No. 129353

IN THE
SUPREME COURT OF ILLINOIS

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

BRIEF OF RESPONDENT-APPELLEE PEOPLE OF THE STATE OF ILLINOIS

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NATURE OF THE CASE

Petitioner was convicted of murder in 1994. He appeals from the denial of his 2021 motion for leave to file a successive postconviction petition. An issue is raised on the pleadings: whether petitioner pleaded actual innocence or cause and prejudice as required to allow leave to file his successive petition.

ISSUES PRESENTED

1. Whether the appellate court correctly followed this Court's well-reasoned precedent that the same evidence may not be used to support both an actual innocence claim and a constitutional claim of trial error.

2. Whether petitioner failed to plead actual innocence based on affidavits from (a) a witness who recants his testimony that petitioner confessed to the murder, and (b) a witness who contradicts her prior statements to police and now claims another man confessed, where both witnesses were known to the defense before trial and an eyewitness identified petitioner as the shooter.

3. Whether petitioner failed to plead cause and prejudice based on allegations that counsel was ineffective and prosecutors withheld evidence and presented perjured testimony, where (a) petitioner raised those claims in prior proceedings and (b) the record rebuts the claims.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315, 612, and 651(d). This Court allowed petitioner leave to appeal on March 29, 2023.

STATEMENT OF FACTS

A. Petitioner's Arrest for the Murder of Samuel Harlib

On November 14, 1991, at 5:45 pm., Samuel Harlib was shot and killed during a robbery at a car dealership he owned in Chicago. R411-430, 486.[1] Based in part on an eyewitness identification, police arrested petitioner, who previously had been convicted of 16 armed robberies in 6 states, as well as bank robbery and kidnapping. R1027-1121; SR51-52, 97.

Petitioner's offenses violated the conditions of his parole, and the government filed a petition to revoke. At the ensuing parole revocation hearing, Detective Lawrence Akin testified that an employee of the dealership saw the shooting but did not know the shooter's name. SR567. During the investigation, police spoke to Elizabeth Barrier, who told them that the day after Harlib's murder, a man named Reggie Smith came to her apartment to do drugs. SR567-73. Smith told her that he was upset because his friend "Sam" had been killed during a robbery at a car dealership, but Smith said he had nothing to do with the murder. SR575.

[1] The common law record and report of proceedings are cited as "C_" and "R_," and the secured record as "SR_." Petitioner's opening brief is cited as "Pet. Br.__."

Police then learned that Smith and a man named Ramano Ricks were in custody for robbing a local grocery store. SR567-68.[2] Ricks told police that Smith had admitted he was the getaway driver and petitioner was the shooter during the car dealership robbery. SR568. Police located petitioner, placed him in a lineup, and the eyewitness pointed at petitioner and started shouting "that's him, that's him." SR569.

The board revoked petitioner's parole. SR586.

B. Petitioner's Trial and Conviction

The Prosecution's Case

At trial, Raphael Mendoza, an employee at Samuel Harlib's car dealership, testified that he and Harlib were alone at the dealership on the evening of the murder. R411-13. Mendoza saw petitioner walking around the lot, so he went outside to speak with him, and petitioner pointed to an Oldsmobile and said he wanted to buy it. R414-16. After Mendoza and petitioner talked about a downpayment, Mendoza noted the car needed a jumpstart. R416-17. Mendoza went inside and told Harlib that petitioner wanted to buy a car, and Harlib went outside to talk to him. *Id.* Mendoza retrieved jumper cables and went back to the car, where Harlib and petitioner were waiting. R419. Mendoza jumpstarted the car while petitioner looked on, returned the jumper cables to the garage, and walked back to the car. R420-21. Harlib said they had locked the keys in the car, so

[2] Petitioner's brief frequently refers to Ricks's first name as "Ramono," but the correct spelling is "Ramano." C303-08.

Mendoza got a tool to unlock it while petitioner and Harlib walked inside the dealership. R421-22. Mendoza unlocked the car, then went in the dealership and heard Harlib calling for him from a back office. R423-24.

In the back office, petitioner was holding a gun and Harlib said petitioner was robbing them. R425-26. Petitioner pointed the gun at Mendoza and told him to sit down. *Id.* Harlib then "jumped for the gun" and tried to slap it out of petitioner's hand. R427-29. The gun "went off" and fired into the floor. *Id.* Then petitioner aimed at Harlib and shot him multiple times. R428-30. Petitioner grabbed two stacks of cash that were on a desk, shot at Mendoza and missed, then ran away. R431-35.

Mendoza testified that he viewed a lineup in December 1991, a few weeks after Harlib's murder. R440. He told police he recognized one person in the lineup, a man named Reggie Smith, because Smith was a customer who sometimes came to the dealership to make his car payments; however, Mendoza told police Smith was not the shooter. R440-41, 467. Mendoza viewed another lineup in March 1992. R441. This time, petitioner was in the lineup and Mendoza immediately told police that he was the shooter. R440-41, 483.

Consistent with Mendoza's testimony, an evidence technician testified that there were bullet holes in the floor of Harlib's office, the wall, and a window. R521. And the medical examiner testified that Harlib died as a result of a bullet that passed through his heart and lungs. R653-57.

Detective Akin testified that during the investigation, he spoke with a woman named Elizabeth Barrier, who provided information about a man named Reggie Smith; Akin discovered that Smith was in Cook County Jail and brought him in for questioning. R538-39. At that time, Akin learned of a man named Ramano Ricks. R539. In December 1991, police put Smith and Ricks in a lineup that the eyewitness, Mendoza, viewed. R539-40. Mendoza told Akin that he knew Smith, because Smith was a customer, but that Smith was not the shooter. R539-40, 568.

Detective Akin testified that, a few months later, Ricks contacted him from Cook County Jail. R540-41. When Akin met with Ricks, Ricks "pointed the finger" at petitioner. R541, 558. Police arrested petitioner in March 1992 and placed him in a lineup. R544. Mendoza "immediately" identified petitioner as the shooter and "started shouting, 'That's him. That's him.'" *Id.*

Ramano Ricks testified that he visited petitioner in November 1991, shortly after Harlib's murder. R582-83. While talking in a bar, petitioner said Ricks needed to repay a loan petitioner had given him. *Id.* When Ricks said he had no money, petitioner said he should commit an armed robbery. R584. Petitioner, Ricks, and Reggie Smith then went to a Days Inn where Ricks was staying, and petitioner gave them advice on how to commit armed robbery. R585-87. Petitioner said that he had recently shot a man while robbing a car dealership. *Id.* Petitioner explained that he had pretended to be interested in buying a car and spoke to an employee, then they went inside

a small room and petitioner pulled out a gun and forced the man to take money out of the safe. *Id.* The man tried to reach for the gun and petitioner shot him. *Id.* Petitioner also said that a "Puerto Rican or Mexican guy" witnessed the shooting. R587-88.

Ricks further testified that, shortly after his conversation with petitioner, he (Ricks) and Smith were arrested as they robbed a grocery store. R577. Ricks and Smith were in custody for that robbery when they were placed in the first lineup that Mendoza viewed. R591. A few months after he appeared in that lineup, an inmate tried to stab Ricks; Ricks contacted Detective Akin and said that he wanted to be housed in protective custody. R593, 606. Ricks subsequently provided statements and grand jury testimony attesting that Smith and petitioner said petitioner killed Harlib. R594-95. Ricks further testified that he later pleaded guilty to robbing the grocery store, he received a 10-year sentence, and prosecutors did not promise him a reduced sentence to testify against petitioner. R627.

On cross-examination, petitioner's counsel impeached Ricks by stating he had spoken to Ricks several times and Ricks had said "I don't know nothing and I don't remember nothing" about Harlib's murder. R595-98. Ricks admitted he told petitioner's counsel he did not know or remember anything about Harlib's murder, but Ricks explained that he had not wanted to talk to petitioner's counsel, petitioner's counsel had tried to get him to "swear that [he] wouldn't come to court on [petitioner]," and he further

testified that his statements to police and testimony inculpating petitioner were true. R595-98, 624-26.

To corroborate Ricks's testimony, a police officer testified that police arrested Ricks and Reggie Smith when they attempted to rob a grocery store in November 1991, shortly after Harlib's murder. R640. During that arrest, police searched a car used in the robbery and discovered a Days Inn receipt, which was the hotel where Ricks said he and petitioner had discussed Harlib's murder. R640-41. Police also recovered paperwork belonging to petitioner in a room at the hotel. R641-43.

The Defense Case

Petitioner did not testify. To impeach Ricks, petitioner called Jack Hawkinsen, a defense investigator. R780. Hawkinsen testified that he and petitioner's counsel spoke to Ricks before trial and Ricks "kept repeating that he didn't remember anything, he had nothing to say, he didn't want to talk without a lawyer[.]" R782.

Defendant also presented an alibi defense, claiming that he was not at the dealership at 5:45 p.m. when Harlib was murdered. Petitioner's wife, Cathy Flournoy, testified that petitioner picked her up from work at 3:30 p.m. on the day of the murder, and they went to a bar for an hour, briefly visited petitioner's mother, then drove home at 5:20. R687-95. Cathy claimed that petitioner then left shortly thereafter with his stepdaughter, Laura Clark. R696. During cross-examination, Cathy admitted that when

she was called to testify before the grand jury, she invoked her right against self-incrimination and did not provide an alibi for her husband. R704-06.

Petitioner's stepdaughters, Laura and Roberta Clark, testified that petitioner and Cathy arrived home at 5:10 p.m. on the night of the murder, and Laura left with petitioner. R742, 757. Laura claimed that she and petitioner ran errands and were home by 7:10 p.m. R747. During cross-examination, Laura admitted that when she was called to testify before the grand jury, she invoked her right against self-incrimination and did not provide an alibi for petitioner. R753. She also admitted that when police were investigating the murder, they came to petitioner's home to speak with him, and she falsely told police he was not there. R750-51.

Lastly, John Lewandowski, petitioner's boss at an imitation perfume company, testified that petitioner stopped by his office around 5:30 p.m. on the night of the murder and left 20 minutes later. R763-65.

In rebuttal, an investigator for the prosecution testified that during the investigation, he spoke with Lewandowski, who said that he did not know where petitioner was on the day of the murder. R801-02. In addition, an Assistant State's Attorney testified that he spoke with petitioner's wife and stepdaughter Laura, and they said they had "no idea" where petitioner was at the time of the murder. R792-93.

Closing Argument, Verdict, and Sentence

The prosecution argued in closing that the evidence proved petitioner was guilty of armed robbery and murder. R845-59. In response, petitioner's counsel argued that Mendoza's eyewitness identification was not credible, and that Ricks was "a liar" and a "criminal" and there "isn't a word of truth that can come out of his mouth." R884-93, 896. Defense counsel told the jury that Ricks testified falsely in exchange for a "deal" from prosecutors and he was "slime, a slug," and "the worst form of human life." R896-97, 914.

The jury found petitioner guilty of first degree murder and armed robbery. R960. During sentencing, prosecutors presented evidence that petitioner had been convicted of numerous armed robberies in several states, as well as bank robbery and kidnapping. R1027-1121; SR51-52. The trial court sentenced him to life in prison. R1181-82.

C. Petitioner's Pro Se Posttrial Motion

Petitioner filed a pro se motion for a new trial, alleging that (1) Ramano Ricks was "coach[ed]" by prosecutors and testified falsely in exchange for a "deal" to reduce his sentence, and (2) counsel was ineffective for failing to call Elizabeth Barrier to testify. SR330, 333-34, 337-340. Petitioner alleged that before trial, Ricks had told petitioner and his friend Nate Neal that if petitioner paid Ricks's legal fees, then he was willing to recant his statements to police. SR337-38, 345-46. Petitioner also attested that he spoke to Ricks's lawyer before trial, and that the lawyer said that

Ricks had told police that petitioner shot Harlib "because [Ricks] allegedly believed [petitioner] was trying to have him beat up at the jail." SR344-45.

At a hearing on the motion, petitioner was given an opportunity to expand on his allegations, and he told the court that his "counsel did speak with" Barrier before trial and she was willing to testify on his behalf. R1177. Petitioner's counsel agreed that he spoke with Barrier and explained to the court that Barrier told him that

> Reginald Smith basically, you know, came to her one evening and said you know a friend of mine has just been killed, [he] was very upset. He had some cash on him, drugs, new clothes, and essentially the conversation was that Reginald Smith had been there just a few minutes beforehand and the implication was, she never came out right and said it although she did say on the phone yeah, I know who killed him, it was Reginald Smith. Although Reginald Smith never came out directly and said that, that was her assumption.

R1178. Counsel said he believed Barrier's testimony would have been helpful to impeach Smith if he testified, but Smith did not testify. R1178-79. The court denied petitioner's pro se motion. R1179.

D. Petitioner's Direct Appeal

On appeal, petitioner argued in part that (1) the evidence was insufficient to convict him because Mendoza and Ricks were not credible, and (2) Ricks committed perjury. C132-48, 225. The appellate court rejected petitioner's arguments and affirmed his convictions. C132-48.

E. Petitioner's First Postconviction Petition

In 1997, petitioner filed a pro se postconviction petition repeating his prior allegations. SR502-47. Specifically, petitioner alleged that prosecutors

presented false testimony that (1) petitioner told Ricks he killed Harlib and (2) Ricks was not given a plea deal (while also concealing from the defense that prosecutors gave Ricks a deal). SR502, 507, 510-12, 526. In an affidavit, petitioner again attested that Ricks had offered before trial to "clear" petitioner of the murder if petitioner paid Ricks's lawyer, and petitioner attested that his wife and Nate Neal were parties to those conversations. SR545. Petitioner also attested that, before trial, (1) Ricks's lawyer told petitioner that Ricks said petitioner "did not do this murder," (2) petitioner gave Ricks's lawyer $2,000 and the lawyer "said we could call [the lawyer] as a witness as to what Ricks had told him," and (3) petitioner told trial counsel this information. *Id.*

Petitioner also again alleged that counsel was ineffective for not calling Elizabeth Barrier to testify. SR503. Petitioner alleged that counsel had spoken with Barrier before trial, counsel knew Barrier could exculpate petitioner, and Barrier was available to testify at trial. SR508, 520-21.

The circuit court dismissed the petition, and the appellate court affirmed. C219. The appellate court held that petitioner had "made his claims of perjury and suppression of evidence repeatedly" in prior proceedings and could not raise them again in postconviction proceedings. C225. The court also held that petitioner's ineffective assistance claim was meritless because counsel had offered a reasonable strategic basis for not calling Barrier to testify. C228-30.

F. Petitioner's Motion for Leave to File a Successive Postconviction Petition

Decades later, in 2021, petitioner's retained counsel filed a motion for leave to file a successive postconviction petition. C155-183. The proposed successive petition repeated the allegations petitioner previously had raised in his post-trial motion, direct appeal, and initial postconviction petition, *i.e.*, that prosecutors knowingly relied on perjured testimony from Ricks, prosecutors failed to disclose that Ricks received a deal to testify, and counsel erred by not calling Barrier to testify. *Id.* The successive petition also alleged that petitioner is innocent. C172-76.

Counsel attached to the successive petition Ricks's March 6, 1992, statement to police, where Ricks stated that (1) Reggie Smith told him that petitioner shot Harlib and (2) police did not offer him anything for his statement. C248-50. Counsel also attached Ricks's March 26, 1992, grand jury testimony where he testified that (1) Smith told him he had been the getaway driver and petitioner was the shooter and (2) petitioner separately told Ricks that he had shot someone in an armed robbery. C257-60.

Counsel also attached police reports from 1992 concerning Elizabeth Barrier. C237-41. The reports state that a friend of Barrier contacted police and said that Barrier had told him that (1) Reggie Smith came to her apartment shortly after Harlib's murder to do drugs, (2) Smith was upset because his friend "Sam" had been killed during a robbery at Sam's car dealership, and (3) Smith told Barrier he had been at the dealership shortly

before the shooting but he was not there when the murder occurred. C237-38. The reports further state that police talked to Barrier, and she told them that Smith said he was upset about the death of his friend "Sam," but he was not at the dealership when the murder occurred. C240-41. The reports also state that a prosecutor re-interviewed Barrier in April 1992, and she repeated the same account. C241.

Lastly, the successive petition included affidavits from Ricks and Barrier that were signed in 2018, *i.e.*, 27 years after Harlib's murder. C303-14. In Ricks's affidavit, he recanted his testimony that petitioner confessed to the murder. C306-08. Ricks claimed that he had lied because he was mad at petitioner and hoped to get a deal in his robbery case. C307. Ricks claimed that Detective Akin told him that "he could not 'officially' help me, but that he would see what he could do to get me a lesser sentence. He also told me that he would help me get into a work release program." *Id.* Ricks did not expressly allege in his affidavit that police or prosecutors knew his testimony was false. C303-08.

Barrier claimed in her affidavit that Reggie Smith came to her house one night to do drugs and told her he had "shot [a] car dealer." C311. Barrier admitted she met with police during the investigation but claimed that, "to the best of [her] memory," she "refused to answer their questions." C312. Barrier acknowledged in her affidavit that a police report existed concerning her interview in 1992; however, she stated that "if the report accurately

reflects what I told police, I did not tell police the full truth[.]" *Id.* Barrier further stated that, sometime before trial, her drug addiction worsened, she began living as a "vagrant" in Florida, and she was impossible to contact. C312-13. Barrier claimed that, therefore, she never spoke with petitioner's trial counsel. *Id.*

The circuit court denied leave to file the successive petition. *People v. Flournoy*, 2022 IL App (1st) 210587-U, ¶ 2. On appeal, petitioner claimed: (1) he is actually innocent, (2) prosecutors relied on perjured testimony from Ricks and concealed that Ricks received work release in exchange for his testimony against petitioner, and (3) his trial counsel erred by not calling Barrier to testify. *Id.* ¶ 25. The appellate court held that, under this Court's precedent, petitioner could not base his actual innocence claim on Ricks's and Barrier's affidavits because he relied on those affidavits to support his claims that prosecutors relied on perjured testimony and counsel was ineffective. *Id.* ¶¶ 29-33. The appellate court further held that, even setting that aside, petitioner failed to present a colorable actual innocence claim or demonstrate cause and prejudice necessary to allege his remaining claims. *Id.* ¶¶ 35-70.

STANDARD OF REVIEW

The denial of leave to file a successive petition is reviewed de novo. *People v. Bailey*, 2017 IL 121450, ¶ 13.

ARGUMENT

Successive petitions are "highly disfavored" because they "impede the finality of criminal litigation." *People v. Montanez*, 2023 IL 128740, ¶¶ 73, 108, 122; *see also People v. Edwards*, 2012 IL 111711, ¶ 29; *People v. Holman*, 2017 IL 120655, ¶ 25. Thus, petitioners must obtain leave of court to file a successive petition. 725 ILCS 5/122(f). In seeking leave, petitioner faces "immense" procedural hurdles. *Montanez*, 2023 IL 128740, ¶ 122. To file a successive petition, he must (1) plead a colorable actual innocence claim based on new evidence; or (2) meet the "cause and prejudice" test for the constitutional claims of trial error he seeks to raise, *i.e.*, establish that he could not have raised his claims earlier and the error so infected the trial that his conviction violates due process. *E.g.*, *Holman*, 2017 IL 120655, ¶ 26.

The record shows that, for decades, petitioner has repeated the same claims in his posttrial motion, direct appeal, and initial petition: (1) prosecutors relied on perjured testimony from Ricks and concealed that he received a deal to testify, and (2) petitioner's trial counsel erred by failing to call Barrier to testify. Now, decades after his conviction, petitioner wants to relitigate those claims yet again in a successive petition. The appellate court correctly held that petitioner may not do so because he has failed to allege a colorable actual innocence claim or demonstrate cause and prejudice.[3]

[3] This brief presents several arguments not raised below, but appellees "may raise any argument" supported by the record to affirm the lower court's judgment. *In re Veronica C.*, 239 Ill. 2d 134, 151 (2010).

I. The Appellate Court Correctly Held That Petitioner May Not Rely on Ricks's and Barrier's Affidavits to Support His Actual Innocence Claim Because They Are the Basis for His Constitutional Claims of Trial Error.

Petitioner contends that he may rely on Barrier's and Ricks's affidavits to support both an actual innocence claim and constitutional claims of trial error. Pet. Br. 13-22. The appellate court correctly held that this Court's precedent prohibits petitioner from doing so, and petitioner fails to demonstrate that this Court should overrule that precedent.

A. Under this Court's longstanding precedent, a petitioner may not rely on the same evidence to support both a claim of innocence and a claim of trial error.

It is settled that evidence used to support a constitutional claim of trial error — such as an affidavit alleging that counsel erred by not calling a witness or prosecutors concealed evidence — may not also be used to support an actual innocence claim. *People v. Washington*, 171 Ill. 2d 475, 479 (1996); *People v. Hobley*, 182 Ill. 2d 404, 444 (1998); *People v. Orange II*, 195 Ill. 2d 437, 460 (2001). In *Washington*, this Court held for the first time that an actual innocence claim may be raised in a postconviction petition. 171 Ill. 2d at 479. Notably, *Washington* defined an actual innocence claim as one that is based on new evidence that "is not being used to supplement an assertion of a constitutional violation with respect to [the] trial." *Id.* In other words, actual innocence claims concern new evidence demonstrating that the petitioner is actually innocent, *even though no error occurred at trial*. These claims differ

from claims of trial error, which a provide a basis for postconviction relief *even though the petitioner is not innocent*.

Consistent with *Washington*, this Court held in *Hobley* that petitioners may not use the same evidence to support claims of trial error and actual innocence claims. There, the petitioner alleged that prosecutors concealed a report showing that his fingerprints were not found on a gasoline can used in a deadly fire. *Hobley*, 182 Ill. 2d at 444. This Court noted that the prosecutors' failure to disclose the report could support a claim of trial error under *Brady v. Maryland*, 373 U.S. 83 (1963). *Id.* But, the Court stated, an actual innocence claim is one based on new evidence that is "'not being used to supplement an assertion of a constitutional violation with respect to [the] trial.'" *Id.* at 443-44 (quoting *Washington*, 171 Ill. 2d at 479). Because petitioner used the report to support his *Brady* claim, he could not use it to support his actual innocence claim, and he "has therefore not properly raised a claim of actual innocence." *Id.* at 444.

This Court reaffirmed these principles in *Orange II*. There, the petitioner presented evidence that the officers who obtained his confession had a history of coercion. 195 Ill. 2d at 445. This Court again held that an actual innocence claim must be based on evidence that "is not being used to supplement an assertion of a constitutional violation." *Id.* at 459. This Court then affirmed the dismissal of the actual innocence claim, holding:

> We find *Hobley* to be on point. Here the [petitioner's] evidence fails to present a free-standing claim of actual innocence under *Washington*. Instead, it is being used to supplement his claim that his confession was coerced and involuntary.

Id. at 460.

And in still other cases, this Court has continued to define an actual innocence claim as "one in which newly discovered evidence is not being used to supplement an assertion of a constitutional violation with respect to the [petitioner's] trial." *People v. Taliani*, 2021 IL 125891, ¶ 56. Further, the appellate court repeatedly has followed this Court's authority and held that evidence used to support a constitutional claim of trial error cannot be used to support an actual innocence claim. *E.g.*, *People v. Jackson*, 2018 IL App (1st) 171773, ¶¶ 70-71, *aff'd* 2021 IL 124818; *see also, e.g., People v. Zareski*, 2017 IL App (1st) 150836, ¶ 71; *People v. Collier*, 387 Ill. App. 3d 630, 637-38 (1st Dist. 2008); *People v. Brown*, 371 Ill. App. 3d 972, 984 (1st Dist. 2007).[4]

To be clear, this Court's precedent does not foreclose a petitioner's ability to obtain relief. Instead, it requires petitioners to pursue the proper type of claim when seeking relief. For example, if a petitioner finds a witness, previously unknown to anyone, who can provide exculpatory testimony, then the petitioner should assert an actual innocence claim, because an actual innocence claim rests on new evidence that was unknown at trial. *People v. Coleman*, 2013 IL 113307, ¶ 96. However, if that witness

[4] Copies of unpublished cases cited in this brief are included in petitioner's appendix and/or available on this Court's website, https://www.illinoiscourts.gov/top-level-opinions/.

was known to the defense before trial, then the proper claim is that counsel was ineffective for failing to call that witness to testify. *E.g.*, *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Coleman*, 2013 113307, ¶ 100 (petitioner could not base an actual innocence claim on potential witnesses known to the defense at trial). Thus, this Court's precedent does not prejudice petitioners but simply channels their allegations into the proper form.

Hobley aptly illustrates this point. As noted, *Hobley* held that the petitioner could not base an actual innocence claim on a fingerprint report he found after trial, because he was using that same report to argue that prosecutors violated *Brady*. 182 Ill. 2d at 444. Yet that ruling did not foreclose the petitioner's chance at relief because the Court considered the petitioner's *Brady* claim on the merits and concluded that it alleged sufficient facts to entitle the petitioner to an evidentiary hearing. *Id.* at 444, 470.

In sum, the appellate court correctly held that petitioner cannot rely on the same affidavits to support both an actual innocence claim and his constitutional claims of trial error. If petitioner contends that Ricks's and Barrier's affidavits constitute new evidence, then they might support an actual innocence claim; if he concedes they are not new, then they might support a claim of trial error, such as that counsel erred by failing to call Barrier, but they could not support an actual innocence claim.

B. Petitioner misunderstands this Court's precedent.

Petitioner is incorrect that *Washington* "never held" that the same evidence cannot be used to support an actual innocence claim and constitutional claims of trial error. Pet. Br. 14-15. As discussed, *Washington* defined an actual innocence claim as one that is based on new evidence that "is not being used to supplement an assertion of a constitutional violation with respect to [the] trial." *Washington*, 171 Ill. 2d at 479. Petitioner also is incorrect when he argues that *Washington* allowed the petitioner to use the same affidavit to support an actual innocence claim and an ineffective assistance claim. Pet. Br. 21-22. As the procedural history in *Washington* makes clear, the circuit court denied the petitioner's ineffective assistance claim but found his actual innocence claim had merit and granted him a new trial on that basis. *Washington*, 171 Ill. 2d at 479. As the Court explained, the only issue before the Court was whether actual innocence claims may be raised in postconviction proceedings. *Id.* at 476.

For these same reasons, petitioner is incorrect to argue that *Hobley* misread *Washington*. Pet. Br. 16. Petitioner also fails to acknowledge that this Court has never suggested that *Hobley* was wrongly decided but instead has relied on *Hobley* in subsequent cases, such as *Orange II*.[5]

[5] In a footnote, petitioner cites a press release that former Governor George Ryan pardoned Hobley, but petitioner does not argue that that fact supports his claims in this appeal, nor could he credibly do so. *See* Pet. Br. 16 n.1.

Indeed, petitioner does not (and cannot) cite any case from this Court holding that a petitioner may use the same evidence to support an actual innocence claim and a constitutional claim of trial error. Petitioner suggests that his arguments are supported by *People v. Tate* and *People v. Harris*, but he does not cite any specific language from those decisions. *See* Pet. Br. 15-18. In any event, *Tate* cannot support petitioner's arguments because *Tate* stated that it was not addressing an actual innocence claim. 2012 IL 112214, ¶ 27. And, while *Harris* addressed multiple claims, it does not state that petitioners may rely on the same evidence to support both an actual innocence claim and a claim of trial error, let alone purport to overrule *Washington*, *Hobley*, and *Orange*. 206 Ill. 2d 293, 301-06 (2002).

Petitioner likewise misses the mark when he argues that *Coleman*, 2013 IL 113307, "clarified" *Washington*, overruled *Hobley*, and held that petitioners may use the same evidence to support both actual innocence claims and claims of trial error, *see* Pet. Br. 17-18. *Coleman* did not cite *Hobley* or *Orange II*, and it expressly noted the Court's "unwavering" support of *Washington*. 2013 IL 113307, ¶ 93. Furthermore, *Coleman* cannot have overruled or "clarified" those cases, even sub silentio, because the only claim raised in *Coleman* was actual innocence. *Id.* ¶ 49. Thus, *Coleman* had no reason to reconsider prior opinions such as *Hobley*, and it provides no support for the arguments petitioner raises in this appeal.

Petitioner's reliance on appellate court decisions fares no better. *See* Pet. Br. 16-18, 22. As discussed, most appellate decisions have followed this Court's precedent and held that petitioners may not base trial error and actual innocence claims on the same evidence. *Supra* p. 18. The majority of appellate cases petitioner cites are irrelevant, as they did not discuss whether actual innocence claims and claims of trial error can be based on the same evidence because that issue was not presented on appeal. *See* Pet. Br. 16-18, 22 (citing *Lofton*, *Sparks*, *Williams*, and *Jarrett*).

And while petitioner cites two First District cases holding that a petitioner may use the same evidence to support an actual innocence claim and a claim of trial error, Pet. Br. 18-19 (citing *People v. Martinez*, 2021 IL App (1st) 190490, and *People v. Danao*, 2022 IL App (1st) 210287-U), the appellate court cannot overrule decisions of this Court, and other panels in the First District have declined to follow *Martinez* and *Danao* because they are contrary to this Court's precedent. *E.g.*, *People v. Logan*, 2022 IL App (1st) 201111-U, ¶¶ 84-89 (affirming denial of leave to supplement petition).

C. Petitioner's argument that this Court should overrule its longstanding precedent is meritless.

Petitioner briefly suggests that this Court should overrule *Hobley* (and, presumably, *Orange II* and other cases following *Hobley*). Pet. Br. 19-20. However, stare decisis "expresses the policy of the courts to stand by precedents and not to disturb settled points." *People v. Williams*, 235 Ill. 2d 286, 294 (2009). To depart from stare decisis, petitioner must show that the

governing decisions "are unworkable or badly reasoned" such that they are "likely to result in serious detriment prejudicial to public interest." *Id.* Petitioner does not argue that this Court's precedent is unworkable or prejudicial to the public interest (nor could he credibly do so), and his contention that *Hobley* is "badly reasoned" is based on his mistaken belief that this Court's precedent forecloses relief to petitioners, when instead it funnels a petitioner's evidence into the proper type of claim. *Supra* pp. 18-19.

Petitioner's other criticisms of this Court's precedent are also meritless. Petitioner is incorrect when he argues that the Court's precedent "thwart[s]" the principle that the Illinois Constitution "provide[s] greater due process than the Federal Constitution." Pet. Br. 17. As this Court has noted, the United States Supreme Court has never held that actual innocence claims are cognizable under the United States Constitution. *Washington*, 171 Ill. 2d at 480-82. Indeed, petitioner's own cases recognize that actual innocence claims are "not cognizable under the federal due process clause." *Martinez*, 2021 IL App (1st) 190490, ¶ 95 (cited at Pet. Br. 18-19). Therefore, this Court *has provided* petitioners with greater opportunities than exist under the federal Constitution, even though the Court requires actual innocence claims to be based on evidence independent of trial error claims.

For similar reasons, petitioner is incorrect that this Court's precedent "violate[s] federal due process" and the "Federal Constitution" because it "requires a defendant" to "forfeit one constitutionally protected right as the

price for exercising another." Pet. Br. 20, 23. As discussed, this Court's precedent does not require petitioners to "forfeit" a claim; it simply channels their allegations into the proper type of claim. *Supra* pp. 18-19.

Petitioner likewise misses the mark when he argues that the holdings of *Washington*, *Hobley* and *Orange II* "contradict[] the language of the Post-Conviction Hearing Act itself." Pet. Br. 21. Petitioner identifies no language from the Act that has been contradicted, which is unsurprising because, as this Court has noted, actual innocence claims are not "codified" in the Act. *Edwards*, 2012 IL 111711, ¶ 23. Rather, the requirements for actual innocence claims have been developed through the common law, in cases like *Washington*, *Hobley*, and *Orange II*, which have consistently held that actual innocence claims and trial error claims cannot be based on the same evidence. That the General Assembly has never amended the Act to provide that petitioners may raise actual innocence claims and claims of trial error based on the same evidence supports the conclusion that this Court's precedent does not contradict the legislature's intent. *See, e.g., People v. Johnson*, 2019 IL 123318, ¶ 32 (discussing legislative acquiescence).

* * *

In sum, petitioner cannot use the same evidence to support both an actual innocence claim and a claim of trial error. Again, if petitioner contends that Ricks's and Barrier's affidavits are newly discovered evidence, then they might support an actual innocence claim; if he concedes they are not new, then he could pursue a claim of trial error, such as that counsel

erred by failing to call Barrier. But he may not use these affidavits to support both an actual innocence and a trial error claim.

II. Petitioner Has Not Alleged a Colorable Actual Innocence Claim.

Setting aside whether petitioner may rely on the same evidence to support an actual innocence claim and a claim of trial error, this Court should affirm the denial of his motion for leave to file a successive petition because the appellate court correctly held that Barrier's and Ricks's affidavits are insufficient to allege a colorable actual innocence claim. As petitioner's cases hold, attempts to plead actual innocence claims are "rarely successful," *Edwards*, 2012 IL 111711, ¶ 32 (cited at Pet. Br. 24), because a petitioner must show, on the pleadings, that he has "newly discovered" evidence that is of such "conclusive character" that "it persuasively shows that the petitioner is factually innocent of the crimes for which he was convicted," *Taliani*, 2021 IL 125891, ¶ 68; *see also People v. Robinson*, 2020 IL 123849, ¶ 44 (evidence must show it is "more likely than not that no reasonable juror" would convict the petitioner). This is an intentionally "high standard," *Taliani*, 2021 IL 125891, ¶ 68, that petitioner fails to meet.

A. Barrier's affidavit is insufficient to support an actual innocence claim.

Three decades after Samuel Harlib's murder, Elizabeth Barrier signed an affidavit claiming that one night in 1991, a man named Reggie Smith came to her apartment to do drugs and said he "shot [a] car dealer." C311. Barrier's affidavit fails to support an actual innocence claim.

1. Barrier's affidavit is not new evidence.

Petitioner contends that Barrier's affidavit is "new evidence" because at trial she was addicted to drugs, lived as a "vagrant" in Florida, and "was unavailable to testify." Pet. Br. 11-12, 27. But that argument is contradicted by the record, including petitioner's own statements.

To plead actual innocence, petitioners must demonstrate that their evidence is "newly discovered," which means "evidence that was discovered after trial" and "could not have discovered earlier through the exercise of due diligence." *Jackson*, 2021 IL 124818, ¶ 42. And, of course, evidence is not "newly discovered" if it was "presumably known" to the defense before trial. *Coleman*, 2013 IL 113307, ¶ 100. Consequently, a petitioner cannot argue in a successive petition that evidence is newly discovered if he alleged in his initial postconviction petition that the evidence was known before trial and counsel erred by not introducing it. For example, in *Jackson*, 2021 IL 124818, ¶¶ 21, 42, this Court held that the petitioner could not argue in his successive petition that an eyewitness was newly discovered and supported his actual innocence claim where he had alleged in his initial petition that she was known before trial and counsel erred by not calling her. Similarly, in *Taliani*, 2021 IL 125891, ¶¶ 41, 71, this Court held that the petitioner could not argue in his successive petition that medical research was newly discovered where he had alleged in his initial petition that counsel erred by not introducing it at trial.

Barrier's affidavit is not newly discovered evidence for that exact reason: petitioner has repeatedly alleged that she was known before trial, was available to testify at trial, and counsel erred by not calling her testify. Specifically, petitioner alleged in his pro se posttrial motion that counsel was ineffective because he "failed to call Elizabeth Barrier" to testify even though she was "willing and able" to testify and exculpate petitioner. SR338-40. At a hearing on that motion, petitioner repeated his claim, telling the court that "my counsel did speak with her before trial [and] she was ready, willing, and able to testify" for the defense. R1177. The court asked counsel whether he spoke to Barrier, and counsel responded, "Yes, I did," and explained that he made a strategic decision not to call her to testify. R1177-78.

Similarly, in petitioner's initial postconviction petition, he again alleged that counsel erred by not calling Barrier to testify even though she "was willing and able" to testify. SR503. After the circuit court dismissed his petition, petitioner appealed and again alleged that counsel erred by failing to call Barrier to testify, and the appellate court found that his claim was meritless as counsel made a reasonable strategic decision. C228-30.

Therefore, the record shows that petitioner has maintained for decades that Barrier's testimony was known to the defense before trial, and she was available to testify. But now, after his ineffective assistance claim has failed multiple times, petitioner is taking the opposite position and claiming that Barrier's affidavit should be considered new evidence because she was

unavailable, and it was impossible for counsel to call her to testify. Pet. Br. 27. This Court's precedent prohibits such an about-face. *E.g.*, *Jackson*, 2021 IL 124818, ¶ 42; *Taliani*, 2021 IL 125891, ¶ 71; *see also People v. Tenner*, 206 Ill. 2d 381, 397-98 (2003) (successive petitions may not refashion or rephrase the allegations of a prior petition because "[w]e refuse to sanction piecemeal post-conviction litigation").

Petitioner's brief does not acknowledge that he has repeatedly attested that Barrier was available to testify. Instead, he states in conclusory fashion that Barrier was unavailable, counsel "made false representations" in court when he said that he had spoken with her, and she never said that Reggie Smith claimed to have killed Harlib. Pet. Br. 27. Petitioner's argument ignores (1) his own prior filings and statements, and (2) that counsel's representations are consistent with police reports and Detective Akin's testimony, which show that Barrier was available at least at some points before trial and she said that Smith told her he was not at the dealership when Harlib was killed. C240-41; SR575.

Moreover, even if petitioner could reverse his position and claim that Barrier was unavailable, he still has failed to establish that her affidavit is newly discovered evidence. As petitioner's authority shows, it is not enough for an affiant to attest that she was unavailable to testify; rather, the petitioner must demonstrate in his petition that counsel diligently attempted to obtain the witness's testimony, such as through a subpoena. *Edwards*,

2012 IL 111711, ¶¶ 35-37 (affiants were not "newly discovered" despite their attestations that they refused to cooperate with the defense, where counsel made "no attempt" to bring them to court, such as through a subpoena). But petitioner's brief does not contend that counsel subpoenaed Barrier and otherwise diligently attempted to find her and bring her to court. Indeed, it would be absurd for petitioner to make such an argument, as it would require him to ask this Court to believe that (1) counsel diligently attempted to obtain Barrier's testimony, including through a subpoena, and was unable to locate her; but (2) rather than simply telling the trial court that he was unable to locate Barrier, counsel falsely represented that he had spoken to Barrier. Accordingly, petitioner cannot demonstrate that Barrier's affidavit is new evidence.

2. Barrier's affidavit fails to show that petitioner is innocent.

Barrier's affidavit is insufficient for a second reason: it fails to persuasively show that petitioner is innocent and likely would be acquitted in a new trial. *See, e.g., Taliani*, 2021 IL 125891, ¶ 68 (evidence must be of such "conclusive character" that "it persuasively shows that the petitioner is factually innocent"); *Robinson*, 2020 IL 123849, ¶ 44 (evidence must show it is "more likely than not that no reasonable juror" would convict petitioner).

The requirement to plead innocence at this stage is not easily met, as two recent cases from this Court illustrate. In *Taliani*, this Court stated that a successive petition "undermines the finality of a conviction," and therefore

"a postconviction petitioner seeking to file a claim of actual innocence is held to a high standard." 2021 IL 125891, ¶ 68. The petitioner in *Taliani* alleged that he was innocent of murder because, at the time of the shooting, he was taking two medications, and research showed that combining them could cause involuntary intoxication. *Id.* ¶ 45. This Court held that the petitioner failed to allege a colorable actual innocence claim for several reasons, including that his claim of involuntary intoxication was rebutted by the trial record where (1) several witnesses testified that the petitioner acted normally at the time of the murder, and (2) a police officer testified that the petitioner said he was not taking his medication because it bothered his stomach. *Id.* ¶¶ 70-72 & n.5.

This Court's decision in *Jackson*, 2021 IL 124818, is also on point. There the petitioner alleged he was innocent based on an affidavit from a witness named Davis who attested that petitioner was not the shooter. *Id.* ¶ 41. This Court affirmed the denial of leave to file a successive petition because, among other reasons, (1) other eyewitnesses told police petitioner was the shooter, and (2) police reports attached to the petition "show that, had Davis testified, the State could have called multiple witnesses to testify that she told police petitioner was the shooter." *Id.* ¶¶ 44-45.

Barrier's affidavit is insufficient for the same reasons. Like *Taliani* and *Jackson*, Barrier's affidavit is rebutted by eyewitness testimony because Mendoza steadfastly identified petitioner as the shooter and unequivocally

stated that Smith was *not* the shooter. R440-41, 483. And, as in *Taliani* and *Jackson*, Barrier's affidavit is contradicted by her prior statements to police: Detective Akin testified at the parole hearing, and contemporaneous police reports show, that Barrier told police that Smith said he was not present when Harlib was murdered. C240-41; SR575. Accordingly, the record shows that Barrier's affidavit is not of such conclusive character that petitioner probably would be acquitted in a new trial.

It is also worth noting that Barrier's own affidavit suggests her memory is in doubt. Specifically, Barrier's affidavit was signed 27 years after the underlying events occurred; she admittedly suffered from a serious drug problem for years that was so debilitating she lived as a "vagrant"; and her affidavit is equivocal, as she offers the caveat that her affidavit is "to the best of my memory," and she suggests that she is unsure of certain memories in part due to the "amount of time that has past [sic]." C310-13.

Petitioner's only argument in support of Barrier is that this Court is required to "assume" that her affidavit would be "accepted by the jury as true." Pet. Br. 25. In support of that assertion, petitioner cites only *People v. Brooks*, 2021 IL App (4th) 200573, ¶ 44. But this Court has consistently held that an affidavit is insufficient to plead a colorable actual innocence claim if it is rebutted by the record. *E.g.*, *Taliani*, 2021 IL 125891, ¶¶ 70-72; *Jackson*, 2021 IL 124818, ¶ 45. And, as discussed, the record shows that Barrier's affidavit fails to support an actual innocence claim for that very reason.

B. Ramano Ricks's affidavit is insufficient to support an actual innocence claim.

Decades after testifying that petitioner said he killed Harlib, Ramano Ricks signed an affidavit that recanted his testimony and said he "did not know anything" about Harlib's murder. C303-08. The appellate court correctly held that Ricks's affidavit fails to meet the actual innocence standard.

1. Ricks's affidavit is not new evidence.

Petitioner makes little attempt to show that Ricks's affidavit is new evidence, and the few arguments he makes are contradicted by petitioner's own sworn statements. Specifically, petitioner claims that he could not contact Ricks, he had no reason to believe Ricks would recant, and he "had no outside evidence to prove that Ricks lied until he came forward" 27 years later. Pet. Br. 26. Petitioner also notes that recantations are new evidence "unless the evidence was available at the time of trial to demonstrate that the witness was lying." *Id.* In support of that argument, petitioner cites *People v. Barnslater*, 373 Ill. App. 3d 512, 523-24 (1st Dist. 2007). *Barnslater*, however, proves that petitioner is *not* relying on new evidence.

The petitioner in *Barnslater* alleged that he was innocent based on an affidavit from the victim recanting her testimony. *Id.* at 515-16. The circuit court denied his petition and the appellate court affirmed. *Id.* at 513. The appellate court explained that "evidence is not 'newly discovered' when it presents facts already known to the defendant at or prior to trial, though the

source of those facts may have been unknown, unavailable, or uncooperative." *Id.*; *see also Edwards*, 2012 IL 111711, ¶¶ 34-36 (same). The *Barnslater* court explained that recantations can sometimes be new evidence, but not "if the defendant had evidence available at the time of trial to demonstrate that the witness was lying." 373 Ill. App. 3d at 524; *see also* Pet. Br. 26 (same). The *Barnslater* court then held that the recantation by the victim in that case was not new evidence because the record showed that the petitioner had "other sources" who could have presented his "evidence of 'actual innocence'" at trial, as he could have called other witnesses to testify that the victim's testimony was false. *Barnslater*, 373 Ill. App. 3d at 524-25.

The same is true here. In his posttrial motion and initial petition, petitioner alleged that he spoke "many" times with Ricks before trial. SR337-38, 344-46, 545. According to petitioner, Ricks told him before trial that his statements to police were false and offered to recant if petitioner paid Ricks's attorney. *Id.* Petitioner further attested that his wife and his friend Nate Neal participated in these conversations. *Id.* Petitioner also attested that Ricks's lawyer met with petitioner before trial and said that (1) Ricks had said he knew petitioner was innocent and (2) petitioner "could call [the lawyer] as a witness [at trial] as to what Ricks had told him." SR545. And petitioner told his own counsel this information before trial. SR345, 545.

Then, at trial, the defense presented evidence that Ricks had recanted. R595-98. Specifically, during cross-examination, Ricks admitted that he had

told petitioner's counsel before trial that he did not know or remember anything about the murder (though he also testified that he simply did not want to talk to counsel and his statements to police and testimony inculpating petitioner were true). R595-98, 624-26. In addition, a defense investigator testified that he was present when petitioner's counsel spoke to Ricks and Ricks said, among other things, "that he didn't remember anything." R782. And, as noted, according to petitioner's own statements, the defense could have called petitioner, petitioner's wife, Nate Neal, and/or Ricks's lawyer to testify that Ricks had recanted before trial. Therefore, as petitioner's authority shows, Ricks's affidavit is not new evidence.

2. Ricks's affidavit does not contend that petitioner is actually innocent.

As discussed, to plead actual innocence, a petitioner must present new evidence "persuasively showing that the petitioner did not perform the acts that constitute the crimes for which he was convicted," such as DNA tests that prove the petitioner "was not the person who committed" the crime or an eyewitness who can "identify someone else" as the killer. *Taliani*, 2021 IL 125891, ¶ 63. Ricks's affidavit fails to meet that standard because it does not claim that petitioner is innocent — to the contrary, Ricks claims in his affidavit that he does "not know anything about the shooting." C304. As the appellate court stated:

> Ricks' affidavit does not speak to the identity of the shooter whatsoever. Ricks merely says he fabricated his prior statements and testimony that [petitioner] confessed to the shooting and that [Reggie] Smith told Ricks that [petitioner] was the shooter. That is not the same as saying Smith was the shooter or even that [petitioner] was not the shooter.

Flournoy, 2022 IL App (1st) 210587-U, ¶ 41. Indeed, as a matter of logic, an affidavit from someone attesting that he "does not know anything" about a shooting, and merely stating that the petitioner did not confess to him, does not demonstrate that the petitioner is "actually innocent." For example, if petitioner attached an affidavit from his friend Nate Neal stating that he spoke with petitioner after his arrest, and petitioner did not confess during that conversation, no one would argue that such an affidavit met the actual innocence standard. That Ricks testified at trial does not change this result because the logic remains the same: saying that petitioner did not confess is not the same as saying petitioner is innocent.

Moreover, as the appellate court noted, Ricks's testimony was "not the only, or even the strongest, evidence against [petitioner]." *Id.* Namely, Mendoza, an eyewitness to the crime, identified petitioner as the shooter and the appellate court held on direct appeal that his testimony was sufficiently reliable to sustain petitioner's convictions, C134-36, a decision that (1) was plainly correct, *infra* pp. 37-38; and (2) petitioner cannot re-litigate, *Taliani*, 2021 IL 125891, ¶ 53 ("Because a postconviction petition is a collateral attack on the judgment, issues that were raised and decided on direct appeal are barred from consideration by the doctrine *of res judicata*[.]").

Ricks's affidavit thus fails to meet the actual innocence standard because it does not contend that petitioner is innocent. *E.g.*, *Edwards*, 2012 IL 111711, ¶ 39 (affidavit was insufficient to meet actual innocence pleading standard because it failed to state that petitioner was not present during murder); *Taliani*, 2021 IL 125891, ¶ 72 (same result where petitioner's evidence showed that his medication "can" cause involuntary intoxication but he did not state he actually experienced that side effect himself).

One last point bears noting: petitioner's assertion that Ricks's recantation "rings true," Pet. Br. 30, is incorrect. Recantations are, of course, inherently unreliable. *People v. Porter*, 2021 IL App (1st) 190808-U, ¶ 49 ("[O]ur supreme court has repeatedly ruled that recantations are inherently unreliable."). And Ricks's recantation is particularly untrustworthy (and would be easily impeached) because petitioner has attested that Ricks offered to recant in exchange for money. SR344-45, 545. Indeed, contrary to petitioner's arguments, the record shows that it is Ricks's *trial testimony* that rings true, because it is corroborated by (1) Mendoza's eyewitness identification of petitioner, and (2) the paperwork belonging to petitioner found at the hotel where Ricks said petitioner confessed. *Supra* pp. 3-7.

C. Petitioner's remaining actual innocence arguments are barred and meritless.

While discussing his actual innocence claim, petitioner argues that Mendoza's eyewitness testimony is unreliable as there are supposedly discrepancies between how he described the shooter to police and petitioner's

appearance. Pet. Br. 31. Petitioner raised that same argument on direct appeal and the appellate court held that Mendoza's identification was reliable because, among other reasons, any alleged discrepancies were minor. C134-36. As noted, petitioner is barred from re-raising that argument now. *Taliani*, 2021 IL 125891, ¶ 53.

In any event, petitioner's criticism of the physical description Mendoza gave police is meritless. Mendoza unequivocally identified petitioner as the shooter when he viewed the lineup, and it is settled that "[t]he presence of discrepancies or omissions in a [witness's] description of the accused do not in and of themselves generate a reasonable doubt as long as a positive identification has been made." *People v. Slim*, 127 Ill. 2d 302, 309-12 (1989) (collecting cases); *see also, e.g., People v. Hill*, 2023 IL App (1st) 150396, ¶ 22 (same). Moreover, any "discrepancies" are minor (Mendoza told police that the shooter was around 5'9" and 180 pounds, while petitioner's arrest report states he was 5'11" and 170 pounds), and the rest are reasonable estimates (Mendoza estimated the shooter could be as old as his early 30's, while petitioner had just turned 40) or a matter of subjective opinion (Mendoza told police the shooter had "dark complexion," while petitioner's arrest report described his complexion as "medium"). *See* Pet. Br. 31; R438; SR73.[6]

[6] Petitioner's brief ignores his arrest report and instead claims that he was 6'0" and 200 pounds. Pet. Br. 4, 31. The only source for that assertion is the testimony of petitioner's wife, who estimated that petitioner was "almost 200 pounds" and said that she "never really did his height, but I'm five-nine, so he's got to be close to six." R699. Petitioner's brief also describes himself as

Petitioner's argument that Mendoza's description of the shooter resembles Reggie Smith, Pet. Br. 31, ignores that (1) Mendoza knew Smith because Smith often came to the dealership to make his car payments, so had he been the shooter Mendoza would have simply told the responding officers that Smith killed Harlib; and (2) Mendoza viewed Smith in a lineup and told police he was *not* the shooter, R440-41, 466-67, 483, 539-40, 554-55, 568.

Petitioner's suggestion that this Court disregard Mendoza's testimony because it is based on a cross-racial identification, Pet. Br. 31, is barred because his petition does not raise a claim based on cross-racial identification, let alone attach new evidence regarding such identifications that could not have been presented earlier, *see* C155-183; *Montanez*, 2023 IL 128740, ¶ 88 ("[A]ny issues to be reviewed must be presented in the petition filed in the circuit court, and a defendant may not raise an issue for the first time while the matter is on review."). There also is no merit to petitioner's argument, as the record shows that Mendoza had a long opportunity to view petitioner in a relaxed environment while they discussed buying a car, then jumpstarted and unlocked it, and experts confirm that "the impact of cross-racial identification is minimized by the amount of time an eyewitness has to view a suspect." *Desaussure v. Warden of Lieber Corr. Inst.*, No. 18-cv-01955, 2019 WL 4545586, *10 (D.S.C. May 15, 2019).

"light skinned," Pet. Br. 31, but his trial counsel referred to petitioner as being "medium complexioned." R886.

Petitioner also fails to acknowledge that his criticism of Mendoza and his claim of innocence are undermined by the fact that petitioner has been convicted 16 times for armed robbery, as well as bank robbery and kidnapping. R1027-1121; SR51-52, 97. Petitioner's long history of committing armed robberies and other dangerous crimes supports the conclusion that Mendoza accurately identified petitioner as the person who robbed the dealership and shot Harlib.[7]

Lastly, petitioner's argument that he has a "credible alibi" is meritless. Pet. Br. 31. Again, the jury heard his alibi defense and rejected it, with good reason. Indeed, his alibi defense is incredible on its face because, even though petitioner did not become a suspect until months after the shooting, at trial his witnesses claimed to recall — almost to the minute — when petitioner did perfectly mundane things on the day of the shooting, such as that petitioner supposedly returned home from a bar at 5:10 p.m., then left the house a few minutes later to run errands, and returned home at 7:10 p.m. *E.g.*, R741-747, 757. Moreover, petitioner's alibi witnesses were impeached by their prior statements, in which they said that they had "no idea" where petitioner was at the time of the murder. R792-93, 801-02. And, of course, any alibi provided by biased witnesses, such as petitioner's family, fails in the

[7] Evidence of a defendant's prior crimes is sometimes admissible at trial and sometimes not, *see, e.g.,* Ill. R. Evid. 404; however, as petitioner notes, evidentiary rules do not apply when a postconviction court considers an actual innocence claim, Pet. Br. 43, so this Court may consider the entirety of petitioner's criminal history when assessing whether he has persuasively shown he is innocent.

face of Mendoza's steadfast and credible testimony that he saw petitioner shoot Harlib. Therefore, the appellate court correctly held that petitioner failed to allege a colorable actual innocence claim.

III. Petitioner Cannot Establish Cause and Prejudice for His *Brady* and *Napue* Claims.

In addition to his innocence claim, petitioner alleges that Ricks's affidavit supports two constitutional claims of trial error: (1) prosecutors violated *Brady*, 373 U.S. at 83, by failing to disclose that Ricks would receive work release from prison in exchange for testifying against petitioner; and (2) prosecutors violated *Napue v. Illinois*, 360 U.S. 264 (1959), by relying on perjured testimony from Ricks. Pet. Br. 35-38. A motion for leave to file a successive petition "must submit enough in the way of documentation" to establish cause and prejudice for "each individual" constitutional claim. *People v. Smith*, 2014 IL 115946, ¶ 35; *see also* 725 ILCS 5/122-1(f). The appellate court correctly concluded that petitioner's *Brady* and *Napue* claims fail to meet that standard.

A. Petitioner has failed to establish "cause" for his *Brady* and *Napue* claims.

To begin, petitioner cannot establish cause for his *Brady* and *Napue* claims. To establish cause, petitioner "must show some objective factor external to the defense that impended his ability to raise the claim in the initial postconviction proceeding." *Holman*, 2017 IL 120655, ¶ 26; 725 ILCS 5/122-1(f). Naturally, a petitioner "cannot satisfy the cause prong of the test"

when, in his initial petition, "he did, in fact, raise the specific claim he seeks to raise again in his successive petition." *Montanez*, 2023 IL 128740, ¶ 106.

Petitioner cannot establish cause for his *Brady* or *Napue* claims because he raised those claims in prior proceedings. In his pro se motion for a new trial, petitioner attested that prosecutors "coach[ed]" Ricks and he testified falsely in exchange for a "deal" to reduce his sentence, and prosecutors failed to disclose his deal. SR330, 334. After his posttrial motion was dismissed, he argued on direct appeal that prosecutors relied on perjured testimony from Ricks and "suppressed evidence favorable to the defense." C147, 224-25. Then petitioner filed a postconviction petition alleging once again that prosecutors knowingly presented false testimony from Ricks and concealed that Ricks had been given a deal to testify. SR502, 507, 510-12, 526. Petitioner supported those allegations with his own affidavit, in which he repeated the same allegations he had made in his previous affidavit. SR545. Accordingly, petitioner cannot show cause. *Holman*, 2017 IL 120655, ¶ 26; *Montanez*, 2023 IL 128740, ¶ 106; 725 ILCS 5/122-1(f).

Nor does it matter that with his successive petition, unlike his prior proceedings, petitioner submitted an affidavit from Ricks. Indeed, petitioners may not "relitigate [a] claim" in a successive petition by relying on "new affidavits that were not submitted with the first petition." *People v. Erickson*, 183 Ill. 2d 213, 226-27 (1998); *see also People v. Davis*, 2014 IL 115595, ¶ 55. For example, in *Davis*, the petitioner alleged in a pro se postconviction

petition that his trial counsel was ineffective for failing to investigate exculpatory witnesses; he then sought leave to file a successive petition alleging that counsel erred by failing to investigate a potential witness, based on an affidavit from that witness. 2014 IL 115595, ¶¶ 53-56. This Court held that the petitioner could not establish cause, and thus could not file a successive petition, because a petitioner "is not permitted to develop the evidentiary basis for a claim in a piecemeal fashion in successive postconviction petitions, as [the petitioner] has attempted to do here." *Id.*; *see also, e.g., Montanez*, 2023 IL 128740, ¶ 108 (successive petitions "are not procedural vehicles for piecemeal discovery and litigation"). Likewise, here petitioner may not continue his piecemeal litigation by once again claiming that prosecutors presented false testimony from Ricks and failed to disclose that he received a deal to testify against petitioner.

B. Petitioner has failed to establish "prejudice" necessary to allege a *Brady* claim.

Petitioner also cannot establish "prejudice" necessary to file a successive petition raising a *Brady* claim. Prejudice requires petitioner to "demonstrat[e]" that the claim he seeks to raise "so infected the trial that the resulting conviction or sentence violated due process." *Smith*, 2014 IL 115946, ¶ 33. In turn, under *Brady*, petitioner must prove that (1) the People withheld exculpatory evidence and (2) there is a reasonable probability petitioner would have been acquitted if he had that evidence before trial. *Brady*, 373 U.S. at 87; *Harris*, 206 Ill. 2d at 293.

Petitioner contends that Ricks's affidavit shows that "a deal had been made where [Ricks] received work release for his armed robbery sentence after agreeing to testify" against petitioner. Pet. Br. 36. However, as the appellate court correctly pointed out, Ricks's affidavit, which was prepared by petitioner's retained counsel, merely claims that at some point Ricks was given work release (as many inmates are), not that he specifically received work release (or any other benefit) in exchange for his testimony against petitioner. *Flournoy*, 2022 IL App (1st) 210587-U, ¶ 56. Moreover, even if Ricks received a promise of future work release, petitioner's *Brady* claim still fails because he has not provided evidence (such as an affidavit from trial counsel) that a deal was concealed from counsel. Indeed, petitioner's counsel told the jury that Ricks was "a liar" who inculpated petitioner in hopes of receiving a benefit from prosecutors. R884-93, 896-97, 914.

Lastly, even if a deal existed and was concealed from the defense, petitioner has not shown a reasonable probability he would have been acquitted had he known of the alleged deal. Again, the prosecution had very strong evidence of petitioner's guilt that was unrelated to Ricks's testimony because Mendoza was an eyewitness who unequivocally identified petitioner as shooter. Moreover, evidence that Ricks received work release would have done little to impeach his testimony, as jurors and courts routinely credit witnesses who testify in exchange for a reduced sentence. *See, e.g., People v. Belknap,* 2014 IL 117094, ¶¶ 15, 54-62 (evidence was not closely balanced

where case rested largely on jailhouse informants who testified that defendant confessed to murder, even if those informants hoped to or did receive sentencing reductions); *People v. Manning*, 182 Ill. 2d 193, 203, 210-11 (1998) (jury could credit testimony of witness that defendant confessed, even though witness's prison sentence was cut by more than 50% in exchange for testifying).

Furthermore, as the appellate court pointed out, any alleged deal was "minor": Ricks received a lengthy sentence — 10 years in prison — and the only benefit petitioner contends Ricks received was work release, meaning that near the end of his sentence he would remain in custody but be released for the portion of the day he was engaged in employment. *Flournoy*, 2022 IL App (1st) 210587-U, ¶ 59. The impeachment value of such a minor benefit pales in comparison to the evidence corroborating Ricks's account of petitioner's confession, such as Mendoza's identification of Ricks and police finding paperwork belonging to petitioner at the hotel where Ricks said petitioner confessed. Consequently, petitioner cannot show he would have been acquitted if he had known of the alleged work release deal.

One last point bears noting. Petitioner suggests that when Ricks first inculpated petitioner, Detective Akin may have promised Ricks that he would do what he could to help get Ricks a lesser sentence for the armed robbery charges he was facing. Pet. Br. 36. But, again, Ricks's affidavit does not say that he received a lesser sentence in exchange for testifying against

petitioner. C303-08. Moreover, the written statement Ricks gave to police inculpating petitioner states that police did not offer him anything for his statement. C248. And, perhaps most importantly, the record shows that by the time he testified against petitioner, Ricks had received a significant sentence — 10 years in prison — for his armed robbery conviction. R627-28. Therefore, petitioner has failed to allege a valid *Brady* claim.

C. Petitioner also has failed to establish "prejudice" necessary to allege a *Napue* claim.

Petitioner has also failed to plead a claim under *Napue*, 360 U.S. at 269-71, which provides that a defendant is entitled to a new trial if (1) a witness testified falsely, (2) the State knew the testimony was false, and (3) there is a reasonable likelihood the testimony affected the outcome of trial. Petitioner fails to show each of these elements.

Petitioner first alleges that "Ricks testified that he had not been promised anything in exchange for his testimony, and that his sole motive for taking the stand was to 'see justice done.'" Pet. Br. 37. Petitioner claims that was false because in his affidavit, Ricks said that Detective Akin had offered to help him get work release and at the parole revocation hearing, Akin said that Ricks asked if he (Akin) could "help" with his armed robbery charges. *Id.* at 38. To begin, petitioner does not accurately characterize Ricks's testimony because (1) Ricks testified that the prosecutor had not offered him a deal, and nothing in Ricks's affidavit is to the contrary, *see* R626-27; and (2) Ricks testified that he contacted police because he wanted to "see justice

done," not that it was the sole reason he was testifying, R609. Even setting that aside, a *Napue* claim based on the allegation that Ricks received a benefit for testifying fails for the same reason petitioner's *Brady* claim fails: (1) there is no evidence Ricks actually received a benefit in exchange for testifying, and (2) petitioner would not have been acquitted if Ricks had testified that he received such a benefit. *Supra* pp. 42-45.

Petitioner further alleges that prosecutors presented false testimony from Ricks that petitioner said he killed Harlib. Pet. Br. 38. This allegation fails to meet all three elements of *Napue*'s test. First, for the reasons discussed, the record rebuts petitioner's claim that Ricks testified falsely because (1) recantations are inherently unreliable, (2) Ricks's testimony was corroborated by Mendoza's identification of Ricks as the shooter and police finding paperwork belonging to petitioner at the hotel where Ricks said petitioner confessed, (3) petitioner has previously attested that Ricks offered to recant in exchange for money, and (4) no evidence corroborates Ricks's recantation. *Supra* p. 36.

Second, as the appellate court correctly pointed out, *Napue* prohibits the *knowing* use of false testimony, and even if Ricks made up a story about petitioner confessing, there is no evidence the People knew his testimony was false. *Flournoy*, 2022 IL App (1st) 210587-U, ¶ 53. Importantly, Ricks's affidavit does not state that police or prosecutors knew his testimony was false. C303-08. That omission is significant because Ricks's affidavit is not a

pro se document created by an untrained layperson, but rather a lengthy affidavit prepared by petitioner's retained counsel; thus, petitioner cannot argue that Ricks's account is undeveloped. Further, the record shows that the People had every reason to believe Ricks's testimony was true because it was corroborated by Mendoza's identification of Ricks as the shooter and police finding paperwork belonging to petitioner at the hotel where Ricks said petitioner confessed. *Supra* pp. 4-7.

Petitioner nevertheless speculates that the People knew Ricks's testimony was false given how Ricks's account unfolded. Pet. Br. 38. However, speculation is insufficient to file a successive petition. *E.g., Smith*, 2014 IL 115946, ¶¶ 34-35 (petitioners "must submit enough in the way of documentation" to "demonstrate" prejudice). Moreover, petitioner's speculation is baseless. Petitioner first speculates the People knew Ricks's testimony that petitioner confessed was false because in Ricks's initial discussion with Detective Akin, Ricks said that Reggie Smith told him he was the getaway driver and petitioner was the shooter, but Ricks did not mention his discussions with petitioner. Pet. Br. 38-39. But at trial, Ricks and Detective Akin explained that, during that first conversation, Akin only asked Ricks about his conversations with Smith, and not about any conversations Ricks may have had with petitioner. R569-70, 593, 605. Ricks testified that, thereafter, he spoke further with an Assistant State's Attorney

and told her that, in addition to his conversation with Smith, he had met with petitioner at the Days Inn and petitioner said he was the shooter. R594.

Nothing in this chronology shows that the People knowingly presented false testimony. To the contrary, it is understandable that when Detective Akin and Ricks first spoke, Akin focused his questions on conversations between Ricks and Smith because they had been arrested together for the grocery store robbery. R577, 591. Moreover, it is not uncommon for witnesses in a criminal investigation to add to or change their accounts, and such changes do not prove that prosecutors knowingly presented false testimony. *E.g., People v. Kidd*, 175 Ill. 2d 1, 29 (1996) (*Napue* does not prohibit prosecutors from presenting a witness's testimony "simply because there are discrepancies" in what the witness has said "at different times on different occasions").

Petitioner's only other argument is that prosecutors knew Ricks's testimony was false because Ricks alleges in his affidavit that, at some point after Ricks first inculpated petitioner, Detective Akin said that petitioner could not be prosecuted unless petitioner confessed. Pet Br. 38-39. But even if Akin said that (which is unlikely, given that police had an eyewitness who had identified petitioner as the shooter), it would not show that prosecutors knowingly presented false testimony. Again, Ricks does not contend that Akin told him to testify falsely or that Akin knew Ricks's account was false. *See* C307. At most, Akin's alleged comment was in inquiry, asking whether

petitioner had ever discussed the murder with Ricks, which is a reasonable question given that police found petitioner's paperwork at the hotel where Ricks was staying. Accordingly, petitioner has failed to show that prosecutors knowingly presented false testimony.

Lastly, petitioner has failed to demonstrate the final element of *Napue*, that he was prejudiced by Ricks's testimony, given that, among other things, (1) petitioner's guilt is clearly established by Mendoza's steadfast eyewitness testimony that petitioner was the shooter, and (2) petitioner has not shown that the jury relied on Ricks's testimony where the defense called him a "liar" whose account changed over time and was making up a story to get a "deal." While petitioner argues that confessions are powerful evidence, Pet. Br. 39, none of the cases he cites address *Napue* claims, nor do they apply here where petitioner's guilt was established by an unbiased eyewitness like Mendoza, whose steadfast identification of petitioner was found to be credible on direct appeal and cannot be re-litigated now.

* * *

In sum, petitioner cannot establish cause for his *Brady* and *Napue* claims because he raised those claims in prior proceedings and he cannot show prejudice because the record rebuts his allegations.

IV. Petitioner Cannot Establish Cause and Prejudice for His Ineffective Assistance of Counsel Claim.

Petitioner's final claim is that trial counsel provided ineffective assistance based on Barrier's allegations in her affidavit that Reggie Smith

told her he killed Harlib but she did not speak to counsel before trial. Pet. Br. 41-44. The appellate court correctly held that petitioner failed to demonstrate cause and prejudice for this claim.

A. Petitioner has failed to establish "cause" for his ineffective assistance claim.

As noted, to demonstrate "cause" petitioner must show that he did not raise, and could not have raised, his ineffective assistance claim in his prior proceedings. *Holman*, 2017 IL 120655, ¶ 26. And petitioner may not "relitigate" a claim in a successive petition by relying on new affidavits that were not submitted with the first petition. *E.g., Davis*, 2014 IL 115595, ¶ 55. Nor may he relitigate a claim by "rephrasing" essentially the same argument. *Tenner*, 206 Ill. 2d at 398 (collecting cases).

Here, as discussed, petitioner has repeatedly claimed in prior proceedings that counsel was ineffective for not calling Barrier to testify. *Supra* pp. 27-28. Petitioner first raised this claim in his pro se posttrial motion, but the trial court denied it. SR340; R1177-79. He again alleged in his initial postconviction petition that counsel was ineffective for not calling Barrier, and the appellate court denied that claim on the merits. C228-30; SR503, 508, 520-21. Accordingly, petitioner cannot establish cause.

B. Petitioner has failed to establish "prejudice" necessary to allege his ineffective assistance claim.

Petitioner also cannot establish prejudice necessary to file a successive petition raising his ineffective assistance claim, which here requires him to show that (1) counsel's performance was deficient; and (2) there is a

reasonable probability that, had counsel called Barrier to testify, petitioner would have been acquitted. *Strickland*, 466 U.S. at 687, 694.

1. Counsel's performance was not deficient.

Petitioner contends that counsel's performance was deficient because Barrier alleges in her affidavit that counsel never spoke to her. Pet. Br. 41. That argument fails for two independent reasons.

First, it is contradicted by the record, which shows that counsel did speak to Barrier before trial and based on their conversation, made a strategic decision not to call her to testify. Specifically, at the hearing on petitioner's pro se posttrial motion, the trial court asked counsel whether he had spoken with Barrier and counsel responded, "Yes, I did, Judge," then he provided strategic reasons for not calling her to testify at trial, including that she did not say that Reggie Smith confessed to the shooting as petitioner had claimed. R1177-79.

Petitioner contends that counsel's representation that he spoke with Barrier was "false" and points out that, decades after petitioner's trial, counsel was disbarred for making false statements to a court about his misappropriation of a client's funds. Pet. Br. 27 (citing C321-22). But petitioner overlooks that he himself has also repeatedly stated that his counsel spoke with Barrier before trial. For example, at that posttrial hearing, petitioner said "my counsel did speak with Elizabeth Barrier before trial," R1177, and in his initial postconviction petition, petitioner's claim was

premised on information that "counsel learned from Elizabeth Barrier" before trial, SR520. In addition, counsel's representation that he spoke with Barrier and chose not to call her because she did not implicate Smith is supported by police reports which show that Barrier (1) was available and willing to talk about the case, at least with police, on multiple occasions before trial, and (2) told police that Smith said he was not at the car dealership when Harlib was killed. C240-41. Further, the record shows that counsel thoroughly prepared for trial and vigorously defended petitioner (thus supporting his representation that he spoke with Barrier): counsel retained an investigator who assisted in the case in several ways, including meeting with witnesses; counsel investigated and called 12 other witnesses to testify for the defense; and counsel met with Ricks multiple times before trial to attempt to get him to recant his statements to police. *E.g.*, R595-600, 780-82; *see also* R668-789.

Second, even if Barrier never spoke with counsel, petitioner's ineffective assistance claim still fails. The thrust of Barrier's affidavit is that she was completely *unavailable* to speak to counsel or testify at trial, because she had a serious drug problem, had moved out of state, lived "as a vagrant" with no fixed address or phone number, and was too scared of Reggie Smith to implicate him. C311-13; *see also* Pet. Br. 11-12 (stating that Barrier "was unavailable to testify at trial"). Taking those statements as true, petitioner's ineffective assistance claim fails because, as common sense and precedent dictate, one "cannot fault defense counsel for failing to pursue a witness who

was apparently unavailable." *People v. Williams*, 147 Ill. 2d 173, 247 (1991); *see also, e.g.*, *People v. Patterson*, 2022 IL App (1st) 182542, ¶ 63 (same).

2. Counsel's performance was not prejudicial.

In addition, petitioner's claim is meritless because he cannot show that he was prejudiced by counsel's decision not to call Barrier to testify. First, this Court has consistently held that ineffective assistance claims cannot be based on counsel's failure to investigate or present inadmissible evidence. *E.g., People v. Pecoraro*, 175 Ill. 2d 294, 322 (1997) (that another man allegedly confessed was inadmissible hearsay and, therefore, defendant could not establish prejudice from counsel's failure to learn of the alleged confession); *People v. Orange I*, 168 Ill. 2d 138, 161 (1995) (similar result); *see also People v. Jenkins*, 2022 IL App (1st) 192514-U, ¶ 36 (collecting cases and holding that "a defendant fails to show prejudice based on counsel's failure to investigate where the relevant evidence would have been inadmissible"). As the appellate court correctly noted, petitioner's ineffective assistance claim fails because Barrier's statements in her affidavit that Smith confessed "are hearsay and would not have been admissible at [petitioner's] trial" if she had been called to testify. *Flournoy*, 2022 IL App (1st) 210587-U, ¶ 67 (citing *People v. Bowel*, 111 Ill. 2d 58, 66 (1986)).

Petitioner's only response on this point is that *Robinson*, 2020 IL 123849, prohibits this Court from denying his claim on the ground that Barrier's testimony is inadmissible. Pet. Br. 43. But *Robinson* is a much

different case. There the petitioner raised an actual innocence claim (not an ineffective assistance claim) and the parties disputed whether the evidence he relied on would be admissible at trial. *Robinson*, 2020 IL 123849, ¶¶ 77-81. The Court held that Rule of Evidence 1101(b)(3), which provides that rules of evidence do not apply to "postconviction hearings," permits postconviction courts to consider whether new evidence demonstrates that a petitioner is actually innocent even if the evidence would be inadmissible in a new trial. *Id.* ¶¶ 79-80. Petitioner is now seeking to significantly expand *Robinson* and hold that where a petitioner faults his counsel for not presenting certain evidence, a court in postconviction proceedings is prohibited from ruling that counsel's actions did not prejudice the petitioner even if the evidence would have been inadmissible at trial. *See* Pet. Br. 43.

Petitioner's proposed rule is contrary to *Strickland* and would lead to absurd results. The very nature of ineffective assistance claims requires a determination of whether counsel made a mistake that affected the outcome of trial, and counsel cannot be said to have made such a mistake by failing to introduce inadmissible evidence. *See, e.g., Strickland*, 466 U.S. at 687, 694; *Pecoraro*, 175 Ill. 2d at 322. By contrast, actual innocence claims are focused not on attorney error but on whether a person is actually innocent and wrongly imprisoned, even though there was no error at trial, *see, e.g.*, *Washington*, 171 Ill. 2d at 479; in that context, when the concern is not

attorney error, but whether an innocent person has been convicted, it is more reasonable not to apply rules of evidence.

Petitioner's proposed rule would also lead to absurd results. Under petitioner's view, for example, a petitioner could allege a colorable ineffective assistance claim that counsel erred by failing to introduce polygraph results to corroborate a defense witness, even though it has long been settled that polygraph results are inadmissible. *See People v. Vriner*, 74 Ill. 2d 329, 347 (1978) ("[T]he well-established rule" is that polygraph results "are not admissible at trial to prove" guilt or innocence).

Simply put, Rule 1101's provision that the rules of evidence do not apply to postconviction hearings does not mean that courts should ignore the requirements of *Strickland*. Instead, Rule 1101 and *Robinson* mean, at most, that courts need not exclude such evidence *in postconviction proceedings*. For example, if a petitioner submits an affidavit from his counsel's secretary attesting that counsel said before trial that he had no intention of investigating the petitioner's case, the postconviction court need not exclude the affidavit even though it is hearsay, and the petitioner may rely on it to support his claim that counsel erred by not investigating his case. If, however, petitioner faults his counsel for failing to introduce inadmissible evidence, then the postconviction court should apply *Strickland* and hold that counsel cannot be faulted for failing to introduce inadmissible evidence. Indeed, courts after *Robinson* have continued to hold, even at the initial

stages of postconviction proceedings, that trial counsel cannot be faulted for failing to investigate or introduce inadmissible evidence. *E.g.*, *Jenkins*, 2022 IL App (1st) 192514-U, ¶¶ 36-37 (affirming summary dismissal of petition).

Second, even if petitioner were correct that this Court must ignore that Barrier's proposed testimony is inadmissible, petitioner still has failed to show that he would be acquitted if Barrier testified. As discussed, Barrier's testimony would be impeached by Detective Akin's testimony and contemporaneous police reports stating that Barrier said that Smith told her he was *not* present when Harlib was murdered. C240-41; SR575; *see* *Jackson*, 2021 IL 124818, ¶ 45 (eyewitness affidavit exculpating petitioner was insufficient to justify filing successive petition because affiant would be impeached by her prior statements). Moreover, Barrier's current account is further undermined by the equivocal statements in her affidavit and that her memory is affected not only by the passage of time but also because she had a drug problem for years that was so serious that she was homeless. C312-13. By contrast, Mendoza's eyewitness identification of petitioner as the person who shot Harlib during an armed robbery was unequivocal and unimpeached, and it is corroborated by the fact that petitioner previously was convicted of numerous armed robberies and other violent felonies. *Supra* pp. 4-7, 39. The reality is, if Barrier testified at a new trial, a jury would reach the same conclusion the jury reached in 1994 and courts have affirmed ever since: petitioner killed Samuel Harlib.

CONCLUSION

This Court should affirm the appellate court's judgment.

December 15, 2023

Respectfully submitted,

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RULE 341(c) CERTIFICATE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing 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 and the certificate of service, is 14,099 words.

/s/ Michael L. Cebula
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PROOF OF SERVICE

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 December 15, 2023, the foregoing **Brief of Respondent-Appellee People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which provided notice to the following registered email address:

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Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail thirteen copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

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