

2011 IL App (1st) 091937 - U
No. 1-09-1937

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IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 90 CR 28440
)	
DEMETRIUS JACKSON,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE STERBA delivered the judgment of the court.
Presiding Justice Lavin and Justice Salone concurred in the judgment.

ORDER

HELD: The circuit court did not err in dismissing the successive postconviction petition where defendant did not make a substantial showing of evidence in support of his claim of actual innocence. Moreover, the circuit court did not err in dismissing the *Brady* violation claim following an evidentiary hearing on that claim where defendant did not establish that the State had the allegedly exculpatory information prior to his trial.

¶ 1 Defendant Demetrius Jackson was charged with two counts of first degree murder in the shooting death of Clinton Walker. Following a bench trial, Jackson was convicted of first degree murder and sentenced to 35 years in prison. On direct appeal, this court affirmed the conviction (*People v. Jackson*, No. 1-92-2157 (1994) (unpublished order under Supreme Court Rule 23)).

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Jackson filed the instant postconviction petition, his fourth, and the circuit court granted the State's motion to dismiss on all but one claim. Following an evidentiary hearing on the remaining claim, the circuit court denied the petition on June 11, 2009. On appeal, Jackson contends that the circuit court erred in granting the motion to dismiss on his claim of actual innocence without allowing an evidentiary hearing on that claim. Jackson further contends that the circuit court committed reversible error in the way it conducted the evidentiary hearing on the *Brady* violation claim. For the reasons that follow, we affirm the judgment of the circuit court.

BACKGROUND

¶ 2 On October 30, 1990, Walker was shot near the building located at 3547-49 South Federal in the Stateway Gardens housing projects. The cause of death was a gunshot wound to the back. At trial, the medical examiner testified that the bullet entered the back and exited the right chest. Officer Schleder testified that when he arrived at the scene of the shooting, he found Walker face down on the sidewalk. As he moved Walker, Schleder saw that he was still alive, and Walker started coughing up blood. Schleder knelt down next to Walker and told him that he had been shot in the back, that it looked pretty bad, and that Schleder thought he was going to die. Schleder then asked Walker who shot him and Walker replied, "Demetrius Jackson shot me." Walker was taken to the hospital where he later died. The police recovered 9-millimeter casings and 380-caliber casings from the scene.

¶ 3 Wayne Fleming testified that at the time of the shooting, he was a member of the Del Viking street gang and Jackson was a member of the Gangster Disciples. The two gangs were feuding over who would control the sale of drugs in certain buildings in the housing complex.

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Fleming said that Walker had previously been a Del Viking member but was no longer a member at the time of the shooting. Fleming testified that around noon on October 30, he and Walker were standing outside the 3547 building talking. He saw Jackson and two other people standing in the back hallway of the 3517 building, approximately 60 feet away. Fleming said that he saw Jackson take a rifle out of a brown case and put it up on a railing outside of a first floor apartment. Walker, who was standing about five feet to the left of Fleming, told Fleming he was going to go home. Walker started walking backwards toward the 3615 building, while looking toward Jackson and the 3517 building. Fleming was also watching Jackson, who was still holding the rifle, when he heard a shot. Fleming ran into the hallway and saw Walker run a short distance and then fall to the ground on his stomach, facing the 3615 building. Fleming heard more shots from the direction of the 3517 building, followed by return fire from the 3547 building.

¶ 4 Fleming testified that there were no children playing on the playground between the buildings at the time of the shooting. He also said that he saw Carlos Easley in the hallway of the 3549 building, but he and Walker were not in the same location as Easley. Fleming testified that he did not see Easley before the shots were fired from the 3517 building, but after the initial shots were fired, he saw Easley returning fire in the direction of 3517. Fleming further testified that he was also returning fire. Fleming said that he was using a 9-millimeter and Easley was using a 380-caliber weapon. Fleming testified that when he heard the first shot, he ran back into the hallway of the 3549 building, stayed there for about five seconds, and then ran back out and he and Easley started shooting. When he came back out, Fleming said he no longer saw Jackson on

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the porch of 3517 building. About three minutes later, Fleming saw Jackson leave the building and go to the parking lot. Fleming watched Jackson get into his gray car alone and drive toward 35th Street.

¶ 5 Melissa Gail Madison testified that she had taken her baby and gone to a nearby store with her friend Tonya on October 30, 1990. When they returned from the store, they went into the 3519 building. They saw Jackson and spoke to him, and then left the building to go to the 3547 building. They were walking on the playground between the buildings when they heard a gunshot from the direction of the 3547 building. They ran back into the 3519 building and saw Jackson standing by the elevator. Madison saw about four young men standing in the hallway by apartment 102, Jackson's mother's apartment. One of the young men was holding a small gun and another was holding a large gun that she thought was a rifle. Jackson said the shooting needed to stop and told Madison to take her baby upstairs. Madison got on the elevator with her baby. Her friend was still downstairs with Jackson. Madison was asked about a statement she gave to the assistant state's attorney in which she said the first shot sounded like it came from the direction of the 3519 building. She said that although she signed the statement, she did not read it and she never said the shot came from that direction.

¶ 6 Tonya Williams testified that she had gone to the store with Madison and her baby on October 30, 1990. After they returned from the store, they walked from the 3519 building toward the 3547 building. Williams heard a shot from the direction of the 3549 building and she and Madison ran back to 3519 with the baby. When they reached 3519, Jackson was standing by himself in the front doorway and he told Madison to take her baby upstairs. Jackson then asked

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Williams to go for a ride with him. She and Jackson got in a gray car and drove away from the building. In the car, Jackson suggested that they go to the police station and visit Anthony.

Williams was not sure which Anthony Jackson meant, so she told him that her boyfriend, Anthony Montgomery, was upstairs. Jackson said they should go anyway. When they got to the police station at 51st and Wentworth, Williams went to the restroom while Jackson walked up to the desk. Williams testified that Montgomery had been in jail the day before, but was no longer in jail. Williams said that she knew an individual named Anthony Hanes who was also in jail but Hanes had not been released when Montgomery was released.

¶ 7 Williams was asked about the statement she gave police in which she said the first gunshot sounded like it was coming from the 3519 building. She said she did not tell the police that the shot came from 3519. Williams was also asked about telling the police that she saw Jackson standing outside apartment 102, Jackson's mother's apartment. She acknowledged that in the statement, the words "by the elevator" were crossed out and replaced with "by the hallway." Williams acknowledged that in the statement she gave police, she said that she saw Jackson with a pair of leather gloves in his hand, but at trial she said she did not remember if she saw him with a pair of gloves. Williams was also asked about telling the police that Jackson was with three other young men who had their hands behind their backs, and that Jackson turned to the other three and said "woo woo." Williams testified that she told police that the three men were older and had their hands down at their sides, and that Jackson did not say "woo woo."

¶ 8 Montgomery testified that he knew Walker at the time of the shooting and Walker was a member of the Del Viking street gang. Montgomery was a member of the Gangster Disciples.

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He testified that he was arrested on October 29, 1990, for disorderly conduct and was released around 10:30 that night. He said that Williams and Jackson and a few other people were there when he was released. Someone gave him some money to post bond for Hanes, so he waited by himself at the police station until 5 or 6 the next morning for Hanes to be released. The two then went to a hotel with a third person and called Jackson from the hotel to let him know they were there. Around noon on October 30, Montgomery was back at his apartment on 3547 Federal. He heard a gunshot so he jumped up and looked out the window. He saw Williams and Madison, with Madison's baby, running back toward the 3519 building. He then heard a lot of gunshots so he went out on the porch and saw Fleming, Easley, and someone lying on the ground. He went back inside and looked out the window again and saw Williams and Jackson. Williams called up to him that she was going to go with Jackson and would be right back. He then saw them walk to the parking lot and get into a gray car. On cross-examination, Montgomery said that about 15 minutes after the shooting, he saw Jackson drive into the parking lot in the gray car and get out of the car. Then Jackson met up with Williams and they walked back to the car together. On redirect, Montgomery acknowledged that he did not see Jackson get out of the gray car when it pulled up 15 minutes after the shooting; he just assumed Jackson was the one driving the car.

¶ 9 Officer McNeal testified that he was working at the desk of the police station at 51st and Wentworth on October 30, 1990, when Jackson and Williams came in. McNeal said that the two inquired about Anthony Montgomery. While McNeal was looking up Montgomery, who had in fact been bonded out the day before, he heard over the radio that Jackson was wanted for an investigation. McNeal took the radio off the desk and went into a separate room to confirm what

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he had heard. McNeal then informed Jackson that he was wanted for an investigation and placed him in custody.

¶ 10 Detective Holmes testified that he discovered what appeared to be a bullet hole in the screen of the porch of apartment 102. Holmes said that it appeared that a bullet had been fired into the screen. He did not find any evidence of shots having been fired from the balcony of apartment 102 at 3519 South Federal. Detective Argenbright testified that he interviewed Fleming on October 30. Argenbright confirmed that in Fleming's handwritten statement, he said that Jackson fired a second shot and then three others next to Jackson fired handguns before the Del Vikings returned fire. The statement also indicated that the first bullet hit Walker in the back and he fell to the ground, and that Jackson got into a gray car alone and sped off.

¶ 11 The defense called Lamont Stewart, who was the building supervisor for the 3517-19 South Federal buildings in October 1990. Stewart testified that on October 30, 1990, he was crossing from the 3519 building to the 3517 building when he saw Jackson and stopped to talk to him. While they were talking, he heard three or four shots fired at close range, and he and Jackson dove to the ground.

¶ 12 Demetrius Moore testified that he was on his way to visit his sister who lived at 3547-49 South Federal around noon on October 30, 1990. He saw Walker outside the building and stopped to talk to him. He heard some shots so he ran into the building. When he came back out, he saw Walker on the ground. Moore did not see who fired the shots or where they were coming from. Moore testified that he knew Fleming very well but did not see him in the area at that time. After Walker was shot, Moore also saw Easley come out of the building. Moore testified

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that he saw Fleming later, after the police arrived.

¶ 13 Chiniko Jackson, Jackson's sister, testified that she lived in apartment 102 at 3519 South Federal in October 1990. Chiniko said she was home around noon on October 30, 1990. She heard gunshots, and a short time later the police came to the apartment. Chiniko testified that Jackson was not in the apartment at that time, and she had not seen him there earlier. The circuit court found Jackson guilty of first degree murder and sentenced him to 35 years in prison.

¶ 14 Jackson filed a *pro se* postconviction petition in May 1995. The circuit court's dismissal of the petition as frivolous and patently without merit was affirmed by this court on February 3, 1997 (*People v. Jackson*, No. 1-95-3359 (1996) (unpublished order under Supreme Court Rule 23)). On May 21, 1996, Jackson filed a *pro se* petition seeking a "writ of error *coram nobis*" pursuant to section 2-1401 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1401 (West 1994)). In the petition, Jackson asked the court to set aside his conviction based on the affidavits of two newly discovered witnesses, Quantis Robinson and Donald Scott.

¶ 15 Robinson stated that he was in the 3517 building on October 30, 1990. Around 11:30 a.m., he walked past Jackson, who was in the hallway talking to the janitor. As Robinson left the building, he heard several shots. He ducked behind his car in the parking lot and looked around but could not see where the shots were coming from. He then changed his tire, got into his car, and started driving. He heard two more gunshots and, from his car, he saw Jackson standing in front of the 3519 building and saw two females running toward him. One of the women had a baby in her arms. He then saw Walker and someone else running, heard several more gunshots, and saw Walker fall on the sidewalk. Robinson said that he gave this information to the police

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after the shooting but he was never contacted again by the police. Robinson further stated that in March 1991, he told Fleming that Jackson was not the shooter and Fleming told him that Jackson was “going down” for Walker’s murder.

¶ 16 Scott stated that he was walking from 3516 South Federal toward 3547-49 South Federal around noon on October 30, 1990, and saw Walker, Moore and Easley talking by the mailboxes. He heard several shots coming from 3547-49 and saw Easley with a gun. He saw Moore and Walker turn to run, heard several more shots, and then saw Walker fall to the ground. He said that he spoke to police after the shooting but was never contacted by the police or Jackson’s attorney. The circuit court dismissed the petition for lack of jurisdiction and Jackson appealed. This court affirmed the dismissal of Jackson’s petition for writ of error *coram nobis* and granted counsel’s motion to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551, 107 S. Ct. 1990 (1987) because there were no issues of arguable merit. (*People v. Jackson*, No. 1-96-2491 (1997) (unpublished order under Supreme Court Rule 23)).

¶ 17 Jackson filed a second *pro se* postconviction petition in 1998. In the second petition, Jackson claimed ineffective assistance of appellate counsel for failing, *inter alia*, to raise the admission of Walker’s dying declaration and the admission of Jackson’s alleged gang affiliation on appeal. The circuit court’s dismissal of the second petition as patently without merit was affirmed by this court on September 30, 1999 (*People v. Jackson*, No. 1-98-2922 (1999) (unpublished order under Supreme Court Rule 23)).

¶ 18 Jackson filed a third *pro se* postconviction petition, alleging ineffective assistance of counsel for failure to file a motion to quash his arrest and failure to call additional witnesses.

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The petition further alleged that his conviction was void because he had newly discovered medical evidence and the trial court erred in admitting Walker's dying declaration. The circuit court's dismissal of the third petition was affirmed by this court on March 2, 2001 (*People v. Jackson*, No. 1-99-4090 (2001) (unpublished order under Supreme Court Rule 23)).

¶ 19 In 2002, Jackson filed a fourth *pro se* postconviction petition which was dismissed and subsequently reinstated. Counsel filed a supplemental petition in 2006. In 2007, Jackson filed a motion to proceed *pro se*, and the motion was granted. The petition alleged that Jackson was innocent based on newly discovered evidence that had in fact been disclosed to the prosecution prior to Jackson's trial. The fourth petition included an affidavit from Deanda Wilson, a/k/a Juvon De Wilson, stating that he was present at the time of the shooting and Easley was the shooter. Wilson stated that he provided this information to Assistant State's Attorney Jim McKay in early 1991. In a separate letter attached to the petition, Wilson stated that he saw Jackson outside talking to Stewart when the shot was fired, and that the only person with a gun was Carlos Smith, who had a 9-millimeter handgun. The fourth petition also included a previous affidavit from Jackson, signed April 3, 2001. Jackson stated that he was acquainted with Wilson and that in the early 1990s, the two of them had spoken twice about Wilson lying at a separate trial. Jackson stated that Wilson asked him how to get in touch with several codefendants at this separate trial because Wilson had lied at trial and people were locked up for something they did not do.

¶ 20 An investigative report dated October 25, 2000, was also attached to the petition. The report detailed an interview of Wilson by Assistant State's Attorney Celeste Stack and

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investigator Margaret Ceb. Wilson was interviewed in connection with a separate shooting in 1989. Wilson initially told investigators in the 1989 shooting that he had witnessed the shooting, but claimed that he later told McKay he did not see the shooters. Wilson stated that he was angry with McKay because on the day he testified regarding the 1989 shooting, he said that he also told McKay that Jackson was innocent of the 1990 shooting. Wilson said that he only testified that he had witnessed the 1989 shooting because he thought McKay was going to help him with his own drug case and help his friend Jackson in connection with the Walker murder. Wilson confirmed that he had been a member of the Del Viking street gang since childhood but had joined the Gangster Disciples in 1990.

¶ 21 During the period of time in which Jackson was represented by counsel, a motion to supplement the postconviction petition with additional affidavits was filed. It included two supplemental affidavits from Wilson. In the first affidavit, Wilson stated that he witnessed Walker's shooting from Jackson's mother's back porch at 3519 South Federal. From this location, he saw Easley holding what appeared to be a 9-millimeter gun. He heard gunshots and saw Easley shoot toward the 3519 building but hit Walker in the back. Immediately prior to the shooting, Wilson saw Jackson talking to the janitor. He did not see him at the time of the shooting or any other time that day. Wilson said that in 1991, he told McKay that Jackson was innocent and McKay put his hands over his ears. In the second affidavit, Wilson stated that if called as a witness, he would testify that he saw Easley point a 9-millimeter handgun and fire a shot into Walker's back and that no other person was present.

¶ 22 The State filed a motion to dismiss the postconviction petition. At the hearing on the

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motion, the circuit court asked whether McKay had filed an affidavit, and upon learning that he had not, asked the assistant State's Attorney if she could try to reach McKay on the phone. The circuit court said that it seemed that everything could be "very easily settled" if they could call McKay as a witness and let Jackson ask him some questions. When McKay could not be reached, the circuit court continued the hearing.

¶ 23 At the beginning of the continuation hearing, the assistant State's Attorney asked for clarification on the court's ruling on the motion to dismiss. The court stated: "There is one issue that the Court feels is something I want to have a further evidentiary hearing on and that is the issue involving the allegations about Mr. McKay. So the *pro se* postconviction petition is denied as to all counts except the allegation regarding ASA McKay." McKay was then called as a witness and questioned by Jackson, who attempted to use the October 25, 2000, investigative report of Wilson's interview with Stack and Ceb. The circuit court suggested questions for Jackson to ask to lay the foundation for the report. The circuit court later stated that it knew Jackson was not a lawyer and wanted to make sure he had a chance to express himself. Jackson explained what his issue was with McKay and the court suggested that Jackson ask McKay about specific conversations rather than continue to try and use the investigative report. McKay acknowledged that he had at least three conversations with Wilson in 1990 or 1991 in connection with a separate murder case. However, McKay said that Wilson did not speak to him about Jackson's case in 1990 or 1991. When asked about the report in which Wilson told Stack and Ceb that he had informed McKay of Jackson's innocence in 1990, McKay said Wilson did not tell him about Jackson's case in 1991. The circuit court then asked if Wilson told McKay about

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Jackson's case at any time. McKay replied that Wilson told him about Jackson's case in 2005 or 2006.

¶ 24 Jackson then asked McKay if anyone else was present when McKay first interviewed Wilson. McKay said that a detective or an investigator would have been present, and maybe another assistant State's Attorney. Jackson asked the court if he could have "the other individual" brought up to show that McKay was not being truthful. On cross-examination, McKay testified that Wilson did not say anything to him about Jackson's case in 1990 or 1991. Sometime around 2005, there was a remand for two of the codefendants in the separate shooting, so McKay saw Wilson again in connection with the retrial, and McKay testified that was the first time Wilson mentioned Jackson's case to him.

¶ 25 In issuing its ruling on the petition, the circuit court stated that the petition came down to Wilson, who stated many different things at different times. The court noted that Wilson admitted committing perjury in a separate trial and that the information he had come forward with after the fact in Jackson's case was inconsistent. The court referred to the proceedings in the trial below, in which the corroborative testimony of the circumstances surrounding Jackson's arrest, the eyewitness testimony and the dying declaration constituted proof beyond a reasonable doubt that Jackson committed the murder. Therefore, the circuit court denied the petition. Jackson timely filed this appeal.

ANALYSIS

¶ 26 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2004)) provides a procedural mechanism by which any person imprisoned in the penitentiary may assert that there

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was a substantial denial of a federal or state constitutional right in the proceeding which resulted in his or her conviction. 725 ILCS 5/122–1(a) (West 2004); *People v. Harris*, 224 Ill. 2d 115, 124 (2007). Proceedings are commenced by the filing of a petition, verified by affidavit, in the circuit court in which the conviction took place. 725 ILCS 5/122–1(b) (West 2004). A postconviction proceeding is limited to constitutional issues that have not been, nor could have been, previously adjudicated. *Harris*, 224 Ill. 2d at 124.

¶ 27 Postconviction proceedings may consist of up to three stages in cases that do not involve the death penalty. *People v. Pendleton*, 223 Ill. 2d 458, 471-72 (2006). At the first stage, the circuit court reviews the petition to determine whether the petition is frivolous and patently without merit. *Harris*, 224 Ill. 2d at 125-26. A petition must present "the gist of a constitutional claim" to survive beyond the first stage. *Id.* at 126. The circuit court is required to dismiss petitions that are frivolous and patently without merit, and such dismissals are final orders. *Id.* At stage two, the circuit court may appoint counsel for the defendant and the State may move to dismiss the petition. *Id.* At the second stage, the relevant inquiry is whether the petition establishes a substantial showing of a constitutional violation. *Id.*, citing 725 ILCS 5/122-6 (West 2004). A petition that is not dismissed at the second stage proceeds to the third stage where the circuit court conducts an evidentiary hearing. *Id.*

¶ 28 At both the second and third stages of postconviction proceedings, the defendant bears the burden of making a substantial showing of a constitutional violation. *Pendleton*, 223 Ill. 2d at 473. At the second stage of the proceedings, all well-pleaded facts that are not positively rebutted by the trial record are taken as true. *Id.* The circuit court does not engage in fact-finding

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or credibility determinations at the dismissal stage; rather, such determinations are made at the evidentiary stage. *People v. Coleman*, 183 Ill. 2d 366, 385 (1998).

¶ 29 The Act generally contemplates the filing of only one postconviction petition. 725 ILCS 5/122-3 (West 2004); *People v. Pitsonbarger*, 205 Ill. 2d 444, 456 (2002); *People v. Morgan*, 212 Ill. 2d 148, 153 (2004). However, our supreme court held in *Pitsonbarger* that fundamental fairness allows the filing of a successive petition where the petition complies with the cause-and-prejudice test. *Id.* at 459. The court stated that “ ‘cause’ in this context refers to any objective factor, external to the defense, which impeded the petitioner’s ability to raise a specific claim in the initial post-conviction proceeding.” *Id.* at 462. The court also noted that the cause-and-prejudice test is to be applied to individual claims, not to the petition as a whole. *Id.* at 462. “ ‘Prejudice’ exists where the defendant can show that the claimed constitutional error so infected his trial that the resulting conviction violated due process.” *Morgan*, 212 Ill. 2d at 154. In 2004, our legislature amended the Act to adopt the cause-and-prejudice test. 725 ILCS 5/122-1(f) (West 2004); *People v. Anderson*, 375 Ill. App. 3d 121, 135 (2007).

¶ 30 In *Pitsonbarger*, the supreme court reaffirmed that even if a petitioner cannot show cause and prejudice, the failure to raise a claim in an earlier petition will be excused if necessary to prevent a fundamental miscarriage of justice. *Pitsonbarger*, 205 Ill. 2d at 459. The supreme court reiterated this principle in *People v. Ortiz*, 235 Ill. 2d 319, 330 (2009), stating that in a case not involving the death penalty where a defendant sets forth a claim of actual innocence, the defendant is excused from showing cause and prejudice.

¶ 31 We review a circuit court’s dismissal of a postconviction petition at the second stage *de*

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novo. Pendleton, 223 Ill. 2d at 473. We review a circuit court’s denial of a postconviction petition following a third-stage evidentiary hearing to determine whether it was manifestly erroneous. *Ortiz*, 235 Ill. 2d at 333. Manifest error is error that is “clearly evident, plain, and indisputable.” *Morgan*, 212 Ill. 2d at 155.

¶ 32 As an initial matter, we address the disagreement between the parties about which claims were dismissed at the second stage, and which claims were dismissed following a third-stage evidentiary hearing. Jackson contends that his actual innocence claim was dismissed at the second stage and that his separate claim that the State purposefully hid evidence of his actual innocence is the only one that progressed to a third-stage evidentiary hearing. The State argues that Jackson’s claim of actual innocence was the sole issue that advanced to an evidentiary hearing and was the subject matter of McKay’s testimony.

¶ 33 We note that there was no distinctly separate claim, as Jackson alleges on appeal, that his due process rights were violated because the State had knowledge of exculpatory evidence before his trial but did not reveal it to the defense (see *Brady v. Maryland*, 373 U.S. 83 (1963)). We further note that at the hearing on the petition, neither the circuit court nor the parties characterized the allegation involving McKay as a *Brady* violation or as something separate from the actual innocence claim. However, Jackson does allege more than once in the petition that Wilson told McKay that Jackson was innocent. In one of the affidavits supplied by Wilson, he states that he provided this information to McKay in early 1991, which would have been prior to Jackson’s trial. This allegation thus essentially asserts a *Brady* violation.

¶ 34 In *Ortiz*, our supreme court stated that evidence in support of a claim of actual innocence

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“must be newly discovered; material and not merely cumulative; and ‘of such conclusive character that it would probably change the result on retrial.’ ” *Ortiz*, 235 Ill. 2d at 333 (quoting *People v. Morgan*, 212 Ill. 2d 148, 154 (2004)). Jackson’s allegation regarding McKay does not by itself support a claim of actual innocence. In fact, the only connection to the actual innocence claim is that if Wilson did, in fact, inform McKay that someone else was the shooter prior to Jackson’s trial, and the State did not disclose Wilson as a potential witness to defense counsel, Jackson would have been deprived of one source of information that Wilson was a potential witness. However, Jackson could have also located Wilson on his own through due diligence. Moreover, Jackson’s allegation regarding McKay is a claim that could potentially merit a new trial even in the absence of an actual innocence claim. Thus, we conclude that Jackson’s *pro se* postconviction petition included a claim of a *Brady* violation in addition to a claim of actual innocence. The circuit court dismissed the actual innocence claim at the second stage and allowed the *Brady* violation claim to advance to a third-stage evidentiary hearing.

¶ 35 We first address Jackson’s claim that the court erred in the way it conducted the evidentiary hearing on the *Brady* violation claim. Jackson contends that during McKay’s testimony at the evidentiary hearing, the court repeatedly interrupted Jackson while he questioned McKay and then refused to allow Jackson to call other witnesses to support his allegation even though they were available. To establish a *Brady* violation, the allegedly suppressed evidence must be both favorable to the accused and material. *People v. Hopley*, 182 Ill. 2d 404, 432 (1998). Favorable evidence is evidence where, had it been disclosed to the defense, there is a reasonable probability that the result of the proceeding would have been different. *Id.* at 432-33,

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quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985). In determining the merits of a postconviction petition at an evidentiary hearing, the circuit court has wide discretion to limit the type of evidence it will permit. *People v. Montgomery*, 162 Ill. 2d 109, 113 (1994), citing *People v. Humphrey*, 46 Ill. 2d 88, 91 (1970).

¶ 36 The record discloses that the circuit court interrupted the proceedings to assist Jackson, who was representing himself and did not know how to lay a proper foundation in questioning McKay. At one point, the circuit court stated, “I’m trying to work with you and I know you’re not a lawyer, but I want to make sure you have a chance to express yourself.” It was Jackson’s choice to proceed *pro se*, and the circuit court could have merely sustained objections made by the State. Instead, the court went above and beyond what was required and attempted to guide Jackson through the process and instruct him on how to lay the foundation and question the witness, in order to ensure that Jackson had every opportunity to make his argument.

¶ 37 McKay acknowledged that he had spoken with Wilson on at least three occasions between 1990 and 1991. McKay then testified that Wilson never mentioned Jackson’s case in any of those conversations. Jackson attempted to impeach McKay with the 2000 investigative report, but the report merely documented Wilson’s claim that he had spoken to McKay about Jackson almost 10 years prior to the 2000 interview and contained no corroboration for Wilson’s claim.

¶ 38 Jackson asked McKay if anyone else was present for the 1990 or 1991 interviews with Wilson. McKay answered that either a detective from the police department or an investigator from his office and maybe another assistant State’s Attorney would have been present. Jackson

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then told the court that he wanted “the other individual” brought up to show that McKay was not being truthful. After confirming that Jackson had no further questions for McKay, the court asked McKay if Wilson told him about Jackson’s case at any time. McKay responded that in 2005 or 2006, when the codefendants from the case in which Wilson testified were retried, Wilson told McKay that Jackson did not commit the murder. Upon further questioning by the court, McKay stated that Wilson told him at that time that Jackson was innocent, but he did not recall Wilson telling him that he was present at the scene and was an eyewitness.

¶ 39 The court did not reach an analysis of whether the allegedly suppressed evidence was both favorable to the accused and material, as required to establish a *Brady* violation, because Jackson failed to establish that Wilson told McKay that someone else committed the murder in 1991. Jackson did not have the names of any other witnesses, and McKay did not recall who was present for the 1990 or 1991 interviews. The court determined that McKay was more credible than Wilson, who said different things at different times, admitted committing perjury in a separate trial, and was currently serving time for an unrelated murder. We cannot conclude that this determination constituted error that is “clearly evident, plain, and indisputable.” Therefore, the circuit court did not err in refusing to allow Jackson to present one or more unknown witnesses and denying the *Brady* violation claim.

¶ 40 We now turn to Jackson’s contention that the circuit court erred in dismissing his actual innocence claim at the second stage of the postconviction proceedings. Although a defendant is not entitled to an evidentiary hearing as a matter of right, our supreme court has repeatedly stressed that a hearing is required whenever the petitioner makes a substantial showing of a

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violation of constitutional rights. *Coleman*, 183 Ill. 2d at 381 (and cases cited therein).

Dismissal of a postconviction petition is warranted only when the petition's allegations of fact, liberally construed in favor of the petitioner and in light of the original trial record, fail to make a substantial showing of imprisonment in violation of the state or federal constitution. *Id.* at 382.

¶ 41 As previously noted, evidence 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.’ ” *Ortiz*, 235 Ill. 2d at 333 (quoting *People v. Morgan*, 212 Ill. 2d 148, 154 (2004)). Evidence that is newly discovered is defined as evidence that was discovered since the trial, and could not have been discovered earlier through due diligence. *Id.* at 334. Evidence is considered cumulative when it does not add anything to what was previously before the jury. *Id.* at 335.

¶ 42 We first address the requirement that the evidence must be newly discovered. Jackson has not made a substantial showing that he meets this requirement. The record shows that Jackson and Wilson had two discussions in the early 1990s regarding a separate trial in which Wilson testified as an eyewitness, after Jackson had already been charged with Walker's murder. Moreover, the substance of the discussions was that Wilson had lied in a separate trial and innocent men were in prison as a result. If Wilson had, in fact, been present at the scene and witnessed Easley shoot Walker, there is no reason to believe he would not have told Jackson in one of those two discussions. The record further shows that at the time of the shooting Wilson was a member of the Del Vikings, but he joined the Gangster Disciples shortly thereafter. Because Wilson and Jackson were acquainted, Jackson could have attempted to ascertain earlier

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whether Wilson was present when Walker was killed. Moreover, Jackson was familiar with the witnesses who testified at his trial and allegedly discovered additional witnesses who submitted affidavits in prior postconviction petitions. He could have questioned many of these witnesses further to determine whether anyone else was present at the time of the shooting. Therefore, Jackson has not made a substantial showing that the evidence could not have been discovered earlier through due diligence.

¶ 43 Because Jackson has not made a substantial showing that the evidence was newly discovered, his claim of actual innocence was appropriately dismissed at the second stage and we need not discuss the remaining two requirements. However, we note that Jackson has not made a substantial showing that either of the other two requirements were met. The witnesses at trial provided some corroboration for different individuals being present at the time of the shooting, but Wilson was not mentioned by anyone. Wilson gives conflicting accounts of where he was standing at the time of the shooting. Wilson also gives conflicting accounts of Jackson's whereabouts, in one document stating that Jackson was not there, while in another stating that he saw him talking to Stewart prior to the shooting. There was sufficient testimony by other witnesses, some of whom were friendly with Jackson and others who were members of the Del Vikings, that Jackson was present at the time of the shooting. The accounts differed regarding where Jackson was and what he was doing when Easley was killed, but Wilson's conflicting statements add nothing to what was before the jury, and would not have likely changed the outcome of the trial. Thus, the circuit court did not err in dismissing Jackson's claim of actual innocence at the second stage of the postconviction proceedings. For the foregoing reasons, we

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affirm the judgment of the circuit court.

¶ 44 Affirmed.