

No. 22-7481 **ORIGINAL**

Supreme Court, U.S.  
FILED

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OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Anthony Allen — PETITIONER  
(Your Name)

vs.

People of the State of Illinois — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Supreme Court of Illinois

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Anthony Allen  
(Your Name)

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(Phone Number)

QUESTION(S) PRESENTED

- I. Whether appointed Appellate Counsel's missapprehended the law and facts by failure to brief and raise the following issues on appeal constitutes unreasonable if not ineffective assistance of appellate representation.
- II. Whether Petitioner has established the necessary cause and prejudice for leave to file a Successive Petition under the Act.
  - A. Whether the Appellate and Illinois Supreme Court's decision which overlooked or missapprehended the law or facts with Smith/Bailey announced the new substantive rules of law conflicts with decisions of this Court.
  - B. Whether the Lower Court's decision prejudice Petitioner's Smith/Bailey challenge that is needed to vacate his unconstitutional sentence and conviction which conflicts with decisions of this Court.

TABLE OF AUTHORITIES CITED

Case	Page Numbers
People v. Kuehner, 2015 IL 117695	5
People v. Smith, 233 Ill. 2d 1,5,17-18 (2009)	5,8-11
People v. Bailey, 2013 IL 113690 ¶ 57,64-65	5,-6,9,11
People v. Pitsonbarger, 205 Ill.2d 444,459 (2002)	6-7,10
People v. Hudson, 195 Ill. 2d 117, 126-27 (2001)	7
Stickler v. Greene, 527 U.S. 263, 284 n.24 (1999)	§
People v. Flowers, 138 Ill. 2d 218, 234 (1990)	7
People v. Partee, 268 Ill. App. 3d 857, 864 (1st Dist. 1994)	7
People v. Cowherd, 114 Ill. 3d 894, 898 (2d Dist.1983)	7
Teague v. Lane, 489 U.S. 288, 301 (1989)	7-10
Beard v. Banks, 542 U.S. 402, 411, n.3 (2004)	8
Schrivo v. Summerlin, 542 U.S. 348, 352 n.4 (2004)	8,10-12
Saffle <sup>V</sup> Parks, 494 U.S. 484, 495 (1990)	8
People v. Alberts, 383 Ill. App. 3d 374, 382 (4th Dist. 2008)	8
People v. De La Paz, 204 Ill. 2d 426, 434-35 (2003)	8-10
People v. Mack, 167 Ill. 2d 525 (1995)	9-11
Jackson v. Virginia, 443 U.S. 307, 99 S.Ct.2781 L.Ed. 2d 560 (1979)	10-11
Welch v. United States, 604 F.3d 408, 415 (7th Cir. 2010)	11-12
People v. Whitfield, 217 Ill. 2d 177, 201 (2005)	12

STATUTES AND RULES

28 U.S.C. § 1257 (a)	1
United State Constitution, Amendment XIV	2,10
Illinois State Constitution, 1970, Article 1, Section 2	2
Criminal Code 5/9-1 First degree murder	2,4-6,8-12
Armed Robbery Chapter 38, Section 18-2-A	2,4-6,8-9,11
United State Constitution, Amendment <del>IV</del>	4
725 ILCS §§ 5/122-1(a)(1)	6
725 ILCS § 5/122-1(f)	6,10
United State Constitution, Amendment <del>VIII</del>	4, 10

Petitioner, Anthony Allen, respectfully prays that this Honorable Court issue a Writ of Certiorari to review the judgment below.

## I.

### INDEX OF APPENDICES

The original judgment of conviction of the Petitioner was appealed to the Appellate Court of Illinois, First Judicial District, Fourth Division, which affirmed the conviction in an unpublished decision and is attached hereto as Appendix "G."

A petition for rehearing of the decision of the Circuit Court decision was ~~not~~ sent to me, but an attached letter was sent to the Illinois Supreme Court explaining why is attached hereto as Appendix "H."

The judgment of the decision of the Appellate Court of Illinois, First District was appealed to the Illinois Supreme Court for leave to file a late petition for leave to appeal is attached hereto as Appendix "C."

A petition for rehearing of the decision of the Appellate Court of Illinois was not sent to me, but an attached letter was sent to the Illinois Supreme Court explaining why is Attached hereto as Appendix "H."

The judgment of the decision to the Illinois Supreme Court was denied on March 29, 2023 and is attached hereto as Appendix "I."

## II.

### JURISDICTION

The judgment of the Appellate Court of Illinois, First Judicial District and the Illinois Supreme Court, which makes the jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a).

### III.

#### CONSTITUTIONSL PROVISION AND STATUTES

##### 1. United States Constitution, Amendment XIV:

Bound the State under (Illinois) to the federal constitution, that under Illinois State Constitution of 1970, Article I Section 2-Due Process of Equal Protects those fundamental right's by it's enforcement. See also Article 1 Section 6,7, and lastly 12-The Right to Remedy and Justice!

##### 2. Illinois State Constitution, 1970, Article 1, Section 2:

No person shall be deprived of life, liberty or property without the due process of law nor be denied the equal protection of the laws.

Petitioner trial court held that the appropriate remedy is to interpret the general verdict as a finding on felony murder, (See Appendix "D 1 of 2 (1)") as a result the Appellate Court vacated petitioner's conviction for the underlying felony, where both the language of the indictment and the evidence adduced at trial support that the conviction for murder were based on an act not alleged in the armed robbery itself. (See Appendix "B 1-2,F") Under Bailey, the jury's general verdict of guilty must be construed as verdict of guilt as to felony murder (predicated upon armed robbery) however, due to the evidence and the language that was brought out through trial, was not based on the armed robbery for felony murder, nothing in the armed robbery charged pertains to an allegation of driving. The murders occurred at a location completely different from that of the armed robbery itself. (See Appendix "B 1-2,F") The Appellate Court on review viewed the jury's general verdict convictions for first degree murder convictions, (See Appendix "B 1-2, C 1 of 4") where the appellate court misapprehended the law or facts, since the State was only prosecuting for felony murder, where the State nolle pros 9-1(a)(1) of intentionally and knowing murders at the end of trial that was outside the jury presents. (See Appendix "A,D 1 of 2 (6)") Therefore his first degree murder convictions has to be vacated.

##### 3. 5/9-1. First degree murder; death penalties; exceptions, separate hearing; proof; findings; appellate procedures; reversals.

- (a) A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death;
  - (1) he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or
  - (2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another; or
  - (3) he is attempting or committing a forcible felony other than second degree murder.

The trial court and appellate courts both used to increase petitioner punishment by applying certain enhancements in calculating the advisory guidelines range to convict the petitioner, where both courts vacated each one of these numbers from the evidence that was brought out through trial, but petitioner still stands convicted of two counts of first degree murders. (See Appendix "B 1-2,C 1 of 4,D 1 of 2 (1-2,6),A") Therfore those convictions should be vacated and petitioner should be release as soon as possible.

##### 4. Armed Robbery Chapter 38, Section 18-2-A:

While armed with a dangerous weapon, to Wit: A handgun, took property, to Wit: United States Currency and a 6-pack of beer from Wilfredo Camacho's presence by threatening the imminent use of force, in violation of Chapter 38,Section 18-2-A

of the Illinois Revised Statutes 1989 as amended and

There is nothing in this indictment that shows that from driving the car that killed the Pacini's was predicated upon the armed robbery for felony murder conviction that the trial court convicted petitioner under or was their an actual verdict by the jury. Which led the appellate court to used those general verdict forms to convict petitioner for two counts of first degree murders, which his first degree murders was nolle pros at the end of trial. The State was only prosecuting for felony murder so there was no reason to used general verdict forms. (See Appendix "A,B 1-2,C 1 of 4, D 1 of 2 (1-2,5-7),F, CI 87-90")

5. United State Constitution, Amendment IV:

Typically, the rights protected by a State Constitution mirror the rights protected by the federal constitution, however, a State constitution may grant additional rights. Here, the ultimate inquiry in analyzing Petitioner's conviction and sentence all together involves matters which were unconstitutionally permissible at its inception, during the jury trial, which actually was a bench trial, since the trial court knew that they was only prosecuting for felony murder and used those general verdict forms to say that the jury found petitioner guilt of felony murder, when actually it was the trial court. However, there was nothing in the armed robbery charged pertains to driving for the murders for the felony murder conviction or was it brought out through trial from the evidence that support the conviction for murders for the felony murder were based on an act alleged in the armed robbery. (See Appendix F,B 1-2)

6. United State Constitution, Amendment VIII:

Petitioner continues to face cruel and unusual punishment from unreasonable seizure, since he has done an extra 12-years or so in prison for two counts of first degree murders that was nolle pros at the end of trial during jury instruction, where the State was only prosecuting for felony murder. The general verdict forms had to be "treated not only as a conviction for felony murder but also for petitioner nolle pros first degree murders," where both (the Circuit and Appellate Courts) vacated either one of those charges from the evidence adduced at trial. (See Appendix "A,B 1-2,C 1 of 4,D 1 of 2 (6),F") Therefore, petitioner should be release as soon as possible.

## STATEMENT OF THE CASE

Petitioner and co-defendants droved from the Westside of Chicago to the Northside of Chicago, where they robbed a liquor store and the get-away driver waited outside. Petitioner and his co-defendants enter a car two blocks away from the armed robbery and droved West on Waveland for three miles unmolested, where Lt. Konior stated he saw a similar car, he conceded that co-defendant Smith was not driving erratically when he first seen us, plus nobody else was hurt as Smith droved through all those other streets. (R.224-34,252-54,279-90)

As Smith moved his car to the right and slowed down, Konior thought Smith was going to stop, but Smith suddenly accelerated and maneuvered through traffic and broadsided the Pacini's vehicle at Ashland and Diversey, three miles from the armed robbery and had a car accident, which killed the Pacini's where Petitioner was not the driver of the car, so all petitioner could do was tell Smith to stop, which he did. (R.279-90, 309-10, 703-07, 764-65)

Before selecting the jury and out of their hearing the State was making a motion to nolle pro se counts 1 and 2, first degree murders under Chapter 38, Section 9-1(A)(1) and 9-1(A)(2). (See Appendix "AA") Then at the end of trial, during jury instructions the State stated after petitioner gave his confessions or statements to the State witnesses, and after the defense counsel cross-examine them, petitioner never told them that it was their intent for Smith to speed up and go through an intersection, or that it was petitioner intent to cause anybody harm, the State nullified both counts, 9-1(A)(1) and 9-1(A)(2), which removed from petitioner case any mental state other than -- any mental state to commit the underlying felony. (See Appendix "A,D 1 of 2 (6)")

Petitioner trial attorney did not object to the general verdict forms. (See CI 87-90) The trial court gave its determination that the armed robbery charged pertains to an allegation of driving and was the predicate felony for felony murder under section 9-1(A)(3). (See Appendix "D 1 of 2 (1-2)") After the judge instructed the jury on first degree murder based on felony murder, (See Appendix "D 1 of 2 (2)") the jurors did not hear or was told before or after trial that the State nolle pros counts 9-1(A)(1) and 9-1(A)(2) first degree murders or what charge or charges was still pending. (See Appendix "AA,A") The trial court made the determination that the jury guilt was for felony murder instead of the jury, since there was no felony murder verdict forms or was there an actual verdict by the jurors on felony murder, where the jury was only instructed on felony murder and the State was only prosecuting petitioner with felony murder. (See Appendix "A,D 1 of 2 (1-4),CI 87-90")

Petitioner indictment and the language of the evidence adduced at trial for murder was based on an act not alleged in the armed robbery count, nothing in the armed robbery charged pertains to an allegation of driving. The murders occurred at a location completely different from that of the armed robbery, and the murders occurred as a result of flight from the police, not from the armed robbery itself. (See Appendix "B 1-2,F") Petitioner is contending that the

trial court erroneously applied certain enhancements in calculating the advisory guidelines range to convict the petitioner, where the general verdict forms for first degree murders had to be "treated not only as a conviction on felony murder, but also for the first degree murders that was nolle pros in 9-1(A)(1) and 9-1(A)(2), since the appellate court on direct appeal viewed the general verdict forms for first degree murders and not on the felony murder conviction, where the felony murder charge was not made during trial from the evidence adduced at trial and was not made in the armed robbery charged pertaining to an allegation of driving. (See Appendix "A,B 1-2,C 1 of 4,D 1 of 2 (1-7),F") The Appellate court missapprehended the law or facts, since the State was only prosecuting petitioner for felony murder, also the State nolle pros 9-1(A)(1) and 9-1(A)(2) at the end of trial during jury instruction, which was outside of the jury presents. (See Appendix "A,D 1 of 2(6)")

#### **REASONS FOR GRANTING THE WRIT**

##### **I.**

###### **WHETHER APPOINTED APPELLATE COUNSEL'S MISAPPREHENDED THE LAW AND FACTS BY FAILURE TO BRIEF AND RAISE THE FOLLOWING ISSUES ON APPEAL CONSTITUTES UNREASONABLE IF NOT INEFFECTIVE ASSISTANCE OF APPELLATE REPRESENTATION**

An Appellate attorney's discretion, use of their professional judgment and section of which an appeal issues have merit, are not immune from such review. As to each, it is incumbent on Counsel to be informed as to his or her options, legally and factually. This becomes more acute and important where Counsel, as here consider or file a Motion for Leave to Withdraw as Counsel on appeal. (See People v. Kuehner, 2015 IL 117695) That a proper assessment is that special problem are presented when Court-Appointed Counsel in criminal appeals determines that the appeal is wholly without merit and would be frivolous.

Here, the appellate attorney misapprehended the law and facts that the direct appeal decision was on felony murder when it explained:

Nothing in the armed robbery charged pertains to an allegation of driving, The murders occurred at a location completely different from that of the armed robbery, and the murders occurred as a result of flight from the police, not from the armed robbery itself. (See Appendix "E 5 of 6")

Thus, the armed robbery offense here served as the predicate felony for the felony murder charged as it had an independent felonious purpose from the murder. (See Appendix "E 5 of 6")

The appellate attorney misapprehended the law or facts, since nothing in petitioner armed robbery charged pertains to driving for the felony murder. (See Appendix "F") Therefore, the trial court lacked authority to determined the armed robbery charged pertains to an allegation of driving for the murders for felony murder conviction. (See Appendix "D 1 of 2 (1-2)")

The appellate attorney also stated that petitioner case was different than People v. Smith, 233 Ill. 2d 1,5,17-18 (2009) and People v. Bailey, 2013 IL 113690, ¶ 57, since

petitioner was only prosecuted for the charged based on the felony-murder rule. (See Appendix "E 3 of 6,D 1 of 2 (1-2,6)") However, the appellate court on direct appeal viewed the general verdict forms for first degree murders and not on felony murder conviction. Where the felony murder charged was not made during trial from the evidence adduced at trial, nor was the armed robbery charged pertaining to an allegation of driving.(See Appendix "F,B 1-2") Petitioner general verdict forms for first degree murders had to be "treated not only as a conviction on felony murder, but also for his nolle pros 9-1(A)(1) on first degree murders. See Bailey, 113690 at ¶ 64, which makes Petitioner case similar to Smith and Bailey, where the appellate court misapprehended the law or facts of petitioner case, since the State was only prosecuting petitioner on felony murder. (See Appendix "A,C 1 of 4,D 1 of 2 (6)") Petitioner should have been sent back to the trial court to be resentenced from the maximum sentences of 30-years for the armed robbery, instead of being convicted for first degree murders and receiving the severe prison sentence in Illinois; Natural Life!

Therefore, the indeph reiteration of the Statement of Facts by Appellate Counsel, with all due respect, may express a causal relationship with his failure to properly assess the merit of potential issues that could be considered raised on appeal, including but not limited to counsel's very own subjective opinion, personal bias and prejudice which may be undetached from the alleged nature of the charged and conviction of the offense.

## II.

### WHETHER PETITIONER HAS ESTABLISHED THE NECESSARY CAUSE AND PREJUDICE FOR LEAVE TO FILE A SUCCESSIVE PETITION UNDER THE ACT

Post-conviction petitions under the Act are used to vindicate constitutional rights. 725 ILCS § 5/122-1(a)(1) '(petitions can assert defects in criminal convictions amounting to "a substantial denial of [petitioner's] rights under the Constitution of the United States or the State of Illinois or both.") A petitioner is entitled to file one petition under the Act, but successive petitions reqire leave of court. 725 ILCS § 5/122-1(f).

Leave to file a successive petition should be granted where the petitioner can show two things- cause and prejudice. 725 ILCS § 5/122-1(f) (leave should be granted "if a petitioner demonstrates cause for his failure to bring the claim in his initial post-conviction proceedings and prejudice results from the failure"). A petitioner shows cause "by identifying an objective factor that impeded his ability to raise a specific claim during hid initial post-conviction proceedings." Id. Prejudice is shown "by demonstrating that the claim not raised during his initial post-conviction proceedings so infected the trial that the resulting conviction and sentence violated due process." Id.

The cause-and-prejudice test balances the interest of finality against the need to ensure that constitutional claims can be heard on the merits. See, e.g., People v. Pitsonbarger, 205

Ill. 2d 444, 459 (2002) ("We hold today that the cause-and-prejudice test is the analytical tool that is to be used to determine whether fundamental fairness requires that an exception be made to section 122-3 so that a claim raised in a successive petition may be considered on its merits.").

Petitioner can show both cause and prejudice for the reasons discussed below.

**A. WHETHER THE APPELLATE AND ILLINOIS SUPREME COURT'S DECISION WHICH OVERLOOKED OR MISSAPPREHENDED THE LAW OR FACTS WITH SMITH/BAILEY ANNOUNCED THE NEW SUBSTANTIVE RULES OF LAW CONFLICTS WITH DECISIONS OF THIS COURT**

Petitioner has established cause to challenge his conviction and sentence in the Successive Petition because this claim was not reasonably available to him before the decision in Smith/Bailey. The Supreme Court of Illinois has recognized that a new legal rule, not previously available to Petitioner, establishes cause for filing a successive petition under the Act. Pitsonbarger, 205 Ill. 2d at 460 ("a showing that the factual or legal basis for claim was not reasonably available to counsel...would constitute cause under" the cause-and-prejudice test for filing successive petitions) (citing *Stickler v. Greene*, 527 U.S. 263, 284 n.24 (1999)).

The Lower Courts have repeatedly affirmed that a new rule of law establishes cause for filing a successive petition under the Act. *People v. Hudson*, 195 Ill. 2d 117, 126-27 (2001) (petitioner established cause for failing to raise issue on direct appeal because the Illinois Supreme Court did not definitively speak to issue until after petitioner's direct appeal); *People v. Flowers*, 138 Ill. 2d 218, 234 (1990) ("There is an important principle involved and the failure of defendant to raise the issue prior to the court's resolution of it [later case] should not bar consideration of it now."); *People v. Partee*, 268 Ill. App. 3d 857, 864 (1st Dist. 1994) (granting petitioner's evidentiary hearing because "the law has changed significantly since the appellate court ruled on [petitioner's] direct appeal"); *People v. Cowherd*, 114 Ill. 3d 894, 898 (2d Dist. 1983) ("Since the basis of defendant's claim is predicated upon case law developed after affirmance of his conviction on direct appeal, fundamental fairness under the circumstances here requires relaxation of the doctrine of res judicata."))

Here, the initial question is whether Smith and Bailey represent a "New Rule." A decision announces a new rule "if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague v. Lane*, 489 U.S. 288, 301 (1989) (Emphasis in original). However, the Smith and Bailey should apply retroactively here.

Under Teague and its progeny, a defendant whose conviction is final, like petitioner, may invoke a new rule of law in one of two situations. First, the defendant may rely on a new

substantive rule placing certain conduct or classes of defendants beyond the State's power to proscribe. Teague, 489 U.S. at 307-08; see also Beard v. Banks, 542 U.S. 402, 411, n.3 (2004) ("Rules that fall within what we have referred to as Teague's first exception 'are more accurately characterized as substantive rules not subject to [Teague's]bar'"). This exception for substantive rules includes "rules prohibiting a certain category of punishment for class of defendants because of the Unified Code of Corrections, where the court relies on the presence of the improper aggravating factor set forth. Smith and Bailey violation are never harmless. Smith, 233 Ill. 2d at 25. Because the rule of Smith and Bailey produce acquittals on charges of intentional/knowing murder, it is a substantive rule that should apply retroactively to Petitioner. Therefore, petitioner first degree murders of intentional/knowing murders has to be vacated.

A new rule is substantive if it "alters the range of conduct or class of persons that the law punishes." Schriro v. Summerlin, 542 U.S. 348, 352 n.4 (2004); see Saffle v. Parks, 494 U.S. 484, 495 (1990)(a rule is substantive if it "prohibits the imposition of...punishment on a particular class of person"); People v. Alberts, 383 Ill. App. 3d 374, 382 (4th Dist. 2008) (a substantive rule "alters the range of conduct or class of persons that the law punishes"). New substantive rules apply retroactively because they "carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." Schriro, 542 U.S. at 352 (internal quotations and citation omitted)(emphasis added). Here, Petitioner more aptly fits in the latter category.

Similarly, here, the rule of Smith and Bailey did not alter the elements of first degree murder, (See Appendix "D 1 of 2 (6)") or outright bar a defendant, like petitioner, from receiving any punishment. While petitioner's conviction was final prior to Smith and Bailey, the new rule announced therein should apply retroactively, as it is either a substantive one, or a procedural one necessary to ensure fundamental fairness and the accuracy of the criminal proceeding. People v. De La Paz, 204 Ill. 2d 426, 434-35 (2003)(Citation omitted). Therefore, petitioner is entitled for his felony murder conviction to be vacated, where the language of the indictment and the evidence adduced at trial for murder was based on an act not alleged in the armed robbery count. Nothing in the armed robbery charged pertains to an allegation of driving, the murders occurred as a result of flight from the police, not from the armed robbery itself. (See Appendix "B 1-2,F") This Court has to vacated petitioner's first degree murder conviction and sentence, as his felony murder conviction is predicated on the general verdict forms for first degree murder conviction that was nolle pros at the end of trial during jury instruction, that was outside of the jury presents. (See Appendix "A,C 1 of 4,D 1 of 2 (1-2,6),CI 87-90")

First, petitioner is not simply claiming that intentional/knowing murder was proven beyond a reasonable doubt, under Smith and Bailey, petitioner stands acquitted of first degree murders, also 9-1(A)(1) and 9-1(A)(2) was nolle pros. (See Appendix "A,D 1 of 2 (6)") Certainly, fundamental fairness and "public reputation of judicial proceedings" must be implicated where two defendants under the exact same pattern-differing only with respect to when their convictions were final relative to Smith and Bailey-recieve such disparate judice. The other is not acquitted of intentional/knowing murder and can be subject to the most severe prison sentence in Illinois: Natural Life! The rule of Smith, 233 Ill. 2d at 29 (2009) and Bailey, 113690 at ¶ 64-65 is precisely aimed at "fundmental fairness and accuracy of the criminal proceeding" and therefore should apply retroactively. Teague, 489 U.S. at 307-08.

Seconly, unlike Apprendi violations, Smith/Bailey violations can never be harmless. In Smith, the State attempted to invoke the doctrine of harmless error by arguing that "the evidence overwhelmingly supports a finding that the defendants were guilty of intentional/knowing murder." Smith, 233 Ill. 2d at 25. The Court noted that the State's argument "[was] not well taken," and held that a trial court's refusal to give separate verdict forms was akin to depriving the defendant of "an actual verdict." Id. at 25-26 (comparing the error to insufficient verdicts addressed in People v. Mack, 167 Ill. 2d 525 (1995)). "[H]armless error review presupposes an actual verdict." Smith, 233 Ill. 2d at 25 (quoting Mack, 167 Ill. 2d at 539, which held that a verdict that is deficient for failing to set forth the jury's specific findings is never subject to harmless error)(emphasis in original). The Smith Court therefore considered that the instant error was tantamount to a deficient verdict that must be remedied in all cases.

Here, the instant error more egregious than simply a Smith violation, as under Bailey, the appellate court review from the evidence that was brought out through trial supports a finding that the jury found me guilty of intentional/knowing murder from the general verdict forms. (See Appendix "B 1-2,C 1 of 4") When the appellate court on direct appeal determination was from the language of the indictment and the evidence adducted at trial for murders was based on an act not alleged in the armed robbery count. Nothing in the armed robbery charged pertains to an allegation of driving, the murders occurred as a result of flight from the police, not from the armed robbery itself. (See Appendix "B 1-2,E") However, the appellate court overlooked or misapprehended the law or facts, since the State only prosecuted petitioner for felony murder. (See Appendix "A,D 1 of 2 (6)") Smith and Bailey, in concert, did alter "the bedrock procedural elements essential to the fairness of the proceedings" and they must apply retroactively to Petitioner. De La Paz, 204 Ill. 2d at 434 (internal quotations and citations omitted). The sentencing court was forclosed from making its own determination that the armed robbery charged pertains to an allegation of driving and was the predicated felony for felony murder from the jury's general verdict forms. (See Appendix "D 1 of 2 (1-5)") Petitioner

went from a jury trial to a bench trial, when the trial court determined the jury's guilt of felony murder, instead of the jury, which the Court was only prosecuting petitioner on felony murder. (See Appendix "A,D 1 of 2 (1-6)") The jury was never told what charge or charges that was still pending after the jury was given their instruction at the end of trial. The sentencing and appellate courts used to increase petitioner punishment by applying certain enhancements in calculating the advisory guidelines range to convict the petitioner, where he was not "properly found convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him. Schriro, 542 U.S. at 352. Therefore, unlike Apprendi, Smith and Bailey remedy errors that are never harmless, and failing to apply them to petitioner, at the very least, seriously diminishes "the likelihood of an accurate conviction. Da La Paz, 204 Ill. 2d at 435 (quoting Teague, 489 U.S. at 313). Petitioner conviction and sentence for first degree murders must be vacated. Smith, 233 Ill. 2d at 29 (vacating the predicate felony that served as the basis for felony murder conviction). Petitioner predicate felony that served as the basis for felony murder conviction was his first degree murders and his conviction for first degree murder was from his felony murder conviction, where his first degree murders was nolle pros at the end of trial during jury instruction, that was outside of the jury's presents. (See Appendix "A,D 1 of 2 (6),CI 87-90") The instant error was tantamount to a deficient verdict that must be a remedy for this case, where petitioner sentence and conviction for first degree murders has to be vacated. Smith, 233 Ill. 2d at 25 (quoting Mack, 167 Ill. 2d at 539, which held that a verdict that is deficient for failing to set forth the jury's specific finding is never subject to harmless error)(emphasis in original). Therefore, petitioner's first degree murders has to be vacated.

Petitioner's as applied challenge under the Illinois Constitution where a decision announces new rule "if the result was not dictated by precedent existing at the time petitioner's conviction became final." Petitioner has established cause to bring this claim now upon case law developed after affirmance of his conviction on direct appeal, fundamental fairness under the circumstances here requires relaxation of the doctrine of *re* judicata.

**B. WHETHER THE LOWER COURT'S DECISION PREJUDICE PETITIONER'S SMITH/BAILEY CHALLENGE THAT IS NEEDED TO VACATE HIS UNCONSTITUTIONAL SENTENCE WHICH CONFLICTS WITH DECISIONS OF THIS COURT**

Petitioner has also met the prejudice prong of the cause-and-prejudice test. A petitioner "show prejudice by demonstrating that the claim not raised during his initial post-conviction proceedings so infected the trial that resulting conviction and sentence violated due process." 725 ILCS § 5/122-1(f)(2); see also Pitsonbarger, 205 Ill. 2d at 464. Here, as established in detail in the Successive Petition, Petitioner's current sentence of natural life for felony murder, when the trial court convicted him was without authority and his unconstitutional under the Eighth Amendment and thus violates due process under the Fourteenth Amendment, satisfying the prejudice prong. See *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 L.Ed. 2d

560 (1979)(A conviction based upon a charge not made violate due process). Nothing in the armed robbery charged pertains to an allegation of driving, the jury returned a "General" guilty verdict for first degree murders and armed robbery. (See Appendix "B 1-2,C 1 of 4,D 1 of 2 (5 & 7),F,CI 87-90")

The rules in Smith and Bailey resulted in defendant facing "a punishment the law cannot impose upon him." (Internal quotation marks omitted) Schriro, 542 U.S. at 351-52 (2004). Although neither Smith nor Bailey altered the elements of first degree murder, they nonetheless resulted in the prohibition of some types of punishment. As, such this Court hold that these rules were substantive and not procedural. Accord Welch v. United States, 604 F.3d 408, 415 (7th Cir. 2010)(Holding that a decision by this Court that "narrowed substantially" the defendant's exposure to enhanced sentence of imprisonment was substantive and retroactively applicable on collateral review), cert. denied, \_\_\_ U.S. \_\_\_, 131 S.Ct. 3019 (2011). Accordingly, the rules announced in Smith and Bailey apply retroactively on collateral review.

Under Bailey, the jury's general verdict of guilt must be construed as a verdict of guilt as to the felony murder, (predicated upon armed robbery) the appellate court noted on review that the trial court determined the jury's guilt from the general verdict forms for felony murder, (See Appendix "D 1 of 2 (1-2)") However, the appellate court determined that the evidence and the language that was brought out through trial, was not based on the armed robbery for felony murder. Nothing in the armed robbery charged pertains to an allegation of driving, the murders occurred at a location completely different from that of the armed robbery, and the murders occurred as a result of flight from the police, not from the armed robbery itself. (See Appendix "B 1-2,F") The appellate court overlooked or misapprehended the law or facts of petitioner sentence and convictions for first degree murders on mental state, since the State was only prosecuting for felony murder after they nolle pros 9-1(A)(1) and 9-1(A)(2) at the end of trial during jury instruction, that was outside the presents of the jury, which his first degree murders has to be vacated. (See Appendix "B 1-2,C 1 of 4,D 1 of 2 (6),A") The sentencing and appellate courts used to increase plaintiff punishment by applying certain enhancements in calculating the advisory guidelines range to convict the petitioner and deprived him of an actual verdict by the jury's. Smith, 233 Ill. 2d at 25 (quoting Mack, 167 Ill. 2d at 539, where the general verdicts forms for first degree murders had to be "treated not only as a conviction on felony murder, but also for his nolle pros first degree murders 9-1(A)(1) on mental state." Bailey, 113690 ¶ 64. Where Petitioner should have been sent back to the trial court, so that he could be resentenced from the maximum sentence of 30-years for the armed robbery. Instead of receiving the most severe sentence in Illinois natural life, which both courts acquitted him of the very conduct of either first degree murders and felony murder convictions from the evidence adduced at trial and those convictions and sentences has to be vacated. The change is certainly a "substantive liability" under the reasoning in Welch,

604 F.3d at 415. And Petitioner certainly now faces a punishment that the law cannot impose upon him." Schriro, 542 U.S. at 352. According, the Smith and Baily rules applies retroactively as a new substantive rule and they must apply to petitioner.

Moreover, the prejudice prong is met where a petitioner "received a more onerous sentences," than should have been imposed under the law. People v. Whitfield, 217 Ill. 2d 177, 201 (2005). Petitioner, therefore, has established both the necessary cause and prejudice, such that the new substantive rules of law in Smith and Bailey applies to Petitioner's sentence and convictions in his Successive Petition where he should be permitted to challenge the constitutionality of his conviction and sentences, and release him immediately from his unreasonable seized from serving an extra ten-years or so in prison by vacating his conviction and sentence for two counts of first degree murder on mental state and natural life from the general verdict forms that served as the basis predicate upon the felony murder conviction. This Court should grant review.

#### CONCLUSION

The order of the Appellate Division should be reversed and petitioner first degree murders on mental state should be EXPUNGE from the court records and petitioner should be IMMEDIATELY RELEASE, or any other appropriate relief. For each of these reasons set forth above, this Court should grant a writ of certiorari.

Respectfully submitted,

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EXHIBIT "A A 11  
APPENDIX

1 THE COURT: Anthony Allen.

2 (The following proceedings took place  
3 out of the presence and hearing of  
4 the prospective jurors.)

5 THE COURT: The record is going to reflect the  
6 cause is resumed. We are selecting the jury in the  
7 case of People versus Anthony Allen, 9-10926.

8 Defense counsel is present. State is present. We  
9 are out of the presence of the venire.

10 Now, Mr. Needham, what if anything with  
11 respect to the indictment?

12 MR. NEEDHAM: Judge, at this time we are going to  
13 be making a motion to nolle pros Counts 1 and 2,  
14 those counts alleging first degree murder under  
15 Chapter 38, Sections 9-1-A(1) and 9-1-A(2). We will  
16 be proceeding on first degree murder in Count 3,  
17 under 9-1-A(3) and the armed robbery count.

18 THE COURT: Very well. Upon nolle of Counts 1  
19 and 2, your demand for trial is sustained,  
20 Mr. Bastianoni.

21 MR. BASTIANONI: Thank you, your Honor.

22 THE COURT: Very well. That being the case, all  
23 discovery being completed, I have a list of all the  
24 witnesses, is that correct?

EXHIBIT "A" 11  
APPENDIX

1 Judge. Under the evidence that you've heard so far.  
2 this is such a case.

3 I would point out that during Mr.  
4 Bastianoni's cross-examination of two witnesses,  
5 both, assistant state's attorney Rivera and Detective  
6 Tony Villardita, both of those witnesses being  
7 persons who Allen gave confessions or statements to.

8 In both of those cross-examinations, Mr.  
9 Bastianoni elicited that Mr. Allen never told them  
10 that it was their intent for Smith to speed up and go  
11 through an intersection, or that it was Mr. Allen's  
12 intent to cause anybody harm.

13 So, I think that the Defense has kind of  
14 put this issue in play, and it indicates where we  
15 rolled both counts, 1 and 2, which removed from this  
16 case any mental state other than -- any mental state  
17 to commit the underlying felony.

18 So, in this case when Mr. Bastianoni says  
19 it's tantamount to making it a strict liability  
20 offense, we are still required to prove mental state  
21 required to commit the offense or convict him of the  
22 offense of armed robbery, which we've been attempting  
23 to do. But once somebody dies during the commission  
24 of that, the mental state, whether he intended that,

EXHIBIT "B"  
APPENDIX

1-93-2453

Additionally, defendant has failed to demonstrate what defense would have succeeded had counsel not conceded the armed robbery charge so that the jury would have acquitted him. Based upon the Strickland standard, we find that defendant has failed to meet his burden of proof.

Next, defendant contends that his sentence for armed robbery must be vacated where the armed robbery was the predicate felony for the felony murders. Based upon People v. Johnson (1993), 154 Ill. 2d 356, 374, 609 N.E.2d 294, defendant contends that his conviction and armed robbery sentence must be vacated because the armed robbery was the predicate felony for both the felony murder and "both convictions were based upon the same conduct \* \* \*." The State argues that the offenses are interrelated yet distinct because each offense involved a different victim and a different physical act although they occurred close in time.

Here, we find that both the language of the indictment and the evidence adduced at trial support the State's conclusion that the convictions for murder were based on an act not alleged in the armed robbery count. Nothing in the armed robbery charge pertains to an allegation of driving. The murders occurred at a location completely different from that of armed robbery, and the murders occurred as a result of flight from police, not from the armed robbery itself. Here, defendants implemented their plan of a "stick-up" with a gunman, lookouts and a getaway car driver.

After defendant produced the gun and held it at the store clerk, the victim turned over the money. It was only after the robbers fled the scene and were attempting to evade the police, that codefendant Smith proceeded through two stop lights and collided with the Pancini's car with "tremendous force." The cases cited by defendant do not pertain to similar circumstances since here the murders were brought about by additional acts of driving, accelerating, speeding and disregarding traffic lights in attempt to avoid the police.

Accordingly, the judgment of the circuit court is affirmed.

Affirmed.

McNAMARA, P.J. with RAKOWSKI and ZWICK, JJ., concurring