trier of fact, since it also went to an ultimate issue in the case: Who was present at the time of the shooting?") (internal punctuation and citation omitted); *People v. Burrows*, 172 Ill. 2d 169, 184-85 (1996) (new witness testimony corroborative of trial alibi testimony not cumulative). Indeed, Judge Sacks's order does not dispute that the recantations are new evidence previously unavailable. (App. 19.)

Moreover, contrary to the conclusion reached by Judge Sacks and as demonstrated below, Tueffel's and Elder's recantations, taken as true, would change the result on retrial. The circuit court erred in holding to the contrary after improperly pre-judging the credibility of the recantations without a hearing.

B. THE CIRCUIT COURT ERRED IN APPLYING THE "LIKELY TO CHANGE RESULT ON RETRIAL" STANDARD BY WEIGHING RECORD EVIDENCE AND MAKING CREDIBILITY DETERMINATIONS WITHOUT A HEARING.

In support of its summary dismissal, Judge Sacks held that Tueffel's and Tina Elder's recantations were unlikely to change the result on retrial. (App. 19.) This was error. In so holding, Judge Sacks articulated and continually applied an improperly elevated standard for evaluating this new evidence, a standard which this Court had admonished Judge Sacks not to use in an earlier reversal.

In *Reyes/Solache*, appellants petitioned for post-conviction relief based on new evidence supporting their claim that their confessions were physically coerced, a claim that had been fully litigated in pre-trial motions, at trial, and on direct appeal. 369 Ill. App. 3d at 5-9, 15, 18. As here, Judge Sacks had presided over the trial of Arturo Reyes. *Id*. at 1. In a simultaneous trial in front of a separate jury, Judge Sacks had presided over the trial of Gabriel Solache. *Id.* Each defendant filed separate post-conviction petitions, and Judge Sacks summarily denied each petition individually. *Id*. at 2, 12. Each defendant then appealed their respective summary dismissals, and the appellate court consolidated the appeals. *Id*. at 16.

In denying the petitions at the first stage, Judge Sacks had concluded that the new evidence of coercion was "not so conclusive as to change the result on retrial." *Id.* at 25-26. This Court reversed, holding that Judge Sacks's conclusions were "not appropriate to a first-stage proceeding, where

'[s]ubstantive questions relating to the issues raised in the petition are not to be addressed.'" *Id*. at 26. (quoting *People v. Smith*, 326 Ill. App. 3d 831, 839-40 (1st Dist. 2001)).

Just as in *Reyes/Solache*, Judge Sacks has again erroneously held that Jimenez, at the first stage of proceedings, "has the burden of *establishing* that a substantial violation of his constitutional rights occurred at trial or sentencing" at the first stage of this process. (App. 9) (emphasis added). Rather, a petitioner need only allege the "gist" of a constitutional violation. *See Edwards*, 197 Ill. 2d at 246-47 (holding that it is error for the circuit court to apply this standard at the first stage); *Reyes/Solache*, 369 Ill. App. 3d at 13 (same).

Judge Sacks also erred in holding that Jimenez was required to prove his "total vindication" or "exoneration" at this first stage. (App. 10.) Where, as here, the remedy for post-conviction relief is merely a new trial rather than outright reversal, there is never a burden on the petitioner to prove his "total vindication" at any stage of the process, much less the first. This Court's recent decision in *Ortiz* highlights this point. There, this Court held that the circuit court's *third-stage* denial of post-conviction relief based upon newly-discovered eyewitness testimony exculpating the petitioner was manifestly erroneous because, upon retrial, the evidence of petitioner's innocence would be "much stronger" and the inculpatory evidence "would be weaker." *See Ortiz*, 2008 WL 4163892, at *9. Significantly, even at that

third-stage proceeding, the petitioner was not required to demonstrate "total vindication" or "exoneration," but merely that the outcome of a new trial was likely to change. *Id.* Certainly, there is no burden to establish "total vindication" or "exoneration" at the first stage of the post-conviction process, where the petitioner need only *allege* a gist of a constitutional claim, a "low threshold" requiring only a "limited amount of detail." *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996).

Additionally, throughout his written order, Judge Sacks made the same kinds of credibility determinations and findings of fact that this Court clearly forbade in *Reyes/Solache*. For example, in his recantation, Tueffel now claims that the police intimidated him into identifying Jimenez and testifying against Jimenez in court. (App. 142-45.) When he testified at Jimenez's trial, Tueffel testified that he did not identify Jimenez at first out of fear that he would face gang retaliation. (Supp. R-165.) Now, Tueffel explains that he was reluctant not because he feared gang retaliation, but because he did not want to lie against an innocent boy. (App. 139-41.)

As a matter of law, Judge Sacks was required to accept Tueffel's recantation as true. *Reyes/Solache*, 369 Ill. App. 3d at 18 (quoting *Smith*, 326 Ill. App. 3d at 839). Instead, the court weighed Tueffel's recantation against his trial testimony and found that Tueffel's explanation for his false identification of Jimenez is not credible because "it is abundantly clear that Tueffel did not want to testify against Jimenez due to fear of retaliation by

fellow gang members." (App. 12.) Indeed, in a particularly stark example of an improper credibility determination, Judge Sacks found that Tueffel's recantation "merely impeach[es] his trial testimony," and Judge Sacks therefore rejected Tueffel's recantation in its entirety because the "logic" of the recantation "totally escape[d]" the judge. (App. 14.) This is clearly an improper conclusion where a court is required to accept the recantation as *true*. *See Coleman*, 183 Ill. 2d at 390-91 (assuming the truth of recantation testimony rather than making credibility determinations on an appeal from a second-stage post-conviction proceeding).

Judge Sacks conducted the same kind of credibility analysis in rejecting Elder's recantation, finding that "Elder's expressed doubts *now* . . . hardly establish that Jimenez is 'actually innocent'" because it "would merely serve to impeach her previous trial testimony." (App. 15.) Again, however, the question is not what Elder's recantation testimony would "establish" at a new trial; it is only whether that testimony (together with Tueffel's) alleges the "gist" of a constitutional claim. *Edwards*, 197 Ill. 2d at 244; *Reyes/Solache*, 369 Ill. App. 3d at 12.

Not only did Judge Sacks fail to conduct this analysis, his rejection of Elder's recantation is particularly inappropriate because it ignores the portion of her testimony that explains why she falsely identified Jimenez: she had been exposed to an unduly suggestive photo array just prior to the lineup. (App. 119.) Thus, notwithstanding Judge Sacks's assertion that he

took Tueffel's and Elder's recantations as true "for the sake of argument," (App. 15), it is plain that he acted instead as a trier-of-fact, pre-judging how he would ultimately evaluate that testimony at a hearing. This Court could not have been more clear in *Reyes/Solache* that this sort of fact-finding at the first stage is reversible error. 369 Ill. App. 3d at 13, 18, 21, 22, 24.

This Court's admonition against summary dismissal of innocence claims at the first stage of proceedings makes particular sense in the context of recanted testimony like Tueffel's and Elder's. *See Mack*, 336 Ill. App. at 44-45. Applying a presumption against the credibility of recantations at the first stage, as Judge Sacks has done here, carries an especially heavy risk of a miscarriage of justice because there are many examples where hastily rejected recantations ultimately have proven to be credible. The decision in *People v. Steidl*, 177 Ill. 2d 239, 260-61 (1997), which Judge Sacks cites in presuming the Tueffel and Elder recantations unreliable (App. 10, 11), actually underscores this point. In *Steidl*, a death penalty post-conviction case (that therefore lacked first-stage proceedings – *see Reyes/Solache*, 369 Ill. App. 3d at 17), the Illinois Supreme Court recognized the general presumption that recantation evidence may be unreliable, but held *that the circuit court was required to hold an evidentiary hearing based upon the recanted testimony at issue.* 177 Ill. 2d at 261. Importantly, the petitioner in that case, Gordon Steidl, has since been exonerated. *See Steidl v. Walls*, 267 F.Supp. 2d. 919, 940-41 (C.D. Ill. 2003) (granting writ of habeas corpus and

vacating conviction).

In this regard, *Steidl* actually supports the need for further proceedings in this case because, as that case illustrates, courts risk a miscarriage of justice when they presume that recantation testimony is unreliable without the benefit of a hearing. The many examples of wrongful convictions where rejected recantation testimony later proved to be the truth, as highlighted in the chart included in the appendix of this brief (*see* App. 26-28), serves as a caution to courts not to rely on this presumption in a knee-jerk fashion. Moreover, this presumption also directly contradicts the requirement that the court take all well-pleaded facts as true at the first stage of a post-conviction proceeding. *See Edwards*, 197 Ill. 2d at 244-45 (recognizing rule); *Reyes/Solache*, 369 Ill. App. 3d at 12 (same).[5]

C. TAKEN AS TRUE, TUEFFEL'S AND TINA ELDER'S RECANTATION TESTIMONY WOULD CHANGE THE RESULT ON RETRIAL.

Taken as true, Tueffel's and Elder's recantation testimony would likely

---

[5] The case of Gary Dotson provides another compelling example of why recantation evidence alone should advance a petition to the second if not the third stage of the proceedings. Dotson was convicted of rape, and years later, the victim admitted that she had fabricated the entire story. *People v. Dotson*, 163 Ill. App. 3d 419, 420 (1st Dist. 1987). Dotson filed a post-trial motion proclaiming his innocence. *Id.*. Following an evidentiary hearing during which the victim recanted her trial testimony, the circuit court determined that the recanted testimony was not credible and denied Dotson a new trial, a finding this Court upheld on appeal. *Dotson*, 163 Ill. App. 3d at 424-25. DNA evidence later exonerated Dotson, proving conclusively that the recantation was true. (App. A-27.) *See also* Shawn Armbrust, *Reevaluating Recanting Witnesses: Why the Red-Headed Stepchild of New Evidence Deserves Another Look*, 28 B.C. THIRD WORLD L.J. 75, 76 (Winter 2008) (describing the Gary Dotson case).

change the outcome on retrial because it would cause a "shift in strength of each side's case [that] would probably create a reasonable doubt of defendant's guilt at retrial." *See Ortiz*, 2008 WL 4163892, at *9. As set forth below, the State's case was based entirely on witness testimony and, in particular, depended on the testimony of four eyewitnesses (Tueffel, Tina Elder, Sandra Elder, and Phil Torres). No murder weapon was ever introduced at trial; there was no DNA or fingerprint evidence; indeed there is no physical evidence of any kind connecting Jimenez to this crime. And, now, all three of the people standing next to Eric Morro when he was shot – Victor Romo, Larry Tueffel, and the shooter himself, Juan Carlos Torres – have identified Juan Carlos Torres as the person who murdered Eric Morro.

Jimenez's new evidence would fatally undermine the State's case on retrial. As the State aptly put it in closing argument, "From the start of the case I think it's clear that it's been agreed that the only issue is who done it. . . . So, we've got three identifications, Phil, Larry, Tina and we've got a fourth in which Sandra gets it down to two people. So what are we to assume here, that this is a case of mistaken identity?" (Supp. T-8, T-57.)

First, as to Tueffel, he was the State's star witness. Tueffel was the only one of the State's witnesses who was standing beside Eric Morro during both the shooting and the argument that preceded it. (Supp. R-155-160.) Because Tueffel knew Jimenez from the neighborhood, (Supp. R-154), and was a close friend of Eric Morro (Supp. R-155), – facts which the State

emphasized at closing arguments (Supp. T-9) – Tueffel's testimony had special significance. Tueffel's was the only testimony the State had to rebut Victor Romo's testimony that the shooter was Juan Carlos Torres, and not Jimenez. Indeed, Tueffel's testimony was so essential that the State had him arrested and detained when he failed to appear at Jimenez's first trial (Supp. R-167-8) despite the fact that the State still had the testimony of the other three eyewitnesses in its arsenal.

Elder's testimony was also a key component of the State's case that would not have the same force at a retrial. At closing arguments, the State emphasized the significance of her identification of Jimenez and touted its credibility on the basis that she had "never seen [Jimenez] before" she identified him from the lineup. (Supp. T-12.) Indeed, the State also argued that Elder's identification of Jimenez "shows the integrity of the lineup procedure and process." (Supp. T-61.) Now, the State would no longer be able to credibly make these arguments. At retrial, Elder would testify that she had seen Jimenez before she identified him – he was one of two boys (the other being Morro, her recently murdered friend) whose picture was left on a desk where she was seated just prior to going into the lineup room. (App. 119.) This testimony would demonstrate that the lineup procedure *lacked* integrity. Finally, Elder would also testify that, having now seen a photograph of Juan Carlos Torres, she cannot positively identify Jimenez as the shooter because she doubts her earlier identification. (*Id.*)

Without Tueffel's and Elder's positive and untainted identifications of Jimenez, the State's case would rest on the dramatically weaker testimony of Sandra Elder and Phil Torres. Sandra was never able to positively identify Jimenez, and, as detailed at length on pages 13-14 above, her testimony at retrial would be riddled with contradictions as a result of her ever-evolving story about what she did, what she saw, and where she saw it. As for Phil Torres, the repeat offender, whose view of the crime was severely limited, he was only able to view the scene from his third-story window in a building 45 feet down the street when it was already dark. (Supp. R-96, R-113, R-133.) And his attention was drawn elsewhere during the shooting – when it happened, he was not looking at Eric Morro and the shooter, he was looking straight down at the sidewalk below his window because he was engaged in a conversation with Tina Elder. (Supp. R-94, R-114-15, R-138.) Phil Torres's identification is also undermined by the fact that he did not name Jimenez originally, but did so only after speaking with his step-brother, Shawn Cosmen. (Supp. R-122, R-140.) In light of the Tueffel and Elder recantations, a jury may likely conclude that Phil Torres's so-called "realization" of what happened was improperly influenced by the suggestion of Cosmen that Jimenez and Morro had a verbal confrontation earlier in the day. (Supp. C-8.)

Tueffel's and Elder's recantations would not only eviscerate the State's case, they would also solidify Jimenez's defense case, corroborating the

existing evidence that he did not commit this crime. Jimenez "[would] no longer rel[y] solely on alibi testimony." *Ortiz*, 2008 WL 4163892, at *9. Instead, Jimenez could rely on the State's most critical eyewitness, Tueffel, to corroborate Victor Romo's testimony that he was never present at the crime and that Juan Carlos Torres was the shooter. On retrial, Jimenez would "be able to attack the credibility of the State's [remaining] eyewitnesses directly with his own eyewitnesses." *Id.* (reversing denial of post-conviction request for new trial where no physical evidence linked petitioner to shooting and new eyewitness testimony identified shooters, corroborating exculpatory trial testimony); s*ee also Reyes/Solache,* 369 Ill. App. 3d at 19 ("If even a fraction of . . . this evidence had been presented prior to trial, it appears likely that . . . the State's case against defendant[] would have been severely weakened."); *Stiedl*, 177 Ill. 2d at 261 ("Because there was no physical evidence linking the defendant to the crime scene, and further given that the evidence against the defendant was comprised solely of witness testimony, we believe that this specific situation warrants a review of [the eyewitness's] new recantation *at an evidentiary hearing*." (emphasis added)).

Further, Tueffel's and Elder's revelations about the suggestive lineups procedures the police used with them "would cast a shadow" of serious doubt on the integrity of every aspect of the investigation (and the resulting evidence) that led to Jimenez's conviction. *See Ortiz*, 2008 WL 4163892, at *9. This evidence "could be used to prove a course of conduct on the part of

the officers involved and could be used to impeach these officers' credibility." *See Reyes/Solache*, 369 Ill. App. 3d at 18 (allegations that officer improperly influenced witnesses to identify suspects were relevant to whether that officer engaged in other misconduct during investigation). Tueffel's new testimony that police asked him "if T.J. was in the lineup," (App. 140), rather than asking him if he could identify the assailant, is obviously unduly suggestive, as was the "show-up" procedure police used on Elder when seating her at a desk with Jimenez's picture next to the victim's immediately prior to her lineup identification. (App. 119); *see also United States. v. Newman*, 144 F.3d 531, 535 (7th Cir. 1998) (noting that show-ups are "inherently suggestive" and generally should only be used in extraordinary circumstances); *Israel v. Odom*, 521 F.2d 1370, 1373 (7th Cir. 1975) ("It is well established that 'the display of pictures of [the suspect] alone [is] the most suggestive and therefore the most objectionable method of pretrial identification.") (citations omitted).

Perhaps most importantly, as explained more fully below, the recantations require reconsideration of the admissibility of Juan Carlos Torres's taped confession to Eric Morro's murder. Were this confession admitted in a new trial, its corroboration by Romo and Tueffel – the only others standing right next to the victim – would virtually guarantee an acquittal for Jimenez. No jury has ever heard that confession.

In light of Tueffel's and Elder's recantations, Jimenez easily meets the

low threshold of establishing a gist of a claim of his innocence. For these reasons, Jimenez respectfully requests that this Court reverse the summary dismissal and remand for a second-stage proceeding.

II. JIMENEZ ALSO STATES THE GIST OF A CONSTITUTIONAL CLAIM THAT, IN LIGHT OF TUEFFEL'S AND TINA ELDER'S RECANTATIONS, THE EXCLUSION OF JUAN CARLOS TORRES'S TAPED CONFESSION TO ERIC MORRO'S MURDER VIOLATED HIS DUE PROCESS RIGHTS AND WARRANTS A NEW TRIAL.

Jimenez has also stated the gist of a claim under the Due Process Clause of the United States and Illinois Constitutions, U.S. Const., Amend XIV; Ill. Const. Art 1, § 2, that new evidence renders Juan Carlos Torres's tape-recorded confession to Eric Morro's murder admissible and warrants a retrial. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). In this regard, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Id.* at 302.

At trial, the trial court barred Jimenez from presenting to the jury Torres's taped confession or the testimony of the person who recorded it, concluding that this evidence is hearsay that does not meet the test of admissibility set forth in *Chambers*, 410 U.S. at 301, which establishes the test for admissibility of a third-party's confession. However, taken as true, Tueffel's recantation now corroborates Torres's confession and would require that the circuit court re-evaluate whether Torres's confession would be

admissible at retrial.

In this respect, Judge Sacks erred when he "decline[d] Jimenez's invitation" to reconsider his ruling on the admissibility of Torres's taped confession based on *res judicata*. (App. 18.) In *People v. Patterson*, 192 Ill. 2d 93, 139 (2000), the Illinois Supreme Court held that, "in the interests of fundamental fairness, the doctrine of *res judicata* can be relaxed if the defendant presents substantial new evidence." New evidence is sufficient to warrant relaxation of *res judicata* where it is "material and not merely cumulative, . . . of such conclusive character that it will probably change the result on retrial, and . . . not discovered or discoverable through the defense's due diligence prior to the original trial." *Reyes/Solache*, 369 Ill. App. 3d at 15 (citing *Patterson*, 192 Ill. 2d at 139).

Again, Judge Sacks erred here in the same manner that he did in *Reyes/Solache*. This Court in *Reyes/Solache* reversed Judge Sacks's refusal to consider appellants' new evidence of physical coercion based on *res judicata* where appellants had fully litigated the voluntariness of their confessions at trial and on direct appeal. *Reyes/Solache,* 369 Ill. App. 3d at 18. This Court reversed based on *Patterson*, explaining that the criteria for relaxing *res judicata* must be evaluated through the lens of the post-conviction procedure. *Id.* at 20. This Court held that Judge Sacks's "dispositive conclusion" to reject the appellants' new evidence of coercion based on *res judicata* "runs directly counter to the admonition that, at the

first stage of post-conviction proceedings, the trial court is not to address substantive questions relating to the issues raised in the petition." *Id.* at 20, 22 (citing *Smith*, 326 Ill. App. 3d at 839-40) (emphasizing that it is error to impose on petitioners an "unreasonable obligation, particularly in light of the lower 'gist of a constitutional claim' burden that is borne by a defendant at the first stage of a post-conviction proceeding").

As explained at pages 19-23 above, Tueffel's recantation is new, noncumulative, material evidence, and it warrants reconsideration of Judge Sacks's ruling excluding Juan Carlos Torres's confession. Judge Sacks declined to admit the confession in part because "[t]he only other evidence which may corroborate to some extent that Torrez [sic] supposedly shot whoever got shot in this case is the testimony of Romo, the juvenile Romo." (Supp. P-74.) Now, Tueffel, the only other person standing next to Eric Morro when he was shot, also says the killer was Juan Carlos Torres. Taken as true, this recantation would cloak Juan Carlos Torres's confession with sufficient indicia of reliability and trustworthiness to render it admissible under the test in *Chambers*.

First, the conversation with Juan Carlos Torres during which he confessed took place just a few days after the shooting occurred. *See Chambers*, 410 U.S. at 300 (explaining that a third-party statement was more reliable where made "shortly after the murder"). Second, Torres's confession that he was the shooter is a statement against penal interest in which he

confesses to the crime and acknowledges that the police had "pinned the blame" on the wrong person. (Supp. C-44); *see Chambers*, 410 U.S. at 300-01 (explaining that a third-party statement was admissible where it was a statement against penal interest). Third, the facts in Torres's confession now interlock with the facts in Tueffel's recantation statement, including: the shooter was named Carlos (App. 106); Carlos's accomplice was named Victor (*id.*); Carlos and Victor walked up to Eric and Victor asked Eric about a debt he owed a man named "Leo" (*id.*); there was an altercation between Eric and Victor and Carlos that preceded the shooting (*id.*); Carlos fired one shot into Eric (App. 112); the shooting took place near the Honey Baked Ham store (App. 106); and that after firing the shot, Carlos ran. (App. 107.) Jimenez, the "other gang boy" mentioned in Torres's confession, had been arrested and jailed for the shooting. (Supp. C-44.) In light of these facts, and other corroborative record evidence – witness testimony that the shooter had curly hair, as Juan Carlos Torres did (Supp. C-33), and Victor Romo's account of the shooting of Eric Morro by Juan Carlos Torres, *Chambers* would now favor admissibility. *See Chambers*, 410 U.S. at 300 (explaining that independent eyewitness corroboration weighs in favor of admissibility of third-party confession).

Standing alone, the admission of Juan Carlos Torres's confession would make acquittal a likely outcome – it is powerful evidence that Thaddeus Jimenez has been wrongfully convicted of a crime committed by

Juan Carlos Torres. When coupled with Tueffel's and Tina Elder's recantation testimony and new evidence suggesting police misconduct to obtain false identifications, no reasonable jury could convict Jimenez.

At bare minimum, with this new evidence, Jimenez states a gist of a claim that the exclusion of Juan Carlos Torres's taped confession violated his constitutional right to due process. *See Chambers*, 410 U.S. at 302 ("[W]here constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice."). For this reason, this Court must reverse the summary dismissal of Jimenez's petition and remand for a second-stage proceeding.

III. JIMENEZ ALSO STATES THE GIST OF A CONSTITUTIONAL CLAIM THAT HIS DUE PROCESS RIGHTS WERE VIOLATED BECAUSE THE POLICE USED UNDULY SUGGESTIVE LINEUP PROCEDURES TO OBTAIN TUEFFEL'S AND TINA ELDER'S PRETRIAL IDENTIFICATIONS OF JIMENEZ.

Jimenez has also stated the gist of a distinct constitutional claim for violation of his rights under the Due Process Clause of the United States and Illinois Constitutions, U.S. Const., Amend XIV; Ill. Const. Art 1, § 2, based on the lineup procedures police used with Tueffel and Tina Elder – specifically, that the lineups violated his due process right "not to be identified before trial in a manner that is 'unnecessarily suggestive and conducive to irreparable mistaken identification.'" *Stovall v. Denno*, 388 U.S. 293, 301-02 (1967); *United States v. Rogers*, 387 F.3d 925, 936 (7th Cir. 2004).

For a lineup identification to violate due process, Jimenez must first show that the identification procedure was "unduly suggestive." *Rogers*, 387 F.3d at 936 (quoting *Gregory-Bey v. Hanks*, 332 F.3d 1036, 1045 (7th Cir. 2003). Next, the court must then determine whether, "under the totality of the circumstances, the identification was reliable despite the suggestive procedures." *Id.* (quoting *United States v. Traeger*, 289 F.3d 461, 474 (7th Cir. 2002)).

As explained above at pages 33-34, there is no question that the lineup procedures police used with Elder and Tueffel were unduly suggestive. As to Tueffel, police essentially told him to identify Jimenez. (App. 114.) As for Elder, seeing only two photos immediately before the lineup, one of her close family friend who was murdered only hours before and the other of Jimenez, (App. 119), is akin to the "show-ups" courts have repeatedly rejected as unduly suggestive. *Newman*, 144 F.3d at 535; *see also United States ex rel. Kirby v. Sturges*, 510 F.2d 397, 403 (7th Cir. 1975) (Stevens, J.) ("Without question, almost any one-to-one confrontation between a victim of a crime and a person whom the police present to him as a suspect must convey the message that the police have reason to believe him guilty."); *Odom*, 521 F.2d at 1373 (7th Cir. 1975) ("It is well established that the display of pictures of [the suspect] alone [is] the most suggestive and therefore the most objectionable method of pretrial identification.") (citations and quotations omitted, alterations in original).

Moreover, Tueffel's and Elder's recantations, taken as true, demonstrate that the unduly suggestive lineup procedures police used so infected their identifications at trial that they were not reliable "under the totality of the circumstances," based on the five factors courts consider. *See People v. Piatkowski*, 225 Ill. 2d 551, 567 (2007) (listing the following factors: witness's opportunity to view the suspect at the scene; degree of attention at the scene; accuracy of pre-identification description; level of certainty in the identification; and time elapsed between crime and identification) (citing *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972)). This is particularly so as to Elder. First, her opportunity to view the shooter and her attention at the scene were extremely limited. She was standing 45 feet down the street, in the dark, with her four-year-old daughter, looking up to Phil Torres's third story window, conversing with him, and only observed the altercation for "two or three seconds," as it "happened very fast." (Supp. R-97-98.) Moreover, Elder waited until the day after the shooting to make her identification – only after discussing the crime with Phil Torres and Sandra Elder and, then, being subjected to the suggestive photographic "show-up" procedure by police just moments before the lineup. (App. 119.) As Elder now candidly admits in her recantation, she is not sure she identified the right person as the shooter. (App. 118.)

Given the incredibly suggestive nature of the lineups police used on the State's key eyewitnesses in a case built entirely on witness testimony,

Jimenez has stated the gist of a constitutional claim that those lineups violated his due process rights. Accordingly, the circuit court erred in summarily dismissing the Petition.

IV. BECAUSE JUDGE SACKS HAS PRE-JUDGED THE MERITS OF THIS CASE, JIMENEZ WILL BE SUBSTANTIALLY PREJUDICED IF THIS CASE IS NOT ASSIGNED TO A DIFFERENT JUDGE ON REMAND.

Given that Jimenez has presented new evidence that satisfies the standard for advancing to second-stage review, it is imperative that he be given a fair opportunity to establish his innocence. To assure this opportunity, Jimenez respectfully requests that he be assigned a new judge on remand. Judge Sacks's written order and comments in court demonstrate that he has pre-judged the merits of this case and is therefore substantially prejudiced against Jimenez.

The Fourteenth Amendment of the United States Constitution guarantees the right to a trial with a judge who is fair and impartial. U.S. Const., Amend XIV; *see also In re Murchison*, 349 U.S. 133, 136 (1955). In the context of a post-conviction proceeding, the same judge who presided over the trial should rule on the petition, unless the petitioner would be substantially prejudiced. *People v. Hall*, 157 Ill. 2d 324, 331 (1993). A previous adverse ruling, standing alone, is not evidence of prejudice. *Id.* at 335. The petitioner must show "'something more' by demonstrating 'animosity, hostility, ill will, or distrust' or 'prejudice, predilections or arbitrariness.'" *Reyes/Solache*, 369 Ill. App. 3d at 25 (quoting *People v. Vance*,

76 Ill. 2d 171, 181 (1979), and *People v. McAndrew*, 96 Ill. App. 2d 441, 452 (2d Dist. 1968)).

Again, *Reyes/Solache* is on point. After reversing Judge Sacks's summary dismissal of that petition, this Court remanded to a new judge for second-stage proceedings. Judge Sacks had drawn conclusions about the evidence only appropriate at the second or third stage, expressing his view that appellants' new evidence of coercion was "not so conclusive as to change the result on retrial." *Reyes/Solache*, 369 Ill. App. 3d at 26. As a result, the Court held that Judge Sacks had "improperly prejudged a central issue in defendants' postconviction case, . . . essentially decid[ing] this issue, and, in effect, the entire case." *Id.* at 25-26.

This Court should similarly remand Jimenez's petition to a new judge. As Judge Sacks himself noted, in open court, his ***"thoughts are pretty clear as to what [he] think[s] about Jimenez'[s] case***." (R. 28) (emphasis added.) Further, Judge Sacks employed language here that is virtually identical to the language he was criticized for using in *Reyes/Solache*. Specifically, he noted that "the court ***does not believe*** that the newly discovered evidence consisting of the recantations of Tueffel and Elder are ***of such a conclusive nature*** that they would change the result of this case on retrial." (App. 19) (emphasis added); *compare Reyes/Solache*, 369 Ill. App. 3d at 26. Just as in *Reyes/Solache*, Judge Sacks "essentially decided the entire case" by making – at the first stage - third-stage credibility determinations rejecting Tueffel's

and Elder's recantations.

Furthermore, it is noteworthy that *Reyes/Solache* was decided on December 11, 2006, and Judge Sacks issued his opinion in this case on June 26, 2008. Thus, Judge Sacks was on notice of the *Reyes/Solache* opinion, yet a year and a half later, he conducted the same heightened analysis that this Court specifically told him was reversible error. Respectfully, Jimenez would suffer substantial prejudice if Judge Sacks were permitted to continue presiding over this case at the second stage where he will again be required to take the recantation evidence as true, something he was unable to do at this first stage, notwithstanding the prior admonitions in *Reyes/Solache*. *See Washington*, 348 Ill. App. 3d 231, 236 (1st Dist. 2004) (noting that at the second stage, the trial court must still take all well-pleaded facts as true).

Jimenez was convicted on the basis of eyewitness testimony and has lost more than 15 years of his life as a result. Substantial evidence that he was wrongfully convicted of a murder actually committed by Juan Carlos Torres has always existed. Now that the State's key eyewitnesses have recanted, Jimenez is entitled to a judge who will give his new evidence fair consideration, not one who has already decided the merits of his petition. For this reason, Jimenez respectfully asks this Court to remand this case to a new judge.

CONCLUSION

For the foregoing reasons, Jimenez respectfully requests that this

Court: (1) reverse the summary dismissal order of the circuit court and remand this case for second-stage proceedings; and (2) order that this case be assigned to a new judge on remand.

Respectfully submitted,

THADDEUS JIMENEZ

_____

By one of his attorneys

Steven A. Drizin
Joshua A. Tepfer
Northwestern Univ. School of Law
Bluhm Legal Clinic
Center on Wrongful Convictions
357 E. Chicago Ave.
Chicago, IL 60611
(312) 503-8576

Stuart J. Chanen
Rachel M. Vorbeck
Patrick C. Harrigan
Aaron M. Chandler
Katten Muchin Rosenman LLP
525 West Monroe Street
Chicago, IL 60661
(312) 902-5200

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Illinois Supreme Court Rules 341(a) and (b). The length of this brief, excluding the appendix, is 45 pages.

_____
Patrick C. Harrigan

CERTIFICATE OF SERVICE

The undersigned attorney for Thaddeus Jimenez hereby certifies under penalties of perjury as imposed pursuant to 735 ILCS 5/1-109 that he caused to be served three copies of the Appellant's Opening Brief and Appendix on the person listed below via first class U.S. Mail, postage prepaid, on November 12, 2008.

Office of the State's Attorney
Criminal Prosecutions
Cook County Courthouse
2650 S. California Ave.
Chicago, IL 60608

_____
Patrick C. Harrigan

Patrick C. Harrigan
Katten Muchin Rosenman LLP
Firm I.D. 41832
525 West Monroe Street
Chicago, IL 60661
(312) 902-5200