2014 IL App (1st) 113070-U

FOURTH DIVISION
August 21, 2014

No. 1-11-3070

IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County.
	)	
v.	)	No. 90CR2025
	)	
LAMONT TAYLOR,	)	The Honorable
	)	Thomas J. Hennelly,
Petitioner-Appellant.	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Howse and Justice Epstein concurred in the judgment.

ORDER

Held: At second-stage successive postconviction proceeding where defendant made a substantial showing of actual innocence, cause is reversed and remanded for a third-stage evidentiary hearing on that issue only. Other claims regarding ineffective assistance of trial counsel are defaulted, and dismissal of the petition as to those claims was proper. Affirmed in part and reversed in part; remanded.

¶ 1 Defendant Lamont Taylor filed a *pro se* successive postconviction petition for relief from judgment under the Post-Conviction Hearing Act (Act), 725 ILCS 5/122-1 *et seq*. (West 2010),

relating to his conviction of first degree murder. The trial court appointed postconviction counsel to represent defendant. Thereafter, defense counsel filed a supplemental successive postconviction petition on defendant's behalf. The State filed a motion to dismiss the petition. After a hearing, the trial court granted the State's motion to dismiss, and dismissed defendant's successive postconviction petition. Defendant appeals, contending that the trial court erred in dismissing defendant's petition where: (1) new evidence shows he was actually innocent of the crime; and (2) he was denied the effective assistance of trial counsel where counsel failed to investigate and call two alibi witnesses; and (3) he was denied the effective assistance of trial counsel where counsel failed to present proper mitigating evidence at defendant's sentencing hearing. For the following reasons, we affirm in part and reverse in part.

¶ 2 I. BACKGROUND

¶ 3 i. The Trial

¶ 4 Defendant was charged with the murder and attempted armed robbery of Fred Bartell. He was tried with co-defendant Antoine Kelley, but with separate juries. Following the jury trial, defendant was found guilty of first degree murder. Defendant was sentenced to 60 years' imprisonment. On direct appeal, this court affirmed defendant's conviction. *People v. Taylor*, No. 1-91-3784 (1994) (unpublished order under Supreme Court Rule 23). Co-defendant Kelley was charged with murder and attempted robbery. He was found guilty of armed robbery and acquitted of murder. Co-defendant Kelley is not a party to this appeal.

¶ 5 Many of the facts herein are taken from our original order on direct appeal. Because the

facts of the offense are fully set out in our order on direct appeal, we restate here only those facts necessary to an understanding of defendant's current appeal.

¶ 6 Evidence was presented at trial that victim Fred Bartell was killed by gunfire around 10:30 p.m. on December 30, 1989. The victim's daughter, Linda Valentino, testified that around that time, she and the victim walked from the victim's house toward his car, which was parked on the street in front of his house. As they did so, she observed a large, light-colored, four-door car stopped at the corner with two people in the frontseat and one person in the backseat. Valentino testified that one of the vehicle's occupants looked in their direction for "at least" five seconds. The car then turned the corner and drove down the street toward the victim's car. As the victim proceeded around the back of his car toward the driver's side, the light-colored car stopped.

¶ 7 A man stepped out of the light-colored car and stood approximately two feet from the victim. Valentino observed this from the passenger side door of the victim's car, at a distance of six to eight feet away. He said something to the victim that Valentino was unable to hear. The victim stood in the street with his hands at his side. Valentino then saw the man raise his arm and aim a gun at the victim. Valentino turned and ran for the house. As she did so, she heard a gun shot. She turned and saw her father holding his face and staggering toward the house. She could see the man still holding the gun in his hand, and looked at him for an additional 4 or 5 seconds. Valentino identified defendant in open court as the man with the gun.

¶ 8 Valentino testified she ran to the house and called 9-1-1. Four hours later, Valentino identified defendant in a line-up as the gunman.

¶ 9 At trial, Valentino described the shooter as a black male in his early twenties, wearing a

dark type of overalls and a red knit cap. She stated that, at the time of the murder, the street lights and lights from surrounding homes were sufficient to enable her to observe defendant.

¶ 10 An autopsy revealed that the victim died as the result of a gunshot wound to the face.

¶ 11 Robert Amidei testified at trial that he was the victim of an armed robbery at approximately 10:45 p.m. on December 30, 1989. The robbery occurred approximately one mile from the Bartell shooting. Amidei testified that, while he was parked at a pay phone, defendant approached his car, pointed a gun through the window at his face, and demanded his wallet. Amidei complied. Amidei then watched as defendant re-entered the backseat of a waiting beige, four-door Buick. He described defendant as a black male wearing dark overalls and a dark skull cap. He also saw there were two other individuals in the front seat of the car, and noticed that the license plate number included the letters "rs" and the numbers "55." Amidei identified defendant as the perpetrator in a line-up later that same night. He also made an in-court identification of defendant.

¶ 12 Defendant's neighbor, Bobby Thomas, testified that on the evening of December 30, 1989, his Buick LeSabre was stolen. He testified that he knew defendant, but acknowledged he did not see defendant stealing the car. Evidence presented at trial showed that defendant fled from Thomas' car prior to his being apprehended on the night of the murder. Thomas testified that a red cap and jacket found in his car after its recovery did not belong to him.

¶ 13 Chicago Police officer Kevin McDonald testified that, on the night of the murder, he was transporting Lannel Taylor[1], an individual arrested in another matter, to the police station when

[1] There is no evidence in the record that defendant and Lannel Taylor are related.

he received a radio dispatch concerning the Amidei armed robbery. Soon after, he and his partner saw a car fitting the description given and began to follow it. The license plate numbers were TS9655. They activated their emergency lights and a high-speed chase ensued. An individual later identified as Kendrick Taylor leapt from the front passenger side and fled on foot. Eventually, the officers followed the car into an alley where it turned into a vacant lot and struck a parked car. Officer McDonald observed defendant, wearing green coveralls, exit the driver's side door and flee. He also saw co-defendant Antoine Kelley exit the rear of the car, carrying a silver revolver. He observed Kelley attempt to raise the gun. Officer McDonald then fired one warning shot, and Kelley dropped the gun and fled down the alley. At trial, Officer McDonald made in-court identifications of both defendant and co-defendant Kelley.

¶ 14 Lannel Taylor, the arrestee in the police car at the time of the incident, corroborated Officer McDonald's testimony and stated that Kelley dropped a red hat near the gun.

¶ 15 Chicago Police officer Maria Soto testified that she apprehended and arrested defendant, who was hiding in a nearby dog house.

¶ 16 Various evidence was presented at trial concerning the .22-caliber gun dropped by co-defendant Kelley. An examination of the gun did not reveal any fingerprints. The State's expert was unable to determine whether the .22-caliber bullet that killed victim Bartell had been fired from the gun dropped by Kelley. At the time the gun was found, it contained one spent round and five live rounds.

¶ 17 Chicago Crime Lab criminalist Robert Berk testified as an expert regarding the gunshot residue tests performed on defendant and co-defendant Kelley at the police station on the night of

the murder. Berk concluded that defendant tested positive for gunshot residue, meaning he had been in contact with a discharged gun, had fired a gun, or had been in close proximity to a gun when it was discharged. His findings as to Kelley were inconclusive.

¶ 18 The State rested.

¶ 19 Defendant testified on his own behalf, stating that he was home the night of December 30, 1989. In the late evening hours, he left his house to go to a nearby store. As he left the store, he saw Antoine Kelley and Kendrick Taylor driving a tan Buick. He knew Kelley and Taylor from high school. They picked him up and offered to drive him to a friend's house. He did not know the car belonged to his neighbor, Thomas. While in the car, defendant was told the car was stolen. He then noticed that the steering column had been "stripped." He testified that at one point during the ride with the others, Kendrick Taylor stopped and exited the car. Then, shortly after they began driving again, he noticed that a police car behind them activated its emergency lights. He testified that, when the car stopped, he exited the driver's side because the front passenger door would not open. He explained that the reason he ran away from the police after the car crashed was not because he had been involved in the murder and robbery, but rather because he knew he was riding in a stolen car. Defendant denied he was at the scene where Bartell was shot. Defendant specifically denied shooting Bartell, as well as denied aiming a gun at and robbing Amidei.

¶ 20 In rebuttal, Chicago Police officer Edward Denk testified he transported defendant to the police station after he was apprehended. While in the squad car, Officer Denk asked defendant with whom he was riding during the robbery, and defendant replied that he was with Kendrick

Taylor. Officer Denk did not record this in a police report.

¶ 21 The jury returned a verdict finding defendant guilty of the first degree murder of Bartell and acquitting him of the attempted armed robbery charge. The court denied defendant's motion for a new trial and sentenced him to 60 years' imprisonment.

¶ 22 ii. The Direct Appeal

¶ 23 Defendant appealed, challenging: (1) the trial court's decision to allow evidence of other crimes; (2) the propriety of the jury instruction on such evidence; (3) the prosecutor's closing remarks concerning other crimes; (4) the decision to allow certain testimony to be read to the jury during deliberations; (5) the appropriateness of his sentence; (6) the correctness of the judgment order; and (7) whether costs should be awarded to the State. *People v. Taylor*, No. 1-91-3784 (1994) (unpublished order under Supreme Court Rule 23). We affirmed the trial court and remanded for corrections to the judgment order. *People v. Taylor*, No. 1-91-3784 (1994) (unpublished order under Supreme Court Rule 23). In rejecting defendant's argument challenging the State's closing argument, we explained that defendant had not objected at trial and that, "[e]ven if the State argued [the other crimes evidence] too broadly, its comments do not rise to the level of plain error in light of the overwhelming evidence of the defendant's guilt." *People v. Taylor*, No. 1-91-3784 (1994) (unpublished order under Supreme Court Rule 23).

¶ 24 iii. The Post-Conviction Petition and Petition for *Mandamus* Relief

¶ 25 In 1995, defendant filed a *pro se* petition for postconviction relief, raising three claims that had already been litigated on direct appeal: a challenge to the admission of other crimes

evidence; a challenge to the court's provision of State witness testimony to the jury during deliberations; and an argument that his sentence was excessive. The petition was summarily dismissed.

¶ 26 In 2003, defendant filed a *pro se* petition for *mandamus* relief, asking the trial court to resentence him in light of various mitigating factors. The petition was denied.

¶ 27 iv. The Successive Post-Conviction Petition

¶ 28 In December 2003, defendant filed a *pro se* successive post-conviction petition. By that petition, defendant raised a number of issues, including a freestanding claim of newly-discovered evidence of actual innocence. In support of his claim of actual innocence, defendant attached the affidavits of co-defendant Antoine Kelley[2], Charles Gossitt, and Terrence Wesson.

¶ 29 Co-defendant Kelley's affidavit was executed on September 3, 2002. By his affidavit, Kelley attested that, rather than defendant, he himself was the shooter. Specifically, Kelley attested:

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[2] Co-defendant Antoine Kelley was acquitted of the murder and found guilty of attempted murder. On appeal, this court vacated his sentence because the acquittal of the murder charge removed him from the Juvenile Court Act's automatic transfer provision. *People v. Kelley*, No. 1-92-1776 (1994) (unpublished order under Supreme Court Rule 23). This court remanded for resentencing under the Juvenile Court Act. *People v. Kelley*, No. 1-92-1776 (1994) (unpublished order under Supreme Court Rule 23). On appeal in this case, the State informs us that, on March 8, 1995, Kelley was re-sentenced to four years' imprisonment, which term had already been served. The defense does not contest this information.

"On December 30, 1989, at approximately 9:30 p.m. I was involved in the taking of a vehicle by gunpoint. Two other individuals were involved: Kendrick Taylor and Anderson Thomas. The vehicle was taken from a guy named "BOB". After taking the vehicle, we rode around in it looking for someone to rob. Around 10:30 p.m., I told Kendrick Taylor, who was driving to stop the car. I exited the vehicle from the back passenger door and fatally shot FRED BARTELL. I re-enter the car and we drove a few blocks further. I exit the vehicle again and robbed Robert Amidei at gunpoint. We then drove to our neighborhood, which are located one (1) mile from where these offenses occurred; North Avenue and Lamon Avenue to be exact.

Upon arriving at our destination I changed clothing getting rid of a black jacket I was wearing. Anderson Thomas said to let him get out of the car and give him the key. At which time, Kendrick Taylor and I decided to keep the car and joyride, in order to do so; we had to break the steering column to start the vehicle, because Anderson Thomas had taken the keys with him. We started the car and drove a few blocks and picked-up Lamont Taylor on the corner of Concord & Cicero Avenue around 10:40 p.m. Lamont Taylor had absolutely no participation in, nor

knowledge of any of the crimes mentioned-above. I would testify, if needed."

¶ 30 Also in support of his claim of actual innocence, defendant presented affidavits from Terrence Wesson and Charles Gossitt. Wesson's affidavit was executed on September 3, 2002. In it, Wesson attested he was an inmate at the Cook County Jail from early 1991 and most of 1992, during which time he became 'very good friends' with Kelley. He attested:

"[Kelley and I] often discussed the hopes of getting out soon. Sometimes after court dates we would discuss what happened to some extent. I recall that on July 11, 1991 Antoine Kelley and I had a short conversation before he went to court. It was known to me that Antoine Kelley was on trial for the murder of Fred Bartell, he asked me to pray for him on that day and I did.

The very next morning Antoine Kelley and I talked and he told me he'd been acquitted of the murder. Antoine Kelley then told me that 'HE' Antoine Kelley had committed the murder, and that a co-defendant named Lamont Taylor had been found guilty of the same murder. Antoine Kelley then stated 'Lamont Taylor had nothing to do with the murder, and that I feel sorry for him but it's better him than me.' "

¶ 31 Gossitt's affidavit was executed on December 7, 2002. In it, Gossitt attested that he shared a jail cell with Kelley from May 1991 to August 1991, during which time they talked

about Kelley's trial. He attested:

> "We were both charged with the offense of murder, so we would discuss what was going on with one another's case. In early July of 1991 Antoine Kelley told me that he had been acquitted of his murder charge, and that 'HE' Antoine Kelley had in fact committed the murder for which he'd been charged but he had just beaten the system. And that I to could probably get acquitted of my charge if I took a jury trial, because murder was the easiest charge to beat.
>
> Antoine Kelley then stated to me that a co-defendant by the name of Lamont Taylor was found guilty for the murder that 'HE' Antoine Kelley had committed. And that Lamont Taylor didn't have any involvement in the crime at all. He just got caught in the wrong place at the wrong time so he got the short end of the stick."

¶ 32 In his petition defendant asserts that Kelley's affidavit "is of such conclusive character it would probably change the result on retrial." He argues that Kelley's affidavit corroborates his own trial testimony that he is innocent of the crime. He asserts that he could not have obtained Kelley's affidavit any sooner than when Kelley signed the affidavit, in September 2002, because "no one had any idea that Kelley would make wholly self-incriminating admissions, under oath, that placed blame for the killing on Kelley himself and also exonerated [defendant] of any involvement in the murder." He considers Kelley a "completely unbiased witness who had

absolutely no motive to lie." Additionally, defendant explains that he only became aware of Gossitt and Wesson through Kelley and, thus, he could not have obtained their affidavits any sooner.

¶ 33 In addition, defendant attached Bobby Thomas' affidavit to his petition. In his petition, defendant relied on Thomas' affidavit to support a claim that the State knowingly used perjured testimony at his trial. On appeal, however, he has abandoned this claim and now relies on this affidavit to support his claim of actual innocence. The affidavit was executed in March 2003.[3] By this affidavit, Thomas, who was the owner of the stolen beige car, recanted his trial testimony that he did not know who stole his car. Instead, Thomas attested, in pertinent part:

> "2. I was a prosecution witness in the Cook County Circuit Court, in the case of People v. Lamont Taylor.
>
> 3. I would like to RECANT my previous testimony, it is not truthful and I feel that a grave injustice has happened to Lamont Taylor, because of my actions.
>
> On December 30, 1989, my car was not stolen as I previously testified to, instead: my vehicle was taken at gun-point in front of my house by Antoine Kelley, Kendrick Taylor and Anderson Thomas around 9:30 p.m.
>
> The reason for this recent recantation is because I feared for my life initially, because Antoine Kelley and Anderson Thomas

[3] There is a "3" written over the "2" in "2002" on the affidavit.

threaten to kill me if I told the police on them. So I just reported the car stolen, but prior to me testifying at Lamont Taylor's trial. I had a conversation with prosecutor Kim Kardas at which time I informed him as to what really happened to my car. This prosecutor told me it was too late to change my story and that if I did he would see to it, that I be prosecuted for obstruction of justice charges, for lying to the police initially.

4. I would testify in court, if needed."

¶ 34 In his petition, defendant also claimed, in part, that his private trial counsel and his appointed appellate counsel were ineffective on various grounds. On appeal, defendant abandons his argument regarding appellate counsel and argues that his trial counsel was ineffective for failing to investigate or present three alibi witnesses to corroborate defendant's defense. These prospective witnesses were defendant's mother, Marian L. Wright; Maria McGowan; and Lakisha McGowan. Defendant attached affidavits from each of these three women to his petition.

¶ 35 In her affidavit, which was executed May 17, 2003, defendant's mother, Marian Wright, attested that defendant was at her house from 5:30 p.m. to 10:30 p.m. on December 30, 1989, the night of the murder, and that he left to go to the store at 10:30 p.m. She attested that, had she been contacted by defendant's trial attorney "about this matter," she would have testified accordingly.

¶ 36 Defendant's neighbors, Lakisha McGowan and Maria McGowan, executed affidavits on May 17, 2003, and December 18, 2002, respectively. In their affidavits, they each attested that

they were at defendant's house on the night of the murder from 8:30 p.m. to 10:30 p.m. As they were leaving at 10:30 p.m., they heard defendant tell his mother he was gong to the store. They attested that, if they had been contacted by defendant's trial attorney, they would have testified accordingly.

¶ 37 Defendant also attached his own affidavit to the petition, which affidavit was executed on December 1, 2003. In it, defendant attested that, although he told trial counsel about the three alibi witnesses and gave counsel their contact information, counsel did not contact any of them. Defendant attested that counsel told him "he'd decided not to contact or interview any of them because judging from what I'd told him they could testify to; he felt they wouldn't be truthful; and that no jury would believe [them] anyway because of the close relationships they all had with me. And that it would be better if I just testified on my own behalf."

¶ 38 Defendant attested that he told his appellate counsel about these witnesses, and asked his appellate counsel to bring a claim regarding his trial counsel's ineffective assistance for failing to call the witnesses. His appellate counsel told him he only "dealt with issues that were a matter of the record and that since this issue wasn't [a matter of record] he couldn't raise it in [defendant's] direct appeal."

¶ 39 In 2004, the postconviction court appointed postconviction counsel. Defendant later retained private counsel, who took over the case in January 2009. Counsel filed a supplemental petition in September 2009, which included additional charges of ineffectiveness of trial and appellate counsel. Defendant now alleged trial counsel was ineffective for neglecting to investigate or present mitigation evidence at sentencing. In support of this claim, defendant

submitted six affidavits from individuals attesting they would have testified at sentencing to defendant's good deeds and good character. These affidavits were executed between September 2008 and April 2009.

¶ 40 The State filed a motion to dismiss the petition in February 2010 in which it argued that, because defendant failed to show cause and prejudice, he could not now litigate his non-innocence claims in a successive postconviction proceeding. The State also argued that defendant failed to make a substantial showing of newly discovered evidence of actual innocence based on Kelley's affidavit because, in part, defendant could have discovered this evidence earlier where he knew Kelley, with whom he was tried, and Kelley's appeal was resolved seven months before defendant filed his first postconviction petition. The State also argued that, in light of the overwhelming evidence presented at trial, Kelley's proposed testimony would probably not change the outcome of a new trial.

¶ 41 After hearing arguments from the parties, the postconviction court granted the State's motion to dismiss in February 2011. The court held that defendant failed to meet his burden under the cause and prejudice test and rejected his actual innocence claim based on newly discovered evidence. It stated:

> "THE COURT: [I]t is my position that I do not believe the Petitioner has demonstrated or satisfied his burden under the cause and prejudice test, as I have indicated.
>
> I have also considered the newly discovered evidence, and I have considered your arguments in regard to that and the actual

> innocence claim that would be part and parcel to that. It is my view after reviewing the record - - I have reviewed these new affidavits with suspicion given the timing and the content of what they contain, juxtapose newly discovered evidence with the trial record, the testimony of the victim's daughter and her testimony, her identification along with the positive gunshot residue tests, and it is the Court's view that even if the affidavits were to be accepted, it would not have changed the outcome. I agree with the State in that regard.
>
> So for both those reasons the State's motion to dismiss the petition is granted."

¶ 42 Defense counsel then filed a motion to reconsider the dismissal, focusing on the claim of newly discovered evidence of actual innocence based on Kelley's admission that he committed the murder and that defendant was not involved. The court denied the motion.

¶ 43 Defendant appeals the dismissal of his successive petition for postconviction relief.

¶ 44 II. ANALYSIS

¶ 45 A. Actual Innocence

¶ 46 On appeal, defendant first contends that the postconviction court erred in dismissing his successive postconviction petition where he made a substantial showing of actual innocence. Specifically, defendant argues that an evidentiary hearing is warranted where co-defendant

Kelley provided an affidavit in which he admitted that he killed the victim and that defendant was neither present at the time of nor involved in the shooting, and where two other affiants stated that, in 1991, Kelley admitted to killing the victim.

¶ 47 We begin by noting the well-established principles regarding postconviction proceedings. The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) provides a means by which a defendant may challenge his conviction for "substantial deprivation of federal or state constitutional rights." *People v. Tenner*, 175 Ill. 2d 372, 378 (1997); *People v. Jones*, 213 Ill. 2d 498, 503 (2004); see also *People v. Coleman*, 206 Ill. 2d 261, 277 (2002). A postconviction action is a collateral attack on a prior conviction and sentence and " 'is not a substitute for, or an addendum to, direct appeal.' " See *People v. Simmons*, 388 Ill. App. 3d 599, 605 (2009), quoting *People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994). Proceedings under the Act are commenced by the filing of a petition in the circuit court in which the original proceeding took place. *Jones*, 213 Ill. 2d at 503. In a noncapital case, the Act creates a three-stage process. *People v. Makiel*, 358 Ill. App. 3d 102, 104 (2005). At the first stage of postconviction proceedings, the circuit court must determine whether the petition is "frivolous and patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012); *People v. Boclair*, 202 Ill. 2d 89, 99 (2002). At this stage, to proceed further, the allegations of the petition, taken as true and liberally construed, need only present the gist of a constitutional claim. *People v. Harris*, 224 Ill. 2d 115, 126 (2007). This standard presents a "low threshold" (*People v. Jones*, 211 Ill. 2d 140, 144 (2004)), requiring only that the petitioner plead sufficient facts to assert an arguably constitutional claim (*People v. Hodges*, 234 Ill.2d 1, 9 (2009)). Accordingly, the trial court may

summarily dismiss a petition as "frivolous and patently without merit," only where the petition "has no arguable basis either in law or in fact," *i.e.*, "is one which is based on an indisputably meritless legal theory or a fanciful legal allegation." *Hodges*, 234 Ill. 2d at 17.

¶ 48 The Act contemplates the filing of only one postconviction petition. *Tenner*, 206 Ill. 2d at 392. All issues actually decided on direct appeal are barred by *res judicata*, and all issues that could have been raised in the original postconviction petition but were not are waived. *People v. Thompson*, 383 Ill. App. 3d 924, 931 (2008); see also 725 ILCS 5/122-3 (West 2010) ("Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived.").

¶ 49 Where, as here, a defendant's petition advances to the second stage of the postconviction process, the State may file a motion to dismiss. 725 ILCS 5/122-5 (West 2010). To survive such motion, a defendant must make a "substantial showing" that his constitutional rights were violated by supporting his allegations with the trial record or appropriate affidavits. *People v. Simpson*, 204 Ill. 2d 536, 546-47 (2001). At the second stage of proceedings, all well-pleaded facts that are not positively rebutted by the trial record are taken as true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). An evidentiary hearing is only required when the allegations of the petition, supported by the trial record and accompanying affidavits, make a substantial showing of a violation of a constitutional right. *People v. Hobley*, 182 Ill. 2d 404, 427-28 (1998). We review a circuit court's dismissal of a postconviction petition at the second stage *de novo*. *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 28.

¶ 50 Obtaining leave of court is a condition precedent to filing a successive postconviction

petition. *People v. Guerrero*, 2012 IL 112020, ¶ 15; see also *Simmons*, 388 Ill. App. 3d at 605; see also 725 ILCS 5/122-1(f) (West 2010) ("[o]nly one petition may be filed by a petitioner under this [a]rticle without leave of the court"). Successive petitions are discouraged because the defendant already has been given "one complete opportunity to show a substantial denial of his constitutional rights." *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 16, quoting *People v. Logan*, 72 Ill. 2d 358, 370 (1978). Successive petitions are governed by section 122-1(f) of the Act, which limits such a filing to cases where it is necessary "to prevent a fundamental miscarriage of justice." *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002). The bar to successive postconviction petitions is relaxed "when fundamental fairness so requires." *People v. Almodovar*, 2013 IL App (1st) 101476, ¶ 59, quoting *People v. Morgan*, 212 Ill. 2d 148, 153 (2004).

¶ 51 Our supreme court has identified two situations in which fundamental fairness will allow the filing of a successive post-conviction petition. The first alternative for determining whether a claim raised in a successive post-conviction petition may be considered on its merits is the "cause and prejudice" test. *Pitsonbarger*, 205 Ill. 2d at 459. Under that test, claims in a successive petition are barred unless the defendant can show cause for failing to raise the claim in his initial petition and prejudice resulting from that failure. 725 ILCS 5/122-1(f) (West 2010). The second basis by which the bar may be relaxed is what is known as the "fundamental miscarriage of justice" exception, which requires a petitioner to show actual innocence. *People v. Edwards*, 2012 IL 111711, ¶ 23.

¶ 52 Here, defendant contends he established his actual innocence based on newly discovered

evidence where co-defendant Kelley presented an affidavit that Kelley, in fact, was the shooter, and that defendant was not at all involved in the crime. The wrongful conviction of an innocent man violates due process. *People v. Washington*, 171 Ill. 2d 475, 481 (1996). The due process clause of the Illinois Constitution allows a prisoner to present a freestanding claim of actual innocence based on newly discovered evidence. *People v. Ortiz*, 235 Ill. 2d 319, 330 (2009). A proper claim under the Act may include a claim of actual innocence based on newly discovered evidence. *People v. Burrows*, 172 Ill. 2d 169, 199 (1996).

¶ 53 The focus of a freestanding claim of actual innocence is on the new evidence itself and whether it would totally vindicate or exonerate the defendant. *People v. Anderson*, 401 Ill. App. 3d 134, 140 (2010). At the second stage of a postconviction actual innocence inquiry, the relevant question is "whether the petitioner has made a substantial showing of actual innocence such that an evidentiary hearing is warranted." *Lofton*, 2011 IL App (1st) 100118, ¶ 34. Newly discovered evidence cannot be used to relitigate the sufficiency of the evidence adduced at trial. *People v. Coleman*, 2013 IL 113307, ¶ 97 ("Indeed, the sufficiency of the State's evidence to convict beyond a reasonable doubt is not the determination that the trial court must make. If it were, the remedy would be an acquittal, not a new trial."). The evidence supporting a claim of actual innocence must be newly discovered, material and not merely cumulative, and of sufficiently conclusive character that it would probably change the result of a retrial. *People v. Edwards*, 2012 IL 111711, ¶ 32. Our supreme court recently explained:

> "Substantively, in order to succeed on a claim of actual innocence, 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.

¶ 54 At the outset of our discussion, it is important to note that this court recently considered a similar factual scenario in *People v. Lofton*, 2011 IL App (1st) 100118. In *Lofton*, the defendant filed a second postconviction petition challenging his murder conviction, which the postconviction court dismissed, as did the court in the case at bar, at the second stage. *Lofton*, 2011 IL App (1st) 100118, ¶ 28. Similarly, in his petition, the *Lofton* defendant claimed that he was actually innocent based on an affidavit of another individual who claimed to be the actual shooter, and alleged that the defendant was not at the scene of the crime. *Lofton*, 2011 IL App (1st) 100118, ¶ 33. On review, we reversed and remanded for an evidentiary hearing, determining that the defendant's petition made a substantial showing of actual innocence based on the affidavit of a person purporting to be the actual shooter who stated that the defendant was not present at the shooting. *Lofton*, 2011 IL App (1st) 100118. There, the affidavit constituted

"newly discovered" evidence because, accepting as true that the defendant was not at the scene of the shooting, the defendant could not have known the identity of the shooter until that person contacted the defendant and made such an admission. *Lofton*, 2011 IL App (1st) 100118, ¶ 37. The court then determined that evidence indicating someone else shot the victim and that the defendant was not present was "certainly" material. *Lofton*, 2011 IL App (1st) 100118, ¶ 38. Finally, this court noted that because the hallmark of actual innocence is total vindication, "[i]t would not have been enough for [the affiant] to state that he was the shooter if [the defendant] was still actively involved in that version of events." *Lofton*, 2011 IL App (1st) 100118, ¶ 40. As in the case at bar, however, the affiant claimed–just as the defendant had consistently claimed–that the defendant was not at the scene of the shooting. *Lofton*, 2011 IL App (1st) 100118, ¶ 40.

¶ 55 In this case, the evidence presented by defendant to establish his claim of actual innocence is Kelley's affidavit in which Kelley avers that Kelley himself was the shooter and that defendant was in no way involved in the crime. Defendant also relies on the affidavits provided by Gossitt, Wesson, and Thomas to support his claim of actual innocence. Defendant claims that, given the evidence upon which he was convicted, there is a reasonable probability that this newly discovered evidence would change the result on retrial.

¶ 56 i. The Gossitt, Wesson, and Thomas Affidavits

¶ 57 We first consider the supporting affidavits provided by Gossitt and Wesson, and find they are not valid supporting documents to this cause. In Gossitt's affidavit, Gossitt avers that he met

Kelley in jail and, in 1991, Kelley told him he, Kelley, had committed the murder. In Wesson's affidavit, Wesson also avers that he met Kelley in jail and that Kelley told him that he, Kelley, had committed the murder. These affidavits do not support defendant's claim of actual innocence where, at most, they show that neither individual was at the scene of the murder, and neither individual has any personal knowledge about the victim's murder. See *People v. Gillespie*, 407 Ill. App. 3d 113, 135 (2010) ("These affidavits merely affirm that neither of these individuals has any personal knowledge concerning [the murder] and, therefore, cannot support defendant's claim of actual innocence.").

¶ 58 In the same manner, Thomas' affidavit does not support defendant's claim of actual innocence. Putting aside the fact that defendant initially attached this affidavit to his petition in order to support a now-abandoned postconviction claim–that he was denied due process by the knowing use of perjured testimony at trial–the affidavit itself provides no support for the actual innocence claim, either. In Thomas' affidavit, Thomas avers that, although he testified at trial he did not know who stole his car, he actually did know that Kelley, Kendrick Taylor, and Anderson Thomas stole the car. Again, this affidavit only serves to prove that Thomas has no actual, personal knowledge of the shooting. Accordingly, we consider here only the affidavit presented by Kelley.

¶ 59 ii. The Kelley Affidavit

¶ 60 a. Is the Evidence Newly Discovered?

¶ 61 We first consider co-defendant Kelley's affidavit in respect to the requirement that the

evidence must be newly discovered. Evidence is "newly discovered" when it is "unavailable at trial and could not have been discovered sooner through due diligence." *Edwards*, 2012 IL 111711, ¶ 34, quoting *People v. Harris*, 206 Ill. 2d 293, 301 (2002); *Ortiz*, 235 Ill. 2d at 334. "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.' " *Barnslater*, 373 Ill. App. 3d 512, 523 (2007). At this stage in the postconviction process, we must take those facts alleged in the petition that are not positively rebutted by the trial record as true. *Pendleton*, 223 Ill. 2d at 473.

¶ 62 Here, taking the facts alleged in the petition as true, Kelley's admission that he was the shooter and that defendant was not at the scene was not discovered until Kelley contacted defendant and subsequently signed the affidavit on September 3, 2002. Kelley, who was tried simultaneously with defendant for Bartell's murder in 1993 but received an acquittal, came forward with his admission of guilt 9 years later. From the time of trial onward, defendant has consistently maintained that he was not present for, or in any way involved in, the murder of Bartell or the robbery of Amidei. Here, we find that, like *Lofton*, Kelley's affidavit is newly discovered evidence.

¶ 63 The State argues that defendant did not exercise due diligence in locating Kelley and securing Kelley's admissions, particularly in light of the fact that they were co-defendants and defendant "knew about Kelley from the very outset of this case." However, a co-defendant's affidavit may be considered "new evidence" although the co-defendant was previously known to a defendant when "no amount of diligence could have forced the co-defendant to violate his fifth

amendment right to avoid self-incrimination." *People v. Molstad*, 101 Ill. 2d 128, 135 (1984). In addition, like the court in *Lofton*, we are hard-pressed to understand how defendant should be expected to know that Kelley was the actual shooter until he came forward with his admission in 2003. According to both defendant's testimony and Kelley's affidavit, defendant was not at the scene of the crime and did not know about the shooting. There is a crucial distinction between knowing who Kelley is and knowing that Kelley was the person who shot Fred Bartell.

¶ 64 b. Is the Evidence Material and Not Merely Cumulative?

¶ 65 Next, we turn to the question of whether the newly discovered evidence is material and not merely cumulative. *Washington*, 171 Ill. 2d at 489. Material evidence is relevant and probative of the petitioner's innocence; noncumulative evidence adds to what the jury heard. *People v. Coleman*, 2013 IL 2d 113307, ¶ 96. Evidence is not cumulative if it would create questions in the mind of the jury. *People v. Williams*, 392 Ill. App. 3d 359, 369 (2009). Here, the evidence is both material and noncumulative. Taking the facts alleged in the petition as true (*Pendleton*, 223 Ill. 2d at 473), the evidence that Kelley rather than defendant was the shooter and that defendant was not even at the scene of the crime is both material and noncumulative. See *Lofton*, 2011 IL App (1st) 100118, ¶ 38 ("the evidence that someone else was the shooter and [the defendant] was not present is certainly material. This evidence also certainly adds something to what was previously before the jury."). In Kelley's affidavit, Kelley attests that he himself was the shooter and that "Lamont Taylor had absolutely no participation in, nor knowledge of any of the crimes mentioned above." This information was never in front of the

jury. Whether or not the jury believed this information, if it had been presented to the jury, its presentation would have added to what was in front of the fact finder. See *Coleman*, 2013 IL 113307, ¶ 96 ("Noncumulative means the evidence adds to what the jury heard.")

¶ 66 The State does not argue the evidence is not material, but instead argues that it is unreliable and should not be considered. The State points out the fact that defendant did not secure Kelley's statement until such time as Kelley could "confess to the murder without exposing himself to any penal risk," and that this timing makes Kelley's admission unreliable. While we acknowledge that the timing of Kelley's admission raises our suspicions, we are cognizant that any inquiry into the reasoning behind the timing of Kelley's admission is not a question to be determined at this stage of the proceedings, but, rather, should be investigated at an evidentiary hearing. See, *e.g.*, *Lofton*, 2011 IL App (1st) 100118, ¶ 37 ("Why [the affiant] came forward when he did is a matter to be investigated at an evidentiary hearing, not at this stage in the proceedings.")

¶ 67 c. Is the Newly Discovered, Material and Noncumulative Evidence Conclusive?

¶ 68 Our next inquiry is whether this evidence is so conclusive that it would probably change the result on retrial. *Coleman,* 2013 IL 113307, ¶ 96 ("[C]onclusive means the evidence, when considered along with the trial evidence, would probably lead to a different result."). A claim of actual innocence is not a challenge to whether the defendant was proved guilty beyond a reasonable doubt, but rather an assertion of total vindication or exoneration. *Barnslater*, 373 Ill. App. 3d at 520. "Probability, not certainty, is the key as the trial court in effect predicts what

another jury would likely do, considering all the evidence, both new and old, together. *Coleman*, 2013 IL 113307, ¶ 97, citing *People v. Davis*, 2012 IL App. (4th) 110305, ¶¶ 62-4. We find the evidence presented here conclusive.

¶ 69 In *Lofton*, this court determined that the admission by an affiant that he was the actual shooter rather than the defendant, and that the defendant had not been at the scene of the crime, was conclusive evidence. The *Lofton* court noted: "It would not have been enough for [the affiant] to state that he was the shooter if [the defendant] was still actively involved under [the affiant's] version of events. However, [the affiant's] affidavit states that not only was [he] the shooter, [the defendant] was not even there." *Lofton*, 2011 IL App (1st) 100118, ¶ 40.

¶ 70 Here, from trial to present, defendant has consistently denied being present at the scene of either the murder or the robbery. He testified at trial that Kelley and Kendrick Taylor picked him up on the night of the murder and offered to drive him to a friend's house. During that time, Kendrick informed him that the car they were riding in had been stolen. At some point, defendant notice a police car following them with its emergency lights activated. When the car stopped, defendant fled. Defendant explained at trial that the reason he ran away from the police after the car crashed was not because he had been involved in the murder or the robbery, but because he new the car in which he was riding was stolen.

¶ 71 Kelley's affidavit corroborates defendant's version of events, explaining that Kelley, Kendrick Taylor, and Anderson Thomas stole a car, drove around in it, stopped the car and Kelley fatally shot Fred Bartell. They drove a few block further and Kelley robbed Amidei at gunpoint. Then they drove back to their neighborhood. Kelley and Kendrick Taylor decided to

ride around some more, drove a few blocks away, and then picked up defendant. Kelley averred, "Lamont Taylor had absolutely no participation in, nor knowledge of any of the crimes mentioned-above." Taking the facts alleged in the petition as true, as we must, we find that, like *Lofton*, where the affiant admits to being the shooter and avers that defendant was neither present nor involved in the shooting, defendant has made a substantial showing that the evidence would probably change the result on retrial.

¶ 72 In addition, we note with some concern the evidence at trial showed that, when the police stopped the vehicle, it was Kelley rather than defendant who was carrying a gun. In fact, it was Kelley who "attempt[ed] to raise his gun" before Officer McDonald fired a warning shot and Kelley dropped the gun and fled down the alley. Additionally, the victim's daughter, Linda Valentino, testified that the shooter was wearing a red knit cap. Lannel Taylor, the arrestee in the police car at the time Kelley and defendant fled from the car and were subsequently apprehended, testified at trial that Kelley dropped a red hat near the gun.

¶ 73 In remanding for an evidentiary hearing, we again recognize that this court, on direct appeal, found the evidence against defendant overwhelming. However, that determination was based only on the evidence presented at trial and did not account for the new evidence at issue here, indicating that defendant had nothing to do with the murder. Our supreme court has recognized this difficulty, and has described the postconviction evidentiary hearing process thus:

> "In practice, the trial court typically will review the evidence presented at the evidentiary hearing to determine first whether it was new, material, and noncumulative. If any of it was, the trial court then must

consider whether that evidence places the evidence presented at trial in a different light and undercuts the court's confidence in the factual correctness of the guilty verdict. This is a comprehensive approach and involves credibility determinations that are uniquely appropriate for trial judges to make. But the trial court should not redecide the defendant's guilt in deciding whether to grant relief. See *Molstad*, 101 Ill. 2d at 136 ('This does not mean that [the defendant] is innocent, merely that all of the facts and surrounding circumstances * * * should be scrutinized more closely to determine [his] guilt or innocence'). Indeed, the sufficiency of the State's evidence to convict beyond a reasonable doubt is not the determination that the trial court must make. If it were, the remedy would be an acquittal, not a new trial. See *Washington*, 171 Ill. 2d at 497 (McMorrow, J., specially concurring) ('where a reviewing court determines that no rational trier of fact could find the defendant guilty beyond a reasonable doubt, the proper remedy is not a new trial but an acquittal'). Probability, not certainty, is the key as the trial court in effect predicts what another jury would likely do, considering all the evidence, both new and old, together. See *People v. Davis*, 2012 IL App (4th) 110305, ¶¶ 62-64 ('New evidence need not be completely dispositive of an issue to be likely to change the result upon retrial.')." *Coleman*, 2013 IL 113307, ¶ 97.

¶ 74 Here, taking the facts alleged in the petition as true, as we must (*Pendleton*, 223 Ill. 2d at 473), and considering the evidence both old and new together (*Coleman*, 2013 IL 113307, ¶ 97), we find defendant has made a substantial showing that Kelley's admission that he was the shooter and that defendant was not at the scene would probably change the result on retrial. We note, again, that any alleged lack of reliability in Kelley's affidavit is a subject to be explored at a third-stage evidentiary hearing. See *Pendleton*, 223 Ill. 2d at 473 (third-stage evidentiary hearing is "where fact-finding and credibility determinations are involved.")

¶ 75 For the above reasons, we hold that defendant has made a substantial showing of a constitutional violation and is entitled to a third-stage evidentiary hearing on his claim of actual innocence. We reverse the circuit court's dismissal of the actual innocence claim in defendant's petition and remand for a third-stage evidentiary hearing.

¶ 76 B. The Ineffective Assistance of Trial Counsel Claims

¶ 77 Next, Defendant contends that the postconviction court erred in dismissing his claim that he was denied the effective assistance of trial counsel where counsel failed to: (1) investigate or call alibi witnesses at trial; and (2) failed to present mitigation evidence at sentencing. In support of his alibi witnesses argument, defendant attached three affidavits to his petition. In support of his sentencing issue claim, defendant attached six affidavits. These claims fail because defendant is unable to meet the cause-and-prejudice test as articulated in *Pitsonbarger*, 205 Ill. 2d at 460, and codified in section 122-1(f) (725 ILCS 5/122(f) (West 2010)).

¶ 78 The Act contemplates the filing of only one postconviction petition. *Morgan*, 212 Ill. 2d

at 153; *Tenner*, 206 Ill. 2d at 392. Consequently, a defendant bringing a successive postconviction petition faces immense procedural default hurdles that are lowered only where fundamental fairness so requires. *Pitsonbarger*, 205 Ill. 2d at 459; *People v. Flores*, 153 Ill. 2d 264, 274 (1992). The cause-and-prejudice test is the analytical tool used to determine whether fundamental fairness requires a court to make an exception to the waiver provision of section 122-3 of the Act and to consider a claim raised in a successive postconviction petition on its merits. *Pitsonbarger*, 205 Ill. 2d at 459. The legislature codified the cause-and-prejudice test adopted in *Pitsonbarger* in section 122-1(f) of the Act (725 ILCS 5/122(f) (West 2010)). Under this test, claims in a successive postconviction petition are barred unless the defendant can establish good cause for failing to raise the claimed error in prior proceedings and actual prejudice resulting from the error. *Tenner*, 206 Ill. 2d at 393.

¶ 79 To establish cause, defendant 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) (West 2010); see also *Pitsonbarger*, 205 Ill. 2d at 458. To establish prejudice, defendant must demonstrate that the error not raised in his initial postconviction proceedings so infected the trial that the resulting conviction violated due process. 725 ILCS 5/122-1(f) (West 2010); see also *Pitsonbarger*, 205 Ill. 2d at 458. "[B]oth elements or prongs of the cause-and-prejudice test must be satisfied in order for the defendant to prevail." *Guerrero*, 2012 IL 112020, ¶ 15.

¶ 80 i. The Alibi Witnesses

¶ 81 According to both his postconviction petition and affidavit, defendant knew about his

putative alibi witnesses, his mother and her two neighbors, at the time of trial, but trial counsel decided not to present them. When defendant was preparing for his trial, he informed trial counsel about these witnesses, each of whom would testify that he was at his mother's house until 10:30 p.m. on the night of the shooting. In his affidavit attached to the instant petition, defendant attested that trial counsel told him "he'd decided not to contact or interview any of them because judging from what I'd told him they could testify to; he felt they wouldn't be truthful; and that no jury would believe [them] anyway because of the close relationships they all had with me. And that it would be better if I just testified on my own behalf." He then told his appellate counsel about this, and appellate counsel informed him he could not raise the issue on direct appeal because the issue was not a matter of record. Then, in 1995, defendant filed his first *pro se* postconviction petition. Although defendant knew about his alibi witnesses and had complained to his appellate counsel about trial counsel's refusal to present them, he did not present the issue in his postconviction petition.

¶ 82 Defendant first presented this claim in his successive *pro se* postconviction in 2003. His petition included attachments of the three affidavits, all executed in 2002 and 2003. The affiants do not offer explanation in their affidavits for defendant's failure to procure the affidavits sooner. Defendant did not offer explanation for the delay in his affidavit nor in his petition.

¶ 83 Here, defendant fails to show the requisite cause because the claim–ineffective assistance of counsel for failure to investigate and present the testimony of various alibi witnesses–is barred by the doctrine of waiver. On appeal, defendant acknowledges he had opportunity to allege his trial attorney's ineffectiveness for failing to investigate or call alibi witnesses when he filed his

initial postconviction petition in 1995. He acknowledges he failed to do so and, therefore, he defaulted that issue. Nevertheless, he urges this court to excuse the procedural default and allow the merits of the claim to be reached "since he did not have the benefit of counsel during that first post-conviction proceeding." He supports his argument by reliance on *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013).

¶ 84 In *Martinez*, while recognizing its prior ruling that an attorney's ineffectiveness in a postconviction proceeding cannot be the basis for cause to excuse procedural default in a federal *habeas corpus* proceeding, the Supreme Court carved a "narrow exception" to the rule, specific to Arizona's rules of criminal procedure, precluding defendants from raising ineffective assistance of counsel claims on direct appeal. The Supreme Court ruled that a prisoner may establish cause for purposes of a default analysis in a federal *habeas corpus* proceedings where: (1) the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial; or (2) appointed counsel in the initial-review collateral proceeding, when the claim should have been raised, was ineffective. *Martinez*, 132 S. Ct. at 320. Subsequently, in *Trevino*, the Supreme Court extended the *Martinez* rule such that the exception applied not only to situations where defendants were prevented from raising ineffective assistance of counsel claims on direct appeal, but also to situations where the state procedural framework made it unlikely that a defendant would have a meaningful opportunity to raise an ineffective assistance of counsel claim on direct appeal. *Trevino*, 133 S. Ct. at 1921.

¶ 85 Defendant acknowledges that this court has already evaluated this issue and determined that *Martinez* and *Trevino* do not apply to Illinois postconviction petitions in *People v.*

Sutherland, 2013 IL App (1st) 113072, ¶¶ 17-18, and *People v. Miller*, 2013 IL App (1st) 111147, ¶ 41. Defendant submits that these cases, *Sutherland* and *Miller,* were wrongly decided and should not be followed by this court. We disagree.

¶ 86 In *Miller*, this court held that *Martinez* only applies to federal courts considering *habeas* petitions, and not to postconviction cases in Illinois. *Miller*, 2013 IL App (1st) 111147, ¶ 41. In *Sutherland*, this court addressed and rejected the exact argument advanced by defendant here, that is, whether under *Martinez* "he should be excused from having to show cause and forgiven his procedural default because he was not represented by legal counsel during first-stage postconviction proceedings." *Sutherland*, 2013 IL App (1st) 113072, ¶ 17. The *Sutherland* court found the defendant's reliance on *Martinez* and *Trevino* misplaced, where Illinois' criminal procedure generally allows for ineffective assistance claims to be raised after trial and on direct appeal. *Sutherland*, 2013 IL App (1st) 113072, ¶ 18. Additionally, the *Sutherland* court recognized that our supreme court has long held that counsel is provided, by statute, at the second stage of the postconviction hearing process as a "matter of legislative grace." *Sutherland*, 2013 IL App (1st) 113072, ¶ 19. The court said:

> "[I]n *People v. Evans*, 2013 IL 113471, ¶ 13, our supreme court's most recent case on successive postconviction petitions, the court held that the petitioner could not claim ignorance of the law as 'cause' to justify the petitioner's failure to include a claim in his initial postconviction proceedings. Yet, that is essentially the 'cause' defendant now presents. * * * Under *Evans*, this argument does not fare well." *Sutherland*, 2013 IL

App (1st) 113072, ¶ 19.

¶ 87 Where this issue has already been decided in *Sutherland* and *Miller*, we decline to depart from these well-reasoned cases. Defendant's claim fails because he is unable to overcome the "cause" prong of the "cause and prejudice" requirement. See *Guerrero*, 2012 IL 112020, ¶ 15. ("[B]oth elements or prongs of the cause-and-prejudice test must be satisfied in order for the defendant to prevail.").

¶ 88 ii. The Mitigation Witnesses

¶ 89 Finally, defendant contends the court erroneously dismissed his petition where he substantially showed he was denied the effective assistance of trial counsel where counsel failed to present particular mitigating witnesses at his sentencing hearing. Defendant attached six affidavits to the supplement to his successive postconviction petition, with each affiant attesting to defendant's good character and good deeds.

¶ 90 Defendant again admits that this issue has been procedurally defaulted because it was not, although it could have been, included in his first postconviction petition filed in 1995. Defendant again argues, as he did above, that "the procedural default should not have prevented the court below from reaching the merits of the claim, as [defendant] can establish 'cause' for omitting the claim from his first petition since he did not receive the assistance of counsel during that initial-review proceeding."

¶ 91 Again, this issue has been considered and rejected by this court. See *Sutherland*, 2013 IL App (1st) 113072, and *Miller*, 2013 IL App (1st) 111147. We decline to depart from this

precedent, and find that defendant's claim fails because he is unable to overcome the "cause" prong of the "cause and prejudice" requirement. See *Guerrero*, 2012 IL 112020, ¶ 15. ("[B]oth elements or prongs of the cause-and-prejudice test must be satisfied in order for the defendant to prevail.").

¶ 92 III. CONCLUSION

¶ 93 For all of the foregoing reasons, we affirm the circuit court's dismissal of the petition as to the ineffective assistance of counsel claims, and we reverse the circuit court's dismissal of the petition as to the actual innocence claim, and remand for a third-stage evidentiary hearing as to that issue only.

¶ 94 Affirmed in part and reversed in part; remanded.