

Appendix A

Summary Order AFFIRMING Judgment
of Cook County (First District Appellate Court)

NOTICE

The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

No. 1-16-1675

SIXTH DIVISION
DECEMBER 7, 2018

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

EMANUEL RIVERA-MARTINEZ,

Defendant-Appellant.

) Appeal from the
) Circuit Court of
) Cook County.
)
) No. 04 CR 18747
)
) Honorable
) Carol M. Howard,
) Judge, presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Delort and Justice Connors concurred in the judgment.

SUMMARY ORDER

¶ 1 Defendant Emanuel Rivera-Martinez appeals the circuit court of Cook County's dismissal of his petition for relief from judgment that was filed pursuant to section 2-1401 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-1401 (West 2014)).

¶ 2 Following a bench trial in 2008, defendant was convicted of the first-degree murder of two victims. Defendant was sentenced to natural life imprisonment on November 2, 2008. On appeal, this court affirmed defendant's convictions. *People v. Rivera-Martinez*, No. 1-08-3583

(2011) (unpublished order under Supreme Court Rule 23). The Illinois Supreme Court denied leave to appeal. *People v. Rivera-Martinez*, No. 112275 (Sept. 28, 2011).

¶ 3 In 2013, defendant filed a petition seeking relief under the Postconviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). The circuit court summarily dismissed that petition, and this court affirmed that dismissal. *People v. Rivera-Martinez*, 2016 IL App (1st) 133642-U. The Illinois Supreme Court denied leave to appeal. *People v. Rivera-Martinez*, No. 121052 (Sept. 28, 2016).

¶ 4 During the pendency of that appeal, on December 1, 2015, defendant filed a petition for relief from judgment, citing section 2-1401 of the Code. That filing is the subject of this appeal. In that filing, defendant argued that the State did not disclose to the defense that the judge who presided at his trial was a defendant in a civil proceeding which alleged the coercion of a false confession in another individual's criminal case. Defendant contended that the trial judge should have recused himself in this case and claims that had he known of the allegations against the trial judge at the time, he would not have waived his right to a jury trial.

¶ 5 The circuit court dismissed defendant's petition in a written order on January 22, 2016. Defendant filed a motion seeking reconsideration of that ruling, and the trial court denied that motion on April 28, 2016. Defendant has filed a timely appeal.

¶ 6 The State Appellate Defender, who represents defendant on appeal, has filed a motion for leave to withdraw as appellate counsel. A memorandum in support of that motion has been submitted in support of the motion pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), in which counsel states that there are no issues of arguable merit for an appeal. Copies of the brief and motion were sent to defendant, and he was advised that he might submit any points in

support of his appeal. Defendant has filed a response, restating the claims raised in his section 2-1401 petition.

¶ 7 We have carefully reviewed the record in this case, along with counsel's brief and defendant's response, and we find no issue of arguable merit. Therefore, counsel's motion to withdraw is allowed, and the judgment of the circuit court of Cook County is affirmed.

¶ 8 This order is entered pursuant to Illinois Supreme Court Rules 23(c)(2), (4) (eff. April 1, 2018).

¶ 9 Affirmed.

Appendix B

Denial of Petition For Leave To Appeal
(Illinois Supreme Court)



SUPREME COURT OF ILLINOIS

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

Emanuel Rivera-Martinez
Reg. No. K-80329
Menard Correctional Center
P.O. Box 1000
Menard IL 62259

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

March 20, 2019

In re: People State of Illinois, respondent, v. Emanuel Rivera-Martinez,
petitioner. Leave to appeal, Appellate Court, First District.
124410

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 04/24/2019.

Very truly yours,

Carolyn Taft Gosboll

Clerk of the Supreme Court

Appendix C

Order of Circuit Court of Cook County
Denying Petition for Relief From Judgment

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION**

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Respondent,)
) Petition for Relief from Judgment
v.) 04-CR-1874701
)
EMANUEL RIVERA-MARTINEZ,)
) Honorable Carol M. Howard
Defendant-Petitioner.) Judge Presiding

ORDER

Petitioner, Emanuel Rivera-Martinez, seeks relief from the judgment of conviction entered against him on November 12, 2008. Following a bench trial, the court found petitioner guilty of two counts of first-degree murder. 720 ILCS 5/9-1(a)(1) (LEXIS 2004). The court sentenced petitioner to life imprisonment. As grounds for relief, petitioner claims: (1) the State committed a *Brady* violation; (2) the trial judge erred by not recusing himself; and (3) his jury waiver was not knowing and voluntary.

BACKGROUND

The Appellate Court recounted the facts underlying petitioner's conviction. *People v. Rivera-Martinez*, 406 Ill. App. 3d 1209 (1st Dist. 2011). Petitioner's conviction stems from his direct involvement in the shooting of Freddy Hurtado and Mario Montanez. At trial, Ricardo Gomez testified that on November 15, 2003, at approximately 9:00 p.m., the two victims, Hurtado and Montanez, and Renee Delgado picked him up. Gomez stated that all four of them were unarmed. They drove in Delgado's car to the Last Chance bar on the corner of Fullerton and Lawndale Avenues in Chicago, Illinois. After they parked the car on Lawndale Avenue a quarter of a block south of the bar, they started walking east to west in a northerly direction across the street.

Gomez noticed two men wearing hoods on the corner across the street from the bar. He did not recognize the men. The men were to Gomez's right and said something to Gomez's group, but the four did not answer and continued walking toward the bar. Gomez testified that the four did not engage the two men in any way or make any movements as if they were armed.

They were on the sidewalk when Gomez heard gunshots. Hurtado ran and Montanez fell on top of Gomez. Gomez lowered Montanez to the sidewalk. Gomez saw petitioner, who was on his left, put a gun into his pocket and run away. Gomez saw a female police officer and he pointed in the direction that petitioner was running. The officer ran after the shooter. At the police station, in both a photographic and physical lineup, Gomez identified petitioner as the shooter.

Amy Gonzales, a patron at the Last Chance bar on the same night, testified that at approximately 10 p.m. she noticed she had missed calls on her cell phone. She stepped outside of the door of the bar onto Lawndale Avenue so she could hear her cell phone. Gonzales noticed two men on the same side of Fullerton Avenue where she stood, but on the other side of Lawndale Avenue. She saw a man walking in the street with two other men, shoot a gun three times in a northerly direction at the two men on the corner. She only heard three shots. She immediately went back into the bar where music was playing very loudly. She admitted that it would be unlikely that any shots would be heard from there. Gonzales described the coat the shooter was wearing. Later, at the police station and at trial, she identified petitioner in a photograph and in a physical lineup as the shooter.

Detective Cathleen Iser of the Chicago Police Department testified that she was riding in a police car with two other police officers in the vicinity at the time of the shooting. Iser testified that after they heard gunfire, she exited the police car, ran towards the sidewalk, jumped over a man who had fallen down, saw a muzzle flash, saw the man who was firing the gun and chased

him in a southerly direction on Lawndale Avenue. The shooter turned west into the alley and Iser identified herself as a police officer and yelled for him to stop and drop the gun. The shooter continued to run at the T-intersection southward down another alley. Iser saw the shooter throw a gun into the air by a garage. Iser's partners had continued driving the police vehicle and were able to apprehend the shooter in the alley. In court, Iser identified petitioner as the shooter and she identified a photograph depicting the garage where the gun was recovered. Iser also testified that besides petitioner, she did not see anyone else discharge a weapon.

Alejandro Vega testified that he had been convicted in 2001 of possession of a controlled substance with intent to deliver and was charged with two counts of first-degree murder as a co-defendant in this case. Vega made an agreement with the Cook County State's Attorney Office that in exchange for his truthful testimony in the petitioner's trial, the State would recommend a sentence of 20 years imprisonment for one of the murders and the other count of murder would be dropped. In November 2003, Vega had been a member of the YLO Cobras gang for approximately 11 years. Vega, whose nickname was Scrappy, knew petitioner, whose nickname was Papito, as a fellow gang member.

Vega testified that on November 15, 2003, he had been "chilling" with Eugenio Lasso, known as Scummy, and another man known as Georgie on Shakespeare Avenue in Chicago. At approximately 10:00 p.m., petitioner approached Vega and the other two men and requested a gun. Petitioner told them that there were some members of a rival gang, the Imperial Gangsters, on the corner of Fullerton and Lawndale Avenues and that he wanted to "[g]et rid of them." Vega testified that petitioner asked him to "watch his back." Vega stated that petitioner had been shot at in the past by a member of the Imperial Gangsters.

Lasso went to his Suburban vehicle, retrieved a gun and gave it to petitioner. The four of them then started walking toward Lawndale and Fullerton Avenues. Vega and Lasso were on the east side of Lawndale Avenue walking north and were planning to "look out for the police." Petitioner was on the west side of Lawndale Avenue near the Last Chance bar. Georgie had stopped at Lawndale and Belden Avenues, south of Fullerton Avenue. Lasso walked all the way to Fullerton Avenue, but Vega only walked to the alley before Fullerton Avenue when he saw some men exit a car and signal a YLO Cobra gang sign directed at him. Vega testified that he did not recognize them and that he did not think they were members of the Cobra gang, and so they were actually "false flagging" the Cobra sign. Vega heard two or three gunshots, saw petitioner firing the gun at the men who had just exited the car, and then he started running southward on Lawndale Avenue. As he was running, Vega heard "a lot" of gunshots and he looked to see a man in all black, someone he could not identify, in the corner of the alley shooting a gun. Vega could feel bullets passing him.

Vega identified the gun in a photograph as the gun that belonged to the YLO Cobra gang that Lasso had in his vehicle that night. Vega also identified the coat that petitioner was wearing the night of the shooting. Vega admitted that he was going to plead guilty to a possession of a controlled substance with intent to deliver charge and he would receive a six-year imprisonment sentence concurrent with his murder sentence. Further, in the past he had been convicted of possession of a stolen motor vehicle and aggravated discharge of a firearm. Vega admitted that in the recorded statement he gave in jail to assistant State's attorneys he did not mention that there were bullets whizzing by his head or that someone was shooting at him.

Petitioner testified that on November 15, 2003, he was traveling by bus from his mother's apartment to see his girlfriend and newborn son who lived on Lawndale Avenue, two blocks

south of Fullerton Avenue. As petitioner was walking south on Lawndale Avenue, he saw two men, one of whom he knew from the streets and later learned was nicknamed Puppet G. Puppet G. yelled out, "Security, bust out that bitch ass nigger G. He a Cobra." Petitioner stated that he was in the gang YLO Cobras and Puppet G. was an Imperial Gangster. Petitioner took the statement to mean that Puppet G. had asked someone to shoot him. Petitioner saw men exit a grey vehicle parked on the corner and they started shooting at him. He took cover behind the second car parked on the street, took out his gun and returned fire northbound on Lawndale Avenue. Petitioner testified that he had received the gun from his brother as a gift, and that he had not seen Vega or Lasso at all that day. Petitioner stated he had three felony convictions and often carried a gun for protection.

After petitioner noticed the female police officer exiting her car, he started running down the street into an alley where she pursued him and yelled to him to drop his gun. He threw the gun onto the roof of a garage, kept running and put his hands into the air. He was then apprehended by the police. Petitioner stated that he had no intention of killing anyone that day, but was defending himself.

PROCEDURAL HISTORY

On direct appeal, petitioner claimed: (1) the State did not prove beyond a reasonable doubt that he was not justified in shooting the victims in self-defense and (2) the court should reduce his conviction to second-degree murder based upon his self-defense claim. On March 15, 2011, the Appellate Court affirmed petitioner's sentence and conviction. *People v. Rivera-Martinez*, 406 Ill. App. 3d 1209 (1st Dist. 2011). On April 11, 2011, the Appellate Court denied petitioner's request for rehearing. *People v. Rivera-Martinez*, 2011 Ill. App. LEXIS 446 (1st Dist. 2011). Petitioner sought leave to appeal to the Illinois Supreme Court. On September 28,

2011, the Illinois Supreme Court denied petitioner's request for leave to appeal. *People v. Rivera-Martinez*, 2011 Ill. LEXIS 1468 (2011).

On July 3, 2013, petitioner filed a *pro se* petition for post-conviction relief. Petitioner claimed: (1) he received ineffective assistance of trial counsel; (2) the State used codefendants' perjured testimony to obtain his conviction; (3) the State did not prove his guilt beyond a reasonable doubt; (4) a *Brady* violation; and (5) that he was denied a fair trial. On October 1, 2013, this Court dismissed the petition for post-conviction relief as frivolous and without merit. An appeal is currently pending under number 1-13-3642.

On December 1, 2015, petitioner filed the instant *pro se* petition for relief from judgment pursuant to 735 ILCS 5/2-1401 (LEXIS 2015).

ANALYSIS

Section 2-1401 of the Code of Civil Procedure establishes a process by which a defendant may seek relief from a judicial order more than thirty days after its entry. Although a section 2-1401 petition is usually a civil matter, relief under this section also extends to criminal cases. *People v. Gosier*, 205 Ill. 2d 198, 206 (2004). In a criminal case, section 2-1401 is the forum to bring facts to the attention of the court, which, if known at the time of judgment, would have precluded its entry. *People v. Haynes*, 192 Ill.2d 437, 463 (2000). A petition is addressed to errors of fact, not law. *People v. Lawton*, 335 Ill. App. 3d 1085, 1087 (1st Dist. 2002). A petition under section 2-1401 is not the proper venue to make a collateral attack based on the alleged denials of constitutional rights. *In re Charles S.*, 83 Ill. App. 3d 515, 517 (1st Dist. 1980). To be entitled to relief under section 2-1401, a petitioner must show: (1) the existence of a meritorious claim or defense; (2) due diligence in presenting the claim or defense to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief. *People v.*

Coleman, 206 Ill. 2d 261, 288-89 (2002). A petitioner may also use section 2-1401 to attack a void judgment. 735 ILCS 5/2-1401(f) (LEXIS 2015). A judgment is void if the court lacked (1) jurisdiction over the parties or subject matter or (2) the inherent power to enter the particular order involved. *People v. Madej*, 193 Ill.2d 395, 401 (2000). When a 2-1401 petition is insufficient as a matter of law to entitle the petitioner to relief, the trial court may dispose of it without waiting for the State's responsive pleading or providing notice of the impending ruling to the petitioner. *People v. Vincent*, 226 Ill. 2d 1, 8-9 (2007). Generally, the petitioner must file a petition pursuant to section 2-1401 within two years after the entry of the judgment unless they allege the judgment itself is void. 735 ILCS 5/2-1401(c), (f); *Gosier*, 205 Ill. 2d at 206.

I. *Brady* violation

Petitioner alleges that the State committed a *Brady* violation where it failed to tender evidence regarding the trial judge's ongoing involvement in litigation unrelated to the case. In support of his claim petitioner has attached opinions for a motion to dismiss and a motion for summary judgment in a civil suit naming the trial judge as part of a group of defendants. *Orange v. Burge*, No. 04 C 0168, 2005 U.S. Dist. LEXIS 7234 (N.D. Ill. Mar. 30, 2005); *Orange v. Burge*, No. 04 C 0168, 2008 U.S. Dist. LEXIS 75103 (N.D. Ill. Sep. 29, 2008).

Petitioner's claim is not cognizable under section 2-1401 because he fails to present any facts that were unknown to the trial court at the time of judgment. Even if his claim were cognizable, it is meritless. The allegations against the trial judge were irrelevant to any issue involved in petitioner's case and the State had no duty to reveal any of this information. See *People v. Coleman*, 206 Ill. 2d 261, 287-88 (2002). Petitioner also fails to demonstrate due diligence in raising this claim in the original action or in filing the instant petition. The facts underlying the attached cases were publicly available prior to petitioner's trial.

II. Recusal

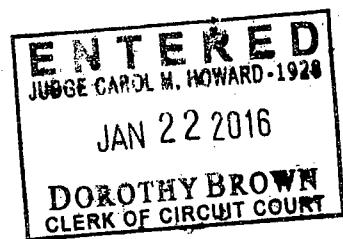
Petitioner claims that the trial judge erred where he did not recuse himself based on the previously mentioned unrelated civil litigation. Petitioner's claim is not cognizable under section 2-1401 because he fails to present any facts that were unknown to the trial court at the time of judgment. Even if petitioner's claim was cognizable, it is meritless. Recusal is only required when a judge's impartiality in that matter might be reasonably questioned. Ill. Sup. Ct., R 63(C)(1). Petitioner has not demonstrated the existence of any factor contemplated in Supreme Court Rule 63 or an independent basis to question the trial judge's impartiality in his case. The trial judge's involvement in an unrelated civil claim has no bearing on petitioner's case and in no way merited recusal.

III. Jury Waiver

Petitioner claims that his jury waiver was not knowing and voluntary because he was unaware of ongoing litigation involving the trial judge. This claim is not cognizable under section 2-1401. The knowing and voluntary nature of a jury waiver deals with a constitutional right. Section 2-1401 is not a proper venue for the alleged denial of constitutional rights. *In re Charles S.*, 83 Ill. App. 3d at 517.

CONCLUSION

Based on the foregoing discussion, this Court finds that petitioner has failed to show cause for relief under 735 ILCS 5/2-1401. Accordingly, the petition for relief from judgment is hereby DENIED.



ENTERED: C. M. Howard 1928

Honorable Carol M. Howard
Circuit Court of Cook County
Criminal Division

DATED: _____

Appendix E

Colloquy of Jury Waiver (Transcript)

3 THE COURT: Mr. Martinez.

4 MR. SALERNO: Good morning, your Honor. For the
5 record, Alex Salerno on behalf of the defendant, who
6 is present and in custody.

11 THE COURT: Mr. Martinez, you're charged with
12 murder of two individuals, a murder in which two
13 individuals were killed. This is a special pros
14 murder, that is in which the sentence is natural
15 life.

16 Do you understand that?

17 DEFENDANT MARTINEZ: Yes, your Honor.

18 . THE COURT: Okay. Originally, it was a capital
19 case, and the State is not seeking the death penalty,
20 so both the minimum and maximum sentence is natural
21 life if you're found guilty of killing both people.

22 Do you understand?

23 DEFENDANT MARTINEZ: Yes, your Honor.

24 THE COURT: You have pled not guilty. You have a

1 right to be tried by a jury trial or a bench trial.
2 A jury trial is 12 citizens chosen by your lawyer and
3 the Assistant State's Attorney. Those 12 people
4 would sit and listen to the evidence against you and
5 decide whether the State has proven you guilty beyond
6 a reasonable doubt.

7 All 12 jurors would have to unanimously
8 agree that the State had proved you guilty beyond a
9 reasonable doubt for you to be found guilty.

10 Do you understand what a jury is?

11 DEFENDANT MARTINEZ: Yes, sir, your Honor.

12 THE COURT: In a bench trial the Judge alone
13 decides whether the State has proven you guilty
14 beyond a reasonable doubt.

15 Do you understand that?

16 DEFENDANT MARTINEZ: Yes, sir.

17 THE COURT: How do you wish to proceed, by way of
18 jury trial or bench trial?

19 DEFENDANT MARTINEZ: Bench, your Honor.

20 THE COURT: Is this your signature on the jury
21 waiver form?

22 DEFENDANT MARTINEZ: Yes.

23 THE COURT: That is a formal waiving of your
24 right to a jury. Has anybody made any threats or

1 promises to get you to waive your right to a jury
2 trial?

3 DEFENDANT MARTINEZ: No.

4 THE COURT: You discussed this with your
5 attorney, Mr. Salviano?

6 DEFENDANT MARTINEZ: Yes.

7 THE COURT: And you are voluntarily waiving your
8 right to a jury?

9 DEFENDANT MARTINEZ: Yes.

10 THE COURT: And you're knowingly waiving your
11 right to a jury?

12 DEFENDANT MARTINEZ: Yes.

13 THE COURT: I find the defendant knowingly,
14 voluntarily waves his right to a jury, and we'll
15 proceed by way of a bench trial.

16 Have a seat at the table.

17 MR. KEATING: For the record, Assistant State's
18 Attorney Joe Keating, Tom Darmon, and Ruth Gudino on
19 behalf of the People.

20 THE COURT: Opening statements.

21 MR. KEATING: Briefly, if I might, your Honor.

22 Judge, the facts and circumstances in this
23 case are going to take you back to the date of
24 November 15th of the year 2003 at approximately

Appendix F

Motion For Leave To Withdraw
(Assistant Appellate Defender)

Memorandum In Support of Motion

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County, Illinois
))
Respondent-Appellee;))
	)	No. 04 CR 18747
-vs-))
))
EMANUEL RIVERA-MARTINEZ,	)	Honorable
	)	Carol M. Howard,
Petitioner-Appellant.	)	Judge Presiding.

**MOTION FOR LEAVE TO WITHDRAW AS COUNSEL ON APPEAL
CONSISTENT WITH *PENNSYLVANIA v. FINLEY* AND PURSUANT
TO ILLINOIS LAW**

Consistent with *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and pursuant to Illinois law (see *People v. Kuehner*, 2015 IL 117695, ¶¶ 15, 21 (discussing applicable Supreme Court Rules), and *People v. Meeks*, 2016 IL App (2d) 140509, ¶ 8 (discussing applicable Rules of Professional Conduct)), the Office of the State Appellate Defender moves for leave to withdraw as counsel on appeal in this case because the appeal presents no potentially meritorious issues for review.

In support of this motion, Brett C. Zeeb, Assistant Appellate Defender, states:

1. Emanuel Rivera-Martinez was sentenced to natural life in prison for first-degree murder on April 28, 2016. Mr. Martinez is currently incarcerated. His conviction and sentence were affirmed on direct appeal in appellate court number 1-08-3583. On June 18, 2013, Mr. Martinez filed a petition for post-conviction relief. On October 1, 2013, the circuit court summarily dismissed the petition, and the dismissal

was affirmed on appeal in appellate court number 1-13-3642.

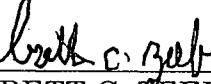
2. On December 1, 2015, Mr. Martinez filed a petition for relief from judgment pursuant to 735 ILCS 5/2-1401. The circuit court denied the petition on April 28, 2016. On February 11, 2016, Mr. Martinez filed a motion to reconsider the denial of his petition. On April 28, 2016, the circuit court denied the motion to reconsider.

3. Notice of Appeal was mailed on May 24, 2016, and filed on June 1, 2016. The Office of the State Appellate Defender was appointed on June 10, 2016.

4. After an examination of the record on appeal, and after discussing the case with another attorney in the office who also read the record on appeal, counsel has concluded that an appeal in this cause would be without arguable merit. Counsel has informed Mr. Martinez of this conclusion and that counsel intends to file the motion to withdraw. Therefore, counsel hereby moves to withdraw as counsel on appeal pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). A memorandum supporting this motion is attached.

WHEREFORE, the Office of the State Appellate Defender respectfully moves to withdraw as counsel on appeal in this cause.

Respectfully submitted,


BRETT C. ZEEB
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR PETITIONER-APPELLANT

STATE OF ILLINOIS)
COUNTY OF COOK) SS

VERIFICATION

Under the penalties provided in law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this motion are true and accurate.

Brett C. Zeeb
BRETT C. ZEEB
Assistant Appellate Defender

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County, Illinois
))
Respondent-Appellee,))
	)	No. 04 CR 18747
-vs-))
))
EMANUEL RIVERAL-MARTINEZ,	)	Honorable
	)	Carol M. Howard,
Petitioner-Appellant.	)	Judge Presiding.

**MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO
WITHDRAW AS COUNSEL ON APPEAL**

I.

STATEMENT OF FACTS

Overview

Emanuel Rivera-Martinez was convicted of the first-degree murders of Freddy Hurtado and Mario Montanez. Mr. Martinez asserted the affirmative defense of self-defense at trial, and testified he shot at Hurtado and Montanez because they were rival gang members who shot at him first. This Court affirmed Mr. Martinez's convictions and sentence in a Rule 23 Order on April 19, 2011. Mr. Martinez filed a post-conviction petition on July 3, 2013. The circuit court dismissed the petition on October 1, 2013. Martinez filed this petition for relief from judgment pursuant to 735 ILCS 5/2-1401 on December 1, 2015. The circuit court dismissed it on January 22, 2016. The circuit court denied Mr. Martinez's motion to reconsider on April 28, 2016.

Trial Court Proceedings

When all the evidence had been presented in this case, the trial judge admitted he could not make sense of the multiple shell casings found at the crime scene. (R. MMM86)¹ The crime scene was the intersection of Fullerton and Lawndale, an area in Chicago where the Imperial Gangsters were known to hang around. (R. MMM35) There, the police found 10 bullet casings, one bullet and two bullet fragments, fired from multiple guns and from multiple directions in a matter of minutes on the evening of November 15, 2003. (St. Ex. 13-47)

Some shell casings were in the middle of Lawndale, south of Fullerton. (St. Ex. 15) Three casings were found on the sidewalk, on the west side of Lawndale, south of the Last Chance Lounge. (St. Ex. 29-30) Some bullets made their way all the way across Fullerton and ended up in storefront windows. (St. Ex. 40-41) Two bullets were found near an open garage on Lawndale. (St. Ex. 45-47) Two bullets ended up killing Mario Montanez and Freddy Hurtado. (R. MMM7-8)

Five people saw the nighttime shooting, but each person had a unique perspective and testified to a different version of events. Two witnesses placed a shooter near the southwest corner of the intersection. (R. III21, JJJ16-17) Two witnesses said a shooter got out of a gray car in the middle of Lawndale. (R. III53, MMM47-49) An officer testified a shooter fired from 40 feet south of the intersection. (R. III63)

Emanuel Rivera-Martinez's Testimony

The moment Emanuel Rivera-Martinez, one of the shooters in this case, stepped

¹Citations to the record will be as follows: "R" and "C" for the report of proceedings and common law record in 1-08-3583; "PC" for the common law record in 1-11-13-3642; "PRJ C." for the common law record in 1-16-1675.

off a city bus at the intersection of Fullerton and Lawndale, he knew he was stepping into a potential war zone. (R. MMM61) To visit his newborn son, Mr. Martinez had to walk through Imperial Gangster territory. (R. MMM20, 62) Mr. Martinez belonged to a rival gang, the YLO Cobras, and those two gangs were at war with each other. (R. MMM24) The Imperial Gangsters had confronted Mr. Martinez in the past. (R. MMM42) He carried a gun for protection, but he did not intend to shoot anyone. (R. MMM29)

When Mr. Martinez got off the bus, he started walking southbound on Lawndale. (R. MMM21) He saw two men standing on the southeast corner of the street, and he recognized one of them as "Puppet G," whom Mr. Martinez had met in Cook County Jail. (R. MMM21) Puppet was an Imperial Gangster. (R. MMM24) As soon as Puppet saw Mr. Martinez, Puppet's body language became aggressive. (R. MMM23)

Then Puppet yelled out, "Security, bust out that bitch ass nigger G. He a Cobra." (R. MMM23) Mr. Martinez testified that "security," means that somebody close by has a gun, and that Puppet meant for a fellow Imperial Gangster to shoot him. (R. MMM24)

After hearing Puppet's command to shoot him, Mr. Martinez felt paranoid and started to look around. (R. MMM25) He did not try and run away because he "probably would have got shot in my back." (R. MMM43) He saw some men coming out of a gray car parked southbound on the corner near the Last Chance Lounge. (R. MMM25, 48) The car was behind him and to his left. (R. MMM47)

Suddenly, a man standing on the driver's side of the gray car started shooting at him. (R. MMM25, 27) Mr. Martinez quickly took cover behind a parked car, pulled out his own gun and started shooting back in self-defense at the man who was shooting

at him. (R. MMM27) He was not sure how many times the other shooter fired at him before returning fire. (R. MMM28)

Mr. Martinez was on the sidewalk shooting northbound toward Fullerton at the shooter, on a diagonal. (R. MMM27) He was not certain how many times he fired because it all happened so quickly, but it was "two to three shots tops." (R. MMM28) After Mr. Martinez shot, he stood there with the gun in his hand and saw a police officer get out of an unmarked car on Fullerton. (R. MMM30) He fled southbound down Lawndale into an alley. (R. MMM30) The officer chased after him and demanded that he drop the gun. (R. MMM31) Mr. Martinez threw the gun on the roof of a garage and then kept running with his hands up until an unmarked police car cut him off and he was arrested. (R. MMM31)

Mr. Martinez testified that he did not intend to kill anyone; he was just defending himself and he feared for his life. (R. MMM31)

Detective Carrie Iser's Testimony

Detective Carrie Iser testified she was driving around with her partner and another officer in the area of Fullerton and Lawndale when she heard several gunshots. (R. III61-62) She bailed out of the car on the corner and ran toward the sidewalk. (R. III62) People were running in various directions. (R. III62) Detective Iser looked southbound and saw a man fall in front of her. (R. III62) She jumped over him and saw a muzzle flash and another man about 40 feet down the block firing and pointing a gun. (R. III63)

Detective Iser chased the shooter, whom she identified in court as Mr. Martinez, southbound on Lawndale and then westbound in the south alley of Fullerton. (R. III63, 66) Mr. Martinez had the gun in his hand as he ran. (R. III64) She told Mr. Martinez

to stop, that she was police, and to drop the gun. (R. III64) Mr. Martinez threw the gun in the air by a garage on the west side of the alley. (R. III64) Her partner cut Mr. Martinez off at the T-alley and placed him in custody. (R. III65)

On cross-examination, Detective Iser acknowledged that the case report she signed did not indicate that she saw a muzzle flash come out of Mr. Martinez's weapon prior to her chasing him. (R. III72)

Amy Gonzales's Testimony

Amy Gonzales testified she was inside the Last Chance Lounge on November 15, 2003. (R. III40) It was crowded inside the bar and loud music was playing. (R. III40) At about 10 p.m., she went outside to return some missed calls on her cell phone. (R. III41) She stood on Lawndale, facing across the street, and saw two men standing on the corner across from her. (R. III42)

According to Gonzales, she saw three men walk up on Lawndale toward Fullerton. One of the three, whom she later identified as Mr. Martinez, pulled out a gun and fired three shots at the two men standing on the corner. (R. III43, 45-47) She described Mr. Martinez as wearing a big puffy coat with a big fur hood. (R. III43-44) When Mr. Martinez fired, he fired north toward Fullerton and he was standing next to a gray car on the driver's side. (R. III43, 50, 53) There were two other men standing by the gray car as well. (R. III50)

Gonzales did not know how many gunshots were fired in total, and did not know if the two men on the corner had fired on Mr. Martinez. (R. III54) The music inside the bar was so loud that she would not have heard any gunshots. (R. III54-55)

Ricardo Gomez's Testimony

Ricardo Gomez testified that Freddy Hurtado, Mario Montanez, and Renee

Delgado picked him up at about 9 p.m. on November 15, 2003, because they had plans to watch a boxing match. (R. III18-19) They drove around for a while and ended up deciding on the Last Chance Lounge, a bar on the corner of Fullerton and Lawndale. (R. III19)

They parked on Lawndale about a quarter block from the bar, on the east side of the street. (R. III20, 35-36) Gomez noticed two men on the southeast corner, right across from the bar, wearing hoodies. (R. III20) The two men said something that caught their attention, but Gomez and his companions kept walking north and west on a diagonal toward the bar. (R. II 21, 36) Gomez did not know the two men. (R. III20)

As soon as they reached the sidewalk, he heard gunshots from his left, west of him. (R. III21, 36) Freddy ran and Mario fell on top of Gomez. (R. III21) According to Gomez, he saw Mr. Martinez put a gun in his pocket and run away. (R. III22, 26) Gomez never actually saw Mr. Martinez shoot the gun. (R. III32-33) Gomez saw a police officer chase Mr. Martinez down an alley. (R. III22)

Gomez identified Mr. Martinez in a physical lineup later that evening as the shooter. (R. III25) Gomez denied membership in the Imperial Gangsters. (R. III31) According to Gomez, he did not have a gun that night, and he did not know whether any of his friends had guns. (R. III26, 30)

Alejandro Vega's Testimony

Alejandro Vega, a co-defendant, testified that in July 2004, two detectives visited him in Cook County jail. (R. JJ28) The detectives told Vega they were going to prosecute him in a murder case and that he might go to prison forever. (R. JJ28-29) To protect himself, Vega agreed to cooperate with the detectives and tell them what happened. (R. JJ29-30) In exchange for his testimony in Mr. Martinez's trial, Vega

would plead guilty to one count of murder and the State would recommend a 20-year sentence. (R. JJJ4) The remaining murder count against Vega would be dismissed. (R. JJJ4)

At trial, Vega testified he was a member of the YLO Cobras in November 2003 and that his gang was at war with the Imperial Gangsters at that time. (R. JJJ5-6) He identified Mr. Martinez as "Papito," a fellow gang member. (R. JJJ6) Vega testified his own gang nickname is "Big Scrappy," and that co-defendant Eugenio Laso's nickname is "Scummy." (R. JJJ7)

On the evening of November 15, 2003, Vega was hanging out on Shakespeare with Scummy and "Georgie" when Mr. Martinez arrived and asked Scummy for a gun. (R. JJJ8-9) Scummy went to his nearby Suburban, got a gun, and gave it to Mr. Martinez. (R. JJJ14) According to Vega, Mr. Martinez said there were some Imperial Gangsters hanging out on Fullerton and Lawndale, and Mr. Martinez wanted to "get rid of them." (R. JJJ13) Mr. Martinez asked Vega and Scummy to watch his back. (R. JJJ13) Vega had seen Mr. Martinez get shot at by Imperial Gangsters in the past. (R. JJJ11)

According to Vega, he, Mr. Martinez, Scummy, and Georgie started walking northbound on Lawndale. (R. JJJ14-15) He and Scummy were looking out for police and walking on the east side of the street on the sidewalk. (R. JJJ15) Mr. Martinez was walking on the west side of Lawndale on the sidewalk. (R. JJJ15) Georgie stopped at Belden, which is one street south of Fullerton, on the left side of Lawndale. (R. JJJ46) Vega walked to an alley just south of Fullerton, and then turned around. (R. JJJ16) Scummy walked all the way to Fullerton, on the east side of Lawndale. (R. JJJ16) Mr. Martinez walked all the way to Fullerton, on the west side of Lawndale, in front of the

Last Chance Lounge. (R. JJJ16-17)

As Vega walked back south on Lawndale, two men jumped out at him from a gray car parked on the left side of the street. (R. JJJ16, 38) One of the guys "flagged" Vega, meaning the guy "threw up the Cobra" hand signal at him. (R. JJJ17) Vega did not recognize the men, and thought they were "false-flagging" him, claiming to be YLO Cobras but were really not. (R. JJJ18)

Vega just kept walking south on Lawndale away from the two men. (R. JJJ18-19) Mr. Martinez was "right behind" the two men, and then Vega saw Mr. Martinez fire two or three shots at them. (R. JJJ19-21) Vega started running. (R. JJJ20) Vega did not hear any gunshots prior to Mr. Martinez shooting. (R. JJJ20) He did not see the other two men fire, but he does not know for sure whether they fired. (R. JJJ39)

As Vega started running away, he heard "a lot of gunshots." (R. JJJ21) According to Vega, "I was feeling bullets pass me by." (R. JJJ22) Vega looked back and saw a person standing in the corner of the alley, dressed all in black, firing a gun southbound in Vega's direction. (R. JJJ22, 43-45) He could not recall whether the second shooter was one of the two guys that had false-flagged him. (R. JJJ22)

Firearms Evidence

The parties stipulated to all of the firearms evidence. Mr. Martinez's gun was found in a gutter at 2341 N. Ridgeway. (R. MMM4) The gun's magazine contained seven 9-millimeter cartridges and there was one 9-millimeter round in the gun's chamber. (R. MMM4) The magazine has a capacity of 12 rounds. (R. MMM15)

Six 9-millimeter bullet casings were found on Lawndale south of Fullerton, as depicted in State's Exhibits 13 through 22. (R. MMM4) Four 9-millimeter bullet casings were found on the west sidewalk on Lawndale, as depicted in State's Exhibits

23 through 33. (R. MMM5) Two bullet fragments were recovered from 3700 W. Fullerton, as depicted in State's Exhibits 37 through 42. (R. MMM5) Finally, a bullet and a bullet fragment were recovered from a garage on Lawndale, as depicted in State's Exhibits 43 through 51.

A 9-millimeter bullet was recovered from Mario Montanez's body, and it was fired from Mr. Martinez's gun. (R. MMM11) A medical examiner determined that Freddy Hurtado died from a through and through gunshot wound to his back. (St. Ex. 84) Of all the cartridge cases recovered and analyzed, only two of them were fired from Mr. Martinez's gun – both of them were 9-millimeter casings found on the sidewalk, as depicted in State's Exhibits 8 and 9. (R. MMM12-13) The six 9-millimeter casings found in the street were fired from the same firearm and could not be eliminated as being fired by Mr. Martinez's gun. (R. MMM12)

Trial Court's Ruling and Sentencing

The trial judge found the testimony of Gonzales, Gomez, and Detective Iser to be credible, and the trial judge believed Vega's testimony that he and Laso and Mr. Martinez were looking to retaliate against rival gang members. (R. MMM85) Regarding the shell casings, the trial judge said the following: "Based on the credibility – let me say the shell casings out there, there's some questions raised with that." (R. MMM86) Nevertheless, based on the testimony of Gonzales, Gomez, Detective Iser, and Vega, the trial judge determined the State had proven Mr. Martinez guilty beyond a reasonable doubt of two counts of intentional and knowing murder. (R. MMM86)

Pursuant to 730 ILCS 5/5-8-1(c)(ii), the trial judge sentenced Mr. Martinez to life in prison. (R. OOO20; C. 122)

Direct Appeal, 1-08-3583

On direct appeal, Mr. Martinez raised two arguments: (1) the State failed to prove beyond a reasonable doubt that he was not justified in shooting the victims in self-defense; and (2) the court should reduce his convictions to second-degree murder based upon his belief that he needed to use deadly force in self-defense. On April 19, 2011, this Court affirmed Mr. Martinez's convictions and sentence.

Post-Conviction Petition, 1-13-3642

Mr. Martinez filed a *pro se* petition for post-conviction relief on July 3, 2013. (PC. 35-104) Mr. Martinez claimed that his trial counsel was ineffective for the following reasons: (1) failing to interview and call as a witness Jorge Gonzalez; (2) failing to investigate a 911 call that was made right after the shootings occurred; (3) failing to interview and call as a witness the reporting officers listed on the General Case Report, who could have impeached Amy Gonzalez and cast doubt on her testimony; (4) failing to hire and call as a witness a forensic expert; (5) failing to investigate and call as a witness the officer to whom Bernardo Gomez admitted to being an Imperial Gangster gang member; (6) failing to call as a witness and interview a mental health expert; (7) failing to conduct any investigation or call any witnesses at trial; (8) failing to impeach Bernardo Gomez's testimony; (9) failing to impeach Alejandro Vega's testimony; and (10) failing to investigate and call as a witness the actual owner of the gray Ford Taurus. Mr. Martinez further argued the State failed to prove his guilt beyond a reasonable doubt, and that the State committed a *Brady* violation by failing to turn over an investigative report regarding Jorge Gonzalez's statement to Detective Schalk. (PC. 46-78)

Among other things, Mr. Martinez attached to his petition an investigative alert

for Jorge Gonzalez issued by Chicago Police Detective Raymond Schalk. (PC. 81) The justification section of the Alert indicates that Gonzalez had been identified by two-codefendants as participating in the double homicide of Freddy Hurtado and Mario Montanez. (PC. 81) Mr. Martinez also attached a document showing that the Alert expired. (PC. 82)

On October 1, 2013, the trial court denied the petition in a written order. (PC. 105-131). The trial court held that Mr. Martinez's claims were either forfeited, barred by *res judicata*, or were frivolous and patently without merit. (PC. 105-131) On appeal, Mr. Martinez argued that he presented an arguable claim of ineffective assistance of trial counsel where counsel failed to investigate the substance of witness Jorge Gonzalez's statement to police and call him as a witness. On May 16, 2016, this Court affirmed the summary dismissal in an unpublished order. *People v. Emanuel Rivera-Martinez*, 2016 IL App (1st) 133642-U.

Petition for Relief from Judgment, 1-16-1675

Mr. Martinez filed a petition for relief from judgment on December 1, 2015. (PRJ C. 31-66) He raised three claims: (1) the State committed a *Brady* violation when it did not disclose to the defense in discovery that the trial judge – Dennis Dernbach – was, at the time of Mr. Martinez's murder trial, jointly defending himself with former State's Attorney Richard Devine in *Orange v. Burge, et. al.*, 2005 WL 742641; (2) his jury waiver was not knowing and voluntary because if he had known of the allegations against Judge Dernbach, he never would have waived his jury trial right; and (3) Judge Dernbach was required to recuse himself. (PRJ C. 43-61)

On January 22, 2016, the circuit court dismissed the petition in a written order. (PRJ C. 97-105) Mr. Martinez filed a motion to reconsider the denial, which the circuit

court denied on April 28, 2016. (PRJ C. 131-32) Mr. Martinez filed a timely notice of appeal on May 24, 2016. (PRJ C. 135)

II.

LEGAL ANALYSIS

Counsel has considered raising the following issue on Mr. Emanuel Rivera-Martinez's behalf:

Whether the circuit court erred in *sua sponte* dismissing Mr. Martinez's petition for relief from judgment.

However, for the reasons stated herein, counsel has concluded that this issue would be without arguable legal merit. Therefore, counsel should be permitted to withdraw.

Relevant 2-1401 Legal Principles

Relief under 735 ILCS 5/2-1401 is predicated upon proof, by a preponderance of evidence, of a claim that would have precluded entry of the judgment in the original action and also diligence in discovering the claim and presenting the petition. *People v. Vincent*, 226 Ill. 2d 1, 6 (2007). A meritorious defense under section 2-1401 involves errors of fact, not law. *People v. Pinkonsly*, 207 Ill. 2d 555, 565 (2003). Accordingly, a section 2-1401 petition can be used to correct all errors of fact occurring in the prosecution of a cause, unknown to the petitioner and court at the time judgment was entered, which, if then known, would have prevented its rendition. *People v. Waters*, 328 Ill. App. 3d 117, 126-27 (1st Dist. 2002).

A section 2-1401 petition must be supported by affidavit or other appropriate showing as to matters not of record. 735 ILCS 5/2-1401(b). Points previously raised at trial and in other collateral proceedings cannot form the basis of a section 2-1401

petition. *People v. Berland*, 74 Ill. 2d 286, 314-15 (1978). A section 2-1401 petition may be dismissed if the facts alleged in the petition do not state a legal basis for the relief requested. *Vincent*, 226 Ill. 2d at 9-10. A section 2-1401 petition must be filed within two years of the entry of judgment, unless the underlying judgment is void. 735 ILCS 5/2-1401(c), (f); *see also People v. Caballero*, 179 Ill. 2d 205, 210 (1997) (petitions filed beyond two-year time limit not generally considered). The two-year limitation must be adhered to in the absence of a clear showing that the petitioner is under legal disability or duress, or the grounds for relief were fraudulently concealed. *Caballero*, 179 Ill. 2d at 211. Dismissal of a section 2-1401 petition prior to an evidentiary hearing is reviewed *de novo*. *Vincent*, 226 Ill. 2d at 14.

Trial Court's Dismissal of the Petition for Relief From Judgment

In dismissing Mr. Martinez's petition, the trial court followed the appropriate procedures for reviewing a section 2-1401 petition. Under section 2-1401, once a petitioner files a petition, the opposing party has 30 days in which to answer the petition or otherwise plead. *People v. Laugharn*, 233 Ill. 2d 318, 323 (2009). Once those 30 days have passed, the petition is ripe for adjudication. *Laugharn*, 233 Ill. 2d at 323; *Vincent*, 226 Ill. 2d at 5. “[I]f the respondent does not answer the petition, this constitutes an admission of all well-pleaded facts [citation], and the trial court may decide the case on the pleadings, affidavits, exhibits and supporting material before it, including the record of the prior proceedings.” *Vincent*, 226 Ill. 2d at 9.

Mr. Martinez filed his petition on December 1, 2015. The State did not file a responsive pleading. The circuit court dismissed it on January 22, 2016. (PRJ C. 97-105) Thus, the circuit judge's dismissal came after the required 30-day time period, and after the State had an opportunity to file a responsive pleading (though it declined

to do so), thus complying with the applicable procedural rules and preventing appellate counsel from making any argument on this basis. *Laugharn*, 233 Ill. 2d at 323.

Though the circuit court did not comment on the timeliness of the petition, it was filed after the two-year limitation period. Mr. Martinez was sentenced on November 2, 2008, and this petition was filed on December 1, 2015, more than five years after the two-year limitation period had ended. Thus, this petition was not timely filed.

Furthermore, the circuit court did not abuse its discretion in declining to recharacterize Mr. Martinez's petition as a post-conviction petition. In his motion to reconsider, Mr. Martinez requested that if the circuit court "believes relief entitlement is not authorized under" the 2-1401 statute, then it should convert his petition into a successive post-conviction petition. (PRJ C. 129) The circuit court judge declined to do so. (PRJ C. 132) Mr. Martinez clearly labeled his filing as a "Petition for Relief From Judgment 2-1401" and he made no reference to it being a post-conviction petition. (PRJ C. 31, 38) There is no meritorious legal argument that the circuit court abused its discretion. *see People v. Shellstrom*, 216 Ill. 2d 45, 53 (2005) (whether to recharacterize a *pro se* pleading as a post-conviction petition is left to the discretion of circuit court). While a circuit court has authority to recharacterize a *pro se* pleading as a post-conviction petition, a court's failure to do so may not be reviewed for error. *People v. Stoffel*, 239 Ill. 2d 314, 324 (2010).

As to the merits of the petition, the circuit court did not err in finding Mr. Martinez's claims were not cognizable under 735 ILCS 5/2-1401 and, even if cognizable, they were meritless. (PRJ C. 103-04) None of the three claims presented any facts that were unknown to the trial court at the time of judgment.

Mr. Martinez claimed that he was denied his right to a fair trial where the State withheld evidence that the trial judge was involved with civil litigation during Mr. Martinez's trial in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). (PRJ C. 43-46) Mr. Martinez argued the prosecutor should have disclosed to the defense that the trial judge was defending himself in a civil suit brought by Leroy Orange, who alleged that Judge Dernbach, while an assistant State's attorney, helped John Burge and other detectives secure coerced and false confessions. (PRJ C. 43-45) But there is no arguable basis for a claim that a *Brady* violation occurred here.

Under *Brady*, the State denies a defendant due process by failing to disclose evidence that is favorable to the defendant and material to guilt or punishment. *People v. Beaman*, 229 Ill. 2d 56, 73-74 (2008). To sustain a *Brady* claim, the defendant must show that: 1) the undisclosed evidence is favorable because it is either exculpatory or impeaching; 2) the evidence was suppressed by the State either willfully or inadvertently; and 3) the defense was prejudiced because the evidence was material to guilt or punishment. *Beaman*, 229 Ill. 2d at 73-74; *Strickler v. Greene*, 527 U.S. 263, 280-82 (1999). Here, the trial judge's involvement in civil litigation unrelated to Mr. Martinez's case simply does not show that a *Brady* violation occurred, as there was no showing that such evidence was favorable, willfully or inadvertently suppressed, or that Mr. Martinez was prejudiced.

Next, Mr. Martinez argued that Judge Dernbach was required to recuse himself from Mr. Martinez's trial because of the same ongoing civil litigation involving Leroy Orange. (PRJ C. 53-61) Recusal is only required when a judge's impartiality in that matter might be reasonably questioned. Ill. Sup. Ct. Rule 63(c)(1). The right of a defendant to an unbiased, open-minded trier of fact is rooted in the constitutional

guaranty of due process of law. *People v. McDaniels*, 144 Ill. App. 3d 459, 462 (5th Dist. 1986). But only under the most extreme cases would disqualification for prejudice be constitutionally required. *People v. Jackson*, 205 Ill. 2d 247, 276 (2001). A trial judge is presumed to be impartial. *Jackson*, 204 Ill. 2d at 276. Here, Mr. Martinez's claim fails because he presented no evidence connecting the civil litigation involving Leroy Orange and Mr. Martinez's own case. Mr. Martinez failed to demonstrate how he was prejudiced himself. See *People v. Maxwell*, 173 Ill. 2d 102, 120-21 (1996) (absent evidence that defendant himself was injured, evidence of physical abuse and coercion of confessions from other suspects at Area 2 does not warrant an evidentiary hearing).

Given Mr. Martinez's unsupported, overly broad allegations regarding Judge Dernbach's speculative unfairness, this claim has no arguable merit.

Finally, Mr. Martinez argued that his jury waiver was not knowing and voluntary because had he known about Judge Dernbach's ongoing litigation involving Leroy Orange, he never would have waived his right to a jury trial. However, whether a defendant's jury waiver was knowing and voluntary is constitutional in nature, and a section 2-1401 petition is not the proper venue for such a claim. *In re. Charles S.*, 83 Ill. App. 3d 515, 517 (1st Dist. 1980).

For the reasons stated herein, counsel has concluded that these issues would be without arguable merit. Therefore, counsel should be permitted to withdraw.

Respectfully submitted,

PATRICIA MYSZA
Deputy Defender
Brett C. Zeeb
BRETT C. ZEEB
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR PETITIONER-APPELLANT

**Additional material
from this filing is
available in the
Clerk's Office.**