NOTICE
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2026 IL App (5th) 240719-U

NO. 5-24-0719

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Alexander County.
	)	
v.	)	No. 97-CF-43
	)	
CLEODIOUS SCHOFFNER JR.,	)	Honorable
	)	William J. Thurston,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE McHANEY delivered the judgment of the court.
Justices Sholar and Bollinger concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court properly dismissed the defendant's section 2-1401 petition as untimely. Although the State's initial motion was struck as late, it raised and litigated the limitations defense before final judgment. Counsel's asserted lack of diligence did not warrant remand because further development of the defendant's as-applied sentencing claim could not cure the petition's untimeliness. The defendant's ability to pursue a separate successive postconviction petition was not before the court.

¶ 2 On April 11, 1997, the defendant, Cleodious E. Schoffner Jr., was charged by information with the following offenses: multiple counts of first degree murder resulting in the death of Donald Murphy and Gary Wheaton, one count of armed robbery, one count of aggravated battery with a firearm, and two counts of aggravated kidnapping. Following a jury trial held in January of 1998, the defendant was convicted on all counts. The defendant's convictions were affirmed on direct appeal by this court in *People v. Schoffner*, No. 5-98-0120 (1999) (unpublished order under Illinois

Supreme Court Rule 23). As the facts are fully set forth in that order, we recite only those facts necessary to this disposition.

¶ 3 I. BACKGROUND

¶ 4 On April 10, 1997, the defendant was 20 years old. His cousin, Glen Schoffner (Glen), drove him to the D&M Quick Mart in Tamms, Illinois. Inside the store, Glen displayed a gun, demanded money, and then shot and killed Donald Murphy (Murphy) and Gary Wheaton (Wheaton) and shot and injured Norma Johnson (Johnson). Johnson testified that Glen dragged her by her hair, beat her, shot her in the left leg, and then was forced into the trunk of the car. The defendant maintained that he did not know Glen intended to rob the store, did not participate in the shootings, and acted under Glen's threats. The State disputed his account of his involvement before and after the crimes.

¶ 5 The defendant was found guilty of the first degree murders of Murphy and Wheaton, armed robbery, and aggravated kidnapping and aggravated battery with a firearm regarding Johnson, based upon his accountability for Glen's actions. Glen was prosecuted separately. At the defendant's sentencing hearing, the parties addressed the seriousness of the crimes, the defendant's lack of a prior record, his relative culpability, and the limits the multiple-murder sentencing provision placed on the court's discretion.

¶ 6 The sentencing court found aggravating circumstances in "the heinous nature and the amount of harm that was inflicted in this crime spree." It also found that the defendant had "no prior criminal history whatsoever, juvenile, adult, or anything that's been uncovered here." The court agreed that "this crime was in large part induced or facilitated by another, by Glen Schoffner." Calling the killings and the violence inflicted on Johnson the first of "two tragedies,"

the court described the effect on the victims and their families. It then described the difference between Glen's culpability and the defendant's as the second tragedy.

¶ 7 The court explained that the jury's two murder verdicts required "a mandatory sentence of no discretion of natural life with regards to the two murder convictions." It stated that comparing the defendant's culpability with Glen's "is a tragedy in my mind." The court was equally clear about the verdict: "The jury was properly instructed to consider the accountability theory. I think they made a correct decision." It imposed natural life imprisonment for the murders and consecutive 10-year terms for armed robbery, aggravated battery with a firearm, and aggravated kidnapping, explaining that the defendant's culpability was less than Glen's.

¶ 8 After this court affirmed the defendant's convictions on direct appeal, the defendant filed an initial postconviction petition in 1999, which counsel amended in 2001. That petition included allegations that trial counsel had failed to investigate Glen and another witness. The circuit court dismissed it. The defendant thereafter pursued other collateral relief. In 2014, this court affirmed the denial of leave to file a successive postconviction petition concerning witness testimony and trial counsel's performance. *People v. Schoffner*, 2014 IL App (5th) 120201-U.

¶ 9 The defendant had also filed petitions under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2018)) in 2005 and 2007. After attorney Michael Jarard (defense counsel) began representing him, the defendant sought to withdraw those petitions. In June 2018, the circuit court ordered that the petitions were withdrawn "without prejudice with leave to refile." On June 13, 2019, defense counsel filed the section 2-1401 petition from which this appeal arises.

¶ 10 The 2019 petition sought to vacate the convictions based on asserted new evidence and alleged irregularities affecting the jury. It relied in part on affidavits concerning Glen, Kevin Mackins, Kimberly Noble, and the defendant's former trial attorney, Patrick Cox. A separate

section, captioned "Petitioner's Sentence of Natural Life in Prison is Now Unconstitutional," challenged the mandatory life sentence under the proportionate penalties clause of the Illinois Constitution.

¶ 11 In the sentencing section, the petition compared the defendant's circumstances with those discussed in *People v. Harris*, 2018 IL 121932, and the then-recent appellate decision in *People v. House*, 2019 IL App (1st) 110580-B. It identified the defendant's age, the accountability theory, his asserted lack of advance knowledge or voluntary participation in the robbery, and his lack of criminal history. It also discussed decisions concerning the treatment of youth in sentencing and reproduced substantial portions of the sentencing court's remarks. Counsel asked for an evidentiary hearing or resentencing on the premise that the sentencing court had lacked discretion to give effect to the mitigation it identified.

¶ 12 The petition requested several forms of relief: vacation of the convictions and a new trial, vacation of the sentence with an evidentiary hearing or resentencing, and, alternatively, leave to file a successive postconviction petition to address "newly discovered constitutional violations." The alternative request did not take the form of a separate successive postconviction petition presenting the youth-based sentencing claim.

¶ 13 The State moved to dismiss on August 14, 2019. The defendant responded with a motion to strike, asserting that the State had failed to answer or otherwise plead within 30 days of the June 13 filing. At a November 2019 hearing, counsel argued that the State's failure required the court to deem the petition's well pleaded facts admitted. The State acknowledged that its motion had been filed after 30 days but argued that the court could still consider whether the allegations provided a legal basis for relief. The circuit court reserved ruling.

¶ 14 In a 2020 docket entry, the circuit court struck the State's first motion to dismiss as untimely. The scope of that ruling became a point of dispute at a May 2022 hearing. Counsel presented a proposed order that would have entered judgment for the defendant on the sentencing section of the petition and directed steps toward resentencing. The court declined to sign it, explaining that the proposed order "does not accurately reflect the ruling of the Court." The court stated: "[A]ll I did was strike the Motion to Dismiss." It had made no ruling on which facts were admitted and had entered no judgment on the sentencing claim.

¶ 15 The parties then addressed which allegations, if any, should be treated as admitted in the absence of the State's timely response to the 2-1401 petition. Counsel relied on the petition and the affidavits of Cox, Noble, Mackins, and Glen and acknowledged that admission of well pleaded facts would leave for another day whether those facts entitled the defendant to relief. The court expressed concern about treating an affidavit's legal conclusions, hearsay, or suppositions as admitted facts merely because the State had not timely answered. It asked whether the parties' proposed allegations were better described as "well-pled averments as opposed to well-pled facts or well-pled beliefs."

¶ 16 At a July 2022 hearing, the State also raised the distinction between a section 2-1401 petition and a successive postconviction petition. The prosecutor argued that the defendant's as-applied challenge was subject to the former petition's time limit and stated: "If counsel wants to dismiss the 2-1401 and come back under the Post-Conviction Hearing Act, we can have different arguments about it. But that's the vehicle." Defense counsel continued to litigate the pending section 2-1401 petition.

¶ 17 In September 2022, the circuit court issued an order addressing the asserted admissions. It examined the allegations concerning each affidavit, the jury-related claims, and the sentencing

claim. The court initially found no well pleaded facts that the State's failure to respond required it to treat as admitted. With respect to the sentencing section, it characterized the asserted unconstitutionality of the sentence as a legal conclusion. The defendant moved to reconsider the order.

¶ 18 The State subsequently filed a statement identifying particular allegations in the Cox, Noble, and Mackins materials that it agreed were well pleaded; it did not agree regarding Glen's affidavit. In May 2023, the court modified its earlier order to include the facts to which the State had agreed. These orders identified admitted factual allegations; they did not decide whether the defendant was entitled to a new trial or a new sentence.

¶ 19 On September 1, 2023, the State filed another motion to dismiss, this time expressly invoking section 2-619(a)(5) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(5) (West 2022)). It asserted that the defendant had filed the 2019 petition more than two years after entry of the judgment, that his as-applied constitutional challenge did not render the judgment void, and that the time limit therefore barred relief. On September 7, 2023, the defendant moved for judgment on the pleadings and filed a supporting memorandum and materials concerning adolescent development. He maintained that the admitted facts and the sentencing court's remarks warranted relief. He later moved to strike the State's new dismissal motion on the ground that the State had waived a limitations objection by failing to respond within the original 30-day period.

¶ 20 At the December 2023 hearing, counsel argued that the time limit was a waivable procedural defense and that the State's missed response deadline effected the waiver. The court asked whether the cases counsel cited meant that the State could waive the defense or that it was "forced to waive it by not filing in a timely manner." Counsel answered, "Absolutely," and continued to argue that waiver occurred by operation of the response deadline. The court asked

counsel to identify authority saying that a failure to respond within 30 days automatically waived the two-year limit.

¶ 21 The parties also addressed the defendant's reliance on *House*. Counsel urged the court to hear evidence about his age and individual circumstances. The court asked whether *House* had arisen from "a post-conviction petition." Counsel answered that it had. The court observed that such a petition was different from a section 2-1401 petition; counsel maintained that his client's claim could also be heard in the pending proceeding. The State opposed relief, arguing that an as-applied claim required a showing connecting the research on development to the defendant's own circumstances and that the procedure and time limits of the pending petition still had to be satisfied.

¶ 22 In an order filed December 29, 2023, the circuit court denied the defendant's motion to strike and granted the State's motion to dismiss. The court rejected the assertion that the State had waived its two-year time limit objection by missing the 30-day deadline, finding that the State continued to assert the statutorily-required two-year time limit. It explained that a failure to answer could result in admission of well pleaded facts, but that its earlier orders concerning those facts did not resolve the petition's legal sufficiency. The court characterized the sentencing challenge as an as-applied claim rather than a challenge to a facially void statute and concluded that the void-judgment exception did not remove it from the section 2-1401 time limit. The court dismissed the petition.

¶ 23 The defendant moved to reconsider. At the ensuing hearing, the court clarified: "I don't think this Court at any time in this case made any finding of anything on the merits. That door has not been opened yet." It distinguished its rulings identifying well pleaded facts from a decision granting substantive relief. In an order filed May 23, 2024, the court denied reconsideration,

reiterating its timeliness ruling and stating that the petition's remaining claims had been or could have been addressed in earlier proceedings. The defendant filed a timely notice of appeal.

¶ 24 On appeal, the defendant argues that Jarard did not exercise due diligence in presenting his youth-based as-applied proportionate penalties claim. He asserts that counsel should have developed the relationship between the research on youthful brain development and his individual circumstances and should have presented the claim in a successive postconviction petition. Alternatively, he contends that the circuit court erred in dismissing the section 2-1401 petition as untimely because the State waived its limitations defense, and that counsel inadequately pleaded the claim in that petition as well. He asks for further proceedings with new counsel. The State maintains that the limitations defense was preserved, that the section 2-1401 petition was untimely, and that the asserted omissions by counsel do not warrant remand of this proceeding.

¶ 25 II. ANALYSIS

¶ 26 The defendant asks us to reverse the dismissal of his section 2-1401 petition and remand so that new counsel can develop his as-applied proportionate penalties claim, either in this proceeding or through a successive postconviction petition. He argues that defense counsel failed to exercise due diligence in presenting the claim and that the circuit court erred in finding the section 2-1401 petition untimely. We review the dismissal of a section 2-1401 petition *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 18 (2007). We first address the procedural ground on which the circuit court dismissed the petition, because it determines whether the asserted shortcomings in counsel's presentation could warrant a remand of this proceeding.

¶ 27 A. Timeliness and the State's Response

¶ 28 Section 2-1401 provides a civil remedy for relief from a final judgment, including a judgment in a criminal case. *Id.* at 7. A petition ordinarily must be filed within two years of entry

of the judgment. 735 ILCS 5/2-1401(c) (West 2018). The statute excludes time during which a petitioner was under legal disability or duress or the ground for relief was fraudulently concealed. *Id.* A challenge to a void judgment is exempt from the ordinary time limit. *People v. Thompson*, 2015 IL 118151, ¶ 29. But the voidness exception is confined, as pertinent here, to a judgment entered without jurisdiction or one based on a statute that is facially unconstitutional and void *ab initio*. *Id.* ¶¶ 31-32. The supreme court specifically held that an as-applied challenge does not invoke the void *ab initio* exception. *Id.* ¶ 32. Here, the defendant's 2019 claim challenged the mandatory sentence as applied to his age and circumstances. It was filed more than 21 years after the 1998 judgment. The 2018 order permitting withdrawal and refiling of the earlier petitions said nothing about suspending section 2-1401's time limit.

¶ 29 The defendant responds that the State waived the time limit by failing to answer or move to dismiss within 30 days of the filing of his 2019 petition. The State's August 2019 dismissal motion was filed beyond that period, and the circuit court struck it for that reason. The defendant maintains that the State could not revive its limitations objection in the September 2023 motion. Because the limitations period is procedural and may be waived, he argues, the State's missed response deadline must be treated as a waiver. The circuit court rejected that reading.

¶ 30 The defendant is correct that the two-year period is capable of waiver. *Thompson* states that, when a petition is filed after the period with no ground excusing delay, it cannot be considered "unless the limitations period is waived by the opposing party." 2015 IL 118151, ¶ 29. Thus, the State's description of that limit as jurisdictional during the hearings does not answer the waiver question. We must determine what follows from the missed 30-day response deadline and the State's later conduct.

¶ 31 *Vincent* explains that section 2-1401 proceedings follow the usual rules of civil practice. 226 Ill. 2d at 8. When a respondent answers a petition on its merits without attacking its allegations, the respondent may waive an objection to the petition's sufficiency. *Id.* When the respondent does not answer, the petition's well pleaded factual allegations are deemed admitted. *Id.* at 9. *People v. Matthews*, 2016 IL 118114, ¶ 8, describes a failure to respond within 30 days as waiving questions concerning the petition's sufficiency. Timeliness presents a distinct question. As *People v. Berrios*, 387 Ill. App. 3d 1061, 1063 (2009), explains, section 2-1401's two-year period is a statute of limitations, not a jurisdictional condition, and the State must assert it as an affirmative defense. We therefore cannot treat the filing date alone as a basis for a court to dismiss a petition on its own initiative.

¶ 32 The defendant relies on decisions applying that distinction when the State failed to assert timeliness in the circuit court. In *People v. Cathey*, 2019 IL App (1st) 153118, ¶ 19, the State filed no response and made no limitations objection before the circuit court dismissed the petition on its own initiative. The appellate court held that the defense was forfeited. It explained why raising the issue below matters: the State should raise timeliness " 'before the trial court, where any amendments could have been made and any factual disputes could have been resolved.' " *Id.* ¶ 17 (quoting *People v. Pinkonsly*, 207 Ill. 2d 555, 564 (2003)). Similarly, in *People v. Oliver*, 2021 IL App (1st) 181605, ¶¶ 18-19, the State conceded it had not raised limitations in the circuit court and attempted to assert it for the first time on appeal. *Oliver* declined to consider the defense. *People v. White*, 2025 IL 129767, ¶ 34, applied the same preservation principle when the State first objected to the procedural vehicle for a proportionate penalties claim in the supreme court. These decisions require us to examine when and how the State asserted its objection here.

¶ 33 The facts that drove *Cathey* and *Oliver* are absent here. The State raised the two-year limit in its first motion. Although that motion was struck because it arrived after the 30-day response period, the court expressly confined its ruling to that motion and did not decide the limitations question. The State continued to press its objection during later hearings and then filed a motion invoking section 2-619(a)(5) in September 2023, before the circuit court entered final judgment. The defendant moved to strike, argued waiver and the asserted exceptions, and supplied further materials; the circuit court heard the parties before ruling. The defendant therefore had the opportunity to address the defense in the circuit court that was missing in *Cathey*. 2019 IL App (1st) 153118, ¶¶ 17-19. The State did not wait until appeal to present the defense, as it did in *Oliver*. 2021 IL App (1st) 181605, ¶ 19.

¶ 34 The defendant's argument does identify a narrower issue the cited cases do not squarely decide: whether striking the State's first motion for missing the 30-day deadline also permanently barred the State from asserting the limitations defense in a later motion before judgment. *Matthews* speaks to waiver of objections to the sufficiency of an unanswered petition, not to the permanent loss of every affirmative defense before the circuit court has decided the action. 2016 IL 118114, ¶ 8. *Cathey* holds that a limitations defense cannot be supplied by the court when the State never raised it; *Oliver* holds that the State cannot supply it for the first time on appeal. *Cathey*, 2019 IL App (1st) 153118, ¶ 19; *Oliver*, 2021 IL App (1st) 181605, ¶ 19. *Cathey* does say the State forfeited the defense "by not filing a response to the petition." 2019 IL App (1st) 153118, ¶ 19. Its account of the record also specifies that the State never objected to timeliness in the circuit court and that the petitioner had no opportunity to respond to the issue there. *Id.* We find that holding does not preclude the State's later motion in this case, filed and litigated before final judgment. The 2020

order striking the earlier motion did not adjudicate the limitations defense, and the State's repeated assertion of it does not establish its relinquishment. See *Thompson*, 2015 IL 118151, ¶ 29.

¶ 35 The well pleaded facts identified in the circuit court's orders do not change that result. The defendant's age, lack of prior criminal history, and the sentencing court's statements are material to the nature of his constitutional claim. However, they do not make the 2019 petition timely or transform an as-applied claim into a facial challenge to a void statute. *Id.* ¶ 32. No alleged legal disability, duress, or fraudulent concealment excused the delay in presenting this sentencing claim. *Vincent*, 226 Ill. 2d at 7. With the State's limitations defense raised and litigated before final judgment, the petition's filing more than two decades after the sentence foreclosed relief under section 2-1401. The circuit court properly dismissed it.

¶ 36 B. Counsel's Asserted Lack of Diligence

¶ 37 The defendant separately argues that counsel's handling of the sentencing claim requires a remand. He contends that defense counsel should have connected the research on youthful development to the defendant's individual circumstances more fully and should have pursued relief in a successive postconviction proceeding. In *Thompson*, the supreme court explained that an as-applied challenge depends on the defendant's particular circumstances; research concerning young adults, standing alone, did not show how that research applied to the person before the court. 2015 IL 118151, ¶¶ 37-38. More recently, *People v. Williams*, 2024 IL 127304, ¶ 31, held that merely citing age and evolving science did not state even the gist of an emerging adult's as-applied claim in an initial postconviction petition. The 2019 petition identified the defendant's lack of a criminal record, his account of Glen's influence, the accountability verdict, and the sentencing court's remarks; defense counsel later supplied research concerning development. Whether those allegations are sufficient to support a constitutional claim is a separate question we need not decide.

¶ 38 In *People v. Stoecker*, 2020 IL 124807, ¶ 35, the supreme court considered the obligations of counsel appointed in a section 2-1401 proceeding. It declined to import the particular duties imposed on postconviction counsel by Illinois Supreme Court Rule 651(c) into section 2-1401 proceedings, explaining that the two proceedings are distinct and that section 2-1401 does not provide a statutory right to counsel. *Id.* ¶ 41. Instead, appointed counsel must make a cogent argument for the client's claims and "overcome any procedural hurdles where it can legally and ethically be done." *Id.* ¶ 42. The defendant here retained defense counsel; the circuit court did not appoint him. We assume without deciding that these due diligence principles govern his claim because applying them does not change the result.

¶ 39 *Stoecker* states that a claim of inadequate diligence sufficient to justify remand depends on an arguably meritorious claim. *Id.* ¶ 43. There, counsel's failure to amend an untimely petition did not require remand because no amendment could cure the legal defect. *Id.* ¶ 44. The court concluded that, unless counsel's asserted shortcoming "could have reasonably affected the outcome of the proceedings," remand served no purpose. *Id.* ¶ 45. The question here is whether the improvements the defendant identifies could have made a difference to the disposition of this section 2-1401 petition.

¶ 40 While additional allegations tying research on adolescent development to the defendant's circumstances might bear on the substance of an as-applied claim, they could not supply an exception to the two-year limit or make the challenged sentencing statute facially void. The two-year limitation requirement that foreclosed the defendant's 2-1401 petition was independent of whether counsel failed to better articulate the constitutional merits. As in *Stoecker*, a remand to amend this petition would leave its dispositive procedural defect intact. *Id.* ¶ 44.

¶ 41 We do not overlook the defendant's argument that counsel should instead have filed a successive postconviction petition. Counsel's 2019 prayer for relief did request, in the alternative, leave to file a successive petition addressing newly discovered constitutional violations. He did not, however, file a separate successive petition developing this sentencing claim, and the circuit court did not decide whether the claim satisfies the requirements for leave to file one. The prosecutor expressly raised the difference between the two procedures in 2022, while counsel continued to seek judgment on the pending section 2-1401 petition. Those circumstances explain the defendant's criticism of counsel's choice. They do not establish that this court can cure the untimeliness of one proceeding by ordering counsel to commence a different one on remand.

¶ 42 The authorities addressing emerging adult claims do not supply that remedy. *Thompson* observed that an offender might pursue an as-applied challenge through the Post-Conviction Hearing Act, including a successive petition, or by a section 2-1401 petition "if certain procedural and statutory requirements are satisfied." 2015 IL 118151, ¶ 44. *People v. Harris*, 2018 IL 121932, ¶ 48, likewise recognized that such a claim might be brought in another proceeding. The defendant here chose section 2-1401 and failed to overcome its two-year limit. *People v. House*, 2021 IL 125124, ¶ 32, remanded for factual development within an existing postconviction proceeding; it did not revive an untimely section 2-1401 petition.

¶ 43 A successive petition raises its own threshold questions. In *People v. Brewer*, 2025 IL App (1st) 240088, ¶ 31, the appellate court explained that later case law applying juvenile sentencing principles does not by itself establish legal cause for an emerging adult to file a successive proportionate penalties claim. It also examined whether newly offered research established factual cause and concluded on that record that it did not. *Id.* ¶ 46. *Brewer* addressed a successive petition; it did not change *Thompson*'s rule concerning the time limit for section 2-1401 petitions. The

defendant's ability to satisfy the distinct requirements for a successive petition has not been litigated here. We express no view on whether a future filing could satisfy them or on the ultimate constitutionality of his sentence.

¶ 44 *People v. Shellstrom*, 216 Ill. 2d 45, 53 (2005), permits a circuit court in appropriate circumstances to recharacterize a *pro se* pleading as a first postconviction petition, subject to safeguards before that recharacterization. The court also made clear that recharacterization is not mandatory. *Id.* at 57. The defendant's 2019 petition was filed by retained counsel after an initial postconviction proceeding and an unsuccessful request for leave to file a successive petition. *Shellstrom* therefore does not require us to treat his section 2-1401 petition as a successive postconviction petition. Doing so on this record would bypass, rather than adjudicate, the distinct requirements for leave to file that petition.

¶ 45 The sentencing court's concern about the disparity between the defendant's culpability and the mandatory sentence is evident from the transcript. Its findings also include the seriousness of the crimes and its express agreement with the accountability verdict. Those facts would matter to a properly presented as-applied claim, which depends on the defendant's particular circumstances. *House*, 2021 IL 125124, ¶ 27. We cannot decide that claim on the merits merely because it raises substantial questions; nor would deciding its merits resolve the time bar in this case. Because the defendant has not identified a change counsel could have made that would allow the pending petition to proceed, the asserted lack of diligence does not warrant a remand. *Stoecker*, 2020 IL 124807, ¶ 45.

¶ 46 III. CONCLUSION

¶ 47 Accordingly, we affirm the circuit court's dismissal of the June 13, 2019, section 2-1401 petition. We do not decide whether the defendant's sentence violates the proportionate penalties

clause as applied to him or whether he may obtain leave to pursue that claim in a separate successive postconviction proceeding.

¶ 48 Affirmed.