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FIRST DIVISION
September 30, 2026

No. 1-25-0237

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County
	)	
v.	)	No. 03 CR 1532
	)	
ARTURO SIMON,	)	The Honorable
	)	Joanne F. Rosado,
Petitioner-Appellant.	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justice Howse concurred in the judgment.
Presiding Justice Ellis specially concurred.

ORDER

- ¶ 1 *Held:* The trial court's dismissal of the actual innocence claim raised in petitioner's successive postconviction petition is reversed, and this cause is remanded for a third-stage evidentiary hearing as to that claim. The trial court's dismissal of the proportionate penalties claim raised in petitioner's successive postconviction petition is vacated. Upon remand, petitioner's counsel is directed to renew compliance with Illinois Supreme Court Rule 651(c) as to that claim only. Following counsel's renewed compliance with Rule 651(c), further second stage proceedings shall be had with respect to the proportionate penalties claim only.
- ¶ 2 Petitioner Arturo Simon appeals the trial court's second-stage dismissal of his successive petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2014)).

He argues that his petition made a substantial showing of actual innocence to justify an evidentiary hearing and that his appointed postconviction counsel did not provide reasonable assistance when he amended the *pro se* petition to add a proportionate penalties challenge to petitioner's sentence. We agree that a third-stage evidentiary hearing is necessary on petitioner's claim of actual innocence. We further hold that, in consideration of recent amendment of the Post-Conviction Hearing Act, remand of petitioner's proportionate penalties claim is necessary for his counsel to renew compliance with Illinois Supreme Court Rule 651(c) (eff. July 1, 2017) and for further second stage proceedings as to that claim only if it is amended.

¶ 3

I. BACKGROUND

¶ 4

The events that led to petitioner's conviction for first degree murder and attempt first degree murder under the theory of accountability occurred at about 8:30 p.m. on December 17, 2002, when 15-year-old Marilu Socha was shot and killed while standing on a sidewalk next to her boyfriend, Joe Maldonado, near South Kolin Avenue and West 30th Street in Chicago. This location was "Two Six" gang territory, and Maldonado was then a Two Six gang member. Three gunshots were fired from the rear driver's side window of a passing car, which Maldonado and other witnesses described as a green car with a broken driver's side window covered in plastic. Four Hispanic male occupants were inside the car at the time. They identified themselves as members of the rival Latin Kings gang by shouting "King love" as they drove away after the gunshots were fired.

¶ 5

A little over an hour later, petitioner and a codefendant, Arturo Bentazos, were arrested after police located a car matching the above description parked in front of a house at 2401 South Spaulding Avenue. Bentazos was sitting alone inside the car when police arrived. Petitioner was inside the house, but he came outside and was arrested. Although evidence of this was not put

before the jury at petitioner's trial, they were initially arrested in connection with a separate robbery that had occurred nearby that same night after the shooting of Socha and Moldonado, which was also reported to involve a car matching the same description. See *infra* ¶ 13. They were taken to Area 4 detective headquarters for questioning.

¶ 6 At petitioner's jury trial in 2005, where he was tried separate from any codefendants, the evidence showed that petitioner was first asked about the shooting at 11:15 p.m. that night and denied any knowledge of it. However, when the detectives returned shortly after midnight and told petitioner that he had been identified as an occupant of a car that was involved in a drive-by shooting, petitioner confessed that he had been in the car when the shooting occurred. He told the detectives that he had not been the shooter but that his role had been to keep a lookout for police and any other Two Six gang members who might return fire. He also told them that the driver of the car had been Bentazos; that the shooter occupying the rear driver's side seat had been "Chilango," later identified as codefendant Daniel Ochoa; and that the rear passenger-side occupant of the car had been "Spook," later identified as codefendant Eduardo Torres.

¶ 7 The detectives' investigation continued overnight and into the following afternoon. All questioning by the detectives was in Spanish, which was the language petitioner spoke. Petitioner was eventually interviewed in English by Assistant State's Attorney Jennifer Walker (ASA Walker) with translation by the lead detective on the case, Adrian Garcia. This ultimately resulted in petitioner agreeing to memorialize his confession in the form of a statement handwritten in English by ASA Walker, which detective Garcia translated into Spanish for petitioner. Petitioner, Garcia, and ASA Walker all signed the statement, and it was admitted into evidence and read to the jury by Garcia during his testimony.

¶ 8 Petitioner's statement was that he was 19 years old, had attended school in Mexico through only the sixth grade, and had been a member of the Latin Kings for two years. The Latin Kings were "always at war" with the Two Six. On December 17, 2002, he was picked up by his friend Bentazos, who drives a car with plastic on the driver's side window. After drinking beer and playing pool, they went cruising in Bentazos's car. Near 25th Street and Spaulding Avenue, they saw Torres, who was also a Latin King then known to petitioner only as "Spook." Bentazos was not yet a Latin King, but he was expected to become one the following Sunday after getting to know other Latin Kings and enduring a beating. Torres joined them in the car and sat in the back seat. They first went to a bar named the Black Hole to play video games and pool. They left the bar with an initial plan to buy more beer, but they had no money with which to do so. Torres thus suggested they drive around to search for Ochoa, whom petitioner then knew only as "Chilango," because Ochoa owed \$300 to Torres.

¶ 9 Petitioner's statement continued that they drove around for nearly an hour before eventually finding Ochoa, who then also joined them in the back seat of the car. They went to Ochoa's house, and Ochoa went inside. Although Ochoa was not a Latin King, he had a gun when he came back to the car. They began driving around again, and Torres instructed Bentazos to "drive over to Two Six territory." Petitioner knew when Torres said this that he "wanted to shoot at some Two Six guys because they were at war with Two Six." At this point, Torres was wearing a gold hoodie, and gold was one of the gang colors of the Latin Kings. Because Torres did not want any Two Six members to see his gold hoodie, he asked petitioner to borrow his jacket. Petitioner gave Torres his jacket. Torres instructed Ochoa to do the shooting. Petitioner stated that he "knew he was to watch out for the police" and that all four of them were looking for Two Six members.

¶ 10 After about ten minutes, the group spotted a Two Six member, which petitioner explained meant that the person “made the hand sign of the Two Six.” Ochoa then pulled out the gun and fired it three times. Petitioner did not see Ochoa fire all three times because he was looking on the passenger side and in front of them for police and to make sure that other Two Six gang members were not around who might return fire. After Ochoa finished firing the gun, Torres yelled “ ‘King love’ ” in English to tell the Two Six that the Latin Kings were in their neighborhood. Torres then told Bentazos to drive away fast. Torres and Ochoa got out of the car at 24th Street and St. Louis Avenue, and petitioner saw Ochoa had a black handgun at that time. Petitioner and Bentazos went to go buy a 40-ounce beer and then drove to the home of petitioner’s friend “Cubbie” at 24th Street and Spaulding Avenue. Petitioner went inside Cubbie’s home while Bentazos stayed in the car. Petitioner saw that police had arrived and were talking to Bentazos. The police then knocked on Cubbie’s door and asked petitioner to step outside. Petitioner did so and was then arrested.

¶ 11 In addition to petitioner’s statement above, forensic evidence was also presented at his trial connecting him to the car and the shooting. Forensic investigator William Sullivan testified that he took possession of the clothing that petitioner and Bentazos had been wearing upon their arrival at Area 4 headquarters. Petitioner had been wearing a gray hooded sweatshirt and black pullover, and forensic analysis of the black pullover revealed the presence of gunshot residue on its left cuff. Sullivan further testified that the right cuff of the sweatshirt taken from Bentazos also tested positive for gunshot residue. A pocketknife containing petitioner’s fingerprint was also found on the floor of the car.

¶ 12 Petitioner did not testify at trial or present any evidence in his defense. The jury returned a verdict finding him guilty of first degree murder as to Socha and of attempt first degree murder as to Maldonado.

¶ 13 Petitioner was sentenced to 45 years' imprisonment on the first degree murder conviction and 10 years' imprisonment on the attempt first degree murder conviction, to run consecutively. At his sentencing hearing, evidence was presented concerning the robbery that had allegedly also occurred on December 17, 2002, after the shooting of Socha and Maldonado. Steven Miranda testified that at about 9:30 p.m. that evening, he was at 25th Street and Albany Avenue when two men arrived in a car with a broken driver's side window with plastic over it. After they got out of the car, a man whom he identified in court as petitioner held him and took his wallet, while a man whom he identified in court as Bentazos held a baseball bat and threatened to hit him. Miranda testified that the men took \$80 from his wallet and drove away.

¶ 14 On direct appeal to this court, petitioner challenged the propriety of certain jury instructions and comments in the State's closing argument. He also challenged his sentence as excessive in consideration of his young age of 19 at the time of offense, lack of criminal background, difficult social history, and degree of participation in the offense. This court affirmed both his conviction and sentence. *People v. Simon*, No. 1-05-2562, 377 Ill. App. 3d 1143 (2007) (table) (unpublished order under Supreme Court Rule 23).

¶ 15 In 2008, petitioner filed an initial postconviction petition. It raised claims that he received ineffective assistance of counsel based on counsel's failing to seek suppression of his statement at trial, preventing him from testifying in his own defense, and in failing to investigate two alibi witnesses. Petitioner attached three separate affidavits, each by him, to this petition. In relevant summary, the petition and affidavits asserted that petitioner had told his defense counsel prior to trial that, after being arrested and taken to the police station, he had confessed only to the robbery. It was only after the detectives repeatedly punched him in the stomach while handcuffed, "busted" his nose, and threatened him with additional beatings if he resisted their demands that petitioner

agreed to sign the paperwork that ASA Walker had written for him purportedly confessing his involvement in the shooting. He stated, however, that he “did not supply the information that made up the contents of that statement concerning the murder.”

¶ 16 Instead, petitioner averred, he informed his trial counsel that at about 6:45 p.m. on the day of the shooting, he had asked Bentazos to take him to the home of Fabiola Hernandez, who was the mother of his child. Bentazos dropped him off there at 7 p.m., and he spent about two hours there with Hernandez and his child. He specifically told Bentazos to return at 9 p.m. to pick him up. While he was at Hernandez’s home, he also placed a call from Hernandez’s phone to his girlfriend (Delia Olmos) at about 8:28 p.m. to tell her he would be home late. At around 8:57 p.m., he heard honking outside and saw Bentazos’s green car parked out front. He yelled to Hernandez that he was leaving. He had previously realized that he had left one of his hooded sweatshirts in the front seat of Bentazos’s car, but it was in the back seat when Bentazos returned. Near 25th Street and Albany, petitioner saw a man walking and decided to stick him up. He told Bentazos to pull the car over, and petitioner got out. He approached the man, said this was a stick-up, and then took money out of the man’s wallet. He and Bentazos then went to the liquor store and bought beer with the money obtained in the robbery. He then directed Bentazos to take him to the home of Ricardo Argueta. He was at Argueta’s home for about two minutes before the police arrived. He was identified by the robbery victim, arrested, and taken to a police station for questioning.

¶ 17 The trial court summarily dismissed his initial postconviction petition as frivolous and patently without merit, and this court affirmed that summary dismissal on appeal. *People v. Simon*, No. 1-09-0205, 402 Ill. App. 3d 1191 (2010) (table) (unpublished order under Supreme Court Rule 23). This court found that petitioner’s own confession and the forensic evidence presented against him constituted overwhelming evidence of his involvement, and thus we found that he could not

establish prejudice due to counsel's failure to investigate alibi witnesses. We also found that the record positively rebutted any assertion that petitioner signed the written confession as the result of police abuse, due mostly to the testimony of the detectives involved and ASA Walker, along with photographs showing petitioner unhandcuffed, sitting at a table with food and drink, and without injury to his nose or blood on his face or clothing. Finally, we found that the trial court had questioned petitioner to ensure that he understood that he had the right to testify and was choosing not to do so after discussing the issue with his defense counsel.

¶ 18 On December 26, 2014, petitioner filed *pro se* the successive postconviction petition that is the subject of this appeal. In it, petitioner raised claims (1) that he was actually innocent of the offenses for which he was convicted, based upon newly discovered affidavits from his former codefendants Bentazos and Torres averring that petitioner was not in the car at the time of the shooting, and (2) the violation of his due process rights based on the use at trial of his purported confession, which was obtained involuntarily through physical coercion. Petitioner also attached his own affidavit, which provided materially the same version of events set forth in the affidavits attached to his initial postconviction petition. See *supra* ¶¶ 15-16.

¶ 19 Bentazos's affidavit stated that he had been with petitioner drinking beer and shooting pool from about 1:30 p.m. until 6:45 p.m. on December 17, 2002, at which time petitioner asked him to drive him to his son's mother's house so that he could spend some time with them. Bentazos did this and dropped off petitioner there around 7 p.m. Petitioner asked Bentazos to return and pick him up at 9 p.m., and Bentazos agreed. Petitioner also told him he was leaving his hoodie in the front seat of the car "to make sure that I did return" to pick him up at 9 p.m.

¶ 20 Bentazos's affidavit goes on to state that after dropping petitioner off, he drove to 26th Street and Central Park where he noticed a couple of guys that he knew from the neighborhood. He knew

one of the men as “Uga Uga,” and he knew the other as “Pecas.” Bentazos stated that Pecas asked him if he could borrow his car to go buy some beers. Although Bentazos did not want Pecas to drive his car, Pecas told him that it would not take long and that he had nothing to worry about. Bentazos allowed Pecas to take the car, but he told Pecas to come right back because he had to pick up petitioner later. Bentazos stated that Pecas, Uga Uga, and some other guys jumped into his car and drove away. They returned around 8:50 p.m. and gave the keys back. Bentazos then went to pick up petitioner from his son’s mother’s house, arriving there around 9:00 p.m. or 9:15 p.m. When petitioner got into the car, he was looking for his hoodie. After finding it in the back seat, he asked Bentazos whether anyone had used his hoodie because he had left it in the front seat. Bentazos responded that he did not know and did not think so. He told petitioner that he had allowed a guy he knew to borrow the car but that he doubted the guy had used the hoodie. Petitioner then put the hoodie on, and they proceeded to rob the man they saw on 25th Street and Albany. They were then arrested.

¶ 21 Bentazos’s affidavit goes on to state that he knows that petitioner was not involved in the shooting of Socha because Bentazos had dropped him off at his son’s mother’s house at 7:00 p.m. and did not pick him up from there until 9:00 p.m. or 9:15 p.m. He states in it that the only reason he told the detectives that petitioner was involved in the shooting was because, in the police car on the way to the police station, the officers had threatened to beat him and to incarcerate him for the rest of his life if he did not say that petitioner was involved. He indicated that the officers told him that he and petitioner were the “prime suspects” because “we had been arrested in my car they said it didn’t really matter because we would both be charged with first degree murder if we survived the beating they were going to give us.” He goes on to state that once he arrived at the police station, one of the officers punched him in the stomach to the point where he could not breathe and

then slammed his head against a wall. The officer also told him that “it’s gonna get worse if I didn’t say that [petitioner] was involved.” Bentazos stated that he was scared and did not want to die, “so I said that [petitioner] was in the car too.”

¶ 22 Torres’s affidavit stated that he was “a witness in the case” involving the murder of Socha and attempted murder of Maldonado, “and it’s a fact that [petitioner] was not in the car that was identified as the getaway car on the night the shooting happened.” Torres states in it that petitioner “was nowhere in the vicinity, nor was he in any way involved in this crime, nor did he have knowledge of this crime, until he was arrested, questioned, and informed by the police.” Torres stated in it that he was in the car on the night of the shooting and pled guilty to attempted murder. He wrote he had refused to testify in petitioner’s defense so as to not incriminate himself, but that he was now willing to testify that everything stated in his affidavit was accurate.

¶ 23 Although it does not appear from the record that petitioner requested that the trial court grant leave to file a successive postconviction petition, the trial court nevertheless ordered it docketed for second stage proceedings. The trial court also appointed the Cook County Public Defender to represent petitioner in those proceedings.

¶ 24 On December 13, 2019, petitioner’s appointed counsel filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. July 1, 2017). Counsel stated that he had consulted with petitioner in person, by phone, and by mail to ascertain his contentions of deprivation of constitutional rights; that he had examined the record of proceedings at petitioner’s trial and sentencing; and that he had filed a supplemental petition to provide an adequate presentation of petitioner’s contentions.

¶ 25 The supplemental petition, which was filed that same day, incorporated the claim of actual innocence but attached an affidavit from Fabiola Hernandez. Hernandez’s stated in that affidavit that she and petitioner had two sons together but no longer lived together as of December 17, 2002.

She stated that petitioner “would visit my home every afternoon to spend time and play with our two sons” and that “[h]e would stay some three to four hours.” She stated that she recalled petitioner “visited us on December 16 and 17, 2002,” and that she then did not hear from him again until several weeks later. She learned in the meantime that he had been arrested for murder. She wrote, “I recall that [petitioner] asked me to testify on his behalf at his trial that he was with me and his sons on December 17, 2002, the night of the murder, which was true.” She wrote that she “refused at that time to testify because I was afraid of my immigration status and I did not want to jeopardize both mine and my children’s lives.” She wrote that she was now willing to testify.

¶ 26 The supplemental petition filed by postconviction counsel also added a new claim not raised in the *pro se* petition challenging petitioner’s sentence aggregate 55-year sentence under the proportionate penalties clause of the Illinois Constitution. It was argued in this new claim that, although it was mentioned at sentencing that petitioner was only 19 years old at the time of the offense, “evolving studies of brain science on juveniles and young adults were not presented to the trial court.” Accordingly, a new sentencing hearing was sought in which the trial court could “assess how [petitioner’s] life history should impact his conviction and sentencing.” Although one scientific paper was attached as an exhibit, no further allegations were pled as to any specific facts about petitioner or his life history showing how his sentence was unconstitutional as-applied.

¶ 27 A motion to dismiss was not filed by the State until July 22, 2024, which was thereafter amended on November 18, 2024, the day before oral argument. The State argued that the affidavits attached to his petition and supplemental petition were insufficient to make a substantial showing of actual innocence. As to the proportionate penalties claim, the State argued that petitioner failed to meet the cause-and-prejudice test necessary to raise a proportionate penalties claim for the first time in a successive postconviction petition. It also argued that the supplemental petition merely

cited to case law involving as-applied proportionate penalties claims without explicitly alleging how this provision applied to him or demonstrating how it was violated in his particular circumstances. It also raised various other arguments for dismissal not pertinent to this appeal.

¶ 28 Petitioner's counsel did not file any written response to the State's motion to dismiss. At oral argument, petitioner's counsel stated that he was going to focus only on the actual innocence claim and the substantial showing on all elements of actual innocence made by the affidavits of Bentazos, Torres, and Hernandez. Counsel made no argument as to the proportionate penalties claim. At the conclusion of oral argument, the trial court stated that it was taking the matter under advisement.

¶ 29 On January 30, 2025, the trial court orally issued its ruling granting the State's motion to dismiss the successive postconviction petition in its entirety. The trial court reasoned that none of the three witnesses were newly discovered, stating that petitioner knew about all of them as of the time of trial and could have called his codefendants to testify. It also reasoned that none of the affidavits were sufficiently conclusive to probably change the result on retrial. It stated that Bentazos was not providing petitioner with an alibi because he merely stated that he dropped him off but "is not providing any additional information as to why he knows that [petitioner] wasn't there, wasn't involved in the shooting." The trial court reasoned that Torres's affidavit did not give any details, and nothing about his statement "would support that [petitioner] wasn't, in fact, in the car and didn't, in fact, commit this crime." And the trial court similarly reasoned that Hernandez's affidavit "doesn't completely say he was there at this time" or "give all the details that would be necessary" to likely change the outcome on retrial. As to the proportionate penalties claim, the trial court dismissed it based on the failure to show "cause" to bring it in a successive petition, reasoning that a youth-based challenge to a sentence was a claim he could have raised "at any point in time"

under Illinois law. The trial court also stated additional grounds for dismissal not pertinent to this appeal. Petitioner filed a notice of appeal that same day, and this appeal followed.

¶ 30

II. ANALYSIS

¶ 31

A. Actual Innocence Claim

¶ 32

Petitioner contends on appeal that he should be granted a third-stage evidentiary hearing based upon the affidavits of Bentazos, Torres, and Hernandez because these constitute newly discovered evidence conclusively showing that he was not present for the shooting of Socha and Maldonado. He contends these affidavits make a substantial showing of his actual innocence, and thus the trial court erred in dismissing his petition without an evidentiary hearing.

¶ 33

The Post-Conviction Hearing Act provides the statutory means by which an incarcerated criminal defendant may challenge his or her conviction or sentence based upon a substantial deprivation of federal or state constitutional rights that occurred at trial or sentencing. 725 ILCS 5/122-1(a)(1) (West 2014). Postconviction cases are characterized as having three stages. The successive postconviction petition in this case was advanced past the leave-to-file stage and is presently at the second stage, wherein counsel may be appointed to represent a *pro se* petitioner who is indigent and the State is authorized to file a motion to dismiss the petition. *Id.* §§ 122-4, 122-5. For a successive postconviction petition raising an actual innocence claim to overcome a motion to dismiss at the second stage, “[a] petitioner must make a substantial showing of actual innocence such that an evidentiary hearing is warranted.” *People v. Sanders*, 2016 IL 118123, ¶ 37. This requires the presentation of evidence that is (1) newly discovered, (2) material and not merely cumulative, and (3) of such conclusive character that it would probably change the result on retrial. *Id.* ¶ 46 (citing *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009)).

¶ 34 Only the third element involving “conclusiveness” is at issue in this appeal. In its appellee brief, the State expressly concedes that the evidence in the affidavits of Bentazos, Torres, and Hernandez qualifies as newly discovered, material, and noncumulative. The State challenges only whether the affidavits set forth evidence that is of such conclusive character that it would probably change the result on retrial. The conclusiveness of new evidence is the most important element of an actual innocence claim. *People v. Washington*, 171 Ill. 2d 475, 489 (1996). The ultimate question is whether the new evidence places the trial evidence in a different light and undermines the court’s confidence in the judgment of guilt. *People v. Robinson*, 2020 IL 123849, ¶ 48.

¶ 35 In evaluating any second-stage motion to dismiss, courts must accept as true both the well-pleaded factual allegations of the petition and its supporting evidence “unless they are positively rebutted by the record of the original trial proceedings.” *Sanders*, 2016 IL 118123, ¶ 48. We must also liberally construe the allegations in favor of the petitioner. *Id.* ¶ 31. Credibility is not an issue at the second stage of postconviction proceedings, as determinations involving credibility may be made only at a third-stage evidentiary hearing. *Id.* ¶ 42. The requirement of making a substantial showing of a constitutional violation is a measure of the legal sufficiency of the petitioner’s well-pleaded allegations, which if proven at an evidentiary hearing would entitle a petitioner to relief. *People v. Dupree*, 2018 IL 122307, ¶ 29.

¶ 36 This court’s recent precedent establishes that, in evaluating affidavit statements in an actual innocence claim at the second stage, applying the above principles means we accept that a juror would find the testimony as set forth in the affidavit to be believable. *People v. McCoy*, 2023 IL App (1st) 220148, ¶ 14; *People v. Wilson*, 2022 IL App (1st) 192048, ¶ 75; see *Robinson*, 2020 IL 123849, ¶¶ 59 n.2, 60 (indicating at leave-to-file stage of actual innocence claim that taking an affidavit as true means assuming testimony would be believed, not merely that affiant would testify

consistently with its content). “ ‘ “We then ask whether it is more likely than not that no reasonable juror, hearing *and believing* this evidence, alongside all the other evidence presented at trial, could convict defendant.” ’ ” (Emphasis in original.) *Wilson*, 2022 IL App (1st) 192048, ¶ 75 (quoting *People v. Brooks*, 2021 IL App (4th) 200573, ¶ 44, quoting *People v. Simms*, 2020 IL App (1st) 161067, ¶ 57 (Ellis, J., dissenting)). We apply a *de novo* standard of review to the dismissal of a postconviction petition without an evidentiary hearing. *Sanders*, 2016 IL 118123, ¶ 31.

¶ 37 Applying the above standards to the facts of this case, we conclude that it is more likely than not that no reasonable juror could convict petitioner if that juror heard *and believed* the testimony of Torres admitting that he was in the car on the night of the shooting and stating that petitioner was not in the car, was nowhere in the vicinity, and would not have had knowledge of the crime at the time it occurred. Similarly, we find that it is more likely than not that no reasonable juror could convict defendant if that juror heard *and believed* the testimony of Bentazos that he dropped petitioner off at Hernandez’s home at about 7 p.m. and did not pick him up again until 9 p.m., corroborated by the testimony of Hernandez that it is true petitioner was with her and his sons on the night of the murder. To draw the opposite conclusion that a reasonable juror could still convict defendant after hearing this testimony would require us to conclude that this testimony is not believable, and credibility determinations such as these are appropriate only in a third stage evidentiary hearing.

¶ 38 The State’s primary argument concerning these affidavits is that it is impossible to take all three of them as true because they are contradictory of one another. Specifically, Torres’s account is that he was in the car when the shooting happened, and thus he knows that petitioner was not; Bentazos’s account is that after dropping petitioner off, he had allowed Pecas, Uga Uga, and other men with them to borrow his car during the time at which the shooting occurred. Bentazos makes

no mention that Torres, whom he knew by the nickname “Spook,” was one of the men who borrowed his car, while Torres makes no mention of any fact that would corroborate Bentazos’s account of who was in possession of the car when the shooting occurred.

¶ 39 We agree with petitioner’s reply that dismissing the petition on this basis would be inconsistent with the requirements for analyzing affidavits in second-stage proceedings. His argument is well-taken that lawyerly precision cannot be demanded of lay affiants at the second stage. Also, the affidavits do not conflict as to the primary point of this claim that petitioner was not in the car when the shooting occurred.

¶ 40 The State also argues, in a somewhat cursory fashion, that petitioner’s new evidence is not so conclusive that it is more likely than not that no reasonable juror would find defendant guilty beyond a reasonable doubt when it is considered along with the eyewitness testimony identifying men in a green car shouting “King love” after shots were fired; petitioner’s own confession in which he stated that Bentazos and Torres were in the green car with him and that Torres yelled “King love” and directed Ochoa to shoot at a Two Six member; and the physical evidence.

¶ 41 We recognize that we could potentially view petitioner’s own confession as evidence from the original trial that positively rebuts his new affidavit evidence. However, this court in similar cases has taken the view that it is inappropriate in second stage proceedings to weigh the strength of a confession against new affidavit evidence that is sufficiently conclusive of innocence when the court accepts that it is true and would be believed by a jury. See *People v. Vann*, 2023 IL App (1st) 221389-U, ¶ 40; *People v. Simms*, 2025 IL App (1st) 232096-U, ¶¶ 27-33.

¶ 42 Petitioner emphasizes the similarity between the facts of this case and those of *Simms*, in which this court recently held that a codefendant’s affidavit statements were sufficiently conclusive to warrant a third stage evidentiary hearing. Similar to the present case, petitioner

Simms was convicted of murder and other offenses under a theory of accountability for the acts of two codefendants, Niles and King, in breaking into an apartment, shooting and killing the victim, and taking property. *Simms*, 2025 IL App (1st) 232096-U, ¶ 4. Also similar to this case, evidence was presented at Simms’s trial that he had confessed to involvement in the offenses, through a statement that was both handwritten and videotaped. *Id.* ¶¶ 5-6. Several eyewitnesses identified Simms near the victim’s building that day, and evidence was presented that Simms and Niles had tried to sell a VCR later that afternoon. *Id.* ¶ 6.

¶ 43 Simms was ultimately granted leave to file a successive postconviction petition, which was supported by the affidavit of codefendant Niles. *Id.* ¶¶ 9-10. Niles stated in that affidavit that he had lied to police about Simms being involved in the crimes to get revenge on Simms and to shift blame away from himself; but the truth was that Niles and King were “the only two involved,” and Simms “had absolutely no involvement whatsoever.” *Id.* ¶ 9. The trial court dismissed the petition at the second stage on the basis that Niles’s affidavit, taken as true and considered with the other trial evidence, was insufficiently conclusive to be likely to change the result on retrial. *Id.* ¶ 11. This court reversed, emphasizing that in second stage proceedings courts cannot make determinations as to credibility, that affidavits must be liberally construed in the petitioner’s favor, and that taking affidavits as true means we must assume the jury would believe the affiant’s testimony unless it is positively rebutted by evidence from the original trial. *Id.* ¶¶ 17, 24-25. We found that, while Niles’s affidavit suffered from some vagueness and uncertainty, that was a matter for third-stage resolution where the statements completely exonerated Simms assuming they were believed. *Id.* ¶ 25.

¶ 44 We further rejected the State’s argument that Simms’s confession to his own involvement was a sufficient basis to deny him an evidentiary hearing in light of the exonerating statements in

Niles's affidavit. *Id.* ¶¶ 26-27. We reasoned that the correct focus was not on the relative strength of the original trial evidence but on whether the new evidence placed it in a different light and undermined the court's confidence in the judgment of guilt; when the statements in Niles's affidavit were taken as true, they placed the trial evidence in a different light and undermined confidence in the conviction. *Id.* ¶¶ 27-28. We found that, assuming the jury believed Niles, it may also reasonably accept that Simms's confession was involuntary or "fed" to him by police, and that the strength of the original evidence is undermined in various other ways. *Id.* ¶ 32. While we recognized that there were "undoubtedly issues with credibility and the cumulative weight of the evidence," resolution of these issues was the entire point of a third-stage hearing. *Id.* ¶ 33.

¶ 45 We believe that the same result is required in this case. We recognize that the evidence presented at petitioner's trial was that he confessed to police that he had been in the car at the time of the shooting of Socha and Maldonado and acted as lookout, and that gunshot residue was found on the sleeve of the pullover he was wearing when he was arrested about an hour later. We find, however, that this evidence is placed in a different light when we assume (which we must do at this stage) that a jury would also hear *and find believable* Torres's testimony that petitioner was not in the car with him at that time along with the testimony of Bentazos and Hernandez that petitioner was at Hernandez's residence from 7 p.m. to 9 p.m. that night.

¶ 46 Mindful that petitioner's claim here is that he stands wrongfully convicted of crimes for which he is actually innocent and that he has supported this claim with the affidavits of three witnesses, we conclude that this case must be remanded for an evidentiary hearing at which the court can evaluate the credibility of these witnesses' testimony and weigh all of the old and new evidence together under the standards applicable in third-stage postconviction proceedings.

¶ 47 B. Reasonable Assistance of Counsel on Proportionate Penalties Claim

¶ 48 The second issue petitioner raises on appeal involves his youth-based sentencing claim under the proportionate penalties clause of the Illinois Constitution. See Ill. Const. 1970, art. I, § 11 (“All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship.”).

¶ 49 In December 2019, when postconviction counsel filed the supplemental petition in this case, counsel raised on petitioner’s behalf a claim not previously raised in the *pro se* petition that his aggregate 55-year sentence violated the proportionate penalties clause. The claim raised is one with which this court is very familiar and needs not be articulated in detail. It was based on our supreme court’s recognition in two cases that an offender who was over age 18 at the time of the crime is “not necessarily foreclosed” from raising an as-applied claim under that state constitutional provision in postconviction proceedings to establish that the evolving science on juvenile maturity and brain development that underpinned *Miller v. Alabama*, 567 U.S. 460 (2012), along with the accompanying changes in law and society’s attitudes toward the sentencing of juveniles, should apply to the petitioner and warrant his resentencing despite the fact that he was 19 years old at the time of the offense. See *People v. Harris*, 2018 IL 121932, ¶¶ 45-48; *People v. Thompson*, 2015 IL 121932, ¶¶ 38, 44.

¶ 50 On appeal, petitioner is not challenging the merits of the trial court’s dismissal of the above claim on the basis, *inter alia*, that he did not establish “cause” to pursue it in a successive postconviction petition. Instead, he argues that his postconviction counsel did not provide him with a reasonable level of assistance because counsel did not support this claim by pleading facts about his specific circumstances or showing why his brain development was similar to that of a juvenile. He argues that counsel should have presented more recent brain science research showing how brain development continues into early adulthood along with an individualized expert assessment

showing how this research applied in his specific case, along with evidence of his rehabilitation. He urges us to remand this case for new second-stage proceedings as to this specific claim.

¶ 51 The rule in postconviction cases is that an attorney appointed pursuant to statute in second stage proceedings owes a duty to provide a reasonable level of assistance to the petitioner whom he or she represents. *People v. Agee*, 2023 IL 128413, ¶ 41. The duties required of postconviction counsel are generally limited to those set forth in Illinois Supreme Court Rule 651(c) (eff. July 1, 2017). *Agee*, 2023 IL 128413, ¶ 43. That rule requires a certificate or other showing within the record that the petitioner’s attorney has (1) consulted with the petitioner by phone, mail, electronic means, or in person to ascertain his or her contentions of deprivation of constitutional rights, (2) examined the record of the trial proceedings, and (3) made any amendments to the *pro se* petition necessary for an adequate presentation of the petitioner’s contentions. Ill. S. Ct. R. 651(c) (eff. July 1, 2017). The duty extends to claims that counsel identifies and adds to an amended petition. *Agee*, 2023 IL 128413, ¶ 46. Once counsel certifies that he or she has complied with the above duties, a rebuttable presumption arises that counsel has provided the petitioner with a reasonable level of assistance, absent an affirmative showing to the contrary in the record. *Id.* ¶ 43. The petitioner bears the burden of overcoming that presumption by showing that counsel did not substantially comply with Rule 651(c), which may be done by proof that counsel did not make all necessary amendments to the petition. *People v. Addison*, 2023 IL 127119, ¶ 21. Our standard of review is *de novo*. *People v. Williams*, 2025 IL 129718, ¶ 41.

¶ 52 Having fully considered the arguments of both sides, we conclude in light of recent legislation that we need not definitively resolve whether petitioner was deprived of a reasonable level of assistance in this case. On one hand, we agree that it was unreasonable to raise an as-applied claim without pleading any factual support for it, never amend it to add such support, and then not defend

it either in writing or orally once it was challenged by a motion to dismiss. On the other hand, we cannot blind ourselves to the fact that no reasonable attorney would have believed by the time of ruling in January 2025 that a youth-based challenge to a discretionary sentence under the proportionate penalties clause was viable when it was raised for the first time in a successive postconviction petition. Our supreme court’s interpretation that such claims were nonviable under procedural default rules no doubt played an important part in counsel’s decisions about whether the duty to provide reasonable assistance required repleading or defending this claim.

¶ 53 As we noted above, this claim was raised for the first time at the second stage of proceedings involving a successive postconviction petition. Petitioner had previously filed an initial postconviction petition in 2008, in which he did not raise any claim challenging his sentence under the proportionate penalties clause. These facts implicated certain rules. First, the Post-Conviction Hearing Act provides that “[o]nly one petition may be filed by a petitioner *** without leave of the court.” 725 ILCS 5/122-1(f) (West 2024)). Second, “[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived.” *Id.* § 122-3. Because the deterrent effect of criminal law is undermined when criminal litigation lacks finality, the allowance of claims through successive petitions is “highly disfavored.” *People v. Montanez*, 2023 IL 128740, ¶ 73. Accordingly, a petitioner “faces immense procedural default hurdles when bringing a successive postconviction petition.” *People v. Davis*, 2014 IL 115595, ¶ 14. “Because successive petitions impede the finality of criminal litigation, these hurdles are lowered only in very limited circumstances.” *Id.*

¶ 54 Except for claims asserting a fundamental miscarriage of justice based on actual innocence (such as the one above), a petitioner is prohibited from raising a claim in a successive postconviction petition unless the petitioner can establish “cause” for his or her failure to raise that

issue in an earlier proceeding and “prejudice” that would result if the petitioner were denied consideration of the claimed error. *Ortiz*, 235 Ill. 2d at 331. Where, as here, a claim is added by counsel to a successive postconviction petition in the second stage of proceedings, the State may move for its dismissal on the basis of the failure to show cause and prejudice for not having raised it in an initial postconviction petition. See *People v. Bailey*, 2017 IL 121450, ¶ 26.

¶ 55 A petitioner 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. 725 ILCS 5/122-1(f)(1) (West 2024)). A petitioner shows “prejudice” by demonstrating that the claim not raised during his or her initial postconviction proceedings so infected the trial that the resulting conviction or sentence violated due process. *Id.* § 122-1(f)(2).

¶ 56 As of December 2019 when counsel filed the supplemental petition adding a youth-based proportionate penalties claim to the successive postconviction petition, no Illinois Supreme Court case had yet specifically addressed whether the seminal decision of *Miller* and the developments in the law of juvenile sentencing that followed it constituted “cause” for an offender who was slightly over age 18 at the time of offense to raise such a claim in a successive postconviction petition where it had not been raised in the petitioner’s initial petition. This court’s case law from that time suggested that it did. See, e.g., *People v. Polk*, 2019 IL App (1st) 180516-U, ¶ 44.

¶ 57 The openness of that question began to change with *People v. Dorsey*, 2021 IL 123010. The relevant question in that case was whether leave to file a successive petition should be granted to a petitioner who had been 14 years old at the time of offense raising a proportionate penalties clause challenge a discretionary sentence of 76 years in aggregate. The supreme court held that, although the holding of *Miller* was a new substantive rule, it did not provide “cause” for a postconviction petitioner to raise a claim under the proportionate penalties clause that was not

raised in the initial petition. *Id.* ¶ 74. It reasoned that, because Illinois courts “have long recognized the differences between persons of mature age and those who are minors for purposes of sentencing,” the unavailability of *Miller* prior to 2012 “at best provided defendant of ‘some helpful support’ for his state constitutional claim, which is insufficient to establish ‘cause.’ ” *Id.*

¶ 58 Next, the supreme court decided *People v. Clark*, 2023 IL 127273, which addressed whether leave to file a successive petition should be allowed to a 24-year-old offender with intellectual disabilities who had received a discretionary sentence of 90 years. Extending its holding of *Dorsey*, the court reiterated that “[c]iting the *Miller* line of cases does not satisfy the ‘cause’ prong of the cause-and-prejudice test for raising a proportionate penalties claim in a successive postconviction petition, as *Miller*’s unavailability does nothing to explain why defendant neglected to raise the proportionate penalties clause claim in his prior postconviction proceedings.” *Id.* ¶ 94. The court further reinforced this point by noting that its prior statements that offenders ages 18 or 19 were not necessarily foreclosed from bringing proportionate penalties claims had addressed the possibility of raising such claims “with respect to *mandatory* life sentences in *initial* postconviction petitions.” (Emphases in original.) *Id.* ¶¶ 87-88 (citing *Thompson*, 2015 IL 118151, ¶ 44, and *Harris*, 2018 IL 121932, ¶ 48).

¶ 59 In *People v. Moore*, 2023 IL 127273, ¶¶ 40-42, the supreme court again reaffirmed this holding in determining that leave to file a successive petition had been properly denied to two petitioners who were 19 years old at the time of offense seeking to challenge discretionary life sentences.

¶ 60 Following the issuance of these supreme court decisions, the appellate court also interpreted them as foreclosing the possibility that a petitioner could raise a proportionate penalties claim—at least as to a discretionary sentence—in a successive petition. See, e.g., *People v. Horshaw*, 2024

IL App (1st) 182047-B, ¶¶ 62-63. We recognized that lower courts were bound by these decisions, even in cases where a petitioner’s claim was well-supported by an expert report connecting the evolving science of juvenile brain development to the youthful offender’s specific facts and circumstances. See *People v. Scaggs*, 2025 IL App (1st) 240953-U, ¶ 52.

¶ 61 In light of the above cases, no reasonable attorney could have believed by the time the State’s motion to dismiss was first filed in July 2024, at oral argument in November 2024, or at the time of ruling in January 2025 that petitioner’s claim could have overcome these rules of procedural default regardless of how well the claim was pled or how thoroughly it was supported by evidence. Because of this, we must also conclude either that petitioner was not denied a reasonable level of assistance notwithstanding counsel’s insufficient pleading of this claim or that he suffered no prejudice from the insufficient pleading because the claim was procedurally defaulted regardless of its merits.

¶ 62 While this appeal was pending, however, the continued validity of the above analysis was placed into question when the General Assembly amended the Post-Conviction Hearing Act to add a new provision touching upon this exact issue. The new statutory provision states:

“A petitioner who was convicted of a felony offense committed when that person was under 21 years of age who seeks leave to file a successive post-conviction petition claiming that his or her sentence violates Section 11 of Article I of the Illinois Constitution does not have to demonstrate cause as set forth in subsection (f) of this Section.” Pub. Act 104-564, § 5 (eff. July 10, 2026) (adding 725 ILCS 5/122-1(g)).

¶ 63 In its appellee brief, the State acknowledges this amendment and the fact that it might be viewed as a procedural amendment that could be applied retroactively. But it argues that “would likely not apply here because this case has been finally adjudicated.” In his reply brief, petitioner

argues that this amendment was immediately effective and thus applies to his case while it remains pending on appeal. He further argues that it applies to his case because it is a procedural amendment and thus has retroactive application. He argues that because he was 19 years old at the time of the offense, and his successive postconviction claims that his sentence violates section 11 of article I of the Illinois Constitution (Ill. Const. 1970, art. I, § 11), the new statutory amendment applies to his case by its express terms and relieves him of the need to demonstrate “cause.”

¶ 64 After this appeal was fully briefed, this court held that this statutory amendment was procedural in nature and applied retroactively to an appeal involving a successive postconviction petition that had been dismissed at the second stage. *People v. Sparkman*, 2026 IL App (1st) 240715, ¶ 39. Accordingly, we will follow *Sparkman* and hold that this new amendment applies retroactively to petitioner’s case also.

¶ 65 Given this recent amendment and the fact that the scope of its application is sure to be hashed out in future cases, we conclude that the most appropriate approach is to remand petitioner’s proportionate penalties claim to the trial court for further second-stage proceedings with directions that petitioner’s appointed counsel renew compliance with Illinois Supreme Court Rule 651(c) (eff. July 1, 2017) as to that claim only. In other words, we direct counsel to reconsult with petitioner and examine the record to determine whether, consistent with counsel’s professional responsibilities, a meritorious proportionate penalties claim can be advanced on petitioner’s behalf under as the law as it presently exists and continues to develop in this area.¹ We are not holding that counsel *must* continue to advance a proportionate penalties claim regardless of merit. But if

¹ In addition to the recent statutory amendment, we point out also that at the time of this decision, reviewing courts are beginning to see cases in which youth-based proportionate penalties claims have been resolved on the merits following third-stage postconviction proceedings. See, e.g., *People v. Green-Hosey*, 2025 IL App (2d) 240284, *appeal allowed*, No. 131560, 270 N.E.3d 851 (Table) (Ill. Sep. 24, 2025); *People v. Masters*, 2024 IL App (4th) 230370. The law that develops from these cases is likely also to bear upon the kinds of facts and evidence necessary to mount a meritorious claim.

counsel determines that a meritorious claim can be advanced on petitioner’s behalf under current law, then counsel must provide reasonable assistance in pleading and presenting that claim. If counsel determines that petitioner has no meritorious claim under the proportionate penalties clause under current law, then counsel—who added this claim not originally raised in the *pro se* petition—must withdraw that claim on the record. A renewed Rule 651(c) certificate must be filed in either instance.

¶ 66 In so holding, we acknowledge the State’s argument that we should resolve this appeal by holding that petitioner could never satisfy the “prejudice” prong of the cause-and prejudice analysis (*i.e.*, that a 45-year sentence for first degree murder and a consecutive 10-year sentence for an attempted murder are simply not disproportionate to the terrible nature of this crime involving the random targeting of someone believed to be a rival gang member). We conclude that it would be premature to hold that petitioner could never prove a proportionate penalties claim on the merits when we are not certain what evidence he could allege and present in support of it upon receiving a reasonable level of assistance from postconviction counsel. See *Addison*, 2023 IL 127119, ¶ 42 (court may not rule on the merits of a claim where counsel has not complied with Rule 651(c) by shaping it into the appropriate legal form).

¶ 67 III. CONCLUSION

¶ 68 The trial court’s dismissal of the actual innocence claim raised in petitioner’s successive postconviction petition is reversed, and this cause is remanded for a third-stage evidentiary hearing as to that claim. The trial court’s dismissal of the proportionate penalties claim raised in petitioner’s successive postconviction petition is vacated. Counsel is directed to renew compliance with Illinois Supreme Court Rule 651(c) (eff. July 1, 2017) as to that claim only consistent with the directions

set forth in this decision. Following counsel’s renewed compliance with Rule 651(c), further second stage proceedings shall be had with respect to the proportionate penalties claim only.

¶ 69 Reversed in part, vacated in part, remanded with directions.

¶ 70 PRESIDING JUSTICE ELLIS, specially concurring:

¶ 71 I fully concur in the majority’s well-reasoned discussion of the actual-innocence claim. And I agree with its resolution of the proportionate-penalties claim but with one caveat: post-conviction counsel performed unreasonably by failing to plead around petitioner’s trial forfeiture of the proportionate-penalties claim.

¶ 72 A proportionate-penalties claim, like virtually any other constitutional claim, may be forfeited. See *People v. Clark*, 2024 IL 127838, ¶ 33 (fourth-amendment claim); *People v. Hillier*, 237 Ill. 2d 539, 547 (2010) (fifth-amendment claim); *People v. Hood*, 2016 IL 118581, ¶ 17 (sixth-amendment claim); *People v. Hughes*, 2015 IL 117242, ¶ 37 (involuntary confession claim invoking various amendments). The same is true for sentencing challenges. See *Clark*, 2024 IL 127838, ¶ 69 (claim that court did not adequately consider defendant’s youthful characteristics); *People v. Fort*, 2017 IL 118966, ¶ 18 (claim that sentence was unauthorized).

¶ 73 While its application may feel harsh, the forfeiture principle is crucial to incentivizing litigants to raise their claims when they surely have the greatest impact—at trial, while memories are fresh and evidence is most recent. When claims are raised years or even decades later, the absence of a developed record makes them nearly impossible to adjudicate.

¶ 74 Our supreme court recognized a “very narrow” exception to forfeiture for claims arising under *Miller v. Alabama*, 567 U.S. 460 (2012). *People v. Holman*, 2017 IL 120655, ¶ 32, *overruled on other grounds by People v. Wilson*, 2023 IL 127666, ¶ 42. But a *Miller* challenge requires no developed factual record; the only information needed is (i) the defendant’s age at the time of the

offense; (ii) the length of the sentence; (iii) whether the sentence was mandatory or discretionary; and (iv) whether the sentencing hearing reflects that the court adequately considered the defendant's youth and its attendant characteristics. *Id.*; *People v. Harris*, 2018 IL 121932, ¶ 44. Indeed, whether the record is sufficiently developed is the very question itself in a *Miller* analysis.

¶ 75 A proportionate-penalties claim is obviously not a *Miller* claim and requires factual development in the trial court. So that claim remains subject to the “typical rules of forfeiture and procedural bars” that apply to the proceeding at hand. *People v. Thompson*, 2015 IL 118151, ¶ 39.

¶ 76 The duty of reasonable assistance under Rule 651(c) requires, among other things, amending a post-conviction petition to avoid forfeiture by pleading ineffective assistance of counsel for not raising the constitutional claim at trial and/or on direct appeal. *People v. Addison*, 2023 IL 127119, ¶ 23. Post-conviction counsel here did not amend the petition to include *Strickland* allegations. Fortunately for petitioner, the majority's disposition will provide counsel another chance to do so.