No. 127241

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. JOHN PRANTE, Defendant-Appellee.	)	Appeal from the Appellate Court of Illinois, Fifth Judicial District, No. 5-20-0074 There on Appeal from the Circuit Court for the Third Judicial Circuit, Madison County, Illinois, No. 82 CF 381 The Honorable Neil T. Schroeder, Judge Presiding.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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POINTS AND AUTHORITIES

NATURE OF THE ACTION

In 1983, after a jury trial in the Circuit Court of Madison County, defendant was convicted of murder and sentenced to 75 years in prison. C2014.[1] In 2018, he sought leave to file a successive postconviction petition. C2637. The circuit court denied leave, C3163-66, but the appellate court reversed, A1-22. The People appeal the appellate court's judgment. An issue is raised concerning the sufficiency of defendant's motion for leave to file a successive postconviction petition.

ISSUES PRESENTED FOR REVIEW

1. Whether the circuit court correctly denied defendant leave to file a successive postconviction petition raising a due process challenge to the admission of bitemark evidence, where the evidence did not so infect the trial as to render defendant's conviction fundamentally unfair.

2. Whether the appellate court erred in allowing defendant to challenge the previously accepted bitemark evidence on the nonconstitutional and unbriefed ground that the evidence would no longer pass muster under the *Frye* admissibility test.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315(a), 604(a)(2), 612(b), and 651(d). This Court allowed leave to appeal on September 29, 2021.

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[1] "C__," "R__," and "A__" refer, respectively, to the common law record, report of proceedings, and this brief's appendix.

STATUTE INVOLVED

Section 122-1 of the Post-Conviction Hearing Act (725 ILCS 5/122-1) provides, in relevant part:

> (a) Any person imprisoned in the penitentiary may institute a proceeding under this Article if the person asserts that:
>
> > (1) in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both[.]
> >
> > * * *
>
> (f) Only one petition may be filed by a petitioner under this Article without leave of the court. 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. For purposes of this subsection (f): (1) 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; and (2) 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.

STATEMENT OF FACTS

A. Defendant Is Convicted of Murder.

On June 20, 1978, 22-year-old Karla Brown and her fiancé, Mark Fair, moved into a new home in Wood River, Illinois. R1138-39. That evening, the couple had friends over to help with the move and for dinner and drinks. R1037, 1139-40. The same day, defendant and John Scroggins were next door at Paul Main's house. R1168-69. Scroggins knew Karla and introduced defendant to her, and the three spoke in front of the house. R1167-70.

Scroggins testified that defendant later expressed considerable sexual interest in Karla and was irritated and upset that she had not invited him over to her house. R1173-74, 1178-80, 1186.

The next morning, Mark went to work and Karla remained at home. R1141. At 10 a.m., Karla spoke by phone with her friend, Debbie Davis. R1044. She also spoke by phone with Mark's mother, Helen Fair, sometime between 10 and 11 a.m., but their conversation was cut short when someone came to Karla's door. R1052-53.

Around 10:45 a.m., six-year-old Eric Moses and his grandmother, Edna Moses, who were driving through the neighborhood, saw a man and a woman talking in Karla's driveway. R1068-69, 1080. The woman matched Karla's description, and Eric testified that she was wearing a short-sleeved shirt with flowers on it. R1069-70, 1081. Eric testified that the woman "sort of got mad at" the man. R1072. Edna testified that the woman turned around and walked toward the house, and the man followed her. R1082.

Around 11 a.m., Debbie arrived at the house and saw Karla's van in the garage. R1045-47. She did not see anyone on the porch next door. R1048. Debbie knocked on the front and back doors, but left when no one answered. R1046-47. Between noon and 2:30 p.m., Debbie, Helen, and another friend called Karla several times, but got no answer. R1039, 1049, 1054.

Mark came home around 5 p.m., with his friend Tom Fiegenbaum, who was helping him move additional items into the house. R1142-43, 1159-60. In the basement, Mark noticed that the room was in disarray and there was blood on the couch and floor. R1147. He then saw Karla's body in the laundry room. *Id.* Karla's head and shoulders were submerged in a large metal barrel filled with water, her hands were tied behind her back with an electrical cord, and her body was bent over the barrel at the waist. R1149, 1152. She was wearing a winter sweater but was naked from the waist down. R1143-44, 1149-50. She had large cuts on her forehead and chin, and two socks were tied around her neck. R933-34, 1151. Mark lifted Karla's body out of the barrel and laid her on the floor. R1149. Fiegenbaum called the police, who arrived within minutes and secured the scene. R995, 1150, 1157.

When Police Chief Ralph Skinner arrived around 6 p.m., he saw two men on Main's front porch, but could not identify them. R1007-08. Detective Charles Nonn, who arrived about 20 minutes later, saw defendant and Main standing in Main's front yard. R1020-21.

A crime scene technician processed the scene for fingerprints. R935-36, 963, 967-69, 971. All recovered prints that were suitable for comparison, except those on a coffee pot found in the basement rafters, matched Karla. R967-69, R1210-12. The prints on the coffee pot did not match defendant or anyone else whose prints were submitted for comparison. C2755, 2758-59.

Dr. Harry Parks performed an autopsy on June 22, 1978. R1243. He noted that Karla had a fractured jaw, bruising and scraping on her throat consistent with strangulation, and lacerations on her forehead, nose, and chin caused by a blunt object. R1244, 1247. Dr. Parks opined that Karla died of strangulation. R1248. He estimated that her time of death was 11:45 a.m., but explained that the time could vary by several hours. R1248.

Skinner interviewed defendant on June 24, 1978. R1099. Defendant said that he was at Main's house the evening before the murder and saw Karla, Mark, and several other people moving stuff into the house and having a party. R1101. He said that at 8:30 the next morning, he went to Main's house to see if Main wanted to go to St. Louis to drop off some job applications. R1102-03. Defendant said that Main could not go, so he dropped off the applications alone and came back and "bummed around." R1103. He said that he next saw Main around 6 p.m. at Harold Pollard's house, when Main told him that Karla had been killed. *Id*.

On July 5, 1978, defendant told a detective that he had been at Main's house the night before the murder and had watched the party at Karla's house. R1506. Defendant thought Karla was beautiful and had hoped that he and Main would be invited to the party. *Id*. He said that the next morning, he went to Main's house to see if Main wanted to drop off job applications, but Main was busy, so he went to St. Louis alone and dropped off applications at several businesses. R1507. Defendant said he was unsure

whether he returned to Main's house and was unable to account for some of his time that day. *Id.* He said the next thing he remembered was being at Pollard's house, when Main informed him of the murder. *Id.*

Main's aunt, Edna Vancil, who lived across the street, saw defendant arrive at Main's house on the day of the murder between 9:30 and 10 a.m. and sit on the front porch with Main. R1086-89. Defendant and Main stayed on the porch until about 11 a.m. R1089. They then "disappeared" until about noon, when they returned to the porch and remained there until about 3 p.m. R1089-91. Vancil did not see defendant there when the police arrived. R1092-93. Although the police spoke to Vancil on the night of the murder, she did not state at that time that she had seen defendant on Main's porch earlier in the day. R1094, 1097.

In 1980, investigators sent autopsy and crime scene photographs to Dr. Homer Campbell, a forensic dentist and expert in image enhancement. R1214-15, 1229-30, 1538-40, 1547-49. Dr. Campbell determined that injuries near Karla's right shoulder were bitemarks. R1549. Investigators had not previously been aware of the presence of bitemarks on Karla's body. R1232.

In the spring of 1982, investigators decided to exhume Karla's body. R1237. Local newspaper articles in May 1982 reported on the planned exhumation and stated that a bitemark had been found on Karla's neck or shoulder. R1987-93, C236-43.

The exhumation occurred on June 1, 1982. R1238. At a second autopsy, Dr. Mary Case identified facial lacerations and jaw and skull fractures resulting from significant blunt force trauma. R1520-27. She also noted bruising on Karla's neck, which had been inflicted shortly before death. R1522, 1530-31. Dr. Case opined that drowning was the cause of death. R1532-33.

After reading a newspaper article about the planned exhumation and bitemark, Vicki White told co-workers that she thought she knew who committed the murder. R1295. On June 1, 1982, Detective Thomas O'Connor separately interviewed Vicki and her husband, Mark White, and Spencer and Roxanne Bond. R1266-71. All four testified at trial.

Vicki testified that a few days after the murder, she and Mark were at the Bonds' house when defendant came over and told them about the murder. R1289-91. Defendant said that Karla's body was in the basement and that "she was in a curled up position" and "had teeth marks on her body." R1291. When defendant mentioned the teeth marks, he pointed at his shoulder. R1291-92. Vicki testified that defendant seemed nervous and said "he had to get his story straight with Paul Main" and "get out of the state." R1291-93.

Mark similarly testified that, within a few days of the murder, he and Vicki were at the Bonds' house when defendant came over. R1304. Defendant was acting strange and appeared nervous. R1306. He said that the police were going to question him about Karla's murder and he "was

afraid that he . . . could have been the last one to see her alive." *Id.* He said he knew Karla and had been at her house on the day of the murder and was supposed to return later in the evening. R1304. Mark testified that at one point in the conversation, he saw defendant gesture at his shoulder, but did not hear what defendant was saying. R1307-08.

Spencer testified that, a few days after the murder, defendant came to his house and discussed the murder. R1312-13. Defendant said that Karla "was in a curled position stuck in a pail of water down in the basement" and "had been tied up." R1313-15. Defendant also said that Karla "had teeth marks . . . on her left shoulder." R1314. Defendant said that he was at Main's house the day of the murder and had seen and spoken with Karla. R1313. Spencer testified that defendant was "a little agitated" and "more nervous" than usual and said that he and Main "had to get their stories together as to what they were doing that day." R1315-16. Spencer stated that, prior to his interview with police, he had not discussed the conversation recounted in his testimony with Roxanne or the Whites, and he did not know what the others had told the police. R1317-18.

Roxanne testified that she was not present for most of the conversation because she had to get up frequently to tend to her daughter. R1301-02. She remembered hearing defendant say "he had to get his story straight," but she could not recall when she heard him say it. R1301.

Shortly after his interview with police, Spencer twice spoke with defendant while wearing a recording device. R1319-20, 1403-04. In the first conversation, defendant said he had been at Main's house on the day of the murder and saw Karla "putter'in [*sic*] around outside." R1350, 1359. In the second conversation, defendant said that he had been on Main's front porch from 10 or 11 a.m. until the evening, but that he and Main left the house a few times to get more to drink. R1405, 1412. He said he was at Main's house when the police arrived and left sometime after that. R1406. He also said that he may have spoken with Karla in the driveway, but he denied going into her house. R1406, 1417. In a statement to detectives the same day, defendant said that he remembered sitting on Main's front porch the day of the murder, seeing Karla "puttering outside in the yard," and later seeing police cars arrive. R1388-89.

Police arrested defendant on June 8, 1982. R1394. Articles published shortly after the arrest reported on details of the investigation, including that Karla's "body was nude from the waist down with her hands tied behind her back and her head in a container of water," R1993, and that defendant's teeth were consistent with bitemarks on her body, C2921, 2923.

In July 1982, police interviewed Pollard for the first time. C99, R1486. Pollard later testified that defendant had come to his house around 6:30 p.m. on the day of the murder and was "agitated" and "anxious." R1479-80. Defendant said he had been at Main's house most of the day and that the girl

next door had been killed. R1480-82. He also said that "the body was found curled up on the floor with its hands tied behind its back." R1481.

Susan Lutz, who had been in a relationship with defendant in 1980 or 1981, testified that defendant occasionally bit her on the neck or shoulder while they had sex. R1469-73. She also testified that defendant told her that he had once killed a woman, but that he could not talk about it because he would "lose [his] freedom." R1472.

The People also presented expert testimony from two forensic dentists. Dr. Campbell testified that there were no published standards for evaluating bitemark evidence, and that such evaluations were done case-by-case, based on the knowledge and experience of the examiner. R1559. From the autopsy photographs, Dr. Campbell identified at least three overlapping bitemarks on the right side of Karla's neck near her collarbone, which he opined were "definitely" human bitemarks. R1562-64, 2020. Dr. Campbell compared the bitemarks to the dental impressions of four individuals: defendant, Main, Joe Seitz, and Joe Milazzo. R1562, 2019.[2] He opined that defendant's teeth were "consistent with" the bitemarks — meaning that his teeth "could have made" them — whereas the three other individuals' teeth "could not have" made the bitemarks. R1566-69, 1581, 2019. Dr. Campbell's opinion was based solely on "the spacing of [defendant's] six anterior teeth, [and] their

[2] Seitz and Milazzo were other potential suspects. R1409, 1455, 1672-73.

relationship to one another," and not on any individual characteristics of defendant's teeth. R1582-83.

Dr. Lowell Levine reviewed the autopsy photographs and identified two or three overlapping human bitemarks near Karla's collarbone. R1618-20. Dr. Levine compared the bitemarks to the dental impressions of defendant, Main, and Seitz and opined that defendant's teeth "could have caused" the bitemarks and that Main's and Seitz's teeth could not. R1621-25. Dr. Levine explained that his opinion was based on the spacing of defendant's upper front teeth and not on individual characteristics of his teeth. R1625-26, 1636, 1639. Dr. Levine testified that there were no published standards for bitemark comparisons other than reliance on "the training and expertise of the examiner." R1614-15.

The People also called Dr. Ronald Mullen, a dentist who had treated defendant in 1980. R1642. Dr. Mullen estimated that he had seen the type of spacing present in defendant's upper front teeth in less than one percent of the 6,000 to 7,000 patients he had treated in his 17-year career. R1641-43.

Defendant called two forensic dentists to challenge the testimony of the People's expert witnesses. Dr. Edward Pavlik[3] testified that he found "very little evidence . . . to even substantiate that we have a bite mark." R1766. He explained that the autopsy photographs showed "abrasions on the

[3] The transcript spells the witness's name "Pavlec," but the correct spelling appears to be "Pavlik." C691.

neck that . . . could be a bite mark," but which also could "have been made through strangulation." R1764. For purposes of conducting a bitemark comparison, Dr. Pavlik described the photographs as "one step above useless." R1769. He noted that the photographs were not taken at right angles and did not include a scale, which undermined their utility for comparison purposes. R1763-65. He also explained that in one photograph, the pathologist was pulling on the skin, which could distort both the shape of the injury and the size of any spaces in it. R1763-66.

When asked to assume that the injury in the photographs was a bitemark, Dr. Pavlik agreed that defendant's teeth were "consistent" with the mark. R1787. But Dr. Pavlik opined that Seitz's teeth, which had shape and spacing similar to defendant's, also "very likely could have" made the mark. R1794-96. According to Dr. Pavlik, as much as ten percent of the adult population have spacing between their teeth. R1767, 1770, 1793. Dr. Pavlik also explained that people without spacing between their teeth can leave spaces in a bitemark due to the shape and condition of their teeth. R1767-77.

Dr. Norman Sperber likewise testified that, due to the poor quality of the autopsy photographs, he was "not sure that there are any bite marks shown." R1814-15. Dr. Sperber explained that some of the marks in question "resemble bite marks," but that they "resemble other things as well." R1827. Referring to two of the enlarged autopsy photographs showing a straight-line injury, Dr. Sperber testified that it was "impossible" for a bitemark to create

that shape. R1828. Dr. Sperber further opined that the autopsy photographs were not "suitable" for making bitemark comparisons. R1814-15. Assuming that the injuries were bitemarks, the most that Dr. Sperber could say was that it was "possible" that defendant's teeth could have made them. R1872-73.

Defendant also took the stand. He testified that he had "virtually no memory" of the events in question, but that "things have come together in this last year" after he read the discovery in the case. R1887, 1890. He recalled that he and Scroggins were at Main's house the evening before the murder, and that Scroggins had gone over and talked to Karla, but he denied that he did so too. R1888-89, 1954, 1976-77. He also recalled that on the day of the murder, he went to Main's house around 8 or 8:30 a.m., left to drop off some job applications, then returned to Main's house sometime between 10 a.m. and 1 p.m. and "sat around" on the front porch. R1890-94, 1975.

He recalled "seeing Karla out in the front yard puttering around." R1958. He said she was wearing "white shorts and like a white flowered top." *Id.* He had a "feeling" that he stayed on the porch all day, except that at one point he and Main went to see the paint job Main was doing at a nearby house, and he also might have gone to the store. R1893-95, 1975-76. He recalled being on the front porch when police arrived and then going inside with Main. R1895-96.

Defendant testified that he left Main's house in the early evening and went to Pollard's house, where Main later "explain[ed] more about what was going on over there at Karla's." R1897. He claimed that he first learned that Karla was dead when Main told him at Pollard's house, R1955, and that the next time he heard about her death was a few days later at Spencer Bond's house, R1898-99. Defendant denied making the statements attributed to him by Pollard, Lutz, Spencer Bond, and Mark and Vicki White, and denied ever biting Lutz. R1923, 1962, 1966-75. He also denied killing Karla. R1930.

In closing argument, the prosecutor recounted the evidence of defendant's guilt, including that defendant met Karla the evening before the murder and became infatuated with her, that he returned to Main's house on the day of the murder, that he went to Pollard's house that evening and discussed details of the crime that only the killer could have known, such as the position of Karla's body and that her hands were tied behind her back, that he made false statements to the police about his whereabouts on the day of the murder, and that he later told Lutz that he had once killed a woman. R2068, 2075-76, 2080-81, 2085. In addition, the prosecutor argued that the jury could "convict based on the teeth marks," not only because the bitemarks were "consistent with" and "match[ed]" defendant's teeth, but also because defendant's knowledge of the bitemarks' presence in a conversation days after the murder was itself evidence of his guilt. R2070, 2093, 2116, 2120.

In response, defense counsel discussed the weaknesses in the People's bitemark evidence. R2106-08. He also argued that the testimony of Spencer Bond, Vicki and Mark White, and Pollard about their conversations with defendant shortly after the murder were not reliable because the witnesses did not come forward until several years later, after details of the crime had been disseminated in the press. R2098-99, 2104-05.

The jury found defendant guilty of murdering Karla. R2152. The trial court then sentenced him to 75 years in prison. R2256.

B. Defendant's Conviction Is Affirmed.

Defendant argued on appeal that the trial court erred in admitting the People's expert testimony concerning bitemarks. The appellate court held that defendant had waived the issue by failing to object to the testimony at trial. *See People v. Prante*, 147 Ill. App. 3d 1039, 1062 (5th Dist. 1986). Alternatively, the appellate court found that the trial court did not abuse its discretion in allowing the testimony. *Id.* (citing *People v. Milone*, 43 Ill. App. 3d 385 (2d Dist. 1976)). The court explained that defendant called his own experts and that it was the jury's province to weigh the competing testimony. *Id.*

C. Defendant's Initial Requests for Collateral Relief Are Unsuccessful.

In 1993, defendant filed a petition for postconviction relief, alleging ineffective assistance of counsel and a due process violation based on purportedly false testimony by a serology expert. C2154-56, 2165-68. The

trial court dismissed the petition as untimely, C2179, R2293-97, and the appellate court affirmed, C2218-26.

In 2002, defendant filed a petition for relief from judgment, claiming that his sentence violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000). C2240-48. The trial court dismissed the petition, C2316-17, 2350-51, and the appellate court affirmed, C2367-75, holding that *Apprendi* did not apply retroactively.

In 2017, defendant filed a motion for DNA and fingerprint testing under 725 ILCS 5/116-3. C2376-2430. He sought DNA testing on various items of evidence and analysis of the fingerprints located on the coffee pot found in the basement rafters. C2404-07. With the People's agreement, the trial court allowed the requested testing. C2596-2604, 2620-28. None of the tested items produced an interpretable DNA profile, C2679, and no match was discovered for the fingerprints on the coffee pot, C2927.

D. The Circuit Court Denies Defendant Leave To File a Successive Postconviction Petition.

In October 2018, defendant filed a motion for leave to file a successive postconviction petition. C2637-47, 2650-2712.[4] He alleged that new research in the fields of bitemark evidence and memory science establish his actual innocence. C2695-2705. He also asserted that his constitutional right to due

[4] Defendant initially argued that this was his first postconviction petition, C2637-38, but he later withdrew that argument, *see* Appellant's Reply Brief, *People v. Prante*, No. 5-20-0074 (Ill. App. Ct.), at 1.

process was violated by the introduction of now-discredited bitemark evidence. C2705-07. Finally, he argued that trial counsel was ineffective for failing to (a) object to and effectively challenge the bitemark experts' testimony, (b) discuss the fingerprints on the coffee pot, and (c) object to references to the Ted Bundy case, and that appellate counsel's failure to raise these contentions on direct appeal was also ineffective. C2707-11.

In support of the petition, defendant submitted two affidavits from Dr. Iain Pretty, an expert in forensic odontology. C2720-26, 2930-36. In the first affidavit, Dr. Pretty explained that while "the use of bitemark evidence was a well-accepted forensic technique" at the time of defendant's trial, that "understanding has shifted significantly . . . as a result of new research[.]" C2721. Dr. Pretty summarized several reports (discussed below) that found no evidence "to support the proposition that a forensic odontologist, looking at a bitemark in human skin, could individualize that mark to a potential biter." C2722. Dr. Pretty also discussed a study he conducted that "demonstrate[d] that even board-certified forensic dentists cannot reliably answer the threshold inquiry in bitemark analysis: whether the injury at issue is or is not a bitemark." C2726.

In his second affidavit, Dr. Pretty explained that the evidence on which the bitemark experts relied at trial was "of the lowest possible quality." C2932 (emphasis omitted). Dr. Pretty stated that the autopsy photographs provide "insufficient detail" of dental characteristics to enable a conclusion

that the marks were "caused by teeth, as opposed to some other mechanism of injury." C2933-34. Dr. Pretty also stated that the "lack of forensic detail" was compounded by the "poor quality" of the photographs, absence of a scale, and "evidence of postural distortion." C2934. Dr. Pretty stated that these shortcomings "would not have been fully understood until [recent research] demonstrated that forensic dentists cannot reliably identify injuries as bitemarks." C2935.

In addition, defendant submitted excerpts from a 2009 report of the National Academy of Sciences (NAS),[5] a 2016 report of the President's Council of Advisors on Science and Technology (PCAST),[6] and a 2016 report of the Texas Forensic Science Commission (TFSC).[7] C2938-53, 2976-95. The NAS report found "no evidence of an existing scientific basis for identifying an individual to the exclusion of all others" through bitemark evidence, but noted that "it is reasonable to assume that the process can sometimes reliably exclude suspects." C2976. The report stated that neither the "uniqueness of

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[5] National Academy of Sciences, *Strengthening Forensic Science in the United States: A Path Forward* (2009), available at https://www.ojp.gov/pdffiles1/nij/grants/228091.pdf.

[6] President's Council of Advisors on Science and Technology, *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (2016), available at https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf.

[7] Texas Forensic Science Commission, *Forensic Bitemark Comparison Complaint Filed By National Innocence Project on Behalf of Steven Mark Chaney — Final Report* (2016), available at https://www.txcourts.gov/media/1440871/finalbitemarkreport.pdf.

the human dentition" nor the "ability of the dentition, if unique, to transfer a unique pattern to human skin and the ability of the skin to maintain that uniqueness" has "been scientifically established." C2975. The report also found that even when a person's dentition cannot be eliminated as having made a bitemark, "there is no established science indicating what percentage of the population or subgroup of the population could also have produced the bite." C2974. Finally, the report noted that "different experts provide widely differing results and a high percentage of false positive matches of bite marks using controlled comparison studies." *Id.*

The PCAST report expressed "serious doubt" about "the fundamental premises" of bitemark analysis — namely, that "dental characteristics . . . differ substantially among people" and that "skin . . . can reliably capture these distinctive features." C2949. Relying in part on Dr. Pretty's study, C2950-51, the report found that the "available scientific evidence strongly suggests that examiners cannot consistently agree on whether an injury is a human bitemark and cannot identify the source of [a] bitemark with reasonable accuracy," C2953. The report concluded "that bitemark analysis does not meet the scientific standards for foundational validity." *Id.*

The TFSC report concluded that "there is no scientific basis for stating that a particular patterned injury can be associated to an individual's dentition" or "for assigning probability or statistical weight to an association." C2988-89. The report found that "the overwhelming majority of existing

research does not support the contention that bitemark comparison can be performed reliably and accurately from examiner to examiner due to the subjective nature of the analysis." C2989. Citing Dr. Pretty's study, the report expressed "great concern" over the "inability of [forensic dentists] to agree on the threshold question of whether a patterned injury constitutes a human bitemark." C2990. The report "recommend[ed] that bitemark comparison not be admitted in criminal cases in Texas" until its reliability and validity is scientifically established. C2992-93.

Defendant also submitted an affidavit from Dr. Nancy Franklin, a professor of psychology who studies cognition, memory, and false memory. C2899. Dr. Franklin discussed various deficiencies in human memory that may have affected the ability of several witnesses to accurately recall the details of their conversations with defendant. C2899-2908. Dr. Franklin highlighted the potential effects of a witness's exposure to post-event information, such as media reports, and the phenomenon of "co-witness contagion." C2901-05.

The circuit court denied defendant leave to file the successive petition. C3163-66. The court held that defendant failed to set forth a colorable claim of actual innocence. The court noted that the jury heard "differing expert opinions as to the strength, relevance and reliability of the bite mark evidence," and concluded that new research on the reliability of bitemark evidence was thus unlikely to change the result of the trial. C3164. As for

defendant's challenge to the reliability of witness memories, the court noted that the tendency of memories to "fade[ ] over time" and "be influenced by more recent events" falls within "the knowledge of a typical juror" and that defense counsel made these points in closing argument. C3165. The court thus concluded that defendant's proffered evidence concerning memory science is "not new, [is] cumulative to evidence and arguments already presented at trial[,] and [is] not conclusive evidence of [his] innocence." *Id.*

Addressing defendant's due process claim, the court found that new research concerning the reliability of bitemark evidence "may very well constitute cause" for allowing defendant to pursue his claim in a successive postconviction petition. C3166. But the court found that defendant could not show the requisite prejudice because the testimony at trial "included a great deal of circumstantial evidence [of defendant's guilt] as well as [defendant's] incriminating statements." C3165. And "given all the competing expert bite mark testimony presented at trial," the court observed, "it is entirely possible the jury disregarded the bite mark comparisons entirely." C3165-66.

Finally, the court held that defendant could not show cause for raising his ineffective assistance claims in a successive postconviction petition, as the underlying allegations "were either of record or known to [defendant] at the time his initial postconviction petition was filed." C3166.

E. The Appellate Court Reverses, Allowing Defendant To Challenge the Bitemark Evidence.

The appellate court reversed the circuit court's judgment in part. A1-22. The appellate court agreed that defendant had not set forth a colorable claim of actual innocence because the new research on the validity of bitemark evidence was not "conclusive of his innocence" given the other circumstantial evidence of his guilt. A21-22, ¶¶ 93-97.

But the appellate court held that defendant had made a sufficient showing of cause and prejudice to challenge the admission of the bitemark evidence. A20, ¶ 87. While the court at times recognized that defendant's claim was rooted in due process, *see* A14, ¶ 62; A22, ¶ 96, it did not analyze the claim under that rubric. Instead, the court focused on a question the parties had not briefed: whether bitemark evidence is "scientific evidence" that must satisfy the general acceptance test of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), to be admitted at trial. *See* A15, ¶ 64 (acknowledging that "[n]either party present[ed] any substantive analysis" of the issue).

The court acknowledged *Milone*'s holding that bitemark evidence is not subject to *Frye* because it "'involves only a visual comparison between the wound and the dentition of the defendant,'" with "'no intermediate mechanical stage in which reliability may be questioned.'" A17, ¶ 70 (quoting *Milone*, 43 Ill. App. 3d at 396). But the court disagreed with *Milone*, holding instead "that bite mark evidence is 'scientific evidence' within the meaning of

Frye because it purports to employ a scientific process requiring examination and analysis by an expert trained in interpreting the evidence." A18, ¶ 76.

The court also recognized that any challenge to the admissibility of the bitemark evidence here was barred by res judicata because that claim was rejected on direct appeal, both on the ground that defendant waived the issue by failing to object at trial and based on *Milone*. A18-19, ¶ 78. But the court noted that res judicata can be relaxed when a defendant presents substantial new evidence in support of a claim. *Id.* Thus, in light of the new research questioning the scientific validity of bitemark evidence, the court held that defendant had "established cause for failing to raise his claim in an earlier proceeding." A19, ¶ 79.

The court further held that defendant had made a prima facie showing of prejudice, reasoning that the expert testimony identifying the injuries on Karla's shoulder as bitemarks was "material" to his conviction because it "corroborated" the lay testimony that defendant discussed the bitemarks days after the murder, which the court found to be "the only clear link between [defendant] and the crime." A19-20, ¶¶ 80-84. The appellate court thus reversed the circuit court's judgment denying defendant leave to file a successive postconviction petition and remanded the matter to the circuit court for further proceedings, A22, ¶ 99, suggesting that the court should "subject[ ] bite mark evidence to the rigors of *Frye*," A18, ¶ 77. The appellate court did not address defendant's ineffective assistance claims. A22, ¶ 97.

ARGUMENT

I. Background Principles and Standard of Review

The Post-Conviction Hearing Act "provides a statutory remedy to criminal defendants who claim that substantial violations of their constitutional rights occurred at trial." *People v. Edwards*, 2012 IL 111711, ¶ 21. But a defendant may file only one postconviction petition as of right. To raise a claim in a successive postconviction petition, a defendant must obtain leave of court, which will be granted only if the defendant presents a colorable claim of actual innocence, *see id.*, ¶¶ 23-24, or "demonstrates cause for his or her failure to bring the [proposed] claim in his or her initial post-conviction proceedings and prejudice results from that failure," 725 ILCS 5/122-1(f). To demonstrate cause, a defendant must "identify[ ] an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings." *Id.* And to establish prejudice, a defendant must "demonstrat[e] 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." *Id.* This Court reviews a decision denying leave to file a successive postconviction petition de novo. *People v. Jackson*, 2021 IL 124818, ¶ 27.

II. The Circuit Court Correctly Denied Defendant Leave To File a Successive Postconviction Petition Raising a Due Process Challenge to the Bitemark Evidence Presented at Trial.

Defendant seeks to raise in a successive postconviction petition a due process challenge to the bitemark evidence presented at trial. Because at the leave-to-file stage "all well-pleaded allegations in the petition and supporting affidavits that are not positively rebutted by the trial record are to be taken as true," *People v. Robinson*, 2020 IL 123849, ¶ 45, the People assume for purposes of this appeal that the bitemark evidence presented at trial has now been discredited and deemed unreliable by the scientific community.

Defendant has shown cause for not raising this claim in an earlier proceeding because the scientific evidence submitted in support of his claim did not exist at the time of trial or when he filed his initial postconviction petition. As this Court has recognized, "a showing that the factual or legal basis for a claim was not reasonably available . . . constitute[s] cause" for raising the claim in a successive petition. *People v. Pitsonbarger*, 205 Ill. 2d 444, 460 (2002) (internal quotation marks omitted).

But while defendant has shown cause, he has not demonstrated that the bitemark evidence "so infected the trial that [his] resulting conviction . . . violated due process." 725 ILCS 5/122-1(f). The circuit court thus correctly denied defendant leave to raise his due process claim based on that lack of prejudice.

Although the admissibility of evidence is ordinarily governed by state evidentiary rules, the constitutional right to due process may be violated "when evidence is so extremely unfair that its admission violates fundamental conceptions of justice." *Perry v. New Hampshire*, 565 U.S. 228, 237 (2012) (internal quotation marks omitted). Several courts have thus held (and the People do not contest) that the presentation of expert testimony that was considered reliable at the time of trial but is later discredited violates due process if the testimony "undermined the fundamental fairness of the entire trial." *Han Tak Lee v. Glunt*, 667 F.3d 397, 403 (3d Cir. 2012) (internal quotation marks omitted) (fire science); *see Gimenez v. Ochoa*, 821 F.3d 1136, 1145 (9th Cir. 2016) (shaken baby syndrome). As one court has explained, the admission of unreliable expert testimony (there, bitemark evidence) "constitutes a denial of fundamental fairness [when] the evidence is . . . a crucial, critical[,] highly significant factor" in the conviction. *Ege v. Yukins*, 485 F.3d 364, 375 (6th Cir. 2007) (internal quotation marks omitted).[8]

[8] Other courts have granted relief on actual innocence and similar claims in cases where later-discredited bitemark evidence was presented at trial. *See Howard v. State*, 300 So. 3d 1011, 1016-20 (Miss. 2020) (finding that result of trial would probably be different based on newly discovered DNA evidence pointing to another perpetrator and new evidence discrediting the bitemark testimony presented at trial); *Ex parte Chaney*, 563 S.W.3d 239, 254-63, 274-78 (Tex. Crim. App. 2018) (finding it more likely than not that the defendant would not have been convicted without discredited bitemark evidence, and granting relief on separate actual innocence claim in light of, among other things, new research undermining bitemark evidence and prosecution's suppression of other favorable evidence). For the same reasons that defendant cannot show that the bitemark evidence here rendered his trial fundamentally unfair, he also cannot show that he would not have been

Considering both the competing bitemark testimony presented at trial and the strength of the People's additional evidence, defendant cannot show that the bitemark evidence "undermined the fundamental fairness of the entire trial." *Han Tak Lee*, 667 F.3d at 403. To start, the People's bitemark experts did not positively identify defendant as the person who made the marks on Karla's shoulder. Rather, Dr. Campbell testified only that defendant's teeth were "consistent with" and "could have made" the marks. R1566-67, 1581; *see* R1583 ("we are going with consistent with, and that's all"). Dr. Levine likewise opined only that defendant's teeth "could have caused" the marks. R1625. And while Dr. Mullen testified that he had seen the type of spacing present in defendant's upper front teeth in less than one percent of his patients, R1643, he was not presented as an expert in forensic odontology and did not opine on whether defendant's teeth could have made (or did make) the marks on Karla's body. Meanwhile, Dr. Pavlik, one of defendant's expert forensic odontologists, testified that as much as ten percent of the adult population have spacing between their teeth, R1767, 1770, 1793, and that even people without spacing between their teeth can leave spaces in a bitemark, R1767-77. Thus, while new research suggests that forensic odontologists cannot reliably "individualize" a bitemark "to a potential biter," C2722, none of the experts here purported to do so.

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convicted absent that evidence, as both the circuit and appellate courts found in rejecting his actual innocence claim.

The bitemark testimony presented here thus drastically differs from the bitemark testimony in cases where courts have granted postconviction relief. *See Howard*, 300 So. 3d at 1017 (expert testified that bitemark "was an 'identical' match to [the defendant's] teeth" and "that [the defendant] 'indeed and without doubt' inflicted the bite mark"); *Chaney*, 563 S.W.3d at 262 (expert testified that the defendant "was a 'perfect match' and that there was only a 'one to a million' chance that someone other than [the defendant] was the source of the mark"); *Ege*, 485 F.3d at 374 (expert testified that bitemark was "highly consistent with the [defendant's] dentition" and that, of the 3.5 million people in that metropolitan area, "nobody else would match up").

Moreover, defendant presented two expert forensic dentists who vigorously contested even the limited opinions of the People's experts. Dr. Pavlick and Dr. Sperber both disputed that the marks on Karla's body could be deemed human bitemarks. Dr. Pavlick found "very little evidence . . . to even substantiate that we have a bite mark." R1766. He explained that while the photographs showed "abrasions on the neck that . . . could be a bite mark," the injuries also could "have been made through strangulation." R1764. Dr. Sperber likewise was "not sure that there are any bite marks shown," explaining that while some of the marks "resemble bite marks," they "resemble other things as well." R1815, 1827. In light of the competing expert testimony, the recent finding that forensic dentists cannot consistently

determine whether an injury is a bitemark, *see* C2726, C2953, would have been readily apparent to the jury.

Defendant's trial experts also made many of the same criticisms of the autopsy photographs that defendant's current expert now makes. In a postconviction affidavit, Dr. Pretty opines that the People's experts relied on "poor quality" photographs that do not include a scale and show evidence of skin distortion. C2934. But Dr. Pavlik similarly explained at trial that the photographs were not taken at right angles and did not include a scale and noted that in one photograph the pathologist was pulling on the skin. R1763-64. Indeed, Dr. Pavlik described the photographs as "one step above useless" for making bitemark comparisons. R1769. Dr. Sperber likewise described the photographs as not "suitable" for that purpose. R1814-15.

There was also considerable evidence of defendant's guilt aside from the bitemark evidence — including evidence of his motive and opportunity to commit the crime, his shifting accounts of his whereabouts at the time of the murder, his knowledge of details about the crime scene in the hours and days after the murder, and his admission to a girlfriend years later that he had killed a woman.

To recap, the evidence established that after being introduced to Karla the night before her murder, defendant expressed considerable sexual interest in her and was angered that she had not invited him to her party. R1168-80, 1186. While defendant initially told police that he returned to

Main's house — next door to Karla's — only briefly the following morning, R1102-03, 1507, he admitted at trial that he was at Main's house that day from as early as 10 a.m. until shortly after the police arrived in the evening, R1890-97, 1975-76. That latter account was corroborated by Vancil, who testified that defendant was on Main's front porch from about 10 a.m. to 11 a.m., but then disappeared for about an hour, before returning to the porch around noon. R1086-91.

Around the same time that Vancil said defendant left the porch, Eric and Edna Moses saw a man talking to Karla in her driveway. R1068-69, 1080-81. At trial, defendant admitted that he had seen Karla in her front yard that afternoon and testified that she was wearing a floral shirt, similar to that described by Eric. R1069-70, 1958. And in a recorded conversation with Spencer Bond, defendant said that he may have spoken with Karla in the driveway that day. R1406, 1417. According to Eric and Edna's account, Karla got mad at the man she was talking to, turned and walked toward her house, and the man followed her. R1072, 1082. A short time later, Karla's friend arrived at Karla's house and knocked on the door, but Karla did not answer. R1045-47.

Later that evening, defendant told Pollard that Karla had been killed and described how her "body was found curled up on the floor with its hands tied behind its back." R1480-81. These were facts that, at the time, only the killer would have known and were consistent with the testimony that Karla

had been found bent over a large metal barrel with her hands tied behind her back. R1149. And defendant made additional incriminating statements a few days later to Spencer Bond and Vicki and Mark White — aside from his reference to bitemarks. Vicki testified that defendant said that Karla's body had been found in the basement of her house and that "she was in a curled up position." R1291. And Spencer testified that defendant said Karla "was in a curled position stuck in a pail of water down in the basement" and "had been tied up." R1313-15. These witnesses also testified that defendant was acting strange and seemed nervous and that he said that he and Main were going to have to get their stories straight. R1291-93, 1305-06, 1315-16.

Dr. Franklin's affidavit suggests that the witnesses' memories could have been influenced by exposure to subsequent media reports about the case and their interactions with each other. C2901-05. But defense counsel advanced a similar theory in closing argument about the effect of media reports on the witnesses' memories, *see* R2098-99, 2105, which the jury apparently rejected. As for the possibility of co-witness contagion, Spencer Bond testified that he did not talk about the conversation with the other participants before he was interviewed by police. R1317-18. And Detective O'Connor testified that he interviewed the witnesses separately. R1268.

Taken together, the non-bitemark evidence convincingly established defendant's guilt. In light of the independent strength of that evidence and the stark disagreement between the competing bitemark experts, it is likely

that the jury gave little weight to the bitemark evidence. In other words, the bitemark evidence was not "a crucial, critical[,] highly significant factor" in defendant's conviction, *Ege*, 485 F.3d at 375, nor did it so infect the trial as to render the proceeding fundamentally unfair.

Because defendant cannot demonstrate that the bitemark evidence "so infected the trial that [his] resulting conviction . . . violated due process," 725 ILCS 5/122-1(f), the circuit court correctly denied leave to file a successive postconviction petition raising a due process challenge to that evidence.

III. The Appellate Court Erred in Considering Whether Bitemark Evidence Is Subject to *Frye*'s Admissibility Test Rather Than Addressing Defendant's Due Process Claim.

Rather than assessing whether defendant could show that unreliable bitemark evidence violated his right to due process, the appellate court addressed the distinct issue of whether bitemark evidence is subject to the admissibility test of *Frye*. Under that test, new or novel "scientific evidence is admissible at trial only if the methodology or scientific principle upon which the opinion is based is sufficiently established to have gained general acceptance in the particular field in which it belongs." *People v. McKown*, 226 Ill. 2d 245, 254 (2007) (internal quotation marks omitted). The appellate court's decision to address whether bitemark evidence is "scientific evidence" subject to *Frye* was wrong for three reasons.

First, the parties did not brief the question, as the appellate court acknowledged. *See* A15, ¶ 64 (stating that "[n]either party present[ed] any

substantive analysis" of "whether bite mark evidence is 'scientific evidence' that is subject to the dictates of *Frye*"). Defendant's opening brief did not cite *Frye*, and the closest it came to addressing whether bitemark evidence is subject to *Frye* was by referencing a federal district court decision noting that bitemark evidence would likely be inadmissible under the federal rules of evidence and an Oregon state court decision holding such evidence inadmissible under state law. *See* Appellant's Brief, *People v. Prante*, No. 5-20-0074 (Ill. App. Ct.), at ii-v, 36. The People's response brief, which also did not cite *Frye*, noted that other decisions, including in Illinois, allow admission of bitemark evidence. *See* Brief and Argument for Plaintiff-Appellee, *People v. Prante*, No. 5-20-0074 (Ill. App. Ct.), at i-iv, 22-23. The first reference to *Frye* came in defendant's reply brief, where he asserted that bitemark evidence would not satisfy *Frye* because it is not generally accepted in the scientific community at this time, but did not address whether bitemark evidence is subject to *Frye* in the first place. *See* Appellant's Reply Brief, *People v. Prante*, No. 5-20-0074 (Ill. App. Ct.), at 2. By addressing an issue that the parties did not brief, the appellate court contravened the well-settled rule that "a reviewing court should not normally search the record for unargued and unbriefed reasons to reverse a trial court judgment." *People v. Givens*, 237 Ill. 2d 311, 323 (2010) (internal quotation marks and emphasis omitted).

Second, resolution of the *Frye* issue would have no effect on the outcome of this case, which is undoubtedly why neither party briefed it below. For one thing, the admissibility of evidence under *Frye* does not present a question of constitutional dimension. *See Brown v. Watters*, 599 F.3d 602, 616 (7th Cir. 2010) (explaining that the federal *Daubert* standard for admission of expert scientific evidence has not "been imposed on states as a requirement of due process"); *Milone v. Camp*, 22 F.3d 693, 702 (7th Cir. 1994) (explaining that the *Frye* standard does not "set a constitutional floor on the admissibility of scientific evidence"). Thus, even if bitemark evidence were inadmissible under *Frye*, this nonconstitutional claim would not provide a basis for postconviction relief. *See People v. Taliani*, 2021 IL 125891, ¶ 57 ("postconviction relief is unavailable if no constitutional right is implicated in the asserted claim"); *People v. Washington*, 171 Ill. 2d 475, 480 (1996) (postconviction "relief is limited to constitutional claims").

Moreover, even if bitemark evidence were subject to *Frye* and even if *Frye*'s general acceptance standard for the admission of expert scientific testimony were constitutionally rooted, defendant could not show that the trial court erred in allowing the bitemark testimony in this case, since he concedes that the field of bitemark analysis was generally accepted in the scientific community at the time of trial. *See* C2655 ("At [defendant's] trial, the ability of forensic odontologists to reliably identify injuries as bite marks and then to associate those bite marks with an individual was not in dispute,

and the technique was well-accepted by the scientific community"); C2721 ("For much of the last three decades, the use of bitemark evidence was a well-accepted forensic technique, generally understood by its practitioners and by the scientific community to be valid and reliable.").

For these reasons, too, the appellate court should have refrained from addressing whether bitemark evidence is subject to *Frye*. *See People v. Bass*, 2021 IL 125434, ¶ 29 (courts should not "consider issues where the result will not be affected regardless of how those issues are decided").

Third, even were it appropriate to "review cases merely to establish precedent" for future cases, *Bass*, 2021 IL 125434, ¶ 29, a determination that the bitemark testimony presented at a trial almost 40 years ago constitutes scientific evidence that is subject to *Frye* would have limited, if any, effect on future cases. Expert testimony is scientific if it is based on a "scientific methodology or principle," Ill. R. Evid. 702, or "is the product of scientific tests or studies," *McKown*, 226 Ill. 2d at 254. In contrast, expert testimony is generally not deemed scientific when it "is derived solely from [the expert's] observations and experiences." *People v. Schuit*, 2016 IL App (1st) 150312, ¶ 95 (internal quotation marks omitted). Here, the People's experts testified that the standard at the time for evaluating bitemark evidence was limited to the training and experience of the examiner. R1559, 1614-15. "The line that separates scientific and nonscientific evidence is not always clear," *People v. Coleman*, 2014 IL App (5th) 110274, ¶ 114, but the expert testimony here

likely fell on the nonscientific side of that line because it relied primarily on the experts' "observations and experiences," *Schuit*, 2016 IL App (1st) 150312, ¶ 95 (internal quotation marks omitted), rather than any "scientific methodology or principle," Ill. R. Evid. 702, or any "scientific tests or studies," *McKown*, 226 Ill. 2d at 254. Regardless, this is not a question that should (or need) be answered in this case, not only because the issue was not briefed below and would provide no basis for relief, but also because it is unlikely that expert testimony similar to that presented here will be offered in any future case, given the new research defendant has proffered. And whether any modern-day bitemark evidence should be subject to (and can pass muster under) *Frye* is an issue properly litigated in a case where it is actually presented.

IV. No Remand for Consideration of Defendant's Ineffective Assistance Claims Is Necessary.

Finally, should this Court reverse the appellate court's judgment allowing defendant to pursue a challenge to the bitemark evidence, there is no need to remand for the appellate court to consider defendant's ineffective assistance claims because it is evident that he cannot establish cause for failing to raise those claims in his initial postconviction petition or resulting prejudice. *See Pitsonbarger*, 205 Ill. 2d at 463 (a defendant "must establish cause and prejudice as to each individual claim asserted in a successive [postconviction] petition").

Defendant contends that trial counsel was ineffective for failing to rely on the unmatched fingerprints on the coffee pot, object to references to the Ted Bundy case, and object to and effectively challenge the testimony of the People's bitemark experts. C2707-11. He also argues that appellate counsel was ineffective for failing to raise these contentions on direct appeal. C2711. But each of these omissions was apparent at the time defendant filed his first postconviction petition. And he has not "identif[ied] an objective factor that impeded his . . . ability to raise" any of these claims "during his . . . initial post-conviction proceedings." 725 ILCS 5/122-1(f). He thus cannot show cause for failing to raise these claims in those proceedings.

Nor can he show prejudice. Given the considerable evidence of his guilt, *see supra* pp. 29-31, there is no reasonable probability that the result of defendant's trial would have been different had counsel discussed the unmatched fingerprints and objected to references to the Bundy case. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). And given the strength of the non-bitemark evidence and the competing bitemark experts that defense counsel presented, *see supra* pp. 27-29, no reasonable probability exists that objecting to or further challenging the People's experts would have changed the result of the trial. Therefore, defendant cannot show that any of counsel's alleged errors "so infected the trial that [his] resulting conviction . . . violated due process." 725 ILCS 5/122-1(f).

CONCLUSION

This Court should reverse the appellate court's judgment and affirm the judgment of the circuit court denying defendant leave to file a successive postconviction petition.

February 15, 2022

Respectfully submitted,

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RULE 341(c) CERTIFICATE OF COMPLIANCE

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. I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing 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(a), is 38 pages.

/s/ Eric M. Levin
ERIC M. LEVIN
Assistant Attorney General

APPENDIX

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Illinois Official Reports

Appellate Court

People v. Prante, 2021 IL App (5th) 200074

Appellate Court Caption	THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOHN PRANTE, Defendant-Appellant.
District & No.	Fifth District No. 5-20-0074
Filed	April 12, 2021
Decision Under Review	Appeal from the Circuit Court of Madison County, No. 82-CF-381; the Hon. Neil T. Schroeder, Judge, presiding.
Judgment	Reversed and remanded.
Counsel on Appeal	Joshua Tepfer and Lindsay Hagy, of the Exoneration Project at the University of Chicago Law School, of Chicago, and Dana M. Delger (*pro hac vice*), of Innocence Project, Inc., of New York, New York, for appellant. Thomas D. Gibbons, State's Attorney, of Edwardsville (Patrick Delfino, Patrick D. Daly, and Julia Kaye Wykoff, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.
Panel	JUSTICE CATES delivered the judgment of the court, with opinion. Justices Moore and Wharton concurred in the judgment and opinion.

OPINION

¶ 1 The petitioner, John N. Prante, appeals from an order of the circuit court of Madison County, denying him leave to file a successive petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)). The successive petition brought five claims: (1) that new scientific evidence regarding memory science, and the invalidity and unreliability of bite mark evidence demonstrates that he is actually innocent of the crime; (2) his constitutional right to due process of law was violated at trial by the State's use of faulty and since-repudiated forensic science on bite mark comparisons; (3) ineffective assistance of counsel of trial counsel, including for failing to challenge the admission of the State's evidence regarding bite marks and bite mark comparisons; (4) ineffective assistance of counsel of appellate counsel for failing to raise trial counsel's ineffectiveness; and (5) cumulative error. The circuit court denied the motion for leave to file the successive postconviction petition. For the reasons that follow, we reverse the judgment of the circuit court.

¶ 2 I. BACKGROUND

¶ 3 Following a three-week jury trial in June and July of 1983, the petitioner was convicted of the June 21, 1978, murder of Karla Brown. The petitioner was sentenced to the Department of Corrections for an extended term of 75 years. The facts of this case were set forth extensively in the petitioner's direct appeal. The evidence, as relevant to the case currently before us, is as follows.

¶ 4 On June 20, 1978, Karla Brown and her boyfriend, Mark Fair, moved into a home they recently purchased at 979 Acton Avenue, Wood River, Illinois. That evening, Fair and Brown, with the assistance of several friends, moved some of their belongings into the home. Paul Main, a friend of the petitioner, lived next door at 989 Acton Avenue. The petitioner and John Scroggins were visiting Main while Brown and Fair moved in next door. Scroggins, who knew both Brown and the petitioner, testified that he introduced Brown to the petitioner, who expressed a sexual interest in Brown.

¶ 5 At 7:45 a.m. the following morning, June 21, 1978, Fair left for work, leaving Brown alone in her new home. Brown spoke to Helen Fair, Fair's mother, on the phone between 10 a.m. and 11 a.m. The conversation was interrupted when Brown said she would have to call Helen back because "someone [was] at the door."

¶ 6 At approximately 10:45 a.m., Edna Moses was driving her grandson, Eric Moses, to the dentist, when she pulled into the driveway at Brown's home to turn her vehicle around. Edna and Eric saw a woman, matching the description of the victim, standing in the driveway talking to a man. Eric testified the woman "sort of got mad at [the man]." Edna testified that as she was turning around, the woman started to walk toward the house. At 11 a.m., a friend of Brown paid a visit to the home. Brown's van was at the house, but no one answered either the front or back door. Phone calls made to Brown's house between 11:45 a.m. and 2:30 p.m. went unanswered.

¶ 7 Around 4:30 p.m., Fair left work and drove to Tom Fiegenbaum's house. The men used Fiegenbaum's truck to pick up additional items from Fair's prior home to bring to the new house. When they arrived at the Acton Avenue house, Fair used his key to enter the front door, while Fiegenbaum backed his truck into the driveway. Fair went through the house to the back

door, which was unlocked, to help unload the truck. After the truck was unloaded, Fair invited Fiegenbaum inside to show him the house. The men entered through the back door, and Fair led Fiegenbaum into the basement. When Fair got to the foot of the stairs, he saw blood on the floor. Fair then noticed that the room was in disarray and there was blood all over the couch. Fair glanced into the laundry room and found Brown's body. Brown was bent at the waist over the side of a large metal lard can, with her head and shoulders submerged in water. Brown's hands were tied behind her back with a white extension cord from which the ends had been cut. Brown was nude from the waist down but was wearing a winter sweater that had been buttoned at the top. Fair pulled Brown's stiffened body from the can and laid her on the floor while Fiegenbaum called the police. Brown had large gashes on her forehead, chin, and nose. Two men's socks, tied together, were tied tightly around her neck. The area where the socks had been tied around her neck was bruised.

¶ 8 Police arrived and secured the crime scene. Fair told police that the men's socks had been kept in a dresser drawer in the bedroom upstairs and the extension cord had been packed in a box in the basement. The clothes that had been stored in the lard can had been dumped onto the floor and a stand of television trays had been overturned. A couch in the basement was soaked with blood, and blood was splattered on the basement floor. The bloodied couch cushion was saturated with water. On the coffee table near the couch was a bloodstained tampon. A coffee pot from the coffee maker in the kitchen upstairs, which police believed had been handled by the perpetrator, was found in the rafters of the laundry room. The scene was processed for fingerprints. All of the fingerprints recovered matched the victim, except for one, which was recovered from the coffee pot. This print did not match the petitioner and has not been matched to anyone else.

¶ 9 Pathologist Dr. Harry Parks conducted an autopsy on June 22, 1978, and concluded that Brown died from strangulation and that her facial injuries were caused by a blunt object. Dr. Parks estimated the time of death as 11:45 a.m. but believed this time could vary by as much as two to three hours.

¶ 10 Two witnesses testified that they saw the petitioner at Main's home on the day of the murder. Edna Vancil, who lived across the street from the residences of the victim and Main, testified that the petitioner arrived at Main's home between 9:30 and 10 a.m. on the day of the murder. Vancil testified that the petitioner and Main sat on the front porch of Main's home until approximately 11 a.m., when the two men "disappeared." Vancil stated that the men reappeared at noon and sat on the front porch until 3 p.m., when the petitioner left in his vehicle. Charles Nonn, a police officer for the City of Wood River, responded to the scene at about 6:20 p.m. Nonn testified he had known the petitioner for several years and that he saw the petitioner and Main standing in Main's front yard when he arrived.

¶ 11 Three days after the murder, on June 24, 1978, Ralph Skinner, the chief of police for the City of Wood River, interviewed the petitioner at his home. Skinner testified that the petitioner indicated he was at Main's house the evening before the murder while Brown and Fair moved in. The petitioner stated that on the day of the murder he dropped off an application at the Shell Oil Company in Roxana, Illinois, at approximately 8:15 a.m. The petitioner stated he arrived at Main's house at about 8:30 a.m. to see if Main would like to go to St. Louis to pick up employment applications while the petitioner dropped some off. The petitioner stated that Main was busy painting a neighbor's house, so the petitioner dropped off the applications alone. Skinner testified that the petitioner indicated he had "bummed around" afterward and was

unsure of where he stopped until he saw Main again at approximately 6 p.m. at Harold Pollard's house. The petitioner advised Skinner that he learned of the murder at that time, when Main told him that the girl next door had been killed.

¶ 12 Two weeks after the murder, on July 5, 1978, Eldon McEuen, an officer for the Wood River Police Department, interviewed the petitioner regarding the investigation. While reviewing the reports, McEuen noticed a discrepancy between the information provided by Main and the petitioner. McEuen testified that the petitioner reiterated that he had stopped at Main's house after dropping off his application at Shell Oil Company and then left to drop off additional applications alone because Main was busy painting a home nearby. McEuen testified that he asked the petitioner if he returned to Main's house afterward, and the petitioner indicated "he wasn't sure if he did or didn't." McEuen testified that the petitioner was unable to account for some of his time and stated the next thing he remembered was seeing Main at Harold Pollard's home when Main advised him about the murder.

¶ 13 In the summer of 1980, investigators sent photographs of the crime scene to Dr. Homer Campbell of the University of New Mexico. Dr. Campbell indicated that he believed certain marks, in the area of the victim's right collarbone, were bite marks. Prior to this time, no one who had examined the body or worked on the case had identified these marks as bite marks. In the spring of 1982, the police sought the assistance of the Federal Bureau of Investigation to develop a psychological profile of the perpetrator. As a result of this collaboration, the police decided to exhume Brown's body and sought to increase the media exposure regarding the crime. Articles appeared in regional newspapers about the impending exhumation, the existence of bite marks on the body, and technological advances in forensic science since the time of the murder.

¶ 14 On June 1, 1982, Brown's body was exhumed. The following day, Dr. Mary Case performed a second autopsy. Dr. Case opined that the cause of death was drowning based on crime scene photos showing the presence of foam around the victim's nose. Dr. Case believed the victim had been sexually assaulted. Dr. Case testified that "bite marks" in the area of the right collarbone had been inflicted at about the time of death because microscopic slides of that tissue showed fresh hemorrhage in the subcutaneous tissue with no inflammation.

¶ 15 At trial, the State presented the testimony of several witnesses, suggesting the petitioner knew certain details about the crime before they were publicized in the media. Harold Pollard testified that the petitioner arrived at Pollard's house around 6:30 or 7 p.m. on the day of the murder. Pollard stated that the petitioner seemed agitated or anxious and asked Pollard for a tranquilizer. The petitioner said that he had been at Main's house most of the day, smoking pot and drinking beer. The petitioner indicated that he had just left Main's house and that the girl living next door had been killed. Pollard testified that he asked the petitioner how he knew this, and the petitioner stated that "he got a glimpse of the girl by looking over the policeman's shoulder at the crime scene." Pollard testified the petitioner indicated "that the body was found curled up on the floor with its hands tied behind its back." Pollard testified that Main arrived at Pollard's house a short time later. Pollard stated that a day or two earlier, the petitioner had expressed sexual interest in the "nice looking blond chick [that] had moved in next door."

¶ 16 Vickie White testified that she had known the petitioner for about eight years. She stated that not more than three days after the murder, she and her husband, Mark, were visiting the home of Spencer and Roxanne Bond. The group was in the kitchen when the petitioner arrived and began to discuss Brown's murder. Mrs. White testified that the petitioner indicated he had

known the victim from college. Mrs. White also testified that the petitioner "had stated that she was murdered and that her body was down in the basement, and she was in a curled up position, and she had teeth marks on her body." Mrs. White testified that when the petitioner made the comment about the teeth marks, the petitioner "put his arm over his shoulder." Mrs. White stated that the petitioner indicated that he had been at Brown's residence on the day of the murder, that he had spoken with the victim, and that he "had to get his story straight with Paul Main." Mrs. White testified that the petitioner stated that Brown was "alright" when he left her house that day and that he was supposed to go back to her house later that day. Mrs. White first reported the petitioner's statements to the police on June 1, 1982. Mrs. White testified that she did not appreciate the significance of this conversation until she read the newspaper articles concerning the exhumation and the bite marks on Brown's body.

¶ 17 Mark White testified that within three days of the murder, the petitioner brought up the subject of Brown's murder while they were in the Bonds' kitchen. Mr. White testified that the petitioner stated he knew Brown, that he had been over to Brown's house talking to her on the day of the murder, and that he was supposed to return to her home that day. Mr. White testified the petitioner stated that he was afraid that he was the last person to see Brown alive and that he expected to be questioned by the police.

¶ 18 Roxanne Bond testified that she had known the petitioner for eight or nine years and that the petitioner had been a good friend of the Bonds. Mrs. Bond testified that she did not hear much of the conversation in her home on the evening in question because she was frequently outside with her child. Mrs. Bond testified that she did hear the petitioner state that he "had to get his story straight."

¶ 19 Spencer Bond testified that he had known the petitioner for 9 or 10 years and that he usually saw the petitioner once a day around the time of the murder. Mr. Bond testified that he first heard about Brown's murder from the petitioner on the Friday night following the murder. Mr. Bond stated that he and the Whites were in the kitchen of his home when the petitioner arrived. Mr. Bond testified that the petitioner stated he had been at Main's house the day of the murder, and that he had spoken to Brown at her house around 2 or 3 p.m. The petitioner indicated that he was supposed to go back to Brown's house that day because the petitioner might have a date with her. Mr. Bond testified that the petitioner stated that the victim had been tied up and "was in a curled position stuck in a pail of water down in the basement." Mr. Bond testified that the petitioner stated that the victim "had teeth marks on her shoulder where she had been bitten on her left shoulder," gesturing as he made the statement. Mr. Bond stated that the petitioner indicated that he had put in a few work applications, and that he and Main had been getting drunk and high at Main's house that day. The petitioner indicated that he and Main "had to get their stories together as to what they were doing that day" because they did not want to give conflicting statements to the police. Mr. Bond testified that he did not realize the significance of the petitioner's statements when they were made and that he first told police about the statements on June 1, 1982, when the police came to talk to him. Mr. Bond indicated he had not talked to Vickie or Mark White prior to his interview with police.

¶ 20 On June 2, 1982, Mr. Bond participated in a wiretap of the petitioner conducted by police. In the first taped conversation, the petitioner stated that he and Main were getting drunk and high at Main's home on the day of the murder and that they had seen the victim "putterin' around outside" that day. The petitioner stated that he did not even know that the murder had occurred until he read about it in the newspaper a few days later.

¶ 21 On June 4, 1982, police officers went to the petitioner's home to obtain his cooperation in making dental impressions of his teeth. On the way to the dentist's office, the petitioner initiated a conversation with the officers. The petitioner stated that he was drinking wine on Main's front porch on the day of the murder and that he was there when the police arrived at Brown's house. The petitioner also asked the officers whether Spencer Bond was working with the police.

¶ 22 Later on June 4, 1982, Mr. Bond participated in a second wiretapped conversation with the petitioner. During this conversation, the petitioner stated that he was at Main's house from approximately 10 or 11 a.m. until sometime between 4 and 7 p.m. on the day of the murder. The petitioner stated that he was drinking wine and smoking pot on Main's porch, and that he and Main had left the house a few times to get more alcohol. The petitioner stated that he saw Fair arrive home that day, as well as the police, the ambulance, and the coroner. In this conversation, the petitioner denied ever being at the victim's home but acknowledged that he may have spoken to her in the driveway.

¶ 23 The State also presented the testimony of Susan Lutz, who had met the petitioner in 1980 or 1981 and had dated the petitioner for a while. Lutz testified that once, when they were in bed, the petitioner "kind of whispered in my ear that he had killed a woman." When Lutz questioned the petitioner about it the next day, the petitioner stated he killed the woman because he was "mad" but that he "can't really talk about it because I'll lose my freedom." Lutz testified that the petitioner had bitten her on the neck a couple of times.

¶ 24 On June 8, 1982, investigators took the dental impressions of the petitioner, Paul Main, and another suspect named Joe Seitz to Dr. Lowell Levine in New York. Agent Randy Rushing testified that Dr. Levine compared the dental impression with photographs of Brown's body and eliminated Seitz and Main as suspects. On June 8, 1982, the petitioner was arrested. The police seized two white electrical cords with no male or female ends from the petitioner's vehicle.

¶ 25 Dr. Campbell, an expert in forensic odontology and photographic enhancement, explained that forensic odontology, as a science, involved the identification of deceased individuals through dental records, injury assessments, and the analysis of bite mark injury patterns. Dr. Campbell was a member of the American Academy of Forensic Sciences, the American Society of Forensic Odontology, and the American Board of Forensic Odontology (the Board). The Board was created in 1976 after the American Academy of Forensic Sciences was requested to sponsor a certification program "to bring the standards [of forensic odontology] up to a par." The Board was the certifying body for forensic odontologists, which required new members to take an examination in order to become certified. Dr. Campbell testified that a practitioner should have some knowledge about each area of forensic odontology, but that it was not necessary for a practitioner "to be an expert in each and every field" in order to become certified. Dr. Campbell testified that he was Board-certified, indicating that he had been "grandfathered in." Dr. Campbell explained that during the Board's first two years, all forensic odontologists that met certain threshold requirements—including an unspecified number of years practicing, cases performed, and autopsies attended—were automatically given Board certification in forensic dentistry.

¶ 26 Dr. Campbell testified that a bite mark examination requires the examiner to first determine whether the injury in question was a human bite mark. Dr. Campbell testified that a human bite mark is ovoid in shape and that frequently only the front six teeth will mark. A bite mark

comparison requires the examiner to compare the "class characteristics" and the "individual characteristics" of the teeth to the mark. Class characteristics are "general characteristics" present in everyone, such as the arch or curvature, general spacing between the teeth, and the general size and shape of the teeth. For example, the central incisors or upper front teeth are usually wider, the lateral incisors are narrower, and the eye teeth or canines are more pointed. The central and lateral incisors on the lower jaw are generally the same size as each other, and there is an eye tooth or canine on each side. Individual characteristics are fillings, breakage of teeth, the placement of the teeth in the mouth, wear patterns, and angles.

¶ 27 Bite mark injuries are usually preserved photographically. Dr. Campbell indicated that it would be ideal for the injury identification if it was photographed at a 90-degree angle, and with a ruler or scale, so the examiner could establish a "true life size" image to use for comparison. Dr. Campbell testified that the Board was working on developing standards but that there were currently no published standards as to how bite mark evidence must be preserved in order to make a comparison. Dr. Campbell also testified there was no published standard governing when an evaluation could be rendered by an examiner. Dr. Campbell stated that the accepted standard in the field of forensic odontology for making an evaluation was dependent on the individual case and the knowledge and experience of the examiner.

¶ 28 In autopsy photographs of the victim, Dr. Campbell testified he saw two or three human bite marks overlapping each other on the right side of the victim's neck just above the collarbone. Dr. Campbell stated that the photos were not taken to document the "bite mark" injuries, noting that, in one photograph, the victim's skin was wrinkled from its positioning and that, in another, the victim's chin was being "lifted." Dr. Campbell acknowledged that in one of the "cropped" or enlarged photographs, the alleged bite mark appeared to be a straight line instead of a curve, which he explained was a result of the camera angle and the positioning of the body, both of which can cause distortions of the injury in photographs.

¶ 29 Dr. Campbell compared molds of teeth from three suspects—the petitioner, Paul Main, and Joe Seitz—to the photographs of the victim's injuries. Dr. Campbell testified that the mold of the petitioner's teeth showed he had a space between each of his six upper front teeth, which Dr. Campbell described as an "anomaly." Dr. Campbell indicated that the cropped and enlarged photograph, in which the "bite mark" was seen as a straight line, showed "a wide tooth, and a wide tooth, and a more narrow tooth and a more narrow tooth with spacing in between the teeth." Dr. Campbell testified that, in his opinion, the petitioner's teeth were consistent with the victim's injury based on the presence of spaces between the six front teeth. Dr. Campbell explained that "consistent" means "those teeth could have made the bite mark, period." Dr. Campbell testified that there was nothing about the quality of the photographs of the injury that concerned him with regard to formulating his opinion that the petitioner's teeth were consistent with the injury.

¶ 30 During cross-examination, Dr. Campbell testified that "the technology or the methods for examining bite marks ha[d] changed dramatically in the last 8 years." Dr. Campbell testified that skin was a "very excellent" medium for recording bite marks and that any doctor "that's had much experience with bite mark injuries consider[s] it to be an excellent reproducer of tooth characteristics" capable of picking up "minute details." Dr. Campbell testified that he would "compare" dental impressions to fingerprints. When asked whether it was possible for more than one set of teeth to make the same mark, Campbell answered that "[e]verybody's dentition is individual," and asserted that, when individual characteristics are present, an

examiner can determine whether a specific person made the mark within a "very high degree" of dental certainty. Dr. Campbell defined a "reasonable degree of dental certainty" as meaning "a very high degree of probability that you would ever find another set of teeth that would make the same marks. I would say it would be virtually impossible."

¶ 31 Dr. Lowell Levine, who was qualified as an expert in forensic dentistry, testified that he was certified by the Board and was a fellow of the American Academy of Forensic Sciences. Dr. Levine testified that to identify an injury for a bite mark, the examiner would look for class characteristics such as whether the injury is an ovoid or semi-ovoid shape, the approximate size of the injury, and whether there is "patterning *** that could be from the shape of teeth."

¶ 32 Dr. Levine testified that the injury is typically photographed for comparison, and while there were no published standards for the identification of bite marks or the procedures to be followed, there were methods that were "generally accepted in the community." Dr. Levine stated that, ideally, the photographs of the injury will be taken at 90 degrees, or perpendicular to the arch, and with a rule of measure in place. Dr. Levine testified that a scale of measurement could be important because it can inform the examiner if the injury is "within the ballpark" of a human bite mark. Dr. Levine testified that having a life size scale of the bite was not "quite as important" as believed 8 to 10 years ago due to increased recognition of individual characteristics of a person's dentition and the skin's ability to "capture and reflect unique and individual characteristics with very good fidelity." Dr. Levine explained that the "technology and expertise" of bite mark analysis had changed dramatically over the last decade. Dr. Levine also testified that there were no published standards for analyzing bite mark evidence or for offering an opinion as to "common origin" and that an analysis was based only upon the training and expertise of the examiner. Dr. Levine testified that different people could not leave identical bite marks.

¶ 33 Dr. Levine opined, to a reasonable degree of medical certainty, that there were two or three overlapping bite marks visible in the autopsy photographs of the victim's body. Dr. Levine explained that a "reasonable medical certainty" means "a very, very high degree of probability." Dr. Levine testified that, in his opinion, to a reasonable degree of dental certainty, the petitioner could have caused the bite mark injuries on Brown. Dr. Levine based his opinion on the spaces between the patterns in the victim's injury and the presence of spaces between the petitioner's upper front teeth. Dr. Levine testified that his ability to make a comparison was not hindered by the fact that the photographs were not taken at a 90-degree angle.

¶ 34 The State also called Dr. Ronald Mullen, the petitioner's dentist, to testify. Dr. Mullen had been practicing as a dentist for 17 years and had treated approximately 6000 to 7000 patients. Dr. Mullen testified that the petitioner's upper teeth had spaces between them, a condition called diastemata. Dr. Mullen testified that he has seen this particular type of spacing in less than one percent of his patients, or less than 15 times over his career.

¶ 35 The petitioner called 17 witnesses at trial, including 3 experts to counter the State's bite mark experts. Dr. Donald Ore, a pediatric dentist who was qualified as an expert in photography, testified that there was no published standard procedure for photographing injuries for the purpose of making a bite mark comparison. Dr. Ore stated that the preferred standard among forensic odontologists would be to photograph the injury at a right angle without stretching the skin in any way, and with a millimeter scale present. Dr. Ore testified that two of the photographs in this case showed "an extreme amount of enlargement," the degree of which could not be determined due to the absence of a scale in the photograph. Dr.

Ore testified that enlarging a photograph to the point that it "exceeds the limits of resolution of the film" can distort the image.

¶ 36 The petitioner also called Dr. Edward Pavlec, an orthodontist and Board-certified forensic odontologist, qualified as an expert in forensic odontology. Dr. Pavlec testified that a committee of the American Academy of Forensic Sciences has issued temporary guidelines on the standard for processing bite mark evidence that were pending approval by the members. The American Society of Forensic Odontologists had also not yet accepted the proposed guidelines, and Dr. Pavlec acknowledged that a minority of examiners did not believe any written guidelines were necessary. Dr. Pavlec also acknowledged that the current "standard" was the "expertise" of the examiner.

¶ 37 Dr. Pavlec testified that proper preservation of bite mark evidence for comparison requires the photograph of the injury to include a standard form of measuring to determine the exact size of the wound. Dr. Pavlec expressed concern that the autopsy photographs were "dirty," meaning that the victim's wounds had not been cleaned and it was unclear whether some of the marks on Brown's body were injuries or dried blood. Dr. Pavlec was also concerned that one of the "bite marks" appeared as a straight line, which Dr. Pavlec testified could only occur if the tissue were stretched and distorted. Dr. Pavlec testified that stretching the skin and enlarging the photograph will make the spaces between the teeth looker larger. Dr. Pavlec described the autopsy photographs as being "one step above useless" for comparison purposes. Due to the lack of quality of the photographs, Dr. Pavlec found little evidence to substantiate a finding that the injury was a human bite mark at all.

¶ 38 Dr. Pavlec testified that the photographs of Brown's body showed a "bruise pattern" on the neck that "could be a bite mark" but that these marks also could have been caused by other trauma, such as through strangulation, or could have been left by jewelry or a heel. Dr. Pavlec testified that, assuming the injury was a bite mark, both the petitioner's teeth and Joe Seitz's teeth could have left the mark on Brown's shoulder. Dr. Pavlec estimated that up to 10% of the adult population had spaces between their teeth. Dr. Pavlec stated that a bite mark with spaces between the teeth could also be made by a person without spaces between their teeth due to the position, shape, and wearing of the person's teeth.

¶ 39 Dr. Norman Sperber, a dentist and Board-certified forensic odontologist, testified that he was a member of the American Academy of Forensic Scientists, the American Society of Forensic Odontology, and the Board. Dr. Sperber testified that forensic odontology was a forensic science, defined as "the types of sciences that use measurements [and] either chemical or physical constants," and which included ballistics, fingerprints, handwriting, forensic psychiatry, and forensic pathology.

¶ 40 Dr. Sperber was the chairman of the Board's Bite Marks Standard Committee, which was formed to determine the standards and guidelines to be applied in "proper[,] accurate scientific bite mark analysis and comparison." Dr. Sperber testified that the proposed guidelines have not yet been accepted by the members but that they have been "accepted as working rules for years." Dr. Sperber stated that the proposed guidelines direct that "standard" and "scientific" procedures be utilized in making comparisons. Dr. Sperber stated that the photograph of the bite mark should be taken at a right angle to prevent distortion and should include rulers or scales to ensure the photograph is in the same scale as the model of the suspect's teeth.

¶ 41 Dr. Sperber testified that the autopsy photographs in this case were "dirty," so it was difficult to differentiate between bloodstains and injuries. Dr. Sperber testified that he was not

sure that any of the victim's injuries were human bite marks and, if they were, the photographs were not suitable to make a bite mark comparison. Dr. Sperber testified that the photographs of Brown's body provided no "usable information" for bite mark identification because the body is bloodstained, the injuries are distorted by the camera angle, and they lack a rule of measurement.

¶ 42 Dr. Sperber rejected the proposition that the enlarged photograph showing a straight line of marks was a bite mark, since "it's just impossible because bite marks don't come out square and straight like that." Dr. Sperber testified that a person could say some of the marks "resemble bite marks" but that these marks could "resemble other things as well." Dr. Sperber stated that he would not make a determination that the marks on the victim's body were human bite marks based on the photographs.

¶ 43 The petitioner testified on his own behalf that he had "virtually no memory" of the day of the murder "but things have come together in this last year." The petitioner testified that on the day of the murder, to the best of his knowledge, he went to Main's home in the morning and then left to drop off job applications at several companies. The petitioner testified that he returned to Main's house at "about ten to twelve or one" and that he "sat around" with Main on Main's front porch. The petitioner testified that he has "this feeling" that he was there all day. The petitioner did not remember leaving the house but acknowledged that he or Main might have gone to the store during the day. The petitioner testified that he and Main saw the victim in her yard, but he denied speaking to her.

¶ 44 The petitioner stated that when the police arrived at Brown's house, he went inside Main's house before leaving shortly thereafter. The petitioner testified that it "keeps feeling right to say" he then went to Harold Pollard's home. The petitioner stated that it "stuck" in his mind that Main showed up at Pollard's home and explained what was happening at Brown's home. The petitioner testified the next time he heard about Brown's death was at Spencer Bond's house a few days or a week later.

¶ 45 The petitioner remembered talking to the police but said he had difficultly remembering what occurred on the day of the murder because he was confused and had memory problems. The petitioner denied biting Lutz or telling her that he ever killed anyone. The petitioner also denied making the statements to Pollard on the day of the murder and the statements attributed to him at the Bonds' home several days after the murder. The petitioner testified that Scroggins lied about introducing the petitioner to the victim the day before the murder.

¶ 46 After deliberation, the jury found the petitioner guilty of murder. The court sentenced the petitioner to an extended term of 75 years.

¶ 47 The petitioner appealed, arguing, among other things, that the State's expert testimony concerning bite marks should not have been admitted because of "its exclusionary nature and its improper conclusiveness of the guilt of the [petitioner]." This court affirmed, finding the issue was waived. *People v. Prante*, 147 Ill. App. 3d 1039, 1062 (1986). Alternatively, citing *People v. Milone*, 43 Ill. App. 3d 385 (1976), this court found that the record did not indicate that the trial court abused its discretion "in allowing expert testimony concerning bite marks to aid comparison between the wounds on the victim's right shoulder and the dentition of the [petitioner], the weight of such testimony being determined by the jury as trier of fact." *Prante*, 147 Ill. App. 3d at 1062.

¶ 48 On May 14, 1993, the petitioner filed a motion seeking DNA analysis on blood evidence from a couch cushion seized from the victim's home. On May 18, 1993, the petitioner filed a

postconviction petition alleging substantial denials of his constitutional rights, including the right to effective assistance of counsel. On July 15, 1993, the petitioner filed an amended postconviction petition. The State filed a motion to dismiss, which the circuit court granted. This court affirmed the circuit court's dismissal of the petitioner. *People v. Prante*, 275 Ill. App. 3d 1153 (1995) (table) (unpublished order under Illinois Supreme Court Rule 23). On January 30, 2002, the petitioner filed a petition for relief from judgment pursuant to section 2-1401(f) of the Code of Civil Procedure (735 ILCS 5/2-1401(f) (West 2002)), asserting that his sentence violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The State filed a motion to dismiss, which the circuit court granted.

¶ 49 On January 3, 2017, the petitioner filed a motion for postconviction DNA and fingerprint testing pursuant to section 116-3 of the Code of Criminal Procedure of 1963 (725 ILCS 5/116-3 (West 2016)), requesting DNA testing on several pieces of physical evidence from the victim's home and latent print testing to try to identify the unidentified fingerprint on the coffee pot. The State did not oppose the motion, and the circuit court entered agreed orders for the testing. The State was unable to locate Brown's rape kit, so this evidence was not tested. No interpretable DNA profiles were obtained from the testing on the remaining evidence. Fingerprint testing revealed usable prints from the coffee pot, but no new matches were made.

¶ 50 On October 15, 2018, the petitioner filed his motion for leave to file a successive postconviction petition, which is the subject of the current appeal before this court. The petitioner has raised five claims in his successive petition. The petitioner's primary contentions are that new scientific evidence regarding memory science and the invalidity and unreliability of bite mark evidence support his claims that he is actually innocent of the crime. Alternatively, the petitioner contends that his constitutional right to due process of law was violated at trial by the State's use of faulty and since-repudiated forensic science on bite mark comparisons. The petitioner also argues ineffective assistance of counsel for failing to raise or preserve issues related to the bite mark evidence, and cumulative error.

¶ 51 In support, the petitioner attached affidavits and other documents suggesting that the current scientific community recognizes a lack of consensus on whether forensic dentists have the ability to reliably identify injuries as human bite marks or to associate those bite marks with an individual. The petitioner attached two affidavits of Dr. Iain Pretty, a dental surgeon and forensic dentist. Dr. Pretty stated that recent research has shown that there is no scientific basis for stating that a particular injury can be associated with an individual's dentition, or for assigning a probability or statistical weight to an association. Dr. Pretty detailed a study, which demonstrated that Board-certified forensic dentists did not consistently agree on whether an injury was a human bite mark. Dr. Pretty averred that there were no studies, empirical experiments, or systematic reviews providing any objective metrics or assurances that the process of comparing injuries caused by teeth on human skin to molds of a suspect's dentition was reliable. Dr. Pretty stated that "bitemark analysis of any kind" was inherently unreliable and that poor quality evidence, like that presented in this case, "further undermine[d] what is a fundamentally unreliable and unsafe forensic technique."

¶ 52 The petitioner's documentation also included reports from the National Academy of Sciences, the Texas Forensic Science Commission, and the President's Council of Advisors on Science and Technology, indicating each of these organizations has examined bite mark evidence and found the evidence lacked a scientific basis. The National Academy of Science's 2009 report, *Strengthening Forensic Science in the United States: A Path Forward* (NAS

report), concluded that there was no scientific basis to support the proposition that a forensic odontologist, looking at a bite mark in human skin, could associate that mark to a potential biter. See Committee on Identifying the Needs of the Forensic Sci. Community, National Research Council, National Academy of Sci., Strengthening Forensic Science in the United States: A Path Forward (2009) [https://perma.cc/2PTA-F47C] (Strengthening Forensic Science). The NAS noted that the Board had approved guidelines for bite mark analysis but found that the guidelines did not indicate the criteria necessary for using each method to determine whether the bite mark could be related to an individual's dentition and with what degree of probability. The report concluded "[t]here is no science on the reproducibility of the different methods of analysis that lead to conclusions about the probability of a match." Strengthening Forensic Science, *supra*, at 174. The NAS reported that even when the Board's guidelines were followed, different experts provided widely differing findings and resulted in "a high percentage of false positive matches of bite marks using controlled comparison studies." Strengthening Forensic Science, *supra*, at 174. The NAS found that no thorough study had been conducted to establish the uniqueness of bite marks and there was no established science indicating what percentage of the population could have produced the bite. Strengthening Forensic Science, *supra*, at 174. The NAS report found there were disputes about (1) the accuracy of human skin as a reliable registration material for bite marks, (2) the uniqueness of the human dentition, (3) the techniques used for analysis, and (4) the role of examiner bias. Strengthening Forensic Science, *supra*, at 176. Despite the Board's development of guidelines, the NAS found "there is still no general agreement among practicing forensic odontologists about national or international standards for comparison." Strengthening Forensic Science, *supra*, at 176. The report found that "[a]lthough the majority of forensic odontologists are satisfied that bite marks can demonstrate sufficient detail for positive identification, no scientific studies support this assessment, and no large population studies have been conducted." Strengthening Forensic Science, *supra*, at 176.

¶ 53 The petitioner included the April 2016 report issued by the Texas Forensic Science Commission (TFSC) on forensic bite mark comparisons (Tex. Forensic Sci. Comm'n, Forensic Bitemark Comparison Complaint Filed by National Innocence Project on Behalf of Steven Mark Chaney—Final Report (2016), https://www.txcourts.gov/media/1440871/finalbitemark report.pdf [https://perma.cc/2ATJ-9Y6M] (Forensic Bitemark Comparison). The TFSC found that there was no scientific basis for stating that a particular patterned injury could be associated to an individual's dentition and that any testimony describing human dentition "like a fingerprint" lacked scientific support. Forensic Bitemark Comparison, *supra*, at 12. The TFSC stated there was no scientific basis for assigning a probability or statistical weight to an association. The TFSC concluded that the "overwhelming majority of existing research does not support the contention that bitemark comparison can be performed reliably and accurately from examiner to examiner due to the subjective nature of the analysis." Forensic Bitemark Comparison, *supra*, at 12. This conclusion was based, in part, upon the inability of Board-certified forensic odontologists to agree on the threshold question of whether a patterned injury constituted a human bite mark. Forensic Bitemark Comparison, *supra*, at 13. Some of the deficiencies found by the TFSC included that (1) there was significant disagreement among Board members about how to establish criteria for the identification of bite marks and how to test that criteria through research studies, (2) there was no system for outside auditing, (3) there was no systemic requirement for peer review or technical review, (4) there was no consistency

in the way analytical results were reported, and (5) there was no meaningful proficiency testing system. Forensic Bitemark Comparison, *supra*, at 14.

¶ 54 The petitioner also included the 2016 report issued by the President's Council of Advisors on Science and Technology (PCAST), titled *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods*. The PCAST report concluded

> "that bitemark analysis does not meet the scientific standards for foundational validity, and is far from meeting such standards. To the contrary, available scientific evidence strongly suggests that examiners cannot consistently agree on whether an injury is a human bitemark and cannot identify the source of bitemark with reasonable accuracy." President's Council of Advisors on Sci. & Tech., Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods 87 (2016), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf [https://perma.cc/83KV-Y2R7] (Forensic Science in Criminal Courts).

The report found that few empirical studies had been undertaken to determine the ability of examiners to accurately identify the source of a bite mark and that, in those studies which have been undertaken, "the observed false positive rates were so high that the method is clearly scientifically unreliable at present." Forensic Science in Criminal Courts, *supra*, at 87.

¶ 55 The circuit court denied the petitioner's motion for leave to file the successive postconviction petition on all grounds. With regard to the petitioner's actual innocence claims, the court found the new evidence regarding bite mark analysis was not of such a conclusive nature that it would probably change the result on retrial. The court also concluded that the petitioner's alleged "new evidence" regarding advances in memory science was not new and was cumulative of evidence and arguments already presented at trial. The court rejected the petitioner's due process claim, finding that recent developments in the field of bite mark analysis may constitute cause but that the petitioner was not prejudiced. The court found no prejudice because there was "a great deal of circumstantial evidence" other than the bite mark evidence that placed the petitioner at or near the crime scene, including the petitioner's own incriminating statements, and the jury may have disregarded the bite mark comparisons in light of the competing expert bite mark testimony. This appeal follows.

¶ 56 II. ANALYSIS

¶ 57 The Act provides a statutory remedy to criminal defendants who claim a substantial violation of their constitutional rights occurred at trial. *People v. Edwards*, 2012 IL 111711, ¶ 21. The Act is not a substitute for an appeal, but instead offers a mechanism to assert a collateral attack on a final judgment. *People v. Robinson*, 2020 IL 123849, ¶ 42. Where a petitioner has previously taken an appeal from a judgment of conviction, the doctrine of *res judicata* bars the postconviction review of all issues decided by the reviewing court and any other claims that could have been presented to the reviewing court are deemed waived. *Edwards*, 2012 IL 111711, ¶ 21.

¶ 58 The Act only contemplates one postconviction proceeding. *Robinson*, 2020 IL 123849, ¶ 42. The bar against successive postconviction proceedings will be relaxed on two bases. *Robinson*, 2020 IL 123849, ¶ 42. The first is where the petitioner can establish cause and prejudice for the failure to assert a claim in an earlier proceeding. 725 ILCS 5/122-1(f) (West 2016); *Robinson*, 2020 IL 123849, ¶ 42. The second basis is when the petitioner can establish

a fundamental miscarriage of justice based on actual innocence. *Robinson*, 2020 IL 123849, ¶ 42. A petitioner must obtain leave of court before instituting a successive postconviction proceeding. *Robinson*, 2020 IL 123849, ¶ 43.

¶ 59 A request for leave to file a successive postconviction petition should be denied only where it is clear from a review of the petition and supporting documentation that the claims fail as a matter of law or where the petition and supporting documentation are insufficient to justify further proceedings. *People v. Smith*, 2014 IL 115946, ¶ 35. At the pleading stage, all well-pled allegations in the petition and supporting affidavits that are not positively refuted by the record must be taken as true. *Robinson*, 2020 IL 123849, ¶ 45. On appeal, this court reviews the sufficiency of the allegations in the postconviction petition, which is purely a legal question. *Robinson*, 2020 IL 123849, ¶ 39. Therefore, the circuit court's denial of a motion for leave to file a successive postconviction petition is subject to *de novo* review. *Robinson*, 2020 IL 123849, ¶ 39.

¶ 60 A. Cause and Prejudice

¶ 61 On appeal, the petitioner argues that the circuit court erred in denying him leave to file his successive postconviction petition because he established a *prima facie* claim of cause and prejudice based on new scientific evidence demonstrating the invalidity and unreliability of the bite mark evidence used by the State to obtain his conviction. Under the cause and prejudice prongs, the petitioner must establish "cause" by demonstrating that some objective factor external to his defense impeded his ability to raise the claim in an earlier proceeding. *People v. Pitsonbarger*, 205 Ill. 2d 444, 460 (2002). To establish "prejudice," the petitioner must demonstrate that the claimed constitutional error so infected his trial that the resulting conviction violated due process. *Pitsonbarger*, 205 Ill. 2d at 464. The petitioner must make a *prima facie* showing of both cause and prejudice as to the asserted claim or claims. *People v. Bailey*, 2017 IL 121450, ¶ 24.

¶ 62 The petitioner contends that his constitutional right to due process of law was violated by the State's use of faulty and unreliable bite mark evidence to obtain his conviction. At trial, the jury heard extensive competing expert testimony regarding the nature of the marks on the victim's right shoulder. The State's experts testified that these injuries were human bite marks and that they were consistent with the petitioner's dentition. The State's experts testified that every person's dentition is unique enough that it is possible, assuming a clear enough mark, to positively identify a specific individual as the "biter." The State also presented evidence that the spacing of the petitioner's teeth, the individual characteristic used by the experts to conclude that the petitioner's teeth were consistent with the marks on the victim's body, was found in as little as one percent of the population. At trial, the petitioner presented expert testimony that the quality of the photographs of the victim's injuries was too poor to make a determination whether the injuries were human bite marks.

¶ 63 On appeal, the petitioner argues that there has been a significant change within the scientific community with regard to bite mark evidence since his trial in 1983. The petitioner argues that while he was able to present some criticisms of the State's bite mark evidence through his own experts' testimony at trial, new evidence demonstrates that the scientific bases of bite mark analysis has been repudiated, such that the identification of injuries as bite marks and the identification of a perpetrator of a bite mark has been rejected by the scientific community. The petitioner asserts that bite mark analysis is no longer generally accepted in

the scientific community and the evidence could not meet the *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), standard for admissibility. In response, the State asserts that bite mark evidence is still admissible in Illinois, citing *Milone*, 43 Ill. App. 3d at 398, and *People v. Shaw*, 278 Ill. App. 3d 939, 948 (1996).

¶ 64 While the parties spar on the question of the admissibility of bite mark evidence in Illinois, they do so in very general terms. Neither party presents any substantive analysis on the current state of the law in Illinois regarding the admissibility of bite mark evidence, specifically, whether bite mark evidence is "scientific evidence" that is subject to the dictates of *Frye*.

¶ 65 "Illinois law is unequivocal: the exclusive test for the admission of expert testimony is governed by the standard first expressed in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)." *Donaldson v. Central Illinois Public Service Co.*, 199 Ill. 2d 63, 76-77 (2002), *overruled on other grounds by In re Commitment of Simons*, 213 Ill. 2d 523, 530-32 (2004) (adopting a dual standard of review for *Frye* rulings). The *Frye* standard, also known as the "general acceptance" test, "dictates that scientific evidence is only admissible at trial if the methodology or scientific principle upon which the opinion is based is 'sufficiently established to have gained general acceptance in the particular field in which it belongs.' " *Donaldson*, 199 Ill. 2d at 77 (quoting *Frye*, 293 F. at 1014).

¶ 66 "General acceptance" does not apply to the expert's ultimate conclusion, but upon the underlying methodology used to generate the conclusion. *Donaldson*, 199 Ill. 2d at 77. "If the underlying method used to generate an expert's opinion [is] reasonably relied upon by the experts in the field, the fact finder may consider the opinion—despite the novelty of the conclusion rendered by the expert." *Donaldson*, 199 Ill. 2d at 77. "General acceptance" does not require universal acceptance of the methodology. *In re Commitment of Simons*, 213 Ill. 2d at 530. While general acceptance does not require that the methodology be accepted by unanimity, consensus, or even a majority of the experts, a technique cannot be "experimental or of dubious validity." *Donaldson*, 199 Ill. 2d at 78.

¶ 67 Under *Frye*, the trial court need not make a separate inquiry into the reliability of the methodology. *Donaldson*, 199 Ill. 2d at 81. The reliability of a methodology is naturally subsumed by the inquiry into whether the methodology is generally accepted in the scientific community because "a principle or technique is not generally accepted in the scientific community if it is by nature unreliable." *Donaldson*, 199 Ill. 2d at 81. "Questions concerning underlying data, and an expert's *application* of generally accepted techniques, go to the weight of the evidence, rather than its admissibility." (Emphasis in original.) *Donaldson*, 199 Ill. 2d at 81. "Trial judges decide the general acceptance of the technique; a jury decides whether it will accept the expert's conclusion which is based on the technique." *Donaldson*, 199 Ill. 2d at 82.

¶ 68 The *Frye* test applies only to a new or novel scientific methodology, which is described as one that is " 'original or striking' " or "does 'not resembl[e] something formerly known or used.' " *Donaldson*, 199 Ill. 2d at 78-79 (quoting Webster's Third New International Dictionary 1546 (1993)). "Once a principle, technique, or test has gained general acceptance in the particular scientific community, its general acceptance is presumed in subsequent litigation; the principle, technique, or test is established as a matter of law." *Donaldson*, 199 Ill. 2d at 79. The presumption of general acceptance in subsequent litigation, however, can be problematic. The courts have cautioned that "relying exclusively upon prior judicial decisions to establish general scientific acceptance can be a 'hollow ritual' if the underlying issue of

scientific acceptance has not been adequately litigated." (Internal quotation marks omitted.) *Donaldson*, 199 Ill. 2d at 84 (quoting *People v. Basler*, 193 Ill. 2d 545, 554 (2000)). In determining whether a *Frye* hearing is required and whether a scientific technique is generally accepted in the relevant scientific community, a reviewing court may rely upon appropriate sources outside of the record, including legal and scientific articles and opinions from other jurisdictions. *In re Commitment of Simons*, 213 Ill. 2d at 530-31.

¶ 69 Not all expert testimony, however, is subject to a *Frye* analysis. The dictates of *Frye* only apply to scientific evidence. *People v. McKown*, 226 Ill. 2d 245, 254 (2007). The line separating scientific and nonscientific evidence is not always clear. *People v. Coleman*, 2014 IL App (5th) 110274, ¶ 114. Whether a particular piece of evidence falls within the classification of "scientific" is an issue frequently litigated. See *McKown*, 226 Ill. 2d at 255 (discussing the split among jurisdictions on the question of whether horizontal gaze nystagmus testing is scientific); *In re Commitment of Simons*, 213 Ill. 2d at 533-35 (discussing the split among the jurisdictions on whether *Frye* is applicable to actuarial risk assessments); *In re Detention of New*, 2013 IL App (1st) 111556, ¶¶ 47-59 (analyzing whether the diagnosis of a novel mental disorder is subject to the general acceptance test under *Frye*); *Coleman*, 2014 IL App (5th) 110274, ¶¶ 111, 114 (finding testimony from an "expert linguist" on the issue of authorship attribution was not scientific evidence subject to *Frye* because the opinion was derived solely from the expert's observations and experiences). Scientific evidence "is the product of scientific tests or studies." *McKown*, 226 Ill. 2d at 254. Illinois courts require scientific evidence to meet the *Frye* standard because evidence labeled as "scientific" "carries a greater weight in the eyes of the jury, which may accord it undue significance because 'science' is equated with truth." *McKown*, 226 Ill. 2d at 254.

¶ 70 In support of its assertion that bite mark evidence is admissible in Illinois, the State cites *Milone*, 43 Ill. App. 3d at 398, and *Shaw*, 278 Ill. App. 3d at 948. *Milone*, 43 Ill. App. 3d 385, is the seminal case on the admission of bite mark evidence in Illinois. It is also the first reported case in Illinois to discuss the issues raised in *Frye*, 293 F. 1013. *Milone* involved a murder in which the victim was found with bite marks on her thigh. The trial court admitted the bite mark evidence offered by the State, which included three expert witnesses who asserted that the defendant was "without a doubt the perpetrator of the bite on the victim's thigh." *Milone*, 43 Ill. App. 3d at 392. The defendant presented four competing expert witnesses who concluded that there was no positive correlation between the defendant's dentition and the bite mark on the victim.[1] *Milone*, 43 Ill. App. 3d at 392. On appeal, the defendant contended that the State should have been precluded from introducing evidence identifying him as the perpetrator of the bite mark. *Milone*, 43 Ill. App. 3d at 394. The defendant argued that bite mark identification should not be admissible because, as a science, it had not gained general acceptance in the particular field in which it belonged, as required by *Frye*. *Milone*, 43 Ill. App. 3d at 394. The defendant also argued that the bite mark identification evidence failed to meet the "prior reliability" test utilized by the Illinois Supreme Court 65 years earlier in *People v. Jennings*,

[1]Milone maintained his innocence even after his release from prison. See *Milone v. Camp*, 22 F.3d 693, 700 (7th Cir. 1994). In support of his federal *habeas* petition, Milone alleged that the mark on the victim's thigh was shown to match the dentition of a known serial killer, Richard Macek. *Milone*, 22 F.3d at 700-01. Milone also alleged that Macek confessed to the murder before committing suicide in 1987, although the parties disputed on whether Macek later recanted his confession. *Milone*, 22 F.3d at 701.

252 Ill. 534 (1911), in holding that fingerprint identification testimony was admissible. *Milone*, 43 Ill. App. 3d at 394. In affirming the trial court's admission of the evidence, the court discussed several decisions from other jurisdictions and ultimately rejected *Frye*'s application to bite mark evidence because it required only the direct observation of physical characteristics, as opposed to the "interpretation of mechanical measurements." *Milone*, 43 Ill. App. 3d at 396-98. The court found that:

> "[b]ite-mark comparison *** involves only a visual comparison between the wound and the dentition of the defendant. *** For this reason, the testimony of the experts serves only to lend assistance to the trial court in interpreting physical evidence not within the ken of the average trial judge's knowledge. There is no intermediate mechanical stage in which reliability may be questioned. Such evidence is more analogous to footprint, fingerprint, and hair, comparisons which are made for purposes of identification." *Milone*, 43 Ill. App. 3d at 396.

¶ 71 The court also noted that evidence regarding the identification of a deceased person from dental records was admissible in Illinois. *Milone*, 43 Ill. App. 3d at 396-97. The court found that the "concept of identifying a suspect by matching his dentition to a bite mark found at the scene of a crime is a logical extension of the accepted principle that each person's dentition is unique." *Milone*, 43 Ill. App. 3d at 397.

¶ 72 In the years following *Milone*, 43 Ill. App. 3d 385, the decision was cited as support for the admissibility of bite mark evidence, as well as other scientific evidence deemed only to involve a "visual comparison." As already noted, in the petitioner's direct appeal, this court cited *Milone*, 43 Ill. App. 3d 385, to summarily dispose of the petitioner's contention that the State's bite mark evidence should not have been admitted at trial. *Prante*, 147 Ill. App. 3d at 1062. Ten years later, in *Shaw*, 278 Ill. App. 3d at 948, *Milone* was cited for the proposition that expert testimony concerning bite mark identification was admissible in Illinois based on the "unique quality of an individual's dentition."

¶ 73 In *People v. Columbo*, 118 Ill. App. 3d 882, 956 (1983), the defendant appealed the trial court's admission of testimony from a forensic anthropologist regarding handprint measurements as a means of identification. The appellate court affirmed the trial court's determination, finding the examination and comparison of the handprints was beyond the realm of common experience and was a proper subject for expert testimony. *Columbo*, 118 Ill. App. 3d at 956-57. The appellate court rejected the argument that *Frye* applied to "all scientific evidence," finding that *Jennings*, 252 Ill. 534, suggested that Illinois courts "adhered to [a] more liberal 'reliability test' " regarding the admission of scientific evidence. *Columbo*, 118 Ill. App. 3d at 957-60. Citing *Milone*, 43 Ill. App. 3d 385, the court held that the handprint comparison evidence was admissible because it involved only a "visual comparison" and "expert testimony regarding the results of a scientific process in which there are no intermediate mechanical stages is admissible once a competent expert testifies that the scientific process in question is reliable." *Columbo*, 118 Ill. App. 3d at 960.

¶ 74 Further developments in the law, however, have eroded *Milone*'s holding that *Frye* is only applicable when the scientific evidence in question involves an "intermediate mechanical stage." See *Milone*, 43 Ill. App. 3d at 396. Although *Milone* has not been explicitly abrogated, at least one other court has recognized the fallacy of its holding. In *People v. Ferguson*, 172 Ill. App. 3d 1, 8-10 (1988), the trial court allowed the State to admit expert testimony on the identification of the suspect based on comparing "shoe wear patterns" on the theory that "wear

patterns" are unique and can be used to identify the person who wore a shoe. The *Ferguson* court observed that some Illinois cases, including *Milone*, did not apply the *Frye* test to determine the admissibility of scientific opinions because the courts "distinguished between scientific processes using an intermediate mechanical stage in which reliability may be questioned from those using only visual analysis such as footprint, fingerprint, and hair comparisons." *Ferguson*, 172 Ill. App. 3d at 10 (citing *Milone*, 43 Ill. App. 3d at 396, and *Columbo*, 118 Ill. App. 3d at 960). The *Ferguson* court rejected the lower standard applied in those cases, even though the instant case was also a visual analysis and found that the expert's "theory" that shoe wear patterns were unique was inadmissible under *Frye* because it was not generally accepted in the scientific community. *Ferguson*, 172 Ill. App. 3d at 10-12.

¶ 75 Some jurisdictions have held that bite mark analysis is not scientific evidence that must meet the *Frye* requirements for admission. See *Handley v. State*, 515 So. 2d 121, 129-32 (Ala. Crim. App. 1987) (finding *Frye* inapplicable when the expert evidence is in the nature of physical comparisons as opposed to scientific tests or experiments); *Commonwealth v. Cifizzari*, 492 N.E.2d 357, 362-64 (Mass. 1986) (finding *Frye* did not apply to bite mark evidence because the testimony merely aided the jury in making a visual comparison). Other jurisdictions have concluded that bite mark evidence is subject to *Frye*. See *People v. Marsh*, 441 N.W.2d 33, 35-36 (Mich. Ct. App. 1989) (bite mark evidence was admissible without conducting a *Frye* hearing because the scientific procedures used—such as X-rays, impressions, and photographs—were not novel); *State v. Hodgson*, 512 N.W.2d 95, 98 (Minn. 1994) (scientific bite mark analysis by a recognized expert is not novel under *Frye*); *State v. Sager*, 600 S.W.2d 541, 560-73 (Mo. Ct. App. 1980) (bite mark evidence was admissible under *Frye*); see also *People v. Middleton*, 429 N.E.2d 100, 103-04 (N.Y. 1981) (bite mark evidence is generally accepted as reliable because the techniques employed in rendering the opinion—such as photography, making dental molds, and visual observation—are accepted by majority of experts in the field).

¶ 76 We agree with the court's holding in *Ferguson* and reject *Milone*'s limited application of *Frye*. Today, in determining whether *Frye* applies, courts examine whether the expert's testimony is the "product of scientific tests or studies." See *McKown*, 226 Ill. 2d at 254. There is no requirement that the scientific methodology employed by the expert involve an "intermediate mechanical stage" for *Frye* to apply. We find that bite mark evidence is "scientific evidence" within the meaning of *Frye* because it purports to employ a scientific process requiring examination and analysis by an expert trained in interpreting the evidence.

¶ 77 Although bite mark evidence has been admitted into evidence in Illinois for more than 50 years, our survey of the law indicates that Illinois courts have never subjected bite mark evidence to the rigors of *Frye*. Instead, *Milone*, the first published opinion in Illinois to even discuss *Frye*, erroneously dismissed its application, which succeeding courts then relied upon when addressing the issue.

¶ 78 As already noted, under the cause and prejudice prongs, the petitioner must establish "cause" by demonstrating that some objective factor external to his defense impeded his ability to raise the claim in an earlier proceeding. *Pitsonbarger*, 205 Ill. 2d at 460. In this case, the defense did not challenge the admissibility of the State's expert testimony on bite marks at trial. The petitioner raised the issue on direct appeal, which this court found was waived and, alternatively, not error. *Prante*, 147 Ill. App. 3d at 1062. Thus, the petitioner's claim is barred by *res judicata*. *People v. Patterson*, 192 Ill. 2d 93, 139 (2000). In the interests of fundamental

fairness, however, the doctrine of *res judicata* can be relaxed if the petitioner presents substantial new evidence. *Patterson*, 192 Ill. 2d at 139.

¶ 79 Relying on *Milone*, this court summarily dismissed the petitioner's argument that the State's bite mark evidence should not have been admitted. *Prante*, 147 Ill. App. 3d at 1062. As evidenced by *Shaw*, 278 Ill. App. 3d at 948, issued in 1996, the courts were still relying on *Milone* in holding that bite mark evidence was admissible years after the petitioner filed his direct appeal and his initial postconviction petition. Furthermore, the successive postconviction petition and supporting affidavits and documents demonstrate that the examination as to the validity of bite mark evidence has occurred only in the past decade or so. Thus, even if the petitioner had previously successfully convinced a court to abrogate *Milone* and hold that *Frye* was applicable to bite mark evidence, the scientific community has only recently come to question the scientific foundation of this evidence. Based on the foregoing, we find that the petitioner has established cause for failing to raise his claim in an earlier proceeding.

¶ 80 We also find that the petitioner has made a *prima facie* showing of prejudice. Again, to establish "prejudice," the petitioner must demonstrate that the claimed constitutional error so infected his trial that the resulting conviction violated due process. *Pitsonbarger*, 205 Ill. 2d at 464.

¶ 81 As the factual background indicates, the State's case against the petitioner was largely circumstantial. The evidence indicated that the petitioner was near the scene of the crime and therefore had the opportunity to commit the crime. The petitioner also repeatedly changed his story and did not provide a reliable account of his whereabouts on the day of the murder. These facts alone, however, are far from sufficient proof of guilt. Instead, the only clear link between the petitioner and the crime was the testimony of the petitioner's friends that the petitioner disclosed certain details regarding the condition of the victim's body and the crime scene shortly after the murder, which only could have been known by the perpetrator.

¶ 82 Harold Pollard testified that the petitioner indicated, on the evening of the murder, that Brown was found with her hands tied behind her back.[2] The petitioner stated he obtained this information when "he got a glimpse of the girl by looking over the policeman's shoulder at the crime scene." The most incriminating statements, though, were those introduced through the testimony of Vickie White and Spencer Bond. White and Bond testified that several days after the murder, the petitioner told them that Brown had "teeth marks" on her body, specifically indicating the left shoulder area. Although the injuries in this case were located on Brown's right shoulder, the fact that no one identified these injuries as potential bite marks until years later was damning circumstantial evidence against the petitioner. During trial, the defense challenged the witnesses' memories, probing the possibility that the witnesses' memories were flawed or contaminated.

¶ 83 The petitioner's statements that the victim was bitten is why the State's bite mark evidence was material to the petitioner's conviction, even though the State's experts did not provide a positive identification of the petitioner as the "biter." In this case, the fact that the injury was definitively identified as a human bite mark by the State's expert witnesses was likely enough

[2]While much has been made of the petitioner's comment that the body was found "curled up" on the floor, the incriminating nature of this comment is questionable. The evidence was that Brown's murderer left her bent over the side of the lard can, which is not the same as being "curled up" on the floor.

to seal the petitioner's fate. The testimony of the State's expert witnesses that the petitioner's teeth were "consistent" with the mark further supported a finding that the petitioner was, in fact, the "biter" and that the petitioner did not learn about this injury on Brown's shoulder in some other way.

¶ 84 Above all, the State's expert testimony gave the impression that the testimony from the Whites and Bonds regarding the petitioner's statements was corroborated by scientific evidence. The persuasiveness of seemingly objective, truthful scientific evidence cannot be ignored or understated. The recognition that "scientific" evidence "carries a greater weight in the eyes of the jury" because it is "equated with truth" is precisely why Illinois courts require scientific evidence to meet the *Frye* standard. *McKown*, 226 Ill. 2d at 254.

¶ 85 During the petitioner's trial, the experts' bite mark testimony was frequently described as "scientific," with the experts touting recent advancements in bite mark "technology." While the experts acknowledged the absence of any published standards in collecting or evaluating the evidence, the necessity of such was dismissed. To the extent that the experts could be said to agree on standard processes, such as photographs being taken perpendicular to the injury with a scale present and no manipulation of the victim's skin, the State's experts asserted that adherence to the standards was not vital to rendering an opinion so long as the examiner was sufficiently experienced. Thus, the State's qualified experts concluded that the marks on the victim's body were, to a reasonable degree of dental certainty, human bite marks and that they were "consistent" with the petitioner's dentition, despite relying on admittedly visually distorted photographs of a poorly positioned body that had no scale, and which had been enlarged to unknown degree.

¶ 86 This court cannot say whether bite mark evidence would have passed a *Frye* examination in 1983; nor does this opinion purport to state whether it can today. That is not the question being asked of this court. Instead, the question is whether the petitioner's successive postconviction petition and supporting documentation, alleging cause and prejudice, fails as a matter of law.

¶ 87 Since the petitioner's trial, the law regarding the admissibility of scientific evidence has developed, to the extent that bite mark evidence would now be considered "scientific" evidence that must withstand a *Frye* analysis. Furthermore, the petition effectively alleges, and supports with documentation, a recent change within the scientific community regarding the validity and reliability of bite mark evidence, suggesting that the evidence presented by the State at the petitioner's trial is no longer generally accepted within the scientific community. We find that the petition made a *prima facie* showing of cause and prejudice and that the circuit court erred in denying the petitioner leave to file his successive postconviction petition on this basis.

¶ 88 B. Actual Innocence

¶ 89 In his motion for leave to file his successive postconviction petition, the petitioner alleged the petition and exhibits present new, material, noncumulative, and conclusive evidence of the petitioner's innocence. Specifically, he argued that the petition and its exhibits present new evidence that the bite mark comparison evidence used against him at his 1983 trial was completely without scientific basis and unreliable and that new evidence on memory science casts doubt on the witness testimony against him.

¶ 90 In a successive postconviction petition, a petitioner's failure to raise a claim in an earlier petition will be excused to prevent a fundamental miscarriage of justice. *Pitsonbarger*, 205 Ill.

2d at 459. To demonstrate a fundamental miscarriage of justice, the petitioner "must show actual innocence." *Edwards*, 2012 IL 111711, ¶ 23. "To establish a claim of actual innocence, the supporting evidence must be (1) newly discovered, (2) material and not cumulative, and (3) of such conclusive character that it would probably change the result on retrial." *Robinson*, 2020 IL 123849, ¶ 47.

¶ 91 Evidence is newly discovered if it is discovered after trial and the petitioner could not have discovered the evidence earlier through the exercise of due diligence. *Robinson*, 2020 IL 123849, ¶ 47. Evidence is material if it is relevant and probative of the petitioner's innocence. *Robinson*, 2020 IL 123849, ¶ 47. Noncumulative evidence is that which adds to the information that the fact finder heard at trial. *Robinson*, 2020 IL 123849, ¶ 47. Evidence is conclusive when the evidence, when considered along with the trial evidence, would probably lead to a different result. *Robinson*, 2020 IL 123849, ¶ 47. "The conclusive character of the new evidence is the most important element of an actual innocence claim." *Robinson*, 2020 IL 123849, ¶ 47.

¶ 92 "Ultimately, the question is whether the evidence supporting the postconviction petition places the trial evidence in a different light and undermines the court's confidence in the judgment of guilt." *Robinson*, 2020 IL 123849, ¶ 48. The new evidence does not need to be entirely dispositive to find that it is likely to alter the result on retrial. *Robinson*, 2020 IL 123849, ¶ 48. The circuit court should only deny the petitioner's request for leave to file the successive postconviction petition when it is clear from a review of the successive petition and supporting documentation that, as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence. *Edwards*, 2012 IL 111711, ¶ 24. Leave of court should be granted when the petition "raises the probability that it is more likely than not that no reasonable juror would have convicted the petitioner in light of the new evidence." *Robinson*, 2020 IL 123849, ¶ 44.

¶ 93 While we agree with the petitioner that the new evidence about the validity and reliability of bite mark evidence would constitute new, material, and noncumulative evidence, we do not believe the petitioner has demonstrated that the evidence is conclusive of his innocence.

¶ 94 On appeal, the petitioner has asserted that the State would be barred from presenting any evidence regarding bite marks on retrial. The petitioner suggests that even evidence akin to that presented by his trial experts, specifically that the injuries to the victim *could* have been caused by human teeth, would be inadmissible. The petitioner posits that if the State cannot present any evidence that the injuries could be bite marks, then any testimony that the petitioner claimed the victim's body had teeth marks on it was irrelevant and without value. We disagree.

¶ 95 The petitioner has presented compelling documentation undermining the scientific foundation of bite mark comparison evidence, including whether Board-certified forensic odontologists can reliably identify an injury as a human bite mark. The State, however, would still be entitled to present evidence as to the condition of the victim's body. It is possible that this could include evidence that there were marks on the victim's right shoulder that could *conceivably* have been made by human teeth.[3] There is a material distinction between the

[3]Notably, the NAS report acknowledged that "forensic odontologists understand the anatomy of teeth and the mechanics of biting and can retrieve sufficient information from bite marks on skin to assist in criminal investigations and provide testimony at criminal trials," even though there was no scientific basis for the conclusion that bite mark comparisons can result in a conclusive match. , *supra*, at 175.

State's expert testimony that the injury on the victim's right shoulder was positively a human bite mark and that this mark was consistent with the petitioner's dentition, versus the testimony of the petitioner's experts that the mark on the victim's body could have been caused by any number of conditions or objects, including human teeth. But as previously noted, we make no decision on the admissibility of this evidence, as it remains to be determined how the *Frye* analysis will determine the scope, if at all, of the admission of comparison testimony.

¶ 96 Nevertheless, while the petitioner has made a *prima facie* showing that the conclusive nature of the State's expert witnesses' testimony deprived him of his constitutional right to due process, he has not demonstrated that a lack of certainty as to the origin of the victim's injury "raises the probability that it is more likely than not that no reasonable juror would have convicted the petitioner in light of the new evidence." *Robinson*, 2020 IL 123849, ¶ 44. This is especially true in light of Harold Pollard's testimony that the petitioner told Pollard on the evening of the murder that the petitioner knew the victim was found tied up in the basement. The State presented circumstantial evidence of the petitioner's guilt, even absent the State's expert testimony on bite mark analysis.

¶ 97 For these reasons, we find the petitioner has not presented a colorable claim of actual innocence, and the circuit court properly denied him leave to file a successive postconviction on this basis. In light of this court's finding as to the petitioner's cause and prejudice claim, we need not address the petitioner's alternative claims for relief.

¶ 98 III. CONCLUSION

¶ 99 For the foregoing reasons, the judgment of the circuit court of Madison County denying the petitioner's motion for leave to file a successive postconviction petition is reversed, and the cause is remanded for further proceedings.

¶ 100 Reversed and remanded.

IN THE CIRCUIT COURT
FOR THE THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

People of the State of Illinois	)	
	)	
	)	
Vs.	)	**No. 82-CF-381**
	)	
JOHN PRANTE,	)	
Defendant.	)	
	)	

ORDER

In July 1983, a jury found the Defendant guilty of the murder of Karla Brown. The conviction was affirmed on direct appeal (147 Ill.App.3d 1039). The Defendant filed a post-conviction petition in May 1993. That petition was dismissed by the trial court and the dismissal was upheld on appeal. The Defendant filed leave to file a successive post-conviction petition in October 2018. A request to supplement the petition was filed in October 2019. The Court has considered the supplement as well as the original motion.

The appellate opinion on direct appeal sets forth a summary of the evidence. The Defendant seeks leave to file the successive petition based on actual innocence as well as claims of due process violations and ineffective assistance of counsel. In order to file a successive petition, the defendant's petition must satisfy the cause-and-prejudice test or it must state a colorable claim of actual innocence.

The Actual Innocence Claims

When a defendant raises a claim of actual innocence, leave to file a successive petition should be granted when the petitioner's supporting documentation raises the probability that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence. The defendant must present new, material, noncumulative evidence that is so conclusive it would probably change the result on retrial. An actual innocence claim does not merely challenge the strength of the State's case against the defendant. The new evidence must support total vindication or exoneration, not merely a reasonable doubt of the defendant's innocence.

Bite Mark Evidence

The petition and supporting documentation set forth that the developments in bite mark analysis are new, material and noncumulative. The question is whether such evidence is conclusive. In essence, the Defendant's position is that bite mark evidence would possibly not be allowed on re-trial, and that even if it were, the jury should also hear from all the experts that have debunked the science of bite mark analysis. At the trial in 1983, experts testified for both the State and Defendant. The jury was presented with differing expert opinions as to the strength, relevance and reliability of the bite mark evidence. When considering the totality of the evidence, the Court cannot conclude that this new evidence relating to bite mark analysis is of such a conclusive nature that it would probably change the result on retrial.

Advances in Memory Science

The Defendant asserts that new evidence regarding advances in memory science is sufficient to rise to the level of evidence of actual innocence. At a re-trial, the Defendant seeks to impeach certain witnesses with expert testimony that the witnesses' memory is somehow flawed. Mere impeachment evidence will typically not be of such conclusive character as to justify post-conviction relief. Moreover, evidence that a person's recollection of an event years earlier may be influenced by more recent events, or that memory fades over time, are not outside the knowledge of a typical juror.

Much of the Defendant's closing argument at trial addressed these very issues. "It might be believable in 1978 that they know there were bite marks there. It's not believable in 1982 after it's been in the paper. If they knew beforehand before it was published before all these facts were in the news it may be more believable. It's not believable now."

Evidence of advances in memory science as set forth in the Defendant's petition may very well be material, but such opinions are not new, are cumulative to evidence and arguments already presented at trial and are not conclusive evidence of the Defendant's innocence.

Due Process Claim

Here, the Defendant relies on federal due process challenges and alleges that now debunked bite mark evidence undermined the fundamental fairness of the entire trial. This argument could possibly have merit if the only evidence placing the Defendant at or near the crime scene was the bite mark. However, here, testimony included a great deal of circumstantial evidence as well as incriminating statements made by the Defendant. Moreover, given all the competing expert bite

mark testimony presented at trial, it is entirely possible the jury disregarded the bite mark comparisons entirely. Recent developments in the field of bite mark analysis may very well constitute cause. Regardless, the Court finds there is no prejudice.

Ineffective Assistance of Counsel

The Defendant raises ineffective assistance of both trial and appellate counsel. All of the allegations of ineffective assistance were either of record or known to the Defendant at the time his initial post-conviction petition was filed. The Defendant has failed to demonstrate cause why these issues could not have been raised in the initial petition.

Cumulative Error

Finally, Defendant alleges "cumulative error." As indicated by the Court's rulings above, this also fails to support the filing of a successive petition.

Conclusion

The Petitioner's Motion for Leave to file a Successive Petition for Post-Conviction Relief is DENIED.

The Clerk of the Court is directed to send a copy of this order to the Defendant's counsel and the Madison County State's Attorney's Office. A notice of adverse judgment shall also be issued and sent to the Defendant's attorney.

2-11-20
DATE

NEIL T. SCHROEDER
PRESIDING JUDGE

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CIRCUIT COURT OF MADISON COUNTY, ILLINOIS
THIRD JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS,	)	**No. 82-CF-381**
Plaintiff- Respondent,	)	
v.	)	
JOHN PRANTE	)	
Petitioner-Defendant.	)	

NOTICE OF APPEAL

(1) Court to which appeal is taken: Illinois Appellate Court, Fifth Judicial District

(2) Name of appellant and address to which notices shall be sent:

Mr. John Prante
The Exoneration Project
at the University of Chicago Law School
311 N. Aberdeen St., 3rd Floor
Chicago, Illinois 60607

(3) Name and address of appellant's attorneys on appeal:

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New York, New York 10013
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If appellant is indigent and has no attorney, does he want one appointed? N/A

(4) Dates of judgment or order: February 11, 2020 – denial of leave to file successive post-conviction petition

(5) Offenses of which convicted: One count of first-degree murder

(6) Sentence: 75 years

(7) If appeal is not from conviction, nature of orders appealed from:

Petitioner appeals from the Court's February 11, 2020 decision denying him leave to file his successive post-conviction petition filed on October 15, 2019.

(8) If the appeal is from a judgment of a circuit court holding unconstitutional a statute of the United States or of this state, a copy of the court's findings made in compliance with Rule 18 shall be appended to the notice of appeal.

DATED: February 25, 2020

Respectfully submitted,

JOHN PRANTE

By: _____
Counsel for Petitioner

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PROOF OF FILING AND SERVICE

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 February 15, 2022, the **Brief and Appendix of Plaintiff-Appellant People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which provided service of such filing to the email addresses of the persons named below:

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Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail thirteen copies of the **Brief and Appendix of Plaintiff-Appellant People of the State of Illinois** to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois 62701.

/s/ Eric M. Levin
ERIC M. LEVIN
Assistant Attorney General