

NOTICE  
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2019 IL App (5th) 160094-U

NO. 5-16-0094

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	St. Clair County.
	)	
v.	)	No. 01-CF-1077
	)	
DANNY A. HARRIS,	)	Honorable
	)	John Baricevic,
Petitioner-Appellant.	)	Judge, presiding.

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JUSTICE CATES delivered the judgment of the court.  
Justices Welch and Chapman concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not err in denying petitioner leave to file a successive postconviction petition where petitioner did not set forth a colorable claim of actual innocence.

¶ 2 Petitioner, Danny A. Harris, appeals from a judgment denying him leave to file a successive postconviction petition alleging his actual innocence based on newly discovered evidence. For reasons that follow, we affirm.

¶ 3 I. BACKGROUND AND PROCEDURAL HISTORY

¶ 4 On May 20, 2001, Michael Gibbs was shot and killed by an intruder during an armed robbery at an Amoco service station in Washington Park, Illinois. Gibbs, a long-

time Amoco employee, was on duty when the robbery occurred. Another employee, Ollie Smith, was also working that night. Smith struggled briefly with the intruder. He suffered non-life-threatening injuries to his face and head.

¶ 5 The Investigations Unit of the Illinois State Police was assigned to handle the case. On August 24, 2001, investigators questioned Danny Harris about the robbery and murder. Harris, then 17 years old, provided a statement, which was written down by one of the investigators, with Harris's permission. In the statement, Harris admitted that he went to the Amoco service station in Washington Park around midnight on May 20, 2001, with the intent to commit a robbery. He stated that he was armed with a sawed-off shotgun, and he had covered his face with a bandana and his head with a knee-high stocking. When he walked into the Amoco station, he laughed, "Ha Ha," and said "Give up the money." Harris pointed the shotgun toward Michael Gibbs and an older man, who were both working in the "money cage." Harris recalled that Gibbs ducked down. He thought Gibbs was reaching for a gun, so he leaned over the counter and fired one shot, hitting Gibbs in the side. Harris entered the cage, hit the older man in the head with a bottle and a can, and took approximately \$1200 from the cash register. Harris left the Amoco and ran home. He put the shotgun under his mattress that night. He had not seen the gun since then, and thought his friend, Desi Pasley, may have taken it. He removed his clothes and burned them later that day.

¶ 6 On August 25, 2001, Harris was charged with one count of first-degree murder in the shooting death of Michael Gibbs. Within two weeks, Harris's parents secured the services of an attorney, who entered a plea of not guilty on behalf of Harris.

¶ 7

## The Plea Proceedings and Sentencing Hearing

¶ 8 During a hearing on June 24, 2002, the State announced that the parties had negotiated a partial plea agreement. Under the terms of the negotiated plea, Harris agreed to plead guilty to first-degree murder. The State agreed to seek a sentence of no more than 40 years, and Harris was free to request the minimum sentence of 20 years. During the hearing, the trial court admonished Harris about his constitutional rights, the consequences of pleading guilty, and the range of punishment for the charge. Harris indicated that he understood the court's admonishments. He stated that he wanted to plead guilty, and that no one was forcing him to enter a guilty plea.

¶ 9 The court then asked the State to provide the factual basis supporting the charge of first-degree murder. The assistant state's attorney indicated that the evidence would show that during the early morning hours on May 20, 2001, Harris walked into the Amoco station located in the 1200 block of Kingshighway in Washington Park, Illinois. His face was covered, and he was carrying a sawed-off shotgun. Harris walked up to the counter, announced a robbery, and fatally shot one of the clerks, Michael Gibbs. Harris then stepped behind the counter and took \$1200 from the cash register. Harris struggled briefly with a second clerk before leaving the station. The assistant state's attorney noted that on August 24, 2001, Harris was questioned by investigators, and voluntarily signed a statement admitting his participation in the robbery and murder. Counsel marked the statement as an exhibit, noting there was a stipulation that it was the voluntary statement given by Harris on August 24, 2001. Counsel read parts of Harris's statement into the record and requested that the entire statement be admitted into evidence for purposes of

the hearing. The court granted the request. The assistant state's attorney represented that Harris's statement had been corroborated by Desi Pasley, a person who went with Harris to the Amoco to participate in the robbery, but withdrew before the crime took place. Counsel also indicated that other witnesses inside the Amoco corroborated Harris's statement. After considering the State's proffer, the court determined that there was a factual basis for the murder charge. The court accepted Harris's guilty plea and scheduled a sentencing hearing.

¶ 10 On August 29, 2002, the parties appeared for the sentencing hearing. The State called Michael Gibbs's son as a witness. Gibbs's son presented a victim impact statement and testified about the impact of losing his father. The defense called Harris's mother and grandmother as witnesses. Both testified that Harris had been a good and obedient child. They indicated that Harris was in the ninth grade when his father was murdered. Harris dropped out of school shortly after the murder, and he began to withdraw. During arguments, the State pointed to the detailed description of the crime as set forth in Harris's own statement and asked the court to impose a 40-year sentence. The defense noted that Harris's statement had been written by one of the investigators, and suggested that some of the wording may not accurately reflect what Harris had said. The defense asked the court for a sentence of 20 years, arguing that Harris had no prior felony or juvenile record and was a candidate for rehabilitation. When Harris was given an opportunity to address the court, he apologized to the victim's family and his own family for the harm he had caused. He stated he was under the influence of alcohol and marijuana, and he asked for forgiveness. After considering the relevant factors in

aggravation and mitigation, and the recommendations of counsel, the court imposed a sentence of 40 years in prison, and noted that Harris would be required to serve the entire sentence.

¶ 11 The Postconviction Proceedings

¶ 12 On September 5, 2002, Harris filed a *pro se* motion to withdraw his guilty plea, based on claims of ineffective assistance of plea counsel and improper admonishments by the trial court. Harris claimed he was advised by counsel that he would receive a 20-year sentence and would have to serve 85% of that term. Harris also claimed that the trial court failed to advise him that he could be sentenced to 40 years and be required to serve the entire sentence. The trial court appointed the public defender's office to assist Harris. After consulting with an assistant public defender, Harris moved to withdraw his *pro se* motion to withdraw his guilty plea. That motion was granted on October 28, 2002.

¶ 13 In February 2003, Harris filed a motion to reduce his sentence. In support of his motion, Harris argued that he was only 17 years old and addicted to drugs at the time of the offense, that he had no prior criminal record, and that he was capable of being rehabilitated. The court again appointed the public defender, and granted leave to amend the *pro se* motion. The same assistant public defender appeared for Harris. Counsel filed an amended motion to withdraw the guilty plea and vacate the judgment. Counsel alleged that at the time of the plea, the trial court did not properly admonish Harris, that Harris's plea was not knowingly and voluntarily made, and that the 40-year sentence was excessive and unduly harsh. The State filed a motion to dismiss the *pro se* motion and the amended motion. The State claimed that the *pro se* motion for reduction of sentence was

legally improper, noting that where a defendant has pleaded guilty in exchange for a cap on the sentence, the defendant must first move to withdraw his guilty plea before seeking a reduction in the sentence. The State argued that the amended motion to withdraw the guilty plea was untimely. Following a hearing on August 12, 2003, the trial court granted the State's motion to dismiss, finding that the *pro se* motion for reduction of sentence was improper, and that the motion to withdraw the guilty plea was untimely. The court further found that Harris had been advised of all of his rights and the consequences of a plea during the hearing on June 24, 2002, and that he knowingly and voluntarily entered a guilty plea. Harris did not appeal the judgment.

¶ 14 Subsequently, Harris filed a series of petitions for postconviction relief. In February 2004, Harris filed a *pro se* postconviction petition and claimed ineffective assistance of counsel. Harris alleged that he was deceived by plea counsel, who “promised repeatedly that for a payment of \$10,000, [counsel] would see to it that [Harris] received a sentence of 20 years.” Harris further alleged that counsel failed to file a motion to suppress Harris's statement even though Harris informed counsel that the statement was forced upon him by detectives “who threatened physical force and who used intimidation tactics.” In addition, Harris alleged that counsel failed to interview any witnesses, including Desi Pasley. Harris submitted his own affidavit in support of his motion. He also submitted affidavits from his mother and stepfather, each of whom indicated that plea counsel gave assurances on several occasions that upon entering an open guilty plea, Harris would receive a 20-year sentence. The court appointed postconviction counsel to assist Harris. Postconviction counsel filed an amended petition

which included an allegation that the assistant public defender provided ineffective assistance when he advised Harris to withdraw his original *pro se* motion to withdraw guilty plea. Following an evidentiary hearing, the court denied the amended postconviction petition. Harris filed an appeal, but his appeal was limited to an alleged error regarding sentencing credit in the mittimus, a claim that had not been raised in the trial court. This court affirmed the judgment, noting that the sentencing credit issue could be presented to the circuit court. *People v. Harris*, No. 5-05-0072 (2006) (unpublished summary order under Illinois Supreme Court Rule 23(c) (eff. July 1, 1994)).

¶ 15 In April 2008, Harris filed a *pro se* motion to vacate the order entered October 28, 2002, allowing him to withdraw his original *pro se* motion to withdraw his guilty plea. The circuit court concluded that it was without jurisdiction to consider the motion, and dismissed it. Harris filed a notice of appeal in the appellate court, rather than the circuit court as required by Illinois Supreme Court Rule 606(b) (eff. Dec. 13, 2005). A show cause order was issued, but Harris failed to respond and the appeal was dismissed for lack of appellate jurisdiction. *People v. Harris*, No. 5-08-0388 (2008).

¶ 16 On August 12, 2013, Harris filed a subsequent postconviction petition and alleged that he was actually innocent of intentional murder. Harris asserted that he had newly discovered evidence that Desi Pasley, for his own profit, secretly put a “behavior altering drug” into the food and drink of two teenagers, Anthony Parks and Harris, while brainwashing them to commit robbery and murder. Harris submitted the affidavit of Anthony Parks in support of his claim. Therein, Parks stated that on the date of the robbery and murder, he saw Desi Pasley place PCP and alcohol into two glasses of kool-

aid. According to the Parks's affidavit, Pasley served the drinks to Parks and Harris, and thereafter "talked about how easy it would be for us to rob an kill an old man named, Mr Michael Gibbs." Parks asserted that he saw Harris drink the kool-aid and then leave. Parks did not drink the kool-aid because he had an upset stomach. Parks also asserted that he had been drugged by Pasley and brainwashed into committing crimes on prior occasions. Parks stated that he did not come forward earlier because Desi Pasley had threatened to have him killed.

¶ 17 On August 12, 2013, Harris filed a separate motion to withdraw the guilty plea and vacate the judgment. Therein, Harris alleged that prior to the plea, he informed his attorney that he had been experiencing nightmares, memory loss, paranoia, and feelings similar to being drugged, and that his attorney did not investigate Harris's mental condition or request a psychiatric evaluation prior to allowing Harris to plead guilty. Harris submitted his own affidavit claiming he participated in the hearing and entered a guilty plea while suffering from a mental illness.

¶ 18 On August 15, 2013, the trial court summarily dismissed the postconviction petition and denied the motion to withdraw the guilty plea. Harris did not appeal this ruling.

¶ 19 On January 28, 2016, Harris filed a *pro se* motion for leave to file a successive postconviction petition alleging that he had newly discovered witnesses who would exonerate him. One of the witnesses, Brian Ward, submitted an affidavit in which he asserted that he was walking toward the Amoco station after midnight on May 20, 2001, when he saw a man, armed with a shotgun, exit the Amoco station, and remove a face

covering. According to Ward's affidavit, the man walked swiftly in Ward's direction and threatened to shoot Ward if he told anyone. Ward recognized the man as Demarko McDowell. Ward stated that McDowell had a gang of friends who were dangerous, retaliatory, and frightening. Ward further stated that he recently learned that Danny Harris had been convicted of the murder at the Amoco station. The second witness, Lemuel Houston, submitted an affidavit, stating that he was with Harris at Jones Park in East St. Louis, Illinois, from midnight until 2 a.m., on May 20, 2001. Harris also submitted a supporting affidavit. Therein, Harris asserted that he had been interviewed by "corrupt investigators of the Illinois State Police," and that they "coerced and coached" him into giving a false statement, resulting in his wrongful conviction. Harris also asserted that the trial court abused its discretion in imposing a 40-year sentence. Harris claimed that the court failed to consider a number of mitigating factors, including Harris's youth and mental unfitness at the time of the plea.

¶ 20 On February 4, 2016, the trial court issued an order denying Harris leave to file a successive postconviction petition. The court found that Harris had entered a plea of guilty, and that at the time of the plea, Harris acknowledged there were other witnesses who would corroborate the statement he had given to the police. The court further found that the newly discovered witnesses were both inmates with Harris, that they had been incarcerated for murder, one serving 53 years and the other serving 45 years, and that they had identified Demarko McDowell, a man who died in 2004, as the perpetrator of the crimes. After considering the affidavits, the court concluded that Harris did not

sustain his burden to show that this new evidence of actual innocence was so conclusive that it would probably change the result of the case. Harris appeals.

¶ 21

## II. ANALYSIS

¶ 22 On appeal, Harris claims that the trial court erred in denying his request for leave to file a successive petition for postconviction relief. Harris contends his petition and the supporting affidavits, taken as true, were sufficient as a matter of law to establish a colorable claim of actual innocence. He asks that the order be reversed and the cause remanded for second-stage postconviction proceedings.

¶ 23 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)) provides a remedy to a criminal defendant whose federal or state constitutional rights were substantially violated in his original trial or sentencing hearing. *People v. Pitsonbarger*, 205 Ill. 2d 444, 455, 793 N.E.2d 609, 618 (2002). A postconviction proceeding is not an appeal from an underlying judgment, but rather a collateral attack on the judgment. *People v. Ortiz*, 235 Ill. 2d 319, 328, 919 N.E.2d 941, 947 (2009). As a collateral proceeding, a postconviction proceeding allows inquiry only into constitutional issues that were not and could not have been adjudicated in an appeal of the underlying judgment. *Ortiz*, 235 Ill. 2d at 328. The Act generally contemplates the filing of one postconviction petition without leave of court. 725 ILCS 5/122-1(f) (West 2016). Any claim of a substantial denial of constitutional rights not raised in the original or amended petition is waived. 725 ILCS 5/122-3 (West 2016); *People v. Edwards*, 2012 IL 111711, ¶¶ 21-22, 969 N.E.2d 829.

¶ 24 Our supreme court has recognized two instances in which the statutory bar against successive postconviction petitions may be relaxed. *People v. Sanders*, 2016 IL 118123, ¶ 24, 47 N.E.3d 237. The statutory bar against successive postconviction petitions may be relaxed when a petitioner can establish “cause and prejudice” for failing to raise a claim earlier. 725 ILCS 5/122-1(f) (West 2016); *Edwards*, 2012 IL 111711, ¶ 22. The statutory bar may also be relaxed where a petitioner shows that a fundamental miscarriage of justice has occurred. *Edwards*, 2012 IL 111711, ¶ 23. In order to establish a fundamental miscarriage of justice, the petitioner must demonstrate actual innocence. *Edwards*, 2012 IL 111711, ¶ 23.

¶ 25 The evidence offered in support of a claim of actual innocence must be newly discovered material and not merely cumulative and of such conclusive character that it would probably change the result on retrial. *Edwards*, 2012 IL 111711, ¶ 32; *People v. Coleman*, 2013 IL 113307, ¶ 96, 996 N.E.2d 617. In *Edwards*, our supreme court noted that the United States Supreme Court stated that a credible 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.’ ” *Edwards*, 2012 IL 111711, ¶ 32 (quoting *Schlup v. Delo*, 513 U.S. 298, 324 (1995)). In a subsequent decision, the supreme court cautioned that while a petitioner must make a substantial showing of actual innocence, the credibility of witnesses and affiants may not be assessed prior to a third-stage evidentiary hearing. *Sanders*, 2016 IL 118123, ¶¶ 37, 42.

¶ 26 A petitioner seeking to file a successive postconviction petition must first obtain leave of court. *Edwards*, 2012 IL 111711, ¶ 24. The court should deny leave only where it is clear, from a review of the successive petition and the attached documentation that, as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence. *Edwards*, 2012 IL 111711, ¶ 24. In other words, leave of court should be granted where a petitioner's supporting documentation raises the probability that it is more likely than not that no reasonable juror would have found the petitioner guilty beyond a reasonable doubt in light of the new evidence. *Edwards*, 2012 IL 111711, ¶ 24.

¶ 27 There remains a question of whether decisions granting or denying leave of court are reviewed for an abuse of discretion or *de novo*. *Edwards*, 2012 IL 111711, ¶ 30. In *Edwards*, our supreme court noted that a decision granting or denying leave of court is generally reviewed for an abuse of discretion, but the court also noted that the language directing that leave should be denied only where, *as a matter of law*, no colorable claim of actual innocence has been asserted, suggests *de novo* review. *Edwards*, 2012 IL 111711, ¶ 30. Noting that the issue had been briefed minimally, the supreme court decided to leave the question for a more appropriate case and another day. *Edwards*, 2012 IL 111711, ¶ 30. In this case, the underlying issue is whether the pleadings and supporting affidavits, when taken as true, are sufficient as a matter of law to establish a colorable claim of actual innocence. Both parties suggest, and we agree, that this presents a legal question to which *de novo* review applies. Moreover, our resolution of the issue is the same under either standard of review.

¶ 28 As noted above, in order to set forth a colorable claim of actual innocence, a petitioner must present new, material, noncumulative evidence that is so conclusive it would probably change the result of the case. *Coleman*, 2013 IL 113307, ¶ 96. At this stage of the proceedings, credibility is not at issue, and all well-pleaded factual allegations and supporting evidence not positively rebutted by the record in the petitioner's case are to be taken as true. *Sanders*, 2016 IL 118123, ¶ 42. In addition, a court is not to consider matters outside of the record. *Sanders*, 2016 IL 118123, ¶ 43.

¶ 29 In this case, the trial court denied Harris leave to file a successive postconviction petition based, in part, upon the court's assessment of the credibility of the affidavits and other matters outside the record. That was improper. The issue presented here is essentially a legal one, requiring this court to make its own independent assessment of the sufficiency of allegations in the postconviction petition. *People v. Coleman*, 183 Ill. 2d 366, 388, 701 N.E.2d 1063, 1075 (1998). Thus, we will review the trial court's judgment, but not the reasons given for the judgment. *Coleman*, 183 Ill. 2d at 388.

¶ 30 In his successive postconviction pleadings, Harris claimed that he was not at the Amoco station in Washington Park around the time of the murder on May 20, 2001, that someone else murdered Michael Gibbs, and that his incriminating statement was the product of police coercion and intimidation. Harris submitted three affidavits in support of these contentions. Affiant Brian Ward averred that he observed a man named Demarko McDowell exit the Amoco station in Washington Park around midnight on May 20, 2001. Ward indicated that McDowell had a shotgun and was removing a covering from his face as he fled. Notably, Ward did not assert that he saw McDowell shoot Michael

Gibbs, or even that he heard a gunshot that evening. Affiant Lemuel Houston asserted that he was with Harris at a park in East St. Louis, at the time of the robbery and murder. The affidavits of Ward and Houston are irreconcilable with and rebutted by the prior postconviction petition and accompanying affidavits, wherein it was alleged that Harris had committed the crimes after being drugged and brainwashed, and therefore that Harris was not responsible for his actions on the night of the robbery and murder. Additionally, we do not find that the information in Houston's affidavit qualifies as newly discovered evidence. Houston's affidavit asserts facts that were already known to Harris at or prior to his plea, even though Houston, as a source of these facts, may have been unavailable or uncooperative. *Edwards*, 2012 IL 111711, ¶ 34. Further, there is no allegation that Houston was unavailable or unwilling to come forward as a witness.

¶ 31 After conducting an independent assessment of the allegations in the successive petition and supporting affidavit, we find that Harris has failed to set forth a colorable claim of actual innocence. Harris's successive postconviction petition and his supporting documentation do not offer evidence of such conclusive character that it would probably change the result of the case.

¶ 32 In this appeal, Harris also raised a legal question about whether a freestanding actual innocence claim may be brought in a case where a defendant has entered a guilty plea. Harris noted that in *People v. Barnslater*, 373 Ill. App. 3d 512, 527, 869 N.E.2d 293, 306 (2007), the First District concluded that if a petitioner claims that his plea was coerced, then that coercion provides the necessary constitutional deprivation for which postconviction relief would be appropriate, but that postconviction relief would not be

appropriate where a defendant claims actual innocence in the face of a prior, constitutionally valid confession of guilt. Harris argues that there are reasons why innocent people plead guilty, and that a defendant should not need to challenge the knowing and voluntary nature of his plea to bring such a claim of actual innocence. In this case, Harris did challenge the knowing and voluntary nature of his guilty plea. Thus, we find that, as to this case, the question is theoretical, and not essential to the disposition of the appeal. A court of review will not decide abstract questions, review cases merely to establish precedent, or consider issues that are not essential to the disposition of the matter before it. See generally *People v. Ringland*, 2017 IL 119484, ¶ 35, 89 N.E.3d 735; *Condon v. American Telephone & Telegraph Co.*, 136 Ill. 2d 95, 99, 554 N.E.2d 206, 208 (1990). Thus, we will not address this issue.

¶ 33

### III. CONCLUSION

¶ 34 After reviewing the record, we conclude that Harris failed to set forth a colorable claim of actual innocence. The circuit court did not err in denying Harris's petition for leave to file a successive postconviction petition. Accordingly, the judgment of the circuit court is affirmed.

¶ 35 Affirmed.