2017 IL App (1st) 161116-U

No. 1-16-1116

Order filed October 19, 2017

Fourth Division

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 98 CR 2141501
	)	
CEDRIC GILMORE,	)	Honorable
	)	Maura Slattery Boyle,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justice McBride concurred in the judgment.
Justice Gordon dissented.

ORDER

¶ 1 *Held*: We affirm the circuit court's denial of defendant's motion for leave to file a successive postconviction petition over his contention that he raised a colorable claim of actual innocence based on newly discovered evidence.

¶ 2 Defendant Cedric Gilmore appeals the circuit court's denial of his motion for leave to file a successive petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq* (West 2010). On appeal, defendant contends that the circuit court erred in denying him leave to file his successive petition where he raised a colorable claim of actual innocence based

on newly discovered evidence as set forth in an affidavit attached to the petition. Defendant asserts that the information contained in the affidavit is material, noncumulative, and would likely change the result of his conviction on retrial.

¶ 3 I. BACKGROUND

¶ 4 A. Evidence at Trial

¶ 5 A full recitation of the facts can be found in this court's order on defendant's direct appeal. *People v. Gilmore*, No. 1-99-2301 (2001) (unpublished order under Supreme Court Rule 23) (modified order on denial of petition for rehearing). As relevant here, at trial, Sandra Nunn testified that on the night of July 19, 1998, she was at her home on South Aberdeen Street in Chicago, Illinois. Just before midnight, she saw her husband, Darryl Nunn, arguing in the street with a man named Leo. Later that night, she saw Darryl on the front porch of their home when defendant approached him. Sandra testified, over objection, that defendant was "one of those guys that hung out on the corner intimidating people." Sandra testified that she had known defendant from around the neighborhood for 9 or 10 years.

¶ 6 Darryl and defendant then got into a verbal argument. Sandra could not hear what defendant was saying, but she heard Darryl tell defendant that "[he] ha[d] nothing to do with it." Sandra then started walking back into the house when she heard gunshots coming from the front porch. When she returned to the front of the house, she saw Darryl open the front door and fall to the floor. Sandra saw defendant running away from the house and Darryl said "I can't believe he shot me." Sandra identified defendant in a line up the next day. Sandra also testified that Darryl owned a shotgun, but that it did not work and was stored in a case on the back porch.

¶ 7 Faye Mitchell testified that on the night of the incident, she saw Darryl arguing with another man on the front porch of the Nunns' home. Mitchell testified that after a brief argument,

Darryl put his hand on the front door to go into the house, but the other man shot him in the back. Darryl, who did not have a weapon, turned and fell forward. The other man then shot Darryl two more times. Mitchell saw the other man put the gun under his shirt and then run away.

¶ 8 Jaquita Strickland, defendant's niece, was in the house next door to the Nunns' home at the time of the shooting. She heard defendant's voice and then heard gunshots, but she could not see what had happened. Strickland testified that she spoke to police when they arrived on the scene and, approximately one hour after the incident, she received a phone call from defendant. Defendant asked her if the police had been there, and Strickland told her that the police were there and that Darryl "may not make it."

¶ 9 Chicago police detective Judy Castellanos testified that she was assigned to investigate Darryl's shooting. She testified that based on her interviews at the scene with Mitchell and Strickland, she determined that defendant, who lived nearby, was a suspect. She obtained a photograph of defendant and showed it to Sandra, who identified the person in the photograph as defendant. She also testified that she did not find any weapons at the scene. Chicago police officer James Shader also testified that although he found a fired bullet and bullet hole at the scene, he did not recover any weapons. Chicago police detective Edward Winstead testified that Mitchell and Sandra identified defendant as the person on the porch with Darryl before the shooting. A forensic pathologist with the Cook County Medical Examiner's office testified that Darryl died of multiple gunshot wounds, two of which were shots from back to front and one of which was a shot from front to back.

¶ 10 Charles Stolar, defendant's brother-in-law, testified that at the time of the shooting, he was at his mother-in-law's house working on his vehicle with his friend, Leo. He testified that

defendant and Charles' wife were on the front porch of the home. At approximately 11:30 p.m., Charles saw Darryl leave his house in his van and then return a few minutes later on foot. Charles testified that Darryl and Leo got into an argument over a debt. Darryl walked away, but returned a few minutes later carrying a shotgun and demanding payment from Leo. Darryl struck Leo with the shotgun several times. Charles testified that he and defendant diffused the situation, and Darryl walked away talking with defendant. Charles then went into his mother-in-law's house. Defendant's sister, Theresa Stolar, gave testimony substantially similar to Charles' testimony. Both Theresa and Charles acknowledged that they had spoken with defendant about their testimony since the shooting.

¶ 11 Defendant testified to a similar version of events as recounted by Charles, and added that when he arrived at Darryl's house with Darryl, he stood outside of the fence while Darryl went into the house. Darryl came back outside and asked defendant what he was doing there and then went to retrieve his shotgun from inside the house. Defendant testified that he shot Darryl after Darryl pointed the shotgun at him. Defendant testified that Darryl was "coming back again with the shotgun" and defendant fired at him until he dropped the shotgun. Defendant then fled the scene. Defendant acknowledged that he later called Strickland, but denied asking her about police or Darryl. Defendant acknowledged that he did not call police or ambulance.

¶ 12 The jury found defendant guilty of first-degree murder and the trial court sentenced defendant to a term of 35 years' imprisonment. This court affirmed defendant's conviction and sentence on direct appeal over his contentions that the court erred in admitting evidence of his gang affiliation where such evidence was not relevant, that he was denied due process where the court failed to give a limiting instruction regarding the gang testimony, and that he was denied

the effective assistance of counsel where his counsel failed to request a limiting instruction for the other crimes evidence. *People v. Gilmore*, No. 1-99-2301 (2001).

¶ 13 B. Defendant's Initial Postconviction Petition

¶ 14 Defendant filed his initial postconviction petition on September 18, 2001, and subsequently amended the petition several times. In his third-amended postconviction petition, defendant contended that he was actually innocent of the offense in that he shot Darryl in self-defense. Defendant attached the affidavit of Mike Jones who averred that he overheard an argument between Darryl and Leo. He then saw Darryl go into his house, retrieve a shotgun, and then confront Leo. Defendant attempted to intervene, but Darryl "was not having any of it, and pull[ed] his shotgun, and then went back into his house." Defendant followed Darryl and Darryl pointed the shotgun at defendant. Jones heard the shotgun misfire and then defendant took out his pistol and shot at Darryl. Jones then ran away and later learned that Darryl was dead and that police were looking for defendant. The court subsequently granted defendant's motion to withdraw his initial postconviction petition on June 9, 2014.[1]

¶ 15 C. Defendant's Successive Postconviction Petition

¶ 16 On August 31, 2015, defendant filed the motion for leave to file a successive postconviction petition at bar. In his petition, defendant raised a claim of actual innocence based on newly discovered evidence. Defendant attached to his petition an affidavit from Odell

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[1] Defendant asserts that his third-amended postconviction petition was "originally set for an evidentiary hearing, but was eventually denied without an evidentiary hearing." The record shows, however, that the court entered an order on June 11, 2014 in which defendant's motion for successive postconviction relief and his third amended postconviction petition were stricken from the court call and the "[l]eave to withdraw [was] granted." Defendant's initial motion for leave to file a successive postconviction petition filed on July 23, 2013, provides that the assistant state's attorney suggested that defendant should withdraw his initial postconviction petition and file a new petition based on actual innocence.

Johnson. In his affidavit, Johnson averred that on the date of the incident, he saw defendant talking to Darryl and another man. He saw defendant and Darryl argue and then saw Darryl run across the street and return later with a shotgun. Darryl pointed the shotgun at defendant who took a gun out of his waistband and shot Darryl. Johnson further averred that about a week before the incident, Darryl threatened him with the same shotgun. Johnson averred that Darryl used to walk around the neighborhood threatening people with guns and baseball bats. Johnson averred that he did not come forward with this information earlier, except for the affidavit he executed on defendant's behalf in 2009, because he was afraid of Darryl's brother, John Nunn, who is head of the vice lords.[2]

¶ 17 Defendant contended that Johnson's proposed testimony constituted newly discovered evidence of his actual innocence. He asserted that the testimony would corroborate his own testimony at trial that Darryl threatened him with a shotgun and that he shot Darryl in self-defense. Defendant further contended that Johnson provided new testimony regarding Darryl threatening Johnson and other people around the neighborhood, which was probative on the issue of whether Darryl was the initial aggressor. Defendant asserted that Johnson's testimony would also refute Sandra's testimony that Darryl owned only one shotgun, which was inoperable and stored in a case on the back porch.

¶ 18 In ruling on defendant's petition, the court found that Johnson's evidence was "newly discovered" because Johnson averred that he would not have provided testimony that he witnessed the incident between defendant and Darryl because he was afraid of Darryl's brother. The court also found that Johnson's affidavit was material because it provided a witness account of the shooting that contradicted the version of events provided by Sandra. The court found,

[2] We note that Johnson's 2009 affidavit is not included in the record filed on appeal.

however, that Johnson's affidavit was cumulative of the evidence already presented at trial because the account he recounted was the same series of events that defendant provided in his testimony. Accordingly, the court found that the information provided in Johnson's affidavit was unlikely to change the result on retrial and that defendant failed to set forth a colorable claim of actual innocence. The court also found that defendant failed to satisfy the cause and prejudice test where he did not demonstrate that he was not aware of Johnson's account at the time he filed his initial postconviction petition in 2001. This appeal follows.

¶ 19 II. ANALYSIS

¶ 20 On appeal, defendant contends that the court erred in denying him leave to file a successive postconviction petition where his petition presented a colorable claim of actual innocence based on newly discovered evidence. Defendant asserts that Johnson's affidavit was not cumulative of the evidence presented at trial because Johnson was an independent, unbiased witness who corroborated defendant's own account of the events. Defendant also contends that Johnson's affidavit is likely to change the result on retrial where the affidavit contains newly discovered evidence about Darryl's violent character.

¶ 21 The Act provides a mechanism by which a criminal defendant may assert that his conviction was the result of a substantial denial of his constitutional rights. 725 ILCS 5/122-1 (West 2010); *People v. Delton*, 227 Ill. 2d 247, 253 (2008). Generally, the Act contemplates the filing of only one postconviction petition (*People v. Ortiz*, 235 Ill. 2d 319, 328 (2009)), and provides that any claim of a substantial denial of constitutional rights not raised in the original or amended petition is waived (725 ILCS 5/122-3 (West 2010)). However, the bar against successive petitions may be relaxed where defendant can establish cause and prejudice for his failure to raise the claim earlier (*People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002)), or actual

innocence (*Ortiz*, 235 Ill. 2d at 329). At this stage of proceedings, all well-pleaded factual allegations and supporting affidavits are taken as true unless they are positively rebutted by the record of the original trial proceedings. *Pitsonbarger*, 205 Ill. 2d at 467.

¶ 22 It is unclear whether we review the circuit court's ruling on a motion for leave to file a successive postconviction petition *de novo* or for abuse of discretion. *People v. Edwards*, 2012 IL 111711, ¶ 30. In *Edwards*, the supreme court pointed out that decisions granting or denying leave of court are generally reviewed for abuse of the discretion. *Id.* The court recognized, however, that where a successive petition is based on a claim of actual innocence, the claim must be colorable, as a matter of law, which suggests *de novo* review. *Id.* The *Edwards* court did not resolve the issue, however, finding that defendant's claim failed under either standard of review. *Id.* Here, we also find that defendant's supporting documentation is insufficient to justify further proceedings and that his claim would fail under either standard.

¶ 23 Where defendant asserts a claim of actual innocence based on newly discovered evidence, the court should deny leave to file the successive petition only where it is clear, from a review of the successive petition and the supporting documentation, that petitioner cannot set forth a colorable claim of actual innocence as a matter of law. *Edwards*, 2012 IL 111711, ¶ 24. In order to succeed on a claim of actual innocence, the petitioner must "present new, material, noncumulative evidence that is so conclusive it would probably change the result on retrial." *People v. Coleman*, 2013 IL 113307, ¶ 96 (citing *People v. Washington*, 171 Ill. 2d 475, 489 (1996)). New evidence is evidence that was discovered after the trial and could not have been discovered earlier through the exercise of due diligence. *Coleman*, 2013 IL 113307, ¶ 96 (citing *People v. Burrows*, 172 Ill. 2d 169, 180 (1996)). Material evidence is evidence that is relevant

and probative of the petitioner's innocence and noncumulative means the evidence adds to what the jury heard. *Coleman*, 2013 IL 113307, ¶ 96.

¶ 24 We first address whether the evidence presented by defendant in this case was "newly discovered." The circuit court found that Johnson's affidavit was newly discovered evidence because Johnson averred that he would not have provided testimony that he witnessed the incident between defendant and Darryl because he was afraid of Darryl's brother. We disagree with circuit court's assessment of this evidence. This court has recognized that:

> " 'Usually, to qualify as new evidence, it is the *facts* comprising that evidence which must be new and undiscovered as of trial, in spite of the exercise of due diligence. 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.' " (Emphases supplied.) *People v. Montes*, 2015 IL App (2d) 140485, ¶ 24 (quoting *People v. Barnslater*, 373 Ill. App. 3d 512, 523 (2007)).

In other words, if a defendant knew of certain facts at or prior to trial, those facts are not transformed into "newly discovered evidence" merely because the source of the facts may have been unknown, unavailable, or uncooperative. *People v. Jarrett*, 399 Ill. App. 3d 715, 724 (2010).

¶ 25 Here, Johnson's proposed testimony was substantially similar to the testimony defendant presented at trial through his own testimony and the testimony of Charles and Theresa Stolar. Defendant's defense at trial was that Darryl pointed a shotgun at him before defendant shot him. The proposed testimony of Johnson was that Darryl was the initial aggressor and pointed a shotgun at defendant before defendant shot him. Thus, these facts were known to defendant prior to trial and the information in Johnson's affidavit is not "transformed" into newly discovered

evidence simply because defendant was not aware that Johnson was a potential witness or because Johnson may have been uncooperative. See *Jarrett*, 399 Ill. App. 3d at 724. Moreover, we cannot say that the evidence concerning Darryl's "violent character" was newly discovered evidence where defendant failed to establish that such evidence could not be obtained despite the exercise of due diligence. Although Johnson averred that he did not come forward with this evidence earlier because he was afraid of Darryl's brother, defendant failed to demonstrate that he learned about Darryl's "violent character" only after the trial or after withdrawing his initial postconviction petition. In fact, Johnson stated in his affidavit that he provided defendant with an affidavit in 2009, which was during the pendency of defendant's initial postconviction petition. Although that affidavit is not included in the record filed on appeal, it is clear that defendant knew that Johnson was a potential witness to the incident and was willing to provide an affidavit while defendant's initial postconviction petition was pending and well before defendant filed his motion for leave to file a successive postconviction petition. Thus, we cannot say that the information contained in Johnson's affidavit constituted "newly discovered" evidence. That said, even assuming the evidence was newly discovered, as the circuit court found, we agree with the circuit court that the information in the affidavit was largely cumulative and unlikely to change the result on retrial.

¶ 26 The account provided by Johnson was substantially similar to the version of events presented by defendant. Thus, the jury already heard this evidence, and, nonetheless, found defendant guilty of the offense beyond a reasonable doubt. Although Johnson's account presents a version of events that is different from that recounted by Sandra and Mitchell, "[w]e are mindful that a new trial will not be granted based on evidence that only discredits or impeaches a witness." *People v. Waters*, 328 Ill. App. 3d 117, 128 (2002); see also *People v. House*, 2015 IL

App (1st) 110580, ¶ 46. Sandra and Mitchell testified that Darryl was unarmed at the time of the shooting. This evidence was corroborated by Detective Castellanos and Officer Shader who testified that they did not recover a weapon at the scene. Accordingly, we cannot say that the information provided in Johnson's affidavit was noncumulative or that it was so conclusive as to likely change the result on retrial.

¶ 27 Defendant contends, however, that Johnson's proposed testimony about Darryl's violent nature supports his contention that Darryl was the initial aggressor. Defendant asserts that Johnson's account that Darryl threatened him with a shotgun a week before the incident and regularly terrorized the neighborhood supported defendant's contention that he acted in self-defense. Defendant contends that this evidence was "extremely probative." Defendant misunderstands the relevant standard.

¶ 28 "Actual innocence" does not involve an analysis of whether a petitioner had been proved guilty beyond a reasonable doubt. *People v. Savory*, 309 Ill. App. 3d 408, 414 (1999) (citing *Washington*, 171 Ill. 2d at 479). The evidence in support of a claim of actual innocence "must do more than merely call into question the sufficiency of the evidence adduced at trial." *People v. Smith*, 2015 IL App (1st) 140494, ¶ 18 (citing *Coleman*, 2013 IL 113307, ¶ 97). Rather, actual innocence is a claim of total vindication or exoneration. *Barnslater*, 373 Ill. App. 3d at 520; *House*, 2015 IL App (1st) 110580, ¶¶ 41, 46. " 'A prototypical example of 'actual innocence' in a colloquial sense is the case where the State has convicted the wrong person of the crime.' " *Savory*, 309 Ill. App. 3d at 414 (quoting *Sawyer v. Whitley*, 505 U.S. 333, 340-41 (1992)). Here, the evidence of Darryl's violent character would not exonerate or totally vindicate defendant of the charged offense. At best, Johnson's affidavit would support a claim that there was a

reasonable doubt as to defendant's guilt of the offense. This, however, is insufficient to raise a colorable claim of actual innocence.

¶ 29 We further find defendant's reliance on *People v. Molstad*, 101 Ill. 2d 128 (1984) misplaced. In *Molstad*, defendant Jeffery Molstad was tried with five codefendants and convicted of aggravated battery. *Id.* at 130. Molstad testified that he was not present during the attack and his parents corroborated his testimony. *Id.* at 132. None of the codefendants, who were also convicted of the offense, testified at trial. *Id.* Molstad's counsel filed a posttrial motion to reopen the case, or, in the alternative, for a new trial, and provided affidavits from the five codefendants. *Id.* Each of the codefendants averred that Molstad was not present at the time of the attack. *Id.* Molstad contended that the evidence in the affidavits represented newly discovered evidence that was not available at the time of trial because the testimony would have violated the codefendant's fifth amendment right to avoid self-incrimination. *Id.* at 132-33.

¶ 30 On appeal, the supreme court found that the evidence presented in the affidavits was newly discovered because "no amount of diligence could have forced the codefendants to violate their fifth amendment right to avoid self-incrimination." *Id.* at 135. The court further found that the evidence was not cumulative because the testimony of the codefendants concerned an ultimate issue of the case: who was present at the time of the attack. *Id.* The court observed that "Although Molstad offered alibi testimony at trial, the introduction of five affidavits at the post-trial stage raises additional questions concerning the trial court's verdict." *Id.*

¶ 31 The court also observed that the introduction of the new testimony would have been likely to produce a different result on retrial. *Id.* The court noted that the trial court would be charged with balancing the State's evidence at trial against Molstad's own denial of his involvement, the testimony of his parents that he was with them at the time of the incident, and

the testimony of the five codefendants who averred that Molstad was not present during the attack. *Id.* at 135-36.

¶ 32 We find *Molstad* distinguishable from the case at bar where the evidence in *Molstad* was newly discovered, noncumulative, material, and supported a claim for exoneration or total vindication. As discussed, *supra*, despite the circuit court's determination that Johnson's affidavit constituted newly discovered evidence, the evidence presented in this case was not newly discovered. In *Molstad*, the evidence provided by the codefendants was newly discovered evidence because the codefendants could not be forced to violate their fifth amendment rights and testify at Molstad's trial. Here, on the other hand, defendant failed to demonstrate that he could not have obtained the evidence contained in Johnson's affidavit earlier through due diligence. Moreover, defendant knew about the contents of Johnson's affidavit as evidenced by his testimony of the same series of events and his mere unawareness of Johnson's account did not transform Johnson's proposed testimony into newly discovered evidence. *Jarrett*, 399 Ill. App. 3d at 724. The introduction of Johnson's proposed would not raise additional questions about the jury's verdict.

¶ 33 The only arguably newly discovered portion of Johnson's affidavit, *i.e.*, the information regarding Darryl's "violent character" did not go to an "ultimate issue of the case." Johnson did not aver that defendant was not at the scene of the incident, as in *Molstad*, or otherwise provide evidence of vindication or exoneration as required to state colorable claim of actual innocence. In short, the evidence provided by the codefendants in *Molstad* was so conclusive that it would probably change the result on retrial. Here, as discussed, Johnson's affidavit failed to satisfy this standard.

¶ 34 Accordingly, we find that the circuit court did not err in denying defendant leave to file his successive petition because he is unable to establish "the most important element of an actual innocence claim": that the evidence in the petition is "so conclusive that it is more likely than not that no reasonable juror would find him guilty beyond a reasonable doubt." *People v. Sanders*, 2016 IL 118123, ¶ 47; *Washington*, 171 Ill. 2d at 489. Defendant cannot satisfy this element where Johnson's affidavit presents only cumulative evidence, which is not newly discovered, and does not support a claim of total vindication or exoneration.

¶ 35 III. CONCLUSION

¶ 36 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 37 Affirmed.

¶ 38 JUSTICE GORDON, dissenting.

¶ 39 In the case at bar, defendant filed a *pro se* postconviction petition on September 18, 2001, and then moved to withdraw it, which the trial court granted on May 31, 2013. On October 22, 2015, defendant filed a motion for leave to file a successive petition, which the trial court denied on February 24, 2016. In its opinion, the majority affirms the trial court's denial of leave to file a successive petition. For the reasons discussed below, I must respectfully dissent.

¶ 40 As the majority observes, a full recitation of the facts can be found in this court's order on defendant's direct appeal. *People v. Gilmore*, No. 1-99-2301 (2001) (unpublished order under Supreme Court Rule 23) (modified on denial of petition for rehearing). In addition, the majority provides a summary of the facts, as well as a description of the relevant statutory and case law. As a result, I find no need to offer a third recitation of the facts, and I provide here only the facts as needed to explain my dissent and the law as needed to explain where the majority and I differ.

¶ 41 First, as a procedural matter, since the trial court granted defendant's motion to withdraw his earlier petition and since there was no court determination on the merits of that petition, there is a real issue as to whether the petition in front of us should even be considered a successive petition. However, that issue was not briefed by the parties, so I will not address it. *People v. Givens*, 237 Ill. 2d 311, 323 (2010).

¶ 42 Second, I respectfully disagree with the majority's legal analysis which concludes that, in a claim of actual innocence such as the one before us, it is the facts that must be newly discovered, not the evidence.

¶ 43 In *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009), our supreme court found that evidence in support of an actual innocence claim must be: (1) newly discovered; (2) material and not cumulative; and (3) of such a conclusive character that it would probably change the result on retrial. I authored the appellate opinion that the Illinois Supreme Court affirmed with the same findings. *People v. Ortiz*, 385 Ill. App. 3d 1 (2008), *aff'd*, 235 Ill. 2d at 322.

¶ 44 In the case at bar, the majority quotes an appellate court case that, in turn, quotes a pre-*Ortiz* appellate court case, to find that it is the facts, rather than the evidence, that must be newly discovered. *Supra* ¶ 24 (quoting *People v. Montes*, 2015 IL App (2d) 140485, ¶ 24, quoting *People v. Barnslater*, 373 Ill. App. 3d 512, 523 (2007)). The Illinois Supreme Court decided this issue in *Ortiz*, and the appellate court has been instructed on that issue, and it would be error to turn the clock back to the time before *Ortiz* existed.

¶ 45 The majority finds that, to qualify as new evidence, it is the facts that must be new and undiscovered at the time of trial and that, generally, evidence is not newly discovered when it presents facts already known to the defendant at or prior to trial, although the source of those facts may have been unknown, unavailable, or uncooperative. *Supra* ¶ 24. This finding

contradicts *Ortiz*, which found that the testimony of a witness was newly discovered where the witness had "essentially made herself *unavailable*." (Emphasis added.) *Ortiz*, 235 Ill. 2d at 334; *People v. Knight*, 405 Ill. App. 3d 461, 467-68 (2010). Similarly, in *People v. Edwards*, 2012 IL 111711, ¶ 32, our supreme court reiterated that "the evidence in support of the claim must be 'newly discovered.' " *Ortiz* and *Edwards* are supreme court cases, while the cases cited by the majority for this point are appellate court cases that are contrary to the instruction provided to us by our supreme court.

¶ 46 By holding that evidence of facts already known to defendant cannot be newly discovered, the majority finds, in essence, that it is the fact that must be newly discovered rather than the evidence. Taken to its natural conclusion, this holding would always bar an innocent defendant from filing an actual innocence claim. Since a truly innocent defendant is always aware of the fact of his innocence, this fact can never be newly discovered. While the fact of his innocence is always known to an innocent defendant, *Ortiz* affords him the ability to present newly discovered evidence of this fact and prove his innocence.

¶ 47 Thus, I cannot concur with the majority's conclusion that because the newly discovered witness' proposed testimony "substantially" corroborates defendant's testimony at trial, it is not newly discovered. *Supra* ¶ 25. The trial court concluded that the proposed testimony was newly discovered because the new witness averred in an affidavit that he would not have provided testimony at trial that he witnessed the incident between defendant and the victim because he feared the victim's brother. Johnson explained that, a week prior to the shooting, the victim had threatened Johnson with the same shotgun that he later pointed at defendant. Johnson averred that the victim and his brother had terrorized the neighborhood and "used to walk in the neighborhood, threatening people with guns and a baseball bat." Johnson averred that he would

not have provided this information to defendant or his attorney at the time of trial because he was afraid of the victim's brother who was “a head of the Vice Lords.” Whether we are reviewing *de novo* or only for an abuse of discretion (*supra* ¶ 22), I can find no reason to disturb the trial court’s ruling on this point.

¶ 48 Third, as to the merits of the rest of the trial court's decision, the trial court was persuaded that the evidence was newly discovered and material, but found that it was unlikely to change the result on retrial because it was cumulative of other evidence already presented at trial. I must respectfully disagree with the last part of this conclusion. The trial court found that Johnson's proposed testimony that the victim “pointed a shotgun at [defendant] places nothing new before the jury.” I cannot agree. Johnson’s affidavit is not cumulative where Johnson is one of only two eyewitnesses to the shooting, and his proposed testimony completely contradicts the testimony of the other eyewitness. The State makes no argument that Johnson is biased as a witness or that his view was blocked or obstructed. Thus, his affidavit presents an independent and potentially unbiased witness who corroborates defendant's own account of the events.

¶ 49 As a result, I would grant defendant leave to file his petition. I note that, if filed, this will be the first time in this case that a petition filed by defendant will embark on the three-stage process envisioned by the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010)). Therefore, I must respectfully dissent.