No. 125891

IN THE
SUPREME COURT OF ILLINOIS

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

BRIEF OF RESPONDENT-APPELLEE
PEOPLE OF THE STATE OF ILLINOIS

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ORAL ARGUMENT REQUESTED

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NATURE OF THE CASE

Petitioner appeals from the appellate court's judgment affirming the denial of his motion for leave to file a second successive postconviction petition. An issue is raised on the pleadings: whether petitioner sufficiently pleaded actual innocence as is necessary to permit his successive filing.

ISSUES PRESENTED

1. Whether petitioner is barred from raising an actual innocence claim in a second successive postconviction petition that he could have raised in his prior petitions.

2. Whether petitioner failed to identify "new evidence," as is required to plead actual innocence, where (1) he admits that the evidence he relies on was known before trial, and (2) the involuntary intoxication defense that he wishes to raise based on that old evidence is not a new or novel theory of defense that was unavailable at the time of his trial.

3. Whether petitioner failed to show that it is more likely than not that he would be acquitted if he raised an involuntary intoxication defense, as is required to plead actual innocence, where (1) no witness attests that petitioner was intoxicated, (2) a dozen witnesses testified that he seemed normal and not intoxicated, and (3) petitioner said he was not intoxicated.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315 and 612. This Court allowed petitioner's petition for leave to appeal (PLA) on May 27, 2020.

STATEMENT OF FACTS

On July 12, 1994, in Spring Valley, Illinois, petitioner fatally shot his ex-girlfriend, Francee Wolf, and shot her mother, Tina Frasco, in the head, permanently blinding her in one eye. Petitioner was apprehended as he attempted to flee the scene, confessed shortly thereafter, and was charged with first degree murder and aggravated battery with a firearm. C40-41.[1]

A. Petitioner's Convictions and Sentence

At trial, the People argued that petitioner, who had a history of domestic violence, killed Francee and shot her mother because he was upset that Francee was breaking up with him. Petitioner raised a temporary insanity defense.

Evidence regarding the weeks and months leading up to the shooting

Petitioner began dating Francee in the summer of 1993, approximately one year before the shooting. R775. Petitioner was 32 years old, six feet tall, and weighed 200 pounds. PA28; R844. Francee was younger and much smaller: she was 22 years old, stood just five feet tall, and weighed only 100 pounds. PA28; R881. When their relationship began, petitioner was serving a term of probation for battering his ex-wife and her mother. R417-18; SC6.

Cari Carlson, Francee's friend, testified that six months before the shooting she saw petitioner use his vehicle to block Francee's car in a parking

[1] The common law record, report of proceedings, secured common law record, and supplemental report of proceedings are cited as "C_," "R_," "SC_," and "SR_"; petitioner's brief and appendix are cited as "Pet. Br. _" and "PA_."

lot, and then jerk Francee out of her car and slap her in the face. R779-80, 797. Francee asked, "Steve, what are you doing?" and petitioner said, "You're lucky that's all you got." R780. Francee tried to walk away, and petitioner grabbed her by the throat and said, "You're worthless. You're going to end up lonely just like your mother." R781. Francee again tried to get away, and petitioner grabbed her finger and "bit through on both sides" hard enough to draw blood. *Id.* Petitioner then pushed Francee to the ground, threw her keys and purse over a fence, and left. R782.

Michelle Castelli, a friend of petitioner and Francee, testified that Francee was breaking up with petitioner in the weeks leading up to the shooting. R16-17. Three weeks before the shooting, Francee told her that petitioner had held a shotgun to her (Francee's) head and said he would kill her and a man named Kevin Trovero if he saw them talking together. R12-13. Similarly, three other women (Kim Miller, Lee Ann Taber, and Angelina Tonielli) testified about separate conversations they had with Francee several weeks before the shooting in which she said that petitioner had told her that (1) while she slept, he held a shotgun to her head and thought about killing her, and (2) he had gone searching for Francee and, had he seen her talking to Kevin, he would have killed them both. R55-56, 77-78, 114-15.

Two of petitioner's other friends testified that three weeks before the shooting, he said that Nicole Brown Simpson "deserved what she got" for "screwing around" and that he should or would "pull an O.J." R714, 739-40.

Julie Taliani, petitioner's sister-in-law, testified that three weeks before the murder, petitioner said that he "wanted to kill himself and Francee because the two of them just aren't getting along." R753. He said that he kept a shotgun in his bedroom that "he was going to use to kill [Francee] and himself." R755. Petitioner told Julie that he had held his shotgun as he watched Francee sleep and considered killing her. R766. Julie advised petitioner to see a counselor. R756. Later that night, Julie asked her husband to remove the shotgun that petitioner kept in his home; her husband took the gun from petitioner's house and locked it in a gun cabinet in the basement of their house. R758-59. A few days later, petitioner told Julie that he had made an appointment with a therapist. R760.

The evidence showed that petitioner met with Dr. Richard Brady on June 27, 1994, *i.e.*, 15 days before the shooting. R448. Julie spoke to petitioner a few times afterward, and he seemed "friendly and like himself"; when she last saw him on Sunday, two days before the shooting, he seemed "all right." R761. Julie later learned that, the Saturday afternoon before the murder, when she and her husband were out of town, petitioner secretly retrieved his shotgun from her home. R762.

Angelina Tonielli, Francee's close friend, testified that, on the Saturday before the shooting (*i.e.*, three days before the shooting), petitioner called her house at 4:30 a.m., looking for Francee. R95. Francee, who frequently stayed with Angelina, was there at the time, but Angelina knew

that she was trying to break up with petitioner, so Angelina hung up on him. R96. Petitioner then drove to Angelina's house, entered Francee's car and took her purse and medication, then left. R96-97. Around noon, Angelina and Francee drove to Francee's mother's home (where Francee lived), and locked all the doors. R97-98. Petitioner called and argued with Francee. R98. Then he drove over, began beating on the doors and said, "If you don't open the door, you're going to make it worse on yourself than it already is." R98-99. Angelina could hear petitioner's son saying, "Dad, let's go," and petitioner finally left, a few hours before he secretly retrieved his shotgun from his brother's house. R100.

Testimony regarding the day of the shooting

It is undisputed that petitioner shot Francee and her mother three days later, at 11:18 p.m. on Tuesday, July 12, 1994. R185-86.

Nicole Mediwar, petitioner's friend and neighbor, testified that when she spoke with petitioner at 4:30 p.m. on the day of the shooting, he acted normal and was the "[s]ame as I've always known him. Fine." R715.

Marlo Capponi testified that she was petitioner's girlfriend at the time of the shooting and his friend at the time of trial. R177-78. They spent lots of time together in the weeks leading up to the shooting, and petitioner acted normal. R179-80. They ate lunch together on the day of the shooting, and petitioner was "in a good mood" and acted normal. R178-79. She spoke with petitioner on the phone at 6:00 p.m., and he seemed "fine." R180.

Kevin Ellerbrock, an owner of Ellie's Bar, testified that he had known petitioner for nearly a decade. R24. On the night of the shooting, petitioner came into the bar shortly after 7:00 p.m. and met a woman, Michelle Castelli. R24-25. Petitioner stayed about two hours and drank a couple of beers. *Id.* Ellerbrock spoke with petitioner, and he seemed normal and coherent and did not say anything bizarre. R26. When petitioner left, he seemed "totally sober" and said he planned to go to Verucchi's Bar. R26-27.

Castelli testified that she met petitioner at Ellie's Bar on the night of the shooting, and he seemed "normal" and did not seem intoxicated. R8-11. Petitioner told Castelli that he loved Francee, but Francee did not feel the same way about him; he asked Castelli about Francee's relationship with Kevin Trovero, and Castelli told petitioner that they were just friends. R9-10.

Arthur Verucchi, co-owner of Verucchi's Bar, testified that he had known petitioner for many years. R27-30. On the night of the shooting, petitioner came into the bar around 9:30 p.m., stayed for less than an hour, and had one drink. R29-30. Petitioner seemed "normal" and did not seem to be under the influence of any substance. R30-31.

Richard Denis testified that he had known petitioner for years, he spoke with petitioner at Verucchi's Bar at around 9:30 p.m. on the night of the shooting, and petitioner acted normal. R34-35. Similarly, Walter Baltikauski testified that he had known petitioner for years, he spoke with

him at Verucchi's the night of the shooting, and petitioner seemed normal and sober. R37-39. Kimberly Olszewski testified that she had known petitioner for years, she spoke with him as he was leaving Verucchi's at approximately 10:15 p.m., and he seemed normal and sober. R49-50.

Kevin Trovero testified that he coached a softball team that Francee played on. R62. Two weeks before the shooting, Kevin was with several members of the softball team when he saw petitioner, who asked him, in front of Francee, "have you fucked her yet?" R65. Kevin, who was married, replied that he and Francee did not have a sexual relationship. *Id.* Kevin testified that, around 11:00 p.m. on the night of the shooting, petitioner called him and asked whether he had contacted Francee at work. R65-66. Petitioner seemed "fine" when he asked the question. R66-67. Kevin said that he had not contacted Francee; as the call continued, petitioner "start[ed] to get a little irritated" and said that Kevin should not chase women around. *Id.* Kevin's wife testified that she also spoke to petitioner during the call and he seemed "fine" and in control of his faculties. R696-98.

The shooting and petitioner's arrest

Angelina Tonielli, Francee's friend, testified that she spoke with Francee on the telephone at 9:00 p.m. on the night of the shooting. R102-03. Francee said she planned to stay home because she did not feel well; they agreed that she should not go to petitioner's house even though he had stolen her medication. R103. At 11:00 p.m., Francee's mother, Tina Frasco, called

and asked Angelina whether she knew where Francee was because she was not at home; Angelina said she might have gone to petitioner's house to get her purse and medication back. R104. Angelina then called petitioner's house at 11:07 p.m. R106. Petitioner denied that Francee was there, but Angelina could hear Francee in the background. R107. Francee "was crying and she was pleading with him to give her the phone." *Id.* Petitioner hung up, and Angelina immediately called Tina and told her what had happened. R107-09.

Tina Frasco corroborated Angelina's testimony about the series of calls at 11:00 p.m. R151-52. After Angelina told her that she could hear Francee crying in the background during her call with petitioner, Tina called petitioner's house; petitioner told Tina that Francee had left, but Tina did not believe him, so she drove to his house, which was just a mile away. R152-53. Tina knocked on the front door and heard Francee screaming. R156-57. Francee sounded "scared." R157. Tina ran to a neighbor's house, pounded on the door, and begged them to call police. R158.

When Tina turned back, she saw Francee run out of petitioner's house. *Id.* Her head was bleeding, and she said that petitioner had hit her. *Id.* Tina got Francee into the car and told her to lay down. R159-60. As Tina started the car, petitioner ran out of the house, carrying a gun, went to the driver's window, and shot Tina in the side of her head. R161-62. Petitioner then walked around the car, and Tina heard another shot. R162-63.

Officer Rick Taylor, of the Spring Valley Police Department, testified that he was on patrol when he heard gunshots at 11:18 p.m. R186. He immediately drove to the scene and saw petitioner get in a car and drive away at a high rate of speed. R186-87, 190-93. He radioed other officers to stop the car, then tried to help Francee, but she was already dead. R193-96.

Petitioner's apprehension

Sergeant Kevin Sangston responded to the call of a shooting, saw petitioner driving away from the scene, and activated his siren. R206-07. Petitioner did not pull over; instead, he ran several stop signs and attempted to evade police at "an extremely high rate of speed" that was more than twice the legal limit. R207-10. Petitioner eventually lost control of his car and crashed into a guardrail. R211. Sangston knew petitioner from "previous encounters." R213. Petitioner got out of the car with his hands up and said "I don't have any more shells" (*i.e.*, ammunition). R213-14. His speech was clear. R214. He walked slowly toward Sangston, with his hands in the air, and asked Sangston to shoot him. R214-15. Petitioner approached so passively that Sangston had time to holster his weapon, take out pepper spray, spray it in petitioner's face, then handcuff him. R216. Throughout the night, petitioner spoke with Sangston; he was not disoriented and "did not seem to be under the influence of anything." R222. He apologized for "putting [Sangston] in that situation." *Id.* Police recovered a sawed-off shotgun from petitioner's car. R217.

Petitioner's confession

Police Chief Douglas Bernabei testified that he saw petitioner when he was brought into the station. R839. Petitioner complied with police directions and appeared "normal" and did not appear to be under the influence of anything. R840, 843, 860. Bernabai and Investigator Michael Miroux sat down to talk with petitioner approximately 90 minutes later, at 1:00 a.m. R841. They provided *Miranda* warnings, and petitioner said that he wanted to talk. R845-51. Petitioner was calm, normal, and coherent, and he did not act strange or make bizarre statements. R844, 852. Petitioner said that he was not intoxicated. R860-61.

Petitioner initially claimed that he did not remember what happened after he left Verucchi's Bar. R862. But petitioner quickly changed his story. R877-78. In his second account, petitioner said that Francee called and was upset because she knew he was going to see Marlo, his other girlfriend. R878. A little later, Francee "stormed into the house" and tried to hit him. R880-81. They got into a "struggle," then Francee left the house. R882-83. Francee stood outside cursing him, so he went outside. R883-84. However, when he went outside he could not find Francee, so he got into his car to look for her, and that is when he was pulled over and arrested. R884-85.

Chief Bernabei told petitioner that they knew he was lying because Francee had been fatally shot. R888-89. At that point, petitioner covered his face with his hands and said, "Okay, I'll tell you the truth." R889.

In his third and final account, petitioner claimed that when Francee came over, they went upstairs to have sex. R890. Petitioner said that, with Francee's consent, he handcuffed her to the bed and then cut some of her clothes off with a large knife and ripped off the rest with his hands. R891-92. At her request, he then sat on her chest and she performed oral sex on him for 30 to 45 minutes, but he did not ejaculate; they stopped and argued about Kevin Trovero and Marlo. R892-94. He called Kevin and accused him of having a relationship with Francee. R895. After the call, Francee hit him. R896. Petitioner pushed her onto the bed and jumped on top of her, she rolled off, and he thought "she was going for the gun." *Id.* Petitioner grabbed his shotgun and said, "If I go, you are going with me." *Id.* He told police that he previously had considered killing Francee and himself. R897.

He shot at the bedroom wall, and Francee ran out of the house, topless. *Id.* Petitioner reloaded with shells that he found in a drawer. R898. He then retrieved a lockbox from his closet, found the key, unlocked it, and took out two letters he had written weeks earlier. *Id.* He left one letter on the kitchen table and taped the other to his front door. *Id.*

When he went outside, Francee was waiting for him, and he fired the shotgun in her direction. R899. Petitioner told police that he wanted to "bring her back inside the house" because he "wanted to kill her" there. *Id.* However, a car pulled up and Francee got inside. R900. Petitioner stepped onto the road and fired into the car window. *Id.* His intent was to "kill

Francee." *Id.* When Chief Bernabei asked if he was sure that was his intent, petitioner said, "Yes. I have had this planned for a long time." R902. After the shooting, petitioner saw an approaching police car and fled. *Id.*

Petitioner said that he met with a psychiatrist, Dr. Brady, a couple weeks before the murder; he also started taking prescribed medication, but did not take all of it because it hurt his stomach. R906-07. After meeting Brady, he did not feel any better or any worse. R948.

Petitioner told police that several weeks before the murder, he wrote the two letters that he left at his house. R905. He also wrote an earlier letter about his plan to kill Francee, but he destroyed it because there was more that he wanted to add to it. R907-08.

Petitioner said that he wanted to kill Francee because "that's the only way I can have her." R909. The turning point was learning that "she was starting to run around on" him. *Id.* He said that when police read the letters they "would see all along that he was going to kill Francee and kill himself." *Id.* He said that he decided a month before the shooting that he was going to kill Francee. *Id.* During the interview, petitioner was "calm" and "composed," as well as oriented to the time, place, and circumstances. R911.

Chief Bernabei read into evidence the letter that petitioner left on the front door of the house. R912-13. Addressed to petitioner's brother and sister-in-law, the letter stated that petitioner was "very sorry," that what

they would find inside the house "may not be appealing," and that they should read the letter he had left on the kitchen table. R913; C200 (letter).

The three-page typed letter that petitioner left on the kitchen table was also admitted into evidence. R914-15. It read in part:

> This isn't a quick decision as you can see it has been on my mind for a long time, and I just wanted to make sure that I do everything as well I can and cover most of my tracks. I hope I have done everything, but as usual I may have forgotten something, as long as it doesn't cost us anything is my main concern.
>
> . . . .
>
> I can't have Francee do this to anyone else especially me.

C202-03. The remainder of the letter instructed petitioner's brother to, among other things, (1) forge petitioner's name on some packages of jewelry that would be delivered and keep or sell what was inside; (2) take everything out of his safe, "hide it until my creditors give up," and pretend that they knew nothing about it; (3) take other cash petitioner had hidden in his house and safety deposit box; and (4) hide the letters. C202-04.

Chief Bernabei testified that, based on his personal experience and his interview with petitioner, he believed that petitioner appreciated the criminality of his conduct, knew the difference between right and wrong, and had the ability to follow the law if he chose to do so. R918-19.

Michael Miroux, an investigator with the Bureau County Sheriff's Department, testified that he participated in petitioner's interview. R967-68. Miroux had known petitioner for more than a decade. R968-69. Petitioner

was "calm and collect[ed]" during the interview, and Miroux saw no evidence that petitioner was under the influence of any substance. R971-72. Petitioner expressly stated that he did not feel intoxicated. R972-73. Miroux's testimony regarding the interview was consistent with Chief Bernabei's, including that petitioner initially claimed that he did not know what happened, but then admitted that was a lie and further admitted that (1) he intended to kill Francee, (2) he fired into the car to kill Francee, (3) he had "planned" for "some time" to kill Francee, (4) Dr. Brady did not make him feel better or worse, and (5) he killed Francee because that was "the only way I can have her" and she was seeing someone else. R972-1010. Miroux testified that based on his personal experience and his interview with petitioner, he believed that petitioner appreciated the criminality of his conduct and had the ability to follow the law. R1015-16.

Forensic, medical, and crime scene evidence

As a result of the shooting, Tina was permanently blind in her left eye and, at the time of trial, still required additional skin grafts to cover exposed bones on her face. SR5.

Francee's treating physician and a forensic pathologist testified that (1) Francee was dead when she arrived at the hospital, and (2) she died of a shotgun wound to her back that cut her spinal cord in two, "shredded" her left lung, and caused "very extensive" hemorrhaging in her kidney, liver, pancreas, stomach, and heart. R572-73, 662-69. In addition, fresh oval

bruises on Francee's arm were consistent with someone forcibly holding her arm down. R652-53. And fresh "lineal" bruises on her other arm were consistent with someone handcuffing her. R659-60. Francee also had fresh bruises on her face and a "large laceration" on her right arm. R561, 653, 658.

In petitioner's bedroom, police found handcuffs, broken glass, and women's underwear and clothing that had been cut and torn. R604-10. When Francee was killed, she was wearing only a pair of shorts. R195. A forensic chemist testified that the blood found throughout petitioner's house could have come from Francee, but not petitioner. R618, 627-28.

Petitioner's case

Petitioner did not testify. R445-46. Dr. Brady testified for the defense that he met petitioner 15 days before the shooting. R448. Brady thought that petitioner was depressed. R451. Petitioner said that he could not get Francee "out of [his] head" and complained that she was seeing another man. R474. Petitioner had trouble sleeping because he was thinking about where Francee was and what she was doing. R475.

Dr. Robert Chapman, a psychiatrist retained by the defense, testified that he examined petitioner before trial. R361. Chapman concluded that petitioner had "major affective disorder, depression with suicide ideation." R368-69. Petitioner's depression had been "severe" for approximately 18 months before the shooting. R372-73. Petitioner experienced "obsessive" thoughts and dreams about murder and suicide. R372, 374. Chapman

concluded that petitioner's depression "impaired his capacity to appreciate the criminality of his behavior." R384. Chapman emphasized that "I didn't say he was unable. I said he was substantially impaired." R407. Petitioner never said that he was unable to control himself or that he did not know that it was wrong to kill Francee. R418. Petitioner told Chapman that three weeks before the murder (before he met with Brady), he got his shotgun out while Francee was sleeping, and he had an "urge" to kill her. R437.

Verdict and Sentencing

Petitioner was found guilty of first degree murder and aggravated battery with a firearm, C294-95, and sentenced to 100 years in prison, R544.

B. Direct Appeal

Petitioner argued on appeal that his sentences were excessive and that he had proved that he was insane at the time of the shooting. C322, 326. The appellate court affirmed petitioner's convictions and sentences, and this Court denied his PLA. C319, 322.

C. Initial Collateral Proceedings

In 1996, petitioner filed a pro se postconviction petition alleging that his trial counsel provided ineffective assistance by failing to file certain motions, including a motion to suppress petitioner's confession. C331-41. The trial court dismissed his petition, the appellate court affirmed, and this Court denied his PLA. C342-44, 385-86, 391. In 2000, petitioner filed a pro se petition for relief from judgment, claiming in part that his shooting of Tina

was "accidental." C416-21. The trial court denied his petition, the appellate court affirmed, and this Court denied his PLA. C481, 802, 805.

D. Petitioner's First Successive Postconviction Petition

In 2002, petitioner filed another pro se petition for relief from judgment, which, at his request, was amended and re-characterized as a successive postconviction petition. C506, 686. In 2003, the trial court appointed the public defender to represent petitioner. C702. Several months later, petitioner moved to substitute counsel because the public defender was not communicating with him, C752; the court allowed petitioner to replace the public defender with retained counsel, George Mueller, C818.

Petitioner filed a counseled amended successive postconviction petition in 2014. C949. As relevant here, the petition alleged that (1) it was known at trial that Dr. Brady had prescribed petitioner Buspar and Desyrel, and (2) combining those medications "can lead to a serious condition known as 'serotonin syndrome'" that can cause "irritability, altered consciousness, confusion, hallucination, [] coma," and "suicidal thoughts." C952-53, 961. Due to this and other reasons, petitioner claimed that his counsel provided ineffective assistance by (1) withdrawing a petition for a fitness hearing, and (2) not seeking a second degree murder instruction. C952-55, 959-61. The petition attached medical literature regarding the risks of antidepressants and serotonin syndrome and cited medical literature published before petitioner's trial that discussed serotonin syndrome. C975-1004.

The trial court dismissed the successive petition, finding that petitioner's claims were barred because he could have raised them in his first petition. C1059-60. On appeal, petitioner argued that (1) he had met the cause and prejudice standard to file a successive petition, and (2) he was innocent of first degree murder because the evidence showed that the shooting was provoked. C1091-92. The appellate court affirmed because (1) "the claims contained in [his] successive postconviction petition could have been raised in his initial petition," and (2) his innocence claim was meritless. C1090-92. This Court denied petitioner's subsequent PLA. C1084.

E. Petitioner's Motion for Leave to File a Second Successive Petition

In 2017, petitioner filed, pro se, a second successive postconviction petition, once again raising the issue of serotonin syndrome. C1096. Petitioner alleged that he was actually innocent based on the affirmative defense of involuntary intoxication because, due to his ingestion of Buspar and Desyrel at the time of the shooting, he "was suffering from symptoms associated with serotonin syndrome, including: heightened irritability, confusion, and altered consciousness, as well as increased suicidal ideations." C1100. Petitioner argued that an involuntary intoxication defense was not available until this Court issued *People v. Hari*, 218 Ill. 2d 275 (2006), which held that an involuntary intoxication defense may be based on unwarned side effects from prescription medication. C1098. The second successive petition attached the same medical literature regarding the risks of antidepressants

and serotonin syndrome that was attached to petitioner's first successive petition. *See* C1117-46.

The circuit court denied petitioner leave to file the second successive petition because petitioner's allegations failed to raise the possibility that it was more likely than not that no reasonable juror would convict him. C1174.

The appellate court affirmed. *People v. Taliani*, 2020 IL App (3d) 170546, ¶ 1. The court noted in passing that it "question[ed] the propriety of treating [petitioner's] claim as an actual innocence claim because it appears that the claim is based on a newly available affirmative defense rather than newly discovered evidence." *Id.* ¶ 25. But the court held that even if petitioner's affirmative defense were considered "new evidence," petitioner failed "to raise 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.* ¶ 27 (quotations omitted). Justice McDade dissented, finding that the potential symptoms of serotonin syndrome "could have deprived [petitioner] of the substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law such that the involuntary intoxication defense would apply." *Id.* ¶ 36 (McDade, J., dissenting).

STANDARD OF REVIEW

Denial of leave to file a successive postconviction petition is reviewed de novo. *People v. Bailey*, 2017 IL 121450, ¶ 13.

ARGUMENT

It is "well-settled" that successive postconviction petitions are "disfavored" because they impede the finality of litigation. *People v. Edwards*, 2012 IL 111711, ¶ 29. Thus, the Post-Conviction Hearing Act requires petitioner to obtain leave of court to file a successive petition. *See* 725 ILCS 5/122-1(f). A petitioner seeking leave to file a successive petition faces immense procedural hurdles: as relevant here, petitioner may file a successive petition only if he pleads a colorable actual innocence claim, supported by new evidence showing that, in light of the new evidence, it is more likely than not that no reasonable juror would convict him. *Edwards*, 2012 IL 111711, ¶¶ 32-33.

I. Petitioner's Actual Innocence Claim Is Barred Because He Could Have Raised It in His Earlier Petitions.

Petitioner's actual innocence claim is barred for two independent reasons: (1) petitioner is barred from filing successive postconviction petitions raising claims related to serotonin syndrome because, as trial and appellate courts have already held, he could have raised such claims in his initial petition, and collateral estoppel prohibits petitioner from now disputing those rulings and (2) there is no dispute that the facts and law that petitioner relies on for his actual innocence claim were available to him when he filed his first successive petition, and, thus, under settled law, he is barred from raising that claim now in a second successive petition.

A. All Claims that Could Have Been Raised in a Prior Postconviction Petition Are Barred.

The Post-Conviction Hearing Act "contemplates the filing of only one postconviction petition," *People v. Morgan*, 212 Ill. 2d 148, 153 (2004), and this Court has made clear that it "refuse[s] to sanction piecemeal post-conviction litigation," *People v. Tenner*, 206 Ill. 2d 381, 398 (2003) (collecting cases). To that end, this Court has long held that a ruling on a prior postconviction petition bars a petitioner from filing a successive petition that includes "claims that were raised *or could have been raised*" in the prior petition. *E.g., People v. Orange*, 195 Ill. 2d 437, 449, 456 (2001) (emphasis added); *People v. Guerrero*, 2012 IL 112020, ¶ 17 (same; collecting cases).[2] The prohibition against raising claims in a successive petition that could have been raised in an earlier petition is not merely a rule of judicial administration but rather an express statutory requirement under the Act. *See* 725 ILCS 5/122-3 (any claim not raised in original petition is barred).

For example, the petitioner in *Orange* filed a successive petition alleging that prosecutors withheld an exculpatory report until after trial; this Court held that the petitioner's claim was barred because he had the report "at the time of his first postconviction petition and was obviously aware of the

[2] This Court has sometimes described claims that could have been raised in a prior postconviction proceeding, but were not, as "forfeited" and sometimes as barred by res judicata. *E.g., Guerrero*, 2012 IL 112020, ¶ 17; *People v. English*, 2013 IL 112890, ¶ 22. But no matter the terminology, the result is the same: petitioner may not raise claims in his second successive petition that he could have raised in his earlier petitions.

facts that would have supported [his] claim." 195 Ill. 2d at 456. Petitioner's claim is likewise barred.[3]

B. Petitioner's Actual Innocence Claim Is Barred Because He Could Have Raised It in His Initial Postconviction Petition.

Petitioner's actual innocence claim is barred because Illinois courts have already conclusively determined that he could have raised claims related to serotonin syndrome in his initial postconviction petition. In his first successive postconviction petition, petitioner claimed, among other things, that his trial counsel provided ineffective assistance because (1) it was known at the time of trial that petitioner had been taking Buspar and Desyrel, (2) it was established in the medical community before trial that the combination of those medications can lead to serotonin syndrome, and (3) the outcome of his trial would have been different if counsel had presented evidence regarding serotonin syndrome and argued that petitioner was unfit to stand trial and innocent of first degree murder. C952-53, 960-61. Both the trial court and the appellate court held that petitioner's claims were barred because they "could have been raised in his initial petition." C1090.

As a result of that final ruling, petitioner is estopped from now arguing that he could not have raised claims related to serotonin syndrome in his first petition. Collateral estoppel "bars the relitigation of an issue already decided

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[3] Although the People did not raise the issue of res judicata or forfeiture below, because the People were appellee in the appellate court and here, they may raise any argument that is supported by the record to sustain the lower courts' judgments. *See, e.g.*, *People v. Donoho*, 204 Ill. 2d 159, 169 (2003).

in a prior case" where (1) a court rendered final judgment in the prior case, (2) the party against whom estoppel is asserted was a party to that case, and (3) the issue decided in the prior case is presented in the instant case. *Tenner*, 206 Ill. 2d at 396.[4] Here the first two elements are easily met: the lower courts rendered final judgment in the prior case when they denied petitioner leave to file his first successive petition. And the third element is satisfied because the issue decided in that case and the issue presented here is the same: whether petitioner's initial petition could have raised a claim that his trial would have been materially different had his counsel presented evidence of serotonin syndrome. Petitioner cannot evade the procedural bar by refashioning his previously-denied claim that counsel erred by failing to present evidence of serotonin syndrome into a claim that he is actually innocent because he supposedly had serotonin syndrome. *E.g., id.* at 396-98 (where the petitioner's initial petition alleged that trial counsel erred by failing to present evidence that the petitioner was incompetent, petitioner could not file a successive petition arguing that his conviction should be overturned because he had evidence that he was unfit for trial).

It is therefore settled that claims related to serotonin syndrome could have been raised in petitioner's initial petition. And, as a result, petitioner is now barred from alleging that he is actually innocent because he suffered from serotonin syndrome.

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[4] Collateral estoppel, not law of the case, is the applicable doctrine because successive petitions are treated as different "cases." *Id.* at 395-96.

C. Alternatively, Petitioner's Actual Innocence Claim Is Barred Because He Could Have Raised It in his First Successive Postconviction Petition.

Even if petitioner could not have raised his actual innocence claim in his initial postconviction petition, his claim would still be barred because he could have raised it in his first successive postconviction petition. As noted, in his amended first successive petition (which was prepared by retained counsel), petitioner alleged that his trial counsel was ineffective because he failed to present evidence of serotonin syndrome and the potential side effects of his medication. C952-53, 961. When petitioner filed that petition in 2014, it was clearly established that an involuntary intoxication defense could be based on side effects of prescription medication. *See People v. Hari*, 218 Ill. 2d 275, 298-99 (2006). Accordingly, both the evidence and the law underlying petitioner's actual innocence claim were available to petitioner when he filed his first successive petition, and he is therefore barred from raising a claim based on that same evidence now. *See, e.g., Orange*, 195 Ill. 2d at 456. To hold otherwise would be to permit the type of piecemeal litigation that is contrary to the Act and this Court's precedent.

Nor can petitioner argue that the failure to raise his innocence claim in his first successive petition should be excused because his postconviction attorney provided unreasonable assistance. To begin, there is no evidence that petitioner asked counsel to raise a claim that he was actually innocent based on involuntary intoxication due to serotonin syndrome. Notably, before retaining counsel to represent him in the successive postconviction

proceedings, petitioner filed a pro se first successive petition and later amended it pro se, and neither pleading alleged this actual innocence claim. C506, 686. After the court appointed the public defender to represent him, petitioner moved to substitute counsel, alleging that the public defender was not adequately communicating with him. C752. Petitioner then retained private counsel, Mueller, who amended the first successive petition. Notably, Mueller's amended petition did not allege that petitioner was actually innocent of all charges as a result of involuntary intoxication, yet petitioner did not replace Mueller as he had the public defender. Instead, Mueller represented petitioner for over a decade in the trial court, then continued to represent him on appeal. Thus, there is no basis to believe that Mueller ignored any request by petitioner to raise an actual innocence claim.

Moreover, Mueller cannot have provided unreasonable assistance by not independently deciding to raise this involuntary intoxication claim: the "reasonable assistance" standard merely requires that counsel who enters the case at the second stage shape the claims already raised in the pro se petition — counsel has "no obligation" to raise or investigate new claims. *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006). And, even setting that aside, it is understandable why Mueller would have raised a claim that trial counsel was ineffective for failing to present evidence regarding serotonin syndrome rather than a claim that petitioner was actually innocent of all charges. First, petitioner's evidence shows that serotonin syndrome was well-known in

the medical community before his trial, *infra* pp. 27; that fact is better suited to a claim that trial counsel erred (by failing to present available medical evidence) than an actual innocence claim, which requires new evidence that "was discovered after trial and could not have been discovered earlier through the exercise of due diligence," *e.g., People v. Coleman*, 2013 IL 113307, ¶ 96. Second, actual innocence claims are "rarely successful" and are more difficult to prove than an ineffective assistance claim because the petitioner must prove that it is "more likely than not" that he would be acquitted which is "a stronger showing than that required to establish *Strickland* prejudice." *Edwards*, 2012 IL 111711, ¶¶ 32-33, 40 (quotations omitted). Accordingly, Mueller cannot be said to have provided unreasonable assistance by raising an ineffective assistance claim rather than an actual innocence claim. Thus, no basis exists to excuse petitioner's failure to raise his actual innocence claim in his first successive petition, and it is barred.

II. Petitioner Has Not Asserted a Colorable Actual Innocence Claim.

Even setting aside these procedural bars, the lower courts correctly denied petitioner leave to file a second successive petition. It is difficult to meet the actual innocence standard. *Coleman*, 2013 IL 113307, ¶ 94. As relevant here, petitioner must present (1) "newly discovered" evidence (2) that is of such "conclusive character" that it raises the probability that "it is more likely than not that no reasonable juror would have convicted him." *Edwards*, 2012 IL 111711, ¶¶ 32-33. Petitioner fails to meet that standard.

A. Petitioner Has Not Presented "New" Evidence.

Petitioner's actual innocence claim fails because the evidence he relies on is not new, *i.e.*, he cannot show that "the evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence." *Coleman*, 2013 IL 113307, ¶ 96. Petitioner correctly notes that it was known at the time of trial that he was taking the antidepressants Buspar and Desyrel. Pet. Br. 28-29. Moreover, both his first and his second successive petitions demonstrate that serotonin syndrome was known in the scientific community and discussed in the medical literature before petitioner's trial in 1995. *See, e.g.,* C1118 at n.2 (citing 1994 medical journal article discussing serotonin syndrome).[5] Indeed, the central allegation of petitioner's first successive petition was that his counsel could have introduced evidence of his medication and serotonin syndrome at or before trial. *See, e.g.*, C951-52, 961. Because petitioner concedes that the fact that he ingested Buspar and Desyrel was known before his trial, and because evidence of serotonin syndrome could have been discovered before trial, it is not new, and cannot support an actual innocence claim. *See, e.g.*, *People v. Bailey*, 2017 IL 121450, ¶ 45 (denying leave to file successive petition because

[5] According to articles in the National Institute of Health's PubMed database, by 1984 "[s]ubstantial evidence" established the dosage relationship between medication and serotonin syndrome. *See, e.g.,* Serotonin Syndrome: History and Risk (1998), https://pubmed.ncbi.nlm.nih.gov/9794145; *see also Leach v. Dep't of Emp't Sec.*, 2020 IL App (1st) 190299, ¶ 44 (collecting cases taking judicial notice of materials on government websites); *United States v. Hardimon*, 700 F.3d 940, 943-44 (7th Cir. 2012) (relying on medical articles from PubMed and other websites).

the medical evidence that the petitioner relied on was known at trial); *Coleman*, 2013 IL 113307, ¶ 100 (actual innocence claim failed because evidence was "presumably" known at trial).

Petitioner's claim that an involuntary intoxication defense should be considered "new"— even though it was known at trial that he was taking medication that could cause serotonin syndrome — rests on his speculation that the trial court would have excluded such evidence as "not relevant" because at that time "involuntary intoxication based on the use of prescription drugs was not an available affirmative defense." Pet. Br. 21, 25. But that argument fails for two independent reasons: (1) as a factual matter, an involuntary intoxication defense based on prescription medication was neither new nor novel at the time of petitioner's trial, and (2) as a matter of law, speculation that a court might have found certain evidence inadmissible had a defendant attempted to introduce it does render the evidence "new" for purposes of clearing the Act's bar on successive postconviction petitions.

1. An involuntary intoxication defense was available to petitioner at the time of his trial.

Contrary to petitioner's unsupported contention, an involuntary intoxication defense based on unwarned side effects of prescription medication *was* available at the time of his 1995 trial. The Illinois Criminal Code (both at the time of petitioner's trial and now) expressly provides an "involuntary intoxication" affirmative defense: a defendant is not responsible for his actions (and thus cannot be convicted of any crime) if he was

"involuntarily" intoxicated and lacked the "substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." 720 ILCS 5/6-3.

Notably, although petitioner claims that had he attempted to raise an involuntary intoxication defense based on his medication use, the trial court would have excluded his evidence as "not relevant," he fails to cite any case holding that an involuntary intoxication defense may not be based on unwarned side effects of prescription medication. *See* Pet. Br. 21-26.

Indeed, several years *before* petitioner's trial, a trial court permitted a defendant to present evidence of involuntary intoxication due to the side effects of prescription medication. *See People v. Smith*, 231 Ill. App. 3d 584, 590 (1st Dist. 1992). The trial court in *Smith* allowed the defendant to present expert testimony that the amount of valium he was prescribed would have an "intoxicating effect" and could cause "a 'paradoxical reaction,' meaning unexplained or unexpected reactions including rage, confusion, hyper-excitability, behavioral abnormalities and impaired cognitive and judgmental abilities." *Id.* However, because the defense expert testified that he "did not know" whether the defendant could appreciate the criminality of his conduct, the trial court concluded that the defendant had failed to present sufficient evidence to justify a jury instruction on involuntary intoxication. *Id.* at 591. The appellate court observed that "[t]here do not appear to be any Illinois cases directly addressing the issue of whether intoxication of the type

alleged here is 'involuntarily produced' within the meaning of the statute." *Id.* at 593. But, rather than holding that such circumstances could not constitute involuntary intoxication, the appellate court held that the defendant was not entitled to an involuntary intoxication instruction because his expert did not know whether the defendant was unable to understand the criminality of his actions. *Id.*

Then, several years after petitioner's trial, the defendant in *Hari* presented expert testimony that the Zoloft he took made him "involuntarily intoxicated," increased his propensity for violence, and left him unable to understand that his actions were criminal. *People v. Hari*, 355 Ill. App. 3d 449, 453-55 (4th Dist. 2005). While the trial court allowed the defendant to present this evidence and argument, it declined to give an involuntary intoxication instruction. *Id.* at 455. The appellate court noted that this was an issue "of first impression" in Illinois, but observed that many other jurisdictions had long held (since the 1970s) that an involuntary intoxication defense can be based on side effects from medication. *Id.* at 456-58 (collecting cases). Based on those cases and the Illinois Criminal Code, the appellate court held that the defendant was entitled to an involuntary intoxication instruction based on evidence that his medication left him unable to understand that his actions were criminal. *Id.* at 458-59.

On appeal, this Court agreed that "an unexpected adverse side effect of a prescription drug that was unwarned by the prescribing doctor . . . is

'involuntarily produced' within the plain meaning of the involuntary intoxication affirmative defense statute." *Hari*, 218 Ill. 2d at 292. The Court based that holding on the "ordinary and popularly understood definition of 'involuntary.'" *Id.* at 293. And the Court noted that there was no contrary on-point precedent, because prior Illinois cases holding that a defendant could not raise an involuntary intoxication defense rested on different factual circumstances, such as defendants who voluntarily took illegal drugs or voluntarily mixed alcohol with medication despite doctors' orders not to do so. *Id.* at 293-94 (collecting cases).

Thus, a review of the case law shows that (1) an involuntary intoxication defense based on prescription medication was neither new nor novel at the time of petitioner's trial, (2) no Illinois precedent precluded a defendant from raising such a defense, (3) to the contrary, Illinois courts before and after petitioner's trial permitted defendants to present evidence of involuntary intoxication due to prescription medication, (4) despite facing the same legal landscape as petitioner, the defendant in *Hari* raised an involuntary intoxication defense based on prescription medication and this Court affirmed that he could do so, and (5) for decades, many other jurisdictions have allowed involuntary intoxication defenses based on prescription medication. Under these circumstances, petitioner cannot reasonably argue that the defense of involuntary intoxication based on prescription medication was "unavailable" to him.

2. As a matter of law, petitioner's speculation that he would not have been permitted to raise an involuntary intoxication defense does not make his evidence "new."

Petitioner's claim fails for an additional, independent reason: untested speculation that a trial court would have excluded certain evidence as irrelevant does not make that evidence "new." Indeed, this Court has squarely held that evidence is not considered "new" even though at trial the circuit court *expressly ruled* that the evidence was irrelevant and, thus, inadmissible. *See Bailey*, 2017 IL 121450, ¶ 45. The petitioner in *Bailey* sought leave to file a successive postconviction petition, arguing that he had medical evidence proving that an injury to his left wrist demonstrated that he could not have committed his charged offenses. *Id.* Because the petitioner knew of his injury at the time of trial, this Court held that the evidence was not new, and thus the petitioner could not file a successive petition, even though the trial court had ruled "that the evidence was irrelevant [and] refused to allow him to present it at trial." *Id.*

Plainly, if a trial court's express ruling that the evidence was irrelevant and inadmissible does not render the evidence "new," then the same must be true when the petitioner made no attempt to introduce the evidence at trial and merely speculates that the trial court would have ruled it inadmissible. *See id.*; *see also Edwards,* 2012 IL 111711, ¶ 37 (petitioner could not argue that certain witnesses were "unavailable" to him at trial and thus "new," even though they told trial counsel that they refused to testify,

where counsel made no attempt to bring them to trial and introduce their testimony, such as by a subpoena).

This Court's application of the analogous "cause and prejudice" test for leave to file successive petitions is also instructive.[6] In *Guerrero*, for example, this Court applied the "cause and prejudice test" to the petitioner's request for leave to file a successive postconviction petition, which alleged that he was not properly admonished about the term of mandatory supervised release he was required to serve. 2012 IL 112020, ¶ 20. Although the record showed that the petitioner was aware of the facts underlying his claim years earlier, when he was pursuing other collateral litigation, he argued that he could not have raised his claim then because at that time the law was against him. *Id.* ¶¶ 18, 20. This Court acknowledged that, when petitioner first learned of his admonishment claim, an Illinois Supreme Court case with "strikingly similar" facts had been decided against him; however, the Court held that this fact did not excuse the petitioner's failure to raise his claim because "the lack of precedent for a position differs from 'cause' for failing to

[6] The test applicable to whether a petitioner may file a successive petition depends on the claim he raises: (1) a petitioner claiming that he is innocent must present new evidence showing that it is more likely than not that he would be acquitted; while (2) a petitioner raising a constitutional claim (such as ineffective assistance of counsel) must meet the "cause and prejudice" test, which requires him to prove that an external factor prevented him from raising the error earlier and the error so infected the trial that his conviction violates due process. *See, e.g.*, *Edwards*, 2012 IL 111711, ¶¶ 32-33; *People v. Smith*, 2014 IL 115946, ¶ 23. Both tests require the petitioner to show that he could not have raised his claim earlier.

raise an issue, and a defendant must raise the issue, even when the law is against him, in order to preserve it for review." *Id.* ¶ 20 (collecting cases).

Similarly, although it deals with an initial postconviction petition, this Court's decision in *People v. English*, 2013 IL 112890, is also instructive. The petitioner in *English* was convicted of felony murder based on the predicate felony of aggravated battery of a child. *Id.* ¶ 15. At the time of his conviction, this Court's precedent held that felony murder could be based on forcible felonies such as aggravated battery. *Id.* ¶¶ 26-27. After the petitioner's direct appeal concluded, this Court held in *People v. Morgan*, 197 Ill. 2d 404 (2001), that forcible felonies (such as child battery) that are inherent in the murder may not serve as the predicate for felony murder. The petitioner filed a postconviction petition, arguing that his felony murder conviction was "improper" under *Morgan* and its progeny. *English*, 2013 IL 112890, ¶ 15.

This Court acknowledged that, at the time of the petitioner's direct appeal, the law was against him. *Id.* ¶¶ 26-27, 31. However, the Court nevertheless held that the petitioner's claim was barred because he could have raised it on direct appeal. As the Court noted, "the defendant in *Morgan* faced the same legal landscape as [the petitioner] but nevertheless argued on direct appeal that aggravated battery was not a proper predicate for felony murder because it lacked an independent felonious purpose. . . . If the defendant in *Morgan* was able to raise the issue under such circumstances, [the petitioner] also could have done so." *Id.* ¶ 31.

The rules applied in *Bailey*, *Edwards, Guerrero*, and *English* are not only fair and sensible, they also are necessary for a just and efficient legal system. Criminal litigation requires a defendant to attempt to introduce the purportedly exculpatory evidence he has at trial; if the trial court finds the evidence inadmissible, the defendant can challenge that evidentiary ruling on direct appeal. Conversely, if defense counsel fails to introduce the evidence at trial, the defendant may bring an ineffective assistance of counsel claim. But in either case what the defendant may *not* do is bring a successive postconviction petition alleging an actual innocence claim because the evidence at issue is not "new." *See, e.g.*, *Bailey*, 2017 IL 121450, ¶ 45; *see also Coleman*, 2013 IL 113307, ¶ 96 ("New means the evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence").

To hold otherwise would multiply litigation and collateral proceedings, give defendants bad incentives to withhold claims, and provide numerous bites at the apple, as the present case illustrates. Petitioner first pursued an insanity defense, arguing at trial and on appeal that he had depression so severe that he was unable to differentiate right from wrong. *Supra* pp. 15-16. When that defense failed, he filed a postconviction petition arguing that counsel erred by not seeking to suppress his confession. C337. When that claim failed, he filed a petition for relief from judgment arguing that his shooting of Tina was "accidental." C416-21. After that claim failed, he filed a

successive postconviction petition arguing that counsel erred by not presenting evidence of petitioner's medication and the possible effects of serotonin syndrome. C952-55, 959-61. That claim failed too, so petitioner now wants to abandon his earlier theories and argue that he is innocent because his medication caused the shooting. This is precisely the type of piecemeal litigation that wastes judicial resources, undermines the finality of verdicts, and is foreclosed by this Court's precedent. *See, e.g., Tenner*, 206 Ill. 2d at 398 ("We refuse to sanction piecemeal postconviction litigation[.]").

3. Petitioner's remaining arguments fail.

Petitioner's remaining arguments lack merit. First, he argues that this Court should adopt a new rule that broadly holds that "facts supporting a newly available affirmative defense" always constitute "new evidence for purposes of presenting an actual innocence claim in a postconviction petition despite those facts being known at the time of trial." Pet. Br. 17, 26-27. Yet petitioner's proposed new rule contravenes this Court's existing precedent, which provides that (1) actual innocence claims must be based on new evidence that could not have been discovered before trial, and (2) criminal defendants must present their evidence and arguments at the first opportunity to do so, even if they believe the law is not in their favor, and they may not engage in piecemeal litigation. *Supra* pp. 32-36.

Petitioner does not acknowledge this authority, let alone provide an argument that it is poorly reasoned, unworkable, or should otherwise be

overturned. *See People v. Williams*, 235 Ill. 2d 286, 294 (2009) (requirements for departing from stare decisis). Nor could he credibly do so because, as discussed, this Court's precedent is fair and reasonable, easily understood and applied, and necessary for the operation of a just and efficient legal system. Moreover, petitioner fails to consider that actual innocence claims are necessarily fact dependent and unique, and thus must be judged on their individual merits, facts, and procedural histories, which does not lend itself to the broad rule that he requests. Rather, the best course is to continue to apply this Court's existing precedent and evaluate each actual innocence claim individually, on its own merits and unique circumstances.

Second, the two cases that petitioner cites do not compel a different result. *See* Pet. Br. 24-25 (citing *Alberts* and *Montes*). The Fourth District in *Alberts* held that an involuntary intoxication defense based on side effects of medication was unavailable before *Hari* because *Hari* "announced a new rule" that was "beyond the plain language of the [involuntary intoxication] statute." *People v. Alberts*, 383 Ill. App. 3d 374, 382 (4th Dist. 2008). But that holding is objectively incorrect because this Court expressly stated in *Hari* that its ruling was based on "the plain meaning of the involuntary intoxication affirmative defense statute." *Hari*, 218 Ill. 2d at 292; *see also id.* at 296 ("Because we find that the plain language of the statute reveals legislative intent, we need not resort to other interpretive aids"). Moreover, the appellate court in *Alberts* failed to consider that the involuntary

intoxication defense could not be considered unavailable given that the defendants in *Smith* and *Hari* presented evidence of their purported involuntary intoxication due to prescription medication in their initial trials (*i.e.*, before this Court decided *Hari*). *Supra* pp. 28-31. In addition, *Alberts* also failed to consider this Court's precedent in cases such as *Bailey*, *Edwards*, *Guerrero*, and *English*, and the important policies underpinning those decisions. *Supra* pp. 32-36. Petitioner's only other case, *Montes*, merely cites *Alberts* in dicta, does not concern involuntary intoxication or a successive postconviction petition, and is therefore irrelevant to the issues presented in this appeal. *People v. Montes*, 2015 IL App (2d) 140485, ¶ 24.

Finally, petitioner argues that if his evidence is not deemed "new," he would be in a procedural lurch, where he could not raise an actual innocence claim and he "would not be able to successfully raise this claim as ineffective assistance of counsel because counsel would not be found to have acted unreasonably for failing to argue an affirmative defense not recognized by the Illinois courts at the time of trial." Pet. Br. 26. As discussed, this argument rests on the false premise that an involuntary intoxication defense was unavailable to petitioner at trial. *Supra* pp. 28-36. And the argument overlooks additional reasons that an ineffective assistance claim would be meritless: (1) petitioner cannot establish deficient performance where counsel retained a forensic psychiatrist to examine petitioner before trial, and that expert concluded that the shooting was a result of the depression that

petitioner had suffered for 18 months and placed no blame on the medication he had taken for a mere two weeks; and (2) petitioner cannot establish prejudice because he has not presented evidence supporting a claim that he actually had serotonin syndrome, or that any side effects made it impossible for him to understand that murder is wrong. These fatal flaws echo the fatal flaws in his innocence claim, they do not contradict them, and thus there is no inconsistency or unfairness in concluding that both claims are meritless.

Moreover, even if there were some inconsistency, it would not matter, as this Court already held in *English*, 2013 IL 112890, ¶ 37. There, the petitioner argued that he was "left without any means of remedying his improper felony-murder conviction" because (1) on the one hand, the court denied his improper-conviction claim "because it could have been raised on direct appeal but was not, even though the law at the time did not support such a claim," and (2) on the other hand, "the court found that counsel was not ineffective in failing to raise the issue on direct appeal because the law at the time did not support such a claim." *Id.* ¶ 36. This Court held that although the petitioner was correct that the denial of his improper-conviction claim "leaves him without a remedy, the limited scope of postconviction review compels this result where, as here, [petitioner] failed to raise his claim on direct appeal when he had the chance." *Id.* ¶ 37.

In sum, petitioner's actual innocence claim fails because he has identified no new evidence.

B. Petitioner Cannot Show that it is "More Likely than Not" that He Would Be Acquitted.

Even if petitioner's evidence were considered "new," his claim would still fail. Actual innocence claims are "rarely successful" in part because the petitioner must raise the probability, on the pleadings, that it is "more likely than not" that "no reasonable juror" would find him guilty. *Edwards*, 2012 IL 111711, ¶¶ 32-33; *see also People v. Robinson*, 2020 IL 123849, ¶ 61 (the supporting evidence must "raise the probability that it is more likely than not that no reasonable juror would have convicted petitioner").

This standard requires careful review of the petitioner's proffered evidence and its potential effects on the verdict, as illustrated by *Edwards*. There, this Court affirmed the denial of a motion for leave to file a successive petition, holding that an affidavit from a man attesting that he (the affiant) was the shooter, and that the petitioner (a minor) "had nothing to do with this shooting" and was neither "a part [of nor] took part in this crime," was insufficient to meet the actual innocence standard, even though no eyewitnesses placed the petitioner at the scene, no physical evidence tied him to the murder, and his inculpatory statements were allegedly coerced. *Edwards*, 2012 IL 111711, ¶¶ 4-10, 39-40. The Court reached that conclusion because, although the shooter's affidavit stated that the petitioner had nothing to do with the shooting and took no part in the crime, "critically, [it] does not assert that petitioner was not *present* when the shooting took place,"

and thus it failed to show that he could not be convicted based on accountability. *Id.* ¶ 39 (emphasis in original).

Petitioner's evidence likewise fails to show that it is more likely than not that he would be acquitted. A defendant's involuntary intoxication excuses his offenses only if his intoxicated condition deprives him of the ability "either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." 720 ILCS 5/6-3. Petitioner fails to make that showing for two independent reasons.

First, petitioner has presented no evidence attesting that he actually had serotonin syndrome, much less that it rendered him intoxicated within the meaning of the statute. Petitioner's evidence merely shows that some (not all) people who take Buspar and Desyrel together might (or might not) experience various side effects: the medical literature attached to his petition states that in "rare" cases, serotonin syndrome "may" result from taking a combination of Buspar and Desyrel, which can cause symptoms ranging from simple nausea to a coma. C1117.

Critically, petitioner provides no affidavit from a doctor or any medical report attesting that he *personally* suffered from one of the "rare" cases of serotonin syndrome, let alone that he experienced side effects that left him unable to understand that it was wrong to shoot Francee and her mother, as required to satisfy the Act's pleading standards. Petitioner's speculation that he might, at an evidentiary hearing, be able to find someone to attest both

that he had serotonin syndrome and that it rendered him unable to understand the criminality of his actions, Pet. Br. 28, is akin to a petitioner who says that he is innocent because it is possible that someone, somewhere might be able to provide him an alibi defense, but who does not present an affidavit from any such person. That is an insufficient basis to grant leave to file a successive petition. *See, e.g.*, *People v. Harris*, 224 Ill. 2d 115, 142 (2007) (unsigned affidavits from potential witnesses are insufficient to avoid summary dismissal of petition because they "were merely what [petitioner] wished these people would say").

Second, even setting all that aside, the unrebutted evidence shows that petitioner's claim that his medication caused him to shoot Francee and her mother has no chance of success. To begin, the evidence shows that long before petitioner started taking the medication, he had a history of violence against women and was already making concrete plans to kill Francee:

- Years before he began taking the medication, petitioner was convicted of battering his ex-wife and her mother, R417-18, SC6;
- Six months before petitioner began taking the medication, a witness saw petitioner slap Francee, grab her by the throat, bite her finger hard enough to draw blood, and push her to the ground, R779-81;
- Before petitioner began taking his medication, Francee told four people that petitioner had (1) held a gun to her head and considered shooting her, and (2) told her that if saw her talking to Kevin Trovero, he would kill them both, R12-13, 55-56, 77-78, 114-15;

- Petitioner's sister-in-law testified that before petitioner began taking his medication, he told her that (1) he wanted to kill Francee, and (2) he had held his shotgun as he sat next to a sleeping Francee and considered shooting her, R753, 766; and

- The typed letters that petitioner left at the scene were written weeks before the shooting, and state that the shooting "isn't a quick decision" and had been in his mind "for a long time," which shows that he had been planning to kill Francee before he began taking his medication, C202, R905.

In addition, nine witnesses saw or spoke with petitioner shortly before the shooting, and he acted normal and not under the influence of any substance:

- Two witnesses — petitioner's neighbor and his girlfriend — saw him the day of the shooting, and testified that he seemed normal, R178-80, 715;

- Six additional witnesses, all of whom had known petitioner for years, saw him 1-3 hours before the shooting, and testified that he seemed normal, and not under the influence, R8-11, 26-27, 30-31, 34-35, 37-39, 49-50; and

- Kevin Trovero's wife spoke with petitioner on the phone about 15 minutes before the shooting, and testified that he was in control of his faculties, R696-98.

Moreover, petitioner's conduct shows that he knew his actions were criminal:

- Petitioner attempted to evade police and first told them that he did not recall what happened, and then that Francee left on her own, before finally admitting those were lies, R206-11, 862, 878-89; and

- The letters that petitioner left for his family show that he was able to understand the criminality of various actions, as they discussed petitioner's desire to "cover most of my tracks" and advised his family to hide his assets and the letters, C202-04.

The testimony of the three law enforcement officers who spoke to petitioner immediately after the shooting further defeats his claims of intoxication:

- The arresting officer testified that petitioner "did not seem to be under the influence of anything," R214, 222; and
- The two law enforcement officers who interrogated petitioner shortly after the shooting testified that he acted normal and did not appear to be under the influence of anything, R843, 852, 860, 972.

Finally, petitioner's own statements to police are fatal to his claim:

- Petitioner told police he was not intoxicated, R861, 972-73;
- Petitioner told police he had been planning to kill Francee before he met with Dr. Brady (the doctor who prescribed his medication), R908-09, 1006-1010; and
- Petitioner told police that he had not felt any different since he met with Dr. Brady, R906, 948, 1009.

Given this record, petitioner cannot show that it is more likely than not that a reasonable jury would accept his involuntary intoxication defense.

Lastly, petitioner's remaining arguments are easily dismissed. Petitioner's claim his medications caused him to have increased suicidal ideations before the murder, Pet. Br. 31-32, is not supported by the record, which shows that (1) no medical professional has tied petitioner's alleged

increase in suicidal ideation to serotonin syndrome, (2) in the weeks leading up to the murder, petitioner possessed a gun and had time alone, but did not commit suicide, and (3) rather than committing a murder-suicide (as might be expected if petitioner were suicidal), petitioner murdered Francee, shot her mother in the head, and fled the scene. More importantly, petitioner's argument is irrelevant because any increased suicidal ideation did not provide a legal excuse to murder Francee or shoot her mother.

Petitioner's claim that his medication put him in an "altered state of consciousness" that made him "able to shoot" Francee after contemplating it for months, Pet. Br. 30, fails for the reasons discussed above, including that (1) petitioner has no affidavit from a doctor attesting that his medication caused an "altered state of consciousness" that left him unable to appreciate that his actions were criminal, (2) a dozen witnesses testified that they spoke with petitioner immediately before or after the shooting, and he seemed normal, in control of his faculties, and not under the influence of anything, and (3) petitioner told police that he did not feel intoxicated and he had not felt any different since meeting with Dr. Brady. Further, as the appellate court observed, petitioner does not explain what he means by "altered state of consciousness," let alone show that it left him unable to understand or comply with the law. PA36. Petitioner's argument that what he means can be "clarified" at a third-stage evidentiary hearing, Pet. Br. 30, ignores that at this stage he must show, on the pleadings, the probability that it is "more

likely than not" that "no reasonable juror" would find him guilty. *Edwards*, 2012 IL 111711, ¶¶ 32-33.

Petitioner is correct that an insanity defense (which he unsuccessfully raised at trial) and an involuntary intoxication defense (which he now raises) are essentially the same, in that both concern whether the defendant was able to appreciate the criminality of his conduct. Pet. Br. 33; *see also* 720 ILCS 5/6-2(a) (insanity); 720 ILCS 5/6-3 (involuntary intoxication). That the jury rejected his temporary insanity defense is further proof that his involuntary intoxication defense cannot meet the actual innocence standard. Petitioner's contention that the People would have the burden to disprove involuntary intoxication is true only if petitioner presents evidence showing that (1) he had serotonin syndrome, and (2) it left him unable to understand the criminality of his actions, which petitioner has failed to do. *See* 720 ILSC 5/3-2(a) (defendant must present evidence of affirmative defense before prosecution has burden to disprove it). In any event, the People would easily carry any such burden based on the evidence discussed above showing that petitioner's medication cannot be blamed for his crimes. Petitioner's related argument that the appellate court "seemed to erroneously conflate an insanity defense with an involuntary intoxication defense," Pet. Br. 32, is inconsistent with the appellate court's opinion, which correctly analyzed petitioner's lack of evidence that his medication is to blame; moreover, petitioner's argument is irrelevant, given that this Court's review is de novo.

Petitioner's assertion that the evidence was closely balanced because jurors sent a note to the judge asking to see particular evidence, is defeated by his own authority. *See People v. Wilmington*, 2013 IL 112938, ¶ 35 (that jury sent notes regarding exhibits did not mean the evidence was closing balanced because "[c]areful consideration of the evidence adduced and exhibits admitted is what we expect of jurors in any trial") (cited Pet. Br. 33). Petitioner's only other case is inapposite because there the jurors' notes said that they were deadlocked. *People v. Lee*, 2019 IL App (1st) 162563, ¶ 71.

Petitioner's final argument — that "there would have been no reason" for his expert, Dr. Chapman, to testify at trial that prescription medication caused petitioner's symptoms and the shooting because petitioner was not raising an involuntary intoxication defense at that time — ignores that the first obligation of every witness is to tell the truth. Pet. Br. 34. Chapman examined petitioner before trial, he knew that petitioner was taking medication, and serotonin syndrome was established in the medical community, yet Chapmen attested that the shooting was a result of the depression that petitioner had suffered for 18 months, without placing blame on the medication petitioner had taken for two weeks. Petitioner's unsupported suggestion that Chapman would materially change his opinion (now blaming medication, and not depression) to fit petitioner's changed theory, is not a valid basis for an actual innocence claim.

CONCLUSION

This Court should affirm the appellate court's judgment.

January 5, 2021

Respectfully submitted,

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RULE 341(c) CERTIFICATE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service is 48 pages.

/s/ Michael L. Cebula
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PROOF 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 January 5, 2021, the foregoing **Brief of Respondent-Appellee People of the State of Illinois** was (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy from my email address to the email addresses below:

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Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail thirteen copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

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