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.

BRIEF AND APPENDIX OF RESPONDENT-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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POINTS AND AUTHORITIES

NATURE OF THE CASE

Petitioner pleaded guilty to first degree murder and was sentenced to 35 years in prison. He later filed a motion for leave to file a successive postconviction petition claiming actual innocence and ineffective assistance of trial counsel. The circuit court denied leave, but the appellate court reversed, holding that petitioner was entitled to pursue both claims on remand. A question is raised on the pleadings: whether petitioner's allegations entitle him to file a successive petition.

ISSUES PRESENTED FOR REVIEW

1. Whether petitioner must obtain leave to file each claim in his successive postconviction petition.

2. Whether petitioner failed to set forth a colorable claim that, notwithstanding his guilty plea, he is actually innocent, because he failed to offer reliable evidence that clearly and convincingly demonstrates that he would be acquitted at trial.

3. Whether petitioner failed to demonstrate cause and prejudice to pursue his claim of ineffective assistance of trial counsel.

JURISDICTION

Appellate jurisdiction lies under Supreme Court Rules 315, 612(b), and 651. This Court granted leave to appeal on September 28, 2022.

STATEMENT OF FACTS

I. Petitioner pleaded guilty to first degree murder.

A grand jury charged petitioner with the first degree murder of Milissa Williams and the attempted murder and aggravated battery with a firearm of Otis Houston. Tr.C42-71.[1] The charges included allegations that petitioner personally discharged a firearm that proximately caused the death of Williams and great bodily harm to Houston, *id.*, which, if proven, required the imposition of sentence enhancements, *see* 720 ILCS 5/5-8-1(a)(1)(d)(iii) ("if, during the commission of the offense, the person personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person, 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court").

By agreement, petitioner pleaded guilty to first degree murder in exchange for a 35-year prison term and dismissal of the remaining counts. Tr.R.U3-4. At the change-of-plea hearing, the circuit court admonished

[1] Citations to the electronic record on appeal appear as follows: "C" refers to the common law record; "Sup2 C" refers to the supplemental volume of common law record; "Sec.C" refers to the secured common law record; "R" refers to the reports of proceedings; and "Sup1 R" refers to the supplemental volume of reports of proceedings. Citations to the hard copy record from the direct appeal appear as "Tr.C" and "Tr.R." "A" refers to the appendix to this brief.

petitioner of his constitutional rights and found that he knowingly and voluntarily waived them. Tr.R.U12.

The prosecutor summarized the factual basis for petitioner's plea. The evidence would show that at around 3:30 a.m., on June 26, 2009, petitioner shot Williams twice and Houston four times. Tr.R.U6. Houston survived a gunshot wound to the chest and would testify that petitioner approached and shot Williams first. Petitioner then chased and shot Houston multiple times. Tr.R.U6-7. Houston identified petitioner in a lineup and would do so in court. Tr.R.U7.

Lavertice Harmon would testify that he was standing outside with a group that included Leroy Battle, Terrence Washington, and Kevin Barnes. *Id.* Petitioner drove up in a vehicle with its headlights off and told Harmon that he was looking for Williams and was "fixin' to merk . . . that bitch," meaning that he would kill her. Tr.R.U7-8. Petitioner "displayed a chrome colored handgun with a black handle." Tr.R.U7. Petitioner agreed to drive around the block to enable Harmon to "get [his] guys out of the way." Tr.R.U9. Harmon then saw petitioner return, exit his car, point a handgun at Williams, fire a single shot, then fire multiple shots at Houston. *Id.* Before petitioner got back into his car and drove away, he stopped within an arm's length of Williams and fired another shot, and she "dropped to the ground." Tr.R.U10.

In addition to Harmon, both Battle and Barnes identified petitioner as the shooter. Tr.R.U10-11. And petitioner later "admitted to the shooting" in a telephone conversation with Carlton Winters. *Id.*

The circuit court found the factual basis sufficient, accepted petitioner's guilty plea, and imposed the agreed-upon 35-year sentence, entering judgment on June 16, 2011. Tr.R.U12. The appellate court allowed petitioner's untimely appeal, Sec.C102, and granted an agreed request for a summary remand to modify the monetary assessments entered against petitioner, Sec.C103.

II. Petitioner unsuccessfully sought postconviction relief.

In 2017, petitioner filed a pro se postconviction petition, which alleged that he is actually innocent, and police officers arrested him without probable cause and coerced a confession. Sec.C119-22. The circuit court dismissed the petition as frivolous and patently without merit. Sec.C110-15. On appeal, the appellate court granted appointed counsel's motion to withdraw and affirmed because the appeal raised no issue of arguable merit. A4-5, ¶ 13.

III. The circuit court denied leave to file a successive petition.

While petitioner's postconviction appeal was pending, in February 2019, he moved for leave to file a successive postconviction petition that would claim, among other things, that (1) trial counsel was ineffective for failing to investigate whether Jerrell Butler was the shooter, and (2) petitioner was actually innocent. Sup2 C9-17.

In support of the first issue, petitioner alleged that before trial, he told defense counsel that he was "hearing around the jail" that Butler had killed Williams. Sup2 C9. Counsel told him that because he "confessed to the murder there is [no] defense that can help me. And I will go to prison for the rest of my life unless I take a plea." *Id.* Petitioner supported his claim of actual innocence with the affidavits of Lavonte Moore and Perrier Myles. Sup2 C10; Sup2 C22-23 (Moore affidavit dated November 20, 2018); Sup2 C24-27 (Myles affidavit dated August 16, 2018). Petitioner explained that while he was incarcerated, he recognized both men from the neighborhood and learned that they had information about the murder. Sup2 C16, C21.

Moore averred that at around 3:00 a.m., on June 26, 2009, he was in a parked car across from LaFollette Park and saw a group of six to ten black males and one female. Sup2 C22. Moore saw Butler emerge from an alley. *Id.* As Butler passed Moore's car, he said "wassup" to Moore and then removed a revolver from his waistband. *Id.* Moore saw Butler jog across the street towards the park, heard five gunshots, then saw Butler run back past Moore's car. *Id.* Moore never mentioned what he saw "out of fear of [Butler] and his friends." Sup2 C22-23. On November 4, 2018, while in prison, Moore recognized petitioner from the neighborhood. Sup2 C23. After learning that petitioner was "locked up" for Williams's murder "in LaFollette Park back in '09," Moore said that he "witnessed that shooting" and knew that Butler was the killer. *Id.*

Myles's affidavit stated that, although he was incarcerated when the shootings took place, his friends "Cornell McWilliams, Kevin Barnes and Lavertice Harmon, were witnesses" who had informed the police that petitioner was the shooter. Sup2 C24. After Myles's release from prison in 2015, he asked McWilliams why petitioner had been convicted. Sup2 C25. McWilliams said that petitioner was a scapegoat "so that [Harmon] and [Barnes's] drug business [could] continue." Sup2 C25-26. McWilliams said that he, Harmon, and Barnes contacted the police to give false accounts identifying petitioner as the shooter. Sup2 C26. McWilliams stated that he did not see the shooter's face but described him as light-skinned with braids, while petitioner was dark-skinned with dreadlocks. *Id.* McWilliams also told Myles that he later learned that Houston had owed money to Butler, and believed that Butler "could have been the actual shooter." *Id.* On June 29, 2018, when Myles was once again incarcerated, he approached petitioner and said that he knew that petitioner "didn't commit the murder." Sup2 C26-27.

The circuit court denied leave to file the successive postconviction petition. A27. It held, pursuant to *People v. Simmons*, 388 Ill. App. 3d 599 (1st Dist. 2009), that petitioner could not pursue a claim of actual innocence because he had pleaded guilty. *Id.* The court's order did not expressly address petitioner's claim of ineffective assistance of trial counsel.

IV. The appellate court reversed.

Petitioner appealed. A30.[2] The appellate court reversed the circuit court's judgment and remanded for further proceedings on petitioner's claims of actual innocence and ineffective assistance of trial counsel. A25, ¶¶ 66-71.

On the first issue, the appellate court noted that after the circuit court had entered its judgment, this Court overruled *Simmons* and "held that [a] defendant's guilty plea did 'not prevent him from asserting his right to not be deprived of life and liberty given compelling evidence of his innocence.'" A14, ¶ 45 (quoting *People v. Reed*, 2020 IL 124940, ¶ 37). Thus, "pursuant to *Reed*, [petitioner] is permitted to raise a claim of actual innocence based on newly discovered evidence notwithstanding his guilty plea." A14, ¶ 46.

The appellate court then considered what standard petitioner must satisfy to pursue his claim in a successive postconviction proceeding. It acknowledged that a claim of actual innocence must be "colorable" to obtain leave to file. A20, ¶ 57. And it noted that *Reed* had adopted a heightened standard for petitioners who pleaded guilty, under which they must "'provide new, material, noncumulative evidence that *clearly and convincingly* demonstrates that a trial would probably result in acquittal.'" A16, ¶ 49

[2] Initially, the appellate court dismissed the appeal for lack of jurisdiction because petitioner failed to demonstrate that his notice of appeal was timely filed, but this Court issued a supervisory order directing the appellate court to reinstate the appeal. *See* A7, n.3; A31 (supervisory order).

(quoting and adding emphasis to *Reed*, 2020 IL 124940, ¶ 49). Such a showing "inherently requires that the court finds the evidence to be reliable." *Id.*

However, the appellate court reasoned that this heightened standard cannot be applied at the leave-to-file stage because reliability determinations can only be made at a third-stage evidentiary hearing. A17-18, ¶¶ 51-52. It therefore applied the more lenient standard that this Court has applied to petitioners who claim actual innocence following a trial. Under that standard, the new evidence need not be reliable and need only "'raise[] the probability that it is more likely than not that no reasonable juror would have convicted the petitioner in light of the new evidence.'" A20, ¶ 57 (quoting *People v. Robinson*, 2020 IL 123849, ¶ 55). Applying *Robinson*'s standard, the appellate court held that the affidavits petitioner submitted from fellow inmates Moore and Myles supported a colorable actual innocence claim. A20-25, ¶¶ 59-67.

Having found this claim colorable, the appellate court concluded that it "must" remand the entire successive postconviction petition for second-stage proceedings, including petitioner's claim of ineffective assistance of counsel. A25, ¶ 68. It reasoned that "partial summary dismissals are not permitted under the Act," and thus the "entire petition must be remanded for further proceedings when one claim has merit." *Id.*

STANDARD OF REVIEW

This Court reviews de novo a circuit court's judgment denying leave to file a successive postconviction petition. *People v. Bailey*, 2017 IL 121450, ¶ 13.

ARGUMENT

I. Petitioner Must Obtain Leave to File Each Claim in a "Highly Disfavored" Successive Postconviction Petition.

The Post-Conviction Hearing Act "contemplates the filing of a single petition," *People v. Coleman*, 2013 IL 113307, ¶ 81, and petitioner may file a successive petition only with leave of court, 725 ILCS 5/122-1(f); *People v. Edwards*, 2012 IL 111711, ¶ 24. Successive petitions are "highly disfavored," *People v. Clark*, 2023 IL 127273, ¶ 39 (internal quotation marks omitted), for "[t]he successive filing of post-conviction petitions plagues [the] finality" of criminal convictions, and "'[w]ithout finality, the criminal law is deprived of much of its deterrent effect,'" *People v. Flores*, 153 Ill. 2d 264, 274 (1992) (quoting *Teague v. Lane*, 489 U.S. 288, 309 (1989)). In addition to barring successive petitions, the Act provides that any claim "'not raised in the original or an amended petition is waived.'" *Clark*, 2023 IL 127273, ¶ 40 (quoting 725 ILCS 5/122-3).

Because petitioner has already pursued a postconviction petition, he must obtain leave to file a successive one. And petitioner must satisfy the leave-to-file standard with respect "to individual claims not to the petition as

a whole." *People v. Pitsonbarger*, 205 Ill. 2d 444, 462 (2002). For most claims, "[l]eave of court may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure." 725 ILCS 5/122-1(f). Alternatively, a petitioner may file a successive petition to pursue a "colorable" claim of actual innocence. *Edwards*, 2012 IL 111711, ¶ 28. Thus, this Court has held, if a petitioner includes both an actual innocence claim and a claim of trial error in a proposed successive petition, the former claim must meet the colorable claim standard, and the latter must meet the cause-and-prejudice test. *Coleman*, 2013 IL 113307, ¶ 91.

This claim-by-claim approach for successive petitions differs from the standard applied to initial postconviction petitions. When reviewing an initial postconviction petition at the first stage of review, a court must determine whether "the petition is frivolous or is patently without merit," 725 ILCS 5/122-2.1(a)(2), and a petitioner need only state one non-frivolous claim for the entire petition to be docketed for second-stage proceedings, *see People v. Rivera*, 198 Ill. 2d 364, 370-73 (2001). Partial summary dismissals are not permitted at that stage. *See People v. Cathey*, 2012 IL 111746, ¶ 34. The appellate court mistakenly applied this standard to a *successive* postconviction petition, *see* A25, ¶ 68 (citing *Cathey* to claim that "we must remand the petition in its entirety and therefore need not review [petitioner's] ineffective assistance of

counsel claim"), and thereby violated the rule set forth in *Coleman* and *Pitsonbarger*.

Under this Court's clear precedent, petitioner must not only demonstrate that his claim of innocence is colorable, but also show cause and prejudice to pursue his claim of ineffective assistance of trial counsel. As discussed below, he can satisfy neither standard.

II. Petitioner Did Not Set Forth a Colorable Claim of Actual Innocence to Pursue in a Successive Postconviction Petition.

Petitioner is not entitled to pursue his claim of innocence in a successive postconviction petition. Leave to file must be denied "where it is clear, from a review of the successive petition and the documentation provided by the petitioner that, as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence." *Edwards*, 2012 IL 111711, ¶ 24.

The standard that governs a claim of actual innocence depends on whether the petitioner was convicted at trial or pleaded guilty. If convicted at trial, a petitioner must offer evidence that "raises the probability that 'it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.'" *Id.* (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). But if a petitioner pleaded guilty, he faces a higher burden: 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.

The latter standard, which governs petitioner's claim, necessarily governs whether petitioner is entitled to file a successive petition, *see infra* Section II.A, and petitioner failed to offer the requisite clear and convincing evidence, *see infra* Section II.B.

A. To State a Colorable Claim of Actual Innocence, a Petitioner Who Pleaded Guilty Must Offer Evidence that Clearly and Convincingly Demonstrates He Would Be Acquitted at Trial.

The appellate court concluded that petitioner was entitled to pursue a successive postconviction petition because he raised a colorable claim under the standard that governs petitioners who were convicted at trial. But its reasoning was flawed: petitioner must instead make a colorable showing that he can satisfy *Reed*'s heightened standard.

1. As a matter of logic, policy, and precedent, a petitioner must make a colorable showing under the standard that governs whether he is entitled to relief.

Ultimately, to obtain postconviction relief, petitioner must satisfy the *Reed* standard, demonstrating by clear and convincing evidence that he would be acquitted at trial. A17, ¶ 52 (acknowledging that *Reed*'s "clear and convincing standard" must be satisfied for petitioner "[t]o receive relief"). The pleading stages of postconviction review evaluate whether petitioner has offered evidence that, if believed, would demonstrate a constitutional violation, such that an evidentiary hearing is warranted. *See People v. Domagala*, 2013 IL 113688, ¶¶ 33-35. At the second stage, petitioner could

receive an evidentiary hearing only by making a "substantial showing" of a constitutional violation, which would be evaluated under the standard set forth in *Reed*. *See, e.g., People v. Brown*, 2017 IL 121681, ¶¶ 24-52 (defining standard that governed whether petitioner was entitled to relief and then determining whether petitioner made substantial showing that he could meet that standard to obtain evidentiary hearing). Although petitioner bears a lesser burden at the leave-to-file stage, in that his claim need only be "colorable," *People v. Robinson*, 2020 IL 123849, ¶ 58 ("the standard for alleging a colorable claim of actual innocence falls between the first-stage pleading requirement for an initial petition and the second-stage requirement of a substantial showing"), he must make a colorable showing that he can satisfy the standard that will govern his entitlement to relief.

To hold that petitioner could pursue a claim by making a colorable showing under a different, inapplicable legal standard — the more lenient standard applied to petitioners who were convicted at trial — is illogical, because it devotes judicial resources to a claim on which petitioner ultimately cannot prevail. And it undermines the purpose behind the bar on successive postconviction petitions, which is to promote the finality of criminal convictions. *See People v. Taliani*, 2021 IL 125891, ¶ 68 ("[b]ecause a successive postconviction claim of actual innocence undermines the finality of a conviction obtained after a fair trial, a postconviction petitioner seeking to file a claim of actual innocence is held to a high standard").

Indeed, the People's interest in finality is paramount in the guilty plea context. *See Reed*, 2020 IL 124940, ¶¶ 25-26 (noting that plea negotiations provide mutual benefits, in which "the State benefits from the prompt and largely final disposition of most criminal cases" and therefore offers concessions such as "a favorable sentence and dismissal of other charges"); *see also Blackledge v. Allison*, 431 U.S. 63, 71 (1977) (noting that mutual benefits of plea bargaining "can be secured[ ] . . . only if dispositions by guilty plea are accorded a great measure of finality"). In *Reed*, this Court adopted a "higher standard" for petitioners who pleaded guilty specifically to "strike[] an equitable balance between the defendant's constitutional liberty interest in remaining free of undeserved punishment and the State's interest in maintaining the finality and certainty of plea agreements." 2020 IL 124940, ¶ 50.

Where the interest in finality plays a special role, the legal standard should reflect that special interest. A grant of leave to file a successive petition undermines the finality of a conviction: it results in further litigation questioning that conviction's validity. Because guilty pleas require a "great measure of finality" to promote the mutual benefits of plea bargaining, *Blackledge*, 431 U.S. at 71, a petitioner must meet a high burden not only to prevail on a claim of actual innocence, but to pursue such a claim in the first place. In keeping with *Reed*'s intent to provide a limited remedy for petitioners who pleaded guilty but later discovered truly compelling

evidence of their innocence, only petitioners with compelling claims should be permitted to undermine the finality of their guilty pleas through successive postconviction petitions.

Thus, a guilty plea petitioner may undermine the finality of his plea only where he makes a colorable showing that he has "new, material, noncumulative evidence that clearly and convincingly demonstrates that a trial would probably result in acquittal." *Reed*, 2020 IL 124940, ¶ 49. "Because the evidence must be clear and convincing, the standard inherently requires the court to consider the evidence to be reliable." *Id.* ¶ 50. Absent a colorable showing that petitioner has such evidence, the policies behind the bar on successive petitions should bar further proceedings.

Contrary to the appellate court's reasoning, this Court's precedents do not support the application of an inapposite standard to permit the filing of successive petitions that have no chance of success. *See* A17-18, ¶ 52 (opining that *Robinson* dictated standard to be applied). Indeed, this Court has never confronted the precise issue presented by this case: what standard a guilty plea petitioner must satisfy at the leave-to-file stage. It has considered the standard that applies to guilty plea petitioners only once, in *Reed*, which held for the first time that a petitioner who pleaded guilty is not precluded from pursuing a claim of actual innocence. Although *Reed*'s procedural posture differed from this case, given that the circuit court had held a third stage evidentiary hearing, its articulation of the applicable legal standard governs.

Other cases decided by this Court — *Edwards* and *Robinson* — have addressed the standard for leave to file successive petitions claiming innocence. But the petitioners in those cases had been convicted at trial; accordingly, the Court recited and applied the established standard governing claims by such petitioners. *See Robinson*, 2020 IL 123849, ¶ 44; *Edwards*, 2012 IL 111711, ¶ 24. Those cases did not hold, and could not have held, that a petitioner who pleaded guilty need not satisfy *Reed*'s higher standard at the leave-to-file stage.

To the contrary, *Edwards* and *Robinson* make clear that the ultimate question to be asked at this stage is whether a petitioner's claim of innocence is "colorable." And whether the claim is "colorable" necessarily turns on the elements of the claim. Taking these holdings together, a petitioner who has pleaded guilty must make a "colorable" showing of actual innocence, *Edwards*, 2012 IL 111711, ¶ 24, by offering "evidence that clearly and convincingly demonstrates that a trial would probably result in acquittal," if credited, *Reed*, 2020 IL 124940, ¶ 49. Any lesser standard would require litigation of claims that have no chance of success and undermine the finality of convictions entered pursuant to guilty pleas.

2. Whether evidence is sufficiently reliable to clearly and convincingly demonstrate innocence is a threshold question that can be determined at the leave-to-file stage.

To the extent that the appellate court believed that it was impossible to apply *Reed*'s standard at the leave-to-file stage, *see* A17-18, ¶¶ 51-52, the court was incorrect.

It is well established that a court should avoid making credibility determinations at the leave-to-file stage. *People v. Sanders*, 2016 IL 118123, ¶ 42 (trial court erred in denying leave to file based on credibility determination at prior hearing because "[c]redibility determinations may be made only at a third-stage evidentiary hearing"); *see also People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998) ("our past holdings have foreclosed the circuit court from engaging in any fact-finding at a dismissal hearing"). This Court appeared to articulate a broader version of this principle in *Robinson*, where it stated that a court should avoid making credibility *or reliability* determinations at the leave-to-file stage. 2020 IL 123849, ¶ 61 ("Credibility findings and determinations as to the reliability of the supporting evidence are to be made only at a third-stage evidentiary hearing[.]") (emphasis added). And, in a footnote in *Reed*, this Court again suggested that a court should leave questions of reliability to a later stage. 2020 IL 124940, ¶ 50 n.2 ("We note that, while post-conviction relief requires the court to consider the new evidence to be reliable, such determination should be made at a third-

stage evidentiary hearing, as all well-pled facts must be taken as true at the motion to dismiss stage.").

But it is error to conflate credibility with reliability. Even if this Court were correct in *Robinson* to hold that questions of reliability are irrelevant at the leave-to-file stage with respect to claims of actual innocence by petitioners convicted at trial — a question not presented here — it should not extend that reasoning to the claim at issue here. If a petitioner pleaded guilty, then the reliability of his new evidence is central to his claim.

Although courts sometimes use "credibility" and "reliability" interchangeably (as in *Robinson*), a court can determine whether evidence is *reliable* for purposes of the *Reed* standard without evaluating credibility. For purposes of applying this standard, "reliability" describes classes or types of evidence. Illinois's actual-innocence standard is not strictly coextensive with the federal standard for demonstrating innocence to overcome a procedural bar, but this Court has cited federal cases with approval, *see, e.g., Edwards*, 2012 IL 111711, ¶ 24 (quoting *Schlup*, 513 U.S. at 327), and federal courts require "'new reliable evidence — whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence — that was not presented at trial.'" *House v. Bell*, 547 U.S. 518 (2006) (quoting *Schlup*, 513 U.S. at 327). The Seventh Circuit has opined that "adequate evidence is 'documentary, biological (DNA), or other powerful evidence: perhaps some non-relative who placed him out of the city, with credit card

slips, photographs, and phone logs to back up the claim.'" *McDowell v. Lemke*, 737 F.3d 476, 483-84 (7th Cir. 2013) (quoting *Hayes v. Battaglia*, 403 F.3d 935, 938 (7th Cir. 2005)).

As these descriptions demonstrate, certain *categories* of evidence, in particular forensic evidence, are viewed as intrinsically reliable. Witness testimony may be reliable if significantly corroborated (such as an alibi witness corroborated by "credit card slips, photographs, and phone logs"). In contrast, some types of evidence are inherently *unreliable*. Such categories include hearsay, *see, e.g., Chambers v. Mississippi*, 410 U.S. 284, 298 (1973) ("The hearsay rule, which has long been recognized and respected by virtually every State, is based on experience and grounded in the notion that untrustworthy evidence should not be presented to the triers of fact."); recantations of prior testimony given under oath, *see, e.g., People v. Jones*, 2012 IL App (1st) 093180, ¶ 63 ("Generally, a witness's recantation of his or her prior testimony is viewed as inherently unreliable."); or "'11th hour' affidavits produced with 'no reasonable explanation' for a long delay," *Morales v. Johnson*, 659 F.3d 588, 608 (7th Cir. 2011) (quoting *Herrera v. Collins*, 506 U.S. 390, 423 (1993) (O'Connor, J., concurring)).

Such well-recognized categories of unreliable evidence cannot clearly and convincingly demonstrate that a petitioner who pleaded guilty would be acquitted at trial, and a claim based solely on such unreliable evidence is not "colorable" under the *Reed* standard. Thus, a court may properly determine,

as a threshold question, whether the type of evidence offered by a postconviction petitioner is sufficiently reliable to justify undermining the finality of a guilty plea through a successive petition. Evidence that meets the threshold requirement of reliability must still be tested at an evidentiary hearing, so that its ultimate credibility can be evaluated. *See, e.g., People v. Wegner*, 40 Ill. 2d 28, 32 (1968) (evidentiary hearing must be held to "weigh the credibility" of evidence supporting postconviction petition and determine its "truth or falsity"). But such proceedings are unwarranted where the evidence is of a type that is demonstrably unreliable. *See Reed*, 2020 IL 124940, ¶ 66 (Burke, J., specially concurring) (petitioner who pleaded guilty should have been denied leave to file where he offered only "prison affidavit" that could not "clearly and convincingly" demonstrate his innocence).

B. Petitioner Made No Colorable Showing That He Can Clearly and Convincingly Demonstrate That He Would Be Acquitted at Trial.

Petitioner has offered no new, reliable evidence that clearly and convincingly demonstrates that he would be acquitted at trial. Accordingly, the circuit court correctly denied leave to file a successive petition, and the appellate court's judgment should be reversed.

In support of his claim of innocence, petitioner provided two affidavits from fellow inmates, both signed in 2018, approximately nine years after the events they describe. The first inmate, Myles, was incarcerated when the shooting occurred, but claimed to have had a conversation with a friend about

conversations that the friend had with prosecution witnesses. The second inmate, Moore, claimed to be an eyewitness, stating that he was sitting in his car right next to the shooting when it occurred and that he had exchanged greetings with the shooter, whom he identified as Butler, but did not come forward at the time.

Neither affidavit contains reliable testimony that clearly and convincingly demonstrates petitioner's innocence. Myles's testimony is particularly weak, given that it consists of double hearsay: Myles claims to have had a conversation with McWilliams (in 2015) about conversations McWilliams had with State witnesses Harmon and Barnes (presumably in 2009) in which they discussed implicating petitioner in the shooting to prevent police from investigating them (Harmon, Barnes, and McWilliams) for drug sales. McWilliams also recounted that he heard unspecified rumors that Houston owed money to Butler, which could have motivated Butler to kill Houston.

This evidence is both unreliable and irrelevant. The appellate court speculated that Myles's hearsay testimony could in some way impeach Harmon's and Barnes's testimony that they observed petitioner commit the shooting. A22-23, ¶ 63. But Myles could only recount a conversation he had with McWilliams. McWilliams provided no affidavit corroborating that he had any conversation with Myles, much less the more relevant point that McWilliams had any conversations with Harmon or Barnes. Harmon and

Barnes could not be impeached with conversations that they had with McWilliams if the only evidence that such conversations occurred were double hearsay recounted by Myles. *See generally People v. Lofton*, 2015 IL App (2d) 130135, ¶ 32 (where hearsay is layered within hearsay, each layer must satisfy a hearsay exception to be admissible). At a minimum, petitioner would need to call McWilliams, and petitioner has produced no affidavit demonstrating that McWilliams would provide helpful testimony.

In fact, petitioner cannot even demonstrate that this double hearsay would be admissible at a third-stage hearing on his claim of innocence. The bar against hearsay evidence does not apply to postconviction hearings, just as it does not apply to sentencing hearings. *See* Ill. R. Evid. 1101(b)(3) (excepting these hearings from scope of rules); *see also Robinson*, 2020 IL 123849, ¶¶ 78-80 (bar against hearsay does not apply at postconviction evidentiary hearing, so hearsay affidavits sufficed for leave to file successive postconviction petition raising claim of actual innocence by petitioner convicted after trial). However, notwithstanding the principle set forth in Rule 1101(b)(3), *double* hearsay is not admissible, even at a sentencing hearing, unless it is corroborated. *People v. Foster*, 119 Ill. 2d 69, 98 (1987). Uncorroborated double hearsay should be similarly inadmissible at a postconviction evidentiary hearing.

Moore's testimony is also not reliable enough to clearly and convincingly demonstrate petitioner's innocence. Such an eleventh-hour

affidavit by a purported eyewitness — signed almost a full decade after the events — is inherently "suspect." *Morales*, 659 F.3d at 608. Moore's testimony is additionally rendered unreliable by the fact that he is an incarcerated inmate and came forward only after meeting petitioner in prison and learning what petitioner was convicted of. Finally, and perhaps most critically, Moore's testimony is not corroborated in any way: no other witness reported seeing Moore at the scene of the shooting, no other witness reported seeing Butler, and Moore offers no corroboration to confirm that he was there. Indeed, Moore claims to have been sitting alone in his car, a fact that no other witness *can* corroborate.

Furthermore, Moore's affidavit cannot clearly and convincingly demonstrate that petitioner would be acquitted at trial given the strength of the People's evidence, as summarized in the factual basis for the plea and elsewhere in the record. The People's factual basis summarized the testimony of four direct witnesses to the shooting who consistently described petitioner shooting Williams and then chasing and shooting Houston multiple times. Those witnesses included Houston, who was motivated to accurately identify the person who shot him four times, and who is in no way impeached by petitioner's new evidence. They also included bystanders Harmon, Battle, and Barnes.

Yet another witness (Winters) would testify that petitioner later admitted to the shooting. And beyond Winters's testimony, the record

reflects that petitioner made inculpatory statements to police.[3] Given the already overwhelming evidence, petitioner's statements were not even *mentioned* in the factual basis. However, a police statement in the record reflects that petitioner admitted to the shooting but claimed that it had been unintentional. Petitioner's new witness, Moore, who claimed to have seen Butler commit the shooting is therefore contradicted not only by multiple eyewitnesses but by petitioner's own statement.

In sum, petitioner's admissions to being the shooter and the testimony of multiple eyewitnesses who confirmed those admissions would be weighed against the testimony of an inmate who claimed to have witnessed the shooting while sitting alone in a car and who did not come forward for almost a decade until he encountered petitioner in prison and offered his implausible story. This unreliable evidence cannot clearly and convincingly demonstrate that petitioner would be acquitted at a trial.

Therefore, petitioner failed to make a colorable showing of actual innocence, and the circuit court properly denied leave to file a successive

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[3] This case thus confirms the Court's reasoning in *Reed* that a heightened standard is necessary to assess whether a petitioner who pled guilty is actually innocent because the People need only present a limited factual basis at a change-of-plea hearing, making it difficult to ascertain the impact of new evidence at a likely trial. 2020 IL 124940, ¶ 45. Here, where petitioner has not demonstrated that his statements would be inadmissible at a trial, the appellate court correctly reasoned that they should be considered in evaluating the strength of petitioner's claim of innocence. A23-24, ¶ 65.

petition raising this claim. The appellate court's judgment to the contrary should be reversed.

III. 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. Indeed, the appellate court did not hold otherwise: it mistakenly assumed that petitioner was entitled to pursue this claim if his claim of innocence were colorable. A25, ¶ 68. As discussed in Section I, *supra*, even if that claim were colorable, petitioner would not be entitled to litigate his claim of ineffective assistance through a successive petition without demonstrating cause and prejudice, *Coleman*, 2013 IL 113307, ¶ 91.

Petitioner can make neither showing. Under the pertinent statutory standard, "a prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings," and "a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f). At the leave-to-file stage, a petitioner must make a "prima facie" showing on both elements. *Clark*, 2023 IL 127273, ¶ 47.

Petitioner claims that trial counsel was ineffective for failing to investigate rumors that Butler was the real shooter. His affidavit recounts pretrial conversations in which he told defense counsel that he was "hearing around the jail" that Butler had killed Williams, and counsel told him that because he "confessed to the murder there is no defense that can help me." Sup2 C20.

In seeking leave to file in the circuit court, petitioner did not even attempt to allege "cause" for failing to raise this claim in his initial postconviction petition. Nor could he. Plainly, he was aware of these discussions at the time he pleaded guilty and when he filed his initial postconviction petition in 2017. Nothing precluded him from raising the claim in that initial petition. And petitioner does not allege and cannot show cause based on the newly discovered affidavits of Myles and Moore.[4] Both witnesses came forward for the first time after meeting petitioner in prison in 2018, and thus could not have been discovered by trial counsel before trial.

Nor has petitioner shown the requisite prejudice. A court "should deny leave to file a successive postconviction petition 'when it is clear, from a review of the successive petition and the documentation submitted by the

[4] It is an open question whether petitioner could properly rely on these affidavits to support *both* a claim of innocence and a claim of constitutional error at trial. A8-12, ¶¶ 28-38. But this Court need not resolve the issue: petitioner's affidavits would not support his claim of ineffective assistance even if considered.

petitioner, that the claims alleged by the petitioner fail as a matter of law.'" *Clark*, 2023 IL 127273, ¶ 70 (quoting *People v. Smith*, 2014 IL 115946, ¶ 35). Petitioner's claim of ineffective assistance of trial counsel fails as a matter of law.

Petitioner would need to show both that (1) trial counsel's performance was objectively deficient; and (2) there is a reasonable probability that, but for counsel's deficient performance, petitioner "would not have pleaded guilty and would have insisted on going to trial." *People v. Hatter*, 2021 IL 125981, ¶¶ 25-26 (internal quotation marks omitted). Where petitioner claims that counsel induced him to plead guilty by misadvising him of his chance of success at trial, the latter inquiry requires consideration of whether petitioner "would have been better off rejecting the plea offer and insisting on trial" because he had a "plausible defense." *Id.* ¶ 30 (internal quotation marks omitted). Here, petitioner did not even allege that, but for trial counsel's failure to investigate, he would not have pleaded guilty. Nor did he allege that, had trial counsel investigated rumors about Butler, the investigation would have produced a plausible defense. Indeed, petitioner has failed to identify any evidence that trial counsel could have uncovered and offered at trial to support a credible alternate-shooter defense.

As a result, accepting a guilty plea was plainly rational, given that petitioner faced charges for Williams's murder and the attempted murder and aggravated battery of Houston. In exchange for petitioner's guilty plea,

the People dropped the charges relating to Houston, and petitioner was sentenced on a single conviction for first degree murder. Moreover, because the factual basis for petitioner's guilty plea establishes that petitioner personally discharged a firearm, proximately causing Williams's death, an enhancement of 25 years to natural life should have been added to his sentence, for a minimum sentence of 45 years, *see* 730 ILCS 5/5-8-1(a)(1)(d)(iii); *People v. White*, 2011 IL 109616, ¶ 21, but the prosecutor recommended, and the trial court imposed, a sentence of 35 years.[5]

Petitioner's guilty plea in exchange for this lenient sentence was rational for the additional reason that the evidence against petitioner, including four eyewitness identifications, a police statement admitting to the shootings, and testimony that he made admissions to a third party, was strong, and virtually ensured that he would have faced multiple convictions had he proceeded to trial. And he would have faced a lengthy sentence not only on the murder charge but on the additional charge of attempted murder, given that he used a firearm in the commission of that offense and

[5] Although petitioner's sentence is unlawful because it should have included the sentence enhancement, *see White*, 2011 IL 109616, ¶¶ 23-27 (where factual basis for guilty plea required imposition of firearm enhancement, sentence omitting enhancement was unlawful, and guilty plea needed to be vacated), *White* does not apply retroactively to invalidate petitioner's guilty plea, *see People v. Smith*, 2015 IL 116572, ¶ 34. If petitioner's request for postconviction relief were granted, however, and the guilty plea were vacated, petitioner would face a minimum sentence of 45 years on the murder charges alone.

proximately caused great bodily harm to Houston. *See* C69-70 (alleging firearm enhancement in connection with attempted murder charges). Such a sentence could have run consecutively to his sentence for first degree murder. *See* 730 ILCS 5/5-8-4(d)(1).

In light of this powerful inculpatory evidence, the absence of a plausible defense, and the likelihood of a severe sentence, pleading guilty was a rational choice, and petitioner cannot demonstrate a reasonable probability that, had trial counsel performed differently, he would not have pleaded guilty. Accordingly, petitioner's claim of ineffective assistance fails as a matter of law.

Because petitioner has shown neither cause for failing to raise his ineffective assistance of trial counsel claim in his initial postconviction petition, nor prejudice, he is not entitled to pursue it in a successive postconviction petition. The appellate court's judgment granting such leave should be reversed.

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.

March 22, 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 Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 30 pages.

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

APPENDIX

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2022 IL App (1st) 191101-B

No. 1-19-1101

Second Division
March 31, 2022
Modified upon denial of rehearing May 10, 2022

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	No. 10 CR 1910
v.	)	
SHAMAR GRIFFIN,	)	Honorable Michael B. McHale
Defendant-Appellant.	)	Judge, presiding.

JUSTICE COBBS delivered the judgment of the court, with opinion.

Presiding Justice Fitzgerald Smith and Justice Pucinski concurred in the judgment and opinion.

OPINION

¶ 1 On June 16, 2011, defendant-appellant Shamar Griffin pled guilty to one count of first degree murder and was sentenced to 35 years' imprisonment. On February 4, 2019, defendant filed a motion for leave to file a successive postconviction petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2018)), which advanced claims of ineffective assistance of counsel and actual innocence supported by affidavits from himself, Lavonte Moore, and Perrier Myles. The circuit court denied leave to file the successive postconviction petition.

Defendant now appeals, arguing that (1) the court incorrectly held that he was not permitted to pursue a claim of actual innocence after entering a guilty plea and he had set forth a colorable claim of actual innocence and (2) he demonstrated both cause and prejudice for his claim of ineffective assistance of counsel. For the following reasons, we reverse and remand for further proceedings under the Act.

¶ 2 I. BACKGROUND

¶ 3 Defendant was charged with 29 counts related to two shootings that occurred on June 26, 2009. For the shooting death of Milissa Williams, he was charged with 24 counts of first degree murder. For the shooting of Otis Houston, he was charged with four counts of attempted first degree murder and one count of aggravated battery with a firearm. Assistant Public Defender (APD) Robert Strunck represented defendant throughout the proceedings. On March 23, 2011, APD Strunck reported to the court that he had negotiated with the State and had tendered the State's offer to defendant.

¶ 4 On May 10, 2011, defendant requested the circuit court to appoint new counsel, stating that APD Strunck was "ineffective" and had only visited him once during the 18 months he had been in jail. APD Strunck responded that he had spent multiple hours at the jail with defendant and had spoken to him on the phone on multiple occasions. APD Strunck had also informed defendant that it was a very difficult case and explained that defendant could review the police reports in APD Strunck's presence later that week. The court determined that there was nothing to indicate that APD Strunck could not continue to effectively represent defendant. The court further explained to defendant that it did not have the ability to assign a different public defender and that defendant's only other option was to hire private counsel.

¶ 5 On June 16, 2011, defendant accepted the State's offer to plead guilty to one count of first degree murder in exchange for a 35-year prison term. At the time defendant entered the plea, he acknowledged that he was giving up his right to trial and his right to a presentence investigation report and that no one had threatened him or promised him anything in exchange for the plea. He signed a written waiver form stating the same.

¶ 6 The State presented the factual basis for defendant's plea as follows.

¶ 7 Lavertice Harmon provided a statement that he was playing dice on North LeClaire Avenue in Chicago with Leroy Battle, Kevin Barnes, and others around 3 a.m. when defendant arrived in a dark-colored vehicle with its headlights off. Defendant, who was armed with a handgun, told Harmon that the car was stolen, that Williams had stabbed defendant in the past, and that he was "fixin' to merk that b***," which Harmon knew meant to kill Williams. Harmon asked defendant to wait so that he could get his friends out of the area, and defendant drove around the block. In the meantime, Harmon warned Williams and Houston. As Williams and Houston began walking toward LaFollette Park, defendant returned, got out of his car, and approached Williams. Harmon did not hear what defendant and Williams said to one another, but he did observe defendant fire a single shot at Williams and multiple shots at Houston. Defendant fired once more at Williams before getting back in his car and driving away.

¶ 8 Houston would testify that, at around 3:30 a.m. on June 26, 2009, defendant shot Williams twice near 5101 West Hirsch Street in Chicago, then chased him down and shot him four times, three times in the bicep and once in the right side of his chest. Houston would also testify that he identified defendant in a physical lineup.

¶ 9 The State also submitted the grand jury testimony of Barnes and Battle, who both identified defendant as the shooter. Further, the State submitted the grand jury testimony of Carlton Winters, who testified that defendant admitted to the shooting in a phone conversation.[1]

¶ 10 Though not part of the State's factual basis, defendant's confession to the police on December 22, 2009, is relevant to the disposition of this appeal, and thus we summarize that statement, as it is found in the police report, which is in the record on appeal. Defendant stated that he was stabbed by Williams in April 2009 and, on the day of the shooting, he was only trying to send her a message, not kill her. He admitted that he fired multiple shots at both Williams and Houston, though he claimed he did not know their names prior to the shooting.

¶ 11 The circuit court accepted defendant's plea and, in accordance with the negotiations, sentenced him to 35 years' imprisonment on June 16, 2011. The court advised defendant of his right to appeal and informed him that he would first have to file a motion to withdraw his guilty plea within 30 days.

¶ 12 Defendant did not file a timely motion to withdraw his plea. He filed a notice of appeal on August 31, 2011, which the circuit court denied. On November 16, 2011, this court allowed defendant's late notice of appeal. On September 6, 2012, we granted the parties' agreed motion for summary remand and directed the clerk of the circuit court to modify certain monetary assessments imposed against defendant. *People v. Griffin*, No. 1-11-3210 (2012) (unpublished summary order under Illinois Supreme Court Rule 23(c)).

¶ 13 On September 17, 2017, defendant filed an initial *pro se* postconviction petition in which he claimed actual innocence based on his own affidavit and documents obtained through a

[1]None of the referenced grand jury testimony transcripts appear in the record on appeal.

Freedom of Information Act request. See 5 ILCS 140/1 *et seq.* (West 2016). In particular, defendant alleged that his inculpatory statement should have been suppressed because the police officers who arrested him in Atlanta, Georgia, did not have a warrant or probable cause. He also alleged mistreatment while in police custody and that for 30 hours he "was threatened and forced to confess." Finally, he claimed that his counsel was ineffective for failing to investigate his illegal arrest. The circuit court summarily dismissed the petition. On appeal to this court, defense counsel, appointed from the Office of the State Appellate Defender, filed a motion to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). This court granted the motion as "there [were] no issues of arguable merit to be pursued on appeal." *People v. Griffin*, No. 1-18-0490 (2020) (unpublished summary order under Illinois Supreme Court Rule 23(c)).

¶ 14 On February 4, 2019, while his initial postconviction petition was still pending before this court, defendant sought leave to file the successive postconviction petition that is the subject of this appeal.

¶ 15 The successive petition first makes a claim of ineffective assistance of counsel, alleging that his trial counsel, APD Strunck, was ineffective for failing to investigate Butler as the actual shooter, which defendant instructed him to do "after 14 months" of awaiting his trial because he "was hearing around the jail that was the person who killed [Williams]."[2] Defendant stated that APD Strunck informed him that "since [he] confessed to the murder there is no defense that can help [him]," and defendant informed trial counsel that his confession was false and was the result of duress, psychological abuse, and mental coercion.

[2]We note that defendant does not identify the source of this information and now claims that he learned of Butler's involvement specifically from Moore and Myles in prison after he pled guilty.

¶ 16 The petition then sets forth a claim of actual innocence based on the newly discovered evidence contained in the affidavits of Moore and Myles, both of whom spoke with defendant in prison. In his petition, defendant alleged that he did not know about the information Moore and Myles had until he spoke with them in prison.

¶ 17 Moore averred that he witnessed the shootings while sitting in his parked car across from LaFollette Park. Moore stated that he observed Jerrell Butler emerge from an alley and walk past his car toward a group of people. As Butler passed Moore's car, he said "wassup," to Moore and then he pulled out a gun from his waistband. Moore heard five gunshots and saw Butler run past his car again. Moore never mentioned this to anyone before encountering defendant in prison in November 2018 because he was afraid of retaliation from Butler and Butler's friends.

¶ 18 Myles, who was incarcerated at the time of the shooting, averred that he was aware that his friends, Cornell McWilliams, Barnes, and Harmon witnessed the shooting and informed the police that defendant was the shooter. He further averred that after his release he spoke with McWilliams and was told that defendant was a scapegoat "so that [Harmon] and [Barnes's] drug business [could] continue without further pressure from Chicago police." McWilliams admitted to Myles that they did not see the shooter's face but said he was light-skinned with braids. This description confused Myles because he knew that defendant is dark-skinned with dreadlocks. According to Myles, McWilliams further stated that he, Harmon, and Barnes contacted the police to make false accounts identifying defendant as the shooter and that he later learned that Houston owed Butler money from drug sales and he believed that Butler was the actual shooter because Houston owed Butler a drug debt. Myles was incarcerated again, and on June 29, 2018, he informed defendant of the conversation with McWilliams.

¶ 19 Defendant's petition also contains a section titled "Newly Discovered Evidence of Police Misconduct" of Chicago police detectives John Folino and Tim McDermott and listed 11 lawsuits, which were attached to the petition. Defendant makes no arguments regarding the police misconduct lawsuits on appeal.

¶ 20 On April 5, 2019, the circuit court denied defendant's motion for leave to file his successive petition. Citing *People v. Simmons*, 388 Ill. App. 3d 599 (2009), the court stated that "petitioner cannot make a claim of actual innocence after a proper constitutionally compliant guilty plea." The court further noted that defendant did not include any allegations that he was coerced into the plea. The court made no reference to defendant's claim of ineffective assistance of counsel. This appeal followed.[3]

¶ 21 II. ANALYSIS

¶ 22 On appeal, defendant first argues that his actual innocence claim is not barred by his guilty plea and that he has made a colorable claim of actual innocence based on newly discovered evidence in the form of affidavits demonstrating that Butler was the actual shooter and that two witnesses named in the factual basis for his plea provided false statements. Defendant also claims that the circuit court ignored his claim of ineffective assistance of counsel. Defendant argues that he established cause and prejudice for his ineffective assistance of counsel claim, which alleged counsel's failure to investigate whether Butler was the actual shooter before allowing defendant to enter a guilty plea. As such, defendant contends that this court should remand his petition for second stage proceedings.

[3]We previously issued a summary order dismissing this appeal for lack of jurisdiction. Pursuant to a supervisory order from the Illinois Supreme Court, the summary order was vacated, defendant's appeal was reinstated, and we now consider the appeal on the merits.

¶ 23 A. The Act

¶ 24 The Act provides a method for a criminal defendant to collaterally attack a conviction by asserting that it resulted from a "substantial denial" of his constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2018); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). The Act contemplates the filing of only one petition without leave of court. *People v. Lusby*, 2020 IL 124046, ¶ 27. There are two bases upon which the bar against successive petitions will be relaxed: (1) where the petitioner can establish cause and prejudice for the failure to assert a postconviction claim in an earlier proceeding or (2) where the petitioner asserts a fundamental miscarriage of justice based on his actual innocence. *People v. Robinson*, 2020 IL 123849, ¶ 42. Because defendant has alleged both bases in his petition and on appeal, we will separately set forth the principles of law applicable to each type of postconviction claim. Nonetheless, under either basis at this stage, we must accept as true all well-pled allegations that are not positively rebutted by the record, and we may not make fact or credibility determinations. *Id.* ¶ 45. Our review of the denial of leave to file a successive petition is *de novo*. *Id.* ¶¶ 39-40.

¶ 25 We first address defendant's actual innocence claim.

¶ 26 B. Actual Innocence

¶ 27 1. Freestanding Claim of Actual Innocence

¶ 28 As a preliminary matter, we must address the State's argument that defendant has not alleged a freestanding actual innocence claim. The State contends that the claim is not freestanding because it is based upon the same newly discovered evidence supporting defendant's claim of ineffective assistance of counsel.

¶ 29 The concept of freestanding actual innocence claims under the Act can be traced back to our supreme court's decision in *People v. Washington*, 171 Ill. 2d 475 (1996). There, the defendant,

who was convicted for murder, had submitted an affidavit (and later *in camera* testimony was heard) from an individual who identified the shooter as someone other than the defendant. *Id.* at 476-77. In his postconviction petition, the defendant alleged, *inter alia*, ineffective assistance of trial counsel and newly discovered evidence based on both the affidavit and testimony. *Id.* at 477-78. The question before the supreme court was whether the defendant could pursue a newly discovered evidence claim under the Act. *Id.* at 479-80. Though the court determined that a freestanding claim of innocence was not cognizable as a fourteenth amendment due process claim, it held that such claims were cognizable under the Act as a matter of due process afforded by the Illinois Constitution. *Id.* at 485-89. In so holding, the court noted that "to ignore such a claim would be fundamentally unfair" and "[i]mprisonment of the innocent would also be so conscience shocking as to trigger operation of substantive due process." *Id.* at 487-88.

¶ 30 Relying on *Washington*, our supreme court two years later in *People v. Hobley* defined a claim of actual innocence as freestanding where "the newly discovered evidence being relied upon 'is not being used to supplement an assertion of a constitutional violation with respect to [the] trial.' " 182 Ill. 2d 404, 443-44 (1998) (quoting *Washington*, 171 Ill. 2d at 479). Based on this, the court held that the defendant, who had been convicted of murder, arson, and aggravated arson, had not properly raised a freestanding claim of actual innocence because his new evidence, which was a fingerprint report and information regarding a second gasoline can, was also being used to establish a violation of his constitutional right to due process under *Brady*. *Id.* at 444.

¶ 31 Subsequently, in *People v. Orange*, 195 Ill. 2d 437 (2001), the court reiterated its holding in *Hobley*. In *Orange*, the court once again noted that a freestanding actual innocence claim cannot rely upon evidence " ' "used to supplement an assertion of a constitutional violation with respect to [the] trial." ' " *Id.* at 459 (quoting *Hobley*, 182 Ill. 2d at 444, quoting *Washington*, 171 Ill. 2d at

479). The court then found that the defendant's actual innocence claim was not permissible because he used the same documentation to support both his actual innocence claim and a claim that his trial was unconstitutional because his confession was involuntary. *Id.* at 459-60.

¶ 32 In several subsequent cases, the appellate court has relied upon the rule in *Hobley* in rejecting actual innocence claims in postconviction petitions. See, *e.g.*, *People v. Jackson*, 2018 IL App (1st) 171773, ¶ 71; *People v. Gonzalez*, 2016 IL App (1st) 141660, ¶¶ 29-30; *People v. English*, 403 Ill. App. 3d 121, 132-33 (2010). But see *People v. Martinez*, 2021 IL App (1st) 190490, ¶ 102 (although ultimately following supreme court precedent, this court critiqued the rule in *Hobley*, stating that the rule "deviated from both the spirit and the letter of the law as set forth in *Washington*"). The State additionally cites *People v. Zareski*, 2017 IL App (1st) 150836, for support. In *Zareski*, this court, in passing, referenced *Hobley* and stated that the defendant's appellate counsel could not have pursued both a claim that a newly discovered witness affidavit established actual innocence *and* that trial counsel was ineffective for failing to discover and investigate the witness. *Id.* ¶ 71.

¶ 33 In his reply brief, however, defendant contends that the supreme court made it clear in *People v. Coleman*, 2013 IL 113307, that "a petitioner who can state a freestanding claim of actual innocence *and* a deprivation of a constitutional right during the proceedings that resulted in his conviction is not required to choose which claim to pursue." (Emphasis in original.) Specifically, the court stated: "Where 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, and the latter claim must meet the *Washington* standard." *Id.* ¶ 91. We acknowledge the court's comment in *Coleman* but reject any suggestion that by that comment the court overruled either *Hobley* or *Orange*. We read the court's comment as merely identifying the

applicable standard for the different types of claims. In point of fact, the court made no reference to *Hobley* or its apparent rule that the different claims may not rely on the same supporting documentation in order for the actual innocence claim to be freestanding. Thus, we reject defendant's interpretation of the court's comment.

¶ 34 Defendant further asserts that the State has misinterpreted the holdings in *Hobley* and *Orange*. According to defendant, the court determined in both *Hobley* and *Orange* that the newly discovered evidence "did not stand on its own" to support a due process violation. The defendant distinguishes the evidence in both of those cases from that presented in *Washington*, specifically that the defendant in *Washington* had witness affidavits corroborating the defendant's innocence, whereas the defendant in *Orange* had only evidence of police torture in obtaining evidence, and the defendant in *Hobley* had evidence of a fingerprint analysis and a second gasoline can that was later destroyed, as well as evidence of police torture. Although factually accurate, we disagree that the court in either *Hobley* or *Orange* based its conclusion on the nature or type of evidence presented. Instead, as we previously stated, the court's disposition was based on the fact that the same evidence was being used to support both the actual innocence claims and claims of constitutional error. The *Hobley* court created a rule that disallowed petitioners from using newly discovered evidence demonstrating actual innocence to also support alternative claims of constitutional trial error within the same postconviction petition.

¶ 35 Ultimately, this court is bound to follow supreme court precedent. We find, however, that because defendant's actual innocence claim is supported by evidence that is different than the evidence supporting his ineffective assistance of counsel claim, the rule espoused in *Hobley* is not violated. See *Martinez*, 2021 IL App (1st) 190490, ¶ 106 (concluding that *Hobley* did not preclude

the defendant's actual innocence claim, as it incorporated additional supporting documentation that was not applicable to the defendant's claims based on police misconduct and *Brady*).

¶ 36 Specifically, in his petition, defendant sets forth two arguments. His first argument is titled "Ineffective assistance of counsel for failure to investigate an individual name[d] Jerrell Butler who I was hearing around the jail that was the person who killed [Williams]." He references "psychological abuse" and "mental coercion" by the detectives, which resulted in his confession. He does not specifically cite any supporting documentation for this claim.

¶ 37 Defendant's second argument is titled, "Newly discovered evidence of actual innocence from affidavit of Lavonte Moore." He then sets forth the contents of Moore's affidavit. Next, there is a header stating "Supporting Affidavit from Perrier Myles" followed by the contents of that affidavit, and then a header stating "Newly discovered evidence of police misconduct of Det. John Folino and Tim McDermott," followed by a list of lawsuits filed against those detectives. The lawsuits, defendant's affidavit, and Myles's and Moore's affidavits are attached to his petition as exhibits.

¶ 38 Because defendant neither relies on nor references any of the exhibits supporting his ineffective assistance of counsel claim in support of his actual innocence claim, we find that the two claims are not based on the same documentation. Arguably either of defendant's two claims may be bolstered by evidence supporting the other. However, we cannot conclude that the two claims share the same evidentiary foundation. Moreover, any references to the supporting documentation on appeal are irrelevant, as the allegations in his petition control. Accordingly, we conclude that defendant's actual innocence claim is not violative of the *Hobley* rule and, therefore, constitutes a freestanding claim.

¶ 39 2. Effect of Guilty Plea

¶ 40 Although our review is *de novo*, we recite the reasoning for the circuit court's denial, *i.e.* that a defendant who has entered a valid guilty plea cannot later pursue a claim of actual innocence. In so concluding, the circuit court relied on *Simmons*, 388 Ill. App. 3d 599, which was recently overruled by our supreme court in *People v. Reed*, 2020 IL 124940.

¶ 41 In *Reed*, the defendant, who pled guilty to armed violence, filed a motion for leave to file a successive postconviction petition alleging actual innocence accompanied by a supporting witness affidavit. 2020 IL 124940, ¶¶ 9-11. The petition advanced to a third stage evidentiary hearing, where testimony was heard from the witness. *Id.* ¶ 13. The circuit court denied the petition, finding that the evidence was not conclusive, and on appeal, this court affirmed the denial but did so because it found that a guilty plea forecloses a postconviction claim of actual innocence. *Id.* ¶¶ 14-15.

¶ 42 Our supreme court granted the defendant's petition for leave to appeal (*id.* ¶ 16) and was then confronted with an issue of first impression: whether a defendant who pleads guilty waives any claim of actual innocence under the Act (*id.* ¶ 24). The court answered the question in the negative. *Id.* ¶ 37.

¶ 43 In its analysis, the court first discussed the motives and consequences of plea agreements, from which both the State and the defendant benefit and make concessions. *Id.* ¶ 25. On the one hand, the State benefits by preserving resources through a prompt and final disposition of a criminal case, but in doing so, the State sacrifices the ability to investigate the case further, add or dismiss charges, and present the entirety of the evidence before the court. *Id.* On the other hand, the defendant benefits by obtaining a more favorable sentence, the dismissal of charges, and avoiding a trial that is often costly and involves protracted proceedings. *Id.* ¶ 26. However, the court noted that the concessions a defendant must make are severe, where a guilty plea is an

admission of guilt, and a defendant must waive certain rights, including "all nonjurisdictional defenses or defects." (Internal quotation marks omitted.) *Id.* ¶ 27.

¶ 44 The State argued that allowing guilty plea defendants to pursue actual innocence claims would discourage it from conducting plea negotiations in the future due to the lack of finality and that a defendant was foreclosed from pursuing an actual innocence claim based on his waiver of rights in entering a guilty plea. *Id.* ¶ 28. The court, however, disagreed with the State, noting that a "defendant's waiver of his right to challenge the State's proof of guilt beyond a reasonable doubt at trial should not impact his actual innocence claim." *Id.* ¶ 31. The court reasoned that actual innocence claims are separate and independent from challenges to the sufficiency of the evidence or claims that an error in the proceedings led to the conviction. *Id.* ¶¶ 29, 31.

¶ 45 Ultimately, the supreme court held that the defendant's guilty plea did "not prevent him from asserting his right to not be deprived of life and liberty given compelling evidence of actual innocence under the Act." *Id.* ¶ 37. In so ruling, the court explained that a guilty plea does not guarantee factual validity of a conviction and "is no more foolproof than full trials," where (1) "the decision to plead guilty may be based on factors that have nothing to do with defendant's guilt" such as the hope for a more lenient sentence, (2) a defendant may continue to assert his innocence despite his plea, and (3) the State's factual basis for the plea is held to a less stringent level of proof than at trial. (Internal quotation marks omitted.) *Id.* ¶¶ 33-35. Thus, when a trial court is "met with a truly persuasive demonstration of innocence, a conviction based on a voluntary and knowing plea is reduced to a legal fiction," and additional due process is triggered despite the defendant's waiver of all nonjurisdictional defects. *Id.* ¶ 35.

¶ 46 Accordingly, pursuant to *Reed*, defendant here is permitted to raise a claim of actual innocence based on newly discovered evidence notwithstanding his guilty plea.

¶ 47 3. Leave-To-File Stage Standard

¶ 48 Prior to addressing defendant's actual innocence claim, we must first determine the appropriate standard governing our review, which the parties dispute on appeal. Currently, the preeminent case on the appropriate standard of review for actual innocence claims in successive postconviction petitions at the leave-to-file stage is *Robinson*, 2020 IL 123849. There, our supreme court stated that the standard at the leave-to-file stage is higher than that applicable to the first stage of an initial petition, which merely requires that the petition not be frivolous or patently without merit. *Id.* ¶ 43. The supreme court, relying upon the well-established caselaw regarding successive postconviction petitions and actual innocence claims, set forth the following principles of law:

> "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. [Citation.] Accordingly, leave of court should be granted where the petitioner's supporting documentation raises the probability that it is more likely than not that no reasonable juror would have convicted the petitioner in light of the new evidence. [Citation.]
>
> At the pleading stage of postconviction proceedings, all well-pleaded allegations in the petition and supporting affidavits that are not positively rebutted by the trial record are to be taken as true. [Citations]. In deciding the legal sufficiency of a postconviction petition, the court is precluded from making factual and credibility determinations. [Citations.]
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> To establish a claim of actual innocence, the supporting evidence must be (1) newly discovered, (2) material and not cumulative, and (3) of such conclusive character that it would probably change the result on retrial." *Id.* ¶¶ 44-47.

¶ 49 The parties debate in their briefs whether the prevailing standard set forth in *Robinson* should apply or the standard espoused in *Reed*. In *Reed*, after determining that guilty plea petitioners could pursue actual innocence claims, the majority identified the applicable standard of review for evaluating such claims following a third stage evidentiary hearing. "[A] successful actual innocence claim requires a defendant who pleads guilty to provide new, material, noncumulative evidence that *clearly and convincingly* demonstrates that a trial would probably result in acquittal." (Emphasis added.) *Reed*, 2020 IL 124940, ¶ 49. The court also stated that it must be determined "whether the new evidence places the evidence presented in the underlying proceedings in a different light and 'undercuts the court's confidence in the factual correctness' of the conviction." *Id.* (quoting *Coleman*, 2013 IL 113307, ¶ 97). This higher standard, the court noted, struck a balance between "the defendant's constitutional liberty interest in remaining free of undeserved punishment and the State's interest in maintaining the finality and certainty of plea agreements." *Id.* ¶ 50. Finally, the court addressed its new "clear and convincing" standard, stating that the standard inherently requires that the court find the evidence to be reliable. *Id.* In a footnote, the court recognized that a finding that the evidence is reliable would only be made at the third stage because "all well-pled facts must be taken as true at the motion to dismiss stage." *Id.* ¶ 50 n.2 (citing *People v. Sanders*, 2016 IL 118123, ¶ 42).

¶ 50 Both parties cite Justice Michael J. Burke's special concurrence in *Reed* for support of their respective positions: defendant for Justice Burke's acknowledgement that the majority failed to address the other stages of postconviction review and the State for Justice Burke's suggestion of a

higher standard than *Robinson* at the leave-to-file stage. We note in passing that Justice Burke dissented from the majority's opinion in *Robinson* and stated in his *Reed* concurrence that the *Robinson* standard was "so vague as to be virtually meaningless." *Reed*, 2020 IL 124940, ¶ 65 (Burke, J., specially concurring).

¶ 51 Defendant asserts that *Reed*'s "clear and convincing" standard would not be appropriate at the leave-to-file stage because "determinations as to the reliability of the evidence can only be made at the third stage evidentiary hearing" and thus, the standard set forth in *Robinson* should be applied in this context of guilty plea petitioners at the leave-to-file stage. Conversely, the State contends that the standard for guilty plea petitioners should be more stringent at the leave-to-file stage than the standard set forth in *Robinson*. Notably, the State does not offer a definitive standard for this court to apply and ultimately analyzes and rejects defendant's actual innocence claim under the *Robinson* standard.

¶ 52 In this appeal, we are presented with a guilty plea petitioner whose petition was denied at the leave-to-file stage, rather than, like in *Reed*, after a third stage evidentiary hearing. Thus, we believe that the standard set forth by our supreme court in *Robinson*, at the leave to file stage, regardless of whether the underlying judgment was based on a guilty plea or a trial, is most appropriate. Contrary to the State's argument, we do not believe that following *Robinson* at this stage runs counter to the court's pronouncement in *Reed* to subject guilty plea petitioners to a more stringent standard. To receive relief, *i.e.*, vacating a defendant's conviction and allowing the opportunity for a trial, petitioners must still satisfy the clear and convincing standard with evidence adjudged reliable following an evidentiary hearing if the petition reaches the third stage under the Act. The high hurdle espoused in *Reed* ultimately remains in place for guilty plea petitioners. Moreover, the supreme court's express acknowledgement that the reliability of evidence can only

be determined, and thus clear and convincing, after an evidentiary hearing implies that *Reed*'s higher standard would only be employed at the third stage, and additionally suggests that the court considered the earlier stages of postconviction proceedings and intentionally abstained from announcing a separate standard for those stages. For these reasons, we find that the supreme court in *Reed* did not supplant the *Robinson* standard in evaluating petitions at the leave-to-file stage and thus, we apply the *Robinson* standard here.

¶ 53 We reject the State's reliance on *People v. Patel*, 2021 IL App (3d) 170337, and *People v. Rocha*, 2021 IL App (1st) 191714-U, for support of its argument that the standard espoused in *Reed* should apply here. Again, unlike the case before us, *Reed* was decided in the context of a third stage evidentiary hearing. Further, although both *Patel* and *Rocha* were decided in the wake of *Reed* and involved guilty plea petitioners, both involved petitions pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2020)). In *Patel*, the Third District found that the defendant could raise a claim of actual innocence based on newly discovered evidence despite his guilty plea, determined that the defendant's evidence was newly discovered, and remanded to the circuit court to consider whether the new evidence presented was material, noncumulative, and clearly and convincingly demonstrated that a trial would probably result in acquittal. *Patel*, 2021 IL App (3d) 170337, ¶¶ 18-22. In *Rocha*, this court found that the defendant's section 2-1401 petition was untimely and, even if it were not, the defendant's actual innocence claim, properly raised notwithstanding his guilty plea based on *Reed*, was without merit because the supporting evidence was not newly discovered. *Rocha*, 2021 IL App (1st) 191714-U, ¶¶ 30-31, 43-44.

¶ 54 In both cases, the court applied the *Reed* standard, concluding that the defendant must provide " 'new, material, noncumulative evidence that clearly and convincingly demonstrates that

a trial would probably result in acquittal.' " *Patel*, 2021 IL App (3d) 170337, ¶ 19 (quoting *Reed*, 2020 IL 124940, ¶ 49); *Rocha*, 2021 IL App (1st) 191714-U, ¶ 42 (quoting *Reed*, 2020 IL 124940, ¶ 49). However, because both cases arose in the context of section 2-1401 petitions, which do not have multiple stages of proceedings, neither case addressed that *Reed* involved a third stage postconviction petition or analyzed whether there should be a different standard for successive postconviction petitions at the leave-to-file stage. As such, we find neither case to be instructive or to have any bearing on our conclusion.

¶ 55 Additionally, after briefing was completed, we granted the State leave to cite *People v. Williams*, 2021 IL App (1st) 190239, as further support for its contention that the clear and convincing standard should be applied here. In *Williams*, the Third Division of this court addressed the circuit court's denial of a guilty plea defendant's motion for leave to file a successive postconviction petition, which alleged a claim of actual innocence. *Id.* ¶ 1. Ultimately, the court in *Williams* concluded that the defendant had sufficiently set forth a colorable claim of actual innocence under the *Reed* standard and reversed and remanded the petition for further proceedings. *Id.* ¶¶ 49-50. Specifically, the court found that the affidavits, "taken as true and reliable," provided "clear and convincing evidence to support the defendant's defense of compulsion." *Id.* ¶ 49. The State requests that we follow the decision in *Williams* and apply the clear-and-convincing standard as set forth in *Reed*.

¶ 56 We first note that we are not bound to follow the decisions either of another district, division, or panel of this court. See *O'Casek v. Children's Home & Aid Society of Illinois*, 229 Ill. 2d 421, 440 (2008). Accordingly, we are not required to apply the same standard here as was applied in *Williams*, particularly where our interpretation of *Reed* appears to differ. The court in *Williams*, reviewing dismissal of a petition at the leave to file stage, purports to apply the holding

in *Reed.* 2021 IL App (1st) 190239, ¶¶ 44-49. But, as we noted earlier, *Reed* involved review of dismissal of a petition at the evidentiary stage of the proceeding. In light of its procedural posture, *Williams* appears to us a divergence from *Reed.* See *id.* ¶ 65 (Burke, J. specially concurring) ("The majority opinion raises the burden from preponderance of the evidence to clear and convincing at the third stage but says nothing about the burden a petitioner must meet at the first two stages."). We believe that our analysis best comports with the analysis in both the majority and the special concurrence in *Reed*. Accordingly, we decline to follow *Williams*.

¶ 57 Accordingly, we summarize the appropriate standard to be applied in the case before us as follows. The appropriate elements for actual innocence claims are that the evidence be (1) newly discovered, (2) material, (3) noncumulative, and (4) of such conclusive character that it would probably change the result on retrial. *Robinson*, 2020 IL 123849, ¶ 47. Again, petitions at the leave-to-file stage should only be denied if they have not set forth a colorable claim of actual innocence, meaning that "the petitioner's supporting documentation raises the probability that it is more likely than not that no reasonable juror would have convicted the petitioner in light of the new evidence." *Id.* ¶ 44 (citing *Sanders*, 2016 IL 118123, ¶ 24, citing *People v. Edwards*, 2012 IL 111711, ¶ 24). Further, we must take all well-pled allegations that are not affirmatively rebutted by the record as true, and we cannot make credibility determinations at this stage. *Id.* ¶ 45. Lastly, in accordance with *Reed*, we make no determination regarding the reliability of defendant's evidence, which can only be determined should the petition advance to the third stage under the Act, where an evidentiary hearing is held. See *Reed*, 2020 IL 124940, ¶ 50 n.2.

¶ 58 4. Defendant's Petition

¶ 59 Having determined the appropriate standard, we now turn to the merits of defendant's actual innocence claim. Here, defendant supported his claim with affidavits from Moore and

Myles. Moore's affidavit provided his witness account of the shooting, stating that he observed Butler walking toward a group of individuals with a gun, heard several gunshots, and then saw Butler run away with a gun. Myles's affidavit provided an account of a conversation he had with McWilliams, who stated that he, Barnes, and Harmon falsely identified defendant as the shooter to avoid police interference with their drug business and that he knew Houston owed Butler money. McWilliams also described the shooter as light-skinned with braids, which is not an accurate description of defendant, who is dark-skinned with dreadlocks.

¶ 60 The State concedes, and we agree, that the affidavits constitute new, material, and noncumulative evidence. Although we are not applying the higher third stage evidentiary standard set forth in *Reed*, we do believe that its statement as to what constitutes "new" evidence in the context of a guilty plea is nonetheless relevant where a trial has not occurred. The *Reed* court clarified that "new" evidence means that the "evidence was discovered after the court accepted the plea and could not have been discovered earlier through the exercise of due diligence." *Id.* ¶ 49. Defendant could not have discovered the information contained in either Moore's or Myles's affidavits earlier through due diligence. He did not come into contact with either individual until after he was sentenced and entered prison. Next, the evidence is clearly material where it goes to the identity of the shooter, suggests that the State's witnesses falsely identified defendant as the shooter, and includes a motive for the witnesses in lying about their identification of defendant as the shooter. Finally, the evidence is noncumulative where the State's factual basis did not contain any witness who identified an individual other than defendant as the shooter.

¶ 61 For the final element for actual innocence claims, we must determine whether the supporting documentation is of such conclusive character that a trial would probably result in acquittal. The conclusiveness element is the most important for an actual innocence claim.

Robinson, 2020 IL 123849, ¶ 47. Conclusive evidence "refers to evidence that, when considered along with the trial evidence, would probably lead to a different result." *Id.* "The new evidence need not be entirely dispositive to be likely" to result in acquittal. *Id.* ¶ 48. Significantly, here, we do not have trial evidence before us; instead, we have the State's factual basis for the plea, which "is held to a less stringent level of proof" than at trial." *Reed*, 2020 IL 124940, ¶ 34.

¶ 62 Defendant's newly discovered evidence identified Butler as the actual shooter based on Moore's alleged eyewitness account. Moore averred that he "witnessed the murder of [Williams] and the shooting of [Houston]." In particular, he identified Butler in the vicinity before and after the shooting with a gun, and he heard gunshots. The State contends that Moore's affidavit does not contain specific factual assertions that he actually saw the shootings. Whether Moore actually saw Butler shoot the victims or merely saw Butler before and after the shooting can be parsed out at an evidentiary hearing, should this claim proceed to that stage. Additionally, Moore's account is bolstered by Myles's conversation with McWilliams that provided a potential motive, *i.e.*, money, for Butler shooting Houston and that described the actual shooter as light-skinned with braids, as opposed to dark-skinned with dreadlocks, as is defendant.

¶ 63 Additionally, the information in Myles's affidavit undermines the veracity of Harmon's and Barnes's grand jury testimony and Harmon's statement to the police, where, according to Myles, McWilliams admitted to making false accounts to the police regarding defendant being the shooter in order to protect their drug business.[4] We recognize that none of the new evidence directly compromises Houston's or Battle's identification of defendant or defendant's alleged

[4]Notably, the Illinois Rules of Evidence do not apply to postconviction proceedings. Ill. R. Evid. 1101(b)(3) (eff. Sept. 17, 2019); *People v. Shaw*, 2019 IL App (1st) 152994, ¶ 67. Thus, the contents of Myles's affidavit are not barred by the hearsay rule.

confession to Winters via telephone. However, the allegation that Houston owed Butler money could have an effect on Houston's credibility as a witness, if it is determined that he refrained from identifying Butler as the shooter. Additionally, we cannot afford Houston's testimony any greater weight than the other witnesses at this stage. "Without engaging in any credibility determinations, there is no way for this court—or any court—to assess the reliability of those affidavits or the veracity of their assertions." *Robinson*, 2020 IL 123849, ¶ 83. Ultimately, the State's factual basis undergirding the court's acceptance of defendant's guilty plea is directly contradicted by the information in the affidavits, and the affidavits provide evidence that defendant was not the shooter and was actually innocent of the crimes.

¶ 64 Significantly, none of this newly discovered evidence can be said to be positively rebutted by the record. As the supreme court stated in *Robinson*, new evidence is only rebutted where it is "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." *Id.* ¶ 60. The State, for the plea's factual basis, did not present any surveillance footage or any other video evidence of the shooting. Likewise, there is no suggestion of any forensic evidence, such as fingerprints, DNA, or ballistics, to connect defendant to the shooting. The totality of the factual basis relied on witness statements and grand jury testimony.[5] As such, the conflicting new evidence cannot be "affirmatively and incontestably demonstrated to be false or impossible." *Id.*

¶ 65 Additionally, we note that, although the record contains an incriminating statement to the police from defendant, this was not introduced as part of the factual basis. However, in determining whether there is sufficient factual basis for a defendant's plea, the trial court may consider the

[5]Again, we note that the grand jury transcripts were not included in the record on appeal.

entirety of the record. See *People v. Banks*, 213 Ill. App. 3d 205, 211 (1991) (the trial court may look anywhere in the record to find a sufficient factual basis for the plea); *People v. Allen*, 323 Ill. App. 3d 312, 317 (2001) (same). Because defendant's inculpatory statement is part of the record, we deem it appropriate to at least consider it here. See *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (a confession may be the " 'most probative and damaging evidence that can be admitted' " against a defendant (quoting *Bruton v. United States*, 391 U.S. 123, 139 (1968) (White, J., dissenting))).

¶ 66 In his December 2009 statement to police, defendant admitted that he fired multiple shots at Williams and Houston and, specifically, that he was trying to send Williams a message after she had previously stabbed him. We acknowledge that defendant's confessed motive for shooting at Williams is corroborated by Harmon's statement that defendant told him prior to the shooting that she had stabbed him in the past. However, we also note that defendant has maintained in both of his postconviction petitions that his confession to the police was involuntary and was coerced. Admittedly, defendant's incriminating statement to Winters, which was included in the State's factual basis, coupled with his confession to the police, weighs toward his guilt. However, the *Robinson* court has specifically rejected the requirement that the newly discovered evidence demonstrate "total vindication" or "exoneration" of the defendant, and again, we cannot weigh the evidence at this stage. *Robinson*, 2020 IL 123849, ¶¶ 55-56. Moreover, it remains true that there is no forensic evidence tying defendant to the crime, two of the four eyewitness accounts are directly impeached with the newly discovered evidence, and defendant has maintained that his confession to the police was involuntary. On this record, we find that the information in the affidavits places the inculpatory evidence in the record and in the factual basis in a different light and undermines this court's confidence in the judgment of guilt. See *id.* ¶ 56.

¶ 67 Defendant's newly discovered evidence directly contradicts the State's evidence in multiple ways, raises questions regarding the veracity of the State's witnesses, and creates a credibility contest that can only be resolved after further proceedings before a factfinder, which this court is not. At this stage, taking as true the well-pled allegations in the affidavits, the exculpatory nature of the evidence alongside the impeachment evidence "raises the probability that it is more likely than not that no reasonable juror would have convicted the petitioner in light of the new evidence." *Id.* ¶ 44 (citing *Sanders*, 2016 IL 118123, ¶ 24, citing *Edwards*, 2012 IL 111711, ¶ 24). Accordingly, we find that defendant has set forth a colorable claim of actual innocence based on the affidavits of Moore and Myles and the trial court incorrectly denied defendant's request for leave to file his successive postconviction petition.

¶ 68 Because we have determined that defendant has presented a colorable claim of actual innocence, we must remand the petition in its entirety and therefore need not review his ineffective assistance of counsel claim. See *People v. Cathey*, 2012 IL 111746, ¶ 34 (stating that, because partial summary dismissals are not permitted under the Act, the entire petition must be remanded for further proceedings where one claim has merit). Finally, nothing in this order should be construed as suggesting that any of the claims in defendant's petition would pass second stage muster.

¶ 69 III. CONCLUSION

¶ 70 For the reasons stated, we reverse the judgment of the circuit court and remand for further proceedings under the Act.

¶ 71 Reversed and remanded.

No. 1-19-1101-B

Cite as:	*People v. Griffin*, 2022 IL App (1st) 191101
Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 10-CR-1910; the Hon. Michael B. McHale, Judge, presiding.
Attorneys for Appellant:	James E. Chadd, Douglas R. Hoff, and Rachel M. Kindstrand, of State Appellate Defender's Office, of Chicago, for appellant.
Attorneys for Appellee:	Kimberly M. Foxx, State's Attorney, of Chicago (Alan J. Spellberg and Brian K. Hodes, Assistant State's Attorneys, of counsel), for the People.

4-5

Order (Rev. 02/24/05) CCG N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS

v.

SHAMAR GRIFFIN

No. 10CR-1910

ORDER

PETITIONER PLED GUILTY TO FIRST DEGREE MURDER ON JUNE 16, 2011. HE NOW MAKES A CLAIM OF ACTUAL INNOCENCE AND HAS ATTACHED AFFIDAVITS FROM 2 ALLEGED WITNESSES. A PETITIONER CANNOT MAKE A CLAIM OF ACTUAL INNOCENCE AFTER A PROPER CONSTITUTIONALLY COMPLIANT GUILTY PLEA. P. v. SIMMONS, 388 Ill. App. 3d 599 (2009)

THUS, HIS "PRO-SE SUCCESSIVE PETITION FOR POST-CONVICTION" FILED 2-5-2019 IS DISMISSED

ENTERED
JUDGE MICHAEL McHALE-1927
APR 05 2019
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Attorney No.: _____

Name: _____

Atty. for: _____

Address: _____

City/State/Zip: _____

Telephone: _____

ENTERED: _____

Dated: _____, _____

M. McHale 1927

Judge Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT-CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF ILLINOIS,)
)
-vs-) NO. 10 CR 0191001
)
SHAMAR GRIFFIN,)
)
Defendant.)

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause before the Honorable MICHAEL B. MCHALE, Judge of said court, on the 5th day of April, 2019.

DIONE R. RAGIN
2650 S. California Ave., 4C02
Chicago IL 60608
Official Court Reporter
C.S.R. #084-004066

THE COURT: Shamar Griffin.

Petitioner plead guilty to First Degree Murder on June 16th, 2011. He now makes a claim of actual innocence and has attached affidavits from two alleged witnesses.

Petitioner cannot make a claim of actual innocence after a proper constitutionally compliant guilty plea. That's People versus Simmons 388 Ill App 3d 599.

Thus his pro se successive petition for post conviction filed February 5th, 2019 is dismissed.

In his petition conviction he makes no allegations that he was coerced into the plea. That's an important part of the analysis as well.

Thank you.

(Which were all the proceedings had in the above entitled cause.)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT - CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS Respondent-Appellee, -VS- SHAMAR GRIFFIN Petitioner-Appellant	Appeal from The CIRCUIT COURT of COOK COUNTY ILLINOIS NO. 10CR0191001 Honorable Michael BROWN Judge Presiding

NOTICE OF APPEAL

AN appeal IS Taken To The APPELLATE COURT FIRST Judicial DISTRICT:

APPELLANT(S) Name: SHAMAR GRIFFIN

APPELLANT'S Address: Register No. R49395
HILL CORRECTIONAL CENTER
P.O. BOX 1700
GALESBURG, ILLINOIS 61402

2019 MAY -7 AM 8 7

Offense of which convicted: FIRST DEGREE MURDER (Case No. 10CR0191001)
(NO DIRECT APPEAL)

DATE OF Judgment or order: [redacted] June 16, 2011

SENTENCE: [redacted]35 years

NATURE of order appealed: Denial of a SUCCESSIVE POST-CONVICTION PETITION (4-5-19).

FILED
MAY 07 2019
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL

Shamar Griffin

APPELLANT-PRO SE,
SHAMAR GRIFFIN
REG. NO.
HILL CORRECTIONAL CENTER
P.O. BOX 1700
GALESBURG, Illinois 61401

128587

127489

IN THE

SUPREME COURT OF ILLINOIS

Shamar Griffin, Movant v. Hon. Cynthia Y. Cobbs, Hon. Aurelia Pucinski, and Hon. James Fitzgerald Smith, Justices of the Appellate Court, First District, Respondents People State of Illinois	)	Motion for Supervisory Order Appellate Court First District 1-19-1101 10CR1910

O R D E R

This cause coming to be heard on the motion of movant, Shamar Griffin, due notice having been given, and the Court being fully advised in the premises;

IT IS ORDERED that the motion for supervisory order is allowed. The Appellate Court, First District, is directed to vacate its July 20, 2021, order, in case No. 1-19-1101, dismissing the appeal for lack of jurisdiction. The appellate court is directed to reinstate the appeal and to consider the merits of the appeal.

Order entered by the Court.

FILED
August 11, 2021
SUPREME COURT
CLERK

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Trial Record – Common Law Record

Trial Record – Supplemental Common Law Record

Trial Record – Reports of Proceedings

Hearings

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 March 22, 2023, the foregoing **Brief and Appendix 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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/s/ Erin M. O'Connell
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