Circuit Court Harford County
Case No. 12-K-98-000892

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 2255

September Term, 2022

STEVEN ANTHONY TAYLOR

v.

STATE OF MARYLAND

Wells, C.J.,
Ripken,
Eyler, James R.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wells, C.J.

Filed: January 22, 2024

*This is an unreported opinion. It may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

In 1999, a jury empaneled in the Circuit Court for Harford County convicted Steven Anthony Taylor of first-degree felony murder, second-degree murder, attempted armed robbery, conspiracy to commit armed robbery, first-degree assault, first-degree burglary, and two counts of using a handgun in a felony or crime of violence. The court sentenced Taylor to life imprisonment and a consecutive twenty years, all but five suspended. In 2016, Taylor filed a petition seeking new testing for DNA evidence, which the court subsequently granted.

In 2022, Taylor filed a Petition for Writ of Actual Innocence, claiming two pieces of evidence met the statutory requirements. One was a nylon mask discovered at the crime scene and later admitted as evidence in the 1999 trial which contained Taylor's DNA, plus one other sample from another person. DNA testing done at Taylor's request in 2016 showed two additional DNA samples on the mask. The other piece of evidence was a memorandum that summarized a police interview with a prison inmate. In the transcribed interview the inmate discussed events related to the crime, including how the inmate disposed of the murder weapon ("Supermax Memo"). Taylor claimed this memorandum exculpated him.

The circuit court held a hearing on December 7, 2022, on Taylor's petition, and denied the requested relief. The court determined neither the new DNA evidence nor the memo pointed to Taylor's actual innocence nor would their admission at trial likely have

changed the trial's outcome. Taylor timely noted this appeal and submitted two questions for our review[1], which we have rephrased and consolidated into one:

> Did the circuit court abuse its discretion by denying Taylor's Petition for Writ of Actual Innocence, when determining neither the new DNA evidence nor the Supermax Memo satisfied the three requirements for relief?

For the reasons we will discuss, we find no abuse of discretion and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In October of 1999, Taylor was convicted of first-degree felony murder, second-degree murder, attempted armed robbery, conspiracy to commit armed robbery, first-degree assault, first-degree burglary, and two counts of using a handgun in a felony or crime of violence. The convictions stemmed from a home invasion that occurred on June 30, 1998. The evidence at trial showed five people conspired to rob Victor Maldonado: Taylor, Gregory Orsini, Will Sheppard, Bill Marshall, and a fifth person who was not identified. During the commission of the robbery, John Von Haack, the owner of the home, was shot and killed. Taylor and others were arrested shortly thereafter. [2]

[1] Taylor's questions presented verbatim are as follows:

1. Did the hearing court abuse its discretion in finding that the DNA evidence adduced, while newly discovered, did not satisfy the other two requirements for relief under a writ of innocence?
2. Did the hearing court abuse its discretion in finding that none of the requirements for relief under a write of innocence were present regarding the Supermax memo?

[2] Following his conviction, Taylor filed an appeal, in which we affirmed the circuit court. *Taylor v. State*, No. 3009, Sept. Term, 1999 (Md. App. Ct. Apr. 2, 2001). In that opinion, we summarized the events as eyewitnesses described them. The account is as follows:

Trial and Evidence

As part of a plea agreement, Orsini testified against Taylor and the other co-conspirators. Orsini testified that on June 29, 1998, he and the four others involved, including Taylor, surveilled Maldonado's home, learned its layout, and planned to go back on June 30 to commit the robbery. The next day, Orsini testified he picked up Sheppard, Taylor, and the unknown participant. Orsini stated the three men were wearing dark clothing, and Taylor had on a "dark-colored stocking." Orsini then drove to meet up with Marshall, where everyone but Orsini jumped into Marshall's vehicle and drove toward the Von Haack house. When Orsini returned to his own house, he learned Von Haack was killed. The next day he turned himself into the police and gave a statement.

At the crime scene, the police recovered several pieces of evidence, including a black nylon stocking tied in a knot. Testing on the black nylon stocking indicated traces of

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Danielle Kreh and Rhyannon Tully supplied the events of the robbery. Ms. Kreh was Orsini's ex-girlfriend at the time of the shooting. She had arrived at the Von Haack home about 9:30 that evening, to visit Ms. Tully and her two-year old son. Jon and Blake Von Haack were present, as was a woman named Lisa Piazza and the three Von Haack children. Maldonado and a man named Donnie Hickman arrived at about 10:00 and went into the back bedroom. As the front door was broken, Maldonado and Hickman entered the house through the rear door, which led into a sun porch, and into the living room.

Shortly after the arrival of Maldonado and Hickman, two men dressed in black and wearing "nylon type" black masks, broke in back door and appeared in the living room's doorway. They ordered all present to "get the fuck on the floor." The intruders were armed with silver and black handguns. When Jon Von Haack stood up and began to run down the hall, he was fatally shot.

saliva. A known sample of Taylor's DNA was sent to the lab with the saliva found on the nylon stocking. The Maryland State Police Crime Lab was able to exclude Orsini, Sheppard, Marshall, and Von Haack as the DNA's source. The crime lab found the DNA on the stocking was a mixed DNA profile, and the mixture was "17,000 times more likely" a mixture from Taylor and one unknown individual.

The State argued Taylor was one of the robbers and suggested he fired the fatal shot that killed Von Haack. During deliberations, the jury asked, "if Taylor was in the car planning the attempted robbery the previous night, does he still receive same charge as murder?" The court responded by providing a supplemental instruction on co-conspirator liability. After which, Taylor was convicted of all charges. He was sentenced to life imprisonment and a consecutive twenty years, all but five suspended.

Motion for Post-Conviction Review

In June 2016, Taylor filed a Motion for Post-Conviction Review of DNA Evidence referencing the nylon stocking. The motion was granted because the judge found "a substantial possibility that advanced DNA testing has the scientific potential to produce exculpatory or mitigating evidence relevant to the claim of wrongful conviction." The results of the new DNA testing revealed a mixture of DNA profiles. One profile was from Taylor. There were also a minimum of three additional contributors, which was two more than the original DNA results.

Motion and Hearing for Writ of Actual Innocence

On April 8, 2022, Taylor filed a Petition for Writ of Actual Innocence, asserting two pieces of newly discovered evidence merited relief. The first was the 2016 DNA results. Taylor pointed to the DNA analyst's conclusion that "[i]t is 74.2 septillion times more likely to obtain these mixture results if Steven Anthony Taylor Jr. and three unknown, unrelated individuals are contributors than if four unknown, unrelated individuals are contributors." He argued these results revealed an even larger contributor pool, thus creating a substantial likelihood of his actual innocence.

In addition to the DNA evidence, Taylor argued that a police report he obtained through a Maryland Public Information Act request, the so-called Supermax Memo, exonerated him. The Supermax Memo memorialized an interview with an unnamed inmate who told the investigator where to find the missing gun used to kill Von Haack. The pertinent part of the Supermax memo is as follows:

> At 900 hours on 2/22/99 I interviewed [REDACTED] in the attorney interview room at Supermax . . . . [REDACTED] stated he knew where the .45 caliber handgun was located because he was with person [sic] that hid it after the murder of Von Haack. [REDACTED] stated he wanted to complete his sentence at Harford County Detention center in exchange for this information . . . . [REDACTED] stated he wanted his lawyer present when he made his statement and to confirm any agreement.

Taylor contended this information showed an alternate suspect murdered Von Haack.

On December 7, 2022, the Circuit Court for Harford County held a hearing on Taylor's petition. Taylor argued the Supermax Memo identified a new potential suspect, showing his actual innocence. He maintained he could not have known about this suspect

in time to move for a new trial. Taylor then argued similarly regarding the new DNA evidence. He concluded, that when considering these two new pieces of evidence together, there was a substantial likelihood of a different result at trial.

The State responded that the new DNA evidence did not suggest Taylor's actual innocence, nor would it have affected the verdict. Rather, the additional DNA testing only further incriminated him.[3] Additionally, nothing in the Supermax Memo, the State contended, spoke to Taylor's actual innocence because it provided no details as to Taylor's involvement or, more importantly, the lack thereof. Moreover, the jury convicted Taylor for participating in a conspiracy, and neither the DNA nor the Supermax Memo changed the fact that Taylor was one of several people who were involved in the home invasion.

On January 20, 2023, the circuit court denied Taylor's petition, finding he failed to satisfy his burden of establishing the three requirements for relief. The court ruled:

> Due to recent advancements in DNA testing, the newly discovered DNA contributors would not have been able to have been discovered at the time of trial. This arguably makes the Defendant's task of satisfying the second prong of the test required for a writ of actual innocence complete. However, as for the remaining requirements, this Court is not moved that this more advanced DNA evidence speaks to the petitioner's actual innocence. In addition, the more precise DNA evidence does not create a substantial or significant possibility that the trial result may have been different. The evidence shows more clearly that the Defendant was at the scene of the murder. This does not advance a notion of actual innocence of the Defendant.
>
> The fact that there were four contributors to the DNA on the nylon mask likely would not have had any effect on this case. The testimony and evidence at trial showed that there were five individuals involved with the home invasion, with at least three entering the home. The presence of the

[3] The prosecutor went into more detail, explaining the new DNA evidence "put[] [Taylor] in even more than the original DNA evidence put him in."

newly found DNA does not speak to the Petitioner's innocence, but rather goes to show that the other individuals involved in the home invasion may also have been in close proximity to the mask. Further, the new DNA testing actually confirms to a greater degree the Petitioner's involvement in the murder, as the new testing revealed a much higher probability that the DNA on the nylon mask belonged to the petitioner. As noted for the same reasons above, the new DNA report does not create a substantial or significant possibility that the trial result may have been different. As such, this Court is not moved that the Defendant has satisfied his burden to show that he should be afforded relief . . . .

Before the Court can determine whether this memo would afford Petitioner relief to support a writ of actual innocence, the required analysis includes determining whether the Supermax Memo constitutes "evidence." The memo confirms that the detective did not advise the inmate of his Miranda rights before conducting the interview. The Defendant was clearly not advised of his right to avoid self-incrimination before he made statements which insinuated his possible involvement in the murder, and the hiding of the murder weapon. Thus, the memo and its contents are subject to suppression. Additionally, use of the statements in the memo appears to be hearsay, and hearsay statements made in police reports are generally inadmissible. *See Diggs & Allen v. State*, 213 Md. App. 28 (2013). The inmate would have to be brought to trial and they could in turn plead the Fifth. The memo itself was not signed under oath by the inmate so it could not be used for cross examination if the inmate took the stand. The Court is not convinced that this memo contains evidence to trigger the above test for a writ of actual innocence.

In addition, the Supermax Memo does not satisfy the elements to be granted relief under the test. The memo alone does not satisfy the first prong of the test of speaking to the Petitioner's innocence. In the memo the inmate makes no claim to have knowledge of who committed the murder in this case or that the Defendant was not involved. The inmate also does not identify any individual involved, does not identify who hid the weapon, and does not identify where the gun was hidden. No information in this memo speaks to the petitioner's lack of involvement or innocence, and instead supports the more likely notion that there were additional witnesses and co-conspirators to this case. The inmate wanted to speak about the crime. This more likely than not means that the inmate could have or was going to implicate the Petitioner in the crime, or name him as the individual who hid the weapon. There appears to be no other reason for the inmate to seek a sentence modification in exchange for this information. As such, the memo does not

> speak to the Petitioner's innocence, but actually supports the Petitioner's guilt.
>
> Additionally, the second prong of the test requires that the evidence could not have been discovered in time to move for a new trial. The court is not convinced this prong has been satisfied. The Petitioner has not shown that this information could not have been obtained by trial counsel in advance of trial. The petitioner did not request such documents until 2008, well after the time had passed to move for Taylor then filed this appeal. a new trial. As such, the Petitioner did not meet his burden in showing that this memo could not have been discovered in time to move for a new trial.
>
> Finally, the memo does not create a substantial or significant possibility that the result of the trial would have been different. As discussed above, the memo alone does not give information that would exonerate the Defendant in the case, and only shows that the inmate was involved, and the inmate sought a sentence modification in exchange for confirming that. Without any additional information from this inmate, there has been no showing that the result at trial would have been any different. The Petitioner in this matter was found guilty of acting as part of a conspiracy in which up to five individuals were involved. The evidence that an unidentified inmate was present at the time the gun used in the murder was hidden, would only add more weight to the theory of the State that numerous individuals acted as part of a conspiracy to murder the victim. Without any further information beyond the memo itself, the Petitioner has failed in his burden to establish that there is a substantial or significant possibility that the result of the trial would have been different had the memo been in hand at trial or available in time to be presented in a motion for a new trial.

Taylor then filed this appeal.

We will provide additional facts in our analysis when necessary.

DISCUSSION

1. Parties' Contentions

Taylor contends the circuit court erred because the two "newly discovered" pieces of evidence met the three requirements for relief. *First*, as for the nylon stocking, Taylor contends that, because new DNA testing completed on the nylon mask revealed a DNA

mixture containing two further contributors, there is a higher likelihood Taylor did not commit the crime. If the jury received this evidence, so Taylor contends, there is a substantial chance the verdict would have been different.[4] *Second*, Taylor contends the Supermax Memo introduced a "potential new suspect," who claimed to know the whereabouts of the missing gun used in Von Haack's murder, pointing to Taylor's possible innocence.

The State responds the circuit court properly denied Taylor's petition. Specifically, that the new DNA evidence including more contributors neither speaks to Taylor's actual innocence nor provides a substantial likelihood of different verdict. Rather, in conjunction with the State's expert's testimony, the new DNA more conclusively linked Taylor to the crime scene. Moreover, the State contends the jury heard sufficient evidence of Taylor participating in a conspiracy to convict, and the DNA only strengthened his connection to the crime scene; thus, no substantial likelihood of a different result existed. The State further contends the Supermax Memo does not merit relief because the inmate's statements do not mention Taylor at all. Instead, the inmate simply discusses the whereabouts of the gun, which does not speak to Taylor's innocence or create a substantial likelihood of a different verdict.

[4] The Circuit Court determined the new DNA testing met the second requirement for relief because only new DNA testing technology could have identified the two further DNA contributions to the mask.

2. Standard of Review

An individual is permitted to file a Petition for Writ of Actual Innocence if they claim there is newly discovered evidence that: "if the conviction resulted from a trial, creates a substantial or significant possibility that the result may have been different, as that standard has been judicially determined[, and] . . . could not have been discovered in time to move for a new trial under Maryland Rule 4-331." Md. Code, CP § 8-301(a). "Courts reviewing actions taken by a circuit court after a hearing on a petition for writ of actual innocence limit their review . . . to whether the trial court abused its discretion." *Hunt v. State*, 474 Md. 89, 102-03 (2021).[5] We will "accept the factual findings of the circuit court unless clearly erroneous and will 'not reverse a [circuit court's] discretionary determination unless it is well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Carver v. State*, 482 Md. 469, 485 (2022) (quoting *Faulkner v. State*, 468 Md. 418, 460 (2020)).

3. Analysis

To prevail in an actual innocence proceeding, the petitioner bears the burden of establishing newly discovered evidence that satisfies three well-established requirements

[5] "Because, as we shall explain, the actual innocence statute was anchored to the motion for new trial on the ground of newly discovered evidence, both this Court and the Court of Special Appeals looked to decisions interpreting Maryland Rule 4-331(c) (governing motions for new trial on the ground of newly discovered evidence) when first interpreting the statute." *See*, *e.g.*, *Douglas*, 423 Md. at 188, 31 A.3d at 269 (recognizing that "decisions on the merits of requests for new trials based on newly discovered evidence, whether filed pursuant to Rule 4-331 or the [actual innocence statute], are committed to the hearing court's sound discretion"). *Hunt*, 474 Md. at 103.

for relief. *First*, the newly discovered evidence must "speak to" the petitioner's actual innocence; meaning the petitioner made a "threshold showing that he or she may be actually innocent, meaning he or she did not commit the crime." *Carver*, 482 Md. at 490 (citing *Faulkner*, 468 Md. at 460.)

Second, the petitioner, after proper due diligence, did not have access to the new evidence at the appropriate time to move for a new trial.

> Whether evidence is newly discovered has two aspects: a 'temporal one,' that is, when the evidence was discovered; and a 'predictive one,' that is, when it 'should' or 'could' have been discovered. 'Due diligence' is relevant to the latter aspect, and, in this context, contemplates that the defendant act reasonably and in good faith to obtain the evidence, in light of the totality of the circumstances and the facts known to him or her.

Id. (citing *Hunt*, 474 Md. at 108) (emphasis in original).

Third, the new evidence "creates a substantial or significant possibility" that, if the jury received the evidence, the trial results "may have been different." *Faulkner*, 468 Md. at 459-60 (internal citations omitted). "The substantial or significant possibility standard falls between 'probable,' which is less demanding than 'beyond a reasonable doubt,' and 'might,' which is less stringent than 'probable.'" *Id.* (citing *McGhie v. State*, 449 Md. 494, 510 (2016)). This requirement "requires a materiality analysis," and "[t]o meet this standard, the cumulative effect of newly discovered evidence, viewed in the context of the entire record, must 'undermine confidence in the verdict.'" *Carver*, 482 Md. at 490. The Supreme Court of Maryland in *Faulkner* explained:

> [I]n analyzing the materiality of multiple items of newly discovered evidence for purposes of an actual innocence petition, a circuit court must conduct a cumulative analysis. A cumulative assessment is necessary for two reasons.

> First, in some cases, no one distinct item of newly discovered evidence will suffice on its own to warrant relief, but cumulatively, such evidence will create a substantial or significant possibility of a different result. Second, even if one or more distinct pieces of newly discovered evidence independently justifies the granting of the writ, a cumulative analysis may affect the court's determination of the appropriate remedy.

Faulkner, 468 Md. at 464. Accordingly, circuit courts evaluating the materiality of newly discovered evidence "must consider the cumulative effect of the new evidence within the context of the entire adversarial proceeding." *Carver*, 482 Md. at 492. However, in ruling on the merits of an actual merits petition, "for purposes of appellate review, we believe it generally is a sound practice for a circuit court first to consider the materiality of each piece of newly discovered evidence independently, and then to conduct a cumulative analysis." *Id.* at 491.

The Supreme Court of Maryland has discussed this issue in multiple cases and they provide guidance for our decision.

a. *Faulkner v. State*

In *Faulkner*, the Court heard an appeal from David Faulkner and Jonathan Smith regarding their actual innocence petitions related to their convictions for Adeline Wilford's murder. 486 Md. at 418. The State's evidence against Smith and Faulkner included statements from Ray Andrews, another participant in the crime, and Beverly Haddaway, Andrews' aunt, who provided inculpatory testimony. *Id.* at 426. Smith and Faulkner filed petitions for Writs of Actual Innocence, based on three distinct items of allegedly newly discovered evidence: (1) palm prints on Wilford's utility room window and washing machine that belonged to Ty Brooks, another suspect; (2) recordings from a conversation

between a Maryland State Police Corporal John Bollinger and Haddaway that questioned the truthfulness of Haddaway's testimony; and (3) statements from a witness who saw an Oldsmobile Cutlass (not the defendant's car) at Wilford's house at approximately 2:00 p.m. on the day of the murder. *Id.* at 446-53.

Ultimately, the circuit court denied the petitions and this Court affirmed. Smith and Faulkner filed petitions for *certiorari*, which were granted. The Supreme Court of Maryland discussed the cumulative analysis and palm print and recording evidence.[6]

The Court held the circuit court properly conducted a cumulative analysis and did not abuse its discretion on that issue. However, although the circuit court provided the cumulative analysis, it erred in other portions of its ruling. *Id.*

The Court looked at the palm print evidence and held the circuit court abused its discretion because "strong alternate perpetrator evidence can be very powerful in the defense of a person accused of a crime where the primary issue in dispute is identity." *Id.* at 468. The Court further emphasized the alternate perpetrator evidence must be compelling, and this is not the case when "a petitioner has come forward with only

[6] The Appellate Court of Maryland held that "Smith and Faulkner failed to show that they exercised due diligence in learning the date and time that, according to Mr. Keene, he saw an Oldsmobile Cutlass backed up against Ms. Wilford's home. Thus, the intermediate appellate court directed the circuit court, on remand, not to consider the Keene evidence in assessing the petitions for actual innocence. Faulkner appeals the ruling that the Keene evidence could have been discovered with the exercise of due diligence. This is a close question that we need not decide. As discussed below, relief is warranted without consideration of Mr. Keene's information." *Faulkner*, 468 Md. at 461-62 (footnote omitted).

conjecture or speculation that another person may have committed the crime for which the petitioner was convicted." *Id.* The new perpetrator theory was compelling here because there were several pieces of evidence supporting another suspect's involvement and a man who told police that two other suspects confessed the crimes to him. *Id.* at 469.

Next, the Court reviewed the Bollinger-Haddaway recordings. The Court explained that "Haddaway's professed willingness to alter her testimony based on whether the State would dismiss the drug charges against her grandson," who was on trial for an unrelated incident, displayed Haddaway's untrustworthiness, and "[b]eing able to show Haddaway in that light likely would have changed a great deal about how the trials proceeded."[7] *Id.* at 475. With "knowledge of Haddaway's machinations," the jury would have placed more weight on the discrepancies in Haddaway's testimony in the two trials, which included adding extra and different details at Faulkner's trial she did not mention at Smith's trial. *Id.* at 476.

The Court also mentioned the circuit court did not consider how the recordings revealed several issues with the State's handling of the case. Specifically, Haddaway threatened to destroy the State's case, and the State responded by capitulating to her. *Id.* at 477. Also, the State refused to put their agreement in writing to avoid Haddaway and Bollinger from being cross examined. *Id.* Lastly, the recordings showed the State provided Haddaway with "extraordinary" access to case files and other discovery materials. *Id.*

[7] An additional note the Court made was that Haddaway's reference to "scrap[ing] the bottom of the bucket" in search of a jailhouse informant "to see if he'll lie" would have been important to Smith's and Faulkner's defenses. *Id.* at 478.

Therefore, when considering the two pieces of newly discovered evidence, and all the surrounding factual considerations, the Court reversed and remanded both cases for new trials. *Id.* at 480.

b. Carver v. State

In *Carver*, our Supreme Court affirmed the circuit court's decision to deny Steven Carver's Writ of Actual Innocence. *Carver*, 482 Md. 469. Carver was originally convicted of first-degree murder for shooting John Green in Baltimore City. *Id.* at 477. Carver argued he was an innocent bystander and tried to introduce evidence showing the actual perpetrator was the same man who attacked Green two months before the murder, Bryant McArthur. *Id.* at 480. Defense counsel argued Green and Kenneth Alston witnessed McArthur murder another individual, and McArthur then murdered Alston, so it was more than plausible McArthur would attempt to attack Green again. *Id.* The circuit court did not allow evidence of that theory to come in, convicted Carver, and sentenced him to life without parole plus a consecutive twenty years. *Id.* at 481-82. In 2012, Carver filed a Writ of Actual Innocence. In it, Carver alleged several pieces of newly discovered evidence warranted a new trial, which, in pertinent part, included (1) a series of police reports related to threats against Green, and an alleged assault on a woman, and (2) one of the witness's criminal history. *Id.* at 481.[8]

[8] There was one other piece of newly discovered evidence discussed in *Carver*. However, it was regarding the false credentials of the State's ballistics expert, and we do not have an expert issue here, so we need not analyze it.

The circuit court denied the petition, explaining the newly discovered evidence failed to satisfy the three requirements for relief. *Id.* at 483-84. This Court affirmed, and Carver filed a writ of *certiorari*, which was granted. *Id.* at 485. The Supreme Court of Maryland first discussed McArthur's threats against Green and the incidents surrounding the assault of the woman, holding the evidence did not erode the factual premise of Carver's conviction. *Id.* at 493. Reasoning that the evidence showing McArthur attempted to solicit other people to murder Green did not discount Carver, who was present at the scene, as a suspect. *Id.* The Court, in differentiating *Faulkner*, said Carver's evidence regarding McArthur was primarily "conjecture and speculation" because there was no sufficiently compelling evidence pointing to an alternative perpetrator. *Id.* at 495-96.

Additionally, regarding the evidence of witness's criminal history, the Court held, "Defense counsel certainly had the opportunity to perform a background check on [the witness], who counsel characterized as the State's 'most important witness,' in time to move for a new trial under Maryland Rule 4-331." *Id.* at 500. Moreover, even if this was considered newly discovered evidence, the Court determined, it would not have created a substantial possibility of a different outcome because, "at best, [it would] be impeachment evidence," and it was consistent with two other eyewitnesses' testimony. *Id.* at 501. Therefore, the Court affirmed the denial of Carver's Writ of Actual Innocence.

c. The Allegedly Newly Discovered Evidence Here Neither Speaks to Taylor's Actual Innocence Nor Creates a Substantial Likelihood of a Different Trial Result.[9]

In reviewing the newly discovered evidence, we conclude neither the new DNA testing nor the Supermax Memo speak to Taylor's actual innocence. *First*, regarding the new DNA evidence, even though the nylon stocking has undergone additional DNA testing, the results from the new test revealed Taylor's DNA was still present. In other words, the key fact—Taylor was in close contact with the nylon stocking—is the same as in the 1999 trial. The only new evidence is that two additional individuals' DNA was on the stocking. As the circuit court indicated, and we agree, the new testing "goes to show that the other individuals involved in the home invasion may also have been in close proximity to the mask." The analyst's expert testimony was that the new testing actually strengthened the original evidence connecting Taylor to the crime scene rather than exonerate him because the new testing revealed a much higher probability that the DNA on the nylon mask belonged to him. The circuit court relied upon the expert's opinion as

[9] For the second requirement, we need not do a thorough analysis for either piece of allegedly newly discovered evidence. The circuit court and both parties agreed that the DNA evidence met the second requirement because, due to DNA technology at the time of the original trial, the new DNA evidence was not readily discoverable. Regarding the Supermax Memo, however, the circuit court felt as though the memo was readily discoverable and did not even qualify as evidence. But, at oral argument the State conceded this requirement. Therefore, for sake of our analysis, we will assume without deciding that the memo was unavailable and is "new." We cannot be sure if Taylor knew about the memo, or that it was subject to a Maryland Public Information Act request and could be obtained in time to move for a new trial. Nonetheless, as we discuss below, it is clear to us that Taylor fails on both prong one (speaks to innocence) and prong three (verdict would not change).

the basis for its decision finding the additional DNA testing failed to satisfy the first prong of Md. Code. CP § 8-301, as interpreted in *Faulkner,* in that the evidence did not point to Taylor's innocence. We agree.

Similarly, the Supermax Memo does not exculpate Taylor chiefly because there is no mention of him within the memo. As we read it, the Supermax Memo simply memorialized a prison inmate's claim that he knew the location of the missing murder weapon. The inmate did not claim Taylor was not involved or that Taylor did not kill Von Haack. As the circuit court explained, if the memo is to be believed, it supports the notion that there were additional witnesses or one additional participant to the crime. It would make more sense to conclude that the author of the Supermax Memo is the unidentified fifth participant in the crime. If the memo is accurate, this information hardly exonerates Taylor.

We are not persuaded by Taylor's contention that the memo tends to show someone other than Taylor was involved in the crime. From our analysis of *Carver* and *Faulkner*, we conclude *Carver* is more analogous on this issue. In *Faulkner*, there was compelling evidence of another perpetrator, which included a laundry list of evidence pointing to another suspect, such as their palm prints at the crime scene, and more significantly, a witness statement from the same alternate suspect confessing to committing the crimes. Here, we have nothing of the sort. Taylor's case is more like *Carver*, because Taylor offers only "speculation and conjecture" that the author of the Supermax Memo was the one who committed the murder. However, at best, the memo indicates the inmate-author could be

another participant in the crime with Taylor, not that Taylor did not participate as a co-conspirator in the home invasion. As the Court stated in *Carver*, "A reasonable jury can accept" the new evidence, while still convicting the defendant "based on the . . . testimony presented at trial." 482 Md. at 503. Therefore, the newly discovered evidence does not speak to Taylor's actual innocence.

Regarding the third requirement, we hold Taylor failed to show that, either singularly or cumulatively, the newly discovered evidence, if utilized at the original trial, created a substantial likelihood of a different result. Taylor was convicted on the basis of participating in a conspiracy to commit robbery, which ultimately lead to Von Haack's murder. Much of our same rationale regarding the DNA testing applies equally with regard to the memo. Even if the jury was given the new DNA evidence, they would still have heard that Taylor's DNA was on the nylon mask. This evidence would not have dissuaded the jury from convicting Taylor of conspiracy, rather it reinforces the likelihood of a conspiracy, *i.e.*, four people, including Taylor, were close together and their DNA ended up on the nylon stocking.

As for the memo, if believed, it would show that the that author was present when the gun used in Von Haack's murder was hidden. That information would only add more weight to the State's theory that several individuals conspired to rob Maldonado and during the robbery someone shot and killed Von Haack. Even if this were true, it does nothing to alter the fact that Taylor was one of the co-conspirators. Consequently, the Supermax Memo does not significantly call the verdict into question.

As part of the third requirement, the Court in *Faulkner* stated the court must do a materiality and cumulative analysis of the newly discovered evidence. In his reply brief, for the first time, Taylor asserts the court neglected to perform this step. Even if true, because Taylor did not raise the claim of error in the initial briefing, it is not preserved, and we need not review. *See Bryant v. Bryant*, 220 Md. App. 145, 172 (2014) (declining to review arguments in the reply brief because "none of these arguments appeared in [appellant's] opening brief"); *Anderson v. Burson*, 196 Md. App. 457, 476 (2010) ("A reply brief cannot be used as a tool to inject new argument.").

However, for the sake of completeness, we determine that the circuit court did not abuse its discretion because, even when cumulatively considered, the newly discovered evidence does not create a substantial likelihood of Taylor's innocence.[10] We conclude the evidence here is not even as material as that in *Carver*, let alone the more compelling evidence in *Faulkner*. In *Carver*, in considering all the allegedly new evidence, which included another man who clearly wanted to and possibly conspired to kill the victim and a witness with a criminal history who was easily impeachable at trial, the Court still determined all conclusions were speculative and did not "put the whole case in such a

[10] At oral arguments, and very perfunctorily discussed in the brief, Appellant's counsel discussed a question the original jury asked the court: "[i]f Taylor was in car planning attempted robbery previous night, does he still receive same charge of murder?" This, appellant's counsel argued, displayed the jury's clear doubt that Taylor was the perpetrator who fired the fatal shot. Therefore, the concomitance with the new DNA and Supermax Memo showed a substantial likelihood of a different result. However, we cannot speculate as to what a jury meant by its question to the court, and we cannot assume simply from that question that they had doubts regarding Taylor's participation. We may not look to the jury's deliberation, rather only rely upon their sworn verdict.

different light as to undermine the verdict." *Carver*, 482. Md. at 502. Here, we have even less than that. We have stronger DNA evidence connecting Taylor to the crime, and an inmate's statements that more likely affirm that a conspiracy involving Taylor occurred.

In conclusion, neither the DNA evidence nor the Supermax Memo spoke to Taylor's innocence or were material enough, even when considered cumulatively, to call the verdict into question. Therefore, we affirm the circuit court's denial of Taylor's petition.

THE JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY IS AFFIRMED. APPELLANT TO PAY THE COSTS.