IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Respondent,	)	**No. 03 CR 8607**
	)	**Honorable Lawrence E. Flood,**
v.	)	**Judge Presiding**
	)	
JOHN FULTON and	)	
ANTHONY MITCHELL,	)	
	)	
Defendants-Petitioners.	)	

PETITIONERS JOHN FULTON AND ANTHONY MITCHELL'S MEMORANDUM IN SUPPORT OF GRANTING POST-CONVICTION RELIEF AFTER THIRD-STAGE EVIDENTIARY HEARING

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I. INTRODUCTION

There is no doubt that the prosecution's argument at trial – that John Fulton snuck out the back door of his apartment building, committed a heinous murder, and snuck back in the back door without being detected – has been thoroughly debunked by the evidence adduced at the third-stage hearing in this case.

Put succinctly, there was evidence of a back door camera and a security swipe system that makes the prosecution's rebuttal to Mr. Fulton's alibi patently false. Not only was the jury misled about the presence of a back door camera, as it turns out, they were not told about the key fob entry security system, which would have logged any entrance by John Fulton through the back door by name and apartment number.

Both John Fulton and Anthony Mitchell must be granted a new trial because the evidence presented at the hearing before the Honorable Court shows that neither received a fair trial.

It was undisputed at trial there was no physical evidence supporting a theory that Fulton and Mitchell killed Christopher Collazo – there was no DNA evidence, no fingerprint evidence, no evidence of the transport of a bleeding body in the trunk of John Fulton's car, and no eyewitnesses. The only evidence was a confession by John Fulton (later parroted by Anthony Mitchell) that evolved so the police could make room in their timeline of events for Fulton's video alibi. As Professor Richard Schak testified, the lack of physical evidence, the insufficient investigation of Mr. Fulton's alibi, the four-day interrogation in which the time of crime changed as each piece of exculpatory video came

in, which was broken up by a recantation to an Assistant State's Attorney on day two, all argue that the confession is likely false – and it is certainly unreliable (*See* 10-18-2018 Transcript, pp. 14-17).

The only way John Fulton could have been involved in the kidnapping and murder of Christopher Collazo is if Fulton managed to not be on surveillance tape leaving his apartment building, had reason to believe that leaving his building without being on surveillance was possible, and somehow did not have to swipe to get back into the building, which the undisputed evidence shows would have left his name and apartment number for anyone to see.

The evidence this Honorable Court has heard makes it clear that the State's theory that John Fulton, together with Anthony Mitchell and Antonio Shaw, killed Chris Collazo between the hours of 11:53 p.m. on March 9th, 2003 and 3:00 a.m. on March 10th, 2003, when the body was discovered is clearly impossible, and at the very least, Mr. Fulton and Mr. Mitchell deserve a new trial.

II. PROCEDURAL HISTORY

On April 16, 2003, Mr. Fulton was indicted with first-degree murder, aggravated kidnapping and concealment of a homicidal death of Christopher Collazo. (*See* Common Law Record).

At a jury trial, Mr. Fulton presented an alibi theory of defense, which included evidence that he was with his fiancée, and that his alleged confessions were false. (*See* Post-Conviction Petition ("PC") Exhibit I 1; Exhibit A, Book U-105-21). Mr. Mitchell relied on that alibi in his defense as well.

On August 31, 2006, petitioners were found guilty of aggravated kidnapping, concealing a homicidal death, and first-degree murder. (*See* Common Law Record).

Following trial, the petitioners made motions for new trials, which were denied on Nov. 30, 2006. (*See* Common Law Record).

On Nov. 30, 2006, the trial court sentenced Mr. Fulton and Mr. Mitchell to thirty-one years in prison for first-degree murder, twenty-five years for aggravated kidnapping, and three years for concealment of a homicidal death. The sentences were to be served concurrently. The court accepted Petitioners' notice of appeal. (*See* Common Law Record).

On September 23, 2010, the Illinois Appellate Court issued a Modified Order in which it affirmed John Fulton's first-degree murder conviction, vacated his concurrent sentences, and remanded for re-sentencing. (PC, Exhibit N 1).

On January 26, 2011 the Illinois Supreme Court denied Mr. Fulton's Petition for Leave to Appeal the appellate decision in case no. 11-1269. (PC, Exhibit N 2).

On January 19, 2012, Mr. Fulton was resentenced to the same sentences he was originally given.

On December 18, 2012, Mr. Fulton filed a Verified Petition for Post-Conviction Relief and a Memorandum in Support of his Verified Petition for Post-Conviction Relief.

On November 27, 2013, Mr. Mitchell filed a Verified Petition for Post-Conviction Relief and a Memorandum in Support of his Verified Petition for Post-Conviction Relief.

On August 22, 2016, The State filed its Response to both Petitioners' Petitions for Post-Conviction Relief. In its Response, the State conceded that an evidentiary hearing was required on Petitioner's claims related the presence of a back door security camera.

On November 29, 2016, Mr. Fulton's Response to State's Answer and Motion to Dismiss was filed.

On or about February 28, 2017, the State filed the People's Response to Supplement to Petition.

On March 20, 2017, Mr. Fulton filed his Reply to the People's Response to his Supplemental Post-Conviction Pleading.

On November 20, 2017, Mr. Fulton filed his Third Supplement to his Post-Conviction Petition.

On November 20, 2017, Mr. Mitchell also filed his Third Supplement to his Post-Conviction Petition.

On January 31, 2018, Mr. Fulton filed an Affidavit of Sonja Streuber as a Supplemental Exhibit to his Post-Conviction Petition. This was joined by Mr. Mitchell.

On March 19, 2018, Mr. Fulton filed the affidavit of Elliot Zinger as a Supplemental Exhibit to his Post-Conviction Petition. This filing was joined by Mr. Mitchell.

On April 20, 2018, Mr. Fulton filed a Motion to Supplement Post-Conviction Petition with New Case Law. This motion was also joined by Mr. Mitchell.

On November 16, 2018, Petitioners Fulton and Mitchell filed their joint Fourth Supplement to their Post-Conviction Petition.

On January 31, 2018, the third-stage evidentiary hearing on the issue of the back door camera commenced, and evidence was heard on the following dates: January 31, 2018; August 30, 2018; and October 18, 2018.

III. FACTUAL SUMMARY

As indicated in the introduction, the evidence in this case relied almost exclusively on the confessions of John Fulton and Anthony Mitchell. A brief summary of the evidence at trial follows.[1]

The police theory during investigation and the State's theory at trial was that Fulton sought revenge against Collazo after Collazo robbed him sometime in February of 2003. According to the theory, around 9:30 p.m. on the night of March 9, 2003, Fulton, Mitchell, and a juvenile, Antonio Shaw, drove to the north side of the city and kidnapped Collazo near a bus stop. The theory continued that the trio beat Collazo, then put him in the trunk of Fulton's car and drove him to the south side where they dumped his body and set a fire. The 911 call reporting the fire was received around 3:05 a.m. on March 10, 2003.

Fulton was arrested on March 18, 2003. During his 4 days in custody Fulton – a senior in high school who was only 18 years old – made statements to police implicating himself. However, when he was given the chance on the second day, he also told felony review State's Attorneys that those statements he made were not true. In fact, Mr. Fulton had an alibi: he was with his girlfriend Yolanda Henderson at an area hospital and then home the rest of the night until he left for school early the next morning.

Unconvinced by Mr. Fulton's claim that he was with his girlfriend at the hospital or at home during the entire 6-hour time frame in which the State believed the Collazo

[1] For a complete Statement of Facts with citations to the trial record, *See* Fulton's original Petition, pp. 6-22 as well as that of Mr. Mitchell.

murder took place, the State charged Fulton and Mitchell with first-degree murder and aggravated kidnapping, and the case went to trial in front of Judge Schrieier in August of 2006.[2]

At trial, the State eventually had to concede that videotape evidence – from security surveillance cameras at the hospital where Mr. Fulton's girlfriend sought treatment and the apartment building where the couple lived at 500 E. 33rd Street – did in fact establish an undisputable alibi for Mr. Fulton from approximately 8:40 p.m. until 11:54 p.m. on March 9, 2003. Anthony Mitchell's defense was that, like John Fulton's confession, his confession was false, and he relied upon John Fulton's video alibi that Fulton presented at trial.

Mr. Fulton presented video evidence that established his whereabouts from 8:40 p.m. until 11:54 p.m. on March 9, 2003, along with testimony from his girlfriend, Yolanda Henderson, that Fulton never left the apartment after they returned home from the hospital. As a result, the State sent its investigator, Eugene Shepherd, out to Fulton's apartment building, presumably to look for a way to defeat Fulton's alibi.

In rebuttal, Shepherd testified that there were no cameras focused on the back door of the apartment building. Shepherd identified 5 photos[3] (which we now know were

[2] Antonio Shaw's confession, which also paralleled that of Mr. Fulton, and which was suppressed by the trial court. The state did not appeal and dismissed the case against Shaw.

[3] The photos were identified and admitted in evidence, both at trial and at the evidentiary hearing, as People's Exhibits 22, 24, 29, 30 and 32.

taken on October 3, 2005) of the front door of the building, and of the outside of the back door, which supported his testimony that there were no cameras at the back door.

In closing arguments, the State argued to the jury that John Fulton slipped out the back door of the building undetected, drove to pick up Anthony Mitchell and Antonio Shaw, and then drove to the north side to kidnap Collazo and carry out this murder.

The jury believed the State. Despite the fact that with such a physically violent beating and kidnapping – in which the victim's body was purportedly put in the back of Fulton's car after he was brutally beaten – there was no physical evidence linking Fulton or his co-defendants to this crime. There were no eyewitnesses. There were only Fulton's and Mitchell's statements and the State's [unrebutted] argument that Fulton's alibi did not matter, because Fulton was able to sneak out the back door of his apartment building without being detected.

Ultimately, Mr. Fulton and Mr. Mitchell were convicted, and those convictions were upheld on appeal.

IV. THIRD-STAGE EVIDENTIARY HEARING

Evidence that there was no camera at the back door of Mr. Fulton's apartment building was critical to his conviction. With the video evidence that he had entered his apartment building at 11:54 p.m. on March 9, 2003 and wasn't seen again on camera until close to 8:00 a.m. on March 10, 2003, the State *had* to make the case that he must have slipped out the back door. As it turns out, there was evidence that there likely was a camera at the back door, and that there was, in fact, a "key fob" security scanner at the back door, so that any entrance in the early morning hours would have been recorded.

The jury never heard this evidence. At the third-stage hearing, this Court heard this evidence, evidence the jury *should* have heard twelve years ago.

On January 31, 2018, the first day of the evidentiary hearing, Mr. Fulton called three witnesses: Tamala Boyette, Nathan Barnett, and Amanda Bashi.

Tamala Boyette, who worked at Lake Meadows apartments from February of 2003, until 2014, and was the manager at John Fulton's apartment building at the relevant time, testified in no uncertain terms that there were three cameras in the lobby – one in the back facing the mailbox, one in front of the elevator and a third in the entryway lobby – which recorded "traffic going in and out of the building." (Ex. A, p. 21). [4]

Ms. Boyette's testimony was supported by that of Nathan Barnett, who was the chief engineer at Lake Meadows, and had been employed there for over 40 years. (*Id.*, pp. 42-43). Mr. Barnett identified Petitioner's Exhibit 4, which was a letter sent to the building residents to notify them of security upgrades, including an upgrade to using key fobs. (*Id.*, p. 67). The key fob mechanism was part of the upgrade sometime after August of 2002. The key fob system has electrical wiring to the door that allows the resident to enter only with the key fob. (*Id.*, pp. 68-69). Mr. Barnett was shown Respondent's Exhibit 1, which was a photo that was apparently taken by an investigator for the State in the fall of 2005. When asked whether Respondent's Exhibit 1 showed the camera that is shown in Petitioner's Exhibit B2, Mr. Barnett answered, "I see the -- the outside of it. I can't make it out but I can see the conduit. (*Id.*, p. 59). As it turns out there were a number of

[4] Transcripts from the evidentiary hearing are attached as: 01-31-18, Exhibit A; 08-30-18, Exhibit B; and 10-18-18, Exhibit C.

photographs taken by the State in 2005 that were never provided to trial counsel, as testified to later in the third-stage hearing by Richard Beuke and Michael Clancy, attorneys for John Fulton and Anthony Mitchell, respectively.

Amanda Bashi, who was one of John Fulton's original post-conviction attorneys, testified that she re-investigated the case; Ms. Bashi and her colleagues discovered cameras where they didn't expect to find cameras based on the record. Ms. Bashi identified Petitioner's Exhibits B2-B27, which are photographs that she took at Lake Meadows in 2012, (Id., pp. 81-85), a PowerPoint presentation timeline related to Mr. Fulton's alleged confession, as well as a summary of surveillance evidence and photographs introduced at Fulton's trial. (*Id.*, pp. 75-80). These exhibits were all admitted into evidence. (Ex. C, p. 42).

On August 30, 2018, the hearing resumed with testimony from two witnesses: Mr. Fulton's trial attorney Richard Beuke; and Mr. Mitchell's trial attorney, Michael Clancy.

Both Mr. Beuke and Mr. Clancy testified that they had not previously seen Respondent's Exhibit 1. (Ex. B, pp. 23, 45, 63). In addition, the photos shown at Mr. Fulton and Mr. Mitchell's trial as People's Exhibits 30 and 32 were taken at an angle so that it is not possible to see the housing for the back door camera (*Id.*, pp. 19, 47, 56-58). In other words, the area where the camera is now located, and where the housing for the camera was located at the time the photos were taken in 2005, was obscured in the photos presented to the jury.

The State presented People's Exhibits 30 and 32 in its rebuttal case; it did not show the jury Respondent's Exhibit 1, because to do so would have opened up the argument that there was a camera installed on that housing back in March of 2003.

As Mr. Clancy stated, "Obviously if there was any indication – even just that box or even just the electric housing going up to that area above the door, if there was any indication that there was a camera back there," it would have "absolutely" changed his investigation in preparation for trial, but especially would have changed the cross-examination of the State's rebuttal witness. (*Id*., pp. 49-50).

On October 18, 2018, Petitioners called Professor Richard Schak, who is currently chair of the criminal justice program at National Louis University, and who was formerly a Chicago Police Officer, Detective and Sargent, from 1969 to 2000. (Ex. C, p. 5). Professor Schak worked as a homicide detective for 27 years with the Chicago Police Department. (*Id*., p. 7).

In forming his opinions related to this case, Professor Schak reviewed the Fulton trial transcripts, the common law record, police reports, the letter to the tenants (Petitioner's Exhibit 4), phone records, and the corresponding analysis of the phone records. Professor Schak noted that in a homicide investigation it is very important to interview people that spoke with a victim just before the victim was killed. Based on Professor Schak's review of the phone records and investigation records in this case, it did not appear that was done[5]. Ultimately, Professor Shack concluded that John Fulton's

[5] This is significant because Precious (the person who supposedly assisted Fulton, Mitchell and Shaw in getting to Collazo by telling them specifically where Collazo was

confession was likely false, "because there's so many inconsistencies," the alibi was not investigated properly, and "there were a lot of things in this case left undone based on what I reviewed and what I've seen since. When you look at the phone records and look at the letter from the management company, I wonder about video surveillance and how much of that was reviewed because it didn't seem like there was very much done." (*Id.*, pp. 12-14).

At the end of Professor Schak's testimony, Petitioners rested.

In rebuttal, the State called retired Cook County State's Attorney investigator Brian Murphy. Murphy identified 24 photos as being the photos that he took (including Respondent's Exhibits 1, 2, and 3) in the fall of 2005. (*Id.*, p. 48). Murphy did not testify at trial, and had no knowledge of whether the 24 photos were provided to the defense or whether any of the photos were introduced at trial (*Id.*, pp. 40, 48). Murphy was not asked to serve subpoenas for information about the security setup at Fulton's apartment building, key fobs or cameras, and he did not speak with anyone at the building about those matters. (*Id.*, p. 49).

The State next called Michael Sanfratello, who installed a security system at Fulton's apartment building in 2002 - 2003. (*Id.*, p. 56). Sanfratello testified that he did not install a back door camera, but that the housing for it was there. (*Id.*, pp. 85-6). Sanfratello installed an entry system at the back door of Fulton's apartment building that

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on the night of his murder) did not talk to Collazo on the day of his murder, but rather the previous day.

"allowed workers, tenants to have key fobs to swipe in and out of certain doors." (*Id.*, p. 56). Anyone returning through the back door would be required to utilize a fob to access that door from the outside to get inside, and that fob would, in fact, capture the identity of the fob holder entering that back door. The data identifying the person entering the back door – name, apartment number – would be saved on a server at the Lake Meadows building, and retained for a period of time. The installation of the rear fob system was competed on September 23, 2002 (*Id.*, pp. 78-80), and that fob system was functioning prior to March 9, 2003. (*Id.*, pp. 76-77).

The State rested, and Petitioners did not present evidence in rebuttal. At the close of evidence, the Court admitted all exhibits offered by the parties, and set the date of January 23, 2019 for closing arguments. In the interim, John Fulton and Anthony Mitchell filed a Fourth Supplement to their Post-Conviction Petitions, which includes claims related to all of the information presented by the State in rebuttal at the evidentiary hearing regarding the key fob entry system.

V. ARGUMENT

As this evidentiary hearing has shown, the State's theory – their *only* viable theory – that John Fulton was able to leave out of his apartment building through the back door and sneak back in, leaving no electronic record, is clearly not the case. The prosecution at trial emphasized this theory in its arguments to the jury no less than six times. For example, the State told the jury that the photos admitted through Shepherd would allow them to "see how easy it was for John Fulton to walk in one minute and walk right back out the next, grab his buddies from the south side," and murder Christopher Collazo. (8-

30-2006 Tr., pp. V177-78). The State further told the jury that Mr. Fulton was "clever enough to know that to go out the back door where he wouldn't be seen and come back into the back door where he wouldn't be seen." (8-30-2006 Tr., pp. V335).

We now know that, in fact, the jury in this case was misled, misinformed, and, thus, misguided. Had the jury known of the back door camera and, importantly, of the key fob records, they would have known the truth; John Fulton and Anthony Mitchell falsely confessed and are actually innocent.

A. Under the Doctrine of *Brady v. Maryland*, John Fulton and Anthony Mitchell are Entitled to Post-Conviction Relief

The prosecution has an obligation to disclose exculpatory and/or impeaching evidence pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). It is well-established that a *Brady* claim requires a showing that: (1) the undisclosed evidence is favorable to the accused because it is either exculpatory or impeaching; (2) the evidence was suppressed by the State either willfully or inadvertently; and (3) the accused was prejudiced because the evidence is material to guilt or punishment. *People v. Beaman*, 229 Ill. 2d 56, 73-74, 890 N.E.2d 500, 510-11 (2008) (internal citations omitted).

Evidence is material if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed, and "[t]o establish materiality, an accused must show 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Id*. (Citing *People v. Coleman,* 183 Ill. 2d 366, 393, 701 N.E.2d 1063, 233 Ill. Dec. 789 (1998), quoting *Kyles v. Whitely,* 514 U.S. 419, 435, 131 L. Ed. 2d at 506, 115 S. Ct. at

1566.) "In making the materiality determination, courts must consider the cumulative effect of all the suppressed evidence rather than considering each item of evidence individually." *Id*. (Citing *People v. Hobley,*182 Ill. 2d 404, 435, 696 N.E.2d 313, 231 Ill. Dec. 321 (1998), citing *Kyles,* 514 U.S. at 436-41, 131 L. Ed. 2d at 507-10, 115 S. Ct. at 1567-69).

Considering the evidence presented at the evidentiary hearing in this matter, it is clear that Petitioners have met all of the legal requirements to prove a *Brady* violation, and thus, should be granted a new trial.

First, the evidence presented of the key fob records and the presence of a back door camera is clearly exculpatory. It was the State's position at trial that Mr. Fulton's alibi was really no alibi at all, because – despite the fact that he was seen on surveillance video entering his apartment building just before midnight on the night of the murder and not leaving again until he left for school early the next morning – he was "clever enough to know that to go out the back door where he wouldn't be seen and come back into the back door where he wouldn't be seen." (8-30-2006 Transcript, p. V335). The key fob records, as well as the evidence of a back door camera, would have ruled out the State's theory that Fulton snuck out the back door after 11:53 p.m. on March 9, 2003, and snuck back in the back door in the early morning hours of March 10, 2003, undetected.

Second, the evidence was suppressed by the State, either willfully or inadvertently. As testified to by Michael Sanfratello, there is no question that in March of 2003, anyone returning through the back door of Mr. Fulton's apartment building would be required to utilize a fob to access that door from the outside to get inside, and that fob

would, in fact, capture the identity of the fob holder entering that back door. The State's theory that Mr. Fulton snuck in and out undetected has been thoroughly debunked.

In addition, in 2005, a State investigator went to Mr. Fulton's apartment building and took photos. According to the State's argument in closing at trial, it sent investigator Eugene Shepherd to Fulton's apartment building in the middle of Fulton's trial because Mr. Fulton's girlfriend testified that she was not sure whether or not there were cameras at the back door of the building. It must be noted that the State sent Shepherd to the building despite the fact that the State already had the photos of the building that Shepherd identified, which were photos that Brian Murphy testified were taken in 2005. At trial, only certain of the photos taken by the State in 2005 were tendered to defense counsel and shown to the jury. Those photos showed the area where the camera was (and at the time, in 2005, where the camera housing was), but, as set forth above, that area was obscured.

Significantly, the photos tendered to defense counsel and shown to the jury on October 30, 2006 did not include Respondent's Exhibit 1, which is the photo tendered to post-conviction counsel during the pendency of the instant Petition, and introduced at the evidentiary hearing in this case. Respondent's Exhibit 1 clearly shows the housing for a camera at the back door of Mr. Fulton's apartment building. The State had this photo prior to trial, and did not tender it, presumably so as to not "muddy the waters" on the issue of a back door camera.

Moreover, we know that the State withheld this evidence based on the trial testimony of Eugene Shepherd. On direct, Shepherd was asked about People's Exhibits

22, 24, 29, 30, and 32, which he identified as photos of Lake Meadows apartment building. On cross, when asked whether or not any other CCSAO investigator had gone to the building in order to determine whether or not there were security cameras in the front or back of the building prior to Shepherd going that morning, Shepherd testified (over "beyond the scope" objection by the State) that he had "no way of knowing that." (8-30-2006 Tr., pp. V73-74). This testimony was misleading. The photos that Shepherd identified at trial, as well as the withheld photos, were taken by Cook County State's Attorney Investigator Murphy, on October 3, 2005, nearly a year before Shepherd visited the building himself. The recently-tendered photos include a photo that indicates the date, time, and the name of the investigator who took the photos, as well as the Assistant State's Attorney who requested the photos. (*See* Petitioner's Exhibit 7).

The State chose to present only a subset of the photos taken by Murphy, and introduced them through Shepherd in order to bolster Shepherd's testimony and "prove" that there were no cameras at the back door, Shepherd must have known that someone else had taken the photos, because he knew he had not taken the photos himself when he visited Lake Meadows on August 30, 2006. [6]

[6] Petitioners note that Eugene Shepherd was not called by the State to testify at the evidentiary hearing.

Finally, it is clear that these photographs including Respondent's Exhibit 1 were not tendered based on the testimony of Petitioners' trial attorneys, Richard Beuke and Michael Clancy, which evidence is unrebutted.[7]

Third, there can be no question that the intentional or unintentional withholding of the clearly exculpatory key fob evidence, camera evidence, and the letter given to tenants (alerting them to the fact that their movements in and out of the building would be electronically recorded), prejudiced Petitioners.

The exculpatory evidence that was known to, or that should have been known to the State, was withheld from Petitioners. The housing for the camera at the back door of Fulton's apartment building was clearly visible in the photos that were never turned over to defense counsel. The fact that these photos were never turned over was not disputed by the state; Brian Murphy testified that he did not know, trial counsel for Mr. Fulton and Mr. Mitchell testified that they had not seen these photos, and the state did not call either of the trial prosecutors or present any evidence that the defense lawyers were mistaken in any way. Thus, the clear evidence is that the defense was not presented with exculpatory evidence that was central and material.

Had Petitioners known of that evidence at the time of trial, the State's reliance on the sneaking out the back door theory would have been to no avail.

B. Ineffective Assistance of Counsel

[7] Petitioners note that neither of the trial prosecutors were called at this hearing.

If this Honorable Court finds that this was not a *Brady* violation, and that this exculpatory evidence could have, or should have been discovered in the course of the defense investigation but was not, then clearly Petitioners were denied their constitutional right to effective assistance of counsel. Evidence presented during this third-stage hearing proves Petitioners' counsel's performance as to the issue of the back door camera and the key fobs failed the two-prong test as set forth in *Strickland v. Washington*. 466 U.S. 688 (1984). *See also People v. Barrow*, 133 Ill. 2d 226 (1989); *People v. Albanese*, 104 Ill. 2d 504 (1984).

Defense counsel's obligations under *Strickland* and its progeny are well known. Pursuant to the Sixth Amendment of the United States Constitution, every defendant is guaranteed the right to effective assistance of counsel. U.S. Const. Amend. VI. The Supreme Court has established a familiar two-part test to determine if counsel's errors deprived a defendant of this constitutional guarantee.

First, the Court must determine whether counsel's performance fell below an "objective standard of reasonableness." *Strickland,* 466 U.S. at 688. In assessing counsel's performance, "a court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Raygoza v. Hulick*, 474 F.3d 958 (7th Cir. 2007). A single oversight by counsel typically does not violate the sixth amendment, as "judges must not examine a lawyer's error (of omission or commission) in isolation." *Williams v. Lemmon*, 557 F.3d 534, 538 (7th Cir. 2009) (internal citation omitted). Rather, the Court must "evaluate the entire course of the defense, because the question is not whether the lawyer's work was error-free, or the best possible approach,

or even an average one, but whether the defendant had the 'counsel' of which the sixth amendment speaks." *Id*.

Second, the Court must determine whether these errors prejudiced the defendant – i.e. "whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694. In determining prejudice, a court hearing an ineffectiveness claim must consider the totality of the evidence before the trier or fact. *Id*. at 695.

As discussed in detail above in Petitioners' *Brady* argument there is no question that the crux of the State case relied on them being able to argue that John Fulton could have snuck out of the building. Since this was not the case, Petitioners meet the two-part test under *Strickland*.

C. Evidence Adduced at This Third-Stage Hearing Shows Actual Innocence

As discussed above, the key fob and back door camera evidence shows that Petitioners are actually innocent.

Post-Conviction relief based on actual innocence requires the petitioner to present "newly discovered" evidence. Evidence that is newly discovered is defined as evidence that was discovered since the trial and could not have been discovered earlier through due diligence. *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 37, citing *People v. Ortiz*, 235 Ill. 2d at 334 (2009). Newly discovered evidence must also be material and noncumulative, and of such conclusive character that it would probably change the result on retrial. *People v. Simmons*, 388 Ill. App. 3d 599, 613-14, 903 N.E.2d 437, 451-52 appeal denied, 232 Ill. 2d

593, 910 N.E.2d 1131 (2009) quoting *People v. Morgan*, 212 Ill.2d 148, 154, 288 Ill. Dec. 166, 817 N.E.2d at 527.

Evidence is material if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed, and "[t]o establish materiality, an accused must show 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Id*. (Citing *People v. Coleman,* 183 Ill. 2d 366, 393, 701 N.E.2d 1063, 233 Ill. Dec. 789 (1998), quoting *Kyles,* 514 U.S. at 435, 131 L. Ed. 2d at 506, 115 S. Ct. at 1566.) "In making the materiality determination, courts must consider the cumulative effect of all the suppressed evidence rather than considering each item of evidence individually." *Id*. (Citing *Hobley,*182 Ill. 2d 404, 435, citing *Kyles,* 514 U.S. at 436-41).

Here, the evidence is clearly material. It was the State's position at trial that Mr. Fulton's alibi was really no alibi at all, because – despite the fact that he was seen on surveillance video entering his apartment building just before midnight on the night of the murder and not leaving again until he left for school early the next morning – he was "clever enough to know that to go out the back door where he wouldn't be seen and come back into the back door where he wouldn't be seen." (8-30-2006 Transcript, p. V335). The key fob records, as well as the evidence of a back door camera, would have completely foreclosed the State's theory that Fulton snuck out the back door after 11:53 p.m. on March 9, 2003 and snuck back in the back door in the early morning hours of March 10, 2003, undetected.

The new evidence presented here is noncumulative. Evidence is considered cumulative when it does not add anything to what was previously before the jury. *Lofton*, 954 N.E.2d at 833, citing *Ortiz,* 235 Ill.2d at 335, 336. The key fob records, as well as the evidence of a back door camera, completely contradict the State's theory that despite all of the inconsistencies and problems with Fulton's confession, that confession should be believed and Fulton's alibi disregarded because Fulton snuck out the back door after 11:53 p.m. on March 9, 2003, and snuck back in the back door in the early morning hours of March 10, 2003, undetected. Accordingly, the new evidence is not cumulative, and is of such conclusive character that it would probably change the result on retrial.

VI. CONCLUSION

In a time in our country where there are those who argue that we are post-fact or can rely on alternative facts, it is our courts to which we turn to in order that we remain steadfast in requiring justice and in caring what the truth is.

The facts here are undisputed. The records show that there was a security system that would have told the jury that John Fulton's alibi is true; he never left his apartment that night to kill anyone. In addition, Professor Schak testified that he was dismayed by the errors and omissions in the investigation of this case, including the fact that the people who had been in contact with Christopher Collazo close to the time of his death were apparently never interviewed in connection with his murder.

In the United States of America, we strive to do justice, but sometimes we fail, and unlike other countries, we can admit when we are wrong. The sad history of false confessions, withholding of exculpatory evidence, ineffective assistance of counsel, and

other facts which cause wrongful convictions, have been on display here in Illinois. Mr. Fulton and Mr. Mitchell respectfully ask this Honorable Court to let a trier of fact hear the entire story of this case.

The injustice here is to John Fulton, Anthony Mitchell, and Petitioners assert – to the family of Mr. Collazo. This Honorable Court should grant their request for post-conviction relief.

Respectfully submitted,

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EXHIBIT A

January 31, 2018 Transcript

EXHIBIT B

August 30, 2018 Transcript

EXHIBIT C

October 18, 2018 Transcript

IN THE CIRCUIT COURT OF COOK COUNTY
CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff-Respondent,	)	
	)	**No. 03 CR 8607**
v.	)	**Honorable Lawrence E. Flood,**
	)	**Judge Presiding**
JOHN FULTON and	)	
ANTHONY MITCHELL,	)	
	)	
Petitioners-Defendants.	)	

NOTICE OF FILING AND CERTIFICATE OF SERVICE

PLEASE TAKE NOTICE that on the XX day of January, 2019, I caused to be filed with the Clerk of the Circuit Court of Cook County, Illinois, the foregoing Petitioners John Fulton and Anthony Mitchell's Memorandum In Support Of Granting Post-Conviction Relief After Third-Stage Evidentiary Hearing.

I certify that copies were served upon the following, by hand delivery, before the hour of 5:00 p.m. on January XX, 2019:

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