APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 16-1476

SHANE CRUTCHFIELD,

Petitioner-Appellant,

v.

JEFF DENNISON,

Respondent-Appellee.

Argued: Dec. 7, 2017
Decided: Dec. 12, 2018

Before Bauer, Manion, and Sykes, *Circuit Judges*.

OPINION

Sykes, *Circuit Judge*. Shane Crutchfield was charged with several Illinois drug crimes and faced enhanced penalties based on his lengthy criminal record. The prosecutor offered a plea deal that would have capped his sentence at 25 years, explaining that Crutchfield would have to serve 85 percent of that term under state law. Crutchfield's attorney advised him of the offer but did not correct the prosecutor's mistake: under Illinois good-time law, Crutchfield would have been eligible for release after serving 50 percent of his sentence, not 85 percent. Crutchfield

rejected the deal. A jury found him guilty, and the judge imposed a 40-year sentence.

After direct appeal and two rounds of postconviction proceedings, Crutchfield filed for federal habeas review under 28 U.S.C. § 2254 claiming that his trial attorney's flawed legal advice about the plea offer amounted to ineffective assistance in violation of his Sixth Amendment right to counsel under the rule of *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). He says he would have taken the deal if his attorney had correctly advised him about the good-time law. But he did not raise this claim on direct appeal or in his initial state postconviction proceeding. Instead, he belatedly presented it in a successive postconviction petition. Applying Illinois rules of procedural default, the state courts refused to hear the claim. The district judge denied § 2254 relief based on the unexcused procedural default.

Crutchfield concedes the default but asks us to hold that Illinois prisoners may use the *Martinez-Trevino* gateway to obtain review of defaulted claims of ineffective assistance of trial counsel. *See Martinez v. Ryan*, 566 U.S. 1 (2012); *Trevino v. Thaler*, 569 U.S. 413, 429 (2013). We decline to do so. Illinois does not impose the kind of restrictive procedural rules on *Strickland* claims to warrant application of the *Martinez-Trevino* exception. Because Crutchfield procedurally defaulted his *Strickland* claim and has not shown cause to excuse the default, we affirm the district court.

I. Background

In 2005 officers searched Shane Crutchfield's home in Decatur, Illinois, recovering large quantities

of cocaine and marijuana along with digital scales, plastic baggies, and cash. Crutchfield was arrested and charged in state court with various drug-trafficking crimes. Because he was a repeat drug offender, Crutchfield faced mandatory minimums and enhanced maximum penalties on several of the counts against him. The prosecutor offered a plea deal calling for a 25-year sentence, explaining that under state law Crutchfield would be required to serve 85 percent of that sentence. That meant 21.25 years behind bars.

The prosecutor was mistaken about how much of the 25-year sentence Crutchfield would have had to serve. With certain inapplicable exceptions, the state's good-time law awards day-for-day credit for good behavior in prison. 730 Ill. Comp. Stat. 5/3-6-3(a)(2.1). Accordingly, with good behavior an Illinois prisoner is entitled to release after serving 50 percent of his sentence. At the time of Crutch-field's crimes, the list of exceptions to this general rule did not include any of the drug charges lodged against him. 2005 Ill. Legis. Serv. P.A. 94-128 (H.B. 611) (amended 2007). Later the Illinois legislature expanded the list of exceptions to include one of the drug crimes Crutchfield was accused of committing, but the amendment applied only to crimes committed on or after August 13, 2007. 730 Ill. Comp. Stat. 5/3-6-3(a)(2)(v). So under the plea deal and assuming a clean record in prison, Crutchfield would have completed his sentence in 12.5 years, not 21.25 years.

Crutchfield's trial counsel advised him of the plea offer but did not correct the prosecutor's mistake. Operating under the misunderstanding that he would have to serve 21.25 years if he accepted the deal,

Crutchfield rejected it. The case proceeded to trial and a jury found him guilty. His counsel moved for a new trial, but the judge denied the motion and imposed a sentence of 40 years. With day-for-day good-time credit, Crutchfield will spend 20 years in prison.

Crutchfield retained new counsel, and his new attorney moved for reconsideration of the denial of the motion for a new trial. The reconsideration motion raised a *Strickland* claim alleging several deficiencies in trial counsel's performance, but it did not identify any error in plea negotiations. The judge held an evidentiary hearing, and Crutchfield testified about his attorney's shortcomings but he did not complain about counsel's handling of the plea offer. The judge denied the motion.

Direct appeal followed. Crutchfield asserts that at this point he told his appellate attorney that his trial counsel had misinformed him about the amount of time he would spend in prison under the plea offer. His appellate attorney did not raise the claim on appeal, focusing instead on the alleged errors identified in the posttrial motions as well as other claims. The Illinois Appellate Court affirmed, and the Illinois Supreme Court denied leave to appeal.

While the direct appeal was still pending, Crutchfield filed a pro se postconviction petition raising several claims of ineffective assistance of trial and appellate counsel, none relating to the plea offer. The trial court denied the motion, but the appellate court reversed, concluding that certain of Crutchfield's claims of ineffective assistance of trial and appellate counsel warranted further proceedings. On remand counsel was appointed, and the new attorney filed an

addendum to the pro se petition raising additional claims. Crutchfield asserts that he advised his postconviction attorney that his trial counsel had misinformed him about how long he would serve in prison under the plea deal. But postconviction counsel did not raise the claim in the addendum. The trial court denied relief, the appellate court affirmed, and the Illinois Supreme Court denied leave to appeal.

In July 2012 Crutchfield filed a pro se motion for leave to file a second postconviction petition. For the first time, he alleged that his trial counsel misinformed him about the amount of time he would have to spend in prison under the plea offer. He cited the Supreme Court's then-recent decision in *Lafler v. Cooper*, 566 U.S. 156, 163 (2012), which explains "how to apply *Strickland*'s prejudice test where ineffective assistance results in a rejection of a plea offer and the defendant is convicted at the ensuing trial." He also attached what purported to be a letter from his trial attorney acknowledging that the prosecutor had offered a 25-year sentence "and [the prosecutor] did state that [Crutchfield] would not receive day for day credit and would have to serve 85% of the sentence pursuant to statute," and that "Crutchfield rejected the offer."

The trial judge denied leave to file the successive postconviction petition, holding that Crutchfield had not shown cause for failing to include this claim in his first postconviction petition or prejudice resulting from the default. The Illinois Appellate Court affirmed for the same reasons, and the Illinois Supreme Court denied review.

Crutchfield then filed a pro se § 2254 petition in federal court seeking habeas relief on several claims of constitutional error, including the defaulted *Strickland* claim for ineffective assistance of counsel in plea negotiations. The judge denied relief on that claim based on the unexcused procedural default, rejected the other claims on the merits, and declined to issue a certificate of appealability. Crutchfield appealed. We issued a certificate of appealability limited to the claim of ineffective assistance of counsel in plea negotiations and recruited pro bono counsel for Crutchfield.[1]

II. Discussion

We begin with the rules of exhaustion and procedural default in federal habeas review of state convictions. A federal court will not hear a state prisoner's habeas claim unless the prisoner has first exhausted his state remedies by presenting the claim to the state courts for one full round of review. *Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017). "The exhaustion requirement is designed to avoid the 'unseemly' result of a federal court 'upset[ting] a state court conviction without' first according the state courts an 'opportunity to … correct a constitutional violation.'" *Id.* (quoting *Rose v. Lundy*, 455 U.S. 509, 518 (1982) (alteration and omission in original)).

The rule of procedural default is an important corollary to the exhaustion requirement: "[A] federal

---

[1] Attorneys Christopher Michel, Jeffrey Harris, and Kirkland & Ellis LLP accepted the pro bono assignment and have ably discharged their duties. We thank them for their service to their client and the court.

court may not review federal claims that were procedurally defaulted in state court—that is, claims that the state court denied based on an adequate and independent state procedural rule." *Id.* A federal court may hear a defaulted claim if the prisoner establishes "'cause' to excuse his failure to comply with the state procedural rule and 'actual prejudice resulting from the alleged constitutional violation.'"[2] *Id.* at 2064-65 (quoting *Wainright v. Sykes*, 433 U.S. 72, 84 (1977)). "Cause" is an objective factor external to the defense that impeded the presentation of the claim to the state courts. *Id.* at 2065. A factor is "external to the defense" only if it "cannot fairly be attributed to" the prisoner. *Coleman v. Thompson*, 501 U.S. 722, 753 (1991) (quotation marks omitted).

Crutchfield concedes that he procedurally defaulted his claim that his trial counsel was ineffective in plea negotiations. He argues that we should excuse the default because he has shown cause for the default and actual prejudice from the alleged *Strickland-Lafler* violation. We decide this issue without deference to the district court. *Johnson v. Foster*, 786 F.3d 501, 504 (7th Cir. 2015).

A. The *Coleman* Rule and the *Martinez-Trevino* Exception

Crutchfield argues that his postconviction counsel is to blame for defaulting this claim in the initial state postconviction proceeding. Even if true, attorney error

---

[2] A federal habeas court may also excuse a procedural default if the prisoner makes a convincing showing of actual innocence. *Coleman v. Thompson*, 501 U.S. 722, 749-50 (1991). Crutchfield does not make a claim of actual innocence.

is not cause to excuse a procedural default. *Coleman*, 501 U.S. at 753. Mistakes by counsel are imputed to the client under "well-settled principles of agency law," so attorney error is not a factor external to the defense. *Id.* at 754.

If, however, an error by counsel amounts to ineffective assistance under the Sixth Amendment, then the error "is imputed to the State and is therefore external to the prisoner." *Davila*, 137 S. Ct. at 2065 (internal quotation marks omitted). In other words, the State bears the risk of attorney error as a part of its constitutional duty to provide counsel. *Coleman*, 501 U.S. at 754.

"It follows, then, that in proceedings for which the Constitution does not guarantee the assistance of counsel at all, attorney error cannot provide cause to excuse a default." *Davila*, 137 S. Ct. at 2065. Because there is no Sixth Amendment right to counsel on collateral review, attorney error in postconviction proceedings is not cause to excuse a procedural default. *Id.* (citing *Coleman*, 501 U.S. at 755).

In *Martinez v. Ryan*, the Supreme Court carved out a limited exception to the *Coleman* rule. Luis Martinez, an Arizona prisoner, sought § 2254 review of a defaulted *Strickland* claim for ineffective assistance of trial counsel. Under Arizona law claims of ineffective assistance of trial counsel must be raised in collateral-review proceedings, not on direct appeal. The Court held where state law *requires* prisoners to raise *Strickland* claims on collateral review, a procedural default at that stage will not preclude a federal court from hearing the claim if "there was no counsel or counsel in that proceeding was ineffective."

Martinez, 566 U.S. at 17. But the default is not automatically excused. Under the *Martinez* exception, a federal court may hear a defaulted *Strickland* claim if the prisoner shows that the underlying claim is "substantial" and that postconviction counsel's failure to raise it amounted to constitutionally ineffective assistance. The first requirement is not a high bar, however; to qualify as "substantial," the claim need only have "some merit." *Id.* at 14.

In *Trevino v. Thaler*, the Court extended the *Martinez* exception to § 2254 proceedings in states that do not forbid prisoners from presenting *Strickland* claims on direct review but "as a matter of procedural design and systemic operation, den[y] a meaningful opportunity to do so." 569 U.S. at 429. Carlos Trevino was a Texas prisoner on death row for murder. He sought federal habeas relief alleging that his trial counsel provided ineffective assistance in the sentencing phase of trial. The trial court had appointed new counsel on direct appeal and again on collateral review, but neither attorney raised this claim. That was a procedural default. Unlike Arizona, however, Texas does not expressly *require* prisoners to reserve *Strickland* claims for collateral review, so the *Martinez* gateway to federal review of the defaulted claim was unavailable. The district court declined to hear the claim and the Fifth Circuit affirmed.

The Supreme Court reversed, holding that because Texas procedural rules make it "all but impossible" to raise a *Strickland* claim on direct appeal, the *Martinez* exception is available to Texas prisoners seeking § 2254 review of defaulted claims of ineffective assistance of trial counsel. *Id.* at 427, 429.

The Court explained that although Texas theoretically permits *Strickland* claims on direct appeal, the state's procedural system operates to prevent meaningful review at that stage. *Id.* at 423-24. *Strickland* claims often require development of a factual record, and while a Texas defendant may move for a new trial in order to develop the needed factual support, the applicable time limits make that vehicle wholly inadequate. *Id.* at 424. Under Texas law a motion for a new trial must be filed within 30 days of sentencing, and the trial court must rule on that motion within 75 days of sentencing. *Id.* (citing Tex. R. App. Proc. 21.4, 21.8(a), (c)). But the court reporter has 120 days after sentencing to prepare the trial transcript, and this deadline may be extended. *Id.* (citing Tex. R. App. Proc. 35.2(b), 35.3(c)). In the words of the Court of Criminal Appeals of Texas—the state's highest criminal tribunal—these procedural rules combine to make it "virtually impossible" for appellate counsel to adequately present a *Strickland* claim on direct review. *Id.* at 423 (quoting *Robinson v. State*, 16 S.W.3d 808, 810-11 (Tex. Crim. App. 2000)).

That was decisive for the Supreme Court. The Court observed that these practical procedural impediments led the Texas courts to "strongly discourage" defendants from raising *Strickland* claims on direct review. *Id.* at 425-27. Indeed, the Court of Criminal Appeals had announced a "general rule" that defendants "should *not* raise an issue of ineffective assistance of counsel on direct appeal." *Id.* at 426 (quoting *Mata v. State*, 226 S.W.3d 425, 430 n.14 (Tex. Crim. App. 2007)). As the Supreme Court put it, this "general rule" amounted to a determination by the Texas courts that collateral review is "as a practical

matter, the *only* … method for raising an ineffective-assistance-of-counsel claim." *Id.* at 427 (emphasis added). Accordingly, because Texas does not offer a meaningful opportunity to present these claims on direct appeal, the Court held that Texas prisoners may use the *Martinez* exception to obtain federal review of defaulted claims of ineffective assistance of trial counsel. *Id.* at 428.

Crutchfield asks for the same result here. Whether to extend the *Martinez-Trevino* exception depends on the procedural regime where the prisoner was convicted, so we have taken a jurisdiction-by-jurisdiction approach to this question. *See Brown v. Brown*, 847 F.3d 502, 509-10 (7th Cir. 2017). In *Ramirez v. United States*, we held that federal prisoners may use the exception to obtain review of defaulted *Strickland* claims. 799 F.3d 845, 852-54 (7th Cir. 2015). We explained that the Supreme Court has "criticized the practice of bringing these claims on direct appeal" because that forum is not suitable for assessing the claim. *Id.* at 853 (citing *Massaro v. United States*, 538 U.S. 500, 504 (2003)). Our court has gone even further, saying that a *Strickland* claim is "doomed" without additional record development and "the federal courts have no established procedure … to develop ineffective assistance claims for direct appeal." *Id.*

Moreover, a federal prisoner has much to lose and little to gain from raising a *Strickland* claim on direct appeal. "[T]here is no procedural default for failure to raise an ineffective-assistance claim on direct appeal … even if the basis for the claim is apparent from the trial record." *Id.* But if the defendant *does*

raise an ineffective-assistance claim on direct appeal, he is precluded from bringing any other claim of ineffective assistance of trial counsel on collateral review. *Id.*; *see, e.g.*, *Peoples v. United States*, 403 F.3d 844, 847-48 (7th Cir. 2005). For these reasons, we held in *Ramirez* that "the situation of a federal petitioner is the same as the one the Court described in *Trevino*: as a practical matter, the first opportunity to present a claim of ineffective assistance of trial or direct appellate counsel is almost always on collateral review[] in a motion under section 2255." *Ramirez*, 799 F.3d at 853.

In *Brown v. Brown*, we held that Indiana prisoners may use the *Martinez-Trevino* exception as a path to federal review of defaulted claims of ineffective assistance of trial counsel. 847 F.3d at 513. Indiana appellate courts will hear *Strickland* claims on direct review, and under the so-called *Davis-Hatton* procedure,[3] a prisoner may suspend his direct appeal to pursue an immediate petition for postconviction relief for the purpose of developing a factual record to support the claim. The direct appeal and collateral-review appeal are then consolidated. *Id.* at 511. As we explained in *Brown*, however, the *Davis-Hatton* procedure is "special, limited, … [and] rarely used." *Id.* at 512 (quoting *Trevino*, 569 U.S. at 427). Indeed, as the Indiana Public Defender Council reported, "between 2008 and 2012, its attorneys filed approximately 2000 appeals and only four *Davis-Hatton* petitions." *Id.* We noted as well that the Indiana appellate courts have expressed a strong

[3] *Davis v. State*, 368 N.E.2d 1149 (Ind. 1977); *Hatton v. State*, 626 N.E.2d 442 (Ind. 1993).

preference for reserving *Strickland* claims for collateral review. *Id.*

Indiana also applies a rule against claim splitting in this context. Mirroring the federal system, an Indiana prisoner who raises a *Strickland* claim on direct appeal is barred from litigating any other claim of ineffective assistance of trial counsel on collateral review. *Id.* at 510-11. This strong rule of preclusion was "critical" to our analysis in *Brown*. *Id.* The opportunity to litigate a *Strickland* claim on direct review is less meaningful when doing so means sacrificing the option to raise other errors by trial counsel in a collateral-review proceeding. Based on the combined effect of these features of state law, we concluded that the "'structure, design, and operation[]' [of] the Indiana procedural system 'does not offer most defendants a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal.'" *Id.* at 512-13 (quoting *Trevino*, 569 U.S. at 428). Indiana prisoners, we held, may use the *Martinez-Trevino* exception to obtain federal review of defaulted claims of ineffective assistance of trial counsel. *Id.* at 513.

B. *Strickland* Claims in Illinois

The factors that warranted the Court's expansion of the *Martinez* rule in *Trevino* and our application of *Martinez-Trevino* in *Ramirez* and *Brown* are notably absent in Illinois. State law permits *Strickland* claims on direct review, and the Illinois Supreme Court has neither directed criminal appellants to save all such claims for collateral review nor warned against raising them on direct appeal. Moreover, Illinois defendants may expand the record on direct appeal by raising a

Strickland claim in a posttrial motion and developing the factual record at an evidentiary hearing. Indeed, the Illinois Supreme Court fashioned a special posttrial motion procedure for the precise purpose of developing a record for litigating a *Strickland* claim in this way. In addition, the relevant time frames are flexible enough to allow development of the claim for direct review. Last, Illinois does not apply a blanket rule against claim splitting.

To begin, the Illinois Supreme Court has not discouraged criminal defendants from raising *Strickland* claims on direct review. Quite the contrary. If the claim relies solely on the existing record, it *must* be brought on direct appeal. *People v. Veach*, 89 N.E.3d 366, 375 (Ill. 2017). For *Strickland* claims in this category, the Illinois Supreme Court has cautioned that "a defendant must generally raise a constitutional claim alleging ineffective assistance of counsel on direct review or risk forfeiting the claim." *Id.* That rule is the opposite of the default rule in Texas and Indiana. *See Trevino*, 569 U.S. at 426 (discussing the "general rule" in Texas courts that defendants "should *not* raise an issue of ineffective assistance of counsel on direct appeal"); *Brown*, 847 F.3d at 512 (describing the Indiana Supreme Court's explanation that Indiana's rules "deter all but the most confident appellants from asserting *any* claim of ineffectiveness on direct appeal") (emphasis added).

Nor has the Illinois Supreme Court expressed a preference for reserving these claims for collateral review. It has said only that claims of "ineffective assistance of counsel … may *sometimes* be better suited to collateral proceedings but only when the

record is incomplete or inadequate for resolving the claim." *Veach*, 89 N.E.3d at 375 (emphasis added). Crutchfield directs our attention to earlier decisions of the intermediate appellate court, most notably *People v. Kunze*, 550 N.E.2d 284 (Ill. App. Ct. 1990). There the Illinois Appellate Court said that "[a]n adjudication of a claim of ineffective assistance of counsel is better made in proceedings on a petition for post-conviction relief, when a complete record can be made and the attorney client privilege no longer applies." *Id.* at 296. But in *Veach* the Illinois Supreme Court expressly disavowed this language from *Kunze*, explaining at length that this statement by the appellate court was in error. 89 N.E.3d at 374-77.

In addition, posttrial procedures for record expansion in Illinois are more flexible and more widely available than those in Texas and Indiana. Two types of posttrial motions allow for the expansion of the record on appeal: an ordinary motion for a new trial and the so-called *Krankel* posttrial motion. Both procedures allow defendants to present extra-record evidence at a hearing, and the hearing transcript forms part of the record on appeal. Ill. Sup. Ct. R. 608(a)(10).

First, a defendant may move for a new trial within 30 days of the return of the jury verdict or entry of a finding of guilt. 725 Ill. Comp. Stat. 5/116-1(b). The motion may incorporate matters outside the record, and if the allegations establish a colorable basis for a new trial, the trial court will hold an evidentiary hearing to allow the defendant an opportunity to prove up those allegations. *See People v. Williams*, 576

N.E.2d 68, 76 (Ill. App. Ct. 1991). There is no deadline to decide the motion.

Crutchfield's case illustrates the flexibility of this procedure. After his initial motion for a new trial was denied, his new appellate counsel sought reconsideration, raising several errors by trial counsel. The trial court held an evidentiary hearing on the reconsideration motion at which Crutchfield testified about the mistakes he claimed his trial attorney had made. On direct appeal he raised the same alleged errors based on this expanded record.

A defendant also has the option to expand the record through a second type of posttrial motion: the *Krankel* motion. This common-law procedure evolved from the Illinois Supreme Court's decision in *People v. Krankel*, 464 N.E.2d 1045 (Ill. 1984), which allows a criminal defendant acting pro se to bring his trial counsel's ineffectiveness to the attention of the trial court either orally or in writing. *See People v. Ayres*, 88 N.E.3d 732, 736 (Ill. 2017). This so-called *Krankel* motion triggers a duty on the part of the trial court to inquire into the underlying factual basis of the claim to determine whether "the allegations show possible neglect of the case." *Id.* If they do, the trial court must appoint counsel to assist the defendant in presenting his ineffective-assistance claim at an evidentiary hearing. *Id.*; *People v. Moore*, 797 N.E.2d 631, 637 (Ill. 2003).

Unlike an ordinary motion for a new trial, a *Krankel* posttrial motion need not be filed within 30 days of the verdict. *People v. Patrick*, 960 N.E.2d 1114, 1123 (Ill. 2011). A *Krankel* motion is timely as long as the trial court retains jurisdiction over the case; that

is, for 30 days after sentencing or 30 days after the resolution of any postjudgment motion. *See id.*; *People v. Nance*, Nos. 1-12-3143, 1-13-1606, 2014 WL 4656929, at *5 (Ill. App. Ct. Sept. 18, 2014) (citing *People v. Bailey*, 4 N.E.3d 474, 477 (Ill. 2014) & Ill. Sup. Ct. R. 606(b)). And there is no deadline to hold the evidentiary hearing or resolve the motion.

Taking a different approach than the federal courts, which have "no established procedure … to develop ineffective assistance claims for direct appeal," *Ramirez*, 799 F.3d at 853, Illinois established the *Krankel* procedure with the precise goal of expanding the record on appeal to better evaluate *Strickland* claims on direct review, *People v. Jolly*, 25 N.E.3d 1127, 1135-36 (Ill. 2014). "By initially evaluating the defendant's claims in a preliminary *Krankel* inquiry," the Illinois Supreme Court explained, "the circuit court will create the necessary record for any claims raised on appeal." *Id.* at 1136.

In contrast to Texas where courts must resolve motions for a new trial within 75 days of sentencing, Illinois imposes no deadline on courts to resolve either type of posttrial motion. This allows criminal defendants and their attorneys greater flexibility in preparing for the evidentiary hearing. Moreover, Illinois's posttrial procedures for expanding the record on appeal provide a more meaningful opportunity than Indiana's *Davis-Hatton* procedure, which we deemed inadequate in *Brown*. One key difference is that the *Davis-Hatton* procedure steers criminal defendants into early postconviction proceedings, whereas Illinois's *Krankel* procedure and the motion

for a new trial are mechanisms by which a criminal defendant may expand the record for direct appeal.

Finally, Illinois does not bar claim splitting. Raising a *Strickland* claim on direct appeal does not prevent a prisoner from raising different claims of ineffective assistance of trial counsel in a postconviction petition. *See People v. Cleveland*, 796 N.E.2d 201, 203 (Ill. App. Ct. 2003). In contrast to Texas and Indiana, an Illinois defendant does not have nearly as much to lose by raising an ineffective-assistance claim on direct appeal.

In sum, Illinois law gives prisoners a meaningful opportunity to litigate claims of ineffective assistance of trial counsel on direct review. The factors that justified the Court's expansion of the *Martinez* exception in *Trevino* and our application of the exception in *Ramirez* and *Brown* are not present here. We decline to extend the *Martinez-Trevino* exception to Illinois prisoners. Crutchfield has not shown cause to excuse the procedural default of his *Strickland-Lafler* claim, so the federal courts cannot hear it on habeas review.[4]

AFFIRMED.

---

[4] Crutchfield argues in the alternative that he can establish cause to excuse procedural default by demonstrating the ineffectiveness of his appellate counsel in failing to present on direct appeal his trial attorney's ineffectiveness in plea negotiations. This claim is unexhausted. Crutchfield had an opportunity in his first postconviction petition to raise a claim of ineffective assistance of appellate counsel, but he did not do so.

Appendix B

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS

No. 12-2229

SHANE CRUTCHFIELD,

Petitioner,

v.

KURTIS HUNTER, Acting Warden, Shawnee Correctional Center,[1]

Respondent.

Filed: Jan. 29, 2016

FINAL ORDER

The case before the court is a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, by a person in state custody. The petitioner, Shane Crutchfield, was convicted in the Circuit Court of Macon County, Illinois, with the offenses of possession of controlled substances with intent to deliver them and with a prior conviction for possession of controlled substances. He has exhausted his state remedies for appeal from his convictions.

---

[1] Acting Warden Hunter is substituted for Former Warden Marc Hodge, pursuant to Rule 2(a) of the Rules Governing Section 2254 Cases in the United States District Court.

On direct appeal, Crutchfield raised several arguments in support of his claim of ineffective assistance of trial counsel: a conflict arising from the joint representation of Crutchfield and his co-defendant, Brandi Hefley; failing to seek a severance when they learned that the State intended to use Hefley's statement against Crutchfield; and failing to tender any jury instructions. On postconviction review, Crutchfield argued that trial counsel was ineffective for failing to move for a mistrial or jury admonition regarding the presence of inadmissible and prejudicial evidence displayed on the State's counsel table; appellate counsel was ineffective for failing to raise that issue on appeal; and his due process right to a fair trial was violated by the prosecution's intentional act of placing the inadmissible evidence in full view of the jury.

Crutchfield then commenced this case. Thereafter, he filed two successive State postconviction petitions, arguing ineffective assistance when counsel incorrectly advised him that a favorable plea bargain of 25 years offered by the State would have to be served at 85%.[2] He also argued a violation of due process based on the trial court's posttrial proceeding to vacate Hefley's conviction and allow her to plead guilty to a different charge, which Crutchfield claimed was pursuant to a pretrial

[2] A document attached to the amended petition attributes the miscommunication to the prosecutor, not defense counsel. *See* d/e 22, p. 18.

agreement that made her, in essence, the State's witness.[3]

Crutchfield asserts in his amended petition for a writ of habeas corpus that (1) counsel's conflict was a violation of due process and led to ineffective assistance of counsel; (2) counsel failed to move to sever the cases against Crutchfield and Hefley; (3) counsel failed to offer any jury instructions; (4) the prominent display of a handgun on the prosecution's table violated due process; (5) counsel failed to move for a mistrial or jury admonition when the handgun was determined to be inadmissible; (6) appellate counsel failed to raise the issue of trial counsel's ineffectiveness regarding the handgun; (7) the trial court erred in dismissing the successive postconviction petitions; and (8) in posttrial proceedings with separate counsel Hefley's outcome was more favorable than Crutchfield's.

Crutchfield seeks a new trial or release from prison.

BACKGROUND

When he was charged with the criminal offenses, Crutchfield had a co-defendant, Hefley, his alleged POSSLQ.[4] Together they retained defense counsel,

---

[3] Crutchfield does not present any evidence other than his speculation that Hefley's posttrial plea was pursuant to a pretrial agreement.

[4] Persons of the opposite sex sharing living quarters. At trial, Hefley testified that they were "dating." *See* d/e 27-7, p. 227. Hefley testified that she stayed at the Olive Street house, and that Crutchfield sometimes went to see her there, but she denied that Crutchfield lived at the Olive Street house. *See* d/e 27-7, pp. 233, 245.

Garry Payton, Esq. The state prosecutor filed a motion to disqualify Payton for conflict of interest in his representation of the co-defendants. The trial judge held a hearing on the motion and, although he ruled that there was no *per se* violation, made further inquiry as to whether Crutchfield and Hefley waived any conflict that might exist. They made that waiver in open court and said they wanted Payton to represent them both.

In the trial, the state's evidence showed that the two defendants were seen coming and going from the premises on Olive Street in Decatur that the police had under surveillance. The police executed a search warrant on the premises and seized controlled substances, cocaine and cannabis, and the trappings of the drug trade, Baggies, scales, cash, and documents that tied the co-defendants to the premises and its contents. Other persons were seen entering and leaving the premises after they had been there only a short time. Crutchfield was seen going in and out and had a key to the front door. A police officer testified that Hefley told police that she lived there and Crutchfield lived there with her. Hefley testified at trial[5] and denied making that statement to the police officer.

Crutchfield complains, among other things, that his due process rights were violated, and/or counsel was ineffective, by allowing the handgun to be displayed on the prosecution's table in view of the jury. The handgun was eventually ruled inadmissible. Crutchfield also complains that Payton failed to move

[5] Her testimony is found at d/e 27-7, pp. 223-246.

for severance of the defendants' cases. Payton also failed to tender several jury instructions that would have enabled the jurors to understand the issues in the case. Crutchfield complains that the court erroneously admitted into evidence against Crutchfield the purported statement by Hefley that Crutchfield was her boyfriend and lived at the premieres with her.

The jury found the co-defendants guilty, and Crutchfield was sentenced to forty years' imprisonment on one count and eight years on the other, to be served concurrently.

ANALYSIS

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which applies to Crutchfield's petition, habeas relief is available if the State court's adjudication was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). Before any claim may be raised on habeas review, the petitioner must have presented that claim to the Illinois Appellate Court *and* the Illinois Supreme Court. *Smith v. McKee*, 598 F.3d 374, 382 (7th Cir. 2010).

Successive post-conviction petitions

Illinois law applies to the filing of post-conviction petitions. In Illinois, "[o]nly one petition may be filed by a petitioner . . . without leave of the court." 725 ILCS 5/122-1(f). The trial court denied Crutchfield leave to file his successive post-conviction petitions;

the denial was affirmed on appeal, and the Illinois Supreme Court denied Crutchfield's petition for leave to appeal (PLA). The State courts rested their decisions on the basis that Crutchfield's successive petitions did not meet the statutory requirements for further post-conviction review. "When a state court . . . rest[s] its decision on a state law ground independent of the federal question and adequate to support the judgment, [the federal court] will not review the question of federal law."[6] *Woods v. Schwartz*, 589 F.3d 368, 373 (7th Cir. 2009). Such claims are procedurally defaulted, and federal courts cannot review the claims in the successive petitions unless Crutchfield can demonstrate "cause for *and* prejudice from the default, or that a miscarriage of justice will occur" if the federal court does not consider the claims. *Woods*, 589 F.3d at 373 (emphasis added).

"Cause" is an objective factor, external to the defense, that prevented the petitioner from raising his claim in an earlier proceeding. *Guest v. McCann*, 474 F.3d 926, 930 (7th Cir. 2007). "Prejudice" is error that so infected the entire trial with unfairness that the *conviction* violates due process. *United States v. Nunez*, 532 F.3d 645, 655 (7th Cir. 2008) (emphasis added). Neither the inaccurate advice regarding the plea bargain or the trial court's posttrial decision as to Hefley constitute prejudice. In this context, prejudice

---

[6] Crutchfield claims that the State court erred in dismissing his successive postconviction petitions. The dismissal of those petitions was pursuant to State law. Therefore, the dismissal is beyond this court's review. However, the claims contained in those successive petitions are addressed herein, relative to the issue of procedural default.

relates to the fact of conviction, not to a particular sentence. Acceptance of the allegedly miscommunicated plea offer would have resulted in Crutchfield's conviction. And Hefley's testimony played virtually no role in the conviction when compared to the other evidence of Crutchfield's guilt.

A miscarriage of justice requires a showing that the defendant is actually innocent of the charge. Crutchfield must do more than state that he is innocent; he must set forth "new, reliable evidence of his innocence." *Woods*, 589 F.3d at 377. The evidence must show that "no juror, acting reasonably, would have [found him] guilty beyond a reasonable doubt." *Woods*, 589 F.3d at 377. The claims set forth in the successive post-conviction petitions amount to a newly asserted argument rather than new, reliable evidence. Neither the miscommunicated plea offer nor Hefley's posttrial plea to a different charge are evidence of Crutchfield's innocence. He cannot show a miscarriage of justice.

The claims in the successive postconvictions are procedurally defaulted, and are barred from review by this court.

Ineffective assistance of counsel

The majority of Crutchfield's claims relate to ineffective assistance ofcounsel. A defendant has a right to the assistance of counsel under the Sixth Amendment to the United States Constitution. "[T]he right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington,* 466 U.S. 668 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). Though it may be comprised of multiple missteps by counsel, ineffective assistance is

a single ground for relief. *Pole v. Randolph*, 570 F.3d 922, 935 (7th Cir. 2009).

The merits of Crutchfield's claim are governed by the teachings of *Strickland*. To be successful, Crutchfield must establish first that counsel's performance was deficient, and second, that the deficiencies prejudiced his defense. *Strickland*, 466 U.S. at 687. The prejudice to the defense must be of a nature that, but for the deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694.

Crutchfield complains of numerous instances of counsel's failings. He argues that counsel's conflict in representing both Hefley and Crutchfield was deficient performance, as was counsel's failure to move for severance of the trials. Crutchfield also claims that counsel's failure to tender jury instructions was deficient, as was counsel's failure to move for a mistrial or a jury admonition regarding the handgun displayed on the prosecutor's table.[7] Even assuming that counsel's performance was deficient and, with the clarity of hindsight, that the trial court's various rulings were erroneous, there is no reasonable probability that but for those deficiencies the outcome of the trial would have been different. The jury could reasonably conclude that Crutchfield and Hefley were both sharing the premises. The long surveillance carried out by the police showed that. That Hefley testified that they were merely "dating" does not

[7] If trial counsel was not ineffective in this regard, appellate counsel was not ineffective for failing to pursue that claim on appeal.

change the analysis. The jury determines the credibility of witnesses, and there was conflicting evidence as to whether Crutchfield lived at the Olive Street house. The evidence of controlled substances, drug paraphernalia, and documents secured in the execution of the search warrant showed clearly what the premieres were being used for. So the second necessary aspect of *Strickland* cannot be met. The absence of the claimed deficiencies would not have changed the outcome of Crutchfield's case.

Due process

Due process requires that the defendant receive a fair trial. *Rodriguez v. Scillia*, 193 F.3d 913, 916 (7th Cir. 1999). However, there is no requirement of "an error-free, perfect trial[.]"*United States v. Hasting*, 461 U.S. 499, 508 (1983). Crutchfield contends that counsel's conflict and the display of the handgun before it was ruled inadmissible deprived him of due process. But Crutchfield received a fair trial. Counsel put on an aggressive defense in the case in chief, calling several witnesses whose testimony favored Crutchfield at least as much as, if not more than, Hefley. Any erroneous rulings did not deprive him of due process.

CERTIFICATE OF APPEALABILITY

To appeal the denial of a habeas petition, 28 U.S.C. § 2253(c)(1) requires the petitioner to obtain a certificate of appealability.

> Where the district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would

> find the district court's assessment of the constitutional claims debatable or wrong.

Slack v. McDaniel, 529 U.S. 473, 484 (2000). Crutchfield cannot demonstrate that reasonable jurists would find this court's assessment of his constitutional claims to be debatable or wrong.

CONCLUSION

The amended petition for a writ of habeas corpus (#22) is denied. A certificate of appealability is also denied. The motion to appoint counsel (#4) is moot. This case is terminated.

Enter this 29th day of January 2016.

/s/Harold A. Baker

_____

Harold A. Baker

United States District Judge

Appendix C

SUPREME COURT OF ILLINOIS

No. 118299

PEOPLE STATE OF ILLINOIS,
Respondent,
v.
SHANE S. CRUTCHFIELD,
Petitioner.

Filed: November 26, 2014

ORDER

Hon. Lisa Madigan

* * *

No. 118299 - People State of Illinois, respondent, v. Shane S. Crutchfield, petitioner. Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 31, 2014.

Appendix D

APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

Nos. 4-12-1143, 4-13-0924 cons.

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
SHANE S. CRUTCHFIELD,
Defendant-Appellant.

Filed: July 7, 2014

Honorable Lisa Holder White, Timothy J. Steadman,
Judges Presiding

ORDER

JUSTICE TURNER delivered the judgment of the court. Justices Harris and Steigmann concurred in the judgment.

¶ 1 *Held:* The appellate court (1) found the trial court did not err in denying defendant's motion for leave to file a successive postconviction petition and (2) vacated the fines imposed by the circuit clerk and remanded for the imposition of applicable fines by the trial court.

¶ 2 In April 2006, a jury found defendant, Shane S. Crutchfield, guilty of unlawful possession of

cannabis and unlawful possession of a controlled substance with intent to deliver. In June 2006, the trial court sentenced him to prison. This court affirmed his convictions and sentences. In June 2008, defendant filed a postconviction petition, which the trial court summarily dismissed. On appeal, this court reversed and remanded for second-stage proceedings. In May 2010, the State filed a motion to dismiss defendant's postconviction petition. In August 2010, the trial court granted the State's motion to dismiss. This court affirmed. In July 2012, defendant filed a *pro se* motion for leave to file a successive postconviction petition, which the trial court denied. In September 2013, defendant filed a second motion for leave to file a successive postconviction petition, which the court also denied.

¶ 3 On appeal, defendant argues the trial court erred in denying him leave to file a successive postconviction petition. We affirm in part, vacate in part, and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 In July 2005, the State charged defendant by information with unlawful possession of a controlled substance with intent to deliver with a prior unlawful-possession-of-a-controlled-substance conviction (720 ILCS 570/401(a)(2)(A), 408(a) (West 2004)), unlawful possession of a controlled substance with a prior unlawful-possession-of-a-controlled-substance conviction (720 ILCS 570/402(a)(2)(A), 408(a) (West 2004)), and unlawful possession of cannabis with a prior unlawful-possession-of-a-controlled-substance conviction (720 ILCS 550/4(d) (West 2004)). The State also charged codefendant Brandi Hefley with various

unlawful-possession offenses. Defendant and codefendant pleaded not guilty.

¶ 6 In April 2006, defendant and codefendant were jointly tried before a jury. After opening statements but before the first witness, defense counsel made an oral motion *in limine,* stating, in part, as follows:

> "We would make a motion *in limine* about presenting the guns as they are not relevant. They're not charged with a gun offense, and we would object to that because we believe that it's a tactic that would prejudice the jury against my clients, and it's not relevant. They're charged with drug offenses. No gun charge is presented before the jury."

¶ 7 Decatur police sergeant Randy Sikowski testified he initiated a drug investigation at 2540 East Olive Street on April 15, 2005. While conducting surveillance, Sikowski observed defendant going in and out of the house "on a daily basis." Sikowski also saw a "high volume of traffic" going into the house, and the visitors would only stay two or three minutes before leaving.

¶ 8 Decatur police detective Christopher Copeland testified he was working as a patrol officer on July 7, 2005, when he went to a residence at 2540 East Olive Street in Decatur. There, he observed a three-foot-tall cannabis plant growing in a green bucket behind the garage. Copeland and another officer secured the residence while a search warrant was obtained.

¶ 9 Decatur police detective Richard Hughes testified he participated in the search of the residence. He testified to several items recovered in the house,

including 62.5 grams of cocaine (exhibit No. 1), a bag with cocaine residue (exhibit No. 2), a man's sock that contained cocaine (exhibit No. 3), 16.5 grams of cocaine (exhibit No. 4), packaging containing cocaine (exhibit No. 5), 54.5 grams of cannabis found in a dresser drawer (exhibit No. 6), a "muscle" T-shirt that the cannabis had been wrapped in (exhibit No. 7), $213 in United States currency found in the dresser drawer (exhibit No. 8), $945 in United States currency found in a glass or plastic bank inside the house (exhibit No. 9), 3.9 grams of cannabis and packaging material found on a bedroom dresser (exhibit No. 10), documents taken from the residence (exhibit No. 11), a set of digital scales (exhibit No. 12), a set of sandwich bags with empty Baggies alongside them (exhibit No. 13), plastic bottles containing protein-type mixes (exhibit No. 14), 5.3 grams of cannabis and packaging material located just inside the front door on a small table (exhibit No. 15), "numerous" Baggies with cannabis residue in them found in a trash can (exhibit No. 16), as well as other items.

¶ 10 Detective Hughes testified the documents in exhibit No. 11 contained, *inter alia*, Illinois identification cards for defendant and Hefley and numerous other items addressed to them at the Olive Street address. Hughes spoke with Hefley, and she stated she had lived at 2540 East Olive Street for approximately six months with her boyfriend, defendant.

¶ 11 At the end of the first day of trial, the trial court raised the issue of the admissibility of a gun and mentioned case law stating a gun may be relevant in a drug-dealing case. Defense counsel objected,

claiming the gun was not found at the residence with the drugs. Moreover, counsel believed "the purpose of having the gun sitting there on the desk in front of the jury [was] dirtying up [his] client." The court did not make a ruling on the gun's admissibility. On the second day of trial, the State told the court the gun was recovered from a storage unit on Woodford Street. The court excluded testimony about the gun.

¶ 12 Decatur police officer Edward Root testified as an expert witness in drug distribution. He stated narcotics dealing is a "cash-and-carry business," and drugs are bought with cash as well as stolen items like stereo equipment, televisions, and guns. Drug dealers use digital scales to weigh the product and sandwich Baggies to package the drugs. Protein powders are often used as a cutting agent, *i.e.,* to dilute the cocaine but increase the amount of the product in an attempt to maximize profits. Root stated drug dealers often use multiple addresses to "hide and confuse law enforcement," as well as to protect against having their narcotics stolen. Drug dealers also place property and valuables in the names of friends or relatives to prevent seizure of the assets by law enforcement. Based on his training and experience, Root opined the drugs found in this case were intended for distribution based on the amount of cocaine, the presence of scales, and the use of sandwich Baggies.

¶ 13 Michael Cravens, a forensic scientist with the Illinois State Police, testified exhibit No. 6 contained 43.3 grams of plant material containing cannabis. Exhibit No. 1 contained 60.7 grams of a chunky, white material containing cocaine. Exhibit No. 4 measured 15.3 grams of a substance containing

cocaine. Exhibit No. 22 was 150.9 grams of a white powder containing cocaine. Exhibit No. 24 was 61.7 grams of a white material containing cocaine. Exhibit No. 26 was 101 grams of a white material containing cocaine.

¶ 14 Brandi Hefley testified on her own behalf. She stated defendant had been her boyfriend and she stayed at the East Olive Street residence. She also stated several other males stayed at the residence. She neither possessed drugs at the residence nor sold any drugs at that location.

¶ 15 Defendant exercised his constitutional right not to testify. Following closing arguments, the jury found defendant guilty of unlawful possession of cannabis and unlawful possession of a controlled substance with intent to deliver. The jury also found Hefley guilty of unlawful possession of cannabis and unlawful possession of a controlled substance with intent to deliver.

¶ 16 In May 2006, defendant filed a posttrial motion, arguing, *inter alia;* the display of the gun on the evidence table in full view of the jury was prejudicial. In June 2006, the trial court denied the motion. Thereafter, the court sentenced him to 40 years in prison for unlawful possession-of-a-controlled-substance with intent to deliver with a prior unlawful-possession-of-a-controlled-substance conviction. The court also imposed a concurrent term of eight years in prison for defendant's conviction of unlawful possession of cannabis with a prior unlawful-possession-of-a-controlled-substance conviction. Defendant filed several postsentencing motions, which the court denied. Defendant appealed, and this

court affirmed his convictions and sentences. *People v. Crutchfield,* No. 4-06-1078 (Jan. 23, 2008) (unpublished order under Supreme Court Rule 23).

¶ 17 In June 2008, defendant filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-l to 122-8 (West 2006)) and set forth multiple issues therein. In the first allegation of error, defendant claimed he was deprived of his constitutional rights to a fair trial and due process when the jury was exposed to the highly prejudicial and inadmissible gun without admonition. In his second claim, defendant alleged his trial counsel was ineffective for failing to move for a mistrial after the trial court determined the gun was inadmissible. In the third claim, defendant alleged appellate counsel was ineffective for failing to raise these two issues in his direct appeal.

¶ 18 The trial court dismissed defendant's postconviction petition, finding it frivolous and patently without merit. The court found defendant received a fair trial and his guilt was decided by a fair jury. The court also stated many of defendant's postconviction complaints were discussed on direct appeal.

¶ 19 On appeal, this court found it was arguable that counsel's failure to request a jury admonition or move for a mistrial was unreasonable. Moreover, we found it was arguable the gun on the table prejudiced defendant in the eyes of the jury and also prejudiced him when appellate counsel did not raise the issue on direct appeal. As we found defendant sufficiently stated a constitutional claim, we reversed the trial court's judgment and remanded the cause for second-

stage proceedings. *People* v. *Crutchfield,* No. 4-08-0505 (Oct. 13, 2009) (unpublished order under Supreme Court Rule 23).

¶ 20 In February 2010, defendant filed an addendum to his postconviction petition. Among other claims, the addendum alleged trial counsel was ineffective for not requesting a mistrial or jury admonition regarding the gun that was visible to the jury. The addendum also raised the issue of appellate counsel's ineffectiveness based on the failure "to argue the prejudicial appearance of the weapon on the evidence table near the jury for much of the trial."

¶ 21 Postconviction counsel filed a certificate pursuant to Illinois Supreme Court Rule 651 (c) (eff. Dec. 1, 1984) providing he had personally consulted with defendant, had examined, copied, and read the entire trial record, and filed necessary amendments to add as an addendum to the *pro se* petition.

¶ 22 In May 2010, the State filed a motion to dismiss. The State contended the firearm issue failed on several grounds because (1) it could have been raised on direct appeal, (2) defendant could not demonstrate a cognizable violation of his constitutional rights, (3) the jury was properly instructed as to withdrawn exhibits or exhibits that were refused or stricken, and (4) the evidence at trial was overwhelming.

¶ 23 ln August 2010, the trial court held a hearing on the State's motion to dismiss. In October 2010, the court issued its written ruling. The court found defendant failed to make a substantial showing of a constitutional violation as it related to the jury viewing the firearm. The court stated there was no

testimony regarding the gun, it was not admitted into evidence, the jury was properly instructed as to what evidence it should consider, and the evidence against defendant was overwhelming. The court also found defendant failed to make a substantial showing of a constitutional violation as it related to trial and appellate counsels' performances. The court granted the State's motion to dismiss. On appeal, this court affirmed the dismissal of the postconviction petition without an evidentiary hearing. *People v. Crutchfield,* 2011 IL App (4th) 100815-U.

¶ 24 In July 2012, defendant filed a motion for leave to file a successive postconviction petition. Defendant alleged he had just cause and had obtained new evidence to support a postconviction claim. He stated there was just cause for his failure to bring his claim in his previous petition because the United States Supreme Court's decision in *Lafler v. Cooper,* 132 S. Ct. 1376 (2012), upon which his claim was founded, was decided after the disposition of his first postconviction petition and the law did not support his issue prior to the *Lafler* decision. Defendant also alleged "[p]rejudice in the form of violation of [his] right to effective assistance of counsel has resulted from [his] inability to raise the issues in [his] new petition in [his] first petition."

¶ 25 The attached postconviction petition alleged trial counsel incorrectly informed him that if he accepted the State's offer to plead guilty in exchange for a 25-year sentence, he would have to serve 85% of that sentence. Defendant claimed he learned after trial that the law requires any sentence for the crimes charged to be served at 50%. He stated he would have

accepted the plea offer if he knew he would have served the 25-year sentence at 50%. Defendant claimed he brought this fact to the attention of direct-appeal counsel and postconviction counsel "but they told him that it was not sufficient grounds and that he could not prove the allegation."

¶ 26 Defendant attached to the postconviction petition a letter purportedly from attorney Garry A. Payton, wherein Payton stated the prosecutor offered defendant a 25-year deal and the sentence would have to be served at 85%. Payton stated defendant rejected the offer and went to trial.

¶ 27 In December 2012, the trial court denied defendant's motion for leave to file a successive postconviction petition. The court noted the Payton letter was not notarized and did not affirmatively indicate counsel incorrectly advised defendant regarding the percentage of any sentence he would have to serve. Moreover, the court noted that although the *Lafler* decision was recent, "there is long standing Illinois law holding the right to effective assistance of counsel extends to the decision to reject a plea offer." The court found defendant had not demonstrated cause for his failure to bring his current claim in his original postconviction petition and had not demonstrated prejudice. From this denial, defendant filed a notice of appeal (No. 4-12-1143).

¶ 28 In September 2013, defendant filed another motion for leave to file a successive postconviction petition. The motion alleged he had cause to bring the petition where the "lack of evidence" prevented him from bringing the claim earlier. Defendant claimed the State committed a violation of *Brady v. Maryland*,

373 U.S. 83 (1963), and had a duty to disclose "the impromptu pleadings, procedural due process and circumstances encompassing his co-defendant and the reason for the negotiated plea after the finding of guilt beyond a reasonable doubt by a jury of peers." Defendant alleged prejudice in that the State rewarded codefendant with a negotiated plea "as part of pre-trial agreement in maintaining wavier of conflict wich [*sic*] in effect made co-defendant states [*sic*] witness and statement admissable [*sic*] as evidence against defendant at trial."

¶ 29 The trial court denied defendant's motion for leave to file a successive postconviction petition. The court found defendant failed to demonstrate cause for his failure to bring the claim in his initial postconviction petition. The court noted the "record further shows that plea agreement concerning the codefendant took place more than two months before the defendant's newly retained counsel filed a motion to reconsider sentence. The terms of the plea agreement were obviously a matter of public record." The court stated defendant failed to identify any objective factor that impeded his ability to raise the *Brady* claim in his initial postconviction petition. From this denial, defendant filed a notice of appeal (No. 4-13-0924). This court consolidated the appeals.

¶ 30 II. ANALYSIS

¶ 31 **A. Successive Postconviction Petition**

¶ 32 Defendant argues the trial court erred in denying him leave to file a successive postconviction petition, claiming he demonstrated cause and prejudice where postconviction counsel failed to adequately present his contentions of error that trial

counsel gave him inaccurate advice regarding the sentencing consequences of the State's guilty-plea offer. We disagree. We note defendant makes no argument regarding his appeal in case No. 4-13-0924. Therefore, he has forfeited any challenge to the judgment in that appeal. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013).

¶ 33 The Act "provides a remedy to criminal defendants who claim that substantial violations of their federal or state constitutional rights occurred in their original trials." *People v. Taylor*, 237 Ill. 2d 356, 371-72, 930 N.E.2d 959, 969 (2010). A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *People v. English,* 2013 IL 112890, ¶ 21, 987 N.E.2d 371. The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero,* 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008). However, "issues raised and decided on direct appeal are barred by *resjudicata,* and issues that could have been raised but were not are forfeited." *People v. Tate,* 2012 IL 112214, ¶ 8, 980 N.E.2d 1100. Moreover, "a ruling on an initial postconviction petition has *res judicata* effect with respect to all claims that were raised or could have been raised in the initial petition." *People v. Jones,* 191 Ill. 2d 194, 198, 730 N.E.2d 26, 29 (2000).

¶ 34 The Act "generally contemplates the tiling of only one postconviction petition." *People v. Ortiz*, 235 Ill. 2d 319, 328, 919 N.E.2d 941, 947 (2009). "However, the statutory bar to a successive postconviction petition will be relaxed when fundamental fairness so

requires." *People v. Lee*, 207 Ill. 2d 1, 5, 796 N.E.2d 1021, 1023 (2003).

¶ 35 A successive postconviction petition may only be filed if leave of court is granted. 725 ILCS 5/122-1(f) (West 2010). "Leave of court may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial postconviction proceedings and prejudice results from that failure." 725 ILCS 5/122-1(f) (West 2010). "[A] successive petition 'is not considered "filed" for purposes of section 122-1(f), and further proceedings will not follow, until leave is granted, a determination dependent upon a defendant's satisfaction of the cause-and-prejudice test.'" *People v. Edwards,* 2012 IL App (1st) 091651, ¶ 19,966 N.E.2d 417 (quoting *People v. Tidwell,* 236 Ill. 2d 150, 161, 923 N.E.2d 728, 734 (2010)). Both prongs of the cause-and-prejudice test must be satisfied for a defendant to prevail. *People v. Guerrero,* 2012 IL 112020, ¶ 15,963 N.E.2d 909; see also *Lee*, 207 Ill. 2d at 5, 796 N.E.2d at 1023 (stating to establish fundamental fairness, "the defendant must show both cause and prejudice with respect to each claim presented").

¶ 36 "While the test for initial petitions to survive summary dismissal is that the petition state the gist of a meritorious claim-that is, a claim of arguable merit-the cause and prejudice test for successive petitions is more exacting than the gist or arguable merit standard." *People v. Miller*, 2013 IL App (1st) 111147, ¶ 26, 988 N.E.2d 1051.

> "To show cause, a defendant must identify 'an objective factor that impeded his or her ability to raise a specific claim 'during his or

> her initial post-conviction proceedings.' [Citation.] To show prejudice, a defendant must demonstrate 'that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process.' [Citation.]" *People v. Evans,* 2013 IL 113471, ¶10,989 N.E.2d 1096.

¶ 37 "Where a defendant fails to first satisfy the requirements under section 122-1(f), a reviewing court does not reach the merits or consider whether his successive postconviction petition states the gist of a constitutional claim." *People v. Welch*, 392 Ill. App. 3d 948, 955, 912 N.E.2d 756, 762 (2009). As the trial court did not engage in any fact-finding here, our review is *de novo. People v. Green*, 2012 IL App (4th) 101034, ¶ 30, 970 N.E.2d 101.

¶ 38 In the case *sub judice,* defendant failed to establish cause for his failure to bring his claim in his initial postconviction petition. Defendant argued it was not until the Supreme Court's 2012 decision in *Lafler* that authority supported his claim that the right to effective assistance of counsel extended to the decision to reject a plea offer. We note defendant cannot establish cause based on the fact that a case on which his claim is based was not decided until after he filed his first postconviction petition. *People v. Purnell*, 356 Ill. App. 3d 524, 531, 825 N.E.2d 1234, 1240 (2005). Moreover, and as the trial court found, prior Illinois case law would have supported his claim. See *People v. Curry*, 178 Ill. 2d 509,518, 687 N.E.2d 877, 882 (1997) (stating "it has been well established that the right to effective assistance of counsel extends to

the decision to reject a plea offer, even if the defendant subsequently receives a fair trial"); *People v. Blommaert*, 237 Ill. App. 3d 811, 815-18, 604 N.E.2d 1054, 1057-59 (1992). That *Lafler* was decided in 2012, after defendant filed his first postconviction petition in 2008, did not prevent him from making the instant claim based on the supreme court's 1997 decision in *Curry* and similar cases. Thus, at the time he filed his initial petition, defendant had ample legal authority to support his claim that counsel was ineffective during plea negotiations.

¶ 39 Defendant argues he demonstrated cause where postconviction counsel failed to amend the first postconviction petition to include the claim of ineffective assistance of trial counsel. However, defendant did not assert in his motion for leave to file a successive postconviction petition that postconviction counsel should have amended the *pro se* petition. Thus, this claim is forfeited. See *People v. Smith*, 352 Ill. App. 3d l 095, 1112, 817 N.E.2d 982, 998 (2004) (stating that an argument not made in the successive postconviction petition precluded the reviewing court from considering it on appeal from the petition's dismissal).

¶ 40 Moreover, defendant claims he established cause by postconviction counsel's failure to amend the petition to include the subject issue. However, to show cause, the defendant must identify an objective factor that impeded *his* ability to raise the claim in his initial postconviction petition. *Evans*, 2013 IL 113471, ¶ 10,989 N.E.2d 1096. Defendant's claim that postconviction counsel failed to amend the petition to include the subject issue is not an objective factor that

impeded defendant's ability to raise the issue in his *pro se* petition. See *People v. Ramey*, 393 Ill. App. 3d 661, 667-69, 913 N.E.2d 670, 676-78 (2009). Accordingly, defendant failed to satisfy the cause prong.

¶ 41 Although we have found defendant failed to establish cause, we also find defendant failed to satisfy the prejudice prong in his claim that trial counsel gave inaccurate advice that he would have to serve 85% of his 25-year term. A defendant has the burden to "submit enough in the way of documentation to allow a circuit court to" grant leave. *Tidwell*, 236 Ill. 2d at 161, 923 N.E.2d at 734-35. Here, defendant's claim of prejudice was unsupported by the letter purportedly from trial counsel that was attached to his motion. First, the letter was not notarized. See 725 ILCS 5/122-2 (West 2010) (stating a petition "shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached"); *People* v. *Wideman,* 2013 IL App (1st) 102273, ¶¶ 15-16, 994 N.E.2d 546 (noting an affidavit that is not sworn is a nullity and does not satisfy the requirements of the Act).

¶ 42 Second, the letter does not indicate counsel incorrectly advised defendant regarding the percentage of time he would have to serve in prison. Instead, the letter notes Payton represented defendant, but it was allegedly the prosecutor who offered defendant a deal of 25 years in prison and stated he would have to serve 85% of that sentence. Thus, the letter does not establish Payton misinformed defendant regarding the application of the truth-in-sentencing statute, and defendant has

not shown a violation of due process. As defendant failed to satisfy the cause-and-prejudice test, the trial court did not err in denying his motion for leave to file a successive postconviction petition.

¶ 43 **B. Fines**

¶ 44 In its brief, the State suggests this court should vacate certain fines imposed by the circuit clerk and remand for the imposition of mandatory fines. In its oral sentencing order on June 16, 2006, the trial court imposed a $39,564.60 street-value fine, a $3,000 mandatory assessment, and a $100 laboratory fee. The June 16, 2006, docket entry reflects imposition of the same fines and fees and states defendant is to be given a $1,710 credit against the $3,000 drug-treatment assessment for time spent in custody. A review of the circuit clerk's online records reveals additional assessments against defendant, some of which are fines.

¶ 45 This court has held "[t]he imposition of a fine is a judicial act" and the circuit clerk, a nonjudicial member of the court, has no power to levy fines. *People v. Swank*, 344 Ill. App. 3d 738, 747-48, 800 N.E.2d 864, 871 (2003); see also *People v. Williams,* 2013 IL App (4th) 120313, ¶¶ 15-25, 991 N.E.2d 914. Thus, any fines imposed by the circuit clerk are void. *People v. Montag*, 2014 IL App (4th) 120993, ¶ 37, 5 N.E.3d 246. Accordingly, we vacate the fines imposed by the circuit clerk and remand with directions for the trial court to impose the applicable mandatory fines for the pertinent offenses.

¶ 46 **III. CONCLUSION**

¶ 47 For the reasons stated, we affirm the trial court's judgment denying defendant leave to file a

successive postconviction petition. We also vacate the fines imposed by the circuit clerk and remand with directions for the trial court to impose all mandatory fines. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 48 Affirmed in part and vacated in part; cause remanded with directions.

Appendix E

ILLINOIS CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

No. 05 CF 962

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiffs,
v.
SHANE S. CRUTCHFIELD,
Defendant.

Filed: Sept. 16, 2013

ORDER DENYING MOTION FOR LEAVE TO FILE SUCCESSIVE POST-CONVICTION PETITION

Now comes the court and states as follows.

1. The defendant and co-defendant, Brandi Hefley, were both represented by the same attorney of choice, Mr. Gary Payton.

2. On February 21, 2006 the defendants waived any conflict of interest regarding their being both represented by Mr. Payton. At that hearing, the "... exchange between the court and the defendant shows that defendant was informed of codefendant's statement that he resided at East Olive Street residence could be entered into evidence if Mr. Payton continued to represent him and the codefendant. Despite this, defendant chose to continue to have Mr.

Payton represent him." Quoting People v. Crutchfield, Illinois Supreme Court Rule 23 Order 4-06-1078.

3. Both defendants were found guilty at jury trial on April 5, 2006.

4. The defendant was sentenced on June 6, 2006 to concurrent terms of 40 years and 8 years in the Illinois Department of Corrections. On the same date, new counsel of choice entered his appearance for the codefendant.

5. On August 24, 2006, pursuant to plea agreement, the jury verdicts as to the codefendant were vacated, and she pleaded guilty to a lesser offense for an agreed sentence of 8 years in the Illinois Department of Corrections.

6. On November 9, 2006 the defendant filed timely motions including a motion to reconsider sentence. Those motions were denied on November, 15, 2006.

7. Defendant filed a petition for post-conviction relief and addendum which was eventually dismissed by the trial court on October 1, 2010.

8. On July 24, 2012 the defendant filed a motion for leave to file successive post-conviction petition. The court denied leave on December 4, 2012.

9. In his most recent motion for leave to file successive post-conviction petition, the defendant claims that his due process rights were violated because the State failed to disclose evidence which may have been favorable to him for purposes of sentencing, as required under *Brady v. Maryland*, 373 U.S. 83. Specifically, the defendant alleges: "... the State rewarded co defendant with negotiated plea as part of pre-trial agreement in maintaining waiver of

conflict wich (sp) effect made co defendant states (sp) witness ...". This claim was not raised in the defendant's first petition for post-conviction relief.

10. The court records shows no suggestion of any pre-trial agreement between the State and the codefendant, Ms. Hefley. The defendants did not have antagonistic defenses. In fact, when Ms. Hefley testified at trial she denied making statements during an interview with police officer Richard Hughes suggesting that the defendant resided at the address where items of contraband were seized.

11. The defendant has failed to demonstrate cause for his failure to bring this claim in his initial post conviction petition as is required under 725 ILCS 5/122-1(f). The court record shows that the defendant was fully aware of the codefendant's out of statement to Officer Hughes well before the trial or sentence hearing took place. See paragraph 2. above. The record further shows that plea agreement concerning the codefendant took place more than two months before the defendant's newly retained counsel filed a motion to reconsider sentence. The terms of the plea agreement were obviously a matter of public record. The defendant has failed to identify any objective factor that impeded his ability to raise the *Brady* claim in his initial post-conviction petition.

12. The defendant has failed to demonstrate prejudice. It is clear from the court's remarks that the defendant's sentence was arrived at primarily because of his extensive prior history of criminality. There is no suggestion that failure to raise the alleged *Brady* claim so infected the defendant's sentence hearing such that his due process rights were violated.

Wherefore, the court hereby denies leave to file the successive post-conviction petition.

So Ordered. S/SIGNATOR'S NAME HERE
[handwritten: 9/27/13]

Timothy J. Steadman

Associate Circuit Judge

Appendix F

ILLINOIS CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

No. 05 CF 962

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiffs,
v.
SHANE S. CRUTCHFIELD,
Defendant.

Filed: Dec. 4, 2012

ORDER

File presented by the Macon County Circuit Clerk on 11/19/12. Court reviews Motion for Leave to File Successive Post-Conviction Petition. Finding Defendant filed his first Post-Conviction Petition 6/12/08. Defendant's first Petition was filed pro se and was extensive. Defendant also filed on June 12, 2008, an Argument and Memorandum of Law in Support of his Pro Se Verified Post-Conviction Petition. Defendant indicates in his proposed Successive Petition for Post-Conviction Relief, that he advised direct appeal counsel of the issue in his proposed Successive Petition for Post-Conviction Relief. Defendant's conviction was affirmed in an opinion filed 1/23/08.

The letter attached to Defendant's proposed Successive Petition for Post-Conviction Relief is not notarized and does not affirmatively indicate defense counsel incorrectly advised Defendant regarding what percentage of any sentence imposed Defendant would have to serve. Although, the Lafler decision is recent, there is long standing Illinois law holding the right to effective assistance of counsel extends to the decision to reject a plea offer, (People v. Curry 178 Ill.2d 509). Finding Defendant has not demonstrated cause for his failure to bring his current claim before the court in his original Petition for Post-Conviction Relief. Further finding Defendant has not demonstrated prejudice. The Motion for Leave To File Successive Post-Conviction Petition is denied. THE CLERK IS DIRECTED to send a copy of this order and notice pursuant to Illinois Supreme Court Rule 561(b) to the Defendant in care of the Illinois Department of Corrections.

[handwritten: December 4, 2012]	S/SIGNATOR'S NAME HERE
Enter	Circuit Judge

Appendix G

SUPREME COURT OF ILLINOIS

No. 113751

PEOPLE OF THE STATE OF ILLINOIS,
Respondent,
v.
SHANE S. CRUTCHFIELD,
Petitioner.

Filed: March 28, 2012

JUDGMENT

The Court having considered the Petition for leave to appeal and being fully advised of the premises, the Petition for leave to appeal is DENIED.

As Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, I certify that the foregoing is a true copy of the final order entered in this case.

* * *

S/SIGNATOR'S NAME HERE
Clerk,
Supreme Court of the State of
Illinois

Appendix H

APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

No. 04-10-0815

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
SHANE S. CRUTCHFIELD,
Defendant-Appellant.

Filed: Dec. 23, 2011

ORDER

PRESIDING JUSTICE TURNER delivered the judgment of the court. Justices Steigmann and Cook concurred in the judgment.

¶ 1 *Held:* Where defendant failed to make a substantial showing of a constitutional violation because he did not demonstrate that counsel was ineffective at trial or on appeal, the trial court did not err in dismissing his postconviction petition at the second stage.

¶ 2 In April 2006, a jury found defendant, Shane S. Crutchfield, guilty of unlawful possession of cannabis and unlawful possession of a controlled substance with intent to deliver. In June 2006, the trial court sentenced him to prison. This court affirmed his convictions and sentences. In June 2008,

defendant filed a postconviction petition, which the trial court summarily dismissed. On appeal, this court reversed and remanded for second-stage proceedings. In May 2010, the State filed a motion to dismiss defendant's postconviction petition. In August 2010, the trial court granted the State's motion to dismiss.

¶ 3 On appeal, defendant argues the trial court erred in dismissing his postconviction

* * *

Illinois identification cards for defendant and Hefley and numerous other items addressed to them at the Olive Street address. Hughes spoke with Hefley, and she stated she had lived at 2540 East Olive for approximately six months with her boyfriend, defendant.

¶ 10 At the end of the first day of trial, the trial court raised the issue of the admissibility of a gun and mentioned case law stating a gun may be relevant in a drug-dealing case. Defense counsel objected, claiming the gun was not found at the residence with the drugs. Moreover, counsel believed "the purpose of having the gun sitting there on the desk in front of the jury [was] dirtying up [his] client." The court did not make a ruling on the gun's admissibility. On 'the second day of trial, the State told the court the gun was recovered from a storage unit on Woodford Street. The court excluded testimony about the gun.

¶ 11 Decatur police officer Edward Root testified as an expert witness in drug distribution. He stated narcotics dealing is a "cash-and-carry business," and drugs are bought with cash as well as stolen items like stereo equipment, televisions, and guns. Drug dealers use digital scales to weigh the product and sandwich

Baggies to package the drugs. Protein powders are often used as a cutting agent, *i.e.,* to dilute the cocaine but increase the amount of the product in an attempt to maximize profits. Root stated drug dealers often use multiple addresses to "hide and confuse law enforcement" as well as to protect against having their narcotics stolen. Drug dealers also place property and valuables in the names of friends or relatives to prevent seizure of the assets by law enforcement. Based on his training and experience, Root opined the drugs found in this case were intended for distribution based on the amount of cocaine, the presence of scales, and the use of sandwich Baggies.

¶ 12 Michael Cravens, a forensic scientist with the Illinois State Police, testified exhibit No. 6 contained 43.3 grams of plant material containing cannabis. Exhibit No. 1 contained 60.7 grams of a chunky white material containing cocaine. Exhibit No. 4 measured 15.3 grams of a substance containing cocaine. Exhibit No. 22 was 150.9 grams of a white powder containing cocaine. Exhibit No. 24 was 61.7 grams of a white material containing cocaine. Exhibit No. 26 was 101 grams of a white material containing cocaine.

¶ 13 Brandi Hefley testified on her own behalf. She stated defendant had been her boyfriend and she stayed at the East Olive residence. She also stated several other males stayed at the residence. She neither possessed drugs at the residence nor sold any drugs at that location.

¶ 14 Defendant exercised his constitutional right not to testify. Following closing arguments, the jury found defendant guilty of unlawful possession of

cannabis and unlawful possession of a controlled substance with intent to deliver. The jury also found Hefley guilty of unlawful possession of cannabis and unlawful possession of a controlled substance with intent to deliver.

¶ 15 In May 2006, defendant filed a posttrial motion, arguing, *inter alia,* the display of the gun on the evidence table in full view of the jury was prejudicial. In June 2006, the trial court denied the motion. Thereafter, the court sentenced him to 40 years for unlawful possession of a controlled substance with intent to deliver with a prior unlawful-possession-of-a-controlled-substance conviction. The court also imposed a concurrent term of eight years in prison for defendant's conviction of unlawful possession of cannabis with a prior unlawful-possession-of-a-controlled-substance conviction. Defendant filed several postsentencing motions, which the court denied. Defendant appealed, and this court affirmed his convictions and sentences. *People v. Crutchfield,* No. 4-06-1078 (January 23, 2008) (unpublished order under Supreme Court Rule 23).

¶ 16 In June 2008, defendant filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 through 122-8 (West 2006)) and set forth multiple issues therein. In the first allegation of error, defendant claimed he was deprived of his constitutional right to a fair trial and due process when the jury was exposed to the highly prejudicial and inadmissible gun without admonition. In his second claim, defendant alleged his trial counsel was ineffective for failing to move for a mistrial after the

trial court determined the gun was inadmissible. In the third claim, defendant alleged appellate counsel was ineffective for failing to raise these two issues in his direct appeal.

¶ 17 The trial court dismissed defendant's postconviction petition, finding it frivolous and patently without merit. The court found defendant received a fair trial and his guilt was decided by a fair jury. The court also stated many of defendant's postconviction complaints were discussed on direct appeal.

¶ 18 On appeal, this court found it was arguable that counsel's failure to request a jury admonition or move for a mistrial was unreasonable. Moreover, we found it was arguable the gun on the table prejudiced defendant in the eyes of the jury and also prejudiced him when appellate counsel did not raise the issue on direct appeal. As we found defendant sufficiently stated a constitutional claim, we reversed the trial court's judgment and remanded the cause for second-stage proceedings. *People v. Crutchfield,* No. 4-08-0505 (October 13, 2009) (unpublished order under Supreme Court Rule 23).

¶ 19 In February 2010, defendant filed an addendum to his postconviction petition. Among other claims, the addendum alleged trial counsel was ineffective for not requesting a mistrial or jury admonition regarding the gun that was visible to the jury. The addendum also raised the issue of appellate counsel's ineffectiveness based on the failure "to argue the prejudicial appearance of the weapon on the evidence table near the jury for much of the trial."

¶ 20 In May 2010, the State filed a motion to dismiss. The State contended the firearm issue failed on several grounds because (1) it could have been raised on direct appeal, (2) defendant could not demonstrate a cognizable violation of his constitutional rights, (3) the jury was properly instructed as to withdrawn exhibits or exhibits that were refused or stricken, and (4) the evidence at trial was overwhelming.

¶ 21 In August 2010, the trial court held a hearing on the State's motion to dismiss. In October 2010, the court issued its written ruling. The court found defendant failed to make a substantial showing of a constitutional violation as it related to the jury viewing the firearm. The court stated there was no testimony regarding the gun, it was not admitted into evidence, the jury was properly instructed as to what evidence it should consider, and the evidence against defendant was overwhelming. The court also found defendant failed to make a substantial showing of a constitutional violation as it related to trial and appellate counsels' performance. The court granted the State's motion to dismiss. This appeal followed.

¶ 22 **II. ANALYSIS**

¶ 23 Defendant argues the trial court erred in dismissing his postconviction petition at the second stage where the petition alleged (1) trial counsel was ineffective for failing to ask for a mistrial or a jury admonition upon learning the handgun, which sat on the evidence table in view of the jury during a portion of the trial, was inadmissible, and (2) appellate counsel was ineffective for failing to argue on direct appeal that trial counsel was ineffective and that the

jury's viewing of the gun was a violation of due process. We disagree.

¶ 24 The Act "provides a means for a criminal defendant to challenge his conviction or sentence based on a substantial violation of constitutional rights." *People v. Beaman,* 229 Ill. 2d 56, 71, 890 N.E.2d 500, 509 (2008). A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *Beaman,* 229 Ill. 2d at 71, 890 N.E.2d at 509. The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero,* 228111. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008).

¶ 25 The Act establishes a three-stage process for adjudicating a postconviction petition. *Beaman,* 229 Ill. 2d at 71, 890 N.E.2d at 509. At the first stage, the trial court must review the postconviction petition and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2006). If the petition is not dismissed at the first stage, it advances to the second stage. 725 ILCS 5/122-2.1(b) (West 2006).

¶ 26 At the second stage, the trial court may appoint counsel, who may amend the petition to ensure defendant's contentions are adequately presented. *People v. Pendleton,* 223 Ill. 2d 458,472, 861 N.E.2d 999, 1007 (2006). Also at the second stage, the State may file an answer or move to dismiss the petition. 725 ILCS 5/122-4, 122-5 (West 2006). A petition may be dismissed at the second stage "only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation."

People v. Hall, 217 Ill. 2d 324, 334, 841 N.E.2d 913, 920 (2005). If a constitutional violation is established, "the petition proceeds to the third stage for an evidentiary hearing." *People v. Harris,* 224 Ill. 2d 115, 126, 862 N.E.2d 960, 967 (2007). In this case, the State filed a motion to dismiss, and the court granted that motion.

¶ 27 At the second stage of postconviction proceedings, the trial court is concerned merely with determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity that would necessitate relief under the Act. *People v. Coleman,* 183 Ill. 2d 366, 380, 701 N.E.2d 1063, 1071 (1998). At this stage, "the defendant bears the burden of making a substantial showing of a constitutional violation" and "all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true." *Pendleton,* 223 Ill. 2d at 473, 861 N.E.2d at 1008. The court reviews the petition's factual sufficiency as well as its legal sufficiency in light of the trial court record and applicable law. *People v. Alberts,* 383 Ill. App. 3d 374, 377, 890 N.E.2d 1208, 1212 (2008). We review the trial court's second-stage dismissal *de novo. Pendleton,* 223 Ill. 2d at 473, 861 N.E.2d at 1008.

¶ 28 Claims of ineffective assistance of counsel may be raised in a postconviction petition. See *People v. Brown,* 236 Ill. 2d 175,185,923 N.E.2d 748, 754 (2010) (citing *Strickland v. Washington,* 466 U.S. 668 (1984)). "To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v.*

Petrenko, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1203 (2010). To establish deficient performance, the defendant must show his attorney's performance fell below an objective standard of reasonableness. *People v. Evans,* 209 Ill. 2d 194, 219-20, 808 N.E.2d 939, 953 (2004) (citing *Strickland,* 466 U.S. at 687). Prejudice is established when a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Evans,* 209 Ill. 2d at 219-20, 808 N.E.2d at 953 (citing *Strickland,* 466 U.S. at 694). A defendant must satisfy both prongs of the *Strickland* standard, and the failure to satisfy either prong precludes a finding of ineffective assistance of counsel. *People v. Clendenin,* 238 Ill. 2d 302, 317-18, 939 N.E.2d 310, 319 (2010).

¶ 29 Claims that appellate counsel was ineffective are also evaluated under *Strickland. Petrenko,* 237 Ill. 2d at 497, 931 N.E.2d at 1203. "Appellate counsel is not required to brief every conceivable issue on appeal and may refrain from developing nonmeritorious issues without violating *Strickland." People v. Jones,* 219 Ill. 2d 1, 23, 845 N.E.2d 598, 610 (2006). Thus, "unless the underlying issue is meritorious, a defendant cannot be said to have incurred any prejudice from counsel's failure to raise the particular issue on appeal." *People v. Edwards,* 195 Ill. 2d 142, 164, 745 N.E.2d 1212, 1224 (2001).

¶ 30 In this case, defendant failed to make a substantial showing of a constitutional violation because defendant did not demonstrate counsel was ineffective at trial or on appeal. Specifically, defendant cannot show he was prejudiced by the gun being

visible to the jury or by defense counsel's failure to request a mistrial or a jury admonition.

¶ 31 The handgun at issue in this case was never admitted into evidence. The trial court barred admission of the gun into evidence as well as testimony about the gun. Although the gun was present on a table in the courtroom for a portion of the trial, it was removed at some point. The jury was instructed it had a duty to determine the facts based on the evidence, which consisted "only of the testimony of the witnesses and the exhibits which the court has received." Withdrawn exhibits were to be disregarded. No discussion of the gun was made during closing arguments.

¶ 32 Here, the evidence against defendant was overwhelming, but defendant claims he was prejudiced because the jury "most likely believed" the gun on the table was found with the other evidence that was recovered and linked to him by the State. However, *"Strickland* requires actual prejudice be shown, not mere speculation as to prejudice." *People v. Bew*, 228 Ill. 2d 122, 135, 886 N.E.2d 1002, 1010 (2008). Defendant can only speculate as to what the jury believed, but such speculation is insufficient to demonstrate prejudice under *Strickland*. Thus, as defendant cannot demonstrate he was prejudiced by the gun or trial counsel's representation, his claim of ineffective assistance of counsel fails. Moreover, because defendant cannot establish ineffective assistance of trial counsel, he cannot establish appellate counsel was ineffective for not raising the issue on appeal. As defendant failed to make a substantial showing of a constitutional violation, the

trial court appropriately dismissed his postconviction petition at the second stage.

¶ 33 **III. CONCLUSION**

¶ 34 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 35 Affirmed.

Appendix I

ILLINOIS CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

No. 05 CF 962

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff,
v.
SHANE S. CRUTCHFIELD,
Defendant.

Filed: Oct. 1, 2010

DECISION OF THE COURT

Cause removed from advisement. It shall be the finding of the court as follows:

1. Defendant has failed to make a substantial showing of imprisonment in violation of the state or federal constitution as it relates to the jury viewing a firearm. A review of the record indicates their was no testimony regarding the gun, it was not admitted into evidence, the jury was properly instructed as to what evidence it should consider, and the evidence against the Defendant was overwhelming. Moreover, this issue could have been raised on appeal and was not.

2. Defendant has failed to make a substantial showing of imprisonment in violation of the state or federal constitution as it relates to his trial counsel's

failure to move for a mistrial upon the court ruling the firearm would not be admitted into evidence. Counsel's performance must be judged pursuant to *Strickland v. Washington*, 466 U.S. 668, which requires a showing of deficiency and, that but for counsel's deficient performance, the outcome would have been different. This court finds counsel's tactical decision was not deficient. Counsel for the Defendant raised this issue in a post-trial motion and in light of the overwhelming evidence against the Defendant, even if it were determined counsel's performance was deficient, Defendant can not show that but for counsel's error the result of the trial would have been different. Finally, this issue could have been raised on appeal but was not.

3. Defendant has failed to make a substantial showing of imprisonment in violation of the state or federal constitution as it relates to the alleged ineffective assistance of appellate counsel for not raising the issues indicated in paragraphs one and two above. Appellate counsel is judged by the same standard as trial counsel. Based on this court's findings with respect to the display of the handgun and the lack of a motion for mistrial, the Defendant has not shown any deficiency or the required prejudice to allow the court to find Defendant was denied effective assistance of counsel.

4. Defendant has failed to make a substantial showing of imprisonment in violation of the state or federal constitution as it relates to the court admitting documents and photographs into evidence. This issue was not raised on appeal and is therefore waived.

5. Defendant has failed to make a substantial showing of imprisonment in violation of the state or federal constitution as it relates to the alleged failure of trial counsel to make the correct objection to photographs admitted into evidence. This issue was not raised on appeal and is therefore waived.

6. Defendant has failed to make a substantial showing of imprisonment in violation of the state or federal constitution as it relates to the failure of appellate counsel to raise the issues in paragraphs four and five above. Appellate counsel is not required to raise issues which are, in his professional opinion, without merit. Moreover, Defendant cannot meet either prong of the *Strickland* test regarding this issue.

7. Defendant has failed to make a substantial showing of imprisonment in violation of the state or federal constitution as it relates to the alleged evidence tampering. Defendant's assertions are contradicted by the record which contains the stipulation of the parties. Moreover, this issue was not raised on appeal and is therefore waived.

8. Defendant has failed to make a substantial showing of imprisonment in violation of the state or federal constitution as it relates to Defendant's allegation trial counsel's failed to conduct a meaningful investigation into and move to suppress evidence that had been tampered with.

Defendant's assertions are contradicted by the record which contains the stipulation of the parties. Moreover, this issue was not raised on appeal and is therefore waived.

9. Defendant has failed to make a substantial showing of imprisonment in violation of the state or federal constitution as it relates to the failure of appellate counsel to raise the issues in paragraphs seven and eight above. Appellate counsel is not required to raise issues which are, in his professional opinion, without merit. Moreover, Defendant cannot meet either prong of the *Strickland* test regarding this issue.

10. Defendant has failed to make a substantial showing of imprisonment in violation of the state or federal constitution as it relates to the failure of appellate counsel to raise the issue of Defendant not being proven guilty beyond a reasonable doubt. On appeal, the evidence in this case was found to be overwhelming. Appellate counsel is not required to raise issues which are, in his professional opinion, without merit. Moreover, Defendant cannot meet either prong of the *Strickland* test regarding this issue.

11. Defendant has failed to make a substantial showing of imprisonment in violation of the state or federal constitution as it relates to trial counsel's failure to object to the People's Motion For Leave to File Additional Information. The State determines what charges are filed and the court may, in its discretion, allow additional charges to be filed. Moreover, this matter could have been raised on appeal .and since it was not, it is waived.

12. Defendant has failed to make a substantial showing of imprisonment in violation of the state or federal constitution as it relates to the allegation trial counsel failed to subject Sergeant Sikowski to

meaningful cross examination and move that his testimony be stricken. The record demonstrates Sergeant Sikowski was subjected to meaningful cross examination and there was no basis to strike his testimony. Counsel's performance as to the cross examination of Sergeant Sikowski does not meet either prong of the *Strickland* test. Moreover, this matter could have been but was not raised on appeal.

13. Defendant has failed to make a substantial showing of imprisonment in violation of the state or federal constitution as it relates to the alleged cumulative errors at trial. This claim is a general assertion with no factual basis.

14. Defendant has failed to make a substantial showing of imprisonment in violation of the state or federal constitution as it relates to appellate counsel's failure to file a petition for rehearing in the appellate court. Defendant cannot meet the second prong of the *Strickland* test regarding this issue.

15. Defendant has failed to make a substantial showing of imprisonment in violation of the state or federal constitution as it relates to his allegation of the unconstitutionality of an alleged lessened burden upon the People in proving the elements of the offense by inferences. Circumstantial evidence is a well established method of proving the elements of an offense. The use of circumstantial evidence in no way changes the burden on the people. The court instructed the jury as to the proper burden and there is no indication the State was not held to that burden.

16. Defendant has failed to make a substantial showing of imprisonment in violation of the state or federal constitution as it relates to his allegation the

Illinois Controlled Substance Act's Subsequent Sentencing provisions are unconstitutional. The Defendant received a sentence within the range proscribed by law. This issue could have been raised on appeal and was not.

17. Defendant has failed to make a substantial showing of imprisonment in violation of the state or federal constitution as it relates to his allegation the jury was informed of his prior conviction. There is no factual support or basis for this claim.

18. Defendant has failed to make a substantial showing of imprisonment in violation of the state or federal constitution as it relates to his allegation the jury, without objection by his counsel, was allowed to view an information which showed his prior conviction. There is no factual support or basis for this claim.

19. Defendant has failed to make a substantial showing of imprisonment in violation of the state or federal constitution as it relates to his allegation trial counsel was ineffective for inadequately advising him to waive any conflict of interest. This claim was raised and fully addressed on appeal, and is now barred by the doctrine of res judicata.

20. Defendant has failed to make a substantial showing of imprisonment in violation of the state or federal constitution as it relates to his allegation of ineffective assistance of counsel due to trial counsel's failure to file pre-trial motions and jury instructions. The Defendant cannot meet the two prong *Strickland* test as to these issues. Moreover, these claims, in part, were raised on appeal and are now barred by the

doctrine of res judicata. The issues not raised on appeal are waived.

21. Defendant has failed to make a substantial showing of imprisonment in violation of the state or federal constitution as it relates to trial counsel's failure to make a demand for an explanation to the jury or to submit a jury instruction regarding the firearm which the Court excluded from evidence. Defendant cannot satisfy the two prong test in *Strickland*. Moreover, this issue could have been but was not raised on appeal.

22. Defendant has failed to make a substantial showing of imprisonment in violation of the state or federal constitution as it relates to his trial counsel's failure to file a Motion to Suppress the co-defendant's statement given after she requested an attorney. Defendant does not have standing to assert a violation of the co-defendant's constitutional rights. Defendant's claim is contradicted by the record and he offers no facts to support this allegation.

23. Defendant has failed to make a substantial showing of imprisonment in violation of the state or federal constitution as it relates to Defendant's claim trial counsel was ineffective for failing to file a Motion in Limine concerning items recovered from a storage locker. This allegation is vague and not specific. Moreover, Defendant cannot satisfy the two prong *Strickland* test as it applies to this issue.

24. Defendant has failed to make a substantial showing of imprisonment in violation of the state or federal constitution as it relates to Defendant's claim trial counsel was ineffective for failing to raise the issue of the inadmissibility of many items of evidence.

This claim is vague and lacks the necessary specificity. It shall be the order of the court as follows:

A. The Motion to Dismiss Petition For Post Conviction Relief And Addendum is granted.

B. The Clerk is directed to send a copy of this decision to counsel of record.

C. The Clerk is directed to notify the Defendant pursuant to Illinois Supreme Court Rule 651(b).

[handwritten: October 1, 2010]
Enter

S/SIGNATOR'S NAME HERE
Circuit Judge

Appendix J

APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

No. 04-08-0505

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
SHANE S. CRUTCHFIELD,
Defendant-Appellant.

Filed: Oct. 13, 2009

ORDER

In April 2006, a jury found defendant, Shane S. Crutchfield, guilty of unlawful possession of a controlled substance with intent to deliver with a prior unlawful-possession-of-a-controlled-substance conviction and unlawful possession of cannabis with a prior unlawful-possession-of-a-controlled-substance conviction. In June 2006, the trial court sentenced him to concurrent terms of 40 years' and 8 years' imprisonment, respectively. This court affirmed defendant's convictions and sentences. In June 2008, defendant filed a *pro se* petition for postconviction relief, which the trial court dismissed as frivolous and patently without merit.

On appeal, defendant argues the trial court erred in dismissing his postconviction petition. We reverse and remand for further proceedings.

I. BACKGROUND

In June 2005, the State charged defendant by information with unlawful possession of a controlled substance with intent to deliver with a prior unlawful-possession-of-acontrolled-substance conviction (720 ILCS 570/401(a) (2) (A), 408(a) (West 2004)), unlawful possession of a controlled substance with a prior unlawful-possession-of-a-controlled-substance conviction (720 ILCS 570/402(a) (2) (A), 408(a) (West 2004)), and unlawful possession of cannabis with a prior unlawful-possession-of-a-controlled-substance conviction (720 ILCS 550/4(d) (West 2004)). The State also charged codefendant Brandi Hefley with various unlawful-possession offenses. Defendant and codefendant pleaded not guilty.

In April 2006, defendant and codefendant were jointly tried before a jury. After opening statements but before the first witness, defense counsel made an oral motion *in limine* about the State presenting guns in its case, arguing it would prejudice his clients. The trial court reserved ruling.

Decatur police detective Christopher Copeland testified he was working as a patrol officer on July 7, 2005, when he went to a residence at 2540 East Olive in Decatur. There, he observed a three-foot-tall cannabis plant growing in a green bucket behind the garage. Copeland and another officer secured the residence while a search warrant was obtained.

Decatur police detective Richard Hughes testified he participated in the search of the residence. He

testified to several items recovered in the house, including 62.5 grams of cocaine (exhibit No. 1), a bag with cocaine residue (exhibit No. 2), a man's sock that contained cocaine (exhibit No. 3), 16.5 grams of cocaine (exhibit No. 4), packaging containing cocaine (exhibit No. 5), 54.5 grams of cannabis found in a dresser drawer (exhibit No. 6), a "muscle" T-shirt that the cannabis had been wrapped in (exhibit No. 7), $213 in United States currency found in the dresser drawer (exhibit No. 8), $945 in United States currency found in a glass or plastic bank inside the house (exhibit No. 9), 3.9 grams of cannabis and packaging material found on a bedroom dresser (exhibit No. 10), documents taken from the residence (exhibit No. 11), a set of digital scales (exhibit No. 12), a set of sandwich bags with empty Baggies alongside of it (exhibit No. 13), plastic bottles containing protein-type mixes (exhibit No. 14), 5.3 grams of cannabis and packaging material located just inside the front door on a small table (exhibit No. 15), "numerous" Baggies with cannabis residue in them found in a trash can (exhibit No. 16), as well as other items.

Detective Hughes testified the documents in exhibit No. 11 contained, *inter alia*, Illinois identification cards for defendant and Hefley and numerous other items addressed to them at the Olive Street address. Hughes spoke with Hefley, and she stated she had lived at 2540 East Olive for approximately six months with her boyfriend, defendant.

At the end of the first day of trial, the trial court raised the issue of the admissibility of a gun and mentioned case law that stated a gun may be relevant

in a drug-dealing case. Defense counsel objected, claiming the gun was not found at the residence with the drugs. Moreover, counsel believed "the purpose of having the gun sitting there on the desk in front of the jury [was] dirtying up [his] client." The court did not make a ruling on the gun's admissibility.

On the second day of trial, the State told the trial court the gun was recovered from a storage unit on Woodford Street. The court excluded testimony about the gun.

Decatur police officer Edward Root testified as an expert witness in drug distribution. He stated narcotics dealing is a "cash-and-carry business," and drugs are bought with cash as well as stolen items like stereo equipment, televisions, and guns. Drug dealers use digital scales to weigh the product and sandwich Baggies to package the drugs. Protein powders are often used as a cutting agent, *i.e.*, to dilute the cocaine but increase the amount of the product in an attempt to maximize profits. Root stated drug dealers often use multiple addresses to "hide and confuse law enforcement" as well as to protect against having their narcotics stolen. Drug dealers also place property and valuables in the names of friends or relatives to prevent seizure of the assets by law enforcement. Based on his training and experience, Root opined the drugs found in this case were intended for distribution based on the amount of cocaine, the presence of scales, and the use of sandwich Baggies.

Michael Cravens, a forensic scientist with the Illinois State Police, testified exhibit No. 6 contained 43.3 grams of plant material containing cannabis. Exhibit No. 1 contained 60.7 grams of a chunky white

material · containing cocaine. Exhibit No. 4 measured 15.3 grams of a substance containing cocaine. Exhibit No. 22 was 150.9 grams of a white powder containing cocaine. Exhibit No. 24 was 61.7 grams of a white material containing cocaine. Exhibit No. 26 was 101 grams of a white material containing cocaine.

Brandi Hefley testified on her own behalf. She stated defendant had been her boyfriend and she stayed at the East Olive residence. She neither possessed drugs at the residence nor sold any drugs at that location.

Defendant exercised his constitutional right not to testify. See U.S. Const., amend. v. Following closing arguments, the jury found defendant guilty of unlawful possession of cannabis and unlawful possession of a controlled substance with intent to deliver. The jury also found Hefley guilty of unlawful possession of cannabis and unlawful possession of a controlled substance with intent to deliver.

In May 2006, defendant filed a posttrial motion, arguing, *inter alia*, the display of the gun on the evidence table in full view of the jury was prejudicial. In June 2006, the trial court denied the motion. Thereafter, the court sentenced him to 40 years for unlawful possession of a controlled substance with intent to deliver with a prior unlawful-possession-of-a-controlled-substance conviction. The court also imposed a concurrent term of eight years in prison for defendant's conviction of unlawful possession of cannabis with a prior unlawful-possession-of-a-controlled-substance conviction. Defendant filed several postsentencing motions, which the court denied. Defendant appealed, and this court affirmed

his convictions and sentences. *People v. Crutchfield*, No. 4-06-1078 (January 23, 2008) (unpublished order under Supreme Court Rule 23).

In June 2008, defendant filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 through 122-8 (West 2006)) and set forth multiple issues therein. In the first allegation of error, defendant claimed he was deprived of his constitutional right to a fair trial and due process when the jury was exposed to the highly prejudicial and inadmissible gun without admonition. In his second claim, defendant alleged his trial counsel was ineffective for failing to move for a mistrial after the trial court determined the gun was inadmissible. In the third claim, defendant alleged appellate counsel was ineffective for failing to raise these two issues in his direct appeal.

The trial court dismissed defendant's postconviction petition, finding it frivolous and patently without merit. The court found defendant received a fair trial and his guilt was decided by a fair jury. The court also stated many of defendant's postconviction complaints were discussed on direct appeal and any issues not raised were barred by the doctrine of *res judicata*. This appeal followed.

II. ANALYSIS

Defendant argues the trial court erred in dismissing his postconviction petition at the first stage where the petition alleged ineffective assistance of appellate counsel for failing to raise trial counsel's ineffectiveness with regard to the handgun displayed to the jury. We agree.

The Act "provides a means for a criminal defendant to challenge his conviction or sentence based on a substantial violation of constitutional rights." *People v. Beaman*, 229 Ill. 2d 56, 71, 890 N.E.2d 500, 509 (2008). A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *Beaman*, 229 Ill. 2d at 71, 890 N.E.2d at 509. The defendant bears the initial burden of establishing a substantial deprivation of his federal or state constitutional rights. *People v. Williams*, 209 Ill. 2d 227, 242, 807 N.E.2d 448, 458 (2004).

> "[I]ssues that were raised and decided on direct appeal are barred from consideration by the doctrine of *res judicata*; issues that could have been raised, but were not, are considered waived. [Citation.] The doctrines of *res judicata* and waiver will, however, be relaxed in three circumstances: where fundamental fairness so requires, where the waiver stems from the ineffective assistance of appellate counsel, or where the facts relating to the claim do not appear on the face of the original appellate record." *Williams*, 209 Ill. 2d at 233, 807 N.E.2d at 452.

The Act establishes a three-stage process for adjudicating a postconviction petition. *Beaman*, 229 Ill. 2d at 71, 890 N.E.2d at 509. Here, defendant's petition was dismissed at the first stage of the three-stage process. At the first stage, the trial court must review the postconviction petition and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.l(a) (2) (West 2006).

"A postconviction petition is considered frivolous or patently without merit if the petition's allegations, taken as true, fail to present the gist of a constitutional claim." *People v. Torres*, 228 Ill. 2d 382, 394, 888 N.E.2d 91, 100 (2008). "The 'gist' standard is a low threshold; the petitioner need only set forth a limited amount of detail, need not set forth the claim in its entirety, and need not include citation to legal authority." *People v. Holt*, 372 Ill. App. 3d 650, 652, 867 N.E.2d 1192, 1194 (2007). Summary dismissal is proper "only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 12, __ N.E.2d __ (2009). "A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16, __ N.E.2d at __.

"In considering a petition pursuant to [section 122-2.1 of the Act], the [trial] court may examine the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate court in such proceeding[,] and any transcripts of such proceeding." 725 ILCS 5/122-2.1(c) (West 2006). The petition must be supported by "affidavits, records, or other evidence supporting its allegations," or, if not available, the petition must explain why. 725 ILCS 5/122-2 (West 2006); see also *People v. Collins*, 202 Ill. 2d 59, 65, 782 N.E.2d 195, 198 (2002). Our review of the first-stage dismissal of a postconviction petition is de novo. *People v. Williams*, 364 Ill. App. 3d 1017, 1023, 848 N.E.2d 254, 258 (2006).

In the case *sub judice*, defendant alleged in his postconviction petition that he was denied a fair trial

and due process by the presence of the gun within the jury's view and his trial and appellate counsel were ineffective for failing to adequately raise the issues. A defendant is guaranteed the right to the effective assistance of counsel under the United States and Illinois Constitutions. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, §8. Claims of ineffective assistance of trial counsel are governed by the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

To prevail on a claim of ineffective assistance of counsel, the defendant must show "(1) that counsel's representation fell below an objective standard of reasonableness, and (2) that the deficient performance prejudiced the defense." *Torres*, 228 Ill. 2d at 395, 888 N.E.2d at 100, citing *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693, 104 S. Ct. at 2064. A defendant must satisfy both prongs of the *Strickland* standard, and the failure to satisfy either prong precludes a finding of ineffective assistance of counsel. *People v. Bannister*, 232 Ill. 2d 52, 80, 902 N.E.2d 571, 589 (2008).

The two-pronged, performance-prejudice test set forth in *Strickland* also applies to claims of ineffective assistance of appellate counsel. *People v. Jones*, 219 Ill. 2d 1, 23, 845 N.E.2d 598, 610 (2006). "A petitioner must show that appellate counsel's performance fell below an objective standard of reasonableness and that this substandard performance caused prejudice, *i.e.*, there is a reasonable probability that, but for appellate counsel's errors, the appeal would have been successful." *People v. Golden*, 229 Ill. 2d 277, 283, 891 N.E.2d 860, 864 (2008).

"Only relevant evidence is admissible, and evidence is relevant if it tends to make a fact of consequence either more or less probable than it would be without the evidence." *People v. Boston*, 324 Ill. App. 3d 557, 561, 755 N.E.2d 1058, 1061 (2001). Relevant evidence will not be admissible "if the prejudicial effect of admitting that evidence substantially outweighs any probative value." *People v. Bobo*, 375 Ill. App. 3d 966, 972, 874 N.E.2d 297, 305 (2007).

"'A weapon generally may not be admitted into evidence unless there is proof to connect it to the defendant and the crime or unless the defendant possessed the weapon when arrested for the crime.'" *People v. Evans*, 373 Ill. App. 3d 948, 960, 869 N.E.2d 920, 932 (2007), quoting *People v. Maldonado*, 240 Ill. App. 3d 470, 478, 608 N.E.2d 499, 505 (1992). "[T]he admission of unconnected weapons is improper since they 'only serve to arouse the jury and prejudice the defendant's position.'" *Evans*, 373 Ill. App. 3d at 960, 869 N.E.2d at 932, quoting *People v. Smith*, 413 Ill. 218, 223, 108 N.E.2d 596, 598 (1952).

Here, defendant alleged police confiscated a gun from a storage unit and not at the residence where the drugs were found. Defendant alleged the gun was placed on an evidence table within four feet of the jury for portions of the *voir dire* examination and trial. Trial counsel argued the purpose of the gun sitting on the table was to "dirty" up his client. Although the trial court ruled the gun was inadmissible, defendant alleged removing the gun from the table did not remove it from the minds of the jurors. Further, he

claimed the jurors were not admonished about the gun, thereby leaving them to speculate.

"At the first stage of post[]conviction proceedings under the Act, a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Hodges*, 234 Ill. 2d at 17, __ N.E.2d at __. Here, it is arguable that counsel's failure to request a jury admonition or move for a mistrial was unreasonable. Moreover, it is arguable the gun on the table prejudiced defendant in the eyes of the jury. Also, it is arguable defendant was prejudiced when appellate counsel did not raise this issue on direct appeal.

We find defendant presented the gist of a constitutional claim to survive the first stage of the postconviction process. The State's attempt on appeal to argue the gun was admissible, the trial court barred admission of the gun anyway, the jury was instructed to disregard exhibits not admitted into evidence, and any error was harmless because of the overwhelming evidence of defendant's guilt are not proper arguments at this stage of the proceedings. See *People v. Boclair*, 202 Ill. 2d 89, 99, 789 N.E.2d 734, 740 (2002) (the State does not have the opportunity to raise any arguments against a postconviction petition during the first stage). It may be that the State's assertions will show the petition is without merit, but at the first stage of the proceedings, when all well-pleaded facts are taken as true, defendant has sufficiently stated a constitutional claim.

Our supreme court has noted "the Act does not speak in terms of dismissing individual claims that are either frivolous or patently without merit." *People v. Rivera*, 198 Ill. 2d 364, 371, 763 N.E.2d 306, 310 (2001). Thus, "if some claims are subject to a dismissal at the first stage while others are not, the entire postconviction petition must be docketed for second-stage proceedings." *People v. Johnson*, 377 Ill. App. 3d 854, 858, 879 N.E.2d 977, 981 (2007), citing *Rivera*, 198 Ill. 2d at 370-71, 763 N.E.2d at 310. As defendant's claims pertaining to the gun were not subject to dismissal at the first stage, the petition in its entirety must be docketed for second-stage proceedings. Thus, we need not discuss the remainder of defendant's postconviction claims.

Although we make no determination on the merits of defendant's claims, this cause must be remanded to the trial court for second-stage proceedings. At the second stage, counsel may be appointed to represent defendant, and counsel will have the opportunity to amend the petition. *Boclair*, 202 Ill. 2d at 100, 789 N.E.2d at 741; see also 725 ILCS 5/122-4 (West 2006). The State shall then file an answer or a motion to dismiss. 725 ILCS 5/122-5 (West 2006). At the second stage, the trial court must determine whether the petition and any accompanying documentation "'make a substantial showing of a constitutional violation.'" *People v. Stewart*, 381 Ill. App. 3d 200, 203, 887 N.E.2d 461, 464 (2008), quoting *People v. Edwards*, 197 Ill. 2d 239, 246, 757 N.E.2d 442, 446 (2001). If a substantial showing of a constitutional violation is set forth, the cause will proceed to the third stage and an evidentiary hearing on the merits of the petition. *Boclair*, 202 Ill. 2d at 100,

789 N.E.2d at 741; see also *Edwards*, 197 Ill. 2d at 246, 757 N.E.2d at 446.

III. CONCLUSION

For the reasons stated, we reverse the trial court's judgment and remand for further proceedings.

Reversed and remanded for further proceedings.

TURNER, J., with MYERSCOUGH and STEIGMANN, JJ., concurring.

Appendix K

ILLINOIS CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

No. 05 CF 962

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff,
v.
SHANE S. CRUTCHFIELD,
Defendant.

Filed: June 17, 2008

JUDGMENT ON POST-CONVICTION PETITION

This cause called for hearing on Defendant's post-conviction petition pursuant to 725 ILCS 5/122 Court makes the following findings and orders:

1. That the Defendant was convicted of possession of a controlled substance with intent to deliver with a prior unlawful possession of a controlled substance 720 ILCS 570/401 (a)(2)(B) West 2004.

2. That the Defendant had counsel of choice at trial.

3. That the Defendant appealed with different counsel of choice and that appeal was affirmed in a Rule 23 decision by a unanimous appellate court.

4. That the appellate court decision discussed many of his present complaints and those it did not the doctrine of res judicata applies.

5. That the Defendant had a fair trial decided by a fair jury.

6. That the petition is frivolous or is patently without merit.

WHEREFORE, it is the order of the Court that the Petition is dismissed.

WHEREFORE, the Defendant is notified of his right to appeal pursuant to Supreme Court Rule 651B.

WHEREFORE, the Clerk is directed to send a copy of the order and notice by certified mail.

DATE: June 17, 2008

ENTER: [handwritten: signature]

SCOTT B. DIAMOND,
ASSOCIATE JUDGE

Appendix L

SUPREME COURT OF ILLINOIS

No. 106733

PEOPLE OF THE STATE OF ILLINOIS,
Respondent,
v.
SHANE S. CRUTCHFIELD,
Petitioner.

Filed: Nov. 26, 2008

ORDER

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 31, 2008.

Appendix M

ILLINOIS APPELLATE COURT
FOURTH DISTRICT

No. 04-06-1078

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
SHANE S. CRUTCHFIELD,
Defendant-Appellant.

Filed: Jan. 23, 2008

ORDER

On April 5, 2006, a jury found defendant, Shane S. Crutchfield, guilty of unlawful possession of a controlled substance with intent to deliver with a prior unlawful-possession-of-a-controlled-substance conviction (720 ILCS · 570/401(a) (2) (B) (West 2004)) and unlawful possession of cannabis with a prior unlawful-possession-of-a-controlled-substance conviction (720 ILCS 550/4(d) (West 2004)). The trial court sentenced defendant to concurrent terms of 40 years' and 8 years' imprisonment. Defendant appeals. We affirm.

I. BACKGROUND

Defendant and his codefendant, Brandi Hefley, were charged on July 12, 2005, with various counts of possession and possession with intent to deliver both

cocaine and cannabis. Attorney Gary Patton entered his appearance for both defendant and codefendant. On January 9, 2006, the State filed a motion to disqualify counsel, claiming the attorney for defendant and codefendant had a conflict of interest due to the State's intention to introduce evidence of a statement made by codefendant to the police that both she and defendant lived at the address where the search warrant in this case was executed.

On January 31, 2006, the trial court held a hearing on the motion to disqualify counsel. After taking the matter under advisement, the court found no *per se* conflict and denied the motion subject to each defendant waiving the conflict. On February 21, 2006, both defendants appeared and waived the conflict.

Defendant and codefendant were jointly tried before a jury from April 3 through 5, 2006. At trial, the State presented evidence that police executed a search warrant at a residence on East Olive Street after discovering a cannabis plant growing in a pot behind the house. In the house, officers discovered a significant amount of cocaine and cannabis, along with digital scales, Baggies, remains of Baggies with the corners missing, and almost $1,000 in cash. The scales and Baggie remains tested positive for the presence of controlled substances. Officers also recovered numerous documents bearing defendant's and/or codefendant's names. One officer testified he conducted surveillance of the residence for three months and noted that people came and went from the house frequently but never stayed long. The same officer saw defendant at the house every time he

conducted surveillance and saw defendant use a key to open the front door.

Also at trial, the state called Officer Richard Hughes, who testified in part that codefendant told him that she had lived at the residence for six months with her boyfriend, defendant. Patton objected to the admission of the statement, characterizing it as hearsay. The trial court denied the objection, finding it was not hearsay against the speaker, codefendant, and that the waiver of the conflict of interest allowed the statement to be admitted against defendant as well.

For the defense, witnesses who admittedly were friends of defendant and codefendant testified that defendant did not live at the residence. The residence was codefendant's but many people stayed there and codefendant did not always stay there. Codefendant testified that she never told the police that defendant stayed at the residence and that he never stayed at the residence. She stated she did not know the drugs were in the house, and she did not know of anyone dealing drugs out of the house.

At the close of the trial, the State tendered jury instructions. Patton did not tender any instructions. The jury found defendant guilty of unlawful possession of controlled substance with intent to deliver with a prior unlawful-possession-of-controlled-substance conviction and unlawful possession of cannabis with intent to deliver with a prior unlawful-possession-of-controlled-substance conviction.

Patton filed a motion for judgment notwithstanding the verdict, or alternatively, for a new trial. The motion alleged that the verdict was

against the manifest weight of the evidence because (1) a handgun that was eventually ruled inadmissible was displayed in open court, prejudicing defendant, and (2) the court admitted the statement of codefendant over objection. The trial court denied the motion and sentenced defendant to 40 years in prison for the controlled-substance conviction and eight years for the cannabis conviction with each sentence to run concurrently.

On June 20, 2006, defendant filed a *pro se* correspondence with the trial court claiming ineffective assistance of counsel in that he was not fully informed about the consequences of the waiver of the conflict of interest and that he was misled by his trial counsel. The court sent a copy of the correspondence to Patton with instructions for Patton to contact defendant. Defendant later stated Patton never contacted him.

On July 10, 2006, defendant filed a *pro se* motion for reduction of sentence, unaware that his family had retained attorney David Ellison for his appeal. On July 13, 2006, unaware of defendant's *pro se* motion, Ellison filed an appeal, No. 4-06- 0592.

On October 18, 2006, the trial court struck the notice of appeal due to the motion filed by defendant. See *People v. Crutchfield*, No. 4-06-0592 (October 24, 2006) (appeal dismissed in trial court and notice of appeal stricken). On November 9, 2006, Ellison filed a new motion for reconsideration of motion for new trial claiming ineffective assistance of counsel and filed a motion for reconsideration of sentence. On November 15, 2006, the court denied the motions. This appeal followed.

II. ANALYSIS

On appeal, defendant argues that the trial court erred for the following three reasons: (1) it erred in finding that defendant knowingly and voluntarily waived a conflict of interest by his defense counsel's duel representation; (2) he was denied effective assistance of counsel due to counsel's dual representation of him and his codefendant; and (3) the court should have ordered a hearing concerning defendant's claim of ineffective assistance of counsel. The State responds: (1) the court did not err in finding defendant knowingly and intelligently waived a conflict of interest; (2) defendant was not denied his sixth-amendment right to effective assistance of counsel and was not sufficiently prejudiced to warrant a new trial; and (3) the court was not required to conduct an inquiry into defendant's *pro se* claims of ineffective assistance of counsel as the claims were subsequently presented by retained counsel.

A. Conflict-of-Interest Waiver

Defendant and codefendant chose to be represented by the same attorney, Gary Patton. While the sixth-amendment right to effective assistance of counsel entitles .a defendant to the undivided loyalty of counsel free from conflicting interests of inconsistent obligations (*People v. Moore*, 189 Ill. 2d 521, 537-58, 727 N.E.2d 348, 357 (2000)), a defendant also has a sixth-amendment right to counsel of choice (*Wheat v. United States*, 486 U.S. 153, 159, 100 L. Ed. 2d 140, 148-49, 108 S. Ct. 1692, 1697 (1988)). "An accused may exercise the right to counsel of choice even where it jeopardizes the right to effective assistance of counsel if the accused makes a knowing,

voluntary, and intelligent waiver of the latter right." *People v. Holmes*, 141 Ill. 2d 204, 217, 565 N.E.2d 950, 955 (1990). Before a defendant may waive his right to conflict-free counsel though, the court must make the defendant aware of the existence and significance of the conflict. *People v. Stoval*, 40 Ill. 2d 109, 113-14, 239 N.E.2d 441, 444 (1968).

Defendant argues that his counsel informed him that the statement made by codefendant was inadmissible and could not be used against him. As counsel was incorrect, defendant maintains he was never fully informed of the nature of the conflict. Because defendant claimed he did not possess true and accurate information about the conflict and the ramifications of waiver, he reasons his waiver was not knowing and voluntary. We disagree that defendant's waiver was not knowing and voluntary.

The State filed a motion to disqualify counsel. In the motion, the State said that it intended to present statements made by codefendant that were antagonistic to defendant's defense. Specifically, the statements would be used by the State to tie defendant to the residence from which the controlled substances were recovered. During the hearing on the State's motion, defense counsel argued no conflict existed because the statement did not imply that defendant committed the crime for which he was charged, codefendant was going to deny making the statement, and the statement was inadmissible. The court, in ruling on the motion, found no *per se* conflict because codefendant did not attribute the contraband to herself or defendant, so if each defendant waived the potential conflict, the court

would deny the State's motion. At the hearing wherein defendant waived the conflict, the following exchange occurred:

> "MR. PAYTON: The conflict as it was related by the prosecutor was that they thought that part of the defense of Mr. Crutchfield would be that he did not reside at this residence and they thought they were going to be able to admit in evidence statements made by [codefendant] who also resides there. And that's what the alleged conflict was, your Honor.
>
> THE COURT: Okay. And [codefendant] and [defendant] are waiving this conflict?
>
> MR. PAYTON: Yes. Both are waiving conflict.
>
> THE COURT: [Defendant], is it your understanding that at some point in time in this case there may be evidence—I don't know—there may be evidence that [codefendant] has made statements that you resided at this residence; do you understand that?
>
> DEFENDANT: Yes, Your Honor.
>
> THE COURT: You're telling me you want Mr. Payton to represent you and you are waiving that conflict; is that accurate?
>
> DEFENDANT: Yes, Your Honor."

This exchange shows that defendant was informed that codefendant's statement that he resided at the East Olive Street residence could be entered into evidence if Mr. Payton continued to represent him and codefendant. Despite knowing this, defendant

chose to continue to have Mr. Payton represent him. Because defendant chose to continue with Mr. Payton as his counsel after being informed of the conflict by the trial court, defendant's waiver was knowing and voluntary.

B. Ineffective Assistance of Counsel

In evaluating ineffective-assistance-of-counsel claims, the Illinois Supreme Court adopted the test outlined by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 s. Ct. 2052 (1984). *People v. Albanese*, 104 Ill. 2d 504, 526, 473 N.E.2d ·1246, 1255 (1984). Under *Strickland*, defendant must show (1) "that counsel's performance was deficient" and (2) "that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693, 104 S. Ct. at 2064. An ineffectiveness claim is defeated if the defendant fails to show either deficient performance or sufficient prejudice. *People v. Palmer*, 162 Ill. 2d 465, 475, 643 N.E.2d 797, 801 (1994).

Defendant alleges his counsel's performance was deficient for two reasons: (1) counsel's failure to sever his and codefendant's trial to keep out codefendant's statements concerning his living at the East Olive Street residence; and (2) counsel's failure to tender any jury instructions, specifically an instruction about defendant's failure to testify, an instruction about the weight to be given to a statement made by one of the defendants, and an instruction about statements made by one defendant being used against another defendant.

1. Failure To Sever

Assuming defense counsel's failure to request severance of defendant's trial was deficient, defendant cannot establish prejudice because defendant cannot show a reasonable probability that but for this error, the result of the proceeding would be different. *People v. Carter*, 168 Ill. App. 3d 237, 250, 522 N.E.2d 653, 661 (1988). Defendant did not even argue that he would have been acquitted if he had a separate trial. Instead, defendant only claimed that codefendant's out-of-court statement was prejudicial.

Codefendant's statement was not the only evidence introduced at trial to establish defendant's residency at the East Olive Street residence. Among other things, the State introduced documents tying him to the residence, testimony from an officer conducting surveillance of the house stating he saw defendant continually at the residence and having and using a key to open the residence, and the presence of male clothing and other items linking defendant to the residence. Codefendant admitted she lived at the residence and that she and defendant were in a relationship. Codefendant stated, though, that defendant was rarely at the residence. Defense counsel further elicited evidence from multiple friends of defendant that defendant did not reside at the house and produced testimony from codefendant that she never made the statement that defendant did reside at the house. Based on all of the evidence, we cannot find a reasonable probability that severing defendant's trial would have resulted in defendant's acquittal.

2. Failure To Tender Jury Instructions

Defendant claims defense counsel was ineffective for not tendering the following Illinois Pattern Jury Instructions (Illinois Pattern Jury Instructions, Criminal (4th ed. 2000) (hereinafter IPI Criminal 4th)): (1) IPI Criminal 4th No. 2.04 (failure of the defendant to testify), (2) IPI Criminal 4th No. 3.06-3.07 (statements by a defendant), and (3) IPI Criminal 4th No. 3.08 (statements—multiple defendants). In failing to tender such instructions, defendant claims his attorney denied the jury guidance on how to (1) use the alleged statement of co-defendant, (2) protect defendant's right not to testify, and (3) properly not use the statement of one defendant against any other defendants.

Choice of jury instructions is a tactical decision that is within defense counsel's judgment. *People v. Houston*, 363 Ill. App. 3d 567, 575, 843 N.E.2d 465, 474 (2006). Further, "[w]hen the evidence against a defendant is overwhelming, the lack of a particular jury instruction is harmless in light of the other instructions, arguments of counsel, and a generally fair trial." *Houston*, 363 Ill. App. 3d at 575-76, 843 N.E.2d at 474. Defense counsel's decision was a matter of trial strategy. Further, defendant has once again not shown that he was prejudiced by the failure to tender the jury instructions because he cannot show that the outcome of the trial would have been different had counsel tendered the instructions.

Because even absent codefendant's statement the evidence against defendant was overwhelming, defendant cannot establish that he was prejudiced by the alleged failures of trial counsel.

C. Hearing on Claim of Ineffective Assistance of Counsel

Defendant finally contends that the trial court failed to order a hearing concerning defendant's *pro se* claim of ineffective assistance of counsel. The trial court has a duty to conduct an adequate inquiry into *pro se* allegations of ineffective assistance of counsel to determine the factual basis for the claim. *People v. Johnson*, 159 Ill. 2d 97, 125, 636 N.E.2d 485, 497 (1994). If the court finds the possibility of neglect, the court should appoint new counsel to assist defendant with presenting his claim. *People v. Pope*, 284 Ill. App. 3d 330, 333, 672 N.E.2d 65, 67 (1996).

In this case, defendant sent a letter to the trial court claiming his trial counsel was ineffective. The court sent a copy of the letter to trial counsel instructing counsel to contact defendant. Defendant then filed a *pro se* motion requesting, among other things, a reduction of sentence and appointment of counsel. Defendant's family retained new counsel and the newly retained counsel eventually filed a motion for reconsideration of motion for new trial and a supplemental motion for reduction of sentence with both motions containing claims of ineffective assistance of counsel. A hearing was conducted on these motions. Only after hearing testimony from defendant and arguments of counsel did the court deny defendant's motions.

Given that defendant's newly retained counsel filed motions presenting defendant's ineffective-assistance-of-counsel claims, defendant testified regarding his claims, and newly retained counsel presented arguments at a hearing concerning those

claims, we do not believe further inquiry into defendant's *pro se* claims was required. Defendant, with the assistance of counsel, had ample opportunity to present his claims of ineffective assistance of counsel and the trial court did not need to conduct a separate inquiry into defendant's *pro se* claims.

III. CONCLUSION

For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal.

Affirmed.

COOK, J., with TURNER and STEIGMANN, JJ., concurring.

Appendix N

ILLINOIS CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

No. 05-CF-962

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff,
v.
SHANE S. CRUTCHFIELD,
Defendant.

Filed: June 20, 2006

JUDGMENT - SENTENCE TO ILLINOIS DEPARTMENT OF CORRECTIONS

WHEREAS the above named defendant has been adjudged guilty of the offenses enumerated below and the Court having considered the statutory factors required to impose sentence FINDS:

☐ 1. The conduct leading to conviction for the offense enumerated in Count(s) ___ resulted in great bodily harm to the victim (730 ILCS 5/3-6-3(a)(2)(iii)).

☐ 2. The defendant is convicted of a Class ___ offense, but sentenced as a Class X offender pursuant to 730 ILCS 5/5-5-3(c)(8).

☐ 3. The defendant has been convicted of First Degree Murder and no good time credit shall be applied (730 ILCS 5/3-6-3(a)(2)(1) or (2.2)).

IT IS THEREFORE ORDERED as follows:

A. That the defendant be and is hereby sentenced to confinement in the Illinois Department of Corrections for the term of years and months specified for each offense.

CT	OFFENSE	DATE OF OFFENSE	STATUTORY CITATION	CLASS	SENTENCE	M.S.R.
Amended I	Unlawful Possession of Controlled Substance With Intent to Deliver With Prior Unlawful Possession of Controlled Substance Conviction	07/07/05	720 ILCS 570/401(a)(2)(B)	X	40 Yrs.	3 Yrs.
VI	Unlawful Possession of Cannabis With a Prior Unlawful Possession of Controlled Substance Conviction	07/07/05	720 ILCS 550/4(d)	3	8 Yrs.	3 Yrs.

☒ B. That Amended Count I and Count VI shall run concurrently with each other.

☐ C. The defendant is entitled to time served on periodic imprisonment for the duration of its term from ___ to ___, for a total of ___ days.

☐ D. The defendant is entitled to a credit for time served awaiting sentence on a bailable offense of ___ days; and a corresponding credit against $___ fine of $___ ($5/day).

☒ E. The defendant is entitled to credit for time actually served in custody of 342 days as of the sentencing day of ___, 2006.

☒ F. That the Clerk of the Court deliver a copy of this order to the Sheriff.

☒ G. That the Sheriff take the defendant into custody and deliver him to the department of Corrections, which shall confine said defendant

until expiration of his sentence or until he is otherwise released by operation of law.

☒ H. This order is effective immediately.

☒ I. IT IS FURTHER ORDERED that the defendant is ordered to pay the cost of prosecution herein. These fees, costs and restitution (if applicable) are reduced to judgment against the defendant and are declared a lien upon the defendant's property.

☐ J. IT IS FURTHER ORDERED that the Court recommends the Defendant for placement in the Impact Incarceration Program.

DATE: [handwritten: June 19, 2006]

ENTER: S/SIGNATOR'S NAME HERE

SCOTT B. DIAMOND, ASSOCIATE JUDGE

Appendix O

RELEVANT STATUTORY PROVISIONS

730 Ill. Comp. Stat. 5/3-6-3(a)(2.1)

Sec. 3-6-3. Rules and regulations for sentence credit.

* * *

(2.1) For all offenses, other than those enumerated in subdivision (a)(2)(i), (ii), or (iii) committed on or after June 19, 1998 or subdivision (a)(2)(iv) committed on or after June 23, 2005 (the effective date of Public Act 94-71) or subdivision (a)(2)(v) committed on or after August 13, 2007 (the effective date of Public Act 95-134) or subdivision (a)(2)(vi) committed on or after June 1, 2008 (the effective date of Public Act 95-625) or subdivision (a)(2)(vii) committed on or after July 23, 2010 (the effective date of Public Act 96-1224), and other than the offense of aggravated driving under the influence of alcohol, other drug or drugs, or intoxicating compound or compounds, or any combination thereof as defined in subparagraph (F) of paragraph (1) of subsection (d) of Section 11-501 of the Illinois Vehicle Code, and other than the offense of aggravated driving under the influence of alcohol, other drug or drugs, or intoxicating compound or compounds, or any combination thereof as defined in subparagraph (C) of paragraph (1) of subsection (d) of Section 11-501 of the Illinois Vehicle Code committed on or after January 1, 2011 (the effective date of Public Act 96-1230), the rules and regulations shall provide that a prisoner who is serving a term of imprisonment shall receive one

day of sentence credit for each day of his or her sentence of imprisonment or recommitment under Section 3-3-9. Each day of sentence credit shall reduce by one day the prisoner's period of imprisonment or recommitment under Section 3-3-9.

725 Ill. Comp. Stat. 5/116-1

Sec. 116-1. Motion for new trial.

(a) Following a verdict or finding of guilty the court may grant the defendant a new trial.

(b) A written motion for a new trial shall be filed by the defendant within 30 days following the entry of a finding or the return of a verdict. Reasonable notice of the motion shall be served upon the State.

(c) The motion for a new trial shall specify the grounds therefor.

725 Ill. Comp. Stat. 5/122-1(f)

Sec. 122-1. Petition in the trial court.

* * *

(f) Except for petitions brought under paragraph (3) of subsection (a) of this Section, only one petition may be filed by a petitioner under this Article without leave of the court. Leave of court may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure. For purposes of this subsection (f): (1) a prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or

her initial post-conviction proceedings; and (2) a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process.