No. 123849

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- RICKEY ROBINSON Defendant-Appellant	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-15-3547. There on appeal from the Circuit Court of Cook County, Illinois , No. 98 CR 3873 (01). Honorable Carol M. Howard, Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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REPLY BRIEF FOR DEFENDANT-APPELLANT

Rickey Robinson Has Set Forth a Colorable Claim of Actual Innocence, Thus Entitling Him to File His Successive Petition, Where He Submitted Newly Discovered Affidavits from Three Uninvolved Witnesses Who Circumstantially Identify State's Witness Leonard Tucker, and Not Robinson, as the Real Murderer of Nicole Giles.

Rickey Robinson is merely seeking leave to file his successive petition. The State's arguments contemplate a much higher burden than is applicable at the leave-to-file stage. Indeed, the State claims that the standard "[t]o prevail on an actual innocence claim 'is extraordinarily difficult to meet.'" (State's Br. 14) (quoting *People v. Coleman*, 2013 IL 113307, ¶ 94) *Coleman*, however, reviewed the denial of a new trial after a third-stage evidentiary hearing. *Coleman*, 2013 IL 113307, ¶ 1. Robinson need only set forth a "colorable claim" of actual innocence. That standard is not "extraordinarily difficult to meet"; it is a lower burden than the showing required at the second or third stages–a point the State does not dispute. (See Appellant's Br. 21-22)

The State also agrees that the denial of leave to file is reviewed *de novo* and the affidavits of Andre Mamon, Donald Shaw, and Tavares Hunt-Bey are newly discovered, material, and non-cumulative. (State's Br. 13, 15-17) The State argues, however, that Robinson's new evidence–the affidavits from three uninvolved witnesses who provide strong, unrebutted circumstantial evidence that State's witness Leonard Tucker, not Robinson, was the real murderer, and Robinson's unrebutted affidavit undermining his prior confession–probably would not change the result at a new trial. In so arguing, the State asks this Court to decline to take allegations as true for reasons other than positive rebuttal, and make credibility and admissibility determinations. The State's arguments contravene well-established

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principles of leave-to-file review, and this Court should grant Robinson leave to file his successive petition and remand this cause for second-stage proceedings.

A. Applicable Legal Principles.

It is necessary to clarify the applicable legal principles that govern review at the leave-to-file stage. First, there is no question that a court must take all well-pleaded allegations as true unless they are positively rebutted by the record. (State's Br. 15, 16) A well-pleaded allegation is factual and specific, and does not amount to a mere conclusion. *People v. Rissley*, 206 Ill. 2d 403, 412 (2003). Thus, the only circumstances under which a court may reject an allegation in a post-conviction petition is if it is not well-pleaded or it is positively rebutted.

The State disagrees with Robinson about the meaning of "positive rebuttal." Contrary to the State's claim, though, Robinson did not assert that allegations "may be rebutted only by physical evidence[.]" (State's Br. 22) (Internal quotation omitted) Rather, Robinson explained that caselaw establishes that allegations are considered positively rebutted "only if they are refuted or disproven by verifiable facts of record, such as those that do not depend on any credibility determination for their truth." (Appellant's Br. 13-14) Physical evidence is only one way to positively rebut an allegation. Robinson also cited *People v. Blair*, 215 Ill. 2d 427, 453-54 (2005), for an example of an allegation regarding counsel's failure to present evidence that was positively rebutted by a transcript proving that counsel elicited the evidence in question. (Appellant's Br. 14)

The State cites *People v. Sanders*, 2016 IL 118123, to suggest that an allegation may be "positively rebutted" by another witness's trial testimony. (State's Br. 22) But, *Sanders* actually undermines the State's argument. In *Sanders*, the

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recanting witness's testimony conflicted with both physical evidence and other witnesses' testimony. *Sanders*, 2016 IL 118123, ¶¶ 48-53. This Court found that *only* the portion that was contradicted by the physical evidence (*i.e.*, the number of gunshots) was "positively rebutted" by the record. *Id.*, ¶ 48 ("Thus, *this part* of [the witness's] recantation is *positively rebutted* by the trial record.") (Emphasis added) The other portions that merely conflicted with trial testimony were not "positively rebutted," but were taken as true, and this Court simply concluded that the allegations were not strong enough to make a substantial showing of actual innocence. *Id.*, ¶ 52.

The State conflates the directive to "take all allegations as true" with the "conclusive character" analysis of actual innocence claims. That is, the State mistakenly relies on *Sanders*'s "conclusive character" analysis to make a point about "positive rebuttal." They are two separate steps: first, the court determines which allegations are well-pleaded and not positively rebutted by the record, and second, taking those allegations as true, determines whether they establish a colorable claim that the evidence probably would change the result at a new trial. The first step (*i.e.*, taking allegations as true) applies to all post-conviction claims, whereas the second step *(i.e.*, the "conclusive character" analysis) is specific to actual innocence claims. See, *e.g.*, *People v. Hall*, 217 Ill. 2d 324, 334-35, 336 (2005) (taking allegations as true in support of ineffective assistance of counsel claim). The State's reliance on *Sanders* is thus misplaced.

Caselaw makes clear that the court and the State must presume the truth of all well-pleaded, unrebutted allegations in a petition. *People v. Coleman*, 183 Ill. 2d 366, 390 (1998). Black's Law Dictionary defines "truth" as "[a]ccuracy in

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the recounting of events; conformity with actuality; factuality." Black's Law Dictionary (11th ed. 2019). Thus, taking an allegation "as true" means presuming it is accurate and factual. If a well-pleaded, unrebutted allegation happens to conflict with a witness's trial testimony, the law is clear: at any time before an evidentiary hearing, the court must presume the allegation is accurate and factual.

The State disagrees with this definition of the presumption of truth, but does not offer any explanation of its own. (State's Br. 28-29) Instead, the State argues that trial testimony that conflicts with new evidence prevails. (State's Br. 28-29) In so arguing, the State again erroneously relies on *Sanders*'s "conclusive character" analysis. See *Sanders*, 2016 IL 118123, ¶¶ 52-53 (taking "the well-pleaded facts as true," but finding they were not conclusive to make substantial showing of actual innocence). More importantly, the State's argument renders the taken-as-true directive meaningless, for crediting trial evidence over new allegations presumes the truth of the trial evidence, not the allegations. That would constitute an impermissible credibility determination at this stage, and it is not the law.

Finally, the State does not address Robinson's assertion that he does not have to prove total exoneration or vindication, as that is not the applicable standard. (See Appellant's Br. 19-21) Instead, the State subtly advocates for this demonstrably incorrect standard by asking this Court to reject the new witnesses' affidavits because none of them offers "conclusive proof of [Robinson's] innocence." (State's Br. 24, 25, 26) That is not–and has never been–required to prove an actual innocence claim to obtain a new trial, let alone establish a colorable claim to obtain leave to file. (Appellant's Br. 19-21); *Coleman*, 2013 IL 113307, ¶ 97 ("Probability, not certainty, is the key[.]").

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B. There is no reason to reject or discount any of the affidavits supporting Robinson's actual innocence claim.

The State asks this Court to reject the new witnesses' affidavits for various reasons, but none of those reasons is valid. Because the allegations are well-pleaded and not positively rebutted by the record, this Court must assume their truth.

First, Andre Mamon's affidavit places Tucker at the scene of Giles's shooting with the murder weapon in his hand. (SPC. C.54) The State asks this Court to reject Mamon's affidavit because he initially said he saw Tucker with one other person in the car, but later said he saw two men with him under the viaduct. (State's Br. 26) Those observations are not mutually exclusive. The second time Mamon saw Tucker, some time had passed from his first observation, and Tucker had moved from the area around the bus stop to the location of the shooting under the viaduct. (SPC. C.54) Another person could have joined the two men in the car, or others could have been concealed in the car when Mamon first saw them.

The important point, though, is that the difference in the number of people Mamon saw can be explained and is not a reason to reject Mamon's affidavit. And, even if there was a discrepancy in the number of people Mamon saw, that does not mean a trier of fact is compelled to reject *all* of Mamon's allegations, as "it is for the fact finder to judge how flaws in part of the testimony affect the credibility of the whole." *People v. Cunningham*, 212 Ill. 2d 274, 283 (2004).

The State also asks this Court to discount Mamon's affidavit stating that Robinson was not one of the men he saw that night. (State's Br. 26) The State posits that, because the other eyewitnesses could not see the men's faces, "Mamon could not have seen the face of the third person in the darkness of the viaduct." (State's Br. 26) The State makes this conclusory claim without knowing whether

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Mamon's vantage point, positioning, and ability to observe were comparable to the other eyewitnesses in terms of distance, lighting conditions, obstructions, or even eyesight. Just because the State's eyewitnesses could not make out the men's faces does not mean Mamon could not. If the State would like to test the reliability or credibility of Mamon's observations, it should do so at a third-stage evidentiary hearing, where such matters are relevant and proper. At this stage, however, this Court must take Mamon's unrebutted affidavit as true.

Second, the State asks this Court to ignore Donald Shaw's affidavit because it merely implicates Tucker "in the disposal of evidence," in which Tucker had already been implicated by his possession of "both Giles's pager and ammunition compatible with the murder weapon in his bedroom." (State's Br. 25) According to the State, Shaw would only "establish[] that Tucker had greater involvement in hiding the evidence[.]" (State's Br. 25) But, that is not a reason to reject Shaw's affidavit, as the allegations are factual, specific, and not positively rebutted by the record. And, as explained below, see Arg. D, *infra*, Shaw's affidavit places Tucker in a car similar to Giles's, on the night of her murder, with the suspected murder weapon at the time of its disposal, in the area where it was later recovered. (SPC. C.51) It also corroborates Mamon's observation that two men were with Tucker in the car, neither of whom was Robinson. (SPC. C.51, 54) This Court must take those well-pleaded, unrebutted allegations as true.

Finally, the State asks this court to reject Tavares Hunt-Bey's affidavit, which includes Tucker's extra-judicial confession to the murder. The State first claims that Hunt-Bey's "allegations are rebutted," namely by another State's witness's testimony about who was present in the car. (State's Br. 21-22) As

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discussed above, though, a mere conflict with another witness's testimony is insufficient to reject an allegation or refuse to take it "as true." This Court does not have to–and actually cannot–concern itself with which witness's testimony is more credible or believable at this leave-to-file stage.

The State next asks this Court to"discount" Tucker's confession "because it is inadmissible hearsay." (State's Br. 22) Despite acknowledging that Illinois Supreme Court Rule 1101(b)(3) provides that the rules of evidence do not apply to post-conviction proceedings, the State asks this Court to apply the hearsay rule to exclude Tucker's confession. (State's Br. 22-23) Rule 1101 is clear and unambiguous: the rules of evidence do not apply.

The State's citation to *People v. Shaw*, 2019 IL App (1st) 152994, is misleading, suggesting that *Shaw* stands for the proposition that this Court, at the leave-to-file stage, may only consider evidence that would be admissible at a new trial. (State's Br. 23) This is not correct. *Shaw* recognized "the apparent conflict" between Rule 1101 and the examination of evidence at a hypothetical new trial, but ultimately followed the dictates of Rule 1101 and "consider[ed] the hearsay affidavit in evaluating defendant's claim," which was the *only* evidence in support of the actual innocence claim. *Shaw*, 2019 IL App (1st) 152994, ¶¶ 12, 14, 17, 67. Thus, the State's argument is defeated by the very case it cites.

The State also cites *People v. Wallace*, 2015 IL App (3d) 130489, ¶ 29, (State's Br. 23), which failed to cite Rule 1101 at all. *Wallace* relied on *People v. Coleman*, 2012 IL App (4th) 110463, which the court in *Shaw* noted was one of the cases decided before Rule 1101 was changed to add post-conviction hearings to a list of proceedings to which the rules of evidence do not apply. *Shaw*, 2019 IL App

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(1st) 152994, ¶ 65. In *People v. Velasco*, 2018 IL App (1st) 161683, ¶¶ 119-20, also cited by the State, (State's Br. 16), the court found that hearsay affidavits were admissible at the second stage under Rule 1101 and would be taken as true along with other corroborative, non-hearsay affidavits. *Velasco* also stated that the court, at the third-stage evidentiary hearing, would be able to "determine *which evidence is admissible at retrial* and whether such evidence entitles defendant to relief." *Velasco*, 2018 IL App (1st) 161683, ¶ 132 (emphasis added).

Next, the State argues that this Court should disregard Tucker's confession because it is "insufficiently reliable," despite recognizing later in its brief that the reliability of evidence is not an issue at this stage. (State's Br. 23, 28) The reliability of hearsay affidavits certainly was not a concern in the *Velasco* court's decision to advance the defendant's actual innocence claim to an evidentiary hearing, and it should not be a concern here either. See also *Coleman*, 183 Ill. 2d at 390 (finding State's reliability argument premature and requiring State to presume truth of factual allegations at second stage); *Sanders*, 2016 IL 118123, ¶¶ 33, 37 (noting that, while recantations are "regarded as inherently unreliable," courts do not make reliability determinations at second stage).

Contrary to the State's claim, *Chambers v. Mississippi*, 410 U.S. 284 (1973), does not provide grounds to reject Tucker's confession at this stage. The State argues that Tucker's confession is unreliable because he did not make "multiple admissions," whereas in *Chambers*, the declarant made several independent confessions. (State's Br. 23-24) Nowhere in *Chambers* did the United States Supreme Court set forth a requirement that a declarant needs to make "multiple admissions" for his extra-judicial confession to be admissible. As Robinson explained in his

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opening brief, *Chambers* set forth four factors–none of which concerns the repetition of a statement–to determine whether there are sufficient indicia of trustworthiness to admit an extra-judicial confession. (Appellant's Br. 31) They are factors because the determination is made on a case-by-case basis. More importantly, this Court has held that even those factors are not requirements; they are guidelines, because the main question is whether the incriminating statement was made under circumstances that provide "considerable assurance" of its reliability. *People v. Tenney*, 205 Ill. 2d 411, 435 (2002) (Internal quotations omitted). Thus, the sole basis for the State's argument that Tucker's confession is not reliable is wrong.

Although admissibility and reliability are not relevant considerations at the leave-to-file stage, Robinson anticipated the State's argument and explained how, based on the information in Hunt-Bey's affidavit, Tucker's confession would be both admissible and reliable, as it corroborates the circumstances of Giles's murder. (Appellant's Br. 30-34) The State does not respond to Robinson's argument. In short, there is no reason to reject Hunt-Bey's unrebutted affidavit, including Tucker's confession. This Court must take it as true. See *People v. Warren*, 2016 IL App(1st) 090884-C, ¶¶ 96, 97 (finding it inadvisable and improper to evaluate trustworthiness or admissibility of extra-judicial confession at leave-to-file stage).

C. This Court should take Robinson's affidavit as true.

The State asks this Court to disregard Robinson's affidavit for several reasons, but these arguments, too, are unavailing. The State claims that Robinson's affidavit "is not newly discovered," so it cannot support his actual innocence claim. (State's Br. 16-17) As Robinson stated in his affidavit, however, since the time of his trial, he renounced his membership in the Black P. Stones gang, of which Tucker was

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also a member. (SPC. C.60-61) He also discovered, after trial, that Tucker had left the Black P. Stones and joined the Black Disciples gang. (SPC. C.60) Thus, Robinson was no longer constrained by his gang's code of silence, allowing him to speak freely. (SPC. C.60-61); see, *e.g.*, *People v. Knight*, 405 Ill. App. 3d 461, 470-71 (3d Dist. 2010) (considering affidavits of defendant and new witnesses who were previously afraid to come forward because of gang pressures in the prison, but provided affidavits after "change in the prison dynamic"; noting that witnesses' reasons for silence affected weight of testimony, but not nature of allegations). These facts were "discovered since the trial," which Robinson "could not have discovered sooner through due diligence," because they had not yet occurred. *People v. Ortiz*, 235 Ill. 2d 319, 334 (2009) (defining "newly discovered" evidence).

The State's reliance on *People v. Wideman*, 2013 IL App (1st) 102273, for the proposition that a petitioner's own statement is not newly discovered and thus cannot support an actual innocence claim, is misplaced. (State's Br. 16) In *Wideman*, the petitioner's affidavit was the *only* evidence in support of the actual innocence claim, as the court had already discounted other witnesses' affidavits because they were not notarized. *Wideman*, 2013 IL App (1st) 102273, ¶¶ 17-18. In finding that the petitioner's statement was not newly discovered and could not establish a colorable claim of actual innocence on its own, the court noted that the affidavit "was general and devoid of the factual detail one would expect" from someone claiming actual innocence. *Id.*, ¶ 17. Notably, though, the court stated the petitioner "could have supported his claim of actual innocence in his initial postconviction petition with his own detailed factual averments." *Id.* In other words, the court determined that the petitioner *could* support his actual innocence claim with his

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own well-pleaded affidavit when he tried to raise the claim in the first instance. His conclusory affidavit, offered for a second time without adding new information, was insufficient to meet the "colorable claim" standard on its own. *Wideman* does not support the State's argument.

Here, unlike in *Wideman*, Robinson's affidavit, offered for the first time, is replete with detailed factual assertions, some of which were discovered after the conclusion of the trial. (SPC. C.57-61) None of those assertions is positively rebutted by the record. And, importantly, Robinson's actual innocence claim is supported by the detailed, unrebutted affidavits of Mamon, Shaw, and Hunt-Bey. Robinson's affidavit merely provides context to explain why his purported confessions introduced at his trial were not true and lends credibility to his affiants' allegations.

Even if this Court were to find that Robinson's affidavit is not newly discovered, that does not mean it should refuse to take his allegations as true. As discussed above, a court may decline to presume the truth of an allegation only if it is not well-pleaded or is positively rebutted by the record. Robinson's affidavit does not fall into either of those categories, nor does the State claim as much. There is no valid reason not to presume the truth of Robinson's allegations.

Contrary to the State's suggestion, Robinson's affidavit is not positively rebutted simply because he confessed, or even because his confession was lengthy. (State's Br. 15-19) The situation would be different if Robinson had alleged that he never confessed at all, as that allegation would be positively rebutted by the transcript of his court-reported statement. See, *e.g.*, *People v. Blair*, 215 Ill. 2d 427, 453-54 (2005) (finding allegation of counsel's failure to present evidence was positively rebutted by transcript proving counsel elicited evidence). But, Robinson's

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affidavit explains why his confession is not true, and there is nothing in the record that positively rebuts those allegations.

At this stage, the law is clear: the Court must take Robinson's well-pleaded allegations as true. And, as explained below, because Robinson could testify to all the information contained in his affidavit, it forms a portion of the body of new evidence that a hypothetical fact-finder would be able to consider in evaluating the trial evidence, assessing witness credibility, and reaching a verdict. See, *e.g.*, *People v. Harper*, 2013 IL App (1st) 102181, ¶¶ 45, 52 (considering defendant's affidavit alleging that his confession was coerced in evaluating actual innocence claim based on other new evidence).

D. Robinson has set forth a colorable claim that the new evidence is sufficiently conclusive to entitle him to file his successive post-conviction petition.

After taking the well-pleaded, unrebutted allegations in Robinson's petition and supporting documentation "as true," this Court must determine whether they present a "colorable claim" that the evidence is of such conclusive character as to probably change the result on retrial. *People v. Washington*, 171 Ill. 2d 475, 489 (1996). Robinson does not have to show he is innocent, "merely that all of the facts and surrounding circumstances . . . should be scrutinized more closely[.]" *People v. Ortiz*, 235 Ill. 2d 319, 337 (2009) (Internal quotation omitted). Robinson has met that threshold.

Initially, the State attempts to diminish the strength of Robinson's new evidence by treating the affidavits separately and claiming that, individually, they do not offer "conclusive proof" of Robinson's innocence. (State's Br. 21-26) But, as discussed above, Robinson does not have to provide "conclusive proof" of

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innocence. See Arg. A, *supra*. Additionally, by the State's own admission, all new evidence is evaluated *together*. (State's Br. 20) (quoting *People v. Coleman*, 2013 IL 113307, ¶ 95) (stating that the court must consider "'*all* the evidence, both new and old, together'") (Emphasis added)) The unrebutted new evidence here, including Robinson's affidavit providing context for his confession, would all be presented to the trier of fact, who could very easily make the necessary inferences to conclude that Robinson was not guilty of Giles's murder.

Indeed, taken together, and taken as true, the affidavits completely undermine the State's theory of the case at Robinson's trial. They provide strong circumstantial evidence that Tucker, not Robinson, murdered Giles. Mamon's affidavit places the murder weapon in Tucker's hand immediately after the shooting. (SPC. C.54) While Mamon may not have seen the shooting itself, he heard gunshots, turned his head, and saw Tucker holding a rifle. (SPC. C.54) He did not say that Tucker was receiving the rifle from anyone else; he was already holding it and was throwing it in the back seat of the car. (SPC. C.54) That is strong circumstantial evidence that Tucker was the one who shot Giles.

Then, Shaw places Tucker in the same type of car that Giles owned, on the night of the murder, at the time the suspected murder weapon was disposed of, and in the same area where the rifle was later recovered. (SPC. C.51; TC. R. K.137-41, 175-76) And, importantly, Shaw corroborated Mamon's observation of Tucker with two other men, neither of whom was Robinson. (SPC. C.51, 54) Finally, Hunt-Bey placed Tucker at a gas station, filling up a gas can, confessing to Hunt-Bey, a known associate, that *he* had just killed a rival gang member's sister the night before–*i.e.*, the night of Giles's murder–and saying he needed to

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"tie up some loose ends," about an hour before Giles's body was found burning in a garbage can. (SPC. C.53)

The State claims that Tucker's purported confession does not indicate "that he *personally* shot Giles," (State's Br. 24) (Emphasis in original), but that is precisely what Hunt-Bey's affidavit states: "[Tucker] answered telling me that *he killed* one of the CVL's sister the night before[.]" (SPC. C.53) (Emphasis added)Even if this Court found that statement not to be clear, it is reasonable to infer that when Tucker said "he killed" someone, he meant that he "personally shot" them. See *People v. Knight*, 405 Ill. App. 3d 461, 471 (3d Dist. 2010) (noting that all reasonable inferences from allegations should be drawn in petitioner's favor).

Despite these unrebutted allegations establishing that Tucker was the principal offender responsible for Giles's murder, the State argues, relying on *People v. Sanders*, 2016 IL 118123, that mere conflicts with the trial evidence are sufficient to reject Robinson's claim. (State's Br. 21-22, 28-29) But, again, the State's reliance on *Sanders* is misplaced. *Sanders* was a second-stage case, where the petitioner had to "make a substantial showing of actual innocence" to advance to an evidentiary hearing. *Sanders*, 2016 IL 118123, ¶¶ 30, 37. That is a much higher standard, applicable to petitioners represented by counsel, than the "colorable claim" standard applicable to *pro se* petitioners merely seeking leave to file.

Further, the State fails to acknowledge the difference in the types of evidence at issue in *Sanders* and this case. In *Sanders*, the new evidence consisted primarily of a co-defendant's recantation testimony–a portion of which was positively rebutted by physical evidence at trial, and another portion of which conflicted with the petitioner's other affiant. *Id.*, ¶¶ 48, 52-53. This already-weakened new evidence

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failed to make a substantial showing of actual innocence in the face of several other trial eyewitnesses who placed the defendant at the scene of the crime. *Id.*

Here, on the other hand, the new evidence points to a completely different offender–one of the State's main witnesses, no less. This is precisely the type of evidence–*i.e.*, identifying a different offender–that caused this Court to grant the petitioner a new trial in *People v. Ortiz*, 235 Ill. 2d 319, 335-37 (2009), and the appellate court to advance the petition from the first stage to the second in *People v. White*, 2014 IL App (1st) 130007, ¶¶ 26-29. That is because such evidence places the State's evidence in an entirely different light and undercuts any confidence in the guilty verdict, particularly where the new evidence strikes at the core of "the ultimate issue before the [trier of fact]: who was involved in the attack." *Coleman*, 2013 IL 113307, ¶ 113. And, here, unlike *Sanders*, there were *no* eyewitnesses who placed Robinson at *any* of the crucial points comprising the offense, unlike the new witnesses who place Tucker at all of them. Importantly, the new evidence in *Sanders*–though positively rebutted and conflicting with the trial evidence–was sufficient to allow the petitioner to file his successive petition and advance it to the second stage, *Sanders*, 2016 IL 118123, ¶¶ 18, 27-28, which is precisely what Robinson is seeking now.

The State also argues that the new evidence is not conclusive because it merely "impeach[es] Tucker's testimony concerning his own involvement in the crime[.]" (State's Br. 27-28) The State's argument mischaracterizes the new evidence. "The purpose of impeaching evidence is to destroy the credibility of a witness and not to establish the truth of the impeaching evidence." *People v. Bradford*, 106 Ill. 2d 492, 499 (1985). The new evidence here does not seek to destroy Tucker's

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credibility, but to establish that someone other than Robinson was responsible for Giles's murder. That person just so happens to be one of the State's witnesses.

Had Tucker not testified at Robinson's trial, Robinson's actual innocence claim would be the same: the affidavits from three uninvolved witnesses provide strong circumstantial evidence that someone other than Robinson (*i.e.*, Tucker) shot and killed Giles. In that scenario, the State could not argue that the new evidence is solely impeaching because there would be no trial witness whose testimony could be impeached. Robinson nevertheless could argue that the new evidence was sufficiently conclusive to allow him to file his successive petition, because it established that someone else was responsible for Giles's murder.

The fact that Tucker testified at Robinson's trial and was partly responsible for his conviction does not weaken the new evidence identifying him as the murderer. It strengthens it. Not only do the affiants directly implicate Tucker in Giles's murder, but they also cast an immense cloud over Tucker's trial testimony, particularly where Tucker was found in possession of Giles's pager and ammunition compatible with the murder weapon, and where Tucker incriminated Robinson only after the police told Tucker he was a suspect. (TC. R. K.98-99, 129-30, 201); (Appellant's Br. 28-30) That is strong evidence of actual innocence that, if believed, would result in Robinson's acquittal. See *People v. Harper*, 2013 IL App (1st) 102181, ¶ 49 ("[W]here newly discovered evidence is both exonerating and contradicts the State's evidence at trial, it is capable of producing a different outcome[.]").

The State nevertheless argues that this Court should reject Robinson's claim because he previously confessed, which, on its own, "defeats his innocence claim." (State's Br. 17-20) The State's position is legally untenable, where Robinson provided

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an unrebutted affidavit undermining the credibility of his confession and lending credibility to the possibility that Tucker murdered Giles. That is, no matter how "compelling" or "reliable" the State says Robinson's confession is, (State's Br. 18-19), this Court must take the allegations in his affidavit as true, as matters of reliability and credibility are left for the third-stage evidentiary hearing.

The State cites *People v. Wideman*, 2016 IL App (1st) 123092, to argue that it is unlikely a jury would choose to believe the new evidence over Robinson's confession at trial. (State's Br. 17) Notably, *Wideman* has never been cited for that proposition, perhaps because the court made an impermissible credibility determination at the leave-to-file stage. And, importantly, the *Wideman* court noted that the petitioner did not provide any reason to disregard his confession, 2016 IL App (1st) 123092, ¶ 67, whereas Robinson has done just that. But, even without Robinson's affidavit, the fact that he previously confessed does not automatically defeat his actual innocence claim. See *People v. Parker*, 2012 IL App (1st) 101809, ¶¶ 85-86 (remanding actual innocence claim for second-stage proceedings, even though State's primary evidence was *defendant's confession*).

The State's argument is also undermined by another case it cites. In *People v. Shaw*, the defendant, who had previously pleaded guilty, filed a post-conviction petition alleging that he was actually innocent and that his guilty plea was involuntary. *People v. Shaw*, 2019 IL App (1st) 152994, ¶¶ 9, 12-15. On appeal, the defendant only raised the actual innocence claim, thus forfeiting the involuntary plea claim. *Id.*, ¶¶ 17, 25. Given this posture, the court "presume[d] that his plea was valid" and then "turn[ed] to [evaluate] defendant's actual innocence claim." *Id.*, ¶ 25. In other words, the fact that the defendant's judicial admission of guilt

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was voluntary did not automatically defeat his claim of actual innocence. But see *People v. Reed*, 2019 IL App (4th) 170009, *pet'n for leave to appeal granted,* No. 124940 (Sept. 25, 2019) (considering whether petitioner who pleaded guilty may raise actual innocence claim without challenging voluntariness of guilty plea).

Here, there is no judicial admission of guilt. There was a confession, which, like any other evidence, the trier of fact evaluates and is free to reject, particularly where the confession does not match the eyewitness accounts of the uninvolved affiants and could be explained by Robinson's further testimony. And, here, while Robinson's confession may have been damaging at his trial, "it remains, nonetheless, but one piece of evidence in an entire circumstantial case." *People v. Patterson*, 154 Ill. 2d 414, 436 (1992). It does not foreclose his actual innocence claim.

Moreover, the State's suggestion that Robinson's confession is *true* just because it is *voluntary* is wrong. (State's Br. 17-18) The issue of voluntariness concerns the admissibility of a confession, not its weight or believability. *People v. Gilliam*, 172 Ill. 2d 484, 512-13 (1996). In fact, this Court has previously held that, even when a confession is voluntary and admissible, "the defendant still has the right to present evidence to the jury that affects the credibility or weight to be given the confession." *Id.* As the *Shaw* court noted, individuals who are actually innocent may choose to plead guilty, voluntarily, for myriad reasons that have nothing to do with their guilt. *Shaw*, 2019 IL App (1st) 152994, ¶ 46. The same rationale applies to individuals who make incriminating statements.

The State also wrongly suggests that Robinson did not establish a colorable claim of actual innocence because the trier of fact could find Robinson guilty under an accountability theory. (State's Br. 24, 25, 26) The State cites *People v. Edwards*,

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(State's Br. 24), but its reliance is misplaced, as the defendant in *Edwards* was originally convicted under an accountability theory, and the new evidence from a co-defendant saying he was the principal offender did not undermine the basis of the defendant's conviction on the accountability theory. *People v. Edwards*, 2012 IL 111711, ¶¶ 3, 5, 39. To be clear, there is no evidence here–either from trial or in the post-conviction allegations–that Robinson may have been accountable for Giles's murder. Taking the new evidence and trial evidence together, there are only two possible scenarios: either Tucker shot and killed Giles or Robinson did. If the State would like to pursue an accountability theory at a new trial, it may present evidence of that. At this stage, however, that theory is unfounded.

Finally, the State claims that Robinson "cannot dispute that direct testimony generally carries more weight than circumstantial evidence, and, accordingly, direct evidence is more likely to be conclusive in proving innocence." (State's Br. 29) Robinson *does* dispute that proposition because, as he explained in his opening brief, the law establishes the exact opposite–that there is *no* difference in the law between direct and circumstantial evidence. (Appellant's Br. 34-37) The State's citation to a federal habeas case, which applies a much higher standard than what is required at the leave-to-file stage in Illinois, does not change this basic principle. (State's Br. 30) (citing *Hayes v. Battaglia*, 403 F.3d 935, 938 (7th Cir. 2005), where petitioner has to prove innocence claim by clear and convincing evidence) And, just because the appellate court here said it did not decide whether circumstantial evidence was insufficient "as a matter of law" to support an actual innocence claim does not mean that its decision to deny Robinson leave to file was not based on its view that the evidence was circumstantial. *People v. Robinson*, 2018 IL App

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(1st) 153547-U, ¶¶ 37, 44-48 (finding affiants could never support actual innocence claim because they did not personally witness murder). The State apparently agrees, as it explicitly credits direct evidence more than circumstantial.

Assuming the truth of the unrebutted allegations in Robinson's petition, the new evidence provides strong, circumstantial evidence that Tucker, not Robinson, murdered Giles. This new evidence probably would change the trial outcome, especially where there was no physical evidence tying Robinson to the murder, and the State's case consisted primarily of Robinson's incriminating statements, the credibility of which he undermined in his own affidavit. This strong evidence sets forth a colorable claim of actual innocence to warrant granting Robinson the mere opportunity to file his successive petition.

CONCLUSION

For the foregoing reasons, Rickey Robinson, defendant-appellant, respectfully requests that this Court reverse the judgments of the appellate court and the circuit court, and remand to the circuit for second-stage proceedings under the Post-Conviction Hearing Act, including the appointment of counsel.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 20 pages.

/s/Michael Gomez
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Assistant Appellate Defender

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No. 123849

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	))	Appeal from the Appellate Court of Illinois, No. 1-15-3547.
Plaintiff-Appellee,	)))	There on appeal from the Circuit Court of Cook County, Illinois , No. 98 CR 3873 (01).
-vs-	))	
RICKEY ROBINSON	)))	Honorable Carol M. Howard, Judge Presiding.
Defendant-Appellant	)	

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On February 5, 2020, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

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