

NOTICE  
Decision filed 03/29/23. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2023 IL App (5th) 210386-U

NO. 5-21-0386

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Perry County.
	)	
v.	)	No. 96-CF-124
	)	
CURTIS BRUNKHORST,	)	Honorable
	)	James W. Campanella,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE MOORE delivered the judgment of the court.  
Justices Welch and Barberis concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where the defendant did not demonstrate “cause” for failing to raise challenge to the grand-jury proceedings in his initial postconviction petition and any defects in those proceedings did not deprive the court of jurisdiction, the circuit court did not err in denying him leave to file a successive postconviction petition, and since any argument to the contrary would lack merit, we grant defendant’s appointed counsel on appeal leave to withdraw and affirm the circuit court’s judgment.

¶ 2 Defendant, Curtis Brunkhorst, appeals the circuit court’s order denying him leave to file a successive postconviction petition. His appointed appellate counsel, the Office of the State Appellate Defender (OSAD), has concluded that there is no reasonably meritorious argument that the circuit court erred in dismissing defendant’s petition. Accordingly, it has filed a motion to withdraw as counsel along with a supporting memorandum. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987). OSAD has notified defendant of its motion, and this court has provided him with

ample opportunity to respond. However, he has not done so. After considering the record on appeal, OSAD's memorandum, and its supporting brief, we agree that this appeal presents no reasonably meritorious issues. Thus, we grant OSAD leave to withdraw and affirm the circuit court's judgment.

¶ 3

### BACKGROUND

¶ 4 The State filed an information charging defendant with first degree murder and other offenses. This was supplanted in October 1996 by an indictment and, in February 1997, by an amended indictment. Following a jury trial, defendant was convicted of first degree murder and other offenses. He was initially sentenced to natural life in prison but, following a successful appeal (*People v. Brunkhorst*, No. 5-97-1095 (2000) (unpublished order under Illinois Supreme Court Rule 23)), was resentenced to 90 years.

¶ 5 In 2004, defendant filed a postconviction petition that the circuit court summarily dismissed. In 2015, he sought leave to file a successive postconviction petition. The circuit court denied leave to file.

¶ 6 In 2021, defendant sought leave to file a second successive postconviction petition. He argued that the record did not show that the grand jury had been properly summoned or empaneled prior to indicting him, which deprived the court of jurisdiction. The circuit court, finding defendant's contentions "grossly convoluted," denied leave to file. The court found that the alleged defects did not deprive the court of jurisdiction and had in any event been waived. Defendant timely appealed.

¶ 7

### ANALYSIS

¶ 8 OSAD concludes that it can make no good-faith argument that the circuit court erred by denying defendant leave to file his proposed petition. We agree, as defendant cannot demonstrate

cause for failing to raise the issue earlier and his claim that the alleged defects in the proceedings deprived the circuit court of jurisdiction fails.

¶ 9 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2020)) provides a means for a criminal defendant to assert that his conviction resulted from a substantial denial of his constitutional rights. 725 ILCS 5/122-1(a) (West 2020); *People v. Delton*, 227 Ill. 2d 247, 253 (2008). However, the Act contemplates the filing of only one postconviction petition in a given case and specifically provides that “ ‘[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived.’ ” *People v. Bailey*, 2017 IL 121450, ¶ 15 (quoting 725 ILCS 5/122-3 (West 2014)). To file a successive petition, a defendant must first obtain leave of court, which must be granted where the defendant demonstrates cause for his or her failure to bring the claim in the initial postconviction proceedings and prejudice resulting from that failure. 725 ILCS 5/122-1(f) (West 2020). “Cause” in this context refers to any objective factor, external to the defense, that impeded the ability to raise a specific claim in the initial postconviction proceeding. *People v. Pitsonbarger*, 205 Ill. 2d 444, 462 (2002).

¶ 10 Defendant cannot show cause here. Obviously, the grand jury that indicted him convened prior to his trial. Thus, no external factor prevented him from raising issues concerning the grand jury proceedings prior to trial, on direct appeal, or in his initial postconviction petition.

¶ 11 The only “cause” defendant asserted was that he learned of the alleged errors only after reviewing the court’s order convening the grand jury and reading *People v. Benitez*, 169 Ill. 2d 245 (1996). Neither fact demonstrates cause. Defendant did not request materials related to the grand-jury proceedings until 2010 and *Benitez* was decided prior to his trial. Thus, the only “cause” defendant asserted was that he was unaware of the law. However, the supreme court has

made clear that “ignorance of the law” cannot provide “cause” for failing to timely raise an issue. *People v. Evans*, 2013 IL 113471, ¶ 13.

¶ 12 Moreover, the alleged defects in empaneling the grand jury did not deprive the court of jurisdiction to try defendant. In *People v. Hughes*, 2012 IL 112817, the court, noting that jurisdiction is conferred by the constitution, held that defects in the charging instrument do not deprive a court of jurisdiction. *Id.* ¶¶ 27-28 (citing *Benitez*, 169 Ill. 2d at 256).

¶ 13 In his motion for leave to file, defendant cited *People v. Gray*, 261 Ill. 140 (1913). *Gray* held that the failure of the record to show that the grand jury had been sworn deprived the grand jury of “jurisdiction to take any action,” which in turn deprived the circuit court of jurisdiction. *Id.* at 142. *Gray* noted that pleading to an indictment generally waives “all informalities in the drawing or summoning of the jurors and questions regarding their qualifications,” but did not waive “fundamental defects” such as the failure to swear the grand jurors. *Id.*

¶ 14 It appears that defendant’s complaints are of the former type, relating to the summoning of the jurors. But in any event, it is clear that *Gray* is based on an outmoded view of jurisdiction and has been superseded by cases such as *Hughes* which recognize that jurisdiction is derived from the constitution and cannot be divested by the failure to follow procedural formalities.

¶ 15 In *People v. Johnson*, 2015 IL App (2d) 140388, which, ironically, defendant cites, the court noted that “jurisdictional principles in force when *Gray* was decided were considerably different from those that apply under our present state constitution.” *Id.* ¶ 6; see Ill. Const. 1970, art. VI, § 9 (circuit courts’ jurisdiction extends to “all justiciable matters”). Accordingly, defects in the grand jury proceedings did not deprive the circuit court of jurisdiction. *Id.*; see also *People v. Kliner*, 2015 IL App (1st) 122285, ¶ 11.

¶ 16 In *Benitez*, which defendant also cites, the defense discovered on the second day of trial that the original indictment did not contain defendant's name and that the prosecution had substituted a new document, typed by its office, including defendant's name. The defense immediately raised the issue. *Benitez*, 169 Ill. 2d at 247-48. The supreme court held that, under those "unique circumstances," the defendant's challenge was timely such that he did not have to show that he was prejudiced by being tried under the invalid indictment. *Id.* at 259. But *Benitez* does not stand for the proposition that the circuit court lost jurisdiction due to the invalid indictment or that it could be challenged at any time.

¶ 17 Here, the record does not show any defects in the indictment or in the proceedings that produced it. At defendant's request, the circuit clerk provided him with a copy of the circuit court's order convening the grand jury. Both indictments were returned during the term specified. The indictment was signed by the grand jury foreman and returned in open court. Defendant has produced no evidence to show that the grand jury was not properly convened or that the indictment was returned improperly. See *People v. Bell*, 2013 IL App (3d) 120328, ¶ 9 (with no error showing on the face of the indictment, defendant did not provide sufficient record to review his contentions, particularly, a record of the grand jury proceedings).

¶ 18 CONCLUSION

¶ 19 As this appeal presents no issue of arguable merit, we grant OSAD leave to withdraw and affirm the circuit court's judgment.

¶ 20 Motion granted; judgment affirmed.