FOURTH DIVISION
July 31, 2014

1-13-0057

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 94 CR 28835
	)	
ALONZO FRANKLIN,	)	Honorable
	)	Thomas Joseph Hennelly,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Lavin and Epstein concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court of Cook County's judgment denying defendant's motion for leave to file a successive postconviction petition is affirmed. The affidavit in support of defendant's claim of actual innocence is not of such a conclusive nature that it would probably change the result on retrial and defendant failed to establish a *Brady* violation.

¶ 2 The circuit court of Cook County convicted defendant, Alonzo Franklin, for one count of first degree murder and one count of aggravated battery and sentenced him to

concurrent terms of imprisonment of 60 and 20 years respectively. This court affirmed defendant's conviction and sentence on direct appeal and affirmed the summary dismissal of defendant's initial postconviction petition. The instant appeal arises from defendant's *second* attempt at filing a successive postconviction petition. In November 2012 the circuit court of Cook County denied defendant's motion for leave to file a (second) successive postconviction petition. That order is the subject of this appeal and for the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 This court has previously set forth the evidence adduced at defendant's trial. We will restate only those portions of the evidence that are pertinent to the issues raised in this appeal.

¶ 5 After this court affirmed defendant's conviction and sentence on direct appeal, defendant filed a petition for postconviction relief. The circuit court summarily dismissed the petition, and this court affirmed. In 2007, defendant filed a *pro se* petition for *habeas corpus* relief. The circuit court recharacterized defendant's petition for *habeas corpus* relief as a successive petition for postconviction relief and appointed counsel to represent defendant on the successive postconviction petition. Subsequently, the circuit court denied leave to file the successive petition, and defendant appealed. This court affirmed the trial court's order denying defendant leave to file a successive postconviction petition. But while that appeal was pending, on August 6, 2012, defendant filed a motion for leave to file a (second) successive postconviction petition[1] and the proffered (second) successive postconviction petition.

---

[1] Defendant never actually filed the "first" successive postconviction petition because the circuit court denied him leave to do so and we affirmed that order. We will refer to the

¶ 6 Defendant's August 2012 motion for leave to file a second successive postconviction petition alleged, in pertinent part, that before defendant's trial the State failed to disclose "any information [of] a deal with Kevin [*sic*] Spivey for his testimony against [defendant] in which he received probation." Defendant further alleged that on November 4, 2010, Kavin Spivey wrote an affidavit in which he recanted his testimony against defendant. Defendant attached Spivey's affidavit to the motion. The motion asked the trial court to grant defendant leave to file a successive postconviction petition because (1) newly discovered evidence proves defendant is actually innocent and (2) the evidence attached to the motion proves that the State violated its duty to provide defendant with exculpatory evidence.

¶ 7 Kavin Spivey's affidavit described the events on the night of the murder and his shooting. Spivey described passing a group of men as he left an apartment at the scene of the crime. He described two individuals as shorter than the other two. The taller men were "over six feet" tall. One of the shorter men wore a blue and white Starter jacket and the other wore a black jacket. Spivey and the murder victim (Joseph) entered a parked car and Spivey saw the individual in the blue and white jacket holding a gun. Spivey, in his affidavit, further described the man in the blue and white jacket as "light skinned with a lot of acne around his face near the cheekbones." That person started firing the gun into the car. According to the affidavit six bullets struck Spivey and he passed out. When he regained consciousness police were on the scene. The affidavit states only that police told Spivey that an ambulance was

---

petition that is the subject of this appeal as a "second" successive postconviction petition for convenience and clarity.

coming for him and Spivey was taken to the hospital. Spivey averred he does not remember police coming to talk to him at the hospital.

¶ 8 Spivey's affidavit states that the following summer a sheriff came to his home and transported him to the Cook County State's Attorney's office. There, Spivey averred, an assistant state's attorney threatened Spivey with jail for failing to come to court. Spivey admitted in his affidavit that he had been subpoenaed prior to this meeting but the subpoena "got torn up." The assistant state's attorney showed Spivey a picture and asked Spivey if Spivey knew the person in the picture. Spivey averred he did not know the man in the picture. Spivey averred that the assistant state's attorney informed him the picture was of the man who shot him and killed Joseph and whom Spivey had previously identified. Spivey's affidavit states that "I never saw any line-up and never pointed anyone out." Spivey averred that the person in the picture was not the person who shot him. Spivey averred that at trial he "pointed to the guy in court who matched the picture [the assistant state's attorney] showed me" but that person "was not the guy wearing the white and blue jacket with acne on his face who shot me."

¶ 9 The affidavit also states:

> "I only testified because I didn't want to go to jail. I picked up an auto theft case before I was picked up on the warrant and [the assistant state's attorney] threatened to send me to jail if I didn't testify. He also promised to get me probation for my auto theft case after I testified."

¶ 10 Spivey averred that he has "been willing to come forward about what happened since then. The opportunity never presented itself."

¶ 11 The trial court denied defendant's motion. The court ruled as follows:

> "All the allegations contained in the petition were already ruled upon by the court and as [defendant] even indicates in his pleading that that matter is currently on appeal based on the court's denial.
>
> So his postconviction petition is *res judicata* so *** leave to file successive postconviction petition is denied."

¶ 12 Defendant appeals the circuit court's order denying his motion for leave to file a second successive postconviction petition.

¶ 13 ANALYSIS

¶ 14 The second successive postconviction petition defendant tendered with his motion for leave to file argued that newly discovered evidence proved that defendant was actually innocent of the crime for which he is currently convicted. The evidence relied on in the second successive postconviction petition includes Spivey's affidavit, the affidavit of Willa Mae Cephus (averring that defendant arrived at the scene after the shooting), and the results of a gunshot residue (GSR) test on defendant after the shooting (which was within normal handblank limits; *i.e.*, no GSR present[2]). Defendant's second successive postconviction petition also sought a new trial on the basis of an alleged violation of the prosecutor's duties

---

[2] See *People v. Palmer*, 80 Cal. App. 3d 239, 253 (Cal. App. 1978)

under *Brady v. Maryland*, 373 U.S. 83 (1963). The alleged *Brady* violations were that the State failed to disclose (1) the results of the GSR test and (2) that the State agreed to recommend Spivey receive probation on a pending charge against Spivey in an unrelated case in exchange for Spivey's testimony against defendant. On appeal, defendant only argues that (1) he presented a colorable claim of actual innocence based on Spivey's affidavit allegedly recanting his identification of defendant as the perpetrator and (2) the State violated *Brady* by failing to divulge the fact Spivey received probation on an unrelated charge in exchange for his testimony against defendant. Any arguments regarding the Cephus affidavit or the GSR test are waived. *People v. Miller*, 2013 IL App (1st) 111147, ¶ 40.

¶ 15 1. Legal Standard

¶ 16 The Act generally contemplates the filing of only one postconviction petition. 725 ILCS 5/122-3 (West 2012). However, the bar against successive proceedings will be relaxed in cases where the defendant can satisfy (1) the cause and prejudice test of the Post-Conviction Hearing Act; or (2) the "fundamental miscarriage of justice" exception, set forth as a claim of actual innocence. 725 ILCS 5/122-1(f) (West 2012); *People v. Edwards*, 2012 IL App (1st) 111711, ¶ ¶ 22, 23. A petitioner in an initial postconviction petition need state only a "gist" of a constitutional claim and may be summarily dismissed only if the petition has no arguable basis either in law or in fact. *People v Hodges*, 234 Ill. 2d 1, 11-12 (2009). However, our supreme court has determined the low "gist" standard applicable to initial postconviction petitions is not applicable to a petitioner filing a successive postconviction petition. *Edwards*, 2012 IL 111711, ¶ 27. To file a successive postconviction petition based on constitutional claims other than claims of actual innocence, such as defendant's *Brady* claim, the defendant

must establish "cause and prejudice" related to the failure to raise the claim sooner. In this case defendant also claimed actual innocence when seeking leave of court to file his successive postconviction petition. To establish what is known as the "fundamental miscarriage of justice" exception or actual innocence exception in a successive postconviction petition, the defendant's petition and supporting evidence must set forth a colorable claim of actual innocence. *Edwards*, 2012 IL 111711, ¶ 33. In *Edwards* our supreme court held that to state a colorable claim of actual innocence in a successive petition the claim must be supported with "new reliable evidence--whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence--that was not presented at trial." *Id.*, ¶ 32 (quoting *Schlup v. Delo*, 513 U.S. 297, 324 (1995)). The court added: "Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful." (Internal quotation marks and citation omitted.) *Id.* An examination of the petition and the supporting documentation must raise the probability that it is more likely than not that no reasonable juror would have convicted petitioner in light of the new evidence. *Edwards*, 2012 IL 111711, ¶ 31. See *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009) (the evidence in support of the claim must be newly discovered; material and not merely cumulative; and of such conclusive nature that it would probably change the result on retrial). "We review the denial of leave to file a successive petition *de novo*." *People v. Adams*, 2013 IL App (1st) 111081, ¶ 30.

¶ 17 2. Defendant's Claims

¶ 18 Defendant's successive petition raises a claim of actual innocence and a claim of a violation of his constitutional rights. Both of defendant's claims are based on information

contained in Spivey's affidavit. In this case, much like the preceding appeal, we must first address the State's argument that defendant may not use the same evidence--in this case Spivey's affidavit--to support both a claim of a *Brady* violation and a claim of actual innocence. This court has already found in proceedings involving this defendant that our supreme court has created a prohibition against using the same newly discovered evidence to raise a claim of actual innocence and to supplement an assertion of a constitutional violation with respect to the trial. See *People v. Franklin*, 2013 IL App (1st) 110505-U, ¶ 52 (citing *People v. Hobley*, 182 Ill. 2d 404, 444 (1998); *People v. Brown*, 371 Ill. App. 3d 972, 984 (2007)). In *Brown*, the defendant argued for the first time on appeal that an affidavit in support of his postconviction claim of ineffective assistance of counsel also supported a free-standing claim of actual innocence. *Brown*, 371 Ill. App. 3d at 984. The *Brown* court held that "the evidence being relied upon to support a free-standing claim of actual innocence means that it is not being used to supplement an assertion of a constitutional violation with respect to the defendant's trial." *Id.* (citing *Hobley*, 182 Ill. 2d at 443-44). The *Brown* court held that because the affidavit at issue was being used to assert ineffective assistance of counsel claims with respect to the defendant's trial, it could not also be used to support a free-standing claim of actual innocence. *Id.*

¶ 19 Defendant's response to the State's argument that Spivey's affidavit cannot be used to support his claim of actual innocence is that "lower courts have interpreted the court's holdings to allow a petitioner to plead and argue a 'freestanding' claim of actual innocence in the alternative, so long as the purported actual innocence claim is not merely a claim of another constitutional violation disguised with the rhetoric of innocence." Defendant cites

People v. Lofton, 2011 IL App (1st) 100188, ¶ 33, and *People v. Munoz*, 406 Ill. App. 3d 844, 854-55 (2010), as supporting his interpretation of our supreme court's ban on using the same evidence to support both a claim of actual innocence and a claim of a constitutional violation at trial. Defendant also argues that such a prohibition is fundamentally unfair because it forbids routine alternative pleading.

¶ 20 In *Munoz*, the State argued that the postconviction petitioner had failed to assert a valid free-standing claim of actual innocence because the petitioner had advanced claims of actual innocence and a *Brady* violation based on the same allegedly newly discovered evidence. *Munoz*, 406 Ill. App. 3d at 853. The *Munoz* court noted that in *Hobley*, our supreme court rejected a postconviction petitioner's claim that his actual innocence claim should survive based on the same evidence the *Hobley* court found supported the petitioner's postconviction *Brady* claim. *Id.* at 854 (citing *Hobley*, 182 Ill. 2d at 433-42). The *Munoz* court interpreted the *Hobley* court decision to be that the evidence at issue in *Hobley* did not support a free-standing actual innocence claim and was being used to supplement a constitutional claim, therefore the petitioner in that case was not entitled to an evidentiary hearing or a new trial on the actual innocence claim. *Id.* at 854. However, the *Munoz* court did not address the issue further. In *Lofton*, this court held that "there are instances in which a purported claim of actual innocence is, on its face, obviously not an actual innocence claim." *Lofton*, 2011 IL App (1st) 100118, ¶ 33. The *Lofton* court made that finding based on the earlier decision in *People v. English*, 403 Ill. App. 3d 121, 132 (2010), in which the court held that the petitioner's claim "though labeled as actual innocence, is nothing more than a reiteration of the same ineffective assistance of counsel claim raised in his original postconviction petition." *Id.*

¶ 21 We construe the ban on the dual use of evidence to sustain both a claim of a constitutional violation and a claim of actual innocence to actually prohibit a postconviction petitioner from arguing, in effect, that based on certain evidence a constitutional violation occurred at trial and *consequently* the petitioner is actually innocent. More importantly, we believe that the ban applies to prohibit the dual use of the same evidentiary fact for both claims rather than to prohibit arguing distinct claims and facts from a single source of evidence. See *People v. Washington*, 171 Ill. 2d 475, 479-80 (1996) (same testimony which supported claim of ineffective assistance formed basis of claim of actual innocence where the petitioner's cross-appeal of denial of relief on ineffective assistance claims was stricken under the fugitive dismissal doctrine.) In *Washington*, the claim of actual innocence was free standing because the testimony was no longer being used to supplement an assertion of a constitutional violation with respect to trial. *Id.*

¶ 22 In this case, unlike defendant's previous argument with regard to the result of the GSR test, in this appeal defendant is not arguing that the same evidentiary fact establishes both a *Brady* violation and his actual innocence. In this appeal, defendant argues that the State failed to disclose its agreement with Spivey in violation of its duties under *Brady*. Defendant also contends that Spivey recanted his identification of defendant; and because Spivey was the only eyewitness to testify, defendant is actually innocent. Defendant's arguments are based on distinct evidentiary facts with a single source: Spivey's affidavit.

¶ 23 Despite persistent overlap in the argument in defendant's brief on appeal between Spivey's alleged recantation and the alleged *Brady* violation, our reading of the proposed second successive postconviction petition is that the bases of the claim of actual innocence and

the constitutional violation are in fact distinct.[3] Under these circumstances, we do not believe that our supreme court's prohibition against using the same evidence to raise a claim of actual innocence and to supplement an assertion of a constitutional violation with respect to trial applies. Defendant is not actually relying on the same evidence; the evidence simply comes from a single source. Accordingly, we will address both defendant's claim of actual innocence and his allegation of a *Brady* violation.

¶ 24 Initially, we note that the trial court's finding that the issues raised in Spivey's second successive postconviction petition were *res judicata* to the first successive postconviction petition was erroneous. "[A] ruling on an initial postconviction petition has *res judicata* effect with respect to all claims that were raised or could have been raised on the initial petition. [Citation.] More broadly, any issues that have previously been decided by a reviewing court are barred by *res judicata*. [Citation.]" (Internal quotation marks and citations omitted.) *People v. Miller*, 2013 IL App (1st) 111147, ¶ 27. The previous proceedings did not address this claim of actual innocence or the alleged *Brady* violation with regard to a deal with Spivey to testify because we declined to consider Spivey's affidavit and defendant's claims based thereon. *People v. Franklin*, 2013 IL App (1st) 110505-U, ¶¶ 56, 64. Defendant attempted to raise the *Brady* violation at issue in this case for the first time in a "Further Supplementation of Motion to Reconsider." *Id.*, ¶ 39. We held that a postconviction petitioner cannot raise a new claim of a deprivation of his constitutional rights for the first time in a motion to reconsider rather

---

[3] The proposed second successive postconviction petition reads, in part: "The only eyewitness who identified [defendant] *** has recanted his identification ***. *** Thus, all this newly discovered evidence [referencing the Cephus affidavit and GSR test] demonstrates that [defendant] is innocent ***."

than in a successive petition. *Id.*, ¶ 61. We found that defendant "must raise new claims of a deprivation of his constitutional rights in a successive postconviction petition" (*Id.*, ¶ 85), and that was true of his claims based on Spivey's affidavit. Nonetheless, as previously stated our review in this case is *de novo* and we are not bound by the trial court's reasoning.

¶ 25 3. Defendant's Actual Innocence Claim

¶ 26 "The evidence supporting the claim of actual innocence must be (1) newly discovered; (2) material and not merely cumulative; and (3) of such conclusive character that it would probably change the result on retrial." *Adams*, 2013 IL 111081, ¶ 30. The court should deny leave to file a successive postconviction petition "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 11711, ¶ 24. That the evidence be of such conclusive character as would probably change the result on retrial is the most important element of a claim of actual innocence. *Washington*, 171 Ill. 2d at 489 (citing *People v. Silagay*, 116 Ill. 2d 357, 368 (1987)). Defendant argues that Spivey's affidavit is likely to change the result on retrial because the new evidence directly contradicts the State's trial evidence, exculpates defendant, and points to a different perpetrator.

¶ 27 We find that Spivey's affidavit recants only portions of his testimony and merely impeaches part of the evidence at trial, therefore it is insufficient to warrant postconviction relief. We reject defendant's argument that Spivey's affidavit is exculpatory because the record contains other evidence of defendant's guilt that is independent of any of Spivey's identification testimony. Defendant's argument that the State's evidence consisted only of

Spivey's identification and defendant's "proximity to the shooting immediately afterwards" unfairly diminishes the actual strength of the State's case. Moreover, Spivey's affidavit does not "directly contradict" all of the State's identification evidence against defendant.

¶ 28 Warren Johnson, a police officer, estimated that he was a block away from the scene when he heard the gunshots. He responded within 20 seconds of hearing the shots and was at the scene for 40 seconds before he went in search of suspects. The officer, accompanied by a witness to the shooting, drove one block north and one block east when he saw defendant and Dennis Hayes walking rapidly and looking over their shoulders. When Johnson motioned toward them, Hayes fled. The officer who arrested defendant testified that he applied handcuffs and defendant was in the face of the witness who accompanied the officer, defendant said "they pulled the gun first." Police officers down the street in the direction Hayes ran were able to arrest Hayes. The officer who apprehended Hayes testified that he saw Hayes running in the direction the other officer had announced by his radio. Police ordered Hayes to the ground, handcuffed him, and placed him in a police vehicle. The officer saw Hayes "fidgeting in the back of the squad car." Police took Hayes out of the car and found shell casings in the vehicle where Hayes had been sitting that matched shell casings recovered from the victim's vehicle. Police also testified that Spivey identified Hayes as having been with the shooter just prior to the shooting. Police attempted to stop defendant and Hayes walking together.

¶ 29 The evidence was not just that defendant was in proximity to the crime scene shortly after the shooting. The jury could reasonably construe defendant's rapidly walking away, especially when coupled with Hayes's reaction of running when approached by police, as

fleeing the crime scene. The evidence is sufficient to support finding that Hayes possessed the same type of ammunition the perpetrator fired and that he tried to discard that ammunition before police discovered it in his possession. Thus, the evidence is sufficient to permit the trier of fact to reasonably infer that Hayes was involved in the shooting, defendant and Hayes were fleeing together, and consequently, that defendant was involved in the shooting. The State adduced at least circumstantial evidence completely independent of Spivey's testimony of defendant's involvement in the crime.

¶ 30 As to defendant's being the actual shooter, defendant's statement to police that "they pulled the gun first" is inculpatory. First, given the temporal and physical proximity to the crime, the statement is inexplicable on its face if defendant was not in fact involved. Second, the trier of fact could reasonably infer the statement was meant as justification or excuse. The jury could reasonably infer that defendant was attempting to justify or excuse his act of committing the shooting at issue. Further, police testified that Spivey described the shooter as 18-20 years of age, 5 feet 2 inches tall, 140 pounds, and wearing a blue and white jacket. Defendant was 5 feet 4 inches tall and weighed 140 pounds. Defendant does not dispute that he was wearing a blue and white jacket on the night of the crime. Spivey averred that he identified the person in court who matched the picture the assistant state's attorney showed to Spivey, but that the person in the picture is not the person who shot him. Spivey's affidavit does not say that Spivey did not provide police with the description of the shooter testified to at trial. The affidavit states only that police told Spivey that an ambulance was coming for him and that he was taken to the hospital.

¶ 31 We find that the evidence in support of defendant's motion for leave in no way diminishes the evidence that Spivey described the shooter and that defendant matched that description. The fact that defendant matched the description of the shooter provided to police shortly after the crime occurred, coupled with his presence in close proximity to the crime with another individual identified as having been with the shooter, is also circumstantial evidence of defendant's guilt of the crime charged. In light of all of the evidence, Spivey's averment 16 years later, repeating the description he originally provided police (a description defendant matched) and adding as a single physical characteristic that the shooter also had acne, is not sufficient to "point to a different perpetrator" or to state a colorable claim of actual innocence.

¶ 32 Spivey identified defendant in court but now denies the person he identified is the person who shot him. Detective William Barron testified, without objection, that Spivey identified defendant as the person who shot him and Hayes, who was with the shooter, from a photographic array. Defendant argues that Spivey, in his affidavit, "specifically denies making *any* identification on the night of the shooting." (Emphasis added.) For that proposition defendant relies upon Spivey's statement in his affidavit that "I never saw any line-up and never pointed anyone out." We find, based on the evidence discussed above and of the photo array identification at the hospital, that the averment does not create a colorable claim of actual innocence.

¶ 33 Spivey's identification of defendant from a photographic array is sufficient in combination with the circumstantial evidence adduced at trial to sustain defendant's conviction. *People v. Williams*, 383 Ill. App. 3d 596, 636 (2008) ("Because [the witness] was

present at trial, testified under oath, and was available to be recalled as a witness after the testimony of Detective Smith for purposes of cross-examination, we find that the trial court did not err in admitting the photo array identification testimony pursuant to section 115–12 of the Code of Criminal Procedure (725 ILCS 5/115–12 (West 2000)). [Citation.]"). See also *People v. Bradley*, 70 Ill. App. 2d 281, 285-86 (1966) ("The record shows that [the witness] had ample opportunity, during the daytime, to observe the defendant's face and profile on two different occasions only minutes apart, and after describing him to the complainant's sister he was shown a photograph of a man whom he identified as one of the men who carried the television set out of the complainant's apartment. We conclude that this formed the basis for a positive identification by Mr. Patterson, which the trial court chose to believe despite the fact that it was contradicted by the testimony of the defendant.").

¶ 34 Even if we construed Spivey's averment broadly as a denial of any and all identifications of defendant as the shooter, rather than identification from a physical line up as the State suggests, Spivey's testimony could at best impeach the detective's testimony that Spivey did identify defendant while in the hospital.

> "Mere impeachment evidence will typically not be of such conclusive character as to justify postconviction relief. [Citation.] However, where newly discovered evidence is both exonerating and contradicts the State's evidence at trial, it is capable of producing a different outcome at trial." *People v. Harper*, 2013 IL App (1st) 102181, ¶ 49.

¶ 35 Spivey's affidavit, while it does contradict some of the State's evidence at trial, is not also exonerating because there is sufficient evidence apart from Spivey's identification to convict defendant. For that reason, Spivey's averment that he only testified because he did not want to go to jail is also insufficient to warrant a new trial based on defendant's claim of actual innocence. The evidence at trial was that the victim of the crime described the shooter, defendant matched the description, defendant was with another person identified as having been involved in the crime, both men were fleeing the area of the crime, police stopped defendant in close proximity to the crime, defendant made an inculpatory statement to police, and the individual defendant was with was in possession of incriminating material linking both men to the crime.

¶ 36 Before this court will grant leave to file a successive postconviction petition, the defendant must offer persuasive evidence supporting a claim of actual innocence. Such evidence must be "new reliable evidence--whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence--that was not present at trial." *People v. English*, 2014 IL App (1st) 102732-B, ¶ 45 (quoting *Edwards*, 2012 IL 111711, ¶ 32 (quoting *Schlup*, 513 U.S. at 324)). In *People v. Collier*, 387 Ill. App. 3d 630, 632 (2008), two witnesses at the defendant's trial recanted their trial testimony, one averring that he did not witness the murder and falsely identified and accused the defendant at trial and the second averring that she fabricated her testimony to match. This court held that those "affidavits measured against their trial testimony address considerations of credibility that go to reasonable doubt, not actual innocence." *Id.* at 637. " '[A]ctual innocence' is not within the rubric of whether a defendant has been proved guilty beyond a reasonable doubt. [Citation.]

Rather, the hallmark of 'actual innocence' means 'total vindication,' or 'exoneration.' [Citation.]" *Collier*, 387 Ill. App. 3d at 636.

¶ 37 Defendant in this case has not supported his motion with new reliable evidence that he is actually innocent. Compare *Munoz*, 406 Ill. App. 3d at 855 ("an eyewitness account of the shooting naming another man as the shooter does more than provide cumulative evidence to support [the] defendant's alibi.") As demonstrated by our discussion of the evidence, Spivey's affidavit does not exonerate defendant. As to Spivey's denial of any identification of defendant, Spivey's testimony would at best contradict his trial testimony and raise a credibility contest between Spivey and the police as to whether Spivey identified defendant from a photo array at the hospital. The documentation attached to the motion and proposed second successive postconviction petition is not of such conclusive character that it would probably change the result on retrial. In light of all the evidence, we find as a matter of law that Spivey's averments do not vindicate defendant. Therefore, we hold as a matter of law that defendant cannot set forth a colorable claim of actual innocence.

¶ 38 4. Defendant's Constitutional Claim

¶ 39 A successive petition is not considered filed and further proceedings will not follow until leave is granted, a determination dependent upon a defendant's satisfaction of the cause-and-prejudice test. *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 19.

> "Cause is an objective factor that impeded [the petitioner's] ability to raise a specific claim during his or her initial postconviction proceedings. [Citation.] In other words, cause may be shown by the petitioner pleading some objective factor

> external to the defense that impeded counsel or defendant from timely raising the claim in an earlier proceeding. [Citation.] Prejudice exists when the claim not raised during his or her initial postconviction proceedings so infected the trial that the resulting conviction or sentence violated due process. [Citation.]" (Internal quotation marks and citations omitted.) *People v. Miller*, 2013 IL App (1st) 111147, ¶ 26.

¶ 40 In this case, defendant argues that he has provided evidence to establish each prong of a *Brady* claim and, therefore, he has established caused and prejudice. In *Banks v. Dretke*, 540 U.S. 668, 691-92 (2004), the United States Supreme Court held as follows:

> "[T]he three components or essential elements of a *Brady* prosecutorial misconduct claim [are]: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued. [Citation.] [C]ause and prejudice in this case parallel two of the three components of the alleged *Brady* violation itself. [Citation.] Corresponding to the second *Brady* component (evidence suppressed by the State), a petitioner shows cause when the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence; coincident with the third *Brady* component

> (prejudice), prejudice within the compass of the cause and prejudice requirement exists when the suppressed evidence is material for *Brady* purposes." *Id.* at 691.

¶ 41 However, we hold that defendant has failed to establish a claim under *Brady* because the evidence at issue is not material for *Brady* purposes.

> "Unless suppressed evidence is material for *Brady* purposes, [its] suppression [does] not give rise to sufficient prejudice to overcome [a] procedural default. [Citation.] *** [T]he materiality standard for *Brady* claims is met when the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. [Citation.] In short, [the defendant] must show a reasonable probability of a different result. [Citation.]" (Internal quotation marks and citations omitted.) *Id.* at 698.

¶ 42 We hold as a matter of law that defendant cannot show a reasonable probability of a different result based on the allegedly suppressed evidence of an agreement between the State and Spivey to seek probation instead of imprisonment for Spivey's unrelated charge in exchange for his testimony against defendant. Defendant's argument that the evidence of the alleged agreement "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict" (*People v. Coleman*, 183 Ill. 2d 366, 393 (1998)) places the entire weight of the State's case on Spivey's testimony at trial. Defendant argues that given that Spivey was the only witness to identify him as the shooter and "no other evidence

linked [defendant] to the shooting," the ability to impeach Spivey with the alleged deal with the State would "unquestionably" place the case in such a different light as to undermine the outcome. We disagree.

¶ 43 To determine whether the impeachment evidence withheld here was sufficiently material to require reversal of defendant's conviction, we must evaluate whether, if disclosed and used effectively, the impeachment evidence may make the difference between conviction and acquittal. *People v. Gennardo*, 184 Ill. App. 3d 287, 311 (1989). We have already discussed that evidence other than Spivey's trial testimony that links defendant to the crime: defendant's fleeing the area of the crime with another individual in possession of physical evidence linking them to the shooting, defendant's inclulpatory statement to police, and defendant's matching the description of the shooter, none of which are contradicted by Spivey's affidavit. The State also adduced evidence that Spivey positively identified defendant from a photo array at the hospital. Spivey's affidavit does not allege that any coercion occurred or promises were made until after that identification took place.

¶ 44 Although Spivey's affidavit denies ever having identified defendant (inferentially, at any time), for purposes of defendant's *Brady* claim, the allegedly suppressed evidence--a deal with the State after the fact--would not cast Spivey's identification at the hospital or his physical description of the shooter in a different light that might result in acquittal. As to Spivey's description of the shooter, it is unlikely Spivey was motivated to lie about defendant's description while police were apprehending defendant fleeing the crime scene. See *Mataya v. Kingston*, 371 F.3d 353, 357 (7th Cir. 2004) (finding self-validating evidence from witness "decisive against the *Brady* claim" because "[t]here is no reasonable possibility that [the

witness] simply made up the facts that he recounted to the police and that his fabrication just happened to correspond to the truth."). We cannot say that the alleged impeachment evidence, if disclosed and used effectively, may make the difference between conviction and acquittal. Accordingly, we hold that defendant has failed to establish the elements of his *Brady* claim and the trial court properly denied defendant's motion to file the second successive postconviction petition.

¶ 45 CONCLUSION

¶ 46 For the foregoing reasons, the circuit court of Cook County's judgment is affirmed.

¶ 47 Affirmed.