2017 IL App (1st) 14-2254-U

THIRD DIVISION
May 17, 2017

No. 1-14-2254

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the Circuit Court
Respondent-Appellee,	)	of Cook County, Illinois,
	)	Criminal Division.
v.	)	
	)	No. 04 CR 30440
ANTHONY RILEY,	)	
	)	The Honorable
Petitioner-Appellant.	)	Charles P. Burns,
	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices Lavin and Pucinski concurred in the judgment.

ORDER

Held: The judgment of the circuit court of Cook County denying the petitioner leave to file a successive postconviction petition is reversed and the $105 assessment of frivolous filing fees (735 ILCS 22-105(a) (West 2012)) is vacated.

¶ 1 The petitioner, Anthony Riley, appeals from the circuit court's denial of his *pro se* petition for leave to file a successive postconviction petition. On appeal, the petitioner argues that he should have been granted leave to file his successive postconviction petition based on newly discovered accounts of two eyewitnesses regarding the victim's possession of a gun at the time of the incident, which would have supported his actual innocence claim and his trial testimony that

he shot the victim in self-defense. On appeal, the petitioner also argues that the exclusive jurisdiction provision (705 ILCS 405/5-120 (West 2004)) of the Illinois Juvenile Court Act (Act), which excludes 17-year-old minors from juvenile court, violates the eight amendment and the due process clause of both the United States and the Illinois Constitutions. U.S. Const., amends, V, XIV; Ill. Const. 1970, art. I, § 2. The petitioner also appeals from the trial court's order assessing him $105 in frivolous filing fees (735 ILCS 22-105(a) (West 2012)), arguing that such an order was improper where his successive postconviction petition contained at least one claim that had an arguable basis in both fact and law (namely, the contention that he was actually innocent). For the reasons that follow, we reverse the denial of the petitioner's leave to file a successive postconviction petition and remand for further proceedings, and vacate the order for fees.

¶ 2 I. BACKGROUND

¶ 3 The record reveals the following facts and procedural history. In 2004, the then 17-year-old petitioner was charged with first degree murder for his involvement in the November 20, 2004, shooting of the victim, Marcus Murphy, also known as "M Murder."

¶ 4 A. Jury Trial

¶ 5 At the subsequent jury trial, the following evidence was adduced. 17-year-old, Taya Martin (hereinafter Martin) testified that on November 20, 2014, he lived at 5721 South Wentworth Avenue, with his mother, his siblings and his cousin, the victim, Marcus Murphy. At about 10 p.m. that day, Martin was "chillin" with the victim, and two of the victim's other cousins, Robert Boyd (hereinafter Boyd) and Carreil Burnett (hereinafter Burnett).

¶ 6 According to Martin, he, Boyd and Burnett left to go to a party. They walked to Boyd's car,

a black Chevy Lumina, which was parked right behind Martin's house. Boyd drove, while Martin sat in the front passenger seat and Burnett remained in the back seat. Martin averred that as they turned onto 57th Street going towards Wentworth Avenue, he saw the petitioner's car, a blue Chevy Malibu. The two cars passed each other, but then the drivers of both reversed so that the cars stopped side by side.

¶ 7 Martin testified that he knew the petitioner from school, and that two weeks prior to that evening, he had been at a party with Burnett and they had fought with the petitioner and his friends. As the two cars sat side by side, Burnett spoke to the petitioner and told him to "squash what was going on," which Martin explained meant they should "quit fighting. It's over." As Burnett and the petitioner were speaking, Burnett said "[M] Murder, what is you doing out here?" Martin then saw his cousin, the victim, walking towards them from the alley with his arms by his side.

¶ 8 Martin testified that at that point the petitioner held up a gun and said "I ain't worried about [M] Murder." According to Martin, the petitioner then lowered the gun, but as the victim approached the front of Boyd's car, the petitioner held the gun out of the driver side window pointed it back to where the victim was standing and fired three or four times. The petitioner drove away, while Martin and his friends went to help the victim.

¶ 9 Burnett, who was 18 at the time, next testified that on November 20, 2004, he visited the victim, Marcus Murphy, who was confined on house arrest. At about 10 p.m. that evening, Burnett left the victim's house with Boyd and Martin. They walked to the car, a black Chevy Lumina, which was parked in the alley behind the victim's house. Boyd drove, Martin sat in the passenger seat and Burnett got in the back seat.

¶ 10 Burnett averred that as they turned out of the alley, he saw the petitioner's blue Chevy Malibu

go past. The two cars stopped so they were side-by-side with the petitioner's window next to the rear driver's window, where Burnett sat. As they were talking, Burnett saw the victim coming out of the alley, and he said, "What are you doing outside?" The petitioner then looked in his rearview mirror and said "I ain't worried about M Murder." According to Burnett, the petitioner held a black revolver in his right hand. After seeing the petitioner's gun, Burnett told Boyd to drive away.

¶ 11 Burnett testified that he then saw the victim walking towards the car. He stated that the victim's hands were empty and at his sides. As they were pulling away, Burnett heard gunshots and heard Martin say "They hit [M] Murder." Burnett looked through the window and saw the victim running down the alley with blood coming out of his neck as the petitioner's car sped away.

¶ 12 Boyd, who was 20 years old, next testified that the victim was his cousin and that he had known him all of his life. According to Boyd, at about 10 p.m. on November 20, 2004, after visiting with the victim, he, Martin and Burnett left to go to a party. As they were driving away, he saw the petitioner's blue Chevy Malibu. Boyd knew the petitioner's car because he had known the petitioner for several years.

¶ 13 According to Boyd, although the two cars initially passed each other, the drivers backed up so that the cars stopped side by side. The petitioner's window was next to Burnett's, who was in the back seat behind Boyd. The petitioner, Burnett and Martin began to talk about their prior fight. Burnett then said, "What M Murder doing out here?" In response, the petitioner said that he was not afraid of the victim and displayed his gun.

¶ 14 Boyd testified that he saw the victim walk towards Boyd's car with his hands down his sides.

Boyd then saw the petitioner point the gun out of the car window towards the victim and start shooting. The petitioner fired four or five shots and then drove off.

¶ 15 At trial, Adriane McMillan (hereinafter McMillan) next testified that at about 10:15 p.m., on the evening of November 20, 2014, she was walking from her boyfriend's house on 57th Street towards her home at 5622 South Wabash Avenue. As she approached Wentworth Avenue, McMillan saw two cars, one facing east and the other facing west. McMillan saw a boy, whom she later identified as the victim, standing outside of the car talking to the people inside the car facing east. McMillan slowed down because she was by herself and "didn't know" what was going on. McMillan then saw the victim walk away from the car, after which shots were fired from the east facing car. One of the bullets hit a pole that McMillan was approaching so she ran across the street. She testified that she could not be certain how many shots were fired but that it was more than three. McMillan watched the victim walking toward Wentworth Avenue, where she was standing, holding his neck before he collapsed to the ground. McMillan called 911 using her cell phone, and remained with the victim until the ambulance arrived. She testified that other people showed up, and that one man came to put pressure to try to stop the victim's bleeding.

¶ 16 McMillan stated that she never lost sight of the victim, and that she never observed him with a weapon. She also averred that she never saw anyone take a weapon from the victim.

¶ 17 Chicago Police Detective James Breen next testified that he and other detectives went to the petitioner's home in Calumet City several hours after the shooting in search of the petitioner's brother, Alfred Nowden. The petitioner's sister, Natasha Nowden, answered the door and told the police that Alfred was not at home. According to Detective Breen, another detective radioed him telling him that he found a car matching the description of the one seen at the scene of the

shooting, parked behind the house. Detective Breen averred that at that point, the petitioner, who was sitting in the living room, jumped up and ran up the stairs to his sister's apartment. The petitioner's sister let the officers come inside the house and led them to the door leading to the upstairs apartment, which was locked. Detective Breen averred that after the police knocked on the door, a man opened it and took them upstairs. Detective Breen found the petitioner crouching in an open closet with a handgun leaning against him inside an open bag.

¶ 18 Detective Breen testified that he arrested the petitioner and brought him to the police station for questioning. After the petitioner was read his *Miranda* rights, he told the police that he was driving his car when he saw his friend Maurice Hale. At that point, Maurice took over the driving, and soon thereafter they picked up another friend, Thomas Jackson, who was 15 years old. According to Detective Breen, the petitioner further told police that once at 57th and LaSalle Streets, he and his friends had a conversation with Boyd, Martin and Burnett who were in another car. The petitioner told the police that during that conversation, the victim walked up in between the two cars, and someone yelled, "[M] Murder be cool." The petitioner's friend Jackson told Hale to "pull off" and then Hale leaned forward out of the window and fired several shots at the victim.

¶ 19 At trial, the forensic pathologist testified that the victim died from a gunshot wound to the chin and that the manner of death was homicide. She also testified that she recovered a bullet from the victim's body and turned it over to the Chicago police. A Chicago police firearms identification expert testified that she tested the gun retrieved from the petitioner by the police, as well as the bullet recovered from the victim's body, and determined that the bullet was fired from the same gun.

¶ 20 At trial, the petitioner testified in his defense. He stated that about two weeks before the

November 20, 2004, shooting, he was involved in a fight with the victim's cousins, Martin and Burnett, and a few others at a party. According to the petitioner, although the victim was not at the party, he later learned from a friend that the victim wanted to "get him" as a result of that fight. After the party, the petitioner saw the victim with a gun on three or four occasions prior to November 20. Specifically, the day after the party involving the fight, he saw the victim shoot his brother, Alfred. Twice after that, the petitioner also saw the victim driving around in a car flashing a gun through the window. To protect himself from the victim, the petitioner brought a loaded gun from someone on the street.

¶ 21 The petitioner testified at about 10 p.m. on November 20, 2004, he was driving his car with his friend, Jackson. The petitioner stopped at a stop sign near the victim's house at 57th Street, between LaSalle Street and Wentworth Avenue. Another car traveling in the opposite direction stopped alongside his car. The petitioner testified that inside were, Boyd, Burnett, Martin and two other individuals (whom he knew only as Jarvis and "Bubba"). When both cars stopped, the petitioner's window faced Burnett's window.

¶ 22 The petitioner testified that the occupants of the other car talked about ending the problems that resulted from the fight at the party. The petitioner also pulled out the handgun which had been next to his seat, and showed it to the people in the other car, and told them he was not worried about the victim. He then put the gun "back to the side." According to the petitioner, at that point in the conversation, Burnett suddenly shouted, "[M] Murder, what you doing out here?" The petitioner's friend, Jackson, then started shouting in a panicked voice for the petitioner to "pull off." The petitioner then looked in his rearview mirror and saw the victim walking towards the back of the petitioner's car, approaching the driver's side window. The petitioner testified that he victim's hands were under his shirt near his waist. The petitioner was

frightened that the victim would shoot him, and therefore ducked, turned his head to the right, and fired the gun three times over his left shoulder out of the window. He stated that he did not see where he was shooting, and that as he fired the shots, he took his foot off the break and drove away. The petitioner drove to his mother's house in Calumet City, where he was arrested later that night. He explained that he was hiding in the closet because he was scared and was waiting for his mother, who was on her way, to come home, before speaking to police. The petitioner also testified, over the State's objection, that he had never shot a gun before.

¶ 23 On cross-examination, the petitioner admitted that he did not see a gun in the victim's hand, but stated that he believed he had one because of the way he held his hands underneath his shirt.

¶ 24 Thomas Jackson, who was 15 years old, next testified for the defense, corroborating the petitioner's testimony. Like the petitioner, Jackson stated that the occupants of the other car included not only Boyd, Burnett, and Martin, but also Jarvis and "some more other people." Jackson averred that at one point during the conversation, he looked in the rear view mirror and saw the victim "creeping up" behind the petitioner's car. Jackson stated that he heard a little boy in Boyd's car say, "M Murder gone do this." Jackson was scared, and yelled at the petitioner to "pull off" and then ducked because he thought the victim was planning to shoot. As the victim came within five to six feet from the back window, Jackson ducked and the petitioner fired his gun out the window.

¶ 25 On cross-examination, Jackson admitted that he never saw a gun in the victim's hands. During cross-examination, the State also impeached Jackson with his prior inconsistent statement given to the police the day after the shooting, where he told the police that the petitioner had been in the back seat and that someone named "Little Man" was the driver and the shooter.

¶ 26 After hearing all the evidence, the jury found the petitioner guilty of first degree murder.

After a sentencing hearing, the court sentenced the petitioner to 50 years' imprisonment: 25 years for the murder plus an additional 25 years for the use of the firearm that proximately caused the death of the victim.

¶ 27 B. Posttrial Proceedings

¶ 28 On direct appeal, the petitioner argued that: (1) the trial court erred in not instructing the jury on involuntary manslaughter; (2) the trial court erred in ruling that presenting evidence of the victim's character would have opened the door for the State to present evidence of the petitioner's prior battery arrests; (3) the trial court did not properly instruct the jury on the burden of proof for second degree murder; and (4) the State made improper comments during rebuttal closing argument. The appellate court affirmed the petitioner's conviction on October 28, 2008 (*People v. Riley*, No. 1-06-2545 (Oct. 18, 2008) (unpublished order pursuant to Illinois Supreme Court Rule 23)), and our supreme court denied the petition for leave to appeal on January 28, 2009 (*People v. Riley*, 231 Ill. 2d 648 (2009)).

¶ 29 On April 12, 2010, the petitioner filed a *pro se* postconviction petition alleging that his trial counsel was ineffective for: (1) failing to investigate and call, *inter alia*, Andre Clifton to support his claim of self-defense where Clifton would have testified that he removed the gun from the victim's person after the shooting; (2) failing to support the self-defense theory by presenting evidence of the victim's prior convictions for unlawful use of a weapon; (4) not calling any witnesses or presenting any evidence at the pretrial motions to quash arrest and suppress statements; (5) failing to investigate and present evidence of the victim's violent reputation as a gang member; and (6) failing to investigate the victim's cousins to discover their violent reputations in the neighborhood and their potential to lie about the victim not having a gun on the night in question. The trial court summarily dismissed the petitioner's *pro se* postconviction

petition as frivolous and patently without merit, and that dismissal was affirmed on April 23, 2012. *People v. Riley*, 2012 IL App (1st) 101651-U.

¶ 30 On March 18, 2014, the petitioner filed the instant *pro se* motion for leave to file a successive postconviction petition. In his petition, he asserted various claims of ineffective assistance of trial and appellate counsels. In addition, the petitioner argued that he had newly discovered evidence of his actual innocence, namely, the affidavits of Romerio Morgan (hereinafter Morgan) and Andrey Maxey Sr. (hereinafter Maxey). The petitioner argued that these two independent witnesses would testify that they observed the victim carrying a gun at the time of the incident and corroborate his claim at trial that he shot the victim in self-defense.

¶ 31 In his affidavit, notarized on August 6, 2013, attached to the petition, Morgan stated that he witnessed the November 20, 2004, shooting of M Murder, because he was standing on the corner of 57th and LaSalle Streets "on the east side-walk." Morgan attested that he noticed a blue car approach the stop sign located at the corner of 57th and LaSalle Streets facing east, and that he paid close attention to the car because he recognized the car as belonging to someone he knew as Fatz, and a week before he and Fatz had had a "disagreement over something." Morgan attested that as he watched the car, another black car reversed from the opposite direction so that both cars were now side by side facing different directions. Morgan stated that he could not hear what was being said but "it appeared to be some type of dispute being talked about." According to Morgan's affidavit, "[i]t went form a calm conversation to a heated conversation back to calm."

¶ 32 Morgan attested that as the conversation was occurring, he saw M Murder approaching between the two cars "gripping a pistol in the front of his pants." As M Murder got closer, Morgan heard "the guys in the black car yelling 'pop his a**' or something of that kind." Morgan stated that as M Murder got to the back of the car he pulled his pistol and Morgan heard three

rapid shots, and ducked. Morgan stated that he "assumed [M Murder] shot into the blue car, but as he watched, he saw both cars take off and M Murder turn around and take off running, before collapsing near the alley. Morgan stated that it was only then that he realized that Fatz was the one that shot.

¶ 33 In his affidavit, Morgan further attested that after the shots were fired, "everyone started coming out" to see what had happened. As Morgan approached M Murder, he observed a man apply pressure on M Murder's neck, and another man take a gun out of his waistline. Morgan stated that by this time the black car had returned, he saw the man who had taken the gun give the gun to one of the individuals from the black car. According to Morgan, the individual who took the gun ran off down the alley, carrying the gun, together with another man.

¶ 34 Morgan explained that when the police and paramedics arrived, he left because he did not "want to be involved." He stated that he was now coming forward with his affidavit because he learned through Facebook that Fatz was found guilty of murder and sentenced to 50 years and he believes that "because of how everything took place" Fatz should not have been convicted. Morgan stated that after contacting Fatz's family through Facebook, he learned that the State witnesses had said that the victim never had a gun, and therefore he wanted to "bring[] forth the truth."

¶ 35 In his notarized affidavit, dated September 4, 2013, Maxey attested that at about 10 p.m. on November 20, 2004, he was walking down LaSalle Street from 55th Street approaching 57th Street when he noticed two cars sitting in the street at the corner of LaSalle facing opposite directions. According to Maxey, the blue car was facing east and the black car was facing west. As Maxey approached 57th Street on LaSalle, he saw M Murder creeping out of the alley with what appeared to be a gun under his shirt. Maxey instantly slowed down his pace as M Murder

approached the two cars. Maxey then heard three gunshots, so he turned around and ran back down the street to avoid begin shot.

¶ 36 In his affidavit, Maxey stated that when he heard the cars speed off, he returned to see M Murder lying in the street with two men over him trying to apply pressure on his neck. Maxey attested that as the black car that was facing west, returned, he saw one of these men remove a handgun from M Murder and give it to one of the individuals in the black car that had returned. Maxey stated that once he saw the gun hand-off, he left because he did not want to be involved. He explained he did not want to "risk[] his a**," and did not want his family to befall any harm because he lived in the neighborhood which was violent. Maxey explained in his affidavit that he was coming forward now because the area has changed for the better, and he now feels safe because there are no more "gangs, hanging on the corners, shootings, or gang wars going on in the area."

¶ 37 On June 16, 2014, the trial court denied the petitioner's leave to file a successive postconviction petition. With respect to the petitioner's actual innocence claim the trial court found that the affidavits of Maxey and Morgan provided only cumulative evidence that would not have changed the outcome of the trial or the initial postconviction proceedings. In addition, the trial court assessed $105 in frivolous filing fees. The petitioner now appeals.

¶ 38 II. ANALYSIS

¶ 39 We being by noting that the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2012)) provides a statutory remedy to criminal defendants who claim that substantial violations of their constitutional rights occurred at trial. *People v. Edwards*, 2012 IL 111711, ¶ 21. The Act is not a substitute for an appeal, but rather, is a collateral attack on a final judgment. *Edwards*, 2012 IL 111711, ¶ 21. Accordingly, issues not presented in an original or amended petition will

be deemed waived, and those issues that have previously been raised and addressed on appeal will be barred under the doctrine of *res judicata*. See *Edwards*, 2012 IL 111711, ¶ 21; see also *People v. Sanders*, 2016 IL 118123, ¶ 24 (citing 725 ILCS 5/122-3 (West 2014)).

¶ 40 The Act contemplates the filing of only one petition without leave of court (725 ILCS 5/122-1(f) (West 2012)). Nonetheless, our supreme court has identified two bases upon which this bar against successive postconviction petitions will be relaxed. *Sanders*, 2016 IL 118123, ¶ 24. The first exception is when the petitioner satisfies the cause and prejudice test. 725 ILCs 5/122-1(f) (West 2012)); see also *Sanders*, 2016 IL 118123, ¶ 24 (citing *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002)). The second exception is known as the fundamental miscarriage of justice exception and requires the petitioner to demonstrate actual innocence. *Sanders*, 2016 IL 118123, ¶ 24. The evidence of actual innocence must be: (1) newly discovered; (2) not discoverable earlier through the exercise of due diligence; (2) material and not merely cumulative; and (4) of such conclusive character that it would probably change the result on retrial. *Sanders*, 2016 IL 118123, ¶ 24 (citing *Edwards*, 2012 IL 111711, ¶ 32).

¶ 41 Our supreme court has held that leave of court to file a successive postconviction petition under the second exception, should be denied "only where it is clear from a review of the petition and attached documentation that, as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence." *Sanders*, 2016 IL 118123, ¶ 24 (citing *Edwards*, 2012 IL 111711, ¶ 24). Stated differently, "leave of court should be granted where the petitioner's supporting documentation raises the probability that it is more likely than not that no reasonable juror would have convicted the petitioner in light of the new evidence." *Sanders*, 2016 IL 118123, ¶ 24 (citing *Edwards*, 2012 IL 111711, ¶ 24).

¶ 42 With respect to our standard of review, we note that in *Edwards*, our supreme court refused

to decide what standard of review applies on appeal. See *Edwards*, 2012 IL 111711, ¶ 30. Nonetheless the court did state that although "[g]enerelly decisions granting or denying 'leave of court' are reviewed for an abuse of discretion," because a trial court should deny leave to file a successive petition only in cases, where as a matter of law, no colorable claim of actual innocence has been made, "[t]his suggests a *de novo* review." *Edwards*, 2012 IL 111711, ¶ 30. Following this suggestion by our supreme court in *Edwards*, we will apply the *de novo* standard of review. See *Edwards*, 2012 IL 111711, ¶ 30; see also *People v. Jones*, 2016 IL App (1st) 123371, ¶ 71 ("As the *Edwards* court itself observed, we are faced with a purely legal question, and legal questions are generally reviewed under a *de novo* standard. [Citation.] In addition, *de novo* review furthers the original goal of the actual-innocence exception, which is to prevent a fundamental miscarriage of justice.").

¶ 43 Turning to the merits, in the present case, the petitioner asserts that the trial court erred in denying him leave to file his successive postconviction petition because the evidence offered by the affidavits of two previously unavailable, undiscoverable and independent eyewitnesses (Morgan and Maxey) stating that the victim carried a gun while he crept toward the petitioner's car, and that subsequently a man removed that gun from the victim's person, constitutes newly discovered evidence, that is material and noncumulative and is of such conclusive nature that it would have probably changed the result on retrial. For the reasons that follow, we agree.

¶ 44 First, we disagree with the State's position that the affidavits of Morgan and Maxey are not newly discovered evidence. Newly discovered evidence is "evidence that has been discovered since the trial and that the defendant could not have discovered sooner through due diligence." *People v. Ortiz*, 235 Ill. 2d 319, 334 (2009). In the present case, both Morgan and Maxey explicitly averred in their affidavits that after they observed an individual, who was helping the

victim, remove a gun from the victim's person, and flee with the gun down an alley, they left the scene of the crime before the police could speak to them because they "did not want to be involved," with Maxey adding that he feared for his and his family's safety since they lived in the neighborhood. See *Ortiz*, 235 Ill. 2d at 334 (holding that an eyewitness was newly discovered when he "essentially made himself unavailable as a witness when he moved to Wisconsin shortly after the murder."). In addition, in his petition, which at this preliminary stage, we must take as true, the petitioner alleged that Maxey and Morgan "were never interviewed by the police investigators, or any private investigators." See *Jones*, 2016 IL App (1st) 123371, ¶ 91 ("In reviewing a trial court's denial of a leave to file a 'successive postconviction petition, all well-pleaded facts in the petition and supporting affidavits are taken as true.' ") (quoting *People v. Williams*, 392 Ill. App. 3d 359, 367 (2009)). Accordingly, since the petitioner alleged that neither affiant was ever interviewed, and both affiants affirmatively stated that they avoided contact with the police, and that they were coming forward now only as a result of personal efforts by the petitioner's family, under this record we are compelled to conclude that the petitioner could not have discovered this evidence earlier and that therefore the affidavits are newly discovered. The trial court apparently agreed with this conclusion, since it never found that the evidence was not new.

¶ 45 The State contends that the even if the evidence offered by the affidavits is newly discovered, it is nonetheless cumulative and immaterial because the issue of self-defense and whether the victim possessed a gun at the time of the shooting were already thoroughly presented to the jury by the testimony of the petitioner and Jackson at trial. We disagree.

¶ 46 Evidence is material if it is "relevant and probative of the petitioner's innocence." *People v.*

Coleman, 2013 IL 113307, ¶ 96 (citing *People v. Smith*, 117 Ill. 2d 53, 82-83 (1997)). Evidence is cumulative if it "adds nothing to what is already before the jury." *People v. Sparks*, 393 Ill. App. 3d 878, 886 (2009); see also *People v. Molstad*, 101 Ill.2d 128, 135 (1984) ("Claiming evidence is cumulative involves a determination that such evidence adds nothing to what is already before the jury.").

¶ 47 In the present case, we cannot state that the two affidavits, if true, are not relevant or material, nor would add anything new to what was already before the jury. At trial, the only evidence that the victim possessed a gun came from the petitioner and Jackson, neither of whom actually saw the gun. The petitioner and Jackson both testified that they saw the victim's hands underneath his shirt and believed him to have a gun. There were no witnesses presented by the defense, however, who testified that they actually saw a gun in the victim's hands. As such, Morgan's and Maxey's affidavits provide a crucial piece of evidence that was not before the jury and that would have made the petitioner's claim of self-defense "more probable than it would [have been] without th[at] evidence." See *People v. Morgan*, 197 Ill. 2d 404, 455-56 (2001) ("Evidence is considered relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of an action either more or less probable than it would be without the evidence.").

¶ 48 The State is incorrect when it argues that Morgan's affidavit stating that he observed M Murder pulling a gun from his pants pocket as he approached the petitioner's car is immaterial because it does not support the petitioner's statement at trial that he did not see the victim with a gun. The State's argument ignores the petitioner's uncontradicted testimony at trial that as he saw the victim approaching his car from behind with his hands underneath his shirt, he immediately ducked down in the driver's seat, stuck his gun out of the window, and started shooting in the

direction of the victim, without looking back. The petitioner nowhere testified that the victim did not have a gun. He only testified that in that split second and fearing for his life he did not see that gun. What is more, the petitioner explained that he began shooting because he believed that the victim had a gun and was about to shoot him for the following reasons: (1) the victim had threatened to "get him" only a week before that; (2) the victim had repeatedly flashed his gun from a car at the petitioner in that same week; (2) the victim had shot at the petitioner's brother; (3) the victim was sneaking up behind the petitioner's car, when he was supposed to be inside his house under house arrest; (4) the victim was holding his hands underneath his shirt as though he carried a gun while approaching the petitioner's car; and (5) someone in the car with the victim's friends, yelled that the victim was about to shoot the petitioner. Accordingly, under this record, contrary to the State's assertion, we find that far from being irrelevant, or contradictory, Morgan's affidavit attesting that he saw the victim approaching between the two cars "gripping a pistol in the front of his pants," and then pulling the pistol out as he got closer to the back of the petitioner's car, materially supports the petitioner's claim of self-defense. See *Ortiz*, 235 Ill. 2d at 335-36 (holding that the testimony of a newly discovered eyewitness was material where it "supplied a first-person account for the incident that directly contradicted the prior statements" of the State's two eyewitnesses); see also *Sparks*, 393 Ill. App. 3d at 886 (holding that where the State's key witness and the defendant presented conflicting versions about the incident, and the affidavit offered by a new and uninvolved witness supported the defendant's testimony, the affidavit was material an noncumulative); see also *Jones*, 2016 IL App (1st) 123371, ¶ 96 (holding that an eyewitness's affidavit recounting what he saw at the time of the fatal shooting, and contradicting the defendant's videotaped confession to the shooting, was material, noncumulative evidence, in support of the defendant's request for leave to file his successive

postconviction petition on the basis of actual innocence, where, *inter alia*, the detail of the affidavit comported in almost all respects with the trial record).

¶ 49 The State next contends that regardless of its relevance, in light of McMillan's testimony at trial that she did not see a gun in the victim's possession either at the time of the shooting or when he was lying on the ground, the evidence offered by Morgan's and Maxey's affidavits is not of such conclusive character that it could probably change the result on retrial.

¶ 50 In that respect, we note that at trial, the petitioner contended that he shot the victim in self-defense because he reasonably believed that the use of force was necessary to prevent death or great bodily harm. As such, the State was required to prove beyond a reasonable doubt that the petitioner did not have a reasonable belief in the need to use deadly force. 720 ILCS 5/7-1(a) (West 2004).

¶ 51 In this respect, the State and the defense presented contradictory testimony by numerous eyewitnesses. The defendant and his friend Jackson both testified that they believed that the victim had a gun and planned to shoot the petitioner, but could not affirmatively state that they saw the gun in the victim's hands. The State's four witnesses, on the other hand, testified that the victim never had a gun. Of those four witnesses presented by the State, however, three were the victim's cousins, and admitted to having a prior rivalry with the petitioner. As such, the only uninvolved witness offered by the State, in a trial that focused entirely on credibility, was McMillan. Contrary to the State's assertion, under such a record, we cannot state, as a matter of law, that the introduction of testimony by two new independent eyewitnesses, attesting to having seen the victim with the gun as he approached the petitioner, does not raise the probability that it is more likely than not that no reasonable juror would have believed the petitioner's version of events. *Sanders*, 2016 IL 118123, ¶ 24 (citing *Edwards*, 2012 IL 111711, ¶ 24). While the

testimony offered by these two new affiants does not necessarily set forth a colorable claim of actual innocence, it nonetheless tends to lend additional support to the petitioner's claim of self-defense, which, if successful, could lead to acquittal.

¶ 52 This is particularly true where McMillan was standing behind the victim during the shooting, and Morgan and Maxey attested in their affidavits to having witnessed the shooting from the front. In that respect, the record reveals that at trial McMillan testified that when she was at the intersection of Wentworth Avenue and 57th Street she observed the victim walking away from her and towards the cars, before the shots were fired. In contrast, in his affidavit Morgan stated that he was standing on the corner of 57th Street and LaSalle Street on the east side-walk, and Maxey averred that he was walking down LaSalle coming from 55th Street and approaching 57th Street, before the shooting occurred, with both apparently facing the victim.

¶ 53 More importantly, contrary to the State's position, nothing in McMillan's testimony affirmatively defeats the petitioner's self-defense claim at this stage of postconviction proceedings. Contrary to what the State would have us hold, McMillan's testimony that she never saw anyone remove a gun from the victim's person does not positively rebut Morgan's and Maxey's accounts. In fact, in some ways the two accounts corroborate each other, with McMillan admitting that after the shooting other individuals showed up at the scene to see what had happened, and a man knelt over the victim in an attempt to stop his bleeding, and Morgan and Maxey attesting that a man, who had been trying to help the victim on the ground, also removed the gun from the victim's person. As such, McMillan's testimony only provides a different version of events than that offered by Morgan and Maxey, necessarily requiring a credibility determination, which our supreme court has made clear, at this stage of postconviction proceedings we are not at liberty to make. See *Sanders*, 2016 IL 118123, ¶ 42

(Reiterating its numerous prior holdings that credibility determinations may not be made at either the first or second stage of postconviction review, but must be reserved for a third-stage evidentiary hearing, and that until then all well-pleaded allegations and supporting affidavits in the petitioner's pleadings must be taken as true).

¶ 54 Under the aforementioned record, because the petitioner's supporting documentation, albeit not necessarily sufficient to set forth a colorable claim of actual innocence, tends to support his claim of self-defense, which, if believed by a trier of fact, could lead to acquittal, we are compelled to conclude that the trial court's denial of the petitioner's leave to file a successive postconviction petition was improper. See *Sanders*, 2016 IL 118123, ¶ 24 (citing *Edwards*, 2012 IL 111711, ¶ 24).

¶ 55 Since we conclude that the petitioner should have been granted leave to file his successive postconviction petition, we necessarily also find that the trial court erred in assessing him $105 in frivolous filing fees pursuant to section 22-105(a) of the Code of Civil Procedure (Code) (735 ILCS 5/22-105 (West 2012)), and order those fees vacated. See *Sparks*, 393 Ill. App. 3d at 888 (vacating the trial court's assessment of $105 in frivolous filing fees and courts costs where the defendant's *pro se* postconviction petition presented an arguable claim of actual innocence).

¶ 56 Because we reverse the denial of the petitioner's leave to file a successive postconviction petition, we need not now address his as-applied constitutional challenge to his 50-year sentence. Upon being granted leave, the petitioner may choose which claims he will proceed with in his petition, and then fully argue those claims below.

¶ 57 III. CONCLUSION

¶ 58 Based on the foregoing reasons, the trial court's denial of the defendant's petition for leave to

file a successive postconviction petition is reversed and the cause is remanded for further proceedings in accordance with the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2012)). The assessment of $105 in filing fees and court costs (735 ILCS 5/22-105 (West 2012)) is vacated.

¶ 59 Reversed and remanded; Fees vacated.