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SIXTH DIVISION  
Order filed April 25, 2014  
Modified Upon Denial of Rehearing June 20, 2014

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IN THE APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 00 CR 9049
	)	
JAMEL MILLER,	)	The Honorable
	)	William G. Lacy,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE LAMPKIN delivered the judgment of the court.  
Justices Hall and Reyes concurred in the judgment.

**ORDER**

¶1 *HELD:* Defendant's motion for leave to file a successive postconviction petition was properly denied where defendant failed to state a colorable claim of actual innocence and failed to demonstrate cause and prejudice as related to his *Brady* claim.

¶2 Following a jury trial, defendant, Jamel Miller, was convicted of first degree murder, aggravated battery with a firearm, and aggravated discharge of a firearm, and sentenced to a 60-year aggregate prison term. On direct appeal, we vacated defendant's conviction for aggravated discharge of a firearm as a violation of the one-act, one-crime rule and affirmed his remaining

convictions and sentence. *People v. Miller*, 1-03-0712 (June 22, 2004) (unpublished order pursuant to Supreme Court Rule 23). We subsequently affirmed the trial court's summary dismissal of defendant's *pro se* petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2004)). *People v. Miller*, No. 1-08-1322 (June 1, 2010) (unpublished pursuant to Supreme Court Rule 23). Defendant now appeals the trial court's denial of his motion for leave to file a successive postconviction petition. Defendant contends the trial court erred where he set forth a colorable claim of actual innocence based on self defense and demonstrated cause and prejudice related to a *Brady v. Maryland*, 373 U.S. 83 (1963), violation. Based on the following, we affirm.

### ¶3 FACTS

¶4 The following facts were revealed at trial:

"In December 2002, defendant and his brother Walter Nunn were tried in separate, simultaneous jury trials for the first degree murder of Antonio Parks, the aggravated battery with a firearm of Lisa Sims, and aggravated discharge of a firearm.

According to the evidence adduced at trial, defendant and Parks belonged to different factions of the Gangster Disciples street gang. Lisa Sims rode with Parks to a liquor store on the night he was killed in April 1999. While Sims waited in the car, Parks entered the store and met Willie Boston, another gang member. Parks and Willie Boston were laughing and wrestling in the store and were told to leave. When they left the store, a verbal argument ensued outside involving Parks, defendant and others. Then, Parks walked away and returned to

his car. Meanwhile, Nunn retrieved a gun from under the porch of a nearby house, and defendant retrieved a gun from a nearby vacant lot.

Nunn approached the rear window of Parks' car, and defendant approached Parks' driver's side window. Parks had started his car and began to drive forward. Defendant told Nunn to "look up," and Nunn fired his gun, shattering the car's rear window. Defendant fired his gun once and missed. His gun jammed but then he cleared it, fired additional shots and ran away. One of the bullets hit Sims in the stomach, and she ran from the car. When she returned to the scene, Parks was lying on the ground. No gun was recovered from Parks' body, and the occurrence witnesses' testimony established that no one saw Parks with a gun that night, nor did anyone see any gunshots coming from inside the car.

Defendant testified that he was afraid of Parks because his family had a reputation for being violent. Defendant testified that he saw Parks shoot at a group of his friends in 1997, and Parks pulled a gun on defendant in the summer of 1998 concerning a confrontation defendant had with a girl. In addition, after January 1999, Parks and a group of men went to the home of defendant's friends, kicked down the door, put a gun in a friend's mouth, and asked about defendant. Furthermore, according to defendant, Darryl Boston told him that he (Darryl Boston) saw Parks with a gun while he was driving on the expressway a few days before the shooting. Darryl Boston, however, testified that he never told defendant about seeing Parks with a gun on the expressway.

Defendant testified that, on the night of the shooting, Parks and Willie Boston started arguing outside the liquor store and defendant tried to separate them. Then, Parks threatened to kill defendant and walked away, back to his car. At that point, defendant retrieved the gun from a nearby vacant lot. He continued watching Parks, who by that time was sitting in his car. Defendant said he did not walk away that night because he was waiting for a ride, and the area was well lit; he felt safer staying near the store. Defendant started walking toward Parks' car and saw Parks bend forward. Defendant thought Parks was reaching for a weapon under his seat. Defendant told Nunn to "look up," and then they fired gunshots at Parks' car.

Chicago police detectives Michael McDermott and David Fidyk and Assistant State's Attorney Julie Mark testified that they interviewed defendant after his arrest. Defendant never told them that he was afraid of Parks or shot Parks in self-defense.

Defense counsel argued self-defense and second degree murder, and the juries were instructed on those defenses. The State urged defendant's jury to reject self-defense and second degree murder, emphasizing that Parks was unarmed.

Defendant was found guilty of all charges, but Nunn was acquitted of first degree murder and found guilty of second degree murder, aggravated battery with a firearm, and aggravated discharge of a firearm. The trial court sentenced defendant to 40 years' imprisonment for murder, a consecutive 20-year term for

aggravated battery, and a concurrent 15-year term for aggravated discharge of a firearm." *Miller*, No. 1-08-1322, slip op. at 2-4.

¶5 As stated, on direct appeal, we affirmed defendant's convictions for first degree murder and aggravated battery, but vacated his conviction and corresponding sentence for aggravated discharge of a firearm. *Miller*, No. 1-03-0712. In relevant part, we found the evidence of defendant's guilt was overwhelming and the evidence supporting his theory of self defense was "virtually nonexistent." *Id.* slip op. at 8, 13.

¶6 On January 10, 2005, defendant filed a *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2004)), claiming that a defective indictment voided his convictions, the class X felony legislation was unconstitutional because it violated the single-subject rule, and the trial court lacked subject matter jurisdiction. Defendant filed an identical petition on March 17, 2005.

¶7 Meanwhile, on February 8, 2005, defendant filed a *pro se* postconviction petition pursuant to the Act, alleging that he was denied a fair trial by the exclusion of evidence, denial of a continuance request, improper jury instructions, prosecutorial misconduct, and ineffective assistance of trial and appellate counsels.

¶8 In a March 22, 2005 written order, the trial court denied defendant's section 2-1401 petition. The trial court found that defendant's claims regarding a defective indictment and unconstitutional statute were barred by *res judicata*. Moreover, the trial court found defendant's subject matter jurisdiction claim lacked merit. The trial court's written March 2005 order did not refer to defendant's February 2005 postconviction petition or the issues raised therein. However, the report of proceedings for March 22, 2005, indicates that the trial court erroneously referred to

defendant's identical January and March 2005 section 2-1401 petitions as a *pro se* petition for postconviction relief.

¶9 In April 2005, defendant appealed the denial of his January and March section 2-1401 petitions, arguing that the trial court improperly recharacterized those pleadings as postconviction petitions under the Act. In July 2007, this court entered an agreed order that vacated the trial court's March 2005 denial order. The cause was remanded to the trial court with instructions to admonish defendant regarding his section 2-1401 petitions and allow him to withdraw or amend his petition. The parties agreed that defendant's new or amended petition would be treated as the filing of his initial postconviction petition.

¶10 In December 2007, in his amended postconviction petition, defendant alleged that he presented the gist of a meritorious claim that trial counsel rendered ineffective assistance by failing to investigate and present the eyewitness testimony of Willie Boston, and that his due process rights were violated by the State's knowing use of Lisa Sims' perjured testimony. To his petition, defendant attached an October 19, 2005, signed affidavit from Willie. In the affidavit, Willie attested that, on the night of the shooting, he told defendant that the decedent said he wanted to kill defendant. Then, after defendant helped break up the argument between Willie and the decedent, the decedent yelled "It's On," and "that he was going to his car to get his gun and 'Tear 103rd up.' " After the shooting, but prior to the arrival of the police, Willie observed the decedent's cousin Deon (also known as "Crazy") "remove a small caliber handgun" and a hat from decedent's person. According to Willie's affidavit, he refused to testify at defendant's trial "out of fear from intimidation that friends of [the decedent] made \*\*\* if he testified." Willie, however, attested that he would be willing to testify now since he was "removed from" those threats. In relation to his due process claim, defendant alleged he and his brother overheard the

State and Sims making arrangements for the State to speak to the sentencing judge in Sim's unrelated criminal case to "get her probation." However, when asked whether the State made promises to seek a lenient sentence in exchange for her testimony, Sims testified in the negative. On appeal, we held that defendant failed to allege a claim of ineffective assistance of counsel as related to Willie with any arguable basis where there was nothing to support the speculative allegation that Willie would have testified favorably for defendant. *Miller*, No. 1-08-1322, slip op. at 12-14. We further held that defendant failed to support his claim that the State knowingly used perjured testimony. *Id.* at 17-19.

¶11 On January 12, 2012, defendant filed a motion for leave to file a successive postconviction petition. In his successive postconviction petition, defendant alleged that his convictions violated his due process rights because newly discovered, material, noncumulative evidence revealed that the decedent was armed with a handgun at the time of the offense, thereby substantiating defendant's claim of self defense or, in the alternative, his claim of the unreasonable need for self defense. Defendant additionally alleged that the State violated his due process rights and *Brady* by knowingly allowing Sims to commit perjury while suppressing evidence that Sims observed the decedent with a handgun and promising Sims leniency in a separate, pending case in exchange for her false testimony. In support of his allegations, defendant attached the following documents: (1) two letters from Sims that she purportedly wrote to defendant while in prison; (2) signed and notarized affidavits by Elizabeth Spann, Sheila Nunn, former Assistant State Appellate Defendant (ASAD) Maya Szilak, and petitioner; (3) trial court records; and (4) a sentencing transcript pertaining to Sims' probation that occurred shortly after defendant's trial. Defendant alleged he was prevented from discovering and presenting his claim of actual innocence until receiving Sims' letter on December 26, 2007,

which was after the filing of his December 18, 2007, amended postconviction petition, because that is when he learned of Sims' admissions that she observed the decedent armed with and reaching for a handgun to shoot defendant, that the decedent's family member removed the gun from the scene before the police arrived, and that Sims suppressed this evidence at the time of trial under inducement by the State that it would assist with her pending criminal case.

¶12 In her letter, dated December 12, 2007, Sims admitted that she did "not tell[] the whole truth" at defendant's trial. Sims further stated that she was "not interested in coming to court [to testify] but when [she] caught her first case in 2003 the State came and gave me a subpoena." According to the letter, the State offered to "help [her] if [she] help[ed] them." The State "started telling [her] what happened that night and [she] told them [the decedent] had a gun but they said don't mention it because the police did not find it." Sims said someone by the name of "Deon" retrieved the decedent's gun from the vehicle after the incident. In describing the incident, Sims stated that the decedent "got into it" in the store and then "he got in the car[,] started it up[,] and put it in drive and the car moved a little[.] Then the back window fall out[,] hit us in the back of our heads[.] [She] turned around and didn't see no one back there and then [she] heard [defendant] say [the decedent's name] and [defendant] was standing at [the decedent's] window pointing the gun[.] It look[ed] like [defendant] tried to shoot but the gun got jammed and why [sic] [he] was trying to unjam it [the decedent] was reaching under his seat for his gun then the first shot that came in the car shot [her] in the chest." At that point, Sims exited the vehicle. Sims averred that she had a Class X "delivery/manufacturing charge" that the State reduced to a Class II felony.

¶13 Sims sent defendant a second letter, which was undated but defendant purportedly received in 2009. In the letter, Sims said she had "2 ½ months left" and then "3 months of

parole" as part of a work-release program. Sims wrote that she would be home on November 20, 2009.<sup>1</sup>

¶14 In an affidavit dated January 6, 2011, and notarized on January 11, 2011, Elizabeth Spann, defendant's aunt, attested that she spoke with Sims on the telephone several times in 2008. During those conversations, Sims told Spann that she was in the car with the decedent during the shooting and the decedent was armed and "preparing to use a gun when he was shot." According to the affidavit, Sims reported she was "willing to make a statement in writing and/or on videotape"; however, Sims failed to appear during scheduled meetings and then could not be located.

¶15 In an affidavit dated and notarized on February 9, 2011, Sheila Nunn, defendant's mother, attested that she "made a diligent attempt to locate the whereabouts of" Sims. On November 5, 2007, Sheila wrote a letter to Sims. Sims responded by letter on December 5, 2007. Sheila attested that Sims also wrote letters to defendant and codefendant on December 26, 2007. According to Sheila's affidavit, Sims "agreed to submit a statement as to why she testified and how she was promised help in the case she was charged with." Sheila's affidavit was consistent with the information provided by Sims in her December 12, 2007, letter to defendant. According to Sheila's affidavit, Sheila and Spann "had on numerous occasions arranged to meet with" Sims to generate a video statement, but Sims never appeared out of fear of being charged with perjury.

¶16 In an affidavit notarized on December 5, 2011, former ASAD Szilak attested that she represented defendant in two postconviction appeals. Szilak averred that defendant requested she obtain the transcript of Sims' sentencing hearing in case number 00 CR 2018 to corroborate

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<sup>1</sup> Because Sims' second letter did not provide the purported "newly discovered evidence," our reference to the Sims' letter throughout this decision refers to Sims' December 12, 2007, letter.

his postconviction claim that the State permitted Sims to testify falsely that her testimony was not related to any deal with the State. Szilak denied the request as an unauthorized expenditure. According to Szilak, Sheila and Spann obtained the transcript from Sims' January 13, 2003, sentencing hearing on their own and Szilak forwarded a copy to defendant, along with documentation of Sims' arrest history.

¶17 Szilak further attested that defendant contacted her between 2009 and 2010 reporting that he received a letter from Sims. The Sims' letter provided that the decedent was armed on the night of the shooting and reached for his gun just before defendant shot him. Defendant further informed Szilak that, in Sims' letter, she said the State reduced her criminal conviction from a Class X to a Class II felony in exchange for her testimony against defendant. Defendant reported that Sims' letter provided the "truth" about what she observed during the shooting and disclosed her reasons for testifying falsely. Szilak attested that she advised defendant to obtain Sims' affidavit. Defendant stated that he asked Sheila and Spann to locate Sims to obtain her affidavit. Sims agreed to provide an affidavit, but failed to do so.

¶18 After this court affirmed the summary dismissal of defendant's amended postconviction petition, Szilak made efforts to locate and speak with Sims herself. Between the months of January 2011 and April 2011, Szilak spoke with Sims on the phone three to four times. During the conversations, Sims stated that the decedent had a handgun in his car when defendant fired gunshots at him. In fact, the decedent was reaching under the front driver's side seat for his gun when defendant shot him. While Sims fled the scene, she observed the decedent's cousin, Deon, and told him what had happened. Deon then returned to the decedent's car and removed the handgun before the police arrived. Szilak attested that Sims was 16 years old in 1999 or 2000 when she was interviewed by the police in relation to the shooting. At the time, she reported that

the decedent had been armed with a handgun which had been removed from the scene by one of his family members, but the State advised her not to mention those facts. Sims told Szilak that the State promised her a minimum sentence on a pending narcotics case in exchange for her testimony. Sims stated that she did not come forward with the information out of fear of being charged with perjury. Szilak arranged to meet with Sims on two occasions to complete an affidavit, but Sims did not appear for either appointment and did not return phone calls.

¶19 In his affidavit notarized on December 22, 2011, defendant attested that, after filing his amended postconviction petition, he received Sims' letter in which she explained that she agreed to testify falsely against him in exchange for the State's promise of leniency in her pending case. Defendant stated that he was unable to obtain Sims' affidavit due to his incarceration; therefore, he relied on his mother, aunt and Szilak to assist him. Defendant attested that, upon learning that all efforts had been exhausted to obtain Sims' affidavit, he submitted his *pro se* successive postconviction petition with the accompanying documentation. Defendant maintained his actual innocence in that he fired his gun in self defense. Defendant attested that the jury should have heard Sims' recantation of her contrary trial testimony and claimed Sims' exculpatory information was "newly discovered" because it was suppressed by the State in violation of *Brady* and Sim's perjured testimony was not corrected at trial.

¶20 Also attached to the motion for leave to file a successive postconviction petition was the January 13, 2003, sentencing transcript from the hearing on Sims' violations of probation. Sims pled guilty and was sentenced to the recommended sentence of three years' imprisonment. After being admonished of her rights and stating that she entered her plea freely and voluntarily without force or threat, the trial court asked whether Sims had any questions. Sims responded

that she "would like to see if my PD talked to the State to see what they could work out regarding me testifying."

¶21 On April 13, 2012, the trial court denied defendant leave to file his successive postconviction petition because he failed to "meet the cause of [*sic*] prejudice test." This court granted defendant's motion for leave to file a late notice of appeal.

#### ¶22 DECISION

¶23 The Act provides a means by which an individual serving a sentence may challenge his or her conviction as resulting from a substantial denial of his or her constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2004). To survive first stage summary dismissal, a *pro se* petition seeking post-conviction relief under the Act must not be frivolous or patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). A postconviction petition is frivolous or patently without merit only if the petition has no arguable basis either in law or fact. *Id.* "A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful allegation." *Id.* We review the dismissal of a postconviction petition *de novo*. *Id.* at 9.

¶24 The Act contemplates the filing of one postconviction petition. *People v. Holman*, 191 Ill. 2d 204, 210 (2000). The statutory bar against filing more than one petition will be relaxed only "when fundamental fairness so requires." *People v. Pitsonbarger*, 205 Ill. 2d 444, 458 (2002). " 'Successive postconviction petitions are disfavored under the Act[,] and a defendant attempting to institute a successive postconviction proceeding, through the filing of a second or subsequent postconviction petition, must first obtain leave of court.' " *People v. Smith*, 2013 IL App (4th) 110220, ¶20 (quoting *People v. Gillespie*, 407 Ill. App. 3d 113, 123 (2010)). There are two exceptions to the procedural default rule allowing a defendant to raise a defaulted

constitutional claim: (1) where "a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial postconviction proceedings and prejudice results from that failure" (725 ILCS 5/122-1(f) (West 2004)), also known as the cause and prejudice test; and (2) where, even without a showing of cause and prejudice, a defendant raises a claim of actual innocence to prevent a fundamental miscarriage of justice. *People v. Coleman*, 2013 IL 113307, ¶¶82-83.

#### ¶25 I. Actual Innocence Claim

¶26 Defendant contends that he is entitled to an evidentiary hearing on his successive postconviction petition where his newly discovered evidence, namely, the Sims letter and the supporting affidavits, set forth a colorable claim of actual innocence.

¶27 Where a defendant raises a claim of actual innocence, "leave of court should be denied only where it is clear, from a review of the successive petition and the documentation provided by the petitioner that, as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence." *People v. Edwards*, 2012 IL 111711, ¶24. A colorable claim of actual innocence is one that raises the probability that it is more likely than not that no reasonable juror would have convicted the defendant in light of the new evidence. *People v. Adams*, 2013 IL App (1st) 111081, ¶30. The supreme court has provided the requirements for an actual innocence claim, such that:

"the defendant must present new, material, noncumulative evidence that is so conclusive it would probably change the result on retrial. [Citation.] New means the evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence. [Citation.] Material means the evidence is relevant and probative of the petitioner's innocence. [Citation.] Noncumulative means the evidence adds to what the jury heard. [Citation.] And

conclusive means the evidence, when considered along with the trial evidence, would probably lead to a different result. [Citation.]" *Coleman*, 2013 IL 113307, ¶96.

The standard for demonstrating actual innocence is "extraordinarily difficult to meet." *Id.* at ¶94. In fact, according to the supreme court, "courts of review have granted postconviction relief on actual-innocence claims in only three reported cases since 1996." *Id.* (citing *People v. Ortiz*, 235 Ill. 2d 319 (2009), *People v. Burrows*, 172 Ill. 2d 169 (1996), *People v. Starks*, 365 Ill. App. 3d 592 (2006)).

¶28 At the outset, we note that the trial court applied the wrong standard in reviewing defendant's motion for leave to file a successive postconviction petition. Because defendant presented a claim of actual innocence, he was not required to satisfy the cause and prejudice test in order to obtain leave to file his successive postconviction petition. *Id.* at ¶¶82-83. Defendant was, however, required to present new, material, noncumulative evidence that was so conclusive it probably would have changed the result on retrial. *Adams*, 2013 IL App (1st) 111081, ¶96. Defendant argues Sims' letter satisfied the requisite standard where the evidence that the decedent was armed with a handgun and reaching for that gun when defendant shot him was not available at any prior proceeding because the State suppressed Sims' exculpatory statement and knowingly used her perjured testimony. According to defendant, the evidence confirms he shot the decedent in self defense and, therefore, it was of such conclusive character he would have been acquitted had it been presented at trial.

¶29 Although not raised by the State, we first, however, must address the fact that defendant attempts to use the same evidence, namely, Sims' letter and his affidavit along with the affidavits

of Spann, Sheila, and former ASAD Szilak, to support both a claim of actual innocence and a *Brady* violation claim.

"Under the due process clause of the Illinois Constitution of 1970 (Ill. Const.1970, art. I, § 2), a defendant can raise in a post-conviction proceeding a 'free-standing' claim of actual innocence based on newly discovered evidence. [Citation.] A free-standing claim of innocence means that the newly discovered evidence being relied upon is not being used to supplement an assertion of a constitutional violation with respect to [the] trial. [Citations.]" (Internal quotation marks omitted.) *People v. Orange*, 195 Ill. 2d 437, 459 (2001) (citing *People v. Hopley*, 182 Ill. 2d 404, 443-44 (1998)).

¶30 Here, defendant is arguing that Sims' letter along with the affidavits demonstrate his actual innocence while at the same time arguing that the letter and the affidavits support a *Brady* violation. The supreme court has held that the same newly discovered evidence may not be used to raise a claim of actual innocence and to supplement an assertion of a constitutional violation with respect to trial. *People v. Washington*, 171 Ill. 2d 475, 479 (1996); *Hopley*, 182 Ill. 2d at 444. Defendant's motion for leave to file a successive postconviction petition does not make a *free standing* claim that he is actually innocent based on the evidence in Sims' letter but, rather, also claims that the State's knowing use of perjured testimony and the failure of the State to disclose material evidence violated *Brady* based on the same evidence. See *People v. Brown*, 371 Ill. App. 3d 972, 984 (2007). Accordingly, the proper method for defendant to raise his free standing claim of actual innocence is to file another successive petition on that ground.

¶31 Even assuming defendant properly presented his claim as a free-standing claim of actual innocence, he failed to sufficiently support the claim and failed to satisfy the requisite standard.

¶32 Section 122-2 of the Act instructs that a postconviction petition shall have attached thereto affidavits, records, or other supporting evidence, or shall state why the same are not attached. 725 ILCS 5/122-2 (West 2004). The purpose of section 122-2 of the Act is to establish that the verified allegations in the petition are capable of objective or independent corroboration. *People v. Delton*, 227 Ill. 2d 247, 254 (2008). A defendant's failure to either attach the necessary "affidavits, records, or other evidence" or explain their absence is 'fatal' to a post-conviction petition [citation] and by itself justifies the petition's summary dismissal." *Id.* at 255 (quoting *People v. Collins*, 202 Ill. 2d 59, 66 (2002) ).

¶33 Here, defendant primarily relies on the information provided in Sims' letter to support his actual innocence claim. Sims did not complete an affidavit or other form of sworn testimony. Defendant, however, attached affidavits from Spann, Sheila, and former ASAD Szilak, in which each attested that she spoke to Sims and Sims relayed the same version of events as described in the letter. In his affidavit, defendant explained that he was unable to obtain Sims' affidavit himself due to his incarceration and, therefore, he attempted to secure her affidavit through Spann, Sheila, and Szilak. When all efforts proved unsuccessful, defendant submitted his *pro se* motion for leave to file a successive postconviction petition without a supporting affidavit from Sims.

¶34 While defendant complied with section 122-2 of the Act to the extent that he attached affidavits and explained the absence of Sims' affidavit from his petition, he did not satisfy the statute where those affidavits failed to support the allegations in his successive petition. Simply put, the "evidence" was not capable of objective or independent corroboration. The affidavits were based on hearsay. "As a general rule, hearsay affidavits are insufficient." *People v. Morales*, 339 Ill. App. 3d 554, 565 (2003); *People v. Gray*, 2011 IL App (1st) 091689, ¶16. In

addition, neither Spann, Sheila, nor Szilak had any personal knowledge of the facts contained in the affidavits since they were not present at the time of the offense. "Where the affidavit does not set forth specific facts to support that it is based upon personal knowledge, it is insufficient." *Brown*, 371 Ill. App. 3d at 984. Illinois courts have provided the justification for the rule against affidavits based on hearsay, such that:

" 'One of the reasons for requiring an affidavit is to spare the court the burden of dealing with frivolous or false [section 2-1401] petitions.<sup>2</sup> The filing of a false affidavit could give rise to a prosecution for perjury or a court imposed sanction for contempt of court. Neither remedy is available when an affidavit is based on pure hearsay since the affiant, in such a situation, could honestly state that he was told the factual matters and believed them to be true. Even if the matters in the affidavit were completely false, neither the court nor the aggrieved party litigant would have any recourse in such a situation since the party making the false statements would not have made them under oath or in any judicial proceeding and the party giving the affidavit would not be doing so corruptly but would be relying on what he may honestly have believed to be true statements.' "

*People v. Perkins*, 260 Ill. App. 3d 516, 518-19 (1994) (quoting *Amerco Field Office v. Onoforio*, 22 Ill. App. 3d 989, 992 (1974)).

¶35 We recognize that the supreme court has stated it will not inflexibly apply the rule against hearsay affidavits. *People v. Sanchez*, 115 Ill. 2d 238, 284 (1986). However, the *Sanchez* case was a capital case and the affidavit at issue included material facts known

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<sup>2</sup> Defendant agrees that the section 122-2 requirements are "materially identical to the [evidentiary] provision that governs section 2-1401 petitions."

to an affiant who invoked the fifth amendment through his attorney; therefore, an affidavit could not be procured. *Id.* at 285. Those facts do not apply to the instant case. Further, we distinguish *People v. Cihlar*, 111 Ill. 2d 212 (1986), a case cited by defendant, from the case at bar. In *Cihlar*, newly discovered evidence contained in a number of hearsay affidavits attacked the reliability of the victim's identification of the defendant, which was the only evidence connecting the defendant to the crime and had been uncontradicted by the record. *Id.* at 217-18. Here, the new evidence did not contradict the sole evidence connecting defendant to the offenses. As we will discuss below, the hearsay contained in the affidavits did not conclusively support defendant's actual innocence claim.

¶36 Moreover, it is clear by the contents of the affidavits, including defendant's own affidavit, that Sims repeatedly has refused to provide an affidavit. "An affidavit must not only identify the source and character of the evidence, it must also identify the availability of the alleged evidence." *Brown*, 371 Ill. App. 3d at 982. There is nothing establishing the availability of Sims' evidence and nothing to demonstrate that Sims would testify on retrial. Defendant's response is that, upon remand, the trial court could subpoena Sims pursuant to section 115-17a of the Act (725 ILCS 5/115-17a (West 2004)). While the statute does provide a means for a defendant to petition the court to issue a subpoena where "the subpoena seeks evidence that is material and relevant to the post conviction hearing," the statute additionally provides that the victim "shall be given the opportunity to appear and *object to the requested subpoena.*" (Emphasis added.) 725 ILCS 5/115-17a (West 2004). Only after the trial court determines that the subpoena seeks evidence that is material and relevant to the postconviction hearing will a subpoena request be granted. 725 ILCS 5/115-17a (West 2004). Accordingly, Sims could object

to a subpoena leaving nothing to identify the availability of Sims' alleged evidence. See *Brown*, 371 Ill. App. 3d at 982. The trial court need not presume the truth of the purported testimony in determining its materiality and relevance.

¶37 However, even assuming the request for a subpoena was granted and Sims complied therewith, to be entitled to a hearing on a successive postconviction petition, defendant was required to present a colorable claim of actual innocence based on new, material, noncumulative evidence that was so conclusive it would probably change the result on retrial. *Sanchez*, 115 Ill. 2d at 286. Defendant did not satisfy his burden.

¶38 Turning to the first element, evidence is "newly discovered" if it has been discovered since trial and could not have been discovered by the defendant sooner through diligence. *People v. Ortiz*, 235 Ill. 2d 319, 334 (2009). "Generally, evidence is not 'newly discovered' when it presents facts already known to the defendant at or prior to trial, though the source of those facts may have been unknown, unavailable, or uncooperative." *People v. Barnslater*, 373 Ill. App. 3d 512, 523 (2007). An exception appears to exist wherein a defendant may present a witness's recantation as newly discovered evidence despite having known the witness perjured himself or herself. *Id.* at 524. However, this exception will not apply if the defendant had evidence available at the time of trial to demonstrate that the witness was lying. *Id.*

¶39 Defendant cannot demonstrate that the evidence provided by Sims was newly discovered. The facts were known by defendant at the time of trial; defendant presented a theory of self-defense alleging that the decedent was armed and cross-examined Sims on her alleged perjury related to her sentencing deal with the State. Then, in his amended postconviction petition, defendant admitted that he and his brother overheard the State and Sims making arrangements to negotiate a lenient sentence on an unrelated criminal case in exchange for her testimony. As we

stated in affirming the dismissal of defendant's amended postconviction petition, defendant failed to provide affidavits from himself or his brother detailing the alleged conversation. *Miller*, 1-08-1322, slip op. at 17-19. To the extent Sims' recantation of her testimony that the decedent was unarmed at the time of the offense was not available at trial, it may have been considered newly discovered. However, defendant had at his disposal at the time of trial evidence in the form of affidavits from himself and his brother to allege that Sims was lying when she testified that she did not strike a deal with the State for her testimony.

¶40 The second element in presenting a successful claim of actual innocence is the newly discovered evidence is material and not merely cumulative. *Adams*, 2013 IL App (1st) 111081, ¶34. Evidence is considered cumulative when it does not add anything to what was previously before the jury. *Ortiz*, 235 Ill. 2d at 335. Evidence is not cumulative if it would create new questions in the mind of the jury. *People v. Williams*, 392 Ill. App. 3d 359, 369 (2009).

¶41 Viewing the facts alleged in Sims' letter and the affidavits as true, evidence that the decedent was armed with a handgun which was later removed from the scene was not cumulative. Although defendant argued self defense at trial, the State repeatedly presented testimony and argument that the decedent was not armed and, therefore, defendant could not have shot him in self defense. As a result, Sim's letter and the affidavits provided evidence that was not previously before the jury.

¶42 The last requirement for a successful actual innocence claim is the evidence was so conclusive that it probably would change the result on retrial. *Edwards*, 2012 IL 111711, ¶32. Evidence alleging actual innocence must demonstrate total vindication or exoneration of the defendant and not merely present a reasonable doubt. *Barnslater*, 373 Ill. App. 3d at 520.

¶43 In this case, we cannot say the evidence was so conclusive that it probably would have demonstrated defendant's innocence on retrial.<sup>3</sup> Initially, we note that recantation evidence is generally considered unreliable. *People v. Deloney*, 341 Ill. App. 3d 621, 632 (2003). The evidence, as provided in Sims' letter, was that, after a disagreement in a store between defendant and the decedent, the decedent entered his vehicle, started it, and moved forward. At that point, a gunshot broke the rear window of the vehicle, and defendant appeared at the decedent's window, attempting to discharge his gun at the decedent. The gun, however, "jammed" and, while defendant was trying to clear it, the decedent reached for his gun under the seat. Then, defendant was able to clear his gun and shoot at both Sims and the decedent. Spann, Sheila, and former ASAD Szilak all attested that Sims reported observing defendant approach the decedent's vehicle and point his weapon at the decedent prior to the decedent reaching for his handgun.

¶44 Although defendant testified at trial to a history of the decedent's violence, defendant fearing the decedent, and incidents in which the decedent threatened defendant, Sims' evidence provided that, on the date in question, the decedent was attempting to leave the area when defendant pointed his handgun at the decedent and attempted to shoot. Only then did the decedent reach down to retrieve his weapon. Defendant, however, was able to discharge his gun before the decedent succeeded. Contrary to defendant's arguments, this was not a case of protecting oneself from imminent harm. See 720 ILCS 5/7-1 (West 2004). There was no allegation that the decedent was armed in the store when he purportedly threatened defendant. Rather, the decedent declared that he was going to retrieve his gun to "tear it up." However,

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<sup>3</sup> Because we conclude that evidence demonstrating that the decedent was armed would not have demonstrated defendant's innocence, we need not determine whether Willie Boston's affidavit was properly before the trial court in consideration for defendant's motion for leave to file a successive appeal. Even assuming, *arguendo*, the affidavit was properly before the trial court, consideration of its contents would not have demonstrated defendant's innocence.

when the decedent went to his car, he entered it, closed the door, and began driving. Meanwhile, defendant retrieved a hidden gun from a vacant lot and, with his armed brother, pursued the decedent. Sims' letter confirms that the decedent did not arm himself until defendant had his gun pointed at the decedent. The decedent would not have had an opportunity to reach for his weapon but for the fact that defendant's gun jammed.

¶45 Simply stated, the evidence in defendant's motion for leave to file a successive postconviction petition failed to support defendant's theory of self defense. Additionally, where defendant pursued the decedent after he entered his car and began driving, defendant cannot establish a colorable claim of actual innocence based on the unreasonable belief in the need to use self defense because the danger was not imminent. See 720 ILCS 5/9-2(a)(2) (West 2004). In sum, the evidence did not establish defendant's total vindication or exoneration. The evidence failed to establish it was more than likely that no reasonable juror would have convicted defendant.

¶46 We conclude that defendant's motion for leave to file a successive postconviction petition based on his claim of actual innocence was properly denied.

#### ¶47 II. *Brady* Claim

¶48 Defendant next contends that he is entitled to an evidentiary hearing on his *Brady* claim where he satisfied the requisite cause and prejudice test. Specifically, defendant contends the State violated *Brady* where it failed to disclose Sims' alleged pretrial statement that the decedent was armed with a handgun and that, in exchange for Sims' testimony against defendant, she was promised leniency in an unrelated probation violation case. Defendant further contends the State knowingly allowed Sims to perjure herself when she testified falsely that the decedent was

unarmed at the time of the shooting and that she was not promised anything in exchange for her testimony.

¶49 A court may grant leave to file a successive petition "only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial postconviction proceedings and prejudice results from that failure." 725 ILCS 5/122-1(f) (West 2004). Cause is "an objective factor that impeded [the petitioner's] ability to raise a specific claim during his or her initial postconviction proceedings." 725 ILCS 5/122-1(f) (West 2004). Prejudice exists when "the claim not raised during [the petitioner's] initial postconviction proceedings so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f) (West 2004). We review *de novo* a trial court's denial of leave to file a successive postconviction petition for failure to comply with the cause and prejudice test. *People v. Almodovar*, 2013 IL App (1st) 101476, ¶59.

¶50 Defendant established cause where he did not receive Sims' letter admitting that she lied under oath until after the filing of his amended postconviction petition. See *People v. Mitchell*, 2012 IL App (1st) 100907, ¶65.

¶51 Turning to whether defendant established prejudice, we must review the relevant *Brady* law. In *Brady*, the United States Supreme Court held that the prosecution must disclose evidence that is both favorable to the accused and "material either to guilt or to punishment." *Brady*, 373 U.S. at 87. Evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *People v. Sanchez*, 169 Ill. 2d 472, 486 (1996); *People v. Anderson*, 375 Ill. App. 3d 990, 1011 (2007). To successfully establish a *Brady* claim, a defendant must show that: (1) the undisclosed evidence is favorable to him because it is either exculpatory or impeaching; (2) the evidence was either

willfully or inadvertently withheld by the State; and (3) withholding the evidence resulted in prejudice to him. *Anderson*, 375 Ill. App. 3d at 1011.

¶52 Based on our review of the record before us, we conclude defendant failed to present a claim of constitutional error that so infected his trial that his conviction violated due process. As previously discussed, the evidence in Sims' letter does not exculpate defendant. Rather, Sims' letter confirms that, after the initial dispute broke up, defendant retrieved a handgun from a nearby vacant lot and, with his brother, pursued the decedent to his car, ultimately pointing and attempting to fire his handgun at the decedent even before the decedent made any attempt to retrieve a handgun. Accordingly, it was not a reasonable probability that, had the State disclosed Sims' pretrial statement that the decedent was armed with a handgun and the promise of leniency in her unrelated case in exchange for her testimony against defendant, the result of trial would have been different. The disclosures could have been used to impeach Sims' trial testimony; however, defendant cannot demonstrate that withholding the evidence was prejudicial. Defendant argues that the proper standard for our consideration presumes Sims testified falsely. Specifically, defendant maintains that his "conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *People v. Coleman*, 183 Ill. 2d 366, 392 (1998). We disagree where we have found defendant's evidence supporting the allegation that Sims committed perjury was not properly supported. In sum, defendant failed to satisfy the cause and prejudice test and, therefore, his motion for leave to file a successive postconviction petition was properly denied.

¶53 CONCLUSION

¶54 We affirm the trial court's denial of defendant's motion for leave to file a successive postconviction petition where defendant failed to set forth a colorable claim of actual innocence and failed to satisfy the cause and prejudice test as related to his *Brady* violation claim.

¶55 Affirmed.