2019 IL App (1st) 160255-U

Nos. 1-16-0255 and 1-17-0460 Consolidated

Order filed March 29, 2019

Fourth Division

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).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 00 CR 17550
	)	
LINSFORD GILL,	)	Honorable
	)	Arthur F. Hill, Jr.,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice McBride and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: Where the affidavit attached to defendant's third successive *pro se* postconviction petition meets the requirements for a claim of actual innocence based on newly discovered evidence, we reverse the trial court's denial of leave to file the petition and remand for further postconviction proceedings.

¶ 2 In this consolidated appeal, defendant Linsford Gill appeals from (1) the trial court's denial of his motion to reconsider the denial of leave to file his first successive *pro se* postconviction petition (appeal No. 1-16-0255), and (2) the trial court's denial of leave to file a

third successive *pro se* postconviction petition (appeal No. 1-17-0460). On appeal, defendant contends that the trial court erred in denying leave to file the third successive petition because he presented a colorable claim of actual innocence based on the exculpatory affidavit of a newly discovered eyewitness.

¶ 3 For the reasons that follow, we affirm in appeal No. 1-16-0255, and reverse and remand for further postconviction proceedings in appeal No. 1-17-0460.

¶ 4 Following a 2002 jury trial, defendant was found guilty of first degree murder and personally discharging the firearm that killed Jamal Moore. The trial court sentenced defendant to 40 years in prison for first degree murder plus 25 years for personally discharging a firearm, for a total sentence of 65 years. We affirmed defendant's conviction and sentence on direct appeal. *People v. Gill*, No. 1-04-0019 (2006) (unpublished order under Supreme Court Rule 23). In the course of doing so, we set forth the underlying facts of the case. Those facts will be repeated here to some extent due to the nature of defendant's current postconviction claim.

¶ 5 At trial, Frederick Funes testified that around 10:30 p.m. on June 17, 2000, he and Moore were driving around in Funes's van. At the corner of Estes and Glenwood Avenues, Funes saw defendant, codefendant Gasi Pitter,[1] and two women standing together. Funes was familiar with defendant and codefendant from the neighborhood, knew them by their nicknames ("Legend" and "Junior," respectively), and identified them in court. Funes stated that there were also "maybe pedestrians walking" in the area.

¶ 6 Funes and Moore drove past the corner, switched seats so that Funes was driving, and came back around the block. When they arrived back at the corner, Funes saw that the two

[1] Pitter was tried in a simultaneous but separate jury trial. He is not a party to this appeal.

women were now by themselves. He pulled up, intending to ask them if they had seen a friend of his. As Moore began talking to one of the women through the van's passenger window, Funes heard gunshots coming from behind him on the passenger side of the van. He started driving away while looking in his side-view mirrors. In the van's right side mirror, he saw Pitter firing a gun, and in the left side mirror, saw defendant running toward Pitter and shooting. Funes turned into an alley and Moore fell into his lap. At first, Funes thought Moore was playing around, but then he noticed a hole in Moore's head, so he drove Moore to the hospital. The next day, Funes was with Moore when he was taken off life support and died. Two days after the shooting, Funes identified defendant and Pitter in a lineup.

¶ 7 On cross-examination, Funes clarified that he did not see actual guns in defendant's or Pitter's hands, but rather, saw fire and sparks coming from their hands. He explained, "If I'm seeing sparks, somebody [is] shooting a gun. That's a gun. *** I know it's a gun. I didn't -- I can't say I saw what color it was or how big but I know that's a gun."

¶ 8 Tamara Adams testified that on the evening of June 17, 2000, she and her friend Michelle Clark were hanging out with defendant and Pitter in front of a corner store at Estes and Glenwood Avenues. She identified defendant and Pitter in court. Around 10:30 p.m., Funes and Moore pulled up in a van. Adams knew Funes as "Blue." Clark spoke with Moore, who was in the van's passenger seat. The van drove away, but then drove by again within a minute. At that point, defendant and Pitter looked at each other and ran under the nearby viaduct. When the van came around a third time, Adams saw defendant and Pitter coming back toward the corner and heard gunshots. She saw defendant in the middle of the street, shooting at the van. Specifically, she saw fire coming from a gun in his hand. Adams dropped to the ground and heard more

gunshots. The van drove away, and Adams and Clark ran inside. Two days later, Adams identified defendant and Pitter in a lineup.

¶ 9 On cross-examination, Adams stated that when the van came around the third time, she saw defendant and Pitter walking toward it at first. Then, they began running up to the van and defendant started shooting at it. Adams acknowledged that she did not see what kind of gun defendant was shooting.

¶ 10 Donna Michelle Clark testified that sometime after 10 p.m. on the night in question, she happened upon Adams, defendant, and Pitter at the corner of Estes and Glenwood Avenues. She identified defendant and Pitter in court. After hanging out for 10 or 15 minutes, Clark saw a van come around the corner and drive by. Funes, whom she knew as "Blue," was driving the van, and Moore, with whom she had "an on again, off again sexual relationship," was in the passenger seat. After the van passed, Clark heard defendant and Pitter talking to each other. One of them said something to the effect of "let's get it," or "let's do it," but Clark did not hear them clearly. Defendant and Pitter then ran off toward the nearby viaduct.

¶ 11 Clark continued to hang out on the corner with Adams. A few minutes later, the van came back around the corner. It slowed down briefly, and then as it started pulling away, Clark heard gunshots from the direction of the viaduct. She saw Pitter running toward the van and defendant in the street, walking toward the van and holding a silver gun at his side. Clark heard a second set of gunshots coming from Pitter's direction, which sounded different from the first set of shots. Clark then saw defendant and Pitter run to Pitter's car, get in, and drive off. Clark and Adams ran inside.

¶ 12 On cross-examination, Clark acknowledged that when she heard the first set of gunshots, she did not see anyone shooting a gun. She reiterated that she saw defendant with a gun in his hand, but did not see him shoot the gun.

¶ 13 The medical examiner who performed Moore's autopsy testified that he died as a result of a gunshot wound to the head, and that the manner of his death was homicide.

¶ 14 Chicago police officer Leonard Stocker, a forensic investigator, testified that he and his partner searched the scene for physical evidence and took photographs of the area. Five spent shell casings were identified grouped together near the middle of the street. After processing the scene, Stocker and his partner went to the hospital to inspect and photograph Funes's van. Stocker identified bullet damage to the van's rear passenger side window.

¶ 15 The parties stipulated that if called as a witness, a forensic scientist would have testified that all the shell casings recovered from the scene were fired from the same firearm and the bullet recovered from Moore's skull was the same caliber as the fired casings.

¶ 16 Defendant testified that on the day in question, he went to a cousin's house around 4:30 p.m. and stayed there until about 11:30 p.m. The cousin's house was at 1406 West Lawndale Avenue. At some point while defendant was at his cousin's house, Pitter paged him, and he called Pitter back. As a result of that conversation, defendant had his cousin drive him to Pitter's girlfriend's house in Evanston. Pitter met defendant in front of the building and they went inside together. Defendant denied ever being at the location of the shooting on the night in question, and denied ever having or firing a gun that night.

¶ 17 In rebuttal, Chicago police detective Nick Rossi testified that on June 19, 2000, he interviewed defendant at the police station. After receiving *Miranda* warnings, defendant told

Rossi and his partner that on the evening in question, he went to his brother's house on West Estes Avenue around 7:30 p.m. and stayed there for about an hour and a half. Then, around 9 or 9:30 p.m., defendant and Pitter picked up Pitter's daughter from a babysitter and went to the child's mother's house around 9:45 p.m. Defendant told Rossi and his partner that he and Pitter stayed there, eating and watching cartoons, until defendant fell asleep around 11 or 11:30 p.m., and that he did not wake up until about 1 p.m. the next day.

¶ 18 The jury found defendant guilty of first degree murder and also found that defendant personally discharged the firearm that killed Moore. Subsequently, the trial court sentenced defendant to 40 years in prison plus 25 years for personally discharging the firearm that killed Moore, for a total sentence of 65 years.

¶ 19 On direct appeal, defendant argued (1) the State failed to prove him guilty beyond a reasonable doubt; (2) ineffective assistance of trial counsel; (3) the trial court prevented him from testifying fully about why he informed the police he had been with his codefendant on the night of the shooting; (4) the State made improper closing arguments; and (5) the enhancement of his sentence was unconstitutional. We affirmed defendant's conviction and sentence. *People v. Gill*, No. 1-04-0019 (2006) (unpublished order under Supreme Court Rule 23). When rejecting defendant's challenge to the sufficiency of the evidence, this court stated "that the evidence overwhelmingly showed that [defendant] was present the night of the incident and fired a gun at Funes' van" and that the testimony of the three eyewitnesses constituted "overwhelming evidence." *Id.*, slip op. at 16.

¶ 20 On December 14, 2006, some seven months after this court affirmed his conviction and sentence, defendant filed his first *pro se* postconviction petition. In the petition, defendant

contended that appellate counsel was ineffective for failing to argue the trial court erred in denying the pretrial motion to quash arrest and suppress evidence. On January 2, 2007, defendant filed a supplemental *pro se* petition, contending he was denied due process because Funes and agents of the State coerced Adams to commit perjury at trial. On February 28, 2008, defendant filed an amended *pro se* petition, renewing his claim of ineffective assistance of appellate counsel and contending his due process rights were violated because he was not notified the State would seek to convict him under a theory of accountability. Counsel was appointed and, on August 23, 2011, filed an amended petition alleging ineffective assistance of appellate counsel based on failure to challenge the denial of the motion to quash arrest and suppress evidence and denial of due process where defendant was not charged under an accountability theory. The State filed a motion to dismiss, which was granted by the trial court. We affirmed. *People v. Gill*, 2015 IL App (1st) 121031-U.

¶ 21 On March 24, 2014, defendant filed a *pro se* petition for relief pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2014)), claiming the firearm enhancement was void because it was not charged in the indictment, and moreover, was unconstitutional. More than 30 days later, on May 5, 2014, the trial court *sua sponte* issued a written order dismissing the petition as meritless. This court affirmed. *People v. Gill*, No. 1-14-1799 (2016) (unpublished summary order under Supreme Court Rule 23(c)).

¶ 22 On August 5, 2015, while the appeal from the dismissal of his section 2-1401 petition was pending, defendant filed a *pro se* motion for leave to file a successive postconviction petition. In the attached petition, defendant asserted a claim of actual innocence based on newly discovered evidence in the form of an affidavit from Elijah Stewart, whom defendant had met

while incarcerated. According to defendant, Stewart told him he and his mother witnessed the shooting, called the police, and viewed photo arrays from which they did not identify anyone. Defendant asserted that the State committed a *Brady* violation by withholding this exonerating evidence. He also argued that his newly discovered evidence would likely change the result at retrial because the evidence against him "was inherently weak where the eyewitnesses' accounts implicating the petitioner was inconsistent."

¶ 23 Defendant attached Stewart's affidavit, dated June 24, 2015, to the petition. In the affidavit, Stewart averred that around 10 p.m. on the day in question, he and his mother, who had since passed away, were getting into her car at the corner of Glenwood and Estes Avenues when he heard gunshots. Stewart looked up and saw two men standing in the intersection, shooting in the direction of "someone that was going towards the lake." Stewart and his mother drove home and she called the police. The next day, they went to the police station and gave statements. A few days later, two plain clothes officers came to their home and showed them a photo array. Neither Stewart nor his mother recognized anyone in the photos. The officers left and Stewart was never again contacted by the police regarding the shooting.

¶ 24 Stewart averred, "The person I saw shooting and describe[d] to the police was not Linsford Gill" and "Overall, I am certain that Linsford Gill was NOT one of the individual[s] I witnessed shooting." Stewart further stated that he would have testified in defendant's defense if he had been called as a witness at trial. However, he did not meet defendant until May 2014, and only then, when defendant related why he was imprisoned, it "jolted" Stewart's memory. He was unable to provide defendant with an affidavit earlier due to a "cell house unit change where I was moved to another location."

¶ 25 The trial court issued a written order on October 19, 2015, denying defendant leave to file his successive petition. The court found that Stewart's affidavit constituted newly discovered evidence that was non-cumulative, but that it was not of such conclusive character as would probably change the result on retrial. Specifically, the court observed that it was not clear whether the shooting Stewart witnessed was the same shooting at issue in this case. Moreover, the trial court stated that, even assuming it was the same shooting, as the appellate court held on direct appeal, the evidence at trial "overwhelmingly established" that defendant was the shooter.

¶ 26 On November 9, 2015, defendant filed a *pro se* motion to reconsider the denial of leave to file his successive postconviction petition, arguing that the trial court erred in finding that Stewart's affidavit was not of such conclusive character that it would probably change the result on retrial. Defendant also asserted that he had discovered additional new evidence of actual innocence that he had not been able to present at trial, in his first petition, or in his initial successive petition. This new evidence was an affidavit provided by Steven Lopez, whom defendant stated he met in prison after being moved to a new cell house location. According to defendant, when he told Lopez the circumstances of his conviction, Lopez related that he had witnessed the shooting, which was committed by "two young black men who he recognizes from the area." Lopez further related to defendant that he did not go to the police because he did not want to get involved. Defendant asserted that where the State's evidence at trial was weak and inconsistent, the proposed testimony of Stewart and Lopez would probably change the result on retrial.

¶ 27 Defendant attached an affidavit executed by Lopez, in which Lopez averred that about 9:45 p.m. on the date in question, he was walking at the intersection of Glenwood and Estes

Avenues when he heard gunshots. He turned and saw "two young black men who [he] often saw in the area" standing in the street and shooting at a van. The shooters got into a parked car near where several women were standing and drove off. Lopez stated that he did not call the police because the shooters saw him and he did not want to get involved. Then, in October 2015, he met defendant in prison and learned why defendant was incarcerated. Lopez told defendant he witnessed the shooting and "none of the two men that I saw & knew from around the area that was shooting at the van was him."

¶ 28 The trial court denied defendant's motion to reconsider. The trial court also found that defendant's additional allegation of newly discovered evidence, *i.e.*, the Lopez affidavit, was not properly before it. The court explained that if defendant wanted to introduce additional evidence, he would need to move for leave to file another successive postconviction petition. Defendant filed a notice of appeal, timely per envelope. The appeal was assigned appeal No. 1-16-0255.

¶ 29 On February 9, 2016, defendant sought leave to file a second successive *pro se* petition for postconviction relief, alleging the State committed a *Brady* violation for failing to disclose that an arresting officer was involved in a pattern of misconduct, that trial counsel was ineffective for failing to investigate and present evidence regarding police misconduct, and that a police detective committed perjury at a pretrial motion hearing. In support, defendant attached two newspaper articles from 1999 detailing police misconduct and three affidavits, including one that was self-executed, also alleging police misconduct. The circuit court denied leave to file on April 29, 2016. On appeal, we granted counsel's motion to withdraw and affirmed. *People v. Gill*, No. 1-16-1663 (2018) (unpublished summary order under Supreme Court Rule 23(c)).

¶ 30 On September 26, 2016, defendant filed a motion for leave to file a third successive *pro se* petition for postconviction relief, asserting that he had obtained newly discovered evidence of actual innocence in the form of an affidavit from Cornelius Laughlin. In the petition, defendant stated that in March 2016, he came across his "old friend" Laughlin in prison. According to defendant, on the day of the shooting, he and Laughlin had a phone conversation during which defendant reported he was on the west side of Chicago at a relative's home and would not be able to meet with Laughlin until the next day. After this conversation, Laughlin was walking near the intersection of Glenwood and Estes Avenues when he heard gunshots and saw men he knew from the neighborhood as "Clif" and "C.G." shooting at Funes's van. Defendant stated that he could not have discovered this information earlier because Laughlin was afraid of Clif, C.G., and the gang with which he was affiliated, and Laughlin feared both for his own safety and that of his family. Defendant asserted that Laughlin's affidavit would probably change the result on retrial because it was inconsistent with the trial testimony offered by Funes, Adams, and Clark, and that State's case was inherently weak and rested entirely on the testimony of three "shaky" eyewitnesses. In the course of presenting his arguments, defendant also wrote, "On August 5, 2015, the petitioner filed a successive postconviction petition where he presented a claim of a *Brady* violation, and actual innocence, where Elijah Stewart and his mother witness [*sic*] said shooting and saw some other [*sic*] than the petitioner shooting."

¶ 31 Defendant attached Laughlin's affidavit to his petition. In the affidavit, Laughlin averred that if called as a witness, he was "competent to testify thereto." Laughlin stated that he had known defendant since 1998. Around 10 p.m. on the night in question, he spoke with defendant on the phone. During the conversation, defendant said he was on the west side and would not be

able to meet up until the next day. Shortly after the conversation ended, Laughlin began walking home. When he got to the area of the intersection of Glenwood and Estes Avenues, he heard shots and saw "Clif" and "C.G.," whom he knew from the neighborhood, shooting at "Blue's" van, which was stopped on Estes. The van sped off and Clif and C.G. got into a car and left. Laughlin further stated that he saw two women and Pitter, who were standing around a car, dive to the ground during the shooting.

¶ 32 Laughlin further averred that he later learned Moore died as a result of the shooting. He also learned that defendant and Pitter had been "locked up" for the murder, but Laughlin "figured they would be released since everyone that was out there that night knew that Clif and C.G. were the ones that did it." Laughlin stated he had been afraid to talk to the police because he feared the reputations of Clif, C.G., and his own gang, and believed if they found out he had talked to the police he and his family would have been badly harmed.

¶ 33 Laughlin stated that he and defendant had been "on the same gallery" in prison for almost six months. When he first saw defendant in prison, defendant reported that he was incarcerated for Moore's death. Laughlin concluded by writing, "However, even now I am hesitant about getting involved knowing that harm can still come to my family some of which still lives on the north side of Chicago. That I knew that Clif and C.G. were the shooters that caused the death of Jamal Moore and not Legend and Junior, *i.e.* Linsford Gill and Gasi Pitter."

¶ 34 Defendant also attached a self-executed affidavit in which he averred he came into contact with Laughlin when he moved to a different cell house in March 2016. According to defendant, when he told Laughlin he was in prison for Moore's murder, Laughlin was surprised and bewildered and "burst out that you and [Pitter] did not even do that." Laughlin then related

to defendant that shortly after they got off the phone on the night in question, he witnessed Clif and C.G. shooting at Funes's van. Laughlin also related that he was afraid Clif, C.G., and his gang would harm him and his family if he went to the police. Defendant concluded:

> "I ask Cornelius if he would provide me with an affidavit in this regard, he mention that he would have to think about it for he have some members of his family that continue to live on the north side of Chicago and don't want to put them in danger and would have to find out where exactly do they live. That on September 2 – 2016 he provided me with the sworn affidavit attach to the successive post-conviction petition for relief. Nothing further."

¶ 35 The trial court denied leave to file. In its written order, the court indicated that while Laughlin's affidavit was newly discovered and non-cumulative, it was not of such conclusive character as would likely change the result on retrial. The trial court noted that on direct appeal, this court found the evidence "overwhelmingly established" defendant was the shooter, and that this evidence consisted of the trial testimony of three eyewitnesses. Further, the trial court observed that Laughlin did not state in his affidavit that he would be willing to testify, but rather, stated that "even now," he was hesitant about getting involved in the case. Defendant filed a notice of appeal. The appeal was assigned appeal No. 1-17-0460.

¶ 36 This court consolidated appeal No. 1-16-0255 and appeal No. 1-17-0460.

¶ 37 On appeal, defendant contends that he should be granted leave to file his third successive postconviction petition based on the newly-discovered eyewitness account of Laughlin that two men named Clif and C.G. shot Moore and that defendant was not present at the scene. Defendant argues that Laughlin's affidavit exonerates him, adds to the evidence that was presented at trial,

independently corroborates his otherwise unsupported alibi, contradicts the testimony of the State's witnesses, and therefore, is of such conclusive nature that it would probably change the result on retrial. Defendant maintains that when weighed against his new evidence, the evidence at trial was "far from overwhelming." He asserts that at retrial, the evidence of his innocence would be much stronger, as he would be able to offer the testimony of Laughlin, who could identify the shooters as Clif and C.G., as well as the eyewitness testimony of Stewart and Lopez to corroborate Laughlin's testimony that defendant was not one of the shooters. Defendant argues that when the trial court concluded Laughlin's statement was not of such conclusive character as would likely change the result on retrial, it failed to consider that at retrial, defendant would be able to present not only Laughlin's testimony, but also that of Stewart and Lopez. Defendant acknowledges that he did not attach Stewart's and Lopez's affidavits to his third successive petition, but argues that he was a *pro se* litigant, and notes that he did reference Stewart in the body of the third successive petition. Defendant concludes that where he has presented a colorable claim of actual innocence, this court should reverse and remand for further postconviction proceedings.

¶ 38 As an initial matter, we note that defendant's contentions on appeal all relate to the trial court's denial of leave to file his third successive *pro se* postconviction petition, which was the subject of appeal No. 1-17-0460. Defendant has made no arguments regarding the correctness of the trial court's denial of his motion to reconsider the denial of leave to file his first successive *pro se* postconviction petition, which was the subject of appeal No. 1-16-0255. Supreme Court Rule 341(h)(7) (eff. May 25, 2018) provides that points not argued in an appellant's opening brief are forfeited. In light of defendant's apparent abandonment of his appeal in case No. 1-16-

0255, we affirm the trial court's judgment denying his motion to reconsider the denial of leave to file the first successive *pro se* postconviction petition. Our remaining analysis is limited to considering the correctness of the trial court's denial of defendant's motion for leave to file his third successive *pro se* postconviction petition.

¶ 39 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2016)) contemplates the filing of only one postconviction proceeding. *People v. Edwards*, 2012 IL 111711, ¶ 22. However, our supreme court has provided two bases upon which the bar against successive proceedings may be relaxed. *Id*. The first basis is when a defendant establishes "cause and prejudice" for failing to raise the claim earlier. *Id.* The second is the "fundamental miscarriage of justice" exception, under which the defendant must show actual innocence. *Id*. ¶ 23. When a defendant claims actual innocence, the question is whether his petition and supporting documentation set forth a colorable claim; that is, whether they raise the probability that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence. *Id*. ¶¶ 24, 31, 33. The evidence supporting the claim of actual innocence must be (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*. ¶ 32. When contemplating whether leave to file a successive petition should be granted, all well-pleaded facts are taken as true. *People v. Warren*, 2016 IL App (1st) 090884-C, ¶ 77. Credibility determinations may not be made until a third-stage evidentiary hearing of a successive postconviction proceeding. *Id.* (citing *People v. Sanders*, 2016 IL 118123, ¶ 42). We review the denial of leave to file a successive petition claiming actual innocence *de novo*. *People v. Jones*, 2016 IL App (1st) 123371, ¶ 71 (citing *Edwards*, 2012 IL 111711, ¶ 30).

¶ 40 Here, the State concedes that Laughlin's affidavit is newly discovered, material, and non-cumulative. As such, the only question before us is whether the affidavit is of such conclusive character that it would probably change the result on retrial. Defendant, as explained above, argues that it is. The State, on the other hand, argues that it is not, given that this court found the evidence was "overwhelming" on direct appeal. The State also asserts that Laughlin's affidavit is not exonerating because it "provides no conclusive evidence that 'Clif' and 'C.G.' were, in fact, the shooters," and that Laughlin's account is not reliable and trustworthy where he waited almost 16 years to tell his story and voiced hesitation in his affidavit "about getting involved."

¶ 41 The conclusiveness of the evidence is the most important element of an actual innocence claim. *Sanders*, 2016 IL 118123, ¶ 47. Evidence of actual innocence must support total vindication or exoneration, not merely present a reasonable doubt. *People v. Adams*, 2013 IL App (1st) 111081, ¶ 36. Where a witness's statement is both exonerating and contradicts prosecution witnesses, it can be capable of producing a different outcome on retrial. *Id.* (citing *People v. Ortiz*, 235 Ill. 2d 319, 336-37 (2009)). Newly discovered evidence does not have to be completely dispositive of an issue to be deemed likely to change the result upon retrial; rather, it need only be conclusive enough "to *probably* change the result upon retrial." (Emphasis in original.) *People v. Davis*, 2012 IL App (4th) 110305, ¶ 62.

¶ 42 At trial, Funes testified that he saw defendant and Pitter in his side view mirrors, shooting guns. Similarly, Adams testified that she saw defendant, who was with Pitter, shooting a gun at the van. Clark, while she did not see defendant shooting, heard gunshots, saw defendant holding a gun and walking toward the van, and then heard a second set of different-sounding gunshots coming from Pitter's direction. In contrast, defendant denied involvement in the shooting and

testified that during the timeframe in which it occurred, he was at a cousin's house on Chicago's west side.

¶ 43 Laughlin's statement corroborates defendant's version of events: according to Laughlin, he had a phone conversation with defendant around 10 p.m. on the night in question, during which defendant reported he was on Chicago's west side, and then, while walking near the intersection of Glenwood and Estes Avenues shortly thereafter, Laughlin saw two men he knew as Clif and C.G. shooting at Funes's van. Laughlin's statement, taken as true (see *Warren*, 2016 IL App (1st) 090884-C, ¶¶ 77, 84; *Adams*, 2013 IL App (1st) 111081, ¶¶ 33, 35, 38), directly contradicts the testimony of the State's witnesses and could exonerate defendant. The evidence offered by Laughlin would be capable of changing the result on retrial because, where there was no physical evidence implicating defendant and defendant did not confess, the evidence of defendant's innocence would be stronger when weighed against the contradictory testimony given by the prosecution's eyewitnesses. *Ortiz*, 235 Ill. 2d at 337; *Warren*, 2016 IL App (1st) 090884-C, ¶ 84; *Adams*, 2013 IL App (1st) 111081, ¶ 37; see also *People v. Ross*, 2015 IL App (1st) 120089, ¶ 36 (where an affidavit attached to an initial petition asserting newly discovered evidence of actual innocence directly rebutted the State's evidence at trial, the affidavit was of such conclusive character that it would probably change the result on retrial); *People v. Harper*, 2013 IL App (1st) 102181, ¶ 52 (an affidavit attached to a successive petition would have lent credence to the defendant's claim his confession was coerced, and therefore, would likely change the outcome on retrial).

¶ 44 We cannot fault the trial court for failing to consider Stewart's and Lopez's affidavits, as they were not attached to the third successive petition. Nevertheless, we conclude that based on

Laughlin's affidavit, defendant set forth a colorable claim of actual innocence in his third successive postconviction petition. That is, the third successive petition raised the probability that it is more likely than not that no reasonable juror would have convicted defendant in light of the new evidence, if credible. *Adams*, 2013 IL App (1st) 111081, ¶ 39 (citing *Edwards*, 2012 IL 111711, ¶ 24). As such, we find that the trial court erred in denying leave to file the third successive petition and reverse and remand for further postconviction proceedings.

¶ 45 For the reasons explained above, we affirm the judgment of the circuit court in appeal No. 1-16-0255 and reverse the judgment of the circuit court in appeal No. 1-17-0460.

¶ 46 Affirmed in part, reversed in part, and remanded.