SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
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January 29, 2025

In re: People State of Illinois, respondent, v. Leivante Adams, petitioner.
Leave to appeal, Appellate Court, First District.
131296

The Supreme Court today DENIED the Petition for Leave to Appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on 03/05/2025.

Very truly yours,

Cynthia A. Grant

Clerk of the Supreme Court

2024 IL App (1st) 230048-U

No. 1-23-0048

Order filed September 25, 2024

Third Division

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. 03 CR 13790
	)	
LEIVANTE ADAMS,	)	Honorable
	)	Stanley Sacks,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE LAMPKIN delivered the judgment of the court.
Justices Martin and D.B. Walker concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the trial court denying leave for defendant to file a successive petition for postconviction relief is affirmed.

¶ 2 Defendant Leivante Adams was convicted in 2004 of first degree murder and sentenced to a 45-year term of imprisonment. His conviction was affirmed on direct appeal, and he has since filed numerous pleadings pursuant to the Post-Conviction Hearing Act (the Act), 725 ILCS 5/122-1 *et seq.* (West 2018). Each of those efforts was unsuccessful in obtaining defendant a new trial.

On December 16, 2019, defendant filed a motion for leave to file a successive postconviction petition based on a claim that he was innocent of the crime. On December 2, 2022, the trial court denied defendant leave to file his successive petition. Defendant now appeals, arguing that he made a sufficient showing to be granted leave to file his successive petition.

¶ 3 For the reasons that follow, we affirm the judgment of the trial court.[1]

¶ 4 I. BACKGROUND

¶ 5 A. Trial and Direct Appeal

¶ 6 On July 1, 2003, the State charged defendant with the first degree murder of Raama Baker, alleging that he beat and killed Baker with a baseball bat. On December 18, 2006, this Court affirmed defendant's conviction and we summarize the pertinent trial evidence from that order. Larry Lewis and his girlfriend, Baker, went to the His and Hers Lounge every Thursday. On March 20, 2003, Lewis was at the lounge with Baker when he heard that Baker and defendant were outside fighting. Lewis went outside and saw defendant punching Baker in the face. Baker sustained injuries to her face.

¶ 7 On May 15, 2003, Terrence Whisby, defendant's brother, was at home with his girlfriend, Kim Washington, and his brother, Anthony Oliver. Defendant and the mother of his son, Toni Washington, were visiting. Around 11:30 p.m., Terrence heard arguing and found defendant and Baker outside, yelling at each other. A fight ensued and defendant repeatedly hit Baker with a stick he was holding. By the time Terrence pulled defendant away from Baker, she was lying on the ground motionless. Terrence acknowledged making multiple different statements to law

[1]In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

enforcement on May 19, 2003. In his final statement to officers and his grand jury testimony, he stated defendant hit Baker with a bat rather than a stick. He also claimed that unspecified officers threatened him and refused to let him leave the station until he provided a signed statement. They also told him that they would "plant something" on him or charge him with Baker's murder if he did not tell them what he knew. It was at that point that Terrence told police that defendant had killed Baker. Terrence also testified that, during his grand jury testimony, he said no promises or threats were made to get him to make a written statement about the murder.

¶ 8 Anthony testified at trial that on May 15, 2003, defendant left the house at 11 p.m., and returned saying that Baker "shouldn't be walking down the block." Anthony called the police, informing them that there had been a fight in the alley. He testified that he spoke to defendant the following day, but he could not recall the content of the conversation. However, during his grand jury testimony, he testified that defendant told him that "he snapped and starting hitting [Baker] with the bat" because he warned her not to walk down his street and because she called him a "bitch" and said she would walk wherever she wanted. During his grand jury testimony, he also testified that on May 15, 2003, he saw Baker lying on the ground and then saw defendant leave the scene in a car.

¶ 9 Kim testified that she saw Baker walking down the street and heard defendant give Baker a "warning" before following her with a bat in his hands. Kim went inside and heard a thump. When she went back outside, she saw Baker lying on the ground and defendant standing over her. Kim also testified that unspecified detectives told her that if she did not cooperate with them, they would charge Terrence and he would get "years." She later signed a statement that detectives provided to her in an effort to help Terrence. However, in her grand jury testimony, Kim testified

that she watched defendant grab a bat from inside the house and saw defendant hit Baker two or three times with the bat and that no one made any threats or promises to her to compel her testimony.

¶ 10 Barbara Oliver, defendant's mother, testified that around 11 p.m. on May 15, 2003, defendant entered her room and told her that Baker was on their block and that she was going to try to have him arrested. Barbara testified that she told defendant to leave the house, and that defendant got in his car and drove away. However, her grand jury testimony maintained that defendant was in his car, quickly entered the house, and then left again. Shortly after, she heard noises that sounded like someone being hit with a bat. She walked down the street and saw Baker lying on the ground. Defendant drove away but called his mother later that night to apologize. She also testified that Detective Robert Lenihan told her the only way they would release Terrence was if she came to the police station.

¶ 11 Toni testified that she and defendant were in defendant's car talking. When they saw Baker, defendant exited the car and talked to Baker in front of the house before walking down the street with her. After that, defendant drove away in his car and Toni drove home in her own car. When she returned to defendant's house, Terrence gave her defendant's gym bag, which contained a black garbage bag. Toni threw it away without looking inside it. However, Toni was impeached with her grand jury testimony in which she said that defendant and Baker argued before she saw defendant hit Baker with a bat six or seven times.

¶ 12 Toni testified that Lenihan threatened her when she was first interviewed and told her that if she did not cooperate, she would never see her son again. According to her, Lenihan gave her a

statement to read that was given by someone else, which she said was not correct. But Lenihan kept insisting that she cooperate and she finally assented.

¶ 13 During her grand jury testimony, Toni stated she saw defendant and Baker arguing, and that she saw defendant hit Baker with a bat six or seven times. Afterward, Terrence retrieved the bat, washed it off, and gave it to Toni, who threw it away. During her grand jury testimony, Toni stated no threats or promises had been made to her. But at trial, she testified that officers promised not to charge her and that she could see her son again if she cooperated. Toni's own attorney testified at trial that he accompanied her to her grand jury testimony, that no one from the State threatened Toni or mistreated her, and that he reached an arrangement with the State that Toni would not be charged with hiding the murder weapon if she told the truth.

¶ 14 Defendant testified that he and Baker previously had sexual relations, but denied ever being in a relationship with her or having a child with her. He admitted that the two of them got in a fight on March 20, 2003, and hit each other. However, he denied killing Baker or hitting her with a bat on May 15, 2003. He testified that he and Baker talked while walking down the street and, when they reached a vacant lot, he turned around and went home.

¶ 15 The jury found defendant guilty of first degree murder, and the trial court subsequently sentenced defendant to a prison term of 45 years. On December 18, 2006, this court affirmed defendant's conviction.

¶ 16 B. Previous Postconviction Proceedings

¶ 17 On June 5, 2007, defendant filed a petition for postconviction relief alleging ineffective assistance of trial counsel for failing to introduce evidence that defendant was provoked and argue for second-degree murder and for failing to seek dismissal based on a violation of defendant's

speedy trial right. That petition was summarily dismissed on July 8, 2007. While that petition was pending, on June 28, 2007, defendant filed a supplement which alleged that he was subject to prosecutorial misconduct, the trial court abused its discretion in making certain evidentiary rulings, and that he was denied the effective assistance of trial and appellate counsel. The trial court treated defendant's filing as a supplemental filing, rather than a successive petition, and summarily dismissed it in a written order on August 13, 2007.

¶ 18 On January 20, 2010, defendant filed a petition for relief from judgment pursuant to 735 ILCS 5/2-1401 (West 2008). The trial court summarily dismissed that petition on March 10, 2010. This court affirmed that dismissal, but corrected defendant's mittimus to reflect 31 additional days that defendant spent in custody. *People v. Adams*, 2011 IL App (1st) 101034-U.

¶ 19 On February 7, 2011, defendant filed a motion for leave to file a successive postconviction petition, which alleged his actual innocence on the basis of three eyewitnesses, Bridgette Rush, Muhammad Williams, and Tijatta Williams, who all averred that they witnessed Baker's murder and that defendant was not the perpetrator. The trial court denied defendant leave to file his successive petition on March 18, 2011, and defendant appealed. While that appeal was pending, defendant continued to file additional postconviction pleadings.

¶ 20 On November 4, 2011, defendant filed another motion for leave to file a successive petition. That motion alleged defendant's actual innocence and that the State violated defendant's due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose forensic testing results from defendant's car. He also alleged that trial counsel was ineffective for failing to obtain these test results. Defendant attached the results of a Freedom of Information Act (FOIA) request sent to the Illinois State Police which stated that no records of forensic testing were located.

He also attached the affidavit of Daniyel Baker who averred knowledge that defendant's car was towed by Chicago police after the murder for the purpose of performing forensic testing. On December 9, 2011, the trial court denied defendant's motion for leave to file a successive petition, and we affirmed after giving appellate counsel leave to withdraw. *People v. Adams*, 2013 IL App (1st) 120213-U.

¶ 21 On May 3, 2012, defendant filed yet another motion for leave to file a successive petition for postconviction relief. That petition alleged that the State violated defendant's due process rights under *Brady* by failing to disclose forensic lab reports for a number of items including, but not limited to, a purse, a phone belt clip, a set of keys, a jacket, and swabs of stains taken at the scene of the murder. Defendant claimed he obtained the reports via a FOIA request and that the suppressed evidence undermined confidence in the outcome of his trial. Defendant also claimed that the State committed prosecutorial misconduct and that he received ineffective assistance of trial counsel for failing to uncover the allegedly suppressed forensic reports and obtain expert assistance in analyzing the items in question. On June 14, 2012, defendant filed a supplement to his motion for leave to file, claiming that forensic testing of the interior of defendant's Lexus yielded no evidence of blood, further pointing to his innocence. He also claimed that the State violated his due process rights by failing to disclose this information and that trial counsel provided ineffective assistance for failing to uncover the forensic testing of defendant's car. The trial court denied defendant leave to file on June 22, 2012, and defendant appealed. This court allowed appellate counsel leave to withdraw and affirmed the judgment of the trial court on August 22, 2014. *People v. Adams*, 2014 IL App (1st) 122315-U.

¶ 22 On August 23, 2013, this court reversed the denial of leave to file the successive petition regarding the affidavits of the three eyewitnesses who claimed defendant was not the perpetrator and remanded for further proceedings. *People v. Adams*, 2013 IL App (1st) 111081, ¶ 1. That petition proceeded to a third-stage evidentiary hearing in May 2016. On November 10, 2016, the trial court denied defendant's petition for postconviction relief, and found that the testimony of Bridgette Rush, Muhammad Williams, and Tijatta Williams was not credible or believable. *People v. Adams*, 2019 IL App (1st) 163168-U, ¶ 44. On August 16, 2019, we affirmed the trial court's judgment. *Id.* ¶ 59. Defendant petitioned the Illinois supreme court for leave to appeal, which was denied on November 26, 2019. *People v. Adams*, 135 N. E. 3d 574 (Table).

¶ 23 While that petition for leave to appeal was pending, defendant filed another motion for leave to file a successive petition for postconviction relief on October 1, 2019. Defendant alleged that his arrest was unconstitutional because it was based on an investigative alert. On July 23, 2020, the trial court denied defendant's motion. On November 4, 2021, this court allowed appellate counsel leave to withdraw and affirmed the judgment of the trial court in a summary order.

¶ 24 C. Instant Successive Postconviction Proceedings

¶ 25 On December 16, 2019, defendant filed a document styled as a "supplemental successive postconviction petition." In it, defendant sought leave to file a successive petition alleging his actual innocence. Defendant claimed that newly discovered evidence showed that Detectives Lenihan, Robert Bartik, and Dolores Myles had "employed fabrication, coercion, threats, and intimidation" in other cases, which supported the claims of the State's witnesses that they had been coerced into identifying defendant as the perpetrator. Defendant's motion contained specific

allegations about Lenihan's conduct, but made no specific allegations about the conduct of Bartik or Myles.

¶ 26 On January 18, 2022, after retaining counsel, defendant filed a supplement to his motion for leave to file a successive petition. Like defendant's *pro se* motion, the supplement made no specific allegations about the conduct of Bartik or Myles in this case. It also realleged defendant's actual innocence based on the notion that the detectives involved in his case coerced witnesses into identifying defendant as the perpetrator. The supplement incorporated exhibits defendant attached to his original motion, as well as numerous additional documents, which the trial court thoroughly summarized in its written order. Given our ultimate disposition, we need not summarize these exhibits in great detail.

¶ 27 Regarding Detective Myles and Detective Bartik, defendant's pleadings referenced multiple lawsuits or published opinions containing various allegations of misconduct against both. However, as we have noted, neither of defendant's pleadings made any factual allegations about the specific conduct of these individuals in defendant's case.

¶ 28 As for Detective Lenihan, defendant's exhibits detailed multiple lawsuits against him alleging conduct such as fabricating evidence, coercing false confessions, threatening witnesses, and withholding exculpatory evidence. All but a handful of the lawsuits or opinions attached to defendant's pleadings became available between 2003 and 2018, before defendant's prior postconviction proceedings. The remaining documents became available in 2020, but none of them involved allegations against Lenihan, although he was involved in some of the underlying investigations.

¶ 29 On December 2, 2022, the trial court denied defendant leave to file his successive petition in an extensive written order. The trial court first observed that defendant's claim, though framed as an actual innocence claim, was instead a claim of a due process violation based on the State's use of allegedly false testimony and police misconduct. The trial court found that defendant could not establish cause because defendant's attached evidence was not newly discovered, and he could not establish prejudice because the new evidence was not so conclusive that it would probably change the result. The trial court also found that defendant's claim could not be considered as an actual innocence claim because it was not free standing. In any event, the trial court observed that defendant's evidence was not newly discovered, immaterial, and not conclusive. Accordingly, the trial court denied defendant leave to file a successive postconviction petition.

¶ 30 II. ANALYSIS

¶ 31 Defendant argues both that he: (1) established cause and prejudice to be permitted to file his successive postconviction petition arguing that the State violated his due process rights by using false testimony at trial, and (2) established a colorable claim of actual innocence. We address both of these issues in turn.

¶ 32 The Act provides a mechanism by which a defendant may raise a collateral attack against his or her conviction based on a claim of actual innocence or where there was a substantial denial of his or her rights under the Constitution of the United States, the State of Illinois, or both. 725 ILCS 5/122-1 *et seq.* (West 2018). Issues that were raised and decided on direct appeal are barred from consideration by the doctrine of *res judicata*; issues that could have been raised, but were not, are considered forfeited. *People v. Davis*, 2014 IL 115595, ¶ 13. The Act contemplates filing only one petition for postconviction relief, but the trial court may allow successive petitions upon

a showing of cause and prejudice. *Davis*, 2014 IL 115595 at ¶ 14. A defendant faces immense procedural hurdles when bringing a successive postconviction petition and, because successive petitions impede the finality of criminal litigation, these hurdles are lowered only in very limited circumstances. *Id.* One basis for relaxing these hurdles is where a defendant can establish both cause and prejudice for the failure to raise the claim in his initial postconviction petition.

¶ 33 "Cause" refers to some objective factor that impeded the defendant's ability to raise the claim in an earlier proceeding, while "prejudice" refers to a constitutional error that so infected the entire trial that the resulting conviction or sentence violates due process. *Davis*, 2014 IL 115595 at ¶ 14; 725 ILCS 5/122-1(f) (West 2018). To meet the cause-and-prejudice test for successive petitions, a defendant must "submit enough in the way of documentation to allow a circuit court to make that determination." *People v. Smith*, 2014 IL 115946, ¶ 35. When a claim of prejudice rests on new evidence, the defendant must show that his supporting evidence is of such conclusive character that it will probably change the result upon retrial. *People v. Jackson*, 2021 IL 124818, ¶ 31.

¶ 34 The initial cause-and-prejudice determination is made on the pleadings rather than from an evidentiary hearing, and a defendant need not establish cause and prejudice conclusively in order to be granted leave to file a successive petition for post-conviction relief. *Bailey*, 2017 IL 121450 at ¶¶ 22-25. Instead, a defendant must only make a *prima facie* showing of cause and prejudice. *Id.* at ¶ 24.

¶ 35 The cause-and-prejudice test is a higher standard than the "frivolous or patently without merit" standard that the trial court employs during first stage proceedings. *Smith*, 2014 IL 115946 at ¶ 35; 725 ILCS 5/122-2.1(a)(2). Leave of court to file a successive post-conviction petition

should be denied when it is clear, from a review of the successive petition and the documentation submitted by the petitioner, that the claims alleged by the petitioner fail as a matter of law or where the successive petition with supporting documentation is insufficient to justify further proceedings. *Smith*, 2014 IL 115946 at ¶ 35.

¶ 36 Alternatively, when a defendant seeks leave to file a successive postconviction petition based on a freestanding claim of actual innocence, he must present new, material, noncumulative evidence that is so conclusive that it would probably change the result on retrial. *People v. Coleman*, 2013 IL 113307, ¶ 96. New evidence means the evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence. *Id.* Material means the evidence is relevant and probative of the defendant's innocence. *Id.* Noncumulative means the evidence adds to what the jury heard. *Id.* And conclusive means the evidence, when considered along with the trial evidence, would probably lead to a different result. *Id.* Whether leave should be granted to file a successive petition is reviewed *de novo*. *Bailey*, 2017 IL 121450, ¶ 13.

¶ 37 We turn first to defendant's claim on appeal that he sufficiently established cause and prejudice to be granted leave to file a successive petition alleging that the State violated his due process rights by presenting false testimony. Although defendant's motion and the additional supplement frame defendant's false testimony and "pattern and practice" claim as an actual innocence claim, we note that the trial court analyzed defendant's pleading under both the cause-and-prejudice test, as well as the relevant test for actual innocence claims. This is because, "It is well settled that 'the use of false testimony underlying a conviction is a due process violation' " *People v. Martinez*, 2021 IL App (1st) 190490, ¶ 61 (quoting *People v. Washington*, 171 Ill. 2d

475, 487 (1996)). Furthermore, due process claims based on false testimony are "fundamentally different" from actual innocence claims. *Washington*, 171 Ill. 2d at 487.

¶ 38 However, the State claims that neither defendant's instant motion for leave to file a successive petition, nor the supplement filed by counsel, pled the requisite cause and prejudice required by the Act. 725 ILCS 5/122-1(f) (West 2018). A claim not raised in the underlying pleading generally cannot be raised for the first time on appeal. *People v. Pendleton*, 223 Ill. 2d 458, 475 (2006) (citing *People v. Jones*, 213 Ill. 2d 498, 505 (2004); see also 725 ILCS 5/122-3 (West 2018). Although waiver and forfeiture are bars on the parties and not the courts, such a principle "should not be a catchall that confers upon reviewing courts unfettered authority to consider issues at will." *Flood v. Wilk*, 2019 IL App (1st) 172792, ¶ 29 (quoting *Jackson v. Board of Election Com'rs of City of Chicago*, 2012 IL 111928, ¶ 33).

¶ 39 Defendant concedes that cause and prejudice was not alleged below. However, he nevertheless urges us to consider the argument as it is based on the trial court's ruling and facts available in the record. While it is true that the trial court performed a cause-and-prejudice analysis below, the fact that the trial court considered the issue does not create allegations of cause out of thin air. We review the sufficiency of a motion for leave to file a successive petition *de novo*; the analysis of the trial court is not at issue. *Bailey*, 2017 IL 121450, ¶ 13. In this instance, we cannot entertain defendant's argument that is raised for the first time on appeal, particularly because defendant's claim that the argument is based on the record is simply untrue. Instead, defendant's cause argument entails several pages of briefing exclusively referencing facts outside the record. See *Keener v. City of Herrin*, 235 Ill. 2d 338, 346 (2009) (parties generally may not rely on matters outside the record, and when a party's brief fails to comply with a rule, a court of review may

strike the brief or disregard the inappropriate material). For example, defendant's brief claims that many of the documents necessary for defendant's claims were not publicly available and were only discovered by counsel through the use of the United States Courts' Public Access to Court Electronic Records (PACER) system. But nothing in the record substantiates this, even on a *prima facie* basis, because this issue was not pled below—even after counsel took over defendant's representation. Likewise, defendant also argues that his ability to investigate his claims continues to be impeded "due to the unavailability of the unredacted police reports" and admits that these reports have not been included in the record on appeal. This claim is also entirely outside the record and unverifiable—we do not even know what police reports defendant is referencing. Defendant's pleadings offer nothing in the way of objective reasons that he could not bring this claim earlier other than conclusory statements that his attached exhibits were newly discovered. Defendant is not simply asking us to consider an argument for the first time on appeal; he asks us to substitute factual allegations contained in his brief that are outside the record for the allegations missing from the pleadings. We decline to do so. The cause-and-prejudice determination is meant to be made on the pleadings and supporting documentation submitted to the trial court. *Bailey*, 2017 IL 121450, ¶ 24. Even assuming that such allegations could establish cause, the pleadings are devoid of any allegations that could make the requisite *prima* facie showing of cause.

¶ 40 As a result, we decline to consider defendant's argument now raised for the first time on appeal. Because defendant cannot demonstrate cause, we need not analyze whether he demonstrated prejudice. Accordingly, the trial court did not err on this issue in denying defendant leave to file his successive petition on this basis.

¶ 41 That brings us to defendant's second argument on appeal: that he demonstrated a colorable claim of actual innocence. When a defendant raises an actual innocence claim in a successive postconviction petition, the trial court should deny leave only where, as a matter of law, no colorable claim of actual innocence has been presented. *People v. Taliani*, 2021 IL 125891, ¶ 52. A free standing actual innocence claim is an extraordinary remedy that challenges a conviction "based on principles of fundamental fairness and borne out of our constitutional obligation to afford a person who presents new evidence that persuasively indicates that he or she is factually innocent with the additional process necessary to prevent a fundamental miscarriage of justice." *Id.* ¶ 67.

¶ 42 In *Washington*, our supreme court recognized for the first time that a defendant may present a free standing actual innocence claim as a matter of due process. *Washington*, 171 Ill. 2d at 487-89. There, the court held that an actual innocence claim "is not being used to supplement an assertion of a constitutional violation with respect to his trial." *Id.* at 479.

¶ 43 Our supreme court subsequently decided *People v. Hobley*, 182 Ill. 2d 404 (1998). Whereas *Washington* observed that a free standing claim of actual innocence does not rely on an assertion of a constitutional violation, *Hobley* instead held that a free standing innocence claim could not entail using new evidence to supplement claims of constitutional violations. *Id.* at 444.

¶ 44 This court recently criticized *Hobley* in *Martinez*, claiming that it "deviated from both the spirit and the letter of the law as set forth in *Washington*," and that "*Hobley* identified no principle or purpose that would be furthered by prohibiting a defendant from using the same evidence to assert both a constitutional claim of trial error and an actual innocence claim." *Martinez*, 2021 IL App (1st) 190490, ¶ 102. However, *Martinez* did acknowledge a possible purpose for the so-called

Hobley rule—preventing a defendant from circumventing the cause-and-prejudice test by asserting an actual innocence claim instead of a constitutional claim. *Id.* ¶ 103.

¶ 45 After *Martinez* was decided, our supreme court decided *Taliani*. While *Taliani* did not specifically address *Martinez*, it did reiterate that a free standing claim of actual innocence "is one in which newly discovered evidence is not being used to supplement an assertion of a constitutional violation with respect to the defendant's trial or that the evidence at trial was insufficient to convict the defendant beyond a reasonable doubt." *Taliani*, 2021 IL 125891, ¶ 56. Instead, it said that a " 'free standing' claim of actual innocence is one in which newly discovered evidence makes a persuasive showing that the [defendant] did not commit the charged offense, and was, therefore, wrongfully convicted." *Id.* We need not take a position on *Martinez*'s criticism of *Hobley* because we are bound to follow *Taliani* and its recitation of what constitutes a free standing innocence claim.

¶ 46 In this case, we need look no further for an example of a free standing actual innocence claim than defendant's own prior postconviction proceedings that culminated in an evidentiary hearing. There, he presented witnesses who testified that the perpetrator was, in fact, not defendant. But the claim defendant makes now, as the trial court correctly noted, is not free standing. None of the evidence now being presented affirmatively shows that defendant did not commit the charged offense. Instead, it is being used "to supplement an assertion of a constitutional violation" and argue that "the evidence at trial was insufficient to convict the defendant beyond a reasonable doubt." *Id.* Any allegations of prior misconduct by the officers in defendant's case do not show that defendant was actually innocent. They would only theoretically support defendant's claim that the State used false testimony against defendant at trial—a due process claim we have already

addressed above and for which defendant could not establish cause for failing to raise it earlier. Because defendant's claim is not free standing and is functionally a due process claim that the State convicted him using false testimony, we need not analyze further whether defendant's evidence is newly discovered, material, or conclusive.

¶ 47 Accordingly, the trial court did not err in denying defendant leave to file a successive petition on this basis. Given our resolution of these two issues, we need not consider defendant's argument that this case should be assigned to a different trial court judge upon remand.

¶ 48 Finally, though it has no bearing on our decision, we make a brief comment on the State's argument that defendant's brief failed to comply with Supreme Court Rule 341(h)(6), which requires briefs to include a "Statement of Facts, which shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment. Ill. S. Ct. R. 341(h)(6) (eff. Oct. 1, 2020). Not only did defendant's brief not include many basic facts about defendant's crime, underlying trial, conviction, and prior postconviction proceedings, which provide essential context, but this was done intentionally. Defendant's brief explicitly states that these facts were omitted to "leave room to fully articulate his arguments on this appeal," even though he used only 31 of the maximum of 50 pages allowed by the rule. Ill. S. Ct. R. 341(b)(1) (eff. Oct. 1, 2020). Whatever the real reason that these facts were omitted from defendant's brief, we reiterate that our rules are not suggestions; they are mandatory. *Perona v. Volkswagen of America, Inc.*, 2014 IL App (1st) 130748, ¶ 21.

¶ 49 III. CONCLUSION

¶ 50 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 51 Affirmed.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Respondent, v. LEIVANTE ADAMS, Defendant-Petitioner.	FILED DEC 02 2022 IRIS Y. MARTINEZ CLERK OF CIRCUIT COURT	Post-Conviction Petition 03 CR 13790 01 Honorable Stanley Sacks Judge Presiding

ORDER

Petitioner, Leivante Adams[1], seeks relief from the judgement of conviction entered against him on February 24, 2005. Following a jury trial, Petitioner was found guilty of first degree murder and sentenced to 45 years' imprisonment.

As grounds for relief, Petitioner claims actual innocence as shown by evidence of a pattern and practice of police misconduct. Based on the foregoing, this court finds Petitioner has not stated a colorable claim of actual innocence or, in the alternative, has not satisfied the cause-and-prejudice test to file a claim that false testimony was used at trial. Accordingly, Petitioner's fifth motion for leave to file a successive postconviction petition is DENIED.

PROCEDURAL HISTORY

On direct appeal, the appellate court affirmed Petitioner's conviction over his contentions that the trial court had wrongly permitted the State to introduce other-crimes evidence and the State had failed to prove him guilty beyond a reasonable doubt. *People v. Adams*, No. 1-05-0908 (Oct. 20, 2006) (unpublished order under Illinois Supreme Court Rule 23).

[1] Notably, Petitioner's first name has been spelt differently throughout various proceedings on this matter and appears to be spelt as: Leivaunde (*People v. Adams*, No. 1-05-0908), Leivaunte (2014 IL App (1st) 122315-U), and Leivante (all other appellate decisions). For the sake of clarity, this court has used the most recent spelling from *People v. Adams*, 2019 IL App (1st) 163168-U and will refer to Mr. Adams as Petitioner throughout this order.

In June 2007, Petitioner filed a post-conviction petition. Petitioner later filed a supplemental petition. In both, Petitioner claimed trial and appellate counsel had been ineffective, prosecutorial misconduct, and the court erred in sustaining objections and modifying a jury instruction. The circuit court summarily dismissed and the appellate court affirmed. *People v. Adams*, No. 1-07-3215 (June 12, 2009) (unpublished order under Supreme Court Rule 23).

In January 2010, Petitioner filed a document entitled "Petitioner's Petition to Vacate Void Judgment," which cited 735 ILCS 5/2-1401 and alleged the first-degree murder statute violated the single-subject clause of the Illinois Constitution. The circuit court dismissed the petition and the appellate court affirmed the dismissal. *People v. Adams*, 2011 IL App (1st) 101034-U.

In February 2011, Petitioner filed a motion for leave to file a successive post-conviction petition claiming actual innocence based on affidavits from Tijatta Williams, Muhammad Williams, and Bridgette Rush, who attested someone other than Petitioner committed this crime, and a forensic report that no blood was in Petitioner's car. The motion was denied and the appellate court reversed and remanded. *People v. Adams*, 2013 IL App (1st) 111081.

On November 10, 2016, after an evidentiary hearing with the three eyewitnesses, the circuit court denied the petition finding that: (1) neither Rush's testimony nor the forensic report were newly discovered evidence; and (2) Tijatta's and Muhammad were incredible. The appellate court affirmed the third-stage dismissal. *People v. Adams*, 2019 IL App (1st) 163168-U.

While proceedings were ongoing on his first motion for leave to file, Petitioner filed a second motion for leave in November of 2011 claiming the State failed to disclose forensic test results from his car and that counsel was ineffective for failing to discover said testing and hire an expert to examine his car. Petitioner's second motion for leave to file was denied and the appellate court affirmed. *People v. Adams*, 2013 IL App (1st) 120213-U.

Petitioner filed a third motion for leave to file on May 3, 2012 with a supplement filed on June 14, 2012. In both, Petitioner alleged actual innocence and *Brady* violations relating to forensic test results. The circuit court denied this motion and the appellate court affirmed. *People v. Adams*, 2014 IL App (1st) 122315-U.

On October 1, 2019 Petitioner filed his fourth motion for leave to file a successive claim based on *People v. Bass*, 2019 IL App (1st) 160640. The circuit court denied this motion and the appellate court affirmed. *People v. Adams,* No. 1-20-0992 (Nov. 4, 2021).

On December 16, 2019, Petitioner filed his fifth motion for leave to file ("Motion") and, on January 18, 2022, counsel filed a supplement ("Supplement"). (collectively, the "Petition").

FACTUAL BACKGROUND

The factual background of Petitioner's conviction for the first degree murder of Raama Baker is recited in detail in the aforementioned appellate opinions. As such, this court only recites those facts necessary for the disposition of the instant motion.

In doing so, this court finds it prudent to recite: (1) the types of police misconduct alleged by the trial witnesses that Petitioner contends were coerced (Toni Washington, Barbara Oliver, Terrance Whisby, and Kim Washington); (2) the substance of their recantations and trial testimony; and (3) the evidence in the record regarding the officers Petitioner contends coerced the aforementioned witnesses (Detectives Robert Lenihan, Robert Bartik, Delores Myles, and Edward Adams).

1. Allegations of Misconduct

Whiby's allegations at trial was that he was a suspect in this murder and fabricated his prior statements to avoid prosecution for the murder or a drug offense. Whisby testified his first statement was false and came after about two hours in custody when the detectives threatened to

"plant something on [him]" when he first got to the station. (R. E80-81). In that statement, Whisby denied witnessing the murder. Whisby was not threatened again, but the detective wasn't buying his story and "[t]he more [Whisby] told it, the more [the detective] didn't buy it so he kind of got physical." (R. E81). Whisby explained portions of his second statement were false, such as being on the porch when Petitioner attacked the victim. Whisby explained he said he was on the porch because he "wanted to put [himself] as far away from [the victim] as possible" and was afraid "they were going to charge [him] with [Baker's] murder." (R. E89). Whisby went on to explain he didn't tell the truth initially to the police as he was scared from "being threatened so many times and getting ready to go down for something I didn't do." (R. E108-09).

In his initial petition, Petitioner submitted an affidavit from Whisby in support of a claim that the State suborned Whisby's perjury. In sum, Whisby restated his trial testimony and provided more detail to his misconduct complaint: (1) Sgt. Adams and his partner arrested him at his mother's house, observed his mother give him shoes that had bullets inside of them, and took him to the police station; (2) a different detective than the two who picked him up at his mother's house, who he didn't have a name for but was able to identify if he saw him, entered the room and physically assaulted him then threatened him with prosecution for a bag of crack rocks; (3) Myles came into the room and offered him food and water which he refused and then brought him to the room to see Kimberly; and (4) Det. Nick DeAngelo came to him about four hours after he saw Kimberly and took his statement.[2]

Whisby described the detective who threatened and beat him as "white" and "about 50" years old and "kind of elderly guy, with gray hair, short." (R. E96). Trial counsel, arguing against the

[2] The record shows DeAngelo, who Whisby identified as a detective, was the Assistant States Attorney who took a statement from Petitioner.

State's motion to continue for Lenihan to appear, said "I definitely am not going to be arguing that Terrence was coerced by Lenihan." (R. H10).

Toni testified she was threatened by Lenihan with prosecution for her having disposed of the murder weapon and was told a result would be her not seeing her son again. Toni and her attorney testified about an immunity deal from obstruction of justice charges for her disposal of the weapon in exchange for her testifying at Petitioner's trial.

Kimberly testified she was told if she cooperated and corroborated the statement of Whisby, her boyfriend, then Whisby would at most be sentenced to half of the years than Petitioner would receive for this murder. (R. E198). Kimberly explained she was given bits and pieces of the story and her grand jury testimony was coached, but could not recall which bits and pieces were given to her or whether her statement was used to coach her grand jury testimony. Kimberly described two male detectives as carrying out the aforementioned but did not know their names and when asked what they looked like she responded "I don't know." (R. E197).

Oliver testified she was told Whisby would not be released unless she came to the station to get him and the detective(s) she spoke with at the station were different than those who picked up Whisby. Oliver explained that, after arriving at the station, she signed a handwritten statement that was written by someone other than her and with allegations provided by Lenihan.

2. Substance of Recantations

Whisby's recantation has been described by the appellate court in their analysis of the sufficiency of the evidence:

> The record demonstrates that the only inconsistency in [Whisby's] testimony was that he stated before the grand jury that defendant hit the victim with a bat, but at trial, he stated that defendant hit her with a stick.

Adams, No. 1-05-0908, p. 13.

Toni's testimony was consistent in the sense that, after Baker was murdered, Whisby gave her a black gym bag with clothes and an item in a black garbage bag and that her agreement with the State was that she wouldn't be charged with hiding the item Whisby gave her. In regards to the item itself, Toni testified she did not know what the item in the black bag was but she guessed the murder weapon, a bat, was in the bag. (R. F102). In recanting her grand jury testimony, Toni testified: (1) she did not observe Petitioner strike Baker with a bat, return to the house upon seeing Baker, search for a bat in the house, or retrieve a bat and approach Baker with the bat in hand; (2) she did not know what Baker looked like or that she had seen Baker on the day in question, but believed Baker was the woman Petitioner approached on the street; and (3) she did not see what happened between Baker and Petitioner near the alleyway, or Baker's body, as she was distracted by someone on the porch and "wasn't even paying attention" to where Baker was when Petitioner returned to the vehicle (R. F76).

In recanting her grand jury testimony, Kimberly testified: (1) she did not observe Petitioner strike Baker; (2) she observed Petitioner following Baker with a bat in his hand after giving her a warning of some sort; (3) she lost sight of Petitioner and Baker when she then turned to grab Oliver's shoes from the house; (4) while turned away from the two, she heard a thump; (5) she turned towards the thump and saw Petitioner standing next to Baker with the bat still in his hand as she was on the ground; (6) she then saw Whisby grab Petitioner and Petitioner drop the bat; and (7) she then saw Whisby retrieve the bat and bring it back to the house.

In recanting her grand jury testimony, Oliver testified: (1) she did not observe Petitioner approach Baker, return to the house for a bat, or on scene after Baker was observed walking by; (2) she observed Petitioner, immediately after Baker was seen walking near her house, leave the

house, get into his car, and drive away; and (3) she never went down the street, never saw Baker on the ground, and never saw Whisby grab Petitioner from away from Baker's body.

3. Officer Testimony

Sergeant Adams testified he and his partner, Det. Jones, took Whisby to the station from his mother's house and then they interviewed Whisby when he gave his initial statements. Adams detailed he gave his car to Oliver when Whisby was taken from her house and, later, received a call from Oliver on the number listed on that card. During that call, Adams explained to Oliver that Whisby "would be at the station until [detectives] talked to [Petitioner and Anthony Oliver] *** [b]ecause we didn't want [Whisby] telling his two brothers the focus of our investigation, the questions we were asking, and just to maintain the integrity of our investigation." (R. G18). Adams explained that, after Whisby gave several statements, he ordered a polygraph examination of Whisby and his shift ended before the scheduled examination.

Det. Andrew Burns testified that he and Myles were partners and were working with a Det. R. Burns as well. At the start of their shift, the three were instructed to take Whisby to the polygraph examination at a station on Homan. Upon arriving at that station, Whisby was handed over to Bartik for the polygraph examination. After a few minutes, Bartik exited the room and told Burns that Whisby refused the exam and said he wanted to speak with them instead. Whisby was then taken back to Area 1 and gave another statement while Myles was taking notes.

Lenihan did not testify at trial. The State moved to continue the trial for Lenihan to appear upon returning from a trip out of town and the defense objected arguing that:

> Now all the witnesses have been impeached by Grand Jury testimony. We haven't really had any impeachment from handwritten statements and we have State's Attorneys who have testified to the handwritten statements. So the only thing Lenihan could testify would be initial interviews that are in G.P.R.'s. I don't think that there has been any impeachment set up that we need Lenihan to perfect and I

> don't think there is anything in reports that would be relevant or been stipulated to.
> I don't know why they're calling him other than for those interviews. Maybe that there was no coercion or something, but it's not coercion of the defendant. The witnesses haven't given any real description of coercion. I mean, there hasn't – none of them with very successful in that.

(R. H5). The State explained they were planning to call Lenihan to testify "he didn't threaten anybody or make any promises to anybody *** [or] [d]idn't make up a story or feed them a statement to tell the State's Attorney. Or threaten Toni Washington." (R. H6). Defense counsel then noted that he "definitely [was] not going to be arguing that [Whisby] was coerced by Lenihan." (R. H10). The court denied the motion to continue the trial for Lenihan to appear.

Additionally, Bartik and Myles did not testify at trial. However, there was no discussion about their unavailability to testify or an intention to call them to testify.

LEGAL STANDARD

The Postconviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2022)) contemplates filing only a single postconviction petition. As a consequence, only one postconviction proceeding is contemplated under the Act. *People v. Edwards,* 2012 IL 111711, ¶ 22. The bar against successive petitions will be relaxed on two grounds: (1) where the Petitioner asserts a fundamental miscarriage of justice based on actual innocence (see *Id.* ¶ 23); or (2) where the petitioner can establish cause-and-prejudice for their failure to assert this claim earlier (see *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002)).

"[A] freestanding actual-innocence claim is independent of any claims of constitutional error at trial and focuses solely on a defendant's factual innocence in light of new evidence." *People v. Coleman,* 2013 IL 113307, ¶ 83. When asserting a successive claim of actual innocence, one must set forth a colorable claim of actual innocence and need not show cause and prejudice. *Edwards,* 2012 IL 111711, ¶ 24. To establish actual innocence, the supporting evidence must be

(1) newly discovered, (2) material and not cumulative, and (3) of such conclusive character that it would probably change the result on retrial. *People v. Robinson*, 2020 IL 123849, ¶ 47.

ANALYSIS

I. Motion to Supplement Motion for Leave to File

Section 122-5 of the Act gives courts discretion to permit amendments to postconviction petitions. 725 ILCS 5/122-5; *People v. Watson*, 187 Ill. 2d 448, 451 (1999). Typically, a petitioner moves to amend or supplement their pending pleading. However, the Supplement does not include a motion to supplement the Motion. Seemingly, the motion to supplement is implied. For the sake of clarity of this analysis, this court grants the implied motion to supplement the Motion. Accordingly, the following analyzes the Supplement and Motion.

II. Actual Innocence

Petitioner presents an actual innocence based upon an allegation that false testimony was used at trial. The purported false testimony came in the form of grand jury testimony used to impeach State witnesses' trial testimony, where they recanted portions of their prior testimony and statements. Petitioner contends the grand jury testimony and statements to police were false and the product of police coercion. In support of this claim, Petitioner exclusively presents evidence of civil complaints and dispositions to evidence a pattern and practice by detectives involved in this case. Petitioner offers no evidence in support of his factual innocence of this crime and instead offers argument and evidence to bolster the credibility of the trial recantations, the complaints of misconduct, and the trial testimony that came after the recantation. In support of this claim, Petitioner begins:

> It is well settled that the use of false testimony underlying a conviction is a due process violation. *People v. Martinez*, 2021 IL App (1st) 190490, ¶ 61) (quoting *People v. Washington*, 171 Ill. 2d 475, 487 (1996)).

(Supp. p. 1). The cites to *Martinez* are to the analysis of a false testimony due process claim. See *Martinez,* 2021 IL App (1st) 190490, ¶¶ 59-85. The vast majority of Petitioner's other cites are to authorities on false testimony claims and basically a restatement of that section of *Martinez.* (Supp. pp. 1-2 (citing *People v. Jackson*, 2021 IL 124818; *People v. Washington*, 171 Ill. 2d 475 (1996); *People v. Patterson*, 192 Ill. 2d 93 (2000); *People v. Reyes*, 369 Ill. App. 3d 1 (2006); and *People v. Tyler*, 2015 IL App (1st) 123470), ¶ 186)).

Petitioner offers no basis to equate a false testimony claim with an actual innocence claim. Beyond citing to authority regarding false testimony claims, in support of his actual innocence claim, Petitioner cites to two cases that clearly explain the difference between these claims.

In *Martinez,* the court found Petitioner's actual innocence claim freestanding from his pattern and practice based false testimony claim—as the former also relied upon an eyewitness expert affidavit. *Martinez,* 2021 IL App (1st) 190490, ¶ 103.

In *Washington,* our supreme court found a freestanding claims of actual innocence is cognizable under the Illinois Constitution, and noted a false testimony due process claim is "fundamentally different" from an actual innocence claim. *Washington,* 171 Ill. 2d at 487. In finding support for the conclusion that an actual innocence claim was cognizable under the Illinois Constitution, our supreme court, cited to similar but distinguishable due process claims:

> Perhaps the closest this court has come to determining that our constitution's due process clause could be a means to recognize a newly discovered evidence claim for post-conviction purposes was in *People v. Cornille*, 95 Ill. 2d 497 (1983).
>
> ***
>
> *Cornille* finds its place among a long line of related cases holding that the use of false testimony underlying a conviction is a due process violation. *Cornille,* 95 Ill. 2d at 508-09. Those kinds of claims are fundamentally different from ones such as Washington has raised. Washington can claim no state action with regard to the evidence he now relies upon for post-conviction relief. And the "adjudicatory process" by which he was convicted did not otherwise lack due process. Essentially, then, the issue is the time relativeness of due process as a matter of this State's constitutional jurisprudence; that is, should additional process be

> afforded in Illinois when newly discovered evidence indicates that a convicted person is actually innocent?

Id. at 486-87. The court noted "there is a significant, qualitative difference between perjured testimony and evidence that the defendant is actually innocent of the crime" as

> An allegation that certain of the State's evidence against the defendant at trial was perjured is aimed at weakening and undermining the strength of the State's evidence of the defendant's guilt. An allegation of newly discovered evidence of innocence is not intended to question the strength of the State's case. An allegation of newly discovered evidence of innocence seeks to establish the defendant's actual innocence of the crimes for which he has been tried and convicted. In comparison, allegations of perjured testimony do not seek to establish the defendant's actual innocence, but are aimed at merely questioning the sufficiency of the State's evidence against the defendant at trial.

Id. at 495.

It is unclear why Petitioner labelled his pattern and practice false testimony claim as actual innocence—despite citing almost exclusively to false testimony authority, providing solely pattern and practice evidence, and there being "a significant, qualitative difference between perjured testimony and evidence that the defendant is actually innocent of the crime." *Id.* However, it is not lost that this is Petitioner's fifth motion for leave to file a successive claim and that a pattern and practice false testimony claim would be subject to the cause-and-prejudice test whereas an actual innocence claim would not. On that point, Petitioner's cite to *Martinez* is confounding as *Martinez* specifically notes the potential of a petitioner attempting to circumvent the cause-and-prejudice test by taking other claims of constitutional violations and framing or coupling them with a claim of actual innocence. *Martinez,* 2021 IL App (1st) 190490, ¶ 100.

Though the *Martinez* court found such an issue was not implicated in that matter as the proceedings were at the second-stage and not the leave to file stage, this court cannot think of a better example of exactly what *Martinez* warned of than here.

Unlike *Martinez,* Petitioner does not submit pattern and practice evidence in support of a false testimony claim and an actual innocence claim based upon the same evidence and some additional, independent evidence. In the event that Petitioner has raised this exact actual innocence claim and a false testimony claim, as the pattern and practice evidence would support, the former claim would not be freestanding and the attempt to circumvent the cause-and-prejudice test by coupling it with an actual innocence claim would be clear. However, Petitioner has not raised both and, instead, has just titled a false testimony claim as actual innocence—in his fifth motion for leave to file, after never previously raising a pattern and practice based due process claim, Petitioner has raised such a claim and inexplicably called it actual innocence.

Whether this was intentionally done to circumvent the cause-and-prejudice test, where the false testimony claim was clearly available to Petitioner during earlier proceedings as discussed *infra,* matters not.

Recently the appellate court rejected the "argument that evidence of a pattern of police misconduct can establish a freestanding claim of actual innocence." *People v. Dixon*, 2021 IL App (1st) 191612-U, ¶ 51. There, like here, the actual innocence claim was solely supported by pattern of misconduct evidence and trial testimony. Though this unpublished order is not binding, this court finds the rationale illustrative and supporting our conclusion that Petitioner has not raised a cognizable or freestanding actual innocence claim.

In the alternative to finding a veiled false testimony claim is not a cognizable actual innocence claim, this court finds Petitioner's actual innocence claim is not freestanding.

A freestanding actual innocence claim is "one in which newly discovered evidence is not being used to supplement an assertion of a constitutional violation with respect to the defendant's

trial or that the evidence at trial was insufficient to convict the defendant beyond a reasonable doubt." *People v. Taliani*, 2021 IL 125891, ¶ 56.

Here, there is not a duplicative use of the same evidence to support a one constitutional claim and an actual innocence claim—for example, an affidavit from a previously unknown witness used to support actual innocence and a *Brady* violation for failing to inform the defense of this witness' prior statements. Instead, Petitioner contends he is actually innocent because his right to due process was violated by the admission of false testimony at trial. As such, the false testimony claim and the actual innocence claim are one in the same, with the latter label applied to what is exclusively a false testimony claim. Accordingly, this court does not find this false testimony claim that is inexplicably labelled actual innocence is a freestanding actual innocence claim.

Even assuming *arguendo* that pattern and practice evidence on its own can state a freestanding and cognizable claim of actual innocence, this court finds Petitioner has not stated a colorable claim of actual innocence as this evidence is: (A) not newly discovered; (B) immaterial; and (C) inconclusive.

A. Newly Discovered

Petitioner contends the submitted evidence is newly discovered as it was undiscoverable prior to trial. However, this ignores that this is Petitioner's fifth motion for leave to file.

In the context of successive actual innocence claims, newly discovered evidence is that which was not discoverable during any prior postconviction proceedings. See *People v. Wideman*, 2016 IL App (1st) 123092, ¶ 58 (finding, in the interest of avoiding piecemeal litigation under the Act, the appropriate review of newly discovered evidence was "whether that evidence was available when the defendant filed his previous postconviction pleadings."); see

also *People v. Warren*, 2016 IL App (1st) 090884-C, ¶ 114; see also *People v. Snow*, 2012 IL App (4th) 110415, ¶ 21; see also *People v. English*, 403 Ill. App. 3d 121, 133 (2010).

In analyzing the discoverability of this evidence by Petitioner prior to trial or his five prior postconviction pleadings, this court finds this evidence is not newly discovered.

For the sake of consolidating the submitted evidence, this court finds it prudent to focus the discussion on the cases to which the various pieces of evidence relate. In doing so, the following table sets for the pattern and practice evidence in chronological order.[3]

Evidence List (Chronological Order)		
Plaintiff	Case Number	Exhibit
Johnathan Tolliver	347 Ill. App. 3d 203 (2004)	Petition
Mikel Pernell	1:03-cv-05316 (N.D. Ill. filed July 31, 2003)	Supp. G-H
Donny McGee	2008 L 003503 (Cir. Ct. Cook County, Mar. 31, 2008)	Mot. A-D; Supp. F
Dany Lanza	1:08-cv-05103 (N.D. Ill. filed Sep. 8, 2008)	Supp. Q-R
Maurice Patterson	1:11-cv-070502 (N.D. Ill. filed Oct. 6, 2011)	Mot. E-H; Supp. N
Tameeka Isby	1:11-cv-07668 (N.D. Ill. filed Oct. 27, 2011)	Supp. O-P
King Garland	2014 IL App (1st) 123016-U	Petition
Rory Cook	2015 IL App (1st) 123236-U	Petition
Wayne Washington*	1:16-cv-01893 (N.D. Ill. filed Feb. 2, 2016)	Supp. A, C
Tyrone Hood*	1:16-cv-01970 (N.D. Ill. filed Feb. 5, 2016)	Supp. B, D
Anteleto Jones	2017 IL App (1st) 123371	Petition
Kevin Jackson	2018 IL App (1st) 171773	Petition
Anthony Mitchell**	1:20-cv-03119 (N.D. Ill. filed May 27, 2020)	Supp. L-M
John Fulton**	1:20-cv-03118 (N.D. Ill. filed May 27, 2020)	Supp. S-T
Sean Tyler	2011.094-T (TIRC order filed Oct. 21, 2020)	Supp. E
Xavier Walker	1:20-cv-07209 (N.D. Ill. filed Dec. 6, 2020)	Supp. I-K

The first 12 pieces of evidence listed above are opinions and complaints that were published from 1-15 years prior to Petitioner filing his fourth motion for leave to file a successive petition on October 1, 2019. As such, these pieces of evidence were discoverable through an exercise of due diligence and are not newly discovered.

[3] * and ** indicates those plaintiffs were co-defendants in their criminal case.

The only evidence that post-dates Petitioner's most recent postconviction proceeding relates to Mitchell, Fulton, Tyler, and Walker. In support of consideration of the pieces of evidence that were discoverable during prior postconviction proceedings, Petitioner contends that "this court should consider the previously discoverable evidence" where the other evidence warrants an evidentiary hearing. (Supp. pp. 29-30) (citing *Martinez,* 2021, IL App (1st) 190490, ¶ 77).

Assuming *arguendo* the four pieces of evidence filed after Petitioner's most recent postconviction pleading warranted an evidentiary hearing, this court finds the circumstances meriting consideration of previously discoverable evidence in *Martinez* are not present here.

To begin with, this is another cite to the false testimony analysis of *Martinez* and not the actual innocence section. Most importantly, this case does not stand for the proposition Petitioner asserts it does. There, the not newly discovered evidence was police reports on which the Petitioner was going to rely to show inconsistencies with the trial testimony to bolster a claim that the testimony and prior statements were false and coerced. To not have considered those inconsistencies as the statements were not newly discovered, would offer the court no context to the pattern and practice evidence and false testimony claim.

Here, the evidence that would necessarily be considered pursuant to the *Martinez* opinion would be the testimony of the trial witnesses, their written statements, and their grand jury testimony. Had Petitioner submitted the grand jury transcripts or written statements with his Petition, *Martinez* would indicate this court should consider that evidence alongside the newly discovered evidence. However, *Martinez* does not support Petitioner's request that evidence from unrelated civil matters that was discoverable during earlier postconviction proceedings should be considered alongside a piece of newly discovered evidence. As such, this court rejects

Petitioner's invitation to consider pattern and practice evidence that predates his trial date because some of the evidence includes civil complaints filed after his trial.

As such, this court denies Petitioner's invitation to consider not newly discovered evidence in support of his actual innocence claim.

Most importantly, this court finds the evidence relating to Mitchell, Fulton, Tyler, and Walker is not newly discovered.

Petitioner's argument is largely focused on the filing date of these specific pieces of evidence—in essence, a yet to be filed document could not have been discovered before it was filed. However, the factual allegations about these plaintiffs were readily discoverable outside of those specific filings and, as such, this evidence is not newly discovered. See *People v. Davis*, 382 Ill. App. 3d 701, 712 (2008) (finding evidence is not "newly discovered" if it presents previously discoverable facts even if the source was unknown, unavailable, or uncooperative.).

Walker's conviction had been vacated via postconviction proceedings on July 17, 2018. (Supp. Ex. K ¶ 2). The appellate court reversed the dismissal of Tyler's postconviction false testimony claim regarding police misconduct in an opinion filed on September 11, 2015. See *People v. Tyler*, 2015 IL App (1st) 123470. Mitchell and Fulton, codefendants in their original criminal cases, had their convictions vacated in February of 2019 and charges dismissed in June of 2019. (Supp. Ex. E, S-T). Also, the submitted exhibits are the second civil complaints filed by Mitchell and Fulton regarding police misconduct from their criminal cases. See *Fulton v. Zalatoriz et al.*, No. 1:05-CV-01551 (N.D. Ill. filed March 16, 2005).

Through those prior opinions on postconviction and the criminal charges, as well as the prior civil complaint, Petitioner could have discovered the substance of this evidence well before the filing dates of a second civil complaint or a TIRC order to do so.

Besides the specific factual allegations of each of the cited cases being discoverable during earlier proceedings, this court notes that evidence of prior allegations and findings of misconduct by these officers was readily discoverable as is evidence by these very pieces of evidence.

Walker's complaint cites to 12 civil cases from before October 1, 2019 that involved Bartik. Additionally, *Jackson,* 2018 IL App (1st) 171773 discusses the evidence submitted by Jackson that included a Chicago Tribune article relating to Bartik that quoted "the testimony of an expert witness who was critical of Bartik's record of pre-[polygraph] test confessions over a five-year period ending in 2003." *Id.* ¶ 87 (citing Duaa Eldeib, Polygraphs and False Confessions in Chicago, Chi. Trib., Mar. 10, 2013, http://www.chicagotribune.com/news/watchdog/ct-met-polygraph-confessions-20130310-story.html).

As the factual allegations regarding the 16 plaintiffs cited by Petitioner was all discoverable to him during earlier proceedings, and even more factual support for his pattern and practice argument was discoverable during earlier proceedings as evidenced by the cross-cites within the previously discoverable complaints and opinions, this court finds this actual innocence claim is not supported by newly discovered evidence.

B. Material

For an actual innocence claim to prevail, the evidence submitted must be material and not-cumulative. "Evidence is material if it is relevant and probative of the petitioner's innocence." *Robinson,* 2020 IL 123849, ¶ 47. In support of the materiality of these prior allegations of misconduct, Petitioner contends:

> Prior allegations of intimidation and coercion "are admissible where they involved the same officer or officers, involved in similar methods of abuse and occurred near the time that the defendant's allegations occurred." *Martinez,* 2021 IL App (1st) 190490, ¶ 62. However, "[w]hile the similarity of allegations is important, 'the test is not one of exact or perfect identity.'" *Id.* (quoting *People v. Jackson,* 2021 IL 124818, ¶ 34).

(Supp. p. 7).

To begin with, these portions of *Martinez* and *Jackson* are specifically analyzing pattern and practice false testimony claims and not actual innocence claims.

Evidence to support an actual innocence claim is material if it is relevant and probative of the defendant's innocence. *Robinson*, 2020 IL 123849, ¶ 47. "[E]vidence which is 'materially relevant' to a defendant's claim of actual innocence is simply evidence which tends to significantly advance that claim." *Id.* ¶ 55 (quoting *People v. Savory*, 197 Ill. 2d 203, 213 (2001)). "[A] freestanding actual-innocence claim is independent of any claims of constitutional error at trial and focuses solely on a defendant's *factual innocence* in light of new evidence." (Emphasis added.) *Coleman*, 2013 IL 113307, ¶ 83.

Here, the submitted evidence does not offer any indication of Petitioner's factual innocence of this crime. Instead, this evidence involves entirely unrelated cases and events and seeks to show a pattern of behavior by these detectives through other instances of misconduct. At best, this evidence suggests possible weaknesses in the State's proof affecting the weight and credibility given to the prior inconsistent statements by Whisby, Toni, Kimberly, and Oliver. As such, none of the submitted evidence is material to Petitioner's actual innocence claim.

Even assuming *arguendo* the false testimony due process claim standard applied to the actual innocence material evidence prong, this evidence is not material as: (i) the evidence is offered in support of conclusory allegations of misconduct by Adams, Myles, and Bartik that have no factual support in the record or submitted exhibits and cannot, as plead, be arguably similar to the submitted evidence; and (ii) those factual allegations of misconduct in the record and instant pleadings are in no way similar to the misconduct in the submitted evidence.

As this evidence is not material to Petitioner's purported factual innocence and is not relevant to a pattern and practice based due process claim, this court finds Petitioner fails to support his actual innocence claim with material evidence. For organization sake, this court finds it prudent to analyze the materiality of this evidence in the context of each of these detectives.

1. Myles

In regards to Myles, the Supplement solely references her having been listed in a discovery response and the Petitioner contends that Myles was the detective who took notes during an interview with Whisby. (Supp. p. 26; Mot. ¶ 27). The Motion cites to Burns' trial testimony that Myles took notes during an interview of Whisby after Whisby had rejected the polygraph and been interviewed several times by Adams. (R. G55). Petitioner then alleges that Myles was either a perpetrator or silent witness to misconduct. However, the record contradicts this allegation of Myles' involvement in the purported physical and mental coercion of Whisby.

Whisby's testimony explicitly details that male detectives were those present in the room during the interview involving him and that the coercion occurred in his initial interviews the day prior to his polygraph. Furthermore, Whisby's affidavit—submitted with Petitioner's supplement to his initial post-conviction petition and signed on June 25, 2007—contradicts the allegation that Myles was present during the pertinent interviews. Whisby identified a male detective as having threatened him with prosecution for crack rocks and then slapped, choked, and punched him. Whisby did not know the name of this detective, but explained it was not Adams and that Myles was involved well after the aforementioned conduct by the unknown male officer. Specifically, after the coercive interview and after he sat for "what felt like an entire day until a female officer named Dolores Myles came into the room and offered me food and water" and that another one of the detectives brought him to see Kimberly. (Whisby Aff. p. 3). This corroborates Burns'

testimony that Myles and he became involved in the investigation of Whisby when they started their shift the day after Whisby had given his statements and when they were tasked with taking him to the polygraph exam.

As such, the contention that Myles was somehow present and a silent witness to the purported misconduct is rebutted by Whisby's own attestations and testimony.

Furthermore, the evidence relating to Myles is irrelevant to the instant allegation of physical and mental coercion. Petitioner contends that:

> In the Maurice Patterson civil suit, Det. Delores Miles [sic] participated in coercing witnesses into identifying Patterson as the victim's attacker.

(Pet. ¶ 26). In doing so, Petitioner cites to a Chicago Reader webpage regarding the settlement of Patterson's civil suit and a summary of the allegations made in the civil complaint.

This contention misstates the evidence and the contents of Patterson's allegation against Myles. The specific allegation was that Myles forwarded the murder weapon to the lab for DNA testing, received two results from the lab that showed positive for the victim and an alternative suspect, and testified that the DNA results from the knife did not show positive for the victim. See *Patterson v. City of Chicago et al.*, 1:11-cv-07052, ¶¶ 19-26 (N.D. Ill. filed Oct. 6, 2011). In essence, Myles either intentionally or accidentally failed to disclose exculpatory test results of physical evidence recovered from the scene.

As this evidence involves an entirely dissimilar type of misconduct, Patterson is not material to Petitioner's claim that Myles was acting in a pattern and practice of witness coercion when she took notes during an interview with Whisby. See *Jackson*, 2021 IL 124818, ¶ 35 ("None of these complaints are for coercion or intimidation of a witness or suspect. The complaints thus have no relevance to determining whether any of the detectives were engaged in a pattern and practice of witness intimidation.").

As such, Patterson is immaterial to Petitioner's claim where it is both rebutted by Whisby's trial testimony and previously submitted affidavit and includes an entirely dissimilar type of misconduct than that alleged here.

2. Adams

Like Myles, Petitioner has not shown in anyway how Adams was involved in this case—let alone submitted any factual allegation Adams engaged in misconduct in this case.

The only allegation in the Supplement is that Adams was listed in discovery and this somehow renders the Patterson case material. Notably, there is no reference made to Adams in the Motion. This is akin to that in *Jackson,* where the evidence offered no allegations specific to the detectives and left "uncertainty as to their exact role in the alleged incidents" which left the court with "no way to determine from this document if either [detectives] engaged in any witness intimidation or coercion" and had "no probative value in establishing a pattern and practice of misconduct relevant to this case." *Jackson*, 2021 IL 124818, ¶ 36. As such, this court finds the submitted evidence is not material to Adams purported misconduct in this case: being listed in a discovery response.

Regardless to the lack of factual allegation, Whisby's previously submitted affidavit rebuts the implied allegation that Adams was involved in his purported coercion. Whisby attested Adams brought him to the station, searched his person before arriving at the station, and after several hours "another detective which [sic] whom I don't have a name for but am able to identify entered the room" and that this detective carried out the physical and emotional coercion. (Whisby Aff. p. 2). As such, Whisby's own attestation rebuts Petitioner's allegation that Adams was even present or involved in the purported misconduct.

Even assuming *arguendo* Petitioner had offered factual allegations of Adams' involvement and these allegations weren't rebutted by Whisby's own testimony and attestations, the submitted evidence is not material as it involves entirely dissimilar types of misconduct.

Isby's case involved allegations of false arrest of a student at school and excessive use of force in doing so. There were no allegations of coercion of witnesses in that case or even a prosecution that followed against the student.

For Tolliver's case, Petitioner cites to a paragraph from the dissent of an order affirming the conviction where the dissenting Justice asserted remand was proper as the admission of six prior inconsistent statements was reversible error due to doubt regarding the voluntary nature of the original inculpatory statements—one of which involved Adams. *Tolliver*, 347 Ill. App. 3d at 236. Notably, the purported allegations against Adams in that case were unfounded and the conviction and evidence found proper. Specifically, the appellate court found the evidence was sufficient and it was not reversible error to have not just admitted those statements but to have admitted gang evidence as: (1) the evidence that fellow gang members had threatened a State witness due to her grand jury testimony was relevant to explain why the witness "recanted her grand jury testimony against defendant at trial: she feared for her safety if she continued to testify against the Gangster Disciples" and (2) the evidence about the Gangster Disciples' bylaws and rules, that testifying against other members was considered a violation that did so would be "beaten or killed in retaliation *** was relevant and admissible to show why several witnesses recanted their grand jury testimony against defendant, a member of the Gangster Disciples." *Id.* at 222.

As such, the submitted evidence consists of a case with no finding of wrongdoing and another case with findings of entirely dissimilar type of misconduct. Accordingly, the evidence relating to Adams is not material to any of the alleged misconduct in this case.

3. **Bartik**

Like Myles and Adams, Petitioner has not offered any allegation or factual support to Bartik having been in anyway involved in the purported misconduct. The only allegation made in the Supplement is that Bartik was listed in discovery. The allegation made in the Motion is that Bartik was going to administer the polygraph examination of Whisby.

The record shows Whisby was brought to Bartik for a polygraph examination but refused to participate in the examination and after ten minutes was returned to the detectives that transported him to that facility, with no statement given to Bartik, and Whisby's affidavit makes no allegations of misconduct by Bartik. In fact, the record shows Bartik was involved in this investigation well after Whisby had been interviewed and subject to the purported coercion. As there is no factual allegation in the Petition or record that Bartik was involved in the purported misconduct, this evidence is immaterial to the instant claim.

In regards to the evidence submitted, three of these cases are unresolved civil complaints: Walker, Mitchell, and Fulton. However, "mere evidence of a civil suit against an officer charging some breach of duty unrelated to the defendant's case" is not relevant to a pattern and practice claim. *People v. Jackson*, 2021 IL 124818, ¶ 38 (citing *People v. Coleman*, 206 Ill. 2d 261, 279 (2002); *People v. Nelson*, 235 Ill. 2d 386, 422 (2009)). As such, these cases are not material.

Otherwise, Petitioner offers two cases with final dispositions: (1) *McGee v. Chicago*, No. 2008-L-3503 (Cir. Ct. Cook County); and (2) Lanza's case.

For McGee's case, Petitioner submits the jury verdict forms from *McGee v. City of Chicago*, No. 2008-L-3503. (Supp. Ex. F, Mot. Ex. A-B). This court takes judicial notice that: (1) this verdict was reversed in *McGee v. City of Chicago*., 2012 IL App (1st) 111084; and (2) following

remand, *McGee,* No. 2008-L-3503 was dismissed for want of prosecution on August 23, 2013.[4] As such, Petitioner's allegation that *McGee,* No. 2008-L-3503 resulted in a finding of wrongdoing by Bartik is baseless as that verdict was vacated seven years prior to the filing of the Motion and nine years prior to the filing of the Supplement. Accordingly, that case is immaterial.

The only remaining piece of evidence submitted relating to McGee's case is a print out of a webpage from the Chicago Reporter regarding the settlement and a summary of the allegations. (Mot. Ex. C-D). In the exhibit submitted by Petitioner, the specific case number is obscured by the formatting of the printout of the webpage. However, this court takes judicial notice that *McGee v. City of Chicago,* No. 2013-L-0258 is listed on that publicly accessible website and the court records of civil suits filed by McGee against the City of Chicago.[5] In that matter, a settlement was reached for the amount listed in Mot. Ex. C-D. Similarly, in Lanza's case a settlement was reached.

However, in both of these cases, the misconduct is entirely dissimilar to the instant claim. In fact, in all of the evidence submitted by Petitioner relating to Bartik there is a very specific type of misconduct that is in no way present here: Bartik would fabricate stories that a defendant blurted out a confession to a crime right as a polygraph examination was going to begin. Here, the allegation is entirely dissimilar from the purported pattern and practice by Bartik. The record, including Whisby's testimony and affidavit, shows Whisby did make these statements and made these statements before Bartik was present. Furthermore, the record clarifies that Bartik did not testify and there was no testimony that Petitioner confessed to the instant crime. As such, Bartik would have been acting in a significant divergence from his purported pattern and practice of

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[4] Public documents, including court records, are subject to judicial notice. *Curtis v. Lofy*, 394 Ill. App. 3d 170, 172 (2009); see also *In re Marriage of Wojcik*, 362 Ill. App. 3d 144, 169 (2005).

[5] A court "may take judicial notice of information on a public website, even where the information does not appear in the record." *People v. Crawford*, 2013 IL App (1st) 100310, ¶ 118, n. 9.

lying on the stand that suspects told him something that they never actually said. If Bartik were acting in accordance with this pattern and practice, Whisby wouldn't have been coerced to give a statement and instead Bartik would have just lied about it and said he gave a statement when he didn't. It follows that this evidence is immaterial to Petitioner's claim that Whisby was coerced into providing a statement.

4. Lenihan

Unlike Bartik, Adams, and Myles, the record includes factual allegations about Lenihan as discussed *supra.* However, none of this evidence is material to the allegations against Lenihan.

Petitioner cites to *People v. Garland,* 2014 IL App (1st) 123016-U, but then goes on to say "while Det. Lenihan was not named as the perpetrator of misconduct *** he was involved in the 1997 murder investigation and testified at defendant's trial." (Supp. p. 11). There is no factual allegation of misconduct by Lenihan in that case and this cite amounts to a mere generalized allegation that Lenihan was involved in misconduct because he testified at some point.

Petitioner cites to the dissenting opinion from *Jones,* 2017 IL App (1st) 123371. However, *Jones* found the Petitioner's allegations unfounded and affirmed the denial of a motion for leave to file a coerced confession claim.

Petitioner cites to the TIRC finding regarding Tyler's allegation of police abuse. There, TIRC found Tyler's complaint regarding Dets. Moser and Clancy merited referral to the circuit court and noted that the previous complaint regarding police misconduct in his case involved Dets. James O'Brien, John Halloran, and Kenneth Boudreau. There is no finding or even allegation of misconduct by Lenihan in the evidence from Tyler's case submitted by Petitioner. Furthermore, *Jones* explicitly addressed whether Tyler's case involved allegations of misconduct by Lenihan:

> The dissent's misleading citations and parentheticals to *Tyler* insinuate that the allegations in that case of police misconduct and physical coercion to obtain the

> defendant's confession included misconduct and coercion claims against Lenihan. That insinuation, however, is absolutely false.

Jones, 2017 IL App (1st) 123371, ¶ 64.

Petitioner cites to two civil complaints filed by exonerated codefendants in the same criminal case, Hood and Washington. There is no finding of misconduct cited by Petitioner relating to these two cases and he has merely cited to two civil complaints.

Petitioner also cites to McGee's case as proof of Lenihan's pattern and practice. As discussed *supra,* McGee's case involved a settlement of a civil complaint based on allegations of perjured testimony by Dets. Bartik and Lenihan that McGee had given a nonexistent confession and that is an entirely dissimilar type of misconduct than that at issue here.

Lastly, Petitioner cites to Pernell's case as proof of Lenihan's pattern of intimidating witnesses. However, the circumstances and type of coercion involved in Pernell's case are entirely dissimilar to the instant matter. There, Pernell confessed after he was in custody for nearly 66 hours without food, water, or bathroom breaks and subjected to other coercive circumstances. Most distinguishable is that Pernell confessed directly after he was subjected to unnecessary and unreasonable force by Farley and Lenihan. Here, there is no allegation of a beating or a false confession by Lenihan. Instead, Lenihan is alleged to have coerced two witnesses to provide statements by: (1) during a 1- to 1.5-hour interview, exchanging promising Toni immunity from obstruction of justice charges for her admitted disposal of the murder weapon and threatening her with being unable to see her son again if said charges were pursued; and (2) making Whisby's release contingent on Oliver coming to the station and ultimately providing a statement.

As none of the aforementioned cases involve Lenihan, findings of misconduct by Lenihan, or any probative value that Lenihan was acting in conformity with a pattern and practice of

misconduct in the instant investigation, this court finds the evidence submitted regarding Lenihan is immaterial.

C. Conclusive Evidence

Petitioner contends in his conclusive evidence argument that this evidence is conclusive as "the only evidence that was presented at trial was the inconsistent testimony of State witnesses, two of whom, fully recanted their inculpatory statements" and that "it would lend substantial credibility to [Petitioner's] claim that his confession was coerced." (Supp. pp. 30-31).

In the pleading stage, the conclusive evidence question is whether "the petitioner's supporting documentation raises the probability that it is more likely than not that no reasonable juror would have convicted the petitioner in light of the new evidence." *Robinson*, 2020 IL 123849, ¶ 44.

To begin with, no confession was admitted into evidence and the record includes no allegation a confession was made. It almost goes without saying, but, this evidence does not increase the probability Petitioner's non-existent testimony about a non-existent confession that was never presented to the jury would have been believed had they also been presented with this pattern and practice evidence. It follows that this evidence is not conclusive in regards to a coerced confession argument.

In regards to the conclusiveness of this evidence relating to the recantations, this court finds this evidence does not raise the probability of a different outcome at retrial.

As Petitioner has not submitted affidavits from these witnesses, this court lacks the traditional type of factual allegations from these witnesses to be taken as true. Instead of affidavits, Petitioner has utilized the post-recantation trial testimony of these witnesses as his factual allegation. For the following analysis, this court has taken as true the trial testimony and the allegations regarding the misconduct, and has attached no value to the recanted prior

inconsistent statements as impeachment or evidence that is probative of guilt. In doing so, this court finds that Petitioner has not shown a different outcome is reasonably probable had this pattern and practice evidence been submitted.

Assuming *arguendo* this evidence afforded Whisby's trial testimony the utmost credibility and diminished any probative value of his prior inconsistent statements, Whisby's post-recantation trial testimony was entirely probative of Petitioner's guilt. In fact, "the only inconsistency in [Whisby's] testimony was that he stated before the grand jury that defendant hit the victim with a bat, but at trial, he stated that defendant hit her with a stick." *Adams,* No. 1-05-0908, p. 13. It can hardly be said that lending credence to Whisby's trial testimony would raise the probability of a different outcome at trial other than a finding that Petitioner killed Baker with a *stick* rather than a *bat.* As such, this court finds the submitted evidence does not raise the probability of a different outcome at trial.

Like Whisby, Toni's trial testimony is not probative of Petitioner's innocence. Toni admits she discarded the murder weapon and testified that Petitioner did approach the victim, walk with her towards the scene of the murder, and return to the vehicle alone. The major difference between Toni's prior statements and trial testimony was that she did not see the attack as it was behind where she was looking and she was distracted by someone on a porch talking about her. Toni further testified that she did not even look to where Petitioner and Baker went and when asked if she saw Baker at the end of the block as she "wasn't even paying attention." (R. F76). This recantation is not probative of Petitioner's innocence and essentially is just a shift from having seen the attack to seeing everything leading up to the attack, including a him giving Baker a "warning," but then being distracted and see Petitioner leave to the scene of the crime

without ever looking towards the scene. This testimony corroborates Whisby's post-recantation testimony and is not exculpatory for Petitioner.

Similarly, Kimberly's post-recantation trial testimony is entirely probative of Petitioner's guilt. Though she didn't see Petitioner hit Baker with the bat, Kimberly testified she observed Petitioner arguing with Baker, give her a warning, following Baker towards the alleyway, and with a bat in his hand. Kimberly explained she looked away for a second to grab Oliver's shoes and heard a thump while turned away. Upon returning her attention to Petitioner and Baker, she observed Petitioner with the bat still in his hand and Baker motionless on the ground next to him. Corroborating both Toni and Whisby, Kimberly then testified that Whisby grabbed Petitioner, causing Petitioner to drop the bat, grabbed the bat off of the ground, and brought the bat and Petitioner back to the house. All of this testimony is inculpatory for Petitioner.

Oliver, unlike every other witness—including Petitioner—testified that Petitioner never actually interacted with Baker that day. Instead, Petitioner saw Baker and immediately left the scene. This testimony directly contradicted Petitioner's own trial testimony and all of the post-recantation trial testimony. There is no likelihood that Oliver's trial testimony would be likely to lead to acquittal where it directly contradicts the defense's own theory of the case and witnesses—including Petitioner himself.

This court does not find a different outcome is reasonably probable if the submitted evidence were considered alongside any of these witnesses' post-recantation trial testimony—individually or collectively. As such, Petitioner has not submitted conclusive evidence in support of his successive actual innocence claim.

III. *Patterson* Due Process Claim

As this is essentially a false testimony claim, this court finds it prudent to rule in the alternative to the actual innocence claim. In doing so, this court finds Petitioner has not met the cause-and-prejudice test for his motion for leave to file said claim.

To file this pattern and practice claim, Petitioner would need to satisfy the cause-and-prejudice test. Given the posture of this case and the submitted evidence, this court finds Petitioner has not satisfied either of those prongs.

As discussed *supra,* the evidence submitted with the Petition is not newly discovered. It follows that Petitioner has not shown cause for his failure to raise a claim based upon evidence he could have discovered during earlier postconviction proceedings. Notably, this is not a case with newly discovered evidence and claims like in *Patterson* and its progeny. See *Patterson*, 192 Ill. 2d at 109 ("beyond interviewing anyone who had ever been a prisoner at Area 2, we can conceive of no manner in which [defense counsel] reasonably could have obtained this information"); *People v. Reyes*, 369 Ill. App. 3d 1, 20 (2006) ("the various allegations against [the detective] could have been discovered prior to trial only if defense counsel had interviewed every person ever detained by [the detective]").

To raise this claim, Petitioner was not required to conduct a near impossible task of interviewing countless detainees to discover evidence that the detectives had a pattern and practice of misconduct. Petitioner did not have to wait for this information to be compiled by OPS or some other entity or in the form of lawsuits collecting pattern and practice evidence regarding these detectives. Instead, Petitioner had several lawsuits and the cases cited within available to him during earlier postconviction proceedings, but has not once raised a *Patterson* based claim and does so now despite 12 of the 16 submitted exhibits being available to him during previous proceedings and the factual contents of all the submitted exhibits being more

than discoverable to him during those earlier proceedings. Accordingly, this court finds Petitioner could have raised this claim earlier than the instant pleading, his fifth motion for leave to file, and has not met the cause prong of his motion.

Where "the claim of prejudice rests on new evidence, the petitioner must show that his supporting evidence is of 'such conclusive character that it will probably change the result upon retrial.'" *Jackson*, 2021 IL 124818, ¶ 31 (quoting *People v. Patterson*, 192 Ill. 2d 93, 139 (2000)). In *Patterson,* the defendant asserted an entitlement to an evidentiary hearing "to present new evidence to support his claim that his confession was the result of torture." *Id.* at 138-39. Our supreme court found the defendant had presented sufficient evidence at the pleading stage and that a defendant presents sufficient evidence at the pleading stage to entitle him to an evidentiary hearing when: (1) he has consistently claimed he was tortured; (2) his claims are "strikingly similar" to other claims of torture; (3) the officers allegedly involved are identified in other allegations of torture; and (4) the defendant's allegations are consistent with OPS findings of systemic and methodical torture at Area 2 under Jon Burge. *Id.* at 145. Since then, our supreme court has clarified that "striking similarity" is not the legal test and instead the question is "whether there is sufficient similarity between the misconduct at issue in the present case and the misconduct shown in other cases, such that it may fairly be said the officers were acting in conformity with a pattern and practice of behavior." *Jackson*, 2021 IL 124818, ¶ 34.

This court finds Petitioner has not carried the standards of *Patterson* and its progeny. The analysis of the immaterial nature of this evidence in the actual innocence context is pertinent to the instant discussion. Of the submitted evidence, none involves remotely similar types of misconduct to that alleged here. There is nothing but conclusory allegations about purported misconduct by Myles, Adams, and Bartik, who Petitioner essentially contends committed the

misconduct of merely being listed in discovery. Furthermore, the record and Petitioner's prior pleadings contradict a finding that conclusory allegation that these detectives were somehow involved in the purported misconduct alleged here. Then, the only detective Petitioner provides factual allegations regarding, Lenihan, is not acting similarly to any of the submitted evidence of other instances of misconduct. As such, this court finds Petitioner has not arguably satisfied the *Patterson* factors and that this claim fails as a matter of law. Accordingly, Petitioner has not satisfied the prejudice prong of the implicit false testimony claim.

As Petitioner has not met the cause-and-prejudice test, this court denies the motion for leave to file a false testimony claim based on a pattern and practice of misconduct.

CONCLUSION

The Court has considered all of the claims and arguments before it. Based upon the foregoing, this Court finds petitioner has failed to state a colorable claim of actual innocence or to satisfy the cause-and-prejudice test to file a successive pattern and practice based false testimony claim. Accordingly, Petitioner fifth motion for leave to file a successive post-conviction petition is DENIED.

ENTERED: Stanley Sacks #1531

Hon. Stanley Sacks
Circuit Court of Cook County
Criminal Division

DATED: DEC. 2 2022

ENTERED
Judge Stanley J. Sacks #1531
DEC 02 2022
IRIS Y. MARTINEZ
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL