No. 128587

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellant, v. SHAMAR GRIFFIN, Petitioner-Appellee.	))))))))))	Appeal from the Appellate Court of Illinois, First District, No. 1-19-1101 There on Appeal from the Circuit Court of Cook County, Illinois, No. 10 CR 1910 The Honorable Michael B. McHale, Judge Presiding.

REPLY BRIEF OF RESPONDENT-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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ORAL ARGUMENT REQUESTED

E-FILED
8/18/2023 10:10 AM
CYNTHIA A. GRANT
SUPREME COURT CLERK

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This Court should reverse the appellate court's judgment granting petitioner leave to file a successive postconviction petition and remanding for further proceedings because petitioner has neither (1) set forth a colorable claim of actual innocence, nor (2) shown cause and prejudice to pursue his claim of ineffective assistance of trial counsel.

I. Petitioner Did Not Set Forth a Colorable Claim of Actual Innocence.

As demonstrated in the People's opening brief, petitioner is not entitled to pursue his claim of innocence in a successive postconviction petition because he did not set forth a "colorable claim," *People v. Edwards*, 2012 IL 111711, ¶ 24, under the relevant standard. Because petitioner pleaded guilty, he must "provide new, material, noncumulative evidence that clearly and convincingly demonstrates that a trial would probably result in acquittal." *People v. Reed*, 2020 IL 124940, ¶ 49.

Petitioner does not attempt to satisfy *Reed*'s "clear and convincing" standard. Rather, petitioner contends that he should be permitted to file his successive petition because he can satisfy the more lenient standard that governs claims of innocence by petitioners who were convicted at trial. *See* Pet. Br. 21-28 (citing *People v. Robinson*, 2020 IL 123849).[1] Alternatively, he

[1] "Peo. Br.," "Pet. Br.," and "Peo. App. Ct. Br." refer, respectively, to the People's opening brief in this Court, petitioner's appellee's brief in this Court,

asserts that the People have forfeited their argument that his evidence is insufficiently reliable to satisfy *Reed*'s standard. *See* Pet. Br. 20, 32-33. But *Reed* necessarily governs, as the People have consistently argued below and have established here.

A. Because Petitioner Pleaded Guilty, *Reed*, Rather than *Robinson*, Provides the Standard for Evaluating Whether His Claim Is "Colorable."

Petitioner concedes that he must satisfy *Reed* to obtain postconviction relief. Pet. Br. 18 (citing *Reed*, 2020 IL 124940, ¶ 49). But he argues that the less stringent standard that governs claims of innocence filed by petitioners convicted at trial should apply at the leave-to-file stage — indeed, at *all* pleading stages for both initial and successive petitions. *See* Pet. Br. 18-19 (asserting that whether petitioner satisfies *Reed*'s clear and convincing standard can only be evaluated "at the third stage"). Under this alternative standard, crafted for petitioners who contested guilt and had a full trial on the merits, a petitioner need only offer evidence that "raise[s] the probability that 'it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.'" *Edwards*, 2012 IL 111711, ¶ 24 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

This Court should reject petitioner's argument. The postconviction process requires that the standard governing a petitioner's claim remain the

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and the People's appellee's brief in the appellate court. Remaining citations appear in the same format as in the opening brief. *See* Peo. Br. 2 n.1.

same throughout the stages of review. And this Court's reasons for adopting a heightened standard in *Reed* apply with equal force at every stage and render the more lenient standard — the application of which is illustrated by *Robinson* — inappropriate for guilty plea petitioners.

1. The same standard must govern at all stages of postconviction review.

Logically, the standard that determines a petitioner's entitlement to relief must also govern whether his claim warrants filing a "highly disfavored" successive petition, *People v. Clark*, 2023 IL 127273, ¶ 39, or whether the petitioner has made a "substantial showing" at the second stage to warrant an evidentiary hearing, *People v. Domagala*, 2013 IL 113688, ¶¶ 33-35.

To be sure, at each stage, petitioner's burden becomes progressively more stringent (from colorable, to substantial, to credible), but the *legal standard* applied to his claim of innocence must remain the same. The People do not contend, as petitioner asserts, that the burden "applied at the leave to file stage should be different when the underlying judgment is from a guilty plea rather than a trial." Pet. Br. 24. The burden is the same: the claim of actual innocence must be colorable. But *Reed*, not *Robinson*, provides the standard that governs whether a claim brought by a guilty plea petitioner is colorable.

Otherwise, parties would litigate successive petitions that have no chance of success. And applying a lower standard at the leave-to-file stage

would undermine the bar against successive petitions, which is a bar to filing and not just a bar to relief. Petitioner stresses that petitioners should be granted special leeway at the earliest stage because motions for leave to file successive petitions "are typically drafted by *pro se* petitioners, who may have little legal knowledge or training," and he invokes the low standard that applies to initial postconviction petitions in which "borderline cases should advance to the second stage of proceedings." Pet. Br. 22. But this Court has made clear that the low standard applied to initial postconviction petitions does not apply to successive petitions, because this would violate "the well-settled rule that successive postconviction actions are disfavored by Illinois courts." *Edwards*, 2012 IL 111711, ¶¶ 25-29. And although petitioner maintains that finality interests would not be undermined if the Court applied the more lenient *Robinson* standard at initial stages, on the logic that granting leave to file "only allows for further post-conviction proceedings," Pet. Br. 27, this Court has recognized that finality interests require barriers to filing such petitions because continuous litigation of the validity of convictions "plague[s] . . . finality," *People v. Tenner*, 206 Ill. 2d 381, 392 (2002) (explaining procedural barriers to filing successive petitions). Removing the established barrier to filing, which is imposed by statute and reiterated in this Court's case law, would undermine the finality interests that it is designed to protect. And the interest in finality protected by the

postconviction statute plays a particularly important role in the guilty plea context. *Reed*, 2020 IL 124940, ¶ 25; *see also infra* pp. 6-7.

The impropriety of applying a different standard is even more apparent when considering petitioner's argument that the different standard set forth in *Robinson*, and not *Reed*, also governs at the *second* stage of review. *See* Pet. Br. 18-19 (asserting that whether petitioner satisfies *Reed*'s clear and convincing standard can only be evaluated "at the third stage"). Under petitioner's logic, even where a pro se petitioner was represented by counsel and provided the opportunity to amend his petition, he still would be required only to allege and substantiate that he can satisfy the standard that applies to petitioners who were convicted at trial. If he made a "substantial showing" under that (inapposite) standard, the case would proceed to an evidentiary hearing at which the petitioner would be required, for the first time, to show that he has reliable evidence that clearly and convincingly demonstrates that if a trial were held, he would not be convicted.

But applying different standards at the second and third stages of the postconviction proceedings would be unprecedented and unworkable. The question asked at the second stage is whether a petitioner has made allegations and offered evidence that, if accepted, would make a substantial showing of a constitutional violation. If a guilty plea petitioner has only offered allegations and evidence based on a lower, inapposite standard, then he has not met that burden and should not be entitled to a hearing.

Logic dictates that the same legal standard should govern a claim at every stage of the postconviction proceeding. Here, that standard is set forth in *Reed*. Because petitioner is at the leave-to-file stage, he must make a colorable showing that he can ultimately satisfy *Reed*'s clear and convincing test.

2. The concerns that motivated this Court's articulation of a different standard in *Reed* apply with equal force at every stage and render *Robinson*'s test inappropriate.

This Court crafted its standard in *Reed* to account for the unique policy concerns implicated by guilty pleas and the impossibility of applying the existing innocence standard to petitioners who admitted their guilt and induced the State to offer only a limited factual basis. *See Reed*, 2020 IL 124940, ¶¶ 42-50. The same considerations apply equally to all stages of postconviction review, so the standard designed to account for the circumstances of guilty pleas should govern a guilty plea petitioner's claim at every stage.

First, the need for finality — which motivates the bar on successive petitions in every case — plays a prominent role in guilty pleas. Guilty pleas benefit the State only because they provide a "prompt and largely final disposition," and such advantages "motivate the State to make certain concessions," including dismissal of charges and recommendation of a reduced sentence. *Reed*, 2020 IL 124940, ¶ 25. Though it declined to flatly bar

innocence claims by guilty plea petitioners, this Court did not deem such considerations unimportant, but reasoned that "the State's interests and policy concerns are more appropriately accounted for and protected by the standard applicable to actual innocence claims involving defendants who plead guilty," *id.* ¶ 42, which the Court designed to be "more stringent," *id.* ¶ 48.

Second, this Court fashioned a new standard in *Reed* because a court evaluating a claim of innocence is placed "in a different position" when the defendant's "waiver of a trial prevented the State from admitting the entirety of its evidence against defendant into the record, leaving only defendant's admission of guilt and stipulation of the factual basis of the plea." *Id.* ¶ 45. It noted that "[w]ithout the developed record produced by a trial, a court cannot determine whether the new evidence sufficiently undermines the evidence presented at trial such that it would probably change the result on retrial," making "strict application" of the existing innocence standard "impractical in cases where defendants plead guilty." *Id.* Because the factual basis for a guilty plea is truncated, when weighing new evidence against such a limited record, a court must decide whether the new evidence is so "clear and convincing[]" that a trial held for the first time "would probably result in acquittal." *Id.* ¶ 49.

The evaluation of an innocence claim in the context of a guilty plea is no less difficult at the leave-to-file stage than it is at the third stage of review. A court still must weigh the new evidence against a record that has

been limited based on the defendant's solemn admission in open court that he committed the crime. Even at the leave-to-file stage, a court still must consider whether the new evidence is "clear and convincing" to account for that limited record. Only then can it be said that the petitioner offered such "compelling evidence demonstrating [his] innocence" that his conviction by guilty plea potentially violates due process. *Id.* ¶ 40.

And an examination of *Robinson*'s application of the more lenient test demonstrates why the same standard is not appropriate for guilty plea petitioners. As this Court articulated the standard: "[i]n assessing whether a petitioner has satisfied the low threshold applicable to a colorable claim of actual innocence, the court considers only whether the new evidence, if believed and not positively rebutted by the record, could lead to acquittal on retrial." *Robinson*, 2020 IL 123849, ¶ 60. Robinson admitted his guilt in a detailed confession, which was corroborated at trial by (among other evidence) neutral eyewitnesses who saw him shoot the victim in the head and load her body into a car. *See id.* ¶¶ 5-15 (summarizing trial evidence); *id.* ¶¶ 121-39 (Burke, J., dissenting) (expanding on "notable . . . level of detail" contained in Robinson's 70-page confession). More than a decade after trial, Robinson offered affidavits from fellow inmates who claimed either to have been at the scene of the shooting or to have witnessed a third-party confession. *See id.* ¶¶ 25-29. This Court concluded that, notwithstanding Robinson's confession and the corroborating testimony of multiple objective

eyewitnesses, these eleventh-hour affidavits supported at least a "colorable" claim that no rational juror would convict Robinson at a retrial. *Id.* ¶¶ 82-83.

But it should not be so easy to cast doubt on a conviction based on a guilty plea, which is premised in large part on a defendant's "knowing and voluntary admission of guilt," which is "a grave act that is not reversible at the defendant's whim." *Reed*, 2020 IL 124940, ¶¶ 46-47. Like Robinson, petitioner offered an affidavit from a fellow inmate (Moore) prepared nine years after petitioner's conviction claiming that Moore was present at the scene of the shooting and saw that the shooter was someone else. As in *Robinson*, petitioner here confessed to the shooting and multiple eyewitnesses identified him as the shooter. But compared to the extremely detailed evidence in *Robinson*, the evidence contained within petitioner's factual basis is generic. For example, the factual basis reflects only that petitioner admitted guilt. *Compare Robinson*, 2020 IL 123849, ¶¶ 121-39 (Burke, J., dissenting) (describing Robinson's well-corroborated, detailed, and court-reported confession), *with* Tr.R.U10-11 (including in factual basis that petitioner had "admitted to the shooting"). Given the standard set forth in *Robinson*, where eleventh-hour affidavits were found to have supported a colorable claim even in the face of exceptionally detailed and powerful evidence of guilt, if the *Robinson* standard applied and only the limited factual basis were considered, petitioner would appear to meet *Robinson*'s "low threshold."

Reed made clear that this should not be enough: the formulation of the innocence standard applied in *Robinson*, and its accompanying "low threshold," 2020 IL 123849, ¶ 60, is not appropriate for guilty plea petitioners, who face a "more stringent" test. *Reed*, 2020 IL 124940, ¶ 25. For petitioner's claim to succeed, like Reed, he must offer new evidence that "clearly and convincingly" shows that he would be acquitted at a trial, and that should be the legal standard applied at every stage of postconviction review.

B. As the People Have Consistently Argued, Petitioner's Claim Is Not Colorable Because He Has Not Offered Evidence that Clearly and Convincingly Demonstrates He Would Be Acquitted at Trial.

Petitioner does not rebut the People's argument that his new evidence is insufficient to clearly and convincingly demonstrate that he would be acquitted at a trial.

Petitioner instead asserts that the People have forfeited an argument that he does not satisfy this standard set forth in *Reed*. Pet. Br. 20 (urging this Court to "reject [the People's] argument on forfeiture principles" because the People rely on a "newly-proposed standard" that was "never raised below"). But both the People's appellate brief and petition for rehearing argued at length that petitioner must satisfy the heightened "clear and convincing" standard of *Reed* and could not do so. *See* Peo. App. Ct. Br. 16-

20; Peo. Reh'g Pet. 2-14.[2] The appellate court maintained that the People had failed to explain how *Reed* should be applied, *see* Pet. Br. 20 ("'the State does not offer a definitive standard'" (quoting A17, ¶ 51)), notwithstanding that the People cited, quoted, and applied the *Reed* standard. The appellate court's statement was inaccurate. Moreover, even if the People have provided a more detailed argument and explanation here, expanding on arguments raised below is not barred by forfeiture principles. *See 1010 Lake Shore Ass'n v. Deutsche Bank Nat'l Trust Co.*, 2015 IL 118372, ¶ 18 ("The court only requires parties to preserve issues or claims for appeal. They are not required to limit their arguments in this court to the same ones made in the trial and appellate courts." (citing *Brunton v. Kruger*, 2015 IL 117663, ¶ 76)).

The People have never sought anything more — in the appellate court or here — than application of this Court's clearly articulated *Reed* standard. In suggesting otherwise, petitioner mischaracterizes the standard applied by the People and argues points that the People do not contest. *See* Pet. Br. 29-31. The People do not seek to omit (or redefine) the requirements that a

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[2] The People also argued below that petitioner could not satisfy the *Robinson* standard, Peo. App. Ct. Br. 20-21, and do not make that argument here, *see* Peo. Br. 20-25 (arguing only that petitioner could not satisfy the *Reed* standard); *supra* at pp. 8-9. The People's inclusion of this alternative argument in their appellate court brief, *see* Peo. App. Ct. Br. 20 (making alternative case for affirmance "even if [the appellate] court disagree[d]" that *Reed* governed), could not result in forfeiture of the primary argument articulated in the People's appellate court brief, petition for rehearing, PLA, and opening brief in this Court.

guilty plea petitioner's evidence be new, material, or non-cumulative. Indeed, the People do not dispute that the evidence here is new and non-cumulative or that Moore's eyewitness affidavit is material.[3] The People have stressed that petitioner offers only eleventh-hour affidavits —not because such delay means that they are not newly discovered, but because it shows they are unreliable. *See Coleman,* 2013 IL 113307, ¶ 96 ("New means the evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence."). Petitioner could not have discovered these witnesses before entering his guilty plea, as he met them many years later in prison. And when the crime occurred, Myles was incarcerated, and petitioner could not possibly have known that an inmate would offer allegedly helpful information about the shooting. So, the evidence is new. However, the nine years of delay and the circumstances of petitioner's discovery of these witnesses *are* relevant to the key point asked by *Reed*: whether petitioner's new evidence is "reliable." 2020 IL 124940, ¶ 50 ("Because the evidence must be clear and convincing, the standard inherently requires the court to consider the evidence to be reliable.").

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[3] Although the People have not argued the point, Myles's double-hearsay affidavit does not appear to be "material," given that it is barely relevant and contains inadmissible hearsay within hearsay. *See People v. Coleman*, 2013 IL 113307, ¶ 96 ("Material means the evidence is relevant and probative of the petitioner's innocence."). However, rather than rely on the "materiality" component of the standard, the People have stressed that because of these weaknesses, Myles's affidavit does not provide clear and convincing evidence of innocence. Peo. Br. 21-22.

Furthermore, on this central issue of reliability, the People do not contend that petitioner's claim must fail because he does not offer forensic evidence, as petitioner contends. *See* Pet. Br. 25. Rather, the People discussed forensic evidence in their opening brief to illustrate how *Reed*'s "clear and convincing" standard applies. *See* Peo. Br. 18-19. Forensic evidence would often qualify as reliable (and, potentially, "clear and convincing") under the *Reed* analysis. However, other types of evidence could also be deemed reliable; for example, numerous witnesses corroborating each other on key points, or a witness account supported by independent objective evidence, such as receipts, video evidence, or contemporaneous police reports placing him at the scene. *See* Peo. Br. 18-19.

To be sure, some categories of evidence are, in contrast, unreliable (and, thus, almost never "clear and convincing"). Hearsay is suspect, but this Court need not hold that hearsay can *never* support a guilty plea petitioner's claim of innocence. The issue presented in this case is solely whether the hearsay within hearsay offered by petitioner — Myles's claim that he had a conversation with a friend about conversations that the friend had with prosecution witnesses — is sufficiently reliable to clearly and convincingly demonstrate innocence. It is not. *See* Peo. Br. 21-22.

And the People have not argued that Moore's affidavit, or similar affidavits, must be categorically rejected. *See* Pet. Br. 25 (characterizing People's position as "excluding an entire category of evidence from being used

to support a post-conviction claim"). Indeed, Moore's affidavit requires closer analysis because there are circumstances under which an eyewitness, who claimed to have been present at a shooting and to have had a conversation with the shooter could offer reliable testimony to support a claim of innocence. But Moore's affidavit does not qualify because it is wholly uncorroborated, and he waited nine years to come forward with no explanation for the delay. Under the circumstances of this case, Moore's eleventh-hour affidavit is not sufficiently reliable to clearly and convincingly demonstrate petitioner's innocence, and it does not suffice under *Reed*. *See* Peo. Br. 22-23.

Petitioner argues that any such consideration of reliability is contrary to precedent. *See* Pet. Br. 24-26. But to the extent that this Court has held that a claim of innocence can be colorable even if the evidence offered is *not* inherently reliable, it has done so only in the context of innocence claims brought by petitioners convicted after trial, for whom the pertinent standard does not incorporate a reliability requirement. *See Robinson*, 2020 IL 123849, ¶ 61. By contrast, the *Reed* standard "inherently requires the court to consider the evidence to be reliable." 2020 IL 124940, ¶ 50. And contrary to petitioner's claim, the People do not contend that this Court should make a premature credibility determination. *See* Pet. Br. 26-27. As the People explained in their opening brief, reliability and credibility are distinct, and reliability can be evaluated at the threshold, in determining whether petitioner

has made a colorable showing. *See* Peo. Br. 18-20. Even if petitioner's evidence were sufficiently reliable to make this colorable showing, he would still need to show that the evidence was *credible* to prevail, and this Court cannot make a final determination of credibility without a third stage hearing.

As the People demonstrated in their opening brief, Peo. Br. 20-24, and petitioner does not contest, petitioner has made no colorable showing under *Reed*. Accordingly, the circuit court did not err by denying him leave to file his successive petition, and the appellate court's judgment requiring further proceedings on petitioner's innocence claim should be reversed.

II. Petitioner Has Made No Prima Facie Showing of Cause and Prejudice to Pursue a Claim of Ineffective Assistance of Trial Counsel in a Successive Postconviction Petition.

Petitioner has also failed to show the requisite cause and prejudice to pursue his claim of ineffective assistance of trial counsel in a successive petition.

A. Petitioner Must Show Cause and Prejudice.

Petitioner's attempt to evade the statutory requirement that he show cause and prejudice should be rejected.

Petitioner maintains that he need not make a showing of cause and prejudice because he has set forth a colorable claim of innocence and theorizes that a court must permit an entire successive petition to proceed if one claim warrants leave to file. *See* Pet. Br. 34-37. But this argument fails even on its own terms: petitioner's argument assumes that he has set forth a colorable

claim of actual innocence; however, as demonstrated, he has *not* set forth a colorable claim. *See* Peo. Br. 20-24. Thus, he could proceed further only if he could meet the cause-and-prejudice standard with respect to his claim of ineffective assistance.

Furthermore, petitioner's proposed rule is wrong as a matter of law, so even if petitioner had set forth a colorable claim of innocence, he still would need to show cause and prejudice to proceed on his additional claim of ineffective assistance. Each claim in a successive petition must meet the pertinent standard to warrant leave to file. *See People v. Pitsonbarger*, 205 Ill. 2d 444, 462 (2002).

Petitioner's assertion that the People forfeited this argument, *see* Pet. Br. 34 ("[a]t no point did the State argue, as it does to this Court, that the appellate court was required to consider each claim individually"), is again contradicted by the People's appellate brief. There, the People stated that "[b]ecause section 122-3 of the Act 'applies to claims and not to petitions . . . a petitioner must establish cause and prejudice as to each individual claim asserted in a successive petition'" and "[t]hus, even if this Court finds that defendant should be permitted to litigate his actual innocence claim he still must show cause and prejudice as to his claim of ineffective assistance of trial counsel." Peo. App. Ct. Br. 30 (quoting *Pitsonbarger*, 205 Ill. 2d at 463). And although petitioner appears to suggest that the People forfeited this point by failing to reiterate it in their petition for rehearing, *see* Pet. Br. 34, this Court's rules

are explicit that "[r]eargument of the case shall not be made in the [rehearing] petition," Ill. S. Ct. R. 367(b). Indeed, a party need not file a rehearing petition at all; it follows that, when seeking rehearing, a party need not reiterate every previous argument to preserve it for further review.

The People cited the relevant cases to the appellate court in their brief, Peo. App. Ct. Br. 30, but that court nevertheless incorrectly applied an inapposite case addressing summary dismissals of initial postconviction petitions, A25 ¶ 68. The standards differ. A petitioner may file an initial petition as of right. At the first stage of review, a court must examine whether "*the petition* is frivolous or is patently without merit," 725 ILCS 5/122-2.1(a)(2) (emphasis added), and if not, "the petition" must be docketed, 725 ILCS 5/122-2.1(b). Partial summary dismissals are not allowed. *People v. Rivera*, 198 Ill. 2d 364, 370-74 (2001). In other words, to survive first stage review, a petitioner need only state "the gist" of a single constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001).

In contrast, because "the Post-Conviction Hearing Act contemplates the filing of only one postconviction petition," a petitioner seeking to file a successive petition faces "immense procedural default hurdles." *People v. Davis*, 2014 IL 115595, ¶ 14. For purposes of a successive petition, "[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived," 725 ILCS 5/122-3, and "[l]eave of court may be granted" to pursue the claim in a successive petition "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," 725 ILCS 5/122-1(f). Thus, as a statutory matter, a court evaluating whether to permit leave to file a successive petition must evaluate each "claim," whereas a court reviewing an initial petition must review an entire "petition" at the first stage.

And, as this Court has already made clear, where the cause and prejudice doctrine applies, a petitioner must show cause and prejudice for each claim in the petition. *Pitsonbarger*, 205 Ill. 2d at 463. Contrary to petitioner's suggestion, this claim-by-claim approach should not differ if a successive petition includes a claim of actual innocence. A postconviction claim of innocence is a claim like any other. *Coleman*, 2013 IL 113307, ¶ 91. It is simply governed by a different standard: "[w]here a defendant makes a claim of trial error, as well as a claim of actual innocence, in a successive postconviction petition, the former claim must meet the cause-and-prejudice standard," *id.*, while the innocence claim must be deemed "colorable," *Edwards*, 2012 IL 111711, ¶ 31.

Accordingly, even if petitioner had demonstrated that his claim of innocence were colorable, that showing would only entitle him to file a successive petition to pursue *that* claim. He would still need to show cause and prejudice to pursue his claim of ineffective assistance of trial counsel under the plain terms of 725 ILCS 5/122-1(f).

B. Petitioner Has Not Made a Prima Facie Showing of Cause and Prejudice.

Petitioner has failed to make the required showing of cause and prejudice.

1. Petitioner made no showing of cause.

Petitioner asserts that he has shown "cause" because he could not have obtained the prisoner affidavits in time to file his initial postconviction. Pet. Br. 40. But the affidavits support petitioner's claim of actual innocence and not his claim of ineffective assistance of trial counsel. *See* A11-12 ¶¶ 35-38.[4] The latter claim rests on an allegations about conversations that petitioner had with counsel before trial: petitioner claims, based on those conversations, that trial counsel should have investigated Jerrell Butler and also suggests that counsel should have investigated whether petitioner's confession had been coerced. *See* Pet. Br. 38.

Because petitioner's claim is based on conversations with trial counsel before trial, he could have included it in his initial postconviction petition. Although petitioner claims that his affidavits "corroborate[] [his] general allegations of counsel's ineffectiveness by demonstrating that counsel failed to do any pretrial investigation," Pet. Br. 39, he is mistaken. Petitioner's affidavits from inmates who came forward long after trial do nothing to do show

[4] As a legal matter, petitioner may have been precluded from relying on the affidavits for dual purposes, an issue now pending before this Court in *People v. Flournoy*, No. 129353. However, he did not attempt to do so.

trial counsel failed to reasonably investigate at the time of trial, because trial counsel cannot be faulted for failing to investigate wholly unknown witnesses who did not come forward until years later.

Nor could petitioner's evidence of lawsuits involving police officers' alleged misconduct in unrelated cases show that counsel failed to reasonably investigate petitioner's allegations of a coerced confession. *See* Pet. Br. 39 (arguing that petitioner'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 trial counsel failed to investigate his case"). It is not even clear from this limited record who interviewed petitioner or why he claims that his confession was coerced, but even assuming that the lawsuits pertain to officers involved in this investigation, petitioner has fallen far short of demonstrating that they establish a pattern or practice that has some bearing on his own claim (which is not even a coerced-confession claim, because his guilty plea waived such a claim, Pet. Br. 39, but instead a claim of ineffective assistance). *See generally People v. Jackson*, 2021 IL 124818, ¶¶ 32-39 (where petitioner seeks to raise claim of coerced confession in successive petition, evidence of police misconduct in other cases is relevant only if it supports claim that officers engaged in pattern or practice that supports petitioner's own allegations of abuse).

Because petitioner's new evidence is not relevant to the claim he seeks to raise, it cannot provide cause for failing to raise that claim earlier. Accordingly,

People v. Johnson, 2019 IL App (1st) 153204, has no application here. *Johnson* found "cause" to file a successive petition claiming that trial counsel was ineffective for failing to investigate and call a trial witness where the petitioner demonstrated that he could not have obtained an affidavit from the witness before filing his initial postconviction petition. *Id.* ¶¶ 26, 39. In *Johnson*, unlike here, the affidavit was integral to the claim that the petitioner sought leave to file, and the petitioner's inability to obtain such a critical affidavit to support that claim provided cause for failing to raise the claim earlier.

Here, petitioner has no "cause" for omitting from his initial petition a known claim based on existing evidence about pretrial conversations with trial counsel.

2. Petitioner has not shown prejudice.

Petitioner also cannot demonstrate prejudice. As the People have established, petitioner set forth no meritorious claim that his constitutional rights were violated and therefore demonstrated no "prejudice" for purposes of the cause and prejudice test. Peo. Br. 26-29. Petitioner's ineffective assistance claim requires him to show that he was prejudiced by the asserted errors of his trial counsel. *People v. Hatter*, 2021 IL 125981, ¶¶ 25-26 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). Petitioner's assertion that the People's argument "wrongly equates 'prejudice' for purposes of the Act with prejudice under a *Strickland* analysis," Pet. Br. 42, ignores that the two

concepts overlap where a petitioner seeks leave to file a successive petition raising a *Strickland* claim. The People have simply argued that petitioner was not prejudiced for purposes of filing a successive petition because he was not prejudiced within the meaning of *Strickland*, so the claimed error in counsel's representation did not "so infect the trial" — or guilty plea proceedings — "that the resulting conviction . . . violated due process," 725 ILCS 5/122-1(f); *see, e.g., Pitsonbarger*, 205 Ill. 2d at 464-67 (petitioner did not show prejudice to pursue ineffective assistance claim in successive petition where he could not show prejudice under *Strickland*).

To show that petitioner was prejudiced by advice that led him to plead guilty, petitioner must adequately allege that, but for counsel's advice, he would not have pleaded guilty. *See Hatter*, 2021 IL 125981, ¶ 26. Petitioner has not even made that allegation here. *See* Sup2 C20-21 (petitioner's affidavit). And, setting that defect aside, such a claim must be supported by evidence corroborating that petitioner would have been rational to reject the plea deal. *See Hatter*, 2021 IL 125981, ¶ 30. In evaluating that question, the terms of the plea deal and the likely sentence at trial are both relevant.

Petitioner cannot show that it would have been rational for him to reject the plea deal. As the People have noted, the factual basis to which petitioner stipulated showed that he personally discharged a firearm that proximately caused Williams's death. Peo. Br. 28. As a matter of law, the fact that petitioner discharged a firearm and proximately caused death demands a

sentence enhancement of 25 years to life, resulting in a minimum sentence, on these facts, of 45 years to life for Williams's murder. *See* 730 ILCS 5/5-8-1(a)(1)(d)(iii). Petitioner instead received an agreed sentence of 35 years.[5] Moreover, the factual basis reflects that the People possessed overwhelming evidence, and petitioner would have been convicted of the additional charge of attempted murder. *See* Tr.R.U6-11. Because petitioner faced a mandatory minimum higher than the sentence he received pursuant to the plea offer, the evidence of guilt was overwhelming, and he would have been convicted of an additional offense, petitioner would not have been better off rejecting the plea, and he has failed to allege a meritorious *Strickland* claim. Accordingly, leave to file should be denied.

[5] Petitioner disputes whether his sentence was "unlawful" where it was inconsistent with the factual basis. *See* Pet. Br. 4 n.2 & 43. The dispute is ultimately beside the point: as the People have conceded, even if it were, this does not void his plea. Peo. Br. 28 n.5. The salient point is that based on the evidence that would have been offered *at trial*, which would have called for a minimum sentence of 45 years to life, *see, e.g.,* Tr.C59 (Count 17 charging first degree murder enhanced by personal discharge of firearm resulting in death), petitioner has no plausible argument that he would have been better off rejecting a 35-year sentence and proceeding to trial.

CONCLUSION

This Court should reverse the appellate court's judgment and affirm the circuit court's judgment denying leave to file a successive postconviction petition.

August 18, 2023

Respectfully submitted,

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RULE 341(c) CERTIFICATE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the table of contents and points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service is 5,789 words.

/s Erin M. O'Connell
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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 August 18, 2023, the foregoing **Reply Brief of Respondent-Appellant 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 email address below:

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