

(720 ILCS 5/10-2(a)(3) (West 2004)), and (5) aggravated possession of a converted motor vehicle (625 ILCS 5/4-103.2(a)(7)(A) (West 2004)). The trial court later sentenced him to concurrent terms of (1) 22 years in prison for each conviction of armed robbery, aggravated vehicular hijacking, and aggravated kidnapping; (2) 10 years in prison for vehicular invasion; and (3) 10 years in prison for aggravated possession of a converted motor vehicle. (The court did not enter judgment on one count of vehicular invasion, having determined that it merged into defendant's conviction on the other vehicular-invasion count.)

¶ 5 Defendant appealed, arguing that he (1) received ineffective assistance of counsel and (2) was denied a fair trial by the prosecutor's comments during rebuttal argument. We disagreed and affirmed. See *People v. Cooper*, No. 4-06-0077 (Dec. 21, 2007) (unpublished order under Supreme Court Rule 23).

¶ 6 In April 2012, defendant filed a postconviction petition in which he alleged, in part, that he was (1) deprived of the effective assistance of counsel and (2) actually innocent. Defendant attached to his petition an affidavit from his codefendant, Jonas Bond, to the effect that Bond told the police that defendant had no involvement in the kidnapping of Damon Lee, Jr., the victim in the case in which defendant was convicted, and that Bond stood by that statement. In the affidavit, Bond further explained that he picked up defendant after the incident (apparently involving Lee) had taken place.

¶ 7 One week later, the trial court dismissed defendant's postconviction petition under section 122-2.1(a)(2) of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-2.1(a)(2) (West 2010), concluding that the petition was frivolous and patently without merit. The court provided a written explanation regarding its rejection of Bond's affidavit, as follows:

"[T]he remaining claims in the petition hinge upon the attached affidavit of codefendant, Jonas Bond. At the time of defendant Cooper's trial, codefendant Bond's case was still pending. Codefendant Bond subsequently pleaded guilty and was sentenced pursuant to a partial plea agreement on November 9, 2005. Accepting all claims in the petition as true, it is apparent from the face of the affidavit that Mr. Bond's statements [do] not amount to newly discovered evidence because the substance of the statements was provided during a police interview at or near the time the offense occurred. There is no suggestion or allegation that statements of Mr. Bond were not disclosed to the defendant by way of discovery. This evidence was available at the time of trial. *People v. Washington*, 171 Ill. 2d 475 [(1996)], *People v. Harris*, 206 Ill. 2d 293 . Evidence is not newly discovered when it presents facts already known to a defendant at or prior to trial, though the source of these facts may be unavailable. *People v. Moleterno*, 254 Ill. App. 3d 615."

¶ 8 This appeal followed.

¶ 9 II. THE TRIAL COURT'S FIRST STAGE DISMISSAL OF DEFENDANT'S
PETITION FOR POSTCONVICTION RELIEF

¶ 10 Defendant appeals, arguing that this court should reverse the trial court's dismissal of his postconviction petition because his petition and Bond's affidavit present "an arguable basis

for freestanding claim of actual innocence." We disagree.

¶ 11 A. Proceedings Under the Act and the Standard of Review

¶ 12 A defendant may proceed under the Act by alleging that "in the proceedings which resulted in his or her conviction[,] there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both[.]" 725 ILCS 5/122-1(a)(1) (West 2010). "In noncapital cases, the Act establishes a three-stage process for adjudicating a postconviction petition." *People v. Andrews*, 403 Ill. App. 3d 654, 658, 936 N.E.2d 648, 652 (2010).

¶ 13 "At the first stage, 'the trial court, without input from the State, examines the petition *only* to determine if [it alleges] a constitutional deprivation unrebutted by the record, rendering the petition neither frivolous nor patently without merit.'" (Emphasis in original.) *Andrews*, 403 Ill. App. 3d at 658, 936 N.E.2d at 652 (quoting *People v. Phyfiher*, 361 Ill. App. 3d 881, 883, 838 N.E.2d 181, 184 (2005)). To withstand dismissal at the first stage, the petition need only state the gist of a constitutional claim for relief. *People v. Henderson*, 2011 IL App (1st) 090923, ¶ 20, 961 N.E.2d 407. The "gist" standard is a low threshold that does not require a petitioner to set forth the constitutional claim in its entirety but instead requires only a limited amount of detail. *People v. Scott*, 2011 IL App (1st) 100122, ¶ 24, 958 N.E.2d 1046.

¶ 14 "[I]n considering a postconviction petition at the first stage of the proceedings, the court can examine the following: 'the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate court in such proceeding[,] and any transcripts of such proceeding.'" *People v. Dorsey*, 404 Ill. App. 3d 829, 833, 942 N.E.2d 535, 539 (2010) (quoting 725 ILCS 5/122-2.1(c) (West 2008)). If a defendant has been sentenced to

imprisonment and the trial court determines that his postconviction petition is frivolous or patently without merit, the court shall dismiss the petition by written order. 725 ILCS 5/122-2.1(a)(2) (West 2010). This court reviews *de novo* a first-stage dismissal of a petition under the Act. *Dorsey*, 404 Ill. App. 3d at 833, 942 N.E.2d at 539.

¶ 15 B. Claims of "Actual Innocence"

¶ 16 The State contends that the trial court's finding that Bond's affidavit was not newly discovered evidence was not erroneous, and therefore this court should affirm the court's dismissal of defendant's postconviction petition as frivolous and patently without merit. Alternatively, the State argues that what defendant submitted in support of his petition, including Bond's affidavit, was not adequate to support defendant's claim of "actual innocence." Because we agree with the State's second contention, we need not address its first.

¶ 17 The Illinois Supreme Court recently had occasion to discuss a defendant's claim of "actual innocence" in the context of a postconviction petition, albeit one in which the issue before the court was whether the defendant should be permitted to institute a successive postconviction petition. Nonetheless, the supreme court's discussion in *People v. Edwards*, 2012 IL 111711, 969 N.E.2d 829 serves to inform this court regarding how we should analyze a claim of "actual innocence" in a postconviction context. In *Edwards*, the supreme court wrote the following:

"The elements of a claim of actual innocence are that the evidence in support of the claim must be 'newly discovered'; material and not merely cumulative; and of such conclusive character that it would probably change the result on retrial.

[Citations.] We deem it appropriate to note here that the United States Supreme Court has emphasized that such claims 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.' [Citation.] The Court added: 'Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful.' [Citation.]

As stated earlier, a petitioner's request for leave of court and his supporting documentation must set forth a colorable claim of actual innocence, *i.e.*, they must raise the probability that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.* ¶¶ 32-33, 969 N.E.2d 829.

¶ 18 C. The Trial Court's First-Stage Dismissal In This Case

¶ 19 To evaluate defendant's claim of "actual innocence," we need to consider the evidence presented against him at the August 2005 jury trial in which he was convicted. We thus quote the following from our earlier Rule 23 order in this case in which we describe that evidence:

"Lee testified that on March 14, 2005, when he was 62 years old, he drove his Lumina into the alley behind his residence (1820 East Decatur Street in Decatur) and parked the car in his

driveway. Two young black men approached him and asked him what time it was and if he had any cigarettes. (Lee identified defendant in court as the "taller one" who "look[ed] like" one of his assailants; he also identified Bond in a photographic array as the assailant "with the braids.") Defendant and Bond then asked Lee to drive them "west of town." When Lee declined to drive them anywhere, defendant and Bond walked away. Lee then sat in his car with the driver's side door slightly open. Defendant and Bond walked back to Lee's car and stood by the driver's side door. The taller man demanded that Lee give them money and then hit him. Defendant and Bond then dragged Lee from his car and continued hitting him. At some point, either defendant or Bond picked up a brick and hit him on the head. When Lee tried to run away, defendant and Bond grabbed him, took \$440 from his wallet, and demanded his car keys. He gave them his keys, and they ordered him to get into the Lumina's trunk. Lee was eventually able to use a cellular phone to call 9-1-1, and police freed him from the trunk after the Lumina came to a sudden stop.

Decatur police officer Brian Earles testified that around 3:30 p.m. on March 14, 2005, he was patrolling in his squad car when he responded to a dispatch and saw the Lumina driving eastbound on Grand Avenue in Decatur. Earles turned on his

emergency lights and pursued the Lumina. Bond, who was driving, did not pull over and, instead, sped up and weaved through traffic. Earles activated his siren and continued pursuing the Lumina. Bond eventually lost control of the car, and both defendant and Bond fled on foot. After another officer apprehended defendant, Earles went to that location and identified defendant as the passenger who ran from the Lumina.

Mike Tarczan, who lived at 441 South 20th Street in Decatur, testified that on the afternoon of March 14, 2005, he saw two men dressed in "all black" walking north on 20th Street. (Mike later identified defendant and Bond in a photographic array as the two men he saw on the day of the incident.) Mike lost sight of defendant and Bond, but later saw them walking south on 20th Street. He then watched as they turned the corner and walked west on Decatur Street. Around 2:15 p.m., Mike saw defendant and Bond approach Mike's elderly neighbor and ask him what time it was. Mike then saw defendant look up and gesture toward Mike. Defendant and Bond then walked away.

Beth Tarczan, Mike's wife, testified that around 2 p.m. on March 14, 2005, she left her residence to go to work at the Macon County jail. As she left, she saw two young black men dressed in black standing in front of her neighbor's residence. Beth stated that

she saw the same two men (defendant and Bond) when they were brought to the jail later that same day." Cooper, slip order No. 4-06-0077, at 3-6.

¶ 20 Confronted with this record and the supreme court's analysis in *Edwards*, defendant argues that "[w]hile the evidence against Bond was overwhelming, it was hardly so against [defendant]." He further contends that if the jury "had information from the clearly guilty party, Bond, that [defendant] was not his co-actor, the verdict may well have been different." We strongly disagree.

¶ 21 We view the evidence of defendant's guilt as overwhelming and deem meritless his claim that his supporting documentation set forth a colorable claim of actual innocence. His petition and supporting documentation do not come remotely close, as they must, in the language of *Edwards*, 2012 IL 111711, ¶ 33, 969 N.E.2d 829, to raising "the probability that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence."

¶ 22 III. CONCLUSION

¶ 23 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 24 Affirmed.