

No. 1-09-0884

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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. 01 CR 10001
	)	
LARON WARREN,	)	Honorable
	)	Arthur F. Hill, Jr.,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE TAYLOR delivered the judgment of the court.  
Justice McBride concurred in the judgment.  
Presiding Justice Gordon dissented.

**ORDER**

¶ 1 *HELD:* Because petitioner failed to provide newly discovered evidence of his actual innocence, the trial court correctly denied him leave to file his *pro se* successive postconviction petition.

¶ 2 Pursuant to the supervisory order issued by the Illinois Supreme Court in *People v. Warren*, No. 113184 (2012), we vacated our previous order and reconsider our decision in light

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of *People v. Edwards*, 2012 IL 111711.

¶ 3 Following a 1997 bench trial, petitioner Laron Warren was convicted of first-degree murder and sentenced to mandatory life in prison, having previously been convicted of another murder. Petitioner's conviction was affirmed on direct appeal. In 1999, petitioner filed his initial postconviction petition, which was dismissed for being untimely. That decision, as well, was affirmed on appeal. Petitioner then filed a *pro se* motion for leave to file a successive postconviction petition, which the trial court denied. This appeal followed.

#### ¶ 4 BACKGROUND

¶ 5 Petitioner was convicted of first degree murder and sentenced to life in prison based on a previous conviction for first degree murder. The evidence adduced at petitioner's trial established that on the afternoon of April 3, 1994, the victim, 17 year old Ebony Higgins, was fatally shot as she walked west on 107th Street in Chicago with five other people, including Michael Stampley, Demario Jackson, Jutoy Hoskins, Keith Smith, and the victim's boyfriend, Omar Muhammad. Stampley and Jackson were walking closest to the street behind the victim and subsequently identified petitioner as the shooter.

¶ 6 Jackson testified that on the afternoon of the shooting, he heard a vehicle strike the curb behind him, and turned to focus on the vehicle, which was about 12 feet from him and moving slowly. Jackson observed that the vehicle was a blue, four-door Buick, with pieces missing above the passenger-side headlight, and a license plate with a "Y" in it. There were two occupants in the vehicle, the driver and petitioner in the front passenger seat. Jackson testified that he saw petitioner extend his arm and part of his head from the front passenger window and

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fire a black revolver at the group. Jackson stated he was looking directly at petitioner, whose hair was in "corn braids," from the time he first saw the car until the shooting started, at which time he turned and ran east. When he reached the next block, he heard two more shots fired and returned to the scene where he observed the victim on the ground.

¶ 7 Police later arrived at the scene and Jackson gave them a description of petitioner. Four days later, he and Stampley saw the blue Buick and recorded its license plate number, which was "VYD 641." The information was given to the police, who subsequently asked Jackson to view a lineup. Jackson identified petitioner in the lineup "right away."

¶ 8 Stampley's testimony was substantially similar to Jackson's. He stated that he was walking beside Jackson when the blue Buick pulled up and he identified petitioner as the shooter. Stampley stated that when he viewed a lineup, he identified petitioner as the shooter "[a]s soon as [he] walked in." Stampley stated that although petitioner had facial hair when he appeared in the lineup eight days after the shooting, he was clean shaven on the day of the shooting.

¶ 9 Muhammad testified that he heard tires screeching, but did not turn around. When he heard approximately four gunshots, he tried to push the victim away from the street. He then heard two more shots and saw the victim fall. He did not see the vehicle or its occupants.

¶ 10 Chicago Police Officer Thomas Hoban testified that on April 9, 1994, six days after the shooting, a vehicle matching the description of the one involved in the shooting had been involved in an accident. The 1989 four door blue Buick, which had a license plate number "VYD 641," was processed and a finger print was recovered from the passenger side rear window matching petitioner's left thumb print.

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¶ 11 Chicago Detective Michael Baker testified that he conducted a lineup of petitioner and four other individuals with similar physical characteristics. Jackson and Stampley separately viewed the lineup and each identified petitioner as the shooter.

¶ 12 Petitioner presented the testimony of several witnesses in his defense. DeJuan Jones, petitioner's friend of 10 years, testified that he was in the back of a blue Buick with "Clay" at the time of the shooting, and that petitioner was not in the vehicle. Jones testified that Jermaine Bledsoe was driving and Willie Madlock was in the passenger seat. Jones testified that Madlock yelled, "[t]here go Herman," and began shooting at a group of people on the sidewalk.

¶ 13 On cross-examination, Jones admitted that he had not told his version of the events to the police or the State's Attorney before testifying in court. He also testified that he did not know the whereabouts of Bledsoe, Madlock, or "Clay."

¶ 14 Chicago Police Officer William Jones testified that he spoke to several individuals when he arrived at the scene. Officer Jones stated that either Stampley or Jackson described the shooter as "male black."

¶ 15 Sylvia Stewart, petitioner's aunt, testified that petitioner spent the day of the shooting at her house. At about 2:30pm, they drove to pick up petitioner's girlfriend and three other friends and then returned to her home, where petitioner remained until 10:30pm. Stewart stated that petitioner was in her sight the entire time, either in her back yard or in the kitchen with her.

¶ 16 On cross-examination, Stewart denied telling an investigator that she needed more time to get her "story straight." She admitted that about 10 days after the shooting, she discovered that petitioner was in jail for the offense, but never told the police that he was present at her home

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during the time of the incident.

¶ 17 Lavelle Stewart, petitioner's cousin, testified similarly to Sylvia Stewart. On cross-examination, however, she indicated that petitioner was in the "front room" of the house until 6 or 7 pm when he went upstairs with his girlfriend and "never came back downstairs."

¶ 18 Detective Joann Ryan testified that following the shooting, she received a telephone call from Demario Jackson who stated that he had heard that one of the offenders was 20 years old, heavysset with light skin, and was wearing his hair in "cornrolls." He described the second offender only as skinny.

¶ 19 The parties stipulated that Mike Butler, an investigator for the State's Attorney's office, would testify that on July 16, 1996 he went to question Sylvia Stewart about petitioner's whereabouts on the day of the shooting, but Stewart told him to "return at a later date so she may get her story straight."

¶ 20 Petitioner was convicted of two counts of murder, and following post-trial motions, was sentenced to mandatory life in prison on October 23, 1997, having previously been convicted of murder on February 19, 1996.

¶ 21 On direct appeal, petitioner argued that the State failed to prove him guilty beyond a reasonable doubt and that his mittimus should be corrected to reflect a single count. This court affirmed his conviction, but ordered the trial court to correct petitioner's mittimus to reflect that judgment was entered on only one count of murder. *People v. Warren*, No. 1-96-1563 (1999) (unpublished order under Supreme Court Rule 23).

¶ 22 On December 27, 1999, petitioner filed his original postconviction petition with the

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assistance of court-appointed counsel. This petition alleged that petitioner had newly discovered evidence of his innocence, but no affidavits were attached to the petition. The record indicates that during this time, petitioner's counsel spoke with petitioner's family and friends who stated that Willie Madlock was the actual shooter. Counsel drafted affidavits to that effect, but they were not signed. Petitioner's counsel later explained this, stating:

"[T]here is a witness, two witnesses who for a long period of time, and I mean years, had told family members and friends that they were willing to come in and provide an affidavit, \*\*\* but those witnesses while they came to our office never were willing to give an affidavit, and his mom, the petitioner's mother, \*\*\* came in with the gentleman once, and left with him, knowing that he wouldn't sign the affidavit."

¶ 23 The State filed a motion to dismiss the petition, alleging that the petition did not make a substantial showing that petitioner's constitutional rights were violated, that the allegations were insufficient to merit an evidentiary hearing, and that the petition was barred by the applicable statute of limitations. Following oral arguments, the trial court granted the State's motion and dismissed the petition, ruling that petitioner's claim of newly discovered evidence of actual innocence lacked merit because it was not supported by affidavits, records, or other evidence. The trial court further added petitioner had failed to provide an excuse for filing his petition outside the applicable statute of limitations period.

¶ 24 Petitioner appealed the dismissal of this petition on statute of limitation grounds, arguing

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that the trial court used an improper date to determine when the limitations period began to run. Petitioner did not challenge the court's ruling as to his actual innocence claim. This court affirmed all aspects of the trial court's rulings in an unpublished order. *People v. Warren*, No. 1-04-2380 (2006) (unpublished order under Supreme Court Rule 23).

¶ 25 On January 5, 2009, petitioner filed a *pro se* motion seeking leave to file a successive postconviction petition, as well as the successive petition itself. In that petition, petitioner again claimed actual innocence based upon newly discovered evidence. Petitioner included six affidavits in support of his petition.

¶ 26 The first affidavit was completed by Grace Warren, petitioner's mother. In her affidavit, Ms. Warren stated that she spoke to Madlock by phone and in person, and Madlock confessed to shooting the victim. When she brought Madlock in to speak with petitioner's attorney, however, he would not repeat his confession or sign an affidavit confessing to the murder. Ms. Warren's affidavit was signed in December 2008, and did not indicate when the conversations took place.

¶ 27 Andrea Young, a family friend of petitioner, completed the second affidavit. She also stated that "Willie" (presumably Madlock) confessed to her that he was the real shooter after she happened upon him in a park. She also stated that she relayed this information to petitioner's attorney on February 19, 2000. The affidavit appears to have been prepared in 2000, but Young did not sign and have the affidavit notarized until January 3, 2006.

¶ 28 Rayetta Felton, another family friend of petitioner, completed the third affidavit. Felton indicated that she spoke to Bledsoe in 1999, and he told her that he knew petitioner was not the shooter because he was in the vehicle when the shots were fired. Felton, as well, met with

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petitioner's attorney in 2000. Felton's affidavit, like that of Ms. Warren, appears to have been prepared in 2000, but was not signed and notarized until January 3, 2006.

¶ 29 The fourth affidavit was completed by Aisha Daily, petitioner's friend, who contacted petitioner after his incarceration in 1999. Daily stated that "one day in 2001" Madlock confessed to her in her home that he was the real shooter. Daily stated that she brought Madlock to petitioner's attorney, but Madlock did not admit to the shooting to the attorney. Daily's affidavit indicates that she signed it on January 9, 2005, and that it was notarized on January 8, 2006.

¶ 30 Darryl Brown, a friend of petitioner, completed the fifth affidavit. Brown stated that he was at a family cookout with petitioner when the shooting occurred. Brown stated that because he had been charged with a crime prior to petitioner's trial, and his own case was pending before the same judge, petitioner's counsel chose not to call Brown as a witness. Brown's affidavit was unsigned and was not notarized.

¶ 31 The sixth affidavit was completed by DeJuan Jones, who claimed that he was a passenger in the vehicle when the crime occurred. In his affidavit, Jones states that he was in the vehicle on Easter Sunday 1994 and that Madlock was the real shooter. Jones' affidavit, as well, lacked notarization.

¶ 32 On March 3, 2009, the trial court denied petitioner leave to file, finding that he did not meet the burden in bringing a successive petition because he failed to satisfy the test for newly discovered evidence. On appeal from that order, petitioner argued that because his petition raised an arguable claim of actual innocence based on four "newly discovered" affidavits we should reverse the trial court's denial of his motion for leave to file a successive postconviction

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petition and remand for second stage proceedings. On September 23, 2011, this court affirmed the circuit court's denial, reasoning that the affidavits did not constitute "newly discovered evidence" because petitioner has failed to explain why the evidence contained in the affidavits of Grace Warren, his own mother, Andrea Young, Rayetta Felton, or Aisha Daily could not have been discovered sooner through the exercise of due diligence. *People v. Warren*, 2011 IL App (1st) 090884-U. Petitioner filed a leave to appeal to the Illinois supreme court, and on May 30, 2012, denied him leave, but entered a supervisory order directing this court to reconsider its judgment in light of *People v. Edwards*, 2012 IL 111711.

#### ¶ 33 ANALYSIS

¶ 34 Petitioner contends that the trial court erred in denying him leave to file his successive postconviction petition because he provided new evidence of his actual innocence. Specifically, he argues that because his petition raised an arguable claim of actual innocence based on four "newly discovered" affidavits we should reverse the trial court's denial of his motion for leave to file a successive postconviction petition and remand for second stage proceedings.

¶ 35 The State, however, contends that the evidence contained in those affidavits is not newly discovered because these affidavits all recount events that took place between 1999 and 2002 and were prepared prior to the adjudication of petitioner's first postconviction petition, and were available to him at that time. Therefore, it argues that because the evidence is not newly discovered, petitioner's claim of actual innocence must fail. For the reasons that follow, we affirm.

¶ 36 The Post-Conviction Hearing Act ("Act") provides a means by which a defendant may

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challenge his conviction for “substantial deprivation of federal or state constitutional rights.” *People v. Anderson*, 402 Ill. App. 3d. 1017, 1027 (2010), quoting *People v. Tenner*, 175 Ill. 2d 372, 378 (1997). A proceeding under the Act is a collateral challenge of the underlying judgment that permits review of constitutional issues that were not and could not have been adjudicated on direct appeal. *People v. Ortiz*, 235 Ill. 2d 319, 328 (2009). The Act “generally contemplates the filing of only one postconviction petition.” *Ortiz*, 235 Ill. 2d at 328. A petitioner may not file a successive petition without being granted leave of the court. 725 ILCS 5/122-1(f) (West 2006). Such leave may be granted only if a petitioner “demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure.” 725 ILCS 5/122-1(f). To establish cause, a petitioner must identify an objective factor that impeded his ability to raise a specific claim during his initial postconviction proceedings. 725 ILCS 5/122-1(f)(1). To establish prejudice, a petitioner must demonstrate that the claim not raised during his initial postconviction proceedings so infected the trial that the resulting conviction violated due process. 725 ILCS 5/122-1(f)(2).

¶ 37 Our supreme court held that in non-capital cases, a petitioner claiming actual innocence in a successive postconviction petition does not need to satisfy the requirements of the cause-and-prejudice test. *Ortiz*, 235 Ill. 2d at 330. Instead, in order to succeed on a claim of actual innocence, “the evidence adduced by the [petitioner] must first be ‘newly discovered.’ That means it must be evidence that was not available at a [petitioner's] trial and that he could not have discovered sooner through due diligence. The evidence must also be material and noncumulative. In addition, it must be of such conclusive character that it would probably

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change the result on retrial. *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008) (citations omitted). Furthermore, as our supreme court recently noted, a petitioner has not only the burden to obtain leave of court, but he must also " 'submit enough in the way of documentation to allow the circuit court to make that determination.' " *Edwards*, 2012 IL 111711, ¶24 (quoting *People v. Tidwell*, 236 Ill. 2d 150, 161 (2010)).

¶ 38 A trial court's denial of leave to file a successive postconviction petition is reviewed de novo. *People v. Edgeston*, 396 Ill. App. 3d 514, 518 (2009). As such, on appellate review, the court is "free to substitute its own judgment for that of the circuit court in order to formulate the legally correct answer." *Coleman*, 183 Ill. 2d at 388. If we affirm the trial court's judgment, however, we may do so on any basis supported by the record. *People v. Edgeston*, 396 Ill. App. 3d 514, 522 (2009). With respect to petitioners seeking to file a successive postconviction petition based on a claim of actual innocence, our supreme court recently held:

"[L]eave 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.

\*\*\* Stated differently, leave of court should be granted when the petitioner's supporting documentation raises the probability that 'it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.' "

*Edwards*, 2012 IL 111711 ¶24 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

¶ 39 Here, the trial court properly denied petitioner leave to file his successive petition because the affidavits submitted with the petition do not constitute "newly discovered evidence," and

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consequently fail to satisfy the test established by *Ortiz*. Newly discovered evidence is defined as "evidence that has been discovered since the trial and that the defendant could not have discovered sooner through due diligence." *Ortiz*, 235 Ill. 2d at 333. "An unbroken line of precedent holds that evidence is not newly discovered when it presents facts already known to a defendant at or prior to trial, though the source of those facts may have been unknown, unavailable or uncooperative." *People v. Jones*, 399 Ill. App. 3d 341, 364 (2010), citing *People v. Coleman*, 381 Ill. App. 3d 561, 568 (2008) and *People v. Barnslater*, 373 Ill. App. 3d 512, 523 (2007).

¶ 40 The foregoing rationale similarly applies in the context of successive postconviction petitions and therefore hold that when facts are known to a petitioner at or before the time he files his first petition, that evidence will not be deemed "newly discovered" for the purposes of any successive postconviction petitions. We find support for this proposition in *People v. Williams*, 392 Ill. App. 3d 539 (2009). There, the appellate court affirmed the denial of the petitioner's motion for leave to file a second postconviction petition three years after filing the first, finding that the petitioner failed to satisfy the test for actual innocence because he "had been aware of the identities of [two affiants] earlier but had offered no proof that he previously had attempted to obtain their statements or that they refused to cooperate or were unable to provide the information." *People v. Williams*, 392 Ill. App. 3d at 363.<sup>1</sup>

¶ 41 In this case, petitioner has failed to explain why the evidence contained in the affidavits

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<sup>1</sup> The court in *Williams* did, however, permit the petitioner to file a *third* postconviction petition which, unlike his second, included newly discovered evidence that could not have been discovered sooner. *Williams*, 392 Ill. App. 3d at 369.

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of Grace Warren, his own mother, Andrea Young, Rayetta Felton, or Aisha Daily could not have been discovered sooner through the exercise of due diligence. These affidavits all recount conversations these individuals had with Willie Madlock, the alleged real shooter, and Germaine Bledsoe that took place between 1999 and 2001, during the pendency of petitioner's first postconviction petition. They indicate that the affiants spoke to petitioner's attorney in either 2000 or 2001, and related this information to him. They further indicate that these affidavits were prepared and written at this time, and were presented to the affiants, but were not signed. The fact that some of the affidavits were signed and notarized years after they were prepared does not, as petitioner suggests, render the information contained within them "newly discovered." Nor, for that matter, does petitioner allege that he attempted to obtain signatures on these unsigned affidavits earlier, but was unable to do so.

¶ 42 Our supreme court's decision in *People v. Harris*, 206 Ill. 2d 293 (2002) is instructive. There, the petitioner, filing his initial postconviction petition, sought to introduce as newly discovered evidence affidavits of his brothers that were dated after his trial. Rejecting the petitioner's claim, the court held despite the fact that the affidavits were signed after the petitioner was convicted, he nevertheless could have discovered the evidence within them earlier through the exercise of due diligence. Thus, the court held that the affidavits did not constitute newly discovered evidence. *Harris*, 206 Ill. 2d at 301.

¶ 43 Similarly in *Jarrett*, our appellate court rejected the defendant's claim of actual innocence in a successive petition based upon "newly discovered" evidence that he had acted in self defense, despite knowing the identity of his alleged attacker before trial. *People v. Jarrett*, 399

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Ill. App. 3d 715, 724 (2010). The appellate court disagreed, finding that the fact that the defendant "may not have known the names of alleged witnesses to [the alleged attacker's] aiming of a gun at defendant does not support defendant's assertion that his proffered evidence is newly discovered. \*\*\* [I]f a defendant knew of certain facts at or prior to trial, those facts are not transformed into 'newly discovered evidence' simply because the source of these facts may have been unknown, unavailable, or uncooperative." *Jarrett*, 399 Ill. App. 3d at 724. See also *Collier*, 387 Ill. App. 3d at 637, *Barnslater*, 373 Ill. App. 3d at 523.

¶ 44 Here, nothing in petitioner's briefs or in the record before us provides any explanation for petitioner's delay in bringing this information to light. The affidavits all indicate that the affiants spoke to petitioner and his attorney about the content of their affidavits between 1999 and 2001, thus establishing petitioner's knowledge of this evidence. None of them however, indicate why the affiants waited up to six years to sign them. It is clear from the record that petitioner knew of the information contained in these affidavits, including Madlock's alleged confession, years before filing his successive petition, and at or before filing his initial petition, and has provided us with no explanation why these affidavits were not produced with that petition. While petitioner avers that "[t]he affiants did not agree to provide affidavits until 2006 and 2008 after Grace Warren and [Daily] began investigating," this assertion is completely contradicted by the affidavits themselves, which indicate that these affiants transmitted this information to petitioner as early as 1999, both through conversations with his attorney and written affidavits, albeit unsigned, which were given to petitioner's attorney in 2000. See *People v. Davis*, 382 Ill. App. 3d 701, 712-13 (2001) (because the defendant was aware of the affiant and what her testimony

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might be, "the fact that [he] did not obtain the affidavit until after the expiration of the time for filing a petition does not render the evidence 'newly discovered.'"). Moreover, in the case of DeJuan Jones, the information contained in his affidavit not only did not divulge any new information, but was identical to his testimony at trial. In addition, this affidavit was unnotarized and consequently would have no legal effect. See *People v. Niezgoda*, 337 Ill. App. 3d 593, 596 (2003).

¶ 45 While it is not disclosed whether the affidavit of Darryl Brown was made available to petitioner contemporaneously with the other five affidavits, it would be of little significance in this case. The information in this affidavit was already made available to petitioner through the testimony at trial of Sylvia Stewart and the information contained in the other affidavits, and thus would be cumulative at best. See *Collier*, 387 Ill. App. 3d at 636. Moreover, because Brown's affidavit was never signed or notarized, it, as is the case with the unnotarized affidavit of DeJuan Jones, has no legal effect. See *Niezgoda*, 337 Ill. App. 3d at 596. Thus, it is clear that the affidavits in this case cannot be deemed to satisfy the requirement that evidence of petitioner's actual innocence be newly discovered and that such evidence be obtained through the exercise of due diligence.

¶ 46 Petitioner now argues, however, that his failure to introduce newly discovered evidence in his successive postconviction petition should be excused by this court because the only reason why his first postconviction petition did not include the affidavits was that his counsel was ineffective. He maintains that if his attorney had waited to file his first postconviction petition until after he was able to acquire the signed affidavits of the aforementioned witnesses, his first

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petition would not have been dismissed and he would not have needed to file a successive petition. Petitioner relies on *Martinez v. Ryan*, 132 S.Ct 1309 (2012), where the United States Supreme Court created an exception to the rules of procedural defaults in federal *habeas corpus* proceedings where an attorney's failure to raise a claim of ineffective assistance of counsel during initial postconviction proceedings was the result of counsel's deficient performance.

¶ 47 The State responds that, the narrow exception to procedural default created in *Martinez* does not apply to petitioner, who claims that the deficiency in his counsel's performance on his initial postconviction proceedings was his failure to acquire sufficient documentation to support a claim of actual innocence. It maintains that the ruling is applicable only to federal *habeas corpus* proceedings, and does not affect how a state interprets its postconviction laws. The State further argues that the Court limited its ruling to claims of ineffective assistance of counsel raised in collateral proceedings in jurisdictions where such claims cannot be brought on direct appeal.

¶ 48 We note that the petitioner in *Martinez*, 132 S. Ct. at 1314, filed a successive postconviction petition in a federal *habeas* proceeding, in which he claimed that his counsel in the initial petition was deficient in failing to argue his claim of inefficient assistance of counsel at trial. Since the state where petitioner filed his petitions requires all claims of ineffective assistance of trial counsel to be brought for the first time in postconviction petitions, the Court created a narrow exception to the general rule against excusing procedural defaults in federal *habeas* proceedings, when a failure to raise such a claim in the first petition resulted either from the absence of counsel, or the deficient performance of counsel. *Martinez*, 132 S. Ct. at 1316-18. However, as this court recognized in *People v. Miller*, the Court in *Martinez* emphasized that it

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based its decision on equitable, rather than constitutional principles and would not, therefore, address whether such constitutional principles require an exception to the general rule that negligence of postconviction counsel does not constitute cause for purposes of a successive petition. *Miller*, 2013 IL App (1st) 111147, ¶35 (citing *Martinez*, 132 S. Ct. at 1315). Further, the Court in *Martinez* explicitly stated that "[its] holding [in that case] does not concern attorney errors in other kinds of proceedings \*\*\*." In fact, unlike petitioner in *Martinez*, who could only bring a claim of ineffective assistance of counsel for the first time on postconviction proceedings, petitioner in this case could, and did, bring a claim of actual innocence at trial. Thus, we are inclined to agree with the State's assertion that the ruling in *Martinez* did not create an exception to procedural default that is applicable to petitioner's successive petition.

¶ 49 More significant, however, is the fact that even assuming, *arguendo*, that petitioner's counsel's decision to file an initial postconviction petition without supporting affidavits sufficed to establish the requisite cause for leave to file a successive petition, petitioner would fare no better. Even if the affidavits attached to petitioner's successive petition could be deemed newly discovered evidence, they would still be insufficient to set forth a colorable claim of actual innocence. While petitioner apparently presumes, without offering any analysis, that Willie Madlock's alleged confession would have been admissible at trial if defense counsel sought to introduce it, the general rule is to the contrary. As the dissent correctly notes, the admissibility of evidence is generally within the discretion of the trial court, and the trial court in this case never ruled on the admissibility of Madlock's hearsay confession, and instead, denied petitioner's motion for leave based solely on his failure to present newly discovered evidence. However, it is

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well established that a trial court's ruling may be affirmed on any basis that appears in the record, regardless of whether the trial court relied on such ground or whether the trial court was correct.

*Gunthorp v. Golan*, 184 Ill. 2d 432, 438 (1998).

¶ 50 A declarant's unsworn extrajudicial declaration that he, and not the defendant on trial, committed the offense at issue is generally inadmissible as hearsay, even though it is an admission against the declarant's penal interest. *People v. Bowel*, 111 Ill. 2d 58, 66 (1986). Such declaration will be admitted, however, where justice requires. *Id.* Where there is sufficient indicia of trustworthiness of those extrajudicial declarations, it may be admitted into evidence as an exception to the hearsay rule. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *Bowel*, 111 Ill. 2d at 66.

¶ 51 In *Chambers*, 410 U.S. at 300-01, the United States Supreme court identified four factors to help determine whether there is sufficient indicia of trustworthiness, namely: (1) whether the declaration was made spontaneously, to a close acquaintance shortly after the crime occurred; (2) whether it was corroborated by other evidence; (3) whether it was self-incriminating and against the declarant's penal interest; and (4) whether there was adequate opportunity for the State to cross-examine the declarant. Just as all four factors are not required to be present before a statement is found trustworthy, the existence of one or more of these factors does not necessarily make a statement trustworthy. *People v. Swaggirt*, 282 Ill. App. 3d 692, 700 (1996). Instead, admissibility ultimately depends on whether the statement was made under circumstances that provide considerable assurance of its reliability by objective indicia of trustworthiness.

*Chambers*, 410 U.S. at 300-01.

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¶ 52 Consideration of the *Chamber* factors and the surrounding circumstances of Madlock's alleged confession, insofar as we can glean from the affidavits, do not favor admissibility. With respect to the affidavits from petitioner's mother and his friends Daily and Young, we note that while Madlock's alleged confession was against his penal interest, and was corroborated by petitioner's single witness at trial, that confession was made to acquaintances of petitioner, not acquaintances of Madlock. Thus, not only is there no indication on the record as to how soon after the crime Madlock made those confessions, but they were made to people who have a defense bias. See, e.g., *People v. Villegas*, 222 Ill. App. 3d 546, 552 (1991) (recognizing lack of trustworthiness of hearsay declarations made to witnesses who are biased towards the defendant on trial). Furthermore, regarding the last factor, we note that Madlock was not a witness at petitioner's trial, and petitioner has not presented any indication that Madlock would have been available to testify on retrial, or that he would not plead his rights under the fifth amendment if compelled to appear in court. See, e.g., *People v. Cunningham*, 130 Ill. App. 3d 254, 264 (1984) (noting that when a witness pleads the fifth amendment, he is not available for cross-examination).

¶ 53 With respect to the affidavit from Felton, stating that Bledsoe told her that petitioner was not in the car at the time of the shooting, we need not address its admissibility because such evidence would be merely cumulative of Jones' trial testimony. Evidence is considered cumulative when it adds nothing to what was already before the jury. *Ortiz*, 235 Ill. 2d at 335. According to Felton's affidavit, Bledsoe told her sometime in 1999 that he knew that petitioner was not present at the shooting because Bledsoe himself was in the car at that time. Bledsoe's

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hearsay statement, even if admissible, merely mirrors Jones' testimony that he was also in the vehicle and petitioner was not. See *People v. Smith*, 177 Ill. 2d 53, 84-86 (1997) (finding that testimony from additional witnesses that co-defendant told them that defendant had nothing to do with the murder was cumulative of trial witness' testimony of the same). As noted above, Jones' affidavit relating the same testimony that he gave at defendant's trial is similarly cumulative, and in any event, both affidavits from Jones and Brown are unnotarized and have no legal effect. See *Niezgoda*, 337 Ill. App. 3d at 596. In light of those limitations, we conclude that the affidavits presented in support of petitioner's successive petition are insufficient to raise the probability that it is more likely than not that no reasonable juror would have convicted him if he tried to introduce that new evidence. See *Edwards*, 2012 IL 111711, ¶31.

¶ 54 Petitioner, who was a minor at the time of the offense, next argues for the first time in his supplemental brief before this court that his life sentence should be vacated pursuant to the recent Supreme Court decision in *Miller v. Alabama*, 567 U.S. \_\_\_, 132 S. Ct. 2455 (2012). He maintains that his supplemental brief was an appropriate vehicle to challenge his sentence, arguing that his sentence was void *ab initio*, therefore subject to challenge at any time.

¶ 55 The State responds that the statute under which petitioner was sentenced is not void because it is not unconstitutional in its entirety. It further argues that the rule set forth in *Miller* cannot be applied retroactively because it is a new rule of law.

¶ 56 The Supreme Court held, in *Miller*, that statutes mandating life imprisonment without the possibility of parole for defendants under 18 years of age at the time of the offense violate the eighth amendment's clause against cruel and unusual punishment. *Miller*, 567 U.S. \_\_\_, 132 S.

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Ct. at 2467-69. The Court did not, however, ban life sentences without parole for minors, but only that *mandatorily* sentencing juveniles to life without parole violates the eighth amendment, and required sentencing courts "to take into account how children are different, and those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at \_\_\_, 132 S. Ct. at 2469.

¶ 57 The statutory scheme under which defendant was sentenced mandates a life sentence without parole, regardless of the age of the offender. See 730 ILCS 5/5-8-1(c)(i). As this court has recognized on more than one occasion, this statute is not unconstitutional on its face because it can be validly applied in other circumstances, namely, when the convicted offender is not a minor. See, e.g., *People v. Chambers*, 2012 IL App (1st) 100575, ¶36; *People v. Williams*, 2012 IL App (1st) 111145, ¶27. Accordingly, petitioner's sentence cannot be deemed void *ab initio*. See *Chambers*, 2012 IL App (1st) 100575, ¶36; *Williams*, 2012 IL App (1st) 111145, ¶47. As such, petitioner's constitutional challenge to his sentence has been waived. See 725 ILCS 5/122-3 (West 2010) ("Any claim of substantial denial of constitutional rights not raised in the original or amended petition is waived.")

¶ 58 In fact, this court has explicitly rejected a similar challenge in *Chambers*, 2012 IL App (1st) 100575, ¶36-37, where, as in this case, a petitioner who was a minor at the time of the offense challenged his sentence for the first time in his supplemental brief on appeal from the circuit's court's denial of leave to file a successive post conviction petition. In affirming the circuit court's denial, this court found that by not including his challenge to his sentence in his petition for leave to file a successive petition, petitioner failed to establish the cause-and-

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prejudice test required under section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2010)). *Id.* at ¶37-39. The court further noted that although *Miller* had not been decided when the petitioner filed his petition, petitioner was not without recourse, since he could file a new successive postconviction petition challenging the constitutionality of his sentence. *Id.* at ¶38-39. In reaching that conclusion, the court in *Chambers* distinguished its facts from those in *Williams*, 2012 IL App (1st) 111145, where, although petitioner could not have relied on *Miller* in his postconviction petition, he nevertheless could have challenged the constitutionality of his sentence in that petition citing *Graham v. Florida*, 560 U.S. 48 (2010), a case the Supreme Court relied on to reach its decision in *Miller*. *Chambers*, 2012 IL App (1st) 100575, ¶36-37.

¶ 59 As in *Chambers*, petitioner in this case did not challenge his sentence at any time prior to the supplemental brief before this court, and never even claimed that he satisfied the cause-and-prejudice test with respect to this argument. Thus, since his sentence was not void *ab initio*, and we do not have the supervisory authority possessed by our supreme court to overlook the procedural posture of the matter before us, we cannot grant petitioner the relief which he now seeks. See *Chambers*, 2012 IL App (1st) 100575, ¶40.

#### ¶ 60 CONCLUSION

¶ 61 For the foregoing reasons, we affirm the denial of petitioner's motion to file a successive postconviction petition.

¶ 62 Affirmed.

¶ 63 PRESIDING JUSTICE GORDON, DISSENTING

¶ 64 I must respectfully dissent for the following reasons. On May 30, the Illinois Supreme

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Court ordered us to vacate our prior Rule 23 order in this case and to reconsider it in light of *People v. Edwards*, 2012 IL 111711. Because *Edwards* dictates a different result with respect to defendant's actual innocence claim, I would grant defendant leave to file a successive petition.

¶ 65 In the case at bar, defendant appealed the trial court's denial of leave to file a successive petition. His petition asserted a claim of actual innocence and included several affidavits which corroborated the testimony of the lone defense event witness who testified at trial that defendant was not in the shooter's vehicle, and which stated that the actual shooter confessed to the crime. The petition also asked this court to vacate defendant's sentence and remand for resentencing, in light of the United States Supreme Court's ruling that the eighth amendment prohibits a mandatory life sentence without parole for minors. *Miller v. Alabama*, 567 U.S. \_\_\_, \_\_\_, 132 S. Ct. 2455, 2460 (2012). As the majority acknowledges, defendant was a minor at the time of the offense and his sentence was mandatory. *Supra* ¶¶ 53, 56.

¶ 66 With all due respect, I believe that the majority's analysis of defendant's actual innocence claim contains two flaws.

¶ 67 First, even though our supreme court in *Ortiz* and *Edwards* has held that a defendant must show "newly discovered evidence" (*Ortiz*, 235 Ill. 2d at 333, *Edwards*, 2012 IL 111711, ¶ 32), the majority has substituted the word "facts" for the word "evidence" and held that a defendant must show that the facts on which a defendant relies are newly discovered rather than the evidence supporting those facts. *Supra* ¶ 39. In support, the majority cites an "unbroken" line of appellate court cases. *Supra* ¶ 39. However, our supreme court has held just the opposite in *Edwards*, a case decided after those appellate court cases were decided. *Edwards*, 2012 IL

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111711, ¶ 38. See also *People v. Parker*, 2012 IL App (1<sup>st</sup>) 101809, ¶¶ 83-84.

¶ 68 In *Edwards*, the State argued that a codefendant's affidavit was not newly discovered because the defendant was obviously aware of the codefendant's identity and the facts in his affidavit. *Edwards*, 2012 IL 111711, ¶ 38. However, our supreme court rejected the State's argument, stressing that it was "the evidence" that must be newly discovered and that no amount of due diligence could have persuaded the codefendant to testify and thus provide the needed evidence. *Edwards*, 2012 IL 111711, ¶ 38. Thus, contrary to the majority's holding, it is the evidence that must be newly discovered, not the facts that are in them. To hold otherwise would preclude innocent defendants from filing actual innocence claims. Every innocent defendant is aware of the fact of his own innocence; it is the evidence that he lacks.

¶ 69 Second, the majority states that defendant possessed unnotarized, unsigned versions of the affidavits at an earlier date, and thus the affidavits were not new. *Supra* ¶ 41. However, the majority then states that it will not consider two of defendant's affidavits because they were not signed and notarized. *Supra* ¶ 45. The majority has thus created a Catch-22. If a prisoner does not present an unsigned draft when he first has it, then it is not new. But if he does present it, it will not be considered because it is not signed.

¶ 70 At trial, the State called two witnesses who identified defendant as the shooter in a drive-by shooting. The defense called DeJuan Jones, who testified that he was a passenger in the shooter's vehicle, that defendant was not in the vehicle, and that Willie Madlock was the shooter. The defense also called defendant's aunt and cousin who provided an alibi for defendant's whereabouts, namely, that defendant was at their house at the time of the shooting.

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¶ 71 Defendant's first postconviction petition was filed by counsel, and it alleged that there was newly discovered evidence of actual innocence. However, his counsel failed to attach any affidavits to the petition, despite the fact that the Post-Conviction Hearing Act requires that "[t]he petition shall have attached thereto affidavits." 725 ILCS 5/122-2 (West 1998). His counsel stated on the record to the trial court that the witnesses were not willing to sign the affidavits and, thus, the trial court had no choice but to grant the State's motion to dismiss.

¶ 72 Defendant then sought leave to file a successive petition supported by six affidavits. Four of the affidavits were signed and notarized; one was not signed; and one was not notarized. The trial court denied defendant's leave to file and we affirmed, but the Illinois Supreme Court ordered us to vacate our order and reconsider.

¶ 73 On this appeal, defendant claims that his postconviction counsel was ineffective for filing a postconviction petition at a time when none of the affidavits were signed, since there is no statute of limitations for claims of actual innocence. Like defendant, I can think of no reason why counsel would rush to file a petition without any supporting affidavits when there is no statute-of-limitations bar.

¶ 74 In *Edwards*, which the supreme court directed us to consider, the supreme court stated: "we hold today that 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." *Edwards*, 2012 IL 111711, ¶ 24. The *Edwards* court explained: "Stated differently, leave of court should be granted when the petitioner's supporting documentation raises the probability that 'it is more likely than not that no

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reasonable juror would have convicted him in the light of the new evidence.' " *Edwards*, 2012 IL 111711, ¶ 24 (quoting *Schlag v. Delo*, 513 U.S. 298, 327 (1995) (characterizing threshold standard as one of probability)).

¶ 75 On appeal, defendant asks us to consider only the four signed affidavits. In three of the affidavits, the affiants stated that Willie Madlock had confessed to them that he was the shooter. The fourth affiant stated that Jermaine Bledsoe confessed that he was in the shooter's vehicle and that Madlock was the shooter. These affidavits corroborate the testimony of the defense's lone event witness at trial, DeJuan Jones, who testified that he was in the vehicle, that defendant was not in the vehicle, and that Willie Madlock was the shooter.

¶ 76 The majority rejects defendant's argument on a ground that the trial court never considered, namely, that the statements would not be admissible as a statement against interest, because there is not a sufficient indicia of trustworthiness. *Supra* ¶ 51. As our supreme court has held countless times, "[t]he admissibility of evidence at trial is a matter within the sound discretion of the trial court and that court's decision will not be overturned [by an appellate court] absent a clear abuse of that discretion." *People v. Adams*, 239 Ill. 2d 1, 23 (2010). However, the majority proceeds to exercise its own discretion to balance various trustworthiness factors and to find that the factors, on the whole, do not "favor admissibility." *Supra* ¶ 51. A determination concerning the trustworthiness of the statements is an issue that should be considered first by the trial court. The trial court is thus in a far superior position than the appellate court to determine, in the first instance, the trustworthiness of these statements. This conclusion is made more compelling when one considers that this case involves a minor facing life imprisonment without

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the possibility of parole.

¶ 77 For those reasons, I must respectfully dissent and I would reverse and remand for further proceedings consistent with the reasons expressed here. A remand will also allow the trial court to benefit from the wisdom expressed in our supreme court's decision in *Edwards*.