No. 129353

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- JOHNNY FLOURNOY, Petitioner-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-21-0587. There on appeal from the Circuit Court of Cook County, Illinois, No. 92 CR 7449. Honorable James B. Linn, Judge Presiding.

BRIEF AND ARGUMENT FOR PETITIONER-APPELLANT

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NATURE OF THE CASE

Johnny Flournoy, petitioner-appellant, appeals from a judgment denying him leave to file his successive petition for post-conviction relief.

An issue is raised concerning the sufficiency of the post-conviction pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether Johnny Flournoy's claim of actual innocence based on Romano Ricks's and Elizabeth Barrier's affidavits is cognizable under the Post-Conviction Hearing act even though these two affidavits are also the basis of Flournoy's other post-conviction claims.

2. Whether Johnny Flournoy's successive post-conviction petition stated a colorable claim of actual innocence based on newly discovered exculpatory affidavits – one from a witness who recanted his testimony that Flournoy admitted being the shooter, and one from a witness who would testify that Reginald Smith confessed to her that he killed Sam Harlib.

3. Whether Johnny Flournoy's petition also established cause and prejudice at the leave-to-file stage that the State violated Flournoy's due process rights when it concealed evidence that Romano Ricks received consideration for his cooperation and Ricks lied about Flournoy's alleged admissions to Harlib's murder.

4. Whether Johnny Flournoy's petition established cause and prejudice at the leave-to-file stage that he was denied the effective assistance of trial counsel based on information provided by Elizabeth Barrier showing that trial counsel failed to interview her, even though she could have provided exculpatory evidence, and misrepresented to the trial court that he had contacted and spoken with her.

STATEMENT OF FACTS

Procedural Background

Johnny Flournoy was convicted of the November 14, 1991 first degree murder of Samuel Harlib and the armed robbery of his used car dealership and sentenced to a term of natural life. (C. 4, 33; C. 109; R. 960) His convictions and sentence were affirmed on direct appeal. (C. 119) *People v. Flournoy*, Rule 23 Order, 1-94-4427 (November 15, 1996). Flournoy's first post-conviction petition was dismissed at the first stage on April 10, 1997. (C. 157, CI. 502, 596) The dismissal was affirmed. *People v. Flournoy*, 1-97-1987 (June 30, 1999). The petition for leave to appeal was denied on February 2, 2000. *People v. Flournoy*, No. 88505. (C. 235) The instant petition presenting newly discovered evidence of actual innocence, and alleging several other constitutional violations, was filed on February 21, 2021. (C. 155 *et seq.*) Attached to the petition, *inter alia*, were affidavits from Romano Ricks and Elizabeth Barrier supporting Flournoy's claims. (C. 303, 310) The circuit court denied Johnny Flournoy leave to file his petition. (C. 329-54) The appellate court affirmed the circuit court's denial of leave to file. *People v. Flournoy*, 2022 IL App (1st) 210587-U.

Trial

Incident

In November of 1991, Samuel Harlib was the owner of Ron/Mar Auto Sales, a used car dealership located at 3845 N. Western Avenue, in Chicago. (R. 411) Raphael Mendoza was employed there as a porter. (R. 411) Mendoza testified that shortly after 5:30 p.m., on November 14, both he and Harlib were in the sales office when he noticed a man looking at a car and went to talk to him. (R. 415) The car the man was interested in needed a jumpstart. (R. 417)

According to Mendoza, after he and Harlib started the car, Mendoza went to put the jumper cables away, while Harlib headed toward the office with the man. (R. 419-20) When Mendoza approached them, Harlib was laughing and asked him to get the "slim jim" because he had accidentally locked the keys in the car with the engine running. (R. 421) Mendoza went outside and unlocked the car. (R. 422)

As soon as Mendoza returned to the office, the man with Harlib pointed a silver revolver at him and ordered him to sit down. (R. 424-25) According to Mendoza, when he went to put the "slim jim" down, Harlib jumped for the gun and it went off, firing into the floor. (R. 428) The offender then shot at Harlib numerous times, grabbed money that was on the desk (between $1000 and $1500), fired repeatedly in Mendoza's direction, but did not hit him, and left. (R. 428-31) Harlib subsequently died as a result of a single gunshot wound to the chest. (R. 440, 657)

Mendoza described the offender as dark-skinned, 5'8"or 5'9" tall, 175 to 180 pounds, in his late 20's or early 30's, and wearing a jean jacket, jean pants and a snow hat. (R. 438, 458-59, 489) In November of 1991, Johnny Flournoy was in his 40's, light-complected, weighed about 200 pounds, and was six feet tall. (R. 459, 551-52, 699, 722)

Officers Place Reginald Smith and Romano Ricks in Lineup

Steven Spritz, Harlib's partner, testified that on the day after Harlib's murder, Reginald Smith came to the lot to make a payment on a car he had previously purchased. (R. 402) Smith was dark-skinned, 5'6" and 160 pounds. (R. 466) He paid one hundred dollars toward his two hundred and fifty dollar monthly payment, even though it was not his regular payment date. (R. 402-03) Smith asked Spritz

what had happened, and Spritz told him that there had been a robbery and that Harlib had been shot. (R. 407)

On December 5, after speaking with a woman named Elizabeth Barrier, whose name he obtained through an anonymous phone call, Detective Lawrence Akin placed Smith and another man, Romano Ricks, in a lineup viewed by Mendoza. (R. 538-39) Mendoza did not identify anyone as the shooter, but knew Smith as an acquaintance of Harlib's who had bought a car from him and came in periodically to make payments. (R. 441, 465, 540, 554) After the lineup, Detective Akin told Ricks that they were conducting an investigation, gave him a card, and asked him to call if he heard anything unusual. (R. 566) Ricks did not provide any information about the murder to Akin at that time. (R. 561)

Romano Ricks Contacts Detective Akin, and Johnny Flournoy Becomes a Suspect

Two months later, in February 1992, Akin said that Ricks contacted him from jail to provide information about the shooting because he wanted to be placed in protective custody. (R. 562) Ricks never told Akin that Flournoy admitted to him that he shot Harlib, but only relayed information that he said Reggie Smith had told him. (R. 562, 569) Ricks signed a written statement on March 6, 1992, attesting that Smith, not Flournoy, told him information about the offense. (R. 563-64)

At trial, Ricks testified that he actually learned about the shooting from Flournoy himself, not from Reggie Smith. (R. 585-89) Ricks said that in October 1991, he was living in Detroit where he met Flournoy for the first time through his friend Nate. (R. 577-78) At this first meeting, Flournoy lent Ricks five hundred dollars. (R. 579-80) On November 21, 1991, Ricks came to Chicago

for Flournoy's wedding. After the wedding, Flournoy asked Ricks to pay his debt. (R. 580-82; 616-17) When Ricks did not have the money, Flournoy told Ricks that he could pay his debt by committing an armed robbery. (R. 583) When Ricks refused, Flournoy moved his coat to the side to show Ricks that he had a gun, and told Ricks he did not have a choice. (R. 584)

Ricks said that in the course of explaining how to commit an armed robbery, Flournoy told him not to pull his gun, and then admitted firing his weapon at a guy during a recent robbery at a "car place" he committed with "Reginald". (R. 585-89) Later that day, Ricks and Reggie Smith were arrested for an October armed robbery of a Jewel grocery store in Blue Island. (R. 590-91) The December 5 lineup that Mendoza viewed was held after Ricks's and Smith's arrests. (R. 591)

A few weeks later, while Ricks was in jail for the Jewel grocery store robbery, someone tried to stab him with a small shiv. (R. 593) He thought Flournoy had ordered the attack because he refused Flournoy's request to take the fall for the armed robbery case to save Smith from a long prison term. (R. 621) Ricks was not injured during the attack because after he refused Flournoy's request, he had begun wearing a homemade protective vest fashioned from magazines. (R. 620) It was after the stabbing attempt and threat that Ricks contacted Detective Akin to give him information about the shooting at the car dealership, and only in exchange for being placed in protective custody. (R. 592-93; 605-07) Ricks never mentioned that he received any other consideration, such as help with sentencing on his armed robbery case, in exchange for his testimony. He said he only testified to "see justice done." (R. 609-10)

After Ricks spoke with Akin, Flournoy became a suspect in Harlib's murder. Flournoy was arrested on March 5, 1992. (R. 541) He was placed in a line up.

(R. 544-46) Mendoza was brought in from a separate room, and identified Flournoy as the shooter. (R. 441) Mendoza also identified Flournoy in court at trial. (R. 415)

The Defense Presents Several Alibi Witnesses

Flournoy's wife, Cathy, provided an alibi for the day of the armed robbery. She said that her husband picked her up at 3:25 p.m. and they went to a bar called Cheers, ran various errands, went to Flournoy's mother's house and got home at 5:20 p.m. (R. 687-695) Cathy's daughter, Laura, was home and went with Flournoy to run another errand. (R. 695-96) Cathy said Flournoy did not drink while he was at Cheers, that he rarely drank, that he did not wear or own jeans, and that he was wearing a suit on November 14. (R. 690-95) These facts were corroborated by Herbert Webb, the night manager at Cheers. (R.728-29) Flournoy's mother, Bertha, testified that he and Cathy were at her house that day. (R. 735-36)

Laura and another step-daughter, Roberta, confirmed that Cathy and Flournoy arrived home on November 14, 1991 just after 5:10 p.m., and that Laura left with Johnny about 10 or 15 minutes later. (R. 718-720; 741-42; 757) According to Laura, they ran some errands related to Flournoy's perfume business. They stopped at two restaurants and a Baskin Robbins. (R. 743-45) They did not go to a car dealership, and they were home by 7:10. (R. 747, 757)

Johnny Earl Lewandowski, Flournoy's boss in the perfume business, testified Johnny Flournoy arrived at the 124th and Harlem office at 5:30 or 5:35 p.m., and left between 5:45 and 5:50 p.m. (R. 763-765) He said that Flournoy normally wore suits, that he was always a very sharp dresser, and that he never saw him wear blue jeans. (R. 766)

The State presented rebuttal evidence that in March of 1992, Cathy and Laura told police that they did not know where Flournoy was on November 14, 1991.

The State presented additional rebuttal evidence that Roberta Hughes, Herb Webb, and John Lewandowski previously said that they did not know where Flournoy was on November 14, 1991. (R. 798-803)

Verdict, Post-Trial Motion, and Sentence

During deliberations, the jurors requested Romano Ricks's written statement - because they wanted to know exactly what Ricks said in the statement - as well as a transcript of Mendoza's testimony. (C. 385-386) The court responded that the jury had all the evidence before it and instructed the jury to continue to deliberate. (C. 385, 387) After further deliberations, the jury found Johnny Flournoy guilty of first degree murder and armed robbery, but not guilty of the attempt murder of Mendoza. (CI. 4, 33; C. 109; R. 960)

Flournoy filed a *pro se* post-trial motion alleging, *inter alia*, that trial counsel was ineffective when he failed to call Reginald Smith and Elizabeth Barrier as witnesses. (CI. 328-347, R. 1171) In response, trial counsel explained to the court that he had located Barrier in Florida and spoken with her. He determined that her testimony would only have been helpful to impeach Smith's testimony if the defense had called Smith, and he testified to something other than what the defense wanted him to say. However, the defense did not call Smith because a lot of what he said would have been damaging to Flournoy. (R. 1178-79) The trial judge denied the motion for new trial without comment. (R. 1179) The jury initially rejected a death sentence. (CI. 395) After a hearing before the judge, Flournoy was sentenced to a term of natural life. (CI. 377)

Direct Appeal and Post-Conviction Proceedings

Flournoy's conviction was affirmed on direct appeal. *People v. Flournoy*, Rule 23 Order, 1-94-4427 (November 15, 1996). Flournoy filed a post conviction

petition alleging, *inter alia*, that trial counsel was ineffective for failing to call Elizabeth Barrier as a witness and failing to impeach Romano Ricks and Detective Akin regarding statements Ricks allegedly made to Akin. (CI. 502-03, 516, 520, 526) The only affidavit attached to the petition was Flournoy's and there were no affidavits provided from either Ricks or Barrier. (CI. 544) The first-stage dismissal of this initial post-conviction petition was affirmed. *People v. Flournoy*, 1-97-1987 (June 30, 1999). (C. 219) Petition for leave to appeal was denied on February 2, 2000. *People v. Flournoy*, No. 88505. (C. 235)

The Instant Petition

On February 21, 2021, Flournoy filed a successive petition presenting newly discovered evidence of actual innocence based on affidavits provided by Romano Ricks and Elizabeth Barrier. (C. 155, 172-76, 303-08, 310-14) These affidavits were obtained after Flournoy secured the assistance of legal counsel with the resources to obtain evidence. (C. 316-18) Based on information in these affidavits, Flournoy also claimed that the State fabricated the evidence that constituted Romano Ricks's testimony and concealed exculpatory evidence involving whether Ricks negotiated for leniency in exchange for his testimony. (C. 177-79) Flournoy's third claim was that the State knowing relied on perjured testimony in its case-in-chief at trial. (C. 179-80) Finally, Flournoy claimed that trial counsel was ineffective for failing to interview Barrier, a potentially exculpatory witness that counsel knew had been interviewed by the State, and for misrepresenting to the trial court that he had spoken to Barrier prior to trial and decided not to call her. (C. 180-81) In support of the *Brady* claim, in addition to the aforementioned affidavits, Flournoy attached three police reports, a written statement given by Ricks in March of 1991, and Detective Akin's testimony at Flournoy's federal parole revocation hearing

in July of 1992. (C. 238, 240, 246, 248, 264) Additional support for the ineffective assistance of counsel claim was provided by an ARDC disposition disbarring trial counsel. (C. 322)

Romano Ricks's Affidavit

In his affidavit, Ricks said he met Johnny Flournoy and Reggie Smith through a mutual friend. (C. 303) Ricks participated in an armed robbery with Smith and two other men. (C. 304) After his arrest, he was approached by some people asking him to take the fall for the robbery so that his co-defendants could go free, and he refused. (C. 303) He was put in a lineup with Smith, and after that lineup, was questioned by Detective Akin about Sam Harlib's murder. Akin described the murder to him and Ricks said he knew nothing about it. (C. 303)

After he spoke with Akin, he was beaten by fellow jail inmates because he would not take responsibility for the robbery. He thought either Smith or Flournoy had ordered the beating. (C. 305) After he was assaulted again, he called Akin and told him he was willing to help with the murder investigation. (C. 306)

Detective Akin had Ricks brought to the station and told Ricks how the shooting occurred. (C. 306) Ricks told the detective that Reggie Smith had confessed that he and Flournoy planned the armed robbery together. (C. 306) Sometime later, Akin told Ricks "that they could not bring a case against Johnny unless [Ricks] testified that *Johnny* [– not Reggie Smith –] told [Ricks] about being involved in the murder." (C. 307) (emphasis added) Ricks then "made up" a story about Johnny telling him that he and Reggie had robbed a car dealer and Johnny shot the owner. (C. 307)

In his affidavit, Ricks swore that neither of these stories were true – Smith never told Ricks that he and Flournoy committed this offense together and Flournoy did not make any admissions. Ricks said he only implicated Johnny "because I believed that he was involved in ordering the attacks of me at jail, and I was angry at him." (C. 306) He also swore he "specifically asked Detective Akin if he could help ... on [his] pending armed robbery case. Detective Akin [responded] that he couldn't 'officially' help [Ricks], but that he would see what he could do to get me a lesser sentence. He also told me that he would help me get into a work release program." (C. 307)

In the final paragraph of his affidavit, Ricks explained that he was aware he was risking a potential perjury charge:

> I have consulted with attorney Paul DeLuca, 1S450 Summit Avenue, Suite 140, Oakbrook Terrace, Illinois, regarding this affidavit. Mr. DeLuca has informed me of the potential penalties for a perjury conviction. Mr. DeLuca has agreed to represent me pro bono in any legal proceedings arising horn this affidavit. Nevertheless, I am coming forward with this information because I feel guilty about testifying falsely against Johnny at his trial.

(C. 308)

Elizabeth Barrier's Affidavit

Barrier met Reggie Smith in a rehabilitation program in the early 1990's. He was 5'8" tall, 180 pounds, dark-skinned, and had dark curly hair and a moustache. He came to her home one night in November of 1991, bringing cocaine and heroin. (C. 311) He told her he had recently robbed a used car dealership and shot the owner in front of his safe. (C. 311) Barrier explained that, if she told police that Smith confessed to committing the offenses with Flournoy, as reflected in a police report, that was not the truth. (C. 312) She said she was unavailable to

testify at trial because she had slipped back into addiction, moved to Florida, and was a vagrant. (C. 312) She never heard of Johnny Flournoy until she was contacted by an investigator on his behalf. (RC. 313) She was unaware that Flournoy had been prosecuted for the murder of the car dealer Smith confessed to committing and she had assumed that Smith had been the one convicted. (R. 313)

To that end, Barrier denied trial counsel's representation, made at the post-trial *Krankel* hearing, that he talked to her prior to trial. (C. 312-313) She reviewed the transcript where trial counsel McCaffrey stated in open court that he found Barrier in Florida after speaking with her parents, that he had spoken with Barrier on the phone, and that she was present and prepared to testify at trial. (C. 313) These were all lies because her parents did not know where she was, she did not have a phone, she was never contacted by McCaffrey about testifying, and she was not present and ready to testify at Flournoy's trial. (C. 313)

Denial of Leave to File

The circuit court denied leave to file, finding no cause and prejudice for the constitutional claims, and determining that the affidavits did not constitute newly discovered evidence that would change the result on retrial. (C. 358-63, R. 1199) The appellate court affirmed, holding that Flournoy could not allege actual innocence and other constitutional claims based on the same new evidence. The court went on to address the merits of Flournoy's claims and found that for the actual innocence claim, Flournoy did not establish that the new evidence would change the result on retrial, and, for the other constitutional claims, he did not meet the cause and prejudice test at the leave-to-file stage. *People v. Flournoy*, 2022 Il App (1st) 210587-U, ¶¶ 42, 46, 62, 67-68.

This Court granted leave to appeal on March 29, 2023.

ARGUMENT

I.

Johnny Flournoy's Claim of Actual Innocence Based on Romano Ricks's and Elizabeth Barrier's Affidavits is Cognizable Under the Post-Conviction Hearing Act Even Though These Two Affidavits also Form the Basis of Flournoy's Other Post-Conviction Claims.

In his successive post-conviction petition, Johnny Flournoy presented newly discovered evidence of his actual innocence in the form of affidavits from Romano Ricks, the State's key witness at trial, and Elizabeth Barrier, a witness who did not testify. These affidavits would prove that Ricks testified falsely that Flournoy confessed to the shooting, and that the shooting was actually committed by Reggie Smith. In addition to his claim of actual innocence, Flournoy also relied on these affidavits to support several other constitutional claims – claims that the State committed a *Brady* violation and that trial counsel was ineffective. The appellate court affirmed the circuit court's denial of leave to file, in part holding that Flournoy could not allege his actual innocence along with his other constitutional claims based on the same newly discovered evidence. *People v. Flournoy*, 2022 IL App (1st) 210587-U, ¶¶ 29-30. In so holding, the appellate court relied on this Court's opinion in *People v. Hobley*, 182 Ill.2d 404, 443-44 (1998).

The appellate court's decision is contrary to this Court's holding in *People v. Washington*, 171 Ill. 2d 475 (1996) – in which this Court for the first time recognized that Illinois defendants had the right to raise a claim of actual innocence in a post-conviction petition as a violation of due process – as well as more recent decisions of this Court such as *People v. Coleman*, 2013 IL 113307 (2013). This Court's precedent establishes, and fundamental principles of due process demand, that a petitioner should not be forced to choose which of two constitutional claims to raise just because they were based upon the same piece of evidence.

Accordingly, the dismissal of Johnny Flournoy's petition should be reversed and this cause remanded for second-stage post-conviction proceedings.

The question posed here appeared to have been resolved years ago in *Washington*, 171 Ill. 2d at 475. In that case, the defendant, who had been convicted of murder, filed a post-conviction petition alleging that his trial attorney was ineffective for failing to investigate evidence that someone other than him had committed the murder. 171 Ill. 2d at 479. This claim was supported by affidavit. After an *in camera* hearing where the affiant testified, Washington amended his petition with a claim of actual innocence based on her testimony, which constituted newly discovered evidence. *Id.* at 478-79. The appellate court dispensed with the ineffective assistance claim on the grounds that trial counsel testified that he could not get hold of the witness in question and, in light of a strong alibi defense, exercised reasonable trial strategy in not investigating this witness further. However, the court found that defendant's actual innocence claim warranted further review. *Id*. This Court agreed with petitioner that this same evidence was the basis of an entirely new "actual innocence" post-conviction claim, which this Court held required a new trial. *Id*. at 489-90.

In affirming the lower court's order remanding the case for a new trial, the *Washington* Court characterized defendant's actual innocence claim as "freestanding." However, the Court used this term only to distinguish it from his ineffective-assistance claim, his other claim that was supported by the *same* newly discovered evidence:

> [t]he issue is not whether the evidence at trial was insufficient to convict Washington beyond a reasonable doubt. The appellate court rejected that challenge on direct appeal. The issue is whether Washington's claim of newly discovered evidence can be raised in a petition under the Post–Conviction Hearing Act to entitle Washington to a new trial.

Id. at 479. In making the distinction, the *Washington* Court never intended to prohibit a petitioner from raising both types of claims based on this same evidence. Rather, recognizing that in *Herrera v. Collins*, 506 U.S. 390 (1993) the United States Supreme Court rejected the notion that a "free-standing" claim of innocence, rather than a "gateway" claim, was a cognizable post-conviction claim under federal law, the *Washington* Court held that under our State constitution, Illinois petitioners had *greater* due process rights than under the Federal Constitution. *Id*. at 487-88.

In its analysis, the *Washington* Court looked to the language of the Illinois Constitution – that no person "shall be deprived of life, liberty or property without due process of law." Ill. Const. 1970, art. I, § 2. This Court recognized that this language did not differ from the Federal Constitution, but found that it was under no constraint to follow federal precedent in "lockstep." *Id* at 485; *People v. McCauley*, 163 Ill.2d 414, 440 (1994); *Oregon v. Hass* (1975), 420 U.S. 714, 719 (1975) (It is unquestionable that State courts have the authority to interpret their respective constitutional provisions more broadly than United States Supreme Court interpretations of similar Federal constitutional provisions). The *Washington* Court concluded "that ignoring a claim of actual innocence based on newly discovered evidence would be 'fundamentally unfair' as a matter of procedural due process." 171 Ill. 2d at 487. The Court also determined that imprisonment of the innocent would so shock the conscience as to implicate substantive due process. *Id*. at 487-88. But, the *Washington* Court *never* held that a defendant was required to choose between bringing an actual innocence claim and raising another constitutional challenge, one at the expense of the other, where both claims rested upon the same evidence. *See People v. Harris*, 206 Ill. 2d 283, 301-13 (2002) (addressing petitioner's

claims of actual innocence and ineffective assistance of counsel beoth based on affidavits supporting petitioner's alibi defense).

Nevertheless, in *People v. Hobley*, 182 Ill. 2d 404 (1998), this Court read the opinion in *Washington* as intending to force post-conviction petitioners to choose among claims based on the same evidence. This was a misreading and misapplication of *Washington*. In *Hobley*, the petitioner was convicted of first degree murder and arson for allegedly setting a gasoline fire that killed seven people. 182 Ill. 2d at 426. Hobley consistently maintained his innocence throughout trial and all post-trial proceedings. In a post-conviction petition, he argued that the State had committed a *Brady* violation for suppressing a fingerprint report on the gasoline can that it introduced into evidence at defendant's trial, suppressing a second gasoline can found at the scene of the fire, and destroying said can after defense counsel demanded its production during post-conviction proceedings. *Id*. at 428-29. He also raised an actual innocence claim based on this same evidence. In rejecting petitioner's actual innocence claim while remanding his *Brady* claim for further proceedings, Justice Bilandic, writing for the Court, created the artificial construct that Hobley could not raise a claim of actual innocence based on the same evidence as his due process claim. *Id.* at 443-44.[1]The *Hobley* Court purported to follow a purported rule it believed was established in *Washington*, limiting the types of actual-innocence claims a petitioner can raise to "free-standing" claims, *i.e.*, those not supported by evidence also relied upon as a basis for other constitutional claims. 171 Ill. 2d at 447-48. Again, as previously explained, *Washington* established no

[1] It should be noted that the petitioner in *Hobley* was subsequently found to be actually innocent. https://tinyurl.com/mhobley

such rule. Furthermore, to read *Washington* in this way would thwart this Court's reading of the Illinois Constitution to provide greater due process than the Federal Constitution. *Washington*, 171 Ill. 2d at 487-88.

Notably, despite the decision in *Hobley*, a line of appellate court decisions correctly recognizes that a petitioner may plead and argue a claim of actual innocence along with other claims of constitutional violations. *See e.g.*, *People v. Williams*, 2012 IL App (1st) 111145, ¶41 (defendant made a substantial showing of freestanding claim of actual innocence" based on new evidence that also supported a *Brady* claim); *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 33 (actual innocence claim was "legitimate," even where same evidence was alleged to support an ineffectiveness claim); *People v. Sparks*, 393 Ill. App. 3d 878, 882, 887 (1st Dist. 2009) (reversing dismissal of petition seeking relief on actual innocence claim, though same affidavit also used to support *Brady* claim); *People v. Tate*, 2012 IL 112214, ¶¶ 17, 23-25, 29 (reversing dismissal of petition seeking relief on both theories supported by the same affidavits; although the court reversed only on the basis of cause and prejudice, it made no mention of either a freestanding requirement or of any deficiency stemming from the overlapping evidence).

Moreover, in *People v. Coleman* , 2013 IL 113307 (2013), this Court affirmed and clarified its holding in *Washington* and resolved any confusion caused by the opinion in *Hobley* regarding whether petitioners may base an actual innocence claim on the same evidence as other constitutional claims. In *Coleman*, the State again urged this Court to adopt the "freestanding"/"gateway" dichotomy that prevails in federal law when analyzing claims of actual innocence based on newly discovered evidence. *Coleman*, 2013 IL 113307, ¶¶ 85-89. This Court rejected the State's

proposal, stating, "The State simply assumes that this court, like the United States Supreme Court, has recognized two types of actual-innocence claims. We have not." *Id.* at ¶ 89. Rather, the Court explained, "[w]e departed from precisely this approach in *Washington*":

> The assumptions that led the Court to distinguish between freestanding and gateway claims, and the legal construct that springs from those assumptions, are integral parts of the federal due process rubric that we declined to follow, as a matter of state constitutional law. We may have used the label "freestanding" to describe the claim in *Washington*, but not as an alternative to the label "gateway."

Id. at ¶ 90. To make the matter even clearer, this Court stated:

> In Illinois, a postconviction actual-innocence claim is just that—a postconviction actual-innocence claim. *Where a defendant makes a claim of trial error, as well as a claim of actual innocence, in a successive postconviction petition, the former claim must meet the cause-and-prejudice standard, and the latter claim must meet the Washington standard. See Ortiz*, 235 Ill.2d at 330, 336 Ill.Dec. 16, 919 N.E.2d 941 ("where a defendant sets forth a claim of actual innocence in a successive postconviction petition, the defendant is excused from showing cause and prejudice"). There is no anomaly in our case law because the evidentiary burden for an actual-innocence claim is always the same whether or not it would be considered a freestanding or gateway claim under federal law.

Id. at ¶ 91 (emphasis added). This Court concluded by saying, "An actual-innocence claim should be treated procedurally like any other postconviction claim." *Id.* at ¶ 92. That is the exact point made in *People v. Martinez*, where the appellate court noted, "*Coleman*'s explanation of a freestanding actual innocence claim contemplates that the *claims* be independent, not that the actual innocence claim be independent

of *the evidence* underlying his other constitutional claim or trial error." 2021 IL App (1st) 190490, ¶ 104 (emphasis in original).

In *Martinez*, the defendant appealed from the dismissal of a successive postconviction petition that alleged constitutional violations and actual innocence. 2021 IL App (1st) 190490, ¶ 2.The claims derived from the same underlying evidence, namely, evidence of a police detective's pattern and practice of engaging in misconduct and new expert testimony regarding witness identification. *Id.* at ¶ 46. In holding that the defendant can raise both claims, the *Martinez* court acknowledged *Hobley*, but determined that *Hobley* "deviated from both the spirit and the letter of the law as set forth in *Washington*." *Id.* at ¶ 102. Furthermore, *Hobley* identified "no principle or purpose" that prohibited "a defendant from using the same evidence to assert both a constitutional claim of trial error and an actual innocence claim." *Id*. The *Martinez* court also noted that *Hobley* was inconsistent with *Coleman*. *Id*. at ¶ 104; *See also People v. Danao*, 2022 IL App (1st) 210287-U, ¶¶ 61-64 (recognizing that pursuant to *Coleman*, 2013 IL 113307, ¶83 and *Martinez*, 2021 IL App (1st) 190490, ¶104, petitioner's *claims* must be independent, but not the actual innocence claim need not be independent of *the evidence* underlying any other constitutional claim of error).[2]

In affirming the dismissal of Flournoy's petition, the court below found that the discussion in *Coleman* rejecting the State's request to adopt the federal dichotomy between freestanding and gateway claims had no relevance to this case, and did not overrule *Hobley*. First, *Coleman* is relevant here where, in

[2] As required by this Court's Rule 23(e)(1), a copy of *People v. Danao*, 2022 IL App (1st) 210287-U is furnished in the Appendix to this brief. Ill. S. Ct. R. 23(e)(1) (eff. Feb. 1, 2023). (App. at A-66-85)

confirming that Illinois does not recognize the legal construct of "free-standing" and "gateway" claims of actual innocence, the *Coleman* Court affirmed that a petitioner can argue his actual innocence along with his other constitutional claims, but each claim had to meet a different legal threshold to survive. 2013 IL 113307, ¶ 90, 91. Next, to the extent that *Hobley* does conflict with *Washington* and *Coleman*, that conflicting portion should be overruled. *See People v. Sharpe*, 216 Ill.2d 481 (2005). In *Sharpe*, this Court abandoned cross-comparison analysis when evaluating proportionate penalty sentencing claims. In so holding, the *Sharpe* Court discussed principles of *stare decisis* and determined that departing from those principles was justified because the governing decisions relied on a questionable citation that was never supported by any reasoning other than stating that the court has used it in several cases. 216 Ill. 2d at 520-21. Similarly, in this case, the *Hobley* Court's declaration forcing a petitioner to choose between two constitutional claims was an artificial construct that was not well-reasoned and, as explained herein, did not derive from this Court's holding in *Washington*. Moreover, to restrict *Washington* in this way would be antithetical to its holding giving petitioners "additional process." 171 Ill. 2d at 487.

Indeed, a rule that requires a defendant to forgo one constitutional claim in order to present another would violate federal due process. A State cannot require someone "to forfeit one constitutionally protected right as the price for exercising another." *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977); *see Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 546 (2001). U.S. Const. Amends. V, XIV. The State of Illinois therefore cannot condition a defendant's ability to raise an innocence claim on his relinquishment of his right to argue constitutionally-based

fair trial claims. *See Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68 (2009) (state post-conviction laws that allow a petitioner to raise a claim of innocence creates a "liberty interest" in fair procedures, and must comport with due process). As *Washington* and *Coleman* demonstrate, this Court created no such rule.

Moreover, barring petitioners from raising certain constitutional claims in a petition contradicts the language of the Post-Conviction Hearing Act itself. The Act limits a petitioner to one petition, with few exceptions. 725 ILCS 5/122-3; *People v. Flores*, 153 Ill.2d 264, 273 (1992). Thus, under the *Hobley* rule, a petitioner, oftentimes representing himself, who discovers new evidence that both supports his actual innocence as well as another constitutional claim, would be forced to forgo one of these claims in his petition. This is untenable and would represent an anomaly in criminal jurisprudence where the same evidence often supports more than one claim or defense. For instance, at a murder trial, the same evidence can support defendant's acquittal by self-defense, or a conviction for second degree murder, a lesser offense based on imperfect self-defense. 720 ILCS 5/3-2; 5/9-1(a); 5/9-2(a)(2), 5/7-1.

In the post-conviction context, *Washington* itself is illustrative. In *Washington*, the petitioner's allegation of ineffective assistance of counsel for failure to interview a witness was based on that witness's testimony, which also supported his innocence claim. *Washington*, 171 Ill. 2d at 479. Similarly, the same evidence can support a *Brady* claim and an actual innocence claim. The difference between each claim is the standard by which they are decided. An actual innocence claim must be based on "new, material, noncumulative evidence that is so conclusive that it would probably change the result on retrial." *Coleman*, 2013 IL 113307 at ¶ 96.

An alternative constitutional claim raised in a successive post-conviction petition warrants leave to file if the petitioner can show why he did not raise the claim earlier and he was prejudiced by the constitutional violation. Notwithstanding whether the basis for these two claims is the same, it is for the court to determine which of petitioner's claims, if any, has merit. *See People v. Jarrett*, 399 Ill. App. 3d 715 (1st Dist. 2010) (addressing post-conviction petitioner's *Brady* and newly-discovered evidence claims based on the discovery of witness who saw an individual point a gun at petitioner); *People v. Harris*, 206 Ill.2d 293 (2002) (addressing petitioner's claims of actual innocence and ineffective assistance of counsel both based on affidavits supporting petitioner's alibi defense).

In conclusion, the appellate court's decision in this case which deprived Johnny Flournoy the opportunity to argue all of his constitutional claims, including actual innocence, does not comport with the holding and spirit of this Court's decision in *Washington*, and runs contrary to this Court's holding in *Coleman*. Moreover, to limit a petitioner's rights to bring claims in this manner is contradicted by statutory language and federal constitutional law, and is bad public policy. Therefore, this Court should reverse the appellate court's holding that Johnny Flournoy was barred from raising all of his constitutional claims in a successive petition.

II.

Where Johnny Flournoy's Successive Post-Conviction Petition Stated a Colorable Claim of Actual Innocence Based on Newly Discovered Exculpatory Affidavits - One from a Witness Who Recanted his Testimony that Flournoy Admitted Being the Shooter, and One from a Potential Witness Who Would Testify that Reginald Smith Confessed to her That He Killed Harlib - the Circuit Court Erred in Denying Him Leave to File his Successive Post-Conviction Petition.

Johnny Flournoy was convicted of shooting Samuel Harlib during an armed robbery at a car dealership. At trial, the State's case against Flournoy rested in significant part on the testimony of Romano Ricks, who testified that Flournoy admitted to him that he was the shooter. In his successive post-conviction petition, Flournoy alleged his actual innocence. In support, Flournoy attached the newly discovered exculpatory affidavits of Ricks and Elizabeth Barrier. In his affidavit, Ricks recanted his trial testimony that Flournoy made admissions to him about the offense. In her affidavit, Barrier swore that her friend Reginald Smith confessed to the shooting, and, contrary to his representations, defense counsel never contacted her to testify. These affidavits, when viewed alongside the trial evidence, support Flournoy's claim of actual innocence.

The appellate court determined that the evidence was not so conclusive so as to lead to a different result on retrial. *People v. Flournoy*, 2022 IL App (1st) 210587-U, ¶ 39. The court found that Ricks' affidavit would not probably lead to a different result and that Barrier's affidavit only negated the intentional and knowing murder charges, not the felony murder charge, as it said nothing about Flournoy's participation in the robbery. *Flournoy*, at ¶ 45. The appellate court's conclusions as to these issues are wrong. Accordingly, this Court should reverse the appellate court's affirmance of the circuit court's denial of leave to file Flournoy's successive post-conviction petition.

The Post-Conviction Hearing Act ("Act") provides a statutory remedy for criminal defendants who claim their constitutional rights were violated at trial. *People v. Edwards*, 2012 IL 111711, ¶21; 725 ILCS 5/122-1 *et seq*. The Act contemplates only one post-conviction proceeding, but a petitioner may seek leave to file a successive post-conviction petition if he states a colorable claim of actual innocence, *Edwards*, 2012 IL 111711, ¶¶22, 28. *People v. Robinson*, 2020 IL 123849, ¶¶ 44; 725 ILCS 5/122-1(f). In order to be successful, a claim of actual innocence must be based on evidence that is "newly discovered; material and not merely cumulative; and of such conclusive character that it would probably change the result on retrial." *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). Leave to file a claim of actual innocence "should be denied only where it is clear from a review of the petition and supporting documentation that, as a matter of law, the petition cannot set forth a colorable claim of actual innocence." *People v. Robinson*, 2020 IL 123849, ¶ 44.

In *Robinson*, 2020 IL 123849, this Court set the standard for when newly discovered evidence establishes a colorable claim of actual innocence to survive the leave-to-file stage. Citing *People v. Coleman*, 2013 IL 113307, ¶ 97, this Court held,

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

Robinson, 2020 IL 123849, ¶ 48 (emphasis added). Moreover, neither the rule against hearsay nor an affidavit's tendency to conflict with trial evidence should

be considered when evaluating whether the new evidence would probably change the result on retrial. *Id.* at ¶¶ 73, 77-78. Rather, "the well-pleaded allegations in the petition and supporting documents will be accepted as true unless it is affirmatively demonstrated by the record that a trier of fact could never accept their veracity." 2020 IL 123849, ¶¶60, 65. When determining the meaning and application of "taken as true," it is not enough to assume the truth of an allegation that certain evidence could have been presented or a witness would have testified a certain way; rather, it must further be assumed that this evidence would have been accepted by the jury as true. *People v. Brooks*, 2021 IL App (4th) 200572, ¶ 44. And, at this stage, "the court is precluded from making factual and credibility determinations." *Id.* ¶ 45; *People v. Warren*, 2016 IL App (1st) 090884-C, ¶77; *People v. Coleman*, 183 Ill. 2d 366, 372 (1998). The decision whether to grant leave to file is reviewed *de novo*. *Robinson*, 2020 IL 123849, ¶ 39.

Johnny Flournoy's petition presented a colorable claim of actual innocence based on information contained in two affidavits that presented new, material, and non-cumulative evidence, not rebutted by the record, that puts the trial evidence in a completely different light. At the leave-to-file stage, Flournoy has demonstrated that this evidence would probably change the result on retrial.

A. The Evidence in the Affidavits is Newly Discovered.

"Newly discovered evidence is evidence that was discovered after trial and that the petitioner could not have discovered earlier through the exercise of due diligence." *People v. Robinson*, 2020 IL 123849, ¶ 47 (citing *People v. Coleman*, 2013 IL 113307, ¶ 96). Although the trial court determined that the affidavits were not "newly discovered" where Flournoy was aware of Barrier and Ricks at

the time of trial, the court below did not decide this question. *Flournoy*, 2022 IL App (1st) 210587-U, ¶ 39. (C. 339) However, this is of no import where Flournoy's affidavit demonstrates his due diligence.

Flournoy complained that Ricks was lying and had been given consideration for his testimony prior to filing this petition, but he had no way of proving it. (CI. 335, 502-03, 516, 520, 526) Ricks did not recant his testimony and admit to being offered consideration for it until 2018, when Flournoy's counsel contacted him. (C. 317) Moreover, Flournoy could not have communicated with Ricks post-trial or prior to filing his initial post-conviction where he did not have contact information for Ricks at that time, nor did he have any reason to believe that Ricks would admit his lies when his first post-conviction petition was filed. (C. 317) In addition, Flournoy swore that he had no outside evidence to prove that Ricks lied until he came forward. (C. 318) And Flournoy also explained that he tried for years to investigate on his own through the mail system, but he did not have the addresses of any witnesses or the ability to locate and/or contact them while he was incarcerated until he found counsel who was willing to investigate and find Ricks. (R. 316-17) Therefore, no amount of due diligence from Flournoy could have discovered this evidence sooner. *See People v. Barnslater*, 373 Ill. App. 3d 512, 523-24 (1st Dist. 2007) (Even if a petitioner knew that a witness was perjuring himself during trial, he will not be precluded from using the witness's recantation as newly-discovered evidence, unless the evidence was available at the time of trial to demonstrate that the witness was lying). As stated above, this evidence was not available at the time of trial. Thus, this petition presented newly-discovered evidence.

Similarly, despite speaking to the police during the investigation, Barrier did not testify at trial. Moreover, as alleged in the petition, trial counsel was Flournoy's only resource to find Barrier at that time. However, counsel made false representations to the court about having spoken to Barrier and determined not to call her as a witness, where, in response to Flournoy's post-trial motion, counsel said that he had spoken with Barrier and determined that she was not a good witness for Flournoy. (C. 311; R. 1178-79) In her affidavit, Barrier contradicted trial counsel's representation, saying he never approached her at all. (C. 313) As Barrier's affidavit must be taken as true at this juncture, trial counsel's representations to the court were not reliable. *Robinson*, 2020 IL 123849, at ¶¶60, 65. Counsel's unreliability is further supported by the fact that he was disbarred for lying to other courts. *In re Joseph Patrick McCaffery,* 12PRO123. (C. 321-22) Finally, as with Ricks, Flournoy could not find or interview Barrier until he found a lawyer who would do the leg work for him on the outside. Any information in Barrier's affidavit was not available to Mr. Flournoy until long after trial and the filing date of Mr. Flournoy's first post-conviction petition.

B. The Information in the Affidavits is Material and Noncumulative.

Evidence is material if it is "relevant and probative of the petitioner's innocence"; it is noncumulative if it "adds to the information that the fact finder heard at trial." *People v. Robinson*, 2020 IL 123849, ¶ 47 (citing *People v. Coleman*, 2013 IL 113307, ¶ 96). The circuit court briefly discussed this factor and found Flournoy's petition lacking, but ultimately denied leave to file for other reasons. (C. 58-63) The reviewing court did not discuss this factor at all. This Court should recognize that both of these affidavits contain material evidence of Flournoy's innocence that is not cumulative to evidence adduced at trial.

Ricks's Affidavit

In his affidavit, Ricks disavowed his damaging trial testimony that Flournoy provided a detailed admission to the shooting. He was motivated to falsely testify against Flournoy because he thought that Flournoy was behind a beating Ricks took while he was in jail, and he cooperated with the police in exchange for possible consideration in his own pending armed robbery case. (C. 305-06) The circuit court judge dismissed the affidavit as unreliable simply because it was a recantation. (C. 350) However, the circuit court's credibility finding was premature as Ricks's affidavit must be taken as true at this juncture. *Robinson*, 2020 IL 123849, at ¶¶60, 65. Moreover, Ricks's recantation is reliable as it is supported by other attachments to the petition that corroborate his affidavit.

In his written statements, Ricks said that it was Reggie Smith who told him about Flournoy's admission. Detective Akin, at Flournoy's federal parole revocation hearing, confirmed this when he testified that the only knowledge Ricks had of the shooting was what Smith had told him. (C. 296-97) In his affidavit, Ricks reported: "Detective Aikin (sic) told me that they could not bring a case against Johnny unless I testified that Johnny told me about being involved in the murder." (C. 307) Subsequently, Ricks made up another story and testified at Flournoy's grand jury proceedings and trial that it was Flournoy who confessed to shooting Harlib. (R. 585-89, 594)

Barrier's affidavit

Barrier swore in her affidavit that one night shortly after Harlib's murder – possibly that night – Reginald Smith came to her home with cocaine and heroin and confessed to her that he had robbed a use car dealer and shot him in front

of his safe. (C. 311) This information is materially different from the information contained in the original police report and the other evidence adduced at trial. However, Barrier's account of Smith's statements in her affidavit ring true where Smith and Barrier were friends, his statement was made shortly after Harlib's murder, the statement was spontaneous, and Smith better fits Mendoza's original description of the shooter to the police. (R. 438, 458-59, 466, 489, 722)

Both of these affidavits repudiate evidence presented by the State at trial. Moreover, they contain evidence that was not put before the jury, which "creates new questions in the mind of the trier of fact." *People v. Williams*, 392 Ill. App. 3d 359, 369 (1st Dist. 2009) Accordingly, the information in both affidavits is material and non-cumulative.

C. The New Evidence Is of Such Conclusive Character That it Would Probably Change the Result on Retrial.

The court below proceeded as if the evidence was newly discovered, but determined that it was not so conclusive so as to warrant a different result on retrial. *People v. Flournoy*, 2022 IL App (1st) 210587-U ¶39. Turning to Ricks' affidavit, the appellate court found that because the affidavit did not name another shooter, it would only remove one piece of damaging evidence against Flournoy upon retrial. *Id.* at ¶41. On the contrary, at the leave to file stage, under *Robinson*, Ricks's affidavit sufficiently supports his claim at this stage. Ricks's affidavit, which must be taken as true, directly recants the most damaging piece of evidence told to the jury: , *i.e.*, that Flournoy confessed to Harlib's murder. A confession is a truly damaging piece of evidence. "There is nothing more damning than a confession. Its effect has been described as 'incalculable' [*People v. Miller*, 2013 IL App (1st) 110879, ¶ 82]. Indeed, confessions constitute the strongest possible

evidence the State may offer in the course of a criminal case." *People v. Hughes*, 2013 IL App (1st) 110237, ¶ 2 , *reversed on other grounds*, *Poeple v. Hughes*, 2015 IL 117242, ¶40.

Moreover, Ricks's affidavit disavowing Flournoy's confession rings true, while his trial testimony was unreliable where Akin testified that when he first spoke with Ricks, Ricks only reported what he claimed Smith told him. (R. 561, 563, 564) Likewise, in his written statement to the prosecutor, Ricks was clear that any information he received was gleaned from Smith. (C. 249, 306) This information was of little use, however, since Ricks could not have testified to Smith's account of Flournoy's alleged admission as related to Smith, since Smith did not testify and his alleged conversation with Flournoy would have been inadmissible hearsay. *People v. Smith*, 256 Ill. App. 3d 610, 615 (1994). Ricks's affidavit convincingly explains that he changed his story after Akin told Ricks that a case could not be brought against Flournoy unless Ricks testified that Flournoy confessed to him. He then testified in front of the grand jury and at trial that Flournoy confessed to him when he visited just after Flournoy's wedding. (C. 307) Where the lead detective himself acknowledges that prosecuting the petitioner would require significant embellishment of a witness's account, recantation of that same account certainly "places the trial evidence in a different light and undermines the court's confidence in the judgment of guilt." *Robinson*, 2020 IL 123849, ¶ 48.

Absent Flournoy's admission, all that remains of the State's case is Mendoza's identification of Flournoy as the shooter. However, Mendoza's identification of Flournoy was not so rock solid that jurors had no choice but to accept it. *See People v. Lerma*, 2016 IL 118496. In *Lerma*, this Court found that the trial court abused

its discretion in denying a defendant's request to allow expert testimony on the reliability of eyewitness identifications and this trial error was not harmless. 2016 IL 118496, ¶¶ 32, 33. In so holding, this Court found that a cross-racial identification by a witness who has no prior familiarity with the offender, in a stressful situation such as when a weapon is present, is worthy of scrutiny. 2016 IL 118496, ¶ 26. Many of these factors are present in this case. This was a cross-racial identification where Mendoza was Hispanic and Flournoy, African-American; Mendoza had never seen the shooter before; Mendoza did not know Flournoy; and the offender fired a gun at Harlib and pointed a gun at Mendoza. (R. 415-17; 424-25; 428-31) Under these circumstances, Mendoza's identification of Flournoy was not dispositive of Flournoy's guilt.

Further, Mendoza's original description of the shooter describes Smith more closely than it does Flournoy. Immediately after the offense, Mendoza described the shooter as a dark-skinned African American, in his twenties, at 5'8" tall, and 175 pounds. (R. 457-59) At the time of the shooting, Flournoy was a light-skinned African American who was 41 years old, 6' tall and 200 pounds. (R. 459, 551-52, 722) Smith, however, at 5'8", 180 pounds, and dark-skinned, matched Mendoza's description. (R. 466)

In addition, Flournoy presented a credible alibi of where he was on the day of the shooting. His family and business partners all testified that he was with them running various errands related to his jewelry business when the shooting occurred. (R. 687-95, 718-20, 728-29, 735-36, 741-45, 747, 757) Therefore, Ricks's affidavit supports a colorable claim of actual innocence.

Turning to Barrier's affidavit, the court below acknowledged that it was conceivable that the information contained in her affidavit would provide a possible defense to "some counts of the indictment." *Flournoy*, 2022 IL App (1st) 210587-U, ¶ 44. The appellate court then considered that Flournoy was charged not only with intentional and knowing murder, but with felony murder for causing a death during the course of the commission of an armed robbery. *Id*. Pointing out that Barrier's affidavit said "nothing about defendant's participation in the robbery," and that the jury returned a general verdict, the court held her affidavit did not show there would have been a different result on the verdict of felony murder. *Id*. at ¶ 45.

The reviewing court's reasoning is incorrect. The State's theory of guilt for both the armed robbery and the murder – whether intentional, knowing, or felony murder – was that Flournoy was the lone offender who robbed the dealership and shot the decedent. The jury instructions make his clear, demonstrating that jurors were never instructed on the law of accountability and therefore would not have been permitted to convict Flournoy on a theory of accountability. *People v. Millsap*, 189 Ill. 2d 155, 166 (2000). And the only suggestions of second offender came from Ricks's claims about what he was told by others, claims he has now sworn were false and that he fabricated to curry favor with Detective Akin – a recantation that must be accepted as true. Thus, if Barrier testified at a new trial definitively saying Smith confessed, and did not implicate Flournoy, that would most certainly "place[ ] the trial evidence in a different light." *Robinson*, 2020 IL 123849, ¶ 48.

D. Conclusion

Johnny Flournoy's motion for leave to file a successive post-conviction petition and the supporting documentation establish a colorable claim of actual innocence sufficient to warrant granting leave to file. *Robinson* 2020 IL 123849, ¶¶57-59. Accordingly, this Court should reverse the appellate court's affirmance of the circuit court's denial of leave to file Flournoy's successive post-conviction petition and remand the cause for second-stage proceedings with counsel.

III.

Johnny Flournoy's Petition Also Made A *Prima Facie* Showing that the State Violated His Due Process Rights When It Concealed Critical Evidence that Romano Ricks, the State's Key Witness, Testified in Exchange for a Promise of Leniency on his Armed Robbery Case, and Ricks Lied on the Stand About Flournoy's Alleged Admissions to Harlib's Murder in Exchange for This Promise.

Johnny Flournoy argued that in addition to presenting evidence of actual innocence, Ricks's affidavit also establishes that Flournoy was deprived of his due process right to a fair trial. The trial court will allow a petitioner to file a successive petition alleging a deprivation of his constitutional rights provided he can establish "cause" for his failure to raise the claim in the initial post-conviction petition and prejudice resulting from that failure. 725 ILCS 5/122-1(f); *People v. Pitsonbarger*, 205 Ill. 2d 444, 462 (2002). A petitioner is not required to establish cause and prejudice conclusively to be granted leave to file a successive petition, and instead only needs to allege adequate facts for a *prima facie* showing of cause and prejudice. *People v. Smith*, 2014 IL 115946, ¶29; *People v. Bailey*, 2017 IL 121450, ¶25. A judge should deny leave to file only "when it is clear, from a review of the successive petition and the documentation submitted by the petitioner, that the claims alleged by the petitioner fail as a matter of law or where the successive petition with supporting documentation is insufficient to justify further proceedings." *Smith*, at ¶35. The decision whether to grant leave to file is reviewed *de novo*. *Id.* at ¶21. Flournoy's petition establishes cause and prejudice in this case.

In affirming the dismissal of Flournoy's petition, the appellate court first concluded that Flournoy was procedurally barred from arguing this issue where this issue is based in the same evidence as his actual innocence claim and the court

determined that the actual innocence claim had greater merit. *Flournoy*, 2022 IL App (1st) 210587-U, ¶ 52. Counsel has responded to this in Argument I, *supra*. The Court then went on to consider the merits of this claim.

A. The State Concealed Exculpatory Evidence that Ricks Received A Promise of Consideration for His Testimony Against Flournoy.

A criminal defendant's right to due process under the Fifth and Fourteenth Amendments to the United States Constitution is violated if the State knowingly fails to disclose exculpatory or impeaching evidence to the accused. U.S. Cont. Amends. V, XIV; Ill. Const. 1970, Art. I, §2; *Brady v. Maryland*, 373 U.S. 83, (1963). A *Brady* violation occurs when the State fails to disclose evidence materially favorable to the accused. *Youngblood v. West Virginia*, 547 U.S. 867, 869 (2006) *Brady*'s protections and obligations extend equally to both exculpatory and impeachment evidence. *Youngblood*, 547 U.S. at 869. Contrary to the appellate court's order, the affidavits attached to the petition show cause that the State committed a *Brady* violation that prejudiced Flournoy by depriving him of his due process rights.

In his affidavit, Ricks swore that he knew nothing about Harlib's shooting until Detective Akin told him about it after the December 5, 1991 lineup, when Akin agreed to see what he could do when Ricks requested "help" on his pending armed robbery case in exchange for his testimony. (C. 303) This was not disclosed to defense counsel. In other words, the affidavit supports a showing that the State concealed evidence that Ricks either did, or thought he was going to, receive consideration for his cooperation with the State in its case against Flournoy. Interestingly, Ricks was eventually sentenced to work release after serving only two years of a 10-year sentence for armed robbery. (C. 308)

The court below concluded that the State never hid this from the defense, and thus cause was not satisfied, because Akin testified in Flournoy's federal parole hearing that Ricks was requesting help, and because Ricks never directly stated that his work release detail was in consideration for his testimony. *Flournoy*, at ¶ 61. But it was not Ricks's request for help that needed to be disclosed, but rather Detective Akin's promise to try to help Ricks by seeing what he could do to get him a lesser sentence, something that was never disclosed. Despite the reference to Ricks asking for help at the parole hearing, the prosecutor never disclosed any deal, or potential deal, to the defense. And, it was not until Ricks submitted his affidavit that Flournoy had any indication that there could have been any deal. Moreover, contrary to the appellate court's finding, Ricks's affidavit provided sufficient information to make a *prima facie* case that a deal had been made where he received work release for his armed robbery sentence after agreeing to testify against Flournoy. A true determination of the nature of the deal can only be made after an evidentiary hearing. *People v. Colasurado*, 2020 IL App (3d) 190356, ¶45. At this stage of proceedings, Ricks's allegations that he asked Akin for assistance with his own case and may have received that help must be considered true. *Robinson*, 2020 IL 123849, ¶¶ 44; *Brooks,* 2021 IL App (4th) 200572, ¶ 44.

The reviewing court also determined that Flournoy cannot demonstrate prejudice from the failure of the prosecution to disclose a deal where the jury heard evidence that Ricks had motive to testify falsely, and a new trial with testimony that there was another motive would not in all probability change the verdict on retrial. *Flournoy*, 2022 IL App (1st) 210587-U, at ¶ 58. The jury did hear that Ricks called Akin asking to be placed in protective custody. But, because it was

not disclosed to the defense, the jurors did not hear that Ricks requested or may have received sentencing relief on his armed robbery case, that Detective Akin promised to do what he could to get Ricks a lesser sentence, or that his written statement about Smith's admission, which was not, and could not have been introduced as substantive evidence at trial, in addition to his testimony about Flournoy's admission, were lies. (C. 385) The introduction of all of this evidence probably would alter the result on retrial.

B. The State Knowingly Relied on Perjured Testimony in its Case-in-Chief.

A criminal defendant's right to due process includes the right to be free from the State's knowing use of perjured testimony. The use of perjured testimony to obtain a criminal conviction violates due process of law. *People v. Olinger*, 176 Ill.2d 326, 345 (1997). Even where the prosecution did not solicit false testimony, but allows it to go uncorrected when it appears, due process is violated. *Napue v. Illinois*, 360 U.S. 264, 269. (1959). Knowledge of a police officer is reasonably imputed to the State. *People v. Rish*, 344 Ill. App. 3d 1105, 1115-16 (3d Dist. 2003). "[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *U.S. v. Agurs*, 427 U.S. 97, 103 (1976) (footnote omitted). Ricks' affidavit supports two instances of State witness perjury.

The first instance of perjured testimony involves Ricks's lie about his motive for testifying. At trial, Ricks testified that he had not been promised anything in exchange for his testimony, and that his sole motive for taking the stand was to "see justice done." (R. 332, C. 166, 179) In his affidavit, Ricks said his testimony

had not been true. In fact, he did ask for help and Akin responded that "he would see what he could do" to get him a lesser sentence and get him into a work release program. (C. 307) Ricks said he received work release after only serving 2.5 years of a 10-year sentence. (C. 307, 308) In addition, Flournoy supported this allegation with testimony from he federal parole revocation hearing, held four months after his arrest in this case, where Akin testified that Ricks asked for help on his armed robbery charge. (C. 165-66, 294-95) The state's attorney who prosecuted Flournoy was present at that hearing, and was thus aware of Akin's testimony, but did not speak up at Flournoy's trial. (R. 166)

The appellate court found that Flournoy could not establish "cause" for this claim where he was aware of the information from the parole revocation hearing when he filed his first petition. *Flournoy*, 2022 IL App (1st) 210587-U, at ¶54. But Flournoy was *not* aware that Detective Akin promised to see what he could to help Ricks secure a lesser sentence. *Napue v. Illinois*, 360 U.S. 264, 267 (1959) (where witness testified he had not been promised consideration, but in fact the prosecutor promised to help do what he could to reduce the witness's sentence, defendant was denied due process).

The next instance involved Ricks's testimony that Flournoy admitted he was the shooter. As outlined above, Ricks recanted his trial testimony that Flournoy himself admitted he was the shooter. He fabricated his statement that Smith told him that Flournoy had admitted the shooting to him immediately after it happened and told this to Akin. (C. 306) This is corroborated by Akin's testimony at Flournoy's parole revocation hearing that the only knowledge Ricks had of the shooting was what Smith had told him. (C. 296-97) Ricks swore in his affidavit that he changed

his story and said that Flournoy admitted the shooting directly to him after Akin told him that would be the only way Flournoy could be prosecuted. (C. 307)

The appellate court held that Flournoy failed to show that the State was aware of this perjury at the time of trial, and therefore, was under no obligation to disclose any information. *Flournoy*, at ¶ 53. On the contrary, Akin, who was the lead detective in this investigation, was, according to Ricks's affidavit, the origin of his perjury. Akin was a State witness who testified that Ricks contacted him and told him that Smith had made admissions that he and Flournoy had committed the crime together. (R. 562, 569) Under these circumstances, the prosecution cannot escape its duty under *Brady* by contending that the suppressed evidence was known only to a police investigator and not to the prosecutor at trial. *Kyles v. Whitley*, 514 U.S. 419, 438 (1995); *People v. Vasquez*, 313 Ill. App. 3d 82, 97 (2000)

Moreover, contrary to the reviewing court's order, the failure of the State to disclose this evidence was prejudicial. Akin and Ricks both testified that Smith provided information about the murders, but the jury did not hear Smith's statements as they would have been hearsay. (R. 562) However, Ricks testified that Flournoy actually admitted to the offense. This was the only purported admission by Flournoy, as he made no admissions to police. "[A]confession is the most powerful piece of evidence the State can offer, and its effect [on the trier of fact] is incalculable." *People v. R.C.*, 108 Ill. 2d 349, 356 (1985); *People v. Davis*, 393 Ill. App. 3d 114, 133-34 (1st Dist. 2009) *see also People v. St. Pierre*, 122 Ill. 2d 95, 114 (1988) (stating that the erroneous admission of a confession is rarely harmless error). In his affidavit, Ricks disavowed Flournoy's admission and swore that he made it up at Akin's direction. This new information would have undercut the purported admission, and in all probability, resulted in a different verdict.

C. Conclusion

Johnny Flournoy's successive petition made a *prima facie* showing of cause and prejudice that the State committed a *Brady* violation, and knowingly suborned perjured and/or fabricated testimony in his trial. When this claim is juxtaposed against the trial evidence, Johnny Flournoy's petition and supporting documents make an adequate showing of both cause and prejudice sufficient to warrant granting leave to file his successive post-conviction petition. As such, this Court should reverse the appellate court's ruling which affirms the trial court order denying leave to file, and should remand the cause for second-stage proceedings.

IV.

Johnny Flournoy's Petition Made a *Prima Facie* Case that He was Denied the Effective Assistance of Trial Counsel Based on Information Provided by Elizabeth Barrier that Flournoy's Trial Counsel Failed to Interview Her, When She Could Have Provided Exculpatory Evidence, and Misrepresented to the Trial Court that He Had Contacted and Spoken with Her.

In addition to his other claims, Johnny Flournoy argued that Elizabeth Barrier's affidavit supports a claim that trial counsel was ineffective. Just like his due process claims, this claim also meets the cause and prejudice test to survive the leave-to-file stage. 725 ILCS 5/122-1(f); *People v. Pitsonbarger*, 205 Ill. 2d 444, 462 (2002). A criminal defendant has the right to effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments to the United States Constitution. U.S. Const. amends. VI, XIV; Ill. Const. 1970, art. I, § 8; *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). To establish ineffective assistance of counsel in a successive post-conviction petition at the leave-to-file stage, a petitioner must make a *prima facie* showing of counsel's deficient performance and a reasonable probability of a different outcome. *People v. Baily*, 2017 IL 121450, ¶ 24.

Whether defense counsel was ineffective for failing to interview and/or call a defense witness is determined by the value of the evidence that was not presented at trial and the closeness of the evidence that was presented. *People v. Morris*, 335 Ill. App. 3d 70, 79 (1st Dist. 2002). Attorneys have an obligation to explore all readily available sources of evidence that might benefit their clients. *Id*. Failure to conduct investigation and develop a defense can amount to ineffective assistance. *Id*.; *see also People v. Wright*, 111 Ill. 2d 18 (1986); *People v. McCarter*, 2021 IL App (1st) 181714-U, ¶46.

In this case, as explained in Argument II, the information contained in Barrier's affidavit was not available to Flournoy at the time of trial or when he filed his first petition. Despite being part of the initial police investigation, she did not testify at trial. Prior to trial, she drove to Florida and was not in contact with anyone. (C. 312) Trial counsel would have been Flournoy's only resource to find Barrier. And, contrary to trial counsel's representations, Barrier attested in her affidavit that counsel did not speak with her at all before trial. (C. 312) Therefore, Flournoy's petition established that counsel's performance was unreasonable as well as cause for not bringing the claim sooner.

In her affidavit, Barrier swore that Reggie Smith admitted to her that he committed the shooting when he came to her home with cocaine and heroin "one night" and said that "*he* had robbed a used car dealer, and that *he* had shot the car dealer in front of his safe." (C. 311) He never mentioned Johnny Flournoy, as Barrier had never heard of him. (R. 311) Barrier said that she may not have told police the truth when they interviewed her because she was afraid of Smith. (C. 312) She also said that at the time of Flournoy's trial, she had slipped back into addiction, moved to Florida, and was a vagrant. Trial counsel did not and could not have contacted her through her parents because her parents did not know where she was. (C. 312)

The appellate court held, as it did when discussing the actual innocence claim, that Flournoy could not have been prejudiced by the failure to call Barrier because Flournoy was charged with felony murder and Barrier's testimony would not have cleared him of that charge. *Flournoy*, 2022 IL App (1st) 210587-U at ¶66. On the contrary, and as previously asserted, this holding defies reasib considering

the State's theory of the case. The State tried the case on the theory that Flournoy committed these crimes alone and all of its evidence was focused in that direction. The jury would have had no basis on which to find that Smith and Flournoy committed the crime together. The information in Barrier's affidavit indicates that Reggie Smith confessed to the shooting on his own. Taking that to be true, especially in light of the information in Ricks's affidavit – that Flournoy did *not* confess and Smith did *not* tell him he committed this offense with Flournoy – there is a reasonable probability that the result at trial would have been different.

The reviewing court also assumed that defense counsel did not call Barrier as a matter of trial strategy where she may have been unreliable and her testimony would have been hearsay. *Flournoy*, 2022 IL App (1st) 210587-U at ¶ 67. First, at first stage proceedings, speculation about counsel's strategy based on Barrier's credibility is not a consideration when determining whether to advance a petition to second stage. *Pitsonbarger*, 205 Ill. 2d at 455.

Nor is potential admissibility is not a consideration when evaluating the new evidence. *People v. Robinson,* 2020 IL 123849, at ¶¶ 73, 77-79; Ill. R. Evid. 1101(b)(3) (Rule against hearsay did not apply to determination whether witness's affidavit, in which she averred that someone other than defendant had confessed to killing victim, was sufficient to raise colorable claim of actual innocence). What is dispositive is trial counsel's failure to interview her despite his representations to the contrary. (R. 1178-79, C. 312) Indeed, trial counsel was disbarred for the same exact type of infraction. (C. 321-24) Therefore, this petition must be advanced to further post-conviction proceedings.

Elizabeth Barrier's affidavit establishes a *prima facie* case that Johnny Flournoy's trial attorney was ineffective for never even interviewing her despite knowing that Reginald Smith spoke with her about the shooting. This violation is all the more galling given that trial counsel lied to the trial court about interviewing Barrier in order to cover his own tracks. Thus, Johnny Flournoy's successive post-conviction petition made a substantial showing that trial counsel was ineffective. When this claim is viewed, along with the *Brady* violation, as juxtaposed against the trial evidence, Johnny Flournoy's petition and supporting documents make an adequate showing of both cause and prejudice sufficient to warrant granting leave to file his successive post-conviction petition. As such, this Court should reverse the appellate court's order vacating the denial of leave to file his petition, and should remand the cause for second-stage proceedings with the appointment of counsel.

CONCLUSION

For the foregoing reasons, Johnny Flournoy respectfully requests that this Court reverse the appellate court's affirmance of the denial of leave to file his petition, and remand this cause for further proceedings with the appointment of counsel.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is forty-five pages.

/s/Maria A. Harrigan
MARIA A. HARRIGAN
Assistant Appellate Defender

APPENDIX TO THE BRIEF

Johnny Flournoy, No. 129353

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

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Respondent, v. JOHNNY FLOURNOY, Defendant-Petitioner.	)	Successive Post-Conviction 92 CR 07449-01 Hon. James Linn Judge Presiding

ORDER

Petitioner, Johnny Flournoy, seeks post-conviction relief from the judgment of conviction entered against him on September 22, 1994. Following a jury trial, petitioner was found guilty of murder and armed robbery. Petitioner was subsequently sentenced to life imprisonment in the Illinois Department of Corrections. As grounds for post-conviction relief, petitioner claims: (1) actual innocence based on newly discovered evidence; (2) the State fabricated inculpatory evidence against him and concealed exculpatory and/or impeachment evidence, in violation of petitioner's right to due process of law; (3) the State knowingly used material, perjured, testimony in violation of petitioner's right to due process of law; and (4) ineffective assistance of trial counsel.

BACKGROUND

Petitioner's conviction stems from his involvement in the armed robbery and murder of Samuel Harlib and his used car dealership. On November 14, 1991, Harlib and another man

named Raphael Mendoza were working at Ron/Mar Auto sales, a used car lot located at 3845 North Western Avenue in Chicago, Illinois. Shortly after 5:30pm, Mendoza testified that he and Harlib were in the sales office when he noticed a man looking at a car. After Mendoza went to wait on the man, the man told him that he was interested in a Regency, and that he had $600 for a down payment. Mendoza testified that although it was getting dark and slightly raining, the lights were on, and he was standing only two or three feet away from the man. Harlib and the man later went into the office while Mendoza opened the car with a slim jim. Mendoza returned to the office, where the man ordered him to sit down. The man was holding a silver revolver. He later fired two shots at Harlib, grabbed two stacks of money from the desk, and took steps towards the door. The man then pointed his gun at Mendoza and fired two shots at him as well, but he missed, and the bullets hit the wall. After the man left, Mendoza called 911 and the police arrived a few minutes later. Mendoza told the police what happened and gave the following description of the offender: the man was 5'8" to 5'9" tall, 175 to 180 pounds, in his late 20's or early 30's, and was wearing a jean jacket, jean pants, and a snow hat. Harlib later died from his injuries. The day after the murder, a man named Reginald Smith came to the lot to make a payment on a car he had previously purchased, even though it was not his regular payment date. He asked Steven Spritz, Harlib's partner, what was happening, and Spritz told him that Harlib had been shot and killed during a robbery the previous day.

At the time of early December 1991, Reginald Smith was incarcerated at Cook County Jail for an armed robbery. He and one of his co-defendants, Romano Ricks, were placed in a lineup for Harlib's murder and armed robbery on December 5. The lineup was viewed by Mendoza, the only witness to the shooting. Mendoza did not identify anyone in the lineup as Harlib's shooter, but he did say that Smith was an acquaintance of Harlib's and that he had

bought a car from him and would come to the lot and make payments. Chicago Police Detective Lawrence Akin spoke with Smith about his conversation with Mendoza but did not discuss the incident with Ricks. He only told Ricks that they were conducting an investigation, gave him his card, and told him to call him if he heard anything regarding the case.

In February 1992, Romano Ricks contacted Detective Akin from Cook County Jail and said he would like to discuss Harlib's murder. Then, on March 6, 1992, Ricks signed a handwritten statement regarding the incident. He stated that he was awaiting trial on an unrelated matter when he and Reginald Smith were taken to Area 6 to stand in the lineup. Ricks stated that while they were there, he asked Smith why they were in that lineup, and Smith replied that it was for a murder that he and "Johnny" did. Ricks stated that he knew Smith was referring to petitioner, Johnny Flournoy. It was after Ricks contacted Detective Akin that petitioner became a suspect. Petitioner was placed in a lineup in March 1992 and Mendoza identified him almost immediately, shouting "That's him. That's him. That's the last guy. The last guy on the right is him."

Petitioner was charged with multiple counts of murder, attempted murder, armed robbery, armed violence, aggravated discharge of a firearm, aggravated unlawful restraint, unlawful restraint, and unlawful use of a weapon by a felon. Ricks later testified at both petitioner's grand jury hearing and trial regarding his statement and knowledge of the shooting. A jury later found petitioner guilty of first-degree murder and armed robbery on September 22, 1994. The jury acquitted petitioner of attempted murder. He was sentenced to life imprisonment on November 9, 1994.

PROCEDURAL HISTORY

On direct appeal, petitioner claimed that: (1) his conviction should be reversed because the evidence was insufficient to convict him beyond a reasonable doubt; (2) the trial court committed reversible error by allowing Ricks to testify to his admissions regarding the crimes in this case, by failing to give the jury a limiting instruction, and by allowing certain comments in the State's closing arguments; and (4) the questioning of his wife and step-daughters about their failure to testify before the grand jury and speak to an investigator was inappropriate because the State argued their silence demonstrated that they were lying, he was prejudiced by these errors, and further, that they required a reversal of his conviction and a new trial. On November 15, 1996, the First District Appellate Court affirmed his conviction. The Illinois Supreme Court denied petitioner's petition for leave to appeal on April 2, 1997.

Petitioner filed his first *pro se* post-conviction petition on February 13, 1997. In that petition, petitioner claimed: (1) the State used perjured testimony to obtain the convictions; (2) the State suppressed evidence favorable to the defense; and (3) he received ineffective assistance of counsel where: (a) counsel withdrew a motion to suppress eyewitness identification testimony; (b) counsel withdrew a motion to quash arrest; (c) counsel failed to obtain a parole revocation hearing tape which counsel could have used to impeach Romano Ricks and Detective Akin; (d) counsel failure to conduct adequate discovery; (e) counsel failed to call Elizabeth Barrier as a witness at trial; (f) counsel failed to call Reginald Smith as a witness at trial; (g) counsel was unfamiliar with the number of peremptory challenges available in a capital case; (h) counsel failed to make a *Batson* objection; and (i) counsel failed to have an identification expert testify at trial. Petitioner's *pro se* petition was dismissed at the first stage on April 10, 1997. The First District Appellate Court affirmed the dismissal of petitioner's *pro se* petition on June 30, 1999.

Petitioner's petition for rehearing was also denied. On February 2, 2000, the Illinois Supreme Court denied petitioner's petition for leave to appeal.

Petitioner filed the instant successive petition on February 22, 2021.

LEGAL STANDARD

The Post-Conviction Hearing Act ("Act") enables a petitioner to seek collateral relief for a substantial violation of rights under the Illinois or United States Constitutions. 725 ILCS 5/122-1 et seq.; *People v. Allen*, 2015 IL 113135, ¶ 20. The Act sets forth three stages of review. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). At the second stage, the court must determine whether the petition and any accompanying documents make a substantial showing of a constitutional violation. *Id.* at 246. When making this determination, the trial court must assume that the allegations in affidavits or other documents are true. *People v. Ward*, 187 Ill. 2d 249, 255 (1999) (citing *People v. Caballero*, 126 Ill. 2d 248, 259 (1989)). If the petitioner makes a substantial showing of a constitutional violation, the petition is advanced to the third stage, where the court conducts an evidentiary hearing. 725 ILCS 5/122-6 (LEXIS 2010); *People v. Johnson*, 191 Ill. 2d 257, 268 (2000). A substantial showing of a constitutional violation is "a measure of legal sufficiency of the petition's well-pled allegations of a constitutional violation, which if proven at an evidentiary hearing, would entitle petitioner to relief." *People v. Domagala*, 2013 IL 113688, ¶ 35. Unsupported, conclusory allegations in a petition are not sufficient to require a post-conviction evidentiary hearing under the Act. *People v. Pierce*, 48 Ill. 2d 48, 50 (1971); *People v. Hysell*, 48 Ill. Ed 522, 527 (1971). Post-conviction review is limited to constitutional issues that were not and could not be previously raised on direct appeal or in prior post-conviction proceedings. *People v. McNeal*, 194 Ill. 2d 135, 140 (2001); *People v. King*, 192 Ill. 2d 189, 192 (2000). Accordingly,

rulings on issues that were previously raised at trial or on direct appeal are barred by *res judicata*, and issues that could have been raised, but were not, are waived. *People v. Davis*, 2014 IL 115595, ¶ 13.

Additional barriers to a hearing exist when a petition is successive. The Act contemplates the filing of only one petition. *People v. Bailey*, 2017 IL 121450, ¶ 15. Any claims that could have been included but were omitted from an initial petition are forfeited. *People v. English*, 2013 IL 112890, ¶ 22. As previously stated, this is petitioner's third successive petition for post-conviction relief. The Post-Conviction Hearing Act generally limits a petitioner to the filing of but one petition. *People v. Holman*, 191 Ill. 2d 204, 209 (2000). However, to bring a new claim in a successive petition, a petitioner must demonstrate cause—an objective factor that impeded inclusion of the claim in the initial petition—and resulting prejudice—that the new claim renders the petitioner's conviction or sentence a violation of due process. 725 ILCS 5/122-1(f); *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002). Indeed, the legislature in its amendment to section 122-1 of the Act, 725 ILCS 5/122-1 (West 2003), mandated:

> (f) Only one petition may be filed by a petitioner under this article without leave of the court. Leave of court may be granted only if a petitioner demonstrated cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure.

Moreover, in adopting the "cause and prejudice test," subsection (f) codifies the holding of the Illinois Supreme Court in *People v. Pitsonbarger*, 205 Ill. 2d 444 (2002). That is, as the statute provides:

> (1) a prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings; and
> (2) a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process.

ANALYSIS

I. Cause and Prejudice

As noted, this is petitioner's second petition for post-conviction relief. The Illinois Legislature, in its amendment to section 122-1 of the Act, 725 ILCS 5/122-1 (West 2003), mandated:

> (f) Only one petition may be filed by a petitioner under this article without leave of the court. Leave of court may be granted only if a petitioner demonstrated cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure.

Moreover, in adopting the "cause and prejudice test," subsection (f) codifies the holding of the Illinois Supreme Court in *People v. Pitsonbarger*, 205 Ill. 2d 444 (2002). That is, as the statute provides:

> (1) a prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings; and
>
> (2) a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process.

In the present case, petitioner has failed to demonstrate that the rule prohibiting successive petitions should be relaxed. Although the factual assertions relied upon by petitioner in the instant petition were available to him at the time his initial petition was filed, he has failed to identify any legitimate objective factors which impeded his efforts to raise the claims in the earlier proceedings besides his incarceration and indigency. It is further apparent that petitioner has failed to demonstrate that any prejudice inured from failure to assert these claims earlier. Had these claims been presented in the initial petition, there is scant probability that petitioner would have prevailed.

The petitioner bears the burden in a post-conviction proceeding to establish a substantial deprivation of his constitutional rights. *People v. Coleman*, 206 Ill. 2d 261, 277 (2002). While a *pro se* petitioner seeking post-conviction relief is "not expected to construct legal arguments, cite legal authority, or draft [his] petition as artfully as would counsel," the *pro se* petitioner must plead sufficient facts to present the "gist" of a valid constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). Petitioner has suffered no prejudice by not including these claims in his initial petitions. Conclusively, petitioner makes no showing that the absence of the claims now presented so infected the trial that his resulting conviction violated due process.

II. Affidavit of Elizabeth Barrier (Foster)

Petitioner first attaches an affidavit from Elizabeth Barrier (now Foster by marriage). The affidavit is signed, dated, and notarized May 30, 2018. Petitioner claims that the affidavit of Elizabeth barrier constitutes: (1) newly discovered evidence of actual innocence; and (2) newly discovered evidence that petitioner was denied his constitutional right to effective assistance of counsel.

In her affidavit, Barrier states that while living at a halfway house during an inpatient rehab program in Chicago, she met Reginald ("Reggie") Smith. She describes him as a Black male who was about 5'8" and 180 lbs., with a dark complexion, short curly hair, and a mustache. She states that in late 1991, Reggie showed up at her apartment with drugs. It was then that Reggie told Barrier that he had robbed a used car dealership, and that he had shot the car dealer in front of his safe. Barrier states that she kicked Reggie out of her apartment because she was scared of what he had said. She explains that she told another friend, John, about what Reggie had told her. John then contacted the police and told them what Barrier knew about the shooting. The police questioned Barrier, but she states that to the best of her memory, she

refused to answer any questions. This was because she did not want to become involved in an investigation, as she had relapsed, and further, she feared Reggie.

Barrier goes on to say that she understands there is a police report that supposedly reflects what she told police about Reggie's statement. However, she states that the report is not consistent with her memory of that day. This is because she recalls refusing to tell the police anything. She goes on to say that if the police report does accurately reflect what she told police, then she did not tell the full truth, because Reggie specifically told her he had robbed the car dealership and shot the car dealer. Barrier states that shortly after she spoke with police, she relapsed back into her addiction and drove to Florida and lived as a vagrant. She states that she never spoke with a lawyer representing petitioner, nor had she heard of petitioner or knew that he was convicted of the murder Reggie confessed to her. Barrier states that she has reviewed a transcript in which petitioner's attorney, Joseph McCaffery, told a judge he located her in Florida through her parents and that he was prepared to call her as a witness. She states that these statements are false, because: (1) her parents did not know where she was; (2) she did not have a phone; and (3) she was never contacted to be a witness.

a. Actual Innocence Based on Newly Discovered Evidence

Petitioner first claims actual innocence based on newly discovered evidence based on the affidavit of Elizabeth Barrier.

Fundamental fairness requires that an exception to the cause and prejudice test is to be made in a showing of actual innocence. *People v. Pitsonbarger*, 205 Ill. 2d 444, 459, 793 N.E.2d 609 (2002). The Illinois Supreme Court in *People v. Washington*, 171 Ill. 2d 475, 489, 665 N.E.2d 1330 (1996), first recognized that "[t]he wrongful conviction of an innocent person violates due process under the Illinois Constitution, and, thus, a freestanding claim of actual innocence is

cognizable under the Post-Conviction Hearing Act." *People v. Barnslater*, 373 Ill. App. 3d 512, 519, 869 N.E.2d 293 (1st Dist. 2007). There is a distinction, however, between being found "not guilty" and being "actually innocent." The court in *People v. Savory*, 309 Ill. App. 3d 408, 414-415 (3d Dist. 1999), defined, "'actual innocence mean[s] 'total vindication,' or 'exoneration,'" not that evidence at trial was insufficient to convict beyond a reasonable doubt. *Washington*, 171 Ill. 2d at 479; *Barnslater*, 373 Ill. App. 3d at 520.

In examining petitioner's claim of actual innocence, this court follows the requirements laid out in *Washington* that "the supporting evidence be new, material, noncumulative and, most importantly, 'of such a conclusive character' as would 'probably change the result on retrial.'" *Washington*, 171 Ill. 2d at 489, quoting *People v. Molstad*, 101 Ill. 2d 128, 134 (1984). In *People v. Collier*, the Illinois Supreme Court was extremely clear on what qualifies as newly discovered evidence. "Among the touchstones for judging claims of actual innocence is the requirement that the evidence adduced by the defendant must first be "newly discovered." *Collier*, 387 Ill. App. 3d 630, 636 (1st Dist. 2008). In other words, this means it must be evidence "that was not available at a defendant's trial and that he could not have discovered sooner through due diligence. The evidence must also be material and noncumulative. In addition, it must be of such conclusive character that it would probably change the result on retrial." *Id.* at 636, quoting *People v. Morgan*, 212 Ill. 2d 148, 154 (2004) and *People v. Barrow*, 195 Ill. 2d 506, 540-41 (2001). Evidence is not newly discovered if it presents facts already known to the defendant at trial or prior to trial. *People v. Coleman*, 381 Ill. App 3d 561, 568 (1st Dist. 2008).

Generally, evidence fails to meet the definition of "newly discovered" if the source of those "facts may have been unknown, unavailable, or uncooperative," as long as the facts are already known to the petitioner at, or prior to, trial. *Id.* Due diligence requires that there is "at least

some level of deductive reasoning in an active effort to discover evidence based on the knowledge and information already possessed by the litigants." *Id.* at 526, quoting *Bradley v. State*, 450 So. 2d 173, 176 (Ala. Crim. App. 1983). Furthermore, the evidence being relied upon to support a free-standing claim of actual innocence cannot also be used to assert a constitutional violation with respect to the petitioner's trial. *People v. Brown*, 371 Ill. App. 3d 972, 984 (Ill. App. 2007).

Here, petitioner alleges that this affidavit constitutes newly discovered evidence because he could not have located or contacted Barrier, nor could he have obtained an affidavit from her, prior to his initial *pro se* filing due to his incarceration and indigence. He asserts that the affidavit establishes that Reginald Smith admitted to Barrier that he shot and killed the victim, and it is materially different than the statements attributed to her in the police report. Further, he states that this affidavit is new evidence because Barrier was unavailable to testify at trial. Petitioner also claims that Smith's statements to Barrier have indicia of reliability because Smith and Barrier were friends, Smith's statement to Barrier was made the night of the shooting, the statement was made spontaneously, and Smith fits the description Mendoza gave to the police the night of the shooting.

Unfortunately, petitioner has not formed a matured claim of newly discovered evidence. As stated above, evidence does not meet the definition of "newly discovered" if the source of those "facts may have been unknown, unavailable, or uncooperative," as long as the facts are already known to the petitioner at, or prior to, trial. Here, Barrier's whereabouts while living in Florida struggling with her addiction were unknown, making her unavailable at the time of trial. Further, even if the information in Barrier's affidavit is considered "newly discovered," it is not material and non-cumulative, and further, it does not raise the probability that in the light of the

new evidence, it is more likely than not that no reasonable juror would have convicted petitioner. This is because the content and reliability of the affidavit is precarious and questionable at best, and it is purely circumstantial. Barrier was a self-titled addict at the time her alleged conversation with Smith occurred, and the conversation also occurred over 20 years ago. Further, although she claims Smith told her the night of the shooting that he committed the crime, that statement would constitute indirect evidence and is purely circumstantial. Lastly, Barrier did speak to the police regarding the shooting before and had a chance to tell them what Reggie told her; however, she failed to mention anything said by Reggie at that time, which is reflected in the police report. Even so, the affidavit of Barrier would not be enough to change the result on retrial, especially when coupled with the evidence against petitioner presented at trial, such as Mendoza's immediate eyewitness identification upon seeing petitioner in a lineup, Ricks' previous handwritten statement to police naming petitioner as the shooter, Ricks' grand jury and trial testimony, and petitioner matching Mendoza's physical description of the shooter. Courts have made clear that "[a] claim of actual innocence is not the same as a claim of insufficiency of the evidence or reasonable doubt or mere impeachment of trial witnesses, but a claim of vindication or exoneration. *People v. Gonzalez*, 2016 IL App (1st) 141660, ¶ 28. The overwhelming amount of evidence presented against petitioner at trial therefore refutes petitioner's actual innocence claim.

Where, as here, a defendant's successive petition makes a claim of actual innocence, such a claim may only be considered if the evidence in support of the claim was newly discovered, material to the issue and not merely cumulative of other trial evidence, and of such a conclusive character that it probably would change the result on retrial. *People v. Ortiz*, 235 Ill. 2d 319, 333-34 (2009). Petitioner fails to satisfy these elements. Conclusively, petitioner's claim of

actual innocence based on what he believes to be newly discovered evidence through Elizabeth Barrier's affidavit fails because it does not meet the required standards. Thus, this claim is dismissed.

b. Ineffective Assistance of Counsel

Petitioner next claims ineffective assistance of trial counsel based on the newly discovered evidence he contends is contained in Elizabeth Barrier's affidavit. Petitioner asserts that he was denied effective assistance of counsel where his trial counsel, Joseph P. McCaffery, failed to conduct a reasonable investigation into Elizabeth Barrier and further failed to interview and subpoena her.

In examining petitioner's claims of ineffective assistance of counsel, this court follows the two-pronged test of *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under this standard, petitioner must show that counsel's representation fell below an objective standard of reasonableness, and that but for this deficiency, there is a reasonable probability that counsel's performance was prejudicial to the defense. *People v. Hickey*, 204 Ill. 2d 585, 613 (2001). "Prejudice exists when 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *People v. Erickson*, 183 Ill. 2d 213, 224 (1998) (citations omitted). A petitioner's failure to make the requisite showing of either deficient performance or sufficient prejudice defeats a claim of ineffectiveness. *People v. Morgan*, 187 Ill. 2d 500, 529-30 (1999).

Significantly, effective assistance of counsel in a constitutional sense means competent, not perfect, representation. *People v. Easley*, 192 Ill. 2d 307, 344 (2000). Notably, courts indulge in the strong presumption that counsel's performance fell within a wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 690 (2001). Moreover, "the fact that another

attorney might have pursued a different strategy is not a factor in the competency determination." *People v. Palmer*, 162 Ill. 2d 465, 476 (1994) (citing *People v. Hillenbrand*, 121 Ill. 2d 537, 548 (1988)). Further, counsel's strategic decisions will not be second-guessed. Indeed, to ruminate over the wisdom of counsel's advice is precisely the kind of retrospection proscribed by *Strickland* and its progeny. *See Strickland*, 466 U.S. at 689 ("[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight"); *see also People v. Fuller*, 205 Ill. 2d 308, 331 (2002) (issues of trial strategy must be viewed, not in hindsight, but from the time of counsel's conduct, and with great deference accorded counsel's decisions). Challenges to trial counsel's representation ordinarily are not cognizable under the Act unless the claim regards a matter outside the trial record. *People v. Britz*, 174 Ill. 2d 163, 178-79 (1996); *People v. Coleman*, 267 Ill. App. 3d 895, 898-99 (1st Dist. 1994).

In general, whether to call a particular witness "is a matter of trial strategy." *People v. Flores*, 128 Ill. 2d 66, 85-6 (1989) (citations omitted). Such a claim cannot form the basis for a claim of ineffective assistance of counsel unless the trial strategy is so unsound that counsel can be said to have entirely failed to conduct any meaningful adversarial testing of the State's prosecution. *People v. Jones*, 323 Ill. App. 3d 451, 457 (1st Dist. 2001). "When the defendant attacks the competency of his counsel for failing to call or contact witnesses, he must attach to his post-conviction petition affidavits showing the potential testimony of such witnesses and explain the significance of their testimony." *People v. Roberts*, 318 Ill. App. 3d 719, 723 (1st Dist. 2000). Further, counsel's failure to adequately prepare for trial or to conduct adequate investigations may support an ineffectiveness claim. *People v. Witherspoon*, 55 Ill. 2d 18, 21, 302 N.E.2d 3, 4 (1973); *People v. Coleman*, 267 Ill. App. 3d 895, 900, 642 N.E.2d 821, 824 (1st

Dist. 1994). However, "a particular decision not to investigate must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland v. Washington*, 466 U.S. 668, 691, 80 L. Ed. 2d 674, 695, 104 S. Ct. 2052, 2066 (1984). In addition, "to prevail on a claim of ineffective assistance for failure to investigate, petitioner must show that substantial prejudice resulted and that there is a reasonable probability that final result would have been different had counsel properly investigated." *People v. Rush*, 294 Ill. App. 3d 334, 342-43, 689 N.E.2d 669, 674 (5th Dist. 1998).

In the instant matter, petitioner has failed to demonstrate that Barrier's affidavit constitutes newly discovered evidence of a claim of ineffective assistance of counsel that is material, noncumulative, and of such conclusive character that it would probably change the outcome on retrial for the same reasons stated in the previous section. Further, petitioner does not even meet the requirements for an ineffective assistance of counsel claim because he fails to satisfy either prong of *Strickland*. Petitioner's failure to make the requisite showing of either deficient performance or sufficient prejudice defeats his claim of ineffectiveness. As stated above, counsel's decision not to investigate must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgments. Here, counsel's decision to not investigate into Elizabeth Barrier was not unreasonable under the circumstances. As she said herself in her affidavit, at the time of petitioner's trial, she was living as a vagrant in Florida and had relapsed back into her addiction. For those reasons alone, she was unavailable and would have been extremely hard to track down. Further, she was out of state – making her even more difficult of a witness to compel to come testify. Thus, counsel's decision not to look into Barrier is not a strategy is so unsound that counsel can be said to have entirely failed to

conduct any meaningful adversarial testing of the State's prosecution. Further, petitioner cannot show that substantial prejudice resulted from the absence of Barrier's testimony, and that there is a reasonable probability that final result would have been different had counsel properly investigated her. It is unlikely that her testimony would have changed the result at trial. Petitioner thus cannot show that counsel's representation fell below an objective standard of reasonableness, and that but for this deficiency, there is a reasonable probability that counsel's performance was prejudicial to the defense.

Conclusively, petitioner's claim of ineffective assistance of counsel based on what he believes to be newly discovered evidence through Elizabeth Barrier's affidavit fails because petitioner has failed to satisfy either prong of *Strickland*. Thus, this claim is dismissed.

III. Affidavit of Romano Ricks

Petitioner next attaches an affidavit from Romano Ricks. The affidavit is signed, dated, and notarized August 9, 2018. Petitioner claims that the affidavit of Romano Ricks constitutes: (1) newly discovered evidence of actual innocence; (2) evidence that the State fabricated evidence against him and concealed exculpatory and impeachment evidence, in violation of his right to due process of law; and (3) evidence that the State knowingly used material, perjured testimony, in violation of his right to due process of law.

In his affidavit, Ricks states that he is currently incarcerated at the St. Louis Correctional Facility in St. Louis, Michigan. He explains that he met petitioner in November 1991 through a mutual acquaintance, Nate Neal. Ricks states that a few weeks later, he traveled with Neal and some over friends from Detroit to Chicago for petitioner's wedding. On November 22, 1991, Ricks states that he participated in an armed robbery of a grocery store with Reggie Smith and two others. They were all arrested and detained at Cook County Jail. Ricks goes on to say that

several individuals approached him in jail and told him that he should take full responsibility for the robbery, to which he responded that he would not do so. He says that sometime later, he was put in a lineup with Smith. After, Ricks states that he was questioned by Detective Akin about a murder at a used car dealership on the north side of Chicago. During the questioning, Ricks says that Detective Akin told him that the murder occurred during an armed robbery and someone had been shot and killed, and that Smith was involved in the murder. Ricks states that he truthfully responded that he did not know anything about the murder, after which Detective Akin gave him his card and asked that Ricks contact him if he wanted to discuss anything further.

After speaking with Detective Akin, Ricks says that he was jumped and beaten by other inmates in jail. He states that he initially believed that Smith ordered the hit on him because he would not take primary responsibility for the robbery that they were both involved him, so he confronted Smith. Ricks says that Smith denied having any involvement in the beating and told Ricks that petitioner must have ordered it. He explains that he called petitioner and confronted him about the beating, which petitioner denied. After this, Ricks was jumped again. He states that after the second beating, he called Detective Akin and told him he wanted to speak to him regarding the car dealership murder. Ricks says that he told Detective Akin that Smith told him that he had set up the robbery of a car dealer, that he drove petitioner to the car lot to do the robbery, and that petitioner told Smith he shot and killed the car dealer. Ricks explains that he further gave a handwritten statement to a prosecutor summarizing what he told Detective Akin. Ricks says that he then specifically asked Detective Akin if he could help him on his pending robbery case, to which the detective responded that he would see what he could do to get Ricks a lesser sentence. He states that he was later approached by Detective Akins again, who told him they could not bring a case against petitioner unless he testified to his statements. Ricks says this

is when he made up the story about petitioner telling him that he and Smith had a robbed a car dealership and petitioner shot the car dealer. He further testified to these statements both at petitioner's grand jury hearing and at trial.

26 years later, Ricks now says that his statements and testimony at the grand jury hearing and petitioner's trial (that Smith told him he drove petitioner to the car lot, that petitioner told Smith he shot the car dealer during the robbery, and that petitioner also told him he shot the car dealer) are all false. He states that Smith never actually made any statements to him indicating that petitioner was involved, nor did petitioner ever implicate himself to him. Ricks says he gave his handwritten statement and later testimony implicating petitioner because he believed petitioner was the one who ordered the attacks on him at the jail, and he was mad at him, and further, he wanted help on his own pending case. He lastly states that he was sentenced to 10 years for the armed robbery, but "to the best of his recollection," he only served 2.5 years.

a. Actual Innocence Based on Newly Discovered Evidence

Petitioner first claims actual innocence based on newly discovered evidence based on the affidavit of Romano Ricks.

Fundamental fairness requires that an exception to the cause and prejudice test is to be made in a showing of actual innocence. *People v. Pitsonbarger*, 205 Ill. 2d 444, 459, 793 N.E.2d 609 (2002). The Illinois Supreme Court in *People v. Washington*, 171 Ill. 2d 475, 489, 665 N.E.2d 1330 (1996), first recognized that "[t]he wrongful conviction of an innocent person violates due process under the Illinois Constitution, and, thus, a freestanding claim of actual innocence is cognizable under the Post-Conviction Hearing Act." *People v. Barnslater*, 373 Ill. App. 3d 512, 519, 869 N.E.2d 293 (1st Dist. 2007). There is a distinction, however, between being found "not guilty" and being "actually innocent." The court in *People v. Savory*, 309 Ill. App. 3d 408, 414-

415 (3d Dist. 1999), defined, "'actual innocence mean[s] 'total vindication,' or 'exoneration,'" not that evidence at trial was insufficient to convict beyond a reasonable doubt. *Washington*, 171 Ill. 2d at 479; *Barnslater*, 373 Ill. App. 3d at 520.

In examining petitioner's claim of actual innocence, this court follows the requirements laid out in *Washington* that "the supporting evidence be new, material, noncumulative and, most importantly, 'of such a conclusive character' as would 'probably change the result on retrial.'" *Washington*, 171 Ill. 2d at 489, quoting *People v. Molstad*, 101 Ill. 2d 128, 134 (1984). In *People v. Collier*, the Illinois Supreme Court was extremely clear on what qualifies as newly discovered evidence. "Among the touchstones for judging claims of actual innocence is the requirement that the evidence adduced by the defendant must first be "newly discovered." *Collier*, 387 Ill. App. 3d 630, 636 (1st Dist. 2008). In other words, this means it must be evidence "that was not available at a defendant's trial and that he could not have discovered sooner through due diligence. The evidence must also be material and noncumulative. In addition, it must be of such conclusive character that it would probably change the result on retrial." *Id.* at 636, quoting *People v. Morgan*, 212 Ill. 2d 148, 154 (2004) and *People v. Barrow*, 195 Ill. 2d 506, 540-41 (2001). Evidence is not newly discovered if it presents facts already known to the defendant at trial or prior to trial. *People v. Coleman*, 381 Ill. App 3d 561, 568 (1st Dist. 2008).

Generally, evidence fails to meet the definition of "newly discovered" if the source of those "facts may have been unknown, unavailable, or uncooperative," as long as the facts are already known to the petitioner at, or prior to, trial. *Id.* Due diligence requires that there is "at least some level of deductive reasoning in an active effort to discover evidence based on the knowledge and information already possessed by the litigants." *Id.* at 526, quoting *Bradley v. State*, 450 So. 2d 173, 176 (Ala. Crim. App. 1983). Furthermore, the evidence being relied upon

to support a free-standing claim of actual innocence cannot also be used to assert a constitutional violation with respect to the petitioner's trial. *People v. Brown*, 371 Ill. App. 3d 972, 984 (Ill. App. 2007).

Here, petitioner alleges that this affidavit constitutes newly discovered evidence because Ricks did not recant his testimony until 2017, and petitioner – due to his incarceration and indigence – could not have contacted Ricks prior to his initial *pro se* filing. Petitioner further asserts the affidavit establishes that Ricks' previous claim that petitioner was the shooter is fabricated. Petitioner claims it is demonstrated that Rick's affidavit has significant indicia of reliability because: (1) Ricks did not tell Detective Akin that petitioner had made any statements admitting to his involvement in the shooting, but rather he told him that Smith had made inculpatory statements, and therefore, Ricks' failure to disclose petitioner's alleged inculpatory statements to Detective Akin or the felony review prosecutor casts significant doubt on the credibility of both his grand jury and trial testimony; (2) Ricks' admission that he fabricated his testimony in exchange for help on a pending case is consistent with what Detective Akin testified to during petitioner's parole revocation hearing; and (3) Ricks admitted he falsely implicated petitioner partly because he believed petitioner arranged to have another inmate attack him.

Unfortunately, petitioner has not formed a matured claim of newly discovered evidence. Those experienced in the administration of criminal law well know the untrustworthy character of recanting testimony. *People v. Marquis*, 344 Ill. 261 (1931). It is widely held in Illinois that recantation of testimony is regarded as inherently unreliable, and a court will not grant a new trial on that basis except in extraordinary circumstances. *People v. Steidl*, 177 Ill. 2d 239, 685 (1997); *see also People v. Morgan*, 212 Ill. 2d 148 (2004). Here, the reliability of Ricks' affidavit, and his recantation in general, is not strong. As stated above, Ricks contacted

Detective Akins back in 1992 and gave a handwritten statement indicating that Smith told him that he had set up the robbery and drove petitioner to the car lot to do the robbery, and that petitioner shot the car dealer. He further freely gave testimony at the grand jury hearing and petitioner's trial, again naming petitioner as the shooter. Ricks is now claiming in his affidavit over 20 years later that he made up this story and fabricated his testimony because he was mad at petitioner and wanted help on his pending robbery case. This renders the recantation both suspect and inherently unreliable. Next, in terms of Ricks' alleged motive to lie about petitioner's involvement, there is no concrete evidence that his previous testimony implicating petitioner actually helped Ricks in terms of his pending robbery conviction, as Ricks himself cannot even confidently recall how much time of that sentence he served.

Even if the information in Ricks' affidavit can be considered "newly discovered," it is not material or non-cumulative, and further, it does not raise the probability that in the light of the new evidence, it is more likely than not that no reasonable juror would have convicted petitioner. This is because the content and reliability of the affidavit is questionable and shaky at best, due to the fact that it is solely recantation of previous testimony. As previously mentioned, the recantation of testimony is regarded as inherently unreliable. *People v. Steidl*, 177 Ill. 2d 239, 685 (1997); *see also People v. Morgan*, 212 Ill. 2d 148 (2004). Ricks' affidavit would not be enough to change the result on retrial, especially when coupled with the evidence against petitioner presented at trial, such as Mendoza's immediate eyewitness identification upon seeing petitioner in a lineup, Ricks' previous handwritten statement to police naming petitioner as the shooter, Ricks' previous grand jury and trial testimony, and petitioner matching Mendoza's physical description of the shooter. Courts have made clear that "[a] claim of actual innocence is not the same as a claim of insufficiency of the evidence or reasonable doubt or mere

impeachment of trial witnesses, but a claim of vindication or exoneration. People v. Gonzalez, 2016 IL App (1st) 141660, ¶ 28. The overwhelming amount of evidence presented against petitioner at trial clearly refutes petitioner's actual innocence claim.

Where, as here, a defendant's successive petition makes a claim of actual innocence, such a claim may only be considered if the evidence in support of the claim was newly discovered, material to the issue and not merely cumulative of other trial evidence, and of such a conclusive character that it probably would change the result on retrial. *People v. Ortiz*, 235 Ill. 2d 319, 333-34 (2009). Petitioner fails to satisfy these elements. Conclusively, petitioner's claim of actual innocence based on what he believes to be newly discovered evidence through Romano Ricks' affidavit fails because it does not meet the standards required. Thus, this claim is dismissed.

b. Newly Discovered Evidence That the State Fabricated Evidence Against Him and Concealed Exculpatory and Impeachment Evidence, in Violation of Petitioner's Right to Due Process of Law

Petitioner next claims that Romano Ricks' affidavit constitutes newly discovered evidence that the State fabricated evidence against him and concealed exculpatory and impeachment evidence, in violation of petitioner's due process rights. Specifically, petitioner alleges that Romano Ricks' affidavit establishes Detective Akin did not disclose to petitioner or his attorney that he had discussed the shooting with Ricks, that Ricks initially denied knowing anything about the crime, that Detective Akin told Ricks he could "help" him regarding his other pending case, and lastly, that Ricks learned information about the shooting from Detective Akin. Petitioner claims that all of this is evidence that the State fabricated and concealed evidence, as this

undisclosed evidence was both favorable and material to petitioner's case and would have impeached Ricks' trial testimony, resulting in petitioner not being convicted.

Firstly, to win relief under the theory of "newly discovered evidence," the evidence adduced by a defendant must actually be newly discovered. *People v. Morgan*, 212 Ill. 2d 148, 155 (2004). That means it must be evidence that was not available at defendant's original trial and that the defendant could not have discovered sooner through diligence. *Id.* The evidence must also be material, noncumulative, and it lastly must be of such conclusive character that it would probably change the outcome on retrial. *Id.* Next, due process prohibits the fabrication or suppression by the State of information or materials favorable to the petitioner and material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *United States v. Bagley*, 473 U.S. 667, 682 (1985). "Moreover, the disclosure obligation applies to impeachment evidence as well." *People v. Pecoraro*, 175 Ill. 2d 294, 305 (1997) (citations omitted). The standard for materiality under *Brady* is whether there is a reasonable probability that disclosure of the evidence to the defense would have altered the outcome of the proceeding. *People v. Sanchez*, 169 Ill. 2d 472, 486 (1996); *Bagley*, 473 U.S. at 682. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Bagley*, 473 U.S. at 682.

In the instant matter, petitioner has failed to demonstrate that Ricks' affidavit constitutes newly discovered evidence of a *Brady* claim that is material, noncumulative, and of such conclusive character that it would probably change the outcome on retrial for the same reasons stated in the previous section. Petitioner has further failed to substantiate his allegation that the State fabricated and concealed evidence against him. Although petitioner has included the affidavit of Romano Ricks, this documentation does not amount to legitimate evidence of concealment or suppression of evidence. As stated above, the recantation of testimony is

regarded as inherently unreliable, and a court will not grant a new trial on that basis except in extraordinary circumstances. *People v. Steidl*, 177 Ill. 2d 239, 685 (1997); *see also People v. Morgan*, 212 Ill. 2d 148 (2004). Ricks' sudden and late recantation of his previous testimony is deemed to be unreliable, for reasons previously stated. Petitioner's *Brady* claim is, thus, nothing more than a bald conclusion. As such, it does not warrant relief.

Conclusively, petitioner's *Brady* claim based on what he believes to be newly discovered evidence through Romano Ricks' affidavit fails. The attached documentation further does not support the requirements for newly discovered evidence. Thus, this claim is dismissed.

c. Newly Discovered Evidence That the State Knowingly Used Material, Perjured Testimony in Violation of Petitioner's Right to Due Process of Law

Petitioner next claims that Romano Ricks' affidavit constitutes newly discovered evidence that the State knowingly used material, perjured testimony, in violation of petitioner's due process rights. Petitioner contends that his constitutional rights were violated by the perjured testimony of Ricks. Specifically, petitioner alleges that Ricks' affidavit establishes that he not only solicited help from the State in his other pending case, but that Detective Akin told Ricks he would help him. Petitioner claims that this is evidence that the State knowingly used perjured testimony, as it elicited Ricks' testimony knowing his motives for testifying and knowing the testimony would be false.

Firstly, to win relief under the theory of "newly discovered evidence," the evidence adduced by a defendant must actually be newly discovered. *People v. Morgan*, 212 Ill. 2d 148, 155 (2004). That means it must be evidence that was not available at defendant's original trial and that the defendant could not have discovered sooner through diligence. *Id.* The evidence must also be material, noncumulative, and it lastly must be of such conclusive character that it

would probably change the outcome on retrial. *Id.* Next, it is axiomatic that a conviction based upon false testimony offends notions of fundamental fairness. *People v. Jimerson*, 166 Ill. 2d 211, 223 (1995); *Giglio v. United States*, 405 U.S. 150, 153 (1972). Perjury has been aptly characterized as "the mortal enemy of justice." *People v. Shannon*, 28 Ill. App. 3d 873, 878 (1st Dist. 1975). To establish a violation of due process, the prosecutor need not have known that the testimony was false; it is enough that there was knowledge on the part of representatives or agents of the prosecution. *People v. Cihlar*, 111 Ill. 2d 212, 218-19, (1986). However, where the claims of perjury are merely conclusory in nature and not supported by further allegations of specific facts, the petition may be dismissed without an evidentiary hearing. *People v. Ashley*, 34 Ill. 2d 402, 411 (1966). Hence, it is incumbent on petitioner to substantiate his allegations with specific facts which establish the falsity of the trial testimony. *People v. Martin*, 46 Ill. 2d 565, 568 (1970). In the context of a conviction claimed to have been obtained through the use of perjured testimony, the petition must specify the nature of the evidence of perjury, its source, and its availability. *People v. Mitchell*, 123 Ill. App. 3d 868, 878-79 (1st Dist. 1984).

In the instant matter, petitioner has failed to demonstrate that Ricks' affidavit constitutes newly discovered evidence of knowing use of perjured testimony that is material, noncumulative, and of such conclusive character that it would probably change the outcome on retrial for the same reasons stated in the previous section. Petitioner has further failed to substantiate his allegation that the State knowingly used perjured testimony. Although petitioner has included the affidavit of Ricks, this documentation does not amount to legitimate evidence of perjury whatsoever. As stated above, recantation of testimony is regarded as inherently unreliable, and a court will not grant a new trial on that basis except in extraordinary circumstances. *People v. Steidl*, 177 Ill. 2d 239, 685 (1997); *see also People v. Morgan*, 212 Ill. 2d 148 (2004). Indeed,

nothing in the instant petition remotely points to the State's knowing use of perjury. Only an actual, knowing use of perjured testimony will constitute a constitutional violation. *People v. Olinger*, 176 Ill. 2d 326, 345 (1997); *United States v. Bagley*, 473 U.S. 667, 678-80 (1985). Even where a petitioner supports his claim of perjury with specific facts, his conviction will only be set aside if he can establish that the prosecutors knew, or should have known, of the perjured testimony. *People v. Brown*, 169 Ill. 2d 94 (1996). Petitioner's claim of perjury is, thus, nothing more than a bald conclusion. As such, it does not warrant relief.

Conclusively, petitioner's claim that the State knowingly used perjured testimony based on what he believes to be newly discovered evidence through Romano Ricks' affidavit fails. The attached documentation further does not support the requirements for newly discovered evidence. Thus, this claim is dismissed.

CONCLUSION

Based on the foregoing discussion, this Court finds that petitioner's claims have not satisfied the cause and prejudice standard and are otherwise frivolous and patently without merit. Accordingly, leave to file the instant petition is hereby DENIED.

ENTERED: James B. Linn

Honorable James Linn
Circuit Court of Cook County
Criminal Division

DATED: 4/29/21

ENTERED
Judge James B. Linn #1544
APR 30 2021
IRIS Y. MARTINEZ
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL

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

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

v.

JOHNNY FLOURNOY,

Defendant-Petitioner.

Case No. 92 CR 07449-01

NOTICE OF APPEAL

An appeal is taken from the order or judgment described below.

(1) Court to which appeal is taken: Appellate Court of Illinois, First Judicial District.

(2) Name of appellant and address to which notices shall be sent:
Johnny Flournoy
Reg. No. B61265
Lawrence Correctional Center
10930 Lawrence Road
Sumner, Illinois 62466

(3) Name and address of appellant's attorney on appeal:
Office of the State Appellate Defender
203 N. LaSalle, 24th Floor
Chicago, Illinois 60601
Phone: (312) 814-5472
Email: 1stDistrict@osad.state.il.us

(4) Date of judgment or order: April 30, 2021

(5) Offense of which convicted: first-degree murder and armed robbery

(6) Sentence: Natural life

(7) Nature of order appealed from: Defendant-Petitioner appeals the trial court's order denying his motion for leave to file a successive post-conviction petition

Johnny Flournoy

Date: 5/17/21

/s/ Nicholas Curran

Nicholas Curran
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2022 IL App (1st) 210587-U

SECOND DIVISION
December 27, 2022

No. 1-21-0587

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, v. JOHNNY FLOURNOY, Petitioner-Appellant.	)	Appeal from the Circuit Court of Cook County. No. 92 CR 7449 Honorable James B. Linn, Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the judgment of the circuit court denying defendant leave to file a successive postconviction petition on grounds of actual innocence. The "new" evidence is not of such a character that it would be likely to change the result on retrial. Defendant's claim that the State used false evidence against him at trial is barred by the doctrine of *res judicata* and, in any event, defendant cannot show prejudice. Defendant's claim of ineffective assistance of counsel due to counsel's failure to investigate a witness does not entitle him to relief because he cannot show prejudice.

¶ 2 Defendant Johnny Flournoy was convicted of first-degree murder and armed robbery for the 1991 killing of Samuel Harlib and robbery of a used car dealership. Defendant filed a motion

seeking leave to file a successive postconviction petition. In his motion, defendant argues that he has supplied newly discovered evidence which presents a colorable claim of actual innocence. Defendant also argues that he has made a substantial showing that the State used false information to secure his conviction and that his trial counsel was constitutionally ineffective. The circuit court denied defendant's motion for leave to file a successive postconviction petition. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 On November 14, 1991, Samuel Harlib[1] was shot and killed as he was working at a car dealership on the north side of Chicago. At defendant's trial, Harlib's coworker, Raphael Mendoza testified he was present when Harlib was shot and identified defendant as the shooter.

¶ 5 Mendoza testified that he and Harlib were working at Ron/Mar Auto Sales, a used car dealership located at 3845 N. Western Avenue in Chicago. Mendoza and Harlib were in the sales office when they noticed a man outside looking at cars on the lot. Mendoza went outside and talked with the man, who Mendoza later identified to be defendant Johnny Flournoy. Mendoza was only two or three feet away from defendant and was looking at his face as they talked about the car. Mendoza notified Harlib that defendant was interested in one of the cars and had money for a down payment, so the three men talked together near the vehicle.

¶ 6 Harlib and defendant went to the office together while Mendoza did some work to get the car ready. When Mendoza finished getting the car ready, he went to join the other men in the office. As Mendoza walked into the office, defendant was standing inside holding a gun and he ordered Mendoza to sit down. Defendant was alternating between pointing the gun at Mendoza

[1] Defendant refers to the victim as Samuel Harib. The State refers to the victim as Samuel Harlib. "Harlib" is used more prominently in the record and appears to be the correct name, so we have used that name in this order.

and Harlib. Mendoza testified that Harlib lunged at defendant going for the gun, and the gun went off, firing into the floor. Defendant then pointed the gun at Harlib and shot at him twice from close range. Harlib screamed. Defendant grabbed around $1,000 in cash that was sitting on the desk. Defendant then fired multiple shots in Mendoza's direction but did not hit him before fleeing the scene.

¶ 7 Mendoza called 911 and police and an ambulance arrived. Harlib was taken from the scene in the ambulance. Mendoza went with the police to the station to answer some questions and then went to the hospital where he learned that Harlib had died. In his trial testimony, Mendoza repeatedly identified defendant as the person who killed Harlib and expressed no doubts that defendant was the person he encountered at the car dealership the day defendant committed the murder.

¶ 8 Mendoza viewed a physical lineup that included Reginald Smith and another witness who testified at trial, Ramano Ricks. Mendoza did not identify any of the individuals in the lineup as the person who was at the car dealership and shot Harlib. Mendoza did, however, identify Reginald Smith as a person he recognized. Mendoza told detectives that Smith was an acquaintance of Harlib and that Smith had previously purchased a car from their dealership. Mendoza told detectives that Smith sometimes came to the car lot to make payments, but Mendoza confirmed to detectives that Smith was not the person who shot Harlib.

¶ 9 The witness who was included in the lineup, Ramano Ricks,[2] briefly spoke to detectives after the lineup. Detective Lawrence Akin testified that he told Ricks that detectives were conducting an investigation but did not tell him anything about the incident they were

[2] Defendant refers to Ricks as "Romano" Ricks. However, in his affidavit, Ricks states his name as "Ramano," and Ramano is the name used more prominently in the record so we have used that name in this order.

investigating. Detective Akin testified that he gave Ricks his business card and told Ricks to call if he heard anything unusual or out of the ordinary.

¶ 10 Ricks contacted Detective Akin two months later after he was arrested for the robbery of a Jewel food store. Ricks was in Cook County Jail and wanted to be placed in protective custody. Ricks told Detective Akin that after he was in the lineup with Reginald Smith, Smith told him they were in the lineup for a murder that "[Smith] and Johnny did." Ricks knew Smith was talking about defendant, Johnny Flournoy. Smith told Ricks that he and defendant went to the car dealership to commit a robbery and that defendant killed the man working there. Ricks wanted to be placed in protective custody because someone tried to stab him while he was in jail. Ricks believed that defendant may have been behind the attempted stabbing because defendant had urged Ricks to take the fall for the robbery of the Jewel food store, but Ricks refused.

¶ 11 Detective Akin conducted another physical lineup for Mendoza to view, this time including defendant. Detective Akin stated that as soon as he opened the curtain, Mendoza immediately began shouting "that's him, that's him *** The last guy on the right is him" as he identified defendant as the person who killed Harlib.

¶ 12 Ramano Ricks testified at trial. He testified that he met defendant in Detroit a month before the murder, in October 1991. Defendant lent him money. Ricks came to Chicago for defendant's wedding in November 1991. Defendant asked Ricks to pay back the money he had borrowed. When Ricks told defendant he did not have the money, defendant told him he could commit an armed robbery to get the money. Defendant showed Ricks that he was carrying a gun, and defendant told Ricks that he did not have a choice but to commit a robbery to get the money.

¶ 13 Ricks testified that defendant gave him tips on performing an armed robbery and told him not to fire the weapon. Defendant told Ricks about committing a recent armed robbery at a car

dealership and that he fired his weapon at a guy during the course of that robbery. Ricks and Reginald Smith went forward with committing an armed robbery of a Jewel grocery store that day and they were arrested. Ricks and Smith were in custody for that robbery when they were placed in the first lineup that Mendoza viewed in this case.

¶ 14 Defendant presented alibi testimony from his wife, his mother, his stepdaughters, and his boss. The alibi witnesses testified that they knew defendant's whereabouts on the day of the murder and that defendant could not have been the perpetrator. One of his stepdaughters testified she was with defendant at the time of the murder, but they did not go to a car dealership. The State presented impeachment evidence that called into question the veracity of the alibi evidence, including prior statements from the alibi witnesses made to police that they did not know defendant's whereabouts at the exact time of the murder. The jury found defendant guilty of first-degree murder and armed robbery but acquitted him of the attempted murder of Mendoza.

¶ 15 Defendant filed a *pro se* posttrial motion claiming that he received ineffective assistance of counsel for the failure of counsel to call two witnesses, Elizabeth Barrier and Reginald Smith. According to police reports, during the early stages of the investigation, a person contacted police and told them Elizabeth Barrier might have information about someone named Sam being murdered at a car dealership. The police reportedly spoke to Barrier and she informed them that her friend Reginald Smith called her and informed her that his good friend had been killed and he wanted to see her. Smith allegedly told Barrier that his best friend Sam was a car dealer on Western Avenue who was killed during a robbery there. Barrier told police that when Smith arrived at her apartment, he told her that someone had shot his friend and that he had left the car dealership just five minutes before the shooting. Defendant alleged in his motion that his counsel should have called Reginald Smith and Elizabeth Barrier as witnesses at trial.

¶ 16 In response to the motion, trial counsel explained that he had spoken to Barrier and determined that her testimony would have only been helpful for the purpose of impeaching Reginald Smith if he was called as a witness. Trial counsel considered calling Smith as a witness but decided not to do so because much of Smith's testimony would have been harmful to defendant. The trial court denied the posttrial motion.

¶ 17 A death penalty hearing was held, and the jury rejected a death sentence for defendant. Defendant was sentenced to life in prison. Defendant's conviction was affirmed on direct appeal. *People v. Flournoy*, No. 1-94-4427 (Nov. 15, 1996) (unpublished order under Ill. S. Ct. R. 23). The Illinois Supreme Court denied defendant's petition for leave to appeal. *People v. Flournoy*, 172 Ill. 2d 557 (Table) (1997). Defendant filed a postconviction petition in which he argued: (1) the State used perjured testimony against him at trial; (2) the State suppressed evidence favorable to the defense; and (3) that he received ineffective assistance from his appellate counsel, who failed to raise these issues on direct appeal. Defendant also argued that his trial counsel was ineffective for several reasons, including that trial counsel: (1) failed to obtain a parole revocation hearing tape which could have been used to impeach Ramano Ricks and Detective Akin; and (2) failed to call Elizabeth Barrier as a witness. Defendant's postconviction petition was dismissed by the circuit court at the first stage. The dismissal of defendant's postconviction petition was affirmed on appeal. *People v. Flournoy*, No. 1-97-1987 (June 30, 1999) (unpublished order under Ill. S. Ct. R. 23). In addressing defendant's claim based on counsel's failure to call Barrier as a witness, we explained that defendant's claim failed because he "did not attach the affidavits of these witnesses to the post-conviction petition" and that "without these affidavits this court cannot determine whether Elizabeth Barrier *** could have provided any information or testimony favorable to [defendant]." *People v. Flournoy*, No. 1-97-1987, at p.

10. The Illinois Supreme Court denied defendant's petition for leave to appeal. *People v. Flournoy*, 187 Ill. 2d 577 (Table) (2000).

¶ 18 On February 21, 2021—27 years after he was convicted, defendant filed the motion seeking leave to file the successive postconviction petition that is the subject of this appeal. In his proposed successive postconviction petition, defendant claims he has newly discovered evidence that: (1) demonstrates his actual innocence; (2) shows the State concealed and fabricated evidence; and (3) shows that he received ineffective assistance of counsel at trial. In support of his successive postconviction petition, defendant attached affidavits from Ramano Ricks and Elizabeth Barrier.

¶ 19 In his affidavit, Ricks claims that after he appeared in the lineup for the investigation in this case, Detective Akin informed him about the murder at a car lot on the north side of Chicago that occurred during an armed robbery and indicated that Reginald Smith was involved. Ricks claims that while he was in jail for the armed robbery of the Jewel, he believed that either defendant or Smith was trying to have him killed, so he contacted Detective Akin to discuss Harlib's murder. Ricks admits that he told Detective Akin that Smith set up the robbery and defendant carried it out. Ricks further admits that he told Detective Akin that Smith had informed him that defendant confessed to Smith that he committed the murder right after the robbery occurred. Ricks admits that he gave a written statement summarizing what he told detectives.

¶ 20 Ricks, however, now claims that the statements he gave detectives "are false." Ricks claims in his affidavit that Smith "never made any statements to me to indicate that [defendant] was involved in the robbery and murder." Ricks claims that he gave the statement to detectives because he was angry at defendant because he believed defendant was behind the attacks against

him in jail. Ricks claims that he also fabricated the story about defendant himself telling Ricks that defendant and Smith had committed a robbery and that defendant shot someone during the robbery. Ricks now claims that defendant "never made any statements to me about having been involved in the robbery of a car dealer, or that he had shot someone." Ricks claims in his affidavit that both his grand jury and trial testimony were false. He states that he gave the false testimony because of his anger towards defendant and for help from the State with his own robbery case.

¶ 21 Defendant also attached an affidavit from Elizabeth Barrier[3] in support of his proposed successive postconviction petition. In her affidavit, Barrier claims that she met Reginald Smith at an inpatient rehab program in Chicago. She was addicted to crack cocaine. Barrier claims that Smith showed up to her apartment one night with cocaine and heroin. Smith told her that he had robbed a used car dealer and had shot the car dealer in front of his safe. Barrier told another individual named John what Smith had told her, and she believes John informed the police. Barrier claims, to the best of her recollection, that she refused to answer the police's questions about the shooting. She had slipped back into addiction and was scared of Smith. Barrier claims that regardless of what is recorded in the police reports from her interviews with police, Smith "specifically told [her] that he shot the car dealer he had robbed." Barrier also claims that trial counsel's statements that he had spoken to her on the phone were false and that she was never contacted by anyone in connection with this case about being a witness at trial.

¶ 22 Defendant contends in his successive postconviction petition that the affidavits from Ricks and Barrier constitute newly discovered, credible evidence of his innocence. Defendant

[3] Barrier refers to herself as Elizabeth Foster in her affidavit. She states that Barrier was her maiden name. For purposes of consistency and to avoid confusion, we have referred to her as Elizabeth Barrier throughout this order.

also contends in his proposed petition that the State violated his due process rights by not correcting the trial record when Ricks testified that he was not receiving any consideration for his testimony. Lastly, defendant contends that he received constitutionally ineffective assistance from his trial counsel for not locating and calling Barrier as a witness.

¶ 23 In a 26-page written order, the circuit court denied defendant leave to file his successive postconviction petition. Among other findings, the circuit court found that the affidavits did not constitute "newly discovered" evidence as is required for defendant's successive postconviction proceedings. The court also noted that, even if the evidence was considered to be newly discovered, it did not raise the probability that the result would be different on retrial. Ultimately, the circuit court found that defendant's proposed successive petition, along with the supporting evidence he supplied, did not meet the standard for going forward on a successive postconviction petition. Defendant filed this appeal.

¶ 24 ANALYSIS

¶ 25 On appeal, defendant raises three arguments from the circuit court's order denying him leave to file his successive postconviction petition. First, he argues the affidavits from Ricks and Barrier constitute newly discovered evidence that support a colorable claim of actual innocence. Second, defendant argues he made a substantial showing that the State violated his due process rights by failing to correct inaccurate testimony by Ricks during the trial. And third, he argues he made a substantial showing that he received ineffective assistance of counsel at trial based on counsel's failure to investigate or call Barrier as a trial witness.

¶ 26 The Post-Conviction Hearing Act provides a method by which defendants may assert that, in the proceedings that resulted in their convictions, there was a substantial denial of their rights under the federal or state constitutions. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009); 725

ILCS 5/122–1 *et seq.* (West 2020). A postconviction proceeding allows inquiry only into constitutional issues that were not and could not have been adjudicated on direct appeal. *People v. Williams*, 394 Ill. App. 3d 236, 242 (2009). Therefore, where a petitioner has previously taken an appeal from a judgment of conviction, the ensuing judgment of the reviewing court will bar, under the doctrine of *res judicata,* postconviction review of all issues decided by the reviewing court and any other claims that could have been presented to the reviewing court will be deemed waived. *People v. Edwards*, 2012 IL 111711, ¶ 21. Moreover, when a defendant is seeking to file a successive postconviction petition, the issues he could have but did not raise in his initial petition are waived. See 725 ILCS 5/122–3 (West 2018) ("Any claim of substantial denial of constitutional rights not raised in the original or an amended [postconviction] petition is waived.").

¶ 27 Under the Post-Conviction Hearing Act, petitioners are entitled to file only one postconviction petition, and any subsequent petitions are allowed only with leave of court. 725 ILCS 5/122-1(f) (West 2020). The limitation on filing multiple postconviction petitions is intended to limit the filing of both successive and frivolous postconviction petitions (*People v. Smith*, 2014 IL 115946, ¶ 24) and successive postconviction petitions are disfavored by Illinois courts (*People v. Johnson*, 2019 IL App (1st) 153204, ¶ 31). A petitioner must meet a higher burden to go forward on a successive postconviction petition than he must meet at the first stage of original postconviction proceedings. *Edwards*, 2012 IL 111711, ¶¶ 25-29.

> "A request for leave to file a successive petition should be denied only where it is clear from a review of the petition and supporting documentation that, as a matter of law, the petition cannot set forth a colorable claim of actual innocence. [Citation.] Accordingly, leave of court should be granted where the petitioner's supporting

> documentation raises the probability that it is more likely than not that no reasonable juror would have convicted the petitioner in light of the new evidence. [Citation.] At the pleading stage of postconviction proceedings, all well-pleaded allegations in the petition and supporting affidavits that are not positively rebutted by the trial record are to be taken as true. [Citations.] In deciding the legal sufficiency of a postconviction petition, the court is precluded from making factual and credibility determinations. [Citations.]" *People v. Robinson*, 2020 IL 123849, ¶¶ 44-45.

¶ 28 We review the denial of leave to file a successive postconviction petition *de novo*. *Id.* at ¶ 25.

¶ 29 Before turning to the merits of the appeal, we must address the contention that defendant cannot raise his claim of actual innocence because it is based on the same evidence defendant uses to support his claims of violations of his constitutional rights. In *People v. Hobley*, our supreme court held that a postconviction petitioner cannot raise a "free-standing" claim of actual innocence based on newly discovered evidence that is being used to supplement an assertion of a constitutional violation with respect to the trial. *People v. Hobley*, 182 Ill. 2d 404, 443-44 (1998).

> "A 'free-standing' claim of innocence means that the newly discovered evidence being relied upon "is not being used to supplement an assertion of a constitutional violation with respect to [the] trial.' See *Washington,* 171 Ill. 2d at 479. For example, in *Washington,* a witness came forward years after the defendant's conviction and stated that two other men had committed the murder for which the defendant was convicted, and that she had not come forward sooner out of fear for her life. [Citation.] This newly discovered evidence was deemed sufficient to grant relief." *Hobley*, 182 Ill. 2d at 443-44.

¶ 30 In this case, the issue arises because defendant is claiming Ricks' affidavit recanting his prior testimony that defendant admitted shooting the victim directly to Ricks is newly discovered evidence of his actual innocence and using Ricks' affidavit to supplement his claim the State knowingly used perjured testimony when it allowed Ricks to testify that defendant admitted shooting the victim. In *Hobley*, our supreme court initially found that the newly discovered evidence in that case could establish a violation at trial of the defendant's constitutional right to due process. *Id.* at 444. Regarding the defendant's subsequent claim of actual innocence based on the same evidence, our supreme court held the evidence did not support a "free-standing" claim of actual innocence and the defendant has "therefore not properly raised a claim of actual innocence."

¶ 31 Defendant in this case argues our supreme court rejected this holding in *People v. Coleman* and found that a defendant who can make both a freestanding claim of actual innocence and a claim of a deprivation of a constitutional right at trial based on the same evidence "is not required to choose which claim to pursue." In *Coleman*, our supreme court rejected the federal courts' distinction between "free-standing" claims of actual innocence and "gateway" claims of actual innocence. See *People v. Coleman*, 2013 IL 113307, ¶¶ 90-91. The court stated it "may have used the label 'freestanding' to describe the claim in *Washington,* but not as an alternative to the label 'gateway.' " *Id.* ¶ 90. In rejecting the federal dichotomy, our supreme court did not overrule or abrogate *Hobley*. See *People v. Griffin*, 2022 IL App (1st) 191101-B, ¶ 33 ("We acknowledge the court's comment in *Coleman* but reject any suggestion that by that comment the court overruled either *Hobley* or *Orange*. We read the court's comment as merely identifying the applicable standard for the different types of claims. In point of fact, the court made no

reference to *Hobley* or its apparent rule that the different claims may not rely on the same supporting documentation in order for the actual innocence claim to be freestanding.").

¶ 32 We also independently find that *Coleman* stands for no more than the proposition that the burden on a defendant raising a postconviction claim of actual innocence is the same whether that claim of actual innocence could be classified under federal law as a "gateway" claim as opposed to a "free-standing" claim. *Coleman*, 2013 IL 113307, ¶ 91 ("the evidentiary burden for an actual-innocence claim is always the same whether or not it would be considered a freestanding or gateway claim under federal law."). Furthermore, as this court has recently reaffirmed, "[t]he *Hobley* court created a rule that disallowed petitioners from using newly discovered evidence demonstrating actual innocence to also support alternative claims of constitutional trial error within the same postconviction petition." *Griffin*, 2022 IL App (1st) 191101-B, ¶ 34.

¶ 33 We will return to this matter at the appropriate moment in our disposition. Suffice now to say that given the vociferation of defendant's actual innocence argument compared with the argument the State knowingly used perjured testimony, specifically when it allowed Ricks, unchallenged, to testify defendant admitted shooting the victim to Ricks, we will consider defendant's evidence of Ricks' recantation of that testimony as it pertains to his claim he is actually innocent.

¶ 34 I. Actual Innocence

¶ 35 Our supreme court has explained the substantive component of the courts' approach to postconviction claims of actual innocence and, recently, how that component is to be executed in practice.

> "Substantively, in order to succeed on a claim of actual innocence, the defendant must present new, material, noncumulative evidence that is so conclusive it would probably change the result on retrial. [Citation.] New means the evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence. [Citation.] Material means the evidence is relevant and probative of the petitioner's innocence. [Citation.] Noncumulative means the evidence adds to what the jury heard. [Citation.] And conclusive means the evidence, when considered along with the trial evidence, would probably lead to a different result. [Citation.]" *Coleman*, 2013 IL 113307, ¶ 96.

¶ 36 We focus here on the requirement that the evidence must be "so conclusive it would probably change the result on retrial." *Id.* Our supreme court has stated that "the conclusive character element refers to evidence that, when considered along with the trial evidence, would probably lead to a different result." *People v. Robinson*, 2020 IL 123849, ¶ 47. This is "the most important element of an actual innocence claim." *Id.* Our supreme court has cautioned that:

> "Ultimately, the question is whether the evidence supporting the postconviction petition places the trial evidence in a different light and undermines the court's confidence in the judgment of guilt. [Citation.] The new evidence need not be entirely dispositive to be likely to alter the result on retrial. [Citations.] Probability, rather than certainty, is the key in considering whether the fact finder would reach a different result after considering the prior evidence along with the new evidence. [Citation.]" *Robinson*, 2020 IL 123849, ¶ 48.

¶ 37 At this stage of proceedings the question is whether defendant has set forth a colorable claim of actual innocence. *Id.* ¶ 50. To answer it, "we consider his motion for leave to file the

successive petition, along with the supporting affidavits, to ascertain whether he has raised the probability that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence"—or in other words, whether defendant has placed the trial evidence in a different light sufficient to undermine our confidence in the judgment of guilt. See *id.* ¶¶ 48-50. We note that our supreme court has directed that:

> "the inquiry applicable at the leave-to-file stage of successive proceedings does not focus on whether the new evidence is inconsistent with the evidence presented at trial. Rather, the well-pleaded allegations in the petition and supporting documents will be accepted as true unless it is affirmatively demonstrated by the record that a trier of fact could never accept their veracity. In assessing whether a petitioner has satisfied the low threshold applicable to a colorable claim of actual innocence, the court considers only whether the new evidence, if believed and not positively rebutted by the record, *could lead to acquittal on retrial*." (Emphasis added.) *Id.* ¶ 60.

Finally, we must also consider evidence in support of the petition that would be hearsay at a subsequent trial. See *id.* ¶ 80 (citing Ill. R. Evid. 1101(b)(3) (eff. Sep. 17, 2019)).

¶ 38 The trial court found that the evidence derived from the affidavits was not newly discovered. Defendant argues that the affidavits from Ricks and Barrier, viewed alongside the trial evidence, present a colorable claim of actual innocence. He maintains that Ricks' recantation and Barrier's statement that Reginald Smith confessed to the shooting in her presence should have caused the trial court to grant him leave to file his successive postconviction petition. The State argues that the evidence is not "new" because our supreme court has defined "new evidence" for purposes of a successive

postconviction petition as evidence which is discovered "after trial and could not have been discovered earlier through the exercise of due diligence" (see *Coleman*, 2013 IL 113307, ¶ 96) and defendant has failed to demonstrate due diligence. The burden of showing due diligence falls on the defendant. *People v. Walker*, 2015 IL App (1st) 130530, ¶ 18. Or, put another way, the defendant bears the burden of showing that there has been no lack of diligence on his part. *People v. Wingate*, 2015 IL App (5th) 130189, ¶ 26.

¶ 39 The parties dispute the issue of whether the evidence is newly discovered. However, even if we assume defendant's evidence in support of actual innocence is newly discovered, petitioner cannot prevail in this case because the evidence is not so conclusive it would probably lead to a different result at trial. *Edwards*, 2012 IL 111711, ¶ 32 (a defendant cannot prevail on his successive postconviction claim unless he can satisfy the requirement that the evidence be "conclusive"—that the evidence, when considered along with the trial evidence, would probably lead to a different result on retrial). Taking the information in Ricks and Barriers' affidavits as true, and in spite of the hearsay nature of the evidence in Barrier's affidavit, there is no probability that the evidence would change the result on retrial. Here we must consider the pertinent averments in Ricks and Barrier's affidavits. We address each affidavit in turn.

¶ 40 Turning first to Ricks, he averred, in pertinent part, as follows:

> "Detective Aikin told me that the murder occurred during an armed robbery, the victim had been shot, and Reggie [Smith] was involved in the murder. Detective Aikin described for me how the shooting occurred.

After Detective Aikin gave me that information, I *truthfully* told him that I did not know anything about the shooting.

* * *

After [an] attempt to stab me, I called *** Detective Aikin ***. *** I told him that I was willing to help him with the murder involving the car dealer.

* * *

*** Detective Aikin told me how the shooting occurred.

* * *

I told Detective Aikin that Reggie [Smith] told me that he had set up the robbery of a car dealer he knew, and that he drove [defendant] to the car lot to do the robbery. I further told Detective Aikin that Reggie [Smith] told me that when [defendant] came out, he told Reggie [Smith] that he had shot the guy.

* * *

My statements that Reggie [Smith] told me that he drove [defendant] to the car lot to do the armed robbery and that [defendant] told Reggie [Smith] he had shot the guy during the robbery are false.

Reggie [Smith] never made any statements to me to indicate that [defendant] was involved in the robbery and murder.

* * *

I specifically asked Detective Aikin if he could help me on my pending armed robbery case. Detective Aikin told me that he could not 'officially' help me, but that he would see what he could do to get me a lesser sentence. He told me that he would help me get into a work release program.

* * *

Detective Aikin told me that they could not bring a case against [defendant] unless I testified that [defendant] told me about being involved in the murder.

I then made up a story about [defendant] telling me that he and Reggie [Smith] had robbed a car dealer, and during the robbery [defendant] shot the owner.

The story I made up was false. [Defendant] never made any statements to me about having been involved in the robbery of a car dealer, or that he had shot someone.

Again, I made up the story because I was mad at [defendant,] and because I wanted help on my pending armed robbery case.

* * *

My testimony before the grand jury was false, in that *neither Reggie [Smith] nor [defendant] ever made statements to me suggesting that [defendant] was involved in the robbery and murder of the car dealer*.

* * *

*** I served approximately 2.5 years of my 10-year sentence before I was allowed work release." (Emphases added.)

¶ 41 The new statement from Ricks is not probative of defendant's innocence nor could it lead to an acquittal on retrial. Contrary to defendant's assertion in his reply brief that "[b]oth affidavits support a conclusion that Reginald Smith, not [defendant], was the shooter," Ricks' affidavit does not speak to the identity of the shooter whatsoever. Ricks merely says he

fabricated his prior statements and testimony that defendant confessed to the shooting and that Smith told Ricks that defendant was the shooter. That is not the same as saying Smith was the shooter or even that defendant was not the shooter. All Ricks averred is at best that defendant did not confess to Ricks that defendant shot the victim and Smith did not tell Ricks defendant shot the victim. We find, based on Ricks' affidavit, as a matter of law Ricks cannot testify at trial to anything that tends to prove defendant's innocence or that would lead to an acquittal upon retrial, considering all the evidence. Accepting Ricks' affidavit as true can only remove one piece of damaging evidence against defendant but Ricks' evidence is not the only, or even the strongest, evidence against defendant.

¶ 42 Ricks' substantive utility for defendant's claim of actual innocence is effectively naught. Thus, even if Ricks' recantation is accepted as true, his evidence is not of such conclusive character that no reasonable juror could fail to acquit defendant after considering the prior evidence along with the new evidence. See *Robinson*, 2020 IL 123849, ¶¶ 48-50.

¶ 43 Turning next to Barrier's affidavit, she avers, in pertinent part, that:

> "In late 1991, Reggie [Smith] showed up at my apartment one night with cocaine and heroin.
>
> At that time Reggie [Smith] told me that he had robbed a used car dealer, and that he had shot the car dealer in front of his safe.
>
> * * *
>
> To the best of my memory, when police asked me about the shooting I refused to answer their questions.
>
> * * *

*** Reggie [Smith] specifically told me that he shot the car dealer he had robbed.

* * *

I never spoke with anybody representing [defendant] about what Reggie [Smith] told me.

In fact, until recently I had never heard of [defendant] or that he was prosecuted for the murder of the car dealer Reggie [Smith] confessed to me he had shot and killed.

* * *

*** I was never contacted about being a witness at [defendant's] trial."

¶ 44 Barrier's affidavit does point to someone else as the shooter in the murder. It is therefore conceivable that if a jury was able to somehow consider the statements in Barrier's affidavit at a trial, it could lead to an acquittal on *some* counts of the indictment against defendant. However, the State indicted defendant on three counts of first degree murder: that he, without lawful justification, (1) intentionally and knowingly shot and killed Samuel Harlib with a gun (count I), (2) shot and killed Samuel Harlib with a gun knowing that such shooting with a gun created a strong probability of death (count II), and (3) while committing a forcible felony, to wit: armed robbery, shot and killed Samuel Harlib with a gun in violation of section 9-1-A(3) of the Illinois statutes (count III). Section 9-1-A(3) read, at the time of defendant's conviction, as follows: "A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death: *** he is attempting or committing a forcible felony other than second degree murder." 720 ILCS 5/9-1(a)(3) (West 1992). In brief, the State charged defendant with felony murder. The jury returned a "general verdict" of guilty of first degree

murder. See *People v. Woods*, 2021 IL App (1st) 190493, ¶ 70, *People v. Bobo*, 375 Ill. App. 3d 966, 978 (2007) (a general verdict is one in which the jury does not determine the defendant is guilty under a specific theory of the offense). "It is 'well settled' that, when an indictment alleges multiple forms of a single murder, and a general verdict is returned finding defendant guilty of first-degree murder, 'the net effect is that the defendant is guilty as charged in each count.' [Citations.]" *People v. Valdez*, 2022 IL App (1st) 181463, ¶ 173.

¶ 45 Barrier's affidavit says nothing about defendant's participation in the robbery. Barrier has expressed no knowledge of the armed robbery in this case. Accepting as true, for purposes of defendant's motion for leave to file a successive petition, that Smith "shot and killed Samuel Harlib with a gun" (counts I and II), when considered along with the trial evidence, that fact does not raise the probability that it is more likely than not that no reasonable juror would convict defendant of *felony murder* (count III). The jury's verdict constitutes a finding of guilty of felony murder. *Valdez*, 2022 IL App (1st) 181463, ¶ 173. Therefore, we find as a matter of law that the averments by Barrier fail to meet the requirement of being likely to bring about a different outcome on retrial.

¶ 46 Defendant has failed to demonstrate that based on Ricks and Barrier's affidavits there would likely be a different result on retrial. The circuit court did not err when it denied defendant leave to file his successive postconviction petition.

¶ 47 II. Claimed Due Process Violation

¶ 48 Defendant argues that he made a substantial showing with newly discovered evidence that the State violated his due process rights when it concealed evidence that Ricks did receive consideration for his cooperation in the case against defendant. Defendant also argues that the State knowingly relied on perjured testimony from Ricks and Detective Akin in its case in chief

that Ricks did not ask for consideration in exchange for his cooperation and Ricks' testimony defendant admitted he was the shooter.

¶ 49 Unlike claims of actual innocence, leave of court to file a successive postconviction petition for a violation of a constitutional right may only be granted when a petitioner: (1) demonstrates cause for failing to bring the claim in initial postconviction proceedings; and (2) prejudice results from that failure. 725 ILCS 5/122-1(f) (West 2020). This standard is known as the "cause-and-prejudice test." *Smith*, 2014 IL 115946, ¶ 24 (citing *People v. Tidwell*, 236 Ill. 2d 150, 156 (2010)). To establish cause, a defendant must identify an objective factor that impeded their ability to raise a specific claim during his initial postconviction proceedings. *People v. Wilson,* 2014 IL App (1st) 113570, ¶ 33. To establish prejudice, a defendant must demonstrate that the claim that was not originally raised infected the trial to the extent that the resulting conviction or sentence violated due process. *Id.* From our review of the record we conclude defendant has failed to demonstrate the requisite cause and prejudice to present this claim.

¶ 50 "Prejudice" for purposes of a motion for leave to file a successive postconviction petition is defined similarly to the "prejudice" required to support a claim of ineffective assistance of counsel. *People v. Pitsonbarger*, 205 Ill. 2d 444, 464 (2002). In *Pitsonbarger*, our supreme court adopted the *Strickland* standard of prejudice for successive postconviction petitions, which was first articulated in *People v. Flores*, 153 Ill. 2d 264, 280 (1992) ("Whether the seemingly narrower test of prejudice required in a *Strickland* analysis satisfies the requisite showing of prejudice under *McCleskey* is uncertain."), and reaffirmed that adoption in *Smith*, 2014 IL 115946, ¶ 34 ("We analogized the cause-and-prejudice test in the context of a successive postconviction petition to the cause-and-prejudice test for ineffective assistance of counsel articulated in *Strickland v. Washington*." (citing *Pitsonbarger*, 205 Ill. 2d at 464.)). Applying that

standard in this context, "the question is not whether a court can be certain [the error] had no effect on the outcome or whether it is possible a reasonable doubt might have been established [absent the error.]" *People v. Lewis*, 2022 IL 126705, ¶ 46 (quoting *People v. Johnson*, 2021 IL 126291, ¶ 54).

> "Instead, [the court] asks whether it is 'reasonably likely' the result would have been different. *Strickland*, 466 U.S. at 696. A defendant must show that there is a reasonable probability that, but for [the error] the result of the proceeding would have been different. [Citation.] A reasonable probability is a probability sufficient to undermine confidence in the outcome. [Citation.]" *Lewis*, 2022 IL 126705, ¶ 46.

¶ 51 Additionally, this court has found that a constitutional error so infected the trial that the conviction violates due process where the alleged error was a material element of the defendant's conviction. See *People v. Montanez*, 2022 IL App (1st) 191930, ¶¶ 45-46 (noting "ample evidence" of the defendant's guilt and finding that allegedly wrongfully withheld impeachment evidence "was not material to [the] defendant's guilt or innocence"). At the "leave to file" stage of successive postconviction proceedings the defendant is only required to demonstrate a *prima facie* showing of cause and prejudice. *People v. Searles*, 2022 IL App (1st) 210043, ¶ 61 (citing *People v. Bailey*, 2017 IL 121450, ¶ 24). To proceed with the claim the defendant must demonstrate both "cause" and "prejudice" as to each claim. *Pitsonbarger*, 205 Ill. 2d at 463-64; *Montanez*, 2022 IL App (1st) 191930, ¶ 43 ("We can decide this issue without resolution of whether defendant established cause sufficient to file the successive postconviction petition because he cannot establish prejudice.").

> "[L]eave of court to file a successive postconviction petition should be denied when it is clear, from a review of the successive petition and the documentation submitted by the petitioner, that the claims alleged by the petitioner fail as a matter of law or where the successive petition with supporting documentation is insufficient to justify further proceedings. [Citation.] The denial of a defendant's motion for leave to file a successive postconviction petition is reviewed *de novo*." *Montanez*, 2022 IL App (1st) 191930, ¶ 29 (citing *Bailey*, 2017 IL 121450, ¶ 13).

¶ 52 Assuming, as we must at this stage of proceedings, the truth of defendant's allegations, defendant has failed to demonstrate prejudice from any due process violation stemming from the State's alleged failure to disclose that Ricks received consideration for his cooperation in the case against defendant and defendant has failed to identify cause for his failure to bring forth his claim at an earlier time. As foreshadowed, we find defendant is procedurally barred from arguing that Ricks' recantation supports an independent claim of a violation of his constitutional rights based on the State knowingly using perjured testimony. *Griffin*, 2022 IL App (1st) 191101-B, ¶ 34.

¶ 53 We also note that defendant's claim the State knowingly used perjured testimony when Ricks testified defendant admitted shooting the victim fails to demonstrate prejudice to defendant. If a defendant's claimed violation of a constitutional right itself lacks merit the defendant cannot show prejudice. *People v. Page*, 2022 IL App (4th) 210374, ¶ 29. On the merits of defendant's claim, "the State only has an obligation to correct the testimony of a witness when it has knowledge that the witness is mistaken in his testimony." (Internal quotation marks omitted.) *People v. Wright*, 2013 IL App (1st) 103232, ¶ 47. Although not stated explicitly

defendant suggests the State knew Ricks' testimony defendant admitted shooting the victim to Ricks was false because Ricks initially stated Smith told him Ricks admitted the shooting but Ricks changed his story after Detective Aiken told Ricks that the State could only prosecute defendant if defendant admitted the shooting directly to Ricks. However, defendant asserts Ricks provided this particular piece of newly discovered evidence—the timing of Ricks changing his story—in his affidavit. Other than the change in the source of the information itself, defendant does not rely on anything in the record to show the State knew Ricks' testimony was false. "Accordingly, the State did not have an obligation to correct the allegedly false testimony of the witness when it did not know that the witness's testimony was untrue." *Wright*, 2013 IL App (1st) 103232, ¶ 50. Even if we accepted the alleged change in Ricks' statements as some evidence his testimony might be untrue we find it unconvincing to establish the State had knowledge that the witness was necessarily mistaken in his testimony or that our confidence in the result of the trial is undermined, and therefore, we find no due process violation.

¶ 54 Turning to defendant's claim the State concealed evidence Ricks obtained work release in exchange for his testimony, we find as a matter of law that defendant failed to make a *prima facie* showing that this potentially impeaching information was not already known to him. The evidence available to defendant prior to trial informs defendant that Ricks sought something in exchange for his testimony against defendant but it does not establish that Ricks actually did receive anything. Initially, we note that Ricks' affidavit, even when taken as true, does not establish on its face that he actually received any consideration from the State in return for his testimony. Ricks' affidavit states as follows:

> "I specifically asked Detective Aiken if he could help me on my pending armed robbery case. Detective Aikin told me that he could not 'officially' help

me, but that he would see what he could do to get me a lesser sentence. He also told me that he would help me get into a work release program.

* * *

To the best of my recollection, I served approximately 2.5 years of my 10-year sentence before I was allowed work release."

¶ 55 Ricks averred he asked for work release, and later he received work release. A reasonable fact finder could assume Ricks received work release in exchange for his cooperation and we acknowledge such a determination can only be made after an evidentiary hearing. See *People v. Colasurdo*, 2020 IL App (3d) 190356, ¶ 45 (citing *People v. Pendleton*, 22 Ill. 2d 458, 473 (2006) (fact-finding and credibility determinations are involved in a third-stage evidentiary hearing). Nonetheless, " 'it is incumbent upon [a petitioner], by whatever means, to prompt the circuit court to consider whether "leave" should be granted, and obtain a ruling on that question.' [Citation.] Defendant not only has the burden to obtain leave of court, but also 'must submit enough in the way of documentation to allow a circuit court to make that determination.' [Citation.] This is so under either exception, cause and prejudice or actual innocence." *Edwards*, 2012 IL 111711, ¶ 24.

¶ 56 In this case, Ricks has not minimally averred he received work release in exchange for his testimony to "prompt the circuit court to consider whether 'leave' should be granted," and defendant has failed to submit *any* evidence or documentation that would have allowed the court to make a determination on that claim. Ricks does not aver that Aiken or anyone from the State ever informed him that his work release resulted from his cooperation in defendant's case. There are facts that militate against that conclusion. As the State notes on appeal, defendant's armed robbery conviction was eligible for day-for-day good conduct credit (730 ILCS 5/3-6-3(a)(2)

(West 1994)) which results in defendant only having to serve 5 years in the Illinois Department of Corrections for his sentence and, consequently, that defendant did in fact serve half of his effective sentence in prison. The State argues this fact, and Ricks' own testimony on cross-examination that he did not have "too much longer to go" on his sentence (approximately two years at the time of trial), and we agree, affirmatively rebuts defendant's current claim Ricks did receive consideration in exchange for his testimony.

¶ 57 We have no need to decide whether the record affirmatively positively rebuts this claim. "The motion for leave to file is directed to the court, and it is the court that must decide the legal question of whether a defendant has satisfied the section 122-1(f) requirement of showing cause and prejudice." *Bailey*, 2017 IL 121450, ¶ 24. We hold, as a matter of law, defendant's petition and supporting documentation fail to demonstrate a *prima facie* showing of prejudice. Defendant has failed to establish prejudice from the State's failure to disclose the consideration for any "deal" with Ricks in exchange for his testimony. The utility of evidence of what Ricks asked for and what Ricks received in exchange for his testimony is to undermine Ricks' credibility by demonstrating Ricks' motivation to fabricate testimony. See *People v. Collins*, 366 Ill. App. 3d 885, 893 (2006) ("In this case, evidence that Harrington's battery arrest had been stricken with leave to reinstate was relevant to show his potential interest, bias, or motive to testify, as this fact could cause one to infer that Harrington had motive to testify favorably for the State." (citing *In re T.S.*, 287 Ill. App. 3d 949, 956 (1997) ("In *T.S.*, for example, this court held that the juvenile respondent in that case should have been allowed to cross-examine the victim about his arrests that had been stricken with leave to reinstate because they may have revealed the witness's motivation to lie and whether he contemplated any leniency in exchange for his testimony."))). *Collins*, 366 Ill. App. 3d at 893.

¶ 58 Defendant had ample evidence of Ricks' motive to testify falsely and that he may have actually testified falsely. Defendant possessed evidence Ricks asked for assistance with his own armed robbery charge. Defendant also possessed evidence that suggested that the only information Ricks could provide about the robbery and murder in this case came from statements by Smith that would have been inadmissible as hearsay. It was allegedly only after Detective Aiken explained to Ricks that the State could not use him unless he had evidence about what defendant said that Ricks provided statements by defendant effectively confessing to the murder. Defendant possessed evidence to attack the motive and substance of Ricks' testimony but the trier of fact chose to believe Ricks.

¶ 59 We find as a matter of law that absent the "concealment" of additional impeachment evidence that Ricks received a minor (by his own admission) concession in exchange for his testimony it is not possible a reasonable doubt might have been established. Defendant has not shown how the addition of this evidence casts Ricks' testimony in any worse light than it already was. It is not reasonably likely that had the trier of fact heard, in addition to evidence that Ricks was motivated to testify favorably for the State to gain assistance with his robbery charge, that Ricks received work release toward the end of his sentence, that the result of the trial would have been different. The fact defendant did not have this specific piece of information, viewed in the light of all of the trial evidence, does not undermine our confidence in the outcome. Accordingly, we find as a matter of law defendant has failed to demonstrate a *prima facie* showing of prejudice and, further, defendant cannot demonstrate prejudice on this particular claim.

¶ 60 Turning next to defendant's' claim the State knowingly relied on perjured testimony that Ricks did not seek consideration in exchange for his cooperation—noting again defendant may not rely on Ricks' recantation to support a claim of a violation of his constitutional right—we

find defendant failed to demonstrate cause for failing to bring this claim in the initial postconviction proceedings. Defendant's only claim of "cause" for failing to raise this claim sooner is that "the information contained in [the] affidavits was not available to [defendant] at the time of trial or when he filed his first petition." However, where the material needed to raise the claim is available at the time of the initial petition, and the absence of that material is the purported "cause" of the failure to raise the claim at that time, this court will find the cause element has not been demonstrated. See *People v. Blalock*, 2022 IL 126682, ¶¶ 44-45 (citing *People v. Brandon*, 2021 IL App (1st) 172411, ¶ 59 (citing *Pitsonbarger*, 205 Ill. 2d at 462)); compare *People v. Weathers*, 2015 IL App (1st) 133264, ¶ 36 ("Because this newly discovered evidence was not available at the time of defendant's prior petitions, he has established the requisite cause, in that an objective factor impeded his ability to raise this claim at an earlier time.").

¶ 61 The record directly rebuts defendant's claim the affidavits make clear that defendant "did not have any outside evidence to prove that Ricks has been lying until [Ricks] himself came forward." This court will only accept as true allegations that are *not* positively rebutted by the record. *People v. Griffin*, 2022 IL App (1st) 191101-B, ¶ 24. In this case the record demonstrates that defendant had knowledge in 1992 that Ricks was seeking consideration from the State in connection with his cooperation in this case. The transcript from defendant's revocation hearing demonstrates that defendant knew about Ricks' efforts to seek consideration. Defendant was present at the hearing and was represented by counsel. He attached a copy of the transcript to his original postconviction petition. Defendant knew about the claim when he filed his initial postconviction petition because he raised almost the identical claim and supported it with *some* evidence. "A defendant is not permitted to develop the evidentiary basis for a claim in a

piecemeal fashion in successive postconviction petitions, as defendant has attempted to do here." *Davis*, 2014 IL 115595, ¶ 55; see also *People v. Green*, 2012 IL App (4th) 101034, ¶ 40. Defendant does not argue nor do we find that the affidavit provides anything additional in support of this particular claim that would be sufficient to establish "cause."

¶ 62 We find as a matter of law defendant cannot establish "cause" for this claim. The record demonstrates that this claim was known to defendant and available to be supported by evidence at the time of trial and at the time he filed his initial petition. Defendant has failed to make a *prima facie* showing of cause for failing to raise this claim in his initial petition. Accordingly, the trial court did not err in denying leave to file the successive petition.

¶ 63 III. Ineffective Assistance of Trial Counsel

¶ 64 Finally, defendant argues he made a substantial showing in his successive postconviction petition that he was denied the effective assistance of trial counsel based on counsel's failure to investigate or call Barrier as a witness for the defense. Defendant attempts to bolster this claim by submitting evidence that his trial counsel was suspended from the practice of law and subsequently disbarred several years after this case. Defendant attaches reports to his proposed successive petition evidencing trial counsel's disciplinary proceedings.

¶ 65 The United States Constitution guarantees criminal defendants the right to effective assistance of counsel. Thus, where a criminal defendant is convicted of an offense but did not receive constitutionally adequate representation, he can seek relief to vindicate his constitutional right to counsel. *People v. Burnett*, 385 Ill. App. 3d 610, 614 (2008). To prove that he was denied the effective assistance of counsel guaranteed by the sixth amendment, a petitioner must show (1) that "counsel made errors so serious that [he] was not functioning as the 'counsel' guaranteed [petitioner] by the Sixth Amendment," and (2) "a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We analyze claims of ineffective assistance of counsel by considering the entire record. *People v. Hommerson*, 399 Ill. App. 3d 405, 415 (2010). A defendant who brings a claim of ineffective assistance must prove both prongs: (1) that the attorney's performance was deficient and (2) that he was prejudiced as a result of the deficient performance. If a defendant is not prejudiced by the allegedly deficient performance of his attorney we should address that issue first. *People v. Hale*, 2013 IL 113140, ¶ 17 (courts may "proceed*** directly to the prejudice prong without addressing counsel's performance."). "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691 (citing *United States v. Morrison*, 449 U.S. 361, 364–65 (1981)).

¶ 66 Barrier's statements could not change the outcome on retrial nor do they undermine our confidence in the outcome of the proceedings. As we previously discussed, the State charged defendant with felony murder and the jury returned a general verdict of guilty, meaning the jury found defendant guilty of felony murder. Accepting Barrier's statements as true, they do not exculpate defendant from his participation in the robbery that led to the victim's death nor do they mitigate his participation. Defendant has not demonstrated prejudice from trial counsel's failure to elicit these statements at trial.

¶ 67 Furthermore, "an ineffective-assistance-of-counsel claim which arises from a matter of defense strategy will generally not support a claim of ineffective representation." *Flores*, 128 Ill. 2d at 106. "[T]he decision to call particular witnesses is a matter of trial strategy, and *** defense counsel need not call a witness if he reasonably believes that under the circumstances the individual's testimony is unreliable." *Id.* Barrier's statements are hearsay and would not have

been admissible at defendant's trial if she had been present. See *People v. Bowel*, 111 Ill. 2d 58, 66 (1986). Defendant's trial counsel reasonably could have concluded that Barrier's testimony would not be admitted and had good reason not to call her as a witness. Because we cannot say that trial counsel's decision was unreasonable under the circumstances, "we cannot say that the defendant was denied a fair trial as a consequence of counsel's election not to call [Barrier.]" *Flores*, 128 Ill. 2d at 107. Therefore, defendant has failed to make a *prima facie* showing to establish his ineffective assistance claim and the trial court did not err in denying defendant leave to file his successive petition.

¶ 68 Because of our disposition, there is no need to consider the request this matter be remanded to a different trial judge or any other arguments raised in this appeal. For the foregoing reasons we affirm the judgment of the circuit court.

¶ 69 CONCLUSION

¶ 70 The judgment of the circuit court of Cook County is affirmed.

¶ 71 Affirmed.

2022 IL App (1st) 210287-U

No. 1-21-0287

December 27, 2022

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 99 CR 19667
	)	
DANIEL DANAO,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Ellis and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the circuit court's dismissal of defendant's successive postconviction petition at the second stage, where defendant failed to make a substantial showing of ineffective assistance of trial counsel or actual innocence.

¶ 2 Defendant Daniel Danao appeals from the circuit court's second-stage dismissal of his successive petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2020)). On appeal, defendant contends that he made a substantial showing of (1) ineffective assistance of trial counsel where counsel failed to seek gunshot residue (GSR) testing on a

sweatshirt; and (2) actual innocence based on the affidavit of a newly discovered witness and testing results showing no GSR on the sweatshirt. For the following reasons, we affirm.

¶ 3 In July 1999, defendant was charged by indictment with first degree murder for killing Augustine Garza "with a gun."

¶ 4 At trial, Gene Nathaniel testified that around 3:45 a.m. on July 3, 1999, he was at the bus stop on the southwest corner of Sacramento Avenue and 63rd Street in Chicago. Streetlights and lights from the gas station across the street lit the area. Teenagers walked from the gas station to a van parked on the southeast corner. Nathaniel, who had an unobstructed view of the van, heard a "loud pop," and saw a young man wearing a "black hoodie" aim a weapon at a man sitting in the driver's seat of the van. The shooter fired several times and the flare from the weapon lit the shooter's face. Nathaniel identified defendant in court as the shooter. Defendant fired additional shots before running into the alley. Nathaniel spoke with police at the scene and later identified defendant in a lineup at the police station.

¶ 5 On cross-examination, Nathaniel stated that the man with the black hoodie stood "outside the passenger compartment with the weapon aimed inside of the van at the guy who got shot." The van was positioned between Nathaniel and defendant, but Nathaniel observed defendant through the front window "clear as a bell."

¶ 6 Christina Cortes testified that on July 3, 1999, she was a member of the Latin Souls gang. Around 3:15 a.m., she and Garza exited a restaurant near 63rd and Sacramento with six people. Cortes and two others walked to the gas station while the rest of the group, including Garza, walked to the van parked across the street. A "greenish teal" four-door vehicle passed her, and Cortes

identified defendant in court as the passenger in the vehicle. Cortes knew defendant as "Smurfy." The men who were with Cortes "made gang signs," but defendant just "smiled."

¶ 7 After leaving the gas station, Cortes heard three gunshots, a pause, and then more shooting. Defendant, wearing a black hoodie and dark pants, jumped out of the passenger side of the van and ran to the alley. In the van, Cortes saw Garza "shot up" against the driver's side door. Cortes knew defendant's address and accompanied police officers to defendant's house. At the police station, she identified defendant in a lineup as the shooter.

¶ 8 On cross-examination, Cortes stated that she left the Latin Souls after Garza's death. When the shooting occurred, the van's front passenger door was open and defendant "put his body in to do the shooting." Cortes could not see defendant's face as he fired because his body was in the van. However, she got "a good look at him" when he exited the van and glanced at her before running into the alley.

¶ 9 April Gritzenbach testified that she was a member of the Latin Souls in July 1999, but no longer belonged to the gang. Around 3 a.m. on July 3, 1999, she was at a restaurant near Sacramento and 63rd with a group of friends, including Cortes and Garza. Afterwards, Gritzenbach walked with a friend to the gas station approximately 45 feet away. Outside the gas station, Gritzenbach saw a vehicle she did not recognize. She could see the driver and the passenger, but she did not know them. The passenger was "medium complected" with a "bald head" and facial hair. Cortes and others displayed gang signs at the people in the vehicle.

¶ 10 Gritzenbach crossed the street and entered the parked van. Garza was in the driver's seat. Through the back window, Gritzenbach saw a man approach wearing a black hoodie with a white "Nike" logo. The man had been in the vehicle involved in the sign flashing incident. There was a

"big rip" at the bottom of his hoodie; underneath, he wore a baby blue shirt with white letters. Gritzenbach thought the man had a firearm because he was "moving" his hands around his stomach. Gritzenbach identified defendant in court as that man.

¶ 11 Defendant stepped into the van, looked around, and shot Garza three times. He stopped and then fired at least four more times. Gritzenbach lowered her head as defendant fired. When the shooting stopped, Gritzenbach looked up and saw the left side of defendant's face before he ran into the alley. Gritzenbach spoke to police at the scene and at the police station. Later, she viewed a lineup and identified defendant as the shooter.

¶ 12 The State sought Gritzenbach's in-court identification of the clothing worn by defendant when he shot Garza. In a sidebar, trial counsel objected on two grounds. First, counsel objected to the prosecutor wearing gloves while handling the clothing in court because he thought it would be "prejudicial to the jury." Counsel argued that he had been allowed to examine the clothing earlier without wearing gloves. Second, counsel objected because he "had no way of knowing if those are the same clothes [defendant] was wearing" during the shooting. Although police recovered the clothes from defendant's house, he was not wearing them when he was arrested, and no one identified the clothes as belonging to defendant. Over counsel's objections, the trial court allowed the State to present People's Exhibit Nos. 12 and 13 to Gritzenbach for identification, without gloves. She identified the exhibits, respectively, as the sweatshirt and baby blue shirt worn by defendant during the shooting.

¶ 13 On cross-examination, Gritzenbach stated that she had not met defendant before the shooting. When presented with her signed statement to an assistant state's attorney, Gritzenbach acknowledged that she said she "first met Smurf back in February 1999," but further testified that

she meant she could have "bumped into him" or seen him in the neighborhood. Gritzenbach told police that through the rip in the hoodie, she saw a baby blue shirt with white letters spelling "University of North Carolina."

¶ 14 The parties stipulated that, if called to testify, Detective Romic[1] would state that Gritzenbach described the shooter as wearing "[b]lack shorts, white socks, white gym shoes, pullover black hoody and a baby blue jersey with the letters North Carolina."

¶ 15 Chicago police officer Guillermo Cerna testified that on July 3, 1999, just before 4 a.m., he and his partner saw "a crowd of kids" near Sacramento and 63rd. Cortes told them her friend had been shot. Cerna approached the van and found the driver unresponsive. He called for an ambulance and obtained descriptions of the offender, whom people identified as Smurfy. According to witnesses, the shooter wore "all black," with a "black hoodie," above "a North Carolina jersey, baby blue." Cortes knew Smurfy's address and accompanied plainclothes officers to his home.

¶ 16 Chicago police officer Adolfo Garcia testified that around 4 a.m. on July 3, 1999, he and his partner responded to a call for assistance at Sacramento and 63rd. After speaking with Cortes, Garcia and his partner accompanied her to a home on the 6400 block of Mozart. The woman who answered the door told Garcia that Smurfy was her brother. She gave officers permission to enter and "look around." On the second floor, they found defendant shirtless, sitting in front of a television in a bedroom. Two young boys were sleeping in the room. The woman confirmed that defendant was her brother Smurf.

[1] The record does not state Detective Romic's first name.

¶ 17 When Garcia handcuffed defendant, he noticed that defendant's heart was beating "real hard." Garcia looked for clothes that matched the shooter's and found a "black hoodie with a North Carolina jersey" next to defendant's chair. He gave the clothing to his partner who later inventoried the items. Outside, Cortes identified defendant as the shooter. Garcia identified People's Exhibit Nos. 12 and 13 as the black hoodie and North Carolina jersey he found in defendant's house. Garcia returned to the crime scene to search for a firearm, but he did not find one.

¶ 18 On cross-examination, Garcia stated that defendant was wearing only white boxer shorts when officers found him in the bedroom. They allowed defendant to "grab some clothes" before transporting him to the police station.

¶ 19 Detective Steve Buglio testified that he arrived at the crime scene around 7:30 a.m. The weather was "very hot and very humid." Later, when Buglio interviewed defendant at the police station, defendant stated that he was a member of the Satan Disciples known as Smurf or Murphy. Defendant had been inside his home "from midnight on." When asked if anyone could verify that he was in the house around 3 a.m., defendant answered, "no because everybody was sleeping." Buglio conducted a lineup that was viewed separately by Gritzenbach, Cortes, and Nathaniel, who each identified defendant as the shooter.

¶ 20 On cross-examination, Buglio denied showing Cortes, Gritzenbach, or Nathaniel pictures of defendant before they viewed the lineup. At the police station, defendant was wearing a white athletic shirt, white underwear, and white jeans with a black belt.

¶ 21 Chicago police detective Michael Rose testified that he interviewed defendant on July 5, 1999. Defendant stated that around 1 a.m. on July 3, 1999, he was in his brother's bedroom watching television while everyone slept. He remained in the room until the police knocked on his

door. When asked if his hands would test negative or positive for GSR, defendant answered "positive" because he had been setting off firecrackers. Informed that only firing a gun would leave GSR, defendant again stated his hands would test positive.

¶ 22 On cross-examination, Rose testified that defendant denied firing a weapon and defendant's hands tested negative for GSR. Rose did not know whether defendant's clothing was tested for residue.

¶ 23 Illinois state police evidence analyst Robert Berk testified as an expert in the field of GSR. He stated that when a weapon is fired, lead, barium, and antimony are emitted. Thus, a person handling a fired weapon will have residue on his or her hands. The elements are not burned into the skin, but are "deposited on the skin," adhering to "skin oil and skin moisture."

¶ 24 Berk analyzed the GSR test taken on defendant. Although defendant's hands tested negative for GSR, Berk explained that a negative result does not mean defendant did not fire a weapon. A person would test negative for GSR if (1) he did not fire a weapon, (2) the weapon did not produce sufficient GSR for detection, or (3) the residue was removed from his hands prior to testing. Residue could also transfer, through "normal hand activity," from the hands to other surfaces so that "positive results may turn into inconclusive and eventually negative findings." Sweating due to hot weather or running could also remove GSR.

¶ 25 On cross-examination, Berk stated that transfer of GSR to clothing "would not be definite," but would depend upon "the environmental situation when the weapon is discharged." He did not test defendant's clothing for GSR. On redirect, Berk confirmed that he found "trace amounts of the barium and antimony" on defendant's hands which, although elevated and significant, did not meet the standards for a positive GSR test.

¶ 26 Cook County medical examiner Dr. Lawrence Cogan testified that he performed Garza's autopsy. He concluded that Garza died from multiple gunshot wounds and the manner of death was homicide.

¶ 27 Outside the presence of the jury, the trial court and the parties discussed which exhibits would be provided to the jury during deliberations. Trial counsel argued that the black hoodie and blue shirt were "never IDed [*sic*] as being the Defendant's," and would, therefore, be "prejudicial." The trial court overruled the objection.

¶ 28 Trial counsel then moved for a directed verdict, arguing that Nathaniel's testimony about observing the shooter's face was incredible given Gritzenbach's testimony that the shooter was inside the van when he shot Garza. Furthermore, in light of Gritzenbach's and Cortes's gang affiliations and biases, their testimony identifying defendant as the shooter carried little weight. The trial court denied the motion.

¶ 29 During closing argument, trial counsel commented on the sweatshirt and jersey recovered from the bedroom. Counsel noted that the bedroom belonged to defendant's brother, who was also in the room along with a friend. Counsel remarked,

> "Lord knows whose sweatshirt and jersey this is. I don't know. And you don't know. And April Gritzenbach who they had I.D. the stuff, how does she know?
>
> How many of these do they sell a year do you think. Do you think its [*sic*] possible that maybe a houseful of boys had a black sweatshirt around that fit the description."

¶ 30 The jury found defendant guilty of first degree murder. After denying defendant's motion for a new trial, the trial court sentenced him to 28 years' imprisonment.

¶ 31 On direct appeal, appointed counsel filed a motion for leave to withdraw as counsel pursuant to *Anders v. California*, 386 U.S. 738 (1967). In his *pro se* response, defendant claimed, in relevant part, that the State presented "fabricated evidence" by "altering" the hooded sweatshirt, and, additionally, the clothes defendant wore on the night of the shooting were on the floor next to his bed and did not include a "hooded sweatshirt." This court allowed counsel's motion to withdraw and affirmed defendant's conviction and sentence. *People v. Danao*, 1-00-3477 (May 6, 2002) (unpublished order under Supreme Court Rule 23).

¶ 32 On April 9, 2003, defendant filed a *pro se* petition for postconviction relief alleging (1) ineffective assistance of trial counsel for failing to challenge biased venirepersons and failing to impeach witnesses, (2) the trial court erred in instructing the jury on evaluating eyewitness identification testimony, and (3) appellate counsel was ineffective for failing to raise the jury instruction issue on direct appeal. The circuit court dismissed the petition as frivolous and patently without merit, and this court affirmed. *People v. Danao*, 1-03-2230 (Dec. 3, 2004) (unpublished order under Supreme Court Rule 23). We found that although the trial court's instruction was improper, the error was harmless where the evidence "was not closely balanced." *Id.* at *8.

¶ 33 Defendant then filed two petitions for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)). In the first petition, he argued that the murder statute violated the single-subject rule. In the second, he argued that his three-year mandatory supervised release term was void. The circuit court denied each petition. Defendant appealed from those judgments, and, in each appeal, this court allowed appointed counsel's motion to withdraw under *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and affirmed the judgment. *People*

v. Danao, 1-09-0412 (May 14, 2010) (unpublished order under Supreme Court Rule 23); *People v. Danao*, 1-15-0807 (Nov. 23, 2016) (unpublished order under Supreme Court Rule 23).

¶ 34 On February 15, 2019, through private counsel, defendant filed a "successive petition for post-conviction relief" and a separate motion for forensic testing of the hoodie, which had been impounded at the close of trial. The circuit court allowed the motion for GSR testing at defendant's expense and continued the matter regarding the successive petition. In a separate order, the court directed the clerk of the circuit court to release the sealed bag containing the sweatshirt to a state's attorney representative for transport to Microtrace LLC (Microtrace). On September 25, 2019, after counsel received the test results, the court allowed counsel's request for leave to file an amended successive petition.

¶ 35 On January 23, 2020, again through private counsel, defendant filed a combined "successive petition for post-conviction relief" and "petition pursuant to 735 ILCS 5/1401(a)." Therein, defendant asserted actual innocence based, in relevant part, on the newly discovered affidavit of Juan Pena and the results of recent GSR testing on the black Nike sweatshirt. Alternatively, defendant claimed ineffective assistance of trial counsel for failing to test the sweatshirt for GSR. Defendant attached, *inter alia*, the affidavit of Pena and a GSR analysis report from Microtrace.[2]

[2] Defendant also presented the affidavit of another newly discovered witness, Francisco Gutierrez, who averred that Cortes and Gritzenbach, contrary to their testimony, remained actively involved in the Latin Souls gang at the time of trial. On appeal, defendant makes no argument based on Gutierrez's affidavit. Consequently, we will not consider it as a basis to support the claims in his petition. Defendant's petition also alleged that appellate counsel was ineffective for failing to investigate the Nike sweatshirt, but defendant does not argue this point on appeal. See Supreme Court Rule 341(h)(7) (eff. Oct. 1, 2020) ("[p]oints not argued are forfeited").

¶ 36 In his affidavit, Pena stated that he was born on March 8, 1987, and was currently incarcerated. Early on July 3, 1999, he was outside playing with fireworks when he heard several gunshots near 63rd and Sacramento. Pena "saw a man running toward me with a gun in his hand. As he was running, he was trying to put the gun away in the front of his body; maybe his waistband or a pocket." The man ran by Pena into the alley. Pena described him as "a dark complected, male Hispanic with a goatee," around 30 years old. Pena ran into his house because he was scared. He did not tell anyone outside his family what he had observed. Pena met defendant in 2010 because they "were on the same wing" of the correctional center. In 2016, defendant spoke about his imprisonment and Pena "realized it was connected to the incident" he witnessed in 1999.

¶ 37 The report from Microtrace stated that on June 7, 2019, it received a "black hooded sweatshirt" in a plastic bag for GSR testing. Samples were taken from the "right cuff, left cuff, and the inside and outside of the fabric" next to the horizontal tear on the front of the sweatshirt. Testing revealed no tricomponent particles in the samples. Reasons for the negative results might include (1) the sweatshirt was not in the immediate vicinity of a discharged firearm; (2) any particles deposited were "removed prior to sampling, through typical wear, intentional cleaning/washing, or handling after it was collected as evidence (*e.g.*, at trial)"; or (3) the ammunition did not produce traditional tricomponent particles. Microtrace concluded that "while it cannot be stated that this sweatshirt was not in the immediate vicinity of a discharged firearm, this testing did not find any evidence supporting the proposition that [the sweatshirt] was in the immediate vicinity of a discharged firearm."

¶ 38 On October 20, 2020, the circuit court advanced defendant's combined petition to second-stage proceedings. The State filed a motion to dismiss. On February 11, 2021, after a hearing, the

circuit court dismissed the combined petition. It found that defendant did not demonstrate actual innocence and his ineffective assistance claims involved reasonable trial strategy. Moreover, the evidence was "not that conclusive to establish relief under section 2-1401."

¶ 39 On appeal, defendant argues that the circuit court erred in dismissing his successive petition where he made a substantial showing of actual innocence based on Pena's affidavit and the GSR test results, and of ineffective assistance of trial counsel for counsel's failure to seek GSR testing on the black sweatshirt.[3]

¶ 40 The Act provides a three-stage process for a criminal defendant to assert a violation of his constitutional rights at trial. *People v. Pendleton*, 223 Ill. 2d 458, 471-72 (2006). A postconviction proceeding does not substitute for a direct appeal but instead "offers a mechanism for a criminal defendant to assert a collateral attack on a final judgment." *People v. Robinson*, 2020 IL 123849, ¶ 42. "The purpose of a postconviction proceeding is to permit inquiry into constitutional issues involved in the original conviction and sentence that were not, and could not have been, adjudicated previously on direct appeal." *People v. English*, 2013 IL 112890, ¶ 22. Therefore, issues raised and decided on direct appeal or in a prior proceeding are barred as *res judicata*, and issues that could have been raised but were not are forfeited. *People v. Daniels*, 2020 IL App (1st) 171738, ¶ 21.

¶ 41 The Act contemplates the filing of only one postconviction petition. *Robinson*, 2020 IL 123849, ¶ 42. To file a successive petition, a defendant must obtain leave of court. 725 ILCS 5/122-

[3] On appeal, defendant does not argue that he was entitled to relief for any claim under section 2-1401.

1(f) (West 2020). Here, the circuit court granted defendant leave to file a successive postconviction petition but dismissed his petition at the second stage.

¶ 42 At the second stage, the defendant must make a substantial showing of a constitutional violation to warrant a third-stage evidentiary hearing. *People v. Domagala*, 2013 IL 113688, ¶¶ 33-34. Such a showing is made when the well-pled allegations of a constitutional violation, if proven at an evidentiary hearing, would entitle the defendant to relief. *Id.* ¶ 35. The circuit court examines and rules upon the legal sufficiency of each claim at the second stage. *People v. Johnson*, 206 Ill. 2d 348, 356-57 (2002). We review the dismissal of a postconviction petition at the second stage *de novo*. *Pendleton*, 223 Ill. 2d at 473.

¶ 43 We first consider the dismissal of defendant's ineffective assistance of trial counsel claim. To make a substantial showing of ineffective assistance, the defendant must show that counsel's performance fell below an objective standard of reasonableness, and he was prejudiced by counsel's substandard performance. *People v. Martinez*, 389 Ill. App. 3d 413, 415 (2009). The defendant's failure to establish either deficient performance or prejudice will defeat an ineffective assistance claim. *People v. Johnson*, 2021 IL 126291, ¶ 53.

¶ 44 We view claims of ineffective assistance "not in hindsight, but from the time of counsel's conduct, and with great deference accorded counsel's decisions on review." *People v. Fuller*, 205 Ill. 2d 308, 330-31 (2002). We begin with the presumption that counsel's actions were motivated by sound trial strategy. *People v. Eddmonds*, 143 Ill. 2d 501, 529 (1991). Furthermore, a defendant is entitled to reasonable, not perfect, representation. *Fuller*, 205 Ill. 2d at 331. The "fact that another attorney might have pursued a different strategy, or that the strategy chosen by counsel has ultimately proved unsuccessful, does not establish" deficient performance. *Id.*

¶ 45 Defendant contends that trial counsel performed unreasonably by failing to seek GSR testing of the black Nike sweatshirt prior to trial. We disagree.

¶ 46 Witnesses described the shooter as wearing a "black hoodie." Counsel thus sought to distance defendant from the black sweatshirt at trial. When the prosecutor wanted Gritzenbach to identify the sweatshirt in court, trial counsel objected because defendant was not wearing it when he was arrested, and no one identified it as belonging to defendant. During closing argument, trial counsel reminded jurors that police recovered the sweatshirt in the bedroom of defendant's brother, and that his brother and his brother's friend were in the room with defendant. Counsel remarked, "Lord knows whose sweatshirt and jersey this is. I don't know. And you don't know."

¶ 47 Counsel's theory of the case was that the black sweatshirt did not belong to defendant. Defendant agreed with this theory. In his *pro se* response to appointed counsel's motion to withdraw as counsel on direct appeal, defendant denied that he wore the black sweatshirt on the night of Garza's murder. Given the theory of the case, counsel's decision to forego GSR testing on the black sweatshirt reflected reasonable trial strategy. See *Fuller*, 205 Ill. 2d at 33. ("courts have held that such claims of ineffective assistance of counsel must be judged on a circumstance-specific basis, viewed not in hindsight, but from the time of counsel's conduct, and with great deference accorded counsel's decisions on review").

¶ 48 Relying on Microtrace's testing results, defendant now contends that trial counsel should have acknowledged defendant wore the black sweatshirt and should have tested it for residue prior to trial. Defendant argues that a thorough investigation by counsel would have included testing the sweatshirt for residue before deciding whether to pursue a strategy of denying defendant's ownership of the sweatshirt.

¶ 49 The State responds that trial counsel's strategy was reasonable because had counsel requested testing of the sweatshirt and it tested positive, prosecutors could credibly argue that the result incriminated defendant in Garza's murder. We also note that defendant's hands tested negative for GSR, but Berk gave plausible reasons why that could occur even if defendant had fired a weapon. Specifically, residue could transfer through "normal hand activity" to other surfaces, and sweating due to hot weather or running could remove GSR. If defendant claimed ownership of the sweatshirt and the sweatshirt tested positive for GSR, that evidence would have further undermined the negative result obtained from defendant's hands.

¶ 50 " 'A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.' " *Eddmonds*, 143 Ill. 2d at 529 (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). Trial counsel's decision to not test the sweatshirt for GSR was sound trial strategy. "The fact that counsel's strategy did not prove successful, or that counsel might have chosen a different strategy in hindsight, does not render a strategy constitutionally ineffective." *People v. Massey*, 2019 IL App (1st) 162407, ¶ 31. We find that defendant has not made a substantial showing that his counsel performed deficiently.

¶ 51 Defendant also has made no substantial showing he was prejudiced by counsel's failure to test the sweatshirt.

¶ 52 Defendant asserts that Pena heard gunshots and saw a man attempt "to conceal the firearm inside his pocket or waistband as he fled the scene." Defendant argues that due to "the proximity of the firearm to the sweatshirt before, during, and after the shooting, one would expect to find

GSR somewhere on the sweatshirt." He contends that he was prejudiced by counsel's inaction because GSR testing would have established no residue on the sweatshirt prior to trial, thus rendering defendant's identity as the shooter questionable.

¶ 53 As an initial matter, to the extent defendant claims that Pena's affidavit bolsters a claim of ineffective assistance, we observe that defendant does not allege that trial counsel knew or should have known about Pena's observations or existence. See, *e.g.*, *People v. Williams*, 147 Ill. 2d 173, 247 (1991) (rejecting claim of ineffective assistance predicated on counsel's failure to call a witness when, even accepting that counsel knew the witness existed, "[w]e cannot fault defense counsel for failing to pursue a witness who was apparently unavailable"). Moreover, defendant presumes that Pena observed the shooter. Pena's affidavit, however, stated only that he heard shots and then saw a man running as "he was trying to put the gun away in *** his waistband or a pocket." Pena did not observe the shooting, nor did he observe the man shoot the firearm.

¶ 54 Even if we presume that trial counsel had knowledge of Pena, defendant has not shown prejudice. Prejudice is established by showing that, but for counsel's deficient performance, there is a reasonable probability the result of defendant's trial would have been different. *People v. Houston*, 229 Ill. 2d 1, 4 (2008).

¶ 55 Defendant claims that he was prejudiced by trial counsel's inaction because the sweatshirt would have tested negative for GSR, and the negative results would have "bolstered" his misidentification defense. We cannot presume, however, that GSR testing of the sweatshirt prior to trial would have yielded the same negative result Microtrace found in September 2019, approximately 20 years after defendant's trial.

¶ 56 Microtrace explained that negative results could have occurred because particles were removed through "handling after [the sweatshirt] was collected as evidence (*e.g.*, at trial)." Trial

counsel admitted to handling the sweatshirt at trial. Prosecutors also presented the black sweatshirt as People's Exhibit No. 12 for Gritzenbach and Officer Garcia to identify, and it was provided to the jury during deliberations. Defendant's conclusion that the sweatshirt would have tested negative in 1999, before extensive handling by attorneys, is mere conjecture. As such, his claim that a potential negative test would have exonerated him amounts to speculation that falls short of demonstrating actual prejudice. *Johnson*, 2021 IL 126291, ¶ 58.

¶ 57 Defendant has not made a substantial showing that trial counsel performed unreasonably by failing to test the sweatshirt for GSR, or that he was prejudiced by counsel's allegedly deficient performance. Therefore, the circuit court properly dismissed his ineffective assistance of counsel claim.

¶ 58 Next, we consider whether newly discovered evidence consisting of Pena's affidavit and Microtrace's negative GSR test demonstrates defendant's actual innocence.

¶ 59 To establish actual innocence, the newly discovered evidence must make "a persuasive showing that the [defendant] did not commit the charged offense and was, therefore, wrongfully convicted." *People v. Taliani*, 2021 IL 125891, ¶¶ 56-57. In Illinois, a free-standing claim of actual innocence in postconviction proceedings is "cognizable as a matter of due process" under the Illinois Constitution of 1970 (Ill. Const. 1970, art. I, § 2). *People v. Washington*, 171 Ill. 2d 475, 489 (1996). A free-standing claim is one where "the newly discovered evidence is not being used to supplement an assertion of a constitutional violation with respect to trial." *Id.* at 479.

¶ 60 *People v. Hobley*, 182 Ill. 2d 404 (1998), discussed what constitutes a free-standing claim of actual innocence. In *Hobley*, the defendant supported his actual innocence claim with newly discovered evidence of a negative fingerprint report and a second gasoline can, the same evidence

used to support his claim that the State failed to disclose exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963). *Id.* at 444. The supreme court found that the defendant did not properly raise a free-standing actual innocence claim where the newly discovered evidence was also "being used to supplement his assertions of constitutional violations with respect to [the] trial." (Internal quotation marks omitted.) *Id.*

¶ 61 Here, the State argues that defendant did not present a free-standing claim of actual innocence where he used the same evidence to support his actual innocence claim and his ineffective assistance of counsel claim. Defendant agrees that the same evidence supports both claims but argues that the supreme court left open the possibility to assert both a free-standing claim of actual innocence and a deprivation of a constitutional right at trial based on the same evidence. As support, defendant cites *People v. Martinez*, 2021 IL App (1st) 190490.

¶ 62 In *Martinez*, the defendant appealed from the dismissal of a successive postconviction petition that alleged constitutional violations and actual innocence. The claims derived from the same underlying evidence, namely evidence of a police detective's pattern and practice of engaging in misconduct and new expert testimony regarding witness identification. *Id.* ¶ 46. In holding that the defendant could pursue both claims, *Martinez* acknowledged *Hobley*, but determined that *Hobley* "deviated from both the spirit and the letter of the law as set forth in *Washington*." *Id.* ¶ 102. *Hobley* identified "no principle or purpose" that prohibited "a defendant from using the same evidence to assert both a constitutional claim of trial error and an actual innocence claim." *Id.* Furthermore, *Hobley* was inconsistent with the supreme court's "more recent pronouncements on actual innocence" in *People v. Coleman*, 2013 IL 113307. *Id.* ¶ 104.

¶ 63 In *Coleman*, the supreme court noted that "a freestanding actual innocence claim is independent of any claims of constitutional error at trial and focuses solely on a defendant's factual innocence in light of new evidence." *Coleman*, 2013 IL 113307, ¶ 83. Accordingly, "[w]here a defendant makes a claim of trial error, as well as a claim of actual innocence, in a successive postconviction petition, the former claim must meet the cause-and-prejudice standard, and the latter claim must meet the *Washington* standard." *Id.* ¶ 91.

¶ 64 The court in *Martinez* found that *Coleman* thus contemplated that "the *claims* be independent, not that the actual innocence claim be independent of *the evidence* underlying" the other constitutional claim of error. (Emphasis in the original.) *Martinez*, 2021 IL App (1st) 190490 ¶ 104; but see *People v. Griffin*, 2022 IL App (1st) 191101-B, ¶ 33 (rejecting the suggestion that *Coleman* overruled *Hobley* or *Orange*). We agree with *Martinez* and therefore will address defendant's actual innocence claim.

¶ 65 "To establish a claim of actual innocence, the supporting evidence must be (1) newly discovered, (2) material and not cumulative, and (3) of such conclusive character that it would probably change the result on retrial." *Robinson*, 2020 IL 123849, ¶ 47. The conclusive character element is the most important in an actual innocence claim. *Id.*

¶ 66 Pena's affidavit and Microtrace's GSR test results lack such conclusive character, as they do not place the trial evidence in a different light or undermine our confidence in defendant's conviction. *Id.* ¶ 48 (stating the appropriate standard when considering, in an actual innocence claim, whether the factfinder would reach a different result when looking at prior evidence along with the new evidence). Microtrace's negative test was far from conclusive. Although Microtrace did not find evidence that the sweatshirt "was in the immediate vicinity of a discharged firearm,"

it could not determine that "this sweatshirt was *not* in the immediate vicinity of a discharged firearm." (Emphasis added.) Berk testified similarly at trial that transfer of GSR to clothing "would not be definite." Also, Pena did not observe the shooting. His statements therefore add nothing to the identification issue where Nathaniel, Gritzenbach, and Cortes testified that they observed the shooting, and they identified defendant as the shooter. As such, defendant has made no substantial showing of actual innocence. Therefore, the circuit court properly dismissed defendant's actual innocence claim.

¶ 67 For the foregoing reasons, we find that defendant has not made a substantial showing of actual innocence or ineffective assistance of trial counsel and affirm the circuit court's dismissal of his successive petition without an evidentiary hearing.

¶ 68 Affirmed.

No. 129353

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- JOHNNY FLOURNOY, Petitioner-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-21-0587. There on appeal from the Circuit Court of Cook County, Illinois , No. 92 CR 7449. Honorable James B. Linn, Judge Presiding.

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 August 8, 2023, the Brief and Argument 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 in an envelope deposited in a U.S. mail box in Springfield, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

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