No. 125891

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- STEVEN A. TALIANI, Petitioner-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 3-17-0546. There on appeal from the Circuit Court of the Thirteenth Judicial Circuit, Bureau County, Illinois, No. 94 CF 37. Honorable Michael C. Jansz, Judge Presiding.

REPLY BRIEF FOR PETITIONER-APPELLANT

JAMES E. CHADD
State Appellate Defender

THOMAS A. LILIEN
Deputy Defender

LUCAS WALKER
Assistant Appellate Defender
Office of the State Appellate Defender
Second Judicial District
One Douglas Avenue, Second Floor
Elgin, IL 60120
(847) 695-8822
2nddistrict.eserve@osad.state.il.us

COUNSEL FOR PETITIONER-APPELLANT

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Carolyn Taft Grosboll
SUPREME COURT CLERK

ARGUMENT

I. Taliani's actual innocence claim is not forfeited for failure to raise the claim in his first *pro se* postconviction petition filed in 1996.

The State does not argue that Taliani was warned that the combined use of Desyrel and Buspar could cause serotonin syndrome or that Taliani's actual innocence claim consists of immaterial or cumulative evidence. The State initially argues that Taliani's actual innocence claim is forfeited because he could have raised it in his first *pro se* postconviction petition. (State brief at pp. 20-22) This argument should fail where "failure to raise a claim in an earlier petition will be excused if necessary to prevent a fundamental miscarriage of justice" and where an actual innocence claim is a way to "demonstrate such a miscarriage of justice." *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002). Additionally, petitioners do not have to satisfy the "cause and prejudice" test when raising an actual innocence claim in a motion for leave to file a successive postconviction petition. *People v. Edwards*, 2012 IL 111711, ¶¶ 22-23; *People v. Ortiz*, 235 Ill. 2d 319, 330 (2009) ("where a defendant sets forth a claim of actual innocence in a successive postconviction petition, the defendant is excused from showing cause and prejudice"). Indeed, this Court has recently reiterated that, "[a] request for leave to file a successive petition should be denied *only* where it is clear from a review of the petition and supporting documentation that, as a matter of law, the petition cannot set forth a colorable claim of actual innocence." *People v. Robinson*, 2020 IL 123849, ¶ 44 (Emphasis added), citing *People v. Sanders*, 2016 IL 118123, ¶ 24.

The State cites to *People v. Orange*, 195 Ill. 2d 437, 449, 456 (2007), and *People v. Guerrero*, 2012 IL 112020, ¶ 17, to support its argument. (State brief at p. 21) These cases are irrelevant where they do not involve the dismissal of actual innocence claims due to petitioner's failure to raise them earlier. Rather, these cases involve the dismissal of claims for failure to satisfy the cause and prejudice test.

The State then argues that Taliani's actual innocence claim could have been raised in his first, *pro se* postconviction petition because in his first amended successive postconviction petition (filed by postconviction counsel in 2014), he raised a claim of ineffective assistance of counsel for withdrawing a petition for a fitness examination. (State brief at 22-23) In presenting that claim, postconviction counsel included information showing that the Buspar and Desyrel medications could lead to serotonin syndrome. (State brief at 22-23) Thus, according to the State, because courts found Taliani failed to show cause for not raising the fitness exam issue in his *pro se* postconviction petition, any claim that mentions serotonin syndrome could have been raised in that petition and Taliani was barred from raising any such claim based in any subsequent petition. (State brief at 22-23)

This argument should fail where Taliani failed to show cause for failing to raise the fitness exam issue because facts about the fitness exam (not serotonin syndrome) were matters on the trial record. (C47-48, 51-53, 936, 939, 1059) Indeed, the ineffectiveness claim is completely different than the current claim of actual innocence based on a newly available, retroactive affirmative defense where, "[f]itness speaks only to a person's ability to function within the context of a trial; it does not refer to sanity or competence in other areas." *People v. Holt*, 2014 IL 116989, ¶ 46, citing *People v. Murphy*, 72 Ill.2d 421, 432-33 (1978).

Additionally, this Court's decision in *People v. Hari,* 218 Ill. 2d 275 (2006), was not decided at the time Taliani filed his initial postconviction petition in 1996 and the new rule was not made retroactive until two years later in *People v. Alberts*, 383 Ill. App. 3d 374 (4th Dist. 2008). Given this, it would be a miscarriage of justice to find that Taliani could have raised the current actual innocence claim in his 1996 *pro se* postconviction petition.

II. The amended successive postconviction petition filed in 2014 does not establish that there was evidence during trial that established serotonin syndrome was a known side effect of Buspar and Desyrel.

The State argues that the fitness argument in the amended successive postconviction petition proves that it was known at the time of trial that serotonin syndrome was a known side effect of the combined use of Buspar and Desyrel, which it relies on to argue the evidence is not new. (State brief at 22, 27) To support this claim, the State again relies on the portion of that amended successive petition that mentions serotonin syndrome as part of a general description of Taliani's mental health and cites to a Drugs.com article attached to the petition that appears to have been printed in October 2014. That attachment includes a citation to a 1994 article titled "Fluoxetine and the serotonin syndrome."[1] (C952-53, 1003-04) But there is no indication the Fluoxetine article discusses Buspar and Desyrel. Taliani claimed in the current petition that he was not warned about the risk of serotonin syndrome as a side effect of the "toxic combination of Buspar and Desyrel medications" and that "the information concerning serotonin syndrome was not available at the time of [his] trial." (C1104) Thus the relevant issue is whether it was known at the time of trial that serotonin syndrome was a side effect of these two specific drugs, not whether serotonin syndrome was known more generally to be a side effect of other various medications. Postconviction counsel did not make any explicit claim that serotonin syndrome was known by the parties to be a side effect of the two drugs at trial. Rather, postconviction counsel asserted that Taliani could have introduced evidence at the fitness hearing through records of his psychiatric treatment with Quad County counseling, Dr. Brady, and Dr. Chapman, that the combined use of Buspar and Desyrel led to "anxiety, agitation, and suicidal thoughts." (C961) Indeed, those records are attached to

[1] Fluoxetine (Prozac) is an anti-depression medication. *People v. Shaw*, 2015 IL App (4th) 140106, ¶ 5.

the amended successive petition and the current successive petition and make no mention of serotonin syndrome. (C1005-18, 1106-15, 1147-67)

Additionally, a 1993 Physician's Desk Reference (PDR) for Buspar and Desyrel attached to the amended petition does not mention serotonin syndrome as a potential side effect of the combined use of these two drugs. (C975-80) A careful reading of the 1993 PDR shows that "[t]he mechanism of Desyrel's antidepressant action in man [was] not fully understood." (C979 under "Clinical Pharmacology") Additionally, the PDR states that the "administration of Buspar with most other psychotropic drugs [had] not been studied." (C977 under "Laboratory Tests") Therefore, the attachments to the amended successive petition do not support, and appear to rebut, any assertion by postconviction counsel that Dr. Brady, Dr. Chapman, or Taliani were aware (or could have been aware) that these drugs presented a risk of serotonin syndrome or that Taliani was warned of such a risk before taking the drugs.

III. The evidence supporting Taliani's actual innocence claim should be treated a newly discovered despite not being raised in the 2014 amended successive postconviction petition.

The State argues that Taliani's actual innocence claim should be barred because Taliani failed to raise it in the 2014 amended successive postconviction petition. (State brief at 24) Taliani acknowledges that the actual innocence claim could have been raised in the 2014 amended successive postconviction petition but, for reasons below, this Court should treat the evidence as newly discovered to prevent a fundamental miscarriage of justice where Taliani exercised due diligence in raising the claim and the failure to raise it in the 2014 petition was not his fault.

Indeed, in a recent decision involving an actual innocence claim, this Court succinctly defined newly discovered evidence as "evidence that was discovered after trial and that the petitioner could not have discovered earlier through the exercise of due diligence." *Robinson*, 2020 IL 123849, ¶ 47. Thus, the pertinent factor is whether the petitioner exercised due diligence

in discovering and presenting the evidence after trial once he became aware of it.

Here, the change in the relevant law and the resulting legal relevance of any side effects of prescription medication were posttrial occurrences. As such, for the purposes of assessing Taliani's claim, the evidence should be considered "newly discovered." As explained in his current petition, once Taliani discovered the *Hari* and *Alberts* decisions, he exercised due diligence in presenting this actual innocence claim by requesting that postconviction counsel raise the issue in the amended successive postconviction petition. (C1102-04) This claim by Taliani is not positively rebutted by the record and, in fact, the record appears to support his claim where postconviction counsel, perhaps in an effort to satisfy Taliani without fully committing to the actual innocence claim, included the facts about serotonin syndrome in one portion of the petition and also argued that Taliani was innocent of first degree murder but guilty of second degree murder. (C952-53, 961; SupR21, 25)[2] And the appellate court noted in its decision affirming the circuit court's denial of the petition that the petitioner argued that he was "actually innocent" of first degree murder but that he did not have to establish the elements of an actual innocence claim because he only argued he was innocent "of a certain classification of crimes." (C1092) The appellate court found that the argument "defie[d] logic" and had "no support in Illinois law." (C1092) Thus, this Court should find that Taliani has exercised due diligence in discovering and presenting his claim and treat the evidence as newly discovered because it was through no fault of his own that postconviction counsel refused to raise the actual innocence claim based upon the newly discovered, retroactive affirmative defense of involuntary intoxication in the 2014 amended successive postconviction petition.

People v. Warren, 2016 IL App (1st) 090884-C, is instructive. In *Warren*, the petitioner filed a postconviction petition with the assistance of appointed counsel which alleged actual

[2] "SupR" is a citation to the Supplemental Report of Proceedings.

innocence of murder based on recently discovered evidence, but no affidavits or other evidence were attached to the petition to support the claim. *Id*. at ¶ 25. The trial court granted the State's motion to dismiss. *Id*. at ¶ 30. The petitioner later requested leave to file a *pro se* successive postconviction petition claiming actual innocence, attaching four witness affidavits and asserting that the actual innocence claim in his initial postconviction petition was not "fully developed." *Id*. at ¶ 32. The contents of the witness affidavits were known to the petitioner and postconviction counsel during the initial postconviction proceedings. *Id*. at ¶¶ 115-16. The trial court denied the petitioner leave to file a successive postconviction petition on the basis that the witness affidavits used to support the petitioner's claim were not new and only presented nonmaterial, cumulative evidence that would not change the result on retrial. 2016 IL App (1st) 090884-C, ¶ 40.

On appeal, the petitioner argued that he stated a colorable claim of actual innocence. *Id*. at ¶ 42. The petitioner did not expressly allege that his postconviction counsel provided unreasonable assistance. *Id*. at ¶ 138. The State argued that the affidavits were not newly discovered because petitioner and his attorney knew of the witnesses' potential testimony during the prior postconviction proceedings. *Id*. at ¶ 115. The *Warren* court agreed that the record showed that the petitioner and his counsel were aware of the evidence during prior postconviction proceedings. *Id*. at ¶ 116.

However, the *Warren* court found that there was no good reason for postconviction counsel to not have presented the affidavits during the initial postconviction proceedings where the failure to include the evidence would prevent the petitioner from being able to present it in a successive petition because the evidence would no longer qualify as being newly discovered. *Id*. at ¶ 118. And there was no reason that postconviction counsel could not have amended the petition to include the affidavits while the petition pended in the trial court for four years.

Id. at ¶ 122.

The *Warren* court explained that "[h]aving a lawyer, but one who failed to present exculpatory evidence, closed every door to defendant." *Id*. at ¶ 128. The petitioner could not have made a record of his desire to include the evidence previously because he was represented by counsel throughout the proceedings and he could not challenge postconviction counsel's unreasonable assistance through *pro se* motions while represented by counsel. *Id*. Thus, without such a record he could not meaningfully challenge postconviction counsel's representation on appeal and such a claim could not be raised in a successive postconviction where claims are limited to constitutional claims. *Id*., citing *People v. Flores*, 153 Ill.2d 264, 280 (1992).

Under those circumstances, the *Warren* court treated the evidence as new, reversed the trial court's order denying the petitioner leave to file his successive postconviction petition and remanded the cause for further postconviction proceedings. *Id*. at ¶ 146. In doing so, the *Warren* court found that "it would be fundamentally unfair to deny defendant an opportunity to present this evidence because it is not technically 'newly discovered.'" *Id*. at ¶¶ 130, 143.

> The ultimate underpinning of the actual-innocence, or fundamental-miscarriage-of-justice, exception is the due process clause of the Illinois Constitution, and the supreme court's admonition that "'no person convicted of a crime should be deprived of life or liberty given compelling evidence of actual innocence.'" It would be a miscarriage of justice if defendant were denied his day in court where his allegations and supporting documentation, supported by the record and taken as true at this stage, demonstrate that he was unable to put forth exculpatory evidence of his innocence through no fault of his own.
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> And where a successive petition has meritorious evidence of a defendant's actual innocence that the defendant could not present earlier through no fault of his own, there is no principled reason why such evidence should not be heard in a successive petition. If that principle of fundamental fairness creates a "floodgate" of cases, which we highly doubt, it is a floodgate we should not only accept but openly welcome.
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> *Id*. at ¶¶ 130, 143 (citations omitted).

Here, Taliani filed a *pro se* 2-1401 petition in 2002, that was then recharacterized and

ultimately became the amended successive postconviction petition drafted by postconviction counsel and filed in 2014. (C506, 686, 949) Postconviction counsel, George Mueller, entered his appearance as postconviction counsel on May 27, 2004, two years prior to this Court's 2006 decision in *Hari,* and four years before it was held to have retroactive effect in *Alberts*. (C818)

Therefore, similar to *Warren*, Taliani would not have been able to raise a claim alleging actual innocence based upon the involuntary intoxication defense at the time he filed his *pro se* 2-1401 petition in 2002 because *Hari* and *Alberts* were not decided yet. This defense only became available retroactively after Mueller entered his appearance in 2004. (C818) Taliani states in the current motion for leave to file a successive petition that he notified Mueller when he learned of *Hari* and *Alberts* and asked him to amend the petition to include the actual innocence claim based on involuntary intoxication but Mueller refused to do so. (C1102, 1104) Taken as true, and not positively rebutted by the record, this Court should find that Taliani's successive petition and supporting affidavit sufficiently establish that it was through no fault of his own that the current actual innocence claim was not raised in the 2014 amended successive postconviction petition. Rather, the claim was not previously raised due to postconviction counsel's deficient performance, and, consequently, the information regarding the side effect of serotonin syndrome as a result of taking Buspar and Desyrel constitutes newly discovered evidence. *Id*. at ¶ 137. Indeed, as *Warren* noted, even if this increases the amount of evidence that is considered "newly discovered," petitioners must also satisfy the remaining elements of actual innocence claims. *Id*. at ¶ 130.

IV. The evidence should be treated as newly discovered even if it was known at trial.

The State then argues that Taliani failed to present a colorable claim of actual innocence because the evidence he relies on to support the claim is not newly discovered where it was

known at the time of his trial. (State brief at pp. 27-39) Taliani acknowledged in his opening brief that it was known at the time of trial he was taking the prescription medications Buspar and Desyrel. (Opening Brief at p. 28; R906-07) However, as discussed above, Taliani does not concede that it was known at the time of trial that Buspar and Desyrel could cause serotnin syndrome where the record does not positively rebut Taliani's claim that it was not discoverable at the time. (C1103-04) *Robinson*, 2020 IL 123849, ¶ 60 ("For new evidence to be positively rebutted, it must be clear from the trial record that no fact finder could ever accept the truth of that evidence, such as where it is affirmatively and incontestably demonstrated to be false or impossible"); see also *Warren*, 2016 IL App (1st) 090884-C, ¶ 72 ("the decision on granting leave . . .considers the legal sufficiency of the allegations, taken as true and liberally construed"), citing *People v. Coleman*, 183 Ill.2d 366, 388 (1998).

As detailed above, the State cites to the Fluoxetine article that indicates the scientific community was generally aware of serotonin syndrome at the time of Taliani's trial in 1994, but there is no indication that article discusses Buspar and Desyrel. (State brief at 27) The State also cites to a 1998 PubMed abstract outside the record that likewise makes no mention of Buspar and Desyrel. (State brief at 27, n. 5) The State has failed to support its argument with any authority explicitly showing that the medical or scientific communities or more importantly, Dr. Brady, Dr. Chapman, or Taliani, understood that the combination of Desyrel and Buspar was known to cause serotonin syndrome at the time of Taliani's trial.

It should also be noted that even if serotonin syndrome was known to be a potential side effect of these medications at the time of trial, it should not defeat Taliani's claim where the affirmative defense of involuntary intoxication based on the unwarned, adverse side effects of prescription medications was not available. See *Alberts*, 383 Ill. App. 3d at 384 (4th Dist. 2008) ("If defendant had raised [the involuntary intoxication defense based on unwarned, adverse

side effects of prescription medication] at his April 2002 trial, it would have been rejected because, at the time, Illinois law disallowed such a defense absent evidence that his intoxication was the result of 'trick, artifice[,] or force'), quoting *People v. Rogers*, 123 Ill. 2d 487, 508 (1988), overruled by *Hari*, 218 Ill. 2d 275. And as the dissent in this case explained in the appellate court, "[p]rior to the supreme court's recognition of involuntary intoxication from the unwarned side effects of prescription medication as a viable defense, the fact that defendant had recently been prescribed Buspar and Desyrel and had experienced unwarned side effects from them had neither relevance nor meaning in his case." *Taliani*, 2020 IL App (3d) 170546 at ¶ 35 (McDade, J., dissenting).

Despite this, the State argues that the affirmative defense of involuntary intoxication based on the unwarned, adverse side effects of prescription medication was available at the time of trial. (State brief at pp 28-31) The State cites to *People v. Smith*, 231 Ill. App. 3d 584 (1992), where the defendant unsuccessfully argued he was involuntarily intoxicated from ingesting Valium that was prescribed to treat his symptoms of withdrawal from alcohol. *Id*. at 590. During trial, the State established that the defendant was not forced to take the Valium against his will. *Id*. at 590-91. In finding that defendant was not entitled to a jury instruction on involuntary intoxication, the appellate court noted that the defendant's expert witness did not know the legal definition of involuntary intoxication and failed to provide an opinion on the defendant's mental state at the time of the offense. *Id*. at 593.

Smith reiterates that the legal standard for establishing an involuntary intoxication defense at the time required evidence that the intoxication resulted from trick, artifice or force, which is why the State in that case established that the defendant was not forced to take the medication. Indeed, this Court clarified only four years prior to *Smith* that involuntary intoxication required evidence that the intoxication was "induced by some external influence such as trick, artifice

or force." *Rogers*, 123 Ill. 2d at 508.

It was not until 2006, when this Court overruled *Rogers* and explicitly found that "trick, artifice or force" was "too narrow" a limitation on the term "involuntary produced," that evidence of unexpected, unwarned, and adverse side effects of prescription medication was understood to constitute an affirmative defense of involuntary intoxication. *Hari*, 218 Ill. 2d at 295.Until then, this Court and other supporting case law required a showing of "trick, artifice or force" to establish an involuntary intoxication defense. Side effects from the willful ingestion of a lawfully obtained prescription medication were understood to be outside the bounds of such a restriction. Indeed, this Court acknowledged this in *Hari* when it determined that the phrase "involuntarily produced" was not limited to "trick, artifice or force" and overruled previous case law (including its own decision in *Rogers*) to the extent it could be "read as excluding the unexpected and unwarned adverse side effects from medication taken on doctor's orders from the plain meaning of 'involuntarily produced.'" *Id*. at 294-95.

The State argues that Taliani could have raised the defense at trial because there was no case law explicitly barring the defense and it was raised in *Smith* and *Hari*. (State brief at 31) But, as explained above, it is not clear that the parties could have understood at the time of trial that Taliani's mental state was a result of serotnin syndrome caused by the medication he was taking. *Smith* and *Hari* did not involve claims related to serotonin syndrome and involved different medications, Valium and Zoloft, respectively. Moreover, even if the parties knew about the risk of serotonin syndrome, this Court acknowledged that raising an involuntary intoxication defense based on the adverse, unwarned side effects of prescription medications prior to *Hari* could have been understood to conflict with existing Illinois Supreme Court precedent where this Court had previously reached a "contrary legal conclusion" when it required a showing of "trick, artifice or force" to support a claim of involuntary intoxication. *Hari,*

218 Ill. 2d at 294, citing *Rogers*, 123 Ill. 2d at 508. This Court clearly believed that prior precedent prevented such claims from being raised, otherwise it would not have overruled a slew of previous case law, including *Rogers*. *Hari*, 218 Ill. 2d at 294 ("To the extent that *Rogers*, *Downey*, *Gerrior*, *Walker*, and *Larry* can be read as excluding the unexpected and unwarned adverse side effects from medication taken on doctor's orders from the plain meaning of 'involuntarily produced,' they are overruled."). It would be unfair and a fundamental miscarriage of justice to now hold that evidence cannot support an actual innocence claim because Taliani should have previously argued the evidence supported a theory of defense that even this Court has acknowledged was commonly understood to be unavailable at the time.

The State then argues that evidence should not be considered new simply because it may have been deemed irrelevant at a previous time. (State brief at pp. 32-36) To be clear, the State has not shown that the parties actually knew or could have known that serotonin syndrome was a side effect of the combination of medications Taliani was taking. But, even if known, the evidence lacked significance where it was in conflict with existing case law at the time and would require Taliani to show he was "tricked" or "forced" to take the prescription medications. Indeed, since facts concerning Taliani's involuntary intoxication were not relevant at the time of his trial, it is questionable whether such facts could be termed "evidence" at all at the time of his trial. *Taliani,* 2020 IL App (3d) 170546, ¶ 35 (McDade J., dissenting) ("The decision in *Hari* was the first time the fact that [Taliani] was experiencing unwarned side effects from the medication acquired significance as evidence"); see also *Alberts*, 383 Ill. App. 3d at 385 ("the facts upon which defendant relies for the involuntary intoxication defense had been rejected by Illinois law as insufficient to support the defense until *Hari*").

The State cites to *People v. Bailey*, 2017 IL 121450, *People v. Guerrero*, 2012 IL 112020*, People v. Edwards*, 2012 IL 111711, and *People v. English*, 2013 IL 112890, to argue that

the evidence supporting Taliani's involuntary intoxication defense is not new. (State brief at pp. 32-36) These cases are distinguishable.

Bailey found that evidence of defendant's hurt wrist was not newly discovered where it was presented in the trial court and rejected as irrelevant.2017 IL 121450, ¶ 45. Here, Taliani is not arguing that a single piece of factual evidence is newly discovered after being rejected by the trial court. Here, evidence was irrelevant and not presented in court because at the time of trial an entire theory of affirmative defense was unavailable due to the trick, artifice or force requirement.

Edwards found that witness affidavits were not newly discovered where the evidence was known at trial and defendant failed to provide any explanation for why the witnesses were not subpoenaed to testify at trial. 2012 IL 111711, ¶ 37 ("[where] there was no attempt to subpoena [the witnesses], and no explanation as to why subpoenas were not issued, the efforts expended were insufficient to satisfy the due diligence requirement"). Here, Taliani explained why the evidence was not raised at trial (serotonin syndrome not known to be side effect of the drugs) and why it was not raised in the amended successive postconviction petition (postconviction counsel refused to raise it) and therefore he exercised due diligence by raising it as soon as he could after the *Hari* and *Alberts* decisions.

Guerrero, 2012 IL 112020, involves an analysis of the cause and prejudice rule and does not involve an actual innocence claim or any discussion of the newly discovered evidence rule and therefore is irrelevant. Indeed, the facts in *Guerrero* are easily distinguished where the defendant failed to raise a claim regarding MSR in his postconviction petition despite knowing of the facts supporting the claim and there being favorable and negative case law on the issue at the time. Id. at ¶¶ 18, 20. Here, the State cited only one case (*Smith*) that raised the involuntary intoxication defense based on unwarned, adverse side effects of prescription medications before

Taliani's trial and that attempt was predictably unsuccessful given the requirement at the time to prove trick, artifice, or force.

In *English*, this Court found that petitioner forfeited a claim on direct appeal that his sentence must be vacated because the theory upon which it rested was technically available and raised by other defendants despite the law being against them at the time. 2013 IL 112890, ¶ 31. This Court also found that appellate counsel could not be ineffective for failing to raise the claim on direct appeal because precedent was against the claim at the time. *Id.* at ¶ 35.

Applying *English* to this case would conceivably require trial counsel to raise every possible theory of defense no matter how weak or frivolous at the time in order to prevent forfeiting a potential future claim based on an unforeseeable change in the law. Further, if trial counsel decided not to pursue a theory of defense because the legal landscape was against the theory at the time, Taliani would have no recourse because, per *English*, it would be reasonable for counsel to conclude that the issue was unlikely to succeed in such a scenario.

Initially, *English* does not involve an actual innocence claim or any analysis of the newly discovered evidence rule so it should be considered irrelevant and inapplicable. Indeed, the newly discovered evidence rule can bend when necessary to ensure that the purpose of actual innocence claims (preventing fundamental miscarriages of justice) is not undermined. *People v. Coleman*, 2013 IL 113307, ¶¶ 102-03 (previously known witnesses would have been uncooperative); *Tyler*, 2015 IL App (1st) 123470, ¶¶ 161-62 (police records that existed prior to trial were difficult to obtain and information revealed in other legal proceedings, though public, would have required great time and effort for counsel to locate); *Warren*, 2016 IL App (1st) 090884-C, ¶¶ 130 (evidence treated as new when it was postconviction counsel's fault for not raising it in an earlier petition); see also *People v. Jackson*, 2018 IL App (1st) 171773, ¶¶ 109-10 (petition for leave to appeal granted, No. 124818, Nov. 2019) (Mivka, J., dissenting)

(finding that the newly discovered evidence rule should be relaxed when not doing so "would risk denying a defendant any real opportunity to show his innocence" and amount to "the sort of fundamental miscarriage of justice that the actual innocence exception to the bar on successive petitions is intended to prevent").

It would be fundamentally unfair and undermine the purpose of actual innocence claims to apply *English* to this case. Justice Freeman's concurrence recognized that the *English* decision amounted to a "gotcha" that made "no sense" and "harken[ed] back to the days . . .when Illinois was widely criticized for procedurally hamstringing criminal defendants who sought collateral review." *Id*. at ¶¶ 31, 35, 54 (Justice Freeman, concurrence).

To the extent this Court finds *English* applies to this case and the involuntary intoxication defense was available to Taliani at trial, this would put Taliani at the mercy of counsel's strategic decisions and thus should be considered the fault of counsel and not a lack of due diligence by Taliani. See *Warren*, 2016 IL App (1st) 090884-C, ¶ 130 (evidence treated as newly discovered where postconviction counsel failed to include it in prior postconviction petition). Alternatively, this Court should not need to consider this issue where Taliani maintains that the record does not positively rebut his claim that the parties could not have known at the time of trial that serotonin syndrome was a side effect of the combined use of Buspar and Desyrel. Therefore, the defense was factually unavailable at the time of trial and Taliani exercised due diligence in discovering and raising it in his current successive postconviction petition.

V. Taliani has shown it is more likely than not he would be acquitted.

The State argues that Taliani failed to show that his intoxicated condition deprived him of the ability to "either appreciate the criminality of his conduct or to conform his conduct to the requirements of the law" as required by statute.720 ILCS 5/6-3(b) (West 1994).(State brief at p. 41) The State argues that there was no affidavit from a doctor or medical report

attached to Taliani's petition attesting that he suffered from serotonin syndrome or that he experienced side effects that rendered him unable to understand that it was wrong to shoot Francee and her mother as required to establish a defense. (State brief at 41-42)

The State fails to mention that Taliani attached Dr. Chapman's report to his petition, which found that his capacity to appreciate the criminality of his behavior or conform his conduct to the requirements of the law was substantially impaired at the time of the offense. (C1163) Taliani's petition should be liberally construed as having sufficiently established that the side effects caused him to be involuntarily intoxicated to the degree required by the involuntary intoxication statute where he asserts that he would be acquitted by a jury if he was able to present this affirmative defense at trial. (C1101, 1103) Chapman's report and the record describe symptoms that support Taliani's claim that he was suffering from serotonin syndrome. (Opening brief at pp. 30, 32, 35)

The State then recites a string of facts from the trial and argues that Taliani's claim has no chance of success. (State brief at 42-44) To the contrary, the takeaway here is that Taliani was unable to commit murder despite expressions of his long desire to do so until he took the medication prescribed by Dr. Brady. Indeed, Taliani suffered from depression for about a decade without committing murder but only two weeks after taking the prescription medications he was able to shoot and kill his girlfriend with a shotgun and shoot his girlfriend's mother in the head with a shotgun. (R372-73, 394) The obvious factor that changed was the medication.

VI. Remaining State Arguments

The State argues Taliani is asking this Court to find that evidence is always new when it is supportive of a newly available affirmative defense. (State brief at 37-38) To be clear, Taliani acknowledges that every case must be considered on its on particular facts. His request is for this Court to find that the facts supporting Taliani's actual innocence claim should be

treated as newly discovered for all of the reasons given in his opening brief and this reply.

The State then argues that *Alberts* was incorrect in finding that the involuntary intoxication defense based on prescription medication was unavailable before *Hari* because in *Hari* this Court did not have to go beyond the plain language of the statute when it determined the defense was available. (State brief at 37) A careful review of *Alberts* shows that it found that the *Hari* decision created a new rule because it broadened the scope of the defense to what was not dictated by existing precedent, which was demonstrated by this Court in *Hari* overruling cases that previously excluded the defense. *Alberts*, 383 Ill. App. 3d at 382, citing *Teague v. Lane*, 489 U.S. 288, 301 (1989). And the new rule was found to be retroactive because it "narrow[ed] the applicability of a substantive criminal statute" where the practical effect of the decision was to "limit the type of conduct that is criminal under the statute." *Id*. at 382-84, citing *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004). The State does not put forth any challenge to this reasoning or argue that the defense should not be retroactive.

And, although the State gives it short shrift, *Alberts* is cited favorably in *People v. Montes,* 2015 IL App (2d) 140485, ¶ 24, for the proposition that evidence of an affirmative defense is new for purposes of an actual innocence claim when the basis for the affirmative defense did not exist until the law changed after trial.

The State makes arguments related to the side effects of suicidal ideation and altered state of consciousness that are sufficiently addressed in the opening brief. (State brief at 44-45) (Opening brief at pp.30-32)

The State argues that Taliani has failed to show he would be able to present "some evidence" that he was suffering from serotonin syndrome or was involuntarily intoxicated as required by the affirmative defense statute before the State would then have to prove he was not involuntarily intoxicated beyond a reasonable doubt. (State brief at 46). 720 ILCS

5/3-2(a) (West 1994). This argument should fail.

Indeed, this Court recently clarified the standard for determining whether newly-discovered, material and non-cumulative evidence is "conclusive" for the purposes of leave to file a successive petition. *Robinson*, 2020 IL 123849, at ¶¶48-60. The Court rejected a standard that would require such evidence to totally exonerate the petitioner. *Id*. at ¶55. It also rejected a standard allowing a court to reject a petition if the new evidence merely "conflicts" with the trial evidence. *Id*. at ¶57. "In 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." *Id*. at ¶ 60. Taliani attached Dr. Chapman's report showing that his mental state at the time of the offense would satisfy the involuntary intoxication statute, and his claim that he was suffering from symptoms associated with serotonin syndrome along with the supportive facts in the record is sufficient evidence to meet that standard.

Finally, the State argues that Dr. Chapman was obligated to testify truthfully at trial and, because he testified that Taliani's mental state was a result of his depression, he could never conclude that Taliani's medication caused his symptoms. (State brief at 47) But Dr. Chapman was never asked to render an opinion on how the combined use of Desyrel and Buspar could have affected his mental state. The State fails to consider that Taliani's mental state could be the result of severe depression *and* his medications. The State does not cite to any portion of the record to show that severe depression cannot cause the same or similar symptoms caused by serotonin syndrome. And, as explained previously, the side effect information would be irrelevant where the affirmative defense based on prescription medications was unavailable at the time of trial. *Alberts*, 383 Ill. App. 3d at 384; *Taliani*, 2020 IL App (3d) 170546 at ¶ 35.

Taliani has raised a colorable claim of actual innocence that is supported by the facts in the record and the applicable law. Accordingly, this Court should reverse the appellate court and vacate the trial court's order denying Taliani leave to file a successive postconviction petition and remand this matter for second-stage postconviction proceedings.

CONCLUSION

For the foregoing reasons, and those in the opening brief, Steven A. Taliani, petitioner-appellant, respectfully requests that this Court reverse the appellate court and remand the cause for second-stage postconviction proceedings.

Respectfully submitted,

THOMAS A. LILIEN
Deputy Defender

LUCAS WALKER
Assistant Appellate Defender
Office of the State Appellate Defender
Second Judicial District
One Douglas Avenue, Second Floor
Elgin, IL 60120
(847) 695-8822
2nddistrict.eserve@osad.state.il.us

COUNSEL FOR PETITIONER-APPELLANT

CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and the certificate of service, is 19 pages.

/s/Lucas Walker
LUCAS WALKER
Assistant Appellate Defender

No. 125891

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- STEVEN A. TALIANI, Petitioner-Appellant.	)	Appeal from the Appellate Court of Illinois, No. 3-17-0546. There on appeal from the Circuit Court of the Thirteenth Judicial Circuit, Bureau County, Illinois, No. 94 CF 37. Honorable Michael C. Jansz, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, eserve.criminalappeals@atg.state.il.us;

Mr. Thomas D. Arado, Deputy Director, State's Attorneys Appellate Prosecutor, 628 Columbus, Suite 300, Ottawa, IL 61350, 3rddistrict@ilsapp.org;

Mr. Geno Caffarini, Bureau County State's Attorney, 700 South Main Street, Princeton, IL 61356;

Mr. Steven A. Taliani, Register No. B62266, Hill Correctional Center, P. O. Box 1700, Galesburg, IL 61402

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 January 19, 2021, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the petitioner-appellant in an envelope deposited in a U.S. mail box in Elgin, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

/s/Vinette Mistretta
LEGAL SECRETARY
Office of the State Appellate Defender
One Douglas Avenue, Second Floor
Elgin, IL 60120
(847) 695-8822
Service via email will be accepted at
2nddistrict.eserve@osad.state.il.us