No. 128740

IN THE
SUPREME COURT OF ILLINOIS

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

BRIEF AND APPENDIX OF RESPONDENT-APPELLEE PEOPLE OF THE STATE OF ILLINOIS

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NATURE OF THE CASE

Petitioner appeals from the appellate court's judgment affirming the denial of his motion for leave to file a successive postconviction petition. An issue is raised on the pleadings: whether petitioner's motion demonstrated "cause and prejudice," as is necessary to permit his successive filing.

ISSUES PRESENTED

1. Whether the prosecutor's comments during petitioner's initial postconviction proceedings, made the year before petitioner requested leave to file a successive postconviction petition, constitute impermissible participation at the "leave-to-file-stage" of the successive postconviction proceedings.

2. Whether petitioner's discovery arguments — that (a) the circuit court abused its discretion by declining to review a police file *in camera* after the prosecutor confirmed that the information contained in the file had been given to the defense before trial, and (b) this Court should adopt special rules regarding the review of such files — are barred and meritless.

3. Whether the circuit court correctly denied petitioner leave to file a successive petition because he did not establish cause or prejudice.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315, 612, and 651(d). This Court allowed petitioner's petition for leave to appeal on September 28, 2022.

STATEMENT OF FACTS

On August 28, 2002, police discovered the body of Roberto Villalobos lying in a pool of blood in a driveway in Chicago and, a few miles away, the body of Alejandra Ramirez in a burned Chevy Caprice. R.K45-51, 62-64.[1] Both were covered in blood and had numerous stab wounds. R.L53-68. Based on eyewitness accounts, police charged petitioner and his friend Jose Luera with the first degree murders of Villalobos and Ramirez. C.Secured.5.

A. Petitioner's Trial, Conviction, and Direct Appeal

At petitioner's jury trial, prosecutors argued that petitioner and Luera were both responsible for the murders. R.J188-195.

Eyewitness Testimony

Anais Ortiz testified that, on the night of the murders, she was at Luera's home in Chicago with petitioner, Luera, and a woman named Claudia. R.J200-03. Around 11:30 p.m., the victims (Villalobos and Ramirez) picked them up in a Chevy Caprice. R.J203-07. The group then dropped off Ortiz and Claudia near Claudia's home; Villalobos and Ramirez remained in the car with petitioner and Luera, and drove away. R.J205-06.

John McDonnell, a Marine who had been awarded the Silver Star, testified that on the night of the murders, he arrived at his Chicago home around midnight. R.J222. While on his front porch, he saw Villalobos exit through the window of a car and call for help. *Id.* Luera got out of the car

[1] A table explaining the record citations used in this brief is provided in the appendix.

and punched Villalobos multiple times, until he collapsed. R.J223-24. Luera then got on top of Villalobos and kept punching him, while McDonnell tried to stop Luera. R.J224-26. McDonnell then saw a flash of light inside the car that made him think there were more people in the car. R.J226-27.

Luera and Villalobos got up, and Villalobos ran to McDonnell and asked for help. R.J228. McDonnell told Luera to leave, and Luera pulled out a knife. R.J229. McDonnell ran behind his house and grabbed a two-by-four to use as a weapon. R.J229-30. When he returned to the front of the house moments later, he saw the car drive away; the front passenger door was open as the car began to leave, but then it closed. R.J230. Villalobos lay on the driveway and had been stabbed multiple times. *Id.* McDonnell called police and, the next day, he identified Luera in a photo lineup. R.J230-31.

Jason Samhan testified that shortly after midnight he was driving in Chicago when he saw a Chevy Caprice run a red light. R.J252-53. A woman's head was hanging out the back window of the car and a man was strangling her. R.J254-56. The woman was trying to fight back, and there was blood on the side of the car. *Id.* Samhan called police. R.J256-57.

Samson Murray, an acquaintance of petitioner, testified that after midnight on the night of the murders, he saw petitioner walking away from a gas station carrying two gas cans. R.K38-40.

George Hoyt testified that he was working at a gas station in Chicago on the night of the murders. R.K22. At 1:45 a.m., petitioner came in to

purchase two cans of gas. R.K22-23. Petitioner said he needed it for his van because his girlfriend had run out of gas while he was at work. R.K24-25. Hoyt told petitioner it would be cheaper to buy one can, fill up his van, and drive back to the station for more gas. R.K25-26. Petitioner nevertheless bought two cans of gas, then walked away. R.K.26. During their conversation, Hoyt noticed scratches on petitioner's neck and face. R.K30-31.

Forensic and Medical Evidence

When police responded to McDonnell's 911 call, they found Villalobos lying dead in a pool of blood. R.K45-51. Two miles away, police discovered the Chevy Caprice, which had sustained fire damage and smelled strongly of gasoline. R.K62-63. In the back seat, police found Ramirez, who was "deceased and bloody" and had burn wounds. R.K63-64. Charred debris inside the Caprice contained gasoline. R.L43-44. The car was about a mile from the station where petitioner had purchased the cans of gasoline. R.K78.

A forensic pathologist testified that Villalobos died due to numerous stab wounds. R.L53-66. Ramirez's autopsy revealed numerous stab wounds, burn injuries, and signs of strangulation. R.L66-68. She may have been alive when she suffered some of her burns. R.L82.

A forensic scientist testified that petitioner "cannot be excluded" from being the person who contributed the DNA found under Ramirez's fingernails. R.K106. The forensic scientist testified that "approximately one in 10 quadrillion black, one in 18 quadrillion white, or 1 in 2.5 quadrillion

Hispanic unrelated individuals cannot be excluded" as the contributor. R.K107. That means, "you would have to add approximately six more zeros to the population of the earth to find one other person who can't be excluded from the DNA profile other than [petitioner]." R.K107-08.

Petitioner's Statements to Police

The lead detective, Robert Lenihan, testified that after speaking with several witnesses, police obtained arrest warrants for petitioner and Luera. R.L17. Luera eventually was arrested in California. R.L18. In November 2002 (three months after the murders), petitioner came into the police station with two attorneys. *Id.* Petitioner told Lenihan he had been in a car with Villalobos and Luera on one occasion, but not on the night of the murders. R.L19. Lenihan saw burn injuries on petitioner's left arm and right leg, and petitioner said that he had been burned on the 4th of July. R.L20-21, 26. One of his attorneys then gave Lenihan a letter from "Dr. E. Cabrera" of the Highland Medical Center, which stated that he had treated petitioner for the burns. R.L21.

Lenihan told petitioner that police knew he was at the scene of the murders and bought gas to burn the Caprice. *Id.* After pausing the interview to confer privately with his attorneys, petitioner admitted that he had purchased cans of gasoline the night of the murders. R.L21-24. He claimed that he needed the gasoline because he was in a car with his friend "Nick," and ran out of gas. R.L24. The interview then ended. *Id.*

The parties stipulated that Dr. Ernest Cabrera, of the Highland Medical Center, would testify that (1) he had never treated petitioner; (2) he did not sign the letter that petitioner gave police; and (3) there were no other doctors named "Cabrera" at the medical center. R.L41-42.

Verdict and Sentencing

Petitioner did not present any evidence. The jury found him guilty of the first degree murders of Ramirez and Villalobos, aggravated kidnapping, and aggravated vehicular hijacking. R.M67. The court sentenced petitioner to life in prison, with a concurrent total of 47 years in prison. R.O9.

Petitioner's Direct Appeal

Petitioner argued on appeal that prosecutors misstated the evidence in closing argument. *People v. Montanez*, 2014 IL App (1st) 122369-U, ¶¶ 21-25. The appellate court rejected that argument and affirmed his convictions. *Id.*

B. Petitioner's Initial Postconviction Petition and the Gorman Letter

In the meantime, in December 2014, petitioner filed a pro se postconviction petition, which he twice supplemented shortly thereafter to add additional claims. C.PC.76-164, 190-206, 238-47. As relevant here, one of the amended claims alleged that prosecutors violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose that Ortiz (who testified petitioner and Luera were in the Caprice with the victims) testified in exchange for a plea deal in an unrelated case. C.PC.190-206. In March 2015, Judge Joseph

Claps advanced the petition to the second stage and appointed counsel to represent petitioner. *People v. Montanez*, 2021 IL App (1st) 191065-U, ¶ 24.

On December 3, 2015 (while petitioner was represented by counsel), a private attorney named Candace Gorman sent petitioner a letter ("Gorman letter"). Supp.C.Succ.24. In the course of representing a client in a federal lawsuit against the City of Chicago, Gorman had found files in the basement of a Chicago police station ("basement files") related to various criminal investigations. *Id.* In her letter, Gorman wrote,

> I found a Chicago Police file related to your case. I would like to talk with your attorney if you have one so I can share the information. Could you please send me the contact information for your attorney? I cannot share the information with you directly because of a court order [in the federal litigation]. If you do not have a current attorney please send me contact information for your last known attorney. I am attaching an authorization for you to sign allowing me to talk with any attorney that has represented you and to obtain your file so that I can compare it with what I have obtained. Also, you can feel free to send me any documents that you believe might be helpful regarding your conviction.
>
> I am sorry I cannot share the contents of the file with you at this time. The judge entered an order stating that I cannot share the documents with the defendant but I can share the documents with the attorney.

Id.[2] Despite receiving the letter, petitioner did not ask his appointed counsel to contact Gorman, nor did he personally contact Gorman or alert the circuit court to the Gorman letter at that time.

[2] The federal protective order limited access to the files to attorneys representing inmates — not inmates themselves — because some files contained witnesses' personal information. Supp.C.Succ.28.

Later that month, petitioner filed a motion to discharge his appointed counsel and proceed pro se, but the court did not rule on it, and counsel continued to represent petitioner. C.PC.705-06. A few months later, in March 2016, petitioner again asked to proceed pro se; Judge Claps admonished petitioner about proceeding pro se and granted his request. R.PC.15-17.

The next month, in April 2016, petitioner filed a pro se amended postconviction petition that alleged 36 claims, including new claims that were not included in his original petition. C.PC.396-499. The amended petition did not include any claim related to the Gorman letter. *See id.*

Petitioner then moved for discovery, asking the People to produce certain documents related to Ortiz's prosecution, which the court granted. R.PC.37, 43-44. Petitioner did not seek discovery related to the Gorman letter or otherwise bring the letter to the court's attention.

In February 2017, the People moved to dismiss the amended petition, arguing, among other things, that there was no evidence that Ortiz had received a plea deal in exchange for her testimony. C.PC.922-51. Petitioner filed a response; he also filed a motion to show cause, which was joined to his response, arguing that the People should "concede" his claims. C.PC.877-98; R.PC.134-35. In August 2017, the court granted the People's motion to dismiss the amended petition. R.PC.178.

Over the next several months, petitioner filed multiple amended petitions (and supplements to his petition) and a motion asking the court to reconsider its judgment dismissing his petition. *See, e.g.,* C.PC.1055-64, 1075-80, 1091-98, 1099-1118, 1284-96. In February 2018, the court denied petitioner leave to amend his petition, but did not rule on his motion to reconsider. R.PC.197. In March 2018, petitioner supplemented his motion to reconsider by asking the court to reconsider the denial of his motion for leave to amend his petition. ThirdSupp.Succ.4-21.

Meanwhile, in January or February 2018, petitioner finally tried to contact Gorman about the letter she sent him in 2015. Supp.C.Succ.28-29. In February 2018, when Gorman did not immediately respond to his inquiry, petitioner filed a complaint against Gorman with the Attorney Registration and Disciplinary Commission (ARDC). Supp.C.Succ.26. In March 2018, Gorman explained in a letter (which petitioner and the ARDC received) that petitioner had only recently contacted her and he had never given her authorization to turn over the file; however, she reiterated that if an attorney contacted her on petitioner's behalf, she still could turn over the file. Supp.C.Succ.29. The ARDC suggested to petitioner that he "contact your prior counsel or another attorney of your choice" for help in obtaining the basement file. Supp.C.Succ.30.

In May 2018, while petitioner's initial postconviction proceedings were pending, he informed the court about the Gorman letter for the first time.

R.PC.218-19. Petitioner also told the court about his ARDC complaint against Gorman, and he claimed that his grandparents had asked one of his prior attorneys, Scott Frankel, to see whether he could obtain the basement file, but Frankel had not done so. R.PC.227-28. Petitioner did not ask any of the many other attorneys who had represented him to contact Gorman. *See id.* Judge Claps ordered the prosecutor who was litigating the postconviction proceedings, Assistant State's Attorney (ASA) Linda Walls, to contact Gorman. R.PC.219-20, 237. In the federal litigation, it had been agreed that any attorney could review the basement files without a subpoena; however, if files were to be shared with a client or made public, a subpoena was required. Supp.C.Succ.31. In June 2018, an ASA standing in for ASA Walls told the court about the subpoena requirement; Judge Claps issued a subpoena and said he would review the file *in camera*. R.PC.244.

In the meantime, Judge Claps was placed on non-judicial duties and this case was transferred to Judge Ursula Walowski. R.PC.247-48. In July 2018, ASA Walls told Judge Walowski that (1) she had reviewed the basement file and compared it to the materials given to the defense before trial; (2) she found only one report that had not been given to the defense before trial in the precise format in which it existed in the basement file; but (3) that report had been given to the defense before trial in a slightly different format, as it was incorporated into a larger report that had been given to the defense. R.PC.248-49. As relevant here, the report found in the

basement file ("McDonnell Report") was a police report regarding McDonnell's account of Luera's attack on Villalobos. Supp.C.Succ.40-44. Judge Walowski ordered ASA Walls to provide the McDonnell Report to petitioner. R.PC.249. Petitioner argued that the court should review the entire basement file *in camera*. R.PC.250. Judge Walowski responded that she "trust[ed] Ms. Walls" to review the file and turn over anything that had not been given to the defense. R.PC.250-51.

Petitioner said that he "understood." R.PC.251. He then said that the McDonnell Report "pertains to my postconviction petition" and noted that his motion to reconsider (challenging the dismissal of his petition and the denial of leave to amend his petition) was pending. R.PC.251-54. Judge Walowski told petitioner, "[M]ake sure whatever filings you have, you put it on file, and then we'll have a hearing as to your motions." R.PC.254. At the next status hearing, in August 2018, petitioner again stated his desire to amend his postconviction petition to allege a claim based on the McDonnell Report and Judge Walowski said, "You can make whatever arguments you want with respect to that police report on the next court date[.]" R.PC.262-65.

Before the next status hearing, petitioner filed his "Third Amended" postconviction petition. C.PC.1515-30. Petitioner noted that he was filing the petition pursuant to his pending motion to reconsider. CR.PC.1516. The amended petition alleged that the People violated *Brady* by failing to disclose the McDonnell Report before trial. C.PC.1515-1622.

At the next hearing, in September 2018, petitioner told Judge Walowski that he wished to file motion for substitution of judge (SOJ) to because she did not review the basement file *in camera*. R.PC.280-83. Judge Mary Margaret Brosnahan heard the motion that same day. R.PC.267-76.

Petitioner stated that the "gist" of his motion was that Judge Walowski had declined to review the entire basement file *in camera* and accepted ASA Walls's "word" that no exculpatory materials were in the file. R.PC.269-70. ASA Walls responded that petitioner had mischaracterized her (Walls's) actions because (1) she made no decisions about what was exculpatory; (2) she instead reviewed the basement file and compared it to the discovery provided to petitioner's trial counsel; (3) she found one document (the McDonnell Report) that had not been given to the defense in the particular format in which it existed in the basement file; but (4) that document was "word for word" the same as a document that had given to the defense before trial in a different format; and (5) she gave petitioner the McDonnell Report. R.PC.270. Judge Brosnahan denied the SOJ motion. R.PC.293.

At the next status hearing, in October 2018, petitioner noted that he had amended his petition to raise a claim about the McDonnell Report. R.PC.295, 299-300. ASA Walls reiterated that (1) the McDonnell Report was "the only thing" in the basement file that had not been given to the defense before trial; and (2) a version of the McDonnell Report had been given to the defense before trial that existed in a different format but otherwise contained

the exact same "wordage" and "content." R.PC.296. Judge Walowski said that she would read everything petitioner had filed and "on the next court date we're going to take care of all these issues." R.PC.299.

At the next hearing, in November 2018, petitioner again asked Judge Walowski to review the entire basement file because it was relevant to his postconviction petition. R.PC.306-11. Judge Walowski responded that she was not obligated to do so and explained that in "postconviction proceedings," petitioner had to make specific allegations based on new evidence, not merely ask a court to review an entire file "to fish for something." R.PC.311-12, 315-17. Petitioner then handed Judge Walowski a motion asking her to hold ASA Walls in contempt for "violating a court order" by reviewing the basement file. R.PC.333. Judge Walowski responded:

> I don't find she's in any way in contempt of court and your — Mr. Montanez, I dealt with these issues. Your motion to reconsider regarding the Chicago Police Department files, I have already dealt with that issue. I don't — like I said, I'm not going to just look at things just to look at things. . . .
>
> So I am not going to go through when I already explained this as far as just going through what's in the basement files, going through police reports. I don't find that's appropriate[.]

R.PC.334. Accordingly, the court denied petitioner's motion to reconsider (challenging the dismissal of his petition and denial of leave to amend his petition), including petitioner's "Third Amended" postconviction petition and its claim about the McDonnell Report. R.PC.340.

Petitioner filed a notice of appeal, C.Secured.232-33, and the Office of the State Appellate Defender was appointed to represent him, C.Secured.239.

In the appellate court, petitioner argued only that the People violated *Brady* by failing to disclose that Ortiz had entered into a plea agreement in exchange for testifying against petitioner. *Montanez*, 2021 IL App (1st) 191065-U, ¶ 35. The appellate court affirmed the dismissal of petitioner's petition because, among other reasons, there was no evidence that Ortiz had received a plea deal for testifying against petitioner. *Id.*, ¶¶ 41-54.

C. Petitioner's Successive Postconviction Petition

In the meantime, in April 2019 (the year after petitioner's initial postconviction petition proceedings ended in the circuit court), petitioner filed a motion for leave to file a successive petition. Supp.CR.Succ.12-19. The proposed successive petition alleged that (1) petitioner's life sentence violated *Miller v. Alabama*, 567 U.S. 460 (2012), because he was 21 years old at the time of the murders; and (2) the People violated *Brady* by failing to turn over the McDonnell Report before trial. Supp.CR.Succ.55-72. The court (with Judge Claps now presiding again) held a couple of brief status hearings on the successive petition; the People made no substantive comments at those hearings. R.Succ.5-7, 10-12, 15. The court denied petitioner leave to file the successive petition. R.Succ.15.

As relevant here, petitioner argued on appeal that (1) the People "improperly participated in discussions at the leave-to-file-stage" of his successive postconviction proceedings; and (2) the court erred by denying leave to file a successive petition alleging that the People violated *Brady* by

not disclosing the McDonnell Report and "the remainder of the basement file" before trial. *People v. Montanez*, 2022 IL App (1st) 191930, ¶ 1.

The appellate court affirmed the circuit court's judgment denying leave to file the successive petition. *Id.*, ¶ 2. The appellate court first noted that the People did not improperly participate at the leave-to-file stage of petitioner's successive postconviction proceedings, because all of the "participation" petitioner complained about occurred in 2018, long before petitioner sought leave to file a successive petition. *Id.*, ¶¶ 33-36. Petitioner's claim that the People violated *Brady* by not disclosing the entirety of the basement file before trial could not be raised on appeal because no such claim was alleged in petitioner's successive petition. *Id.*, ¶¶ 40-41. And petitioner's claim that the People violated *Brady* by not turning over the McDonnell Report failed because even assuming, for the sake of argument, that he did not have the report earlier, there was no prejudice because the report at most could have been used to try to impeach McDonnell on two minor points, and would not have changed the outcome of trial given the overwhelming evidence of petitioner's guilt. *Id.*, ¶¶ 43-46.

STANDARDS OF REVIEW

The denial of leave to file a successive petition is reviewed de novo. *People v. Bailey*, 2017 IL 121450, ¶ 13. Discovery orders are reviewed for an abuse of discretion. *People v. Simpson*, 204 Ill. 2d 536, 548 (2001).

ARGUMENT

In this appeal of the denial of his motion for leave to file a successive postconviction petition, petitioner's claims of error focus almost exclusively on conduct and rulings made during his *initial* postconviction proceedings. His first claim — that comments the prosecutor made in the initial postconviction proceedings, long before petitioner sought leave to file a successive petition, constitute improper participation at the leave-to-file-stage of the successive postconviction proceedings — is meritless. *See infra* Section I. His second claim — that the circuit court erred by denying his request to review the basement file *in camera* in the initial postconviction proceedings — is barred and meritless. *See infra* Section II. And his final claim — that the circuit court erred by denying leave to file a successive petition asserting a *Brady* claim relating to the "remainder of the basement file" — is barred and meritless too. *See infra* Section III.[3]

I. The Prosecution Did Not Impermissibly Participate at the Leave-to-File Stage of the Successive Postconviction Proceedings.

Petitioner contends that the prosecution violated *People v. Bailey*, 2017 IL 121450, by impermissibly participating in the circuit court's decision to deny petitioner leave to file his successive petition. Pet. Br. 33-35. The appellate court correctly held that this argument is meritless.

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[3] As noted, in the appellate court petitioner raised two *Brady* claims: one based on the McDonnell Report and one based on the "remainder of the basement file." *Supra* pp. 14-15. His opening brief in this Court challenges only the *Brady* claim related to the remainder of the basement file.

The Post-Conviction Hearing Act limits each petitioner to the filing of a single postconviction petition and provides that a petitioner must obtain leave of court to file a successive petition. *See* 725 ILCS 5/122-1(f). As relevant here, to file a successive petition, a petitioner first must file a motion for leave to file a successive petition that demonstrates "cause" and "prejudice" for failing to raise his claims in his earlier proceedings. *Id.* In *Bailey*, 2017 IL 121450, ¶ 1, the petitioner filed a motion for leave to file a successive petition, the prosecution argued against the motion in a hearing, then the circuit court denied the motion. This Court held that at the leave-to-file stage, where the petitioner has filed a motion seeking leave to file a petition, prosecutors may not argue that the motion be denied. *Id.*, ¶¶ 16-25.

The record rebuts petitioner's claim that the People violated *Bailey*. Petitioner filed his motion for leave to file a successive petition in April 2019. Supp.C.Succ.12-19. The circuit court held two brief status hearings, then denied the motion in August 2019. R.Succ.5-7, 10-12, 15. The People did not make any substantive statements at those hearings, let alone argue that the motion should be denied. *Id.* Indeed, petitioner's brief does not identify any improper participation by the People after he filed his successive petition motion. *See* Pet. Br. 33-37. Therefore, the appellate court correctly held that the People did not violate *Bailey*.

Petitioner nevertheless argues that this Court should extend *Bailey* to prohibit the People from making statements "even before" a petitioner files a

motion for leave to file a successive petition. Pet Br. 33-34. That is, he argues that this Court should hold that the People violated *Bailey* because in 2018, *the year before* petitioner filed his successive petition motion, ASA Walls reviewed the basement file and stated that (1) the only document that was not tendered to the defense before trial was the McDonnell Report and (2) the contents of that report was given to the defense word for word before trial in a different format. *Id.*

Petitioner's argument fails for several reasons. First, *Bailey* is expressly based on the plain language of the Post-Conviction Hearing Act: this Court "interpreted [the Act] to mean that the legislature did not contemplate the State's participation" when the circuit court "determines" whether to grant a motion for leave to file a successive petition. *Bailey*, 2017 IL 121450, ¶¶ 16-25. But petitioner identifies nothing in the Act that prohibits the People from making comments *before* a petitioner files a successive petition motion, nor could he credibly do so. Therefore, there is no statutory basis for his claim.

Second, in addition to a lack of statutory support, extending *Bailey* as petitioner suggests would put the prosecution in unfair and impossible positions, as this case shows. From the moment petitioner raised the issue of the basement file, he asserted that the file related to his *initial* postconviction petition, which was then in the midst of second-stage proceedings — a stage

in which the prosecution may and does participate. *Id.*, ¶¶ 19-20 (noting that prosecutors may participate and argue in second-stage proceedings).

For example, petitioner faults ASA Walls for comments she made in the first two status hearing that occurred after the case was transferred to Judge Walowksi. Pet. Br. 33 (citing R.PC.248-49, 258). But in those hearings, petitioner said that the basement file "pertains to my postconviction petition," noted that his motion to reconsider (challenging the dismissal of his petition and the denial of leave to amend his petition) was still pending, and said that he was amending his petition to include a claim relating to the basement file. *E.g.*, R.PC.251-54, 261-65. Then, shortly thereafter, petitioner filed his third amended petition which included allegations related to the McDonnell Report. CR.PC.1515-30. Moreover, in the midst of all that, petitioner filed (1) an SOJ motion alleging that Judge Walowski erred by allowing ASA Walls to review the basement file, rather than reviewing it *in camera*; and (2) a motion for sanctions against ASA Walls for reviewing the basement file. R.PC.268, 333. ASA Walls, of course, responded to those pleadings (the year before petitioner filed his successive petition). Petitioner now contends that this Court should hold that her comments violate *Bailey*. Pet. Br. 33 (citing R.PC.270).

Simply put, all of ASA Walls's comments were proper when made, because they were made in response to petitioner's arguments regarding his second-stage, initial postconviction petition, his related SOJ motion, and his

related motion for sanctions. By asking this Court to extend *Bailey*, petitioner is attempting to retroactively recharacterize ASA Walls's comments, which were indisputably proper when made, as improper because, *the year after* she made those comments, petitioner sought leave to file a successive postconviction petition. Petitioner's proposed extension of *Bailey* is unfair to the prosecution and contrary to the operation of a just and efficient legal system.

Prosecutors must be able to make arguments during second-stage postconviction proceedings, and in response to motions like petitioner's, seeking an SOJ or sanctions, without fear that their comments will retroactively be held to be improper merely because, at some future date, the petitioner seeks to file a successive petition. Prosecutors and circuit courts need clear rules about when a prosecutor may respond to a petitioner's arguments, but extending *Bailey* as petitioner requests would instead create uncertainty: the propriety of a prosecutor making a substantive argument could never be judged in the moment, but instead would depend on whether the petitioner filed a successive postconviction petition at some later time. The fair and sensible rule, which provides a clear line for courts and prosecutors, is the rule this Court has already announced: at the leave-to-file stage of successive postconviction proceedings, the prosecution may not argue that leave to file should be denied. *Bailey*, 2017 IL 121450, ¶¶ 16-26.

Two additional points should be noted. First, petitioner claims that it is "unfair" that he was required to "argue against the State" when he was pro se. Pet. Br. 33. But the court appointed counsel for petitioner, and petitioner chose to fire his counsel and proceed pro se despite the circuit court's admonishments; it is unreasonable to suggest that petitioner's decision to represent himself should foreclose the prosecutor's authority to make any arguments. *Supra* p. 8. Second, as demonstrated below, petitioner cannot establish cause and prejudice as is required to file a successive petition. *See infra* Section III. Therefore, even if the prosecution violated *Bailey*, that error would be harmless. *E.g.*, *People v. Lusby*, 2020 IL 124046, ¶ 29 (remand is unnecessary, despite *Bailey* error, where petitioner fails to show cause and prejudice).

II. Petitioner's Discovery Arguments Are Barred and Meritless.

All of petitioner's discovery arguments are barred and meritless. When petitioner received Gorman's letter in 2015, he had two simple ways to obtain the basement file, both of which were spelled out in the letter: he could have (1) asked his appointed postconviction counsel (or prior counsel) to obtain the file from Gorman; or (2) signed the authorization form that Gorman sent him, which would have allowed her to review his file to determine whether he had a *Brady* claim. Supp.C.Succ.24. Instead, petitioner waited for years, until 2018, to take any action on Gorman's letter, and then asked the circuit court for help. *Supra* pp. 7-14. Petitioner now

complains about the help the court provided, arguing that (1) Judge Walowski should have reviewed the file *in camera*, rather than trusting ASA Walls's review; and (2) this Court should adopt new rules specific to review of the basement files referred to in Gorman's letter. Pet. Br. 32-40. Petitioner's arguments should be rejected.

A. Petitioner's Discovery Arguments Are Barred.

Petitioner's discovery arguments are barred both by settled rules of appellate procedure and the Post-Conviction Hearing Act because they (1) challenge conduct that occurred during the initial postconviction proceedings, and (2) should have been raised in petitioner's initial postconviction appeal.

Specifically, petitioner's request that Judge Walowski review the basement file *in camera*, and her ruling that she would not do so, occurred in 2018, in the midst of the *initial* postconviction proceedings, the year *before* petitioner began his successive postconviction proceedings. In July 2018, petitioner told Judge Walowski that the basement file "pertains to my postconviction petition" and argued that the court should review the file *in camera*. R.PC.250-54. Judge Walowski denied that request because she "trust[ed] Ms. Walls" to review the file properly and turn over any information that had not been given to the defense previously. R.PC.250-51.

Over the next several months, petitioner (1) amended his petition to assert a *Brady* claim based on the McDonnell Report in the basement file, and (2) filed an SOJ motion to replace Judge Walowski because she did not review the basement file *in camera*, which Judge Brosnahan denied. *Supra*

pp. 11-14. Then, at a hearing in November 2018, petitioner repeated his request that Judge Walowski review the basement file *in camera* because it was relevant to his pending, initial postconviction petition. R.PC.306-12. Judge Walowski again denied that request. R.PC.311-18. Judge Walowski then denied petitioner's motion to reconsider (thereby denying petitioner leave to file his amended petition) as well as petitioner's motion for sanctions against ASA Walls for reviewing the basement file herself rather than giving it to the court for *in camera* review. R.PC.334-40.

In December 2018 (the year before petitioner commenced his successive postconviction proceedings), petitioner filed a notice of appeal, stating his intent to appeal the denial of his postconviction petition, the denial of his motions to amend his petition, the denial of his motion to reconsider, "and all other" denial orders. C.Secured.232-33. Yet, in his postconviction appeal, petitioner (represented by appointed counsel) argued only that the People violated *Brady* by failing to disclose Ortiz's alleged plea agreement. *Montanez*, 2021 IL App (1st) 191065-U, ¶ 35.

Based on this procedural history, it is clear that petitioner may not raise his discovery arguments in this appeal. The doctrine of res judicata "bars not only what was actually decided in the first action but also whatever could have been decided." *Hudson v. City of Chicago*, 228 Ill. 2d 462, 467 (2008). Similarly, it has long been settled that "no question which was raised or could have been raised in a prior appeal on the merits can be urged on

subsequent appeal and those not raised are considered waived." *McDunn v. Williams*, 156 Ill. 2d 288, 334 (1993); *People v. Rowell*, 2022 IL App (5th) 200266-U, ¶ 31 (same); *People v. Brown*, 2017 IL App (2d) 160971, ¶ 24 (same). In addition, the "purpose" of a successive postconviction petition "is to permit inquiry into constitutional issues involved in the original conviction and sentence that were not, and could not have been, adjudicated" in earlier proceedings. *People v. English*, 2013 IL 112890, ¶ 22. The Act "does not, however, provide a forum to test the propriety of conduct at an earlier post-conviction proceeding." *People v. Flores*, 153 Ill. 2d 264, 277 (1992); *see also People v. Tenner*, 206 Ill. 2d 381, 398 (2003) (collecting cases and noting that "[w]e refuse to sanction piecemeal post-conviction litigation").

It cannot be disputed that petitioner's discovery arguments (1) challenge conduct and rulings made in the initial postconviction proceedings, and (2) could have been raised in petitioner's initial postconviction appeal. Accordingly, petitioner may not raise those arguments in these successive postconviction proceedings and appeal.

B. Judge Walowski Did Not Abuse Her Discretion by Declining to Review the Basement File *In Camera*.

In addition to being barred, petitioner's argument that Judge Walowski erred by declining to review the basement file is meritless.

1. Judge Walowski's ruling was not arbitrary, fanciful, or unreasonable.

Neither the civil nor the criminal discovery rules apply to postconviction proceedings, but "a circuit court nonetheless has inherent

discretionary authority to order discovery in post-conviction proceedings." *People v. Simpson*, 204 Ill. 2d 536, 548 (2001) (collecting cases). However, this Court has warned that "[t]his authority must be exercised with caution, because of the potential for abuse of the discovery process and because of the limited scope of post-conviction." *People v. Williams*, 209 Ill. 2d 227, 236 (2004); *see also, e.g., People v. Hickey*, 204 Ill. 2d 585, 598 (2001); *People v. Enis*, 194 Ill. 2d 361, 415 (2000).

A postconviction discovery request should be denied when it imposes an undue burden. *See, e.g., People v. Lucas*, 203 Ill. 2d 410, 431-32 (2002). And this Court has consistently held that a postconviction discovery request should be denied where it amounts to a "fishing expedition." *E.g., Enis*, 194 Ill. 2d at 415; *see also Simpson*, 204 Ill. 2d at 548 (same); *Hickey*, 204 Ill. 2d at 598 (same); *Williams*, 209 Ill. 2d at 238 (same). A circuit court's denial of a request for discovery in a postconviction proceeding "will not be reversed absent an abuse of discretion." *Simpson*, 204 Ill. 2d at 548. An abuse of discretion occurs if the decision "is arbitrary, fanciful, or unreasonable." *People v. Brand*, 2021 IL 125945, ¶ 36.

Petitioner cannot carry his burden of showing that Judge Walowski's ruling was arbitrary, fanciful, or unreasonable. Notably, Judge Walowski did not deny petitioner discovery of materials in the basement file: instead, she ordered ASA Walls to turn over any documents in the basement file that had not been given to the defense before trial, and Walls confirmed that she did.

The only request that Judge Walowski denied was petitioner's request that the court personally review the entire file *in camera*, compare it to all the materials the defense was given before trial, and give petitioner any materials Judge Walowski thought could support a *Brady* claim. But Judge Walowski had good reasons for denying that request.

First, Judge Walowski explained that ASA Walls is "an officer of the court" and that she "trust[ed]" Walls to review the basement file properly, and turn over any materials the defense had not previously received. R.PC.250-51. That is reasonable because under *Brady* it is the prosecutor (not the court) who reviews the People's files to determine what materials must be produced to the defense, and nothing in the record shows that ASA Walls cannot be trusted to carry out this duty. *See, e.g.*, *Hickey,* 204 Ill. 2d at 603-04 (it is prosecutors' duty to disclose *Brady* materials); *see also United States v. Caro-Muniz*, 406 F.3d 22, 30 (1st Cir. 2005) (trial court did not err by relying on State to review previously withheld tape recordings for potential *Brady* material, rather than reviewing them *in camera*, because in the "'typical case'" it is "'the State who decides which information must be disclosed'"); *United States v. Lucas*, 841 F.3d 796, 807-09 (9th Cir. 2016) (reasonable for trial court to reject defendant's discovery request by relying on prosecutor's representations about lack of *Brady* material in its files); *Comm. v. Williams*, 624 Pa. 405, 433-34 (2014) (denying postconviction discovery request for State's file and noting that *Brady* imposes a "duty upon

the government to disclose exculpatory information, but it establishes no specific right in the defendant to review the [State's] file to see, for example, if he agrees with the [State's] assessment and representation").

Second, Judge Walowski also told petitioner that she was not obligated to review the basement file to search for evidence that might support a *Brady* claim because, as she explained, in "postconviction proceedings" petitioners may not ask a court to review an entire file "to fish for something" in the hope that helpful evidence will be found. R.PC.311-12, 315-17. That explanation echoes this Court's precedent establishing that postconviction discovery requests cannot be "fishing expeditions." *Supra* p. 25. It is also consistent with settled precedent holding that "*Brady* does not permit a defendant to sift through information held by the government" in the hope of finding useful information. *Lucas*, 841 F.3d at 807 (collecting cases); *see also, e.g.*, *United States v. Mincoff*, 574 F.3d 1186, 1200 (9th Cir. 2009) (defendant's "'mere speculation about materials in the government's files' did not require the district court to make those materials available, or mandate an in camera inspection").

In sum, because it was well supported by precedent, Judge Walowski's ruling was not arbitrary, fanciful, or unreasonable.

2. Petitioner's own authority rebuts his claim that it was unreasonable for Judge Walowski to trust ASA Walls.

Petitioner does not cite a single case holding that it is an abuse of discretion to allow prosecutors to review an allegedly withheld file when

responding to a *Brady* claim. Instead, petitioner's assertion that it was unreasonable for Judge Walowski to trust ASA Walls is based on two assumptions: (1) the file holds exculpatory information that was "concealed" from petitioner before trial; and (2) even though she knew the court could decide to review the file *in camera* at any time, ASA Walls was willing to risk falsely representing the nature of the file's contents to Judge Walowski because the State's Attorney's Office "benefit[s] from the concealment" of files as it makes it "easier" for them to "prosecut[e] criminal defendants" and avoid "culpability in suppressing *Brady* material" in past trials. Pet. Br. 34-39. Petitioner cites nothing in the record to support his assumptions, *see id.*, and the caselaw he relies on rebuts them.

To begin, petitioner's brief repeatedly refers to the file at issue as a "street file," and argues that ASA Walls could not be trusted to review it because "[t]he State was responsible for concealing the street file in the first place." Pet. Br. 32-36. Those assertions incorrectly conflate "street files" and "basement files," and make assumptions unsupported by the record.

In the courts below, the parties correctly referred to the police file at issue in this case as a "basement file," *i.e.*, a police file that was stored in the basement of a police station. *See, e.g.*, R.PC.249, 259. There is nothing intrinsically improper about a basement file — that is to say, the existence of a file stored in the basement of a police station does not automatically mean that exculpatory evidence was concealed from the defense. After all, as

petitioner's own authority recognizes, police officers must be allowed to create files while investigating crimes, those files must be stored somewhere, and the police have the "widest latitude" to determine how they are stored. *See Palmer v. City of Chicago*, 755 F.2d 560, 577-78 (7th Cir. 1985) ("*Palmer I*") (cited in Pet. Br. 16-17, 39).

By contrast, as petitioner's authority shows, a "street file" is different: it is defined as a file that police "withheld from the state's attorney and [was] therefore unavailable as a source of exculpatory information that might induce him not to prosecute or, failing that, would at least be available to defense counsel under *Brady*." *Jones v. City of Chicago*, 856 F.2d 985, 995 (7th Cir. 1986) (cited in Pet. Br. 16-18, 39); *see also Rivera v. Guevara*, 319 F. Supp. 3d 1004, 1061 (N.D. Ill. 2018) (cited in Pet. Br. 18).

Here, the record establishes only that the file is a basement file — a police file stored in a basement — not that it is a street file or that police withheld exculpatory information, let alone that prosecutors knew that information was withheld. Thus, petitioner's arguments that ASA Walls cannot be trusted to review the file due to "the State's proven record of mishandling Montanez's street file" and because the State's Attorney's Office "was part of concealing this evidence in the first place," either conflate basement and street files or rely on assumptions that have not been established. Pet. Br. 36-39.

Petitioner further assumes that the remainder of the basement file contains undisclosed *Brady* material — and that ASA Walls falsely reported that everything in the file was given to the defense before trial — based on federal litigation concerning alleged street files in unrelated cases. Pet. Br. 16-18, 36, 39. But those cases rebut petitioner's arguments about ASA Walls.

In petitioner's first case, *Palmer I*, the Seventh Circuit Court of Appeals granted a class action preliminary injunction, requiring the Chicago Police Department to preserve 300 police files so that they could be reviewed to determine whether they contained exculpatory evidence that had not been disclosed to criminal defendants before trial. *Palmer I*, 755 F.2d at 577-78 (cited in Pet. Br. 16-17, 39). But petitioner fails to note that one year later, the attorneys representing those criminal defendants inspected the 300 files, they "found nothing on which they could base a claim that any member of the class had been convicted in violation of the Constitution," and the case was dismissed. *Palmer v. City of Chicago*, 806 F.2d 1316, 1317 (7th Cir. 1986) ("*Palmer II*"). Thus, the *Palmer* litigation rebuts petitioner's speculation that the basement file at issue here contains undisclosed *Brady* material and, by extension, that ASA Walls cannot be trusted.

Petitioner's other federal cases are likewise unavailing. *See* Pet. Br. 16-18, 39 (citing *Jones*, 856 F.2d at 985; *Rivera*, 319 F. Supp. 3d at 1004; *Fields v. City of Chicago*, No. 10 C 1168, 2017 WL 4553411 (N.D. Ill. Oct. 12, 2017)). Indeed, those cases support the conclusion that it is reasonable to

rely on ASA Walls's determination because (1) the plaintiffs alleged that the police, *not* prosecutors, concealed evidence; and (2) the courts concluded that had prosecutors known of the evidence, they would have given it to the defense.

For example, the plaintiff in *Jones* alleged that police attempted to frame him for murder by concealing exculpatory evidence in files that they "did not turn over to the state's attorney's office." 856 F.2d at 988-91. When prosecutors learned of the withheld evidence, they dropped the charges against the plaintiff. *Id.* at 991. The plaintiff successfully sued the police officers. *Id.* at 985. In affirming the officers' liability, the court noted the evidence at trial showed that (1) the officers "concealed from the prosecutors" material facts to influence the charging decision; and (2) "[i]f the prosecutors had known of [the concealed] evidence," they would have not charged the plaintiff. *Id.* at 993. Petitioner's two remaining federal cases are similar. *See Fields*, 2017 WL 4553411, at *3 (evidence showed that "had he known about it," prosecutor "would have turned over" materials that police concealed); *Rivera*, 319 F. Supp. 3d at 1060-62 (evidence showed officers withheld street file from prosecutor to influence charging decision).

Petitioner's federal precedent thus fails to prove that ASA Walls cannot be trusted to review the basement file: in petitioner's cases, the evidence proved that prosecutors did not conspire to withhold information

from the defense but, to the contrary, would have given the information to the defense (and/or not charged the defendant) had they known of it.

Petitioner's contention is also undermined by the state cases he cites. *See* Pet. Br. 23 (citing *People v. Lyles*, 2022 IL App (1st) 201106-U, and dismissal order in *People v. Fallon*, No. 1-21-1235). The petitioners in *Lyles* and *Fallon* filed postconviction petitions alleging that Gorman had discovered files relating to their criminal cases; prosecutors agreed to advance both petitions to the second stage. *See Lyles*, 2022 IL App (1st) 201106-U, ¶ 16; Pet. App'x A-84 (Fallon dismissal order).[4] The prosecutors' actions in those cases rebut petitioner's assertion that prosecutors cannot be trusted because the State's Attorney's Office "benefit[s] from the concealment" of files as it makes it "easier" for them to prosecute criminal defendants and avoid "culpability in suppressing *Brady* material" in past cases. Pet. Br. 34-39.

Petitioner's remaining arguments fare no better. Petitioner cites a 2016 newspaper article in which Gorman (then in the midst of suing the City of Chicago) alleged that she had reviewed 60 basement files and 90% of them had "information that was not in the defense file." Def. Br. 17, 39. Petitioner contends that this shows that ASA Walls's representations cannot be trusted. *Id.* But the article cannot be considered in this appeal because it was not presented to the circuit court. *See, e.g., Webster v. Hartman*, 195 Ill. 2d 426,

[4] To be clear, prosecutors did not agree that the petitioners' claims had merit but only that it was sensible for the litigation to advance to the second stage of postconviction proceedings.

434-36 (2001) (reviewing court may not consider evidence that was not presented in circuit court).[5] Even setting that aside, Gorman's estimate is, at the very least, open to question, given that (1) similar claims made in the *Palmer* litigation were proven incorrect; and (2) although Gorman sent her letters concerning the basement files in 2015, petitioner has not identified anyone who has won a postconviction claim based on those files. Moreover, even if Gorman were correct that the files she found contained "information" not in the defense file, that allegation does not establish a viable *Brady* claim: Gorman did not contend that such information was necessarily exculpatory, and she states in the article that it was unclear whether anything she found "would have changed the outcome of a trial."[6] And, perhaps most importantly for present purposes, while Gorman claimed that *police* withheld information, she did not claim that *prosecutors* did, which means the article fails to support petitioner's contention that ASA Walls cannot be trusted to review the file.

Lastly, petitioner claims that ASA Walls "was part of concealing this evidence in the first place" and that her comments about the file "had the effect of absolving her office from culpability in suppressing *Brady* material

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[5] Petitioner's opening brief did not argue that this Court may take judicial notice of information in the article, so such an argument is forfeited. Ill. Sup. Ct. R. 341(h)(7). It would also be meritless. *See, e.g.*, Ill. R. Evid. 201(b) (court may take judicial notice only of facts not subject to reasonable dispute).

[6] *See* https://www.chicagotribune.com/news/ct-chicago-police-street-files-met-20160212-story.html.

at Montanez's trial." Pet. Br. 39. But, again, there is no evidence that the basement file contains information that was not given to the defense before trial. Moreover, petitioner has pointed to no evidence that *prosecutors* had any role in storing the files in the basement of the police station, or participated in any alleged concealment of information, let alone that ASA Walls (who was not the prosecutor in petitioner's trial) did so. The accusation that an ASA, or the State's Attorney's Office more generally, concealed exculpatory evidence and then lied about it in open court years later in postconviction proceedings is a serious charge that should be leveled only when it can be supported with concrete evidence, which petitioner has failed to provide.

In sum, petitioner has failed to show that prosecutors cannot be trusted to review files when responding to *Brady* claims — to the contrary, his precedent shows precisely the opposite. Accordingly, petitioner has failed to prove that it was arbitrary, fanciful, or unreasonable for Judge Walowski to allow ASA Walls to review the basement file.

C. Petitioner's Argument that This Court Should Adopt New Rules for Cases Related to Gorman's Letters Is Meritless.

In his opening brief, petitioner predicts that many more postconviction petitions will be filed related to the letters Gorman sent inmates in 2015, and he asks this Court to "intervene to direct the circuit courts" on a "uniform method of treating these claims." Pet Br. 37. Specifically, petitioner argues that this Court should "mandat[e]" that courts, upon receipt of a petition

attaching Gorman's 2015 letter, must: (1) "automatically" advance the petition to the second stage, where counsel is appointed to review the basement file and amend the petition; or (2) review the basement file *in camera*, compare it to the materials given to the defense before trial, and determine whether the petitioner has a valid *Brady* claim. *Id.* at 37-39.[7] This Court should reject petitioner's proposals, because they are contrary to the Post-Conviction Hearing Act and this Court's precedent, and are unnecessary for the just and efficient resolution of such claims.

1. Petitioner's arguments are contrary to the Post-Conviction Hearing Act and this Court's precedent.

As petitioner's authority shows, this Court strictly interprets the Post-Conviction Hearing Act and declines to adopt procedures that are not expressly provided by the statute. *E.g.*, *Bailey*, 2017 IL 121450, ¶ 16 (prosecutors may not participate in the initial stage of postconviction proceedings due to "the absence of language in the Act expressly allowing the State" to do so) (cited in Pet. Br. 33-37); *see also Flores*, 153 Ill. 2d at 276-77 (petitioners may not allege in a successive petition that postconviction counsel erred, because nothing in the Act allows them to do so).

Petitioner does not identify any provision in the Post-Conviction Hearing Act that supports his contention that petitions attaching the

[7] Petitioner also suggests this Court could require courts to automatically appoint counsel to review the file found by Gorman and try to "substantiate a *Brady* violation." Pet. Br. 38. That proposal is not meaningfully different than petitioner's first proposal, *i.e.*, that petitions should automatically be advanced to the second stage, where counsel is appointed.

Gorman letter should automatically advance to the second stage or automatically trigger *in camera* review, nor could he credibly do so. He suggests this Court can adopt such rules, even though they are not provided by the Post-Conviction Hearing Act, because Illinois courts have "developed bodies of case law directing automatic remand to [the] second stage" if a circuit court fails to rule on a postconviction petition within a 90-day period after the petition is filed. Pet. Br. 37-38. But petitioner ignores that the Act expressly provides that if a court does not rule on a petition within 90 days of its filing, it must be advanced to the second stage. *See* 725 ILCS 5/122-2.1.

Moreover, petitioner's proposals are contrary to this Court's precedent. As noted, this Court has consistently "caution[ed]" circuit courts about allowing discovery in postconviction proceedings "because of the potential for abuse of the discovery process and because of the limited scope of post-conviction" review. *Williams*, 209 Ill. 2d at 236; *see also supra* p. 25. And this Court has consistently held that a postconviction discovery request should be denied when it amounts to a "fishing expedition." *E.g., Enis*, 194 Ill. 2d at 415; *see also supra* p. 25. Petitioner's argument — that this Court should "mandate" *in camera* review or advancement to second-stage proceedings to allow attorney review of a file simply because a petitioner attaches Gorman's letter — turns this Court's well-reasoned precedent on its head. The better rule is the existing rule: courts have discretion to determine what, if any, discovery is appropriate in a given case.

2. Petitioner's proposed rules are unnecessary.

Even setting aside the lack of legal support for petitioner's position, there is no basis for his assertion that it is necessary to adopt new rules governing petitions that attach Gorman's letter because "it is virtually certain" there will be a large number of such petitions in the future. Pet. Br. 37. Gorman mailed her letters in 2015, yet the parties have identified only five other postconviction cases related to those letters, all of which have either ended or are in the second stage of postconviction proceedings (and thus would be unaffected by the adoption of petitioner's proposed new rules). *See* Pet. Br. 37.[8] It is reasonable to believe that anyone else who received Gorman's letter eight years ago either investigated the matter — and, like in the *Palmer* litigation, found no basis to raise a *Brady* claim — or for some other reason decided not to pursue the matter, a decision that is unlikely to change now, a decade later.

Perhaps more importantly, if new cases do arise, petitioner's proposed new rules are still unnecessary. Petitioner argues that they are necessary because pro se petitioners cannot directly access the basement files due to the federal protective order, which provides that only attorneys may obtain the files. *Id.* But petitioner fails to consider that Gorman anticipated that issue

[8] Petitioner identifies four cases: *Lyles*, *Banks*, *Fallon*, and *Brocks*. Pet. 23-25. There is also a fifth case, *People v. Mosley*, 2021 IL App (1st) 192045-U, ¶ 39, where the appellate court affirmed the denial of a petitioner's motion for leave to file a successive petition. Copies of these unpublished cases are included in petitioner's appendix and/or on this Court's website, https://www.illinoiscourts.gov/top-level-opinions/.

and expressly provided an easy workaround that does not require intervention from a court. *See* Supp.C.Succ.24. Indeed, the Gorman letter states: (1) "I am attaching an authorization for you to sign allowing me to talk with any attorney that has represented you and to obtain your file [*i.e.*, the defense attorneys' files] so that I can compare it with what I have obtained [*i.e.*, the basement file]"; and (2) alternatively, Gorman could "share the documents [in the basement file] with the attorney" who currently represents or previously represented the petitioner. *Id.*

Any person who is capable of filing a pro se petition is capable of signing the authorization form that Gorman provided and/or asking their current or former lawyers to contact Gorman. Indeed, in one of the cases that petitioner relies on, *People v. Banks*, 2020 IL App (1st) 180322-U, ¶ 8, the petitioner did just that: he "put Gorman in touch" with one of his former appellate attorneys, and that attorney obtained the basement file and signed an affidavit attesting that material in the file "could have had an impact on the issue of [petitioner's] guilt or innocence." While the appellate court noted that the affidavit "does not explicitly state" that the file "contained material exculpatory or impeachment evidence" that was concealed from the defense, it concluded that "we must construe the allegation liberally in favor of the [petitioner]" and held that his initial petition alleged enough to advance to the second stage. *Id.*, ¶ 17.

Moreover, if a petitioner is unable to contact Gorman or have any of his attorneys do so, there are still other options. In such a situation, the Post-Conviction Hearing Act permits petitioners to explain why they are unable to attach evidence supporting their claim. 725 ILCS 5/122-2. The circuit court can consider that explanation, as well as the claim the petitioner seeks to raise, then decide the best way to move forward.

Sometimes, as was true in two of the cases identified by the parties, the proper course will be to deny leave to file a successive postconviction petition without engaging in any discovery. *See Mosley*, 2021 IL App (1st) 192045-U, ¶¶ 37-40; *Brocks*, 2020 IL App (1st) 171630-U, ¶¶ 12-13. For example, in *Mosley* the petitioner stated that he had not had an opportunity to review the basement file Gorman found, but he speculated that it might contain a photo array that police reportedly had used during the murder investigation and lost before trial. 2021 IL App (1st) 192045-U, ¶ 29. However, the appellate court affirmed the denial of the petitioner's successive petition motion (without discovery) because it correctly ruled that the photo array, even if found, "would be immaterial," as (1) there was testimony that multiple eyewitnesses who saw the petitioner commit the murder were not shown a photo array, and (2) "there was overwhelming evidence of [petitioner's] guilt." *Id.*, ¶¶ 37-38. Thus, *Mosley* is an example of a case where there was no need to automatically require a court to review an entire

file *in camera* to search for a potential *Brady* claim or automatically advance the case to the second stage, as petitioner's proposed rules would require.

And there are still other options and ways cases can unfold that do not require petitioner's proposed rules. For example, as occurred in two of the cases cited by petitioner, the prosecution may agree that the case should advance to the second stage. *See Lyles*, 2022 IL App (1st) 201106-U; Pet. App'x A-84 (order in *Fallon*, No. 1-21-1235). Or, similar to this case, a circuit court may reasonably decide to order an assistant state's attorney to review the basement file. Or the court could attempt to contact the petitioner's prior counsel and ask them to review the file. Or, if the court prefers, the court could review the file *in camera*. And if the petitioner disagrees with the path the court ultimately chooses, the petitioner can appeal. Simply put, petitioner has identified no reason to adopt rigid rules that deviate from the Post-Conviction Hearing Act and remove discretion from the circuit courts.

Moreover, petitioner's proposed rules are unworkable. Requiring a circuit court to conduct an *in camera* review in every case would require the court to review an entire basement file, compare it to everything that was given to the defense before trial to see whether information was withheld, then determine whether the petitioner had a potential *Brady* claim (which, in turn, would require the court to review the record of the petitioner's trial and decide whether any withheld evidence could have changed the verdict). That is a burdensome task for trial judges, as they already have heavy caseloads

and significant responsibilities. It also turns a judge — who is supposed to be a neutral arbiter — into an advocate for the petitioner. *See, e.g.*, *People v. Hardin*, 217 Ill. 2d 289, 305 (2005) (rejecting postconviction petitioner's argument because "in effect, [petitioner] asks us to order the trial court to act as his advocate, investigating a nebulous" claim); *see also United States v. Zolin*, 491 U.S. 554, 571 (1989) (noting that "a blanket rule allowing in camera review" places a burden "upon the district courts, which may well be required to evaluate large evidentiary records without open adversarial guidance by the parties," and turns courts into "unwitting (and perhaps unwilling) agents" of the party seeking the review). Similarly, requiring the court to automatically appoint new counsel to investigate the matter is not always the best option either, as that attorney will often need significant time to review the defense file and the basement file, and to learn the facts of the underlying trial, tasks that may be more efficiently handled by someone else, such as prior counsel or the prosecution.

In sum, petitioner's proposed new rules are not only contrary to the Post-Conviction Hearing Act and this Court's longstanding precedent, they are also unnecessary. The better course is to continue to apply the existing rule: if a petitioner has been unable to obtain the basement file referenced in Gorman's letter, the circuit court has discretion to determine whether the petitioner is entitled to discovery or some other review of the file, and, if so, what form that discovery or review will take.

III. The Appellate Court Correctly Affirmed the Circuit Court's Denial of Petitioner's Motion for Leave to File a Successive Postconviction Petition.

Lastly, petitioner contends that he should be granted leave to file a successive postconviction petition asserting that the People violated *Brady* by not disclosing the "remainder of the [basement] file" before trial. Pet. Br. 20-31.[9] That argument is barred and meritless.

A. Petitioner Is Barred from Raising His "Remainder of the Basement File" Claim in This Appeal Because He Did Not Include it in His Proposed Successive Petition.

It is settled that petitioners may not raise claims on appeal that were not included in their proposed successive petitions. *E.g., People v. Petrenko*, 237 Ill. 2d 490, 502 (2010) (holding that "any issues to be reviewed must be presented *in the petition* filed in the circuit court, and a defendant may not raise an issue for the first time while the matter is on review") (emphasis in original); *People v. Cathey*, 2012 IL 111746, ¶ 21 (collecting cases).

For example, the petitioner in *Petrenko* alleged in his pro se petition that his trial counsel was ineffective for failing to contest the validity of a search warrant that was issued for his home. 237 Ill. 2d at 497. The search warrant was issued based on an affidavit from a police officer attesting that certain evidence linked the petitioner to the murder victim, including the discovery of the petitioner's fingerprint in the victim's house and mail

[9] As noted, petitioner does not challenge the portion of the appellate court's ruling denying him leave to file a successive petition based on the McDonnell Report. *Supra* p. 16 n.3.

belonging to the victim found in the petitioner's garbage can. *Id.* at 497-98. According to the petitioner's pro se petition, his counsel should have argued that police lacked probable cause for a warrant because there was an innocent explanation for the evidence referred to in the officer's affidavit: the petitioner and the victim had lived together for a time. *Id.* at 498. On appeal, he also claimed that his counsel should have argued that the officer's affidavit failed to inform the issuing judge that the victim's mail was dated several months before the murder (and, thus, could not be directly linked to the murder). *Id.* at 502. This Court refused to consider that particular claim because it was not clearly raised in the pro se petition. *Id.* at 502-03. The Court explained that while the ineffective assistance claims asserted in the petition "mention the age of the mail that was found in [the petitioner's] trash, they do not mention it as an example of information that was wrongfully withheld from the issuing judge. Rather, they mention it only in the context of arguing that the remaining evidence, including the mail, was insufficient to support a probable cause finding." *Id.* at 503.

Similarly, petitioner's successive petition did not raise a *Brady* claim based on the remainder of the basement file. Supp.C.Succ.56-72. Instead, the petition raised two other claims: (1) petitioner's life sentence violated *Miller*, 567 U.S. at 460, because he was 21 at the time of the murders; and (2) the People violated *Brady* by failing to turn over the McDonnell Report before trial. *Id.* Although petitioner now contends he raised a *Brady* claim related

to the remainder of the basement file, a plain reading of the petition shows that the claim he raised was based solely on the McDonnell Report: petitioner argued that he had a valid *Brady* claim because police "failed to turn over [the] report" until 2018, when ASA Walls gave him a copy, and the report contained information that would have allowed the defense to impeach parts of McDonnell's testimony. Supp.C.Succ.12-16, 56-63.

Petitioner points to nothing in his proposed successive petition expressly raising a *Brady* claim based on the remainder of the basement file. Instead, he first suggests that his use of the word "suppressed" on one page of his successive postconviction motion implied that he intended to raise a claim about the entire basement file. Pet. Br. 21. But that passage was expressly discussing the McDonnell Report: it says that "the police report (Ex. 4)" — *i.e.*, the McDonnell Report — contained "favorable and suppressed evidence." Supp.C.Succ.14. Petitioner next points out that he recited the background facts of how he learned about the basement file and eventually obtained the McDonnell Report. Pet. Br. 21-22. But those facts did not raise a *Brady* claim about the entire basement file; rather, petitioner relied on them to allege that he did not have the McDonnell Report before trial (a requirement for a *Brady* claim) and could not have raised a claim related to the "police report" earlier (a requirement for a successive petition). *See, e.g.*, Supp.C.Succ.13-14, 22. Petitioner is also incorrect that he raised a *Brady* claim regarding the entire basement file by using the phrase "cumulative

pattern of misconduct" in one section of his motion. Pet. Br. 22. That section argued that the alleged concealment of the McDonnell Report plus the alleged concealment of Ortiz's plea agreement (the subject of petitioner's failed initial postconviction petition) showed a "cumulative pattern of misconduct," Supp.C.Succ.62-64, and not a claim about the remainder of the basement file. What petitioner fails to consider is that when he raised his *Brady* claim in his proposed successive petition, he did not do so obliquely or implicitly. Rather, he discussed each element of his *Brady* claim in detail, detailing why he believed he had a valid claim, and the only basis for that claim was the McDonnell Report, not the remainder of the basement file. Supp.C.Succ.13-15, 56-61.

Lastly, petitioner argues that his failure to expressly raise a *Brady* claim regarding the remainder of the basement file should be excused because he was pro se. Pet. Br. 26. But even pro se petitioners are barred from raising a claim on appeal that was not clearly raised in their successive petitions, *see, e.g., Petrenko*, 237 Ill. 2d at 502-03; none of petitioner's cases disputes that point, even if some of them ultimately found that the pro se petition sufficiently pled a particular claim to preserve it for appellate review, *see* Pet. Br. 26 (collecting cases).

Indeed, the principle that pro se petitioners must clearly raise their claim in their petition is illustrated by one of petitioner's cases, *People v. Mars*, 2012 IL App (2d) 110695 (cited in Pet. Br. 26). The petitioner in *Mars*

alleged in his pro se petition that "defense counsel" was ineffective for failing to challenge his indictment; on appeal, he also argued that "appellate counsel" was ineffective for failing to argue that the trial court erred by not dismissing the indictment. *Id.,* ¶ 31. The appellate court held that the petitioner could not raise the appellate counsel claim on appeal because it was not included in his pro se petition. *Id.,* ¶ 33. The court reasoned that "no matter how liberally" it construed the petition, the court could not interpret "defense counsel" to refer to "*appellate* counsel's failures." *Id.* (emphasis in original). The court further explained:

> In short, we do not have to comb through a morass of irrelevancies to try to figure out what [petitioner] meant to raise as constitutional violations. He was aware of legal concepts, such as a *Brady* violation, and he was capable of articulating the type of relief he thought he was entitled to[.]

Id. The same is true here: petitioner's successive petition (and his many other pro se pleadings) show that he is not unsophisticated but, instead, is capable of articulating the claims he wishes to raise. He did not assert a *Brady* claim based on the remainder of the basement file in his successive petition, so he cannot raise such a claim now on appeal.

B. Petitioner Has Not Met the Cause and Prejudice Standard Necessary to File a Successive Petition.

Leave to file a successive postconviction petition alleging a *Brady* claim based on the remainder of the basement file should be denied for an alternative, independent reason: petitioner has not demonstrated the "cause and prejudice" that is required to file a successive postconviction petition. It

is settled that a petitioner's motion for leave to file a successive petition "must submit enough in the way of documentation" to establish both cause and prejudice "for each individual" constitutional claim he seeks to raise. *People v. Smith*, 2014 IL 115946, ¶ 35; *see also* 725 ILCS 5/122-1(f) (imposing cause and prejudice standard). Petitioner has failed to carry that burden.

1. Petitioner cannot establish "cause."

To establish cause, petitioner "must show some objective factor external to the defense that impeded his ability to raise the claim in the initial postconviction proceeding." *People v. Holman*, 2017 IL 120655, ¶ 26; *see also* 725 ILCS 5/122-1(f). The claim petitioner seeks to raise in these successive proceedings is based on (1) the fact Gorman discovered a file relating to his case in a police department basement and (2) petitioner's speculation that "the remainder of the file" (*i.e.*, everything besides the McDonnell report) "contains *Brady* material." Pet. Br. 22-31. Nothing prevented petitioner from raising such a claim during his initial postconviction proceedings.

Petitioner received Gorman's letter in 2015; at that time, the circuit court had advanced his initial postconviction proceedings to the second stage and petitioner was represented by appointed counsel. *Supra* p. 7. Nothing "external to the defense" prevented petitioner from contacting Gorman at that time, or asking his current or prior counsel to contact her, yet petitioner chose not to do so, a decision he fails to acknowledge, let alone justify. *See People v. Davis*, 2014 IL 115595, ¶ 56 (petitioner failed to plead cause where

evidence he relied on "is not of such character that it could not have been discovered earlier").

Over the next few years, petitioner amended and/or supplemented his petition several times to add new claims, yet he did not add a claim about the basement file discussed in Gorman's letter. *Supra* pp. 7-9. Perhaps most notably, he amended his petition to add a *Brady* claim related to Ortiz's alleged plea deal and successfully moved to obtain discovery regarding her case (all while pro se). *Id.* Given that petitioner was able to do that, he cannot credibly argue that an "objective factor external to the defense" prevented him from also raising a *Brady* claim related to the entire basement file. After all, as noted, the information petitioner now relies on to support his *Brady* claim is the same information he had "in the initial postconviction proceeding": (1) Gorman discovered the basement file and (2) he speculates that it contains *Brady* material.

For reasons petitioner has never explained, he waited until 2018 to attempt to contact Gorman and alert the circuit court to the existence of the letter and basement file. *Id.* However, once the court was informed of the basement file, it quickly became a focus of the initial proceedings: petitioner repeatedly argued during those proceedings that it should be reviewed *in camera* because he believed it contained *Brady* material. *Supra* pp. 9-14. The arguments petitioner made at that time are the same as those he makes now: petitioner concedes that his arguments during the initial proceedings

"[in] 2018" are "the crux of [his] argument today." Pet. Br. 20. Indeed, as petitioner admits, he "spent months" during the initial proceedings asking the court to review his entire basement file because he believed "that his full, unseen, [basement] file contains *Brady* material." *Id.* at 22. Furthermore, while making those arguments, petitioner amended his postconviction petition yet again, this time to add a *Brady* claim related to the McDonnell file. C.PC.1515-30. Nothing prevented him from including in that amended petition a claim related to the remainder of the basement file if he wished.

Simply put, it is not the purpose of successive proceedings to repeat arguments that were made in the initial postconviction proceedings, nor to raise claims that could have been raised in the initial proceedings. It is petitioner's burden to demonstrate that an "objective factor external to the defense" prevented him from raising his *Brady* claim related to the remainder of the file during his initial proceedings, and he cannot do so.

Petitioner ignores the history of this case when he argues that it is unfair to deny him leave to file a successive petition because he is merely seeking "access to his file" to determine if it contains *Brady* material. Pet. Br. 30-31. That argument fails to acknowledge that he could have had an advocate (either Gorman or petitioner's past or current counsel) review the file if he had merely responded to Gorman's letter when she sent it to him in 2015. Moreover, as noted, the entire basement file *has been reviewed*: during the initial proceedings, an officer of the court (ASA Walls) reviewed the

basement file and represented that it contains no information that was not given to the defense. The claim that petitioner seeks to raise in these successive proceedings reduces to the argument that ASA Walls cannot be trusted, so the file should be reviewed *in camera* (or by appointed counsel). But petitioner already raised (and lost) that argument during the initial postconviction proceedings; he could have pursued that theory in the appeal of his initial postconviction proceedings, but chose not to do so.

In light of this history, it is perfectly fair to hold that petitioner cannot pursue the same argument yet again in a successive petition. Indeed, denying petitioner leave to file a successive petition is compelled by this Court's "well-settled" precedent that successive postconviction petitions are "disfavored" because they impede the finality of litigation, *People v. Edwards*, 2012 IL 111711, ¶ 29, and that courts should "refuse to sanction piecemeal post-conviction litigation," *Tenner*, 206 Ill. 2d at 398; *see also, e.g., People v. Dorsey*, 2021 IL 123010, ¶ 32 (hurdles to bringing a successive petition are intentionally "immense" to protect "the finality" of litigation).

Lastly, petitioner's reliance on *Banks*, *Fallon*, and *Lyles* is misplaced. *See* Pet. Br. 23-25. Two of those cases — *Banks* and *Fallon* — do not involve successive postconviction petitions; rather, the petitioners in those cases were pursuing *initial* postconviction petitions, which, of course, did not require them to show cause. *Banks*, 2020 IL App (1st) 180322-U, ¶¶ 7, 13; Pet. Appx. A-84. And in the third case, *Lyles*, the petitioner demonstrated cause because

his initial postconviction petition proceedings ended in 2011, so he could not have raised claims related to the Gorman letter he did not receive until 2015. 2022 IL App (1st) 201106-U, ¶¶ 5-7, 16. By contrast, in this case, petitioner knew of the basement file during his initial postconviction proceedings and (he admits) repeatedly argued during those proceedings that it might contain *Brady* material. Therefore, he has failed to demonstrate the cause necessary to file a successive petition.

2. Petitioner also cannot establish "prejudice."

Petitioner also cannot establish the "prejudice" necessary to file a successive postconviction petition. In this context, prejudice requires petitioner to "demonstrat[e]" that the claim he seeks to raise (*i.e.*, his *Brady* claim related to the remainder of the file) "so infected the trial that the resulting conviction or sentence violated due process." *Smith*, 2014 IL 115946, ¶ 35; 725 ILCS 5/122-1(f). In turn, under *Brady*, petitioner must prove that (1) the People withheld exculpatory evidence from the defense, and (2) there is a reasonable probability he would have been acquitted if he had those materials before trial. *Brady*, 373 U.S. at 87; *see also People v. Harris*, 206 Ill. 2d 293, 311-12 (2002).

Petitioner cites no concrete evidence supporting either element of his *Brady* claim. Instead, he *hopes* that the basement file might contain exculpatory evidence that was never given to the defense and he *hopes* that that evidence is so strong he would have been acquitted if he had presented it at trial. But petitioner's hope is insufficient to establish cause or prejudice

because postconviction proceedings are not intended to be fishing expeditions. *Supra* p. 25 (collecting cases); *Smith*, 2014 IL 115946, ¶¶ 34-35 (petitioners "must submit enough in the way of documentation" to "demonstrat[e]" prejudice).

This Court's decision in *People v. Delton*, 227 Ill. 2d 247 (2008), is instructive. There the petitioner was convicted of battering a police officer in the parking lot of a condominium complex, even though his wife testified that police were the initial aggressors, and petitioner never struck them. *Id.* at 249-51. Petitioner alleged in his postconviction petition that his trial counsel erred by failing to interview residents of the complex because he believed that someone living there likely witnessed the incident and could provide exculpatory testimony. *Id.* at 258. Similar to this case, the petitioner's theory in *Delton* that such exculpatory evidence existed was speculative — he did not attach affidavits demonstrating that such exculpatory evidence actually existed. *Id.* Accordingly, this Court affirmed the summary dismissal of the petitioner's claim, noting it was the type of "broad conclusory allegation" that is "not allowed" under the Post-Conviction Hearing Act. *Id.*

Petitioner's claim is even weaker than the claim in *Delton*, for three reasons. First, *Delton* involved the dismissal of an initial postconviction petition, where a petitioner need only to show that his claim is not frivolous or patently without merit; it settled that "the cause-and-prejudice test for a successive petition involves a higher standard" that places a greater burden

on a petitioner. *Smith*, 2014 IL 115946, ¶ 35. Second, in *Delton* there was no evidence rebutting the petitioner's speculation that residents of the complex might have exculpatory information; here, there is direct evidence rebutting petitioner's speculation that his basement file might support a *Brady* claim, because ASA Walls reviewed the file and represented that everything in the remainder of the file was given to the defense before trial. Third, in *Delton* the evidence against the petitioner was not overwhelming (the prosecution's case primarily was based on the testimony of two officers, which was contradicted by the petitioner's wife) and it was clear what evidence the petitioner thought he might find (eyewitness accounts corroborating his wife's testimony). Here, by contrast, petitioner has never explained what information he thinks he might uncover that could demonstrate a reasonable probability he would be acquitted.

Indeed, given the strength of the People's case, it is difficult to imagine what evidence possibly *could* exist in the basement file that would demonstrate a reasonable probability that petitioner would be acquitted. The overwhelming evidence against petitioner includes evidence that: (1) an eyewitness testified that petitioner was in the Caprice with the victims shortly before their murders; (2) one victim had DNA under her fingernails that was consistent with petitioner's DNA; (3) the victim was found dead in the Caprice, which was burned and smelled strongly of gasoline; (4) two people saw petitioner walking away from a gas station carrying cans of

gasoline on the night of the murder; (5) petitioner provided inconsistent stories for why he needed the gasoline; (6) petitioner had burns on his arm and leg after the murders; and (7) petitioner falsely told police that he had burned himself months earlier and been treated by a doctor. *Supra* pp. 2-6. It is also notable that petitioner has never provided a cogent defense, such as an explanation of where he was the night of the murder or a credible explanation of why he purchased cans of gasoline after midnight, both of which are facts within his knowledge.

In light of this record, for petitioner to have a valid *Brady* claim, this Court would have to believe that:

1. Exculpatory evidence exists that is strong enough to demonstrate a reasonable probability that petitioner would be acquitted (even though the evidence against petitioner is overwhelming); *and*

2. Police discovered that exculpatory evidence during their investigation, they recorded it and stored the recorded information in the basement file, then they concealed the file from the defense and the prosecution (even though petitioner's own precedent shows that basement files do not necessarily contain undisclosed information); *and*

3. ASA Walls falsely represented that everything in the remainder of the file had been given to the defense (even though petitioner has identified no specific reason that ASA Walls cannot be trusted).

The likelihood of any one of these assumptions being true is very low and the likelihood of all of them being true (as would be necessary to support a *Brady* claim) is even lower. Accordingly, petitioner has failed to show prejudice.

The few arguments petitioner makes in an attempt to demonstrate prejudice are meritless. Petitioner's argument that Gorman's letter and prior

federal litigation give rise to the assumption that his basement file likely contains undisclosed *Brady* material, *see* Pet. Br. 22-31, fails for the reasons discussed, including that: (1) as a matter of law, speculation is insufficient to demonstrate prejudice; and (2) ASA Walls represented that everything in the remainder of the basement file was given to the defense before trial.

Petitioner also misses the mark when he argues that the People's agreement that three cases involving the Gorman letter — *Lyles*, *Banks*, and *Fallon* — should proceed to the second stage "cannot be squared" with the People's argument in this case that petitioner has failed to demonstrate prejudice. Pet. Br. 25. As noted, *Banks* and *Fallon* involved initial postconviction petitions, which are not subject to the demanding cause and prejudice test. *Supra* p. 50. More importantly, petitioner fails to consider that in this case, petitioner's basement file has been reviewed and found to contain no information that was concealed from the defense, which means his *Brady* claim is meritless. In addition, petitioner fails to consider that the People have successfully opposed two other petitions citing Gorman's letter. *See Mosley*, 2021 IL App (1st) 192045-U, ¶¶ 37-40; *Brocks*, 2020 IL App (1st) 171630-U, ¶¶ 12-13. Therefore, there is no inconsistency in the People's position. Instead, what these cases collectively show is that the People are litigating these matters exactly as they should, by evaluating each case based on its particular facts, allegations, and procedural history, and according to established postconviction procedures.

In this case, the facts, allegations, and procedural history show that petitioner should not be permitted to file a successive petition. Petitioner cannot demonstrate cause because his *Brady* claim is based on arguments that were, or could have been, made during his initial postconviction proceedings. And he cannot demonstrate prejudice because, among other reasons, his *Brady* claim is based on speculation that has been affirmatively disproven by a review of the basement file. Accordingly, this Court should hold that petitioner may not file a successive petition.

CONCLUSION

This Court should affirm the appellate court's judgment.

April 4, 2023

Respectfully submitted,

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RULE 341(c) CERTIFICATE

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 14,151 words.

/s/ Michael L. Cebula
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Appendix

Abbreviation	Source
Pet. Br. __	Petitioner's Opening Brief
Pet. App'x __	Petitioner's Appendix
R__	Trial Transcript
C.Secured.__	Secured Common Law Record (1-19-0017)
C.PC.__	Common Law Record for Initial Postconviction Proceedings (1-19-0017)
R.PC.__	Report of Proceedings for Initial Postconviction Proceedings (1-19-00017)
R.Succ.__	Report of Proceedings for Successive Postconviction Proceedings (1-19-1930)
Supp.C.Succ.__	Supplemental Common Law Record for Successive Postconviction Proceedings (1-19-1930)
ThirdSupp.Succ.__	Third Supplemental Record for Successive Postconviction Proceedings (1-19-1930)

PROOF OF 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 April 4, 2023, the foregoing **Brief and Appendix of Respondent-Appellee 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 notice to the following registered email address:

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Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail thirteen copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

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