No. 123849

IN THE

SUPREME COURT OF ILLINOIS

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

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

JAMES E. CHADD
State Appellate Defender

PATRICIA MYSZA
Deputy Defender

MICHAEL GOMEZ
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLANT

ORAL ARGUMENT REQUESTED

E-FILED
8/21/2019 3:07 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

POINT AND AUTHORITIES

Page

NATURE OF THE CASE

Rickey Robinson, petitioner-appellant, appeals from a judgment denying him leave to file a successive post-conviction petition alleging actual innocence.

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

ISSUE PRESENTED FOR REVIEW

Whether Rickey Robinson set forth a colorable claim of actual innocence entitling him to file a successive post-conviction petition, where newly discovered, material, and non-cumulative affidavits from three uninvolved witnesses circumstantially identify Lenny Tucker, a key State's witness, as the real murderer of Nicole Giles, and that Robinson was not involved in the offense.

STATEMENT OF FACTS

Overview

Rickey Robinson was convicted after a bench trial of first degree murder, armed robbery, aggravated vehicular hijacking, and concealment of a homicidal death related to the murder of Nicole Giles on December 28, 1997. (TC. R. C.157)[1] His conviction and sentence were affirmed on direct appeal. (PC. C.41-50) Robinson's first post-conviction petition was dismissed at the second stage, and the dismissal was affirmed on appeal. *People v. Robinson*, 2015 IL App (1st) 123360-U, ¶ 59.

On May 8, 2015, Robinson moved for leave to file a successive post-conviction petition, raising, *inter alia*, a claim of actual innocence based on three newly discovered witness affidavits. (SPC. C.41-62) The three witnesses all placed Lenny Tucker, one of the State's main witnesses, at or near the scene of the murder and disposal of the murder weapon. (SPC. C.51-55) One of the affiants stated that Tucker confessed to the murder while filling a gas can about one hour before Giles's body was found burning in a garbage can. (SPC. C.53; TC. R. J.87-91, 99-100) The circuit court denied Robinson leave to file his successive petition, finding that Robinson did not state a colorable claim of actual innocence. (SPC. C.72-74) The Appellate Court, First District, in an unpublished decision, affirmed the circuit court's denial of leave to file, finding that Robinson's new evidence was not of such

---

[1] For the purposes of this brief, references to the record shall be as follows: references to the record in the instant appeal (reviewing court number 1-15-3547) are denoted "SPC. R." for the report of proceedings and "SPC. C." for the common law record. References to the record of Robinson's initial post-conviction proceedings (reviewing court number 1-12-3360) are denoted "PC. R." for the report of proceedings, and "PC. C." for the common law record. References to the record of Robinson's trial court proceedings (reviewing court number 1-00-2981) are denoted "TC. R." for the report of proceedings and "TC. C." for the common law record.

a conclusive character as to probably change the trial outcome, because none of the affiants actually saw the murder or burning of Giles's body and their allegations "conflict[ed] with" the trial evidence. *People v. Robinson*, 2018 IL App (1st) 153547-U, ¶¶ 36-49. Robinson now appeals to this Court.

Trial

The evidence at Robinson's bench trial established that shortly before 5 p.m. on December 28, 1997, two witnesses saw someone shoot another individual by a car under the viaduct at 88th Street and Kingston Avenue in Chicago. (TC. R. J.22-28, 46-51) The shooter and another man put the victim's body in the back seat of the car and drove away. (TC. R. J.23-28, 50) The witnesses could not see the faces of the individuals because it was too dark. (TC. R. J.40, 52-53)

D'Andre Weaver testified that a little before noon on December 29, 1997, he looked out of his rear window and saw two men whose faces he could not see get out of a red Chevy, with one of the men carrying a gas tank. (TC. R. J.87-89) The men walked down an alley, returned to the car a few moments later, and sped off. (TC. R. J.88-91) Weaver heard fire engines and saw smoke coming from the alley. (TC. R. J.92) The police responded to a call of a dumpster fire and found Giles's body burning in a garbage can. (TC. R. J.99; K.171; M.47-50)

The police ultimately recovered Giles's pager and a box of ammunition of the same type as the shell casing found at the scene of the shooting from the bedroom of Leonard Tucker, Robinson's sister's boyfriend. (TC. R. K.37-38, 95-96, 99, 125, 190) Tucker testified for the State that he was at Robinson's home on the evening of December 28 when Robinson arrived with Peter Ganaway and Marques Northcutt. (TC. R. K. 89-90) Robinson said he had killed Giles. (TC. R. K.107) Robinson also

stated that he, Ganaway, and Northcutt dumped her body in a garbage can and ditched the gun on Bennett Avenue. (TC. R. K.110-11, 125) On Tucker's walk home, Ganaway approached him and asked him to take a green pager. (TC. R. K.94-95, 118 120) Ten minutes after that, Ganaway arrived at Tucker's home and asked him to hold a green box containing AK-47 ammunition, which Tucker put in his bedroom. (TC. R. K.96, 120, 123)

Tucker testified that the next morning he went to Robinson's house and saw Robinson carrying a gas can. (TC. R. K.98) According to Tucker, Robinson stated, "It's done, we did it, we burned her body." (TC. R. K.111) A little over a week after the murder, the police went to Tucker's school and took him to the police station. (TC. R. K.98) They told him he was a suspect and asked him why he had the pager and ammunition box at his house. (TC. R. K.129-30) Tucker then told the police what he knew. (TC. R. K.130)

Maisha Muhammad testified that on the morning of December 29, she went to Robinson's house in her grandmother's car, a red Chevy. (TC. R. B.13) Muhammad agreed to drive Robinson and Ganaway around in her car; she said Robinson had a gas can with him. (TC. R. B.18, 30) They first stopped at a gas station, then drove around until Robinson told her to stop. (TC. R. B.18-21) Robinson and Ganaway got out of the car with the gas can and walked down an alley. (TC. R. B.21) About five to ten minutes later, the two jogged back to the car and told her to drive back to Robinson's house. (TC. R. B.22-23) Muhammad said Robinson told her they had burned Giles's body. (TC. R. B.32-35)

Michelle McClendon, Robinson's then-girlfriend, made a statement wherein she said that Robinson told her that he shot Giles in the head, and that she

overheard Robinson and Ganaway explain to Northcutt how they burned Giles's body. (TC. R. M.11-12, 18, 24-25, 34-38)

Two days after the murder, Detective Michael McDermott went to Robinson's house to speak with him, but he was not home. (TC. R. K.171-72) Robinson voluntarily went to the police station with Ganaway later that evening. (TC. R. K.173-74) Robinson told McDermott that Giles was supposed to pick him up on the afternoon of December 28, but she did not show up, so another friend drove him, Ganaway, and Northcutt to their friend Kevin's house. (TC. R. C.4-5) After a few interviews, Ganaway led McDermott to an alley on S. Bennett Avenue, where Ganaway recovered a MAK 90 rifle. (TC. R. C.14, K.175-76)

McDermott testified that Robinson eventually made a statement admitting to robbing and killing Giles. (TC. R. C.14-15) Robinson gave a 70-page court-reported statement, wherein he said that he, Ganaway, and Northcutt planned to rob Giles because he believed she had received a few hundred dollars in cash. (TC. R. C.59-65, 75-77) They planned only to rob Giles, but decided to kill her because she knew them. (TC. R. C.78) Worried that they may have left fingerprints on Giles's clothes, they decided to burn her body. (TC. R. C.123-25)

The court found Robinson guilty on all counts and sentenced him to natural life in prison for first degree murder, 30 years for aggravated vehicular hijacking, 30 years for armed robbery, and 5 years for concealing a homicide. (TC. C.180)

Direct Appeal & Initial Post-Conviction Proceedings

The Appellate Court, First District, affirmed Robinson's convictions and sentences on direct appeal, and this Court denied his petition for leave to appeal. (PC. C.41-50, 52) Robinson filed a *pro se* post-conviction petition raising claims

of trial court error and ineffective assistance of counsel. (PC. C.70-97) His petition was dismissed, and the appellate court affirmed the dismissal. (PC. C.210-24; PC. R. PPP.2-3); *People v. Robinson*, 2015 IL App (1st) 123360-U, ¶ 59.

Instant Successive Post-Conviction Petition

On May 8, 2015, Robinson filed a motion for leave to file a successive post-conviction petition, raising, *inter alia*, a claim of actual innocence. (SPC. C.41-62) Robinson attached the affidavits of three witnesses: Andre Mamon, Donald Shaw, and Tavares Hunt-Bey. (SPC. C.51-55) Robinson asserted that these witnesses' affidavits provided evidence that Lenny Tucker, one of the State's witnesses, was the real murderer for whom Robinson took the fall. (SPC. C.44)

Andre Mamon's Affidavit

Andre Mamon stated in his affidavit that he witnessed someone get shot and shoved into a car just days after Christmas in December 1997. (SPC. C.54) He was with his father and three of his father's female associates. (SPC. C.54) While they walked to the bus stop at Kingston Avenue and 88th Street, a car stopped across the street and honked. (SPC. C.54) The women waved and said hello to a man named "Lenny" who was sitting in the car with one other guy. (SPC. C.54)

Mamon, his father, and the three women continued to the bus stop, and after standing there a short while, their attention was drawn to the viaduct across S. Chicago Avenue when they saw a bright flash and heard a loud gun shot. (SPC. C.54) Mamon saw "that same Lenny guy" shove an "AK" in the back seat of the same car he had seen him in earlier. (SPC. C.54) Lenny and the two guys with him got in the car and drove away. (SPC. C.54) When the bus came, Mamon, his father, and three women got on it and left. (SPC. C.54)

In August 2014, Mamon, who was in prison, spoke to someone on the phone who asked him if he had run into "a guy named Ricky" who "had been locked up a long time for a murder around the way on South Chicago [Avenue] under a viaduct." (SPC. C.55) Mamon recalled the incident he had witnessed years ago. (SPC. C.55) Mamon later encountered Robinson, whom he knew as "R.C.," at a dining table at the prison. (SPC. C.55) Mamon saw Robinson's full name on his ID card and confirmed that he was in prison for the murder under the viaduct at S. Chicago Avenue. (SPC. C.55) Mamon told Robinson he was at the bus stop when that murder occurred, and Robinson was not one of the faces he saw that night. (SPC. C.55)

Donald Shaw's Affidavit

Donald Shaw stated in his affidavit that he used to hang out on the block of 89th Street and Bennett Avenue from January 1995 until August 1999. (SPC. C.51) An acquaintance of his mentioned some information on Facebook pertaining to Robinson, which caused Shaw to recall the night of December 28, 1997. (SPC. C.51) According to his affidavit, Shaw was hanging out in the alley behind 8918 S. Bennett Avenue on the evening of December 28. (SPC. C.51) He saw a dark-colored Ford Contour drive past him and stop a couple of garages down. (SPC. C.51) He approached the car and saw three guys who used to hang out with Robinson, including Tucker, whom he knew well. (SPC. C.51)

While he was speaking with Tucker, a man got out of the back seat with "an AK type assault rifle[,] *** ran between a gangway on the other side of the alley[,] *** and returned empty handed without the gun." (SPC. C.51) The man got back into the car with Tucker and another of Robinson's acquaintances, and

they all left. (SPC. C.51) Shaw stated that Robinson was not there. (SPC. C.51)

Tavares Hunt-Bey's Affidavit

Tavares Hunt-Bey stated in his affidavit that at about 10 or 11 a.m. on December 29, 1997, he was hanging out around the gas station on 87th Street and Exchange Avenue. (SPC. C.53) He saw a red Chevy Corsica pull into the gas station. (SPC. C.53) He approached the car and recognized the driver as a former gang member by the name of Lenny Tucker. (SPC. C.53) Tucker threw up a gang sign when he saw Hunt-Bey approach and then got out of the car along with two other gang members to shake hands with Hunt-Bey. (SPC. C.53) One man went inside to pay for gas, the other got back in the car, and Tucker stood outside conversing with Hunt-Bey. (SPC. C.53)

Hunt-Bey asked Tucker whose car that was and what they were doing that night. (SPC. C.53) Tucker said that he had killed a sister of one of the "CVLs" ("Conservative Vice Lords") the night before under a viaduct on S. Chicago Avenue, and that Hunt-Bey should be "on point" because the CVLs might seek revenge for what Tucker did. (SPC. C.53) Tucker said he was borrowing the car from a friend to "tie up some loose ends." (SPC. C.53) Tucker then started pumping gas into a gas can. (SPC. C.53) Once Tucker was done pumping, they traded gang signs, and Tucker drove away. (SPC. C.53)

The following day, Hunt-Bey heard the news that Robinson had confessed to killing and burning the victim. (SPC. C.53) He knew right then that Robinson was taking the rap for Tucker, but because they all belonged to the same gang, he had to honor the "code of silence," and could not talk to the police about it. (SPC. C.53) Not too long after Giles's murder, Hunt-Bey ran into legal troubles of his

own. (SPC. C.53) Just before preparing his affidavit, Hunt-Bey learned that Tucker had testified falsely against Robinson and that Tucker was no longer a member of his gang, allowing Hunt-Bey to speak freely. (SPC. C.53)

Robinson's Affidavit

Robinson also prepared an affidavit stating that he and Tucker were members of different sects of the Black P. Stones. (SPC. C.57-58) There was a gang war pitting the Latin Kings and Black P. Stones against the Latin Dragons and CVLs. (SPC. C.57-58) Robinson and Tucker started hanging out regularly, and Robinson's sect would provide assistance to Tucker's sect. (SPC. C.58) Through Tucker, Robinson met Nicole Giles, with whom Robinson became good friends. (SPC. C.58) Giles would help Robinson move weapons from sect to sect. (SPC. C.58)

Giles's cousin, Jerry, was a high-ranking member of the CVLs, the Black P. Stones's rival gang, and Giles would often brag in front of Tucker and others about her cousin giving her money. (SPC. C.58) The fact that Jerry was a high-ranking CVL rubbed Tucker the wrong way, and he began to see Giles "as the bait to bring the war to Jerry's front door." (SPC. C.58)

On the day of Giles's murder, Robinson solicited Giles's assistance with moving weapons. (SPC. C.58) Robinson waited at his home with his friends Northcutt and Ganaway until Robinson had to leave for a date. (SPC. C.59) After the date, Robinson returned to his house, where Tucker was visiting Robinson's sister. (SPC. C.59) Northcutt and Ganaway said they had moved the weapons to where they needed to go. (SPC. C.59) Robinson spent the night at another woman's house, while Tucker stayed at Robinson's house. (SPC. C.59) Robinson did not know about Giles's murder, which is why he voluntarily went to the police station for questioning

and agreed to take a polygraph test, which he passed. (SPC. C.59)

Robinson also stated that there was a law within the Black P. Stones gang that no member would cooperate with the police against another "brother." (SPC. C.59-60) Robinson later learned that Tucker had left the Black P. Stones and joined the Black Disciples. (SPC. C.60) Robinson has since left the Black P. Stones and now believes he can reveal the truth without reprisal. (SPC. C.61)

Circuit Court's Denial of Leave to File & Appellate Court Decision

The circuit court found that Mamon's, Shaw's, and Hunt-Bey's affidavits did not support a colorable claim of actual innocence. (SPC. C.72-74) The court found that the affidavits were newly discovered, material evidence, but were not of such a conclusive character that they would probably change the trial outcome, as none of the affiants witnessed the murder. (SPC. C.72-74)

On appeal from the denial of leave to file, Robinson argued that he stated a colorable claim of actual innocence to warrant filing a successive post-conviction petition. *Robinson*, 2018 IL App (1st) 153547-U, ¶ 31. The appellate court affirmed the denial of leave to file. *Id.* ¶ 49. The appellate court assumed that the affidavits were newly discovered, material, and non-cumulative. *Id.* ¶ 36. The court found, however, that, although the three new witnesses' testimony provided circumstantial evidence that challenged the State's evidence, they were "not of such a character as to probably change the result on retrial" because none of them was present at the shooting or burning of Nicole Giles, and the allegations "conflict[ed] with" the trial evidence. *Id.* ¶¶ 36-47. Robinson filed a petition for rehearing, which the appellate court denied on June 26, 2018.

This Court granted leave to appeal on May 22, 2019.

ARGUMENT

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

"[N]o person convicted of a crime should be deprived of life or liberty given compelling evidence of actual innocence." *People v. Washington*, 171 Ill. 2d 475, 489 (1996). But, at this stage of proceedings, Rickey Robinson is not seeking release from prison or even a new trial. "What is at stake here is the possible wrongful incarceration of a man who is asking *only for the opportunity to file his claims* so that they can be heard by the trial court." *People v. Jones*, 2017 IL App (1st) 123371, ¶ 187 (Gordon, J., dissenting) (emphasis added). And, despite providing affidavits from three uninvolved witnesses who have nothing to gain from their involvement in this case, all of whom identify one of the State's main witnesses as the real murderer, the circuit court and the appellate court have denied Robinson the opportunity to file his petition and have an attorney investigate his actual innocence claim.

Robinson moved for leave to file a successive post-conviction petition alleging actual innocence based on the affidavits of Andre Mamon, Donald Shaw, and Tavares Hunt-Bey. Together, these affidavits place State's witness Lenny Tucker at the location of the murder with a rifle in his hand, at the location where the rifle was disposed of and later recovered, and at a gas station filling up a gas can about an hour before Nicole Giles's body was found burning in a garbage can. (SPC. C.51-55) Crucially, Hunt-Bey's affidavit includes a confession to the murder by Tucker himself, as well as Tucker's statement that he needed to "tie up some loose

ends" just before Giles's burning body was found. (SPC. C.53) According to these affiants, Robinson was not present at any of these times. (SPC. C.51-55) These witnesses' affidavits, which Robinson obtained well after trial, provided material, non-cumulative evidence that someone other than Robinson murdered and burned Giles, which undermines any confidence in Robinson's conviction and requires a reexamination of the trial evidence. In light of this evidence from these three disinterested witnesses who indicate that one of the people responsible for Robinson's conviction was the actual murderer, this Court should grant Robinson the opportunity to file his successive petition and remand for second-stage proceedings.

A. The Post-Conviction Hearing Act and Claims of Actual Innocence.

The Post-Conviction Hearing Act (the "Act") allows a person serving a criminal sentence to challenge his conviction under the federal or Illinois constitutions. 725 ILCS 5/122-1 *et seq.* (West 2014); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). The Act normally contemplates the filing of only one post-conviction petition. 725 ILCS 5/122-1(f) (West 2014); *People v. Coleman*, 2013 IL 113307, ¶ 81. The bar to successive petitions may be relaxed, however, in two situations: (1) where the petitioner can demonstrate "cause and prejudice" for his failure to raise a claim earlier; or (2) to avoid a "fundamental miscarriage of justice." *People v. Edwards*, 2012 IL 111711, ¶¶ 22-23. Under the second exception, a petitioner may submit a successive petition asserting a freestanding claim of actual innocence based on newly discovered evidence, because such a claim is cognizable under the Act as a due process violation. *Id.* ¶ 24; *People v. Washington*, 171 Ill. 2d 475, 489 (1996); U.S. Const. amend. XIV; Ill. Const. 1970, art. I, § 2.

To obtain leave to file a successive post-conviction petition alleging actual

innocence, a petitioner need only "set forth a colorable claim of actual innocence." *Edwards*, 2012 IL 111711, ¶ 24. That is, a petitioner must establish a colorable claim that the evidence supporting his actual innocence claim is "new, material, noncumulative and, most importantly, of such conclusive character as would probably change the result on retrial." *Washington*, 171 Ill. 2d at 489. As this Court held in *Edwards*, leave of court to file an actual innocence claim "should be denied only where it is clear, from a review of the successive petition and the documentation provided by the petitioner that, as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence." *Edwards*, 2012 IL 111711, ¶ 24. In other words, "leave of court should be granted when the petitioner's supporting documentation raises the probability that 'it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.' " *Id.* (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

In reviewing a motion for leave to file a successive petition and the supporting documentation, the court must take all well-pleaded allegations as true and liberally construe them in the petitioner's favor. *People v. Sanders*, 2016 IL 118123, ¶¶ 31, 48 (citing *People v. Coleman*, 183 Ill. 2d 366, 382, 388-89 (1998)). A court may decline to accept an allegation as true if it is "positively rebutted by the record." *Id.* ¶ 48. A court may not "assess the credibility of witnesses and affiants by judging the reliability of their statements," because such questions "can only be resolved by an evidentiary hearing." *Id.* ¶¶ 37, 40.

This Court's jurisprudence establishes that allegations are considered "rebutted by the record" only if they are refuted or disproven by verifiable facts of record, such as those that do not depend on any credibility determination for

their truth. In *Sanders*, for example, a witness claimed he alone shot the victim one time and the defendant was not involved in the shooting. *Id.* ¶ 48. This Court found this allegation was rebutted by the record because the autopsy showed the victim had been shot twice. *Id.*; see also *People v. Blair*, 215 Ill. 2d 427, 453-54 (2005) (finding allegation that trial counsel failed to present evidence that defendant had been drinking alcohol and using marijuana before incident was rebutted by record, where counsel elicited from witness at trial that defendant had drunk alcohol and had used marijuana before incident).

In *Edwards*, by contrast, the defendant presented an affidavit from a co-defendant who claimed he was the shooter and the defendant was not involved. *Edwards*, 2012 IL 111711, ¶ 10. Although the defendant had confessed to his involvement in the shooting, this Court did not find the co-defendant's affidavit was rebutted by the record. *Id.* ¶¶ 5, 38-40. Rather, this Court assumed the affidavit was true, then asked whether it was of such conclusive character that the co-defendant's testimony would probably change the result at a new trial. *Id.* ¶ 40. This Court did the same in *Sanders*, where it first refused to take as true the allegation about the number of shots fired because it was rebutted by the autopsy, then took as true all of the other allegations about the extent of the defendant's participation in the offense, including those from the same affiant. *Sanders*, 2016 IL 118123, ¶¶ 48-52. Thus, unless an allegation is positively rebutted by the record, the court must assume the trier of fact would believe and credit the new allegations over the trial evidence, and determine whether they establish a colorable claim of actual innocence.

This Court has not yet determined the standard of review applicable to

a circuit court's denial of leave to file a successive petition alleging actual innocence. In *Edwards*, this Court noted that decisions granting or denying "leave of court" are generally reviewed for an abuse of discretion. *Edwards*, 2012 IL 111711, ¶ 30. On the other hand, the fact that leave to file should be denied only "where, as a matter of law, no colorable claim of actual innocence has been asserted *** suggests a *de novo* review." *Id.* This Court declined to resolve this discrepancy, *id.*, but countless appellate courts have applied *de novo* review. See *People v. Warren*, 2016 IL App (1st) 090884-C, ¶ 73 (stating that cases since *Edwards* have applied only *de novo* review to denials of leave to file).

While Robinson maintains that he is entitled to relief under either standard, this Court should hold, as it suggested in *Edwards*, that this issue is reviewed *de novo*. In every other context in which a post-conviction petition is dismissed without an evidentiary hearing, the appellate court's review is *de novo*, *Sanders*, 2016 IL 118123, ¶ 31 (citing *Coleman*, 183 Ill. 2d at 388-89), because at those stages, the circuit court cannot make any factual findings and may review only matters of law. Accordingly, this Court already applies *de novo* review to whether a successive petition raising a claim other than actual innocence satisfies the "cause-and-prejudice test." *People v. Pitsonbarger*, 205 Ill. 2d 444, 456-57 (2002). And, this Court has held that "[a]n actual-innocence claim should be treated procedurally like any other postconviction claim[.]" *Coleman*, 2013 IL 113307, ¶ 92. By extension, then, *de novo* review should apply to denials of leave to file successive petitions raising actual innocence claims.

B. Robinson has set forth a colorable claim of actual innocence to warrant granting leave to file his successive petition.

With the aforementioned principles in mind, under either a *de novo* or an

abuse-of-discretion standard of review, Robinson has set forth a colorable claim of actual innocence to warrant the opportunity to file his successive petition.

1. The affidavits of Andre Mamon, Donald Shaw, and Tavares Hunt-Bey are newly discovered.

A freestanding claim of actual innocence must be supported by newly discovered evidence. *People v. Washington*, 171 Ill. 2d 475, 489 (1996). Newly discovered evidence is "evidence that has been discovered since the trial and that the defendant could not have discovered sooner through due diligence." *People v. Ortiz*, 235 Ill. 2d 319, 334 (2009).

There was no dispute below that Robinson established a colorable claim that the affidavits of Mamon, Shaw, and Hunt-Bey were newly discovered. (SPC.72-74) (trial court finding affidavits were newly discovered); *People v. Robinson*, 2018 IL App (1st) 153547-U, ¶ 36 (assuming affidavits were newly discovered).

Mamon's, Shaw's, and Hunt-Bey's affidavits were dated December 19, 2014, March 5, 2015, and April 25, 2014, respectively. (SPC. C.51-55) There is no evidence that Robinson knew or should have known about these witnesses' existence or their relevance to this case. The testimony of an eyewitness who was unknown to the defense at the time of trial, and who remained silent about his or her account until long after trial, constitutes newly discovered evidence. See *Ortiz*, 235 Ill. 2d at 333-34 (finding witness's testimony was newly discovered where witness did not come forward until more than 10 years after trial and had moved to Wisconsin in the interim). The appellate court in *People v. Adams* came to a similar conclusion, where the defendant did not know the two affiants were at the scene and thus had no reason to seek them out earlier. *People v. Adams*, 2013 IL App (1st) 111081, ¶ 33. Here, as well, none of the three witnesses came forward prior

to 2014, and there was no way Robinson could have known that they had exonerating information, regardless of how diligent he was in seeking out witnesses and preparing his defense for trial. None of this is rebutted by the record. Thus, Robinson has presented a colorable claim that the affidavits are newly discovered.

2. The affidavits from Mamon, Shaw, and Hunt-Bey are material and non-cumulative.

The evidence supporting a claim of actual innocence must also be material and non-cumulative. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). "Material means the evidence is relevant and probative of the petitioner's innocence." *People v. Coleman*, 2013 IL 113307, ¶ 96. And, "[e]vidence is considered cumulative when it adds nothing to what was already before the jury." *Ortiz*, 235 Ill. 2d at 335.

Like the "newly discovered" prong above, it was undisputed below that the affidavits here were material and non-cumulative. (SPC. C.72-74) (trial court finding affidavits were material and non-cumulative); *People v. Robinson*, 2018 IL App (1st) 153547-U, ¶ 36 (appellate court assuming affidavits were material and non-cumulative).

The affidavits from the three new witnesses are material, as they bear directly on the matter of Robinson's innocence. The witnesses' affidavits identify Tucker as the murderer and all state that Robinson was not present at the scene of the murder, disposal of the murder weapon, or filling up of the gas can an hour before Giles's body was found burning in a garbage can. (SPC. C.51-55) Because this new evidence concerns the ultimate issue of whether Robinson is the perpetrator, it is material. See *People v. Adams*, 2013 IL App (1st) 111081, ¶ 35 (finding new evidence identifying someone else as murderer and exonerating defendant was material because it concerned "the ultimate issue" of defendant's guilt); see also

People v. Lofton, 2011 IL App (1st) 100118, ¶ 38 ("[E]vidence that someone else was the shooter and [petitioner] was not present is certainly material.").

Similarly, the new affidavits are not cumulative, as there was no evidence presented at trial suggesting that Tucker, rather than Robinson, was the individual who shot Giles and burned her body. Because the trial court heard no evidence identifying someone other than Robinson as the murderer, the new affidavits add to what was previously before the trier of fact and are "sufficient to create a new question of [Robinson's] innocence in the eyes of the [factfinder]." *Adams*, 2013 IL App (1st) 111081, ¶ 35; see also *Ortiz*, 235 Ill. 2d at 336 (finding affidavit material and not merely cumulative where it "conflicted with the State's main witnesses on the central issue of who beat and killed the victim" and "[n]o other defense witness at trial offered the evidence presented by [affiant]").

3. Robinson has set forth a colorable claim that Mamon's, Shaw's, and Hunt-Bey's affidavits are of such conclusive character that they would probably change the trial outcome.

Both the circuit court and the appellate court denied Robinson leave to file his successive petition because they found the new evidence was not conclusive enough as to probably change the trial outcome. (SPC. C.72-74); *People v. Robinson*, 2018 IL App (1st) 153547-U, ¶¶ 36-47. As discussed below, see Arg. C, *infra*, the circuit and appellate courts were wrong. Robinson has met the very low threshold of establishing a colorable claim that the new evidence is of such conclusive character as to probably change the result on retrial.

The third prong of the actual innocence test asks whether the new evidence is of such conclusive character that it would probably lead to a different result. *People v. Washington*, 171 Ill. 2d 475, 489 (1996). To obtain a new trial on a

successful actual innocence claim after a third-stage evidentiary hearing, a petitioner need only show that the new evidence "would *probably* change the result on retrial." *Id.* (Internal quotations omitted) (emphasis added). At this stage, however, where the petitioner merely seeks leave to file his petition, he need only set forth a *colorable* claim that the new evidence would *probably* lead to a different trial outcome. *People v. Edwards*, 2012 IL 111711, ¶ 31. This Court has always discussed this prong of the actual innocence test in terms of probability and likelihood, not certainty. See *People v. Coleman*, 2013 IL 113307, ¶ 97 ("Probability, not certainty, is the key as the trial court in effect predicts what another jury would likely do, considering all the evidence, both new and old, together.").

In *People v. Ortiz*, where this Court found that the petitioner was entitled to a new trial on his actual innocence claim, this Court reiterated that " 'this [did] not mean that [defendant was] innocent, merely that all of the facts and surrounding circumstances, including the testimony of [defendant's witnesses], should be scrutinized more closely to determine the guilt or innocence of [defendant].' " *People v. Ortiz*, 235 Ill. 2d 319, 337 (2009) (quoting *People v. Molstad*, 101 Ill. 2d 128, 136 (1984)); see also *People v. Gonzalez*, 407 Ill. App. 3d 1026, 1034 (2d Dist. 2011) ("The new evidence need not necessarily establish the defendant's innocence; rather, a new trial is warranted if all of the facts and surrounding circumstances, including the new evidence, warrant closer scrutiny to determine the guilt or innocence of the defendant.") (citing *Molstad*, 101 Ill. 2d at 136). As such, the requirement that the new evidence be of "conclusive character" does not mean that it must totally exonerate or vindicate the petitioner, contrary to some appellate court holdings. See, *e.g.*, *People v. Collier*, 387 Ill. App. 3d 630, 636 (1st Dist. 2008); *People*

v. Montes, 2015 IL App (2d) 140485, ¶ 25.

The erroneous "total exoneration or vindication" standard comes from an appellate court decision in a DNA motion case. *People v. Savory*, 309 Ill. App. 3d 408, 414-15 (3d Dist. 1999), *aff'd on other grounds*, 197 Ill. 2d 203 (2001). And, actually, this Court, in reviewing that decision, explicitly rejected that standard in the DNA context and held that a petitioner is entitled to additional DNA testing where the evidence at issue simply is "materially relevant to," or "significantly advances," a claim of actual innocence. *Savory*, 197 Ill. 2d at 213-14 (Internal quotation omitted). Nevertheless, the appellate court in *Collier* erroneously relied on that "total exoneration or vindication" standard that this Court rejected and improperly applied it in the context of post-conviction actual innocence claims. *Collier*, 387 Ill. App. 3d at 636. Courts that have since relied on *Collier* have invoked a standard that this Court expressly disavowed and has never applied to post-conviction petitions.

The actual "conclusive character" prong requires that a petitioner provide evidence that simply "places the evidence presented at trial in a different light and undercuts the court's confidence in the factual correctness of the guilty verdict." *Coleman*, 2013 IL 113307, ¶ 97 ("New evidence need not be completely dispositive of an issue to be likely to change the result upon retrial.") (Internal quotation omitted). Importantly, as this Court noted in *Coleman*, if the petitioner were required to provide evidence that conclusively exonerated or vindicated him–at any stage–"the remedy would be an acquittal, not a new trial." *Id.* The remedy here, however, is not even a new trial. It is the mere chance to file a petition to raise an actual innocence claim, which is why the petitioner need only set forth a *colorable claim*

of actual innocence to be entitled to that relief.

The "colorable claim" standard has a very low threshold. While that standard is above the first-stage "gist" standard, it is lower than the second-stage "substantial showing" standard. *Edwards*, 2012 IL 111711, ¶¶ 25-29; *People v. Sanders*, 2016 IL 118123, ¶¶ 25, 28. And, although this Court has not determined exactly where on that spectrum a "colorable claim" lies, this Court's jurisprudence suggests it is much closer to the first-stage "gist" standard than the second-stage "substantial showing" standard.

The first-stage inquiry focuses on the nature of the factual allegations in the petition and the underlying legal merit of the alleged claims, whereas the inquiry at the leave-to-file stage focuses on whether the unrebutted factual allegations, as a matter of law, could probably lead to a different trial outcome. See *Edwards*, 2012 IL 111711, ¶ 24; *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). But, like first-stage post-conviction petitioners, petitioners seeking leave to file a successive petition raising an actual innocence claim almost always are proceeding *pro se*, have no legal training, and have relatively little, if any, access to legal materials or contact with the world outside the prison walls to acquire the necessary documentation to support their claims. As Justice Pucinski noted in her dissenting opinion in *People v. Walker*:

> "*Pro se* petitions are not expected to be perfect, nor are they required to prove a point; they are only required to show that they could prove a point. *** When *pro se* petitions are not perfect, the opportunity to amend them to fix the problem should be routine. We should not expect a *pro se* defendant to know or foresee all of the puzzle pieces and get them right the first time."

People v. Walker, 2015 IL App (1st) 130530, ¶¶ 32, 35 (Pucinski, J., dissenting). And, in the context of successive petitions alleging actual innocence, these are

pro se petitioners who obtained new evidence that could prove they are actually innocent of the crime for which they stand convicted. The relief for petitioners either at the first stage or at the leave-to-file stage is the same: advancing the petition to second-stage proceedings, including the appointment of counsel. See *Sanders*, 2016 IL 118123, ¶¶ 25, 28; *Hodges*, 234 Ill. 2d at 10.

Accordingly, this Court should find that *pro se* motions for leave to file successive petitions alleging actual innocence, like initial *pro se* petitions at the first stage, should be construed liberally, using "a lenient eye, allowing borderline cases to proceed." *Hodges*, 234 Ill. 2d at 21 (Internal quotation omitted). This is particularly true where the petitioner's liberty and the accuracy of his conviction are at stake–not to mention the possibility that the real offender remains free–and the remedy is simply the filing of the petition. See *People v. Jones*, 2017 IL App (1st) 123371, ¶ 68 (Gordon, J., dissenting) ("All that is at stake in this appeal is whether defendant may even file his postconviction petition. If we grant him leave to file, then he still faces the hurdles of second-stage and third-stage proceedings.").

To meet the low "colorable claim" threshold of the "conclusive character" prong of the actual innocence test, the petitioner need only provide new evidence that, if believed, could lead to the petitioner's acquittal. This Court's decisions have never required more than that. See *Sanders,* 2016 IL 118123, ¶¶ 24, 47; *Coleman*, 2013 IL 113307, ¶ ¶ 96, 113; *Edwards*, 2012 IL 111711, ¶¶ 24, 33, 40; *Ortiz*, 235 Ill. 2d at 333, 336-37; *Washington*, 171 Ill. 2d at 489; *Molstad*, 101 Ill. 2d at 134-36. Underlying this standard is the presumption that the new evidence conflicts with the trial evidence. As the appellate court in *People v. Warren* recognized, evidence that merely contradicts the trial evidence may be sufficient

to likely change the result on retrial. *People v. Warren*, 2016 IL App (1st) 090884-C, ¶ 87. The *Warren* court indicated that this was the standard this Court contemplated in *Sanders*. *Id. Warren* commented that this Court in *Sanders* just found that the new evidence, which conflicted with the trial evidence, would not have changed the result in that particular case because the new evidence was contradicted by physical evidence and the petitioner's other witnesses who testified on his behalf at trial. *Id.* But, the standard remains unchanged: new evidence is conclusive, thereby satisfying the third prong of the actual innocence test, if it consists of well-pleaded allegations that are not positively rebutted by the trial record and that, if believed, could lead to the defendant's acquittal.

The fact remains that there are individuals in Illinois who have been convicted of crimes and are serving time in prison even though they are actually innocent. Where such individuals discover new evidence that contradicts the trial evidence and that, if believed, could lead to their acquittal, that evidence satisfies the third prong of the actual innocence test. At this stage of proceedings, where a petitioner need only state a colorable claim of actual innocence, the court presumes that the trier of fact would believe the new evidence. Thus, the only question for the court to resolve at this point is whether the new evidence, unrebutted by record, *could* lead to the petitioner's acquittal. In resolving this question, the court leaves credibility determinations regarding the new evidence to the third-stage evidentiary hearing, and credibility determinations regarding the petitioner's guilt or innocence to the fact-finder at a new trial. The court's only concern at the leave-to-file stage is whether that new evidence could result in the petitioner's acquittal.

Turning to this case, there is no doubt that the new evidence, if believed

by the trier of fact, would result in Robinson's acquittal. The affiants placed Lenny Tucker, and not Robinson, at all of the significant events surrounding this offense: Shaw saw Tucker shoot someone under the viaduct; Mamon saw Tucker around the time of the disposal of the murder weapon; and Hunt-Bey saw Tucker, who confessed to the murder, filling up a gas can at a gas station just before Giles's body was found burning in a garbage can. (SPC. C.51-55) That is sufficient to meet the very low threshold to grant Robinson leave to file his petition.

Mamon's affidavit places the murder weapon in Tucker's hand at the time of the shooting. Mamon stated that a few days after Christmas in December 1997, he, his father, and his father's three female associates left a liquor store at 87th Street and Colfax Avenue in Chicago, which, according to Google Maps, is about two blocks from where Giles's murder occurred. (SPC. C.54; TC. R. J.22-23, 46-51); see Google Maps, www.google.com/maps (last visited Aug. 20, 2019).[2] They walked to catch the bus near 88th Street and Kingston Avenue. (SPC. C.54) While they were walking, a car pulled up and honked at the women, who said hello to a man named "Lenny" sitting in the car with one other man. (SPC. C.54) A few minutes later, while waiting for the bus, Mamon's attention was drawn to the area under the viaduct across from S. Chicago Avenue, (SPC. C.54), just like the State's eyewitnesses whose attention was drawn to the same area, (TC. R. J.23, 48-49). Mamon heard a gunshot and saw a flash of light, and then saw Lenny throw an "A.K." in the back seat of the car. (SPC. C.54) Mamon also said he saw the person

---

[2] See *People v. Crawford*, 2013 IL App (1st) 100310, ¶ 118, n.9 (taking judicial notice of Google Maps); *People v. Clark*, 406 Ill. App. 3d 622, 633-34 (2d Dist. 2010) ("[C]ase law supports the proposition that information acquired from mainstream Internet sites such as Map Quest and Google Maps is reliable enough to support a request for judicial notice.").

who was shot get shoved in the car, and two other men get in. (SPC. C.54) Most importantly, Mamon stated that Robinson was not one of the faces he saw that night, which supports Robinson's actual innocence claim. (SPC. C.54)

Next, Shaw's affidavit places Tucker in the same type of car that the victim owned, in the same car as the possible murder weapon, on the same night of the murder, and in the same area where the rifle was recovered. Shaw stated that on December 28, 1997, he was hanging out near 8918 S. Bennett Avenue in Chicago. (SPC. C.51) Shaw said that Tucker and two other people who used to hang out with Robinson pulled up in a Ford Contour, (SPC. C.51), the same car that Giles drove and that was later found abandoned in Homewood, Illinois, (TC. R. K.137-41). According to Shaw, one of the other two people got out of the car with an "AK type assault rifle," went into an alley, and returned two to three minutes later empty-handed. (SPC. C.51) It is in this precise area that the police recovered the AK assault rifle they believed to have been used in this offense. (TC. R. K.175-76) Like Mamon, Shaw stated that Robinson was not in the car with Tucker and the two other people. (SPC. C.51)

Finally, Hunt-Bey's affidavit includes a confession to the murder by Tucker himself. Hunt-Bey was hanging out at the gas station near the corner of 87th Street and Exchange Avenue in Chicago on the morning of December 29, 1997, the day after Giles's murder. (SPC. C.53) According to Hunt-Bey, Tucker drove up to the gas station in a maroon Chevy Corsica containing two other men. (SPC. C.53) The three men exchanged gang signs and greetings with Hunt-Bey. (SPC. C.53) One man got back into the car, while the other went inside to pay for gas. (SPC. C.53) Tucker remained outside conversing with Hunt-Bey. (SPC. C.53) Hunt-Bey

asked Tucker whose car that was and what they were doing that night. (SPC. C.53) Tucker responded that he had killed a sister of a member of the Conservative Vice Lords ("CVL") the night before under a viaduct on S. Chicago Avenue. (SPC. C.53)

Hunt-Bey's affidavit, including Tucker's crucial confession to the murder, is not rebutted by the trial record; rather, the allegations are corroborated by the trial evidence. Indeed, Tucker's confession to killing a woman under the viaduct at S. Chicago Avenue the night before matches the date, location, and circumstances of Giles's murder (TC. R. J.22-28, 46-51) And, according to Robinson's affidavit, Giles's cousin was a member of the CVLs; Tucker said he killed the sister of a CVL. (SPC. C.53, 58) Also, Tucker drove a maroon Chevy Corsica to the gas station, which matches the burgundy Chevy Corsica that Maisha Muhammad said she borrowed from her grandmother on the morning of December 29. (SPC. C.53; TC. R. B.13, 23-24; J.93-94)

Just as significant, Hunt-Bey saw Tucker filling up a gas can between 10 and 11 a.m. on December 29, when Tucker said he had to "tie up some loose ends." (SPC. C.53) About an hour later, State's witness D'Andre Weaver said he saw two men, one carrying a gas can, walk into an alley, and run back to their red Chevy, where a third person was waiting to drive them away. (TC. R. J.87-91) Five minutes after that, police discovered Giles's body burning in a garbage can. (TC. R. J.98-99; K.171; M.47-50) In other words, about one hour after Tucker, who was filling up a gas can, told Hunt-Bey he needed to "tie up some loose ends," Giles's body was found burning.

Assuming that a hypothetical fact-finder would believe these affiants'

testimony, as opposed to the State's witnesses–as courts must do when reviewing *pro se* motions seeking leave to file a successive petition, see *Sanders*, 2016 IL 118123, ¶¶ 32-37; *People v. Coleman*, 183 Ill. 2d 366, 371, 390 (1998)–there is no doubt Robinson has established a colorable claim that the trier of fact would acquit him. The new witnesses directly contradict the State's witnesses on the ultimate issue before the trier of fact: who was involved in the offense. See *Coleman*, 2013 IL 113307, ¶ 113 (finding new evidence was of such conclusive character as to probably change trial outcome, where new witnesses "all directly contradicted [State's witnesses] on the ultimate issue before the jury: who was involved in the attack"). The State's trial evidence indicated that Robinson was the offender, whereas the new witnesses all identify Tucker as the real murderer and all aver that Robinson was not present at any of the critical events surrounding the offenses. This places the State's trial evidence in a new light and undermines confidence in the trial outcome that the trial court here, without this new information, reached. *Id.* This is sufficient to establish that the new evidence is conclusive enough that another trier of fact would probably reach a different result. *Id.*

Although the circuit court does not make credibility determinations at this stage of proceedings, it is important to note that there is no reason to reject Robinson's newly discovered evidence. There is no physical evidence here to positively rebut any of the allegations in the affidavits. The rest of the State's case consisted primarily of various witnesses who said that Robinson confessed to Giles's murder. If this Court were to take their testimony as true–that is, find that the State's witnesses are more credible than the new witnesses–that would constitute an impermissible credibility determination at this stage of proceedings.

See *Coleman*, 183 Ill. 2d at 398 (stating that courts are not to make credibility determinations until third-stage evidentiary hearing).

In any event, the State's case against Robinson was not overwhelming, such that he should be denied the opportunity to file his successive petition. Bearing in mind that Tucker actually may have been the real murderer, the State's case weakens considerably. Indeed, it becomes clear that Tucker's entire testimony placing the blame on Robinson and absolving himself of criminal liability was incredibly self-serving.

On January 7, 1998, the police pulled Tucker out of school and took him to the police station to interview him in connection with the murder. (TC. R. K.98) Tucker testified that the police told him he was a suspect in Giles's murder because he had some incriminating items related to the offense. (TC. R. K.130) During that interview, Detective Michael McDermott also told Tucker that Robinson was a suspect and that Tucker "might have did [*sic*] something wrong, but [they] would rather have [his] cooperation." (TC. R. K.201) Tucker then handed over the ammunition box and Giles's pager, which he had in his bedroom, and told the officers that Robinson had confessed to the murder. (TC. R. K.99, 129-30) Assuming the truth of the new witnesses' affidavits–*i.e.*, that Tucker was the real murderer–his "cooperation" with the police and subsequent trial testimony are highly suspicious and self-serving, unworthy of belief.

Moreover, neither Maisha Muhammad nor Michelle McClendon, the other two State's witnesses who said Robinson confessed to the murder, positively rebut Robinson's new evidence. They did not witness the shooting or the burning of Giles's body. Rather, Muhammad herself was implicated in the concealment offense, as

she allegedly drove Robinson and Ganaway to fill up a gas can and later took them to the area where they allegedly set Giles's body on fire. (TC. R. B.11-23, 32-35) And, if Tucker were the kind of person who, according to Hunt-Bey's affidavit, would kill the sister of a rival gang member, (SPC. C.53), it is not unreasonable to conclude that Muhammad would have gone along with Tucker's version of events to save herself. Importantly, both Muhammad and McClendon said they did not believe Robinson when he said he killed Giles and burned her body. (TC. R. B.49-50; M.19-20, 25, 32-33) But, again, this Court does not have to make any of these credibility determinations now, as this Court must presume that the fact-finder would believe the new witnesses over the State's witnesses in its determination of whether the new evidence would probably change the result on retrial.

The fact that Robinson confessed to the murder does not defeat his actual innocence claim. See *People v. Parker*, 2012 IL App (1st) 101809, ¶¶ 85-86 (remanding actual innocence claim for second-stage proceedings where State's primary evidence was defendant's confession); see also *People v. Villa*, 2011 IL 110777, ¶¶ 55-56 (rejecting State's argument that improper impeachment with defendant's juvenile adjudication was not prejudicial, even though the only incriminating evidence in case was defendant's statement to police). Robinson submitted his own affidavit, which, like the affiants' allegations, this Court must take as true. See *People v. Hall*, 217 Ill. 2d 324, 328-30, 333-36, 340-41 (2005) (taking as true factual allegations in petitioner's affidavit, which State was also required to do in moving to dismiss; advancing petition to third stage, where it was supported only by petitioner's affidavit). Robinson explained that, because he and Tucker were in the same gang, there was a code of silence preventing him

from turning in or testifying against his fellow member. (SPC. C.59-60, 61) Notably, Robinson made a statement to police after they had obtained a confession from co-defendant Ganaway and confronted Robinson with all the information they had gathered in their investigation. (TC. R. C.14-15) There is nothing that positively rebuts the allegations in Robinson's affidavit, nor is there any reason to reject his actual innocence claim based on the fact that he confessed.

Finally, there is nothing preventing this Court from considering the most crucial new evidence Robinson obtained: Tucker's confession to the murder. (SPC. C.53) The circuit court found that Hunt-Bey's testimony about Tucker's confession would be inadmissible hearsay. (SPC. C.73) As a threshold matter, Illinois Rule of Evidence 1101(b)(3) provides that the rules of evidence do not apply to post-conviction proceedings. Ill. R. Evid. 1101(b)(3) (eff. Jan. 6, 2015); *Warren*, 2016 IL App (1st) 090884-C, ¶ 166 (Gordon, J., specially concurring) (finding no issue over the fact that new affidavits contained hearsay, as this Court "specifically amended the Illinois Rules of Evidence so that admissibility is not the standard even at the later third-stage postconviction hearings," and noting that "[t]his should apply more strongly at this early stage, where the imprisoned defendant lacks ready access to counsel"); see also *People v. Velasco*, 2018 IL App (1st) 161683, ¶¶ 119, 123 (taking as true, pursuant to Rule of Evidence 1101(b)(3), hearsay allegation in affidavit that another gang member bragged to affiant about committing murder; advancing actual innocence petition to third stage).

In any event, based on Hunt-Bey's affidavit, Tucker's confession would be admissible at Robinson's new trial. Generally, an unsworn extra-judicial declaration that the declarant committed a crime is inadmissible hearsay, even though it is

against the declarant's penal interest. *People v. Bowel*, 111 Ill. 2d 58, 66 (1986). Where there are sufficient indicia of trustworthiness, however, due process and a defendant's right to present a defense require that a defendant be allowed to present such extra-judicial confessions by another person. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (finding defendant was denied a fair trial and his right to present a defense where trial court excluded extra-judicial confession to murder by another person, made under circumstances that bore sufficient indicia of reliability; noting that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice").

In *Chambers*, the United States Supreme Court proposed four factors to consider in determining whether there are sufficient indicia of trustworthiness: 1) whether the statement was made spontaneously to a close acquaintance shortly after the crime; 2) whether the statement was corroborated by other evidence; 3) whether the statement was self-incriminating and against the declarant's interest; and 4) whether there has been an adequate opportunity to cross-examine the declarant regarding the statement. *Id.* at 300-01. This Court has held that the *Chambers* factors are guidelines and not requirements, and that the essential question is whether the statement was made under circumstances that provide "considerable assurance" of its reliability by objective indicia of trustworthiness. *People v. Tenney*, 205 Ill. 2d 411, 435 (2002) (Internal quotations omitted).

The record indicates that Tucker's extra-judicial confession would be admissible under *Chambers*, as an analysis of each *Chambers* factor favors admission. First, according to Hunt-Bey, Tucker made the statement to him, a

friend and fellow gang member, spontaneously in response to Hunt-Bey asking whose car Tucker was driving and what they were doing that night. (SPC. C.53) Hunt-Bey did not goad Tucker into making this confession. Tucker volunteered it on his own to warn Hunt-Bey to be "on point," because the Conservative Vice Lords might seek revenge for what he did. (SPC. C.53)

Second, Tucker's confession was corroborated by the circumstances of the murder. Just as Tucker confessed, Giles was murdered the previous night under a viaduct on S. Chicago Avenue. (TC. R. J.22-28, 46-51) And, while filling up a gas can, Tucker said he was going to "tie up some loose ends"; Giles's body was found burning in a garbage can about an hour later. (SPC. C.53; TC. R. J., 87-89, 98-99; K.171; M.47-50) Tucker was also driving a red/maroonish Chevy Corsica, the same type of car D'Andre Weaver testified he saw two men get out of, with one carrying a gas can, shortly before Giles's body was found. (SPC. C.53; TC. R. J.87-92) Additionally, Tucker said he had killed the sister of a Conservative Vice Lord. (SPC. C.53) According to Robinson's affidavit, Giles's cousin, Jerry, was a high-ranking member of the Conservative Vice Lords, and Tucker began seeing Giles "as the bait to bring the war to Jerry's front door." (SPC. C.58) Simply put, Tucker's confession was corroborated by other evidence.

Third, Tucker's statement was self-incriminating and against his penal interest. He confessed to murdering someone, a felony offense that would subject him to at least 20 to 60 years in prison. 730 ILCS 5/5-8-1(a)(1)(a) (West 1996). Finally, Tucker testified at trial, so he would be available for cross-examination about his extra-judicial confession. Therefore, the circumstances thus far indicate that Tucker's confession *would* be admissible, particularly because Robinson has

a constitutional right to present relevant evidence that would weaken the State's case against him, which includes evidence tending to show that *someone else committed the crime*. See *People v. Beaman*, 229 Ill. 2d 56, 75 (2008).

In any event, it is premature to decide the admissibility of Tucker's confession. Similar to this case, the appellate court in *Warren* reviewed a denial of leave to file a successive petition alleging actual innocence based on hearsay affidavits containing extra-judicial confessions by the real murderer and stating that the defendant was not present. *Warren*, 2016 IL App (1st) 090884-C, ¶¶ 32-37. The *Warren* court took the allegations in the affidavits as true, noting that this Court "recently reminded [the court] that the initial stage of a successive postconviction proceeding is not the forum for credibility or reliability determinations." *Id.* ¶ 93 (citing *Sanders*, 2016 IL 118123, ¶¶ 33, 37). The court could not "imagine how [it] could find, as a matter of law, at this initial stage of the postconviction proceeding, that [the hearsay affidavits were] so inherently untrustworthy that they would be inadmissible under *Chambers*. *** [I]t [was] neither appropriate nor advisable for [the court] to adjudicate the trustworthiness of the evidence." *Id.* ¶¶ 96, 97.

Likewise, here, this Court must take as true that Tucker confessed to the murder and said he was going to "tie up some loose ends" while filling up a gas can about an hour before Giles's body was found burning in a garbage can. (SPC. C.53) It must also take as true the rest of the unrebutted allegations in Mamon's, Shaw's, Hunt-Bey's, and Robinson's affidavits–meaning that a hypothetical trier of fact at a new trial, hearing the trial evidence and the new evidence, would choose to believe Robinson's new evidence. And, in light of that, Robinson has set forth,

at the very least, a colorable claim that the evidence was of such a conclusive character as to probably change the trial outcome. *Cf. People v. White*, 2014 IL App (1st) 130007, ¶¶ 26-29 (finding new affidavit identifying someone else as murderer was sufficient to advance first-stage petition to second stage, even where affidavit conflicted with trial evidence of multiple witnesses identifying defendant; noting new affidavit would require jury to make credibility determinations that court could not make). This Court should grant Robinson the mere opportunity to file his petition so that he can finally raise his actual innocence claim.

C. The appellate court misconstrued this Court's precedent on several key points.

Despite the fact that the affidavits here provide strong evidence pointing to State's witness Lenny Tucker, and not Robinson, as the real murderer, the appellate court affirmed the circuit court's denial of leave to file. *People v. Robinson*, 2018 IL App (1st) 153547-U, ¶ 49. In so ruling, the appellate court made several findings that cannot be reconciled with this Court's precedent or the fundamental principles of post-conviction proceedings.

1. The appellate court's implicit holding that only direct evidence, as opposed to circumstantial evidence, may support an actual innocence claim is erroneous.

One of the appellate court's primary reasons for denying Robinson leave to file is that none of the affiants actually saw the murder or the burning of Giles's body. *People v. Robinson*, 2018 IL App (1st) 153547-U, ¶¶ 37-42. Because of that, the court found, the new evidence could not change the trial outcome. *Id.* By virtue of its finding, the appellate court implicitly held that only direct evidence, as opposed to circumstantial evidence, could ever support a claim of actual innocence.

That implied holding–or even mere suggestion–violates bedrock principles

of the law. This Court has held repeatedly that there is no distinction in the law between direct and circumstantial evidence. See *People v. Robinson*, 14 Ill. 2d 325, 331 (1958); *People v. Gavurnik*, 2 Ill. 2d 190, 196 (1954); *People v. Fedora*, 393 Ill. 165, 176 (1946); *People v. Botulinski*, 383 Ill. 608, 614-15 (1943). Up until 1989, appellate courts reviewing sufficiency claims applied different standards depending on whether the trial evidence was direct or circumstantial. In *People v. Pintos*, however, this Court, recognizing that there truly is no difference between direct and circumstantial evidence–because evidence is evidence– eliminated the disparate sufficiency standards and held that the same standard "should be applied in reviewing the sufficiency of the evidence in all criminal cases, whether the evidence is direct or circumstantial." *People v. Pintos*, 133 Ill. 2d 286, 291 (1989).

In that same vein, this Court has consistently held that circumstantial evidence alone may be legally sufficient to sustain a criminal conviction. See *Robinson*, 14 Ill. 2d at 331 (finding that circumstantial evidence may be sufficient "when it is of such convincing nature that it satisfies the jury of the guilt of the defendant"); *People v. Patterson*, 217 Ill. 2d 407, 447 (2005). In fact, circumstantial evidence may be even more damning than direct evidence. See *People v. Baylor*, 25 Ill. App. 3d 1070, 1076 (2d Dist. 1975) (finding "[t]he circumstantial evidence here was more damning than the direct evidence").

Given these axiomatic principles, it makes no sense that actual innocence claims should be limited to direct evidence, as the appellate court's decision here suggests. There is no basis in the law to draw that distinction. It also makes no sense that the type of evidence that, on its own, can sustain a conviction, cannot support a claim to undermine a conviction. And, on a practical level, it would cause

mass confusion among litigants and the courts if post-conviction actual innocence claims were the only context in which circumstantial and direct evidence were treated differently.

The appellate court's decision here nevertheless draws this improper distinction and exposes the resulting logical incongruence. Indeed, the court found that the affiants could never support Robinson's actual innocence claim because they did not actually witness the offenses (*i.e.*, because they only provide circumstantial evidence), while completely ignoring the fact that none of the State's witnesses witnessed the offenses either. See *Robinson*, 2018 IL App (1st) 153547-U, ¶¶ 37, 44-47. Essentially, the court's decision contemplates a legal system in which Robinson, despite obtaining strong evidence from three uninvolved witnesses indicating that someone else committed the offenses for which he was convicted, can never prove his actual innocence, even if he were innocent, because he does not have access to direct evidence.

The appellate court is wrong. The law already presupposes that circumstantial evidence alone may support an actual innocence claim. DNA evidence is considered circumstantial evidence. See, *e.g.*, *People v. Hillsman*, 362 Ill. App. 3d 623, 638 (4th Dist. 2005) (considering DNA evidence as part of State's circumstantial case against defendant). And, there is no question that a petitioner can raise an actual innocence claim based on DNA evidence alone. See *People v. Shum*, 207 Ill. 2d 47, 67 (2003) (noting that petitioner could raise actual innocence claim after receiving DNA test results). In fact, the legislature has created a vehicle–the motion for DNA testing under 725 ILCS 5/116-3–for the explicit purpose of allowing a convicted individual to attempt to prove his actual innocence based on DNA analysis.

People v. Harper, 2019 IL App (4th) 180160, ¶ 14; *People v. Urioste*, 316 Ill. App. 3d 307, 310 (5th Dist. 2000).

Thus, it is of no consequence that the affiants here did not personally witness Giles's murder or the burning of her body. Their affidavits provide strong circumstantial evidence, including a confession by Tucker himself, indicating that Tucker, and not Robinson, was the real murderer. See, *e.g.*, *People v. Harper*, 2013 IL App (1st) 102181, ¶ 52 (finding witness's affidavit providing circumstantial evidence to support claim that defendant's confession was coerced supported advancing actual innocence claim to third-stage evidentiary hearing, even though affiant did not witness crime); *People v. Warren*, 2016 IL App (1st) 090884-C, ¶ 107 (considering affiant's statement that real murderer made extra-judicial confession to murder, even though affiant did not personally witness shooting, because she would not be testifying to facts of shooting, but the facts of real murderer's confession). Under well-established law, Robinson's new evidence can be–and, in fact, is–sufficient to "place[] the evidence presented at trial in a different light and undercut[] the court's confidence in the factual correctness of the guilty verdict." *People v. Coleman*, 2013 IL 113307, ¶ 97. And, at this stage, where Robinson need only state a colorable claim of actual innocence and seeks only to file his post-conviction petition, the affidavits meet that low threshold.

2. The appellate court misunderstood this Court's directive to take all well-pleaded allegations, unrebutted by the record, as true.

The appellate court here determined that the allegations in the new witnesses' affidavits were rebutted by the State's witnesses' trial testimony. *People v. Robinson*, 2018 IL App (1st) 153547-U, ¶¶ 44-47. It further found that the affidavits were

"not of such a conclusive character that they would probably change the result on retrial, as they merely conflict with [Robinson's] confession and other testimony presented at trial." *Id.* ¶ 47. The court's findings represent an abandonment of the well-established principles that govern review at the leave-to-file stage.

As discussed above, the essence of actual innocence claims is that they are based on new evidence that conflicts with the trial evidence. See Arg. B.3, *supra*. That is, the trial evidence resulted in a conviction, whereas the new evidence, if believed, presumably would lead to an acquittal. Contradiction with the trial evidence is not just presumed; it is required.

Moreover, a well-pleaded allegation can only be rebutted by concrete, verifiable facts in the trial record that do not depend on any type of credibility determination. See Arg. A, *supra*. Where the truth of a "fact" depends on a credibility determination that the fact-finder must make, that "fact" is not a positive rebuttal; it is a contradiction. Put differently, if the new evidence would require the fact-finder to reassess the trial evidence and make new credibility determinations, the trial evidence contradicts the new evidence; it does not positively rebut it. While positive rebuttals do not support actual innocence claims, contradictions lie at their core.

The appellate court improperly denied Robinson an opportunity to file his successive petition simply because the new evidence "conflict[ed] with" the State's witnesses' trial testimony. *Robinson*, 2018 IL App (1st) 153547-U, ¶ 47. There was no physical evidence tying Robinson to the offenses, so there were no concrete, verifiable facts that could have positively rebutted the allegations in the affidavits.

Shockingly, one of the appellate court's reasons for rejecting the new witnesses' identifications of Tucker is that their allegations contradicted Tucker's trial

testimony–that is, the very person accused in the affidavits of being the murderer. See *id.* ¶¶ 46-47. If witness testimony in general cannot positively rebut new evidence, the trial testimony of someone who may have fabricated his testimony to incriminate someone else to save himself certainly should not. And, based on the allegations in the affidavits, this Court must presume that a trier of fact would believe the affiants' testimony about Tucker's admission and actions, which undermines Tucker's trial testimony and casts it in an entirely new light.

The appellate court's decision is actually a refusal to take the new allegations as true and constitutes an impermissible credibility determination that the trier of fact would find the State's witnesses more believable than the three disinterested, uninvolved affiants. See *People v. Coleman*, 183 Ill. 2d 366, 385 (1998) (stating that credibility determinations are made at third-stage evidentiary hearing, not before). Indeed, the appellate court pit the new evidence against the "strong evidence of [Robinson's] guilt presented at trial," and determined that the trial evidence was stronger. *Robinson*, 2018 IL App (1st) 153547-U, ¶ 47. That is not taking the new evidence as true; that is assessing the weight and believability of the evidence, and making a credibility determination, thus violating basic principles that govern this stage of post-conviction proceedings. Had the court taken the affidavits as true, as it was required to do, it would have found that the new evidence indicating that Tucker was the real murderer–including a *confession by Tucker himself*–set forth a colorable claim of actual innocence such that Robinson should be granted the opportunity to file his petition.

D. Conclusion.

Robinson, a *pro se* prisoner, presented affidavits from three uninvolved,

disinterested witnesses who provided strong evidence that one of the State's main witnesses was the real murderer. These affidavits are not conclusory, nor are they positively rebutted by the record. Rather, they place Lenny Tucker, and not Robinson, at all of the significant points surrounding the murder and burning of Nicole Giles. Crucially, one of the affiants stated that Tucker confessed to the murder while filling up a gas can about an hour before Giles's body was found burning in a garbage can. The circuit and appellate courts, however, applied incorrect standards and contravened basic principles of leave-to-file review, and thus improperly denied Robinson leave to file his petition and raise his actual innocence claim.

While the State certainly has an interest in the finality of convictions and the avoidance of successive post-conviction petitions, those interests do not override the due process rights to life and liberty of someone who may actually be innocent of the crimes of which he was convicted. See *People v. Washington*, 171 Ill. 2d 475, 489 (1996). Robinson's new evidence not only undermines the State's case against him, but also identifies someone else as the real offender–that is, an individual who may have murdered someone, gotten away with it, and remained free. Given that Robinson has set forth a colorable claim of actual innocence, this Court should grant him leave to file his successive petition and remand for second-stage proceedings, including the appointment of counsel, for "there is no more important question than whether an actually innocent man is in prison[.]" *People v. Jones*, 2017 IL App (1st) 123371, ¶ 77 (Gordon, J., dissenting).

CONCLUSION

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

Respectfully submitted,

PATRICIA MYSZA
Deputy Defender

MICHAEL GOMEZ
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLANT

CERTIFICATE OF COMPLIANCE

I, Michael Gomez, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) 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(a) is 41 pages.

/s/Michael Gomez
MICHAEL GOMEZ
Assistant Appellate Defender

No. 123849

IN THE

SUPREME COURT OF ILLINOIS

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

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., Chicago, IL 60601, eserve.criminalappeals@atg.state.il.us;

Ms. Kimberly M. Foxx, State's Attorney, Cook County State's Attorney Office, 300 Daley Center, Chicago, IL 60602, eserve.criminalappeals@cookcountyil.gov;

Mr. Rickey Robinson, Register No. K82958, Stateville Correctional Center, P.O. Box 112, Joliet, IL 60434

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 21, 2019, 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 defendant-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Alicia Corona
LEGAL SECRETARY
Office of the State Appellate Defender
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
Service via email is accepted at
1stdistrict.eserve@osad.state.il.us

APPENDIX TO THE BRIEF

Rickey Robinson No. 123849

INDEX TO THE RECORD

Common Law Record ("C") **Page**

Report of Proceedings ("R")

Supplemental Common Law Record for Appeal No. 12-3360 ("SC") **Page**

Supplemental Report of Proceedings for Appeal No. 12-3360 ("SR")

	Direct	Cross	Redir.	Recr.	
January 8, 2007					
Continuance					U2
June 19, 2007					
Continuance					W2
July 18, 2007					
Continuance					X2
September 17, 2007					
Continuance					Z2
November 14, 2007					
Continuance					AA2
November 29, 2007					
Continuance					BB2
March 27, 2008					
Continuance					DD2
September 10, 2008					
Continuance					FF2
October 29, 2008					
Continuance					GG2
January 7, 2009					
Continuance					HH2
January 13, 2009					
Continuance					II2
February 24, 2009					
Continuance					JJ2
April 14, 2009					

	Direct	Cross	Redir.	Recr.	
Continuance					KK2
June 9, 2009					
Continuance					LL2
July 6, 2009					
Continuance					MM2
August 25, 2009					
Continuance					NN2
October 27, 2009					
Continuance					OO
December 22, 2009					
Continuance					PP2
February 11, 2010					
Continuance					QQ2
March 11, 2010					
Continuance					RR2
May 13, 2010					
Continuance					SS2
July 14, 2010					
Continuance					TT2
October 7, 2010					
Continuance					UU2
November 10, 2010					
Continuance					VV2
January 5, 2011					
Continuance					WW2

	Direct	Cross	Redir.	Recr.	
March 2, 2011					
Continuance					XX2
April 7, 2011					
Continuance					YY2
May 25, 2011					
Continuance					ZZ2
July 5, 2011					
Continuance					AAA2
July 13, 2011					
Continuance					BBB2
August 10, 2011					
Continuance					CCC2
August 25, 2011					
Continuance					DDD2
September 12, 2011					
Continuance					EEE2
September 28, 2011					
Continuance					FFF2
October 6, 2011					
Continuance					GGG2
October 12, 2011					
Continuance					HHH2
November 17, 2011					
Continuance					III2
November 22, 2011					

Direct Appeal Record
Common Law Record ("T.C.") **Page**

Direct Appeal Record
Report of Proceedings ("T.R.")

2018 IL App (1st) 153547-U

No. 1-15-3547

Order filed June 1, 2018

Sixth 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. 98 CR 3873
	)	
RICKEY ROBINSON,	)	Honorable
	)	Carol M. Howard,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the judgment of the circuit court denying defendant leave to file a successive postconviction petition. Defendant failed to raise a colorable claim of actual innocence because defendant's proffered affidavits were not of such a conclusive nature as to probably change the result of the case on retrial.

¶ 2 Defendant Rickey Robinson appeals from an order of the circuit court of Cook County denying leave to file a successive petition for relief under the Post-Conviction Hearing Act (Act)

(725 ILCS 5/122-1 *et seq.* (West 2014)).[1] Following a bench trial, defendant was found guilty of first degree murder, aggravated vehicular hijacking, armed robbery, and concealment of a homicidal death relating to the shooting death of Nicole Giles.[2] He was sentenced to natural life imprisonment for first degree murder, a consecutive 30-year term for armed robbery, a concurrent 30-year term for aggravated vehicular hijacking, and a consecutive 5-year term for concealment of a homicidal death. We affirmed defendant's convictions and sentence on direct appeal. See *People v. Robinson*, 1-00-2981 (2002) (unpublished order under Supreme Court Rule 23). This court further affirmed the second-stage dismissal of defendant's initial postconviction petition under the Act. See *People v. Robinson*, 2015 IL App (1st) 123360-U.

¶ 3 The circuit court denied defendant's motion for leave to file a successive postconviction. Defendant appeals, arguing that his petition raised a colorable claim of actual innocence based on the attached affidavits of Andre Mamon, Donald Shaw, and Tavares Hunt-Bey demonstrating the shooting was committed by another person.[3] For the reasons set forth below, we affirm.

¶ 4 At trial, Anjanette Vance and Lavell Rogers testified that, on December 28, 1997, shortly before 5 p.m., they were traveling in a car in the vicinity of 88th Street and Kingston Avenue. Under a viaduct, they observed an individual exit the front passenger's seat of a car and shoot a person, who was sitting on the ground near the car. Another individual was standing near the person who had been shot. The shooter then retrieved a plastic bag and placed it over the

[1] Defendant's name is spelled variously as "Ricky" and "Rickey" throughout the record and in the parties' briefs. We will adopt the spelling "Rickey" contained within defendant's *pro se* proposed successive postconviction petition and notice of appeal.

[2] Defendant was charged along with codefendants Marques Northcutt and Peter Ganaway, and the matter proceeded to severed, simultaneous bench and jury trials. Northcutt and Ganaway are not parties to this appeal.

[3] Defendant argued in his petition that his claim of actual innocence is also supported by the affidavit of Yasmyn Johnson. However, on appeal, defendant abandons this issue and it is thus forfeited. See *People v. Hall*, 2014 IL App (1st) 122868, ¶ 7.

victim's head. Both offenders put the victim into the backseat of the car. Vance and Rogers were able to track down a police officer and, when they returned to the scene of the shooting with the officer, saw blood on the ground. The entire incident lasted about 30 seconds, and Vance and Rogers could not make out the faces of the offenders.

¶ 5 At the scene, officers recovered a spent shell casing and blood samples. A forensic scientist testified the blood samples matched Giles's blood.

¶ 6 D'Andre Weaver testified that, on December 29, 1997, around 11:45 a.m., he saw two men exit a red Chevrolet with a gas can and walk down an alley. A few moments later, they ran back to the Chevrolet with the gas can and sped off. Weaver was unable to see the men's faces. Between 5 to 10 minutes later, Weaver heard the sirens of police and fire engines and saw smoke coming from the alley.

¶ 7 That same day, police responded to a call of a dumpster fire in an alley in a residential area. A body, later determined to be Giles, was found burning in a dumpster. The car belonging to Giles was later discovered abandoned in Homewood, Illinois. It contained, in the backseat, a large amount of Giles's blood and a bloody plastic bag.

¶ 8 Sherrilyn Bivens, Giles's mother, testified that Giles was supposed to pick her up from work at 6 p.m. on December 28, but did not show up. Bivens called Elise Reed, Giles's friend, to ask if she had heard from Giles. Reed told her that Giles had spoken with defendant, who wanted Giles to stop by his friend's house. Bivens went to defendant's house and spoke with him. Defendant initially denied speaking with Giles but later stated he did, in fact, speak with her. Defendant stated that Giles "never showed up" to meet him.

¶ 9 Reed testified that she was on a three-way phone conversation with Giles and defendant on December 28. According to Reed, defendant asked Giles to stop at his house before coming to pick up Reed. When Giles did not arrive to pick up Reed, Reed called defendant to ask if he had seen Giles. Defendant responded that Giles did not show up at his house, and he then hung up the phone.

¶ 10 The police later recovered Giles's pager and ammunition of the same type as the shell casing recovered at the scene of the shooting from Leonard Tucker's bedroom.

¶ 11 Tucker testified that he was the boyfriend of defendant's sister and, on December 28, 1997, was present at defendant's house and had a conversation with defendant, Peter Ganaway, and Marques Northcutt about Giles. When Tucker and defendant were alone, defendant told Tucker that he had killed "her." Tucker asked who he was referring to, and defendant responded, "Nicole." Tucker initially did not believe defendant, but defendant responded, "[t]hat's on stone," meaning that it was the truth.

¶ 12 Tucker further testified that defendant told him that he had jumped out of a car and shot Giles in the head. Defendant stated that he, Ganaway, and Northcutt dumped her body in a garbage can and had dropped the gun off on a street. Tucker later left defendant's house and, as he was walking home, Ganaway approached and asked Tucker to hold onto a green pager. About 10 minutes later, Ganaway arrived at Tucker's house and asked him to hold onto a box of AK-47 ammunition. Tucker put the ammunition and pager in his bedroom.

¶ 13 The next morning, Tucker was at defendant's house when defendant and Ganaway arrived. Defendant was carrying a gas can and stated, "It's done. [W]e did it. [W]e burned her

body." A week after the murder, police came to Tucker's school and took him to the police station. After being questioned about the ammunition and pager, Tucker spoke with the police.

¶ 14 Maisha Muhammad testified that she is the best friend of defendant's sister. On December 29, 1997, she received a phone call from defendant's sister, who asked her to get her grandmother's car and come over. Muhammad arrived at defendant's house in her grandmother's burgundy, four-door Corsica. Muhammad agreed to drive defendant and Ganaway, and noticed defendant was carrying a gas can. They first stopped at a gas station and defendant left the car holding the gas can. After defendant returned, they drove around for several blocks "under the viaduct area." Eventually, defendant told her to stop, and he and Ganaway got out of the car with the gas can and walked down an alley. About 5 to 10 minutes later, defendant and Ganaway jogged back to the car and told her to drive back to defendant's house. When they returned to defendant's house, defendant told Muhammad that they had burned Giles's body.

¶ 15 Michelle McClendon, defendant's girlfriend at the time of the incident, testified that she was at Northcutt's house on December 29, 1997, with Ganaway, Northcutt, and defendant. McClendon overheard defendant and Ganaway telling Northcutt how they had burned Giles's body. Specifically, they stated that they had gotten gasoline, soaked a bandanna in gasoline, and lit the garbage can containing Giles's body on fire. Later that evening, defendant told McClendon that he, Northcutt, and Ganaway snuck a gun into Giles's car, and one of the men told Giles that he had to use the bathroom. When Giles pulled over to let the man use the bathroom, defendant shot her in the head.

¶ 16 The next day, McClendon saw a news report and began to believe defendant and the others were telling the truth. At trial, McClendon identified a picture of a rifle and testified that she had observed that weapon in defendant's house within a month before Giles's murder.

¶ 17 Detective Michael McDermott testified that he spoke with defendant at the police station after providing him with his *Miranda* rights. Defendant stated that he spoke with Giles, who indicated that she wanted to stop by defendant's house. When Giles did not arrive, defendant called a friend to drive him, Ganaway, and Northcutt to "Kevin's" house. Later, he had McClendon pick up him, Ganaway, and Northcutt and drive them to defendant's grandmother's house.

¶ 18 After speaking with Ganaway and defendant a few more times, McDermott and Ganaway went to an alley in the 8900 block of South Bennett. There, Ganaway retrieved a rifle. The rifle could not be matched to the spent shell casing found under the viaduct at the scene of the shooting.

¶ 19 McDermott again spoke with defendant and told him the nature of the investigation and that officers had recovered the gun. Defendant made a statement admitting to shooting and robbing Giles.

¶ 20 Assistant State's Attorney John Karnezis testified that defendant agreed to give a court-reported statement. At trial, Karnezis read into the record defendant's 70-page statement. We summarized defendant's statement in the order on direct appeal and repeated it in our decision affirming the dismissal of defendant's initial postconviction petition. The summary is as follows:

> " 'The evidence at trial included defendant's court reported statement which indicated that sometime prior to December 28, 1997, he and two codefendants, Marques

> Northcutt and Peter Ganaway, decided to rob Nicole Giles (the victim) because they believed she would have a large sum of money on her. They then decided that, because she knew them, they would also kill her. The three formulated a plan for carrying out the crime and then put it into action. On December 28, 1997, pursuant to the plan, defendant contacted the victim and asked her to come over. The three men entered the victim's vehicle. While the victim was driving, Northcutt indicated that he had to urinate. The victim stopped under a viaduct and Northcutt exited the car. Ganaway pulled the victim out of the car and defendant shot her in the head. A bag was placed over the victim's head and she was pushed back into the car. Defendant and codefendants removed $50 from the victim's pocket and placed her into a garbage can. They then ditched the car. The next day after learning that fingerprints can be left on clothing, defendant and Ganaway returned to the garbage can. Ganaway poured gasoline into the can. Defendant lit a bandana soaked with gasoline and threw it into the can.' " *Robinson*, 2015 IL App (1st) 123360-U (quoting *People v. Robinson*, 1-00-2981 (2002) (unpublished order under Illinois Supreme Court Rule 23)).

¶ 21 The trial court found defendant guilty of first degree murder, aggravated vehicular hijacking, armed robbery, and concealment of a homicidal death. He was sentenced to natural life imprisonment for first degree murder, a consecutive 30-year term for armed robbery, a concurrent 30-year term for aggravated vehicular hijacking, and a consecutive 5-year term for concealment of a homicidal death. On direct appeal, we affirmed his convictions and sentence. See *Robinson*, 1-00-2981 (2002) (unpublished order under Illinois Supreme Court Rule 23).

¶ 22 Defendant filed a *pro se* petition under the Act raising various claims of ineffective assistance of counsel. Counsel was appointed but defendant later chose to proceed *pro se*. The circuit court found defendant failed to make a substantial showing of a constitutional violation and dismissed defendant's petition. This court affirmed the second-stage dismissal of defendant's petition. See *Robinson*, 2015 IL App (1st) 123360-U.

¶ 23 On May 8, 2015, defendant filed a motion for leave to file a successive postconviction petition under the Act, wherein he alleged, *inter alia*, a claim of actual innocence. Specifically, he asserted that Tucker was the actual murderer of Giles and that he was not involved. In support, defendant included his own affidavit as well as affidavits of four witnesses: Yasmyn Johnson, Donald Shaw, Tavares Hunt-Bey, and Andre Mamon. On appeal, defendant only relies on the affidavits of Mamon, Shaw, and Hunt-Bey.

¶ 24 In defendant's affidavit, he stated that he and Tucker were members of different sects of the Black P. Stones. Defendant met a woman named "Allison" and her cousin, Giles, who became friends with defendant. Giles helped defendant move guns between both sects of the gang. At some point, Giles told defendant in the presence of Tucker that her cousin "Jerry," a member of a rival gang, would give her money. This information "rubbed [Tucker] the wrong way," and Tucker viewed Giles as "bait" to get to the rival gang. On the date of Giles's murder, defendant contacted Giles for assistance in moving weapons. Defendant remained at his home with Northcutt and Ganaway but had to leave to go on a date with a woman. After the date, defendant returned home and learned from Northcutt and Ganaway that the weapons were moved to where they needed to be. Defendant spent the night at another woman's home and had

no knowledge that Giles was killed and her body burned. Defendant explained that there was a law within the Black P. Stones that no member would cooperate with police against a "brother."

¶ 25 In Johnson's affidavit, she stated that, on December 28, 1997, she was at her sisters' apartment with defendant, who was her boyfriend at the time. It was getting dark outside, and she and defendant stayed at the apartment for one to two hours.

¶ 26 In Shaw's affidavit, dated March 5, 2015, he avers that, on December 28, 1997, he observed a dark-colored Ford Contour stop near 8918 South Bennett Avenue. The vehicle contained "three guys that hung with Rickey," including a man named "Lenny." One man exited the car with an "AK type" assault rifle and ran between the gangway on the other side of the alley towards Constance Avenue. About one to two minutes later, the man returned without the gun and entered the backseat of the car. Defendant was not in the Contour with Lenny.

¶ 27 Shaw recently spoke with an acquaintance, who told him there was information on Facebook regarding defendant. This information prompted Shaw to recall the events of the night of December 28, 1997, and it "did not dawn on [Shaw] that this information could and would have been helpful."

¶ 28 In Hunt-Bey's affidavit, dated April 25, 2014, he avers that, on the morning of December 29, 1997, he spoke with Leonard "Lenny" Tucker at a gas station near the corner of 87th Street and Exchange Avenue. Tucker told him that he killed a woman the night before under a viaduct on South Chicago and had to "tie up loose ends." Tucker filled a container with gasoline and drove away with two unknown men. Hunt-Bey knew defendant "was taking the rap for Lenny" but because of the gang "code of silence," Hunt-Bey could not snitch on a fellow gang member.

¶ 29 In Mamon's affidavit, dated December 19, 2014, he avers that, in December 1997, he observed a man named "Lenny" and two unknown men by a viaduct on South Chicago Avenue. He then saw a bright flash and heard a loud gunshot. Lenny placed an "A.K." in the backseat of a car and drove away with the two men. In August 2014, Mamon spoke with an individual on the phone, who asked whether Mamon knew a "Ricky." The caller explained that "Ricky" had been "locked up" for a murder on South Chicago for a long time, but Mamon did not know defendant as "Ricky" because he went by a nickname. Later, while incarcerated, Mamon met defendant in prison and asked him "if he had a murder that happened under a viaduct right off South Chicago." Mamon did not see defendant under the viaduct the night of the incident and averred that "[defendant's] face wasn't one of the faces [he] saw that night."

¶ 30 The circuit court, in a written order, denied defendant leave to file a successive postconviction petition on October 2, 2015. The court reasoned, *inter alia*, that while the affidavits of Shaw, Hunt-Bey, and Mamon were newly discovered and material evidence, they were not of such a conclusive character as to probably change the outcome on retrial. The court noted that Shaw did not witness the murder occur and could not testify that defendant was not present when the murder occurred or when Giles's body was burned. With respect to Hunt-Bey, the court found that any testimony regarding the statement made by Tucker confessing to the crime would be inadmissible hearsay. Further, Hunt-Bey did not witness the murder and subsequent burning of the body. Finally, Mamon's affidavit does not state he witnessed the murder himself, who had shot Giles, or who had burned the body. Accordingly, the court concluded, defendant failed to raise a colorable claim of actual innocence. Defendant filed a timely notice of appeal.

¶ 31 On appeal, defendant argues the circuit court erred in denying him leave to file a successive postconviction petition under the Act where he raised a colorable claim of actual innocence. Specifically, he asserts that the affidavits of Shaw, Hunt-Bey, and Mamon are newly discovered, material and non-cumulative, and are of such a conclusive nature as to probably change the outcome on retrial as required to raise a colorable claim of actual innocence. He further asserts the circuit court made several errors in denying him leave to file a successive postconviction petition.

¶ 32 The Act provides a procedural mechanism for a defendant to assert a substantial denial of his constitutional rights in the original trial or sentencing. 725 ILCS 5/122-1 (West 2014); *People v. Allen*, 2015 IL 113135, ¶ 20. Where a defendant previously appealed a judgment of conviction, "the ensuing judgment of the reviewing court will bar, under the doctrine of *res judicata*, postconviction review of all issues actually 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.

¶ 33 Generally, the Act contemplates the filing of only one petition for postconviction relief. 725 ILCS 5/122-1(f) (West 2014). A petitioner must first obtain leave of court to file a successive petition before the claims in a successive petition can be considered. *People v. Miranda*, 2018 IL App (1st) 170218, ¶ 24. A successive postconviction petition may only be considered when a defendant (1) establishes "cause and prejudice" for the failure to raise the claim sooner, or (2) makes a claim of actual innocence. *People v. Ortiz*, 235 Ill. 2d 319, 329-30 (2009). Leave to file a successive postconviction petition will be denied where "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." *People v. Smith*, 2014 IL 115946, ¶ 35.

¶ 34 Defendant's proposed successive postconviction petition raises a claim of actual innocence. To succeed on a claim of actual innocence, a petitioner must present evidence that is (1) newly discovered, (2) material and noncumulative, and (3) of such a conclusive character that it would probably change the result on retrial. *People v. Jones*, 2017 IL App (1st) 123371, ¶ 43. These claims "must be supported 'with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.' " *Edwards*, 2012 IL 111711, ¶ 32 (quoting *Schlup v. Delo*, 513 U.S. 298, 324 (1995)).

¶ 35 "An actual innocence claim does not merely challenge the strength of the State's case against the defendant." *People v. Evans*, 2017 IL App (1st) 143268, ¶ 30. That is, the sufficiency of the evidence presented by the State is not at issue in a postconviction proceeding. *Id.* Rather, "the hallmark of 'actual innocence' means 'total vindication,' or 'exoneration.' " *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008) (citing *People v. Savory*, 309 Ill. App. 3d 408, 414-15 (1999)). We review *de novo* a trial court's ruling denying a motion for leave to file a successive postconviction petition. See *People v. Warren*, 2016 IL App (1st) 090884-C, ¶¶ 74-75; *Miranda*, 2018 IL App (1st) 170218, ¶ 22.

¶ 36 Here, even assuming that the attached affidavits of Shaw, Mamon, and Hunt-Bey are newly discovered and material and noncumulative, they are not of such a character as to probably change the result on retrial. As our supreme court noted in *People v. Edwards*, 2012 IL

111711, to set forth a colorable claim of actual innocence, a defendant's "request for leave of court and his supporting documentation [must] raise the probability that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence[.]" *Edwards*, 2012 IL 111711, ¶ 31. Defendant's evidence cannot meet this burden.

¶ 37 In Shaw's affidavit, he contended that he observed "three guys that hung with Rickey," including Tucker, in a dark-colored Ford Contour. One man exited the car with an assault rifle and ran between the gangway on the other side of the alley towards Constance Avenue. The man returned without the gun and entered the backseat of the car. Defendant was not in the car with Tucker.

¶ 38 This evidence would not exonerate defendant. All Shaw saw was someone apparently disposing of a rifle. Shaw was not present at the shooting and did not observe the shooting of Giles or her body being burned. Therefore, Shaw cannot exonerate defendant, but can only provide circumstantial evidence that would, at best, challenge the sufficiency of the evidence to convict defendant. See *People v. Brown*, 2017 IL App (1st) 150132, ¶ 51.

¶ 39 In Mamon's affidavit, he asserted that he saw Tucker and two unknown men by a viaduct on South Chicago. He then observed a bright flash and heard a loud gunshot. Tucker placed a rifle in the backseat of a car and drove away with the two men. Mamon averred that "[defendant's] face wasn't one of the faces [he] saw that night."

¶ 40 However, Mamon does not state that he actually saw the murder take place. He further does not state who shot Giles or that he was present when Giles's body was burned. Rather, he simply avers that Tucker was present under the viaduct with two men, and cannot point to which

individual actually shot Giles and burned her body. Accordingly, this affidavit is not of such a conclusive character as to probably change the result on retrial.

¶ 41 Finally, in Hunt-Bey's affidavit, he asserted that, while at a gas station, Tucker told him that he killed a woman the night before under a viaduct on South Chicago. Tucker further stated he had to "tie up loose ends," filled a container with gasoline, and drove away with two unknown men. Hunt-Bey knew defendant "was taking the rap for Lenny" but because of the gang "code of silence," Hunt-Bey could not snitch on a fellow gang member.

¶ 42 However, similarly to Shaw, Hunt-Bey was not present at the shooting, did not see who shot Giles, and did not see who burned her body. Further, Tucker's inculpatory statement to Hunt-Bey is rebutted by the evidence at trial, which included witness testimony and defendant's own confession. See *Brown*, 2017 IL App (1st) 150132, ¶ 52. Specifically, Muhammad, McClendon, and Tucker all testified that defendant told them that he had killed and burned Giles's body. They further testified to details that matched defendant's own court-reported confession.

¶ 43 In defendant's 70-page court-reported statement, he admitted he shot Giles and burned her body. Defendant stated that he, Northcutt, and Ganaway planned to rob Giles so he contacted her to come over. After she arrived, he entered her vehicle with Northcutt and Ganaway. Ganaway informed Giles he had to urinate. After Giles pulled over, defendant exited the car and shot Giles in the head. They ditched Giles's body in a dumpster. The next day, defendant and Ganaway returned to the dumpster with gasoline and burned Giles's body.

¶ 44 Muhammad testified that she drove defendant to a gas station where defendant filled a gas can. She then drove to an alley where defendant and Ganaway exited her car with the gas can. Later, defendant told Muhammad that he had burned Giles's body.

¶ 45 McClendon testified that defendant told her about his involvement in Giles's murder and the subsequent burning of her body. Defendant also told her he was in Giles's car with Ganaway and Northcutt when one of the men needed to use the bathroom. After Giles pulled the car over under a viaduct, defendant shot her in the head. Later, McClendon overheard defendant and Ganaway telling Northcutt that they had gotten gasoline, soaked a bandana in gasoline, and lit the garbage can containing Giles's body on fire.

¶ 46 Tucker testified that defendant told him that he jumped out of a car, shot Giles in the head, and put her body into a garbage can. The next day defendant had a gas can and said "It's done. [W]e did it. [W]e burned her body."

¶ 47 Muhammad, McClendon, and Tucker all testified to defendant's involvement in Giles's murder and corroborated defendant's own court-reported confession. This evidence overwhelmingly pointed to defendant as the person who murdered Giles and burned her body. Accordingly, the affidavits of Shaw, Mamon, and Hunt-Bey are not of such a conclusive character that they would probably change the result on retrial, as they merely conflict with defendant's confession and other testimony presented at trial. See *People v. Mabrey*, 2016 IL App (1st) 141359, ¶ 30. Given each affidavit's individual deficiencies and in light of the strong evidence of defendant's guilt presented at trial, we cannot find that "no reasonable juror would have convicted him in light of the new evidence[.]" *Edwards*, 2012 IL 111711, ¶ 31. Defendant therefore has failed to present a colorable claim of actual innocence based on these affidavits.

¶ 48 Defendant further contends the circuit court made several errors in denying his motion for leave to file a successive postconviction petition. Specifically, he asserts the court erred when it seemed to suggest circumstantial evidence was insufficient as a matter of law to change the outcome on retrial and when it found that Tucker's confession to the murder, contained in Hunt-Bey's affidavit, constituted inadmissible hearsay. We need not determine whether the circuit court's reasoning was proper. Here, we review the judgment of the lower court *de novo* and may affirm on any basis contained in the record. *Miranda*, 2018 IL App (1st) 170218, ¶ 22; see *People v. Johnson*, 208 Ill. 2d 118, 128-29 (2003) (the reviewing court reviews the correctness of the result of the lower court and not the correctness of its reasoning); *People v. Stoecker*, 384 Ill. App. 3d 289, 294 (2008) ("An appellate court is not constrained by the reasoning of the trial court and may affirm the dismissal of a postconviction petition on any basis supported by the record"). Given our determination that defendant cannot establish a colorable claim of actual innocence, we affirm the court's denial of leave to file a successive postconviction petition and do not address the correctness of the circuit court's reasoning.

¶ 49 For the reasons set forth above, we affirm the judgment of the circuit court of Cook County.

¶ 50 Affirmed.

In the Circuit Court of the COOK Judicial Circuit
COOK County, Illinois
(Or in Circuit Court of Cook County).

THE PEOPLE OF THE STATE OF ILLINOIS)
v.)
Rickey Robinson)
Defendant/Appellant

No. 98 CR 03873-01

Notice of Appeal

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

(1) Court to which appeal is taken: Circuit Court of Cook County, Criminal Division. 2650 S. California Ave., Chicago, Illinois 60608

(2) Name of appellant and address to which notices shall be sent:
Name: Rickey Robinson # K82958
Address: P.O. Box 112, Joliet, Illinois 60434-0112

(3) Name and address of appellant's attorney on appeal:
Name: N/A
Address:
If appellant is indigent and has no attorney, does he want one appointed?
Yes!

(4) Date of judgment or order: OCTOBER 02, 2015 ✓

(5) Offense of which convicted: first degree murder, armed Robbery, agg. Veh. hijacking, and Concealment of a homicidal death.

(6) Sentence: Natural life, 30 years consec.; 30 years concur.; 5 years consec.

(7) If appeal is not from a conviction, nature of order appealed from:
Successive Post-Conviction Petition

Signed Rickey Robinson
(May be signed by appellant, attorney for appellant, or clerk of circuit court)

Revised Jan 2002