APPENDIX

2018 IL App (2d) 150768-U
No. 2-15-0768
Order filed January 23, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, v. DEWAYNE L. WESTER, Petitioner-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 99-CF-1675 Honorable George Bridges, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Schostok and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied defendant's motion for leave to file a successive postconviction petition. However, we remand for enforcement of an earlier order to vacate a $750 fee.

¶ 2 Defendant, Dewayne L. Wester, convicted of first-degree murder and sentenced to 45 years' imprisonment in 2001, now appeals the trial court's denial of leave to file a successive postconviction petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). He also seeks enforcement of this court's earlier order to vacate his $750 public defender reimbursement fee. *People v. Wester*, 2013 IL App (2d) 111085-U, ¶ 39; 725 ILCS

5/113/3.1(a) (West 2010). The State concedes that enforcement of our earlier order is proper. We affirm the denial of leave to file a successive postconviction petition but remand for enforcement of our earlier order to vacate the $750 fee.

¶ 3 I. BACKGROUND

¶ 4 A more thorough recitation of the facts can be found in our prior dispositions. See *People v. Wester*, 2015 IL App (2d) 140732-U (affirming the denial of defendant's *pro se* petition pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2012)) as untimely and unmeritorious); *Wester*, 2013 IL App (2d) 111085-U (third-stage denial of the postconviction petition, which had challenged the State's presentation of rebuttal witnesses, affirmed; $750 public defender reimbursement fee vacated); *People v. Wester*, 2-06-0097 (2007) (unpublished order under Illinois Supreme Court Rule 23(c)) (second-stage dismissal vacated based on postconviction counsel's failure to comply with Supreme Court Rule 651(c) (eff. Dec. 1, 1984)); cause remanded for the trial court to hear defendant's motion for substitution of counsel); *People v. Wester*, No. 2-03-0864 (2004) (unpublished summary order under Supreme Court Rule 23(c)) (first-stage dismissal reversed and remanded); *People v. Wester*, No. 2-01-0204 (2002) (unpublished order under Supreme Court Rule 23(c)) (on direct appeal, the court held that the evidence was sufficient to convict for first-degree murder, trial counsel was not ineffective for failing to tender a second-degree murder instruction, and the trial court did not consider improper sentencing factors).

¶ 5 In 2000, defendant was tried before a jury for first-degree murder (720 ILCS 5/9-1-(a)(1), (a)(2) (West 1998)) and, alternatively, involuntary manslaughter (720 ILCS 5/9-3 (West 1998)). At trial, the State's theory of the case was that defendant shot the victim, Brian Blanchard,

several times after initiating a confrontation with Blanchard over a drug debt. Eyewitnesses saw defendant initiate the confrontation and shoot Blanchard.

¶ 6 Defendant testified, claiming self defense following a confrontation with Blanchard over stolen gambling money. Defendant alleged that he, Blanchard, and several men from the neighborhood were gambling with dice when Blanchard stole his winnings. When he tried to take back the money, Blanchard began punching him. The punches disoriented defendant, and Blanchard continued to attack. Defendant shot his gun multiple times at the ground to stop Blanchard's attack, and he did not intend to hit Blanchard. (The witnesses with whom defendant claimed to have been playing dice denied that they were playing dice that day. In balance, toxicology reports later showed Blanchard had cocaine in his system.)

¶ 7 As is relevant to the instant appeal, the jury was instructed prior to deliberation that a person: (1) commits *first-degree murder* when he acts with intent to kill or do great bodily harm or knowledge that his acts create a strong probability of the same; (2) acts with *knowledge* of the result of his conduct "when he is consciously aware that the result is practically certain to be caused by his conduct" (Illinois Pattern Jury Instructions, Criminal, No. 5.01B, paragraph [2] (4th ed. 2000) (IPI Criminal No. 5.01B)); and (3) commits *involuntary manslaughter* when he unintentionally causes the death of another person by acts that are reckless and likely to cause death or great bodily harm.

¶ 8 During deliberation, the jury sent a note with a two-part question:

> "What is the definition of 'likely' in the [third] proposition of involuntary manslaughter?
>
> And,

What is the definition of 'strong probability' in the [second] proposition of [first]-degree murder?"

¶ 9 The trial court discussed the note with trial counsel and the State off the record. The parties returned to the record, tentatively agreeing to inform the jury that the terms did not have legal definitions and to continue to deliberate. However, trial counsel also wanted defendant's approval. Defendant was brought up from the holding cell. The court indicated that trial counsel and defendant engaged in discussion. Trial counsel informed the court that he discussed the question and the proposed response with defendant, and defendant approved ("he does not have any problems with that"). The court instructed the jury that there was "no unique legal definition" for the terms "strong probability" and "likely" and to continue deliberating.

¶ 10 The jury found defendant guilty of first-degree murder. The trial court sentenced defendant to 45 years' imprisonment and entered a judgment of $160 in costs for the State. This court affirmed the conviction on direct appeal. Defendant pursued postconviction proceedings. This court twice remanded for further proceedings.

¶ 11 On remand, defendant retained private counsel, Gregory C. Nikitas. At the State's request, the trial court imposed a $750 public defender reimbursement fee based on representation during earlier postconviction proceedings. The court did not hold a hearing before imposing the fee.

¶ 12 Nikitas amended the postconviction petition, adding paragraph 29: "[Trial counsel] should have requested the court provide legal definitions for mental states when the jurors raised that question during their deliberations. This was the central inquiry for the jurors and undoubtedly it affected [its] verdict." At the start of the evidentiary hearing, Nikitas stated that he was withdrawing paragraph 29. Then, he clarified that he was withdrawing only that portion

that alleged that trial counsel did not provide legal definitions for mental states. He acknowledged that trial counsel introduced instructions on mental states, such as knowingly and (un)intentionally. Rather, he challenged that, after the jury asked the question about the definitions of "strong probability" and "likely," a more substantive response should have been given. ("[T]here was no further information provided to them.")

¶ 13 Trial counsel testified at the evidentiary hearing. According to trial counsel, in general, defendant participated in his defense and participated in five to six separate conversations about jury instructions in the days leading up to deliberation. Specifically, trial counsel explained the jury question now at issue to defendant before the court issued its response. During that conversation, defendant seemed nervous and excited. Trial counsel thought defendant seemed worried that a verdict was imminent.

¶ 14 The trial court denied the postconviction petition. It did not specifically comment on trial counsel's handling of the jury question about the definitions of "strong probability" and "likely." It did comment on other claims, such as the propriety of rebuttal testimony, and the admission of autopsy photos.

¶ 15 On appeal, defendant argued that postconviction counsel provided unreasonable assistance in presenting the rebuttal argument. Defendant also sought to have the $750 fee vacated, because it had been imposed without holding a hearing. This court found no unreasonable assistance, but we vacated the fee. *Wester*, 2013 IL App (2d) 111085-U, ¶¶ 34, 39.

¶ 16 Defendant next filed a *pro se* petition under section 2-1401 of the Code. Defendant again challenged aspects of the rebuttal testimony and certain jury instructions. Defendant's petition complained of the trial court's failure to define "strong probability" and "likely."[1] The

[1] Defendant now denies that he formally raised the challenge. We choose not to address

trial court dismissed the petition, and this court affirmed. *Wester*, 2015 IL App (2d) 140732-U, ¶¶ 29-32.

¶ 17 In December 2014, defendant filed the instant *pro se* motion for leave to file a successive postconviction petition. He alleged ineffective assistance based on trial counsel's handling of the jury's request to define "strong probability" and "likely" and unreasonable assistance of postconviction counsel based on counsel's handling of the issue.[2] Specifically, defendant argued that, after the jury asked about the difference between the phrases "strong probability" in the first-degree-murder instruction and "likely" in the involuntary-manslaughter instruction, trial counsel should have requested that the jury be provided with a *second* definition of "knowledge."

¶ 18 Again, the jury had been instructed that a person commits first-degree murder when he acts with intent to kill or do great bodily harm or knowledge that his acts create a strong probability of the same, and that a person commits involuntary manslaughter when he unintentionally causes the death of another person by acts that are reckless and likely to cause death or great bodily harm. Additionally, the jury had been instructed that a person acts with knowledge of the result of his conduct "when he is consciously aware that the result is practically certain to be caused by his conduct." The provided definition of knowledge, contained in IPI Criminal No. 5.01B, paragraph [2], is defined in terms of a prohibited *result* and is one of several

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this obstacle for defendant, as there are other bases upon which to affirm.

[2] Defendant did not argue in his 2013 postconviction appeal that postconviction counsel provided unreasonable assistance based on his handling of the jury-question argument. Again, we choose not to address this obstacle for defendant, as there are other bases upon which to affirm.

acceptable definitions. A second acceptable definition, contained in IPI Criminal No. 5.01B, paragraph [1], is defined in terms of prohibited *conduct* and states that a person acts with knowledge of the nature or attendant circumstances of his conduct "when he is consciously aware that his conduct is of that nature or that those circumstances exist. Knowledge of a material fact includes awareness of the substantial probability that the fact exists." The jury was not given this definition.

¶ 19 Defendant notes that the paragraph given depends upon how the offense is defined to the jury, and he does not appear to dispute that the proper definition of knowledge, paragraph [2], was given to start. (Nikitas expressly conceded that point in the initial postconviction proceedings.) Defendant contends, however, that the jury's question regarding the difference between "strong probability" and "likely" indicated that it did not understand the definition of "knowledge," and, therefore, trial counsel provided ineffective assistance when he failed to request that the jury be provided with a second definition of knowledge, paragraph [1], based on prohibited conduct.

¶ 20 The trial court denied defendant leave to file, finding that defendant could not establish cause or prejudice. It further noted that defendant did not allege actual innocence. Defendant moved to reconsider and the court denied the motion. This appeal followed.

¶ 21 II. ANALYSIS

¶ 22 Defendant argues that the trial court erred in denying leave to file a successive postconviction petition, which would have alleged ineffective assistance based on trial counsel's handling of the jury's request for the definitions of "strong probability" and "likely." For the reasons that follow, we disagree with defendant. However, as defendant requests and the State concedes, we remand for enforcement of our earlier order vacating the $750 fee.

¶ 23 Postconviction proceedings are collateral in nature and allow for review of constitutional issues that were not, and could not have been, decided on direct appeal. *People v. Ortiz*, 235 Ill. 2d 319, 328 (2009). As such, issues that were raised and decided on direct appeal are barred by *res judicata*. *Id.* Issues that could have been raised on direct appeal, but were not, are forfeited. *Id.* The Act contemplates the filing of only one postconviction petition. *Id.*; 725 ILCS 5/122-3 (West 2014).

¶ 24 The statutory bar to a successive postconviction petition can be overcome by satisfying either: (1) the cause-and-prejudice test (*People v. Pistonbarger*, 205 Ill. 2d 444, 460 (2002)); or (2) the actual-innocence test (*Ortiz*, 235 Ill. 2d at 330). Here, only the cause-and-prejudice test is at issue. We review *de novo* the trial court's determination that defendant failed to satisfy the cause-and-prejudice test. *People v. Williams*, 394 Ill. App. 3d 236, 242 (2009).

¶ 25 The cause-and-prejudice test was set forth in *Pistonbarger*, and the legislature codified it in section 122-1(f) of the Act. *Ortiz*, 235 Ill. 2d 319. That section provides:

> "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]: (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." 725 ILCS 5/122-1(f) (West 2014).

¶ 26 This case does not present a traditional cause-and-prejudice analysis. A cause-and-prejudice analysis presumes that a defendant has *not* yet raised the issue he seeks to raise in the successive postconviction petition. That is not true here.

¶ 27 Here, as defendant concedes, defendant "in fact raised the claim [concerning trial counsel's handling of the jury question] in his initial postconviction procedings." Defendant recounts that, "at the evidentiary hearing, postconviction counsel clarified that the original instructions [concerning the definition of knowledge, etc.] were not being challenged, but that [defendant] was still challenging the [response] to the jury note." At the evidentiary hearing, trial counsel testified that he had explained the jury note to defendant before agreeing to the response. The trial court denied the petition. Even though the trial court did not specifically mention the handling of the jury note in denying the petition, we infer that it rejected the claim.

¶ 28 Defendant argues that he satisfied the cause element and is entitled to raise the issue a second time, because there was no "full and final" resolution of the issue at the initial postconviction proceeding. As discussed in previous paragraphs, we disagree with that premise. Moreover, the case upon which defendant relies to establish cause, *People v. Britt-El*, 206 Ill. 2d 331 (2002), is wholly inapposite.

¶ 29 In *Britt-El*, the defendant unsuccessfully argued that he satisfied the cause element where the trial court improperly impeded his ability to bring his claims of ineffective assistance in the initial postconviction petition. The trial court had *sua sponte* dismissed the initial petition as untimely. The law at the time permitted the trial court to *sua sponte* dismiss the petition as untimely, so the court did not improperly impede the defendant's initial postconviction claim. *Id.* at 342. Moreover, the trial court considered and rejected the defendant's argument, raised in the motion to reconsider the dismissal, that his tardiness should be excused where he was not

culpably negligent. Similarly, the appellate court considered and rejected the defendant's argument that his tardiness should be excused. As such, the issue was "fully and finally litigated." *Id.*

¶ 30 Here, there is no claim that the trial court improperly impeded defendant from alleging ineffective assistance based on trial counsel's handling of the jury question. To the contrary, defendant raised the argument, and trial counsel testified to it at the evidentiary hearing. If defendant felt that the trial court failed to consider the issue or ruled in error on the issue, he could have filed a motion to reconsider the denial of his initial postconviction petition and raised the issue on appeal of the denial. *Even if* we were to assume that the issue was not specifically ruled on, again, defendant could have brought the matter to the court's attention and sought clarification. Defendant's failure to do so resulted in forfeiture and precluded his ability to establish cause here. Because defendant has not established cause, we need not address the prejudice. Nevertheless, we briefly do so.

¶ 31 Defendant cannot establish prejudice. The alleged constitutional error cannot be said to have violated due process. We agree with defendant that his mental state was a central issue. Defendant does not explain, however, why failing to provide a *second* definition of "knowledge" in response to the jury's request for the definitions of "strong probability" and "likely" impeded the jury's understanding of the requisite mental states for the charged offenses. To the contrary, answering the jury's question in such a manner would have been non-responsive to its question, causing confusion. (The jury showed no indication that it was confused over the intent-or-knowledge mental state for first-degree murder *vis a vis* the unintentional mental state for involuntary manslaughter. And, if defendant really is arguing that the second definition of

knowledge was necessary to understand the first-degree murder charge, independent of the jury question over probabilities and likelihoods, his chance to raise that claim has long passed.)

¶ 32 The cases cited by defendant finding error based on a failure to provide a definition upon request are distinguishable. See *People v. Lowry*, 354 Ill. App. 3d 760, 762 (2004) (failure to define knowingly); *People v. Lovelace*, 251 Ill. App. 3d 607, 619 (1993) (failure to provide a second definition of knowingly); *People v. Brouder*, 168 Ill. App. 3d 938, 948 (1988) (failure to define knowingly). In those cases, the jury *asked* for the definition of "knowingly" and expressed confusion over the term. In *Lowry*, the jury indicated by its question that, without clarification, it would decide the case based on a fundamental misunderstanding of the law: "Does 'knowingly' impl[y] that it wasn't an accident, or *can it be accidental and knowing*?" (Emphasis added.) See *Lowry*, 354 Ill. App. 3d at 762. Thus, in the cases cited by defendant, the issue was whether the jury should receive the definition for which it asked. In contrast, defendant contends that the jury should have received a definition for which it did *not* ask and for which it expressed *no* confusion.

¶ 33 As to the question the jury *actually* asked, defendant does not now suggest what definitions of "strong probability" and "likely" could have been given. Defendant provides no legal definitions for those terms, let alone legal definitions that could have been more helpful to the jury than their commonly-understood definitions. Defendant gives trial counsel no credit for having him be brought to the courtroom to be involved in the discussion and for giving him an opportunity to approve the response to be given to the jury. There is no hint of a due-process violation.

¶ 34 Finally, we reject defendant's *res judicata* argument. Defendant argues that the court should not have evaluated his motion for leave to file a successive postconviction petition under

the cause-and-prejudice test. Rather, because he *raised* the issue in his initial postconviction petition, defendant urges that the correct rubric was *res judicata*. And, because, in his view, the trial court never *ruled on* the issue in the initial postconviction, *res judicata* does not bar the issue now.

¶ 35 Defendant does not cite authority for the proposition that he can file a successive postconviction petition based on the absence of a *res judicata* bar. See *People v. Ward*, 215 Ill. 2d 317, 332 (2005) (points not supported by citation to relevant authority are forfeited). In any event, applying a *res judicata* rubric does not help defendant. If *res judicata* bars defendant's claim, defendant loses. If *res judicata* does not bar defendant's claim, then defendant still must proceed to a cause-and-prejudice analysis to show that he should be granted leave to file a successive postconviction petition. And, as we have established, defendant cannot satisfy that test.

¶ 36 As the State concedes, we remand for enforcement of our earlier order vacating the $750 fee.

¶ 37 III. CONCLUSION

¶ 38 For the reasons stated, we affirm the trial court's denial for leave to file a successive postconviction petition. However, we remand for enforcement of our earlier order vacating the $750 fee.

¶ 39 Affirmed and remanded with directions.

STATE OF ILLINOIS)
) SS
COUNTY OF LAKE)

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, LAKE COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff,	)	
vs.	)	99 CF 1675
DEWAYNE WESTER, Defendant.	)	

ORDER

This matter coming to be heard pursuant to the Defendant's *pro se* petition for leave to file a successive post-conviction, 725 ILCS 5/122-1(f), and the court finds as follows:

1. The Court has reviewed the Petition, the Appellate Court's Rule 23 orders (02-01-0204 (2002)), (02-06-0097 (2007), 2013 Il.App (2d) 111085-U, and 2015 Il.App (2d) 140732-U.

2. After a jury trial, the defendant was found guilty of first-degree murder in 2000. The Appellate Court affirmed the conviction in the above Rule 23 order. In 2003, defendant filed a post-conviction petition which was dismissed by the trial court; however, the case was reversed and remanded. On remand the defendant was appointed counsel, who amended the post-conviction. This court denied the State's motion to dismiss and then held an evidentiary hearing on said petition. The court ultimately denied this petition as well. The defendant then appealed the denial of his post-conviction petition, which was subsequently affirmed by the Appellate Court. On January 10, 2014, defendant filed a pro se 2–1401 petition wherein he argued that his conviction was "void," because the trial court lacked the power to convict him where: (1) the State fraudulently concealed evidence during his trial; and (2) the court allowed the jury to receive fraudulent instructions.

3. In affirming the dismissal of defendant's 2-1401 petition the Appellate Court in 2015 Il.App (2d) 140732-U, held that in order for defendant to receive relief under section 2–1401, that he had to establish three elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2–1401 petition. Here the Court ruled that Petitioner, as a matter of law, had failed to establish diligence in this matter by virtue of the fact defendant was aware of the language of his jury instructions and the trial court's decision not to define certain terms for the jury, hence Petitioner was not diligence in raising the issue in his 2-1401 petition.

4. In defendant's instant petition he is requesting leave to file a successive post-conviction petition. In this petition, defendant essentially claims that his post-conviction counsel

was ineffective when he withdrew allegation 29 (allegation 29 alleged error of his trial counsel for failing to provide a legal definition for the mental state) from consideration during his evidentiary hearings on his post-conviction proceedings.

5. The Post-Conviction Act under Section 122–3 contemplates the filing of only one petition. *People v. Pitsonbarger*, 205 Ill.2d 444 (2002). Successive post-conviction petitions are permissible, however, provided certain stringent requirements are met to determine whether fundamental fairness requires an exception to the waiver rule of section 122–3. One of these requirements is known as the "cause and prejudice" test, which dictate that a defendant show good cause for failing to raise the claimed error in a previous proceeding and show the actual prejudice that resulted from that claimed error. Cause means that there must have been some objective circumstance external to the defense that impeded the defendant's ability to raise the claim in an initial post-conviction proceeding. *Id.* And, to establish "prejudice," the defendant must show that the claimed constitutional error so infected the trial that the resulting conviction violated due process.

6. Under the cause-and-prejudice test the defendant must establish (1) good cause for failing to raise his claims in prior proceedings and (2) actual prejudice resulting from the claimed errors. *People v. Jones*, 191 Ill.2d 194 (2000). "Cause" can be "any objective factor, external to the defense, which impeded the [defendant's] ability to raise a specific claim in the initial post-conviction proceeding." *People v. Pitsonbarger*, 205 Ill.2d 444 (2002). "Prejudice" results when an error so infected the entire trial that the resulting conviction violates due process." *People v. Britt–El*, 206 Ill.2d 331 (2002). Both prongs of the test must be satisfied in order for a defendant to prevail on a motion for leave to file a successive petition for post-conviction relief. *Id.*

7. Defendant's petition alleges that because his post-conviction counsel withdrew allegation 29 from consideration during his evidentiary hearings he was prejudice which ultimately denied him the opportunity to obtain a new trial. This issue, regarding the mental state and instructions to the jury was raised in defendant's previous post-conviction petition. As a result, they are barred by res judicata. Moreover, defendant cannot satisfy the cause-and-prejudice test. He cannot establish cause because no external factor prevented him from raising his claims before this successive post-conviction petition. In fact, defendant himself acquiesced to having this matter withdrawn from consideration at his evidence hearing and thus he has waived this issue. Furthermore, the record indicates that most of defendant's claims are merely attempts to reassert matters that were already fully considered and decided, or which could have been raised, either in the trial court or in the context of the defendant's multiple appeals, and since it was not, this issue is waived. Waiver is the voluntary relinquishment of a known right. *People v. Tapia*, 2014 IL App (2d) 111314. Issues that were raised and decided on direct appeal are barred from consideration by the doctrine of res judicata, and issues that could have been raised, but were not, are waived. *Pitsonbarger*, 205 Ill.2d at 455–56.

8. Lastly, in addition to the "cause and prejudice test" the bar to successive post-conviction proceedings may be relaxed under what is known as the 'fundamental miscarriage of justice' exception." *People v. Edwards*, 2012 IL 111711. To demonstrate a "fundamental miscarriage of justice," the petitioner must show actual innocence. *Id.* In non-death-penalty

cases, that a petitioner must show actual innocence to demonstrate such a miscarriage of justice. *Pitsonbarger*, 205 Ill.2d at 459. It should be noted that none of defendant's claims in this case involve actual innocence.

Wherefore, this court finds that the defendant completely failed to establish either cause or prejudice in connection with his claims that he sought to raise in a successive petition, nor did he established a claim of actual innocent. Consequently, his petition for leave to file a successive post-conviction petition is denied. A copy of this order shall be served upon Defendant.

ENTERED:

GEORGE BRIDGES

JUDGE

Dated at Waukegan, Illinois
This 1st day of June, 2015.

YOU ARE HEREBY NOTIFIED THAT ON **JUNE 1, 2015** THE COURT ENTERED THIS ORDER. YOU HAVE THE RIGHT TO APPEAL. IN THE CASE OF AN APPEAL FROM A POST-CONVICTION PROCEEDING INVOLVING A JUDGMENT IMPOSING A SENTENCE OF DEATH, THE APPEAL IS TO THE ILLINOIS SUPREME COURT. IN ALL OTHER CASES, THE APPEAL IS TO THE ILLINOIS APPELLATE COURT IN THE DISTRICT IN WHICH THE CIRCUIT COURT IS LOCATED. IF YOU ARE INDIGENT, YOU HAVE A RIGHT TO A TRANSCRIPT OF THE RECORD OF THE POST-CONVICTION PROCEEDINGS AND TO THE APPOINTMENT OF COUNSEL ON APPEAL, BOTH WITHOUT COST TO YOU. TO PRESERVE YOUR RIGHT TO APPEAL YOU MUST FILE A NOTICE OF APPEAL IN THE TRIAL COURT WITHIN 30 DAYS FROM THE DATE THE ORDER WAS ENTERED.

STATE OF ILLINOIS)
) SS
COUNTY OF LAKE)

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT,
LAKE COUNTY, ILLINOIS

FILED
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CIRCUIT CLERK

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff,)
)
vs.) No. 99 CF 1675
)
DEWAYNE WESTER)
)
Defendant.)

ORDER

This matter coming to be heard pursuant to the Post-Conviction Act, and the court having presided over a hearing on the State' motion to dismiss, finds as follows:

1. The Petition for Post-Conviction Relief was filed in this court on March 31, 2003. On March 24, 2005 a supplemental petition for Post-Conviction relief was filed.

2. The Court has reviewed the petitions, motion to dismiss, and, in *People v. Wester*, both the Rule 23 Order, No. 2--01-0204 (2nd Dist., September 6, 2002) and the Summary Order, No. 2--03--0864 (2nd Dist., July 13, 2004).

3. Defendant's petition essentially asserts that his constitutional rights were violated when the trial judge allowed a witness to testify during rebuttal, who had been in the courtroom during the trial, when gruesome autopsy photographs had been shown to the jury, and because of the ineffective assistance of his appellate counsel for failure to raise the same in his appeal.

4. It is well settled that it is within the trial court's discretion to permit a material witness who has remained in the courtroom to testify as a rebuttal witness. *People v. Leemon*, 66 Ill. 2d 170, 361 N.E.2d 573 (1977); *People v. Miller*, 26 Ill. 2d 305, 186 N.E.2d 317 (1962). Absent a showing of prejudice by the defendant, no abuse of discretion will be found in allowing a material witness to remain in the courtroom. In the instant case the defendant has failed to show prejudice, thereby establishing an abuse of discretion.

5. The decision of whether a jury should be allowed to see photographs of a decedent is a decision that rests within the sound discretion of the trial judge. *People v. Henderson*, 142 Ill. 2d 258, 319, 154 Ill. Dec. 785, 568 N.E.2d 1234 (1990). If photographs are relevant to prove facts at issue, they are admissible and may be shown to the jury unless the prejudicial nature of the photographs outweighs their probative value. Henderson, 142 Ill. 2d at 319. Among the valid reasons for admitting photographs of a decedent is to prove the nature and extent of injuries, the position and location of the body, the manner and cause of death, and to aid in understanding the testimony of a pathologist or other witness.

6. The trial court did not abuse its discretion in admitting the autopsy photographs. The trial judge considered these photographs and found them relevant to the manner of the victims' deaths.

7. The Post-Conviction Hearing Act (725 ILCS 5/122-1) provides a procedural mechanism for criminal defendants to assert that their constitutional rights were substantially violated during the original proceedings resulting in their convictions. *People v. Harris*, 224 Ill.2d 115, (2007); *People v. Johnson*, 401 Ill.App.3d 685 (2nd. Dist. 2010). A proceeding under the Act is a collateral attack on the judgment, allowing inquiry into issues that were not, and could not have been, adjudicated on direct appeal. *Harris*, 224 Ill.2d at 124. Issues that the defendant could have raised on direct appeal but did not are procedurally defaulted, and issues that a reviewing court previously decided are barred by res judicata. *Harris*, 224 Ill.2d at 124-25.

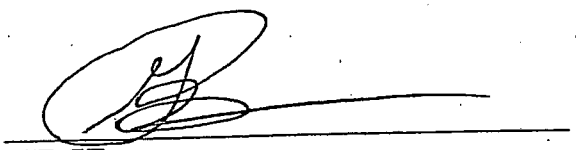
8. Defendant's allegation that his trial counsel was ineffective for failing to tender a second degree murder instruction was presented on direct appeal and was rejected. (See *People v. Wester*, No. 2—01—0204 (2nd Dist., 2002) (unpublished Rule 23 Order). As a result, this claim is barred by the doctrine of res judicata. *People v. Davis*, 879 N.E. 2d 996 (2nd. Dist. 2007); *People v. Blair*, 215 Ill.2d 427 (2005). However even assuming this claim is not barred by re judicata this court has considered this claim and finds that it too must fail. The court having judged the credibility of the witnesses during the hearing found defendant's trial counsel, Michael Conway to be a credible witness. Mr. Conway testified that he discussed both instructions with the defendant and that while he wished to submit the second degree instructions that it was his client's, the defendant's, wish to submit only the involuntary instruction. Therefore this court does not find that the defendant decision not to tender a second degree murder instruction was based upon faulty advice from trial counsel. Consequently, it was the defendant's decision to tender an involuntary manslaughter instruction and not a second degree murder instruction and that he cannot now complain that his trial counsel was ineffective for failing to tender said instruction.

9. To succeed on a claim of ineffective assistance of counsel, a defendant must satisfy the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Under the first prong of this test, the defendant must demonstrate that his counsel's performance was deficient. However, even if it is established that counsel's performance was professionally unreasonable, this, by itself, is insufficient to warrant reversal. The defendant must also meet the second prong of the Strickland test: he must demonstrate that counsel's deficiencies resulted in prejudice. In order to establish prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. In the case at bar, defendant has failed to satisfy either prong.

10. At the third stages of a post conviction proceeding, the defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Coleman*, 206 Ill.2d 261, 277 (2002); *People v. Edwards*, 197 Ill.2d at 246 (2001). Following an evidentiary hearing this court was able to make credibility determinations and findings of facts regarding defendant's claims. As a result this court has concluded that the defendant failed to show that there was any constitutional violation that deprives him of a fair trial. He failed to make a substantial showing that he was prejudice by his trial and or appellate counsel's performance, in other words, that he

received ineffective assistance of counsel. Because the matters complained of clearly lack merit the Petition for Post-Conviction Relief is denied. A copy of this order shall be served upon Petitioner as provided in 725 ILCS 5/122-2.1(a)(2).

ENTER:



JUDGE

Dated at Waukegan, Illinois
This 26th day of September, 2011.

YOU ARE HEREBY NOTIFIED THAT ON **September 26, 2011** THE COURT ENTERED THIS ORDER. YOU HAVE THE RIGHT TO APPEAL. IN THE CASE OF AN APPEAL FROM A POST-CONVICTION PROCEEDING INVOLVING A JUDGMENT IMPOSING A SENTENCE OF DEATH, THE APPEAL IS TO THE ILLINOIS SUPREME COURT. IN ALL OTHER CASES, THE APPEAL IS TO THE ILLINOIS APPELLATE COURT IN THE DISTRICT IN WHICH THE CIRCUIT COURT IS LOCATED. IF YOU ARE INDIGENT, YOU HAVE A RIGHT TO A TRANSCRIPT OF THE RECORD OF THE POST-CONVICTION PROCEEDINGS AND TO THE APPOINTMENT OF COUNSEL ON APPEAL, BOTH WITHOUT COST TO YOU. TO PRESERVE YOUR RIGHT TO APPEAL YOU MUST FILE A NOTICE OF APPEAL IN THE TRIAL COURT WITHIN 30 DAYS FROM THE DATE THE ORDER WAS ENTERED.

SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721
(217) 782-2035

DeWayne Wester
Reg. No. B-76091
Lawrence Correctional Center
10930 Lawrence Rd.
Sumner IL 62466

FIRST DISTRICT OFFICE
160 North LaSalle Street, 20th Floor
Chicago, IL 60601-3103
(312) 793-1332
TDD: (312) 793-6185

May 30, 2018

In re: People State of Illinois, respondent, v. DeWayne L. Wester, petitioner. Leave to appeal, Appellate Court, Second District. 123331

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 07/05/2018.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

Ex. C

SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721

CAROLYN TAFT GROSBOLL
Clerk of the Court

(217) 782-2035
TDD: (217) 524-8132

July 24, 2018

FIRST DISTRICT OFFICE
160 North LaSalle Street, 20th Floor
Chicago, IL 60601-3103
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DeWayne Wester
Reg. No. B-76091
Lawrence Correctional Center
10930 Lawrence Rd.
Sumner, IL 62466

In re: People v. Wester
123331

Today the following order was entered in the captioned case:

Motion by Petitioner, *pro se*, for leave to file a motion for reconsideration of the order denying petition for leave to appeal. Denied.

Order entered by the Court.

This Court's mandate shall issue forthwith to the Appellate Court, Second District.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

cc: Appellate Court, Second District
Attorney General of Illinois - Criminal Division
State's Attorney Lake County
State's Attorney's Appellate Prosecutor, Second District

Ex. D