

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

SIXTH DIVISION  
June 30, 2014

---

IN THE APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

---

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 00 CR 9049 (02)
	)	
WALTER NUNN,	)	The Honorable
	)	William G. Lacy,
Defendant-Appellant.	)	Judge Presiding.

---

JUSTICE LAMPKIN delivered the judgment of the court.  
Justices Hall and Reyes concurred in the judgment.

**ORDER**

¶1 *HELD:* Defendant's motion for leave to file a successive postconviction petition was properly denied where defendant failed to state a colorable claim of actual innocence and failed to demonstrate cause and prejudice related to his *Brady* claim.

¶2 Following a jury trial, defendant, Walter Nunn, was convicted of the second degree murder of Antonio Parks, aggravated battery with a firearm, and aggravated discharge of a firearm, and sentenced to a 30-year aggregate prison term. On direct appeal, we vacated defendant's conviction for aggravated discharge of a firearm because it violated the one-act, one-

crime rule and affirmed his remaining convictions and sentence. *People v. Nunn*, 357 Ill. App. 3d 625, 641-42 (2005). Defendant now appeals the trial court's denial of his motion for leave to file a successive postconviction petition.<sup>1</sup> Defendant contends the trial court erred where he set forth a colorable claim of actual innocence based on the defense of others, namely, his codefendant brother, and demonstrated cause and prejudice related to a *Brady v. Maryland*, 373 U.S. 83 (1963), violation. Based on the following, we affirm.

### ¶3 FACTS

¶4 The following facts were revealed at trial:

"At trial, Deanna Parks testified she was Antonio Parks' mother. Her son was shot and killed on April 17, 1999.

Lisa Sims testified she was with the victim on the night he was killed. On April 17, 1999, Sims rode with Parks to a liquor store at 103rd and Wentworth Streets in Chicago. Sims waited in the car while Parks entered the store. He returned 10 minutes later, carrying only a bag. Parks got into the car, started the engine, and began to drive forward. At that point, the car's rear window shattered. Sims turned and saw Jamel Miller<sup>2</sup> standing by the driver's side window. After seeing Miller, Sims looked out the back window but did not see anyone. She did not see Nunn fire any shots, but Miller fired a black gun several times at the car. One of the bullets hit Sims in the stomach. As Sims ran from the car, she heard

---

<sup>1</sup> Defendant's initial postconviction petition, alleging ineffective assistance of counsel and challenging his sentence, was summarily dismissed. Defendant's late notice of appeal was rejected.

<sup>2</sup> Defendant Nunn and his brother, codefendant Jamel Miller, were tried simultaneously by separate juries.

additional shots fired. When she returned to the scene later, she found Parks lying on the ground.

Lilly Seals testified she knew both Nunn and Miller, his brother. Both were members of the Gangster Disciples street gang. Seals also knew Parks, who belonged to a different faction of the Gangster Disciples. Seals was in the liquor store when Parks entered the store on April 17, 1999. Parks was laughing and wrestling with Willie Boston, another gang member. The store owner told everyone to leave, so Seals went to the restaurant next door. She heard Parks arguing with someone in the street and heard several voices shouting back and forth. When Seals heard gunshots, she looked out the restaurant's window and observed both Nunn and Miller shooting at Parks' car.

Donnell Davis testified he was Parks' friend and was at the liquor store on April 17, 1999. Davis saw Parks 'playing' or 'wrestling' with Boston. When everyone was asked to leave the store a few minutes later, Davis saw Nunn and Miller outside. Parks and Boston were still arguing with each other, but Davis testified, 'it was nothing serious.'

Although Davis could not recall the details of the shooting at trial, he admitted giving police a handwritten statement describing the incident on July 6, 1999. In his statement he said he saw Nunn retrieve a gun from under the porch of a nearby house. Nunn walked over to Parks' car and shot into the rear window of Parks' car. Davis saw Miller walk to the driver's side window and shoot three times. Davis never saw Parks with a gun that night, nor did he see any gunshots coming from inside the car.

Dr. Joseph Kogan, a forensic medical examiner, testified he reviewed Parks' autopsy report. He believed Parks was leaning to his right side with his left hand extended when he was shot. On cross-examination, Dr. Kogan admitted he could not be sure of Parks' position because he did not know the angle of the gun.

Kevin Noel testified that he bought a .380 chrome handgun from Nunn in Indianapolis in the summer of 1999. Noel sold the gun to Warren Cornett, who was arrested on unrelated charges, and the police confiscated the weapon. The police questioned Noel about the gun and about Nunn. Noel identified the handgun at trial.

On cross-examination, Noel admitted he was a drug dealer and was in custody at the time of trial. He was brought from Indiana to testify.

The parties stipulated that Indianapolis police officer Roger Gammons would have testified the gun introduced as evidence at trial was the same gun he recovered from Cornett's car.

Peter Brennan, an expert in firearms identification, testified he examined the bullets recovered from the victim's body, a discharged .380 caliber bullet recovered from the sidewalk next to the victim's car, and several cartridge cases recovered from the scene, two from beside the car's front wheel and two from behind the car, were all fired from the gun in evidence. A discharged .32 caliber bullet found in the car's back seat was fired from a different weapon.

Detective David Fidyk testified he and his partner transported Nunn to Chicago from a penal institution in Michigan City, Indiana, where Nunn was incarcerated. When they reached the police station, Fidyk advised Nunn of his

rights. Nunn said he understood his rights and agreed to talk to the officers. During their conversation, Nunn admitted his participation in the April 17, 1999, shooting. He repeated his story to Assistant State's Attorney Jack Blakely, but did not say he was protecting his brother during the shooting. Nunn chose to give a videotaped statement.

The videotape was played for the jury. In the video, Nunn said Miller told him about a gang dispute involving members from 108th Street, Parks' faction of Gangster Disciples. Miller said the others were involved in a carjacking and blamed him for it. On April 17, 1999, Nunn and Miller were standing outside the liquor store. After Parks left the store, Miller asked Nunn to get a gun, so Nunn retrieved a .380 caliber gun from a vacant lot next to the store. Nunn gave the weapon to his brother, watched his brother for a minute, then got a .32 caliber gun from under a nearby porch. While Nunn was getting the guns, Parks was yelling and making his way back to his car. Nunn did not see Parks holding a weapon. Both Nunn and Miller approached Parks' car. Standing behind the car, Nunn fired two bullets into the back window of the car. Parks tried to drive away, but the car stalled. Both Nunn and Miller ran from the scene and left for Indianapolis a few days later. Nunn admitted he sold the .380 caliber handgun because he "didn't want to have the murder weapon in [his] possession if [he] got arrested."

Nunn also testified at trial. He said that in 1999 he traveled from Indianapolis to visit Miller, his brother. Miller told him that he and Parks had several altercations. Parks had pulled a gun on Miller during a fight over a girl. Another time Parks and his friends kicked in Miller's friend's door and assaulted

him with guns because they were looking for Miller. Miller told Nunn he was afraid he was going to get killed.

On April 17, 1999, after Parks left the liquor store, he began calling Miller and other people names and threatening that he was going to get his gun from his car. Nunn testified Parks told his brother that 'they always wanted to kill him and they should have [done] it when they had the chance to.' When Nunn heard Parks threaten his brother, he got a revolver that was hidden underneath an abandoned porch. Miller continued to follow Parks to his car. When Parks got to the car, Miller told Nunn to 'look out,' and Nunn fired twice at the car. Although Nunn pulled the trigger five times, only two shells came out. He then ran away.

Nunn recognized the handgun in evidence as the gun his brother used on the night of the shooting. Miller forgot the gun at Nunn's house, so Nunn sold it.

Nunn said his statement that he retrieved the gun his brother used was not true. He also said he lied when he told police that he wanted to get rid of the gun because it was a murder weapon. Nunn said he was not offered a choice other than a videotaped statement and was told to sign the consent form, even though he told police he did not want to give a statement.

Darryl Boston testified he saw Parks with a gun twice. The first time Parks had a weapon tucked into his pants and asked Boston where Miller lived. Boston also saw Parks with a handgun while driving on the expressway in April 1999.

Lunye Williams, a Chicago police officer, testified she lived near 103rd and Wentworth. In February 1999, she met Miller at her home to ask him why someone knocked down her door looking for him. Williams testified she did not

know the name of the person who broke into her home. Prior to Williams' testimony, defense counsel told the court Williams would testify that her sons told her it was Parks who broke into her home and the incident was tied to a carjacking. The trial court told defense counsel such testimony was hearsay and was not admissible." *Id.* at 627-30.

¶5 As stated, on direct appeal, we affirmed defendant's convictions and sentences for second degree murder and aggravated battery, but vacated his conviction and corresponding sentence for aggravated discharge of a firearm. *Id.* at 641-42. In affirming the remaining convictions, we found the evidence was overwhelming and stated that "[c]onsidering [Nunn] and his brother pursued and opened fire on an unarmed man, we believe the evidence supporting [Nunn's] defense [of others] theory was somewhere between weak and nonexistent." *Id.* at 636-37.

¶6 On April 4, 2006, defendant filed his initial *pro se* postconviction petition, alleging, *inter alia*, his trial counsel was ineffective for failing to call Miller to testify that he fired the shots that killed Parks and injured Sims and to establish that defendant reasonably believed he needed to use deadly force to defend Miller. Defendant also alleged his trial counsel was ineffective for failing to call Willie Boston to testify that he saw Parks' cousin remove a gun from Parks before the police arrived. Defendant additionally alleged his appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on direct appeal. Defendant attached supporting documents, including affidavits from himself, Miller, and Boston. On July 21, 2006, in a written order, the trial court summarily dismissed the petition, finding defendant failed to satisfy *Strickland v. Washington*, 466 U.S. 668, 687 (1984), where trial counsel's decision not to call Miller or Boston as witnesses was trial strategy and their attached affidavits failed to support his defense of others theory.

¶7 On April 19, 2012, defendant filed two verified *pro se* motions seeking leave to file a successive *pro se* postconviction petition and simultaneously filed his successive *pro se* postconviction petition. In the successive petition, defendant alleged: (1) he was actually innocent based on new evidence from Sims, namely, two letters she wrote to Miller while in prison admitting that Parks was armed and reaching for his gun when Miller shot him; and (2) the State violated their discovery obligations under *Brady* by failing to disclose Sims' pretrial statement in which she said Parks was armed at the time of shooting and instead knowingly allowing Sims' to commit perjury by testifying that Parks was unarmed and that she was not promised leniency in a separate, pending case in exchange for her false testimony. In support of his allegations, defendant attached the following documents to his successive petition: (1) two letters from Sims that she purportedly wrote to defendant while in prison; (2) signed and notarized affidavits by Elizabeth Spann, Sheila Nunn, and former Assistant State Appellate Defendant (ASAD) Maya Szilak; (3) two affidavits from Miller, the first signed and notarized and the second undated, unsigned, and unnotarized; (4) trial court records; and (5) a sentencing transcript pertaining to Sims' probation that occurred shortly after defendant's trial.

¶8 In her letter to Miller, dated December 12, 2007, Sims admitted that she did "not tell[] the whole truth" at defendant's trial. Sims further stated that she was "not interested in coming to court [to testify] but when [she] caught her first case in 2003 the State came and gave me a subpoena." According to the letter, the State offered to "help [her] if [she] help[ed] them." The State "started telling [her] what happened that night and [she] told them [Parks] had a gun but they said don't mention it because the police did not find it." Sims said someone by the name of "Deon" retrieved Parks gun from the vehicle after the incident. In describing the incident, Sims stated that Parks "got into it" in the store and then "he got in the car[,] started it up[,] and put it in

drive and the car moved a little[.] Then the back window fall out[,] hit us in the back of our heads[.] [She] turned around and didn't see no one back there and then [she] heard [Miller] say [Parks' name] and [Miller] was standing at [Parks'] window pointing the gun[.] It look[ed] like [Miller] tried to shoot but the gun got jammed and why [*sic*] [he] was trying to unjam it [Parks] was reaching under his seat for his gun then the first shot that came in the car shot [her] in the chest." At that point, Sims exited the vehicle. Sims averred that she had a Class X "delivery/manufacturing charge" that the State reduced to a Class II felony.

¶9 Sims sent Miller a second letter, which was undated but purportedly received in 2009. In the letter, Sims said she had "2 ½ months left" and then "3 months of parole" as part of a work-release program. Sims wrote that she would be home on November 20, 2009.<sup>3</sup>

¶10 In an affidavit dated January 6, 2011, and notarized on January 11, 2011, Elizabeth Spann, defendant's aunt, attested that she spoke with Sims on the telephone several times in 2008. During those conversations, Sims told Spann that she was in the car with Parks during the shooting and Parks was armed and "preparing to use a gun when he was shot." According to the affidavit, Sims reported she was "willing to make a statement in writing and/or on videotape"; however, Sims failed to appear during scheduled meetings and then could not be located.

¶11 In an affidavit dated and notarized on February 9, 2011, Sheila Nunn, defendant's mother, attested that she "made a diligent attempt to locate the whereabouts of" Sims. On November 5, 2007, Sheila wrote a letter to Sims. Sims responded by letter on December 5, 2007. Sheila attested that Sims also wrote letters to Miller and defendant on December 26, 2007. According to Sheila's affidavit, Sims "agreed to submit a statement as to why she testified and how she was

---

<sup>3</sup> Because Sims' second letter did not provide the purported "newly discovered evidence," our reference to the Sims' letter throughout this decision refers to Sims' December 12, 2007, letter.

promised help in the case she was charged with." Sheila's affidavit was consistent with the information provided by Sims in her December 12, 2007, letter to Miller. According to Sheila's affidavit, Sheila and Spann "had on numerous occasions arranged to meet with" Sims to generate a videotaped statement, but Sims never appeared out of fear of being charged with perjury.

¶12 In an affidavit notarized on December 5, 2011, former ASAD Szilak attested that she represented Miller in two postconviction appeals. Szilak averred that Miller requested she obtain the transcript of Sims' sentencing hearing in case number 00 CR 2018 to corroborate his postconviction claim that the State permitted Sims to testify falsely that her testimony was not related to any deal with the State. Szilak denied the request as an unauthorized expenditure. According to Szilak, Sheila and Spann obtained the requested transcript from Sims' January 13, 2003, hearing along with documentation of Sims' arrest history.

¶13 Szilak further attested that Miller contacted her between 2009 and 2010 to report he received a letter from Sims. The Sims' letter provided that Parks was armed on the night of the shooting and reached for his gun just before Miller shot him. Miller further informed Szilak that, in Sims' letter, she said the State reduced her criminal conviction from a Class X to a Class II felony in exchange for her testimony against defendant. Miller reported that Sims' letter provided the "truth" about what she observed during the shooting and disclosed her reasons for testifying falsely. Szilak attested that she advised Miller to obtain Sims' affidavit. Miller stated that he asked Sheila and Spann to locate Sims to obtain her affidavit. Sims agreed to provide an affidavit, but failed to do so.

¶14 After this court affirmed the summary dismissal of Miller's amended postconviction petition, Szilak made efforts to locate and speak with Sims herself. Between the months of January 2011 and April 2011, Szilak spoke with Sims on the phone three to four times. During

those conversations, Sims stated that Parks had a handgun in his car when Miller fired gunshots at him. In fact, Parks was reaching under the front driver's side seat for his gun when Miller shot him. While Sims fled the scene, she observed Parks' cousin, Deon, and told him what had happened. Deon then returned to Parks' car and removed the handgun before the police arrived. Szilak attested that Sims was 16 years old in 1999 or 2000 when she was interviewed by the police in relation to the shooting. At the time, she reported that Parks had been armed with a handgun which had been removed from the scene by one of his family members, but the State advised her not to mention those facts. Sims told Szilak that the State promised her a minimum sentence on a pending narcotics case in exchange for her testimony. According to Sims, she did not come forward with the information out of fear of being charged with perjury. Szilak arranged to meet with Sims on two occasions to complete an affidavit, but Sims did not appear for either appointment and did not return phone calls.

¶15 In an affidavit notarized on December 22, 2011, Miller attested that, during his and Nunn's incarceration, the brothers were allowed to communicate and shared "all newly discovered evidence" to support both of their successive postconviction petitions.

¶16 In an unsigned, undated, and unnotarized affidavit, Miller attested that, after engaging in a fight with Parks on the date in question, Parks threatened to obtain a handgun from his car to kill Miller. In response, Miller obtained a gun for "self-protection, followed Parks to his car, and tried to persuade him to stop fighting \*\*\* and not to follow through on his threat to shoot." Miller averred that defendant followed Miller to Parks' car. When Miller observed Parks bend over inside the car and "make motions as if to reach for a gun and position himself to shoot," Miller told defendant to "look up." Defendant fired two gunshots at the rear window, while

Miller attempted to fire his weapon at Parks through the driver's side window. The gun initially jammed, but Miller successfully fired additional shots at Parks before Miller and defendant fled.

¶17 Miller further attested that "[a]t one point during trial, [he] overheard Sims and a prosecutor discussing that the State would help Sims by speaking to the judge in her pending case and urge and agree to a lenient sentence." Miller shared the information with his trial counsel, but Sims perjured herself on cross-examination when she denied receiving any promises of leniency in exchange for testimony against Miller. Miller added that the State never corrected Sims' false testimony and suppressed Sims' pretrial statements that Parks was armed with a gun at the time of the shooting. Miller maintained that he was innocent of the first degree murder and aggravated battery with a firearm because he shot Parks in self defense and that Sims' newly discovered evidence supported his innocence.

¶18 Also attached to the motion for leave to file a successive postconviction petition was the January 13, 2003, sentencing transcript from the hearing on Sims' violations of probation. Sims pled guilty and was sentenced to the recommended sentence of three years' imprisonment. After being admonished of her rights and stating that she entered her plea freely and voluntarily without force or threat, the trial court asked whether Sims had any questions. Sims responded that she "would like to see if my PD talked to the State to see what they could work out regarding me testifying."

¶19 The record additionally contains an affidavit by defendant, notarized and dated on April 19, 2012. Neither defendant nor the State reference the affidavit in their appellate briefs. The affidavit reiterates defendant's version of the events and his belief that he shot Parks in defense of Miller. The affidavit provides that defendant and Miller overheard a conversation between Sims and the State at the time of trial, in which the State agreed to help Sims obtain a lenient

sentence in a pending case. Defendant further averred that he was unable to contact Sims prior to her 2007 letter that was sent to Miller because defendant did not know her whereabouts while he was incarcerated. Defendant explained that he had to rely on third parties, namely, Sheila, Spann, and Szilak, to contact Sims because his incarceration and Sims' incarceration/parole status prohibited their direct contact. Defendant attested that in May 2011 Miller learned that all efforts had been exhausted to obtain Sims' affidavit.

¶20 On May 18, 2012, the trial court denied defendant leave to file his successive postconviction petition where he failed to "meet the cause-and-prejudice test required for the Court to grant leave to file a \*\*\* successive post-conviction petition," finding there was nothing in "fact or law in what he has set forth." This appeal followed.

#### ¶21 ANALYSIS

¶22 Defendant contends the trial court erred in denying him leave to file his successive postconviction petition.

¶23 The Act provides a means by which an individual serving a sentence may challenge his or her conviction as resulting from a substantial denial of his or her constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2004). The Act contemplates the filing of one postconviction petition. *People v. Holman*, 191 Ill. 2d 204, 210 (2000). The statutory bar against filing more than one petition will be relaxed only "when fundamental fairness so requires." *People v. Pitsonbarger*, 205 Ill. 2d 444, 458 (2002). " 'Successive postconviction petitions are disfavored under the Act[,] and a defendant attempting to institute a successive postconviction proceeding, through the filing of a second or subsequent postconviction petition, must first obtain leave of court.' " *People v. Smith*, 2013 IL App (4th) 110220, ¶ 20 (quoting *People v. Gillespie*, 407 Ill. App. 3d 113, 123 (2010)). There are two exceptions to the procedural default rule allowing a

defendant to raise a defaulted constitutional claim: (1) where "a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial postconviction proceedings and prejudice results from that failure" (725 ILCS 5/122-1(f) (West 2004)), also known as the cause and prejudice test; and (2) where, even without a showing of cause and prejudice, a defendant raises a claim of actual innocence to prevent a fundamental miscarriage of justice. *People v. Coleman*, 2013 IL 113307, ¶¶ 82-83.

#### ¶24 I. Actual Innocence Claim

¶25 Defendant first argues that he is entitled to an evidentiary hearing on his successive postconviction petition because his newly discovered evidence, namely, the Sims letter and the supporting affidavits, set forth a colorable claim of actual innocence.

¶26 Where a defendant raises a claim of actual innocence, "leave of court should be denied only where it is clear, from a review of the successive petition and the documentation provided by the petitioner that, as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence." *People v. Edwards*, 2012 IL 111711, ¶ 24. A colorable claim of actual innocence is one that raises the probability that it is more likely than not that no reasonable juror would have convicted the defendant in light of the new evidence. *People v. Adams*, 2013 IL App (1st) 111081, ¶ 30. The supreme court has provided the requirements for an actual innocence claim, such that:

"the defendant must present new, material, noncumulative evidence that is so conclusive it would probably change the result on retrial. [Citation.] New means the evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence. [Citation.] Material means the evidence is relevant and probative of the petitioner's innocence. [Citation.]

Noncumulative means the evidence adds to what the jury heard. [Citation.] And conclusive means the evidence, when considered along with the trial evidence, would probably lead to a different result. [Citation.]" *Coleman*, 2013 IL 113307, ¶ 96.

The standard for demonstrating actual innocence is "extraordinarily difficult to meet." *Id.* at ¶ 94. In fact, according to the supreme court, "courts of review have granted postconviction relief on actual-innocence claims in only three reported cases since 1996." *Id.* (citing *People v. Ortiz*, 235 Ill. 2d 319 (2009), *People v. Burrows*, 172 Ill. 2d 169 (1996), *People v. Starks*, 365 Ill. App. 3d 592 (2006)). Our supreme court has not yet articulated the appropriate standard of review for actual innocence claims. *Edwards*, 2012 IL 111711, ¶ 30. Nevertheless, defendant's actual innocence claim fails under either the abuse of discretion standard or *de novo* review.

¶27 We note that the parties dispute whether the trial court considered the wrong exception in reviewing defendant's motion for leave to file a successive postconviction petition. Because defendant presented a claim of actual innocence, he was not required to satisfy the cause and prejudice test in order to obtain leave to file his successive postconviction petition. *Id.* at ¶¶ 82-83. However, any error by the trial court in utilizing the cause and prejudice test does not require reversal where the question before us is whether defendant set forth a colorable claim of actual innocence. *People v. Anderson*, 401 Ill. App. 3d 134, 141 (2010). Defendant was required to present new, material, noncumulative evidence that was so conclusive it probably would have changed the result on retrial. *Adams*, 2013 IL App (1st) 111081, ¶ 96.

¶28 Defendant argues Sims' letter satisfied the requisite standard where the evidence that Parks was armed with a handgun and reaching for that gun when Miller and defendant shot him was not available at any prior proceeding because the State suppressed Sims' exculpatory

statement and knowingly used her perjured testimony. According to defendant, the evidence confirms he shot Parks in the defense of Miller and, therefore, it was of such conclusive character that he would have been acquitted had it been presented at trial.

¶29 Although not raised by the State, we first must address the fact that defendant relies on the same evidence, *i.e.*, Sims' letter along with the affidavits and Sims' sentencing transcript, to support both a claim of actual innocence and a *Brady* violation claim. The supreme court has advised:

"Under the due process clause of the Illinois Constitution of 1970 (Ill. Const.1970, art. I, § 2), a defendant can raise in a post-conviction proceeding a 'free-standing' claim of actual innocence based on newly discovered evidence. [Citation.] A free-standing claim of innocence means that the newly discovered evidence being relied upon is not being used to supplement an assertion of a constitutional violation with respect to [the] trial. [Citations.]" (Internal quotation marks omitted.) *People v. Orange*, 195 Ill. 2d 437, 459 (2001) (citing *People v. Hobley*, 182 Ill. 2d 404, 443-44 (1998)).

The supreme court has held that the same newly discovered evidence may not be used to raise a claim of actual innocence and to supplement an assertion of a constitutional violation with respect to trial. *People v. Washington*, 171 Ill. 2d 475, 479 (1996); *Hobley*, 182 Ill. 2d at 444.

¶30 Because defendant asserts that Sims' letter along with the affidavits demonstrate his actual innocence while at the same time arguing that the letter and the affidavits support a *Brady* violation, his motion for leave to file a successive postconviction petition does not make a *free standing* claim that he is actually innocent but, rather, also claims that the State's knowing use of perjured testimony and the failure of the State to disclose material evidence violated *Brady* based

on the same evidence. See *People v. Brown*, 371 Ill. App. 3d 972, 984 (2007). Accordingly, the proper method for defendant to raise his free standing claim of actual innocence would be to file another successive petition on that ground. However, even assuming defendant properly presented his free-standing claim of actual innocence, he failed to sufficiently support the claim and failed to satisfy the requisite standard.

¶31 Section 122-2 of the Act instructs that a postconviction petition shall have attached thereto affidavits, records, or other supporting evidence, or shall state why the same are not attached. 725 ILCS 5/122-2 (West 2004). The purpose of section 122-2 of the Act is to establish that the verified allegations in the petition are capable of objective or independent corroboration. *People v. Delton*, 227 Ill. 2d 247, 254 (2008). A defendant's failure to either attach the necessary "affidavits, records, or other evidence" or explain their absence is 'fatal' to a post-conviction petition [citation] and by itself justifies the petition's summary dismissal." *Id.* at 255 (quoting *People v. Collins*, 202 Ill. 2d 59, 66 (2002)). Without the requisite affidavits, "a reviewing court cannot determine whether the proposed witness could have provided testimony or information favorable to the defendant, and further review of the claim is unnecessary." *People v. Harris*, 224 Ill. 2d 115, 142 (2007) (quoting *People v. Enis*, 194 Ill. 2d 361, 380 (2000)). Moreover, under either cause and prejudice or actual innocence, the defendant not only has the burden to obtain leave of court to file a successive postconviction petition, but also "must submit enough in the way of documentation to allow a circuit court to make that determination." *Edwards*, 2012 IL 111711, ¶ 24 (quoting *People v. Tidwell*, 236 Ill. 2d 150, 161 (2010)).

¶32 Turning to the question before us, we agree with the trial court that defendant's request for leave of court and his supporting documentation did not raise the probability that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.

Defendant primarily relies on the information provided in Sims' letter to support his actual innocence claim because Sims did not complete an affidavit or other form of sworn testimony. Defendant did attach affidavits from Spann, Sheila, and former ASAD Szilak, in which each attested that she spoke to Sims and Sims relayed the same version of events as described in the letter. In his affidavit, defendant explained that he was unable to obtain Sims' affidavit himself due to his incarceration and, therefore, he attempted to secure her affidavit through Spann, Sheila, and Szilak. When all efforts proved unsuccessful, defendant submitted his *pro se* motion for leave to file a successive postconviction petition without a supporting affidavit from Sims.

¶33 While defendant complied with section 122-2 of the Act to the extent that he attached affidavits and explained the absence of Sims' affidavit from his petition, he did not satisfy the statute where those affidavits failed to support the allegations in his successive petition. Simply put, the "evidence" does not consist of verified allegations capable of objective or independent corroboration. The affidavits were based on hearsay. "As a general rule, hearsay affidavits are insufficient." *People v. Morales*, 339 Ill. App. 3d 554, 565 (2003); *People v. Gray*, 2011 IL App (1st) 091689, ¶ 16. In addition, neither Spann, Sheila, nor Szilak had any personal knowledge of the facts contained in the affidavits since they were not present at the time of the offense.

"Where the affidavit does not set forth specific facts to support that it is based upon personal knowledge, it is insufficient." *Brown*, 371 Ill. App. 3d at 984. Illinois courts have provided the justification for the rule against affidavits based on hearsay, such that:

" 'One of the reasons for requiring an affidavit is to spare the court the burden of dealing with frivolous or false [section 2-1401] petitions.<sup>4</sup> The filing of

---

<sup>4</sup> Defendant agrees that the section 122-2 requirements are "materially identical to the [evidentiary] provision that governs section 2-1401 petitions."

a false affidavit could give rise to a prosecution for perjury or a court imposed sanction for contempt of court. Neither remedy is available when an affidavit is based on pure hearsay since the affiant, in such a situation, could honestly state that he was told the factual matters and believed them to be true. Even if the matters in the affidavit were completely false, neither the court nor the aggrieved party litigant would have any recourse in such a situation since the party making the false statements would not have made them under oath or in any judicial proceeding and the party giving the affidavit would not be doing so corruptly but would be relying on what he may honestly have believed to be true statements.' "

*People v. Perkins*, 260 Ill. App. 3d 516, 518-19 (1994) (quoting *Amerco Field Office v. Onoforio*, 22 Ill. App. 3d 989, 992 (1974)).

¶34 We recognize that the supreme court has stated that it will not inflexibly apply the rule against hearsay affidavits. *People v. Sanchez*, 115 Ill. 2d 238, 284 (1986). However, the *Sanchez* case was a capital case and the affidavit at issue included material facts known to an affiant who invoked the fifth amendment through his attorney; therefore, an affidavit could not be procured. *Id.* at 285. Those facts do not apply to the instant case. Further, we distinguish *People v. Cihlar*, 111 Ill. 2d 212 (1986), a case cited by defendant, from the case at bar. In *Cihlar*, newly discovered evidence contained in a number of hearsay affidavits attacked the reliability of the victim's identification of the defendant, which was the only evidence connecting the defendant to the crime and had been uncontradicted by the record. *Id.* at 217-18. Here, the new evidence did not contradict the sole evidence connecting defendant to the offenses. As we discuss herein,

the hearsay contained in the affidavits did not conclusively support defendant's actual innocence claim.

¶35 Moreover, it is clear by the contents of the affidavits that Sims repeatedly has refused to provide her own affidavit. "An affidavit must not only identify the source and character of the evidence, it must also identify the availability of the alleged evidence." *Brown*, 371 Ill. App. 3d at 982. There is nothing establishing the availability of Sims' evidence and nothing to demonstrate that Sims would testify on retrial. Defendant's response is that, upon remand, the trial court could subpoena Sims pursuant to section 115-17a of the Act (725 ILCS 5/115-17a (West 2004)). While the statute does provide a means for a defendant to petition the court to issue a subpoena where "the subpoena seeks evidence that is material and relevant to the post conviction hearing," the statute additionally provides that the victim "shall be given the opportunity to appear and *object to the requested subpoena*." (Emphasis added.) 725 ILCS 5/115-17a (West 2004). Only after the trial court determines that the subpoena seeks evidence that is material and relevant to the postconviction hearing will a subpoena request be granted. 725 ILCS 5/115-17a (West 2004). Accordingly, Sims could object to a subpoena, leaving nothing to identify the availability of Sims' alleged evidence. See *Brown*, 371 Ill. App. 3d at 982. Furthermore, the trial court need not presume the truth of the purported testimony in determining its materiality and relevance.

¶36 However, even assuming a subpoena request was granted and Sims complied therewith, to be entitled to a hearing on a successive postconviction petition, defendant was required to present a colorable claim of actual innocence based on new, material, noncumulative evidence that was so conclusive it would probably change the result on retrial. *Sanchez*, 115 Ill. 2d at 286. A claim of actual innocence must be supported " 'with *new reliable evidence*—whether it be

exculpatory scientific evidence, *trustworthy eyewitness accounts* or critical physical evidence—that was not presented at trial.' " (Emphases added.) *Edwards*, 2012 IL 111711, ¶ 32 (quoting *Schlup v. Delo*, 513 U.S. 298, 324 (1995)). Defendant did not satisfy his burden.

¶37 With respect to the first element, evidence is "newly discovered" if it has been discovered since trial and could not have been discovered by the defendant sooner through diligence.

*People v. Ortiz*, 235 Ill. 2d 319, 334 (2009). "Generally, evidence is not 'newly discovered' when it presents facts already known to the defendant at or prior to trial, though the source of those facts may have been unknown, unavailable, or uncooperative." *People v. Barnslater*, 373 Ill. App. 3d 512, 523 (2007). An exception appears to exist wherein a defendant may present a witness's recantation as newly discovered evidence despite having known the witness perjured himself or herself. *Id.* at 524. However, this exception will not apply if the defendant had evidence available at the time of trial to demonstrate that the witness was lying. *Id.*

¶38 Defendant cannot demonstrate that the evidence provided by Sims was newly discovered. The facts were known by defendant at the time of trial where he presented a theory of defense of others alleging that Parks was armed during the offense and also cross-examined Sims on her alleged perjury related to her sentencing deal with the State. While Sims' recanted testimony was not available at trial, defendant could have exercised diligence and requested leave to file his successive petition at an earlier date. Sims' recantation surfaced in 2007, yet defendant did not request leave to file the successive postconviction petition until April 2012. We acknowledge the difficulties alleged in the affidavits and the attempts to secure Sims' affidavit; however, Szilak advised Miller that all efforts had been exhausted for Sims' affidavit in May 2011. Notwithstanding, defendant waited nearly another year to submit his request for leave to file his successive petition. Moreover, according to defendant's affidavit, he and Miller overheard the

State and Sims discussing a deal for leniency in a pending case. Defendant, therefore, had at his disposal at the time of trial evidence from himself and his brother to allege that Sims was lying when she testified that she did not strike a deal with the State for her testimony. Accordingly, the evidence was not newly discovered.

¶39 The second element in presenting a successful claim of actual innocence is the newly discovered evidence is material and not merely cumulative. *Adams*, 2013 IL App (1st) 111081,

¶ 34. Evidence is considered cumulative when it does not add anything to what was previously before the jury. *Ortiz*, 235 Ill. 2d at 335. Evidence is not cumulative if it would create new questions in the mind of the jury. *People v. Williams*, 392 Ill. App. 3d 359, 369 (2009).

¶40 Viewing the facts alleged in Sims' letter and the affidavits as true, evidence that Parks was armed with a handgun which was later removed from the scene was not cumulative.

Although defendant argued defense of others at trial, the State repeatedly presented testimony and argument that Parks was not armed and, therefore, defendant could not have shot him in defense of Miller. As a result, Sim's letter and the affidavits provided evidence that was not previously before the jury.

¶41 In relation to the final requirement for a successful actual innocence claim, the evidence must be so conclusive that it probably would change the result on retrial. *Edwards*, 2012 IL 111711, ¶ 32. Evidence alleging actual innocence must demonstrate total vindication or exoneration of the defendant and not merely present a reasonable doubt. *Barnslater*, 373 Ill. App. 3d at 520.

¶42 In this case, we cannot say the evidence was so conclusive that it probably would have demonstrated defendant's innocence on retrial.<sup>5</sup> Initially, we note that recantation evidence is generally considered unreliable (*People v. Deloney*, 341 Ill. App. 3d 621, 632 (2003)), and claims of actual innocence must be based on reliable evidence (*Edwards*, 2012 IL 111711, ¶ 32 (quoting *Schlup v. Delo*, 513 U.S. 298, 324 (1995))) in order for leave to be granted. The evidence, as provided in Sims' letter, was that, after a disagreement in a store between Miller and Parks, Parks entered his vehicle, started it, and moved forward. At that point, defendant fired gunshots at the rear window of Parks' vehicle, and Miller appeared at the driver's side window, attempting to discharge his gun at Parks. The gun, however, "jammed" and, while Miller tried to clear it, Parks reached for a gun under the seat of the car. When Miller was able to clear his gun, he shot both Sims and Parks. Spann, Sheila, and former ASAD Szilak all attested that Sims reported the same version of events as described in her letter.

¶43 Although defendant testified at trial to a history of Parks' violence and threats against Miller, Sims' evidence provided that, on the date in question, Parks was attempting to leave the area when defendant shot out Parks' rear car window and Miller pointed his handgun at Parks and attempted to shoot. Only then did Parks reach down to retrieve his weapon. Miller, however, was able to discharge his gun before Parks succeeded. Contrary to defendant's arguments, this was not a case of protecting Miller from imminent harm. See 720 ILCS 5/7-1 (West 2004). There was no allegation that Parks was armed in the store when he purportedly

---

<sup>5</sup> Because we conclude that evidence demonstrating that Parks was armed would not have demonstrated defendant's innocence, we need not determine whether Willie Boston's (a.k.a. Beachey) affidavit was properly before the trial court in consideration for defendant's motion for leave to file a successive appeal. Even assuming, *arguendo*, the affidavit was properly before the trial court, consideration of its contents would not have demonstrated defendant's innocence.

threatened Miller. Rather, Parks declared that he was going to retrieve his gun to "tear it up." However, when Parks went to his car, he entered it, closed the door, and began driving. Meanwhile, Miller retrieved a hidden gun from a vacant lot and defendant followed, retrieving a handgun from underneath a nearby porch, in pursuit of Parks. Sims' letter confirms that Parks did not arm himself until after defendant shot out the rear window and Miller had his gun pointed at Parks. Parks would not have had an opportunity to reach for his weapon but for the fact that Miller's gun jammed. Accordingly, Sims' letter and the affidavits do not raise the probability that, in light of the new evidence, it is more likely than not that no reasonable juror would have convicted defendant, nor is the evidence of such conclusive character that it would probably change the result on retrial.

¶44 Simply stated, the evidence in defendant's motion for leave to file a successive postconviction petition failed to support a theory of defense of others, establishing defendant's total vindication or exoneration. As a result, we conclude that defendant's motion for leave to file a successive postconviction petition based on his claim of actual innocence was properly denied.

#### ¶45 II. *Brady* Claim

¶46 Defendant next contends that he is entitled to an evidentiary hearing on his *Brady* claim where he satisfied the requisite cause and prejudice test. Specifically, defendant contends the State violated *Brady* where it failed to disclose Sims' alleged pretrial statement that Parks was armed with a handgun and that, in exchange for Sims' testimony against defendant, she was promised leniency in an unrelated probation violation case. Defendant further contends the State knowingly allowed Sims to perjure herself when she testified falsely that Parks was unarmed at the time of the shooting and that she was not promised anything in exchange for her testimony.

¶47 A court may grant leave to file a successive petition "only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial postconviction proceedings and prejudice results from that failure." 725 ILCS 5/122-1(f) (West 2004). Cause is "an objective factor that impeded [the petitioner's] ability to raise a specific claim during his or her initial postconviction proceedings." 725 ILCS 5/122-1(f) (West 2004). Prejudice exists when "the claim not raised during [the petitioner's] initial postconviction proceedings so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f) (West 2004). We review *de novo* a trial court's denial of leave to file a successive postconviction petition for failure to comply with the cause and prejudice test. *People v. Almodovar*, 2013 IL App (1st) 101476, ¶ 59.

¶48 Defendant established cause where he did not receive Sims' letter admitting that she lied under oath until after the filing of his amended postconviction petition. See *People v. Mitchell*, 2012 IL App (1st) 100907, ¶ 65.

¶49 Turning to whether defendant established prejudice, we must review the relevant *Brady* law. In *Brady*, the United States Supreme Court held that the prosecution must disclose evidence that is both favorable to the accused and "material either to guilt or to punishment." *Brady*, 373 U.S. at 87. Evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *People v. Sanchez*, 169 Ill. 2d 472, 486 (1996); *People v. Anderson*, 375 Ill. App. 3d 990, 1011 (2007). To successfully establish a *Brady* claim, a defendant must show that: (1) the undisclosed evidence is favorable to him because it is either exculpatory or impeaching; (2) the evidence was either willfully or inadvertently withheld by the State; and (3) withholding the evidence resulted in prejudice to him. *Anderson*, 375 Ill. App. 3d at 1011.

¶50 Based on our review of the record before us, we conclude defendant failed to present a claim of constitutional error that so infected his trial that his conviction violated due process. See 725 ILCS 5/122-1(f) (West 2004). As previously discussed, the evidence in Sims' letter does not exculpate defendant. Rather, Sims' letter confirms that, after the initial dispute broke up, defendant and Miller retrieved hidden handguns and pursued Parks to his car. Ultimately, defendant shot out the rear car window and Miller attempted to fire his handgun at Parks even before Parks made any attempt to retrieve a handgun. Accordingly, it was not a reasonable probability that, had the State disclosed Sims' pretrial statement that Parks was armed with a handgun and the promise of leniency in her unrelated case in exchange for her testimony against defendant, the result of trial would have been different. The disclosures could have been used to impeach Sims' trial testimony; however, defendant cannot demonstrate that withholding the evidence was prejudicial.

¶51 Defendant argues that the proper standard for our consideration presumes Sims testified falsely. Specifically, defendant maintains that his "conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *People v. Coleman*, 183 Ill. 2d 366, 392 (1998). Again, this strict standard presumes a conviction was obtained by the knowing use of perjured testimony. *Id.* at 391-92. We disagree where we have found defendant's evidence supporting the allegation that Sims committed perjury was not properly supported. In sum, defendant failed to satisfy the cause and prejudice test and, therefore, his motion for leave to file a successive postconviction petition was properly denied.

¶52 CONCLUSION

¶53 We affirm the trial court's denial of defendant's motion for leave to file a successive postconviction petition where defendant failed to set forth a colorable claim of actual innocence and failed to satisfy the cause and prejudice test as related to his *Brady* violation claim.

¶54 Affirmed.