No. 129353

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plantiff-Appellee, -vs- JOHNNY FLOURNOY, Defendant-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-21-0587. There on appeal from the Circuit Court of Cook County, Illinois , No. 92 CR 7449. Honorable James B. Linn, Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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ARGUMENT

I. Johnny Flournoy's Claim of Actual Innocence Based on Ramano Ricks' and Elizabeth Barrier's Affidavits is Cognizable Under the Post-Conviction Hearing Act Even Though These Two Affidavits also Form the Basis of Flournoy's Other Post-Conviction Claims.

In his successive post-conviction petition, Johnny Flournoy presented an actual innocence claim and several other constitutional claims supported in part by the same two affidavits. The State argues that under *People v. Hobley*, 182 Ill. 2d 404 (1996) and *People v. Orange II*, 195 Ill. 2d 437 (2001), these claims cannot be based on the same evidence. (St. Br. 16-17) The State's argument is rooted in the *Hobley* Court's misinterpretation of language in *Washington* and should be rejected.

A. *People v. Washington*, 171 Ill. 2d 475 (1996) Does Not Preclude a Petitioner from Relying on the Same Evidence to Support a Claim of Innocence and a Claim of Trial Error.

The State argues that the limitations in *Hobley* are "well-settled" where they comport with this Court's opinion in *Washington,* 171 Ill. 2d 475 (1996), and therefore, the limitations on successive petitioners' rights are well-settled. (St. Br. 16-17) The State's argument relies on the faulty premise that in *People v. Washington*, this Court held that a petitioner could not raise a claim of actual innocence based on the same evidence used to support a different constitutional claim. (St. Br. 16-17) On the contrary, the *Washington* Court held that due process requires courts presented with compelling new evidence of innocence to order a retrial, regardless of whether the petitioner's claim was coupled with a claim of another constitutional violation. 171 Ill. 2d at 477-79. In so holding, the Court explained the difference by using the words "freestanding" and "gateway." Freestanding claims stood on their own and gateway claims were entwined with another constitutional violation. *Id*. However, nothing in *Washington* suggested that evidence offered in support of an actual innocence claim must *only* be offered in support of an actual innocence claim. To the contrary, the testimony this Court found to

prove a "freestanding" claim in *Washington* had originally been offered to support an alternative claim of ineffective assistance of trial counsel. *Id.; People v. Washington*, 256 Ill. App. 3d 445, 446-50 (1st Dist. 1993) (detailing history).

After *Washington*, the term "freestanding" began to take on a different connotation. In *Hobley,* 182 Ill.2d at 443, this Court for the first time suggested that if an actual innocence claim was being used to "supplement" a claim of a different constitutional violation, it was not an authentic claim of actual innocence because it was not "freestanding." *Id.*; *see also People v. Orange II*, 195 Ill. 2d 437, 459 (2001). But *Washington* never imposed these limitations. Moreover, reading *Washington* this way infringes on a petitioner's constitutional rights where it requires him or her to forgo one claim for another just because they are supported by the same evidence. *See People v. Martinez*, 2021 IL App (1st) 190490, ¶¶ 99-106 (cataloguing split in authority and allowing alternative pleading). Indeed, as "Illinois law unquestionably allows litigants to plead alternative grounds for recovery, regardless of the consistency of the allegations," *Heastie v. Roberts*, 226 Ill. 2d 515, 557 (2007), innocent people should not remain in prison merely because they happen to plead other constitutional claims in the alternative. Indeed, extracting the cost of forfeiture of an actual innocence claim as the price for offering that evidence in support of an alternative claim would be the kind of arbitrary rule due process prohibits. *See, generally. Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68 (2009) (due process protects "liberty interest" in state actual innocence proceedings).

In its brief, the State argues that pigeon-holing the issues in this way does not foreclose a petitioner's ability to obtain relief, but only requires the petitioner to pursue the proper type of claim. (St. Br. 18) The State attempts to illustrate this point by hypothetical: A claim of actual innocence would involve "a witness, previously unknown to anyone, who can provide exculpatory testimony," whereas if that witness were previously known to the defense, the

claim is that counsel was ineffective for failing to call that witness to testify. (St. Br. 18-19) However, all possible situations do not fit neatly in these slots.

For example, under the State's reasoning, if a witness totally unknown to the defense comes forward and names someone other than the defendant as the shooter and also swears that he named that shooter to the police, this cannot be an innocence claim because the witness was known to the State. This is an absurd interpretation of *Washington* and could not have been intended. *See People v. Williams*, 2012 IL App (1st) 111145, ¶41 (defendant made a substantial showing of a "freestanding claim of actual innocence" based on new evidence that also supported a *Brady* claim); *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 33 (actual innocence claim was "legitimate," even where same evidence was alleged to support an ineffectiveness claim); *People v. Sparks*, 393 Ill. App. 3d 878, 882, 887 (1st Dist. 2009) (reversing dismissal of petition seeking relief on actual innocence claim, though same affidavit also used to support *Brady* claim); *People v. Tate*, 2012 IL 112214, ¶¶ 17, 23-25, 29 (reversing dismissal of petition seeking relief on both theories supported by the same affidavits; although this Court reversed only on the basis of cause and prejudice, it made no mention of either a freestanding requirement or of any deficiency stemming from the overlapping evidence).

By the same faulty reasoning, the State's argument would mean a *Brady* claim (a "trial error" claim) could not be based on a newly discovered affidavit. This is, by definition, wrong, as a *Brady* claim *must* be based on new evidence not disclosed to the defense at trial. *See Strickler v. Green*, 527 U.S. 263, 283-84 (1999) (finding cause for raising a *Brady* claim not previously discoverable by defense).

Likewise, trial counsel's ineffectiveness can be based on his failure to interview a witness who has evidence of defendant's actual innocence. Indeed, although the State disagrees, *Washington* itself was such a case. (St. Br. 20) Petitioner based a claim of actual innocence and a claim of ineffective assistance of counsel on evidence from the same witness. The trial

court dispensed with the ineffective assistance claim first where counsel explained that he could not get hold of the witness. This Court then determined that this witness's testimony at that hearing supported a claim of actual innocence so as to require a new trial. 171 Ill. 2d at 478-79. The determination to reject one claim and to accept the other occurred only *after a hearing*. To force a petitioner - in most instances, a *pro se* petitioner - to choose which claim to raise and which to forfeit at the leave-to-file stage is unreasonable and a violation of federal due process rights. *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977); *see Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 546 (2001) (A State cannot require someone "to forfeit one constitutionally protected right as the price for exercising another").

The State also disagrees that *Hobley* and its progeny forces a petitioner to forfeit a potentially valid claim; postulating that it merely "channels [petitioner's] allegations into the proper type of claim." (St. Br. 24) Again, to require a petitioner to have to make this choice at the pleading stage forces a petitioner's hand. Such a limitation could not have been what the *Washington* Court intended where *Washington* ultimately *expanded* a petitioner's constitutional rights to include additional claims not recognized by statute or by the Federal Constitution. 171 Ill. 2d at 487-88. Moreover, notwithstanding whether the basis for more than one of defendant's claims is the same, he has the right to make alternative claims. *Heastie v. Roberts*, 226 Ill. 2d 515, 557 (2007). It is for the court to determine which of petitioner's claims, if any, has merit. *See People v. Jarrett*, 399 Ill. App. 3d 715 (1st Dist. 2010) (addressing post-conviction petitioner's *Brady* and newly-discovered evidence claims based on the discovery of witness who saw an individual point a gun at petitioner); *People v. Harris*, 206 Ill.2d 293, 301, 306 (2002) (addressing petitioner's claims of actual innocence and ineffective assistance of counsel both based on affidavits supporting petitioner's alibi defense).

B. The State Misunderstands this Court's Decision in *Washington.*

Next, the State asserts that because *Washington* explained the difference between freestanding and gateway claims of innocence, the Court intended for them to be mutually

exclusive. (St. Br. 20) Flournoy does not dispute that these are two different types of claims that are defined differently. But nowhere does the *Washington* Court characterize these definitions as a limitation. *See People v. Coleman*, 2013 IL 113307, ¶ 84 (2013) (recognizing that actual innocence and constitutional claims have different burdens at the "leave-to-file" stage); *see also*, *People v. Martinez*, 2021 IL App (1st) 190490, ¶ 104 ("*Coleman*'s explanation of a freestanding actual innocence claim contemplates that the *claims* be independent, not that the actual innocence claim be independent of *the evidence* underlying his other constitutional claim or trial error.") (emphasis in the original).

Moreover, the State's argument that this is "long-standing precedent" that is "settled" is an exaggeration. In addition to *Washington*, which it misinterprets, the State cites to two additional decisions of this Court - *Hobley*, and *Orange II*.[1] (St. Br. 16-17) But, this supposedly "settled" precedent was not even mentioned when this Court issued its opinion in *Harris* the following year where, as noted above, the petitioner raised an innocence claim and an ineffectiveness claim based on the same alibi affidavits. Further, subsequently to these cases, appellate court decisions have imposed no *Hobley* limitations on petitioners, but have followed *Washington* and allowed petitioners to argue claims of actual innocence in the alternative. *See, e.g., People v. Williams*, 2012 IL App (1st) 111145, at ¶ 41 (same evidence offered in support of claims of actual innocence and *Brady* violation); *People v. Munoz*, 406 Ill. App. 3d 844, 853-55 (1st Dist. 2010) (allegation that police suppressed eyewitness account that would prove innocence); *People v. Martinez*, 2021 IL App (1st) 190490, ¶¶ 99-106 (Based on *Hobley* and this Court's other precedent, permitting actual innocence to be offered in the alternative is required by the Illinois constitution).

[1] The State also cites to *People v. Taliani*, 2021 IL 125891. (St. Br. 18) However, that case only involves actual innocence and makes no comment on other types of constitutional claims.

Moreover, the State's reading of *Washington* defies all logic where Ricks' affidavit - a single piece of evidence - does support more than one claim. It contains support for a claim of actual innocence: that Flournoy never confessed; evidence of a *Brady* violation: that Ricks testified in exchange for an undisclosed deal; and evidence of a *Napue* violation: that the State knowingly suborned perjury where Akin told him to testify to Flournoy's confession. Likewise, Barrier's affidavit contains newly discovered evidence that someone else - Reggie Smith - was the shooter and supports the alternative claim, that counsel was ineffective for failing to interview her and lying about it in open court.

C. To the Extent that *Hobley* Is Inconsistent with *Washington*, it Should be Overruled.

The State argues that this Court should not overrule *Hobley* because Flournoy has not met the requisite standard to depart from *stare decisis* - that *Hobley* is unworkable or badly reasoned and likely to result in serious detriment prejudicial to public interest. (St. Br. 22-23) On the contrary, *Hobley* arbitrarily requires a petitioner to choose between constitutional claims at the pleading stage, a requirement not imposed on any other litigants, and has the potential to keep an innocent person in prison. These results are unfairly prejudicial to the public interest and therefore, the *Hobley* limitation should not be followed.

The State also claims that, contrary to Flournoy's argument, *Hobley* could not restrict a petitioners's constitutional rights because there is no Federal Constitutional right to pursue a claim of actual innocence. (St. Br. 23-24) This is exactly Flournoy's point. The *Washington* court disagreed with the United States Supreme Court's determination that an actual innocence claim was not a cognizable federal due process claim. 171 Ill. 2d at 487-88. Consequently, the *Washington* Court read the due process clause of the Illinois Constitution *more broadly*. To use that opinion to restrict the rights of a possibly innocent person does not comport with the spirit of *Washington.*

In conclusion, depriving Johnny Flournoy and all other petitioners the opportunity to argue all of their constitutional claims, including actual innocence, just because they happen to be based on the same evidence does not comport with the holding and spirit of this Court's decision in *Washington*, or the reasoning found in numerous decisions of this Court decided since *Washington*, *i.e., Harris*, *Tate* and *Coleman*, and violates due process. Accordingly, this Court should reverse the appellate court's holding that Johnny Flournoy was barred from raising all of his constitutional claims in a successive petition.

II. Where Johnny Flournoy's Successive Post-Conviction Petition Stated a Colorable Claim of Actual Innocence Based on Newly Discovered Exculpatory Affidavits - One from a Witness Who Recanted his Testimony that Flournoy Admitted Being the Shooter, and One from a Potential Witness Who Would Testify that Reginald Smith Confessed to her That He Killed Harlib - the Circuit Court Erred in Denying Him Leave to File his Successive Post-Conviction Petition.

In his opening brief, Flournoy raised a claim of actual innocence based on newly discovered affidavits swearing that Flournoy never confessed to this crime, but that Reggie Smith - originally a suspect - did. The State asserts that Flournoy failed to meet the standard for actual innocence at the leave-to-file stage. However, many of the State's arguments involve determinations of credibility, which is not a consideration at this stage, and should be rejected. The other arguments also fail.

Ramano Ricks' affidavit

The State argues that the information contained in Ricks' affidavit is not new evidence. (St. Br. 33) In support, the State points to Flournoy's previous attempts to prove that Ricks was lying. (St. Br. 33-34) On the contrary, the fact that Flournoy knew of, and attempted to establish, Ricks' perjury does not preclude this claim. *People v. Wideman*, 2016 IL App (1st) 123092, ¶ 53 (a recantation of trial testimony may be considered new evidence, even though a defendant may have known the witness committed perjury, where the defendant did not have evidence available at the time of trial to demonstrate the witness was lying); *People v. Harper*,

2013 IL App (1st) 102181, ¶ 42 (where witness attested that his trial testimony was a lie and that police officers threatened him to obtain the testimony, the affidavit was newly discovered because, "clearly, due diligence could not have compelled [witness] to testify truthfully at the first trial"). As in those cases, until Flournoy was able to obtain Ricks' affidavit, he had no way to support his allegations.

In support of this argument, the State relies on *People v. Barnslater*, 373 Ill. App. 3d 512, 523-24 (1st Dist. 2007). (St. Br. 32-33) However, the State's reliance on *Barnslater* is misplaced where *Barnslater* was overruled by *People v. Robinson*, for taking a far too restrictive approach to actual innocence claims:

> We now clarify that the inquiry applicable at the leave-to-file stage of successive proceedings does not focus on whether the new evidence is inconsistent with the evidence presented at trial. Rather, the well-pleaded allegations in the petition and supporting documents will be accepted as true unless it is affirmatively demonstrated by the record that a trier of fact could never accept their veracity. 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.

2021 IL App (1st) 172411. In addition to applying a far too stringent standard for innocence, the court in *Barnslater* made another significant error. The court found that evidence was not newly discovered because petitioner purportedly had "other sources" for establishing his innocence, namely "his co-defendants," who, according to the court, he could have called to testify. *Barnslater*, 373 Ill. App. 3d at 525. This is wrong: "Statements of a co-defendant are considered newly discovered, since no amount of diligence could have forced them to testify." *People v. Beard*, 2023 IL App (1st) 200106, ¶ 50, *citing People v. Edwards*, 2012 IL 111711, ¶ 38.

Applying the correct test, Ricks' affidavit is newly discovered because, until Ricks swore under oath that his prior testimony was false, Flournoy could not prove that Ricks fabricated his claim *See Harper*, 2013 IL App (1st) 102181, ¶ 41 (affidavit attesting that a witness' trial testimony was a lie induced by the police was newly discovered because "due diligence could

not have compelled him to testify truthfully at the first trial"); *People v. Fields*, 2020 IL App (1st) 151735, ¶ 47 (although defendant was previously aware of witness, the witness "had demonstrated no intent of recanting her pretrial identification to the police at the time of trial")

The State's argument that Ricks' affidavit does not establish Flournoy's innocence also fails. The State asserts that because Ricks does not name another shooter this is not an actual innocence claim. (St. Br. 35-36) However, it is not necessary to actually name a shooter to qualify as evidence of actual innocence. It is enough for a witness to recant her testimony implicating the defendant. *Ayala*, 2022 IL App (1st) 192484, ¶ 75-76

In *Ayala*, defendant was convicted on a theory of accountability. *Id.* at ¶ 2 . The claim of actual innocence rested on a recantation from a witness who testified at trial that she had information that defendant Ayala had ordered the shooting. *Id.* at ¶ 76. The *Ayala* court held that the affidavit was sufficient to advance the petition to third stage. *Id.* at ¶ 138. In this case, which is only at the leave-to-file stage, Flournoy has made the *prima facie* case that Ricks' affidavit has the probability to affect the outcome of trial.

The State also asserts that Ricks' testimony was not the strongest evidence presented in light of Mendoza's lineup identification of Flournoy. (St. Br. 35) On the contrary, Ricks' testimony was critical. First, during closing argument, the prosecutor repeatedly discussed Ricks' testimony, focusing on Flournoy's alleged confession. (R. 850-52) During rebuttal argument, the prosecutor spent even more time discussing why the jury should find Ricks' account of Flournoy's alleged confession to be credible. (R. 918-23) And, during deliberations, the jury requested Ricks' statement in addition to Mendoza's testimony. (C. 385-86) In the face of this record, the State cannot credibly assert that Ricks' testimony was not strong.

Elizabeth Barrier's affidavit

The State contends that Barrier's affidavit is not "new evidence" where Flournoy previously alleged that she was known before trial, was available to testify, but that counsel

was ineffective for not calling her. (St. Br. 27-28)The State argues that Flournoy cannot do an "about face" and claim that evidence was newly discovered because of his prior post-trial and post-conviction claims. (St. Br. 26-27) Barrier provided an explanation for this in her affidavit. She swore that, contrary to his representations at Flournoy's post-trial hearing, trial counsel never contacted her. (C. 312) In other words, according to Barrier, trial counsel lied. And Flournoy's prior representations were based on these lies by a subsequently disbarred attorney. Until Flournoy received Barrier's affidavit, he had no reason to know that counsel had not spoken to Barrier.

The fact that trial counsel lied to the court and Flournoy about contacting Barrier - unusual and shocking misconduct - is significant for Flournoy's claim, yet the State does not seriously address it. But counsel's "inexplicabl[e]" conduct in regard to a potential witness can be considered in determining whether a later executed affidavit from that witness is newly discovered. See *People v. Warren*, 2016 IL App (1st) 090884-C, ¶ 130, 142. And, if a defendant who solemnly confesses his guilt as part of a guilty plea can still raise an innocence claim, *People v. Reed*, 2020 IL 124940, ¶ 42, then surely a defendant who makes an incorrect statement as a result of an attorney's lies can do the same.

The State also asserts that Flournoy cannot argue that Barrier was unavailable where counsel did not attempt to subpoena her. (St. Br. 28-29) On the contrary, we know that Barrier was unavailable where she moved to Florida and lived as a vagrant. *See People v. Ortiz*, 235 Ill. 2d 319, 334 (2009) (A newly discovered witness "essentially made himself unavailable when he moved to Wisconsin shortly after the murder"). Indeed, the State later recognizes in its brief that the "thrust of Barrier's affidavit is that she was *completely unavailable* to speak to counsel or testify at trial." (St. Br. 52) (emphasis added).

Furthermore, this argument would preclude a claim of actual innocence whenever the trial attorney was ineffective - the same forfeiture argument set forth in *Hobley* that requires

a petitioner to choose at the pleading stage one constitutional claim or another. However, Illinois law unquestionably allows litigants to plead alternative grounds for recovery, regardless of the consistency of the allegations, as long as the alternative factual statements are made in good faith and with genuine doubt as to which contradictory allegation is true. *See Bulatovic v. Dobritchanin*, 252 Ill.App.3d 122, 127 (1993). Illinois law likewise permits parties to argue in the alternative, even when such arguments are based on inconsistent facts. *See Fitchie v. Yurko*, 212 Ill.App.3d 216, 224 (1991). Where, as here, the facts are controverted, determining which, if any, of the possible theories is meritorious is a question for the trier of fact. *Heastie v. Roberts*, 226 Ill. 2d 515, 557–58 (2007).

Ultimately, the reason for the affiants's delay in making their statement is a matter to be addressed in later proceedings such as a third-stage evidentiary hearing. *See People v. Lofton*, 2011 IL App (1st) 100118, ¶ 37. This case is at the leave-to-file stage. Therefore, taking the allegations in these affidavits and statements in the petition as true, defendant has made a *prima facie case* that the evidence was newly discovered. *People v. House*, 2020 IL App (3d) 170655, ¶ 30

The cases relied on by the State are distinguishable. For instance, in *People v. Jackson,* the affidavits attached to the petition were sworn by two witnesses who had testified at trial to the same information contained in the affidavits. 2021 IL 124818, ¶42. A third affidavit was sworn by someone who was present at trial and ready to testify. *Id.* In *People v. Edwards*, petitioner's successive petition alleged that witnesses would have provided an alibi defense. 2012 IL 111711, ¶ 31. He admitted he knew of the alibi at the time of trial, but claimed that this evidence was unavailable to him where the witnesses refused defense counsel's attempts to persuade them to testify. *Id.* at ¶¶ 34, 36. The *Edwards* Court determined that since there was no indication on the record that defense counsel attempted to subpoena them, the logical assumption was that the testimony would not have been helpful. 2012 IL 111711, ¶¶ 35-37.

This case presents a completely different scenario. Unlike the witnesses in *Jackson*, Barrier did not testify and was not present at trial. Unlike those in *Edwards*, Barrier did not refuse to cooperate with the defense; counsel never contacted her and it would not have been possible for him to do so. Although at a prior hearing, defense counsel said he spoke with her, his credibility is in question as he was disbarred for lying in open court. (C. 322) And credibility findings and determinations as to the *reliability* of the supporting evidence are to be made only at a third-stage evidentiary hearing in a successive postconviction proceeding. *People v. Robinson*, 2020 IL 123849, ¶ 61; *People v. Sanders*, 2016 IL 118123, ¶ 42.

The State then asserts that Barrier's affidavit did not show that Flournoy was innocent. (St. Br. 29-30) The State relies on *People v. Taliani*, 2021 IL 123849, ¶ 44 and *Jackson*, in support of this argument. (St. Br. 29-30) But, those cases are different from the case at bar.

In *Taliani*, petitioner made the novel actual innocence claim admitting he was the shooter, but arguing that the two medications he was taking have since been found to cause serotonin syndrome, which would have supported a defense of involuntary intoxication, a defense not recognized until after petitioner had been convicted. The State posits that the dismissal of Taliani's petition was affirmed because the evidence at trial contradicted his claims. (St. Br. 30) However, the main reason that the *Taliani* Court affirmed the dismissal of the petition was because the evidence constituted a new theory of defense, but did not present new evidence that defendant was involuntarily intoxicated or actually suffered from serotonin syndrome at the time of the shooting. 2021 IL 123849, ¶¶ 70-72. In this case, Flournoy does not admit he was the shooter; he raises a classic claim that new evidence shows that someone else was.

As previously discussed, in *Jackson*, unlike the case at bar, the newly discovered witness was at trial and ready to testify. Further, there were multiple witnesses who reported that she named petitioner as the shooter, but refused to sign a statement saying so. 2021 IL 124818, ¶ 45. Here, on the other hand, Barrier had moved by the time of trial, and, although Detective

Akin testified at Flournoy's parole hearing that she said that Smith had denied being the shooter, she explained that she may have lied to the police because she was afraid of Smith. (C. 312) Moreover, whether the purported shooter's confession to a witness was trustworthy and reliable was not relevant to determining whether evidence averred in the witness's affidavit raised a colorable claim of actual innocence. *People v. Robinson*, 2020 IL 123849, ¶ 81.

The State then notes that Barrier's own affidavit suggests her memory is in doubt based on her debilitating drug problem and years as a "vagrant." (St. Br. 31) Again, the State's argument involves a credibility determination, which is not at issue at the leave-to-file stage.

The State then asserts that, because Mendoza's identification was found to be credible on direct appeal, Flournoy is barred from arguing its reliability now. (St. Br. 36-37) On the contrary, not only is petitioner not barred from examining the trial evidence, he is required to do so. *Robinson*, 2020 IL 123849, ¶ 56; *Ortiz,* 235 Ill.2d 319, 336-37 (2009). Indeed, Flournoy is not relitigating the reasonable doubt argument - which he would not be allowed to do - but inviting the court to view the trial evidence in light of the new evidence. To this end, it is true that Mendoza was certain in his identification. But if the jury were to hear evidence that Flournoy did not make a confession, and that another man - who more closely matched Mendoza's original description - did, there is a probability that it would come to a different result. Therefore, this Court should remand this cause for further postconviction proceedings.

III. Johnny Flournoy's Petition Also Made A *Prima Facie* Showing that the State Violated His Due Process Rights When It Concealed Critical Evidence that Ramano Ricks, the State's Key Witness, Testified in Exchange for a Promise of Leniency on his Armed Robbery Case, and Ricks Lied on the Stand About Flournoy's Alleged Admissions to Harlib's Murder in Exchange for This Promise.

In his opening brief, Flournoy argued that he established cause and prejudice for his *Brady* and *Napue* claims. The State disagrees, arguing that Flournoy has raised these claims before and neither claim would affect the outcome of trial. However, the State fails to take into account that Flournoy had no additional support for his claim until Ricks agreed to cooperate and once again uses the wrong standard to show prejudice at the leave-to-file stage.

Cause

The State asserts that Flournoy cannot establish cause where he previously raised these claims. (St. Br. 40-41) The State quotes *People v. Davis*, 2014 115595, ¶ 55 in support of its argument. *Davis* is distinguishable from this case. In *Davis*, the petitioner did not raise an ineffective assistance issue until his successive post-conviction petition, and provided no explanation for why he could not have obtained the information earlier. Indeed, the *Davis* court found this important as evidenced by the entire quoted passage cited by the State:

> Before this court, defendant argues that juvenile court counsel's deficient representation was not discovered until his current postconviction counsel spoke with Baxter in December 2010. We reject this argument. *Defendant fails to explain why he was unable to discover this allegedly new evidence earlier, or raise this or a similar claim in any of his earlier postconviction proceedings.* A defendant is not permitted to develop the evidentiary basis for a claim in a piecemeal fashion in successive postconviction petitions, as defendant has attempted to do here. *See People v. Erickson*, 183 Ill.2d 213, 226–27 (1998).

2014 IL 115595, ¶ 55 (emphasis added).

In other words, it was petitioner's failure to raise the issue previously that defeated the claim in *Davis*. In contrast, where a defendant did attempt to previously raise the claim, but lacked the necessary support, new evidence will establish cause for him to raise the claim again in a successive petition. *People v. Wrice*, 2012 IL 111860. In *Wrice*, defendant continually maintained he was tortured and raised that claim multiple times - in a pre-trial motion, and in two prior post-conviction petitions. 2012 IL 111860, ¶¶ 7, 40, 41. This Court affirmed the appellate court's holding that defendant had cause to raise this issue once newly discovered proof was available. *Id.* at ¶ 49; *People v. Wrice*, 406 Ill. App. 3d 43, 52 (1st Dist. 2010).

This case is different than *Davis*, where defendant never attempted to raise the claim prior to his successive petition or explain why could not have. *Davis*, 2014 IL 115595, ¶ 55: Here, Flournoy attempted to raise the claim but did not have the requisite support for his allegations that the State withheld exculpatory evidence and suborned perjury until he obtained

Rick's affidavit. *See also People v. Brandon*, 2021 IL App (1st) 172411, ¶¶ 49-69 (petitioner showed cause where previously-raised claim was supported with newly released supporting documents).

Moreover, unlike in *Davis*, Flournoy *did* explain why this claim could not be established until now: the State concealed evidence in violation of *Brady* and suborned perjury in violation of *Napue*. The fact that this is a *Brady/Napue* claim makes this a different case than *Davis*, which involved an ineffectiveness claim. The State overlooks that, by establishing the elements of a *Brady/Napue* claim, the defendant necessarily establishes "cause" to raise it. *Banks v. Dretke*, 540 U.S. 668, 691 (2004) ("Corresponding to the second *Brady* component (evidence suppressed by the State), a petitioner shows 'cause' when the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence").

Prejudice

The State argues that Flournoy was not prejudiced by a *Brady* or *Napue* violation where he has not shown that Ricks received a benefit in exchange for his testimony; the existence of such a deal would have had a significant impact, given the strong trial evidence; and any deal was anything more than "minor." (St. Br. 43-44, 46) The State is wrong on all points.

First, for either claim, a petitioner need not show that he received a benefit in exchange for his testimony, only that one was offered. *Napue v. Illinois,* 360 U.S. 264, 266 (1959) ("a *recommendation* for a reduction of [State witness Hamer's] sentence would be made and, *if possible* effectuated"); *People v. Ellis*, 315 Ill. App. 3d 1108, 1114 (1st Dist. 2000) (the prosecution's *offer* to recommend lenient sentences for two witnesses should have been disclosed even though it was not a contractual deal). The State goes further, suggesting that to prove the existence of a deal, Flournoy should have attached an affidavit from trial counsel. (St. Br. 43) However, it is long-settled that petitioner is not expected to attach an affidavit from defense counsel where petitioner claims ineffective assistance. *People v. Hall* 217 Ill. 2d 324 (2005); *People v. Williams*, 47 Ill. 2d 1, 4 (1970).

Ricks established the existence of a deal by stating that he served only 2.5 years of a 10-year sentence after he testified. This was anything but minor when most defendants have to serve at least 50% of their imposed sentences if not more. 730 ILCS 5/3-6-3(a)(2).

Nor is Ricks' statement to police that he did not receive a deal dispositive. (St. Br. 45) Ricks recanted that statement in his affidavit and this formed the basis of Flournoy's *Napue* claim. (C. 306-07) At this stage of proceedings, these allegations must be considered true. *Robinson*, 2020 IL 123849, ¶¶ 44; *Brooks,* 2021 IL App (4th) 200572, ¶ 44. A true determination of the nature of the deal can only be made after an evidentiary hearing. *People v. Colasurado*, 2020 IL App (3d) 190356, ¶45; *Robinson*, 2020 IL 123849, ¶¶ 44.

The State's argument that the State did not know that Rick's testimony implicating Flournoy was false fails where his affidavit names State witness Detective Akin as the person who told him to change his story. (C. 307) (St. Br. 46) Moreover, the prosecution is presumed to know the truth or falsity of its own witnesses's testimony. *Kyles v. Whitley*, 514 U.S. 419, 438, (1995). *Youngblood v. W. Virginia*, 547 U.S. 867, 869–70 (2006) (*Brady* suppression occurs when the government fails to turn over evidence that is "known only to police investigators and not to the prosecutor"); *See also People v. Rish*, 344 Ill. App. 3d 1105, 1115-16 (3d Dist. 2003). (Knowledge of a police officer is reasonably imputed to the State).

The State again argues that Flournoy has not shown that he was prejudiced where Mendoza's testimony alone was enough to convict and the jury did not rely on Ricks' testimony. (St. Br. 49) On the contrary, the new evidence here puts Mendoza's identification in a new light. Moreover, during closing argument, the prosecutor repeatedly discussed Ricks' testimony, focusing on Flournoy's alleged confession. (R. 850-52) During rebuttal argument, the prosecutor spent even more time arguing how credible his testimony relating Flournoy's confession was. (R. 918-23) And, during deliberations, the jury requested both Mendoza's testimony *and* Ricks' statement. (R. 385-86) In the face of this record, the State cannot credibly assert that Ricks' testimony played no part in the verdict.

Finally, the State's argument that Flournoy would not have been acquitted if the jury would have heard about Ricks' deal and his lies also fails. (St. Br. 43) Once again, the State utilizes the wrong standard. The determination at the leave-to-file stage is not whether the petitioner would have been acquitted, but whether he made a *prima facie* showing that there was a *reasonable probability* of a different result at trial.

IV. Johnny Flournoy's Petition Made a *Prima Facie* Case that He was Denied the Effective Assistance of Trial Counsel Based on Information Provided by Elizabeth Barrier that Flournoy's Trial Counsel Failed to Interview Her, When She Could Have Provided Exculpatory Evidence, and Misrepresented to the Trial Court that He Had Contacted and Spoken with Her.

The State asserts that Flournoy has not established "cause and prejudice" for this claim where he has made that claim previously and he cannot show that had Barrier been called, petitioner would have been acquitted. (St. Br. 50-51) The State's repetitious arguments fare no better here than against petitioner's other arguments.

Cause

As to cause, until he received Barrier's affidavit, Flournoy only knew what counsel told him - that he had spoken with Barrier and decided not to call her. He could not have obtained Barrier's affidavit showing that this conversation never happened until an investigator contacted her. (C. 313) Therefore, Flournoy established cause for this claim despite raising the claim before. *People v. Wrice*, 2012 IL 111860, ¶¶ 40, 41, 49.

Prejudice

Flournoy first addresses the State's claims that counsel's performance was not deficient. In so arguing, the State stubbornly repeats counsel's representation that he *did* speak with Barrier and Flournoy's previous claims that he did as well. (St. Br. 51) Barrier's affidavit contradicts these representations. (C. 313) Assuming her affidavit is true, as we must, defense counsel lied to the court. This is supported by the fact that he was later disbarred for the same type of infraction. (C. 321-22) This renders Flournoy's prior representations that counsel spoke with Barrier of no import. Moreover, according to Flournoy, counsel lied to him as well. (C. 317)

The State also argues that police reports support the fact that Barrier was available where she spoke with police numerous times prior to trial. (C. 240-41) Although the police did contact her, in her affidavit, Barrier said she did not want to talk to the police because she was afraid of Smith, which is why she did not name him as the shooter to police. (C. 311)

The State switches gears and asserts that assuming Barrier was unavailable, counsel was not ineffective because he should not have been expected to find her. (St. Br. 52) If this turns out to be the case, Flournoy's petition should be advanced on his newly discovered evidence claim. This illustrates well the point made in Argument I - that a petitioner should not be precluded at the pleading stage from making alternative arguments based on the same evidence.

The State also argues that Flournoy cannot show prejudice where the contents of Barrier's affidavit would be inadmissible hearsay. (St. Br. 53) First, admissibility should not be a consideration at this stage of the proceedings. *Robinson*, 2020 IL 123849, ¶¶ 73, 77-79; Ill. R. Evid. 1101(b). (Def. Orig. Br., at p. 44)

The State posits that if admissibility were not a concern, a defendant could argue that his attorney was ineffective for failing to introduce polygraph evidence. This is an absurd comparison because polygraph evidence is *always* inadmissible. Likewise, in *Jenkins*, 2022 IL App (1st) 192514-U, ¶¶ 36-37, counsel could not be found ineffective for failing to introduce defendant's own exculpatory statements, which, like polygraph evidence, are *always* inadmissible. *People v. Burwell*, 285 Ill. App. 3d 98, 990 (1996). But, third-party confessions *are* admissible under certain circumstances. *Chambers v. Mississippi*, 410 U.S. 284, 88-89 (1973) (carving out an exception to the hearsay rule against third-party confessions when those confessions are shown to be reliable). Although the State has not addressed *Chambers* in its brief, its holding is pivotal to the ultimate resolution of this case.

In finding that third-party confessions are sometimes admissible as an exception to the rule against hearsay, the *Chambers* court set forth the following non-exclusive factors:

the statement is against penal interest, there is independent corroboration for the statement, it was spontaneously made close to the time of the offense, and the declarant is available for cross-examination. However, not all factors have to be present to qualify as admissible. *People v. Tenney*, 205 Ill. 2d 411, 435 (2002). In *Tenney*, defendant sought to introduce evidence that another person originally charged with the same offense confessed. This Court found the confession admissible even though it was made weeks after the offense and the declarant was not available for cross examination. 205 Ill. 2d at 436-41. This Court explained that, if the confession is of the type "that prosecutors regularly use *against* defendants," then a defendant is entitled to use it. *Id.* at 440, *quoting Lee v. McCaughtry*, 933 F. 2d 536, 537 (7th Cir. 1991).

As in *Tenney*, Smith's statement qualified under only some factors: it was spontaneous, made close in time to the murder, was against penal interest and was exactly the type of confession that prosecutors regularly use against defendants. It is also arguable that there was independent corroboration in that Smith was originally a suspect, but he was not available for cross-examination. Thus, at the leave-to-file stage, Flournoy has established he would be entitled to use this evidence at retrial.

Finally, the State asserts that Barrier's testimony would be impeached, and repeats its argument that Flournoy would not have been acquitted if this evidence were introduced. The first argument again involves a premature credibility determination, and the second used the wrong standard. Again, Flournoy need only make a *prima facie* showing of both deficient performance and a reasonable probability that the outcome of his trial would have been affected. *People v. Bailey*, 2017 IL 121450, ¶ 24.

In the event it does not show actual innocence, Barrier's affidavit establishes a *prima facie* case that trial counsel was ineffective for never having interviewed her. This violation is all the more galling given that trial counsel lied to the court to cover his own tracks. Therefore, Flournoy's petition makes an adequate showing of both cause and prejudice sufficient to warrant granting leave to file his successive petition. As such, this Court should reverse the appellate court's order and remand the cause for second-stage proceedings with the appointment of counsel.

CONCLUSION

For the foregoing reasons, Johnny Flournoy, petitioner-appellant, respectfully requests that this Court reverse the appellate court's decision affirming the denial of leave to file his petition, and remand this cause for further proceedings with the appointment of counsel.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 20 pages.

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No. 129353

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plantiff-Appellee, -vs- JOHNNY FLOURNOY, Defendant-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-21-0587. There on appeal from the Circuit Court of Cook County, Illinois , No. 92 CR 7449. Honorable James B. Linn, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On January 30, 2024, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the in an envelope deposited in a U.S. mail box in Springfield, 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.

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