NOTICE
Decision filed 11/23/26. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2026 IL App (5th) 250863-U

NO. 5-25-0863

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Champaign County.
	)	
v.	)	No. 21-CF-1226
	)	
KEMION D. DORRIS,	)	Honorable
	)	Randall B. Rosenbaum,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE CATES delivered the judgment of the court.
Justices Barberis and Vaughan concurred in the judgment.

ORDER

¶ 1 *Held*: Where the defendant did not satisfy either the cause-and-prejudice test or the standard for leave to file a claim of actual innocence, the trial court did not commit error when it denied the defendant's motion for leave to file his second successive postconviction petition. Because no argument to the contrary would have arguable merit, we grant appellate counsel leave to withdraw, and we affirm the judgment of the trial court.

¶ 2 The defendant, Kemion D. Dorris, appeals the judgment of the circuit court of Champaign County that denied the defendant's motion for leave to file his second successive postconviction petition. The defendant's appointed counsel on appeal, the Office of the State Appellate Defender (OSAD), has concluded that this appeal lacks arguable merit, and on that basis, OSAD has filed a motion for leave to withdraw as counsel (see *Pennsylvania v. Finley*, 481 U.S. 551 (1987)), along with a supporting memorandum of law. OSAD served the defendant with notice. This court

provided the defendant the opportunity to file a written response to OSAD's motion. The defendant filed a response with this court on March 17, 2026. This court has examined OSAD's *Finley* motion and memorandum of law, the defendant's response, and the record on appeal. This court concludes that OSAD is correct that this appeal lacks arguable merit. Accordingly, we grant OSAD leave to withdraw as counsel, and we affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 Many of the facts relevant to the defendant's conviction and sentence are described in this court's disposition of the defendant's direct appeal (*People v. Dorris*, 2024 IL App (5th) 220822-U), and in this court's disposition of the defendant's appeal from the summary dismissal of his initial postconviction petition. *People v. Dorris*, 2024 IL App (5th) 240355-U. Additional relevant facts are taken from the remainder of the record on appeal. On October 12, 2021, the defendant was charged with one count of armed habitual criminal[1] in violation of section 24-1.7(a) of the Criminal Code of 2012 (Code) (720 ILCS 5/24-1.7(a) (West 2020)) and four counts of unlawful possession of a weapon in violation of section 24-1.1(a) of the Code (720 ILCS 5/24-1.1(a) (West 2020)). *Dorris*, 2024 IL App (5th) 220822-U, ¶ 4. The latter four counts ultimately merged, at sentencing, with the offense of armed habitual criminal. *Dorris*, 2024 IL App (5th) 240355-U, ¶ 4. The State's theory of the case was that the defendant possessed a firearm, specifically a 9-millimeter handgun, after having been convicted of burglary and unlawful possession of a weapon by a felon. *Dorris*, 2024 IL App (5th) 240355-U, ¶ 4.

¶ 5 The defendant made a knowing and voluntary waiver of his right to counsel, and thereafter made a knowing and voluntary waiver of his right to a jury trial. *Dorris*, 2024 IL App (5th) 240355-

[1]The offense of "armed habitual criminal" is now entitled "unlawful possession of a firearm by a repeat felony offender." See 720 ILCS 5/24-1.7(a) (West 2024).

U, ¶ 5. As a result, the defendant represented himself at the bench trial that followed. *Dorris*, 2024 IL App (5th) 240355-U, ¶¶ 5, 8. As part of its case in chief, the State presented, without objection, certified copies of the defendant's convictions for burglary in Champaign County case No. 16-CF-226, and for possession of a weapon by a felon in Champaign County case No. 19-CF-199, which were admitted into evidence. *Dorris*, 2024 IL App (5th) 240355-U, ¶ 8.

¶ 6 The State then presented live testimony and video and audio recordings in support of its case. *Dorris*, 2024 IL App (5th) 240355-U, ¶ 8. The evidence showed that on October 11, 2021, officers from the Champaign Police Department engaged the defendant outside of the defendant's mother's home. *Dorris*, 2024 IL App (5th) 240355-U, ¶ 9. Officers thereafter arrested the defendant in the garage of the home, at which point the defendant asked a woman who was present—who was later identified as Jasmine Epperson—for a kiss. *Dorris*, 2024 IL App (5th) 240355-U, ¶ 9. The defendant leaned toward Epperson and appeared to whisper something to her. *Dorris*, 2024 IL App (5th) 240355-U, ¶ 9. At this time, Epperson was wearing a sweatshirt, while the defendant was wearing a tank top and a pair of jeans or sweatpants. *Dorris*, 2024 IL App (5th) 240355-U, ¶ 9.

¶ 7 Shortly thereafter, while officers were conducting a consensual search of the living room of the home, an officer observed a Nike sweatshirt on a couch and began to move toward it. *Dorris*, 2024 IL App (5th) 240355-U, ¶ 9. As he did so, Epperson, still clad in her own sweatshirt, also moved toward the sweatshirt. *Dorris*, 2024 IL App (5th) 240355-U, ¶ 9. The officer commanded her to stop, but instead she grabbed the sweatshirt. *Dorris*, 2024 IL App (5th) 240355-U, ¶ 9. After a brief struggle, officers took possession of the sweatshirt from Epperson. *Dorris*, 2024 IL App (5th) 240355-U, ¶ 9. Wrapped in the sweatshirt, officers found a 9-millimeter handgun with a loaded magazine in it. *Dorris*, 2024 IL App (5th) 240355-U, ¶ 9. The defendant was arrested and

taken to the county jail. *Dorris*, 2024 IL App (5th) 240355-U, ¶ 9. Officers testified that in a recorded telephone conversation from the jail, the defendant stated that he had been caught with his "pipe," which they testified was slang for a gun. *Dorris*, 2024 IL App (5th) 240355-U, ¶ 9. A single latent fingerprint, which matched the defendant, was found on the magazine of the gun, with no fingerprints found on the gun itself. *Dorris*, 2024 IL App (5th) 240355-U, ¶ 10.

¶ 8 In his case in chief, the defendant testified in narrative form that on October 11, 2021, he and Epperson—who were in a relationship—argued in the garage after the defendant stated that he wanted to break up with Epperson and move away from the area. *Dorris*, 2024 IL App (5th) 240355-U, ¶ 11. The defendant testified that Epperson reached into her backpack, produced a gun the defendant had never seen before, and threatened to shoot the defendant and herself. *Dorris*, 2024 IL App (5th) 240355-U, ¶ 11. The defendant testified that he pleaded with Epperson, and that eventually the magazine fell out of the gun. *Dorris*, 2024 IL App (5th) 240355-U, ¶ 11. He testified that he grabbed the magazine, but that Epperson again threatened to shoot him. *Dorris*, 2024 IL App (5th) 240355-U, ¶ 11. He testified that he did not know if there was a bullet still in the gun, so he tossed the magazine toward Epperson, who picked it up and placed it back in the gun. *Dorris*, 2024 IL App (5th) 240355-U, ¶ 11. He testified that the police eventually arrived and detained him, and that the gun the police found in the garage was not his. *Dorris*, 2024 IL App (5th) 240355-U, ¶ 11.

¶ 9 On cross-examination, the defendant reiterated that he had never seen the gun before. He agreed that he did not tell an investigating detective the things he had just told the court. He denied that he possessed the gun on September 9, 2021, the date of an earlier incident not involving Epperson. The defendant objected to being asked about the September 9, 2021, incident, which led the trial court to ask the State, "What evidence do you have that on September 9th the defendant

possessed the exact same gun?" The State answered, "Shell casings from that shooting were recovered. They were sent to the crime lab, and they were matched to shell casings from [the gun found in the sweatshirt]." The State added that the defendant admitted to a detective that he possessed and fired the gun on September 9, 2021. The defendant contended that although he admitted firing a gun on September 9, 2021, he never told the detective that it was the same gun. He agreed that in his first 15 phone calls from the jail, he never told anyone that Epperson pulled a gun on him.

¶ 10 On redirect examination, the defendant continued to insist that he never possessed the gun that Epperson had on the day the defendant was arrested, that he had never seen that gun before, and that he did not know where Epperson obtained the gun. The trial court rejected—as violating rules against hearsay—attempts by the defendant, prior to and during trial, to introduce an affidavit from Epperson in which she averred the sweatshirt and gun were hers, and a body camera video in which she told a police officer that the sweatshirt was hers. *Dorris*, 2024 IL App (5th) 240355-U, ¶ 13. During the course of the trial, the defendant stated at times that he wished to call Epperson as a witness, but at other times he stated that he would not call her. *Dorris*, 2024 IL App (5th) 240355-U, ¶ 13. Ultimately, the defendant stated that he did not need to have Epperson testify, and he did not attempt to call her as a witness. *Dorris*, 2024 IL App (5th) 240355-U, ¶ 13.

¶ 11 The State contended in its closing argument that the evidence of (1) Epperson's struggle to grab the sweatshirt with the gun in it, (2) the defendant's fingerprint on the magazine of the gun, (3) the defendant's statement in a phone call from the jail that he had been caught with his "pipe"—which was slang for a gun—and (4) the other circumstances surrounding the incident, all proved that "the defendant was in constructive possession of the firearm." The State argued that the fact that Epperson was already dressed in a sweatshirt, and that the defendant was wearing a tank top,

was "consistent with the defendant" owning the sweatshirt in which the gun was found, not with the sweatshirt belonging to Epperson. The State further argued that the defendant did not mention in his first 15 calls from the jail that Epperson pulled a gun on him, and did not tell police that on the day he was arrested. The State contended that although the defendant denied ever seeing the gun before, the State "presented numerous evidence to rebut" the defendant's assertion.

¶ 12 Following closing arguments, the trial court took a brief recess to consider its notes. Thereafter, the trial court found the defendant guilty of all five charges. *Dorris*, 2024 IL App (5th) 220822-U, ¶ 7. The trial court found the State's witnesses and evidence credible, and found the defendant not credible. *Dorris*, 2024 IL App (5th) 240355-U, ¶ 14. Commenting on some of the evidence, the trial court noted that it was only after the defendant appeared to whisper something in Epperson's ear that Epperson went to the couch and tried to grab the sweatshirt before officers could reach it. The court noted that the State could meet its burden of proof that the defendant possessed the gun in this case "by direct or circumstantial evidence," and that it was permissible for inferences to "be drawn from the evidence." The court stated that the evidence in this case supported the inference that the defendant "knows he has a gun, it's in the sweatshirt, in the living room, and he asks [Epperson] to do something with it."

¶ 13 Following a sentencing hearing, the defendant was sentenced to a term of 20 years of imprisonment in the Illinois Department of Corrections. *Dorris*, 2024 IL App (5th) 240355-U, ¶ 15. In his direct appeal, the defendant raised only one issue, arguing that he should have been allowed to withdraw his waiver of a jury trial. *Dorris*, 2024 IL App (5th) 220822-U, ¶ 10. This court disagreed, and affirmed the defendant's conviction and sentence. *Dorris*, 2024 IL App (5th) 220822-U, ¶¶ 11-19.

¶ 14 On December 4, 2023, while the defendant's direct appeal was still pending, the defendant filed a petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2022)). *Dorris*, 2024 IL App (5th) 240355-U, ¶ 17. In the petition, the defendant claimed that the trial court's denial of two of the defendant's pretrial motions *in limine* deprived the defendant of a fair trial. *Dorris*, 2024 IL App (5th) 240355-U, ¶ 17. The trial court summarily dismissed the defendant's postconviction petition, concluding that the petition did not raise a claim of a constitutional dimension, and that the defendant could have brought his claim in his direct appeal. *Dorris*, 2024 IL App (5th) 240355-U, ¶ 19. OSAD was appointed to represent the defendant on appeal, but moved to withdraw, contending the appeal presented no issues of arguable merit. *Dorris*, 2024 IL App (5th) 240355-U, ¶¶ 2, 23. We agreed, concluding that the defendant's claim could have been raised in his direct appeal, and accordingly was forfeited. *Dorris*, 2024 IL App (5th) 240355-U, ¶ 25. We therefore granted OSAD's motion to withdraw, and affirmed the judgment of the trial court. *Dorris*, 2024 IL App (5th) 240355-U, ¶ 28.

¶ 15 On October 21, 2024, while the defendant's appeal from the summary dismissal of his initial postconviction petition was still pending, the defendant filed what he styled as a petition for relief from judgment. Attached to the pleading were two unsigned affidavits, one purportedly from N.L., and one purportedly from T.L. The affidavits alleged that the defendant was the brother of each affiant, and that each affiant observed a portion of the argument between the defendant and Epperson in the garage, during which the affiants saw Epperson point a gun at the defendant.

¶ 16 On January 10, 2025, the trial court entered an order in which the court stated that it would characterize the defendant's pleading as a successive postconviction petition, which it would advance to the second stage of proceedings. The trial court appointed the public defender to represent the defendant on his successive postconviction petition, and gave the public defender

until March 21, 2025, to file an amended petition and to comply with Illinois Supreme Court Rule 651(c) (eff. July 1, 2017).

¶ 17 On March 21, 2025, the defendant, by counsel, filed a verified amended successive petition for postconviction relief. Therein, the defendant sought relief "based on newly discovered evidence and actual innocence." The petition alleged that the newly discovered evidence—which consisted of the statements of N.L. and T.L.—supported the defendant's stand-alone actual innocence claim. The petition stated that counsel, like the defendant, had been unable to obtain signed, notarized affidavits from N.L. and T.L. in support of the claims. The petition was accompanied by exhibits, as well as by counsel's certificate of compliance with Rule 651(c).

¶ 18 On April 17, 2025, the State filed a motion to dismiss the petition. On May 2, 2025, the defendant's postconviction counsel filed a response. On May 6, 2025, the trial court entered an order in which it advanced the petition to the third stage of proceedings, an evidentiary hearing.

¶ 19 On June 27, 2025, the evidentiary hearing was held. N.L. and T.L. both testified. Following their testimony, and arguments presented by the parties, the trial court took the matter under advisement.

¶ 20 On June 30, 2025, the trial court entered its written order. Therein, the trial court recounted the testimony given at the evidentiary hearing by N.L. and T.L., and found that both witnesses were "less than credible," because they (1) contradicted each other's testimony in various ways, (2) had an interest in the outcome of their older brother's case, (3) were very young at the time of the incident in the garage, (4) had limited memories of the incident—often testifying "they 'did not know,' "—and (5) testified with demeanors that appeared to the trial court to be "contrived." With regard to the final point, the trial court added that their demeanors appeared to be contrived

because "they knew the specifics of what they were to say, but did not have strong or complete answers on anything other than the main issue of seeing [Epperson] with the gun."

¶ 21 The trial court stated that even if the witnesses were credible, their testimony "only minimally corroborated" the defendant's version of what happened in the garage. The trial court stated that the most that their testimony provided, "if believed, was that they saw [Epperson] point a gun at" the defendant. The trial court pointed out that their testimony did not address any of the other evidence that supported the defendant's guilt. The court further pointed out that neither N.L. nor T.L. testified that they saw the magazine fall out of the gun, or that they saw the defendant pick it up. They also did not testify that they saw the struggle between Epperson and a police officer over the sweatshirt in which the gun was wrapped.

¶ 22 The trial court concluded that it was "possible, but not likely," that N.L.'s and T.L.'s statements were newly discovered. The court reiterated that both witnesses were not credible, but that even if they were, and even if their evidence was newly discovered, it did "not address the most material issues in the case" with regard to the defendant's possession of "a gun on the day in question." The trial court noted that the most important questions for the court were whether the statements of N.L. and T.L. clearly and convincingly demonstrated that a new trial would probably result in an acquittal, and whether the statements were so conclusive that it was more likely than not that no trier of fact would find the defendant guilty beyond a reasonable doubt of possessing the gun. The trial court stated, "The answer to these questions is a resounding 'no.' "

¶ 23 The trial court stated that after considering the credibility of N.L. and T.L., and weighing the evidence presented at the defendant's trial, the court concluded that the defendant had failed to prove, by a preponderance of the evidence, that he was actually innocent. The court stated that the defendant therefore failed to prove, by a preponderance of the evidence, that his constitutional

rights were violated. Accordingly, the court denied the petition. The defendant filed a timely appeal, which was docketed by this court as case No. 5-25-0595. In a separate decision, also issued today, we affirmed the trial court's denial of the defendant's verified amended successive postconviction petition. See *People v. Dorris*, 2026 IL App (5th) 250595-U.

¶ 24 On September 26, 2025, the defendant filed the motion for leave to file a second successive postconviction petition (motion) that is the subject of this appeal. Therein, the defendant stated that he would demonstrate both cause and prejudice for not bringing his claim in an earlier postconviction petition. He also stated that his claim was "based on newly discovered evidence." Within his proposed second successive postconviction petition, the defendant claimed that "the newly discovered evidence was unavailable at trial and could not have been discovered sooner through due diligence" because the affidavit the defendant was attaching "was made after the trial had concluded [and] the information contained was generally undiscoverable until after the trial and the affiant was ready to speak." He thereafter claimed that he could not have raised the newly discovered evidence contained in the affidavit "at trial or in his first postconviction petitions because he was unaware of this information." The defendant alleged that the newly discovered evidence contained in the affidavit supported his claim of "actual innocence." He requested the appointment of counsel to assist him, and that the case be remanded for a new trial. The defendant did not allege—in either the motion, or in the proposed second successive postconviction petition—the date on which the affidavit was produced, or the date on which he became aware of its existence.

¶ 25 Attached to the motion as Exhibit A was an affidavit—purportedly signed by a "Jasmine Epperson"—that was not notarized or dated. The affidavit consists of a single, approximately one-half page, sentence, which states that Epperson (1) held the defendant at gunpoint on the date in

question; (2) is "the owner of the black and silver gun he is in jail for"; (3) "got the gun from laura ladarrion moma," who wanted Epperson to hold onto the gun so that the police would not find it, due to its use in a previous shooting; (4) explained this to Janie Miller Jones, an attorney who was representing the defendant, but Jones told her that she was admitting to committing a crime; (5) did not attend the defendant's trial because she "was scared of going to jail on gun charges"; (6) was the owner of the hoodie and the gun, and had the gun in her possession; and (7) "should have come forward sooner." The affidavit is silent as to whether, to Epperson's knowledge, the defendant ever possessed the gun on the date the defendant was arrested. Moreover, in addition to not being dated, the affidavit does not provide any other information that would indicate when it was produced, or when the defendant became aware of it.

¶ 26 On October 10, 2025, the trial court entered an order in which it denied the motion. Therein, the trial court recounted the procedural history of the case, as well as some of the evidence adduced at the defendant's bench trial, which is described in detail above. The court stated that it would analyze the motion under both the cause-and-prejudice test, and the standard for leave to file an actual innocence claim. The court noted that although it believed the signature on Exhibit A was "similar to" the signature on Epperson's 2021 affidavit, there were "differences" as well.

¶ 27 The trial court stated that, in terms of an actual innocence analysis, even if Exhibit A was only recently received by the defendant, as he alleged, the determining factor was when the defendant actually knew of the contents of the exhibit. The court stated that it was clear from the record that the defendant "knew from the onset of the case that Ms. Epperson would say she possessed the gun." The court noted that the defendant could have called Epperson to testify at the defendant's bench trial, but chose not to do so. The court also found that Exhibit A was "consistent with [the defendant's] testimony at trial," presented "nothing different," and therefore was

"cumulative" and added only "more non-material details." The court stated that, "[m]ost importantly," Exhibit A was not conclusive. Thus, the court concluded that the defendant had not met the standard for leave to file an actual innocence claim.

¶ 28 With regard to the cause-and-prejudice test, the trial court stated that the defendant had not shown cause "why the current claim could not have been raised earlier," because the defendant was aware of the testimony Epperson would have offered "all along, even though [Exhibit A] contained more non-material details." Therefore, the court concluded, the defendant could have raised the current claim in his direct appeal, or one of his earlier postconviction petitions. The trial court also found that the defendant was not prejudiced, because the court was aware of the defendant's theory of the case "before and during the trial," and that the defendant testified at trial "that the gun belonged to Ms. Epperson." The court stated that "[t]here was no error at trial that so permeated the proceedings that [the defendant's] due process rights were violated." Accordingly, the trial court denied the motion. This timely appeal followed.

¶ 29 II. ANALYSIS

¶ 30 In the legal memorandum that accompanies its *Finley* motion to withdraw, OSAD states that it considered raising the following issue: whether the trial court erred when it denied the motion. However, OSAD concludes that this potential issue is without arguable merit. For the following reasons, we agree.

¶ 31 The Act provides a mechanism by which a defendant may challenge the defendant's conviction by filing a petition for relief in the trial court. 725 ILCS 5/122-1 (West 2024). The Act allows a defendant to assert that there was a substantial denial of the defendant's federal or state constitutional rights in the proceedings that resulted in the defendant's conviction or sentence. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). "A postconviction proceeding is a collateral proceeding,

rather than an appeal of the underlying judgment, and therefore it allows inquiry only into constitutional issues that were not, and could not have been, adjudicated on direct appeal." *People v. Terry*, 2016 IL App (1st) 140555, ¶ 32. Moreover, "any claim not presented in an initial postconviction petition or amended petition is waived." *Terry*, 2016 IL App (1st) 140555, ¶ 32. Broad, conclusory allegations are not permissible under the Act. *People v. Delton*, 227 Ill. 2d 247, 258 (2008). In addition, a petition filed under the Act must have attached affidavits, records, or other evidence supporting its allegations, or must state why they are not attached. 725 ILCS 5/122-2 (West 2024).

¶ 32 The Act contemplates the filing of only one postconviction petition. 725 ILCS 5/122-1(f) (West 2024). "[S]uccessive postconviction petitions are highly disfavored." *People v. Bailey*, 2017 IL 121450, ¶ 39. If a defendant desires to file a successive postconviction petition after the defendant's initial petition is dismissed or denied, the defendant must request leave of court before filing it. 725 ILCS 5/122-1(f) (West 2024). Unless a defendant asserts a claim of actual innocence, the trial court will grant the defendant leave only if the defendant satisfies the cause-and-prejudice test. 725 ILCS 5/122-1(f) (West 2024); *People v. Montanez*, 2023 IL 128740, ¶ 77. To establish "cause" under the cause-and-prejudice test, a defendant must identify an objective factor, external to the defense, that impeded the defendant's ability to raise a specific claim during the defendant's initial postconviction proceeding. 725 ILCS 5/122-1(f) (West 2024); *Montanez*, 2023 IL 128740, ¶ 77. To establish "prejudice," a defendant must demonstrate that the claimed constitutional error so infected the trial that the resulting conviction or sentence violates due process. 725 ILCS 5/122-1(f) (West 2024); *Montanez*, 2023 IL 128740, ¶ 77.

¶ 33 The cause-and-prejudice test is a more exacting standard than the gist-of-a-claim standard trial courts use to review initial postconviction petitions at the first stage of proceedings. *People v.*

Conick, 232 Ill. 2d 132, 142 (2008). The defendant must make a *prima facie* showing of cause and prejudice in order to be granted leave, before any further proceedings on the defendant's claims can occur. *Bailey*, 2017 IL 121450, ¶ 24. A defendant cannot obtain leave of court unless the defendant satisfies each of the two elements of cause and prejudice; it is not sufficient to establish only one element. *People v. Guerrero*, 2012 IL 112020, ¶ 15. Leave should be denied when it is clear, from a review of the successive petition and the documentation submitted by the defendant, that the claims alleged by the defendant fail as a matter of law, or where the successive petition, with its supporting documentation, is insufficient to justify further proceedings. *People v. Griffin*, 2024 IL App (1st) 191101-C, ¶ 30. This court reviews *de novo* the trial court's decision—based upon the failure of the defendant to make a *prima facie* showing of cause and prejudice—to deny the defendant's motion for leave to file a successive postconviction petition. *People v. Robinson*, 2020 IL 123849, ¶ 39. We may affirm the trial court's decision on any basis supported by the record because the question before us is the correctness of the result reached by the trial court, not the correctness of the trial court's reasoning in reaching that result. See, *e.g.*, *People v. Johnson*, 208 Ill. 2d 118, 128-29 (2003).

¶ 34 If a defendant seeks to file a successive postconviction petition on the basis of a claim of actual innocence, the trial court should deny the defendant leave to do so only if it is clear, from the trial court's review of the proposed successive petition, and the documentation the defendant has provided in support of the petition, that as a matter of law the defendant cannot set forth a colorable claim of actual innocence. *People v. Harris*, 2024 IL 129753, ¶ 43. If the defendant, through the supporting documentation, raises the probability that it is more likely than not that no reasonable juror would have convicted the defendant in light of the new evidence, the trial court should grant leave to file. *Harris*, 2024 IL 129753, ¶ 43. "Probability, rather than certainty, is the

key in considering whether the fact finder would reach a different result after considering the prior evidence along with the new evidence." *Harris*, 2024 IL 129753, ¶ 43. A trial court's denial of a defendant's motion for leave to file a successive postconviction petition alleging actual innocence is reviewed *de novo*. *Harris*, 2024 IL 129753, ¶ 44.

¶ 35 When a defendant submits evidence in an attempt to demonstrate actual innocence, that "evidence must be new, material, noncumulative, and, most importantly, of such conclusive character as would probably change the verdict on retrial." *Harris*, 2024 IL 129753, ¶ 47. Illinois Supreme Court "precedent establishes that 'new' for purposes of an actual innocence claim means evidence that was discovered after trial and that could not have been discovered earlier through the exercise of due diligence." *Harris*, 2024 IL 129753, ¶ 52. "Conclusive," for purposes of an actual innocence claim, "means the evidence, when considered along with the trial evidence, would probably lead to a different result." *Harris*, 2024 IL 129753, ¶ 65. As the *Harris* court recognized, "[t]he conclusive-character element requires only that the [defendant] present evidence that places the trial evidence in a different light and undermines the court's confidence in the judgment of guilt," and therefore "[p]robability, 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." 2024 IL 129753, ¶ 65. As with the cause-and-prejudice test, we may affirm the trial court's ruling with regard to an actual innocence claim on any basis supported by the record, because the question before us is the correctness of the result reached by the trial court, not the correctness of the trial court's reasoning in reaching that result. See, *e.g.*, *Johnson*, 208 Ill. 2d at 128-29.

¶ 36 In this case, OSAD considered raising the issue of whether the trial court erred when it denied the motion. OSAD states that the issue has no arguable merit because the evidence found

in Exhibit A is not newly discovered, is not conclusive, the defendant did not adequately allege cause, and the defendant did not adequately allege prejudice. We, like OSAD and the trial court, will consider both the cause-and-prejudice test and the standard for leave to file a claim of actual innocence in a successive postconviction petition.

¶ 37 With regard to the defendant's attempt to present a colorable claim of actual innocence, we agree that the evidence in Exhibit A is not conclusive, which, we reiterate, "means the evidence, when considered along with the trial evidence, would probably lead to a different result." *Harris*, 2024 IL 129753, ¶ 65. The evidence in Exhibit A is for the most part duplicative of the defendant's testimony at trial, which the trial court determined was not credible. The only new information found in Exhibit A is Epperson's statement about where she allegedly obtained the gun, why she possessed it, why she did not testify at the defendant's trial, and that she believed she should have come forward with her information sooner. Notably, although Epperson claims in the affidavit that she possessed the gun on the date in question, she does not claim that the defendant did not also possess it on that date. Thus, her "new" evidence does not in any way diminish the evidence of the defendant's guilt that was presented at his bench trial and that is described in detail above. Taking her allegations as true, and construing them in the defendant's favor, the defendant still has not raised the probability that it is more likely than not that no reasonable juror would have convicted the defendant in light of the new evidence found in Exhibit A. Accordingly, the defendant has not shown that, on the basis of his actual innocence claim, the trial court should have granted the motion, and should have allowed him to file his second successive postconviction petition. See *Harris*, 2024 IL 129753, ¶ 43.

¶ 38 As explained above, to establish a *prima facie* showing of "prejudice" for purposes of the cause-and-prejudice test, a defendant must demonstrate that the claimed constitutional error so

infected the trial that the resulting conviction or sentence violates due process. 725 ILCS 5/122-1(f) (West 2024); *Montanez*, 2023 IL 128740, ¶ 77. The fact that a small amount of the information found in Exhibit A was not presented at the defendant's bench trial does not make any such demonstration. As explained immediately above, Epperson's information, taken as true, does not in any way diminish the evidence of the defendant's guilt that was presented at his bench trial and that is described in detail above. We reiterate that a defendant cannot obtain leave of court unless the defendant satisfies each of the two elements of cause and prejudice; it is not sufficient to establish only one element. *Guerrero*, 2012 IL 112020, ¶ 15. Accordingly, the defendant's failure to make a *prima facie* showing of prejudice is fatal to his claim under the cause-and-prejudice test. We note as well that in his response to OSAD's motion to withdraw, the defendant does not address OSAD's reasoning in any substantive way, and does not address either the cause-and-prejudice test, or the standard for leave to file an actual innocence claim, at all.

¶ 39 III. CONCLUSION

¶ 40 For the foregoing reasons, the trial court did not err when it denied the defendant's motion for leave to file his second successive postconviction petition. No argument to the contrary would have arguable merit. Accordingly, we grant OSAD leave to withdraw as counsel, and we affirm the trial court's judgment.

¶ 41 Motion granted; judgment affirmed.