No. 129753

IN THE

SUPREME COURT OF ILLINOIS

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

REPLY BRIEF FOR PETITIONER-APPELLANT

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ARGUMENT

Kyjuanzi Harris made a colorable claim of actual innocence based on new evidence by providing Wynton Collins's affidavit in which Collins averred that Sacky committed the shooting, he just found out that Harris was in prison for the shooting, and he did not come forward due to fear.

The State does not contest that Illinois precedent holds that "newly discovered evidence includes testimony from a witness who essentially made himself unavailable as a witness out of fear of retaliation." *People v. Class*, 2023 IL App (1st) 200903, ¶ 76 (citing *People v. Ortiz*, 235 Ill. 2d 319, 334 (2009)). Harris's motion and Collins's affidavit provide colorable proof that Wynton Collins was an undiscoverable witness before trial because Collins immediately fled the park, he did not speak to any investigator or lawyer about the shooting, and he refused to come forward until he met Harris in prison and learned that Harris was in prison for a shooting committed by Sacky. (C. 531-33). Additionally, the State does not argue the averments in Collins's affidavit were immaterial, cumulative, or insufficient to undermine confidence in the verdict. Instead, the State contends Harris, a *pro se* petitioner, failed to adequately plead Collins could not have been discovered before trial, or during prior postconviction proceedings. (St. Br. 11-21).

This Court should reject the State's arguments as contrary to both the law and the facts of this case. When the averments in Harris's motion for leave to file and Collins's affidavit are accepted as true, Harris has made a *prima facie* showing that no amount of due diligence could have uncovered Collins's potential testimony before trial or during prior postconviction proceedings. This Court has never required a *pro se* petitioner raising a claim of actual innocence in a successive petition to show that new evidence could not have been discovered during prior postconviction proceedings. Since no positive evidence conclusively refutes the conclusions that

can be drawn from motion for leave to file and supporting affidavit, this Court should reverse the trial court's order denying Harris leave to file his successive petition, and remand this case for second-stage postconviction proceedings.

A. Harris's motion for leave to file, Collins's affidavit, and the record satisfy the low threshold for showing Collins's potential testimony is "new" and raises a colorable claim of actual innocence.

Collins's affidavit establishes that he saw Sacky commit the shooting, he never spoke to any investigator or lawyer about the shooting due to fear of Sacky, he never met Harris before trial, and in approximately January of 2020, he learned that Harris was in prison for the shooting. (C. 531-33). This Court should find that Harris's motion for leave to file and Collins's affidavit satisfied the low threshold for establishing a colorable claim of actual innocence, including a showing that Collins was a newly discovered witness, because no amount of due diligence could have uncovered his potential testimony before trial.

The State inaccurately asserts Harris did not provide information from which the circuit court could determine when Harris first learned of Collins's knowledge about the shooting. (St. Br. 5, 17). But Collins's January 3, 2020 affidavit was executed almost a year after the dismissal of Harris's first postconviction petition on February 27, 2019. (C. 371). Additionally, in that affidavit, Collins averred, "I am coming forward now because *I just found out* that Kyjuanzi Harris was incarcerated for this horrific crime that I know personally that he didn't do." (C. 532-33) (emphasis added). The phrase "just found out" establishes Harris became aware of Collins's potential testimony well after his first postconviction petition was dismissed on February 27, 2019. (C. 371). Harris's motion for leave also noted that his actual innocence claim and proportionate penalties challenge could not

have been asserted during prior postconviction proceedings. (C. 506).

Harris's pleading, including supporting documents, makes a colorable showing Collins was a new witness who could not have been discovered before because Collins feared the true perpetrator of this crime. (C. 532-33) (explaining Collins never spoke to anyone about the shooting, and feared for his safety because "everybody know how Sacky get down"). Illinois precedent, including *Ortiz, Griffin*, *Anderson*, and other cases, establish that an affidavit from an eyewitness who was unknown to the defense and made themself unavailable constitutes new evidence which could not have been discovered with the exercise of due diligence. *Ortiz*, 235 Ill. 2d at 334; *People v. Griffin*, 2022 IL App (1st) 191101-B, ¶ 60 (post-trial witness affidavits constituted "new evidence" because the defendant did not meet the witnesses until he was in prison, and could not have discovered the information in the affidavits with due diligence), *aff'd People v. Griffin*, 2024 IL 128587, ¶ 55 (approving of the appellate court's holding); *People v. Anderson*, 2021 IL App (1st) 200040, ¶ 63 (holding that an unknown, unobserved, and unrecorded witness who refused to come forward was a new witness, as there was "no amount of due diligence that [could have] forced him . . . to come forward."). In summary, Illinois law is clear that an affidavit from a witness who made himself unavailable due to fear of retaliation constitutes new evidence. *People v. Ayala*, 2022 IL App (1st) 192484, ¶ 13. Here, the circuit court and the appellate court erred by concluding otherwise.

The State and the appellate court postulate that Collins could have been discovered via an interview with Smith, Hardy, or first responders due to his location during the shooting, (St. Br. 13-14), but this speculation does not amount to positive

record evidence conclusively refuting the conclusion that no amount of due diligence could have uncovered Collins before trial. *People v. Robinson*, 2020 IL 123849, ¶ 60 (explaining that only positive record evidence rebuts the presumption that a well-pleaded fact is true at the leave-to-file stage). Right after the shooting, Collins fled the scene, and the park mostly cleared out. (R. 381-82). Detective Roberts recalled he arrived at the park three minutes after shooting and mostly police officers were present. (R. 380-82). There is no positive showing, such as a police report or discovery answer, showing Smith, Hardy, or a first responder saw Collins before he fled, or that these witnesses were capable of providing information that could facilitate the identification and testimony of Collins.

In fact, the record positively refutes much of, if not all, the State's speculation that due diligence could have discovered Collins. The State omits that Smith declined Harris's trial counsel's pretrial request to interview her even though she remained in contact with detectives and prosecutors. (R. 108-09, 276-77, 288-89). Harris's trial counsel did not have broad power to depose her. (Def. Br. 24). Harris's trial counsel faced significant hurdles including the passage of time and faded memories as Harris was not arrested until more than a year and a half after the shooting. (R. 407-09). The State did not present Collins or the boy who was beside the victim's car during the shooting despite the State having access to Smith, Hardy, detectives, and first responders before trial. The requirement of due diligence did not require Harris's counsel to outperform the police department and the Cook County State's Attorney Office by identifying and locating a witness to the shooting who the police were unable to identify themselves.

Critically, Smith testified she was not paying attention to her surroundings

before the shooting. (R. 275). In fact, her attention was on her friends rolling a blunt. (R. 272). When she saw the gun, she ducked to save her life. (R. 284). After the shooting, she recalled that the situation was crazy as she focused on trying to save Turner and Armstrong. (R. 286-88). Understandably, Smith's attention was focused on the activities of her, Turner, and Armstrong, as opposed to keeping a detailed log, with a description of every person in the area. The record thus does not support the conclusion that Smith could have notified Harris's trial counsel about Collins's existence.

Nor does the record show that Hardy could have notified trial counsel about Collins. In fact, the record demonstrates that it would have been almost impossible for counsel to pry any helpful information from her. Hardy, who was a convicted murderer, was not a reliable source of information due to her relationship to her nephew Sacky, and her reliability as an eyewitness was also undermined by her history of substance abuse, criminal convictions, and mental illness. (R. 297-98, 307, 309-10). She was addicted to heroin and diagnosed with paranoid schizophrenia. (R. 308-09). When Harris's trial counsel directly asked her who she saw in the park, she did not identify anyone by name or description. (R. 313). The post-trial evidence, including a recording of Hardy's recantation, indicates she identified Harris to protect her nephew Sacky. (C. 312-15); (CI. 434).

This is not a case in which the discovery or trial record provided clear notice to the defense of a potential missing witness. The discovery and trial record contains no mention of Collins. In summary, there is no positive record evidence that any amount of due diligence could have uncovered Collins before trial.

The State also argues Harris had to show what trial counsel knew at the

time of trial. (St. Br. 12). This argument fails because postconviction petitioners are not required to provide affidavits from trial counsel when alleging trial counsel failed to conduct an adequate investigation. *People v. Hall*, 217 Ill. 2d 324, 333–34 (2005); *People v. Williams*, 47 Ill. 2d 1, 4 (1970). This Court recognizes the inherent "difficulty of obtaining such an affidavit is self-apparent," as no counsel would admit to incompetence, laziness, or undercut their client's position. *Hall*, 217 Ill. 2d at 333-34. Thus, the lack of an affidavit from Harris's trial counsel does not preclude this Court from treating Harris's motion for leave to file and Collins's affidavit as true. *See People v. Barghouti*, 2013 IL App (1st) 112373, ¶ 16 (citing *Hall* to conclude that lack of an affidavit from trial counsel "does not permit us to ignore the allegations of [defendant's] postconviction petition.")

The State's argument is, at its base, a factual claim that Collins was a discoverable witness. However, it is well established, when "deciding the legal sufficiency of a postconviction petition, the [reviewing] court is precluded from making factual and credibility determinations." *Robinson*, 2020 IL 123849, ¶ 45. In *Griffin*, this Court recently clarified that when "assessing whether a petitioner has satisfied the *low threshold* applicable to a colorable claim of actual innocence, the [reviewing] court considers only whether the new evidence, if believed and not positively rebutted by the record, could lead to acquittal on retrial." *Griffin*, 2024 IL 128587, ¶ 40 (emphasis added) (citing *Robinson*, 2020 IL 123849, ¶ 60). This means that at "the pleading stage of postconviction proceedings, all well-pleaded allegations in the petition and supporting affidavits that are not positively rebutted by the trial record *are to be taken as true*." *Id.* ¶ 55 (emphasis added) (quoting *Robinson*, 2020 IL 123849, ¶ 45). When this Court accepts the averments in Collins's

affidavit as true, this Court should find that the record makes a colorable showing that he is a new witness as no positive record evidence rebuts this conclusion.

The State attempts to redirect attention from the lack of clear positive evidence by arguing that Harris "failed to allege" Collins could not have been discovered before trial with due diligence. (St. Br. 11-12). This argument was not raised in the appellate court. Regardless, the State's argument misrepresents both the record and the law because Harris alerted the circuit court he was relying on the actual innocence test, *and* supplied Collins's affidavit.

This Court has consistently held a *pro se* petitioner seeking leave to file may use "whatever means to prompt" the circuit court to grant such a request. *People v. Sanders*, 2016 IL 118123, ¶ 27. This Court does not require a *pro se* defendant pursuing leave to file to exercise technical perfection in the pleadings to obtain a ruling. *See People v. Tidwell*, 236 Ill. 2d 150, 157 (2010) (holding that even the failure to file a motion to leave did not prevent a circuit court from analyzing whether a defendant satisfied the cause-and-prejudice test).

This Court has held that when a defendant requests leave to pursue a successive postconviction petition based on actual innocence, "it is incumbent upon [a petitioner], by *whatever means*, *to prompt* the circuit court to consider whether 'leave' should be granted, and obtain a ruling on that question." *Edwards*, 2012 IL 111711, ¶ 24 (quoting *Tidwell*, 236 Ill. 2d at 157) (emphasis added). After the defendant prompts the circuit court of the basis for a successive postconviction petition, a request "should be denied only where it is clear, from a review of the successive petition and the documentation provided by the petitioner that, as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence."

Edwards, 2012 IL 111711, ¶ 24; *see also Prante*, 2023 IL 127241, ¶ 74 (only requiring a defendant to "produce newly discovered evidence that, when considered along with all the evidence presented at trial, would probably lead to a different result on retrial").

Harris provided notice that he presented a freestanding claim of actual innocence based on newly discovered evidence in the form of Collins's affidavit. He even directed attention to the actual innocence test as set forth in *Edwards*. (C. 508, 515-517, 519).The circuit court judge was on notice of its obligation to determine the question of whether Harris's motion for leave to file and Collins's affidavit, taken as true, could set forth a colorable claim of actual innocence. *Edwards*, 2012 IL 111711, ¶ 24; *Robinson*, 2020 IL 123849, ¶ 44.

The record proves Harris made a colorable showing of all three elements of the actual innocence test, including that Collins's affidavit was new evidence. Harris's motion and Collins's affidavit make a colorable showing that defense counsel could not have discovered Collins before trial because he immediately fled the scene of the shooting and refused to come forward until he met Harris in prison many years later and learned that Harris was in prison for a shooting that Collins observed Sacky commit. The speculation by both the State and appellate court that other eyewitnesses may have observed Collins before he fled and could have identified him for the defense at the time of trial is not supported by positive and clear record evidence, and does not provide a legally adequate basis at this stage of proceedings to deny leave to file.

Regarding the remaining elements of a claim of actual innocence, in the appellate court, the State did not contest whether Collins's affidavit was material and noncumulative evidence. *People v. Harris*, 2022 IL App (1st) 211255, ¶ 30.

Similarly, before this Court, the State did not address the last two elements of the actual innocence test and only asks this Court, in a footnote, to remand this case to the appellate court to determine whether the evidence was conclusive. (St. Br. 7, fn. 3). The State has forfeited any challenge of whether this Court may review and conclude that Harris satisfied all the elements of the actual innocence test. *See* Ill. S. Ct. R. 341(h)(7) (eff. Oct. 1, 2020); *People v. Sophanavong*, 2020 IL 124337, ¶ 21 ("[T]he doctrine of forfeiture applies to the State as well as to defendant."); *Griffin*, 2024 IL 128587, ¶ 70 (noting that "this Court has repeatedly held that the failure to argue a point results in forfeiture of the issue.").

Remand to the appellate court is also unnecessary because, while the other elements of the actual innocence test are not disputed by the State before this Court, this Court, like the appellate court, would have to decide them *de novo* if they were. *People v. Robinson*, 2020 IL 123849, ¶ 40. Applying that standard, this Court would have to find Collins's affidavit provides material, noncumulative, and conclusive evidence undermining confidence in the guilty verdict because Collins's identification conflicts with the identifications by Smith and Hardy, which were made under questionable circumstances. (Def. Br. 27-31); (C. 531-33). Those witnesses only caught glances of the shooter for a few seconds while their attention was on the shooter's weapon and trying to avoid gunfire. (R. 254-55, 279-81). Smith could not see the shooter's mouth or nose. (R. 284). Hardy's testimony, in particular, is suspect due her subsequent recantation, in which she implicates her nephew Sacky as the shooter. (C. 314-15, 538-42). Moreover, the trial evidence showed that she was far away from the shooting and she had a background that included felony convictions, substance abuse, and severe mental illness. (R. 307-12, 319). In addition, the shooter's face was partially covered by a scarf, and the lead detective

did not have a suspect for more than a year after the shooting until Hardy was arrested on drug charges. (R. 283, 304-05, 330-32, 360-62, 376-77). No forensic or video evidence connected Harris to the shooting. There is no evidence that law enforcement found the vehicle used in the shooting, and Harris did not make any inculpatory statements.

Collins's averment that Sacky was the shooter creates further doubt regarding the reliability and credibility of the State's witnesses. *See Anderson,* 2021 IL App (1st) 200040, ¶ 56 (holding that two witnesses' affidavits placed the trial evidence in an entirely different light); *People v. Wilson*, 2022 IL App (1st) 192048, ¶ 72 (holding that an account by a newly discovered witness would have forced the jury to reevaluate two trial witnesses' identifications of the defendant and make a "much different and potentially more difficult credibility determination"). In light of Collins's affidavit and other circumstances, Harris's case is one in which interests of justice certainly warrant closer examination during further postconviction proceedings.

The State solely relied upon questionable identification testimony, and Collins's affidavit places this testimony in different light. This Court has recognized that "eyewitness misidentification is now the single greatest source of wrongful convictions in the United States, and responsible for more wrongful convictions than all other causes combined." *People v. Lerma*, 2016 IL 118496, ¶ 2. This Court should ensure that eyewitness identification does not result in another wrongful conviction and life sentence of an innocent man.

Harris has consistently asserted his innocence, yet no post-trial court has ever reached the merits of his claims. For example, during his initial postconviction proceeding, Harris introduced several statements that tended to show Sacky was

the shooter, including a recorded recantation from Hardy, but his postconviction attorney failed to perform the basic task of providing properly sworn and notarized affidavits. *See People v. Harris*, 2020 IL App (1st) 190690-U (affirming second-stage dismissal because witnesses's affidavits were not properly sworn and notarized by Harris's postconviction counsel). In light of Collins's affidavit and other circumstances, this Court should ensure that Harris has a full opportunity to develop his current actual innocence claim with the assistance of postconviction counsel.

For the aforementioned reasons, this Court should conclude that Harris established a colorable claim of actual innocence. This Court should reverse the appellate court's decision and remand this case for second-stage postconviction proceedings. *Robinson*, 2020 IL 123849, ¶ 85 (remanding for second-stage proceedings when the record showed that a defendant fulfilled all three elements of showing colorable claim of actual innocence).

B. The record and postconviction petition demonstrate that Collins's affidavit could not have been discovered at the time of Harris's first postconviction proceeding and this Court's precedent prohibits the introduction of collateral bars to actual innocence claims due to the fundamental miscarriage of justice exception.

Under this Court's precedent, "new evidence" "must have been discovered since the trial and be of such character that it could not have been discovered *prior to trial* by the exercise of due diligence." *People v. Molstad*, 101 Ill. 2d 128, 134 (1984) (emphasis added) (internal citations and quotations omitted). This Court has never held that the definition of new evidence requires a defendant to establish that due diligence could not have discovered the evidence during prior postconviction proceedings.

For the first time on appeal, the State asks this Court to create a collateral

bar and a "cause" requirement in the form of a post-trial due diligence requirement. (St. Br. 15–21). However, the State has failed to disclose that an appellate court split has developed with respect to whether a reviewing court can consider the question of post-trial due diligence where denial or dismissal of the defendant's claims may result in a fundamental miscarriage of justice. *Compare People v. Beard*, 2023 IL App (1st) 200106, ¶ 49 (affidavits available when the defendant filed his initial petition did not prevent their consideration of a successive petition where the petition did not receive a ruling on the merits); *People v. Smith*, 2015 IL App (1st) 140494, ¶ 19 (petitioner need only show that the newly discovered evidence could not have been discovered before trial, not during the period after trial and pendency of the postconviction litigation process); *with People v. English*, 403 Ill. App. 3d 121, 133 (1st Dist. 2010) (a third alibi witness named in a successive petition is not newly discovered, as all alibi witnesses would have been available when the initial postconviction petition was filed); *People v. Snow*, 2012 IL App (4th) 110415, ¶ 22 (reiterating the holding in *English* that evidence was not newly discovered when "most of defendant's supporting evidence would have been available at defendant's trial or direct appeal with the exercise of due diligence"); *People v. Wideman*, 2016 IL App (1st) 123092, ¶¶ 53-62) (relying on *English* and *Snow* to hold a defendant failed to show a trial witness's post-trial affidavit was new evidence). But this Court does not need to resolve this split because the facts are clear: Almost a year after the dismissal of Harris's first postconviction petition, he learned that Collins was a witness to the shooting and Collins did not previously come forward due to fear.(C. 532-33). Consequently, Harris could not have raised this issue in his initial petition for postconviction relief.

The record supports the conclusion that Collins was an unknown witness

to Harris during proceedings on his initial postconviction petition and that no amount of prior due diligence could have discovered him during prior proceedings. Harris's motion for leave to file noted this actual innocence claim was not available during prior postconviction proceedings and Collins's affidavit supports this claim. (C. 506). In the January 3, 2020 affidavit, which was executed almost a year after the dismissal of Harris's first postconviction petition, Collins averred, "I am coming forward now because *I just found out* that Kyjuanzi Harris was incarcerated for this horrific crime that I know personally that he didn't do." (C. 532-33) (emphasis added). This averment, assumed to be true at this stage in the proceedings, establishes that prior to approximately January 3, 2020, Collins was an unknown eyewitness to Harris. Since Harris could not have known about Collins's knowledge during prior postconviction proceedings, the State's request for a collateral bar is inapplicable and this Court need not address the appellate court split to resolve this case. *See*, *e.g., People v. Bass*, 2021 IL 125434, ¶ 29-30 (explaining that Court will not address non-dispositive issues, including constitutional questions); *Peach v. McGovern*, 2019 IL 123156, ¶ 64 (holding that reviewing courts "will not decide moot or abstract questions, will not review cases merely to establish precedent, and will not render advisory opinions").

However, if this Court chooses to address the appellate court split, this Court should follow the appellate court's opinion in *Beard,* which highlighted the faulty reasoning in *English, Snow*, and *Wideman*. See *Beard*, 2023 IL App (1st) 200106, ¶¶ 44-48. In *Beard*, the appellate court explained that the opinions in question conflated the newly discovered analysis with the cause-and-prejudice test and were inconsistent with the goal of preventing a miscarriage of justice, which underlies the substantive due process right to raise a claim of actual

innocence. *Id.* ¶¶ 44-48. The *Beard* court declined to follow the *English* line of cases because "imprisonment of a factually innocent person is a fundamental miscarriage of justice" that shocks the conscience. *Id.* ¶ 48 (citing *People v. Taliani*, 2021 IL 125891, ¶ 55. *Beard* is consistent with this Court's longstanding precedent, the Illinois Constitution, and the fundamental miscarriage of justice exception. Ill. Const. 1970, art. I, § 2; *People v. Washington*, 171 Ill.2d 475l 487 (1996*). Ortiz*, 235 Ill. 2d at 331.

The State's argument for a post-trial due diligence requirement relies on the issue preclusion doctrines of collateral estoppel and *res judicata*. (St. Br. 18-20). The State asserts that any requirement would be "analogous" to the "'cause' standard" of the cause-and-prejudice test. (St. Br. 18-21). In other words, the State attempts to utilize a post-trial due diligence requirement to impose a procedural bar or graft a cause requirement to claims of actual innocence. However, the State's arguments for a cause, *res judicata*, or collateral estoppel bar conflict with precedent and are simply "incompatible with a defendant's constitutional right to assert an actual innocence claim in Illinois." *Ortiz*, 235 Ill. 2d at 331.

This Court has consistently held that the fundamental miscarriage of justice exception permits a defendant to raise a claim of actual innocence based on new evidence that was never previously presented without regard to the doctrines of *res judicata* or collateral estoppel. *Ortiz*, 235 Ill. 2d at 332-33; *Edwards*, 2012 IL 111711, ¶¶ 21-23; *Griffin*, 2024 IL 128587, ¶¶ 32-33. In *Ortiz*, this Court held that where a defendant presents newly discovered evidence to support an actual innocence claim, "collateral estoppel is *not applicable* because it is not the same 'claim.'" *Id.* at 332 (emphasis added). Issue preclusion doctrines do not bar "multiple claims of actual innocence where each claim is supported by newly discovered

evidence." *Id.* at 333.

Harris's motion to file a successive postconviction petition presented a new claim of actual innocence based on Collins's affidavit as Collins's knowledge about the shooting was previously unknown to Harris. This case is similar to *Ortiz* in which this Court held that a third successive petition based on evidence of actual innocence was not precluded because "it offered two additional eyewitnesses who were previously unknown to [the] defendant." 235 Ill. 2d at 333. Just as in *Ortiz*, this case involves a previously unknown witness. Consequently, this case is also distinguishable from *English*, *Snow*, and *Wideman* because those cases involve affidavits from either trial witnesses or an alibi witness, but Collins was an unknown witness during prior proceedings. *English*, 403 Ill. App. 3d at 133 (holding an alibi witness was not a new witness); *Snow*, 2012 IL App (4th) 110415, ¶¶ 22-26 (holding that trial witnesses's affidavits were not new); *Wideman*, 2016 IL App (1st) 123092, ¶¶ 53-62 (same). Since Collins was an unknown witness to Harris during prior proceedings, the fundamental miscarriage of justice exception prevents the use of a collateral estoppel or a *res judicata* bar, including a post-trial due diligence requirement, in this case.

Moreover, the State's request for a post-trial due diligence requirement that is equivalent to a "cause" requirement is directly contrary to *Ortiz*'s holding that the cause-and-prejudice test does not apply to actual innocence claims. *Ortiz*, 235 Ill. 2d at 330-31. In *Ortiz,* this Court held that where "a defendant sets forth a claim of actual innocence in a successive postconviction petition, the defendant is excused from showing cause and prejudice." *Id.* at 330. In *Taliani*, this Court clarified that when requesting leave to file an actual innocence claim "a petitioner *need not show cause* and prejudice [citation omitted] but must support his claim

of actual innocence with evidence that is 'newly discovered, material and not merely cumulative, and of such conclusive character that it would probably change the result on retrial.'" *Taliani*, 2021 IL 125891, ¶ 58 (emphasis added) (quoting *Ortiz*, 235 Ill. 2d at 330). But the State's request to require a defendant to show that new evidence of actual innocence was not available in previous postconviction proceedings would impose a requirement equivalent to a cause requirement. *See* 725 ILCS 5/122-1(f) (defining cause as "an objective factor that impeded [petitioner's] ability to raise a specific claim during his or her initial post-conviction proceedings"). That request conflicts with *Ortiz, Taliani*, and the Postconviction Hearing Act, and this Court should reject it.

Lastly, the State misplaces reliance on *People v. Warren*, 2016 IL App (1st) 090884-C, because in *Warren*, the appellate court held that the fundamental miscarriage of justice exception supported a conclusion that evidence was in fact "new" regardless of whether a petitioner's postconviction counsel had access to it. *Warren*, 2016 IL App (1st) 090884-C, ¶ 130. The State relies on a single sentence from *Warren*, (St. Br. 17), to support its general claim that "new evidence" excludes evidence that was available during prior postconviction proceedings, but the *Warren* opinion's statement was simply a reiteration of the questionable opinions of *English* and *Snow*. *See Warren,* 2016 IL App (1st) 090884-C. ¶ 114; *Supra.* p.13-14 (discussing the flaws in *English* and *Snow*). A complete reading of *Warren* supports reversal here as the appellate court held that there "would be a miscarriage of justice if [a] defendant were denied his day in court where his allegations and supporting documentation, supported by the record and taken as true at this stage, demonstrate that he was unable to put forth exculpatory evidence of his innocence through no fault of his own." *Id*. ¶ 130.

This Court should continue its own precedent of keeping courtroom doors open to meaningful review of actual innocence claims. *See*, *e.g., Griffin*, 2024 IL 128587 (holding that a defendant provided sufficient evidence for leave to file an actual innocence claim); *Robinson*, 2020 IL 123849 (same). While the State relies on the notion of finality, it is this Court's "firm belief that allowing an innocent person to remain incarcerated would offend all notions of fairness and due process." *Taliani*, 2021 IL 125891, ¶ 67.

For the aforementioned reasons, Harris's pleadings and Collins's affidavit establish a colorable claim of actual innocence and that a miscarriage of justice would result if Harris is denied meaningful exploration of Collins's affidavit during further postconviction proceedings at which Harris would be represented by counsel. (Open. Br. 13-31); *Supra.* pp. 9-11. Therefore, Harris respectfully requests that this Court reverse the appellate court's decision and remand this case to the circuit court for second-stage proceedings on his successive postconviction petition.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 18 pages.

/s/Samuel B. Steinberg
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No. 129753

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NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On August 7, 2024, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the petitioner-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

/s/Monica Rios
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