

No. 128587

IN THE

SUPREME COURT OF ILLINOIS

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| PEOPLE OF THE STATE OF |) | Appeal from the Appellate Court of |
| ILLINOIS, |) | Illinois, No. 1-19-1101. |
| |) | |
| Respondent-Appellant, |) | There on appeal from the Circuit |
| |) | Court of Cook County, Illinois, |
| -vs- |) | No. 10 CR 01910. |
| |) | |
| |) | Honorable |
| SHAMAR GRIFFIN, |) | Michael B. McHale, |
| |) | Judge Presiding. |
| Petitioner-Appellee. |) | |

BRIEF AND ARGUMENT FOR PETITIONER-APPELLEE

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ISSUES PRESENTED FOR REVIEW

- I. Whether this Court should uphold the well-reasoned decision of the appellate court applying the standard set forth in *People v. Robinson*, 2020 IL 123849, to evaluate the legal sufficiency of an actual innocence claim at the leave to file stage of the Post Conviction Hearing Act, irrespective of the nature of the underlying judgment, in this case, Shamar Griffin's guilty plea, and affirm its holding that he made a colorable claim of actual innocence.

- II. Whether the appellate court was required to consider whether Shamar Griffin established cause and prejudice for his ineffective assistance of counsel claim when reversing the denial of leave to file and advancing his petition to the second stage of post-conviction proceedings, and if it was, whether this Court should remand this matter for consideration by the appellate court in the first instance.

- III. Whether Shamar Griffin established cause and prejudice for his ineffective assistance of trial counsel claim such that his motion for leave to file his successive petition should be granted on this claim.

STATEMENT OF FACTS

Procedural history

Shamar Griffin was charged with murder and attempt murder stemming from the June 26, 2009, shooting of Melissa Williams and Otis Houston in Chicago. (Sec. C. 39-67)¹ On June 16, 2011, Griffin entered a guilty plea to one count of murder in exchange for a 35-year sentence pursuant to a negotiated plea agreement. (Sec. C. 39) Griffin did not move to withdraw his guilty plea. Griffin's direct appeal was resolved pursuant to an order on the parties' agreed summary motion, in which the appellate court vacated several fines and fees and awarded presentence custody credit. (TC. 107, 109-19; Sec. C. 103)

Griffin filed an initial *pro se* petition for post-conviction relief on September 17, 2017, alleging, *inter alia*, that his confession should be suppressed because it was coerced. (Sec. C. 1116-24) He also asserted that his claim established either actual innocence or trial counsel's ineffectiveness for failing to investigate the circumstances of his arrest. (Sec. C. 123-24) The circuit court summarily dismissed Griffin's petition, and the appellate court granted the Office of the State Appellate Defender's motion to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551

¹ Citations to the electronic record are as follows: (CLR Vol 1 of 1 190708 1314.pdf) is cited as (C.); (ROP Vol 1 of 1 190731 1005.pdf) is cited as (R.); (SupplementalRecord2 Vol 1 of 1 200107 1250.p) is cited as (Sup 2. C.); (SupplementalRecord1 Vol 1 of 1 190925 1620.pdf) is cited as (Sup 2. R.); and (SecuredRecord Vol 1 of 1 190731 1005.pdf) is cited as (Sec. C.). The hard copy volumes supplemented to Griffin's record are cited as (TC.), (T. Supp. C.), and (TR.).

(1987). (Sec. C. 110-15); *People v. Griffin*, No. 1-18-0490 (summary order entered on March 25, 2020).

On February 24, 2019, Griffin filed a motion for leave to file a successive petition, which is the subject of this appeal. (Sup2. C. 16-17) The petition alleged claims of actual innocence and ineffective assistance of trial counsel, and included Griffin's affidavit, as well as the affidavits of Lavonte Moore and Perrier Myles. (Sup2. C. 9-175) The affidavits indicated that a man named Jerrell Butler was the actual shooter, and that several of the witnesses identified in the State's factual basis had a motive to lie and misidentify Griffin as the shooter. (Sup2. C. 20-27) On April 5, 2019, the circuit court denied Griffin's motion for leave to file on the grounds that a constitutionally compliant guilty plea precluded him from asserting an actual innocence claim in a post-conviction petition. (C. 24; R. 5-6)

Griffin successfully appealed the denial of his motion for leave to file his petition. *People v. Griffin*, 2022 IL App (1st) 191101-B (March 31, 2022). While his appeal was pending, this Court issued its decision in *People v. Reed*, 2020 IL 124940, ¶37, holding that a guilty plea petitioner could pursue an actual innocence claim. The appellate court held that under *People v. Robinson*, 2020 IL 123849, ¶¶44-47, Griffin established that the affidavits of Moore and Myles constituted newly discovered, material, and noncumulative evidence that was of such a conclusive character that it would probably change the result on retrial. *Id.*, ¶¶51-66. Because it ruled that Griffin's actual innocence claim should be remanded for second-stage proceedings, the court declined to review his ineffective assistance of counsel claim. *Id.*, ¶66. The State's petition for rehearing was denied, and in

a modified decision, the appellate court reaffirmed its rejection of the State's argument that the clear and convincing standard applied at the leave to file stage.

People v. Griffin, 2022 IL App (1st) 191101-B, ¶¶55-56 (May 10, 2022).

Guilty plea proceedings

Griffin was arrested on December 21, 2009. (TC. 19-24) The Cook County Public Defender was appointed to represent Griffin, and although he made a pre-trial complaint that his assigned public defender was ineffective, the trial court, in essence, told him that his public defender was not deficient and that the court could not assign him a new attorney. (TR. R1-9) Griffin continued to be represented by his assigned public defender who entered into plea negotiations on Griffin's behalf. (TR. R1-9, U1-15)

About a month before his retirement, Griffin's assigned public defender informed the trial court that Griffin wished to accept the State's offer to plead guilty to count 1 of the indictment alleging murder while armed with a firearm, in exchange for a minimum 35-year sentence and the dismissal of the remaining 28 counts.² (TR. Q4, U3-4)

According to the State's factual basis, several witnesses identified Griffin as the individual who shot Melissa Williams twice, then shot Otis Houston four times. (TR. U6-10) The State represented that Lavertice Harmon was playing dice with a group of men around 3:00 a.m. on June 26, 2009, in the 1400 block

² The State's fifth footnote on page 28 of its brief is incorrect, as count 1 of the indictment alleged only that Griffin was armed with a firearm, which carries a 15-year firearm enhancement. 730 ILCS 5/5-8-1(d)(i) (West 2009); (Sec. C. 39).

of North LeClaire in Chicago. (TR. U7) Harmon identified Leroy Battle, Terrence Washington, and Kevin Barnes as some of those men. (TR. U7) Harmon saw a dark-colored, four-door car drive south on LeClaire Avenue from LeMoyne. (TR. U7) He noticed the car because it had no headlights, and the others scattered when it pulled up. (TR. U8) Harmon claimed that he saw Griffin in the car. (TR. U8) Griffin called Harmon over to the car, and Harmon claimed that Griffin had a chrome-colored, black-handled handgun on his lap under a bandana, and that he told him the car was stolen. (TR. U8) According to Harmon, Griffin also told him that he was “fixin’ to merk” Williams, which meant “murder kill,” because she had stabbed Griffin in the past. (TR. U8)

In response, Harmon told Griffin to wait so he could get the others off of the block. (TR. U9) Griffin drove around the block to give Harmon time. (TR. U9) Harmon warned Williams and Houston, and they walked towards the park. (TR. U9) Harmon claimed that he saw Griffin get out of the car and approach Williams. (TR. U9) Griffin and Williams had a conversation that Harmon could not hear, then Griffin took out a handgun and shot once at Williams. (TR. U9) Houston ran, and Griffin chased him, firing what Harmon believed to be four shots at Houston. (TR. U9) Griffin went back to Williams and shot her once more, then got in the car and drove off. (TR. U10)

The State also represented that Kevin Barnes and Leroy Battle, both of whom knew Griffin, identified him as the shooter. (TR. U10-11) Another individual named Carlton Winters claimed that he and Griffin had a telephone conversation wherein Griffin admitted to the shooting. (TR. U11) The medical examiner’s report

indicated that the manner of Williams' death was a homicide. (TR. U11) The State identified four grand jury transcripts as exhibits, and an exhibit containing a stipulation to the report of the medical examiner. (TR. U7-11) The record does not indicate that the State presented Griffin's confession as an exhibit during the plea proceedings. (TR. U1-15)

Subsequently, the trial court accepted the factual basis for Griffin's plea, and entered a finding of guilty on count 1. (TR. U12) The court sentenced Griffin in accordance with the negotiated plea to a term of 35 years in prison. (TR. U12-13)

Proceedings on successive petition

On February 4, 2019, Griffin filed his motion for leave to file a successive post-conviction petition. (Sup2. C. 16-17) In the attached petition, Griffin argued that his trial counsel was ineffective for failing to investigate whether an individual named Jerrell Butler was the person who killed Williams. (Sup2. C. 9) Griffin alleged that he heard "around the jail" that Butler killed Williams, but that his attorney told him that since he confessed there was no defense that could help him, and that he should take the plea or risk life in prison. (Sup2. C. 9) Griffin also alleged that he told his attorney that his confession was false, and that it was given under duress, psychological abuse, and mental coercion as a result of tactics used by Detectives Folino and McDermott. (Sup2. C. 9-10) He asserted that he was detained for 30 hours with no sleep, and that he had a lifelong learning disability and used ecstasy every day since age 14. (Sup2. C. 10) In support of his claims, he attached exhibits showing that Detectives Folino and McDermott were parties to multiple lawsuits alleging, among other claims, that the detectives

falsely arrested and/or illegally searched the plaintiffs. (Sup2. C. 12, 28-175)

Griffin also alleged that he was actually innocent of the offenses, and attached newly discovered evidence in the form of affidavits from Lavonte Moore and Perrier Myles. (Sup2. C. 10-11, 16, 22-27) Moore attested that he witnessed the shooting of Williams and Houston. (Sup2. C. 22-23) Around 3:00 a.m. on June 26, 2009, Moore was parked on the corner of the 1400 block of LeClaire. (Sup2. C. 22) Moore saw a group of six to 10 black males and one female standing across from LaFollette Park. (Sup2. C. 22) A few minutes later, Moore saw Jerrell Butler, who was wearing a white shirt, black jeans, and a black hat, exit an alley on LeClaire. (Sup2. C. 22) Butler walked by Moore's car and said "wassup" to Moore. (Sup2. C. 22) Butler pulled out a revolver from his waistband with his right hand, and Moore panicked and froze in his seat. (Sup2. C. 22) Butler jogged across the street towards the park, and a few seconds later Moore heard five loud gunshots and saw Butler running back past his car and into the alley off LeClaire. (Sup2. C. 22) Moore drove away down Hirsch. (Sup2. C. 22-23) He attested that he never told anybody what he saw out of fear of Butler and Butler's friends. (Sup2. C. 23)

Moore spoke with Griffin on November 4, 2018, while incarcerated at Hill Correctional Center. (Sup2. C. 23) Moore attested that he knew Griffin from his former neighborhood. (Sup2. C. 23) Moore told Griffin that he witnessed the shooting, and that he knew the shooter was Butler. (Sup2. C. 23) He also told Griffin that he knew Griffin was innocent of that case, and that he was willing to testify in court about the truth of what happened that morning. (Sup2. C. 23)

Myles attested that he had a conversation with a friend, Cornell McWilliams,

who went by the nickname C-Lo, about the murder of Williams and the shooting of Houston on the 1400 block of LeClaire. (Sup2. C. 24) Myles asserted that he was incarcerated at the time of the shooting, but some of his friends, including McWilliams, Barnes, and Harmon, were witnesses who identified Griffin as the shooter to the Chicago police. (Sup2. C. 24) According to Myles, after he got out of prison on or about January 1, 2015, he was driving down the 1400 block of LeClaire when he saw McWilliams and a few other people. (Sup2. C. 24-25) Myles attested that McWilliams was an old friend from his neighborhood. (Sup2. C. 25) Myles stopped his car and motioned to McWilliams to come over. (Sup2. C. 25)

While they were talking, Myles asked McWilliams why Griffin was incarcerated for the murder of Williams, who was McWilliams' girlfriend. (Sup2. C. 25) According to Myles, McWilliams admitted that Griffin was a scapegoat, and that Griffin was falsely identified as the shooter so that Harmon's and Barnes' drug business could continue without pressure from the Chicago police. (Sup2. C. 26) McWilliams admitted that he did not recognize the shooter's face, but remembered that the shooter was light skinned with braids. (Sup2. C. 26) When Myles pointed out to McWilliams that Griffin was dark skinned with dreadlocks and therefore distinguishable from McWilliams' description of the shooter, McWilliams further admitted that the only reason he identified Griffin was because Houston had a prior conflict with Griffin and because he wanted justice for Williams. (Sup2. C. 26) McWilliams, Harmon, and Barnes contacted the Chicago police and made false accounts to Detective Folino in July, 2009. (Sup2. C. 26)

Myles attested that McWilliams also admitted that he found out a year

and a half later that Houston owed money to Butler, nicknamed “Fatty,” from some drug sales and that he believed Butler may have been the actual shooter. (Sup2. C. 26) Myles asked McWilliams to leave his vehicle, and drove home. (Sup2. C. 26) He attested that he felt “heartbroken” for Griffin and Williams’ family, and that he has not spoken to McWilliams since he “exposed the truth about what happened.” (Sup2. C. 26) Further, Myles said he spoke to Griffin in June, 2018 while they were both in the recreational yard one morning of Hill Correctional Center. (Sup2. C. 27) Myles told Griffin that he knew Griffin did not commit murder, and that McWilliams admitted that because they need to resolve the matter, Griffin “was the perfect person to blame the murder on.” (Sup2. C. 27)

Griffin also attached his own affidavit in support of his claims. (Sup2. C. 20-21) He attested that he pleaded guilty to a murder he did not commit as a result of his trial counsel’s ineffectiveness. (Sup2. C. 20) He alleged that trial counsel refused to properly investigate his case, even after he informed him that he had been hearing around the jail that Jerrell Butler was the actual shooter. (Sup2. C. 20) According to Griffin, his attorney responded that because he confessed, there was no defense that could help him, and he would spend the rest of his life in prison unless he took a plea. (Sup2. C. 20) He also told his attorney that his confession was false, and that he confessed as a result of duress, psychological abuse and mental coercion. (Sup2. C. 20) He attested that he was detained for 30 hours, and that Detectives Folino and McDermott engaged in coercive tactics while he had no sleep, suffered from a learning disability, and had taken ecstasy every day since age 14. (Sup2. C. 20) Although he did not understand his rights,

his attorney told him that it did not matter and he should plead guilty and move on with his life, and that he pleaded guilty out of a fear of being sentenced to life in prison despite knowing he was innocent. (Sup2. C. 21)

Further, Griffin attested that in 2018, he was incarcerated with Moore and Myles, who informed him that they had information about his case, knew he was innocent of Williams' murder, and were willing to sign affidavits and testify in court about the truth. (Sup2. C. 21)

On April 5, 2019, the circuit court dismissed Griffin's successive petition. (C. 24; R. 5-6) In its ruling, the judge stated, "Petitioner cannot make a claim of actual innocence after a proper constitutionally compliant guilty plea. That's *People versus Simmons* 388 Ill App. 3d 599." (R. 5) The judge also indicated that Griffin was not making a claim that his guilty plea was coerced, and that "[t]hat's an important part of the analysis as well." (R. 5) Griffin timely appealed. (C. 28-29)

Proceedings in appellate court

On appeal, Griffin argued that the circuit court erred in dismissing his petition based on its erroneous conclusion that his guilty plea precluded him from raising an actual innocence claim, citing *People v. Reed*, 2020 IL 124940, ¶37. (App. Ct. Opening Br. at 11-15)³ Griffin argued that the affidavits of Myles and Moore constituted newly discovered, material, and noncumulative evidence that, under

³ Contemporaneously with the filing of this brief, appellee's counsel has requested that the appellate court file the e-filed, stamped copies of the appellate court briefs and the State's petition for rehearing with this Court pursuant to Supreme Court Rules 318(c) and 612(b)(2), and the First District Appellate Court's procedure. Because they are necessary to the contentions in this appeal, appellee cites to the appellate filings in this brief.

the standard articulated in *People v. Robinson*, 2020 IL 123849, ¶¶46, 54-55, would probably lead to a different result at trial. (App. Ct. Opening Br. at 12-15) Griffin also argued that he established cause and prejudice for his ineffective assistance of trial counsel claim where his attorney coerced him into pleading guilty based on his representation that Griffin had no defense to the charges and his failure to investigate whether other witnesses could establish that Butler was the actual shooter. (App. Ct. Opening Br. at 16-19)

In response, the State admitted that the affidavits of Moore and Myles constituted newly discovered, material, and noncumulative evidence. (App. Ct. St. Br. at 22-23) It contended, however, that the appellate court should apply the “clear and convincing” standard articulated in *Reed*, and require Griffin to show that his evidence clearly and convincingly demonstrates that a trial would probably result in an acquittal. (App. Ct. St. Br. at 17-20) Alternatively, even under the standard articulated in *Robinson*, the State contended that his evidence did not set forth a “colorable claim of actual innocence,” meaning that it was of such a conclusive nature that it would probably lead to a different result at trial. (App. Ct. St. Br. at 20-30) The State recited the factual basis for Griffin’s plea, and argued that the affidavits would not meet either the *Reed* or *Robinson* standard. (App. Ct. St. Br. at 24-26)

With respect to Moore’s affidavit, the State contended that it did not establish that Moore saw the shooting or saw Butler commit it, and therefore was only “circumstantial evidence that Butler *could* have been the shooter.” (App. Ct. St. Br. at 26-27) With respect to Myles’ affidavit, the State conceded that the hearsay

statements of McWilliams could be considered in a post-conviction petition under *Robinson*. (App. Ct. St. Br. at 28) It argued, however, that despite McWilliams' claims that Harmon and Barnes lied, Myles' affidavit did not contradict Battle's identification of Griffin as the shooter. (App. Ct. St. Br. at 28) It opined that Myles' affidavit did not undercut Houston's identification of Griffin, and speculated that if Griffin and Houston had a prior conflict it may have provided Griffin with a motive to shoot Houston. (App. Ct. St. Br. at 28) It contended that even if Houston owed Butler money, that would not provide a motive for Houston to falsely implicate Griffin. (App. Ct. St. Br. at 28)

With respect to Griffin's ineffective assistance of counsel claim, the State argued that he could not show cause because he had raised counsel's ineffectiveness in his first post-conviction petition, and the factual basis for Griffin's underlying claim that counsel failed to investigate Butler was known to him at the time of his plea and initial petition. (App. Ct. St. Br. at 30-39) It also contended that Griffin could not establish prejudice because there was no reason to believe that counsel's investigation would have turned up the evidence supplied by Moore and Myles. (App. Ct. St. Br. at 335) Additionally, there was no reason to believe that counsel did not investigate Butler based on the timeline of the case, nor did Griffin assert that counsel failed to investigate his case when he complained to the trial court. (App. Ct. St. Br. at 35-36)

Finally, the State argued that Griffin's actual innocence claim was not freestanding because the same affidavits were used to support his claim that trial counsel was ineffective, and therefore must be rejected. (App. Ct. St. Br. at 21-22)

In Griffin's reply brief, he argued that the court should reject the State's argument because in *People v. Coleman*, 2013 IL 113307, this Court noted that there was only one type of actual innocence claim under Illinois law, and the language of *Coleman* indicated that the only difference between a claim of trial error and an actual innocence claim was the use of the cause and prejudice standard for the former, and the use of the standard articulated in *People v. Washington*, 171 Ill. 2d 475 (1996), for the latter. (App. Ct. Reply Br. at 6-7) He argued that *People v. Hogley*, 182 Ill. 2d 404 (1998) and *People v. Orange*, 195 Ill. 2d 437 (2001), were distinguishable because the evidence in those cases did not, standing alone, provide support for an actual innocence claim. (App. Ct. Reply Br. at 7-8)

The appellate court initially dismissed Griffin's appeal for lack of jurisdiction, based on the lack of proof of timely filing. *People v. Griffin*, 2021 IL App (1st) 191101-U (Summary Order, July 20, 2021). This Court granted Griffin's motion for a supervisory order, and directed the appellate court to vacate its dismissal, reinstate the appeal, and consider the claims on their merits. *Griffin v. Hon. Cynthia Cobbs et al.*, No. 127489 (order entered Aug. 11, 2021). The State's motion to cite *People v. Williams*, 2021 IL App (1st) 190239, was granted by the appellate court, and the court held oral argument on March 29, 2022.

Appellate court decision

The appellate court issued a decision on March 31, 2022, reversing the denial of leave to file Griffin's successive petition and holding that pursuant to *People v. Robinson*, 2020 IL 123849, ¶47, Griffin set forth a colorable claim of actual innocence based on the affidavits of Moore and Myles. *People v. Griffin*, 2022 IL

App (1st) 191101-B; ¶¶35, 57-65 (Mar. 31, 2022).

The State filed a petition for rehearing, asking the appellate court to reconsider its ruling applying the *Robinson* standard in favor of the “clear and convincing” standard articulated in *Reed*, and arguing that Griffin could not establish that the affidavits, which the State conceded constituted newly discovered, material, and noncumulative evidence, would clearly and convincingly demonstrate that a trial would likely result in an acquittal. (St. Pet. Reh. at 3-14) The State also argued that, should the court reconsider and reverse its ruling on Griffin’s actual innocence claim, it should reject his ineffective assistance of counsel claim because he did not establish cause and prejudice. (St. Pet. Reh. at 14) The State never asserted that the appellate court erred in declining to review his ineffective assistance of counsel claim because the court was required to determine whether each claim satisfied the cause and prejudice standard before advancing the petition to the second stage of post-conviction proceedings.

A modified decision issued upon the denial of the State’s rehearing petition on May 10, 2022, was largely the same as its prior opinion, except that it rejected the State’s argument that it should apply *People v. Williams*, 2021 IL App (1st) 190239, ¶49, wherein another panel applied the clear and convincing standard at the leave to file stage, and held that the petitioner met that standard. *People v. Griffin*, 2022 IL App (1st) 191101-B, ¶¶55-56 (May 10, 2022).

Consistent with its original decision, the court addressed the State’s claim that Griffin did not allege a freestanding claim of actual innocence because the same newly discovered evidence also supported his ineffective assistance of counsel

claim. *Griffin*, 2022 IL App (1st) 191101-B, ¶¶28-38. It declined to depart from this Court’s decisions in *People v. Hopley*, 182 Ill. 2d 404, 443-44 (1998) or *People v. Orange*, 195 Ill. 2d 437, 459-60 (2001), which it viewed as holding that the same evidence cannot be used to support both an actual innocence claim and claims of constitutional error. *Id.*, ¶34. It concluded, however, that the same documentary evidence supporting Griffin’s actual innocence claim was not used to support his ineffective assistance of counsel claim, noting that the affidavits of Moore and Myles were not referenced in his ineffectiveness claim but were referenced in his actual innocence claim. *Id.*, ¶¶35-38. It held that while either claim may be bolstered by evidence supporting the other, it “cannot conclude that the two claims share the same evidentiary foundation.” *Id.*, ¶38.

With respect to Griffin’s actual innocence claim, the court determined that the standard articulated in *Robinson* was more appropriate at the leave to file stage regardless of whether the underlying judgment was from a trial or a guilty plea. 2022 IL App (1st) 191101-B, ¶¶52-57. Noting this Court’s acknowledgment in *Reed* that “the reliability of the evidence can only be determined, and thus clear and convincing, after an evidentiary hearing,” the court held that the clear and convincing standard could only be employed at the third stage, and that this Court intentionally refrained from announcing a separate standard for earlier post-conviction proceedings. *Id.*, ¶52.

Moreover, the court held that the affidavits from Moore and Myles constituted newly discovered, material, and noncumulative evidence. 2022 IL App (1st) 191101-B, ¶60. The court indicated that the affidavits met the definition of “new” evidence

set forth in *Reed*, namely “evidence [that] was discovered after the court accepted the plea and could not have been discovered earlier through the exercise of due diligence.” *Id.*, quoting *Reed*, 2020 IL 124940, ¶49. It determined that Griffin could not have discovered the information from Moore and Myles since he did not speak with either of them until after he was incarcerated. *Id.* The court also determined that the evidence was material where it went to the identity of the shooter and suggested that the State’s witness falsely implicated Griffin and had a motive to do so. *Id.* It held that the evidence was noncumulative because the State’s factual basis did not contain information from any witness who identified another as the shooter. *Id.*

The court also held that the affidavits were of such a conclusive character that they would probably lead to a different result at trial. 2022 IL App (1st) 191101-B, ¶¶61-67. With respect to the State’s argument that Moore did not actually see Butler commit the shooting, the court indicated that such facts could be parsed out at an evidentiary hearing. *Id.*, ¶62. It noted that Moore’s account was bolstered by Myles’ affidavit alleging that Butler had a motive to shoot Houston because he owed him money, and that McWilliams gave a description of the shooter inconsistent with Griffin’s characteristics. *Id.* With respect to Myles’ affidavit, the court acknowledged that it did not undercut Battle or Houston’s identifications, or Winters’ claim that Griffin confessed to him. *Id.*, ¶63. The court noted, however, that it undercut Houston’s credibility as it gave him a motive to lie, and that the affidavits directly contradicted the State’s factual basis for the guilty plea. *Id.* Additionally, none of the newly discovered evidence was positively rebutted by

the record, and to that end, the court noted that there was no surveillance footage or forensic evidence to connect Griffin to the shooting presented by the State during the factual basis. *Id.*, ¶64.

The court acknowledged that the record contained Griffin's incriminating statement to the police, but pointed out that Griffin consistently maintained that his confession was involuntary, and that in *Robinson* this Court rejected that the newly discovered evidence must totally vindicate the defendant. 2022 IL App (1st) 191101-B, ¶¶65-66. It determined that the evidence placed the inculpatory statement and the factual basis in a different light, and undermined confidence in Griffin's guilt. *Id.*, ¶66.

Since the evidence created a credibility contest that could not be resolved at the leave to file stage, and Griffin met the *Robinson* standard, the court reversed the denial of leave to file his petition and remanded for further proceedings. Citing *People v. Cathey*, 2012 IL 111746, ¶34, for the proposition that partial summary dismissals are impermissible, the court remanded Griffin's petition in its entirety, without reviewing his ineffective assistance of counsel claim. *Id.*, ¶68.

The State filed a petition for leave to appeal, arguing that the court erred when it applied the *Robinson* standard instead of the "clear and convincing" standard in *Reed*, and was in conflict with the aforementioned decision in *Williams*. Although it never raised the issue below, the State contended that the court erred in advancing the entirety of Griffin's petition without determining if he established cause and prejudice for his ineffective assistance of counsel claim. This Court granted the petition on September 28, 2022.

ARGUMENT

- I. This Court should uphold the well-reasoned decision of the appellate court applying the standard set forth in *People v. Robinson*, 2020 IL 123849, to evaluate the legal sufficiency of an actual innocence claim at the leave to file stage of the Post Conviction Hearing Act, irrespective of the nature of the underlying judgment, in this case, Shamar Griffin’s guilty plea.**

Having already determined that post-conviction petitioners may raise an actual innocence claim following the entry of a guilty plea, the primary issue before this Court is what standard applies for evaluating those claims at the leave to file stage. *People v. Reed*, 2020 IL 124940, ¶¶37, 45-50. In *Reed*, this Court acknowledged the State’s arguments in favor of precluding such claims outright, including its interest in finality of judgments, but concluded that those interests had to give way to its “long-established preference for life and liberty over holding defendant to his plea.” *Id.*, ¶36. In an effort to strike a balance, this Court created a more stringent standard for evaluating actual innocence claims following a guilty plea. *Id.*, ¶50. Accordingly, at the third stage of post-conviction proceedings, the petitioner asserting an actual innocence claim from an underlying guilty plea must show that his new, material, and noncumulative evidence clearly and convincingly demonstrates that a trial would probably result in acquittal. *Id.*, ¶49.

Although the State’s brief implies that it is a foregone conclusion that the “clear and convincing” standard also applies at the leave to file stage, *Reed’s* language specifically limits its reach. (St. Br. at 11-16) After stating that, “[b]ecause the evidence must be clear and convincing, the standard inherently requires the court to consider whether the evidence is reliable,” this Court clarified that any reliability determination must be made at the third stage evidentiary hearing,

because at the lower stages all well-pled facts must be taken as true. *Reed*, 2020 IL 124940, ¶50 n.2 (citing *People v. Sanders*, 2016 IL 118123, ¶42, indicating that credibility determinations are only appropriate at the third stage). In Griffin's case, the appellate court relied on the foregoing language to hold that the standard set forth in *People v. Robinson*, 2020 IL 123849, ¶¶44-45,60, was more appropriate for the leave to file stage, since all well-pled allegations must be taken as true unless positively rebutted by the record, and no credibility determinations may be made by the circuit court. *People v. Griffin*, 2022 IL App (1st) 191101-B, ¶¶52, 57. Nor did applying *Robinson* at the leave to file stage conflict with the policy considerations in *Reed*, as the petitioner was only entitled to further post-conviction proceedings, and not the ultimate relief of vacating his plea and obtaining a new trial. *Id.*, ¶52.

The State offers no persuasive arguments warranting this Court's departure from the *Robinson* standard, let alone a reversal of the appellate court's decision in Griffin's case. Unlike the third stage hearing at issue in *Reed*, at the leave to file stage, the court considers only the petition's legal sufficiency, and may not make factual or credibility determinations. *Robinson*, 2020 IL 123849, ¶45. The State's formulation of "clear and convincing" in its brief demonstrates the difficulty of shoehorning the standard into a lower stage of post-conviction proceedings. In order to apply the standard, it argues that, contrary to decades of precedent, "reliability" is distinguishable from "credibility," and that the scope of acceptable evidence used to support actual innocence claims should be limited to that deemed "intrinsically reliable," *i.e.*, scientific or forensic evidence, and not affidavits

containing hearsay. (St. Br. at 17-24) These arguments have been repeatedly rejected by this Court, and should also be rejected in Griffin's case. *People v. Sanders*, 2016 IL 118123, ¶¶31-42 (reliability or trustworthiness of affidavit was improper consideration at second-stage review, citing *People v. Dedrick Coleman*, 183 Ill. 2d 366, 390-91 (1998) (same)); *Robinson*, 2020 IL 123849, ¶78 (rejecting State's argument that hearsay affidavit did not support actual innocence claim at the leave to file stage; under IL R. Evid. 1101(b)(3), rules of evidence do not apply); see *People v. Christopher Coleman*, 2013 IL 113307; ¶¶85-94 (federal standards do not apply to Illinois actual innocence claims).

As to whether Griffin's petition is legally sufficient at the leave to file stage, the State abandons its concession that Griffin's affidavits were newly discovered, material, and noncumulative, and its argument that his affidavits cannot satisfy the *Robinson* standard. *Griffin*, 2022 IL App (1st) 191101-B, ¶60; (App. Ct. St. Br. at 22-30); (St. Br. at 20-24). Instead, it argues, under its newly-proposed standard, which it never raised below, that Griffin's affidavits do not constitute "new, reliable evidence that clearly and convincingly demonstrates that he would be acquitted at trial." (St. Br. at 20); 2022 IL App (1st) 191101-B, ¶51 ("Notably, the State does not offer a definitive standard for this court to apply and ultimately analyzes and rejects defendant's actual innocence claim under the *Robinson* standard). This Court should reject its argument under forfeiture principles, and because it is contrary to *Robinson* and decades of precedent, and uphold the appellate court's decision. See *People v. Collins*, 2022 IL 127584, ¶¶19-23 (dismissing State's appeal where it abandoned argument in appellate court that it raised in this Court);

People v. Cruz, 2013 IL 113399, ¶¶24-25 (State forfeited argument that unnotarized affidavit was insufficient by failing to raise it in trial court).

A. This Court should hold that the standard set forth in *People v. Robinson* applies uniformly to a consideration of the legal sufficiency of an actual innocence claim at the leave to file stage, even when the underlying judgment is from a guilty plea.

The Post-Conviction Hearing Act (the “Act”), 725 ILCS 5/122-1 *et seq.* (West 2019), allows an individual to collaterally challenge his criminal conviction. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). Nothing in the language of the Act limits its application based on the type of underlying conviction. Its language is inclusive, and states:

Any person imprisoned in the penitentiary may institute a proceeding under this Article if the person asserts that: (1) in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both.

725 ILCS 5/122-1(a)(1) (West 2019).

Given the Act’s inclusivity, its three-stage process for evaluating and litigating a post-conviction petition applies irrespective of the nature of the underlying judgment of conviction. 725 ILCS 5/122-1(a)(1); *People v. Edwards*, 197 Ill. 2d 239, 244-46 (2001). Initial petitions at the first stage are independently reviewed by the circuit court to determine whether the claims are frivolous or patently without merit. *Hodges*, 234 Ill. 2d at 11. The circuit court’s role is to screen out petitions that lack any legal substance or obviously lack merit. *People v. Rivera*, 198 Ill. 2d 364, 373 (2001). This Court has defined “frivolous or patently without merit” to mean that the claim has no arguable basis in law or fact, *i.e.*, one that is based on an indisputably meritless legal theory or fanciful factual allegation. *Hodges*,

234 Ill. 2d at 16-22.

Because petitions are typically drafted by *pro se* petitioners, who may have little legal knowledge or training and may be unaware of the legal bases for their claims, the threshold for determining whether to advance a petition to the second stage of post-conviction proceedings is deliberately low. *Edwards*, 197 Ill. 2d at 245; *Hodges*, 234 Ill. 2d at 9. A *pro se* petitioner need only include a limited amount of detail, and legal arguments and citation to legal authority “shall be omitted from the petition.” *Edwards*, 197 Ill. 2d at 244; 725 ILCS 5/122-2 (West 2019). First stage, *pro se* petitions are liberally construed, and borderline cases should advance to the second stage of proceedings. *Hodges*, 234 Ill. 2d at 21.

If a petition is not summarily dismissed by the circuit court, it advances to the second stage, where counsel is appointed and the circuit court must determine whether the petition makes a substantial showing of a constitutional violation. *Edwards*, 197 Ill. 2d at 245-46. If the petition makes a substantial showing, the circuit court advances the petition to the third stage for an evidentiary hearing. *Id.* at 246.

Although the Act generally contemplates the filing of only one petition, the circuit court may grant leave to file a successive petition if the petitioner demonstrates: (1) cause and prejudice for failing to raise his claim earlier, or (2) to avoid a “fundamental miscarriage of justice.” 725 ILCS 5/122-1(f) (West 2019); *People v. Edwards*, 2012 IL 111711, ¶¶ 22-23. A claim of actual innocence based on newly discovered evidence falls under the second exception, because such a claim is cognizable as a due process violation. *People v. Washington*, 171 Ill. 2d

475, 489 (1996). This Court held in *Reed* that guilty plea petitioners may raise claims of actual innocence in a successive petition. 2020 IL 124940, ¶¶37, 45-50.

As with first-stage, initial post-conviction petitions, a motion for leave to file a successive petition is typically drafted by a *pro se* litigant with the same lack of legal training. See *People v. Bailey*, 2017 IL 121450, ¶27 (State may not file response at leave to file stage because it would be “fundamentally unfair” and raise due process concerns for *pro se* litigant). The circuit court reviews a *pro se* request for leave to file a successive petition without input from the State, and for a determination of its legal sufficiency based on the pleadings. *Bailey*, 2017 IL 121450, ¶¶ 23, 27; *People v. Smith*, 2014 IL 115946, ¶33. In determining whether to grant leave to file and advance a successive petition to the second stage, a court considers whether the petitioner’s evidence is newly discovered, material, and noncumulative, and of such a conclusive character that it would probably change the result on retrial. *Robinson*, 2020 IL 123849, ¶¶ 43, 47. The leave to file standard for actual innocence claims in a successive petition is higher than the first stage standards for initial petitions, but not as high as the “substantial showing” standard utilized at the second stage. *Id.*, ¶43.

Because the circuit court’s review of a first stage, initial petition and a request for leave to file a successive petition are based solely on a determination of the sufficiency of the pleadings, they have one crucial aspect in common: the court must take all well-pleaded allegations not positively rebutted by the record as true, and may not make any factual or credibility determinations. *Robinson*, 2020 IL 123849, ¶45. Therefore, in determining whether the petitioner’s newly discovered,

material and noncumulative evidence makes a colorable claim of actual innocence, “the well-pleaded allegations in the petition and supporting documents will be accepted as true unless it is affirmatively demonstrated by the record that a trier of fact could never accept their veracity,” and whether, “if believed and not positively rebutted by the record, could lead to an acquittal on retrial.” *Id.*, ¶60.

The State has offered no persuasive reason why the standard applied at the leave to file stage should be different when the underlying judgment is from a guilty plea than from a trial. In fact, its formulation of the clear and convincing standard demonstrates why it should not apply at the leave to file stage. (St. Br. at 17-20) In order to apply *Reed*, the State argues that this Court should consider the reliability of Griffin’s evidence. (St. Br. at 17-20) It acknowledges that a court cannot make credibility determinations at the leave to file stage, but argues that credibility and reliability are not interchangeable, and that petitioners like Griffin should be required to support their actual innocence claims with “reliable evidence,” namely scientific or other forensic evidence that is “intrinsically reliable.” (St. Br. at 18-20) In contrast, categories of evidence deemed “inherently unreliable,” such as hearsay affidavits, should be insufficient to support a colorable claim of actual innocence brought from an underlying guilty plea. (St. Br. at 19-20)

Accepting the State’s proposed new standard at the leave to file stage would require upending decades of precedent. Previously, this Court rejected the State’s argument that an actual innocence claim could only be supported by “new reliable evidence,” such as “trustworthy” eyewitness accounts, as opposed to a recantation regarded by courts as “inherently unreliable.” *Sanders*, 2016 IL 118123, ¶¶32-33.

The State’s “reliability” argument was held improper at the pleadings stage of post-conviction review. *Id.* Moreover, this Court’s precedent demonstrates that a court reviewing an actual innocence claim is capable of determining whether to grant post-conviction relief on the basis of newly discovered witness affidavits, even if those affidavits are not “corroborated” by the types of evidence that State alleges is “intrinsically reliable.” (St. Br. at 19); *People v. Ortiz*, 235 Ill. 2d 319, 326-27, 333-37 (2009) (affidavit and testimony of witness who did not see defendant at scene was sufficient to award new trial following evidentiary hearing on actual innocence claim). Additionally, the State cites to no decision of an Illinois court excluding an entire category of evidence from being used to support a post-conviction claim, or otherwise limiting post-conviction relief to those petitions supported by scientific or other forensic evidence. (St. Br. at 18-20) Given the acknowledged difficulties faced by *pro se* litigants, foreclosing an actual innocence claim based on the lack of scientific or other forensic attached to a petition would be a significant departure from both the letter and spirit of Illinois jurisprudence. *Edwards*, 197 Ill. 2d at 245; *see also Martinez v. Ryan*, 566 U.S. 1, 12 (2012) (“While confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim [that] turns on evidence outside the trial record.”).

Similar arguments made by the State were also rejected in *Robinson*. In *Robinson*, the petitioner sought leave to file an actual innocence claim, attaching affidavits indicating that petitioner was not at the scene, and that another individual confessed to the shooting for which the petitioner was convicted. 2020 IL 123849, ¶¶23-29. The State argued that the petitioner’s affidavits were insufficient to support

his actual innocence claim. *Id.*, ¶¶59-83. Among other contentions, the State argued that the affidavit with the extrajudicial confession was unreliable hearsay, and as it would not be admissible at trial, it could not support a colorable claim of actual innocence. *Id.*, ¶¶77-81. This Court rejected its arguments, noting that the rules of evidence do not apply to post-conviction proceedings under Illinois Rule of Evidence 1101(b)(3), and that admissibility of evidence or reliability of an extrajudicial confession under *Chambers v. Mississippi*, 410 U.S. 284, 300-01 (1973), were not proper considerations at the leave to file stage. *Id.*, ¶¶77-81 (“However, given the procedural posture of this case, the parties’ reliability arguments are premature.”). This Court reinforced the longstanding rule that affidavits must be taken as true and no factfinding or credibility determinations can be made in judging the legal sufficiency of a petition, writing, “[w]ithout engaging in any credibility determinations, there is no way for this court or any court to assess the reliability of those affidavits or the veracity of their assertions.” *Id.*, ¶83.

The State’s application of its proposed standard further demonstrates that it requires a court to make an improper credibility determination at the pleading stage. (St. Br. at 20-24) For example, the State points out that Lavonte Moore (who identified Jerrell Butler as the shooter) was an incarcerated inmate when he prepared the affidavit, and argues that Moore’s status renders his affidavit “inherently suspect” and unreliable. (St. Br. at 21, 23) But this is just another way of stating that Moore is an incredible witness or untrustworthy, a consideration this Court has already rejected in evaluating a petition at the leave to file stage.

Sanders, 2016 IL 118123, ¶¶32-33. Additionally, the State contends that Perrier Myles' affidavit (which undercut the witnesses in the State's factual basis) contains double hearsay and is uncorroborated. (St. Br. at 21-22) As noted above, this Court rejected a similar argument in *Robinson*, noting that the rules of evidence do not apply and that the ultimate admissibility of evidence is not a proper leave to file consideration. 2020 IL 123849, ¶¶77-81.

None of the additional reasons offered by the State support departing from the Act or this Court's precedent when a petitioner is seeking relief from an underlying guilty plea. The State argues that its "paramount" interest in finality of judgments favor applying *Reed's* standard to the leave to file stage, but as the appellate court pointed out, granting leave to file a petition alleging actual innocence only allows for further post-conviction proceedings, and not the ultimate relief of vacating his guilty plea and awarding a new trial. (St. Br. at 12-16); *Griffin*, 2022 IL App (1st) 191101-B, ¶52. This Court acknowledged the same policy considerations in *Reed*, but ultimately concluded that a defendant's right not to be deprived of life and liberty given compelling evidence of innocence had to prevail. *Reed*, 2020 IL 124940, ¶¶28-37. The State's attempt to severely curtail a guilty plea petitioner's access to post-conviction relief by imposing a stringent standard on a *pro se* litigant is nothing more than an attempted end-run around *Reed*, and should be rejected by this Court.

The State also argues that the clear and convincing standard should be applied at the leave to file stage as a matter of judicial economy, because in its view, if the petitioner cannot satisfy the clear and convincing standard at the leave

to file stage, it “ultimately cannot prevail” at an evidentiary hearing. (St. Br. at 13, 16) This argument is a red herring, however, because the standard applied by the court in evaluating whether to *advance* a post-conviction petition has always depended on the stage of proceedings, and not whether the petition will succeed on its merits. *Hodges*, 234 Ill. 2d at 9-17. Applying the same standard to the leave to file stage and to a third stage evidentiary hearing also flies in the face of the Act and its precedent. It is contrary to the Act’s three-step process, because if a petitioner was required to meet the clear and convincing standard at the leave to file stage, there would be no need for an evidentiary hearing. The petitioner would be entitled to withdraw his plea and obtain a new trial. *See People v. Dodds*, 344 Ill. App. 3d 513, 520 (1st Dist. 2003) (trial court should not collapse second and third stages of post-conviction proceedings). Moreover, the rationale for applying a low threshold of review to a *pro se* pleading is no less salient because the request is from a petitioner convicted pursuant to a guilty plea. *See Edwards*, 197 Ill. 2d at 245. It is fundamentally unfair to hold a *pro se* petitioner to a standard that this Court indicated could only be made an evidentiary hearing with the benefit of counsel. *Reed*, 2020 IL 124940, ¶50 n.2; *Bailey*, 2017 IL 121450, ¶¶ 23, 27.

In sum, this Court was clear in *Reed*: because the clear and convincing standard requires a determination of the reliability of the evidence, it should be reserved for petitions that have advanced to an evidentiary hearing. 2020 IL 124940, ¶50 n2. This Court should hold that the standard set forth in *Robinson* applies equally to guilty plea petitioners pursuing claims of actual innocence under the Act. 2020 IL 123849, ¶¶47-8.

B. The appellate court correctly determined that Shamar Griffin should be granted leave to file his successive petition based on actual innocence under the *Robinson* standard.

Applying this Court's standard in *Robinson*, and conducting its own *de novo* review, the appellate court determined that Griffin's affidavits constituted newly discovered, material, and noncumulative evidence that was of such a conclusive character that it would probably change the result on retrial. 2020 IL 123849, ¶¶40, 47; *Griffin*, 2022 IL App (1st) 191101-B, ¶¶59-67. Although the State conceded that affidavits from Myles and Moore were newly discovered, material, and noncumulative in the appellate court, it appears to abandoned that concession in this Court. *Griffin*, 2022 IL App (1st) 191101-B, ¶60; (App. Ct. St. Br. at 22-23). It also abandons the argument it made in the appellate court as to whether Griffin satisfied the *Robinson* standard. (App. Ct. St. Br. at 23-30; St. Br. at 20-24) In this Court, the State argues that the affidavits are not "new" because they were signed in 2018, nine years after the shooting. (St. Br. at 20, 23) Implicit in the State's argument is that this Court should reject the affidavits as new because Griffin learned of the evidence while both affiants were inmates several years after the shooting, and therefore they are of questionable veracity. (St. Br. at 20-24)

In setting forth the clear and convincing standard in *Reed*, this Court did not jettison the requirement that a petitioner's evidence be newly discovered, material, and noncumulative. 2020 IL 124940, ¶49. "Newly discovered" is evidence that "was discovered after the court accepted the plea and could not have been discovered earlier through the exercise of due diligence." *Id.* The appellate court rightly held that the affidavits of Moore and Myles constituted newly discovered

evidence since Griffin did not come into contact with them until after he was incarcerated. 2022 IL App (1st) 191101-B, ¶60. Here, no amount of due diligence could have prompted Moore or Myles to come forward sooner. Moore averred that he was afraid to come forward out of fear of Butler and his friends, and did not speak with Griffin until November, 2018. (Sup2. C. 23) Similarly, Myles did not speak with McWilliams until January 1, 2015, when he learned about the false statements made by McWilliams, Barnes, and Harmon to the police and that McWilliams thought Butler was the actual shooter. (Sup2. C. 26) Myles did not disclose what he learned in his 2015 conversation to Griffin until June, 2018. (Sup2. C. 27) Under this Court's precedent, the affidavits of Moore and Myles were newly discovered evidence. *Ortiz*, 235 Ill. 2d at 334 (witness affidavit newly discovered where witness made himself unavailable by not coming forward); *Griffin*, 2022 IL App (1st) 191101-B, ¶60.

Griffin's affidavits were also correctly held to be material and noncumulative. 2022 IL App (1st) 191101-B, ¶60. In the factual basis, the State asserted that Harmon and Barnes would identify Griffin as the shooter. (TR. U7-11) But Myles averred that he learned their identifications were false, and that Barnes and Harmon were motivated to lie about the identity of the shooter because they wanted to continue their drug trade without police interference, thereby undercutting the basis of the State's case. (Sup2. C. 24-27) Moore averred that someone else was the shooter. (Sup2. C. 22-23) Evidence that someone else was identified as the shooter, and that the State's identification witnesses had a motive to lie, qualifies as material. *Coleman*, 2013 IL 113307, ¶103 (evidence that someone else was

the perpetrator is material). Further, where evidence that someone other than Griffin was the shooter, and that several of the State's identification witnesses had a motive to falsely identify Griffin, was not heard by the court before accepting the plea, such evidence is noncumulative. *Robinson*, 2020 IL 123849, ¶47.

The appellate court also correctly held that Griffin's affidavits were of such a conclusive character that they would probably result in an acquittal. 2022 IL App (1st) 191101-B, ¶¶62-67. It considered the State's argument that Moore's affidavit did not contain specific assertions that he saw Butler commit the shooting, but only that he heard gunshots and saw Butler in the vicinity. *Id.*, ¶62. Consistent with the pleading stage where no factfinding occurs, whether Moore saw or only heard the shooting could be tested at an evidentiary hearing. *Id.*, ¶¶62, 67. Moore's identification of Butler was bolstered by Myles' affidavit, in which he recounted that McWilliams provided a motive for Butler to commit the shooting, and that the description of the shooter was more consistent with Butler than Griffin. *Id.*

Additionally, the court noted that Myles' affidavit undermined the accounts of Harmon and Barnes identifying Griffin as the shooter. 2022 IL App (1st) 191101-B, ¶¶63. It acknowledged that Myles' affidavit did not "compromise" Houston or Battle's identification, or Griffin's alleged telephone confession to Carlton Williams, but concluded that an allegation that Houston owed Butler money could bear on his credibility if it provided a motive not to identify Butler. *Id.* Thus, the affidavits directly contradicted the factual basis for the plea, and were not positively rebutted by the record. *Id.*, ¶¶63-64. In reaching this conclusion, the court noted that nothing in the factual basis affirmatively showed that the affidavits were false. *Id.*, ¶64.

The court also acknowledged that there was information in the record that Griffin made an inculpatory statement, but noted that Griffin consistently alleged that his confession was involuntary in his prior pleadings. 2022 IL App (1st) 191101-B, ¶¶65-66. In holding that Griffin’s affidavits placed inculpatory information in the record and in the factual basis in a different light and undermined confidence in the judgment of guilt, the court highlighted the lack of forensic or other documentary evidence connecting Griffin to the shooting. *Id.*, ¶66.

The State does not address the appellate court’s application of the *Robinson* standard to Griffin’s affidavits. (St. Br. at 20-24) It abandons the arguments it made below that Griffin’s affidavits did not “suffice to raise a probability of a different result” in light of its factual basis. (App. Ct. St. Br. at 23-26) The State never offered an argument to the appellate court as to how *Reed’s* clear and convincing standard applied to Griffin’s actual innocence claim. (App. Ct. St. Br. at 23-30)

Instead, the State argues that Griffin did not meet its formulation of the clear and convincing standard, which in its view, requires a court to limit the scope of evidence to that deemed “reliable.” (St. Br. at 20-24) As addressed *supra* at 24-28, applying the State’s formulation of clear and convincing would require this Court to upend its own precedent holding that determinations of reliability, such as trustworthiness, are not appropriate considerations at the pleading stage. *Sanders*, 2016 IL 118123, ¶¶32-33. Other than its improper arguments attacking the credibility of Griffin’s affiants, by pointing out that they are inmates and asserting that their averments were “implausible,” the State offers no sound reason as to

why Moore's identification of another person as the shooter, and Myles's affidavit undercutting three of the State's eyewitnesses and providing a motive for them to lie, would not probably result in a different outcome at trial. (St. Br. at 24)

Finally, the State's abandonment of its argument below applying the *Robinson* standard to Griffin's actual innocence claim should result in a forfeiture before this Court. *Collins*, 2022 IL 127584, ¶¶19-23; *see also People v. Crespo*, 203 Ill. 2d 335, 344 (2001) (State may not change its theory of the case on appeal). The State's brief, which only argues Griffin's claim under its newly-formulated clear and convincing standard, can also be viewed as a tacit agreement that his actual innocence claim satisfies the *Robinson* standard.

For all of the reasons addressed by the appellate court, Griffin's supporting documentation provided newly discovered, material, and noncumulative evidence that would probably result in a new trial, and therefore the court properly reversed the decision of the circuit court denying leave to file his petition, and advancing his petition to second stage proceedings. This Court should affirm that decision.

II. The appellate court was not required to consider whether Shamar Griffin established cause and prejudice for his ineffective assistance of counsel claim when reversing the denial of leave to file and advancing his petition to the second stage of post-conviction proceedings, but should this Court determine that a claim-by-claim resolution is required, it should remand this matter for consideration by the appellate court.

After holding that Shamar Griffin satisfied the *Robinson* standard for his actual innocence claim, the appellate court remanded Griffin's petition for second stage proceedings in its entirety, without considering his ineffective assistance of counsel claim, on the grounds that partial summary dismissals are not permitted. *Griffin*, 2022 IL App (1st⁴) 191101-B, ¶68. The State filed a petition for rehearing, arguing that the appellate court should have applied the clear and convincing standard to Griffin's actual innocence claim, and requesting that if the court reversed its relief on that claim, that it further reject his ineffective assistance of counsel claim. (St. Pet. R. at 14) At no point did the State argue, as it does to this Court, that the appellate court was required to consider each claim individually. (St. Br. at 9-11)

Now, the State argues that while partial summary dismissals are not permitted in the context of initial post-conviction petitions, a different approach is required with successive petitions. (St. Br. at 10) In its view, because the Act distinguishes between successive claims of actual innocence which require the petitioner to show a "colorable claim," and those constitutional claims which require the petitioner to establish cause and prejudice, the appellate court's failure to separately consider Griffin's ineffectiveness claim violated this Court's "rule" established *People v. Pitsonbarger*, 205 Ill. 2d 444 (2002) and *People v. Coleman*,

2013 IL 113307. (St. Br. at 10-11)

Problematically, neither *Pitsonbarger* or *Coleman* stand for the State's proposed rule that a reviewing court cannot advance a petition to the second stage in its entirety. In *Pitsonbarger*, this Court considered petitioner's arguments related to the second-stage dismissal of several of his claims, as well as the denial of one of his claims following an evidentiary hearing. 205 Ill. 2d at 450. The petitioner made no claims of actual innocence, and this Court held that for the purposes of his petition, he needed to show cause and prejudice as to each claim. *Id.* at 460, 463. Contrary to the State's assertion, this Court did not foreclose an argument that prior proceedings on a petition might be so fundamentally flawed that an individual assessment of each claim for cause and prejudice was unnecessary. *Id.* at 463; (St. Br. at 9-10). In *Coleman*, which involved the denial of relief following an evidentiary hearing, this Court pointed out that if the petitioner made a claim of trial error and a claim of actual innocence, "the former claim must meet the cause-and-prejudice standard, and the latter claim must meet the *Washington* standard." 2013 IL 113307, ¶¶49-77, 91.

Neither case supports the State's argument that the appellate court erred in remanding Griffin's petition without separately addressing his ineffectiveness claim. At most, both cases stand for the proposition that pursuant to the Act, there are two bases for relaxing the bar to filing more than one petition, and that depending on the type of claim a different standard applies. 725 ILCS 5/122-1(f). At no point did this Court impose a requirement that lower courts may only reverse the denial of leave to file a successive petition after considering each claim.

Moreover, the State's argument is contrary to the procedures under the Act and this Court's rules. Much like the procedures utilized with respect to an initial post-conviction petition, if a lower court grants leave to file a successive petition, and the petitioner is indigent, counsel is appointed. 725 ILCS 5/122-4 (West 2019); *Robinson*, 2020 IL 123849, ¶85. Subsequently, the petitioner may be permitted to amend his post-conviction petition. 725 ILCS 5/122-3 (West 2019); 725 ILCS 5/122-5 (West 2019). Illinois Supreme Court Rule 651(c) requires that post-conviction counsel certify that he consulted with petitioner, examined the record of proceedings, and "made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions."

Requiring a lower court to evaluate each claim is premature, and would render the procedures under the Act and this Court's own rules meaningless. *See People v. Marshall*, 242 Ill. 2d 285, 292 (2011) ("We construe the statute to avoid rendering any part of it meaningless or superfluous."). Because even a successive petition is subject to the same procedures under the Act as an initial post-conviction petition, including the ability to amend the petition, this Court's holding in *Rivera* precluding partial summary dismissals applies with equal force. 198 Ill. 2d at 367-74. In addition, the State's proposed requirement is wholly unnecessary because it is not prevented from arguing that the petitioner did not establish cause and prejudice at subsequent stages for any of his constitutional claims, when the petitioner has the benefit of counsel. *Bailey*, 2017 IL 121450, ¶¶25-27. As a result, the appellate court did not err in reversing the denial of leave to file Griffin's petition, and remanding the petition for second stage proceedings in its entirety. *Griffin*,

2022 IL App (1st) 191101-B, ¶68.

Notwithstanding Griffin’s argument, should this Court not agree, the most appropriate action would be to remand Griffin’s case to the appellate court for a consideration of whether he established cause and prejudice for his ineffective assistance of counsel claim in the first instance. *People v. Prante*, 2023 IL 127241, ¶88 (“Where trial errors were raised but not ruled upon in the appellate court, it is appropriate for this court to remand the cause to the appellate court for resolution of those remaining issues.”) (internal quotations and citation omitted). In this case, no court has determined whether Griffin established cause and prejudice for his ineffective assistance of counsel claim, as the circuit court denied leave solely because he pleaded guilty. (C. 24; R. 5)

III. Because Shamar Griffin established cause and prejudice for his ineffective assistance of trial counsel claim, his motion for leave to file his successive petition should be granted.

Should this Court disagree with Shamar Griffin's arguments set for above in argument II, Griffin has nonetheless established cause and prejudice for his ineffective assistance of counsel claim. Griffin argued that his trial counsel was ineffective for failing to investigate whether Butler was the actual shooter, and asserted that he pleaded guilty based on counsel's advice that there was no defense to the charges. (Sup2. C. 9) Griffin's affidavits show that at least two of the witnesses identified Griffin for reasons other than his guilt, and that one witness saw someone else commit the shooting, supporting a defense to the charges. (Sup2. C. 22-27) Taken in conjunction with Griffin's claim that he falsely confessed to the charges, had counsel done any investigation, Griffin likely would not have pleaded guilty and sought to defend himself at trial. To that end, his claim also undercuts the voluntariness of his guilty plea.

At the leave to file stage, Griffin must make a *prima facie* showing of cause and prejudice for failing to assert his claim in an earlier petition. *People v. Ryburn*, 2019 IL App (4th) 170779, ¶20. A petitioner establishes "cause" by identifying an objective factor that impeded his ability to raise a claim in initial proceedings. *Id.*, ¶32 (quoting 725 ILCS 5/122-1(f)). A petitioner establishes "prejudice" by showing that the claim "so infected the trial that the resulting conviction or sentence violated due process." *Id.*, ¶38 (quoting 725 ILCS 5/122-1(f)). The denial of leave to file based on the failure to establish cause and prejudice is reviewed *de novo*. *Robinson*, 2020 IL 123849, ¶39.

Initially, Griffin's claim is a cognizable post-conviction claim. *People v. Montgomery*, 327 Ill. App. 3d 180, 184-86 (1st Dist. 2001) (petition remanded for second-stage proceedings where it raised a claim that defense counsel was ineffective for failing to investigate and present expert evidence countering the cause of death). Additionally, an ineffective assistance of counsel claim based on an allegation that counsel's erroneous advice regarding his defense induced the petitioner to plead guilty, thereby rendering his plea involuntary, is also cognizable in a petition. *People v. Hall*, 217 Ill. 2d 324, 334-40 (2005) (second-stage dismissal reversed where petition stated a substantial claim that defendant was induced to plead guilty based on counsel's erroneous advice that there was no defense to the charges). While a guilty plea generally waives any fourth amendment claims, Griffin's allegation that his confession was coerced by the investigating detectives, as supported by the lawsuit documentation he attached to his petition, supports his claims that defense counsel failed to investigate his case before inducing him to plead guilty. *See People v. Miller*, 346 Ill. App. 3d 972, 980-89 (2d Dist. 2004) (trial counsel was ineffective, and denial of post-conviction relief manifestly erroneous, where petitioner established that had counsel litigated a motion to suppress he likely would not have pleaded guilty). It corroborates Griffin's general allegations of counsel's ineffectiveness by demonstrating that counsel failed to do any pretrial investigation before concluding that Griffin's only option was to plead guilty or face a life sentence. (Sup 2. C. 20-21) The standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), applies when evaluating an ineffective assistance of counsel claim, namely "that counsel's performance fell

below an objective standard of reasonableness and the defendant was prejudiced by counsel's substandard performance." *Hall*, 217 Ill. 2d at 335.

Contrary to the arguments by the State, Griffin made a *prima facie* showing of cause for not bringing his claim earlier. (St. Br. at 25-26) The State argues that Griffin cannot establish cause because he was aware of "these discussions" at the time he pleaded guilty and when he filed his initial petition, pointing out his allegation that he heard Butler's name mentioned while in jail. (St. Br. at 26) The State also argues that the affidavits from Myles and Moore do not show cause because they did not come forward until 2018, and thus could not have been discovered by trial counsel. (St. Br. at 26)

These arguments were recently rejected by the appellate court in *People v. Johnson*, 2019 IL App (1st) 153204. In *Johnson*, the petitioner was convicted of murder and aggravated battery with a firearm. *Id.*, ¶3. The petitioner sought leave to file a successive petition asserting actual innocence, and attached two affidavits to his petition. *Id.*, ¶¶21, 23. One of the affiants, Terrance Hilliard, attested that he was present at the shooting and saw another person shoot at one of the victims. *Id.*, ¶21. Hilliard also attested that one of victims falsely identified the petitioner as the shooter. *Id.* Another affiant, Jason Nichols, attested that two of the victims falsely identified that petitioner in order to get even. *Id.* The petitioner ultimately filed an amended petition raising a claim of ineffective assistance for failing to investigate Douglas Williams. *Id.*, ¶26. Williams averred that he was with two of the victims at the time of the shooting, and that the petitioner was not the shooter. *Id.* Williams indicated that he did not come forward

until 2014, after he learned of the petitioner's conviction. *Id.* The circuit court ultimately granted the State's motion to dismiss. *Id.*, ¶28.

On appeal, the *Johnson* court considered the State's argument that the petition failed to establish cause for the ineffective assistance of counsel claim based on the failure to investigate Williams. 2019 IL App (1st) 153204, ¶34. As in Griffin's case, the State asserted that the petitioner waived his ineffective assistance of counsel claim because he did not raise it in his initial post-conviction petition. *Id.*, ¶36. The court rejected the State's argument, noting that the petitioner could not have known the substance of Williams' testimony until he came forward in 2014, and therefore the petitioner could not have raised his claim in an earlier proceeding. *Id.*, ¶39. The petitioner established cause even though Williams was identified as being present at the shooting by one of the trial witnesses, and noted that the petitioner alleged he asked his trial counsel to investigate the witnesses at the shooting but that counsel failed to do so. *Id.*, ¶40.

Like the petitioner in *Johnson*, Griffin could not have known that Moore's or Myles' attestations would have supported his post-conviction ineffective assistance of counsel claim until they came forward in 2018. (Sup 2. C. 23, 27) Griffin like the petitioner in *Johnson* also alleged that he asked his plea counsel to investigate his case because he had been hearing that Butler was the shooter, but that counsel refused to and told him to plead guilty and move on with his life, and avoid a sentence of life in prison. (Sup 2. C. 20-21) Griffin's allegations that counsel failed to investigate his case, and coerced him into a plea based on counsel's assessment that he had no other options, are corroborated by his documented complaints about

counsel asserted before entry of his guilty plea, and in his subsequent collateral filings. (TR. R1-9; TC. 110-17; SEC. C. 123-24; Sup2. C. 9-10, 20-21) Counsel, who was about a month away from retirement prior to the entry of Griffin's plea, and faced with an unchallenged confession, arguably had little incentive to investigate Griffin's case. (TR. Q4, U3-4) The difference between Griffin's prior complaints and filings, and his current proceedings, is that he has more documentation supporting his claim that counsel did nothing to investigate his defense. For the purposes of leave to file, and contrary to the State's argument, Griffin established cause for his claim. *Johnson*, 2019 IL App (1st) 153204, ¶40.

Griffin also established prejudice for the purposes of the Act. In its brief, the State wrongly equates "prejudice" for the purposes of the Act with prejudice under a *Strickland* analysis. (St. Br. at 26-29) The State relies on *People v. Hatter*, 2021 IL 125981, for the proposition that to show prejudice, the petitioner would need to show he would have been better off rejecting the plea and going to trial. (St. Br. at 27) *Hatter* does not involve a consideration of cause and prejudice because it involved an initial petition, and this Court was clearly considering "prejudice" under *Strickland*. 2021 IL 125981, ¶¶23-40. Notably, unlike the petitioner in *Hatter*, Griffin is alleging facts that show his actual innocence for the purposes of undermining his guilty plea. *Id.*, ¶¶38-40.

To show prejudice under the Act, Griffin must demonstrate that the alleged errors worked an "actual and substantial disadvantage," and infected the proceedings that resulted in his conviction with an error of constitutional dimension. *People v. Hudson*, 195 Ill.2d 117, 123-24 (2001). At this stage, a court is only considering

whether petition and supporting documentation make a *prima facie* showing of cause-and-prejudice such that leave should be granted, taking all well-pleaded allegations in the petitioner and supporting affidavits not positively rebutted by the record as true. *Bailey*, 2017 IL 121450, ¶ 24; *Robinson*, 2020 IL 123849, ¶45.

Contrary to the State's arguments, Griffin made a *prima facie* showing of prejudice based on counsel's failures. While the State focuses on its perception of the leniency of his plea agreement, including its incorrect assertion that his current sentence is unlawful (*supra* at 4 n.2), its assessment is largely irrelevant for the purposes of determining whether counsel's failures infected Griffin's plea proceedings for the purposes of prejudice under the Act. (St. Br. at 28-29) In his petition and affidavit, Griffin alleged that he was innocent of the charges, and that he told his attorney that he was hearing from other inmates in jail that Butler was the actual shooter and that he needed to investigate him. (Sup 2. C. 20) According to Griffin, his attorney responded that there was "no defense that can help" him because of his confession, and that if he did not plead, he would spend the rest of his life in prison. (Sup 2. C. 20) Griffin also told counsel that his confession was false and was the product of psychological and mental coercion by the detectives, but that counsel nonetheless told him to plead guilty and get on with his life. (Sup 2. C. 21) Had counsel done any investigation to support Griffin's innocence instead of telling him that there was "no defense," it is evident that Griffin would not have pleaded guilty. *Hall*, 217 Ill. 2d at 335-36. Griffin's claim is corroborated by the affidavits of Myles and Moore, demonstrating that he had a plausible defense and would not have pleaded guilty absent counsel's ineffectiveness. *Id.* at 335-36.

As in *Hall*, the trial court's admonishments did not overcome the involuntary nature of Griffin's plea, which was based on counsel's erroneous advice. *Id.* at 340.

To the extent that the State asserts that counsel would not have uncovered exculpatory evidence had he investigated Griffin's case, its argument is rank speculation that is inappropriate at this stage, and should be rejected by this Court. (St. Br. at 27); *Robinson*, 2020 IL 123849, ¶45. An attorney is obligated "to explore all readily available sources of evidence that might benefit their clients" and has a legal and ethical obligation "to explore and investigate a client's case." *People v. Makiel*, 358 Ill. App. 3d 102, 107 (1st Dist. 2005) (internal citations omitted). The failure to conduct a reasonable investigation in defense of a client, including the failure to investigate and subpoena witnesses, supports an ineffective assistance of counsel claim. 358 Ill. App. 3d at 107-08. Nothing in the record discloses that plea counsel actually investigated any defense to the charges against Griffin including Butler, and an ineffective assistance of counsel claim based on what could should have done and supported by materials outside of the record is not subject to forfeiture and warrants further post-conviction proceedings. *People v. Tate*, 2012 IL 112214, ¶¶13-15.

The allegations of the motion, petition, and attached supporting documentation, taken as true, show that plea counsel's performance was objectively unreasonable and highly prejudicial, and resulted an involuntary guilty plea. *Hall*, 217 Ill. 2d at 335-37, 340. Because a plea entered in violation of the right to effective assistance of counsel violates due process, Griffin has established cause and prejudice for the purposes of the Act, and should this Court consider his claim,

it should reverse the denial of leave to file his petition and remand for second-stage proceedings and the appointment of counsel. *Ryburn*, 2019 IL App (4th) 170779, at ¶42.

CONCLUSION

For the foregoing reasons, Shamar Griffin, petitioner-appellee, respectfully requests that this Court affirm the decision of the appellate court reversing the denial of leave to file a successive petition, and remanding his petition in its entirety for second-stage proceedings under the Post-Conviction Hearing Act. Alternatively, for the purposes of argument II, if this Court determines that a reviewing court is required to rule on cause and prejudice for Griffin's ineffective assistance of counsel claim, it should remand this matter to the appellate court in the first instance.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 46 pages.

/s/Rachel M. Kindstrand
RACHEL M. KINDSTRAND
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IN THE

SUPREME COURT OF ILLINOIS

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|------------------------|---|------------------------------------|
| PEOPLE OF THE STATE OF |) | Appeal from the Appellate Court of |
| ILLINOIS, |) | Illinois, No. 1-19-1101. |
| |) | |
| Respondent-Appellant, |) | There on appeal from the Circuit |
| |) | Court of Cook County, Illinois, |
| -vs- |) | No. 10 CR 01910. |
| |) | |
| |) | Honorable |
| SHAMAR GRIFFIN, |) | Michael B. McHale, |
| |) | Judge Presiding. |
| Petitioner-Appellee. |) | |

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 July 19, 2023, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the petitioner-appellee in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/ Alicia Corona

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