No. 129753

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- KYJUANZI HARRIS, Petitioner-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-21-1255. There on appeal from the Circuit Court of Cook County, Illinois , No. 11 CR 03722. Honorable James B. Linn, Judge Presiding.

BRIEF AND ARGUMENT FOR PETITIONER-APPELLANT

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NATURE OF THE CASE

Following a 2012 jury trial, petitioner-appellant Kyjuanzi Harris was convicted of two counts of first degree murder and sentenced to life in prison. (C. 190). The appellate court affirmed his conviction on direct appeal. *People v. Harris*, 2016 IL App (1st) 141206-U. Harris filed the instant motion for leave to file a successive postconviction petition. (C. 506-76). The circuit court denied the motion, and Harris appealed. (C. 587-90); (R. 1471). The appellate court affirmed the trial court's denial of the motion for leave to file a successive postconviction petition. Harris filed a petition for rehearing, and the appellate court denied the petition for rehearing and issued a modified order. *People v. Harris*, 2022 IL App (1st) 211255-U, modified upon denial of rehearing May 9, 2023. This Court allowed Harris's petition for leave to appeal on September 27, 2023. *People v. Harris*, 221 N.E.3d 374 (Ill. 2023). The sufficiency of Harris's *pro se* motion for leave to file a successive postconviction petition is at issue on this appeal.

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ISSUE PRESENTED FOR REVIEW

Whether Kyuanzi Harris made a colorable claim of actual innocence by providing an affidavit from a newly discovered witness who averred that Harris did not commit this crime and specifically identified another man as the shooter, and explained that he first met Harris in prison and did not come forward sooner due to fear of reprisal from the actual shooter.

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STATEMENT OF FACTS

Kyjuanzi Harris has been serving a life sentence after a jury found him guilty of the first degree murders of Derrick Armstrong and Bernadette Turner. (C. 24,155); (CI. 4-5). Armstrong and Turner died as a result of a May 21, 2009, drive-by shooting on W. Van Buren, by Chicago's Horan Park, as they sat in the fronts seats of a parked car. (R. 460, 470). Harris's convictions and sentences were affirmed on direct appeal. *People v. Harris*, 2016 IL App (1st) 141206-U; *People v. Harris*, 80 N.E.3d 4 (Ill. 2017). His first postconviction petition was dismissed and that dismissal was affirmed on appeal. *People v. Harris*, 2020 IL App (1st) 190690-U.

On August 20, 2021, Harris filed the instant *pro se* motion for leave to file a successive post-conviction petition that raised an actual innocence claim based on newly discovered evidence and an as-applied constitutional challenge to his mandatory life sentence. (C. 506-30). Harris's actual innocence claim was based on a notarized affidavit from Wynton Collins in which Collins averred that he met Harris in prison and learned that Harris was in prison for the Horan Park shooting. (C. 508, 530-31). Collins averred that he was at Horan Park and never saw Harris, and he identified the shooter as someone with the nickname Sacky. (C. 531-32). Collins further averred that he did not speak with police, an attorney, or anyone else about the shooting because he feared for his safety as "everybody know(s) how Sacky get down." (C. 533). He also expressed that he feared for his family's safety. (C. 533).

On August 30, 2021, the circuit court denied Harris's motion for leave to file a successive postconviction petition. (R. 1471). The appellate court affirmed

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that decision. *People v. Harris*, 2022 IL App (1st) 211255-U, modified upon denial of rehearing May 9, 2023.[1] On September 27, 2023, this Court allowed Harris's petition for leave to appeal. *People v. Harris*, 221 N.E.3d 374 (Ill. 2023).

Pretrial proceedings

At a pretrial hearing on August 22, 2012, Harris's trial counsel stated that his investigator had been unable to locate eyewitness Tamira Smith and asked the State to provide an updated address. (R. 106). The State replied, "I have not had any contact with her. I don't where she is." (R. 106). Smith later appeared at the hearing, but she refused to provide her address to or agree to an interview with Harris's trial counsel. (R. 108-09). Harris's trial counsel stated, "I spoke to her, I introduced myself, told her who I was, who I represent, asked her to speak with me. She refused to speak with me, refused to provide me her address." (R. 109). The trial court and trial counsel recognized that Smith may choose not to cooperate with trial counsel. (R. 108-09). At trial, Smith confirmed that she refused to talk with Harris's trial counsel. (R. 277).

The trial

The trial evidence showed that on May 21, 2009, many people enjoyed Chicago's Horan Park on a spring evening before the drive-by shooting. (R. 251, 313). On that day, Tamira Smith was hanging out with Derrick Armstrong and Bernadette Turner inside a two-door Grand Am that was parked on W. Van Buren Street adjacent to Horan Park. (R. 249-50). Debra Hardy was not with Smith's group or in their vehicle, but was seated on a park bench and drank a beer by herself. Hardy had a history of felony convictions, mental illness and delusions.

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[1] All citations to decision in the appellate court will reference the modified order issued on May 9, 2023.

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During the trial, Smith and Hardy did not describe any of the other park visitors, including a little boy who spoke to Smith's group, with any identifying details. (R. 251, 275, 313).

Smith testified that on the day of the shooting, she, Bernadette Turner, and Derrick Armstrong operated an informal candy store at Horan Park. (R. 248-49,269). They first arrived at the park at approximately 3:00 p.m., but at about 6:00 p.m., Smith and Turner drove to Smith's house, where Smith styled Turner's hair. (R. 249-50, 270). They returned to the park at approximately 8:40 p.m., and they parked the car on the south and left curb of W. Van Buren Street adjacent to Horan Park. (R. 249). The driver's side faced the sidewalk and the park. (R. 251, 259). Armstrong sat in the driver's seat, Turner sat in the front passenger seat, and Smith sat in the backseat. (R. 250).

At approximately 9:15 p.m., Smith was not expecting a shooting when she watched Turner and Armstrong roll a blunt and observed a little boy approach the driver's side of the car to talk to them. (R. 251-52, 272-73, 275). The State did not call the unidentified little boy to testify at trial.

While Turner and Armstrong talked to the boy, Smith spotted a black car pull along the right side of the Grand Am and caught glances of the passing driver's mostly covered face. (R. 252-53, 280). Smith testified that the bottom half of his face was covered by a scarf or mask, and she "glanced" at the driver for "five to ten seconds" through the small back passenger window and only saw the his eyes and hair. (R. 250-54, 259, 280, 284). Smith did not see the driver's nose and mouth due to the facial covering. (R. 284). When the driver fired shots, Smith ducked and did not see him drive away. (R. 255-56, 280).

Smith remembered that after the shooting, the scene was "crazy" with people

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screaming and running. (R. 286-87). Smith testified that she was in shock when she saw blood and her dying friends. (R. 286-87). Later that night, Smith spoke with police and provided a physical description of the shooter, but could not provide the shooter's name. (R. 258, 288).

At trial, Smith recalled that there were several people in the park during the shooting, but that she was not paying attention to what was going on behind her when the shooting occurred. (R. 251, 275). Smith's testimony included the following exchange:

> [DEFENSE COUNSEL]: Now, you know – you were not expecting any car to pull up next you, were you?
>
> [SMITH]: No, I was not.
>
> [DEFENSE COUNSEL]: You were not paying attention to what was going on behind you, were you?
>
> [SMITH]: No, I was not. (R. 275).

The State's other eyewitness, Debra Hardy, testified she was in prison for possession of a controlled substance, and had been previously diagnosed with "various psychiatric disorders," including schizophrenia. (R. 297-98, 309-10). Hardy said she spent 20 years in prison for a 1984 murder conviction, and had prior convictions for possession of a controlled substance. (R. 297-98, 307). Hardy was a daily heroin user when she witnessed the 2009 shooting, but denied that she used heroin before she saw the shooting. (R. 297-98, 307-08, 313-14).

Hardy recalled that she arrived at Horan Park around 5:00 p.m. (R. 299-00, 312). While she initially testified that she was "a couple inches" from the victims' car, she later testified that she was sitting on a bench about 18 to 20 feet away and behind a fence. (R. 300, 317-19). While on the bench, she drank a beer. (R.

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300, 308, 313-14).

Hardy claimed that at approximately 9:30 p.m., she saw Harris, without a scarf or facial covering, drive up to Armstrong's car and open fire. (R. 301-03, 320. 328). At trial, Hardy said that she knew Harris from prior drug deals. (R. 299). Hardy, who was friends with Turner, followed the ambulances to the hospital. (R. 303, 323-25). At the hospital, Hardy told Turner's mother that she knew the shooter's identity, but Hardy would not give the shooter's name. (R. 326-27).

Detective David Roberts testified that when he arrived at Horan Park about three minutes after the shooting, another officer said that there were "many people present" when the shooting occurred, but they left. (R. 380-82). Roberts did not interview any witnesses before speaking with Smith later that night. (R. 382). Roberts recalled that Smith described the shooter as a black male in his twenties with a medium complexion. (R. 382-83). Smith did tell him that the shooter's face was covered. (R. 383). After Roberts's first conversation with Smith, he had "no suspects." (R. 383).

Roberts interviewed Hardy on June 6, 2009. According to Roberts, Hardy did not identify Harris as the shooter or say that there was a backseat passenger in the victims' vehicle. (R. 354-55, 386). Hardy testified that she told Roberts the shooter's identity, while Roberts testified that his investigation made little progress for more than a year. (R. 327-29, 355, 386-87, 390).

On November 2, 2010, Roberts received an anonymous telephone tip that led him to compile a photo array. (R. 355-56, 386-87, 390). On November 8, 2010, Smith arrived at the police station and identified Harris's photo. (R. 261-63, 291-92, 376). On February 11, 2011, Smith viewed a physical lineup and identified Harris. (R. 267, 378).

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On December 9, 2010, Roberts met with Hardy, who was in jail on drug charges, and she identified Harris as the shooter from a photo array. (R. 304-05, 330-32, 360-62, 376-77). Harris was arrested on February 11, 2011. (R. 394).

At trial, Harris did not offer evidence or testimony. (R. 491). The jury found Harris guilty of committing both murders. (R. 560-61); (CI. 4-5).

At sentencing, Harris maintained his innocence while expressing remorse and condolences to the families of Armstrong and Turner. (R. 653). The trial court sentenced Harris to a mandatory sentence of life in prison. (R. 655-56).

Original and amended postconviction petition proceedings

On August 20, 2018, Harris, via private counsel, filed a petition for postconviction relief. (CI. 424-32). The State filed a motion to dismiss that petition. (C. 287-92). On January 2, 2019, Harris's counsel filed an amended postconviction petition. (C. 302-11). The amended petition raised claims of ineffective assistance of trial and appellate counsel, and asserted actual innocence based on newly discovered evidence in the form of statements from Hardy and a Donathon Williams, which were given to private investigators. (C. 304-311). The amended petition also asserted that appellate counsel was ineffective for failing to investigate whether trial counsel took statements from alibi witnesses Yvette Harris and Derrick Sylvester. (C. 306-07). In an unnotarized document, postconviction counsel's investigator stated that he took statements from Derrick Sylvester and Yvette Harris on February 13, 2018. (CI. 448).

Hardy, in both a signed, unnotarized statement and in an audio recording, claimed that the real shooter was her nephew, Dennis Glover, who was known as Sacky. (CI. 434, 436); (C. 539). According to postconviction counsel's investigator, Hardy said that she "didn't not want her nephew to go to jail." (CI. 434). Hardy

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stated that detectives planted drugs on her and forced her to falsely testify, before the grand jury and at trial, that Harris committed a murder in a park. (CI. 433-34); (C. 538-39). Hardy stated that she wanted to talk to Harris's attorneys but she was "scared for [her] life" and "did not want to spend 50 years in the penitentiary." (C. 539-40). According to postconviction counsel's investigator, Hardy said she had known Harris his whole life and never saw him with a gun or a knife. (CI. 436). She stated that "Dennis Glover, my biological nephew, committed the crime." (CI. 436). In a notarized affidavit, Hardy confirmed that she gave a recorded and sworn statement to postconviction counsel's investigator and that she was willing to provide further sworn testimony at a postconviction hearing or at a new trial. (C. 314).

Harris's amended postconviction petition also included an unnotarized affidavit from Donathan Williams, in which Williams averred Glover, also known as Sacky, told Williams he killed Armstrong and Turner. (C. 535-37). Williams stated that on November 12, 2013, he and Sacky were in Sacky's car. (C. 535). Williams asked about a gun that Sacky was carrying and Sacky asked, "Have you heard the story about Keez (AKA Kyjuanzi Harris)?" (C. 535). Sacky later said, "You know I'm like that, you heard about some of my work." (C. 535). Sacky continued, "I put that TEK on their ass," and added, "I killed Ole Boy that Bitch was right there. I shot her too." (C. 535). In a second unnotarized document, Williams stated that "Ole Boy" and "The Bitch" were, respectively, Armstrong and Turner. (C. 537).

The State moved to dismiss the amended petition and the defense filed a response. (C. 318-29, 344-53); (CI. 1044-65). On February 27, 2019, the circuit court granted the State's motion to dismiss the petition. (C. 371).

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The appellate court affirmed the dismissal of postconviction petition in 2020. *People v. Harris*, 2020 IL App (1st) 190690-U, ¶ 71, appeal denied, 167 N.E.3d 649 (Ill. 2021). The appellate court reasoned that because the affidavits from Williams and Hardy were not properly notarized, Harris failed to make a substantial showing of actual innocence warranting an evidentiary hearing. *Id.* ¶ 81. The court also concluded trial counsel was not ineffective for failing to call alibi witnesses. *Id.* ¶¶ 95-97.

Present motion for leave to file successive postconviction petition

On August 20, 2021, Harris filed the instant *pro se* motion for leave to file a successive petition for postconviction relief. (C. 505). The motion argued that he had new evidence of actual innocence and his sentence was unconstitutional based on his age at the time of the offenses and other circumstances. (C. 506-07).

Harris based his actual innocence claim upon a January 3, 2020 notarized affidavit from Wynton Collins, in which Collins averred that he present at Horan Park and could "totally exonerate petitioner." (C. 508). Collins averred that he met Harris in prison and learned that Harris was in prison for the Horan Park shooting. (C. 531). Collins averred that he was around Horan Park, never saw Harris, and that Sacky committed the shooting. (C. 531-33).

In Collins's affidavit, he averred that he was parked at W. Van Buren and South Wipple Street. (C. 531-32). He sat on his car hood and talked to a woman. (C. 531-32). While speaking with the woman, Collins saw "his homie Sacky" drive a black car near him. (C. 532). Collins stated: "I seen the homie Sacky I tried to speak to him but he pulled up to the car that was parked directly in front of me and started shooting at the two occupants who were sitting inside, it was 10 to 15 shots fired." (C. 532).

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Collins averred that he and the woman ran in different directions and never saw each other again. (C. 532) Collins hid behind a parked vehicle as Sacky drove away. (C. 532). After Sacky left, Collins ran back to his car and saw that two people in the car in front of his "looked deceased." (C. 532). Collins drove away. (C. 532)

Collins averred that did not speak with the police, an attorney, or anyone else about the shooting because he feared for his life and his family members' lives, as "everybody know[s] how Sacky get down." (C. 533).Collins averred that he was now coming forward because he found out that Harris was incarcerated for a crime that he did not commit. (C. 532).

On August 30, 2021, the circuit court denied Harris's motion for leave to file a successive petition. (R. 1471). Regarding the actual innocence claim, the circuit court stated that Collins's affidavit lacked context, and that Harris failed to explain "what the lawyer at trial knew or didn't know about this witness and how they came to come forward now." (R. 1471). Regarding Harris's sentencing claim, the circuit court found that Harris was 21 years old at the time of the shooting and he was not a young adult offender. (R. 1471). On September 28, 2021, Harris filed a timely notice of appeal. (C. 602).

Appellate court's ruling

The appellate court affirmed the denial of the motion for leave to file a successive postconviction petition. *People v. Harris*, 2022 IL App (1st) 211255, modified upon denial of rehearing May 9, 2023. Harris filed a petition for rehearing, and the appellate court denied rehearing and issued a modified order. *Id.*

The appellate court determined that Harris failed to sufficiently establish an actual innocence claim by reasoning that Collins's affidavit was not "new." *Id.* ¶¶ 30, 33. According to the appellate court, Collins's affidavit, which the court

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presumed to be true, established that no one approached Collins about the shooting and he did not come forward with information because he feared Sacky. *Id.* ¶¶ 33-34. The appellate court concluded that although Collins explained why he did not come forward, his "affidavit does not establish that [Collins] could not have been discovered earlier through due diligence." *Id.* ¶¶ 33-34; *accord* ¶ 43. The appellate court theorized that Collins's position behind the victim's vehicle made it "unlikely Smith and Hardy could have failed to register his presence." *Id.* ¶ 36. Therefore, the appellate court determined that Harris or his trial counsel could have discovered Collins by speaking with Smith or Hardy. *Id.* ¶¶ 40-42. The appellate court thus held Harris "has not shown that Collins's affidavit is new evidence as he has not established that Collins's presence at the scene could not have been discovered before trial through the exercise of due diligence." *Id.* ¶ 43.

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ARGUMENT

Kyuanzi Harris made a colorable claim of actual innocence by providing an affidavit from a newly discovered witness who averred that Harris did not commit this crime and specifically identified the shooter as someone else, and explained that he met Harris in prison and did not come forward due to fear of reprisal from the actual shooter.

This appeal raises the specific issue of whether Kyjuanzi Harris's motion for leave to file a successive postconviction presented a colorable claim of actual innocence based on new evidence by presenting Wynton Collins's affidavit that identified Sacky, not Harris, as the shooter. (C. 531-33). Because there is colorable evidence that Collins's affidavit is newly discovered, this Court should answer this question affirmatively and remand this case for second-stage postconviction proceedings because Illinois case law recognizes that "if an unknown, unobserved and unrecorded witness chooses not to come forward, there is no amount of due diligence that can force him or her to come forward to 'get involved." *People v. Anderson*, 2021 IL App (1st) 200040, ¶ 63. Harris's motion and Collins's affidavit provide colorable proof that Collins was an undiscoverable witness who fled the scene of a drive-by shooting and refused to come forward until he met Harris in prison. (C. 531-33). Collins's affidavit, which must be accepted as true at this stage, makes a sufficient showing that (1) no amount of due diligence could have discovered Collins before Harris's trial, (2) Collins's testimony was material and noncumulative, and (3) Collins's testimony is sufficiently conclusive because it undermined confidence in the verdict and the State's questionable identification testimony.

Collins averred that Sacky was the shooter, he recently met Harris in prison, he fled the shooting, and he avoided speaking with anyone about the shooting because he feared reprisal from Sacky. (C. 531-33). The appellate court's speculation that Harris could have uncovered Collins's existence at the time of trial through

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the State's eyewitnesses, Tamira Smith or Debra Hardy, was not supported by positive or affirmative record proof. *People v. Harris*, 2022 IL App (1st) 211255, ¶¶ 36, 40-42. Smith refused to cooperate with Harris's trial counsel's pretrial investigation and she testified that she was not paying attention to anything behind her, which was where Collins's car was located when he observed the shooting. (R. 108-09, 275, 277); (C. 531-33). Similarly, Hardy did not provide the defense with any specific names of people in the park. (R. 313). Additionally, the record establishes that Harris was an unreliable witness, as she suffered from mental illness, paranoid schizophrenia, substance abuse issues, and homelessness, and she also had several felony convictions, including her own murder conviction. (R. 297-98, 307-012, 352). She was not a helpful witness for Harris at the time of trial, although after trial, Hardy identified the shooter as her nephew. (CI. 234). She explained that she did not come forward sooner because she "didn't not want her nephew to go to jail." (CI. 434). The record thus refutes the appellate court's unsupported speculation that Harris's trial counsel could have uncovered Collins by interviewing Smith and Hardy before trial.

Consistent with well-established Illinois law, Collins's affidavit provided new, material and noncumulative, and conclusive evidence that would likely the change the result of a trial that hinged upon questionable identification testimony. Therefore, this Court should reverse the appellate court's decision and order that this case be remanded to the circuit court for second-stage postconviction proceedings.

A. Claims of Actual Innocence, Due Process, and the Post-Conviction Hearing Act.

This Court steadfastly refuses to turn a blind eye to a potential manifest

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injustice that results from the continued incarceration of a demonstrably innocent person because to ignore a claim of actual innocence "would be fundamentally unfair in terms of procedural due process." *People v. Washington*, 171 Ill. 2d 475, 487 (1996); *accord People v. Reed*, 2020 IL 124940, ¶¶ 19, 41. The Illinois Constitution's due process clause provides that "[n]o person shall be deprived of life, liberty or property without due process of law." Ill. Const. 1970, art. I, § 2.. The imprisonment of an innocent person shocks the conscience to such a degree as to trigger substantive due process concerns under the Illinois Constitution. *Washington*, 171 Ill. 2d at 492; *Reed*, 2020 IL 124940, ¶¶ 19, 41 (citing Ill. Const. 1970, art. I, § 2).

An actual innocence claim based on newly discovered evidence is cognizable under the Post-Conviction Hearing Act (the "Act"). *Washington*, 171 Ill. 2d at 489; *accord People v. Taliani*, 2021 IL 125891, ¶ 57 (2022). 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.* (2021); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). While the Act generally contemplates the filing of one postconviction petition, a petitioner may receive "leave of court" to pursue a successive postconviction petition by presenting a freestanding claim of actual innocence or "cause and prejudice" for his failure to raise a claim earlier. *People v. Edwards*, 2012 IL 111711, ¶¶ 24; *Washington*, 171 Ill. 2d at 489; *Taliani*, 2021 IL 125891, ¶ 55.

The sufficiency of postconviction pleadings is a purely legal question which this Court reviews *de novo*. *Robinson*, 2020 IL 123849, ¶¶ 39-40. "[W[hen a petitioner raises an actual innocence claim in a motion for leave to file a successive postconviction petition, the petitioner should be denied leave to file only where, as a matter of law, no colorable claim of actual innocence has been presented."

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People v. Prante, 2023 IL 127241, ¶ 74. *See also Robinson*, 2020 IL 123849, ¶ 50 (to obtain leave to file a successive postconviction petition, a petitioner need only "set forth a colorable claim of actual innocence"). A colorable claim of actual innocence must based upon evidence that is new, material, noncumulative and of such conclusive character that it would probably change the result upon on retrial. *Washington*, 171 Ill. 2d at 489.

At the pleading stage for leave to file a successive postconviction petition, a reviewing court must take all well-pleaded allegations as true and liberally construe them in the petitioner's favor unless there is clear and positive record evidence refuting an allegation. *Robinson*, 2020 IL 123849, ¶ 45. "In deciding the legal sufficiency of a postconviction petition, the [reviewing] court is precluded from making factual and credibility determinations." *Id.*

B. Harris's motion for leave to file and Collins's affidavit creates a colorable showing that Collins is a "new" witness, supporting Harris's claim of actual innocence.

Accepting the averments in Collins's affidavit as true, Harris's motion and Collins's affidavit present a colorable showing that Collins was a new, material witness who could not been discovered before Harris's trial. Collins was unknown to Harris and the State because Collins fled the shooting and avoided talking to any police investigators. (C. 432-33). Collins averred that he avoided speaking with police investigators because he feared for his life as "everybody know(s) how Sacky get down." (C. 533). Smith, Hardy, and law enforcement did not provide any positive or affirmative testimony or pretrial assistance to Harris's trial counsel that either confirmed or refuted Collins's presence during the shooting. Collins explained that he first met Harris in prison after Harris's trial and that he was coming forward with information because Harris was incarcerated for Sacky's

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actions. (C. 531, 533). At the pleading stage, the record established that Collins was a unknown and unobserved witness who quickly fled without a trace after the shooting and could not have been discovered at the time of trial through the exercise of due diligence. (C. 531-32).

It is well-established that witnesses such as Collins, who are "unknown, unobserved, and unrecorded" and previously refused to come forward are considered newly discovered since "no amount of due diligence that [could have] forced him . . . to come forward." *People v. Anderson*, 2021 IL App (1st) 200040, ¶ 63. Newly discovered evidence also includes a witness who was unavailable due to threats and intimidation. *People v. Fields*, 2020 IL App (1st) 151735, ¶ 46.

Evidence is "newly discovered" when it was unavailable at trial and it could not have been discovered sooner through due diligence." *Robinson*, 2020 IL 123849, ¶¶ 47, 53; accord *People v. Ortiz*, 235 Ill. 2d 319, 334 (2009) (same). Whether due diligence, rather than luck, could have uncovered a witness and facilitated a witness's trial testimony depends on the circumstances of the specific case, including a litigant's knowledge and relationship to the witnesses, whether the witness was known or hidden, whether the witness was subject to the power of subpoena, or whether the witness refused to get involved before trial. *People v. Edwards*, 2012 IL 111711, ¶ 37. For example, a "witness's legitimate fear of a gang retaliation may, in certain circumstances, be sufficient to deem that witness unavailable to testify at trial" and qualify the witness's post-trial statements as newly discovered. *People v. Rosalez*, 2021 IL App (2d) 200086, ¶ 122 (citing *Ortiz*, 235 Ill. 2d at 334). For purposes here, a chance post-trial prison encounter between a defendant and a previously unknown witness may also constitute newly discovered evidence. *See,* e.g., *People v. Horman*, 2023 IL App (3d) 220010-U, ¶ 17 (finding a witness

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affidavit was newly discovered evidence, as "the only reason the evidence was ultimately discovered was due to a chance encounter between defendant and Smith at Menard Correctional Center") (opinion attached pursuant Ill. S. Ct. R. 23(c)).

An affidavit from an unknown and unobserved witness who chose not to come forward before trial also provides newly discovered evidence that no amount of due diligence could have uncovered. *See*, e.g., *Anderson*, 2021 IL App (1st) 200040, ¶ 63. Such witnesses are distinguishable from alibi witnesses because an alibi witness is usually known to the defendant before trial. *See, e.g., Robinson*, 2020 IL 123849, ¶ 53 (holding that testimony from a fellow gang member and potential alibi witness was not new evidence because the defendant would be aware of this information prior to trial); *Edwards*, 2012 IL 111711 ¶¶ 34-37 (holding alibi witnesses were not newly discovered because the defendant knew about them). Similar to alibi witnesses, when a defendant can personally observe a witness during a crime, then that witness's statements would not be considered new unless there were other circumstances that would cause the witness to be unavailable. *People v. Wingate*, 2015 IL App (5th) 130189, ¶ 21 (holding the defendant failed to make a substantial showing of a constitutional violation because he was present during his admitted shooting of the victim and there were no facts to suggest that the witnesses could not be seen by the defendant or other witnesses).

The case here is not a known witness case. Accepting Collins's affidavit as true, Collins was unknown to Harris before trial. There is no evidence that Harris, the Chicago Police Department, Smith, or Hardy saw, knew, or remembered Collins before Harris's trial. If "no amount of [due] diligence by defendant could have compelled [the witness] to testify to the statements in his affidavit" at trial, then a witness affidavit constitutes "newly discovered evidence." *People v. White*,

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2014 IL App (1st) 130007, ¶ 22.

Collins averred that he fled the shooting and that he did not speak to law enforcement or an attorney because he feared for his and his family's safety due to reprisal from Sacky. (C. 533). Collins expressly stated:

> "I know for a fact [Harris] did not do this crime. The reason why I never spoke to the police about this, I was in fear for me and my family safety. Everybody know how Sacky got down. But now that I know someone else is incarcerated for his actions I must come forward." (C. 533)

This averment establishes colorable proof that Collins made himself unavailable and undiscoverable before Harris's trial due to threat of violence from Sacky.

This Court's precedent establishes that testimony of an eyewitness who was unknown to the defense, or even to a known witness, and who made themself unavailable constitutes new evidence that could not have been discovered with the exercise of due diligence. *Ortiz*, 235 Ill. 2d at 334. In *Ortiz*, defendant Ortiz was convicted of first degree murder for allegedly participating in a gang-related shooting. *Id.* at 326. The defendant later filed a successive post-conviction petition raising an actual innocence claim based on the affidavits of several new witnesses, including Sigfredo Hernandez. *Id.* Hernandez's affidavit stated that he saw the offense and that defendant Ortiz was not one of the offenders. *Id.* At a third-stage evidentiary hearing, Hernandez testified that "[h]e did not report his story to police because he was scared of being killed by his fellow gang members," that he moved to Wisconsin shortly after the offense, and that he executed his affidavit in this case shortly after seeing the defendant's mother. *Id.* at 326-27. The trial court found Hernandez's testimony was insufficient to warrant a new trial. *Id.* at 327.

On appeal, this Court held that Hernandez's testimony constituted newly discovered evidence because he did not come forward until after the trial and he

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made himself unavailable by fleeing the shooting and moving. *Id.* at 333-34. This Court also concluded that Hernandez's testimony was material, noncumulative, and "of such a conclusive character that it would probably change the result of retrial." *Id.* at 336. This Court held that the trial court erred in dismissing the petition, and remanded the case for a new trial. *Id.* at 336.

In *Anderson*, the appellate court relied upon *Ortiz* to reverse a circuit court's denial of leave to file a successive postconviction petition when the defendant presented affidavits from two new eyewitnesses to a shooting. *Anderson*, 2021 IL App (1st) 200040, ¶ 65. The court held that affidavits from new eyewitnesses who did not previously admit to witnessing a shooting and who identified a different shooter than the defendant constituted newly discovered evidence. *Id.* The court concluded these witnesses were new because they were not in a position where other witnesses would have noticed them, and the new witnesses ensured their anonymity by immediately fleeing the area. *Id.* The court noted that such evidence "satisfied the low bar at [the leave to file] stage for alleging newly discovered evidence." *Id.* The court again explained that "if an unknown, unobserved and unrecorded witness chooses not to come forward, there is no amount of due diligence that can force him or her to come forward to 'get involved.' " *Id.* ¶ 63.

In *People v. Griffin*, 2022 IL App (1st) 191101-B, appeal allowed, 197 N.E.3d 1086 (Ill. 2022),the appellate court yet again reversed a denial of leave to file a successive postconviction petition by finding that the defendant presented new evidence from a witness who fled the scene of a shooting and remained silent. In *Griffin*, the defendant pled guilty to one count of first degree murder and filed a motion for leave to file a successive postconviction petition that asserted a claim of actual innocence based on two witness statements from his fellow prisoners.

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Griffin, 2022 IL App (1st) 191101-B, ¶¶ 1,16. In the defendant's motion for leave to file, he averred that he did not know about the witnesses until he met them in prison. *Id.* ¶ 16. Particularly, Lavonte Moore averred that he observed the shooting while sitting in his car across from Chicago's LaFollette Park. *Id.* Moore averred that he saw a different shooter than the defendant walk past his car, pull out a gun, and start shooting. *Id.* ¶ 17. He heard the gunshots and saw the shooter, who he identified as Jerrell Butler, run past his car. *Id.* Moore wrote that he "never mentioned this to anyone before encountering the defendant in prison because he was afraid of retaliation from Butler and Butler's friends." *Id.*

The court in *Griffin* concluded and the State conceded that the post-trial witness affidavits, including Moore's affidavit, constituted "new evidence" because the defendant did not meet the witnesses until he was in prison, and could not have discovered the information in the affidavits with due diligence. *Id.* ¶ 60. Based on those facts, the appellate court did not require the defendant to explain his counsel's pretrial investigation for potential witnesses. *Id.*

Ortiz, *Anderson,* and *Griffin* demonstrate that a defendant satisfies the low bar of establishing a colorable claim of newly discovered evidence at the leave to file stage when the defendant provides a sworn statement from a previously unknown witness and there is proof that the witness fled the scene of a shooting and chose to remain silent due to fear of physical harm. *Ortiz*, 235 Ill. 2d at 334; *Anderson*, 2021 IL App (1st) 200040, ¶ 65; *Griffin*, 2022 IL App (1st) 191101-B, ¶ 60. Illinois law is clear that "'newly discovered evidence' includes testimony from a witness who essentially made himself unavailable as a witness out of fear of retaliation.'" *People v. Class,* 2023 IL App (1st) 200903, ¶ 75 (quoting *People v. Ayala*, 2022 IL App (1st) 192484, ¶ 137 (citing *Ortiz*, 235 Ill. 2d at 334)). In

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Harris's case, the trial court and the appellate court erred by concluding otherwise.

Collins's affidavit made a colorable showing of newly discovered evidence of Harris's actual innocence because Collins was unknown and unavailable to Harris before trial. Collins averred that he first met Harris in prison and was unaware that Harris was found guilty of the shooting until he and Harris started talking about their cases. (C. 531-32). Collins did not see Harris before Collins fled the crime scene. (C. 533). He never spoke to the police or an attorney because "everybody know(s) how Sacky get down," and he did not want to put his family in harm's way. (C. 533). Consistent with *Ortiz*, *Anderson,* and *Griffin*, Harris made a colorable showing that new evidence supported a claim of actual innocence because Collins was an unknown witness who did not want to be found until Collins and Harris met in prison. When Harris's pleadings and Collins's affidavit are accepted as true, Collins qualified as a newly discovered witness as there is no evidence that he could have been discovered earlier.

The appellate court's reasoning that Harris could possibly have found Collins through Smith or Hardy since they "could have observed [Collins]," *Harris*, 2022 IL App (1st) 211255-U; ¶ 40, is not supported by positive evidence in the record. The flaw of the appellate court's reasoning is "at the pleading stage of postconviction proceedings, all well-pleaded allegations in the petition and supporting affidavits that are not *positively rebutted* by the trial record are to be taken as true." *Robinson*, 2020 IL 123849, ¶ 45. Allegations are considered "positively rebutted by the record" only if they are refuted or disproven by clear and verifiable facts of record, such as those that do not depend on any credibility determination for their truth. *See*, e.g., *Sanders*, 2016 IL 118123, ¶ 48 (finding a witness's claim that he shot the victim one time refuted by an autopsy that showed the victim had been shot twice);

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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 the transcript showed counsel eliciting testimony regarding the defendant's alcohol and marijuana use).

In the present case, the record lacks any positive testimony by Hardy and Smith that would indicate that Collins was even a discoverable witness, let alone a willing witness. In fact, during the trial, Smith and Hardy did not describe any of the other park visitors, including the little boy who approached the car just prior to the shooting. (R. 251, 313). Furthermore, the State did not even present the little boy as a witness despite his immediate proximity to the shooting. Both the State and Harris, via his trial counsel, faced an uphill battle in finding and securing credible witnesses to this drive-by shooting.

Moreover, the record refutes the appellate court's speculation that Collins was discoverable through Smith for two main reasons. First, Smith testified that she was not paying attention to her surroundings when the shooting occurred. (R. 275). Her trial testimony was as follows:

> [DEFENSE COUNSEL]: Now, you know – you were not expecting any car to pull up next you, were you?
>
> [SMITH]: No, I was not.
>
> [DEFENSE COUNSEL]: You were not paying attention to what was going on behind you, were you?
>
> [SMITH]: *No, I was not*. (R. 275) (emphasis added).

This exchange showed that Smith's attention was not focused on Collins's location behind her vehicle. (C. 531-33); (R. 275).

It is clear that after the shooting, Smith was shocked, and attempted to save her friends's lives e while "Sweat Pea! Sweat Pea!" (R. 286-288). In other

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words, she was focused on her friends rather than looking for potential witnesses.

Additionally, Smith declined Harris's trial counsel's pretrial request to interview her and thus, despite Harris's trial counsel's diligent efforts, Smith provided no assistance in identifying Collins before trial. (R. 108-09, 277). The court and trial counsel had the following exchange regarding Smith's decision not to cooperate with the defense's investigation:

> THE COURT: . . . Have you had a chance to talk to her?
>
> [TRIAL COUNSEL]: I did. Judge. I spoke to her, I introduced myself, told her who I was, who I represent, asked her to speak with me. She refused to speak with me, refused to provide me her address.
>
> THE COURT: That, of course, is her right.
>
> [DEFENSE COUNSEL]: Absolutely it is. (R. 108-09)

Smith later confirmed that she refused to speak with Harris's counsel. (R. 277).

Smith's refusal shows that despite Harris's trial counsel's efforts to conduct a thorough investigation, counsel faced obstacles. "[A] prosecution witness is not obligated to grant an interview to defense counsel." *People v. Craig*, 79 Ill. App. 3d 584, 590 (5th Dist 1978); *accord People v. McCollum*, 239 Ill. App. 3d 593, 596 (3rd Dist. 1992) (same). The State may compel a witness's testimony by pursuing charges for obstruction of justice or criminal contempt for refusal to testify, but Harris's trial counsel possessed no such tools. 720 ILCS 5/31-4 (2012); *People v. Geiger*, 2012 IL 11318 (generally explaining that a defendant who refuses to testify may be subject and punished for criminal contempt). Since Harris's case was a criminal proceeding, Harris's counsel did not have the broad power to force Smith or Hardy to sit down for a pretrial deposition or to answer interrogatories. *Compare* Ill. S. Ct. R. 414 (limiting depositions in criminal proceedings) *with* Ill. S. Ct. R(s). 202, 204, 210 (broadly allowing depositions in civil cases for any purpose). Harris's

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trial counsel had no power compel Smith and Hardy to provide a pretrial interview or answer questions.

Hardy's testimony, like Smith's, also contained no positive showing that she even knew about Collins. Harris's trial counsel asked Hardy, "when you got there, *who* did you see?" (R. 313) (emphasis added). Hardy replied that she saw "several people," but did not provide any names or give descriptions of the people. (R. 313). Also, Hardy, who was 18 to 20 feet away from the shooting, could not see Smith's face in the backseat of Grand Am, and unlike Smith, Hardy did not see that the shooter covered his face. (R. 284, 322, 438 383).

Hardy's lack of assistance should not be surprising since she admitted to drinking alcohol, and she observed the shooting from 20 feet away and behind a fence. Moreover, she has since recanted her trial testimony by claiming that her nephew Sacky committed the shooting: during Harris's first postconviction proceedings, Hardy provided recorded statements that Sacky committed the shooting and that she "didn't want her nephew to go to jail." (CI 434). In addition, she was a convicted felon, a drug user, and had a history of mental illness, which included delusions and a diagnosis of schizophrenia. (R. 297-98, 307, 309-10). The trial judge acknowledged on several occasions that Hardy carried a lot of "baggage." (R. 574, 629, 1383). Hardy's baggage, discrepancies regarding her point of view, and her familial relationship with the new and actual suspect undermine any conclusion that she could have provides Harris's trial counsel with the means to discover another eyewitness. (R. 297-98, 307, 309-10).

At the pleading stage for a motion for leave to file a successive postconviction petition, Harris was not required to show that his trial counsel's pretrial efforts exceeded the amount of due diligence by the Chicago Police Department and Cook

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County States's Attorney Office, neither of whom identified any other eyewitnesses to the shooting. A postconviction petitioner is not required to provide an affidavit from his trial counsel regarding counsel's pretrial investigation. *People v. Hall*, 217 Ill. 2d 324, 333–34 (2005); *People v. Williams*, 47 Ill. 2d 1, 4 (1970). Despite the Chicago Police Department's resources and manpower, the State produced Smith and Hardy as the only eyewitnesses. The little boy by the victim's vehicle was not called by the State, and the Chicago police did not prevent witnesses from immediately fleeing the crime scene. (R. 381-82). Detective Roberts did not make any progress on the investigation until a year and half after the shooting, when he received an anonymous telephone tip. *Harris*, 2016 IL App (1st) 141206-U, ¶¶ 30-32; (R 355, 386-87). By the time of Harris's arrest, witnesses to the shooting, including Collins and the little boy beside the vehicle, had disappeared without a trace.

Without affirmative record evidence that Hardy and Smith could and would have identified Collins before Harris's trial, the appellate court erred by making a factual finding that Collins was not a newly discovered witness. The appellate court erred because "in deciding the legal sufficiency of a postconviction petition, the court is precluded from making factual and credibility determinations." *Robinson*, 2020 IL 123849, ¶ 45. Moreover, the appellate court's speculation that Smith or Hardy "could have observed" Collins at one point during that chaotic evening, does not "completely contradict" the claim that Collins was an undiscoverable witness and that no amount of due diligence of due diligence would have uncovered his presence before trial. *See Hodges*, 234 Ill. 2d at 16 (explaining that "[a]n indisputably meritless legal theory is one which is *completely contradicted* by the record") (emphasis added).

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For the foregoing reasons, Harris has established a colorable claim that Collins's statements qualify as newly discovered evidence, as Collins's affidavit shows that he made himself unavailable due to fear of retaliation from Sacky. Consistent with this Court's precedent, this Court should thus hold that for purposes of the leave to file stage, Collins's affidavit constitutes new evidence.

C. Collins's identification of Sacky as the shooter was material, noncumulative, and of such conclusive nature as to undermine the State's identification evidence.

The record and the standard of review warrant this Court examining, as a matter of law, whether Harris made a colorable showing that Collins's testimony is material, noncumulative, and of such conclusive nature as to undermine the State's identification evidence. Since a reviewing court utilizes the *de novo* standard and no fact-finding can be made until a third-stage evidentiary hearing, this Court is capable of efficiently and clearly answering these questions for purposes of the pleading stage for a successive petition. *Robinson*, 2020 IL 123849, ¶¶ 39-40, 61 (holding that the defendant satisfied the pleading requirements for granting leave to file a successive postconviction petition based on new affidavits); *see also In re Marriage of Dahm-Schell & Schell*, 2021 IL 126802, ¶ 31 (explaining that the interests of judicial economy allow this Court to consider related issues).

For pleading stage purposes, Collins's identification of Sacky as the Horan Park shooter provides material, noncumulative, and conclusive evidence that was not presented at Harris's trial and that undermines the State's identification testimony. No trial witness identified Sacky or someone other than Harris as the shooter, but Collins had a clear view of the shooting. (C. 531-33). The evidence against Harris was tenuous as the State's witnesses only caught glances of the suspect for a few seconds, the suspect wore a facial covering over most of his face,

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and the lead detective did not have a suspect for more than a year and a half after the shooting. (R. 261-63, 291-92, 304-05, 330-32 360-62, 376-77). No forensic or video evidence connected Harris to the shooting, and he did not make any inculpatory statements. The State did not present any evidence regarding a motive for the shooting or a relationship between Harris and the victims. Collins's identification that Sacky was the shooter creates doubt regarding the credibility and reliability of the State's witnesses and the trial evidence.

"Material means the evidence is relevant and probative of the petitioner's innocence." *People v. Coleman*, 2013 IL 113307, ¶ 96. "Evidence is considered cumulative when it adds nothing to what was already before the jury." *People v. Gabriel*, 398 Ill. App. 3d 332, 351 (1st Dist. 2010). "T]he conclusive character element requires only that the petitioner present evidence that places the trial evidence in a different light and undermines the court's confidence in the judgment of guilt." *Robinson*, 2020 IL 123849, ¶ 56. "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." *Coleman*, 2013 IL 113307, ¶ 9.

In the previously discussed case of *Ortiz*, this Court found that testimony from a new witness that identified a different shooter than the defendant was material, noncumulative, and conclusive because such evidence was not presented at trial and differed from the testimony presented by State witnesses. *Ortiz*, 235 Ill. 2d 319 at 336-37. When this Court evaluated those elements, this Court noted that the testimony identifying a different shooter directly contradicted trial testimony from two eyewitnesses and thus, the fact-finder would need to weigh the conflicting accounts. *Id*. at 337.

In *People v. Adams*, 2013 IL App (1st) 111081, the appellate court held

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that at the pleading stage for leave to file a successive postconviction petition, affidavits from two witnesses that identified a different shooter than the defendant were material, noncumulative, and conclusive evidence because these affidavits concerned "the ultimate issue" of whether the defendant was the murderer. *Adams*, 2013 IL App (1st) 111081, ¶ 35. The court explained that this evidence was noncumulative because the jury heard no evidence identifying someone other than the defendant as the murderer. *Id.* The court held that the defendant made a colorable showing that such evidence was capable of changing the result on retrial because there was no physical evidence implicating defendant, the defendant did not confess, and the fact-finder would have to weigh the new evidence against the contradictory testimony from the State's eyewitnesses. *Id.* ¶ 37.

As in *Ortiz* and *Adams*, at the pleading stage for a successive postconviction petition, Collins's affidavit was material, noncumulative, and conclusive evidence that undermined's confidence in the jury's verdict. Moreover, the State has waived any argument contesting whether Collins's affidavit was material and noncumulative *People v. Harris*, 2022 IL App (1st) 211255, *Id.* ¶ 30 ("Here, the State does not dispute that Collins's affidavit is material and noncumulative."). On the merits, Collins had a clear view of the shooting and the jury did not hear any evidence that Sacky or someone else committed this crime. (C. 531-33). His expected testimony would have contradicted the State's identification testimony and called into question the State's other evidence.

To be clear, the State had a weak case. No physical, forensic, video or other evidence corroborated the highly doubtful identification testimony from Smith and Hardy. Notably, they only saw the shooting for a few seconds, Smith's view of the shooter was obstructed by the shooter's facial covering that hid most of the

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shooter's face, and a lapse of more than a year-and-half occurred before the lead detective even had a suspect. (R. 261-63, 291-92, 304-05, 330-32 360-62, 376-77). Even prior to Hardy's recantation and identification of her nephew as the shooter, the credibility of her trial identification of Harris was very questionable. When the shooting started, she was drinking and at least 20 feet away from the shooting. (R. 317-19); (CI. 434, 436); (C. 539). Her dubious history of substance abuse, mental health issues, and the pending charges against her when she identified Harris erode her credibility. (R. 297-98, 307, 309-10).

In summary, testimony from Collins would further weaken the credibility of the original trial testimony of Hardy and Smith. When presumed true at this stage, Collins's affidavit places the trial evidence in an entirely different light, contradicts the State's identification testimony, and creates questions of doubt in the jury's verdict. *See Robinson*, 2020 IL 123849, ¶ 56 (for the conclusive character element, the evidence only needs to place "the trial evidence in a different light and undermine[] the court's confidence in the judgment of guilt."); *People v. Wilson,* 2022 IL App (1st) 192048, ¶ 72 (holding that an account by a newly discovered witness would have forced the jury to reevaluate two trial witnesses' identifications of the defendant and make a "much different and potentially more difficult credibility determination").

This is a case in which the State's weak evidence and due process warrant closer examination of Harris's conviction in light of Collins's affidavit and other circumstances. *Ortiz*, 235 Ill. 2d 319, 329 (2009) (noting that procedural bars on pursuing a successive postconviction petition may be relaxed due to fundamental fairness). In both the present motion for a successive postconviction petition for leave to file and in Harris's original postconviction petition, Harris has attempted

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to bring forth new evidence of his actual innocence, but a court has never reached the merits of his claim. *See People v. Harris*, 2020 IL App (1st) 190690-U (affirming second-stage dismissal because affidavits were not properly sworn and notarized). Harris has consistently maintained his innocence while asserting that this is a case of misidentification. This Court has recognized that "eyewitness misidentification is now the single greatest source of wrongful convictions in the United States, and responsible for more wrongful convictions than all other causes combined." *People v. Lerma*, 2016 IL 118496, ¶ 24. For courts to bar a meaningful exploration of Harris's specific claims of actual innocence "would be fundamentally unfair in terms of procedural due process" and undermine confidence in the postconviction process. *Washington*, 171 Ill. 2d at 487.

For the aforementioned reasons, Harris's pleadings and Collins's affidavit establish a colorable claim of actual innocence based on newly discovered evidence at the leave to file stage of a successive postconviction proceeding. Therefore, this Court should reverse the denial of leave to file Harris's successive postconviction petition and remand this case for second-stage proceedings. *Robinson*, 2020 IL 123849, ¶ 85.

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CONCLUSION

For the foregoing reasons, Kyjuanzi Harris, petitioner-appellant, respectfully requests that this Court reverse the appellate court's order affirming the denial of leave to file his successive postconviction petition, and remand this cause for second-stage postconviction proceedings in the circuit court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 32 pages.

/s/Samuel B. Steinberg
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Presentence Investigative Report (January 8, 2013) . . . . CI 261

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Pro Se Motion For Ineffective Assistance of Counsel (January 3, 2013) . . . . CI 316

Duplicate Pages Found on CI 317-CI 1603

Report of Proceedings ("R")

	Direct	**Cross**	**Redir.**	**Recr.**	
August 30, 2021					
Petition for Post-Conviction Relief - Denied					R 1470

Report of Proceedings ("SR")

	Direct	**Cross**	**Redir.**	**Recr.**
June 11, 2012				
Pre-Trial Motions				
Witnesses				
Officer Batalin	R 52	R 56	R 60	
Officer Almanza	R 63	R 70		
July 17, 2012				
Motion to Suppress				
Witnesses				
Det. David Roberts	R 81	R 88	R 95	
December 3, 2012				
Jury Trial				
Witnesses				
Ruthie Guider	R 242	R 246		

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	Direct	Cross	Redir.	Recr.
Tamira Smith	R 247	R 268		
Debra Hardy	R 297	R 307	R 332	R 333
December 4, 2012				
Jury Trial Continued				
Witnesses				
Debra Hardy		R 379	R 402	R 403
Brian Dress	R 404			
Officer Almanza	R 407	R 414		
Eleanor Giacometti	R 418	R 433 R 442	R 443	
Ponni Arunkumar	R 444			
Kyjuanzi Harris	R 467			
Officer Young	R 483			
April 8, 2014				
Famara Turner	R 638			
Joanne Armstrong	R 640			
June 11, 2012				
Witnesses				
Officer Batalin	R 715	R 719	R 723	
Officer Almanza	R 726	R 733		
July 17, 2012				
Det. David Roberts	R 744	R 751	R 758	

Duplicate Pages Found on R 795-R 1278

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Certified Report of Disposition **(12/01/20) CCCR 0002**

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

PEOPLE OF THE STATE OF ILLINOIS

v.

KYJUANZI HARRIS

Case No. 11CR0372201

CERTIFIED REPORT OF DISPOSITION

The following disposition was rendered before the Honorable Judge JAMES B. LINN ON AUGUST 30, 2021. THE PRO-SE SUCCESSIVE POST-CONVICTION PETITION IS WITHOUT MERIT DENIED.

I hereby certify that the foregoing has been entered of record on the above captioned case.

Date: SEPTEMBER 09, 2021

Iris Y. Martinez

Iris Y. Martinez, Clerk of the Circuit Court

IRIS Y. MARTINEZ, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

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Sheet #	CRIMINAL DISPOSITION SHEET	Branch/Room/Location	Court Intrerpreter
43	Defendant Sheet #1	Criminal Division, Courtroom 700 2650 South California Avenue, Chicago, IL, 60608	

Case Number	Defendant Name	Attorney Name	Session Date	Session Time
11CR0372201	HARRIS, KYJUANZI	Defender, Public 006224360	8/30/2021	09:00 AM -

CB/DCN#	IR #	EM	Case Flag	Bond #	Bond Type	Bond Amt
018073708	1646245					

CHARGES	COURT ORDER ENTERED	CODES
C001 720-5/9-1(A)(1) MURDER/INTENT TO KILL/INJ 4/8/2014 DEFT. SENTENCED TO Life	Succ Pro Se P.C. w/o merit Denied clerk to notify	
C002 720-5/9-1(A)(1) MURDER/INTENT TO KILL/INJ 4/8/2014 DEFT. SENTENCED TO Life		
C003 720-5/9-1(A)(2) MURDER/STRONG PROB KILL/I		
C004 720-5/9-1(A)(2) MURDER/STRONG PROB KILL/I		
C005 720-5/9-1(A)(3) MURDER/OTHER FORCIBLE FEL		
C006 720-5/9-1(A)(3) MURDER/OTHER FORCIBLE FEL		
C007 720-5/9-1(A)(3) MURDER/OTHER FORCIBLE FEL		
C008 720-5/9-1(A)(3) MURDER/OTHER FORCIBLE FEL		
C009 720-5/9-1(A)(1) MURDER/INTENT TO KILL/INJ		

JUDGE: Linn, James B	JUDGE'S NO: 1544	RESPONSIBLE FOR CODING AND COMPLETION BY DEPUTY CLERK:	VERIFIED BY:

129753

In The Circuit Court of Cook County, Illinois (Criminal Division).

People of The State of Illinois	Case No. 11 CR0372201
vs.	Honorable
KyJuanzi Harris	James B. Linn
Pro se Petitioner	Judge Presiding

Notice of Appeal

RECEIVED SEP 28 2021 CLERK OF THE CIRCUIT COURT CRIMINAL DIVISION

An appeal is taken from the August 30, 2021 denial of indigent pro se Movant's motion to proceed in a successive post conviction petition pursuant to the Illinois Post Conviction Hearing Act.

ENTERED SEP 28 2021 IRIS Y. MARTINEZ CLERK OF THE CIRCUIT COURT OF COOK COUNTY, IL

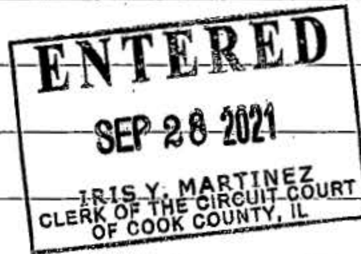
(1) Pro se Movant/Petitioner is appealing the denial of his meritorious claim of actual innocent of the two murders for which he was convicted based on "newly discovered evidence" and the wholly unconstitutional disproportionate "mandatory" life sentence imposed upon him as a documented traumatized adolescent/"emerging adult".

(2) The order was handed down August 30, 2021.

(3) Indigent Pro se Litigent request the appointment of counsel to represent him in this cause.

(page 1 of 2)

Respectfully Submitted
|S| Kyjuanzi Harris
Kyjuanzi Harris
I.D.O.C. Reg. No. M44405
2500 Rt. 99 South
Mt. Sterling, IL. 62353



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2022 IL App (1st) 211255-U
No. 1-21-1255
Order filed December 13, 2022
Modified upon denial of rehearing May 9, 2023
Second Division

NOTICE: This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

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. 11 CR 3722
	)	
KYJUANZI HARRIS,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm denial of leave to file a successive postconviction petition. Defendant does not establish a colorable claim of actual innocence based on a witness's affidavit because he does not demonstrate the affidavit is new evidence. He does not establish cause and prejudice for his claim that his sentence is unconstitutional based on his youth and background.

¶ 2 Defendant Kyjuanzi Harris appeals from the circuit court's order denying him leave to file a successive petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et*

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seq. (West 2020)). He argues that he established a colorable claim of actual innocence based on newly discovered evidence, namely, a witness's affidavit averring that the witness observed someone else commit the murders for which defendant was convicted. He further argues that he established cause and prejudice for his claim that his mandatory life sentence is unconstitutional because he was 21 years old at the time of the murders. We affirm.

¶ 3 Following a 2012 jury trial, defendant was convicted of the first degree murders of Derrick Armstrong and Bernadette Turner. He was sentenced to two mandatory, concurrent life sentences, pursuant to section 5-8-1(a)(1)(c)(ii) of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 2008)). We affirmed on direct appeal. *People v. Harris*, 2016 IL App (1st) 141206-U. As we have provided detailed accounts of the facts in prior orders, we recount the facts here only as necessary to resolve the issues in the instant appeal.

¶ 4 At trial, Tamira Smith testified that, on the evening of May 21, 2009, she, Turner, and Armstrong were parked in Turner's car, a two-door Pontiac Grand Am, near Horan Park, which was on the 3000 block of Van Buren Street, in Chicago. They arrived around 3 p.m. Around 6 or 6:30 p.m., Smith and Turner left in the Grand Am but returned around 8:40 or 8:45 p.m. Armstrong got back in the vehicle and they parked on the left side of the street. Armstrong was in the driver's seat, Turner in the front passenger's seat, and Smith in the rear seat behind Turner. Smith alternately testified there were "a few" and "a lot" of people outside. Turner and Armstrong were rolling a "blunt"; Smith could not smoke because she was pregnant.

¶ 5 Around 9:15 p.m., a black vehicle approached the Grand Am's passenger's side. Although the driver wore a mask or scarf covering his mouth and nose, Smith observed his complexion, eyes, and dreadlocks from about three feet away for 5 or 10 seconds. She identified him in court

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as defendant. Defendant extended a firearm and fired continuously at the Grand Am's front passenger window. Smith ducked until he drove away.

¶ 6 After the shooting, things were "crazy," and people screamed. Smith was shocked. Armstrong and Turner had been shot. Smith pushed Armstrong aside so she could exit, then pulled him and Turner out of the vehicle. She held Turner. Ambulances arrived and transported Armstrong and Turner to the hospital. Smith described the shooter to police and went to the police station to talk to detectives. She again met with detectives in November 2010 and February 2011, when she identified defendant in a photo array and an in-person lineup, respectively.

¶ 7 Debra Hardy testified that, at the time of trial, she was serving a 2½-year prison sentence for possessing a controlled substance and had previously been convicted of, *inter alia*, murder. She had also been diagnosed with "various psychiatric disorders," including paranoid schizophrenia. She knew defendant, Armstrong, and Turner, who was like her goddaughter.

¶ 8 On the day of the shooting, Hardy was in Horan Park from around 5 p.m. to around 9:30 p.m. She saw Turner and Armstrong parked in their vehicle by the park when she arrived. They stayed in the park the entire time; she never saw Turner's vehicle leave. Hardy initially testified she was a few inches from their vehicle, but later stated she was on a bench about 20 feet away. She drank one beer. Other people were also in the park, a heavy traffic area.

¶ 9 Around 9:30 p.m., Hardy observed defendant drive next to the vehicle in which Turner and Armstrong sat parked directly in front of her, extend his hand out the window, and fire "quite a few" shots at Turner and Armstrong's vehicle. She first stated she "[p]artially" saw the shooter's face but later testified his face was uncovered. Hardy was stunned for a moment and "ducked

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behind the car." When defendant drove away, Hardy ran to the front of the Turner's vehicle as Turner exited it. When the ambulances arrived, Hardy followed them to the hospital.

¶ 10 Hardy did not go to the police. When police eventually located and interviewed her on June 6, 2009, she told them that defendant was the shooter. In December 2010, she was shown a photograph array and identified defendant.

¶ 11 Detective David Roberts testified that he was assigned to the investigation around 10 p.m. on May 21, 2009. However, he later testified that he arrived at the scene about three minutes after the shooting, as the ambulances were leaving. There were only a few witnesses present, but Roberts learned from the first officer who responded that there had been "many people present" when that officer arrived. Roberts did not interview any witnesses at the scene but interviewed Smith at the police station that night. He located Hardy on June 6, 2009, and interviewed her but did not determine the identity of the shooter. Following an anonymous tip in November 2010, Roberts showed Smith a photograph array and she identified defendant. In December 2010, Hardy told Roberts the shooter was named "KyJuan" and identified defendant in a photograph array. Defendant was arrested in February 2011.

¶ 12 The jury found defendant guilty of first degree murder for the deaths of Turner and Armstrong.

¶ 13 Defendant's presentence investigation report (PSI) reflected that he was 21 years old on the date of the offense. His parents were not together but had provided good homes. His father was killed in 2003. Defendant denied any past or present gang affiliation, or being diagnosed with a psychological, learning, or behavioral disorder. He began drinking alcohol and smoking marijuana when he was 16 years old. He got drunk twice a week and smoked five or six "blunts" per day. He

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was expelled from school during his senior year for being late. He had eight prior nonviolent convictions, including a 2009 conviction for which he was sentenced to boot camp. Between his release from boot camp and his arrest in this case 11 months later, he did not drink alcohol or smoke marijuana. During that time he took ecstasy two or three times a month but stopped when it caused blood in his urine. He denied that he ever had a substance abuse problem.

¶ 14 At the sentencing hearing, the court noted that it lacked discretion and sentenced defendant to concurrent terms of life imprisonment without the possibility of parole. Defendant appealed and we affirmed. *People v. Harris*, 2016 IL App (1st) 141206-U.

¶ 15 In August 2018, defendant, through counsel, filed a petition for relief under the Act. Relevant here, he raised a claim of actual innocence based on newly discovered evidence. The evidence included an unnotarized summary from a private investigator, signed by Hardy, stating that Hardy told the investigator the police coerced her into falsely testifying that defendant was the shooter. The real shooter was her nephew, Dennis Glover. The investigator also signed an unnotarized "affidavit" stating he had obtained a written and recorded statement from Hardy. Defendant further attached two unnotarized "affidavits" from Donathan Williams which stated that Glover, also known as "Sacky," told Williams he killed Armstrong and Turner

¶ 16 The court docketed the petition and the State moved to dismiss it at the second stage of proceedings under the Act. Defendant's counsel filed an amended petition which, *inter alia*, reiterated that defendant was actually innocent. Defendant submitted with the amended petition a notarized affidavit from Hardy averring that her statement to the investigator was true, an audio recording of the conversation between Hardy and the investigator, and defendant's own notarized

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affidavit averring that he was unaware of Hardy and Williams's information until August 2018.[1] The State filed a motion to dismiss the amended petition, which the circuit court granted.

¶ 17 On appeal, we affirmed the dismissal. *People v. Harris*, 2020 IL App (1st) 190690-U. We declined to consider the content of Hardy and Williams's statements as they were unnotarized, and concluded that defendant did not make a substantial showing of actual innocence. *Id.* at ¶¶ 73-81.

¶ 18 On August 20, 2021, defendant filed the *pro se* motion for leave to file a successive postconviction petition at issue in this appeal, incorporating the petition. He first claimed that he was actually innocent based on newly discovered evidence in the form of a January 3, 2020, affidavit from Wynton Collins, which defendant attached.

¶ 19 In the affidavit, Collins averred that, around 9 p.m. on May 21, 2009, he sat on the hood of his vehicle at Van Buren Street and Whipple Street talking to a woman. A black vehicle drove past him "to the car that was parked directly in front" of his. The driver of the black vehicle was "Sacky," whom Collins knew. Sacky fired 10 or 15 shots at the occupants of the vehicle in front of Collins's car. Collins ran to the north side of Van Buren, then west towards Albany Avenue. The woman ran in another direction and he never saw her again. Collins hid behind a parked vehicle and Sacky drove past him. After Sacky left, Collins ran back to his vehicle and saw "the two occupants" of the vehicle in front of his "looked deceased." He heard tires screeching, feared Sacky was returning, entered his vehicle, and drove away.

¶ 20 Collins did not speak to police about the murder because he feared for his and his family's safety as "everybody know how Sacky get down." Collins was never interviewed by police, an

[1] The recording is not included in the record on appeal in the instant case. However, in our order affirming the circuit court's dismissal of defendant's petition, we noted that it was "consistent with [the] handwritten summary." *People v. Harris*, 2020 IL App (1st) 190690-U, ¶ 48.

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attorney, or an investigator. He later, at an unspecified time, met defendant in prison. One day, defendant told Collins why he was imprisoned, and Collins realized that the wrong person was convicted of the shooting deaths. Now that Collins knew that someone else was incarcerated for Sacky's actions, Collins had to come forward. Collins had not seen defendant the day of the shooting or heard defendant had been involved.

¶ 21 Defendant also raised an as-applied constitutional challenge to his mandatory life sentence, claiming he was an emerging adult at the time of the offenses and his sentence was disproportionate. He alleged he could not have raised the claim previously because "[t]he law and the science supporting the law had not been sufficiently developed at that time." He argued that he was 21 years old at the time of the offenses with a brain similar to a juvenile's, possessed rehabilitative potential, experienced a traumatic childhood, and should be allowed to file a successive petition so he could develop the record supporting his argument.

¶ 22 In support of his sentencing claim, defendant attached his own affidavit explaining his background. When he was 1½ or 2 years old, he found a can of mace and sprayed it into his diaper, burning his skin in "a very traumatic experience." He was raised in a "rough and violent" housing project. He was bullied and often fought to protect his younger sisters. When he was nine years old, his aunt with whom he was very close died of cancer, and he saw his four-year-old sister get hit by a car. When he was 11 years old, he was struck in the forehead with a baseball bat, which resulted in stitches and a large knot for which he was bullied and teased, frequently causing him to enter fights. Two of his best friends were shot and killed around the same time. He began to smoke PCP-laced cigarettes and marijuana, drink alcohol, and take pills. His father was killed when defendant was 15 years old. He dropped out of school and started sleeping in abandoned

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vehicles and buildings. He was attacked by and recruited into a street gang, as part of which he sold drugs and stole things. He then lost his best friend in a car accident and another friend to a drive-by shooting. However, since his incarceration, he achieved a high school diploma, resolved to be positive example for his daughter, and gained a mentor, Marvin Bryant.

¶ 23 Defendant attached an affidavit from Bryant averring that he was incarcerated with defendant and found defendant "decent, kind and respectful," "ambitious, motivated, resourceful, trustworthy and eager to learn." Defendant demonstrated remorse and Bryant requested the court allow defendant to return to society to parent his daughter and become a productive citizen. Bryant included a leadership certificate he received from a "Global Leadership Summit."

¶ 24 Defendant further submitted memorandums from the Illinois Department of Corrections (IDOC). One noted that IDOC was prioritizing reducing the prison population and providing meaningful reentry opportunities. The other discussed an incentive-based correctional model. He also attached a memorandum from a psychology professor and excerpts from articles that argued offenders aged 18 to 25 should be provided more protections than adults, as research revealed that human brains do not mature until approximately age 25. The psychology professor's memorandum further stated that young people who had experienced violence suffered a "double whammy" of "the general limitations of unformed brains and the disadvantaged functioning that arises from their adverse childhood experiences." (Emphasis omitted.)

¶ 25 Lastly, defendant attached his high school diploma and several of the materials he submitted with his initial postconviction petition, including the statement of the investigator who interviewed Hardy.

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¶ 26 On August 30, 2021, the circuit court denied defendant leave to file a successive petition. Regarding his actual innocence claim, the court stated that Collins's affidavit lacked context and defendant failed to explain "what the lawyer at trial knew or didn't know about this witness and how they came to come forward now." Regarding his sentencing claim, the court stated that, at 21 years old, defendant was not a young adult offender.

¶ 27 On appeal, defendant argues the court erred in denying him leave to file a successive petition. He first contends that, based on Collins's affidavit, he established a colorable claim of actual innocence.

¶ 28 The Act provides a statutory remedy where a defendant claims his constitutional rights were violated at trial. 725 ILCS 5/122-1 *et seq.* (West 2020); *People v. Edwards*, 2012 IL 111711, ¶ 21. The Act contemplates the filing of only one postconviction petition. *Edwards*, 2012 IL 111711, ¶ 22. However, a defendant may, by leave of court, file a second or successive petition where he establishes (1) a fundamental miscarriage of justice because he is actually innocent, or (2) cause and prejudice for failing to previously raise the claim. *Id.* ¶¶ 22-23. At the pleading stage, all well-pleaded allegations in the petition and supporting affidavits are taken as true unless positively rebutted by the record, and the court is not to make factual or credibility determinations. *People v. Robinson*, 2020 IL 123849, ¶ 45. We review *de novo* denials of leave to file successive petitions, whether they assert actual innocence or cause-and-prejudice. *Id.* ¶¶ 39-40.

¶ 29 A defendant must support his actual innocence claim with evidence that is (1) new, (2) material and noncumulative, and (3) of such conclusive character that it would probably change the result on retrial. *People v. Allen*, 2015 IL 113135, ¶ 22. Leave to file a petition claiming actual innocence "should be denied only where it is clear from a review of the petition and attached

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documentation that, as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence." *People v. Sanders*, 2016 IL 118123, ¶ 24.

¶ 30 Here, the State does not dispute that Collins's affidavit is material and noncumulative. Rather, the State argues that the affidavit is not new or conclusive. We agree with the State that defendant has not shown Collins's affidavit is new, and we therefore need not determine whether it is conclusive.

¶ 31 To be new, evidence must have been discovered after trial and "could not have been discovered earlier through the exercise of due diligence." *People v. Coleman*, 2013 IL 113307, ¶ 96. "The due diligence requirement for newly discovered evidence applies to the diligence shown before trial." (Internal quotation marks omitted.) *People v. Ayala*, 2022 IL App (1st) 192484, ¶ 134. Thus, for example, "an affidavit is still newly discovered, even when the defendant knew of the witness earlier and knew what facts the witness could testify to, if no amount of due diligence could have forced that witness to come forward and swear to those facts earlier," *i.e.*, at trial. *People v. Anderson*, 2021 IL App (1st) 200040, ¶ 59 (citing *Edwards*, 2012 IL 111711, ¶ 38); *People v. Fields*, 2020 IL App (1st) 151735, ¶ 48. However, our supreme court has also held that a defendant's efforts to discover evidence sooner may be insufficient to satisfy the due diligence requirement. *Edwards*, 2012 IL 111711, ¶¶ 34-37 (where the defendant did not explain why alibi witnesses were not subpoenaed for trial, "the efforts expended were insufficient to satisfy the due diligence requirement").

¶ 32 Defendant argues that Collins's affidavit is newly discovered because Collins fled the scene of the shooting, was never approached by police, attorneys, or investigators, and did not come forward with his information about the shooting because he feared for his and his family's

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safety. Defendant asserts that there was, therefore, no way for defendant to know that Collins possessed exonerating information until he met Collins in prison and Collins realized that defendant, not Sacky, was convicted of Turner and Armstrong's murders.

¶ 33 After reviewing the record, including the motion for leave to file and the successive postconviction petition incorporated therein, together with the affidavits attached thereto, we find that Collins's affidavit cannot be considered new evidence. Again, to be new, evidence must not have been discoverable before trial through the exercise of due diligence. *Coleman*, 2013 IL 113307, ¶ 96. Collins's affidavit establishes that no one approached him about the shooting and he did not come forward on his own because he feared Sacky. However, Collins's affidavit does not establish that he could not have been discovered earlier through due diligence.

¶ 34 Collins's affidavit, which we must accept as true (*Robinson*, 2020 IL 123849, ¶ 45), establishes that, around 9 p.m. on May 21, 2009, he was sitting on the hood of a vehicle on Van Buren Street and Whipple Street, parked directly behind a vehicle in which two people were shot and killed. Given the factual similarity between the date, time, and location of the shooting set forth in Collins's affidavit and the testimony of the trial witnesses, we will infer Collins was parked directly behind the Grand Am in which Turner, Armstrong, and Smith sat.

¶ 35 When the shooting began, Collins ran and hid. When the shooter drove past him, Collins returned to his vehicle. He saw the occupants of the vehicle "looked deceased," heard tires screeching and thought the shooter was returning, entered his own vehicle and drove away. Given his positioning on the hood of his vehicle directly behind the Grand Am, he would have been visible to Hardy, who observed the shooting directly in front of her from feet away. Smith, in the backseat of Turner's vehicle, would also have noticed Collins sitting on the hood of the vehicle

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directly behind her, talking to another person. While Turner and Armstrong were rolling a "blunt," Smith was pregnant and could not smoke, lessening the likelihood she would be focused on the blunt. Similarly, Hardy was drinking a beer, but that would not prevent her from noticing Collins.

¶ 36 Smith and Hardy would further have observed Collins return to his vehicle and drive away immediately after the shooting. Hardy testified that she had run to the Grand Am after the shooting, and Smith testified that she helped Turner and Armstrong exit the Grand Am after the shooting. Both Smith and Hardy would have been in close proximity to Collins when he returned to the vehicle directly behind the Grand Am and drove away. Thus, Collins was so noticeably positioned before and after the shooting that it is unlikely Smith and Hardy could have failed to register his presence.

¶ 37 However, there is no evidence in the record that defendant ever attempted to ascertain who was at the scene besides Smith and Hardy and defendant offers no explanation in his motion for leave to file, successive petition incorporated therein, or affidavit, regarding why Collins could not be identified or located sooner. In his reply brief, defendant argues that it is "speculative" he could have learned about Collins through Smith or Hardy and that due diligence does not require him to outperform the police's investigation, as they also did not discover Collins. But due diligence presumes some effort by the defendant to discover evidence (*Edwards*, 2012 IL 111711, ¶ 37 (finding a defendant's efforts "insufficient to satisfy the due diligence requirement")), and defendant alleged no effort whatsoever here.

¶ 38 Defendant did not allege in his motion for leave to file, for instance, that Smith and Hardy failed to tell police that someone sat on the vehicle directly behind the Grand Am when the shooting occurred or that someone entered that vehicle after the shooting and drove away. Nor did

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defendant allege that they mentioned such a person but no one could locate him. He did not claim he only found out about Collins's evidence when he met him in prison, and Collins did not aver in his affidavit that he was in any way unavailable, had moved away, or could not have been located. *Cf. People v. Ortiz*, 235 Ill. 2d 319, 334 (2009) (witness "essentially made himself unavailable" by moving out-of-state shortly after witnessing crime). Granted, Collins averred he did not come forward for fear of reprisal from Sacky. But neither defendant nor Collins asserts Collins would not have offered his affidavit earlier had defendant tried to find him. In short, defendant's motion, successive postconviction petition, and attached affidavits alleged nothing establishing that Collins's presence at the scene was not discoverable before trial through the exercise of due diligence.

¶ 39 In reaching this conclusion, we are not persuaded by defendant's reliance on *Anderson*, 2021 IL App (1st) 200040, *People v. Griffin*, 2022 IL App (1st) 191101-B, or *People v. Adams*, 2013 IL App (1st) 111081.

¶ 40 In *Anderson*, this court found affidavits were newly discovered for purposes of allowing the defendant leave to file a successive postconviction petition premised on actual innocence where: the witnesses did not previously admit to witnessing a shooting; it was "unlikely" that the defendant or others "would have observed or noticed them"; and "they insured their anonymity by their immediate flight from the scene." *Anderson*, 2021 IL App (1st) 200040, ¶ 65 (citing *Ortiz*, 235 Ill. 2d at 334 (witness newly discovered where he did not previously admit to witnessing crime, "would not have been seen by [the] defendant," left the area, and moved out-of-state)). Here, however, as discussed, it was not "unlikely" that anyone would have noticed Collins at the scene. He sat on top of the vehicle directly behind the Grand Am immediately before the shooting

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and, although he then ran away, he returned to his vehicle, entered it, and drove away. Smith and Hardy could have observed him at either point. *Anderson* is therefore distinguishable.

¶ 41 In *Griffin*, this court found affidavits were newly discovered for purposes of allowing the defendant leave to file a successive postconviction petition premised on actual innocence where the defendant could not have discovered the information contained in the witnesses' affidavits earlier through due diligence as he did not encounter the witnesses until after he was sentenced and entered prison. *Griffin*, 2022 IL App (1st) 191101-B, ¶ 58. However, *in Griffin*, unlike in the case at bar, the State conceded that the affidavits were new and thus the issue was not contested. *Id.* Further, the *Griffin* defendant alleged in his petition that he did not know about the information in the witnesses' affidavits until he spoke to the witnesses in prison. *Id.* ¶ 16. As discussed, defendant here made no similar allegation that he was unaware of Collins's presence at the scene of the shooting until he met Collins in prison. Collins's averment that he did not meet defendant until they met in prison does not mean defendant could not have learned of Collins's presence at the scene of the shooting earlier.

¶ 42 In *Adams*, this court found affidavits were newly discovered for purposes of allowing the defendant leave to file a successive postconviction petition premised on actual innocence where the defendant, who had testified he was not at the scene, had no way of knowing the exculpatory witnesses had "passed by." *Adams*, 2013 IL App (1st) 111081, ¶ 33. The defendant was convicted of beating his ex-girlfriend to death in the street with a bat or stick. He supported his motion for leave to file a successive petition with the affidavits of two witnesses who drove and walked past the scene of the murder as it occurred. *Id.* ¶¶ 24, 27. The witnesses averred they saw four or five people, or a crowd, in the middle of the street and a person who was not the defendant strike a

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woman with a bat. *Id.* ¶¶ 24, 27. Neither went to the police with what they had seen. *Id.* ¶¶ 24, 27. Unlike the witnesses in *Adams*, Collins did not merely "pass by" the shooting as it was occurring. Rather, his affidavit establishes he was on the hood of a vehicle directly behind the Grand Am for a period of time before the shooting and, after the shooting, he returned to that vehicle and drove away. Unlike the witnesses in *Adams* who "passed by" the scene of the beating, Collins was readily observable to anyone present at the scene.

¶ 43 In sum, defendant has not shown that Collins's affidavit is new evidence as he has not established that Collins's presence at the scene could not have been discovered before trial through the exercise of due diligence. *Coleman*, 2013 IL 113307, ¶ 96 (to be new, evidence must not have been discoverable earlier through the exercise of due diligence). Thus, defendant failed, as a matter of law, to make a colorable claim of actual innocence, and the court did not err in denying him leave to file a successive petition on that basis. *Sanders*, 2016 IL 118123, ¶ 24 (evidence of actual innocence must not have been discoverable earlier through the exercise of due diligence, and leave to file a successive petition should be denied where it is clear that, as a matter of law, petitioner cannot set forth a colorable claim of actual innocence).

¶ 44 Defendant next argues that the circuit court erred in denying him leave to file a petition because he established cause-and-prejudice regarding his claim that his mandatory life sentence is unconstitutional due to his youth and background at the time of his offense. Defendant argues he has established cause because the record and law regarding his claim were insufficiently developed at the time of his direct appeal. He argues that he has established prejudice because his age and background at the time of the offense rendered him a young adult and the trial court did not

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consider appropriate factors when sentencing him. The State argues that defendant has not established cause or prejudice.[2]

¶ 45 A defendant establishes cause where he identifies an objective factor that impeded his ability to raise a claim during earlier proceedings. 725 ILCS 5/122-1(f) (West 2020). He establishes prejudice where he demonstrates that the alleged constitutional violation "so infected the trial that the resulting conviction or sentence violated due process." *Id.*

¶ 46 In *Miller v. Alabama*, 567 U.S. 460 (2012), the United States Supreme Court held that the prohibition on cruel or unusual punishment in the eighth amendment to the United States Constitution (U.S. Const., amend. VIII) forbids mandatory life sentences without the possibility of parole for "those under the age of 18 at the time of their crimes." *Miller*, 567 U.S. at 465, 479. Our supreme court has subsequently held that, where an offender is younger than 18 years old, the trial court must consider certain factors before imposing a life sentence, including: his age and evidence of his "particular immaturity"; his family and home environment; his degree of participation in the homicide and any familial or peer pressure; his incompetence; and, his rehabilitative potential. *People v. Savage*, 2020 IL App (1st) 173135, ¶ 58 (citing *People v. Holman*, 2017 IL 120655, ¶ 46). *Miller* applies retroactively to cases on collateral review. *Montgomery v. Louisiana*, 577 U.S. 190, 206 (2016).

[2] The State further argues that defendant waived this claim by not raising it in prior proceedings. However, as defendant correctly notes, the cause-and-prejudice test codified in section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2020)) "is an exception to the statutory waiver rule," and permits the filing of a successive petition if the defendant demonstrates cause and prejudice. *People v. Walsh*, 2022 IL App (1st) 210786, ¶ 20; see also *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002) ("We hold today that the cause-and-prejudice test is the analytical tool that is to be used to determine whether *** a claim raised in a successive petition may be considered on its merits.").

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¶ 47 Defendant was subject to mandatory life imprisonment because he was found guilty of murdering multiple people. 730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 2008) (when the death penalty is not imposed, court shall sentence a person who murdered multiple victims to life imprisonment). He was 21 years old at the time he committed the murders in this case. Twenty-one-year-old offenders cannot establish prejudice to file a successive postconviction petition raising an eighth amendment claim as, " 'for sentencing purposes, the age of 18 marks the present line between juveniles and adults.' " *People v. Montanez*, 2022 IL App (1st) 191930, ¶ 52 (quoting *People v. Harris*, 2018 IL 121932, ¶ 61). Thus, had defendant raised an eighth amendment claim, that claim would fail.

¶ 48 Defendant, however, argued his mandatory life sentence violated the Illinois Constitution's proportionate penalties clause. The proportionate penalties clause of the Illinois Constitution provides greater protection than the eighth amendment. *People v. Clemons*, 2012 IL 107821, ¶ 39. The clause provides that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. Our supreme court has indicated that young adult offenders may, through the Act, establish under *Miller* that their life sentence is unconstitutional pursuant to the proportionate penalties clause. See *Montanez*, 2022 IL App (1st) 191930, ¶ 53 (citing *Harris*, 2018 IL 121932, ¶¶ 40, 45, and *People v. Thompson*, 2015 IL 118151, ¶ 44). We have further concluded that young adult offenders may bring successive postconviction claims raising as-applied constitutional challenges to their sentence under the proportionate penalties clause where they received life sentences without consideration of the *Miller* factors. *Id.* ¶ 54.

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¶ 49 Nevertheless, defendant's proportionate penalties claim fails because, at age 21 when he committed his offenses, he is not a "young adult offender." See *People v. Humphrey*, 2020 IL App (1st) 172837, ¶¶ 33-34 (holding that "for now[,] individuals who are 21 years or older when they commit an offense are adults for purposes of a *Miller* claim," and collecting statutes differentiating those who are younger than 21 from those who are 21 or older); see also *Montanez*, 2022 IL App (1st) 191930, ¶ 56 (collecting cases concluding that *Miller* protections did not extend to offenders 21 years or older).

¶ 50 As defendant notes, this court has in one instance held that a defendant who was 21 years or older may invoke *Miller*'s protection in a collateral challenge. In *Savage*, the defendant was at least 21 years old when he committed first degree murder and attempted murder. *Savage*, 2020 IL App (1st) 173135, ¶ 2.[3] He was sentenced to 85 years' imprisonment, a *de facto* life sentence. *Id.* ¶ 59. He filed an initial postconviction petition claiming that his sentence violated the proportionate penalties clause. *Id.* ¶ 7. He alleged that he had been a drug addict since age nine, was influenced by gang members, used drugs every day when he committed the offenses, and committed the offenses while attempting to rob a drug house. *Id.* ¶¶ 7-8. He claimed his age and long-term drug addiction made him volatile and easily peer-pressured and his sentence did not account for his rehabilitative potential. *Id.* ¶ 7.

¶ 51 The circuit court in *Savage* dismissed the defendant's petition at the first stage. *Id.* ¶¶ 11-12. On appeal, we recognized that Illinois law treats adults younger than 21 years old differently than those 21 or older. *Id.* ¶¶ 67-69. However, we noted that case law supported his argument that

[3] Although the defendant's petition alleged that he was 22 years old at the time of the offense, we later stated that he was "seven months past his 21st birthday." *Savage*, 2020 IL App (1st) 173135, ¶ 67.

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an offender's mental health issues may lower his "functional age." *Id.* ¶ 70. Further, the record, including hospital reports submitted with his PSI, supported his allegations that his age, mental health issues, and drug addiction made him unusually volatile and susceptible to peer pressure. *Id.* ¶¶ 71-73. Thus, as his argument was supported by "both the filed record and recent case law," the circuit court erred in finding his claim frivolous and patently without merit. *Id.* ¶ 76.

¶ 52 Defendant argues that he has established cause to file a successive petition because *Savage* was decided after he filed his previous postconviction petition. However, *Savage* concerned an initial petition, not a successive petition. *Id.* ¶ 7. Defendants filing their initial petition face a lower burden than those seeking to file successive petitions. *People v. Hemphill*, 2022 IL App (1st) 201112, ¶ 34 (distinguishing *Savage* and noting that pleading requirements for successive petitions are higher than initial petitions).

¶ 53 Moreover, our supreme court has confirmed that "*Miller*'s announcement of a new substantive rule under the eighth amendment does not provide cause for a defendant to raise a claim under the proportionate penalties clause" in a successive postconviction petition. *People v. Dorsey*, 2021 IL 123010, ¶ 74. The court in *Dorsey* reasoned:

> "Illinois courts have long recognized the differences between persons of mature age and those who are minors for purposes of sentencing. Thus, *Miller*'s unavailability prior to 2012 at best deprived defendant of 'some helpful support' for his state constitutional law claim, which is insufficient to establish 'cause.' " *Id.*

¶ 54 Thus, even in cases decided after *Savage*, we have found under *Dorsey* that *Miller* and its progeny do not provide cause for an offender who was 21 or older to bring a successive postconviction petition raising a proportionate penalties claim. *Montanez*, 2022 IL App (1st)

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191930, ¶¶ 67-69 (Rochford, J., specially concurring); *Hemphill*, 2022 IL App (1st) 201112, ¶ 31; *People v. Figueroa*, 2022 IL App (1st) 172390-B, ¶¶ 37-39; *People v. Ruddock*, 2022 IL App (1st) 173023, ¶ 72.

¶ 55 Further, although there are cases where we have found that a defendant has established cause based on the evolution of juvenile sentencing law, in each of those cases the State conceded the issue. *People v. Walsh*, 2022 IL App (1st) 210786, ¶¶ 32-33 (collecting cases and noting that, "when cause has been fully litigated, *** this court has universally applied the holding in *Dorsey* to conclude that cause has not been established based on the prior unavailability of *Miller* and its progeny"). The State does not concede the issue here. Thus, we conclude that, under *Dorsey*, defendant has not established cause.[4]

¶ 56 In sum, defendant has not established cause and prejudice warranting leave to file his claim that his sentence violates the proportionate penalties clause. Nor, as discussed, has he made a colorable showing of actual innocence based on Collins's affidavit. Accordingly, we affirm the circuit court's judgment denying him leave to file a successive postconviction petition.

¶ 57 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 58 Affirmed.

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[4] In his reply brief, defendant briefly asserts that the failure of his counsels on direct appeal and in previous postconviction proceedings to raise his proportionate penalties claim "was not complet[e]ly in [his] control" and was an objective factor impeding his ability to raise the claim. However, to the extent he is arguing that prior counsels' failure to raise the claim in earlier proceedings establishes cause to bring his successive petition, we note that he did not raise that argument in his motion for leave to file a successive petition or in his opening brief. It is therefore forfeited. See, *e.g.*, *Dorsey*, 2021 IL 123010, ¶ 70 (claim not raised in petition for leave to file a successive petition or petition itself is forfeited); *Victim A. v. Song*, 2021 IL App (1st) 200826, ¶ 11 (appellant forfeits arguments not raised in opening brief).

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2023 IL App (3d) 220010-U

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

NOTICE: This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

Appellate Court of Illinois, Third District.

The PEOPLE of the State of Illinois, Plaintiff-Appellee,
v.
William B. HORMAN, Defendant-Appellant.

Appeal No. 3-22-0010
|
Order Filed August 3, 2023

Appeal from the Circuit Court of the 13th Judicial Circuit, La Salle County, Illinois, Circuit No. 15-CF-149, Honorable H. Chris Ryan Jr., Judge, Presiding.

ORDER

JUSTICE DAVENPORT delivered the judgment of the court.

***1** ¶ 1 *Held*: The circuit court erred in dismissing defendant's postconviction petition. Reversed and remanded.

¶ 2 Defendant, William B. Horman, appeals the circuit court's first-stage dismissal of his postconviction petition, arguing he stated the gist of claims of actual innocence and ineffective assistance of counsel. We reverse and remand for second-stage proceedings.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged with first degree murder (720 ILCS 5/9-1(a)(1) (West 2014)) and concealment of a homicidal death (*id.* § 9-3.4(a)). Defendant worked for the victim, Robert Dowd Jr., at Rob's Washouts (Washouts) in Ottawa. Dowd was the owner of Washouts and went missing around April 14, 2015.

¶ 5 At the outset, we note that the facts of this case were previously set forth in detail in defendant's previous two appeals (*People v. Horman*, 2018 IL App (3d) 160423; *People v. Horman*, 2021 IL App (3d) 190382-U). We have relied on these previous cases, in conjunction with the record, in summarizing the facts relevant to this appeal.

¶ 6 At defendant's jury trial, the State introduced evidence that Dowd's friends were unable to locate him on April 15 and 16, 2015, but saw a smoldering fire in a burn pile at Dowd's trailer (where defendant occasionally stayed) and later saw defendant and Jonathan Beckman cleaning up the property. Numerous witnesses testified defendant was angry at Dowd for not making him a partner in Washouts and repeatedly stated he wanted to hurt or kill Dowd.

¶ 7 Blood was recovered at Washouts, which was determined to be Dowd's. Bone fragments were found in the burn pile and in the Fox River, which an expert determined were from the same adult individual. No DNA could be obtained from the bone fragments in the burn pile, and a DNA test of the bones recovered from the Fox River did not match Dowd. The State's expert believed it did not match because of a contaminant.

¶ 8 Beckman reached a deal with the State in which he would plead guilty to concealment of a homicidal death and testify against defendant in exchange for the dismissal of the murder charge against him and a sentence of five years' imprisonment, of which he would only have to serve 50%. Before testifying, Beckman reviewed his prospective testimony and transcripts of statements he had made to law enforcement. Beckman further acknowledged his initial statements contained numerous lies and admitted to making several statements that were inconsistent with his trial testimony. He testified defendant called him after 9 p.m. on April 14 and stated he was upset with Dowd. Defendant picked up Beckman and said he was going to kill Dowd. They went to Washouts and saw Dowd asleep on a cot in his office. Defendant told Beckman to kill Dowd with a wooden club, but Beckman refused. Defendant then went into the office. Beckman heard 10 to 15 thuds but did not look into the office. Beckman helped put a tarp over Dowd's body, and defendant loaded him into the truck. Defendant dragged Dowd's body onto a burn pile and lit it on fire. After the body was burned, Beckman acted as a lookout as defendant threw the remains into the Fox River. Beckman later helped defendant get rid of Dowd's Ford Bronco.

***2** ¶ 9 Defendant testified he was not a partner in Washouts but believed he would be. Defendant stated he did make statements about wanting to harm Dowd but would never actually do so. On April 13, 2015, defendant was with Dowd

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until approximately 2:30 or 3 p.m. before returning to his apartment. The following day, April 14, Barbara Higgins called defendant to fix a broken water heater, and he arrived at her house around 11 a.m. or noon. Defendant slept at her house. On April 15, defendant left Higgins's home at 9:30 or 10 p.m. to purchase a car with Beckman. Defendant drove his truck and Beckman drove Dowd's Bronco, which Beckman stated he was going to have detailed. They left the Bronco in Harvey, Illinois, and returned to Higgins's home at approximately 1:30 or 2 a.m. The next day, April 16, defendant offered to let Beckman borrow his lawnmower if he would help clean up the yard around Dowd's trailer. They went to the trailer shortly before noon on April 16. A fire was already smoldering in the yard. They cleaned up the yard and burned the yard waste.

¶ 10 The jury found defendant guilty of all charges, and the court sentenced him to 35 years' imprisonment. On direct appeal, defendant claimed his counsel was ineffective for failing to move to dismiss the charges under the speedy trial statute and the court failed to conduct a preliminary *Krankel* hearing. *Horman*, 2018 IL App (3d) 160423. We affirmed defendant's convictions and remanded for a *Krankel* inquiry. *Id.* ¶ 33.

¶ 11 At the July 3, 2019, *Krankel* inquiry, defendant presented an affidavit from Cody Smith, dated June 3, 2019, unrelated to the subject of the *Krankel* inquiry. At the hearing, defendant explained he obtained the affidavit from Smith who had approached him at the Menard Correctional Center:

> "When [Smith] said what are you doing here at Menard when you should be home? I said what do you mean? Well, *** Beckman came to [Smith] and was telling [him] he got the sweet deal, this, that and the other, and I was like whoa, whoa, whoa, whoa. Write this all down in your words and get it approved by the State's—the notary at Menard's law."

In the affidavit, Smith alleged he was at La Salle County jail with Beckman, who

> "was bragging to anyone who would listen[ ] that a murder charge was being dropped, and he would receive a sweet deal of 5 years [at] 50% if he testified against [defendant]. The State had no evidence against [defendant]. So they needed Beckman's testimony that the State wrote for him ***. *** Beckman is lying for the State to get out of somethings he might or might not have done. *** Beckman told [Smith, defendant] was not guilty. The police scared him into lying ***."

The court did not consider the affidavit since it was not relevant to the *Krankel* inquiry. The court declined to appoint counsel and denied defendant's motion. Defendant appealed and this court upheld the circuit court's dismissal. *Horman*, 2021 IL App (3d) 190382-U, ¶ 24.

¶ 12 Defendant then filed a *pro se* postconviction petition on October 14, 2021, which is the subject of this appeal. In the petition defendant alleged he was innocent of the charged crimes based on the newly discovered affidavit from Smith and that his counsel was ineffective for failing to introduce phone records contradicting parts of Beckman's testimony. Defendant attached Smith's affidavit to his petition. The circuit court summarily dismissed defendant's petition, and this appeal followed.

¶ 13 II. ANALYSIS

¶ 14 On appeal, defendant argues the circuit court erred in dismissing his postconviction petition as he stated the gist of constitutional claims of actual innocence and ineffective assistance of counsel. The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2020)) provides a process for a criminal defendant to assert his conviction resulted from a substantial denial of his rights under the United States Constitution, the Illinois Constitution, or both. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). At the first stage, defendant need only state the "gist" of a constitutional claim. *Id.* This standard presents a low threshold, requiring only that defendant plead sufficient facts to assert an arguably constitutional claim. *People v. Jones*, 211 Ill. 2d 140, 144 (2004). The circuit court may summarily dismiss the petition at the first stage of proceedings if it is frivolous or patently without merit, such that it "has no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 12.

***3** ¶ 15 "[W]hile a *pro se* petition is not expected to set forth a complete and detailed factual recitation, it must set forth some facts which can be corroborated. *People v. Delton*, 227 Ill. 2d 247, 254-55 (2008). "All well-pleaded facts must be taken as true unless 'positively rebutted' by the trial record." *People v. Brown*, 236 Ill. 2d 175, 189 (2010) (quoting *People v. Coleman*, 183 Ill. 2d 366, 385 (1998)). The reviewing court must draw all reasonable inferences in favor of advancing the petition. *People v. Knight*, 405 Ill. App. 3d 461, 471 (2010). We review *de novo* the circuit court's first-stage summary dismissal of a postconviction petition. *Hodges*, 234 Ill. 2d at 9.

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¶ 16 The due process clause of the Illinois Constitution forbids punishing a defendant for a crime where evidence newly discovered after trial shows that defendant is actually innocent of the crime. *People v. Washington*, 171 Ill. 2d 475, 487-88 (1996). Such a claim is established by supporting evidence that is "(1) newly discovered, (2) material and not cumulative, and (3) of such conclusive character that it would probably change the result on retrial." *People v. Robinson*, 2020 IL 123849, ¶ 47. To survive first-stage dismissal, a petition must present evidence that arguably meets each of these three factors. *People v. Coleman*, 2013 IL 113307, ¶ 96.

¶ 17 First, the evidence contained in Smith's affidavit is arguably newly discovered. "Newly discovered evidence is evidence that could not have been obtained earlier through due diligence." *People v. Fields*, 2020 IL App (1st) 151735, ¶ 46. Smith's affidavit was dated June 3, 2019, which was over three years after the trial ended. "The dating indicates that the information contained in the affidavits was generally undiscoverable until after the trial had concluded ***." *People v. House*, 2020 IL App (3d) 170655, ¶ 30. Moreover, Smith was not a witness to the crime, and there was no way for defendant or counsel to know about his existence at the time of trial. Smith's testimony, therefore, could not have been discovered earlier. The only reason the evidence was ultimately discovered was due to a chance encounter between defendant and Smith at Menard Correctional Center. Further, while defendant had attempted to bring the affidavit to the court's attention during his *Krankel* inquiry, the court declined to address the affidavit, noting it was obtained after the matter had been resolved. Taking the allegations in the affidavit and petition as true, defendant has shown the evidence was arguably newly discovered.

¶ 18 Second, the evidence here is arguably material and noncumulative. "Evidence is material if it is relevant and probative of the petitioner's innocence"; it is noncumulative if it "adds to the information that the fact finder heard at trial." *Robinson*, 2020 IL 123849, ¶ 47. Smith's affidavit is arguably material. Beckman was a major witness at trial and testified at length against defendant, outlining the murder, how they disposed of the body, and their actions after disposing of the body. The only people that knew exactly what happened to Dowd were defendant and Beckman so both their testimonies and inconsistencies were important to the case. The affidavit alleged Beckman not only exaggerated defendant's role in the murder, but defendant was actually innocent of the murder. Further, the evidence is arguably noncumulative. The jury heard evidence that Beckman received a lenient and favorable deal from the State and could make the reasonable inference he had an incentive to downplay his own role in the murder. However, no evidence was presented that Beckman completely fabricated his testimony at the State's request and admitted defendant was not guilty, which Smith's testimony would provide.

***4** ¶ 19 Finally, the new evidence is arguably of such conclusive character that it would change the result on retrial, even if the "evidentiary balance weighed heavily in the State's favor at defendant's trial." *People v. White*, 2014 IL App (1st) 130007, ¶ 26. Besides Beckman's testimony, the State presented evidence defendant wanted to kill the victim, was at the trailer with a smoldering fire the day after the murder was believed to have occurred, and he and Beckman drove Dowd's Bronco shortly thereafter. However, Beckman's testimony was unquestionably a key part of the State's case since it was the only testimony presented at trial that defendant was present at the time of Dowd's death. In his defense, defendant testified at length regarding his activities from April 13 to 16, 2015, and provided an alternative, exonerating explanation for why he was driving the Bronco, why he was at the trailer with a smoldering fire, and where he was at the time of the murder. Given the conflict in testimony and the nature of the affidavit, we believe the petition has surpassed the low bar at this stage of the proceedings. *People v. Harmon*, 2013 IL App (2d) 120439, ¶ 22 ("The trial court is not allowed to engage in any fact finding or credibility determinations at this stage ***."); *White*, 2014 IL App (1st) 130007, ¶ 29 (petition withstood first-stage scrutiny where a single affiant stated he lied at trial when he said defendant was the shooter and that he was with defendant at the time of the shooting even though "multiple witnesses testified that defendant was the shooter").

¶ 20 Because defendant stated the gist of an actual-innocence claim, we remand his full petition for second-stage postconviction proceedings. See *Hodges*, 234 Ill. 2d at 23. We need not consider defendant's ineffective assistance of counsel claim as partial summary dismissals are not permitted at the first stage of postconviction proceedings. See *People v. Rivera*, 198 Ill. 2d 364, 374 (2001); *White*, 2014 IL App (1st) 130007, ¶ 33.

¶ 21 III. CONCLUSION

¶ 22 For the reasons stated, we reverse and remand the judgment of the circuit court of La Salle County.

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¶ 23 Reversed and remanded.

Presiding Justice Holdridge and Justice Albrecht concurred in the judgment.

All Citations

Not Reported in N.E. Rptr., 2023 IL App (3d) 220010-U, 2023 WL 4959523

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No. 129753

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- KYJUANZI HARRIS, Petitioner-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-21-1255. There on appeal from the Circuit Court of Cook County, Illinois , No. 11 CR 03722. Honorable James B. Linn, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, eserve.criminalappeals@ilag.gov;

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Mr. Kyjuanzi Harris, Register No. M44405, Western Illinois Correctional Center, 2500 Rt. 99, Mt. Sterling, IL 62353

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 January 23, 2024, 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 petitioner-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.

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