No. 128740

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- PIERRE MONTANEZ, Petitioner-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-19-1930. There on appeal from the Circuit Court of Cook County, Illinois , No. 02 CR 31134. Honorable Joseph M. Claps, Judge Presiding.

BRIEF AND ARGUMENT FOR PETITIONER-APPELLANT

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E-FILED
11/16/2022 10:34 AM
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TABLE OF CONTENTS AND POINTS AND AUTHORITIES

NATURE OF THE CASE

Pierre Montanez, petitioner-appellant, appeals from a judgment denying his motion for leave to file a successive post-conviction petition.

An issue is raised concerning the sufficiency of the post-conviction pleadings.

ISSUES PRESENTED FOR REVIEW

I. Whether the circuit court erred in denying Pierre Montanez leave to file his successive post conviction petition, where he demonstrated cause and prejudice with his claim that the Chicago Police Department violated *Brady v. Maryland* when they concealed a potentially exculpatory "street file" from him at trial, and where he repeatedly requested, but was denied, access to the full file, meaning he could not attach it to his petition or make specific allegations based off of it.

II. Whether remand is also necessary because, prior to Pierre Montanez filing his successive post conviction petition, the trial court erred by giving the State decision making power over what Montanez was entitled to access from his street file, which is fundamentally unfair, where the State was responsible for the initial suppression of the file.

STATEMENT OF FACTS

Overview

Together with codefendant Jose Luera, Pierre Montanez was convicted of the first degree murders of Roberto Villalobos and Alejandra Ramirez, along with aggravated kidnaping and aggravated vehicular hijacking, after a jury trial. Montanez filed a successive post-conviction petition arguing, *inter alia*, that the State violated *Brady v. Maryland* by failing to disclose documents related to his case that were hidden in a Chicago Police Department "street file." Montanez alerted the circuit court to the existence of his street file during proceedings on his initial post conviction petition, and, over Montanez's persistent objection, the circuit court allowed the Assistant State's Attorney (ASA) prosecuting his initial post conviction petition to review the file, and decide what from it to tender to Montanez. The State tendered a single police report that Montanez attached to his petition. Montanez's petition was dismissed at the leave to file stage, and the appellate court affirmed, finding that the police report was not prejudicial and that Montanez did not make an allegation in his petition that the remainder of the file may have contained *Brady* material. *People v. Montanez*, 2022 IL App (1st) 1191930. This Court allowed Montanez's Petition for Leave to Appeal.

Jury Trial

In opening, the State argued that Montanez and Luera were responsible for each other's actions leading to the murder of Villalobos and Ramirez (R.JJJJJJJ195[1]). The defense presented the theory that Luera committed both murders and Montanez did not participate (R.JJJJJJJ196-199).

Anais Ortiz testified that on August 27, 2002, she was with Luera, Montanez, and Claudia

[1] The citations to the trial report of proceedings reflect the pagination of the paper record. The trial report of proceedings can be found in the record for 1-19-0017, which is a part of the record for the instant case (*See* Fn. 2).

Negrette, and they called Bobby Villalobos for a ride home (R.JJJJJJJ201-4). Ortiz and Negrette were dropped off near their homes, leaving Ramirez and Villalobos in the car with Luera and Montanez (R.JJJJJJJ205-206).

John McDonnell testified that he was on his porch in Chicago on August 28, 2002, around midnight, when he observed two men getting out of a car across the street, and one of the men punching the other (R.JJJJJJJ224-26). McDonnell saw a "little light" inside the car, which made him think that there could be more people in the car (R.JJJJJJJ226-27).The assailant showed McDonnell a knife, so McDonnell went to the back of his house to get a 2x4 to defend himself. When McDonnell returned, he saw the car driving away, and saw one of the men who had been stabbed multiple times on the driveway. He called 911, officers arrived, and McDonnell identified a photo of Luera as the assailant (R.JJJJJJJ229-32).

Jason Samhan testified that he was driving on August 28, 2002, shortly after midnight, when he saw a car run a red light. He saw a woman being choked in the back window of the car (R.JJJJJJJ250-52). He followed the car, and called 911 (R.JJJJJJJ257).

George Hoyt testified that he was working as a cashier at a gas station after midnight on August 28, when Montanez came in and bought cans of gas (R.KKKKKKK22-25). Samson Murray testified that, around midnight, he was in a car outside a restaurant with his friend Nick, when Montanez walked up with gas cans (R.KKKKKKK37-39). Montanez got into Nick's car and Murray waited in the restaurant for 2-3 hours before Nick returned (R.KKKKKKK41). He did not see Montanez again that night (R.KKKKKKK43).

Officers located Villalobos' abandoned car at 3710 W 69th St. The car had been burned, and Ramirez' body was recovered inside it (R.KKKKKKK63). A mixture of DNA from Ramirez, Villlalobos, and Montanez was found in the fingernail clippings of the right hand of Alejandra Ramirez, and Luera was excluded from having contributed to that DNA mixture

(R.KKKKKKK105). Montanez could not have been excluded from having contributed to the DNA under Ramirez's left hand fingernail clippings (R.KKKKKKK106).

Officers obtained an arrest warrant for Montanez on November 5, 2002 (R.LLLLLLL16). On November 16, Montanez came to the police station with two attorneys, and made statements (R.LLLLLLL18). He said he had never seen Ramirez before, but knew Villalobos from the neighborhood, and had been in his car one time, during the day (R.LLLLLLL19). The officers noticed that Montanez had burns on his arm, but he said he was burned on 4th of July (R.LLLLLLL20-21). Montanez presented a doctor's note from a Dr. Cabrera to the officers, which certified that he received burn treatment (R.LLLLLLL27). The parties stipulated that Dr. Cabrera would testify that he did not treat Montanez at any time (R.LLLLLLL41). Montanez also stated that he knew he was on camera at the gas station, and stated that he bought two gas cans because he ran out of gas while in the car with Nick Bugos (R.LLLLLLL24). Charred debris collected from Villalobos's Chevy contained gasoline (R.LLLLLLL43-44). Ramirez's primary cause of death was multiple stab wounds, with a contributing factor of strangulation (R.LLLLLLL81).

The jury found Montanez guilty of aggravated vehicular hijacking, aggravated kidnaping, first degree murder of Villalobos, and first degree murder of Ramirez (R.MMMMMMM67). Montanez was sentenced to mandatory natural life, 20 consecutive years for aggravated vehicular hijacking, and 27 consecutive years for aggravated kidnaping (R.OOOOOOO9).

Direct Appeal and Initial Post Conviction Petition

The appellate court affirmed Montanez's conviction on direct appeal, over Montanez's claim that the State's attorney misstated the evidence in closing arguments. *People v. Montanez*, 2014 IL App (1st) 122369-U.

Montanez's initial post conviction petition raising the issue that the State violated *Brady v. Maryland* when it failed to disclose that key witness Anais Ortiz was testifying in

contemplation of a plea deal was dismissed at the second stage, and the appellate court affirmed. *People v. Montanez*, 2021 IL App (1st) 191065-U.

Street File Litigation

On May 2, 2018, during a hearing discussing a motion to reconsider the denial of Montanez's initial post conviction petition, Montanez first told Judge Claps that attorney Candace Gorman had sent him a letter stating she found documents relating to his case in a Chicago Police Department basement, but she could not tender the documents to him, because he was not represented by counsel (R.218-219, 1190017[2]). Judge Claps asked the Assistant State's Attorney (ASA) to bring attorney Gorman into court, with any relevant Chicago Police Department records (R.225, 1190017).

At the next hearing, Montanez explained that he had been attempting to obtain the documents from Gorman, and had asked his family members to contact his former trial attorney, Scott Frankel, so that Frankel could receive the documents from Gorman (R.227, 232, 1190017). He explained that he also filed an Attorney Registration and Disciplinary Commission (ARDC) complaint against Gorman for not tendering the file, but the ARDC found that Gorman was not at fault, because *pro se* litigants are not allowed to access street files (R.227, 1190017).

Over the next few months Judge Claps repeatedly assured Montanez that he would "find out" the situation with the street file. Judge Claps spoke with Judge Kennelly, the federal district court judge who issued the protective order dictating that street files could only be shared with attorneys, and not *pro se* litigants, and Judge Kennelly stated that the street files

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[2] Prior to filing his opening brief in the appellate court, Montanez filed a motion to consider the record from his initial post conviction petition, appellate court number 1-19-0017, and the record from his 2-1401 petition for relief from judgement, appellate court number 1-19-1065, as parts of the record in the instant case. The appellate court granted his motion on March 9, 2021. Thus, both 1-19-0017 and 1-19-1065 are part of the instant record. Any time a record citation comes from appellate case number 1-19-0017 or 1-19-1065, the record citation includes the appellate case number, in the format of the citation above.

were in the possession of the City of Chicago (R.219, 225-6, 233, 237, 1190017). Judge Claps instructed the ASA to issue a subpoena for the file, and stated that once the ASA received the documents, they would be returned to him for *in camera* review (R.244, 1190017).

At the next hearing date, the parties appeared before Judge Walowski[3]. The ASA informed Judge Walowski that she went through the file and determined that it contained no exculpatory information except for one police report, but the police report in question was part of a police report that had been previously tendered (R.248-49, 1190017). Montanez stated that Judge Claps had ordered an *in camera* review and stated "It was not my understanding that the State would be going through the file and deciding what was discoverable and what wasn't" (R.249-51, 1190017). Judge Walowski stated, "as an officer of the court, I trust [The ASA] went through everything and that she was able to find what relates to you" (R.249-51, 1190017). Montanez received a copy of the police report. After reviewing the report, Montanez argued that it contained exculpatory information, and the ASA argued "there has been no discovery violation" (R.259, 1190017).

Montanez filed a third amended petition for post conviction relief, after Judge Claps had already denied the initial post conviction petition. The petition asked for "judicial notice" of the State's refusal to tender the entire file (C.1515, 1190017). The petition also made claims related to the police report that was tendered from the street file (R.1523-4, 1190016). Judge Walowski addressed Montanez's third amended petition for post conviction relief on the record, stating, "As far as the issue of the police report. You did receive that, and I don't find anything that -- objectionable or anything upon which I'm going to grant sanctions for based on what I heard. So I already addressed that" (R.280, 1190017).

The parties also addressed a pending Substitution of Judge (SOJ) motion Montanez

[3] On July 3, 2018 Judge Claps was placed on "non judicial duties."

had filed. Montanez again argued that the ASA had an interest in the street files, so she should not have reviewed his file, and "Judge Claps understood this, and this is why he ordered the State to tender the file over to him so he can conduct in camera examination" (R.281, 1190017). Judge Walowski transferred the case for a ruling on the SOJ (R.287, 1190017), and Montanez explained the situation before Judge Brosnahan:

> Judge Claps gave says (sic.) Assistant State's Attorney Linda Walls specific orders to secure the file -- since I'm *pro se* and I couldn't get the secured my file myself -- to secure the file and give it to the Court so the Court can conduct an in camera review of the file to determine if there's any exculpatory material contained in the file. Due to issues that occurred with Claps -- Judge Claps, Assistant State's Attorney Walls took it upon herself to go through the file and pretty much make a determination on what she determined was exculpatory and what she did was after the fact, then she said that nothing was in the file that was -- pretty much the defense had everything. I brought forward to Judge Walowski that --I brought forth evidence to Judge Walowski that the defense did not have certain materials. Judge Walowski took pretty much Assistant State's Attorney Walls' word over mine and Walls presented no evidence, just off her word alone. That's pretty much just the gist of the motion. (R.269-270, 1190017).

The ASA countered that she had "compared" the street file to discovery that was tendered pretrial, and found one report that was "formatted differently" than a report tendered pretrial, but the same in substance, and explained that she had tendered that report (R.270, 1190017). Montanez further argued:

> It was my understanding it was the Court's responsibility to go through the file given the fact that there's current litigation in the 7th Circuit of *Fields v. City of Chicago* and being that Assistant State's Attorneys are representing the City of Chicago, this would make Assistant State's Attorney Walls an interested party and -- which would make -- which would mean that she -- she couldn't go through the file herself, which is why Judge Claps ordered -- ordered Walls -- Assistant Walls to give him the file. (R.271, 1190017).

Judge Brosnahan responded that Corporation Counsel represented the City in *Fields*, not the State's Attorney's office, so there was no conflict with the State reviewing the street file (R.272-73). The SOJ was denied (R.4, 1191065[4]).

[4] Judge Brosnahan denied the SOJ orally.

Back before Judge Walowski, Montanez again argued that the police report was substantively different from any material in the pretrial file (R.296, 1190017). He explained that he intended to prove this with trial transcripts, as the relevant witness was not cross examined based on the information in the report, suggesting that defense counsel did not have possession of the impeaching information in it (R.297, 1190017). Judge Walowski replied that Montanez needed "some kind of" additional evidence that the file was suppressed because "that's a pretty strong allegation to make" (R.298, 1190017).

At the next hearing, Judge Walowski addressed Montanez's motion to reconsider, stating that her intent regarding the file was "I don't even need to go through in-camera, you get everything…So I was even expounding on Judge Claps' ruling…rather than have what the State found and give it to him and then him deciding what to give you, I just said, State, give Mr. Montanez everything you find relating to him" (R.307, 1190017). The ASA stated that she was not required to "tender[ ] the entire stack of police reports" (R.308-309, 1190017). Judge Walowski addressed Montanez, stating "I'm confused. Don't you already have all the police reports," and Montanez again stated that he did not (R.308, 1190017).

Judge Walowski then asked "What are you saying your lawyer's didn't get? Do you have something specific to point to that you're saying your lawyers didn't get something?" (R.310, 1190017). She continued:

> I mean, that's not my job to review all these reports…I mean, that's not what these post conviction proceedings are for. I'm not going to get all these reports, look at them, For what? I mean, there has to be something. When you make allegations, that's what I'm saying, what-are you saying there is a report that is newly discovered that you didn't have?... (R.311, 1190017).

Montanez again explained:"See, the issue is, Judge, me being *pro se*, I'm at a disadvantage because according to the State, I'm not entitled to the police reports. So how can I know what was found in the basement if I can't have the files" (R.311-12, 1190017). Judge Walowski replied: "See, Mr. Montanez, a postconviction is not like, you know, let me go through everything

again and, you know, throw things out. There has to be specific issues, and that's what I'm saying I do not see that" (R.312). Judge Walowski's final statement on the matter was:

> I understand your argument. You don't have any police reports to look at. Therefore, you don't have anything to look at that is in these files, and therefore, you can't raise issues, but that's not the legal standard because you can't just be getting everything to fish for something. There has to be some kind of reason for your filing of postconviction, so that's that. (R.315, 1190017).

The State argued, "And with regards to the basement file issue, the only thing that I would say, Judge, is one of the things that the Petitioner is missing is simply because there was a file that we are calling basement files down there of his police reports does not automatically mean that there are mysterious police reports that were not tendered" (R.317, 1190017).

Montanez also asked about the "motion for rule to show cause" he had filed against the ASA, which argued that the ASA should be in contempt of court for her handling of the street file (C.896, 1190017), and Judge Walowski ruled:

> What I stated was even -- what I explained was, I said I don't even need to inspect it, just give it to you, and that's what Ms. Walls did. So I am not going to go through when I already explained this as far as just going through what's in the basement files, going through police reports. I don't find that's appropriate, so your motion to reconsider as to that issue is denied. (R.334, 1190017).

Successive Post Conviction Proceedings

Montanez filed a motion for leave to file his successive post conviction petition on April 22, 2019 (Sup.C.12). He claimed that the State violated *Brady v. Maryland* by concealing his street file (Sup.C.14-15). He argued that he established cause because, years after his conviction, Candace Gorman informed him that a street file existed in his case and he had not previously been aware of this "factual basis to establish his *Brady* claim" (Sup.C.14).

As for prejudice, Montanez claimed that he was prejudiced by the *Brady* violation stemming from the materiality of the "favorable and suppressed evidence" (Sup.C.14). Regarding the "favorable" evidence, Montanez explained that after multiple attempts to obtain documents that attorney Candace Gorman had uncovered in the basement of a Chicago Police Department

building--"the basement file[5]"--he informed Judge Claps of his inability to obtain the documents from Gorman, and, eventually, the ASA tendered a police report from the file that was not available to the defense at trial or at the time of the initial post conviction petition (Sup.C.14). Montanez argued that he was prejudiced because the police report contained information not tendered at trial and favorable to the defense (Sup.C.14).

Regarding the "suppressed evidence," Montanez argued that the State engaged in a pattern of *Brady* violations at trial, including concealing the entire street file (Sup.C.13, 63-64). He explained "After repeated efforts by petitioner to secure the investigative files found in the Chicago police station basement…on May 2, 2018, Petitioner advised the Honorable Joseph M. Claps of his failed efforts to secure the file in the possession of Attorney H. Candace Gorman…" (Sup.C.13). He continued, "Now, documents from over (17) years ago, hidden in file cabinets by agents of the state, are unearthed. This clear cumulative pattern of misconduct is pervasive, deliberate, and requires remedy" (Sup.C. 63-64). Montanez attached an affidavit explaining that he repeatedly attempted to secure the file, but "the A.S.A., contrary to Judge Claps' order (Ex.3) viewed the file itself and made the determination of what material the defense did not have at the trial of the undersigned" (Sup.C.21).

Montanez attached chronological evidence of his correspondence with Gorman, including Gorman's December 3, 2015 letter informing Montanez of the file, and various ARDC correspondence in relation to Montanez's complaint that Gorman would not share the file with him (Sup.C.24-32). He attached the protective order referenced by Gorman and by the parties at the hearings. The order was titled, "Protective Order Relating to the Chicago Police Department Files Ordered Produced at the May 28 ,2015 Hearing,"and is captioned "Fields

[5] The parties initially referred to the Candace Gorman file as "the basement file," and undersigned counsel adopted this term during proceedings in the appellate court. Due to the evolving body of case law on the subject, counsel is now using "street file" per the language currently being used in the First District.

v. City of Chicago" (Sup.C.32). The order, signed by District Court Judge Kennelly, states:

> The documents and information in the CPD Files shall be kept, maintained, and considered for attorneys' eyes and ears only, with the exception that: (1) plaintiff's counsel may show and discuss the documents with the criminal defense attorney involved in any particular case; (2) in the event it becomes necessary for plaintiff's counsel to show documents to a criminal defendant from one or more of the CPD Files, the parties shall meet and confer to agree upon a reasonable way for that to occur, and (3) plaintiff's counsel can discuss with plaintiff the types of documents or other materials in those files. (Sup.C.32).

Montanez also attached transcript pages reflecting his efforts to obtain the full street file (Sup.R.36). Specifically, he attached the hearing date in front of Judge Claps wherein the ASA and Judge Claps gave assurances that the ASA would subpoena the street file and then return it to Judge Claps for *in camera* review (Sup.C.36).

Montanez's petition also alleged that the State violated *Miller v. Alabama* and the Proportionate Penalties Clause of the Illinois Constitution (Sup.C.15).

On August 15, 2019, Judge Claps[6] denied Montanez leave to file his successive post conviction petition, stating that the petition was frivolous and patently without merit (R.15).

The appellate court affirmed the dismissal of Montanez's petition in *People v. Montanez*, 2022 IL App (1st) 1191930. The court rejected Montanez's argument that, by reviewing his street file, the ASA improperly interfered prior to the leave to file stage in violation of the principles espoused in *People v. Bailey*, 2017 IL 121450. The court reasoned that Montanez had not yet filed his petition at the time the improper participation was alleged, and that the ASA was entitled to participate because "defendant raised the specter of utilizing the basement files" in other pending litigation. *Montanez*, 2022 IL App (1st) 1191930 at ¶¶34-36.

As for the *Brady* claims, the court found that Montanez was not prejudiced by the concealed police report. *Id*. at ¶ 42. Further, it found that Montanez had waived the claim that he was prejudiced by the still-uncovered information in the entire street file, because he did

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[6] Judge Claps took this case back over once he resumed judicial duties.

not include that allegation in his *pro se* petition. *Id*. at ¶ ¶ 40-41.

Montanez filed a petition for rehearing, where he directed the appellate court to portions of the post conviction petition and the record indicating that Montanez intended to claim that the State violated *Brady* with the information in the still concealed street file. The petition was denied on June 28, 2022.

This Court granted Leave to Appeal on September 28, 2022.

ARGUMENT

I. The circuit court erred in denying Pierre Montanez leave to file his successive post conviction petition, where he demonstrated cause and prejudice with his claim that the Chicago Police Department violated *Brady v. Maryland* when they concealed a potentially exculpatory "street file" from him at trial, and where he repeatedly requested, but was denied, access to the full file, meaning he could not attach it to his petition or make specific allegations based off of it.

It is well established that the purpose of the Chicago Police Department's (CPD's) "street files" was to conceal potentially exculpatory information. In a series of cases involving civil suits against the City regarding the practice in the 1980s, the 7th Circuit Court of Appeals discussed and condemned CPD's policy of keeping street files containing exculpatory information separate from other investigative files, and concealing the street files from the defense. The 7th Circuit decisions reflected an understanding that CPD had abandoned the practice, but in 2016, attorney Candace Gorman uncovered hundreds of newer street files, including that of Pierre Montanez, and in her initial review, Gorman discovered that 90% of these files contained exculpatory information.

Montanez demonstrated cause in his successive post conviction petition with his argument that, after he had filed his initial post conviction petition, he learned that Gorman had discovered a street file that was kept in his case. He demonstrated prejudice with the claim that the State violated *Brady v. Maryland*, 83 S.Ct.1194 (1963) by suppressing exculpatory information in the file. He could not attach the file to his petition, or make specific allegations based on it, because a federal court order prevents *pro se* litigants from gaining access to their street files. The lower court dismissed Montanez's petition, in a decision that represents a departure from other First District cases, where near-identical claims have advanced, based on the reasoning that, where litigants need counsel in order to access their street file, denying petitions at the initial stage before counsel is appointed unjustly precludes litigants from ever discovering the

contents of their file. *See People v. Lyles*, 2022 IL App (1st) 201106-U, *People v. Banks, 2020 IL App (1st) 180322-U* [7].

The First District's decision in *Montanez* was based on the finding that Montanez forfeited any claim regarding the portion of the street file he had not yet accessed, by not making an allegation in his *pro se* petition that the still-unseen file contained *Brady* material. *People v. Montanez*, 2022 IL App (1st) 191930 ¶ 41. A review of Montanez's petition, its supporting documentation, and the history of Montanez's post conviction litigation reveals that the appellate court's decision was patently incorrect. Liberally construed, Montanez alleged that his still unseen file likely contained *Brady* material, and this allegation is enough to allow his petition to advance. In keeping with the decisions of *Lyles* and *Banks*, the circuit court's denial of leave to file Montanez's petition should be reversed, and the petition remanded for second-stage post conviction proceedings including the appointment of counsel, so that he can access his full street file.

The Post-Conviction Hearing Act provides a procedural mechanism by which a defendant may raise constitutional claims as to his conviction and sentence. *People v. Davis*, 2014 IL 115595, ¶13; 725 ILCS 5/122-1(a) (2016). Generally, a defendant may only file one post-conviction petition. *Davis*, 2014 at ¶14; 725 ILCS 5/122-1(f) (2016). A defendant may file a successive post-conviction petition, however, if he first obtains leave of court. *People v. Edwards*, 2012 IL 111711, ¶ 24. A circuit court should grant leave to file a successive petition where the defendant's pleadings demonstrate "cause and prejudice" excusing his failure to raise the claim in an earlier proceeding. *Davis*, at ¶14;

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[7] This Court may consider *People v. Lyles*, 2022 IL App (1st) 201106-U as persuasive authority pursuant to Supreme Court Rule 23(e)(1). *People v. Banks*, 2020 IL App (1st) 180322-U is unpublished and was decided prior to the new Rule 23(e)(1), but is not being cited for precedential value. Rather, Montanez cites *Banks* because this brief seeks to describe to this Court every First District decision regarding Candace Gorman street files. Copies of *Lyles* and *Banks* are appended to this brief.

725 ILCS5/122-1(f) (2016). A defendant satisfies the test for "cause" where he shows that "some objective factor external to the defense" impeded his ability to raise the claim in an earlier proceeding, and he shows "prejudice" where the constitutional error at issue "so infected the entire trial that the resulting conviction or sentence violates due process." *Davis*, at ¶ 14.

At the leave-to-file stage, all well-pleaded facts in the petition and affidavits must be taken as true, and courts may not resolve any factual conflicts. *People v. Towns*, 182 Ill.2d 491, 503 (1998); *People v. Coleman*, 183 Ill.2d 366, 381-82 (1998). A petitioner may not be "required to establish cause and prejudice conclusively prior to being granted leave to file a successive petition." *People v. Smith*, 2014 IL 115946, ¶ 29. A court should only deny leave to file "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." *Id.* ¶ 35.

The question of whether a defendant's *pro se* pleadings satisfy the cause-and-prejudice test, such that he must be granted leave to file his successive post-conviction petition, is subject to *de novo* review. *People v. Weathers*, 2015 IL App (1st) 133264, ¶ 18, *citing People v. Pitsonbarger*, 205 Ill.2d 444, 456 (2002).

A. CPD's use of street files to hide exculpatory evidence is well documented, and Montanez established in his petition that he was one of hundreds of criminal defendants contacted by attorney Candace Gorman when she uncovered a secreted street file related to his case.

i. Street file history

The practice by the Chicago Police Department (CPD) of keeping and concealing "street files" was first uncovered and publicized in connection with the criminal proceedings of George Jones, a juvenile who was charged as an adult with murder and

aggravated battery in 1981. *See Jones v. City of Chicago*, 856 F.2d.985, 988 (N.D.Ill.1986). Prior to Jones' trial, the complainant had been interviewed in the hospital, and stated that the assailant was someone with the last name Anderson, Henderson, or Harrison. *Id*. at 989. Officers wrote a report reflecting this, but placed the report, "not in the police department's regular files but in its 'street files.' These were files that the police did not turn over to the State's Attorney's office as they did with their regular investigative files. As a result, the street files were not available to defense counsel even if they contained exculpatory material." *Id*.

Prior to Jones' trial, an investigating detective convinced that Jones was innocent alerted defense counsel of previously unknown exculpatory information regarding Jones, including the exculpatory information secreted in Jones' street file. *Id*. at 991. Defense counsel alerted the trial judge, the trial judge declared a mistrial, and the charges against Jones were dropped. *Id.*

Jones subsequently filed a Section 1983 civil rights lawsuit, a jury awarded damages, and 7th Circuit Court of Appeals affirmed, noting the "frightening abuse of power by members of the Chicago police force and unlawful conduct by the city itself." *Id*. at 988. The 7th Circuit further found, "There is little doubt that the clandestine character of the street files played a role in Jones's misfortunes." *Id*. at 996, noting,

> The City, **which has abandoned the practice**, does not challenge the jury's implicit finding that it denied criminal defendants due process of law. *Brady v. Maryland* does not require the police to keep written records of all their investigatory activities; but attempts to circumvent the rule of that case by retaining records in clandestine files deliberately concealed from prosecutors and defense counsel cannot be tolerated. The City sensibly does not attempt to defend such behavior in this court. *Id*. at 995. (Emphasis added).

George Jones' situation inspired a class action lawsuit brought by individuals charged with or convicted of crimes in Cook County, alleging that street files in their cases had been kept from their defense. *See Palmer v. City of Chicago*, 755 F.2d 560 (7th

Cir. 1985). In adjudicating the suit, the 7th Circuit Court of Appeals again acknowledged CPD's use of street files that were separate from the investigative files tendered to defense counsel. In *Palmer*, the 7th Circuit ordered CPD to preserve street files wherein the plaintiffs individuals with pending criminal cases had alleged that their street files contained material, exculpatory evidence. The court reasoned, "There is no conceivable manner in which the plaintiffs can meet th[e] burden [of showing that the files had exculpatory value] unless the existing 'street files' remain intact and are available for review…" *Id*. at 564.

Years later, in 2015, during the investigation for a civil lawsuit regarding Nathan Fields, an individual convicted and later exonerated of murder, attorney Candace Gorman uncovered Fields' street file, along with hundreds of additional hidden street files in a Chicago Police Department basement. *See* "Old police 'street files' raise question: Did Chicago cops hide evidence?" Chicago Tribune (Feb. 13, 2016)[8]. A federal district court order allowed Gorman to conduct discovery on not only Fields' file, but on the other files, as she sought to establish that concealing street files was an ongoing CPD policy. Federal district court Judge Kennelly also issued a protective order on the files, mandating that Gorman was able to share the files with litigants represented by counsel, but could not share the files with *pro se* litigants, due to confidentiality concerns (Sup.C.32).

Gorman initially conducted a review of 60 of the files she uncovered, and of the files she reviewed, **an astounding 90%** contained information that was not in the defense's trial file. *See* "Old police 'street files' raise question: Did Chicago cops hide evidence?" Chicago Tribune (Feb. 13, 2016). The logical conclusion here is that, despite

[8] The above Chicago Tribune Article describing Candace Gorman's review of street files has been cited by the First District Appellate Court. *See People v. Banks*, 2020 IL App (1st) 180322-U, ¶18.

CPD's assurance in the 7th Circuit that it had "abandoned" the practice in the 1980s, CPD was still in the business of keeping and hiding street files. *See Rivera v. Guevara*, 319 F. Supp. 3d 1004, 1062 (N.D. Ill. 2018)("The City and police department were on notice, via the *Jones/Palmer* litigation and the department's own subsequent internal inquiry, of deficiencies in its recordkeeping and record-production practices that, at least in some situations, led to harm. And Fields offered evidence that permitted a reasonable jury to find that the policies instituted to deal with these problems were insufficient to correct them")(internal citations omitted).

As established in the George Jones case and the resulting class action suits, and as confirmed by Gorman's extensive review of street files, the purpose of CPD street files was to keep information from defense attorneys the paradigmatic basis of a *Brady* violation. *See Fields v. City of Chicago*, 2017WL4553411, pg. 3 (U.S.Dist. Ct., N.D. Ill.)[9]("Fields' evidence, including evidence of systematic underproduction of police reports, was sufficient to show a systemic failing that went beyond his own case").

ii. Montanez's street file

Among the street files uncovered by Gorman was that of Pierre Montanez. On December 3, 2015, Gorman wrote Montanez while he was incarcerated, informing him that she had found a "Chicago Police file" related to his case (Sup.C.24). She stated that she could not share the file with Montanez because of a court order (Sup.C.24). The order, signed by United States District Court Judge Matthew Kennelly on June 16, 2015, states that the street files uncovered by Gorman are to be "considered for attorneys eyes and ears only" but contains exceptions, including the exception that "in the event it

[9] *Fields* is an unpublished federal district court case, cited for its useful background information regarding street files, not for precedential value. A copy of the decision in *Fields* is appended to this brief.

becomes necessary for plaintiff's counsel to show documents to a criminal defendant from one or more of the CPD files, the parties shall meet and confer to agree upon a reasonable way for that to occur" (Sup.C.32). The letter from Gorman and the protective order are attached to Montanez's petition (Sup.C.23-24).

Once alerted to the existence of a street file related to his case, Montanez attempted to obtain the file from Gorman (Sup.C.21). He first had his family members contact his former trial attorney to request that he contact Gorman, to no avail (R.232-33, 1190117). Subsequently, he contacted the Attorney Registration and Disciplinary Commission (ARDC), requesting an investigation of Gorman (Sup.C.26). Gorman responded to the ARDC, stating that she had sent "letters to several hundred men who were in prison and whose underlying investigative files were found in the basement," including to Montanez, after she uncovered the secreted files. She noted that Judge Kennelly allowed her to conduct discovery on the files, however, she could only share the files with attorneys (Sup.C.28). Thus, Gorman was legally prohibited from sharing Montanez's street file with him, as he was not represented by counsel. Montanez attached all of this correspondence to his post conviction petition (Sup.C.21, 26, 28).

During proceedings on Montanez's initial post conviction petition (where Montanez appeared *pro se*), Montanez told circuit court Judge Claps that Gorman had uncovered his street file, but would not share it with him (R.218-219, 1190017). Over the next few months, Judge Claps repeatedly assured Montanez that he would "find out" what was going on with Gorman's street files (R. 225-26, 237). Ultimately, Judge Claps crafted an agreed-upon remedy: the State's attorney would subpoena the file, and then immediately tender it to Judge Claps for *in camera* review (R.244).

The State's attorney subpoenaed the file, but *in camera* review was never conducted (Sup.C.36, R.244, 1190017). The case was transferred to Judge Walowski,

who allowed the Assistant State's Attorney (ASA) opposing Montanez on his initial post conviction petition to review the file, and determine what from it Montanez was entitled to access (R.249-251, 1190017). The ASA tendered a single police report from the file, which she alleged had been tendered to defense counsel prior to trial (R.258, 1190017). Montanez disputed this, asserting that defense counsel did not have the police report at trial, and claiming that the report was exculpatory (R.259-260, 1190017).

Over the next several months, Montanez vehemently contested the ASA having control over his street file, and argued that he deserved his promised *in camera* review (R.293, 307-12, 1190017). He filed an amended post conviction petition attempting to litigate the issue, filed a substitution of Judge Walowski based on her refusal to review the file *in camera*, and filed motions seeking recourse against the ASA for her handling of the file (C.1515, 1190017; C.303, 1190017; Sup.4.C.4-33; C.896, 1190017).

Judge Walowski eventually took the position that she would not review the file without a specific allegation of what *Brady* material may have been in it (R.311, 1190017). She warned Montanez that post conviction proceedings are not for general allegations, and to gain access to his street file, or to have her review it, he would need to make a specific allegation of what *Brady* material was in it (R.310, 1190017). Montanez again explained: "See, the issue is, Judge, me being *pro se*, I'm at a disadvantage because according to the State, I'm not entitled to the police reports. So how can I know what was found in the basement if I can't have the files" (R.311-12, 1190017). This statement by Montanez, on November 29, 2018, is the crux of Montanez's argument today. Indeed, Montanez cannot, as it stands, make an argument as to what exculpatory information appears in his street file, because he has **still** never been allowed access to it.

Montanez repeatedly argued on the record that he was entitled to his entire file, and was repeatedly told that he did not deserve access to his file, and warned that any

claim he would make regarding the entire file without an allegation of what was missing from it would not be proper in a post conviction petition (R.311, 312, 1190017). Montanez, unable to overcome this impossible hurdle, never received an *in camera* review, and never gained access to the full file.

B. Montanez is entitled to second-stage post conviction proceedings where, liberally construed, he argued that his street file likely contained Brady *material, and the First District has held that second stage proceedings are necessary in claims substantively identical to Montanez's.*

i. Montanez's petition established cause and prejudice with its claim that years after his trial, he learned that the State concealed potential Brady *material, some of which is contained in the yet unseen remainder of his street file.*

After Montanez was unable to obtain his promised *in camera* review, and was otherwise without a means to gain access to his full file, he filed the successive post conviction petition that is the subject of the instant case. In it, he argued that the single police report that the State did choose to tender contained materially exculpatory evidence, and, thus, that the State violated *Brady* by not tendering it pretrial. Liberally construed, he also argued that the remainder of the street file likely contained *Brady* material, warranting advancement of the petition.

Montanez established cause with his well supported allegation that Candace Gorman notified him after his initial post conviction petition that his street file had been suppressed at trial (Sup.C.14). Montanez claimed in his petition that he was prejudiced by the *Brady* violation stemming from the materiality of the "favorable **and** suppressed evidence" (Sup.C.14) (emphasis added). A full reading of the petition demonstrates that by "favorable evidence" Montanez refers to the police report tendered by the ASA, and by "suppressed evidence" he refers to the still suppressed remainder of the file.

At the outset of his successive post conviction petition, Montanez laid out his efforts to secure his street file: "On May 2, 2018, Petitioner advised the Honorable Joseph

M. Claps of his failed efforts to secure the file in the possession of Attorney H. Candace Gorman, due to the petitioner's pro se status" (Sup.C.13). "After repeated efforts to secure the file mentioned by Attorney H. Candace Gorman…Judge Claps ordered ASA Linda Walls on June 28, 2018, to subpoena said file for his in camera inspection"; "On July 31, 2018, the ASA, contrary to Judge Claps' order, viewed the file itself and made the determination of what material the defense did not have at the trial of the undersigned" (Sup.C.21). Montanez attached as an exhibit to his petition the transcript page where Judge Claps promised an *in camera* review (Sup.C.36).

Moreover, Montanez's petition asserted cumulative prejudice based on the State's "pattern of misconduct" in his case, i.e., the repeated *Brady* violations (Sup.C.63-64). He concluded the "cumulative prejudice" section, with the following: "Now, documents from over (17) years ago, hidden in file cabinets by agents of the State are unearthed. This clear cumulative pattern of misconduct is pervasive, deliberate, and requires remedy" (Sup.C.64).

Montanez argued in his *pro se* post conviction petition that the State violated *Brady* with the material in the full street file. And looking at the context of the proceedings prior to Montanez filing his petition, it is clear that his intent has long been to argue that his full, unseen, street file contains *Brady* material. Montanez spent months asking on the record for his street file, filing motion after motion alleging misconduct by the ASA, Judge Walowski, Candace Gorman herself, for failing to turn over the entire file. He was told repeatedly that a street file-based claim in post conviction petition would not be successful without the allegation that something specific from the street file violated *Brady*, but was also told repeatedly that he could not have his street file. After all of this, he filed a successive post conviction petition claiming that the file Gorman belatedly discovered constituted cause, and that he was prejudiced by the exculpatory

information in the police report he did receive from the ASA, as well as additional information in the full file, that he could still not access. Liberally construed, Montanez's petition made out a cognizable claim that second stage proceedings were warranted, as a means for Montanez to access the full file with counsel's assistance.

ii. The First District has held that pro se *post conviction petitioners are entitled to second stage proceedings where a street file exists in their case, but they cannot gain access to it as* pro se *litigants.*

Montanez's case is the first published decision in the First District concerning Candace Gorman street files. The First District denied Montanez leave to file, reasoning that Montanez did not claim in his petition that he should move to second stage based on the contents of the full street file. *People v. Montanez*, 2022 IL App (1st) 191930 ¶ 41. In better reasoned decisions, the First District has allowed near-identical claims to advance, finding that, where litigants need counsel to access their street file, denying petitions at the initial stage before counsel is appointed unjustly precludes litigants from ever discovering whether their full file contains *Brady* material. *See People v. Lyles*, 2022 IL App (1st) 201106-U; *People v. Banks*, 2020 IL App (1st) 180322-U; *People v. Jeremiah Fallon*, 1-21-1235[10].

In *People v. Lyles*, the First District appellate court advanced a successive post conviction petition alleging a *Brady* violation based on a still-unseen street file to second stage after the defendant argued that CPD concealed his street file, which may have

[10] In *People v. Jeremiah Fallon*, 1-21-1235, the advancement of Fallon's street file-based initial post conviction petition was disposed of when the appellate court accepted Fallon and the State's agreed motion to move the petition to second stage. While Montanez acknowledges that summary orders do not have precedential effect, he notes this motion and order to show the current state of the law when it comes to Candace Gorman street files. Copies of the agreed order in *Fallon* is appended to this brief. *See People v. Alvarez-Garcia*, 395 Ill.App.3d 719, 726-27 (1st Dist. 2009)(appellate court may take judicial notice of matters that are readily verifiable from sources of indisputable accuracy such as public documents kept by Illinois courts).

contained favorable evidence not disclosed pretrial. 2022 IL App (1st) 201106-U, ¶ 7. The defendant attached letters from Candace Gorman, explaining that she discovered a file related to his case, but was unable to share it, due to a court order. *Id*. The State conceded that defendant established cause and prejudice, and the First District accepted the concession even though: "the contents of the street files are unknown at this point, so it is premature to say whether the evidence is favorable to the defendant." *Id*. at ¶17. The court reasoned:

> We again note that the trial court's order concerning the hidden street files only allows disclosure of the file to counsel and not the defendant. Yet, by denying the defendant the right to file his postconviction petition, that likely ensured he would not be represented by counsel. Consequently, the trial court's order denying the defendant leave to file his successive postconviction petition precluded the defendant from discovering the contents of the hidden file discovered by attorney Gorman, which is unjust. *Id*. at ¶ 18.

Likewise, in *People v. Banks*, the First District appellate court advanced a first-stage post conviction petition alleging a *Brady* violation based on a still-unseen street file to the second stage. 2020 IL App (1st) 180322-U. The defendant could not attach his street file to the petition or "allege that the evidence was either exculpatory or impeaching or that the evidence was material." *Id*. at ¶ 16. However, the defendant attached affidavits from Gorman and appellate counsel, explaining the situation. *Id*. at ¶ 17. The appellate court advanced the petition, noting the "impossibility, at this stage, of including the allegedly withheld evidence itself." *Id*. at ¶ 20.

The Cook County State's Attorney's Office's recent concessions in street files cases are significant, where they indicate the State's own agreement that claims based on Candace Gorman's street files should advance to second stage so that counsel can be appointed. As explained above, in *People v. Lyles*, the First District's advancement of the petition was based on a State's concession that a successive post conviction petition alleging a *Brady* violation and attaching correspondence from Gorman was enough to

establish cause and prejudice, even where the defendant could not attach the street file itself. 2022 IL App (1st) 201106-U, ¶17. Likewise, in *People v. Jeremiah Fallon*, the parties resolved the issue of a *pro se* post conviction allegation that a Candace Gorman street file likely contained *Brady* material by an agreed motion to advance the petition to second stage, so that the contents of the file could be reviewed.

The First District's acceptance of State concessions and issuance of summary orders based on agreed motions for summary disposition on these claims indicates tacit agreement that litigants who have discovered that a street file exists in their case, but cannot yet access the street file, are entitled to advancement of their petitions. What happened to Montanez[11] cannot be squared with the results in *Lyles*, *Banks*, and *Fallon*. These cases represent the First District's acknowledgment that it is unjust for a post conviction litigant's *pro se* status to foreclose his ability to access his street file. But that is precisely what happened to Montanez.

iii. Montanez's petition contained enough facts to make out a claim that the State violated Brady *by concealing potentially exculpatory information in his street file, and the context of his street file-related litigation confirms that he intended to make such a claim.*

The First District's decision that Montanez was procedurally barred from making the claim that he was entitled to second-stage proceedings based on the probable *Brady* material in his still concealed street file ignores the full history of Montanez's attempts to obtain the street file, and ignores the legal rules of post conviction petitions, specifically the rules of liberal construction. Looking at the text of his petition, especially within the

[11] In *People v. Brocks,* 2020 IL App (1st) 171630-U, the First District considered a claim similar to that of Montanez, Lyles, and Fallon, but affirmed the dismissal of Brocks' first stage petition. *Brocks* is unpublished and was decided prior to the new Rule 23(e)(1), but, again, is not being cited for precedential value. Rather, Montanez cites *Brocks* to illustrate to this court the full extent of the conflict in the First District surrounding street files decisions. A copy of the decision is appended to this brief.

context of his exhaustive pre-filing efforts to access the full file (some of which are reflected in the transcripts he attached to his post conviction petition), it is clear that Montanez's petition, liberally construed, made the allegation that he was prejudiced by the *Brady* material likely within the portion of the file he had not yet been able to access.

Montanez's petition was dismissed at the leave-to-file stage, meaning he drafted his petition without the assistance of counsel. "Because a *pro se* petitioner will likely be unaware of the precise legal basis for his claim, the threshold for survival is low, and a *pro se* petitioner need only allege enough facts to make out a claim that is arguably constitutional for purposes of invoking the Act." *People v. Thomas*, 2014 IL App (2d) 12001, ¶ 48; *See also People v. Mars*, 2012 IL App (2d) 110695, ¶ 32 (where facts alleged in a petition are sufficient to support a legal theory that the petitioner did not expressly raise, that legal theory is not forfeited). "Petitions filed *pro se* must be given a liberal construction and are to be viewed with a lenient eye, allowing borderline cases to proceed." *Thomas*, 2014 IL App (2d) 12001, ¶ 48. Montanez alleged the requisite facts to make out a claim that the State violated *Brady* with the remainder of the still suppressed street file. Thus, in denying Montanez's petition at the leave-to-file stage, the First District improperly applied waiver principles, and disregarded the rules of liberal construction.

Recent appellate court cases reversing the dismissal of post conviction petitions at the first stage demonstrate how liberal construction is meant to function. For example, in *People v. Reese*, 2021 IL App (1st) 200627-U[12], a *pro se* petitioner argued that a certain officer was unreliable, and that trial counsel was ineffective for generally failing to

[12] This Court may consider *People v. Reese*, 2021 IL App (1st) 200627-U as persuasive authority pursuant to Supreme Court Rule 23(e)(1). A copy of the decision is appended to this brief.

investigate the officer. *Id*. at ¶ 29. The petitioner attached newspaper articles discussing the officer, including an article stating that he had amassed over 60 misconduct complaints in his time with CPD. *Id*. at ¶¶21, 22. He also attached transcripts of the officer's testimony that was inconsistent with other trial testimony, and a federal decision wherein the officer's conviction for obstruction of justice in an unrelated matter was affirmed. *Id*.

On appeal, the defendant argued that he stated the gist of a meritorious claim that trial counsel was ineffective for failing to investigate the officer, which would have uncovered the misconduct complaints against him that could have been used as impeachment evidence. *Id*. at ¶ 28. The State countered that the claim was forfeited, because the *pro se* petition did not specifically raise ineffectiveness for failing to investigate misconduct that would have been impeachment evidence against the officer. *Id*. at ¶ 29. The appellate court disagreed, finding:

> Keeping in mind that the *pro se* petitioner was likely unaware of the precise legal basis for this claim, we conclude that the allegations in the petition bear a sufficient relationship to the ineffective assistance of counsel claim raised in this appeal, so that the issue is not novel but rather based on the same underlying subject matter as the petition. *Id*. at ¶ 32.

Accordingly, the appellate court found that the petition's allegations, supported by the attachments "directly [challenging the officer's] trustworthiness" and detailing the numerous misconduct complaints against him "set forth enough facts to make out of a claim of ineffective assistance of counsel on the basis of counsel's failure to investigate [the officer]." *Id*. at ¶ 31. Thus, the appellate court remanded for second stage proceedings. *Id*. at ¶ 49. *See also People v. Franklin*, 2021 IL App (1st) 181160-U, ¶ 23[13]

[13] This Court may consider *People v. Franklin*, 2021 IL App (1st) 181160-U as persuasive authority pursuant to Supreme Court Rule 23(e)(1). A copy of the decision is appended to this brief.

(appellate court accepted argument that petitioner's guilty plea was entered to avoid an unconstitutional sentence, over the State's argument that the claim was waived where the *pro se* petition only argued that the guilty plea was involuntary).

As in *Reese*, the facts alleged in Montanez's petition, combined with his supporting documents, give rise to the claim that the remainder of the suppressed file likely contained *Brady* material, meaning he was entitled to advancement of his petition. Again, Montanez attached transcript pages reflecting his efforts to obtain the file, chronological evidence of his correspondence with Gorman and attempts to compel her to give him the file, and the federal protective order related to *Fields v. City of Chicago*, which explained the existence of street files and dictated the very issue Montanez was challenging that he could not obtain the file as a *pro se* litigant. (Sup.C.36, 23-33, 32). Montanez used all of this outside-record evidence to support his petition's allegation that the suppression of the *Brady* material was part of a "cumulative pattern of misconduct [that] is pervasive, deliberate and requires remedy" (Sup.C.64).

Thus, as in *Reese*, where the newspaper article detailing the officer's over 60 misconduct complaints, along with the other attached evidence of his untrustworthiness, supported the claim that the officer should have been impeached with evidence of his prior CPD misconduct, Montanez's attached supporting documents help substantiate his claim that he had been long attempting to obtain his street file which likely contained *Brady* material. Accordingly, Montanez's "petition sets forth enough facts to make out [his claim] and "...issue is not novel but rather based on the same underlying subject matter as the petition." *Reese,* 2021 IL App (1st) 200627-U at ¶ ¶31-32. Montanez's petition claims that (1) Gorman uncovered his street file, (2) the purpose of street files is to hide exculpatory information, (3) *pro se* litigants cannot access their own street files by court order, (4) the ASA should not have reviewed his street file and tendered a single

document, and (5) the State violated *Brady* by concealing exculpatory information from the defense at trial. The attached correspondence with Gorman and protective order from Judge Kennelly verify these claims. Thus, Montanez's petition included the requisite facts to make out the claim that he was prejudiced by the concealment of the potentially exculpatory information in the still-unseen remainder of his street file.

Montanez's intent was to argue in his petition that he was prejudiced by his inability to access his street file. This is evident from the text of the petition itself which references his "repeated efforts" to obtain the file, and the record even further clarifies this is a fact (Sup.C.21). Prior to filing his post conviction petition, Montanez attempted to obtain his street file from Gorman (R.227,232, 1190017). He attempted to obtain his street file by complaining to the ARDC (R.227, 1190017). He attempted to access the file via *in camera* review by Judge Claps (R.244, 1190017). He attempted to obtain the file from the ASA after Judge Claps did not perform the promised *in camera* review (R.249-51, 1190017). He even attempted to obtain the file from a new judge by filing an SOJ motion alleging that Judge Walowski improperly tendered the file to the State (R.287, 1190017). Judge Walowski would not give him his street file, and refused to conduct Judge Claps' promised *in camera* review (R.249-51, 1190017). Judge Brosnahan refused to appoint another judge who would perform an *in camera* review (R.4, 1191065). The ASA refused to tender the full file (R.308-309,1190017). So Montanez did the only thing he had left to do filed a successive post conviction petition making detailed allegations about the police report he did obtain from the street file, while maintaining that the State engaged in a "clear cumulative pattern of misconduct" by keeping an entire file of information that was secreted from the defense.

The culmination of these exhaustive efforts to access the file was the appeal from the denial of leave to file his successive post conviction petition, where the First District

ruled that he could not have his street file because he did not ask for it. In dismissing Montanez's petition at the first stage, the appellate court did not make any substantive finding as to whether Montanez was entitled his street file or deserved the appointment of counsel so that an attorney may review the file. Instead, it procedurally defaulted his claim on the ground that his *pro se* petition did not make a claim that the entirety of the file contained *Brady* material. *People v. Montanez*, 2022 IL App (1st) 191930 ¶ ¶ 40, 43.

The First District's shortsighted finding that Montanez did not make allegations based on the entire file ignores the facts alleged in Montanez's petition, the petition's attachments, the rules of liberal construction, and the context of Montanez's street file litigation. Montanez has always wanted, still wants, and still deserves, his street file. Success in this Court means that Montanez's petition moves to the second stage, and that he receives the assistance of counsel, who will be able to obtain and review Montanez's street file. The relief requested here is narrow. A reversal of the appellate court does not mean that Montanez is released from incarceration, or receives a new trial, or even that the CPD or the Cook County State's Attorney's office receive any sanction for the well established practice of hiding street files, and, in this case, keeping them hidden. It simply means that he gains access to his file, access which numerous criminal defendants in Cook County have already gained via the same means Montanez pursued. *See People v. Lyles*, 2022 IL App (1st) 201106-U; *People v. Banks*, 2020 IL App (1st) 180322-U; *People v. Jeremiah Fallon*, 1-21-1235.

This Court should reverse the lower court, and in so doing, rectify the inequity created by the long line of entities the Chicago Police Department, the State's Attorney's Office, Judge Walowski, the post conviction circuit court, the First District appellate court denying Montanez his right, through counsel, to simply see the street file that was concealed from him at trial. Montanez deserves to be granted leave to file, so that he may

be granted the simple opportunity to even make the allegation of prejudice, in a case where the sordid history of street files means that it is very likely that he was a victim of a corrupt practice that denied him a fair trial.

II. Remand is also necessary because, prior to Pierre Montanez filing his successive post conviction petition, the trial court erred by giving the State decision making power over what Montanez was entitled to access from his street file, which is fundamentally unfair, where the State was responsible for the initial suppression of the file.

While Montanez maintains that he properly alleged that he was prejudiced by potentially exculpatory information in the full file, he also contends that there is an alternative, procedural basis for remand: It was improper for Judge Walowski to allow the ASA to control and review Montanez's street file. By doing so, the ASA's determination of what from the file Montanez was entitled to see became the ultimate determining factor in what allegations Montanez could make in his petition. As it is well established that the Government is responsible for *Brady* violations perpetrated by police officers (*See People v. Hobley*, 182 Ill. 2d 404, 438 (1998)), the State was at fault for the initial suppression of the file at trial, and therefore should not have been placed in a position to determine what from it Montanez was entitled to access. This Court should ultimately hold that the State the same entity responsible for concealing Montanez's street file should not have participated in reviewing it. The ASA's participation in reviewing and tendering documents from Montanez's street file was fundamentally unfair, and this court should remand so that Montanez can gain access to the full file, remedying the improper review of the file by the State.

The dismissal of a successive post conviction petition at the leave-to-file stage is subject to *de novo* review. *People v. Weathers*, 2015 IL App (1st) 133264, ¶18, citing *People v. Pitsonbarger*, 205 Ill.2d 444, 456 (2002).

To briefly recap the circumstances leading to the ASA controlling Montanez's street file: Montanez alerted Judge Claps to the existence of his street file and Judge Claps ordered the State to subpoena the file and tender it directly to him for *in camera* review. The case was then transferred to Judge Walowski, who refused to conduct an *in*

camera review and bestowed upon the State the responsibility of reviewing the file. The State ultimately tendered a single police report from the entire file, telling the court that nothing else from the file was "discoverable." The report Montanez did receive became the primary basis for Montanez's post conviction petition, where he argued that the report contained valuable impeachment information. However, in his petition, Montanez also alleged that the State should not have controlled his file, and that this circumstance represented the latest in a pattern of misconduct by the State, beginning with the suppression of the file in the first place, prior to Montanez's jury trial.

The procedure ordered by Judge Walowski created an adversarial relationship between Montanez and the State, even prior to the leave-to-file stage. Under the Act, State input is not permitted at the leave-to-file stage, because it is unfair for a *pro se* litigant to be made to argue against the State. 725 ILCS 5/122-5; *People v. Bailey*, 2017 IL 121450, ¶ 27. But here, the ASA argued on the record that Montanez was not entitled the entire file, and also, argued that even the police report that she did tender was not *Brady* material (R.248-249, 258, 270). In other words, the State began espousing its position on the merits of Montanez's successive post conviction petition even before he filed it.

This situation violates many of this court's fundamental fairness principles when dealing with early stage post conviction petitions. The Post Conviction Act "contemplates an independent determination by the circuit court," free from State input in determining whether to grant leave to file a successive post-conviction petition. *Bailey*, 2017 IL 121450, ¶ 24. This is supported by the structure of the Act, post-conviction case law, and fundamental fairness to the defendant. *Id.* at ¶¶ 18-27. Allowing the State to argue opposite a *pro se* defendant "is inequitable, fundamentally unfair, and raises due process concerns." *Id.* at ¶27.

In the appellate court, Montanez claimed that the State's handling of his street file and giving its opinion to the court that there was no *Brady*-violative material within the file was inappropriate, where the State's participation occurred prior to when he was entitled counsel. The court rejected this claim, reasoning that it would have had to "extend" the holding in *People v. Bailey*, in order to find error. *People v. Montanez*, 2022 IL App (1st) 191930 ¶¶34-36. In other words, the court found that, because the specific situation condemned in *Bailey* was that the State improperly participated during the leave to file stage, and the ASA's improper participation in this case came prior to Montanez filing his successive petition, while he was attempting to gain access to the street file that could support it, *Bailey* was not directly applicable.

This finding ignores the true issue at hand: the State the agency responsible for the initial concealment of Montanez's potential *Brady* information--was given control over the previously concealed documents. While the reasoning of *Bailey* that the State should not interfere with the court's independent determination of cause and prejudice at the leave to file stage is applicable, this issue should not have been disposed of based on the notion that the court would have had to "extend" *Bailey* in order to find that the ASA's participation here was inappropriate. *Id*. Rather, the appellate court should have utilized the reasoning of *Bailey* to help determine that the ASA gained an unfair advantage when it gained control of Montanez's file even before he was able to craft his petition, and that this is especially true where the State was the cause of Montanez not having the file to begin with.

Indeed, the spirit of *Bailey* is certainly applicable in this case. Under *Bailey*, this Court warned that the State's opinion should not be a factor in the circuit court's determination of whether leave to file should be granted. Here, the ASA determined that Montanez was not entitled to review the full file, but a single document, and gave her

opinion that the document tendered was not offensive to *Brady* principles, stating, "There has been no discovery violation" (R258, 1190017) and adding:

> And with regards to the basement file issue, the only thing that I would say, Judge, is one of the things that the Petitioner is missing is simply because there was a file that we are calling basement files down there of his police reports does not automatically mean that there are mysterious police reports that were not tendered.(R.317, 1190017).

The ASA's review of the file prevented the independent determination by the circuit court, free from State input, regarding whether leave to file should be granted. The State's actions determined the extent of Montanez's access to the file, meaning the State had an undue influence on the substance of Montanez's petition. Put simply, because of the State, Montanez did not have the full file to attach to his petition or make specific claims based on, causing the circuit court's ultimate denial of leave to file. This was true in *Bailey* where the State participated at the leave to file stage, and it is true here where the ASA interfered while Montanez was trying to gather evidence important to the crafting of his petition.

Bailey, at its core, is concerned with equity, fairness, and due process. *Id*. at ¶27. Here, the ASA's control over the file, and free reign to give her opinion on the record that the file did not contain *Brady* material, was offensive to these principles. The State was responsible for concealing the street file in the first place. *See Hobley*, 182 Ill. 2d 404 at 438 (the law is well settled that the same *Brady* rules apply even where the suppressed evidence was known only to police investigators and not to the prosecutors); *See also People v. Lyles,* 2022 IL App (1st) 201106-U ¶ 17 (finding that hidden street file "was undoubtedly suppressed by the State, even if inadvertently"). Any *Brady* violation stemming from the documents in the file would have been the State's fault, so the ASA had an interest in giving its opinion that the file did not contain *Brady* material.

And Montanez knew this. He argued during the SOJ motion, asking to remove

Judge Walowski from his case due to her tendering the files to the ASA, "Assistant State's Attorney Walls an interested party and -- which would make -- which would mean that she -- she couldn't go through the file herself, which is why Judge Claps ordered -- ordered Walls -- Assistant Walls to give him the file" (R.271, 1190017). Montanez was, essentially, ignored, with Judge Brosnahan responding that the State was not an interested party because Corporation Counsel, rather than the State's Attorney's office would have been the entity representing CPD in civil litigation regarding the street files. This is, of course, beside the point. The determining factor as to who would be an "interested party" for the purposes of Montanez's street files claim is not which entity would have been defending CPD against allegations of misconduct stemming from street files. Rather, the interested party is the party who, at the outset, benefitted from the concealment of the street files. This would have plainly been the State's Attorneys office.

CPD's concealment of the street files meant that the State's Attorney had an easier time prosecuting criminal defendants, where they did not perform their required duty of disclosing all of the exculpatory information in the case, because some of it was secreted in the street file. Indeed, an acceptance of the ASA's opinion that the street file contained nothing discoverable allows CPD and, by extension, the State's Attorney, to avoid allegations of misconduct for suppressing *Brady* material, at least in Montanez's specific case.

There is no reason the trial court should have entrusted the ASA to fairly provide Montanez with his entitled information from the file or provide a fair opinion as to what from it Montanez was entitled, or what from it would have violated *Brady*. The State's proven record of mishandling Montanez's street file should have meant, at the very least, that it not be allowed to control it once it was uncovered. This is particularly true in light of Judge Kennelly's order dictating that counsel **for** litigants with street files may be

permitted to receive said files and discuss them and share them with the litigants (Sup.C.32). The ASA **opposing** Montanez having received the file in this case violated Montanez's due process, and calls for remand. *People v. Bailey*, 2017IL121450, ¶ 27.

As for what should have happened in Montanez's case, there are more equitable options, and this Court should intervene to direct the circuit courts on a method of fairly handling *pro se* petitions raising street files allegations. Gorman uncovered hundreds of street files, and, especially now, where some *pro se* post conviction litigants have been successful in the advancement of petitions raising street file claims (*see People v. Lyles*, 2022 IL App (1st) 201106-U, *People v. Banks*, 2020 IL App (1st) 180322-U, *People v. Jeremiah Fallon*, 1-21-1235), it is virtually certain that more incarcerated individuals will seek access to their street files via this means. A uniform method of treating these claims will ensure that what happened to Montanez arbitrary dismissal of a street files-related claim even where similarly situated individuals have advanced will not happen to future litigants.

Perhaps the simplest method of resolving this issue is by mandating that every individual who files a *pro se* post conviction petition attaching correspondence from Gorman alerting them to the existence of a street file in their case is automatically moved to second stage. And if this does not occur at the circuit court level, the appellate court can automatically remand for second stage proceedings when reviewing cases with a well-supported allegation of a *Brady* violation based on a Gorman street file. Indeed, in certain circumstances, the appellate court has developed bodies of case law directing automatic remand to second stages. *See e.g. People v. Greer*, 212 Ill.2d 192, 202-03 (2004)(Automatic second-stage proceedings when the circuit court does not rule on *pro se* post conviction petitions within 90 days). If Gorman's letter serves as a trigger for automatic second stage proceedings, in the same way that the appellate court today

considers a 90-day violation automatic grounds for advancement, the result would be that any criminal defendant informed by Gorman that CPD kept a street file for their case would receive counsel, and thereby would be able to access the file from Gorman, without Gorman violating the court order mandating that only attorneys can view street files.

Again, the State now has a track record of assenting to agreed motions advancing street files to second stage, meaning this option may not even be offensive to the State, and would promote judicial efficiency. *See People v. Lyles*, 2022 IL App (1st) 201106-U; *People v. Jeremiah Fallon*, 1-21-1235. As it stands, the procedure, even for agreed motions, involves the circuit court dismissing a petition, appellate counsel being appointed, appellate counsel corresponding with the State before agreeing to a motion for remand, and the appellate court remanding the case based on the agreed motion. Appointment of counsel at the circuit court level the moment a well pleaded street file allegation is made would expeditiously resolve the early stages of these claims by automatically providing defendants an advocate to access their file.

A less swift but still equitable option is that, once a street file claim is raised on post conviction, the circuit court can appoint counsel for the sole purpose of obtaining and reviewing the street file in question. *See Tedder v. Fairman*, 92 Ill.2d 216, 226-27 (1982) (The court has the discretion to appoint counsel for a *pro se* prisoner). Had this occurred in Montanez's case, he would have had the benefit of an advocate reviewing his street file and comparing it to the defense discovery file, and determining whether there was any additional discoverable material in the file, such that he could substantiate a *Brady* violation. Once this determination was made, the merits of the petition could have been decided, with the benefit of conclusive information about any *Brady* material in the street file.

Finally, Montanez having received his promised *in camera* review by Judge Claps would have been more equitable than the street file being reviewed by the ASA:

> *In camera* review is warranted regarding disputed materials under *Brady* where the defendant is able to some showing that the materials in question could contain favorable, material evidence; The defendant should be able to articulate with some specificity what evidence the defendant hopes to find in the requested materials, why he or she thinks the materials contain this evidence, and finally, why this evidence would be both favorable to the defendant and material. 22A C.J.S. Criminal Procedure and Rights of Accused § 454.

Based on the history of street files generally, Gorman's findings regarding the files that she uncovered specifically, and the fact that the very purpose of street files was to conceal *Brady* material, Montanez's petition certainly made "some showing" that the street file "could contain" *Brady* material that was material, and not disclosed at trial. *See Fields v. City of Chicago*, 2017WL4553411, pg. 3 (U.S.Dist. Ct., N.D. Ill.); *Palmer v. City of Chicago*, 755 F.2d 560 (7th Cir. 1985); *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988); Old police 'street files' raise question: Did Chicago cops hide evidence? Chicago Tribune (Feb. 13, 2016). Review of the file by the court a neutral arbiter is an option more likely to have resulted in a comprehensive, trustworthy review of the file, than review by the ASA, who was a part of concealing this evidence in the first place, and whose opinion that the street file contained nothing discoverable would have had the effect of absolving her office from culpability in suppressing *Brady* material at Montanez's trial. *See Hobley*, 182 Ill. 2d at 438 (the law is well settled that the same *Brady* rules apply even where the suppressed evidence was known only to police investigators and not to the prosecutors); *See also People v. Lyles*, 2022 IL App (1st) 201106-U ¶ 17, (finding that hidden street file "was undoubtedly suppressed by the State, even if inadvertently").

What happened in Montanez's case Judge Walowski handing control of the file over to the ASA was inequitable, "fundamentally unfair, and raise[d] due process

concerns," where the State's interference was the determining factor as to what specific claims Montanez could raise in his *pro se* petition. *Bailey*, 2017IL121450, ¶ 24. While appointment of counsel for the limited purpose of examining the file would have resulted in an advocate for Montanez reviewing the file, and *in camera* review would have resulted in a neutral arbiter reviewing the file and determining if anything from it would give rise to a *Brady* violation, none of this occurred below, and Montanez's petition was dismissed before he ever gained access to the full file. While this Court may consider the options of appointment of counsel for a limited purpose or mandated *in camera* review for future street files litigants, the only equitable solution for Montanez now is the reversal of the circuit court's denial of leave to file, and remand for second stage proceedings, including the appointment of counsel. At this juncture, this is the only way that Montanez will be able to access his file.

This Court should ultimately remand for second stage proceedings in Montanez's case to ensure that he is appointed an attorney who will then have access to the entire street file, and can craft a detailed *Brady* violation claim based on any materially exculpatory evidence in it. Doing so will signal to the circuit and appellate courts that individuals who file post conviction petitions with potential *Brady* claims based on Candace Gorman street files are entitled the appointment of counsel, because dismissing the petitions in the early stages stage deprives these litigants the opportunity to ever see the file, and, correspondingly, ever articulate the bases for their claim, "which is unjust." *People v. Lyles*, 2022 IL App (1st) 201106-U.

CONCLUSION

For the foregoing reasons, Pierre Montanez, petitioner-appellant, respectfully requests that this Court reverse the order of the circuit court denying Montanez leave to file his successive post conviction petition, and the First District's decision affirming that order, and remand for second-stage post conviction proceedings including the appointment of counsel.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 41 pages.

/s/Adrienne E. Sloan
ADRIENNE E. SLOAN
Assistant Appellate Defender

APPENDIX TO THE BRIEF

INDEX TO THE RECORD

Common Law Record ("C") **Page**

Secured Record ("Sec. C.")

Secured Record ("Sec. C.")

Common Law Record ("C")
Appeal No. 19-0017

Volume II

Volume III

Supplemental Common Law Record ("SC")

Direct Appeal Record
Report of Proceedings ("R")

	Direct	Cross	Redir.	Recr.	
August 12, 2005 - Continuance					SS7
September 1, 2005 - Continuance					TT3
September 16, 2005 - Continuance					UU4
October 20, 2005 - Continuance					VV4
November 1, 2005 - Continuance					WW4
December 29, 2005 - Continuance					YY3
January 25, 2006 - Continuance					ZZ6
February 14, 2006 - Continuance					AAA 15
February 28, 2006 - Continuance					BBB7
March 24, 2006 - Continuance					CCC4
April 21, 2006 - Continuance					DDD6
May 1, 2006 - Continuance					EEE3
May 16, 2006 - Continuance					FFF2
June 5, 2006 - Continuance					GGG4
August 4, 2006 - Continuance					III2
September 29, 2006 - Continuance					KKK2
November 8, 2006 - Continuance					LLL4
November 16, 2006 - Continuance					MMM 4
November 21, 2006 - Continuance					NNN2
December 20, 2006 - Continuance					OOO5
December 27, 2006 - Continuance					QQQ2
March 1, 2007 - Continuance					SSS6
May 4, 2007 - Continuance					UUU2
May 10, 2007 - Continuance					VVV2

	Direct	Cross	Redir.	Recr.	
December 7, 2010 - Continuance					PPPP PP20
December 21, 2010 - Continuance					QQQQ QQ3
December 28, 2010 - Continuance					RRRR RR2
January 5, 2011 - Continuance					SSSS SS2
February 15, 2011 - Continuance					TTTT TT2
March 23, 2011 - Continuance					UUU UUU4
April 12, 2011 - Continuance					VVVV VV3
April 20, 2011 - Continuance					WWW WWW 5
May 31, 2011 - Continuance					XXXX XX3
June 29, 2011 - Continuance					ZZZZZ Z2
August 11, 2011 - Continuance					AAAA AAA5
August 16, 2011 - Continuance					BBBB BBB2
September 8, 2011 - Continuance					CCCC CCC2
September 27, 2011 - Continuance					DDDD DDD 10

2022 IL App (1st) 191930

No. 1-19-1930

Opinion filed June 9, 2022

Fourth 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. 02 CR 31134
	)	
PIERRE MONTANEZ,	)	Honorable
	)	Joseph M. Claps,
Defendant-Appellant.	)	Judge presiding.

JUSTICE LAMPKIN delivered the judgment of the court, with opinion.
Justice Martin concurred in the judgment and opinion.
Justice Rochford specially concurred, with opinion.

OPINION

¶ 1 The circuit court denied defendant Pierre Montanez's motion for leave to file a successive petition for relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2018)). On appeal, defendant contends that the State improperly participated in discussions at the leave-to-file stage. Defendant also argues that he satisfied the cause and prejudice test on two *Brady* claims (see *Brady v. Maryland*, 373 U.S. 83 (1963)), namely, a police report contained in the Chicago Police Department's "basement file" and the entirety of the "basement file." Finally, defendant argues that he established cause and prejudice on his claim that his mandatory natural

life sentence violates *Miller v. Alabama*, 567 U.S. 460 (2012), and the Illinois proportionate penalties clause (Ill. Const. 1970, art. I, § 11).

¶ 2 For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3 I. BACKGROUND

¶ 4 Defendant and codefendant Jose Luera were found guilty after a jury trial of the first degree murders of Roberto Villalobos and Alejandra Ramirez (Ramirez), as well as aggravated vehicular hijacking and aggravated kidnapping. Defendant was sentenced to prison terms of mandatory natural life for the two first degree murder counts, 20 years for aggravated vehicular hijacking, and 27 years for aggravated kidnaping, the latter two sentences to run consecutive to one another and to the first degree murder sentences. We affirmed on direct appeal.

¶ 5 A comprehensive description of the trial evidence can be found in our prior disposition of defendant's direct appeal in *People v. Montanez*, 2014 IL App (1st) 122369-U. We set forth only that evidence which is necessary to review the issues in this appeal.

¶ 6 At trial, Alma Ramirez (Alma), the sister of the victim Ramirez, testified that on August 27, 2002, at about 10 p.m., she saw Villalobos pick up her sister in his vehicle. Other evidence established that Ramirez's body was later found in Villalobos's burned four-door Chevrolet Caprice. Alma confirmed that a photograph depicted Villalobos's vehicle with burn marks, but the burn marks were not there when she observed her sister get into the vehicle that night. Alma identified defendant in court and stated defendant had visited her house two days earlier looking for Ramirez.

[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.

¶ 7 Anais Ortiz testified that on August 27, 2002, she was at codefendant Luera's home with defendant and Claudia Negrette smoking marijuana and drinking alcohol. She knew codefendant through their gang affiliation. At 11:30 p.m., they were all picked up by Villalobos, who was driving a Chevy Caprice with Ramirez in the front passenger seat. Villalobos dropped off Ortiz and Negrette near 83rd Street and Kolin Avenue in Chicago. Defendant and codefendant remained in the car with the two victims. Ortiz did not notice anything unusual happen between the victims and defendants. When shown a photograph of Villalobos's car, Ortiz noted that it had burn marks that were not present on it when she was in the car. Ortiz acknowledged that she was currently in jail awaiting trial on a charge of armed robbery.

¶ 8 John McDonnell testified that on August 28, 2002, around midnight, he was on his front porch in the 7900 block of South Kolin Avenue. McDonnell saw a man "asking for help" exit through the rear driver's side window of a four-door vehicle. The man was subsequently identified as Villalobos. A second, shirtless man, whom McDonnell identified in a photo array as Luera, exited through the same window, punched Villalobos to the ground, and continued to punch him on the ground. McDonnell approached but saw a flash of light that he thought came from inside the vehicle. He hesitated because he thought "there could be more people inside the car." Luera stood up, Villalobos hid behind McDonnell, and Luera drew a knife. McDonnell then ran behind his house and picked up a piece of lumber. When he returned, the vehicle drove away, and Villalobos was lying on McDonnell's driveway with multiple stab wounds. McDonnell confirmed that a photograph depicted the same vehicle he saw that night. On cross-examination, McDonnell stated he could not see any other people or movements inside the vehicle but saw the light inside the vehicle.

¶ 9 Jason Samhan testified that shortly after midnight on August 28, 2002, he saw a Chevrolet Caprice drive through a red light at the intersection of 79th Street and Tripp Avenue. The vehicle had blood on the rear driver's side door, and a man's arm was choking a woman's neck with her head "out the back window." Samhan confirmed that a photograph depicted the vehicle he saw that night but with additional burn marks he had not seen.

¶ 10 George Hoyt testified that at about 1:45 a.m. on August 28, 2002, he was working at a gas station on 67th Street and Pulaski Road. Defendant, whom Hoyt identified in court, entered with "scratches upon his face and neck area" and grabbed two one-gallon gas cans. Hoyt told defendant it would be cheaper to buy one can, fill his vehicle with gas, and drive to the gas station for more gas. Nonetheless, defendant purchased the two cans and left. Later that evening, Hoyt told a police officer about defendant's purchase and gave the officer a receipt of defendant's purchase, which was entered into evidence. Hoyt also identified defendant from a photo array and a lineup.

¶ 11 Samson Murray testified that at about 1:45 a.m. on August 28, 2002, he was outside a restaurant near the intersection of 67th Street and Pulaski Road with Nick Buogos. Defendant, whom Murray identified in court and described as a friend of Buogos, approached from the nearby gas station carrying two gas cans and said, "I need to talk to you." Buogos asked Murray to wait for him in the restaurant and drove away with defendant in Buogos's vehicle.

¶ 12 Chicago police officer Joseph William Dunigan Jr. testified that shortly after midnight on August 28, 2002, he arrived at the 7900 block of South Kolin Avenue and saw Villalobos's body covered by a sheet on a driveway. He then went to the 3700 block of West 69th Street and saw a Chevrolet four-door vehicle with blood on the exterior driver's side and fire damage and a "bloody" deceased woman in the rear driver's side seat. Dunigan stated there was a large quantity

of water on the ground and a "strong odor of gasoline." The parties stipulated to testimony that charred debris was collected from inside the Chevrolet Caprice and an Illinois State Police forensic chemist tested the debris and found it contained gasoline.

¶ 13 Illinois State Police forensic DNA analyst Amy Rehnstrom testified that she received known DNA samples from Ramirez, codefendant, defendant, and Villalobos. She also received unknown samples of bodily fluids recovered from the crime scenes as well as swabs from Ramirez's fingernails. She compared the DNA samples from the crime scene to the standards provided by each individual to determine who could have contributed to the samples from the crime scene and who definitely could not have contributed to them. Rehnstrom testified that she analyzed DNA from Ramirez's right-hand fingernail clippings and could not exclude defendant, Ramirez, or Villalobos as having contributed to the DNA profile, but could exclude Luera. She also analyzed DNA from Ramirez's left-hand fingernail clippings and found that it contained a combination of two DNA profiles, and she could not exclude defendant as being one of the contributors.

¶ 14 Cook County deputy medical examiner Dr. James Filkins testified that he reviewed the autopsies of Ramirez and Villalobos. Dr. Filkins opined that Villalobos "died of multiple stab and incise wounds" and Ramirez's primary cause of death was "multiple stab wounds," with strangulation being a "significant contributing factor." He also observed that Ramirez had burn injuries that appeared to be inflicted postmortem.

¶ 15 Chicago police detective Robert Lenihan testified that on November 16, 2002, he interviewed defendant in the presence of defendant's attorneys. Lenihan observed what looked like a burn scar on defendant's left arm near the wrist. Defendant stated he had burned his left arm

and right leg on the Fourth of July. During the interview, defendant produced for Lenihan a prescription for a cream used to treat burns, as well as a doctor's note dated "July" and signed by "Dr. E. Cabrera," both of which were entered into evidence at trial. The parties stipulated that, if called to testify, Dr. Ernest Cabrera would state that he has never treated defendant "at any time for any reason" and did not sign the doctor's note.

¶ 16 The jury found defendant guilty of the first degree murders of Villalobos and Ramirez, aggravated vehicular hijacking, and aggravated kidnaping. The trial court sentenced him to mandatory natural life for the two first degree murder counts and prison sentences of 20 years for aggravated vehicular hijacking and 27 years for aggravated kidnaping to run consecutive to one another and to the first degree murder sentences.

¶ 17 On direct appeal, defendant's sole argument was that the State engaged in prosecutorial misconduct in closing argument by misstating the trial evidence. We affirmed. *Montanez*, 2014 IL App (1st) 122369-U, ¶ 25.

¶ 18 Defendant filed his first postconviction petition in December 2014. In March 2015, defendant's petition was docketed for second-stage proceedings and defendant was appointed counsel. At a March 2016 hearing, defendant was permitted to proceed *pro se*. In April 2016, defendant filed his *pro se* "first amended" postconviction petition. In June 2016, defendant filed a *pro se* "motion to vacate judgment," alleging that the State had suppressed evidence regarding Ortiz's plea deal. In August 2017, the trial court granted the State's motion to dismiss defendant's postconviction petition.

¶ 19 Defendant then filed a motion to amend his postconviction petition a second time, a "supplemental" motion to amend the petition, a timely motion to reconsider the dismissal of his

petition, an "addendum" to his proposed second amended postconviction petition, and a "supplemental" motion for reconsideration of the dismissal, among many other filings. On February 15, 2018, the trial court denied defendant's motion to amend his postconviction petition.[2]

¶ 20 On May 2, 2018, while defendant's motion to reconsider the dismissal of his postconviction was pending, defendant brought a letter from attorney Candace Gorman to the trial court's attention. The letter indicated that Gorman found a Chicago police file related to defendant's case. The parties and the trial court spent the next several months locating and reviewing the files and then litigating defendant's access to the files. On May 21, 2018, the trial court stated that Gorman had the files and directed Assistant State's Attorney (ASA) Linda Walls to contact her. On June 28, 2018, the State represented that the basement files could only be obtained via subpoena. With defendant's permission, the trial court directed the State to issue a subpoena returnable to the trial court. On July 31, 2018, ASA Walls stated that she had reviewed the basement files and compared the files to what was tendered to the defense pretrial. ASA Walls stated that one report was in a different format but that the exact content of that report was contained in a larger report. The trial court directed ASA Walls to turn that report over to defendant.

¶ 21 Defendant then questioned the propriety of the State's review of the files as opposed to an in camera review by the trial court. The trial court stated that it trusted ASA Walls as an officer of the court that the only relevant document in the basement files was the one police report. Defendant

[2]Despite the trial court's denial of defendant's motion to amend his postconviction petition, defendant attempted to file multiple amended petitions. On January 22, 2018, defendant filed an addendum to his second amended postconviction petition where he argued that his mandatory natural life sentence violated the eighth amendment of the United States Constitution (U.S. Const., amend. VIII) and the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11). On September 17, 2018, defendant filed a third amended petition for postconviction relief, raising a *Brady* issue related to the police report that is the basis of one of his current claims. As these amendments were not sanctioned by the trial court, they were never ruled on.

filed a motion to substitute Judge Ursula Walowski in which he argued that it was Judge Walowski's responsibility to review the basement files and that Judge Walowski erred in allowing ASA Walls to review the basement files. Defendant's motion to substitute Judge Walowski was denied.

¶ 22 On November 29, 2018, the trial court denied defendant's motion to reconsider the dismissal of his postconviction petition and dismissed defendant's section 2-1401 petition. See 735 ILCS 5/2-1401 (West 2018).

¶ 23 Defendant appealed the dismissal of his postconviction petition and argued that he made a substantial showing that the State violated *Brady* by failing to disclose that Ortiz had entered into a plea agreement prior to testifying against him at trial. This court affirmed the second-stage dismissal of defendant's postconviction petition because the proffered impeachment evidence was not material to defendant's guilt or innocence. *People v. Montanez*, 2021 IL App (1st) 191065-U, ¶ 53. Defendant also appealed the dismissal of his section 2-1401 petition. This court affirmed the dismissal of defendant's section 2-1401 petition after appellate counsel filed a motion to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). *People v. Montanez*, No. 1-19-0017 (2020) (unpublished summary order under Illinois Supreme Court Rule 23(c)).

¶ 24 While those appeals were pending, on April 22, 2019, defendant filed a motion for leave to file a successive postconviction petition. Defendant raised two claims. First, defendant alleged that the State violated *Brady*, 373 U.S. 83, in that the State failed to turn over a police report that would have affected the credibility of multiple witnesses for the State. Second, defendant alleged that his mandatory life sentence violated the eighth amendment of the United States Constitution and the proportionate penalties clause under *Miller* and its progeny. The trial court denied

defendant's motion for leave to file a successive postconviction petition. Defendant appeals the trial court's judgment.

¶ 25 II. ANALYSIS

¶ 26 The Act provides a three-stage mechanism by which a criminal defendant may assert that his conviction resulted from the substantial denial of a constitutional right. *People v. Myles*, 2020 IL App (1st) 171964, ¶ 17; *People v. Delton*, 227 Ill. 2d 247, 253 (2008). "[T]he Act contemplates the filing of only one post-conviction petition." *People v. Pitsonbarger*, 205 Ill. 2d 444, 456 (2002). "Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2018). "Only when fundamental fairness so requires will the strict application of this statutory bar be relaxed." *Pitsonbarger*, 205 Ill. 2d at 458.

¶ 27 "[T]he cause-and-prejudice test is the analytical tool that is to be used to determine whether fundamental fairness requires that an exception be made to section 122-3 so that a claim raised in a successive petition may be considered on its merits." *Id.* at 459. The cause-and-prejudice test has been codified in the Act. Section 122-1(f) of the Act provides: "Leave of court may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure." 725 ILCS 5/122-1(f) (West 2018). Thus, section 122-1(f) is an exception to the statutory waiver rule "permitting a successive petition, but only if the defendant first obtains permission from the court and demonstrates to the court cause and prejudice for not having raised the alleged errors in his or her initial postconviction petition." *People v. Bailey*, 2017 IL 121450, ¶ 15.

¶ 28 "[A] prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings ***." (Internal quotation marks omitted.) *Id.* ¶ 14. "[A] prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." (Internal quotation marks omitted.) *Id.* "[T]he cause-and-prejudice test for a successive petition involves a higher standard than the first-stage frivolous or patently without merit standard ***." *People v. Smith*, 2014 IL 115946, ¶ 35.

¶ 29 "[L]eave of court to file a successive postconviction 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." *Id.* "The denial of a defendant's motion for leave to file a successive postconviction petition is reviewed *de novo*." *Bailey*, 2017 IL 121450, ¶ 13.

¶ 30 A. State's Improper Participation Claim

¶ 31 Defendant first argues that a remand is "necessary because the proceedings on [his] successive post-conviction petition were tainted by the State's premature and fundamentally unfair participation at the leave-to-file stage." Defendant relies on *Bailey*, 2017 IL 121450. In *Bailey*, the Illinois Supreme Court was tasked with deciding whether "the denial of defendant's motion for leave to file a successive postconviction petition must be reversed because the circuit court permitted the State to provide input on the merits of the motion and petition at the cause and prejudice stage." *Id.* ¶ 12.

¶ 32 The court held that "the State should not be permitted to participate at the cause and prejudice stage of successive postconviction proceedings." *Id.* ¶ 24. The court stated that trial courts are "capable of making an independent determination on the legal question of whether adequate facts have been alleged for a *prima facie* showing of cause and prejudice." *Id.* ¶ 25. "[P]ermitting the State to argue against a finding of cause and prejudice at this preliminary stage, when the defendant is not represented by counsel, is inequitable, fundamentally unfair, and raises due process concerns." *Id.* ¶ 27. While the court held that the State had improperly participated at the leave-to-file stage, the court nonetheless opted to review the defendant's motion for leave to file his successive postconviction petition in the interest of judicial economy. *Id.* ¶ 42.

¶ 33 Defendant complains about the State's participation in discussions about whether, and to what extent, defendant should have access to files found at a Chicago Police Department facility. These discussions took place between May and November 2018 during second-stage proceedings on defendant's initial postconviction petition. Defendant filed his motion for leave to file a successive postconviction petition, which is at issue in this case, in April 2019.

¶ 34 We reject defendant's invitation to extend *Bailey* to these circumstances. *Bailey*, and defendant's other case, *People v. Coffey*, 2020 IL App (3d) 160427, both involved procedural postures where the defendants had already filed a motion for leave to file a successive postconviction petition. Thus, there was active litigation on whether the defendants should be granted leave to file a successive postconviction petition. Here, on the other hand, defendant had neither filed his motion nor gave any indication that a motion for leave to file was imminent.

¶ 35 Aside from the procedural distinction between this case and *Bailey*, it would also be impractical to find error in the State's participation under the facts of this case. Defendant had filed

an initial postconviction petition, which was at the second stage of proceedings. A motion to reconsider the dismissal of the petition was pending when the basement files issue first arose. Defendant had also filed a section 2-1401 petition. While litigating those filings, defendant brought up a letter from attorney Gorman, which stated that she had found files related to defendant's case. The trial court then directed the State to contact Gorman to determine the relevancy of the files. Just before the State tendered the police report, defendant stated to the trial court that he would possibly amend his filings depending on the contents of the report.

¶ 36 Thus, defendant raised the specter of utilizing the basement files in the pending litigation. The State properly participated in those proceedings, and no *Bailey* violation occurred.

¶ 37 B. *Brady* Claims

¶ 38 Defendant's first substantive argument is that he adequately alleged cause and prejudice regarding two *Brady* claims. Both claims stem from the basement file found at a Chicago Police Department facility. The file was found by attorney Gorman. Gorman notified defendant of the existence of the file in December 2015. The trial court issued a subpoena for the file, and the ASA was directed to review the file and tender anything to defendant that was not tendered to the defense prior to trial. The State turned over a single police report, which the ASA represented was the only record not tendered to the defense prior to trial. The ASA represented that the contents of the police report were nonetheless included within a larger document. Defendant's first claim relates to the police report that includes a summary of statements made by several State witnesses. The second claim relates to the entirety of the basement file, the contents of which are not in the record.

¶ 39 In *Brady*, the United States Supreme Court held that "the prosecution must disclose evidence that is favorable to the accused and 'material either to guilt or to punishment.' " *People v. Harris*, 206 Ill. 2d 293, 311 (2002) (quoting *Brady*, 373 U.S. at 87). To succeed on a *Brady* claim, a defendant must establish: "(1) the undisclosed evidence is favorable to the accused because it is either exculpatory or impeaching; (2) the evidence was suppressed by the State either willfully or inadvertently; and (3) the accused was prejudiced because the evidence is material to guilt or punishment." *People v. Beaman*, 229 Ill. 2d 56, 73-74 (2008). "Evidence is material if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed." *Id.* at 74. To establish materiality, a defendant must show that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

¶ 40 We can dispose of defendant's second *Brady* claim first because defendant never raised a claim related to the entirety of the basement file in his successive petition. Section 122-2 of the Act specifically provides that "[t]he petition shall *** clearly set forth the respects in which petitioner's constitutional rights were violated" (725 ILCS 5/122-2 (West 2018)), while section 122-3 provides that "[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived" (*id.* § 122-3). It is black letter law that a defendant may not raise an issue for the first time on appeal from the dismissal of a postconviction petition if the petition failed to include that issue. *People v. Jones*, 211 Ill. 2d 140, 148 (2004); *People v. Coleman*, 183 Ill. 2d 366, 388 (1998); *People v. McNeal*, 194 Ill. 2d 135, 153 (2000); *People v. Jones*, 213 Ill. 2d 498, 505-06 (2004); *People v. Petrenko*, 237 Ill. 2d 490, 502 (2010).

¶ 41 Defendant points to the last sentence of defendant's first claim, which was titled, "The State failed to turn over a police report which would have affected the credibility of multiple witnesses for the State in violation of *Brady v. Maryland*, 373 U.S. 83 (1963)." At the end of the section, defendant argued cumulative prejudice in that two pieces of evidence had been suppressed; namely, the existence of a plea agreement for witness Anais Ortiz[3] and "documents from over (17) years ago, hidden in file cabinets by agents of the State." This statement is clearly a reference to the police report because the report is the subject of the entirety of defendant's first claim. The statement is not a reference to the entirety of the basement files because defendant does not otherwise discuss the entirety of the files or claim error in the trial court's discovery-related rulings regarding the basement files. Because defendant did not raise a claim related to the entirety of the basement files in his petition, he has waived review of that claim.

¶ 42 The *Brady* claim defendant did raise in his motion for leave to file relates to a police report that contains statements of various witnesses. Defendant argues that McDonnell's statements in the police report differ significantly from his trial testimony. In the police reports, McDonnell told officers that he did not see any offenders leaving the scene. At trial, McDonnell testified that he saw the offender's vehicle leave the scene. McDonnell also testified that he saw a little flash of light in the car while codefendant Luera was outside of the car, which made McDonnell think there was another individual in the car. The police report does not mention the flash of light. Defendant concludes that his petition demonstrated that the police report contained material evidence that

[3]This evidence was the basis for defendant's *Brady* claim in his initial postconviction petition. This court affirmed the second-stage dismissal of the initial postconviction petition in a prior appeal. *Montanez*, 2021 IL App (1st) 191065-U, ¶ 2.

could have both impeached a key State's witness and exculpated himself because the report suggests codefendant Luera committed the crimes alone.

¶ 43 We can decide this issue without resolution of whether defendant established cause sufficient to file the successive postconviction petition because he cannot establish prejudice. In resolving defendant's appeal from the dismissal of his initial postconviction petition, this court noted the "ample" evidence supporting his guilt. This court stated:

> "The State presented ample evidence that defendant was, at a minimum, accountable for the murders of Villalobos and Ramirez while in Villalobos's vehicle with Luera where he was seen in the vehicle with the victims, he had scratches on his neck, his DNA was found under Ramirez's fingernails, Villalobos's vehicle was burned with Ramirez's body inside it, defendant purchased two cans of gasoline not long after Luera had killed Villalobos and Samhan saw the vehicle drive by with a woman being strangled out the window, and defendant lied about where he sustained the burn on his arm." *Montanez*, 2021 IL App (1st) 191065-U, ¶ 52.

Notably, there is no mention of McDonnell's testimony because McDonnell shed little to no light on whether defendant was involved in the murders of Villalobos and Ramirez. In other words, even assuming defendant could have impeached McDonnell on whether he saw a flash of light in the vehicle or whether he saw Villalobos's vehicle drive away, defendant would not have been exculpated nor would the evidence tend to show that there was only one perpetrator.

¶ 44 Ortiz placed defendant in Villalobos's vehicle with Luera, Villalobos, and Ramirez minutes before Luera murdered Villalobos. Moments after the murder, Samhan witnessed Villalobos's

vehicle traveling recklessly. A woman's head was hanging out the back window with a male's arm around her neck. These two pieces of evidence together provide strong evidence that not only were two people in the vehicle with Ramirez, but that the two people were Luera and defendant. Aside from the evidence about defendant's presence in the vehicle, there was testimony that defendant had scratches on his face and neck shortly after Samhan saw a man choking a woman in Villalobos's vehicle. Defendant's DNA could not be excluded from the DNA profile found under Ramirez's fingernails and the odds of another person not being excluded were astronomical. As we noted, this evidence supported "a reasonable inference that Ramirez was the one who caused defendant's scratch marks."

¶ 45 On top of the evidence that defendant was an active participant in Ramirez's murder, "abundant evidence" established that defendant purchased two cans of gasoline to burn the Caprice with Ramirez inside it. A gas station attendant testified that defendant bought two cans of gasoline around 1:45 a.m. the night of the murders. Murray then saw defendant walk up to a restaurant near the gas station with two cans of gasoline. The officer who found the Caprice with Ramirez's body inside noted fire damage and a strong odor of gasoline. Debris inside the vehicle contained gasoline. A detective noted a burn scar on defendant's arm, and defendant provided a forged doctor's note to explain the burn scar defendant received from burning Villalobos's vehicle.

¶ 46 In short, even if defendant could have impeached McDonnell with the two discrepancies between the police report and his testimony, we have full confidence in the jury's guilty verdicts. Thus, the impeachment evidence was not material to defendant's guilt or innocence. See *People v. Roman*, 2016 IL App (1st) 141740, ¶ 18 (noting that "impeachment evidence may not be material where the State's remaining evidence is strong enough to preserve confidence in the

verdict"). Because defendant cannot establish prejudice for his failure to raise the *Brady* claim in his initial postconviction petition, the trial court properly denied defendant leave to file his successive postconviction petition.

¶ 47 C. *Miller* and Proportionate Penalties Claim

¶ 48 Defendant's final argument is that he established cause and prejudice in relation to his claim that his mandatory life sentence violates *Miller* and the proportionate penalties clause "because he was 21, an emerging adult, at the time the offense was committed, and his sentencing hearing did not consider the attendant circumstances of his youth."

¶ 49 The eighth amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments." U.S. Const., amend. VIII. In a line of cases the United States Supreme Court has applied the eighth amendment to juvenile offenders who have committed serious offenses. In *Roper v. Simmons*, 543 U.S. 551, 578 (2005), the Court held that the eighth amendment prohibited the "imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." In *Graham v. Florida*, 560 U.S. 48, 82 (2010), the Court held that the "Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide."

¶ 50 In *Miller*, the Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller*, 567 U.S. at 479. The Court then determined that the *Miller* holding applied retroactively to cases on collateral review. *Montgomery v. Louisiana*, 577 U.S. 190, 212 (2016). Most recently, the Court clarified that *Miller* only required a "discretionary sentencing procedure" and not any formal factual finding. *Jones v. Mississippi*, 593 U.S. ___, ___, 141 S. Ct. 1307, 1317 (2021).

¶ 51 The Illinois Supreme Court has also weighed in on the import of these decisions. Our supreme court in *People v. Reyes*, 2016 IL 119271, ¶¶ 9-10, held that *Miller* applied to *de facto* life sentences. In *People v. Buffer*, 2019 IL 122327, ¶ 41, our supreme court defined a *de facto* life sentence for a juvenile as a sentence of more than 40 years' imprisonment. Our supreme court has also held that *Miller* applies to discretionary as well as mandatory sentences (*People v. Holman*, 2017 IL 120655, ¶¶ 43-44), although the court has subsequently called that holding into question (see *People v. Dorsey*, 2021 IL 123010, ¶ 41).

¶ 52 Defendant's eighth amendment claim fails because he was 21 years old when he committed the murders in this case. The Illinois Supreme Court has made clear that, "for sentencing purposes, the age of 18 marks the present line between juveniles and adults." *People v. Harris*, 2018 IL 121932, ¶ 61 (rejecting the 18-year-old defendant's eighth amendment challenge because the defendant fell on the adult side of the dividing line); *Miller*, 567 U.S. at 465 (limiting the Court's holding to "those under the age of 18 at the time of their crimes"). Because defendant was over 18 when he committed the crimes in this case, he cannot establish prejudice warranting leave to file a successive postconviction petition on his eighth amendment claim.

¶ 53 The proportionate penalties clause provides: "All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. The Illinois Supreme Court has twice indicated that young adult offenders may establish an unconstitutional life sentence through a postconviction petition. In *People v. Thompson*, 2015 IL 118151, ¶ 44, our supreme court rejected the 19-year-old defendant's as-applied constitutional challenge because it was raised for the first time on appeal. However, the court noted that the defendant was not prohibited from raising the issue

through the Act. *Id.* In *Harris*, our supreme court reversed the appellate court's decision because the "appellate court held [the] defendant's sentence violated the Illinois Constitution without a developed evidentiary record on the as-applied constitutional challenge." *Harris*, 2018 IL 121932, ¶ 40. The court concluded that because *Miller* did not apply directly to the 18-year-old defendant's circumstances, the record must be sufficiently developed to support the defendant's as-applied challenge. *Id.* ¶ 45.

¶ 54 We have described the import of *Thompson* and *Harris* as permitting "young adult offenders to bring successive postconviction claims alleging that their sentences in excess of 40 years imposed without consideration of the *Miller* factors are unconstitutional as applied to them under the proportionate penalties clause." *People v. Horshaw*, 2021 IL App (1st) 182047, ¶ 69. The key question in this case is whether defendant falls into the category of "young adult offenders." If so, we would proceed to determine whether defendant sufficiently alleged cause and prejudice to warrant the filing of his successive postconviction petition. If not, defendant cannot establish prejudice and the trial court properly denied the motion for leave to file.

¶ 55 The vast majority of our cases have drawn a bright line at 21 years old in determining who qualifies as a "young adult offender." For example, in *People v. Humphrey*, 2020 IL App (1st) 172837, ¶ 33, this court held that "individuals who are 21 years or older when they commit an offense are adults for purposes of a *Miller* claim." This court relied on "other aspects of criminal law and society's current general recognition that 21 is considered the beginning of adulthood." *Id.* ¶ 34. For the criminal law context, this court cited the legislature's decision to grant parole review to homicide offenders, who were under 21 at the time of the offense, after serving 20 years of their sentence. *Id.* (citing 730 ILCS 5/5-4.5-115 (West Supp. 2019)). This court also cited the

statutory prohibitions against the sale of nicotine, tobacco, and alcohol products to those under 21. *Id.* (citing 720 ILCS 675/1 (West Supp. 2019); 235 ILCS 5/6-16 (West 2016)).

¶ 56 *Humphrey* is consistent on this issue with nearly every other case from our appellate court. See *People v. Kruger*, 2021 IL App (4th) 190687, ¶ 32 ("We agree with the *Humphrey* court limiting *Miller*-based claims to those young adults aged 18 to 20."); *People v. Green*, 2022 IL App (1st) 200749, ¶ 42 ("[D]efendant was 21 years old at the time of the offense, and therefore was an adult for purposes of a *Miller* claim."); *People v. Suggs*, 2020 IL App (2d) 170632, ¶ 35 (noting that the defendant could not "point to any line, societal, legal, or penological, that is older than 21 years"); *People v. Glinsey*, 2021 IL App (1st) 191145, ¶ 46 (noting that "our state's statutes and caselaw treat young adults under 21 years of age differently than adults"); *People v. Rivera*, 2020 IL App (1st) 171430, ¶ 27 (recognizing that *Miller* protections "have been arguably extended in some cases and statutes to under-21-year-olds," but that any further extension "should be made by our legislature or our highest court"); *People v. Williams*, 2021 IL App (1st) 190535, ¶ 35 (rejecting a 22-year-old defendant's proportionate penalties claim because it could not be said that "the legislature's decision to define adulthood as being 21 years old or older shocks the moral sense of the community").

¶ 57 In one instance this court has held that a defendant 21-years-old or older may potentially invoke the *Miller* protections. In *People v. Savage*, 2020 IL App (1st) 173135, ¶ 67, this court began by noting the general rule that "Illinois law treats adults under 21 years of age differently than adults." However, this court accepted the defendant's argument that mental health issues and drug addiction may lower a defendant's functional age. *Id.* ¶ 70. The defendant's petition alleged that "he had been a drug addict since he was nine years old, that he was using drugs every day at

the time of the offense, and that he was attempting to rob a drug house when the offenses at issue occurred." *Id.* ¶ 71. These allegations were supported by the trial record and documents filed with the PSI, all of which further supported the postconviction claim that the defendant's long-term addiction and young age left him " 'more susceptible to peer pressure' " and " 'more volatile in emotionally charged settings.' " *Id.* ¶¶ 71-73. This court concluded that, "where [the] defendant's argument finds support in both the filed record and recent case law, it cannot be considered frivolous and patently without merit." *Id.* ¶ 76.

¶ 58 We conclude that defendant cannot establish prejudice based on the significant precedent setting the dividing line for *Miller* protections at 21-years-old. Defendant, who was 21 at the time of the offenses in this case, falls on the adult side of the dividing line. As noted in *Rivera*, any extension of *Miller* protections to those 21 and over should come from the legislature or the Illinois Supreme Court. *Rivera*, 2020 IL App (1st) 171430, ¶ 27. Our supreme court has recognized that the legislature is "the entity best suited" to make determinations regarding compliance with constitutional mandates in the juvenile sentencing arena. *Buffer*, 2019 IL 122327, ¶ 40 (relying on legislative enactments to conclude that a sentence of over 40 years constitutes a *de facto* life sentence for *Miller* purposes); *Graham*, 560 U.S. at 75 (noting that it is "for the State, in the first instance, to explore the means and mechanisms for compliance" with eighth amendment mandates in juvenile sentencing).

¶ 59 The legislature has taken significant steps in implementing *Miller* protections. Trial courts are now mandated to consider, when sentencing individuals who were under 18 at the time of the offense, several additional mitigating factors related to the individual's youth and upbringing. 730 ILCS 5/5-4.5-105(a) (West 2020). For those same individuals, trial courts have the discretion

in most cases to decline to impose otherwise applicable sentencing enhancements. *Id.* § 5-4.5-105(b). The legislature has also provided for parole review after 20 years for first degree murder offenders who were under 21 at the time of the crime. *Id.* § 5-4.5-115. The Illinois Supreme Court, for its part, has suggested that 18-to-20-year-olds may raise as-applied challenges under the proportionate penalties clause based on the reasoning in *Miller*, which is "already a significant extension of *Miller*." *Kruger*, 2021 IL App (4th) 190687, ¶ 32.

¶ 60 In short, any further extension of *Miller* should come from either the legislature or the Illinois Supreme Court. Because defendant, as a 21-year-old adult, failed to make a *prima facie* showing of prejudice, the circuit court properly denied his motion for leave to file a successive postconviction petition.

¶ 61 To the extent *Savage* represents an avenue for individuals 21 and over to obtain relief based on *Miller*, this case is distinguishable. First, the burden on defendant in this case is higher as he is attempting to file a successive postconviction petition whereas the defendant in *Savage* filed an initial postconviction petition. As we have consistently held, "the pleading requirements for successive postconviction petitions are higher than the pleading requirements for initial postconviction petitions." *Horshaw*, 2021 IL App (1st) 182047, ¶ 134. Second, and more importantly, the defendant in *Savage* listed specific factors, drug addiction and mental health, which were supported by the record, in alleging that *Miller* protections should apply to him. *Savage*, 2020 IL App (1st) 173135, ¶ 78.

¶ 62 Here, on the other hand, defendant concedes that he pointed to no "specific issues" that would warrant the extension of *Miller* to his case. A bare bones assertion that *Miller* should be applied based solely on an individual's age is insufficient to make out a *prima facie* case of

prejudice. See *People v. Carrion*, 2020 IL App (1st) 171001, ¶ 38 (finding an insufficient allegation of prejudice where the defendant made a "flat allegation as to evolving science on juvenile maturity and brain development"); *People v. Evans*, 2021 IL App (1st) 172809, ¶ 20 (affirming the denial of leave to file a successive postconviction petition where the "defendant's petition failed to set forth *any* individual characteristics that would require the trial court to apply the sentencing protections set forth in *Miller*" (emphasis in original)). Thus, even assuming *Miller* could be applied to a 21-year-old defendant under the proportionate penalties clause, defendant failed to sufficiently allege prejudice and his motion for leave to file a successive postconviction petition was properly denied.

¶ 63 III. CONCLUSION

¶ 64 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 65 Affirmed.

¶ 66 JUSTICE ROCHFORD, specially concurring:

¶ 67 I concur in the result affirming the denial of defendant's motion for leave to file a successive postconviction petition. I write separately because with respect to defendant's proportionate penalties claim, I would affirm based on his failure to satisfy the cause prong of the cause-and-prejudice test.

¶ 68 Recently, the supreme court in *Dorsey*, 2021 IL 123010, ¶ 74, found that "*Miller*'s announcement of a new substantive rule under the eighth amendment does not provide cause for a defendant to raise a claim under the proportionate penalties clause." The supreme court reasoned: "Illinois courts have long recognized the differences between persons of mature age and those who are minors for purposes of sentencing. Thus, *Miller*'s unavailability prior to 2012 at best deprived

defendant of 'some helpful support' for his state constitutional law claim, which is insufficient to establish 'cause.' " *Id.* (quoting *People v. LaPointe*, 2018 IL App (2d) 160903, ¶ 59).

¶ 69 Dorsey indicates that any unavailability of *Miller* and its progeny prior to the date of the filing of the initial postconviction petition did not prevent defendant from raising a proportionate penalties claim based on the sentencing court's failure to consider his youth and its attendant characteristics. In light of *Dorsey*, defendant cannot establish cause for failing to raise his proportionate penalties claim in his initial petition, and I would affirm on that basis without addressing the prejudice prong. See also *People v. Ruddock*, 2022 IL App (1st) 173023, ¶ 72 (finding the juvenile defendant relying on *Miller* and its progeny did not establish cause for failing to bring a proportionate penalties claim in an earlier postconviction petition); *People v. Howard*, 2021 IL App (2d) 190695, ¶ 39 (finding the young adult offender relying on *Miller* and its progeny did not establish cause for failing to bring a proportionate penalties claim in an earlier postconviction petition); *People v. Haines*, 2021 IL App (4th) 190612, ¶¶ 38-47 (finding the same for a young adult offender).

No. 1-19-1930

2022 IL App (1st) 191930

Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 02-CR-31134; the Hon. Joseph M. Claps, Judge, presiding.
Attorneys for Appellant:	James E. Chadd, Douglas R. Hoff, and Adrienne E. Sloan, of State Appellate Defender's Office, of Chicago, for appellant.
Attorneys for Appellee:	Kimberly M. Foxx, State's Attorney, of Chicago (Enrique Abraham and Brian K. Hodes, Assistant State's Attorneys, of counsel), for the People.

2022 IL App (1st) 201106-U

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

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).

Appellate Court of Illinois, First District,
FIFTH DIVISION.

The PEOPLE of the State of Illinois, Plaintiff-Appellee,
v.
William LYLES, Defendant-Appellant.

No. 1-20-1106

MARCH 25, 2022

Appeal from the Circuit Court of Cook County. No. 01 CR 31263, Honorable Vincent M. Gaughan, Judge Presiding.

ORDER

JUSTICE CUNNINGHAM delivered the judgment of the court.

***1** ¶ 1 *Held*: The trial court's judgment denying the defendant's motion for leave to file a successive postconviction petition is vacated and the case is remanded to the trial court for further proceedings.

¶ 2 The defendant-appellant, William Lyles, filed a *pro se* motion for leave to file a successive postconviction petition in the circuit court of Cook County, alleging, *inter alia*, that a *Brady* violation occurred during his trial and that his 48-year sentence for first degree murder is unconstitutional. The circuit court denied the defendant's motion and the defendant now appeals. For the reasons that follow, we vacate the judgment of the circuit court of Cook County and remand the case for further postconviction proceedings.

¶ 3 BACKGROUND

¶ 4 In 2004, the defendant was convicted of first degree murder for the November 18, 2001, shooting death of Bobby Roberts. The defendant was sentenced to 48 years' imprisonment. He was 21 years old at the time of the offense. For a full recitation of facts leading up to the defendant's conviction and sentence, see *People v. Lyles*, No. 1-04-1662 (2006) (unpublished order under Supreme Court Rule 23). On direct appeal, this court affirmed his conviction and sentence. *Id.*

¶ 5 On February 8, 2007, the defendant filed a *pro se* postconviction petition, alleging, *inter alia*, that his arrest was unlawful and that he received ineffective assistance of trial and appellate counsel. His petition was dismissed by the trial court at the second stage of proceedings. On appeal, this court allowed the defendant's appellate counsel to withdraw and affirmed the dismissal. *People v. Lyles*, 2011 IL App (1st) 100470*People v. Lyles*, 2011 IL App (1st) 100470 (unpublished summary order under Supreme Court Rule 23(c)).

¶ 6 On December 23, 2019, the defendant filed a *pro se* petition entitled, "Verified Petitions," which is the subject of this appeal. The petition sought relief from judgment pursuant to both the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 (West 2018)) and section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2018)). In the petition, the defendant alleged, *inter alia*, that his 48-year sentence for first degree murder is unconstitutional as applied to him pursuant to both, the eighth amendment of the United States Constitution (U.S. Const., amend. VIII) and the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11), because he was 21 years old at the time of the offense. He cited recent case law from this court and our supreme court regarding the sentencing of juveniles and young adult offenders, which is an evolving area of law.

¶ 7 The defendant's petition additionally argued that the police "fraudulently concealed" the "street file" in his case, which contained favorable evidence that was not presented at his jury trial. In support, the defendant attached a series of letters he received in 2015 and 2016 from attorney H. Candace Gorman. In her letters, attorney Gorman explained that while she was working on an unrelated case, she discovered a "hidden" police file related to the defendant's case (as well as files related to 200 other cases) in a police station basement. Attorney Gorman stated that, due to a trial court order, she could not send the file to the defendant or share the contents of the file with him. She explained that pursuant to the court order, she could only share the file with an attorney, and so she encouraged the defendant to either get in touch with his former counsel or to obtain new counsel. The defendant also

attached to his petition, three news articles detailing hundreds of investigative files in homicide cases, also known as "street files," that had been stored in a police station basement for years and were never turned over to the defendants in question.

***2** ¶ 8 On September 10, 2020, the trial court entered a written order in response to the defendant's *pro se* petition filed on December 19, 2019. The order noted that the court was treating the defendant's pleading as a motion for leave to file a successive postconviction petition, because the defendant had previously filed a postconviction petition. The trial court also considered it to be a petition for relief from judgment under section 2-1401 of the Code. The court held, though, that a section 2-1401 petition "is not a proper vehicle to attack the alleged denial of constitutional rights."

¶ 9 The trial court ultimately denied the defendant's motion for leave to file a successive postconviction petition. In its written order, the trial court rejected the defendant's argument that his 48-year sentence is unconstitutional since the defendant was 21 years old at the time of his offense and "not a juvenile." The trial court's order also rejected the defendant's argument that favorable evidence had been fraudulently concealed from him, stating: "Assuming, *arguendo,* that [the defendant's] files were concealed fraudulently, there was no prejudice. It is inconclusive as to what was in [the defendant's] files." Following the trial court's order denying him leave to file a successive postconviction petition, the defendant filed a notice of appeal.

¶ 10 ANALYSIS

¶ 11 We note that we have jurisdiction to consider this matter, as the defendant filed a timely notice of appeal. Ill. S. Ct. Rs. 606, 651(a) (eff. July 1, 2017).

¶ 12 The defendant presents the following issue for our review: whether the trial court erred in denying his motion for leave to file a successive postconviction petition.[2] He argues that his petition pled a *prima facie* showing of a *Brady* violation as well as a showing that his 48-year sentence for first degree murder violates the proportionate penalties clause of the Illinois Constitution. The defendant asks us to vacate the trial court's judgment denying him leave to file his successive postconviction petition and remand this case for further postconviction proceedings.

¶ 13 The Act provides a procedural mechanism through which a criminal defendant can assert that his constitutional rights were substantially violated in his original trial or sentencing hearing. 725 ILCS 5/122-1 (West 2018); *People v. Allen*, 2019 IL App (1st) 162985, ¶ 29. The Act generally contemplates the filing of only one postconviction petition, and any claim not presented in the initial petition is subsequently forfeited. 725 ILCS 5/122-1(f) (West 2018); *Allen*, 2019 IL App (1st) 162985, ¶ 29. However, a court may grant a defendant leave to file a successive postconviction petition if he demonstrates cause for failing to raise the claim in his earlier petition and prejudice resulting from that failure. 725 ILCS 5/122-1(f) (West 2018); *Allen*, 2019 IL App (1st) 162985, ¶ 32. Under this cause-and-prejudice test, a defendant must establish *both* cause and prejudice. *Allen*, 2019 IL App (1st) 162985, ¶ 32. " 'Cause' is established when the defendant shows that 'some objective factor external to the defense impeded his ability to raise the claim' in his original postconviction proceeding." *Id.* (quoting *People v. Tenner*, 206 Ill. 2d 381, 393 (2002)). And " '[p]rejudice' is established when the defendant shows that the 'claimed constitutional error so infected his trial that the resulting conviction violated due process.' " *Id.* (quoting *Tenner*, 206 Ill. 2d at 393). If the defendant makes a *prima facie* showing of cause and prejudice, the court should grant the defendant leave to file his successive postconviction petition. *People v. Ames*, 2019 IL App (4th) 170569, ¶ 13. This court reviews the denial of a defendant's motion for leave to file a successive postconviction petition *de novo*. *Id.*, ¶ 11.

***3** ¶ 14 Here, the defendant's petition alleged that: (1) his 48-year sentence for first degree murder is an unconstitutional *de facto* life sentence because he was 21 years old at the time of the offense, and (2) a *Brady* violation occurred during his trial when the State withheld his street file[3]. [4] Because the *Brady* violation matter is dispositive, we turn to it first.

¶ 15 Pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), (known as a *Brady* violation), the State is required to disclose exculpatory evidence to the defendant. *People v. Gonzalez*, 2016 IL App (1st) 141660, ¶ 68. To establish a *Brady* violation, a defendant must show that: (1) the undisclosed evidence is favorable to the defendant because it is either exculpatory or impeaching; (2) the evidence was suppressed by the State either willfully or

inadvertently; and (3) the defendant was prejudiced because the evidence is material to guilt or punishment. *Id.*

¶ 16 In this case, the State concedes that the defendant's petition established cause and prejudice as to his *Brady* violation claim and that his petition should be remanded to the trial court for further postconviction proceedings on that basis. We accept the State's concession and agree with the conclusion that the defendant's petition established cause and prejudice and should be remanded to the trial court. Indeed, the defendant attached letters from attorney Gorman, that he received in 2015 and 2016, years after he filed his initial postconviction petition in 2007, informing him of the hidden street file. This satisfied the cause prong of the cause-and-prejudice test since the defendant could not have raised this issue before attorney Gorman discovered his street file. See 725 ILCS 5/122-1(f) (West 2018) (a defendant "shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings").

¶ 17 Further, the street file was undoubtedly suppressed by the State, even if inadvertently. See *People v. Hobley*, 182 Ill. 2d 404, 438 (1998) (the law is well settled that the same *Brady* rules apply even where the suppressed evidence was known only to police investigators and not to the prosecutors). And although the contents of the street file are unknown at this point, so it is premature to say whether the evidence is favorable to the defendant, the defendant is entitled to move forward in the process so that counsel can review the evidence and make a determination of whether there is a *Brady* violation. As attorney Gorman explained in one of her letters, the defendant is currently unable to prove his *Brady* claim because of a trial court order preventing him from accessing the contents of the street file. It would be prejudicial to the defendant to assume the evidence is not favorable to him without giving him the opportunity to see it. See *Fields v. City of Chicago*, 981 F.3d 534, 561 (7th Cir. 2020) (the discovery restriction regarding evidence files held in a police basement rendered it "virtually impossible" for the plaintiff to prove his claim). Under these facts and circumstances, the defendant established prejudice. See *People v. Ortiz*, 235 Ill. 2d 319, 329 (2009) (prejudice is shown where the claimed constitutional error so infected the entire trial that the resulting conviction or sentence violates due process).

***4** ¶ 18 We again note that the trial court's order concerning the hidden street files only allows disclosure of the file to counsel and not the defendant. Yet, by denying the defendant the right to file his postconviction petition, that likely ensured he would not be represented by counsel. Consequently, the trial court's order denying the defendant leave to file his successive postconviction petition precluded the defendant from discovering the contents of the hidden file discovered by attorney Gorman, which is unjust. We emphasize that in this case, the presence of the street file kept by the police regarding the defendant, without his knowledge and only to be disclosed to him by a third party, years after his conviction, is troubling.

¶ 19 Thus, we agree with the parties that the defendant's petition satisfied the cause-and-prejudice test as to his *Brady* violation claim, entitling him to file his successive postconviction petition. See *People v. Johnson*, 2019 IL App (1st) 153204, ¶ 32 (when the trial court grants a defendant leave to file a successive postconviction petition, the petition is effectively advanced to the second stage of postconviction proceedings); *People v. Ruhl*, 2021 IL App (2d) 200402, ¶ 63 (if the court grants the defendant leave to file a successive petition, and the petition advances to the second stage, the defendant must make a substantial showing of actual innocence to proceed to an evidentiary hearing).

¶ 20 The parties dispute whether the defendant's other claim in his petition (that his 48-year sentence is unconstitutional) has enough merit to also advance in the postconviction proceedings. However, it is irrelevant whether that claim is meritorious because we have already held that his petition should advance to the second stage of postconviction proceedings based on his *Brady* violation claim. And if a single claim in a multiple-claim petition warrants further proceedings, then the *entire petition* advances, notwithstanding the State's argument regarding the merits of the other claims. *People v. White*, 2014 IL App (1st) 130007, ¶ 33 ("we have no need to address any of the other claims in the petition because partial summary dismissals are not permitted during the first stage of a postconviction proceeding"); see also *People v. Romero*, 2015 IL App (1st) 140205, ¶ 27. Accordingly, we need not engage in an analysis on the defendant's claim in his petition that his 48-year sentence for first degree murder is unconstitutional.

¶ 21 We therefore vacate the trial court's judgment denying the defendant's motion for leave to file a successive postconviction petition and remand the case for further postconviction proceedings consistent with this order. We

also order the appointment of counsel to represent the defendant during the proceedings in the trial court.

¶ 22 CONCLUSION

¶ 23 For the foregoing reasons, we vacate the judgment of the circuit court of Cook County and remand the case to that court for further proceedings consistent with this order.

¶ 24 Vacated and remanded.

Presiding Justice Delort and Justice Connors concurred in the judgment.

All Citations

Not Reported in N.E. Rptr., 2022 IL App (1st) 201106-U, 2022 WL 888154

Footnotes

1 The *Brady* rule requires the State to disclose evidence that is favorable to the defense and material to guilt. *People v. Brandon*, 2021 IL App (1st) 172411, ¶ 83.

2 We note that while the defendant's *pro se* pleading was entitled “Verified Petitions” pursuant to both the Act and section 2-1401 of the Code, the substance of the pleading was a motion for leave to file a successive postconviction petition, and we will consider it as such. See *In re Haley D.*, 2011 IL 110886, ¶ 67 (“the character of the pleading should be determined from its content, not its label”).

3 “Street file” is a common term for police memoranda in a case. *People v. Velez*, 123 Ill. App. 3d 210, 216 (1984).

4 The defendant's petition in the trial court alleged several other claims, but he only raises these two claims on appeal, so they are the only relevant claims.

2020 IL App (1st) 180322-U

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

Appellate Court of Illinois, First District,
SIXTH DIVISION.

The PEOPLE of the State of Illinois, Plaintiff-Appellee,
v.
Dion BANKS, Defendant-Appellant.

No. 1-18-0322

JUNE 5, 2020

Appeal from the Circuit Court of Cook County. No. 01 CR 10553 (01), Honorable Timothy Joseph Joyce, Judge Presiding.

ORDER

JUSTICE CUNNINGHAM delivered the judgment of the court.

***1** ¶ 1 *Held:* Dismissal of the defendant's postconviction petition at the first stage reversed where petition stated the gist of a *Brady* violation.

¶ 2 Defendant-appellant Dion Smith, convicted of first-degree murder and aggravated discharge of a firearm, appeals the first stage dismissal of his postconviction petition. On appeal, the defendant argues that he stated the gist of a claim that the Chicago police department's failure to turn over its 340-page street file concerning him prior to trial amounted to a *Brady* violation. For the reasons that follow, we reverse the judgment of the circuit court of Cook County and remand the matter for second stage proceedings and the appointment of counsel to represent the defendant.

¶ 3 BACKGROUND

¶ 4 On March 24, 2001, the defendant shot and killed Rose Newburn outside of Ford City Mall in front of her four- and five-year-old sons during the course of a carjacking. The defendant left the scene in Newburn's car with her children in the backseat. After driving for a short time, the defendant stopped the car and told the boys to jump out of the window, but then allowed them to leave through the door. The boys hid behind a stop sign as the defendant drove away, and then returned to the mall where their mother was.

¶ 5 In addition to Newburn's five-year-old son, another witness saw the shooting and identified the defendant as the shooter. Other witnesses also saw the defendant driving Newburn's car that day. During an interview with an assistant state's attorney two days after the shooting, the defendant confessed to the carjacking and murder.

¶ 6 In 2006, a jury convicted the defendant of first-degree murder and aggravated discharge of a firearm and also found him eligible for the death penalty. Following a hearing at which evidence in aggravation and mitigation was presented, the jury found no mitigating factors that would preclude the imposition of the death penalty. The defendant appealed his conviction and sentence directly to the supreme court, which affirmed both in February 2010. His sentence was commuted to life in prison in 2011.

¶ 7 On September 7, 2017, the defendant filed a postconviction petition in the circuit court of Cook County. His petition alleged that he was contacted by attorney Candace Gorman, who uncovered a street file bearing the defendant's name during the course of her search for documents in her own client's case. According to the defendant, that street file was never disclosed to his trial counsel. Attached to the defendant's petition was the letter attorney Gorman sent to the defendant informing him of the existence of the street file as well as Gorman's own affidavit. Gorman averred that during the course of her representation of Nathson Fields in an unrelated civil rights claim, she discovered a homicide investigative file on Fields which contained "substantial exculpatory material" that had never been tendered to Fields or his prior counsel. She recovered the file in a cabinet in the basement of the police station at 51st Street and Wentworth Avenue in Chicago. That basement had over 20 other cabinets all containing homicide investigation files. Among the 466 files she recovered from that location was the file of the defendant in the instant case, containing 320 pages of "documents and photos." Gorman wrote to the defendant and informed him of the existence of the street file. She could not share the file directly with the defendant because of a court order, so she asked the defendant for the

contact information for his current or previous attorney with whom she could share the file.

***2** ¶ 8 The defendant put Gorman in touch with Charles Schiedel, who was the deputy defender at the office of the State Appellate Defender when that office represented the defendant in his appeal to the Illinois supreme court. Schiedel also submitted an affidavit in support of the defendant's postconviction petition. In that affidavit, Schiedel averred that he was contacted by Gorman and signed the required non-disclosure forms in order to review the material in the defendant's street file. Scheidel also consulted Allen Andrews, who had been assigned to represent the defendant in his appeal before the Illinois supreme court. Based on that consultation and his review of the file provided by attorney Gorman, Schiedel believed that the material in the street file was not included in the appellate record sent to the Office of the State Appellate Defender. Further, Schiedel believed that the material in the file "could have had an impact on the issues of [the defendant's] guilt or innocence and/or his sentence."

¶ 9 Allen Andrews averred that he read the record on appeal while preparing the defendant's appeal to the Illinois supreme court and noted that the only evidence elicited at trial regarding the cause of Newburn's death was that after she was shot, "she was observed at the scene to be in shock, and that she died from a loss of blood caused by a gunshot wound."

¶ 10 On November 17, 2017, the circuit court dismissed the defendant's postconviction petition, finding that the defendant's claim that the State withheld exculpatory material in violation of *Brady* was "merely speculative and conclusory." The court chastised the defendant for failing to support his claims with "factual details" or "specific information." The defendant appealed.

¶ 11 ANALYSIS

¶ 12 We note that we have jurisdiction to review this matter, as we allowed the defendant's late notice of appeal. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); Ill. S. Ct. R. 303 (eff. July 1, 2017).

¶ 13 The Post-Conviction Hearing Act (Act) allows a defendant who is imprisoned in a penitentiary to challenge his conviction or sentence for violations of his federal or state constitutional rights. 725 ILCS 5/122-1 (West 2016); see also *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005). The Act establishes a three-stage process for adjudicating a postconviction petition. 725 ILCS 5/122-1. During the first stage, at issue here, the circuit court must independently review the petition, taking the allegations as true, in order to determine whether the petition is frivolous or patently without merit. *People v. Tate*, 2012 IL 112214, ¶ 9; 725 ILCS 5/122-2.1(a)(2) (West 2016)). Because most postconviction petitions are drafted by *pro se* defendants, the threshold for a petition to survive the first stage is low. *People v. Allen*, 2015 IL 113135, ¶ 24. While a defendant must provide some factual support for his claims to show that they are capable of corroboration, those facts need only state the gist of constitutional claim. *Id.*

¶ 14 A circuit court should only dismiss a petition as frivolous or patently without merit if it has "no arguable basis either in law or fact" and relies on "an indisputably meritless legal theory or a fanciful factual allegation." *People v. Hodges*, 234 Ill. 2d 1, 16, 17 (2009). Meritless legal theories are those that are completely contradicted by the record, while a fanciful factual allegation is "fantastic or delusional." *Id.* at 17. We review a circuit court's dismissal of a petition at the first stage *de novo*. *People v. White*, 2014 IL App (1st) 130007, ¶ 8.

¶ 15 The parties in this case agree that the defendant's petition purports to allege a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), requiring the State to disclose material evidence favorable to the defendant. A successful *Brady* claim requires a defendant to show: (1) the withheld evidence was either exculpatory or impeaching; (2) the prosecutor either willfully or inadvertently suppressed the evidence; and (3) the evidence was material to guilt or punishment. *People v. Morales*, 2019 IL App (1st) 160225, ¶ 20. Of course, at the first stage of postconviction proceedings, the defendant need not *prove* a *Brady* violation, but only state the gist of a claim.

***3** ¶ 16 Here, the defendant did not attach the street file to his petition and therefore, could not allege that the evidence was either exculpatory or impeaching or that the evidence was material. Ordinarily, a postconviction petition must attach evidence in support of its claims in order to establish that the petition's allegations are capable of objective corroboration. *Hodges*, 234 Ill. 2d at 10. But section 122-2 of the Act also permits a petitioner to explain, by way of affidavit, why

evidence supporting his allegations cannot be attached. 725 ILCS 5/122-2 (West 2016).

¶ 17 In this case, attorney Gorman's affidavit provides that explanation. She averred that a court order prevented her from sharing the street file with the defendant directly and she could only disclose it to his attorney. The defendant took the additional step of securing an affidavit from his appellate counsel—who did review the file—in which counsel averred that the evidence "could have had an impact on the issues of [defendant's] guilt or innocence and/or his sentence." While counsel does not explicitly state that the street file contained material exculpatory or impeachment evidence, we must construe the allegation liberally in favor of the defendant. See *People v. Morales*, 2019 IL 160225, ¶ 19*People v. Morales*, 2019 IL 160225, ¶ 19. And construed liberally, we conclude that it is at least arguable, based on Schiedel's affidavit, that the street file contained evidence which may have impacted the defendant's guilt, innocence, or sentence.

¶ 18 With respect to whether the State suppressed the evidence, the defendant submitted an affidavit from appellate counsel indicating that he believed the street file was not part of the appellate record. While not all material disclosed to trial counsel necessarily becomes part of the record on appeal, there is other evidence that raises the inference that the evidence was withheld from trial counsel. Specifically, Gorman's affidavit indicates that her own client's street file contained exculpatory material that was not disclosed to his trial counsel. And Gorman's review of 60 of the 400 plus street files she uncovered revealed that 54—or 90%—of those files contained material that was not in the defense file. Jason Meisner, *Old police 'street files' raise question: Did Chicago cops hide evidence?*, Chicago Tribune (Feb. 13, 2016), https://www.chicagotribune.com/news/ct-chicago-police-street-files-met-20160212-story.html. Indeed, the State acknowledges that the Chicago police department has a long history of keeping non-disclosed street files separate from investigative files that are tendered to defense counsel. See, *e.g.*, *Palmer v. City of Chicago*, 755 F.2d 560 (7th Cir. 1985); *Jones v. City of Chicago*, 856 F. 2d 985 (7th Cir. 1988). While these facts may not *establish* that the street file was not disclosed to the defendant's trial counsel in the instant case, it is certainly at least *arguable* that the file was suppressed.

¶ 19 Finally, we are not persuaded by the State's argument that the allegation of suppression is contradicted by the record. Specifically, the State points out that prior to trial, it certified that all material required to be disclosed pursuant to Illinois Supreme Court Rule 412 was tendered to defense counsel. But this self-serving certification in no way contradicts the defendant's allegation that the State willfully suppressed the street file for purposes of bringing the matter under the *Brady* principle. Illinois Supreme Court Rule 416 required the State to proffer this certification, but it is far from a fanciful factual allegation to suggest that notwithstanding the certification, the State nevertheless withheld material evidence.

***4** ¶ 20 Given the impossibility, at this stage, of including the allegedly withheld evidence itself, this *pro se* defendant has met his low burden of stating an arguable *Brady* claim. Accordingly, the trial court erred in summarily dismissing his petition.

¶ 21 CONCLUSION

¶ 22 For the reasons stated, we reverse the circuit court of Cook County's dismissal of the defendant's postconviction petition and remand the case for further proceedings consistent with this opinion.

¶ 23 Reversed and remanded.

Justices Connors and Harris concurred in the judgment.

All Citations

Not Reported in N.E. Rptr., 2020 IL App (1st) 180322-U, 2020 WL 3051555

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2017 WL 4553411
Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.

Nathson FIELDS, Plaintiff,
v.
CITY OF CHICAGO, David O'Callaghan, and Joseph Murphy, Defendants.

Case No. 10 C 1168

Signed 10/11/2017

Filed 10/12/2017

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CORRECTED MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, United States District Judge

***1** Nathson Fields sued Chicago police detectives David O'Callaghan and Joseph Murphy and the City of Chicago under 42 U.S.C. § 1983 and state law for claims arising from his prosecution for the 1984 murders of Talman Hickman and Jerome Smith. Fields was convicted and sentenced to death in 1986. His convictions were affirmed on appeal but were overturned on post-conviction review in 1998. Fields was acquitted on retrial in 2009. He filed this lawsuit in 2010.

The first trial in this case, held in March 2014, resulted in a mistrial after seven days of trial when defendants introduced prejudicial testimony that the Court had excluded in a pretrial *in limine* ruling. *See Fields v. City of Chicago*, No. 10 C 1168, 2015 WL 12806567 (N.D. Ill. Nov. 6, 2015) (imposing a sanction on defendants' counsel).[2] The second trial, held in April 2014, ended in a finding for Fields on one of his claims against O'Callaghan and for the defendants on the other claims. The jury awarded Fields $80,000. The Court later ordered a new trial. The Court's ruling was based on newly-discovered evidence concerning a key defense witness, who had been released on parole shortly after the trial even though he has been expected to remain in prison for 13 more years, as well as the Court's conclusion that it had erroneously limited discovery on Fields's *Monell* claim against the City and had given the jury an erroneous instruction on the *Monell* claim. *Fields v. City of Chicago*, No. 10 C 1168, 2015 WL 13578989 (N.D. Ill. Apr. 7, 2015).

Fields then retained new, additional counsel to represent him. O'Callaghan also retained new counsel. The case was retried in November-December 2016. The jury found for Fields against O'Callaghan and Murphy on one of his claims against them under section 1983; for Fields against the City on his *Monell* claim under section 1983; for Fields against O'Callaghan only on a state-law claim for intentional infliction of emotional distress (IIED); and for the defendants on the remaining section 1983 and state law claims. The jury awarded Fields compensatory damages of $22 million, as well as punitive damages of $30,000 against O'Callaghan and $10,000 against Murphy.

Defendants have moved under Federal Rule of Civil Procedure 50(a) for entry of judgment as a matter of law and under Federal Rule of Civil Procedure 59(a) for a new trial.

A. Motion for entry of judgment [3]

***2** A court may enter judgment as a matter of law in a party's favor only if "the evidence presented, combined with all reasonable inferences permissibly drawn therefrom, is [not] sufficient to support the verdict when viewed in the light most favorable to the party against whom the motion is directed." *Clarett v. Roberts*, 657 F.3d 664, 674 (7th Cir. 2011). A jury's verdict may be overturned "only if no reasonable juror could have found in the [prevailing party's] favor." *Id.* The court "must construe the facts strictly in favor of the party that prevailed at trial." *Schandelmeier Bartels v. Chicago Park Dist.*, 634 F.3d 372, 376 (7th Cir. 2011) In addressing defendants' motion, the Court assumes general familiarity with the case.

1. Claims against individual defendants

The evidence, viewed in the light most favorable to Fields, amply supported the jury's verdicts on the claims on which it found in his favor against O'Callaghan (due process and IIED) and Murphy (due process). First of all, the Court rejects defendants' attempt to divide Fields's due process claim into two separate claims, one involving his prosecution through the 1986 criminal trial and one involving his continued prosecution through the retrial in 2009. Fields asserted a single due process claim; the jury was instructed accordingly; and defendants interposed no objection to that instruction.

Fields contended, and the evidence supported, that O'Callaghan and Murphy falsified incriminating evidence and concealed favorable evidence, and that he was deprived of his liberty as a result. This includes evidence from which the jury reasonably could infer, among other things, that Murphy pulled a group of suspects, including Fields, more or less out of the air and turned them over to O'Callaghan; O'Callaghan in turn fabricated identifications by witnesses who had no real opportunity to see the perpetrators; Murphy caused the fabrication of a purported admission by Fields to Anthony Sumner; O'Callaghan had responsibility—perhaps along with others—to review a police investigative "street file" and provide it to Cook County prosecutors; Murphy, too, had information placed in the street file (a request for photographs used to purportedly identify the perpetrators); and the street file, which was never turned over, contained information that a reasonably competent defense attorney could have used to show the existence of reasonable doubt. This, along with other evidence introduced by Fields, plainly supported due process claims against O'Callaghan and Murphy. *See, e.g., Avery v. City of Milwaukee*, 847 F.3d 433, 439-40 (7th Cir. 2017).

Defendants contend that the bribery of Judge Maloney in connection with the 1986 criminal trial eliminates any possibility that defendants' misconduct caused Fields's injury. The 1986 trial may have been corrupted by bribery, but that does not wipe out defendants' liability for the foreseeable results of their conduct—specifically, Fields's conviction for murder. As the court of appeals stated in an earlier appeal in this case, "[h]e who creates the defect is responsible for the injury that the defect foreseeably causes later." *Fields v. Wharrie*, 740 F.3d 1107, 1111-12 (7th Cir. 2014). In any event, direct evidence of Judge Maloney's *specific* motivation was not introduced. What was introduced is evidence that he was bribed; returned the bribe and convicted the defendants; and that the corruption undermined confidence in the outcome, requiring the vacating of the convictions. The jury reasonably could find that absent the defendants' misconduct, there would have been no evidence at all to support a conviction. The evidence against Fields consisted of eyewitness identifications, which the jury reasonably could find had been fabricated by O'Callaghan, and the testimony of Sumner, which the jury reasonably could find had been fabricated by Murphy. [4] The jury reasonably could conclude that without this evidence, the charge against Fields would have been dismissed or Maloney would have felt compelled to acquit him irrespective of the bribery scheme, and that this same evidence was what enabled him to convict Fields.

***3** Assuming it was necessary for Fields to demonstrate that the fabricated and withheld evidence was material to his reprosecution after the reversal of his 1986 conviction, the evidence supported that. [5] Cook County prosecutor Brian Sexton testified otherwise, but the jury was entitled to find that he was biased and, that aside, was not required to accept his testimony. The question—as the Court's instructions told the jury, without objection by defendants—was what would influence a reasonable prosecutor, not what Sexton said influenced him. There was evidence that the primary evidence used against Fields to continue the prosecution after the reversal included significant fabricated identifications and also that Sexton would have turned over the "street file"—which a jury reasonably could find contained material exculpatory evidence that a competent defense attorney could have used to show reasonable doubt—had he known about it. The jury was entitled to infer from this that the fabricated

and withheld evidence was material irrespective of Sexton's denial. [6]

Finally, defendants' contention that Fields's acquittal bars his claim lacks merit. Unlike a defendant who is released after his arrest and is later acquitted, Fields *was* deprived of his liberty; he was held in custody from 1984 through 2003. This is more than sufficient to support his due process claim. *See, e.g.,* *Cairel v. Alderden*, 821 F.3d 823, 833 (7th Cir. 2016). The key to a due process claim is not a conviction but rather a deprivation of liberty. *See* *id.* at 833; *Armstrong v. Daily*, 786 F.3d 529, 553-55 (7th Cir. 2015) (affirming denial of dismissal where destruction of exculpatory evidence caused accused to spend three more years in prison pending retrial until charges against him were dismissed). The Court also notes that defendants interposed, and still interpose, no objection to the instructions to the jury on the due process claim, which did not suggest that the 2009 acquittal undermined Fields's claim or any part of it.

With regard to the claim of intentional infliction of emotional distress, the same points discussed above likewise support the jury's verdict against O'Callaghan. In addition, defendants argue that O'Callaghan could not possibly have had the intent to inflict emotional distress upon Fields because he did not know Fields before 1985. This misses the point. The jury reasonably could find that O'Callaghan essentially pinned the case on Fields because he was a member of the El Rukn gang, in willful disregard of whether he was an actual perpetrator. Finally, even if O'Callaghan did not participate in making the decisions to charge or retry Fields, a tortfeasor is liable for the natural and probable consequences of his wrongdoing.

2. Claim against City

The City also challenges the sufficiency of the evidence to support the jury's finding of liability on the *Monell* claim. [7]

The City contends there was no evidence that any *other* street file containing material exculpatory or impeachment evidence was withheld. It is true that to prove an official policy, custom, or practice under *Monell*, a plaintiff "must show more than the deficiencies specific to his own experience." *Daniel v. Cook Cty.*, 833 F.3d 728, 734 (7th Cir. 2016). But the plaintiff "need not present evidence that these systemic failings affected other specific [persons]." *Id.* at 735. Fields's evidence, including evidence of systematic underproduction of police reports, [8] was sufficient to show a systemic failing that went beyond his own case. The City and police department were on notice, via the *Jones/Palmer* litigation and the department's own subsequent internal inquiry, of deficiencies in its recordkeeping and record-production practices that, at least in some situations, led to harm. And Fields offered evidence that permitted a reasonable jury to find that the policies instituted to deal with these problems were insufficient to correct them. Under *Daniel*, policymakers' knowledge of deficiencies and failure to correct them suffices; "[a]n unconstitutional policy can include both implicit policies as well as a gap in expressed policies." *Daniel*, 833 F.3d at 734, 735. The gaps here include, but are not limited to, insufficient or unnecessarily subjective instructions regarding what materials had to be maintained, insufficient instructions on producing materials to prosecutors, and the absence of any supervision or after-the-fact auditing.

***4** The verdict on the *Monell* claim is also sustainable on other bases, as Fields argues, *see* Pl.'s Resp. at 14-25, but the Court need not deal with those points expressly, as the verdict need only be sustained on a single basis.

B. Motion for new trial

In seeking a new trial, defendants do not challenge any of the instructions that the Court gave to the jury. Rather, they argue that the jury's verdict was against the manifest weight of the evidence, and they assert a lengthy laundry list of purportedly erroneous rulings by the Court before and during trial, mostly concerning the admissibility of evidence or the propriety of counsel's arguments. A new trial is appropriate under Federal Rule of Civil Procedure 59 only "if the jury's verdict is against the manifest weight of the evidence or if the trial was in some way unfair to the moving party." *Venson v. Altamirano*, 749 F.3d 641, 656 (7th Cir. 2014).

1. Weight of the evidence

A court may set aside a verdict as against the manifest weight of the evidence "only if no rational jury could have rendered the verdict. The ... court must view the evidence in the light most favorable to the prevailing party, leaving issues of credibility and weight of the evidence to the jury." *Lewis v. City of Chicago Police Dep't*, 590 F.3d 427, 444–45 (7th Cir. 2009). The verdict must be upheld so long as there is a "reasonable basis in the record" to support it. *Flournoy v.*

City of Chicago, 829 F.3d 869, 874 (7th Cir. 2016) (internal quotation marks omitted).

The Court overrules defendants' challenge regarding the weight of the evidence for the same reasons it overruled their motion for judgment as a matter of law. As the Court has discussed, there was a more-than-reasonable basis in the record to support the jury's liability findings.

2. Claimed errors on evidentiary and other pretrial and trial rulings

Defendants' remaining grounds for seeking a new trial largely involve challenges to rulings by the Court admitting or excluding evidence. A new trial is warranted on such grounds only if the Court's ruling on the particular point was erroneous and the error had "a substantial or injurious effect or influence on the determination of a jury and the result is inconsistent with substantial justice." *Lewis*, 590 F.3d at 440; *see also* *Doornbos v. City of Chicago*, —— F.3d ——, 2017 WL 3574812, at *4 (7th Cir. Aug. 18, 2017).

As indicated earlier, defendants cite a laundry list of alleged errors by the Court. The Court will address them in the sequence in which defendants argue them in their opening memorandum, with some exceptions.

a. *Jones/Palmer* evidence

The Court permitted Fields to introduce, via retired Chicago police lieutenant James Hickey, the following points that related directly or indirectly to the case of *People v. Jones* and the case of *Palmer v. City of Chicago* (in summary):

- In or about 1982, in *Jones*, a homicide detective disclosed the existence of undisclosed police investigative files.
- This put the City on notice that there was a problem that needed to be addressed, sometimes involving pertinent information not being recorded in official police reports and not being turned over to the criminal justice system.
- Hickey was tasked with attempting to identify current practice and report to the superintendent of police.

***5** • The superintendent issued a directive in 1982 to preserve all investigative files.

- Hickey drafted a proposed policy change that was adopted in 1983, requiring recordation and preservation of any relevant information obtained by a detective during the course of a violent crime field investigation. This included a specific format, called a "general progress report," for recording a detective's notes. These were to be maintained in an investigative file and turned over to the criminal justice system in connection with an ensuing court case.

The Court permitted Fields to introduce, via its police practices expert Michael Brasfield, the following points related to *Jones* and *Palmer* (in summary):

- In 1982, George Jones was prosecuted for a murder. A detective obtained information exculpatory of Jones, wrote it up, and put it into an investigative file. The information was not disclosed to Jones's attorney. When the detective learned that the case was proceeding, he went to the defense attorney and shared the exculpatory information.
- There was litigation in 1982-1983, the *Palmer* case, in which the plaintiffs alleged that the Chicago police had a practice of suppressing investigative information similar to what had occurred in the *Jones* case. In 1982, a federal judge entered an order requiring all investigative documents to be retained.
- The City's policymakers were called upon to testify and were put on notice of the lawsuit. In response to the litigation, the City instituted policies requiring preservation, retention, and non-disposal of investigative files and making them available in criminal matters.
- The problem persisted after this, and the City did not do an adequate job of remedying the problem. It left too much leeway to detectives to determine what was relevant, and it did not establish guidelines regarding how materials were to be produced or for after-the-fact auditing. There was also inadequate training. This was a problem given the department's practice of creating parallel files that had become ingrained.

As indicated, this testimony included limited and circumscribed evidence regarding the *Jones* and *Palmer* cases, all of it predating the relevant events in this case. This was admitted, in a series of rulings the Court made after extensive argument, for the purpose of showing that the City had notice of claimed deficiencies in the police department's prior practices. *See* dkt. no. 1076 at 8. The Court excluded, on defendants' objections, a significant amount of additional

evidence that Fields wanted to introduce regarding the *Jones* and *Palmer* matters.

The Court excluded, over defendants' objection, a ruling made by the Seventh Circuit in the *Palmer* case in 1986, *after* the events relevant to the creation of the policy challenged in Fields's case and *after* the creation of the street file in Fields's case. *Palmer v. City of Chicago*, 806 F.2d 1316 (7th Cir. 1986). The ruling was made on an appeal from an attorney's fee award. The City wanted to introduce the court of appeals' statement that the plaintiffs in the *Palmer* case had not uncovered any situation in which a class member had been convicted in violation of the constitution or in which there was exculpatory material in street files. Contrary to defendants' argument, the Court properly excluded this. It had no bearing on the question of notice at the relevant time. And the exclusion did not leave the jury with an unfairly erroneous understanding of the relevant points concerning *Palmer*. The Court did not admit any finding from *Palmer* that was contrary to the points defendants cite from the court of appeals' ruling. Rather, plaintiffs' evidence regarding *actual* exculpatory material in street files concerned *Jones*—which was summarized in an accurate and even-handed way—Fields's own case, another particular case offered by Fields, and analysis by Fields's expert of discrepancies between police files and materials obtained by criminal defense attorneys. The Court also notes that defendants have offered no argument challenging the Court's determination that the court of appeals' later findings amounted to inadmissible hearsay (contrary to the limited evidence from *Palmer* offered by Fields, which was offered for a non-hearsay purpose).

b. Defendants' "skewed picture" contention

***6** Contrary to defendants' contention and unlike in *Cobige v. City of Chicago*, 651 F.3d 780 (7th Cir. 2011), the evidence did not portray Fields as a role model or even as a law-abiding person of peaceful character. Evidence was admitted that he had:

- joined the El Rukn street gang;
- committed a serious crime for which he served 12 years in prison;
- concocted a false alibi and suborned others to assist in an unsuccessful attempt to avoid conviction for that crime;
- was involved in violent incidents in prison;
- became an officer in the street gang;
- resumed activities in the gang after getting out of prison; and
- and voluntarily associated with killers and drug dealers in the El Rukn gang.

Defendants also introduced a significant amount of evidence regarding the illegal and violent activities of the El Rukn gang. This included evidence that the gang was run by a leader who operated from prison and ordered killings; it was involved in narcotics dealing and violent crime; it protected its narcotics business by using violence; it included "sociopaths" and "killers"; some gang members' roles involved killing people; and there were numerous criminal prosecutions involving El Rukn members, including for murder. This evidence tainted Fields given his membership and rank in the gang.

The Court did not admit a good deal of the bad-character evidence that defendants wanted to offer, but the evidence the Court barred was excluded for appropriate reasons. Just as importantly, the picture painted for the jury was not unfairly skewed, as defendants contend.

c. Wiretap evidence

The Court reaffirms its rulings excluding certain recorded wiretap evidence obtained during the federal government's investigation of the El Rukn gang. The Court need not repeat here its detailed pretrial rulings discussing this evidence and finding that defendants had not established its admissibility as co-conspirator statements. *See* dkt. no. 549 at 1-13; dkt. 1084 at 1-5. In addition:

- The Court overrules defendants' contention that this evidence was appropriately admissible to show intimidation of witnesses at the criminal trial. A significant amount of witness intimidation evidence *was* admitted, including evidence that El Rukns had intimidated and pressured Anthony Sumner. Given this background, what the wiretaps added on this score was minimal.
- The Court overrules, as it did during the trial, defendants' contention that Jeff Fort's alleged directions on the recordings were not hearsay and therefore were admissible. Each of the purported directions by Fort (which were all in unintelligible code)[9]

contained embedded factual statements, including about the existence of a scheme to bribe Judge Maloney, that defendants plainly were offering for their truth. This constituted inadmissible hearsay that did not have a separate basis of admissibility. *See* Fed. R. Evid. 805. The Court also notes that witness Earl Hawkins was permitted to testify that he told Fields directly about the bribery scheme. Defendants got in significant evidence of Fields's purported involvement.

- Finally, the Court overrules defendants' contention that the recordings should have been admitted under the residual hearsay exception, Fed. R. Evid. 807, for the reasons discussed in its prior ruling on that point. *See* dkt. no. 1084 at 4-5. [0]

***7** - Defendants' separate contention that the wiretap evidence was admissible on Fields's credibility, *see* Defs.' Mot. at 40, lacks merit. This is simply a backhanded way of trying to avoid the hearsay and other problems with this evidence. Defendants quite plainly were offering the wiretap evidence to attempt to demonstrate Fields's complicity in the bribe, that is, for the truth of the matter asserted. The "credibility" issue they cite is simply the flip side of this, specifically, his denial of complicity.

d. Randy Rueckert testimony

The Court appropriately barred criminal trial prosecutor Randy Rueckert from testifying regarding Fields's alleged behavior during the 1986 criminal trial, over 30 years earlier. As the Court ruled, defendants' Rule 26(a) disclosures were inadequate to put Fields on notice that Rueckert would testify on this topic. (The Court notes that it made a similar determination in limiting the testimony of a witness called by Fields, criminal defense attorney Herschella Conyers.) In any event, the probative value of Rueckert's testimony, if relevant at all, had at best minimal probative value that was significantly outweighed by its unfairly prejudicial effect.

e. 1971 murder conviction

Defendants wanted to introduce that Fields was convicted of murder in 1972. It appears to be undisputed that he was convicted on an accountability theory. The Court permitted defendants to introduce that Fields was convicted of a crime. The Court also allowed defendants to introduce evidence that Fields presented a false alibi defense at the 1972 trial and induced others to do so, concluding that this was a prior deceptive act that bore on his credibility. And even though the Court excluded evidence regarding the length of Fields's prison term, defense counsel violated the ruling and said during opening statement that Fields had served 12 years. The Court later reversed the ruling and permitted evidence of the length of the prison term on the ground that it was relevant regarding damages. *See* dkt. no. 1095 at 7-8. This evidence, quite obviously, made it very clear to the jury that the crime for which Fields had been convicted was quite serious. In short, the only point the Court excluded was the nature of the conviction. Given the age of the conviction and the potential for unfair prejudice—specifically, the use of the murder conviction as inappropriate propensity evidence—the Court's ruling was appropriate.

Defendants also seem to contend that they should have been able to get in the underlying circumstances of the 1972 murder case, but they never made a proffer regarding what exactly this entailed, so they have forfeited the point. Even if that were not the case, the details were not relevant for any basis other than a prohibited propensity inference.

The 1972 murder also was not properly admissible regarding damages. The Court reaffirms its ruling on this issue made in connection with the 2016 trial. Defendants contend that it would have helped show why Fields got the death penalty for the Smith/Hickman murders. But Fields became eligible for the death penalty based on his conviction for the Smith/Hickman murders. If that conviction was wrongfully obtained as a result of defendants' tortious conduct, then they are responsible for the damages proximately caused; the precise reasons why Fields got the death penalty after his conviction for the Smith/Hickman murders are immaterial. And the 1972 murder conviction did not *separately* render him eligible for the death penalty; it was simply part of the aggravating evidence offered after the conviction for the Smith/Hickman murders. Fields was not called upon to prove materiality separately for the death sentence imposed as a result of the conviction he contended was wrongfully obtained. In any event, the potential for an inappropriate propensity reference significantly outweighed its minimal probative value (at the death penalty sentencing, the prosecution used two far more recent double murders in aggravation, specifically the Smith-Hickman and Vaughn-White murders).

f. Prison visitor list / purported visit by Hank Andrews

***8** The Court appropriately excluded a prison visitor list that included a number of El Rukn gang members. Defendants had no evidence that Fields added these names to the list; they

were in a different handwriting than that used to list Fields's relatives. Defendants' argument in their post-trial motion that Fields "approved" the additional names is a contention they did not advance before or during trial and is thus forfeited, and in any event they did not lay a foundation for this contention before or during the trial. Defendants also had no admissible evidence of any actual visits by any persons on the list; the Court appropriately ruled that their contention that Hank Andrews had visited Fields was premised on inadmissible multiple-level hearsay.

g. April 1985 arrest / Treddest Murray incident

The Court did not err in excluding evidence of Fields's April 1985 arrest for possession of a weapon. Fields was not convicted; the charge was dismissed. This by itself rendered the arrest and surrounding circumstances inadmissible; the general rule is that arrests that do not lead to convictions are inadmissible. *See, e.g., Cruz v. Safford*, 579 F.3d 840, 845 (7th Cir. 2009).

Defendants argue that the evidence was admissible to show "the lack of plaintiff's credibility, and for his damages." Defs.' Mot. at 39. Their contention is that other evidence that they also wanted to admit—the testimony of Derrick Kees—would have shown that Fields's version of the April 1985 arrest was false. But the fact that a party supposedly lied about an otherwise irrelevant or inadmissible episode does not render evidence about that episode admissible. A witness typically may not be impeached by contradiction on collateral matters elicited on cross-examination, in other words matters on which the impeaching fact cannot be introduced into evidence for any purpose other than to show the contradiction, which is the case here. *See, e.g., Taylor v. Nat'l R.R. Passenger Corp.*, 920 F.2d 1372, 1375 (7th Cir. 1990). In other words, a party may not "contradict for the sake of contradiction." *United States v. Bitterman*, 320 F.3d 723, 727 (7th Cir. 2003).

Finally, defendants do not articulate a cogent theory of how evidence that Fields had a firearm possession arrest that did not result in a conviction or prison time had any plausible bearing on his damages. On the argument that it rebutted his claim of being a "peaceful El Rukn," the Court has dealt with that point previously, and again, what we are talking about here was an arrest without a conviction.

h. Firearms found at "African Hut"

The Court properly barred evidence of firearms found during a May 1985 search of the "African Hut," the apartment building owned by the El Rukn gang that Fields managed for the gang. The firearms were found during a raid to execute warrants for the arrest of Fields and Earl Hawkins, Fields's co-defendant in the Smith/Hickman murder case (Hawkins was arrested, but Fields was not there and was not arrested). Defendants had no evidence connecting the firearms to Fields himself. They pointed to no evidence that the firearms were found in open or common areas; all defendants could say was that they were found "in the building." Defendants contended that as the building manager Fields would have had to be aware of these weapons, but that argument was speculative and lacked foundation.

i. 2000 incident at Cook County Jail

The Court reaffirms its ruling precluding admission of an incident at the Cook County Jail in 2000 in which defendants contended Fields instigated an attack on guards so that he could sue them for excessive force. *See* dkt. no. 557 at 1-5; Defs.' Ex. 12. The written ruling (dkt. 557) and a subsequent oral ruling (Defs.' Ex. 12) were detailed and dealt sufficiently with defendants' contentions. In addition, defendants do not make a cogent or supportable argument regarding how this episode impacted the damages Fields claimed. Even if they had, this would not alter the Court's determination that the evidence was appropriately excluded under Rule 403.

j. Hunter / Clay testimony about plaintiff's building manager position

***9** The Court properly excluded testimony by Eugene Hunter and Jackie Clay regarding what Fields did as an El Rukn building manager. No foundation, or an inadequate foundation, was laid at Hunter's deposition or in connection with Clay's testimony regarding what Fields's responsibilities were. The Court did permit defendants to elicit from Clay what *his own* responsibilities were as a building manager; he testified that he collected rent, made sure there was security at the building, and "ma[de] sure there was narcotics at the building." Defendants were perfectly free to use this to argue, inferentially, what Fields' own responsibilities were. They were not prejudiced, let alone unfairly prejudiced, by the Court's ruling.

k. Other El Rukn evidence

Defendants were able to introduce a very large amount of "evidence regarding the criminal nature" of the El Rukn gang,

Defs.' Mem. at 41-42, notwithstanding their contention to the contrary. Evidence and argument was admitted that:

- the El Rukns were run by a leader who operated from a prison and ordered killings;
- the gang was involved in coordinated narcotics dealing and violent crime;
- they protected their narcotics business from other gangs by using violence;
- they were "sociopaths" and "killers";
- several gang members testified that their role with the gang involved killing people;
- a large law enforcement task force was established to investigate their activities, including over 200 officers who participated in a takedown;
- there were numerous prosecutions and trials involving members of the El Rukn gang; and
- a number of gang members were brought up on murder charges.

And the evidence also made it abundantly clear that Fields was a ranking member of the gang. In short, the evidence in this regard was anything but "sanitized," as defendants falsely contend. Defense counsel were able to make effective use of this evidence, including arguing in closing that the El Rukns had been "running the South Side" and that the law enforcement officers who took them down were "heroes."

The Court did exclude particular items of evidence, and these rulings were correct. The Court overrules defendants' contention that the following evidence was improperly excluded or that they were unfairly prejudiced by the exclusion:

- The Court properly excluded evidence of specific other crimes, not involving Fields, on which Anthony Sumner was claimed to have provided reliable information. This evidence was at best tangentially relevant, and the admission of these other crimes would have unfairly prejudiced Fields in a way that far outweighed its probative value. In addition, evidence that raids and arrests followed Sumner's cooperation was introduced, as well as the fact that high-ranking El Rukn members went to prison. This was more than sufficient to make defendants' point.
- Earl Hawkins testified that Fields was a shooter in the Smith/Hickman murders and that he knew that Judge Maloney was being bribed. The Court properly excluded Hawkins's prior consistent statement to a prosecutor about Fields's involvement in the murders. Federal Rule of Evidence 801(d)(1)(B) permits statements of this type —which are otherwise hearsay—where the statement was made before the declarant's motive to fabricate arose. Here it was not; Hawkins's motive to fabricate arose at the point in time when he agreed to cooperate with law enforcement, which was before he made the statement to the prosecutor. The same basis warranted exclusion of Hawkins's prior consistent statement to law enforcement about Fields's knowledge of the bribe.
- The Court properly excluded evidence that the U.S. Attorney's Office, in seeking a further sentence reduction for Derrick Kees, opined that Kees had testified truthfully against Fields at the previous trial in this case. This out-of-court opinion would have amounted to improper vouching, via hearsay, by a non-party regarding the particular testimony whose credibility the jury was called upon the determine. In addition, explaining the context of the sentence reduction motion would have required a significant detour from the relevant issues. Defendants *were* permitted to introduce the fact that the U.S. Attorney had moved to reduce Derrick Kees's sentence and that it did so because it found his cooperation to be reliable and valuable. Defendants' introduction of this evidence entitled Fields to introduce an earlier statement by the U.S. Attorney's Office that Kees had lied under oath. The admission of the latter point by Fields's counsel did not open the door to admission of further evidence about the sentence reduction motion. The Court addressed this point in detail both in advance of and after the questioning by Fields's counsel.

***10** • The Court properly barred federal prosecutor William Hogan from testifying regarding why Earl Hawkins was granted parole in 2014. Hogan is not a member of the Parole Commission and was not involved in the decision-making. His account, or that of Hawkins, would have been inadmissible hearsay, speculation, or both. And defendants never stated that they would call or were able to call as a witness a representative from the Parole Commission with personal knowledge on this point.

- The Court properly barred defendants from introducing a document belatedly produced—*during* the 2016 trial—constituting a purported prosecution memorandum ("pros memo") regarding the federal El Rukn indictments. Prior to the testimony of certain defense witnesses who were El Rukn cooperators, the government had refused to produce the document(s), citing privilege. During trial, it reversed course and produced one such document, apparently at the urging of the defense in the present case, once evidence was introduced that arguably suggested, somewhat obliquely in the Court's view, that the cooperators had used the document(s) as a basis for later testimony in the criminal El Rukn trials. Given the circumstances—including the late production and the fact that there was at least some reason to believe that what was produced was not the totality of what the cooperators had actually seen—the Court properly excluded the document under Federal Rule of Evidence 403. The Court did, however, permit prosecutor Hogan to testify about the contents of the document. Thus even if the document itself was admissible, defendants were not harmed by its exclusion.

- The Court did not err in excluding, under Rule 403, a prior out-of-court statement made by witness George Carter to an informant during a drug deal that "I kill people." Carter was claimed to have been involved in the Smith/Hickman murders. This had little, if any, probative value on whether Carter was involved in killing Smith and Hickman. And Carter's credibility was adequately impeached in other ways.

- Defendants were permitted to introduce that Gerald Morris and his family were put into witness protection, as well as evidence from the state criminal trial regarding intimidation of Anthony Sumner. Defendants were also able to introduce evidence that one of the reasons Earl Hawkins received certain benefits for his cooperation involved his concern for his family's safety vis-à-vis the El Rukn gang. This was more than sufficient to enable defendants to make the points they wanted to make about threats to witnesses. Evidence of other benefits provided by Cook County and federal prosecutors to witnesses in El Rukn trials had only limited additional probative value, would have unfairly prejudiced Fields, and would have led to a significant diversion in explaining the background and context.

- Cook County prosecutor Brian Sexton, who led the state prosecution team in Fields's second, 2009 trial on the Smith/Hickman murders, testified at trial. Prior to trial, the Court had excluded testimony by a defense "gang expert" on various grounds. *See* dkt. no. 550 at 2-7. At the present trial, O'Callaghan's counsel asked Sexton why he had introduced at the 2009 trial a statement by Fields. Sexton gave a run-on answer, including that he believed the statement showed that Fields was trying to rise up in the El Rukn gang, "which our gang crimes expert had testified the only way you rise up is through violence." [2] Fields's counsel objected, and O'Callaghan's attorney compounded the problem by saying, incorrectly, "that testimony had already been elicited, Judge, in this case." The Court admonished counsel about making "speaking objections" and then held a lengthy discussion outside the jury's presence. During this discussion, the Court asked to review the 2009 trial testimony by the Cook County prosecutor's expert witness. After reviewing the testimony, the Court determined that the expert had not, in fact, given the testimony that Sexton had claimed during the state criminal trial. Rather, the witness had testified that Fields had been promoted to a general; that one got promoted in the gang by Jeff Fort; and that was based on how one ran different narcotic locations and not letting the location get pushed around by any outside gangs and by violence. The Court determined that a curative instruction was needed. Defendant O'Callaghan's counsel—who had elicited the erroneous testimony—*himself* proposed a curative statement to the effect that the gang crime expert "did not make that statement. He made a different statement." Counsel for the City and Murphy agreed with this proposal. The Court said that it would give an instruction that Sexton's statement about the gang crime expert's testimony "was not correct. There was no such testimony at the 2009 trial"—in other words, *almost exactly what defense counsel had proposed.* No one objected to the proposed curative instruction. The Court then gave the instruction, adding only the words, "I have read it myself." Defendants now challenge the Court's ruling. This is entirely meritless, for a number of reasons: defendants elicited evidence that misstated the testimony at the 2009 trial; defendants themselves proposed a curative instruction to the effect that the witness in question had not made the statement Sexton attributed to him; the Court gave an instruction that did not materially differ from this; and defendants did

> not contemporaneously object to the Court's proposed curative instruction. Moreover, the Court's instruction was a fair and balanced resolution of this episode. In addition, as defendants concede, they were later permitted to read the gang expert's actual testimony on this point to the jury. The fact that the Court reread its curative instruction at this point did not "compound[ ]" the prejudice as defendants contend, *see* Defs.' Reply at 19; there was no error, and no prejudice, at all, let alone unfair prejudice.

l. State court ruling on certificate of innocence proceeding

***11** The Court correctly excluded the state court judge's finding—made on a different record—denying Fields's state-court petition for a certificate of innocence (COI), a ruling that, as of the writing of this decision, is on appeal. Even if it would be appropriate to introduce another fact-finder's rulings on issues the jury in this case was called upon to determine for the very purpose of influencing the jury's determination of those same issues—a proposition that the Court seriously doubts—countering this would have required a detailed explanation of the differences between the record in the state court proceeding and the evidence admitted in the present case. This would have driven the entire trial into a lengthy sidetrack. And it would have required a discussion of evidence this Court excluded, which would have had the effect of defeating the Court's evidentiary rulings. Second, there was no basis, and no need, to introduce the result of the COI proceeding, or even its existence, for the purpose of explaining the sentence-cutting deals that defense witnesses Earl Hawkins and Derrick Kees got. The Court permitted introduction of evidence showing that those deals were made by Assistant State's Attorney Brian Sexton and not by defendants, and it also admitted evidence that the deals were made in connection with a state-court proceeding involving Fields. That was more than sufficient. Third, the fact that a state trial judge denied Fields's COI petition in 2014 had no logical bearing on his compensatory damages, which were almost entirely premised on the lengthy period he served in prison long before that date. Nor do defendants articulate a viable argument for why this evidence is relevant on Fields's request for punitive damages.

The Court also notes that, as it stated in excluding this evidence as to both liability and damages,

> the Illinois statute governing COI petitions unambiguously provides that a decision on such a petition 'shall not have a res judicata effect on any other proceedings' aside from a proceeding in the Illinois Court of Claims. 735 ILCS 5/2-702(j). Allowing the state trial judge's findings in evidence would essentially end-run this prohibition.

Dkt. no. 685 at 8-9.

Finally, defendants' contention that evidence regarding the COI proceeding was necessary to rebut Fields's claim that he was innocent of the Smith/Hickman and Vaughn/White murders is meritless. Defendants were given a full and fair opportunity to attempt to demonstrate Fields's involvement in those murders, and they took full advantage of the opportunity.

m. Gerald Morris affidavits

The Court properly admitted affidavits executed in 2011 by Gerald Morris, who gave identification testimony at Fields's criminal trials. Defendants relied on Morris's testimony from the criminal trials for, among other things, a hearsay purpose: to prove Fields's guilt on the underlying crimes. The Court concluded that as a result, Morris's affidavits were admissible under Federal Rule of Evidence 806 to impeach his account as given in the criminal trials. (Morris's residence placed him outside the subpoena power for purposes of trial.)

The Court also notes that the affidavits were admissible for another purpose, specifically as circumstantial evidence of intent (malice) on the part of defendant O'Callaghan, an element of Fields's malicious prosecution claim. This was a non-hearsay purpose for which the affidavits were admissible.

Defendants were not unfairly prejudiced by the admission of the affidavits such that they should have been excluded under Rule 403. They were permitted to present their own out-of-court statements by Morris disavowing statements in the affidavits, and they were able to introduce evidence regarding the circumstances under which the affidavits were obtained, which they then relied upon to argue that the affidavits should be discredited.

Defendants made a last-minute request before the 2014 trial to take Morris's deposition, but this came too late, after the close of discovery and close to trial, and the Court properly refused the request. Though defendants requested to take the deposition again after the Court ordered a new trial, the Court concluded, correctly, that it had not reopened discovery generally, but rather only with regard to the *Monell* claim on

which the Court had concluded, in granting a new trial, that it had improperly barred or limited discovery. This was not unfairly differential treatment, as defendants contend; they are comparing apples and oranges. Finally, Fields proposed to call Morris live at the 2016 trial, but defendants objected to this and thus bypassed the opportunity to question him directly.

n. O'Callaghan statement about Morris's attorney

O'Callaghan testified, in a non-responsive add-on answer to a question asked by Fields's attorney, that "your side hired an attorney [to represent Morris] and barred anybody from going back to get an honest assessment of what he had told." After a sidebar, the Court told the jury:

> ***12** I do need to correct something. So there was a statement that your side in reference to Mr. Loevy's side, you side hired an attorney and barred anybody from going back to give him an honest assessment of what Gerald had told him. That's an error. Mr. Morris had an attorney that obtained an order barring anybody from contacting him. It wasn't Mr. Loevy's side. It wasn't Mr. Fields's side.

The Court acted appropriately. There was no evidence—none—supporting O'Callaghan's statement that Fields or his counsel "hired" an attorney to represent Morris or that Fields or his counsel barred anyone from doing anything. As the Court told the jury in order to correct the record, Morris's attorney sought a protective order, not "Fields's side." The record *arguably* supports an inference that Fields's counsel made a referral of Morris to a lawyer, but as any lawyer knows (or at least most do), there's a clear and obvious difference between referring a person to a lawyer and hiring a lawyer to represent that person. O'Callaghan's volunteered, unresponsive statement left the jury with the false impression that Fields had *hired* a lawyer for Morris and that *his side* had barred contact with Morris. The Court acted properly in clearing up the false impression.

o. Vaughn/White evidence

On the question of the admission of evidence regarding the investigation of the Vaughn/White murders, defendants first sought to exclude it after jury selection in the 2016 trial. The Court quotes from a written ruling it made shortly thereafter:

> On the first afternoon of the trial, after opening statements, defendants asked the Court to exclude certain evidence relating to the Vaughn/White murders. They do not oppose admission of evidence that Sumner's implication of Fields in those murders was false. But they argue that no other evidence regarding the Vaughn/White murders or the investigation into them should be admitted. Defendants argue that this is inadmissible propensity evidence.
>
> The Court disagrees. The intent of the individual defendants is directly in issue on, if nothing else, Fields's malicious prosecution claim. He has to prove that they acted with malice, defined as acting for a purpose other than bringing the crime's true perpetrator to justice. Fields's claims attack, at least most directly, his conviction on the Smith/Hickman murders, but the two matters were closely linked. Sumner's implication of Fields in both sets of murders was part of what got the investigation of Fields that led to his indictment going. And the Vaughn/White murders were introduced as evidence in aggravation during Fields's capital sentencing hearing. [2] If Fields can show that an individual defendant deliberately took steps to fabricate or conceal evidence in connection with Vaughn/White, it tends to make it more likely that the same defendant acted deliberately—i.e., with malice—in connection with Smith/Hickman. This is not, at defendants contend, an impermissible "propensity" use of the Vaughn/White evidence. Federal Rule of Evidence 404(b) specifically permits use of other act evidence—if that is what this is, which is perhaps questionable given the intertwining of the matters—to show a party's intent or motive.
>
> Defendant O'Callaghan's argument at the November 15 hearing against admission of this evidence largely amounts to an attack on its sufficiency to show malice, rather than its admissibility: he says that he had little involvement in the Vaughn/White investigation. But sufficiency is not the issue at this point. Even though O'Callaghan may not have been the lead detective on the Vaughn/White matter, there is enough evidence of his involvement in the investigation to pass the threshold needed to permit plaintiff to offer evidence relating to that investigation. O'Callaghan is, of course, entitled to offer evidence rebutting Fields's

contentions and tending to show that he played only a bit part, or less, in the Vaughn/White investigation.

[2] This should not be read as indicating any backtracking on the Court's ruling that "death penalty materiality" is not an issue in the case. The Court's point here is simply that the Smith/Hickman and Vaughn/White cases and investigations are closely intertwined.

***13** Dkt. no. 1095 at 8-10. The Court reaffirms this ruling; the evidence was properly admitted for the purposes cited, as well as others cited by Fields in his response to defendants' post-trial motion. And, contrary to defendants' contention, plaintiff did not make an improper use of this evidence.

p. The hallway distance demonstration

There was evidence that one or more witnesses to the Smith/Hickman murders viewed the person claimed to be Fields from 155 feet away, or from 80 feet away. The Court allowed plaintiffs' counsel to demonstrate how far these distances are, in the hallway outside the courtroom, a very well-lit area. [3] This was done only after the distances to be marked were verified, and only after the Court instructed the jury as follows:

> You have heard testimony about distances. You heard some testimony about 80 feet and you heard some testimony about 155 feet. So what we are going to do is we are going to go out in the hallway and there is going to be a person standing at a particular place. I am going to point that person out to you. There is another person going to be standing 80 feet away and then I am going to tell the person to go to 155 feet away. They have measured this in advance. The lawyers have vetted it. I will give everybody an opportunity to see those distances and how long they are and then we are going to come back in here.
>
> I want to say one thing in caution first. First of all, this isn't intended to duplicate whatever the conditions were at the scene of the Hickman and Smith murders because they weren't committed in the hallway. So nothing about the lighting, the angles of view, you know, how dark or how light it was and other things like that. It's just purely to illustrate the distance, 80 feet and 155 feet.

This was not a "view," contrary to defendants' characterization; there was no visit to a scene outside the courthouse where relevant events occurred. That aside, defendants' contention that this was inappropriate and unfairly prejudiced them is frivolous, particularly given the cautionary instruction that the Court provided to the jury.

q. The *Monell* claims

The individual defendants' contention that they were unfairly prejudiced by a single trial of the claims against the individual officers and the *Monell* claims against the City lacks merit. There was sufficient overlap between the two sets of claims to make a joint trial a permissible exercise of judicial discretion. And defendants cite no specific evidence that unfairly prejudiced them. Finally, the jury was clearly instructed that it had to give separate consideration to each claim and to each party, and there is no reason to believe that it disregarded this instruction. Indeed, the jury's verdict directly reflects separate and discerning consideration of each claim and party; the jury found for Fields on some claims and the individual defendants on others, and on one claim it split its verdict as between the two individual defendants. This undercuts defendants' claim that the *Monell* evidence somehow overwhelmed the jury's ability to give the individual defendants a fair trial.

r. Conduct by Fields's attorney

***14** Nothing about the conduct of Fields's trial counsel, whether considered item-by-item or in the aggregate, impaired defendants' ability to fully and fairly present their case or unfairly prejudiced them.

During the trial, defendants objected to a number of questions posed and arguments made by Fields's counsel. The Court sustained some of these objections and overruled others (the same was true of Fields's objections to questions and arguments by defendants' counsel). The Court also instructed the jury that questions are not evidence and that it was required to disregard matters that the Court struck. In addition, the Court gave instructions at appropriate points during the trial striking and/or directing the jury to disregard particular matters. The jury is presumed to have followed those instructions. *See, e.g.,* *Sanchez v. City of Chicago*, 700 F.3d 919, 932-33 (7th Cir. 2012). There is no basis to find the presumption overcome in this case.

Defendants' current challenge is based, overwhelmingly, on points in three categories: matters to which they made no objection at the time; matters on which the Court overruled their objection; and matters on which the Court sustained an objection and either did not permit the question to be answered or instructed the jury to disregard the

point. Defendants have forfeited any challenges in the first category by the absence of contemporaneous objections. Their challenges in the second category lack merit (in this section of their brief, they do not separately attack the substance of any but a few of the Court's rulings in this category). With regard to their challenges in the third category, as indicated, the jury is presumed to have followed the Court's instructions to disregard these matters.

The Court need not and does not address each point separately but will discuss several that defendants highlight:

- Defendants take issue with the manner of counsel's examination of defendant O'Callaghan. The Court made the observation during the trial, and repeats here, that O'Callaghan was an extraordinarily unresponsive witness. This made his examination by Fields's counsel exceedingly difficult. Among other things, the Court was required to strike as non-responsive a significant number of O'Callaghan's answers to questions by Fields's counsel. As defendants argue, the Court also struck or sustained objections to a significant number of the questions by Fields's counsel as argumentative or on other grounds. But as Fields points out, this represents a rather small proportion of a very long examination. Taken as a whole, counsel's examination of O'Callaghan —which was, unsurprisingly, adversarial given that he was a defendant—was not improper and did not unfairly prejudice the jury.

- Defendants complain that Fields's counsel acted inappropriately by implying that defendant Murphy had altered his report of his debriefing interview of Anthony Sumner. Their contention boils down to the proposition that the implication was untrue. Making that determination, however, would require viewing the evidence in the light *least* favorable to Fields, which is the opposite of the applicable standard. As Fields correctly points out, he was not required to accept defendants' interpretation of the evidence. Fields's counsel did not act improperly in eliciting evidence that supported an inference that the notes had been altered or fabricated.

***15** • No ruling by the Court prevented O'Callaghan from explaining that he had, in fact, documented his interviews of various El Rukn cooperators. Rulings excluding *exhibits* or the contents of prior interviews (absent a proper evidentiary basis) did not bar *testimony* about documenting interviews.

• The Court sustained an objection to a question by Fields's counsel to a defense expert regarding whether other persons' convictions had been overturned due to *Brady* violations by the City of Chicago. But counsel was prompted to ask the question by defendants' elicitation of testimony from their expert witness that during his years of experience working with Chicago detectives while at the Cook County State's Attorney's Office, he never experienced any *Brady* violations. Defendants suffered no harm from this question; the Court sustained the objection. If anyone was harmed, it was Fields: defendants' elicitation of this testimony arguably took unfair advantage of the Court's pretrial ruling granting defendants' request to bar plaintiffs from eliciting testimony about specific cases.

• Defendants' contentions that Fields's counsel's questions frequently "assumed facts not in evidence" are, quite simply, erroneous; there *was* evidence to support counsel's questions on these points. And although the Court sustained objections to a number of Fields's counsel's questions as argumentative, there was not an unduly high volume given the length of the trial and the fact that many of the witnesses were highly adverse to Fields.

- Defendants' contentions that Fields's counsel acted improperly in asking a question indicating that Earl Hawkins gestured toward defendants in answering a question are wrong. This happened; the Court observed it. Counsel likewise did not act inappropriately in asking Randy Langston about looking at defense counsel. This did not prejudice defendants in the least.

- Finally, Fields's counsel did not make an improper argument when he suggested the involvement of O'Callaghan and Murphy in securing Earl Hawkins's early release from prison. O'Callaghan wrote a letter supporting his release on parole. Fields's counsel erroneously stated in opening that Murphy also wrote a letter, but this was harmless; among other things, the jury was instructed that openings are not evidence. The closing argument by Fields's counsel did not include the same error; he awkwardly said "they" wrote letters but stated, " 'they' being O'Callaghan." He did not attribute to Murphy a letter supporting Hawkins's early parole.

The Court also overrules the other contentions made by defendants in this section of their memorandum. And from an

overall perspective, there was not an unusually large number of sustained objections such that the cumulative effect of these matters unfairly prejudiced defendants or deprived them of the ability to fully and fairly present their case to the jury.

The Court concludes with an observation. The gist of defendants' motion is that counsel's objectionable conduct prejudiced the jury against them. The undersigned judge's own experience—derived from trying cases, presiding over trials, and talking to many, many juries during its tenure on the bench—is that when a trial attorney repeatedly has objections to his questions or arguments sustained, it tends to prejudice the jury against *him*. In such situations, the jury tends to perceive the attorney as trying to stretch the bounds of proper conduct, and this tends to be a negative factor for that attorney and his client. That aside, however, the Court is confident that its instructions to the jury to disregard particular questions or conduct and that "questions and objections or comments by the lawyers are not evidence" were followed in this case. Indeed, if the supposedly unfair or inappropriate conduct by Fields's counsel had the overwhelmingly prejudicial effect that defendants claim, one would not, under ordinary circumstances, to have expected the jury to reach the divided verdict that it returned on the various claims against defendants, in which it found in their favor on some claims. This, too, is a significant indication of the absence of unfair prejudice. [4]

Conclusion

***16** To the extent the Court has not expressly addressed any point made by defendants, it is because the Court has determined that the point lacks merit and does not require further discussion. For this and the other reasons stated above, the Court denies defendants' motions for judgment as a matter of law or for a new trial [dkt. nos. 1145, 1146, 1147 & 1180].

All Citations

Not Reported in Fed. Supp., 2017 WL 4553411

Footnotes

1 Fields dismissed his claims against former detective Joseph Brannigan shortly before the 2016 trial in this case.

2 The Court's opinion imposing a sanction on defendants' counsel was later vacated at the joint request of defendants' counsel and Fields, who advised the Court that the monetary sanction had been paid. *See* Order of Dec. 8, 2015 (dkt. no. 901).

3 Fields contends that a number of defendants' arguments in support of their motion for entry of judgment have been forfeited because they were not argued or were argued in cursory fashion at trial. Certain of these points have merit, but to ensure a complete record on appeal the Court will bypass forfeiture issues and will, with an exception of two, address the merits of defendants' contentions.

4 Even though Fields may have known the witnesses were lying, "the material question is whether [plaintiff] was aware of the impeachment evidence." *Avery*, 847 F.3d at 443. If "he did not have the evidence that would help him prove that the [witnesses'] statements were false," then his due process rights were violated. *Id.*

5 The evidence also supported a finding for Fields on the theory that defendants were liable because he was prosecuted through 2009 and held in custody through 2003 based on material fabricated and withheld evidence, and that the corruption of the 1986 trial, which ultimately was declared in effect a nullity, was not a significant event in this process in terms of liability or causation.

6 The Court rejects defendants' contention that Fields was required to present expert testimony on this point; they offer no authority that supports this proposition.

7 Again, the Court will bypass the issues of forfeiture asserted by Fields, at least some of which have merit, and deal with defendants' arguments on their merits to ensure a full record on appeal.

8 The Court overrules, as it did before and during the trial, defendants' contention that Fields's comparison methodology was fatally flawed. Defendants' attack on the methodology involved its weight, not a fundamental deficiency that rendered it insufficient to support Fields's claims. The jury reasonably was entitled to infer from this and other evidence introduced by Fields that there was systematic underproduction of exculpatory materials to prosecutors and defense counsel.

9 The Court notes that defendants failed to lay a foundation in this case regarding the admissibility of their “translations” of the coded language in the recorded conversations.

10 The Court also observes that there is a disconnect between defendants' contention that the recordings should have been admitted because the persons being recorded did not know they were being recorded and the fact that they were speaking in otherwise unintelligible code.

11 The proposition that another fact finder (the state court judge who decided Fields's certificate of innocence petition) made a finding along these lines is not an appropriate foundation.

12 Sexton, though called by Fields at trial, was clearly aligned with the defense. But at the colloquy outside the jury's presence, O'Callaghan's counsel claimed that he had not talked to Sexton before the trial and thus had never posed the question he asked at trial. He characterized Sexton's testimony about the gang crimes expert as “volunteered.”

13 This could not be done within the confines of the undersigned judge's courtroom, because it is shorter than 155 feet from front to back.

14 It is true that the Court lost patience with Fields's counsel at a few points during the trial—just as it did with defendants' counsel on occasion. But given the length of the trial and its highly adversary nature, this, too, was not beyond the normal range of clashes.

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2020 IL App (1st) 171630-U

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

Appellate Court of Illinois, First District,
FIFTH DIVISION.

The PEOPLE of the State of Illinois, Plaintiff-Appellee,
v.
Eric BROCKS, Defendant-Appellant.

No. 1-17-1630

Date Filed: November 25, 2020

Appeal from the Circuit Court of Cook County. No. 10 CR 12453, Honorable James B. Linn, Judge, Presiding.

ORDER

JUSTICE HOFFMAN delivered the judgment of the court.

***1** ¶ 1 *Held*: We affirm the circuit court's first-stage summary dismissal of the defendant's *pro se* post-conviction petition where he failed to state the gist of a constitutional claim that the State committed a *Brady* violation.

¶ 2 The defendant, Eric Brocks, appeals from an order of the circuit court of Cook County denying his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)). He contends that the circuit court erred in dismissing his petition where he presented an arguable basis of a claim that the State failed to disclose exculpatory evidence in the form of a "street file" related to his case in violation of *Brady v. Maryland*, 373 U.S. 82 (1972).

¶ 3 The defendant was charged by indictment with, *inter alia*, multiple counts of attempted first degree murder, one count of aggravated arson, and two counts of arson. These charges arose from an event that occurred on November 25, 2000, in which the defendant and co-offender started a fire inside of a food and liquor store located at 1359 West Roosevelt in Chicago, Illinois, causing the deaths of two employees, Annie Reed and Katari Smith.

¶ 4 A full recitation of the facts can be found in this court's order on the defendant's direct appeal. *People v. Brocks*, 2016 IL App (1st) 140301-U. However, for the resolution of this appeal, we will present only the facts that are necessary.

¶ 5 The matter proceeded to a jury trial and the defendant was found guilty of two counts of felony murder for causing the deaths of the two victims while committing arson. The circuit court then sentenced him to a mandatory life sentence.

¶ 6 The defendant appealed, and on direct appeal, he argued, *inter alia*, that the evidence was insufficient to sustain his underlying conviction of arson and that "his mittimus order must be corrected to accurately reflect the jury's verdict finding him guilty of felony murder, rather than intentional murder." *Brocks*, 2016 IL App (1st) 140301-U, ¶ 2. This court affirmed the conviction and instructed the circuit court to correct the mittimus to reflect that the defendant was found guilty of felony murder, rather than intentional murder. *Id.* ¶ 40.

¶ 7 On April 28, 2017, the defendant filed a *pro se* postconviction petition, arguing, *inter alia*, that the State committed a *Brady* violation by failing to disclose evidence in the form of a "street file" related to his case. Specifically, the defendant maintained that H. Candace Gorman, an attorney who was not involved in his case, discovered a "Chicago police file related to [his] case." The defendant attached multiple exhibits to his petition, including a *Chicago Tribune* article detailing Gorman's discovery of numerous homicide "street files" as well as a letter from Gorman, which stated, in pertinent part:

> "I am writing because *** I found a Chicago police file related to your case. I would like to talk with your attorney if you have one so that I can share the information. *** I am sorry I cannot share the contents of the file with you at this time. The judge entered an order stating that I cannot share the documents with the defendant[,] but I can share the documents with the attorney."

***2** ¶ 8 On May 18, 2017, the circuit court dismissed the petition as frivolous and patently without merit. This appeal followed.

¶ 9 The defendant's sole argument on appeal is that the circuit court improperly dismissed his postconviction petition at the first stage when he presented an arguable basis of a claim that the State committed a *Brady* violation by failing to disclose

exculpatory evidence during his original trial proceedings. We disagree.

¶ 10 Pursuant to the Act, a postconviction proceeding has three distinct stages. 725 ILCS 5/122-1 *et seq.* (West 2016); *People v. English*, 2013 IL 112890, ¶¶ 22-23. In the first stage, the defendant files a petition, and the trial court determines whether it is frivolous or patently without merit. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). To survive dismissal at this stage, a petition must present only the "gist" of a constitutional claim. *Id.* (citing *People v. Porter*, 122 Ill. 2d 64, 74 (1988)). The term "gist" describes what the petitioner must allege at the first stage; it is not the legal standard used by the court to evaluate the petition. *People v. Hodges*, 234 Ill. 2d 1, 11 (2009). The legal standard is whether the petition is frivolous or patently without merit, meaning it has no arguable basis in law or fact. *Id.* at 16. "A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation." *Id.* The allegations in a postconviction petition must be supported by affidavits, records, or other evidence to demonstrate that the petition's allegations are capable of " 'objective or independent corroboration.' " *People v. Delton*, 227 Ill. 2d 247, 254 (2008). Further, "the affidavits and exhibits which accompany a petition must identify with *reasonable certainty* the sources, character, and availability of the alleged evidence supporting the petition's allegations." (Emphasis added.) *Id.* Although the first stage presents a low threshold for survival, broad conclusory allegations are never enough to meet that low threshold. *Id.* at 258. We review the summary dismissal of a postconviction petition *de novo.* *Hodges*, 234 Ill. 2d at 9.

¶ 11 Under *Brady*, the State violates a defendant's right to due process by failing to disclose evidence that is favorable to the accused and is material to either guilt or punishment. *People v. Beaman*, 229 Ill. 2d 56, 73 (2008). In order to succeed on a claim of a *Brady* violation, the defendant is required to demonstrate that: (i) the undisclosed evidence favors the accused because it is exculpatory or impeaching; (ii) the State willfully or inadvertently suppressed the evidence; and (iii) the accused was prejudiced because the evidence was material to guilt or punishment. *Id.* at 73-74. Evidence is material where a reasonable probability exists that, had the evidence been disclosed, the outcome of the proceeding would have been different. *People v. Hobley*, 182 Ill. 2d 404, 433 (1998).

¶ 12 The defendant concedes that he never attached the street file nor its contents to the petition, neither was he able to provide "any suggestion" of what the street file may contain. Nevertheless, he asserts that he has stated an arguable claim that the State committed a *Brady* violation because he explained why he did not attach the street file to the petition and because the letter from Gorman, the *Chicago Tribune* article, and the history of Chicago police officers withholding information in street files all create a reasonable inference that the street file in this case contains exculpatory information. Again, we disagree.

***3** ¶ 13 Not only has the defendant failed to demonstrate the three elements necessary to establish that the State committed a *Brady* violation, he has also failed to state with any reasonable degree of certainty what the new evidence is apart from the mere possibly that something exculpatory *may* be contained within the street file. He presents an entirely speculative and conclusory argument about what he believes the file contains and how it "likely" consists of "undisclosed and possibly favorable material." Even under the low threshold of the first stage, this conclusory argument is insufficient to state an arguable claim of a *Brady* violation. See *Delton*, 227 Ill. 2d at 258. Accordingly, we find that that the circuit court did not err when it dismissed the defendant's petition at the first stage, and we affirm the judgment of the circuit court.

¶ 14 Affirmed.

Justices Cunningham and Rochford concurred in the judgment.

All Citations

Not Reported in N.E. Rptr., 2020 IL App (1st) 171630-U, 2020 WL 6965432

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2021 IL App (1st) 200627-U

Appellate Court of Illinois, First District, SECOND DIVISION.

The PEOPLE of the State of Illinois, Respondent-Appellee,

v.

Tyshawn REESE, Petitioner-Appellant.

No. 1-20-0627

November 2, 2021

Appeal from the Circuit Court of Cook County. No. 13 CR 13268 (05), Honorable Vincent M. Gaughan, Judge Presiding.

ORDER

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

***1** ¶ 1 *Held*: The circuit court erred in summarily dismissing the petitioner's *pro se* postconviction petition where the petition set forth an arguable claim of ineffective assistance of trial counsel on the basis of counsel's failure to investigate the State's sole identification witness.

¶ 2 The petitioner, Tyshawn Reese, appeals from the circuit court's summary dismissal of his postconviction petition filed pursuant to the Postconviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2018)). On appeal, he contends that the circuit court erred in summarily dismissing his petition where he set forth an arguable claim of ineffective assistance of trial counsel based upon counsel's failure to investigate the State's sole eyewitness, now former Chicago police officer Ronald Coleman, who had amassed over 60 misconduct complaints and was subsequently convicted on a federal obstruction of justice charge. For the following reasons, we reverse and remand for further proceedings under the Act.

¶ 3 I. BACKGROUND

¶ 4 Because the record before us is voluminous we set forth only those facts relevant to the resolution of the issues raised in this appeal. Together with codefendants, Donzell Bonner, Deandre Fields, Antonio Bryant, and Dajuan Gates, the petitioner was charged with *inter alia*, attempted first degree murder and aggravated assault of a peace officer, arising from two shooting incidents that occurred in Chicago on the evening of April 28, 2013. Among other things, relevant to this appeal, the charges alleged that the petitioner personally discharged the firearm that caused great bodily harm to Nicklaus Dorsey. In addition, the charges alleged that the petitioner placed Officer Ronald Coleman in reasonable apprehension of a battery by pointing a firearm at Coleman while knowing him to be a peace officer engaged in the performance of his duties.

¶ 5 The following relevant evidence was adduced at the petitioner's bench trial, which was severed from all codefendants.

¶ 6 Nicklaus Dorsey testified that at 10:30 p.m. on April 28, 2013, he was crossing the street from his home, at 315 South Leavitt Street, to his parked car when he noticed a maroon vehicle stopped in the street. Dorsey observed someone exit the vehicle but could not tell whether it was a man or a woman. He also could not see who was inside the vehicle. Suddenly, Dorsey heard multiple gunshots and took cover behind his own car. He fled to his home, where he noticed that he was wounded. Dorsey acknowledged that he made no remark to any passersby or bystander about being shot before going into his home. He stated, instead, that as he entered his home, he told his girlfriend that he had been shot. Dorsey was subsequently transported to the hospital where it was determined that he sustained a bullet wound to his buttocks.

¶ 7 Former Chicago narcotics police officer Ronald Coleman next testified that at approximately 10 p.m. that evening, he was off duty, in plain clothes in an unmarked police car in the 300 block of South Leavitt Street. The officer had his badge, and his weapon, a .45-caliber semiautomatic gun, which was loaded with 10 rounds. Officer Coleman saw a maroon four-door Buick with four occupants turn onto Leavitt Street and abruptly stop directly across from his vehicle, about five to six feet away. Two men, whom the officer later identified as the petitioner and codefendant Bryant, exited the maroon Buick from the rear passenger side and rear driver side and

fired multiple gunshots. Officer Coleman averred that the petitioner had a silver semiautomatic pistol while the other shooter had a silver revolver. After both men reentered the maroon vehicle and it drove away, Officer Coleman reported the incident, made a U-turn, and followed the maroon car. The officer averred that as he was leaving, he heard a man on the street exclaim, "These motherf*****s shot me."

***2** ¶ 8 Officer Coleman next testified that he caught up to the maroon vehicle as it came to a stop at a red light on Van Buren Street, where a state trooper was conducting an unrelated traffic stop. Officer Coleman averred that he exited his car, announced his office, and told the state trooper what had happened. He stated that at this point the occupants of the maroon car turned in his direction and that the petitioner and the other man in the rear seat slumped down. Holding his badge in one hand and his service weapon in the other, Officer Coleman approached the maroon car, announced his office, and told the occupants to stop the car and get out. The petitioner then pointed a silver semi-automatic pistol at him. In response, the officer fired ten shots at the petitioner, as the maroon car sped off. After the state trooper confirmed that Officer Coleman was indeed a police officer, her drove off in pursuit of the maroon car.

¶ 9 On the following day, Officer Coleman viewed a photographic array from which he identified the petitioner as the man who pointed a gun at him. He subsequently also identified the petitioner from a lineup.

¶ 10 A security video from a high school in the 300 block of South Leavitt Street was shown at trial and Officer Coleman described the video as it was played for the court. While the video corroborates the officer's testimony about the sequence of events it does not corroborate his identification of the petitioner.

¶ 11 On cross-examination, Officer Coleman was asked about an interview he gave to the Independent Police Review Authority (IPRA) on April 30, 2013, in which he described the petitioner's gun as black and not silver. The officer averred that he had always described the gun as silver and that the investigator must have erred in preparing his statement. When asked if he was saying that the stenographer who transcribed his interview with the IPRA had erred, Officer Coleman maintained that the investigator must have made a mistake and asserted that he had no explanation for the interview transcript reflecting that he had described the gun as black.

¶ 12 On cross-examination, the officer further admitted that in the IPRA interview he had described the petitioner's weapon as a silver revolver and not a silver semi-automatic gun as he had just testified at trial. He explained, however that it was "hard to tell if it [was] a revolver from where" he had been. Officer Coleman further acknowledged that a silver revolver was found in the maroon vehicle. He also admitted that he was aiming at the petitioner when shooting at the maroon car but that he did not hit the petitioner, and instead injured codefendant Bryant, who had been holding a silver revolver earlier during the shooting on Leavitt Street. The officer, however, denied confusing the petitioner with Bryant as the man who aimed the gun at him.

¶ 13 Illinois State Trooper Timothy Mayerbock next testified that he was conducting a traffic stop on the night in question when a man holding a badge announced loudly that he was a police officer before firing several shots into a red car about 40 feet away. When the red car drove away, the state trooper confirmed that the shooter was in fact a police officer. He then reported the incident by radio and proceeded to pursue the red car. A few minutes later, he saw the red car with the rear window shot out, a revolver in plain view, and a blood trail leading away from the car.

***3** ¶ 14 Because the state trooper was conducting a traffic stop at the time of the incident, the video system in his patrol car was recording. That video was played for the court and Mayerbock was asked to describe what was being shown. Because of the camera angle, the video does not show Officer Coleman until after the shots and the maroon car's departure. Coleman is also not seen interacting with Mayerbock before firing any shots. The video, however, does reflect Officer Coleman yelling "police" two times before any shots were heard.

¶ 15 Chicago Police Officer Maureen Boyle next testified that on the night in question she responded to a report of a wounded man. Bystanders directed her to an alley where she found codefendant Bryant bleeding from multiple gunshot wounds. Officer Boyle called for an ambulance and followed the trail of blood from Bryant to a maroon Buick with a broken rear window and a revolver on the back-seat floor.

¶ 16 The parties next stipulated, *inter alia*, that codefendant Bryant's fingerprint was found on the rear passenger door of the maroon Buick and that his DNA was found on two cellphones inside that vehicle.

¶ 17 The parties further stipulated to the collection and testing of firearms evidence. According to that stipulation, a .45-caliber revolver was found on the rear floor of the Buick, and five cartridge cases found in the revolver had been fired from it. Ten cartridge cases found at the scene where Officer Coleman fired at the maroon car had been fired from Coleman's .45-caliber semi-automatic pistol. Nine .45-caliber cartridge cases found at Leavitt Street had been fired from one gun that was neither the revolver nor Officer Coleman's pistol. A spent bullet from Leavitt Street, and two spent bullets found in the maroon car, were not fired from the revolver, but Officer Coleman's pistol could not be either identified or eliminated as their source.

¶ 18 Following closing arguments, the circuit court found the petitioner guilty of attempted first degree murder and aggravated assault of a peace officer. The court subsequently sentenced the petitioner to concurrent prison terms of 32- and 5-years imprisonment.

¶ 19 The petitioner appealed, arguing that: (1) the State failed to prove him guilty beyond a reasonable doubt of both charges; and (2) his trial counsel was ineffective for failing to move for a substitution of judge, where the same trial judge that presided over his trial had already presided over his codefendants' cases and found them guilty. On appeal, we affirmed the petitioner's convictions and sentence. *People v. Reese*, 2018 IL App (1st) 153631-U.

¶ 20 The petitioner subsequently filed the instant *pro se* postconviction petition. Therein, among other things, he alleged ineffective assistance of trial counsel for counsel's failure to: (1) throw out the aggravated assault of a peace officer charge; (2) investigate the case thoroughly; and (3) call an expert on eyewitness misidentification, where the State's sole eyewitness, Officer Ronald Coleman, was an unreliable witness.

¶ 21 The petitioner's allegation that Coleman was an unreliable witness was supported with: (1) details from trial noting the inconsistencies between Coleman's testimony and the other evidence; (2) two newspaper articles (from the Chicago Tribune and the Chicago Sun Times); and (3) a decision by the Seventh Circuit Court of Appeals.

¶ 22 The two newspaper articles detail Coleman's actions during his stint with the Drug Enforcement Agency (DEA), which led to his federal conviction for obstruction of justice. According to the articles, Coleman was sentenced to five years imprisonment for obstruction of justice, after he tipped off one of the Conservative Vice Lord gang's major heroin suppliers to a federal investigation in June 2014. The Chicago Tribune Article further notes that Coleman had over 60 complaints filed against him while he worked for the Chicago Police Department (CPD), and that he was named in three civil lawsuits (two involving illegal strip searches of suspects, and one involving a police shooting of a fleeing suspect).

***4** ¶ 23 The decision of the Seventh Circuit, affirming Coleman's conviction for federal obstruction of justice, includes further details regarding Coleman's crimes. See *United States v. Coleman*, 914 F.3d 508, 510 (7th Cir. 2019). Moreover, the decision explicitly affirms Coleman's sentence enhancement for perjury, noting that he lied on the stand during his jury trial.

¶ 24 On January 24, 2020, the circuit court summarily dismissed the *pro se* postconviction petition. In doing so, among other things, the court found that the petitioner's ineffective assistance of counsel claim based on Coleman's unreliability as a witness was a "bald, conclusory" allegation. The petitioner now appeals contending that the circuit court erred in summarily dismissing his *pro se* petition where he set forth an arguable claim of ineffective assistance of trial counsel.

¶ 25 III. ANALYSIS

¶ 26 We begin by noting that the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et. seq.* (West 2018)) provides a three-step process by which a convicted defendant may assert a substantial denial of his or her constitutional rights in the proceedings that led to the conviction. *People v. Edwards*, 2012 IL 111711, ¶ 21; *People v. Tate*, 2012 IL 112214, ¶ 8; see also *People v. Walker*, 2015 IL App (1st) 130530, ¶ 11 (citing *People v. Harris*, 224 Ill. 2d 115, 124 (2007)). A proceeding under the Act is a collateral attack on a prior conviction and sentence and is therefore "not a substitute for, or an addendum to, direct appeal." *People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994); see *Edwards*, 2012 IL 111711, ¶ 21; *People v. Barrow*, 195 Ill. 2d 506, 519 (2001). Accordingly, any issues that were decided on direct appeal are *res judicata*, and any issues that could have been presented on direct appeal, but were not, are waived. *Edwards*, 2012 IL

111711, ¶ 21; see also *People v. Ligon*, 239 Ill. 2d 94, 103 (2010); *People v. Reyes*, 369 Ill. App. 3d 1, 12 (2006).

¶ 27 At the first stage of postconviction proceedings, such as here, the circuit court must independently review the petition, taking the allegations as true, and determine whether " 'the petition is frivolous or patently without merit.' " *People v. Hodges*, 234 Ill. 2d 1, 10 (2009) (quoting 725 ILCS 5/122–2.1(a)(2) (West 2006)); see also *Tate*, 2012 IL 112214, ¶ 9. At this stage, the court may not engage in any factual determinations or credibility findings. See *People v. Plummer*, 344 Ill. App. 3d 1016, 1020 (2003); see also *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998). Instead, the court may summarily dismiss the petition only if it finds the petition to be frivolous or patently without merit. See *People v. Ross*, 2015 IL App (1st) 120089, ¶ 30; see also *Hodges*, 234 Ill. 2d at 10 A petition is frivolous or patently without merit if it has no arguable basis either in law or in fact. *Tate*, 2012 IL 112214, ¶ 9. Our supreme court has explained that a petition lacks an arguable basis where it "is based on an indisputably meritless legal theory or a fanciful factual allegation"—in other words, an allegation that is "fantastic or delusional," or is "completely contradicted by the record." *Hodges*, 234 Ill. 2d at 11-12; *People v. Brown*, 236 Ill. 2d 175, 185 (2010); see also *Ross*, 2015 IL App (1st) 120089, ¶ 31. Our review of summary dismissal is *de novo*. *Tate*, 2012 IL 112214, ¶ 10.

***5** ¶ 28 On appeal, the petitioner argues that his petition set forth an arguable claim of ineffective assistance of trial counsel based on counsel's failure to investigate possible impeachment evidence about the State's sole eyewitness, Officer Coleman. The petitioner points out that by the time of his trial, Officer Coleman had amassed over 60 misconduct complaints and was the subject of a federal investigation for obstruction of justice. Where the petitioner was convicted solely based on Coleman's identification testimony, the petitioner contends that counsel's failure to investigate and impeach Coleman on the basis of this evidence, constituted ineffective assistance of counsel.

¶ 29 The State initially responds that the petitioner has forfeited this issue because he did not raise it in his postconviction petition. In support, the State points out that while the petitioner alleged that Officer Coleman was an "unreliable witness," and that counsel was ineffective for a variety of reasons, including his failure to "investigate," it nowhere explicitly alleged counsel's ineffectiveness on the basis of counsel's failure to investigate impeachment evidence regarding Officer Coleman. For the following reasons, we disagree.

¶ 30 It is axiomatic that if an issue is not raised in the original petition, then it may not be raised on appeal. See 725 ILCS 5/122-3 (West 2018) ("Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived."). Nonetheless, "[b]ecause a *pro se* petitioner will likely be unaware of the precise legal basis for his claim the threshold for survival is low, and a *pro se* petitioner need only allege enough facts to make out a claim that is arguably constitutional for purposes of invoking the Act." *People v. Thomas*, 2014 IL App (2d) 12001, ¶ 48; see also *People v. Mars*, 2012 IL App (2d) 110695, ¶ 32. Accordingly, "[p]etitions filed *pro se* must be given a liberal construction and are to be viewed with a lenient eye, allowing borderline cases to proceed." *Thomas*, 2014 IL App (2d) 12001, ¶ 48

¶ 31 In the present case, contrary to the State's position, and liberally construing the petitioner's allegations, we find that the petition sets forth enough facts to make out a claim of ineffective assistance of counsel on the basis of counsel's failure to investigate Officer Coleman. The petition alleges both that trial counsel was ineffective for failing to investigate the petitioner's case, and that the State's key eyewitness, Officer Coleman, was an unreliable witness, and a person not to be trusted. In support of the latter argument, the petition attaches evidence discovered by the petitioner during his incarceration, which directly challenges Officer Coleman's trustworthiness, namely evidence that he was convicted for obstruction of justice, and that numerous complaints of misconduct were brought against him while he worked as an officer with the CPD. In addition, the petition alleges that counsel was ineffective for failing to challenge Coleman's reliability by failing to call an expert witness on identifications. According to the petition, had counsel challenged the officer's reliability the outcome of the proceedings would have been different because the State's only identification testimony came from Coleman and no other physical or corroborative identification evidence was presented at trial.

¶ 32 While the State correctly point out that the petition nowhere explicitly alleges counsel's ineffectiveness for failure to investigate impeachment evidence regarding Coleman, liberally construed, the petition certainly sets forth enough facts to make an arguable claim of counsel's ineffectiveness on that ground. Keeping in mind that the *pro se* petitioner was likely unaware of the precise legal basis for this claim, we conclude that the allegations in the petition bear a sufficient relationship to the ineffective assistance of counsel claim raised in this appeal, so that the issue is not novel but rather based on the same underlying subject matter as the petition. See *Thomas*, 2014 IL App (2d) 121001, ¶ 87 ("the assertions in the petition need bear only 'some relationship' to the arguments raised on appeal") (quoting *Mars*, 2012 IL App (2d) 110695, ¶ 32). Accordingly, we find that the issue is not forfeited for purposes of appeal. *Thomas*, 2014 IL App (2d) 121001, ¶ 87 (noting that the defendant's petition and the postconviction appellate arguments related to the same underlying issue so that the arguments in the defendant's appeal were not forfeited).

***6** ¶ 33 In so holding, we find the decision in *People v. Reed*, 2014 IL App (1st) 122610, relied on by the State, to be distinguishable. In *Reed*. on appeal, the petitioner alleged a completely different basis for his constitutional violation regarding appellate counsel's effectiveness. *Id.*, ¶ 59. Specifically, while before the circuit court, the petitioner alleged appellate counsel's ineffectiveness for counsel's failure to challenge the admissibility of certain hearsay statements, on appeal, the petitioner challenged the admissibility of those statement on the basis of his Fifth Amendment right to remain silent and the right to request the presence of counsel. *Id.* Unlike *Reed*. in the present case, the petitioner does not argue a different basis for his constitutional argument regarding trial counsel's ineffectiveness on appeal. Instead, his appellate argument parallels the allegations in his *pro se* petition regarding trial counsel's failure to investigate, and Officer Coleman's unreliability as a witness, based upon the complaints filed against Coleman while he was a police officer. While the *pro se* petition does not use the magic words "impeachment evidence" in tandem with the allegation regarding counsel's "failure to investigate," liberally construed, it sets forth sufficient facts to assert that claim for purposes of this appeal.

¶ 34 The State next argues that even if we determine that the petitioner's argument regarding counsel's ineffectiveness is not forfeited, summary dismissal of the petition was proper because the petition did not attach any affidavits, records or other evidence supporting the allegation that counsel was ineffective for failing to investigate Coleman. In making this argument, the State concedes that the petition attaches two newspaper articles and a court decision detailing Coleman's misconduct and the federal criminal conviction for obstruction of justice. Nonetheless, the State asserts that these documents are insufficient evidence of Coleman's misconduct and that the petitioner was required to obtain "verification" of such misconduct through FOIA requests. In the very least, the State contends, the petitioner was required to explain why he did not make such FOIA requests by way of an affidavit. We strongly disagree.

¶ 35 This court has repeatedly held that newspaper articles alone are sufficient to support similar arguable factual postconviction allegations. See *e.g.*, *People v. Almodovar*, 2013 IL App (1st) 101476 (where the petitioner attached a Chicago Tribune article detailing how a defendant had been retried and acquitted after it came to light that the arresting detective in his case, who was the same detective that arrested the petitioner, had intimidated witnesses and framed the defendant for murder); see also *People v. Mitchell*, 2012 IL App (1st) 100907 (where the petitioner attached a special prosecutor's report regarding an investigation into crimes committed by Area 2 police officers, and one of those officers was the interrogating officer in the petitioner's case).

¶ 36 Contrary to the State's assertion, there is no requirement that a petitioner attach affidavits and FOIA requests to corroborate the evidence provided by the attached newspaper articles. At the first stage of postconviction review, the petitioner need only provide a sufficient factual basis to show the allegations in the petition are " 'capable of objective or independent corroboration.' " *People v. Allen*, 2015 IL 113135, ¶ 24 (quoting *People v. Collins*, 202 Ill. 2d 59, 67 (2002)). Prior to the third-stage evidentiary hearing the petitioner is not required to provide any such objective corroboration, but rather must only "allege enough facts to make out a claim that is arguably constitutional." *Hodges*, 234 Ill. 2d at 9.

¶ 37 The petitioner here has clearly done so by attaching articles, which establish that, at the time of his trial, the State's sole identification witness was the subject of a federal investigation and had dozens of complaints filed against him with the CPD. Accordingly, we reject the State's procedural

argument and proceed with the merits of the petitioner's ineffective assistance of counsel claim.

¶ 38 It is axiomatic that claims of ineffective assistance of counsel are resolved under the two-prong standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Lacy*, 407 Ill. App. 3d 442, 456 (2011); see also *People v. Colon*, 225 Ill. 2d 125, 135 (2007) (citing *People v. Albanese*, 104 Ill. 2d 504 (1984) (adopting *Strickland*)). Under *Strickland*, the petitioner must establish both: (1) that his counsel's conduct fell below an objective standard of reasonableness; and (2) that he was prejudiced by that conduct. See *Lacy*, 407 Ill. App. 3d at 456; see also *People v. Ward*, 371 Ill. App. 3d 382, 434 (2007) (citing *Strickland*, 466 U.S. at 687-94).

***7** ¶ 39 In the context of a first stage postconviction proceeding, such as the on here, a petitioner need only show that he can arguably meet these two standards, *i.e.*, (1) it is *arguable* that counsel's performance was deficient and (2) it is *arguable* that he was prejudiced by it. See *Tate*, 2012 IL 112214, ¶ 19; *People v. Wilson*, 2013 IL (1st) 112303, ¶ 20; see also *Hodges*, 234 Ill. 2d at 17.

¶ 40 For the following reasons, in the present case, we find that the *pro se* petition sufficiently alleged that counsel was arguably both deficient and that this deficient performance prejudiced the petitioner, so as to permit the petition to proceed to the second stage of postconviction review.

¶ 41 First, where the State's case entirely rested on the identification testimony of Officer Coleman, it is in the very least arguable that trial counsel's failure to investigate the officer's background and use the evidence of his prior misconduct to impeach him, fell below an objective standard of reasonableness. While typically counsel's decisions regarding what evidence to present at trial are considered matters of trial strategy, such strategic decisions "may be made only after there has been a 'thorough investigation of law and facts relevant to plausible options.' " *People v. Gibson*, 244 Ill. App. 3d 700, 703-704 (1993). Accordingly, our courts have repeatedly held that trial counsel has a professional duty to conduct "reasonable investigations or to make reasonable decisions that make[ ] particular investigations unnecessary." *People v. Domagala*, 2013 IL 113688, ¶ 38. The duty to investigate arises from counsel's basic function, which is to ensure that the adversarial process works the way it should. *Id.* An attorney's failure to investigate witnesses may constitute objectively unreasonable assistance. See *e.g.*, *People v. Myles*, 2020 IL App (1st) 171964, ¶ 23 (holding that counsel's failure to investigate a key State's witness's background, which would have revealed that the witness had pending charges of bribery and fraud, constituted ineffective representation); *People v. Bolden*, 2014 IL App (1st) 123527, ¶ 38 (holding that counsel's failure to investigate and contact alibi witnesses constituted objectively unreasonable assistance); *Hodges*, 234 Ill. 2d at 20-21 (holding that counsel's failure to investigate and call three witnesses who would have testified that they observed an individual take a gun from the victim's body after the defendant shot him, was arguably objectively unreasonable, as it would have supported the defendant's theory of defense, *i.e.* a finding of guilt on second degree murder based on an unreasonable belief that deadly force was necessary).

¶ 42 Contrary to the State's position, counsel's failure to investigate cannot be excused by speculating that some of the allegations of the officer's misconduct may have occurred after the petitioner's trial and were therefore undiscoverable. The newspaper articles attached to the petition clearly state that the events leading up to Coleman's obstruction of justice conviction took place in the summer of 2014 and that Coleman was charged in 2016. Where the petitioner's trial took place in 2015, by the time Coleman testified for the State and against the petitioner, he was no longer working for the CPD and was employed by the DEA for seven months. This timeline makes clear not only that at the time of the petitioner's trial, all the complaints against Coleman mentioned in the articles were already filed with the CPD, but also that it was possible that Coleman was already being investigated for obstruction of justice.

***8** ¶ 43 Under this record, we find that the petitioner has made an arguable claim that counsel was reasonably deficient for failing to investigate Officer Coleman's background and to impeach him with evidence of his misconduct. See *Myles*, 2020 IL App (1st) 171964, ¶ 23 (holding that trial counsel's failure to investigate and discover that a State witness had pending charges for fraud and bribery, and counsel's failure to use that information to impeach the witness amounted to deficient performance for purposes of an ineffective assistance of counsel claim, where the witness's credibility was critical to the State's case).

¶ 44 The State nonetheless asserts that even if the petitioner can establish that counsel's performance was arguably unreasonable, in light of the overwhelming evidence presented at his trial, he cannot establish prejudice so as to succeed under *Strickland*. We disagree.

¶ 45 Under the second prong of *Strickland*, the petitioner was only required to show that it is arguable that "but for" counsel's deficient performance, there is a reasonable probability that the result of his proceeding would have been different. *Lacy*, 407 Ill. App. 3d at 457; see also *Colon*, 225 Ill. 2d at 135. "[A] reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome--or put another way, that counsel's deficient performance rendered the result of [the proceedings] unreliable or fundamentally unfair." *People v. Evans*, 209 Ill. 2d 194, 220 (2004); see also *Plummer*, 344 Ill. App. 3d at 1019 (citing *Strickland*, 466 U.S. at 694).

¶ 46 In the present case, the petitioner has arguably established such a reasonable probability. Contrary to the State's position, the evidence presented at the petitioner's trial was far from overwhelming. The State's case against the petitioner on the charges of attempted murder and aggravated assault of a peace officer was premised in its entirety on the single eyewitness testimony of Officer Coleman. Officer Coleman was the only one who identified the petitioner as one of the shooters on Leavitt Street and as the individual who subsequently pointed a gun at him from inside the maroon vehicle. While physical evidence of the bullets retrieved at the scene and the video surveillance footage supported the officer's testimony regarding the sequence of events, and the fact that there were two shooters on Leavitt Street, without the officer's identification testimony, nothing in that physical evidence linked the petitioner to the crimes.

¶ 47 Therefore, evidence of the officer's pattern of misconduct at CPD and his indictment on federal obstruction of justice charges, which went directly to his veracity as a witness, arguably had the potential of changing the outcome of the petitioner's trial. Accordingly, it is undeniable that counsel's deficient performance arguably could have prejudiced the petitioner. See *Myles*, 2020 IL App (1st) 171964, ¶ 23 (holding that failure to investigate a key State's witness's background, which included pending charges of bribery and fraud prejudiced the petitioner because the witness's credibility was central to the State's case); *People v. Steidel*, 177 Ill. 2d 239, 256-57 (1997) (holding that where no physical evidence linked the defendant to the crime, and the jury's determination necessarily rested on witness credibility, counsel's failure to investigate witnesses prejudiced the defendant).

¶ 48 Since the petitioner has presented an arguable claim of ineffective assistance of counsel, summary dismissal of his petition was improper. The petition should have been advanced to the second stage of postconviction review, where counsel could be appointed to aid the petitioner. *Id.*

¶ 49 III. CONCLUSION

***9** ¶ 50 For the aforementioned reasons, we reverse the circuit court's summary dismissal of the pro se petition and remand for further proceedings under the Act (725 ILCS 5/122-2.1(b) (West 2018)).

¶ 51 Reversed and remanded.

Justices Lavin and Cobbs concurred in the judgment.

All Citations

Not Reported in N.E. Rptr., 2021 IL App (1st) 200627-U, 2021 WL 5099311

Footnotes

1 This testimony was corroborated by Chicago Police Detective Dave March, who averred that on April 29, 2013, he showed Officer Coleman a photographic array from which Coleman identified the petitioner as the man who pointed a gun at him after firing a gun in the street. Detective March further testified that after

the petitioner was arrested in June 2013, he showed Officer Coleman a lineup from which Coleman again identified the petitioner as the man who pointed a gun at him after firing a gun in the street.

End of Document

2021 IL App (1st) 181160-U

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

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).

Appellate Court of Illinois, First District, SIXTH DIVISION.

The **PEOPLE** of the State of Illinois, Plaintiff-Appellee,

v.

Johnathan L. **FRANKLIN**, Defendant-Appellant.

No. 1-18-1160

August 20, 2021

Appeal from the Circuit Court of Cook County. No. 09 CR 3669, Honorable Nicholas R. Ford, Judge Presiding.

ORDER

PRESIDING JUSTICE MIKVA delivered the judgment of the court.

***1** ¶ 1 *Held*: The circuit court's summary dismissal of defendant's postconviction petition is reversed where defendant presented the gist of a claim in his petition that his guilty plea was not knowing and voluntary because it was induced by the prospect of an unconstitutional natural life sentence.

¶ 2 Pursuant to a 2012 negotiated guilty plea, defendant Johnathan **Franklin** was convicted of attempted first degree murder and sentenced to 30 years in prison. Mr. **Franklin** now appeals from the summary dismissal of his 2017 *pro se* postconviction petition, contending that he stated the gist of a meritorious constitutional claim that his guilty plea was not knowing and voluntary because it was induced by the prospect of an unconstitutional natural life sentence. For the reasons stated below, we agree and reverse the dismissal of his claim.

¶ 3 I. BACKGROUND

¶ 4 Mr. **Franklin** was born on August 17, 1978. The crime to which he pleaded guilty occurred on November 13, 1995, when he was 17 years old. However, he was not charged until 2009, when he was already in jail on an unrelated felony murder charge in the state of Wisconsin. In the case that is before this court, Mr. **Franklin** was charged with first degree murder, attempted first degree murder, and aggravated discharge of a firearm for allegedly shooting at a car driven by Russell Robinson, in which Cassandra Jordan, a passenger, was fatally shot.

¶ 5 On March 23, 2012, the State made a plea offer of 30 years in prison for attempted first degree murder in exchange for dismissal of all other charges. In his discussion with the circuit court on the guilty plea, the following exchange occurred:

"THE COURT: Did anyone threaten you or promise you anything to make you plead guilty today?

MR. **FRANKLIN**: No.

THE COURT: You're pleading guilty of your own free will?

MR. **FRANKLIN**: I feel like I don't have a choice.

THE COURT: You can do it because you want to do it because you feel like—

MR. **FRANKLIN**: I don't want to have natural-life.

THE COURT: You can do it to avoid natural-life, but are you doing it of your own free will?

MR. **FRANKLIN**: Yes."

¶ 6 The State provided a factual basis for the plea: Mr. Robinson had identified Mr. **Franklin** as one of the men who shot at his car and killed Ms. Jordan, and another witness would testify that Mr. **Franklin** admitted to him on the day after the shooting that he participated in firing at the car.

¶ 7 The court advised Mr. **Franklin** that the sentence would be concurrent to a sentence he was already serving on the felony murder charge in Wisconsin and that he faced 6 to 30 years in prison for the attempted first degree murder including three years of mandatory supervised release (MSR) and a possible fine. Mr. **Franklin** waived his rights to a bench trial, a jury trial, and a presentencing investigation (PSI). The court asked if there was anything else in aggravation or mitigation, and neither party added anything. Pursuant to the plea, the court found Mr. **Franklin** guilty of attempted first degree

murder and sentenced him to 30 years in prison. He was then admonished of his appeal rights.

*2 ¶ 8 Mr. Franklin filed a direct appeal without first filing a motion to withdraw his plea, and we dismissed the appeal. *People v. Franklin*, 2014 IL App (1st) 121625-U, ¶¶ 7, 25. We found that the circuit court substantially admonished Mr. Franklin of his appellate rights following a negotiated guilty plea so that the admonishment exception to the requirement of a timely postplea motion did not apply. *Id.* ¶¶ 10-16. We did not address the merits of his claim "that he felt pressured to plead guilty to avoid a natural-life sentence, which, in light of *Miller v. Alabama*, [citation], decided three months after Mr. Franklin's plea, would have been unconstitutional because Mr. Franklin was under 18 years old at the time of the offense." *Id.* ¶ 17 (citing *Miller*, 567 U.S. 460 (2012)). We did grant Mr. Franklin's request for a correction of his mittimus to reflect that the sentence would be concurrent with Mr. Franklin's 50-year prison sentence for the felony murder conviction in Wisconsin. *Id.* ¶ 24.

¶ 9 Mr. Franklin's October 2017 *pro se* postconviction petition and accompanying memorandum set out claims that he "was denied his right to the effective assistance of appellate counsel who failed to raise ineffective assistance of trial counsel that did not raise meritorious issues." He then laid out several issues including the delay in bringing him to trial, that he was denied his "right to a juvenile adjudication" due to the delay, and that "[t]he judge might would've [*sic*] found defendant adolescent brain incapable of adult rationale." The memorandum in support of the petition began with "[t]herefore, defendant is prejudiced by the delayed prosecution resulting in involuntarily, unknowingly and unwillingly entering guilty plea."

¶ 10 Neither the petition nor the attached memorandum of law cites *Miller*. However, included with the petition in the record is an undated letter from Mr. Franklin to the clerk of the circuit court requesting forms to file a postconviction petition. The letter stated Mr. Franklin's belief that he had a valid claim under *Miller*, which he characterized as "ruling that age 18 under shall be eligible for parole after 15 years [of] incarceration." He also stated that the delay in prosecution deprived him of a juvenile adjudication and caused an "obstruction of rehabilitation."

¶ 11 The circuit court summarily dismissed the petition in January 2018. In its written order, the circuit court listed Mr. Franklin's claims as follows: a *Brady* violation, voluntariness of guilty plea, speedy trial and confrontation, actual innocence, and ineffective assistance of appellate counsel. This appeal followed.

¶ 12 On appeal, counsel initially moved to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). In his response in this court, Mr. Franklin filed two documents. The first was titled a "Motion for Leave to File Successive Post-Conviction Petition" and the second "Appellant's Explanation for Appeal." This court viewed these documents as his response to the *Finley* motion. In the first document he argued that, under *People v. Buffer*, 2019 IL 122327, he could receive only 40 years' imprisonment because he was a juvenile at the time of the offense. In the second document he cited *Miller*, 567 U.S. 460, and again cited *Buffer*, arguing "settled law stipulates that threat of a natural life sentence when defendant could not receive natural life constitutes unknowingly & understandingly entered plea of guilty." We denied counsel's motion to withdraw, and the parties briefed the issue that is before the court.

¶ 13 II. JURISDICTION

¶ 14 Mr. Franklin's petition was dismissed on January 22, 2018, and this court granted Mr. Franklin leave to file a late notice of appeal on June 20, 2018. We have jurisdiction pursuant to article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6) and Illinois Supreme Court Rules 606 (eff. March 12, 2021) and 651 (eff. Dec. 1, 1984), governing criminal appeals and appeals from final judgments in postconviction proceedings cases.

¶ 15 III. ANALYSIS

*3 ¶ 16 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2018)) provides a framework for an incarcerated individual to collaterally attack his or her conviction by establishing the substantial denial of a constitutional right in the trial or sentencing that resulted in that conviction. 725 ILCS 5/122-1(a)(1) (West 2018). Claims are limited to those that were not, and could not have been, previously litigated. *People v. Petrenko*, 237 Ill. 2d 490, 499 (2010).

¶ 17 Proceedings under the Act occur in three stages. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). At the first stage, the circuit court determines, without input from the State, whether a petition is frivolous or patently without merit. *Id.*; 725 ILCS 5/122-2.1(a)(2) (West 2018). At the second stage, the court appoints counsel to represent the defendant and, if necessary, to file an amended petition; at this stage, the State must either move to dismiss or answer the petition. *Gaultney*, 174 Ill. 2d at 418; 725 ILCS 5/122-4, 122-5 (West 2018). Only if the petition and accompanying documentation make a substantial showing of a constitutional violation does the defendant then proceed to the third stage, an evidentiary hearing on the merits. *People v. Silagy*, 116 Ill. 2d 357, 365 (1987); 725 ILCS 5/122-6 (West 2018).

¶ 18 Mr. Franklin's petition was dismissed at the first stage. Our supreme court has made clear that to survive first-stage scrutiny, a petition need only state the "gist" of a constitutional claim. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). Formal legal argument and citation to authority are not required (*id.*), and all well-pleaded facts that are not positively rebutted by the record must be taken as true (*People v. Romero*, 2015 IL App (1st) 140205, ¶ 26). A petition may be summarily dismissed as "frivolous or patently without merit" only when it has "no arguable basis either in law or in fact"—*i.e.*, where the petitioner's claims rely "on an indisputably meritless legal theory or a fanciful factual allegation." (Internal quotation marks omitted.) *People v. Boykins*, 2017 IL 121365, ¶ 9. We review the summary dismissal of a postconviction petition *de novo*. *People v. Brown*, 236 Ill. 2d 175, 184 (2010).

¶ 19 Because most postconviction petitions are drafted by *pro se* litigants, a petition at the first stage is required only to include a limited amount of detail and need not present formal legal arguments or citations. *People v. Hodges*, 234 Ill. 2d 1, 9-10, (2017). And the allegations in a *pro se* petition should "be given liberal construction" in petitioner's favor. *Id.* at 21. If it is a "borderline" question as to whether a *pro se* petition raised a claim argued on appeal, the petition should advance to the second stage of proceedings. *Id.*

¶ 20 On appeal, Mr. Franklin contends that his postconviction petition should not have been summarily dismissed because he presented an at least arguably meritorious claim that his guilty plea was not knowing and voluntary because it was induced by the prospect of an unconstitutional life sentence. The underpinning for this argument is the evolving case law, which culminated most recently in our supreme court's decision in *People v. Buffer*, 2019 IL 122327, finding that a defendant who was under 18 at the time of the crime could not receive a sentence in excess of 40 years, unless the court had properly considered the defendant's youth and attendant characteristics. *Id.* ¶¶ 40-47. *Buffer* followed and built upon a line of cases in this state and from the United States Supreme Court that rest upon that Court's decision in *Miller*, 567 U.S. 460, that a mandatory life sentence for a juvenile violated the eighth amendment. As the Court recognized there, "children are constitutionally different from adults for purposes of sentencing." *Id.* at 471.

¶ 21 The State responds that Mr. Franklin forfeited his claim by not raising it in his petition and also argues that the claim is not of arguable merit. We deal with the State's two arguments in support of dismissal in turn.

¶ 22 A. Mr. Franklin Did Not Forfeit This Claim

*4 ¶ 23 We reject the State's argument that Mr. Franklin's claim was forfeited because it was not properly raised in Mr. Franklin's *pro se* petition. Mr. Franklin clearly raised a claim that his guilty plea was unknowing and involuntary in his postconviction petition and the accompanying memoranda. The circuit court specifically listed the voluntariness of the plea as one of the issues raised in the petition. Mr. Franklin also claimed that he should have been tried as a juvenile where his youth would have received due consideration in sentencing and referenced his "adolescent brain." We acknowledge that in the petition, Mr. Franklin focused his argument that the plea was involuntary on the State's State undue delay in waiting over 12 years to charge him with this crime. But a party—even one who is represented—forfeits claims, not arguments in support of those claims. *Brunton v. Kruger*, 2015 IL 117663, ¶ 76. As our supreme court made clear in *Brunton*, "[w]e require parties to preserve issues or claims for appeal; we do not require them to limit their arguments here to the same arguments that were made below." *Id.*

¶ 24 Mr. Franklin clearly made a claim that his guilty plea was not knowing and voluntary in his postconviction petition.

Elsewhere, in the accompanying memorandum, he argued that his youth should have been considered in sentencing. In light of our duty to liberally construe a *pro se* petition, we cannot view this as a forfeiture of the claim in his postconviction petition that his plea was involuntary or as a reason that we should not consider the arguments that Mr. Franklin is making on appeal in support of that claim.

¶ 25 We find further support for our liberal reading of Mr. Franklin's petition in the fact that Mr. Franklin specifically cited *Miller* in the undated letter that appears from the record to be an attachment to Mr. Franklin's petition. Although it is unclear whether the letter was actually attached to the petition, and counsel for Mr. Franklin has not relied on it in this court, we consider this letter as clarification of the claims that Mr. Franklin was making in his petition. Mr. Franklin also expressly raised the argument that his plea was unknowing and involuntary because of *Miller* and *Buffer* in his response to the *Finley* motion. It is true, as the State argues, that a claim cannot be raised for the first time on appeal, including in a response to a *Finley* motion. However, we can and do view the *Finley* response as material that elucidates the contents of the postconviction petition.

¶ 26 Considering all of the above, we decline to find that Mr. Franklin forfeited his claim that his plea was not voluntary or that he is precluded from raising an argument in support of that claim that the plea was induced by his fear of life sentence that would have been unconstitutional under *Miller.*

¶ 27 B. Mr. Franklin Has Stated the Gist of a Constitutional Claim

¶ 28 Mr. Franklin's argument on appeal is that his guilty plea was involuntary and unknowing because it was induced by the possibility of a sentence that was subsequently found to be unconstitutional for juveniles, absent specific considerations and circumstances. Mr. Franklin alleged that he pleaded guilty and accepted the offered deal because, as he said directly in his colloquy with the circuit court, he did not want a sentence of natural life in prison which was, at the time he pled guilty in March 2012, a likely sentence for murder. Several months after Mr. Franklin's guilty plea however, in June 2012, the United States Supreme Court, in *Miller*, held that such a sentence should be "uncommon" and reserved for juveniles whose crimes reflect "irreparable corruption." (Internal quotation marks omitted.) 567 U.S. at 479-80.

¶ 29 In support of the merits of this argument, Mr. Franklin relies on *People v. Parker*, 2019 IL App (5th) 150192, ¶ 18, and several decisions from this district that follow that case. In *Parker*, this court held that a defendant could file a successive postconviction petition based on *Miller* and *Buffer,* challenging his negotiated guilty plea for first degree murder, The State in *Parker* had agreed to a cap of 50 years and the defendant had actually been sentenced to 35 years, which was less than the 40-year line drawn in *Buffer*. *Id.* ¶¶ 3,16. Nonetheless, the court found his claim had merit.

*5 ¶ 30 The court in *Parker* noted:

> "The defendant contends that he would not have pled guilty to felony murder in exchange for a sentencing cap of 50 years if the guidelines set forth in *Buffer* were established at the time that he entered his guilty plea. Specifically, he contends that he pled guilty after being repeatedly admonished that he could receive a natural-life sentence, which, given the facts of the case and the issuance of *Buffer*, is no longer a reasonable threat." *Id.* ¶ 18.

¶ 31 In contrast to this case, *Parker* involved a successive postconviction petition where the defendant had to show cause and prejudice (*id.* ¶ 17), a higher standard than here, where Mr. Franklin need only show the "gist" of a claim. See *People v. Smith*, 2014 IL 115946, ¶ 35. The *Parker* court found cause and prejudice because, in accepting a 35-year sentence, the defendant was influenced by repeated admonishments that he could receive a life sentence. *Parker*, 2019 IL App (5th) 150192, ¶¶ 4, 18. The court concluded that "retroactive application of *Buffer* constitutes cause and prejudice for purposes of being granted leave to file a successive postconviction petition." *Id.* ¶ 18.

¶ 32 In *People v. Robinson*, 2021 IL App (1st) 181653, ¶ 33, this court followed *Parker* in reversing the dismissal of a first-stage postconviction petition. As the court noted there, "[the defendant's] rights under the eighth amendment in this context were not known at the time he pleaded guilty; therefore, he could not have voluntarily relinquished them." *Id.* ¶ 30.

¶ 33 Other unpublished decisions of this court have also followed *Parker*. See *People v. Brown*, 2021 IL App (1st) 160060-U, ¶ 35; *People v. Hudson*, 2020 IL App (1st) 170463-U, ¶ 27. These cases reversed dismissals of

postconviction petitions that made the same claim that Mr. Franklin makes here. As those courts recognized, while the actual sentence imposed did not violate *Miller* and *Buffer*, the defendant's argument in each case that his guilty plea was influenced by the possibility of a sentence that would have violated the principles in those cases stated at least the gist of a constitutional claim.

¶ 34 The State argues here that *Parker* and these other cases should not be followed because they are inconsistent with the pronouncement of the United States Supreme Court in *Brady v. United States*, 397 U.S. 742, 757 (1970). The Court in that case said:

> "[A]bsent misrepresentation or other impermissible conduct by state agents [citation], a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise. A plea of guilty triggered by the expectations of a competently counseled defendant that the State will have a strong case against him is not subject to later attack because the defendant's lawyer correctly advised him with respect to the then existing law as to possible penalties, but later pronouncements of the courts, as in this case, hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered."

*6 ¶ 35 The defendant in *Brady* pleaded guilty to a federal kidnapping charge (see 18 U.S.C. § 1201(a) (West 1970)), under which he faced a possible death penalty. The Supreme Court subsequently held that the death penalty could not be imposed under that statute because the statute impermissibly burdened a defendant's right to a jury trial by making that penalty available only where the defendant refused to waive the right to a jury. *Id.* at 745-46 (citing *United States v. Jackson*, 390 U. S. 570 (1968)).

¶ 36 We see no conflict between *Brady* and the four decisions from this court, all holding that a defendant could state, at least, the gist of a constitutional claim where he pleaded guilty as a juvenile under the threat of a sentence that violated *Miller* and *Buffer*. While there is some language in the *Brady* decision that suggests the kind of blanket rule that the State proffers, when viewed in context, we do not view *Brady* as setting up a bar to the claim that Mr. Franklin makes here. Rather, the Court in *Brady* recognized that a defendant's misapprehension of the law, like a defendant's misapprehension of fact, is a factor that goes to the question of whether the plea was voluntarily and intelligently made. See *People v. McIntosh*, 2020 IL App (5th) 170068, ¶ 39. ("The misapprehension of law or fact goes to the question of whether the plea was voluntarily and intelligently made.")

¶ 37 The State ignores that the decision in *Brady* was based on a finding by the district court, after an evidentiary hearing, that the guilty plea was *not* induced by the defendant's incorrect belief that he could get the death penalty. The Supreme Court summarized the findings at that hearing as follows:

> "[P]etitioner decided to plead guilty when he learned that his codefendant was going to plead guilty: petitioner pleaded guilty 'by reason of other matters and not by reason of the statute' or because of any acts of the trial judge. The court concluded that 'the plea was voluntarily and knowingly made.' " *Id.* at 745.

¶ 38 The Court in *Brady* emphasized that "[t]he voluntariness of [the defendant's] plea can be determined only by considering all of the relevant circumstances surrounding it." *Id.* at 749. The Court in *Brady* considered those circumstances, and accordingly we do not read *Brady* as creating a *per se* rule that a significant change in the law as to the available sentence can never support a claim that a guilty plea was unknowing or involuntary. *Brady* does not preclude a finding, such as the ones made in *Parker* and the cases following it, that newly recognized constitutional limitations on juvenile sentencing of which a juvenile defendant was unaware when they pled guilty can support a postconviction claim.

¶ 39 In addition, the *Miller* line of cases may be unique in reference to the dramatic change they represent in sentencing. As both the United States Supreme Court and our supreme court have recognized, *Miller* created a new substantive rule that applies retroactively and to postconviction cases. *Montgomery v. Louisiana*, 577 U.S. 190, 208-09 (2016); *People v. Davis*, 2014 IL 115595, ¶ 41. Both commentators and courts have recognized how sweeping these changes have been. See Guyora Binder & Ben Notterman, Penal Incapacitation: A Situationist Critique, 54 Am. Crim. L. Rev. 1, 2 (2017) ("In two recent cases, *Graham v. Florida* and *Miller v. Alabama*, the Supreme Court changed the landscape of Eighth Amendment jurisprudence by requiring a more searching proportionality review of certain sentences of incarceration."); see also *People v. House*, 2020 IL App (2d)

180040-U, ¶ 17 (recognizing the "sea change of jurisprudence related to life sentencing for juveniles" following *Miller*). Whatever limits might exist on postconviction petitioners' reliance on changes in sentencing law, such limits may not even be applicable to juveniles who pled guilty prior to *Miller.*

*7 ¶ 40 The State also cites one case of this court and several from federal appellate courts that it argues have held that subsequent court decisions finding a potential sentence unconstitutional can never be the basis for a postconviction petition on a guilty plea. This suggests to us that, at best, there is some split in the law. The existence of *Parker* and the cases following it, which we do not think are inconsistent with any controlling authority, make clear that Mr. **Franklin's** claim is not "indisputably meritless," and thus it must survive first-stage scrutiny. See ***People v.*** *Zumot*, 2021 IL App (1st) 191743, ¶¶ 38-39 (the existence of cases that support a petitioner's claim provides the "gist" of a claim, even if there is a case-law split with other cases to the contrary). In short, we reject the State's arguments that we cannot find that Mr. **Franklin** has stated the gist of a claim here, based on *Parker* and the cases following it.

¶ 41 IV. CONCLUSION

¶ 42 For the foregoing reasons, the judgment of the circuit court is reversed, and the matter is remanded for second-stage proceedings.

¶ 43 Reversed and remanded.

Justice Connors concurred in the judgment.

Justice Harris dissented.

¶ 44 JUSTICE HARRIS, dissenting:

¶ 45 I respectfully disagree with my colleagues that defendant has stated the gist of a meritorious claim under *Parker* and its progeny. None of those cases acknowledge *Brady*, and thus none sought to distinguish *Brady* as my colleagues do here. However, I do not find the majority's attempt at distinguishing *Brady* to be persuasive, and I would find that this case is firmly governed by *Brady* as binding United States Supreme Court precedent so that defendant's instant constitutional claim is not even arguable under the law. In other words, because I find *Brady* to be controlling precedent, I reject the majority's conclusion that:

> "at best, there is some split in the law. The existence of *Parker* and the cases following it, *which we do not think are inconsistent with any controlling authority*, make clear that Mr. **Franklin's** claim is not 'indisputably meritless,' and thus it must survive first-stage scrutiny." (Emphasis added.) *Supra* ¶ 40.

¶ 46 The majority correctly states that the "Court in *Brady* emphasized that '[t]he voluntariness of [the defendant's] plea can be determined only by considering all of the relevant circumstances surrounding it.' " *Supra* ¶ 38 (quoting *Brady*, 397 U.S. at 749). The *Brady* court went on to state:

> "One of these circumstances was the possibility of a heavier sentence following a guilty verdict after a trial. It may be that Brady, faced with a strong case against him and recognizing that his chances for acquittal were slight, preferred to plead guilty and thus limit the penalty to life imprisonment rather than to elect a jury trial which could result in a death penalty. But *even if we assume that Brady would not have pleaded guilty except for the death penalty provision* of [§] 1201(a), this assumption merely identifies the penalty provision as a 'but for' cause of his plea. That the statute caused the plea in this sense does not necessarily prove that the plea was coerced and invalid as an involuntary act." (Emphasis added.) *Brady*, 397 U.S. at 749-750.

In other words,

> "*Jackson* ruled neither that all pleas of guilty encouraged by the fear of a possible death sentence are involuntary pleas nor that such encouraged pleas are invalid whether involuntary or not. *Jackson* prohibits the imposition of the death penalty under § 1201(a), but that decision neither fashioned a new standard for judging the validity of guilty pleas nor mandated a new application of the test theretofore fashioned by courts and since reiterated that guilty pleas are valid if both 'voluntary' and 'intelligent.' " *Id.* at 747.

¶ 47 However, the *Brady* Court ruled out a postplea change in the applicable maximum sentence, including a judicial ruling that the maximum sentence was unconstitutional, as a circumstance relevant to determining whether a guilty plea was made voluntarily and knowingly.

> *8 "[J]udgments may be made that in the light of later events seem improvident, although they were perfectly sensible at the time. The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action. More particularly, absent misrepresentation or other impermissible conduct by state agents, [citation], a voluntary plea of guilty intelligently made *in the light of the then applicable law* does not become vulnerable because *later judicial decisions indicate that the plea rested on a faulty premise.* A plea of guilty triggered by the expectations of a competently counseled defendant that the State will have a strong case against him is *not subject to later attack because the defendant's lawyer correctly advised him with respect to the then existing law as to possible penalties but later pronouncements of the courts, as in this case, hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered.*" (Emphasis added.) *Id.* at 756-57.

¶ 48 Unlike the majority, I believe this is not merely "some language in the *Brady* decision that suggests the kind of blanket rule that the State proffers." *Supra* ¶ 36. Instead, the highlighted language is stated as a general rule, not merely a ruling on Brady's particular circumstances, that I find fully applicable here. Defendant pled guilty to avoid facing life imprisonment under the statutes in effect when he pled, while *Miller* and its progeny subsequently – that is, months after his plea – cast doubt on whether a life sentence pursuant to those statutes would be constitutional for a defendant who was a minor at the time of the offense. Similarly, in *Brady*, plea counsel advised Brady that a jury could give him the death penalty and then, "nine years later, in *United States v. Jackson*, [citation], the Court held that the jury had no such power as long as the judge could impose only a lesser penalty if trial was to the court or there was a plea of guilty." *Id.* at 756. Just as the *Brady* court held that "these facts do not require us to set aside Brady's conviction" (*id.*), I conclude that defendant's negotiated guilty plea should not be vacated on his similar claim.

¶ 49 Except that *Miller* and its progeny effected a sea change in the sentencing of minors, which I do not doubt, the majority does not support its remark that "[w]hatever limits might exist on postconviction petitioners' reliance on changes in sentencing law, such limits may not even be applicable to juveniles who pled guilty prior to *Miller*." *Supra* ¶ 39. While the *Brady* court was not dealing with an actual or *de facto* life sentence imposed on a juvenile, it was considering a case where a defendant pled guilty after being advised that he faced the *death penalty* if he chose a jury trial, a more daunting prospect than this defendant faced. Also, while defendant was a minor at the time of the offense, he was a 33-year-old adult when he pled guilty so that this court does not face the issues of voluntariness and knowledge that we might face for a defendant who pled while still a minor. Thus, I find the calculus or circumstances here regarding the voluntariness and knowledge of a plea to be substantively indistinguishable from *Brady*: a defendant pled guilty believing that he faced a certain maximum sentence, that belief was correct as the law stood at the time of the plea, and a postplea judicial ruling cast doubt on the constitutionality of that maximum sentence.

¶ 50 Moreover, a potential natural-life sentence for a minor is not *per se* unconstitutional. The *Miller* court held "that the Eighth Amendment forbids a sentencing scheme that *mandates* life in prison without possibility of parole for juvenile offenders." (Emphasis added.) *Miller*, 567 U.S. at 479. It rejected an "argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger." *Id.* "Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 480. A defendant who was a minor at the time of his or her offense "may be sentenced to life imprisonment without parole, but only if the trial court determines that the defendant's conduct showed irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation." *People v. Holman*, 2017 IL 120655, ¶ 46.

*9 ¶ 51 This case is therefore similar to *People v. Beronich*, 334 Ill. App. 3d 536 (2002), where this court followed *Brady* in rejecting a challenge to a 1990 guilty plea that it was involuntary because the defendant had faced a possible extended-term sentence rendered unconstitutional by *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The *Beronich* defendant contended:

> "that his guilty plea was not knowing and voluntary because the trial court misadvised him about the maximum possible penalty. The trial court told him that he faced a maximum of 100 years or natural life in prison; however, *Apprendi* later made those sentences unconstitutional. Defendant contends that had he known that he faced a maximum of only 60 years in prison, he would not have agreed to accept a 50-year sentence, which was only 10 years less than the maximum." *Beronich*, 334 Ill. App. 3d at 538.

However, "*Apprendi* does not hold that a State may never subject a defendant to a sentence beyond the usual statutory maximum, only that the facts justifying the enhancement (other than prior convictions) must be proved to a jury beyond a reasonable doubt." *Id.* at 539. The admonishment that the "defendant was eligible for extended-term sentences was not only true under the then-existing law but remains literally true today." *Id.* Improper admonishments about the sentencing a defendant faces may render a guilty plea unknowing, but "whether a guilty plea is intelligent and voluntary is judged in light of the law that existed when the plea was entered and a voluntary plea is not invalidated by later changes in the law." *Id.* at 541 (citing *Brady*, 397 U.S. at 757).

¶ 52 Similarly, it "was not only true under the then-existing law but remains literally true today" (*id.* at 539) that defendant could receive at least a *de facto* life sentence as defined in *Buffer* if he was to be convicted of first degree murder, as he was charged before his plea, and the State was to prove him permanently incorrigible. Even absent a finding of incorrigibility, a defendant who was a minor at the time of his offense can receive a prison sentence of up to 40 years. While defendant did not know about *Miller* and its progeny when he pled guilty, he knew that his plea was eliminating the need for the State to prove the elements of the charges against him and to make a case in aggravation at sentencing. He traded uncertainty – he could have been found guilty of first degree murder, he could have received a longer prison sentence than 30 years – for certainty. Now he wants to challenge his sentence on his negotiated plea because *Miller* and its progeny bring him hindsight he did not have when he pled. However, "we evaluate the plea's knowing and voluntary character by the law at the time it was entered, not with hindsight." *Id.* at 541.

¶ 53 For the foregoing reasons, I would affirm the judgment of the circuit court summarily dismissing defendant's postconviction petition.

All Citations

Not Reported in N.E. Rptr., 2021 IL App (1st) 181160-U, 2021 WL 3709207

No. 1-21-1235
IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- JEREMIAH FALLON, Petitioner-Appellant.	)	Appeal from the Circuit Court of Cook County, Illinois No. 05 CR 20077 Honorable Arthur F. Hill, Jr., Judge Presiding.

ORDER

This matter coming to be heard on Appellant's motion, all parties having been duly notified, the State's Attorney's Office agrees to the disposition, and the Court being advised in the premises,

IT IS HEREBY ORDERED:

That Appellant's Agreed Motion for Summary Disposition is hereby allowed/~~denied~~.

IT IS FURTHER ORDERED:

That Appellant having pleaded an arguable claim of a constitutional deprivation, the judgment of the Circuit Court dismissing Appellant's post-conviction petition is reversed, and the case is remanded to the Circuit Court for second stage post-conviction proceedings under 725 ILCS 5/122-5, including the appointment of counsel.

This is a final and complete disposition of appeal number 1-21-1235 and the mandate of this Court shall issue forthwith.

Jesse G. Reyes
PRESIDING JUSTICE

Mary K Rochford
JUSTICE

LeRoy K. Martin, Jr.
JUSTICE

DATE: _____

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In the Circuit Court of Cook County
Criminal Division

FILED
AUG 28 2019
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL

People of the State of Illinois, Respondent-Appellee, v. Pierre Montanez, Petitioner-Appellant.	No. 02 CR 31134-01 Hon. Joseph M. Claps

Notice of Appeal

An appeal is taken from the order described below.

1.) Court to which appeal is taken: Appellate Court First District

2.) Name and address of appellant: Pierre Montanez M30561 P.O. Box 99 Pontiac, IL 61764

RECEIVED 2019 AUG 28 AM 11:29 CLERK OF CIRCUIT COURT CRIMINAL DIVISION

3.) Appellant is indigent and request an attorney to be appointed.

4.) Date of Order: August 15, 2019

1 of 2

5.) Offense of which convicted : First degree Murder

6.) Sentence : Natural Life

7.) Nature of Order appelled from : Successive Post-Conviction Petition

Respectfully Submitted,

By: /s/

Pierre Montanez

M30561

P.O. Box 99

Pontiac, IL 61764

No. 128740

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- PIERRE MONTANEZ, Petitioner-Appellant.	)	Appeal from the Appellate Court of Illinois, No. 1-19-1930. There on appeal from the Circuit Court of Cook County, Illinois , No. 02 CR 31134. Honorable Joseph M. Claps, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, eserve.criminalappeals@ilag.gov;

Ms. Kimberly M. Foxx, State's Attorney, Cook County State's Attorney Office, 300 Daley Center, Chicago, IL 60602, eserve.criminalappeals@cookcountyil.gov;

Mr. Pierre Montanez, Register No. M30561, Pontiac Correctional Center, P.O. Box 99, Pontiac, IL 61764

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On November 16, 2022, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the petitioner-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Rebecca S. Kolar
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