No. 129753

IN THE
SUPREME COURT OF ILLINOIS

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

BRIEF OF RESPONDENT-APPELLEE PEOPLE OF THE STATE OF ILLINOIS

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POINTS AND AUTHORITIES

NATURE OF THE CASE

Petitioner was convicted of two counts of first degree murder and sentenced to life in prison. After unsuccessfully pursuing a claim of actual innocence in an initial postconviction petition, petitioner requested leave to file a successive petition to again pursue a claim of actual innocence, this time based on a new affidavit. The circuit court denied leave to file, and the appellate court affirmed, finding that petitioner made no colorable showing that this witness was "newly discovered." A question is presented on the pleadings: whether the successive postconviction petition that petitioner sought leave to file sets forth a colorable claim of actual innocence.

ISSUE PRESENTED FOR REVIEW

Whether petitioner's claim of innocence was not colorable because he failed to allege, much less demonstrate, that he could not have discovered his newly offered witness through the exercise of due diligence before trial or, at the latest, before he filed his amended initial postconviction petition.

JURISDICTION

Appellate jurisdiction lies under Supreme Court Rules 315 and 612(b). This Court granted leave to appeal on September 27, 2023.

STATEMENT OF FACTS

I. Petitioner Was Convicted of Two Counts of Murder Based on the Testimony of Two Eyewitnesses.

Petitioner was charged with the first degree murders of Derrick Armstrong and Bernadette Turner. C35-102.[1] At his December 2012 jury trial, two eyewitnesses identified him as the shooter. *See* R229-560.

Tamira Smith testified that at around 9:15 p.m. on May 21, 2009, she, Armstrong, and Turner were sitting in a Grand Am parked on the lefthand side of West Van Buren Street, next to Horan Park. R250-51. They had spent the afternoon selling chips, candy, and drinks to people at the park and now talked in the car, with Smith in the backseat, Armstrong in the driver's seat, and Turner in the front passenger seat. R248-50, 269, 272. The weather was nice that evening, and there were lots of people at the park, including several on the sidewalk near the car. R269-71.

Smith, Armstrong, and Turner had started talking to child who had approached the driver's side of the Grand Am when petitioner drove up in a black car and pulled alongside the passenger side of the Grand Am. R251-54. He stuck his left arm out the window, pointed a gun at the Grand Am, and opened fire, hitting both Armstrong and Turner. R254-58. As the people at the park ran and screamed, R287, petitioner drove away, R255-56.

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[1] "C_," "R_," "Pet. Br.," and "A_" refer, respectively, to the common law record, report of proceedings, petitioner's opening brief, and the appendix to that brief.

Smith described petitioner to responding police officers, R258-59 — she had seen his face from a distance of about three feet when he pulled up and opened fire, R252-54, 279 — and identified him as the shooter from a photo array in November 2010, R261-63. In February 2011, Smith identified petitioner from an in-person lineup. R264-68.

Debra Hardy testified that she was among the people at the park during the shooting, which she witnessed from a bench. R313, 316-18. Armstrong and Turner were sitting in a car parked directly in front of her when petitioner drove up alongside them, stuck a gun out the window, and opened fire into the car before driving away. R301-02, 319. She recognized petitioner because they had dealt drugs together. R299.

Hardy remained on the scene until an ambulance arrived, but she did not talk to police that night. R323-24. She went to the hospital, where she told Turner's mother that she had witnessed the shooting. R325-26, 351-52. After police spoke to Turner's mother, they contacted Hardy, who confirmed that she had witnessed the shooting. R352-54. In December 2010, Hardy identified petitioner from a photo array. R304-05.

Detective David Roberts testified that he responded to the park to investigate and arrived just as ambulances were leaving. R344-45, 380. Other officers were already present, securing the scene of the crime. R344-35, 380-81. Several people remained at the park, and one of the officers who had arrived before Roberts told him that many people had been present

before Roberts arrived. R381-82. During the course of his investigation, Roberts learned of witnesses who were present at the park and may have seen the shooting. R349. One of those witnesses was Smith, who provided a description of the shooter. R348-50. Roberts later spoke with Hardy, who also identified petitioner as the shooter. R394.

After petitioner was identified as the shooter, officers sent to find him spotted him on the street and asked him to stop. R408-11. Petitioner had been walking toward the officers, but when the officers asked him to stop, he turned and ran. R411-13, 415. The officers apprehended him after a foot chase. R411-13.

The jury convicted petitioner of murdering Armstrong and Turner. C121; R560. The circuit court sentenced petitioner to life in prison. C190. The appellate court affirmed this judgment, rejecting petitioner's claims of trial error. C206-46.

II. Petitioner Pursued an Initial Postconviction Petition Claiming Actual Innocence.

Through retained counsel, petitioner filed a postconviction petition, which he amended on January 2, 2019. C302-11. The amended petition raised a claim of actual innocence, C305-06, supported by statements from Donathan Williams and Debra Hardy implicating Dennis Glover as the shooter. First, petitioner attached an unnotarized "affidavit" from Williams claiming that, in 2013, Glover (also known as "Sacky") had confessed to killing Turner and Armstrong. C309-10; *see also* C535-37 (attachments to

successive petition). Second, petitioner attached his investigator's statement that Hardy told the investigator that the shooter was her nephew, Dennis Glover, and that she had been coerced into testifying against petitioner. *See* C310, 314-15; *see also* C538-42. The circuit court dismissed the postconviction petition in February 2019. C371-96. The appellate court affirmed this judgment in November 2020. C465-90.

III. The Circuit Court Denied Leave to File a Successive Postconviction Petition Claiming Actual Innocence.

In August 2021, petitioner moved for leave to file a successive postconviction petition to raise claims that (1) his life sentence was unconstitutional because he was an "emerging adult" (21 years old) at the time of the crime, and (2) he is actually innocent of the murders based on the affidavit of Wynton Collins. C503-30.

Collins's affidavit, which was signed on January 3, 2020, stated that he was "currently incarcerated at Western Illinois Correctional Center." C531. Collins explained, without reference to dates, that he met petitioner while lifting weights in the prison yard and they "became cool by way of us trying to get in shape." *Id.* Collins averred that, "to [his] surprise," petitioner "was from the westside of Chicago just like [Collins], and a few blocks away from where [Collins] grew up at, this made [them] closer." *Id.*[2] Then "one day" —

[2] Contrary to petitioner's claim that Collins "averred that . . . he recently met [petitioner] in prison," Pet. Br. 13, the affidavit does not contain the word "recently" or otherwise characterize the date on which Collins and petitioner met while lifting weights.

Collins did not specify when — they "spoke about [their] cases and when [petitioner] told [Collins] where his case happen[ed] at [Collins] was lost for words" because he "ha[d] first hand knowledge of the shooting deaths that took place on the south side of Van Buren [and] Whipple at approx 9 pm hour on May 21, 2009." *Id.* Collins stated that he "didn't know [petitioner]" but "knew he was not involved in any activity in [the] area." *Id.* Collins recounted:

> On the day of the incident I was parked on Van Buren and Whipple sitting on the hood of my car talking to this female that I just recently met name Tasha, we were on the southwest side of the street talking when a black car drove up next to mines and I seen the homie Sacky. I tried to speak to him but he pulled up to the car that was parked directly in front of me and started shooting at the two occupants who were sitting inside, it was 10 to 15 shots fired. I took off and ran to the north side of Van Buren and ran west toward Albany. Tasha ran north on Whipple[.] I never saw her again. I was hiding behind a parked car on Van Buren and Albany when I seen the same car Sacky was driving speeding past me, I know it was Sacky because I know him from around the way. After he left I ran back to my car and seen the two occupants looked deceased. I heard tires screetching[.] I thought Sacky was coming back to shoot me. I was scared so I got in my car and drove to work. I am coming forward now because I just found out that [petitioner] was incarcerated for this horrific crime that I know personally that he didn't do.

C531-33. Collins stated that he "was never interviewed by the police regarding this case nor any attorney, investigator or anyone else regarding this case," and "[t]he reason why [he] never spoke to the police about this, [he] was in fear for [his] and [his] family['s] safety [because] everybody know how Sacky get down." C533.

The circuit court found that petitioner failed to provide essential context for evaluating whether Collins was a newly discovered witness or whether his testimony was of such conclusive character that it would alter the result at trial. R1470-71. The court emphasized that petitioner failed to set forth "what his lawyer knew or didn't know, how this came to light and why this person is so late in coming to their claims in their affidavit," ten years after trial. *Id*. Accordingly, the court denied leave to file the petition. A5; R1470-71.

IV. The Appellate Court Affirmed Because Petitioner Made No Colorable Showing that His Witness Was "Newly Discovered."

The appellate court affirmed the judgment denying leave to file the successive petition, holding that petitioner failed to demonstrate that Collins's affidavit was "newly discovered" and declining to address whether Collins's testimony was "conclusive." *People v. Harris*, 2022 IL App (1st) 211255-U, ¶ 30.[3]

The appellate court quoted this Court's precedent that "[t]o be new, evidence must have been discovered after trial and 'could not have been discovered earlier through the exercise of due diligence.'" *Id.* ¶ 31 (quoting *People v. Coleman*, 2013 IL 113307, ¶ 96). This standard imposes a "due

[3] Should this Court disagree with the appellate court's ruling that the evidence was not "newly discovered," it should remand for the appellate court to address the unadjudicated question of whether the evidence was "conclusive." *See, e.g., People v. Griffin*, 2024 IL 128587, ¶¶ 71-72 (remanding for appellate court to consider unaddressed issue).

diligence" requirement. *Id.* It follows that "a defendant's efforts to discover evidence sooner may be insufficient to satisfy the due diligence requirement." *Id.*

As the appellate court explained, "Collins's affidavit establishes that no one approached him about the shooting and he did not come forward on his own because he feared Sacky," but the "affidavit does not establish that he could not have been discovered earlier through due diligence." *Id.* ¶ 33. Indeed, to the contrary, Collins claimed that "he was sitting on the hood of a vehicle on Van Buren Street and Whipple Street, parked directly behind a vehicle in which two people were shot and killed," and from that position would have been visible to "Hardy, who observed the shooting directly in front of her from feet away," and Smith, who, from "the backseat of Turner's vehicle, would also have noticed Collins sitting on the hood of the vehicle directly behind her, talking to another person." *Id.* ¶ 35.

The appellate court found that "there is no evidence in the record that [petitioner] ever attempted to ascertain who was at the scene besides Smith and Hardy and [petitioner] offers no explanation in his motion for leave to file, successive petition incorporated therein, or affidavit, regarding why Collins could not be identified or located sooner." *Id.* ¶ 37. In sum, "due diligence presumes some effort by the [petitioner] to discover evidence," but "[petitioner] alleged no effort whatsoever here." *Id.*

STANDARD OF REVIEW

This Court reviews de novo a circuit court's judgment denying leave to file a successive postconviction petition. *People v. Griffin*, 2024 IL 128587, ¶ 33.

ARGUMENT

Petitioner Was Not Entitled to File a Successive Petition Because He Made No Colorable Showing That His Witness Could Not Have Been Discovered Sooner Through the Exercise of Due Diligence.

The Post-Conviction Hearing Act "contemplates the filing of a single petition," *People v. Coleman*, 2013 IL 113307, ¶ 81, and a petitioner may file a successive petition only with leave of court, 725 ILCS 5/122-1(f); *People v. Edwards*, 2012 IL 111711, ¶ 24. Because "[t]he successive filing of post-conviction petitions plagues [the] finality" of criminal convictions, and "'[w]ithout finality, the criminal law is deprived of much of its deterrent effect,'" successive petitions are disfavored. *People v. Flores*, 153 Ill. 2d 264, 274 (1992) (quoting *Teague v. Lane*, 489 U.S. 288, 309 (1989)); *see also, e.g., People v. Bailey*, 2017 IL 121450, ¶ 39 ("successive postconviction petitions are highly disfavored"). The burden falls on a petitioner to obtain leave, and he "'must submit enough in the way of documentation to allow a circuit court to make that determination'" that leave is warranted. *Edwards*, 2012 IL 111711, ¶ 24 (quoting *People v. Tidwell*, 236 Ill. 2d 150, 157 (2012)).

A postconviction petitioner may claim that he is actually innocent based on "supporting evidence that is new, material, noncumulative and,

most importantly, of such conclusive character as would probably change the result on retrial." *Coleman*, 2013 IL 113307, ¶¶ 83-84 (internal quotation marks omitted); *see also People v. Washington*, 171 Ill. 2d 475, 485-89 (1996) (recognizing freestanding claim of actual innocence under Ill. Const. art. I, § 2 and adopting standard applied to motions for new trial based on newly discovered evidence). And a petitioner may file *successive* claims of actual innocence, provided that he satisfies these criteria with respect to each claim. *People v. Ortiz*, 235 Ill. 2d 319, 332-33 (2009). But, as this Court has emphasized, "'[b]ecause a successive postconviction claim of actual innocence undermines the finality of a conviction obtained after a fair trial, a postconviction petitioner seeking to file a claim of actual innocence is held to a high standard.'" *People v. Prante*, 2023 IL 127241, ¶ 86 (quoting, with alteration, *People v. Taliani*, 2021 IL 125891, ¶ 68).

To obtain leave to file a successive petition raising a claim of actual innocence, a petitioner must set forth a "colorable claim" that satisfies each element of the claim. *Griffin*, 2024 IL 128587, ¶ 35. This means that the petitioner's evidence of innocence must be both competent and sufficient to prove his innocence. *See id.* (colorable claim of innocence requires evidence that is both "new" and "material"). Evidence cannot be considered in support of a claim of innocence unless it is "newly discovered," which requires that it "was unavailable at the time of trial and could not have been discovered employing due diligence." *Taliani*, 2021 IL 125891, ¶ 68. And evidence of

innocence is insufficient to prove innocence unless it is "of such a conclusive character that it persuasively shows that the petitioner is factually innocent of the crimes for which he was convicted and that the evidence, if presented at trial, would exonerate the petitioner." *Id.* If the evidence petitioner offers does not satisfy all of these criteria, then the court should deny leave to file because, "as a matter of law, no colorable actual innocence claim has been presented." *Prante*, 2023 IL 127241, ¶ 74; *see Edwards*, 2023 IL 127241, ¶¶ 34-40 (petitioner failed to show colorable claim of actual innocence where some of his evidence of innocence was not newly discovered and his remaining evidence, though newly discovered, was alone insufficiently conclusive of his innocence).

Here, petitioner failed to set forth a colorable claim of actual innocence because he made no colorable showing that the evidence he claimed proved his innocence — Collins's account of the shooting — was "newly discovered." Petitioner did not allege, much less demonstrate, that he could not have discovered Collins through due diligence before trial or, at the latest, before he filed his amended initial postconviction petition. Therefore, the circuit court properly denied him leave to file a disfavored successive petition, and this Court should affirm. *See People v. Jackson*, 2021 IL 124818, ¶ 41 (affirming denial of leave where "it is clear that petitioner cannot set forth a colorable claim of actual innocence because his supporting affidavits are not new").

A. Petitioner Failed to Show That He Could Not Have Discovered Collins Before Trial.

Petitioner failed even to allege that he could not have discovered Collins before trial through the exercise of due diligence, much less provide evidence showing that such was the case. Consequently, he failed to plead an essential element of a claim of innocence, as both courts below found. *See People v. Walker*, 2015 IL App (1st) 130530, ¶ 18 ("[T]he burden to show due diligence falls on the defendant.").

The circuit court properly denied leave to file based on this failure, for leave to file "should be denied when it is clear . . . [that] the successive petition with supporting documentation is insufficient to justify further proceedings." *People v. Smith*, 2014 IL 115946, ¶ 35. As the circuit court noted, petitioner failed to explain "what his lawyer knew or didn't know" and "how this came to light." R1470-71. And the appellate court agreed that "the requirement of due diligence presumes some effort by the defendant to discover evidence," but "defendant alleged no effort whatsoever here." *Harris*, 2022 IL App (1st) 211255-U, ¶ 37. With no allegation that Collins's testimony was not discoverable before trial in the exercise of due diligence, "as a matter of law, no colorable actual innocence claim ha[d] been presented." *Prante*, 2023 IL 127241, ¶ 74.

Contrary to petitioner's assertion, the circuit court was not required to supply the missing allegations by "liberally constru[ing] [the allegations] in [his] favor." Pet. Br. 16 (citing *People v. Robinson,* 2020 IL 123849, ¶ 45). To

the contrary, as *Robinson* held, "*well-pleaded* allegations in the petition and supporting affidavits that are not positively rebutted by the trial record are to be taken as true." 2020 IL 123849, ¶ 45 (emphasis added). In holding that courts must take well-pleaded facts as true, *Robinson* did not require courts to assume facts that a petitioner did not plead. Moreover, overlooking the failure to plead a critical element of a claim of innocence would ignore this Court's repeated admonitions that "successive petitions are disfavored by Illinois courts," *Edwards*, 2012 IL 111711, ¶ 29, and that, even at the pleading stage, petitioners seeking to file successive petitions claiming actual innocence face a "high standard," *Prante*, 2023 IL 127241, ¶ 86; *Taliani*, 2021 IL 125891, ¶ 68.

Petitioner would flip the burden. He faults the appellate court for engaging in "unsupported speculation" that he could have discovered Collins before trial in the absence of "positive or affirmative proof," Pet. Br. 13-14, rather than engaging in unsupported speculation that he could *not* have discovered Collins before trial in the absence of any proof. But petitioner bore the burden of making a colorable showing that he could not have discovered Collins through the exercise of due diligence; the appellate court was not obligated to presume, absent any proof — or, indeed, any allegation — that this was the case.

Nor was the record such that it was otherwise plain Collins could not have been discovered previously. To the contrary, as the appellate court

correctly observed, given the circumstances recounted in Collins's affidavit, it is highly improbable that he was *not* discoverable before trial. *Harris*, 2022 IL App (1st) 211255-U, ¶ 36. Collins stated that he was sitting on the hood of his car, which was parked directly behind the victims' car at the time of the shooting. C531. There, he would have been visible to *at least* Hardy, who was sitting on a nearby bench; Smith, who was in the back seat of the Grand Am; and the child talking to the victims from the sidewalk next to the Grand Am. Collins further stated that immediately after the shooting, he fled on foot and hid before returning to his car — arriving in time to see the deceased victims — and then driving away. C533. As a result, he would have been noticeable to Hardy and the emergency medical personnel who immediately rushed the victims to the hospital in an ambulance, as well as to the responding officers arriving on the scene. *See* R380-81 (Roberts's testimony that he arrived within minutes of shooting, just after the ambulance had left, by which time officers had already been on the scene). As the appellate court put it, according to his affidavit, Collins was so "noticeably positioned before and after the shooting" that he would have been readily visible to anyone at the scene. *Harris*, 2022 IL App (1st) 211255-U, ¶ 36.

Thus, the record tends to show that Collins would have been discoverable before trial in the exercise of due diligence. Without any allegations or evidence to the contrary, the burden did not fall on the appellate court to find some basis to conclude that Collins was discoverable;

the burden fell on petitioner to show that he was not. Because petitioner failed to bear that burden, he failed to set forth a colorable claim of actual innocence, and he was not entitled to file a successive petition.

B. Petitioner Failed to Show That He Could Not Have Discovered Collins Before He Filed His Initial Amended Postconviction Petition.

It is enough that petitioner failed to allege that he could not have discovered Collins *before trial* through the exercise of due diligence, but his claim also fails for a second reason. Petitioner sought leave to file a *successive* postconviction petition claiming innocence, after already having pursued that claim in an initial petition. Consequently, petitioner needed to make a colorable showing that he could not have discovered Collins through the exercise of due diligence before he filed his operative initial petition — the amended petition that he filed in 2019. *See People v. Wideman*, 2016 IL App (1st) 123092, ¶ 58 ("we review not only whether the testimony in [the] affidavit could have been discovered at the time of trial, but whether that evidence was available when the defendant filed his previous postconviction pleadings"); *People v. Snow*, 2012 IL App (4th) 110415, ¶ 21 ("if the evidence was available at a prior posttrial proceeding, the evidence is also not newly discovered evidence").[4]

[4] For example, given that Collins was likely observed by multiple eyewitnesses, including Hardy, petitioner should explain why his postconviction investigator was unable to locate Collins despite talking to Hardy at length in generating her statement in support of the initial postconviction petition.

The appellate court's decision did not rest on this rationale, instead relying on the independently sufficient basis that petitioner had failed to show he could not have discovered Collins before trial, but this Court "may affirm on any basis presented in the record." *People ex rel. Alvarez v. $59,914 U.S. Currency*, 2022 IL 126927, ¶ 24. And the People did not forfeit their argument that petitioner failed to state a colorable claim of actual innocence on this basis, for "an appellee may raise any argument or basis supported by the record to show the correctness of the judgment below, even though he had not previously advanced such an argument." *In re Veronica C.*, 239 Ill. 2d 134, 151 (2010).

This Court previously has framed the diligence requirement in terms of whether a witness was discoverable before trial. *See, e.g.*, *Griffin*, 2024 IL 128587, ¶ 35 ("'New' means the evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence."); *Robinson*, 2020 IL 123849, ¶ 47 ("Newly discovered evidence is evidence that was discovered after trial and that the petitioner could not have discovered earlier through the exercise of due diligence."). But the Court never suggested that a petitioner's obligation to exercise diligence in discovering the factual basis of his claim and in presenting that claim ceases upon conviction. Rather, the Court's articulation of the diligence requirement in relation to trial reflects the Court's use of precedent concerning post-trial motions in crafting the standard governing postconviction claims of actual

innocence. The precedent on which the Court relied concerned defendants who moved for new trials on the basis of newly discovered evidence. *See Washington*, 171 Ill. 2d at 486-89 (citing *People v. Molstad*, 101 Ill. 2d 128, 134 (1984)). In the post-trial context, those defendants needed to show that the evidence on which they relied was not discoverable before trial.

The appellate court has correctly applied the same obligation to exercise due diligence to prior post-trial proceedings, recognizing that "if the evidence was available at a prior posttrial proceeding, the evidence is also not newly discovered evidence." *Snow*, 2012 IL App (4th) 110415, ¶ 21. This principle plainly applies where the evidence in support of a successive petition was actually known at the time of an initial petition. *People v. Warren*, 2016 IL App (1st) 090884-C, ¶ 114 ("Typically, evidence of which defendant was aware in earlier postconviction proceedings will not be considered newly discovered evidence."). Here, notably, petitioner may have actually known of Collins's account when he amended his initial petition in 2019.[5] Neither petitioner nor Collins specify when they met or when they discussed petitioner's case, but Collins's affidavit was signed in January 2020, shortly after his amended petition was dismissed and while that dismissal was pending on appeal.

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[5] In his initial postconviction proceeding, petitioner was represented by counsel, who would have been ethically prohibited from presenting false testimony in support of petitioner's innocence claim. *See generally People v. Greer*, 212 Ill. 2d 192, 205-10 (2004) (noting that rules of ethics require postconviction attorney to withdraw rather than advance frivolous claims).

But regardless of whether petitioner knew of Collins's account, he was still required to exercise due diligence before and during his initial postconviction proceedings. *See Wideman*, 2016 IL App (1st) 123092, ¶ 58; *Snow*, 2012 IL App (4th) 110415, ¶ 21. And evidence of which petitioner should have been aware through the exercise of due diligence before or during his initial postconviction proceedings was "available," and thus cannot be considered newly discovered. *See Snow*, 2012 IL App (4th) 110415, ¶ 21.

Requiring petitioners litigating actual innocence claims to exercise diligence with respect to mustering available evidence in support of those claims rather than engage in piecemeal litigation is not only consistent with the structure of the Post-Conviction Hearing Act, which discourages successive petitions, *see Bailey*, 2017 IL 121450, ¶ 39, but also with *res judicata* principles. *Res judicata* "bars not only what was actually decided in the first action but also whatever *could have been* decided." *Hudson v. City of Chicago*, 228 Ill. 2d 462, 467 (2008) (internal quotation marks omitted and emphasis added); *see also Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334-35 (1996) (*res judicata* "extends not only to what was actually decided in the original action, but also to matters which could have been decided in that suit"). As the appellate court reasoned in *Wideman*, "[k]eeping in mind the desire to avoid 'piecemeal post-conviction litigation,' we find it is appropriate, for *res judicata* purposes, to review not only whether the testimony in [the] affidavit could have been discovered at the time of trial, but whether that

evidence was available when the defendant filed his previous postconviction pleadings." 2016 IL App (1st) 123092, ¶ 58 (quoting *Ortiz*, 235 Ill. 2d at 332).

In *Ortiz*, the case on which *Wideman* relied, this Court considered whether *res judicata* bars successive claims of innocence. 235 Ill. 2d at 332-33. It acknowledged, generally, that "[t]he preclusion doctrines of *res judicata,* collateral estoppel, and law of the case prevent a defendant from taking two bites out of the same appellate apple and avoid piecemeal post-conviction litigation." *Id.* at 332. But, it reasoned, "[w]here a defendant presents *newly discovered*, additional evidence in support of a claim, collateral estoppel is not applicable because it is not the same 'claim.'" *Id.* (emphasis added). And that was the case in *Ortiz*, where the defendant's second successive petition "presented a new 'claim' of actual innocence because it offered two additional eyewitnesses who were previously unknown to [him]." *Id.* at 332-33. Ultimately, the defendant relied on a key witness who "did not admit to his having witnessed the incident until more than 10 years after trial when he spoke to defendant's mother" and who had "made himself unavailable as a witness when he moved to Wisconsin shortly after the murder." *Id.* at 334.

Based on this reasoning, *Ortiz* did not consider the evidence presented in support of a successive claim of actual innocence to be "new" simply because it was unavailable before trial, but because it was "previously unknown" to the defendant, *id.* at 332-33, who had pursued two prior

postconviction petitions while the evidence was unavailable. Although *Ortiz* did not specify that this was necessary for evidence offered in support of a successive claim of innocence to be "new," requiring petitioners to present available evidence in support of actual innocence claims rather than litigate those claims piecemeal is consistent with this Court's repeated admonitions that "'a successive postconviction claim of actual innocence undermines the finality of a conviction obtained after a fair trial,'" and thus "'a postconviction petitioner seeking to file a claim of actual innocence is held to a high standard.'" *Prante*, 2023 IL 127241, ¶ 86 (quoting *Taliani*, 2021 IL 125891, ¶ 68). This "high standard" requires diligence in presenting claims of actual innocence.

And finally, a diligence requirement during initial postconviction proceedings would ensure that innocence claims are treated similarly to other claims that a postconviction petitioner seeks to raise in a statutorily restricted successive petition. *See* 725 ILCS 5/122-1(f). The statute provides that "[l]eave of court may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure," and defines cause as "an objective factor that impeded [the petitioner's] ability to raise a specific claim during his or her initial post-conviction proceedings." *Id.* This Court has recognized actual innocence claims as an additional exception and held that petitioners raising them need not show "cause" to pursue them in a

successive petition. *Ortiz*, 235 Ill. 2d at 330-31; *see also Edwards*, 2012 IL 111711, ¶¶ 24-29 (reiterating that innocence claims are not subject to cause-and-prejudice test, but holding that innocence claim raised in successive petition faces higher bar than claim in initial petition due to statutory bar on successive petitions). Just as the "cause" standard is intended to curb piecemeal postconviction litigation, this Court's "due diligence" standard imposes an analogous limit on successive claims of actual innocence and effectuates the legislative purpose of disfavoring successive petitions that plague finality.

Here, petitioner failed to make any showing that he exercised due diligence in seeking Collins's testimony before his 2012 trial, in the years leading up to his 2019 amended postconviction petition, or during proceedings on that petition. Because petitioner failed to show that Collins's affidavit was not discoverable when he pursued his first postconviction petition, he failed to show that it was "newly discovered," and the lower courts properly barred his petition on this basis as well.

CONCLUSION

This Court should affirm the appellate court's judgment.

July 1, 2024

Respectfully submitted,

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RULE 341(c) CERTIFICATE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 22 pages.

/s/ Erin M. O'Connell
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Assistant Attorney General

CERTIFICATE OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On July 1, 2024, the foregoing **Brief of Respondent-Appellee People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which automatically served notice on counsel at the following e-mail address:

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