IN THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT
LASALLE COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, **Plaintiff.**	)	
v.	)	**60 CF 753**
CHESTER WEGER, **Defendant.**	)	

MOTION TO DISMISS DEFENDANT'S AMENDED SUCCESSIVE POST-CONVICTION PETITION.

The People of the State of Illinois, by Will County State's Attorney James W. Glasgow, appointed as special prosecutor for the People of the State of Illinois in this matter, and his assistant, Colleen M. Griffin, move to dismiss defendant's amended successive post-conviction petition, and state as follow:

INTRODUCTION

Defendant in this case was convicted of the murder of Lillian Oetting, who, along with two friends, Frances Murphy and Mildred Lindquist, were brutally murdered in the Starved Rock State Park, in 1960. Defendant worked as a dishwasher at the Lodge at that State park, and was there on the day of the murders. Beside for other evidence against defendant, defendant confessed to this brutal slaying. Defendant throughout his petition insists that his confession was coerced and false, and that there was no other evidence linking him to this crime. However, several courts have found

that defendant's confession was not coerced, and that it was corroborated. The Illinois State courts have found that defendant's confession was not coerced:

> The confession was amply corroborated by other circumstances in evidence. Many of Weger's coemployees testified that they had noticed scratches on his face on the evening of the 14th or shortly thereafter. An examination of the jacket he said he was wearing on the day of the murders revealed bloodstains thereon. The owner of the airplane Weger said he saw was located and testified that he had indeed been flying in the Starved Rock area on the day of the murders. There was also testimony by a wood expert that a piece of wood found in Mrs. Oetting's head came from a long club found near the scene of the murders, which the defendant had confessed was one of the murder weapons. Other physical evidence found at or near the scene of the crime all tend to corroborate further the defendant's confession. When all the facts and circumstances are considered, together with the confession, all elements of the corpus delicti were established beyond any reasonable doubt.

People v. Weger, 25 Ill. 2d 370, 381–82, 185 N.E.2d 183, 189 (1962).

This decision regarding defendant's confession was again affirmed in defendant's federal habeas corpus action, wherein the Court stated:

> Petitioner's first contention is that several confessions which he made and which were introduced at his trial were involuntary. This contention was advanced in the appeal from his conviction and rejected by the Illinois Supreme Court in People v. Weger, 25 Ill.2d 370, 185 N.E.2d 183 (1962). The court's determination was based on evidence introduced in the trial court's hearing on petitioner's motion to suppress the

confessions. Under 28 U.S.C. s 2254(d), there is a presumption of correctness of this decision unless one of eight enumerated conditions is present. Since none of them is, petitioner has the burden of establishing by convincing evidence that the state court's determination was not supported by the record. LaVallee v. Delle Rose, 410 U.S. 690, 93 S.Ct. 1203, 35 L.Ed.2d 637 (1973). Moreover, since the material facts were adequately developed at a full and fair hearing before the state court, no new hearing in this court is required. United States ex rel. Kirby v. Sturges, 510 F.2d 397 (7th Cir.), cert. denied, 421 U.S. 1016, 95 S.Ct. 2424, 44 L.Ed.2d 685 (1975).

The Illinois Supreme Court determined after reviewing the entire record that, since petitioner confessed immediately after a tearful meeting with his family, it was most likely that his confession was triggered by that encounter and not by police coercion. Therefore, the confession was held to be voluntary.

We have reviewed the same record, on file with this court, and conclude that the state court's decision was amply supported by the facts. The only coercive aspects to the police questioning, according to petitioner's testimony, were the rough tone of voice of the questioners, insulting remarks about petitioner's wife and, primarily, threats that petitioner would go to the electric chair if he did not confess. These allegations of coercion were held by the court not to have triggered the confession:

'Even if defendant's testimony that threats of the electric chair and promises of a less severe punishment were made earlier in the evening and after the departure of his family is accepted as true, the possibility that these threats and promises suddenly became effective to produce a confession is most remote. Similar earlier threats had

not had any effect, and those made before the arrival of the family were apparently not considered important enough to mention to his father when they were alone. The defendant's suggestion that he confessed because he became enraged at remarks indicating that his wife was untrue is not clear nor its role in producing his confession apparent. We conclude that the spontaneous appeal of his mother must have been the factor that triggered the confession and that it was not involuntary.' 185 N.E.2d at 188—89. U. S. ex rel. Weger v. Brierton, 414 F. Supp. 1150, 1151–52 (N.D. Ill. 1976). The United Supreme Court denied defendant's petition for writ of certiorari. Weger v. Brierton, 434 U.S. 850, 98 S. Ct. 161, 54 L. Ed. 2d 119 (1977).

Beside for the fact that the courts have found that defendant's confession was voluntary, defendant is incorrect that this was the only evidence against him. While defendant continually asserts that this was the only evidence in this case, defendant ignores the fact that he also told Doctor Meyer Kruglik[1], a physician and surgeon, specializing in psychiatry, on November 17, 1960, in the LaSalle County jail, while it was only the two of them present, that he made his confession willingly, and that he had done so after his mother had kissed him and told him to tell the truth. There was no question in Kruglik's mind that defendant was competent to relate to him what he was telling him. Defendant told Kruglik, that he had committed the offenses, and relayed facts about the crime.

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[1] Doctor Kruglik helped develop the profile that led to the arrest of serial killer Richard Speck.https://www.chicagotribune.com/lifestyles/ct-xpm-2010-05-15-ct-met-0516-obit-kruglik-20100515-story.html. Also, according to the Prisoner Review Board decision to deny defendant parole (attached hereto as exhibit A), on September 27, 1960, Deps. Dummett and Hess drove defendant to Chicago for an examination by State prison pyschiatrist Meyer Kruglik, where defendant was given a complete diagnostic interview and was questioned about the murders, which exam took about four hours. As such, defendant was not unfamiliar with Doctor Kruglik when he made his November statements to him.

Kruglik did not threaten the defendant during this conversation. R. 4754-4762. Kruglik's report indicated that defendant told him about two additional crimes, crimes that Kruglik would have not known about, lending credence to defendant's statements to Kruglik.[2] Defendant's statements regarding the red plane flying overhead were corroborated. R. 4740-4741. Defendant also lied at trial, and said he was writing a letter at the time of this crime. R. 1640. The defendant told a deputy Don Cila on November 23, 1960, that the two worst things he ever did was to take a lie detector test in Chicago, and going to Starved Rock and putting all the pieces together for the "dumb cops." R. 1743-1748. Defendant worked at the Lodge, and was there the day the victims were murdered. Defendant's repeated insistence that the "false confession" was the only evidence against him, is simply not true.

LEGAL STANDARD [3]

The Post–Conviction Hearing Act (Act) (725 ILCS 5/122–1 et seq. (West 2012)) provides a method by which a criminal defendant can assert that his conviction was the result of a substantial denial of his rights under the United States Constitution or Illinois Constitution or both. *People v.*

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[2] In fact, in case 60-11-757, defendant was charged on December 23,1960 with assault on Jean Kapps, attempting to ravish and carnally know, the said Jean Kapps. That case was dismissed after defendant was convicted in the instant case. In November, 1960, defendant was charged with larceny in case 60-11-756, with attempting to rob James Supan, which case was dismissed after defendant's conviction in the instant case. Also in November, 1960, defendant was charged in case 60-11-758, with robbing and assaulting Virginia Funfainn, which case was dismissed after the defendant's conviction in the instant case. This court can take judicial notice of the court's dockets.

[3] While defendant elects to start his petition with various sections and subsections in which he generally attacks the sufficiency of the evidence against him, and certain legal proceedings he believes were not followed correctly (such as his attorney not being provided discovery, which of course was not necessary in 1960), the State will begin with a summation of the law applicable to these proceedings, something defendant does not adequately provide this Court in his petition. Then, the State will address each of defendant's sections and subsections accordingly.

Petrenko, 237 Ill.2d 490, 495–96 (2010). A postconviction proceeding is not an appeal from the judgment of conviction, but rather is a collateral attack on the trial court proceedings. *Id.* at 499. In noncapital cases, the Act provides for three stages. *People v. Carter*, 2017 IL App (1st) 151297, ¶ 125. During the second stage, defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Domagala*, 2013 IL 113688, ¶ 35. Evidentiary questions are not to be resolved at this stage. *Id.* As the supreme court stated in *People v. Coleman*, 183 Ill.2d 366, 385. (1998)(emphasis added):

> "At the dismissal stage of a post-conviction proceeding, all *well-pleaded* facts that are not positively rebutted by the original trial record are to be taken as true. The inquiry into whether a post-conviction petition contains sufficient allegations of constitutional deprivations does not require the circuit court to engage in any fact-finding or credibility determinations. The Act contemplates that such determinations will be made at the evidentiary stage, not the dismissal stage, of the litigation. Due to the elimination of all factual issues at the dismissal stage of the post-conviction proceeding, a motion to dismiss raises the sole issue of whether the petition being attacked is proper as a matter of law."

However, at the pleading stage of postconviction proceedings, it is only *well-pleaded* allegations in the petition and supporting affidavits *that are not positively rebutted* by the trial record that need be taken as true. At the pleading stage of postconviction proceedings, all well-pleaded allegations in the petition and supporting affidavits that are not positively rebutted by the trial record are to be taken as true, and the court is precluded from making factual and credibility determinations, which can "be made only at a third-stage evidentiary hearing." *People v. Robinson*, 2020 IL 123849

¶¶ 45, 61. Moreover, evidence is not "positively rebutted simply because it was contradicted by the evidence presented at trial." *Id.* ¶ 60. "For new evidence to be positively rebutted, it must be clear from the trial record that no fact finder could ever accept the truth of that evidence, such as where it is affirmatively and incontestably demonstrated to be false or impossible ***." *Id.* However, the People would submit that, if defendant's allegations in his petition specifically rebut each other, as they do here, they are not well-pleaded, and can be dismissed at second stage.[4]

"Substantively, in order to succeed on a claim of actual innocence, the defendant must present new, material, noncumulative evidence that is so conclusive it would probably change the result on retrial. For newly discovered evidence to warrant a new trial, the evidence must be: (1) sufficiently conclusive to probably change the result on retrial; (2) material and not cumulative; and (3), must have been discovered after the trial and be of such nature that defendant could not have

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[4] This submission finds support in another context where all well-pleaded facts are to be accepted as true, when a defendant is attempting to overcome a default. In *Trans World Airlines, Inc. v. Hughes*, 308 F. Supp. 679, 683 (S.D.N.Y. 1969), supplemented, 312 F. Supp. 478 (S.D.N.Y. 1970), and aff'd as modified, 449 F.2d 51 (2d Cir. 1971), rev'd sub nom. *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, the court discussed well-pleaded facts. In that case, the court concluded that a defendant may show that an allegation is not well pleaded, for example, when made indefinite or erroneous by other allegations in the same complaint. Furthermore, two United State's Supreme Court cases have discussed a plausibility factor when faced with the question of whether an allegation is well-pleaded. In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Court stated that "naked assertion[s]" devoid of factual enhancement will not establish justiciable damages supportive of a litigatable case. 550 U.S. at 557. In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Court stated "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " 556 U.S. at 678 (*quoting Twombly*, 550 U.S. at 570). Also, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* The Seventh Circuit, in *Silha v. ACT, Inc.*, 807 F.3d 169, 174 (7th Cir. 2015) (*quoting Iqbal*, 556 U.S. at 679), defines well pleaded factual allegations as those that discard pleadings that are "no more than conclusions" and that "plausibly give rise to an entitlement of relief." *Carlsen v. GameStop, Inc.*, 833 F.3d 903, 914 (8th Cir. 2016). Here, defendant's allegations are not well-pleaded where they are made erroneous by defendant's other, contradictory allegations, as well as being implausible. As such, it is the State's position that this Court can dismiss defendant's contentions on this basis.

discovered the evidence by exercising due diligence. *People v. Carter*, 2013 IL App (2d) 110703, ¶ 75. "New means the evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence. [Citation.] Material means the evidence is relevant and probative of the petitioner's innocence. [Citation.] Noncumulative means the evidence adds to what the jury heard. [Citation.]" *People v. Coleman*, 2013 IL 113307, ¶ 96.

The court also must be able to find that petitioner's new evidence is so conclusive that it is more likely than not that no reasonable juror would find him guilty beyond a reasonable doubt. *People v. Sanders*, 2016 IL 118123, ¶ 47. The evidence must be considered together, and not in isolation. *People v. Gonzalez*, 2016 IL App (1st) 141660, ¶ 28. A freestanding claim of actual innocence requires just that—a freestanding claim.

> "Under the due process clause of the Illinois Constitution of 1970 (Ill. Const. 1970. art. I, § 2), a [petitioner] can raise in a post-conviction proceeding a 'free-standing' claim of actual innocence based on newly discovered evidence. [Citation.] A free-standing claim of innocence means that the newly discovered evidence being relied upon 'is not being used to supplement an assertion of a constitutional violation with respect to [the] trial.' [Citations.]" *People v. Orange*, 195 Ill.2d 437, 459 (2001) (*quoting People v. Hobley*, 182 Ill.2d 404, 443–44 (1998).[5]

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[5] Defendant's petition in this case, while purportedly raising a free-standing claim of actual innocence, in fact does not raise a free-standing claim of actual innocence, as the entirety of the petition attempts to interject other issues, *i.e.* that his confession was coerced, that he was not provided *Brady* material, that the police arrested him without probable cause, all in an attempt to muddy up the actual issue here, whether he has raised a sufficient claim of actual innocence. Because of this, defendant's petition is extremely difficult to reply to, and the State would suggest that, if this case does proceed to any type of evidentiary hearing, defendant be advised as to any limitations this Court might impose on his interjection of non-issues.

People v. Gonzalez, 2016 IL App (1st) 141660, ¶ 29.

Postconviction hearings may be held at the second and third stages. At the second stage, the court may hold a dismissal hearing on the State's motion to dismiss. *People v. Hatchett*, 2015 IL App (1st) 130127, ¶ 27. At the third stage, the court holds an evidentiary hearing. *Id.* Rule 1101(b)(3) does not specify that the rules of evidence are inapplicable only during second-stage hearings, or only during third-stage hearings. Instead, Rule 1101(b)(3) provides that the rules of evidence are inapplicable to "postconviction hearings" generally and makes no distinction between second and third-stage hearings. In *People v. Velasco*, 2018 IL App (1st) 161683, ¶¶ 88-132, the court indicated that the supreme court thereby clearly indicated that the rules of evidence are inapplicable at both types of hearings, citing *See generally, People v. Gibson*, 2018 IL App (1st) 162177.

In *Velasco*, the court indicated that hearsay evidence may be treated differently at the second stage than at the third stage. At the second stage, the well-pleaded facts in the petition and accompanying affidavits, including any affidavits containing hearsay, which do not conflict with the record, or the State would submit, each other, are taken as true when determining whether a defendant has made a substantial showing of his innocence so as to advance the petition to a third-stage evidentiary hearing; no credibility determinations are made. *People v. Gacho*, 2016 IL App (1st) 133492, ¶ 13. By contrast, if a petition advances to a third-stage evidentiary hearing, a defendant will "no longer enjoy[ ] the presumption that the allegations in his petition and accompanying affidavits are true." *See Gacho*, 2016 IL App (1st) 133492, ¶ 13. Instead, as to a claim of actual innocence, the postconviction court at the third stage is to decide the weight to be given the testimony and evidence, make credibility determinations, and resolve any evidentiary conflicts. *People v. Carter*, 2013 IL App (2d) 110703, ¶ 74. In determining the weight to be given

the new evidence and whether all the evidence, new and old, is so conclusive that it is more likely than not that no reasonable juror would find defendant guilty beyond a reasonable doubt on retrial, the court at the third stage must necessarily consider whether the new evidence would ultimately be admissible at a retrial. *Valasco*, ¶ 118. Also, while double hearsay is generally admissible, at least some parts must be corroborated by other evidence. *Id.* In addition, uncorroborated hearsay is not inherently unreliable, particularly when (1) the information was compiled during an official investigation or (2) the evidence was never directly challenged. *Id. People v. Brooks*, 2021 IL App (4th) 200573, ¶ 54.

Regarding claims that are constitutional, and not based on a claim of actual innocence, Section 122–3 of the Act (725 ILCS 5/122–3 (West 2002)) provides: "Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." *Id* .; *see also People v. Guerrero*, 2012 IL 112020, ¶ 17 ("[A] ruling on an initial postconviction petition has *res judicata* effect with regard to all claims that were raised or could have been raised in the initial petition.").

Regarding successive post-conviction petitions based on constitutional claims, it has recently been reaffirmed by the Illinois Supreme Court that they are highly disfavored. In *People v. Montanez*, 2023 IL 128740, the Court reiterated that successive postconviction petitions impede the finality of criminal litigation, and therefore, a defendant faces immense procedural default hurdles when seeking to file a successive post-conviction petition. *Id*, ¶ 122. In *People v. Pitsonbarger*, 205 Ill.2d 444, 459 (2002), our supreme court held 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." *Id.*

"Cause" is defined as " ' "some objective factor external to the defense [that] impeded counsel's efforts" to raise the claim' in an earlier proceeding." *Id.* at 460 (*quoting People v. Flores*, 153 Ill.2d 264, 279 (1992), *quoting McCleskey v. Zant*, 499 U.S. 467, 493 (1991)). "Prejudice" is defined as an error so infectious to the proceedings that the resulting conviction violates due process. *Pitsonbarger*, 205 Ill. 2d at 464; 725 ILCS 5/122-1(f)(2) (West 2018). Although only a prima facie showing of cause and prejudice needs to be established (*People v. Bailey*, 2017 IL 121450, ¶ 24), a defendant must establish both cause and prejudice as to each individual claim asserted in his proposed successive postconviction petition. *Pitsonbarger*, 205 Ill. 2d at 463; 725 ILCS 5/122-1(f) (West 2018)).

Regarding cause, pursuant to the decision of the Supreme Court of Illinois in *People v. Flores*, 153 Ill.2d 264 (1992)[6], it is well-established that, as a general rule, a petitioner cannot raise non-compliance with Rule 651(c) in a second post-conviction petition. Prior to that decision, at least two decisions of the Supreme Court of Illinois, *People v. Hollins*, 51 Ill.2d 68 (1972), and *People v. Slaughter*, 39 Ill.2d 278 (1968), had suggested that, when post-conviction counsel had not performed his responsibilities under Rule 651, subsequent filings would be allowed. *Flores*, however, made it very clear under what circumstances it would allow ineffective assistance of counsel claims to be raised in a successive post-conviction petition:

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[6]Defendant's petition cites *People v. Pitsonbarger*, 205 Ill.2d 444 (2002), and correctly states that a successive post-conviction petitioner who is alleging a claim other than actual innocence must demonstrate "cause" for failing to raise the error and actual "prejudice" resulting from the claimed errors. Defendant does not acknowledge *Flores* which holds that a defendant cannot show cause when he is asserting ineffective assistance of prior post-conviction counsel in a successive petition.

> In sum, where a defendant files a second or subsequent post-conviction petition in which he claims sixth amendment ineffective assistance of prior post-conviction counsel, because there is no right to sixth amendment counsel in post-conviction proceedings, such claims do not present a basis upon which relief may be granted under the Act. Further, where a defendant files a second or subsequent post-conviction petition wherein he claims ineffective assistance in his first post-conviction proceeding, because the Act is confined to errors which occurred in the original proceeding, only, such claims are beyond the scope of the Act.
>
> Where, however, a defendant files a second or subsequent post-conviction petition in which he raises meritorious claims of ineffective assistance of appellate counsel, which could not have been raised in a prior post-trial proceeding, the defendant is entitled to consideration of those claims. *Flores*, 153 Ill. 2d at 280.[7]

Consequently, after *Flores* substandard performance by state post-conviction counsel is no longer a basis for relief in a successive post-conviction petition. Regarding the assertion of ineffective assistance of counsel as a basis for a showing of cause necessary to permit a successive petition for postconviction relief, such claims constitute cause for purposes of the Act only when the alleged ineffective assistance occurred at the trial or appellate level, and only when such claims could not have been raised in the initial petition. *People v. Flores*, 153 Ill.2d 264, 280 (1992). Such claims do not, however, constitute cause, for purposes of the Act, if they relate to alleged unreasonable assistance of counsel in a prior postconviction petition because the Act applies only to errors which

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[7] As will be discussed further, in response to defendant's "new" constitutional claims, he cannot show cause under *Flores*.

occurred in the original proceeding. *Id.* A defendant's right to postconviction counsel derives not from the constitution but from the Act. Once counsel is appointed, the defendant is entitled only to the level of assistance that the Act mandates, which is a "reasonable level" of assistance. 725 ILCS 5/122 (West 2008); *see People v. Greer*, 212 Ill.2d 192, 204 (2004); *People v. McNeal*, 194 Ill.2d 135, 142 (2000).

And of course, if defendant cannot raise these claims in a successive post-conviction petition, there are time-barred, as well as forfeited.

I. THE CRIME.[8]

The defendant's recitation of the crime, contained on page one, is accurate.

II. THE CRIMINAL TRIAL

The State will not reiterate the criminal trial in this case. However, the State would note that in his successive post-conviction petition, the defendant makes various statements that have no bearing on whether the defendant is entitled to a new trial based on a claim of actual innocence, including that the defense "had less than two months to prepare, had no discovery, was not allowed to view the evidence, was not given notice of the State's experts, had no co-counsel or other assistance, and was defending his client in a capital case." (Deft's petition ¶ 5). This case was tried in 1960 before *Brady*. Since defendant references the trial, in this section and in the following section, the People will assume defendant will provide this Court with a transcript of the entire trial, instead of asking this Court to simply rely on what defendant picks and chooses to focus on.[9]

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[8] Defendant's successive post-conviction has numerous sections, and subsections. For the sake of clarity, the State will section its motion to dismiss in kind.

[9] For instance, defendant does not provide the testimony of Dr. Kruglik or deputy Don Cila.

III OVERVIEW OF THE STATE'S EVIDENCE AT TRIAL

Defendant says that a review of the State's trial evidence is the first step in evaluating the "new" evidence. Defendant then however, omits certain evidence that was presented during the State's case. And again, contrary to what is properly considered during a free-standing claim of actual innocence, defendant again attempts to interject what he believes were constitutional violations that occurred in this case, or other extraneous suggestions of impropriety. For example, defendant in this section again points to "extra precautions" he did not receive in this case, (Deft's petition, ¶¶ 63-64), but in the same breath, (footnote 2) admits that none of these "extra precautions was necessary." Defendant says, "[i]t is important to remember that the State sought the death penalty. Before executions were stopped in 2000 and the death penalty was abolished in 2011, the legislature had instituted extra precautions requiring early notice, expanded discovery that included depositions, separate discovery provisions, and requirements that attorneys for both sides be qualified to handle the extra demands of litigating a capital murder case. (Deft's petition, ¶ 62). Defendant does not say when these extra precautions went into effect, but apparently wants this Court to consider that they were not in effect in 1960, in deciding whether defendant has made a free-standing claim of actual innocence, something this Court should not consider in deciding whether defendant has made a free-standing claim of actual innocence.

A. This Was Not a Confession Only Case.

Defendant again asserts this was a confession only case, (Deft's paragraphs, 66-68), an assertion that is untrue.

B. The Confession Was Not Illogical.

The defendant attempts to challenge his confession, as illogical. (Deft's paragraphs 69-82). While he challenged the confession as involuntary during his various appeals, counsel certainly could have argued that the confession was illogical at trial, and assumedly did so. It is not for this Court to decide why defendant said certain things during his confession and whether that made sense with what occurred. Defendant also interjects in this subsection, that a juror told the Chicago Tribune that she found defendant's confession implausible. (Deft's petition,¶¶ 72-73). What a juror told the Chicago Tribune decades after defendant's conviction is not evidence of actual innocence. Why defendant said certain things during his confession is not the issue in this case. The issue is whether defendant can show actual innocence.

C. <u>The Confession Was Not Inconsistent with the Physical Evidence.</u>

Defendant attacks again the sufficiency of the evidence, and his confession in this subsection he entitles "The Confession Was Inconsistent With The Physical Evidence" (Deft's petition, ¶¶ 83-100). Defendant had every opportunity at his trial to argue that the confession was inconsistent with the physical evidence. Regarding this assertion, the defendant refers to a Chicago Tribune report from March 24, 1960 and a report from a meeting of March 20, 1960, that the tree limb was soft and old. This information was available shortly after the victims were murdered, and is not new, it was available before trial. Furthermore, the report that the alleged murder weapon (log) did not match trees in St. Louis Canyon, from November 29, 1960, does not mean that defendant did not murder the victims. Inconsistencies in defendant's confession, do not make his confession not true. Furthermore, it appears that under this section, the defense is attempting to make an argument that the State used false evidence against the defendant, citing to *Napue v. People of the State of Illinois*, 79 S.Ct. 1173 (1959). (See Deft's petition, ¶¶ 114-118). To the extent the defendant is trying to add

a prosecutorial misconduct claim, defendant has not raised this claim, nor asked this Court to file a successive post-conviction petition based on a claim of prosecutorial misconduct. The People fully understand that defendant is trying to say his confession is illogical, but that does not make it untrue as to the aspect that he murdered the women. And, again, if defendant wanted to, he could have used this information provided in this March 24, 1960 Tribune Report to cross-examine about any claim that that particular tree limb was used to bludgeon the victims.

The same holds true regarding any suggestion that the prosecution misled anyone about twine. Defendant says that "contrary to State's Attorney Harland Warren's persistent claims, the twine found around the women's wrists could not be uniquely matched to the Lodge." (Deft's petition, ¶ 92). The People do not believe that the testimony at trial was that the twine found around the women's wrists was unique to the Lodge. Defendant refers again to newspaper articles, specifically regarding that the twine found around Mrs. Murphy's wrist and Mrs. Oetting's wrist "had been cut." (Deft's petition, ¶ 95). Defendant continues that his confession did not include that he was carrying a knife. Again, defendant is attempting to challenge his confession through inconsistencies which could have, or were brought up at trial. Defendant talks about the fact that Frances Murphy was missing the tip of her left index finger, and defendant's confession did not make mention of cutting off Ms. Murphy's finger. (Deft's petition, ¶ 96). That defendant's confession was missing certain details does not make it untrue as to the aspect that he murdered the women. *See Conner v. State*, 711 N.E.2d 1238, 1248 (Ind. 1999)(even though some of the facts in the defendant's confession may be inconsistent with facts established at trial, these inconsistencies do not render the confession unreliable or involuntary.)

D. Weger's Buckskin Jacket was a Red Herring.

Defendant in this subsection talks about his Jacket being a Red Herring, and he insists there was nothing incriminating about that jacket, and there was no evidence he had tried to clean the jacket. (Deft's petition, ¶¶ 101-109). Again, defendant had every opportunity to challenge the weight of the evidence against him, at trial, and on direct appeal. It is not the purpose of this successive post-conviction petition to reevaluate the evidence given at trial. It does not appear that defendant raises an ineffective assistance of counsel claim for counsels' failure to ever challenge the sufficiency of the evidence. Defendant admits that nothing of value was found on the Buckskin jacket, yet asserts, without citation to the record, that the State "enthusiastically argued that the jacket was evidence of guilt but this was simply untrue." If the defendant wanted to raise a claim that the prosecutor misstated the evidence during trial, the time to do so was on direct appeal, or at least in some pleading prior to now. Any such claim now would, in any event, be barred by waiver. *People v. Allen*, 2015 IL 113135, ¶ 20.

E. <u>The State's Evidence Regarding Weger's Scratches</u>

Defendant in this subsection says that the "States Evidence Regarding Weger's Alleged Scratches was Highly Suspect." (Deft's petition, ¶¶ 110-115). Defendant had every opportunity to challenge the weight of the evidence against him, at trial, and on direct appeal. It is not the purpose of this successive post-conviction petition to reevaluate the evidence given at trial. It does not appear that defendant raises an ineffective assistance of counsel claim for counsel's failure to ever challenge the sufficiency of the evidence. Any such claim now would, in any event, be barred by waiver. *People v. Allen*, 2015 IL 113135, ¶ 20.

Additionally regarding this "claim," defendant refers to an interview with Lodge Employee Victoria Hobneck conducted by ASA Craig Armstrong on October 12, 1960. (Deft's petition, ¶¶

112-114). Defendant asserts that ASA Craig Armstrong "attempted to dig up dirt on Chester and refused to take no for an answer when Ms. Hobneck repeatedly told him she did not recall seeing any scratches on Chester's face." A review of the portion of that interview defendant attaches as his Exhibit 14, reveals no such attempt to dig up dirt on Chester. That Victoria Hobneck did not recall seeing scratches on defendant's face, does not mean that the evidence that was presented at trial about scratches was untrue. It simply means Hobneck did not see any. Glen Comatti testified he saw scratches on defendant's face. R. 541. Irma Byczynski saw bruises and scratches on defendant's face. R. 578-579. Louise Reeves saw scratches on defendant's face. R. 592-594. Mark Lolkus saw a scratch on defendant's face. R. 622. Mattie Robinson saw marks and bruises on defendant's face. R. 628. While defendant says the questioning of these witnesses was leading and badgering, defendant does not include copies of their interviews with the police. And while defendant says the women would have been unable to inflict injury on the defendant because they were wearing gloves, defendant could have got scratches on his face wielding the murder weapon. The fact remains that there were scratches on defendant's face.

F. The State's Evidence Regarding the Twine.

In this subsection, defendant says the "The State's Evidence Regarding the Twine was Misleading and Incomplete." (Deft's Petition, ¶¶ 116-120). Again, defendant had every opportunity to challenge the weight of the evidence against him at trial, and on direct appeal. It is not the purpose of this successive post-conviction to reevaluate the evidence given at trial. It does not appear that defendant raises an ineffective assistance of counsel claim for counsels' failure to ever challenge the sufficiency of the evidence. Any such claim now would, in any event, be barred by waiver. *People v. Allen*, 2015 IL 113135, ¶ 20. Defendant refers to the fact that Mr. Comatti from

the staved rock lodge said he could not say that the 20-strand twine found on Mrs. Oetting's wrist came from the lodge. However, it certainly was not misleading to include the similarities at trial, as circumstantial evidence. Additionally, while defendant asserts it was improper for the State not to inform the jury that investigators also found a piece of 20-strand twine knotted to a piece of 10-strand twine in the cave, if the defendant is asserting some type of prosecutorial misconduct on the part of the State, defendant fails to explain why this was not raised below, or explain why this was a "key finding" that must have been presented to the jury. (Deft's petition, ¶ 119). Notably too, while defendant takes issue with the fact that ASA Armstrong testified he went to defendant's home looking for 20-strand twine but only found 12-strand twine, (Deft's petition, ¶ 120), defendant admits this testimony presented by the State was exculpatory, and was presented to the jury.

IV. PROCEDURAL HISTORY

Defendant says that it is clear that he was denied a fair trial and that many of his constitutional rights were violated at that trial. He says his conviction cannot stand where the constitutional violations below were never raised on Weger's behalf over the years by appointed counsel. Of course, that is not the question that is solely to be presented in a successive post-conviction petition. A successive postconviction petition may be considered only when the petitioner (1) establishes "cause and prejudice" for the failure to raise the claim earlier, or (2) makes a claim of actual innocence. *People v. Ortiz*, 235 Ill. 2d 319, 329–30 (2009). This Court has made no finding that defendant has met the cause and prejudice test regarding any of these new claims of constitutional error, not included in his motion for leave to file a successive post-conviction petition. And, defendant cannot make that showing. "Cause" denotes an objective factor external to the defense which impaired the petitioner's ability to raise a claim in an earlier proceeding. *Id.* at 329.

"Prejudice" refers to a constitutional error which " 'so infected the entire trial that the resulting conviction or sentence violates due process.' " *Id.* (*quoting People v. Pitsonbarger*, 205 Ill. 2d 444, 464 (2002)). Both elements of the test must be satisfied in order to allow for the filing of a successive postconviction petition. *Davis*, 2014 IL 115595, ¶ 14. These new claims not included in the motion for leave to file should be dismissed, as the defendant has not asked this Court allow such claims in his motion, and defendant cannot make the requisite showing of cause and prejudice in any event, under *Flores*[10] as set forth above.

A. Direct Appeal.

Defendant sets forth what was raised on defendant's direct appeal. (Deft's petition, ¶¶ 123-125). He does not say why none of his claims he presents in his new claims II-VIII could not have been raised in that direct appeal.

B. First Post-Conviction Petition 1967-1971.

Defendant sets forth what was raised in defendant's first post-conviction petition. (Deft's petition, ¶¶ 126-130). He does not say why his new claims II-VIII could not have been raised in that first post-conviction petition.

C. Second Post-Conviction Petition 2001-2003

Defendant sets forth what was included in his second post-conviction petition. (Deft's petition, ¶¶ 131-135). He does not say why his new claims II-VIII could not have been raised in that petition, except for a bare allegation at some point that each of his post-conviction counsels' were ineffective in not raising these claims previously. However, even if Mr. McNamara was defendant's

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[10] Again defendant does not acknowledge the holding in *Flores*, which is specifically applicable to this case, and which precludes any finding of "cause."

counsel in his first post-conviction petition, and ostensibly would not raise his own ineffectiveness, this does not get defendant review of any of these issues, since defendant had a second post-conviction counsel, who was not defendant's trial counsel. Defendant does not utilize the *Strickland* test in asserting his various counsels were ineffective throughout the years. And, pursuant to the decision of the Supreme Court of Illinois in *People v. Flores*, 153 Ill.2d 264 (1992), it is well-established that a petitioner cannot raise non-compliance with Rule 651(c) in a second post-conviction petition.

V. THE ALLEGED ABUNDANCE OF NEW EXCULPATORY EVIDENCE[11]

A. The Results of Recent DNA Testing Which Excludes Defendant.

Defendant relies on one hair found on the tip of Mrs. Murphy's glove that does not match his, as the primary evidence of his innocence. (Deft's petition, ¶¶ 136-150). As part of this argument, defendant points out that the State believed the hairs on Mrs. Murphy's glove were relevant as the State sent one of those hairs to the Washington University School of Medicine to be compared with the hair standards from Chester Weger and the three victims. Of course the State would have hairs tested. If the hairs had come back to a viable assailant, that would have been valuable evidence of who committed this crime. That it did not match defendant's hair did not mean that defendant did not commit this crime. Defendant notes that a November 23, 1960 report

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[11] Under this section, which spans from pages 22-45 and which encompasses paragraphs 136-256, defendant sets forth what he considers the abundance of new exculpatory evidence. While at this stage of proceedings this court is not to make credibility determinations, the State would suggest and point out that this Court can certainly take note that defendant basically is throwing everything at the wall to see what sticks. Much of defendant's "new" evidence is not new, and contradicts other evidence, and defendant's various theories of who he thinks committed these murders are inconsistent with each other. It is for this reason the State believes this Court can dismiss this petition, and find that the defendant's factual allegations are not "well-pleaded."

indicates that the hair was dissimilar to that of Weger and his victims. (Deft's petition, ¶ 148). Defendant notes that this information was not shared with the defense, and thus the jury heard nothing of this evidence. (Deft's petition, ¶ 149). Again, the defendant faults the prosecution in 1960 from not revealing what it was not required to in 1960. Additionally, defendant herein complains about the testimony of Doctor Kivela. (Deft's petition, ¶ 147). Again, defense counsel could have, if he did not, object to any objectionable testimony, and any issue regarding same could have been raised well before this current petition.

Defendant adds that "[i]t has long been established that microscopic comparison of hairs cannot determine a 'match' and a series of reports from national forensics academies and a presidential commission has conclusively determined that this is flawed forensic science." (Deft's petition, ¶ 148). He therefore says the State improperly elicited testimony from Dr. Kivela that a few hair strands caught in the broken camera belonged to Mrs. Oetting. (Deft's petition, ¶ 147). Defendant does not say what reports he is referring to, so the State will assume it is the April 2015, report when the Federal Bureau of Investigation (the "FBI") participated in a joint press release with the United States Department of Justice (the "DOJ"), the Innocence Project, and the National Association of Criminal Defense Lawyers (the "NACDL"), entitled, "FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review." That, of course was in 2015, and that report has been held not to be a valid basis on which to grant a post-conviction petition, in a case wherein the expert testified that there was "a match." *Commonwealth v. Chmiel*, 662 Pa. 672, 675, 240 A.3d 564, 566 (2020).

Defendant now refers to the current report that this hair did not belong to Mrs. Murphy. However, that does not exonerate the defendant. In a case regarding a request for DNA testing of

a hair found on the vagina of a sexual assault victim, that court allowed the testing, but noted that, "although the State is correct that a nonmatch would not completely exonerate defendant of the sexual assault, it is arguable that such a result could advance defendant's claim that he is innocent of the crime." *People v. Grant*, 2016 IL App (3d) 140211, ¶ 27. Further, there the hair was on the vagina of a sexual assault victim, not on a piece of clothing that could have come in contact with numerous other sources. Yet, again, the results of this hair evidence could never be introduced at a new trial, as a foundation could never be laid for its admission. Defendant's entire claim here assumes that the hair on the glove must conclusively belong to the murderer.[12] However, that defendant was excluded as the source of a hair on a glove, does not show that defendant was not a participant in the crime. No one knows where that hair came from.

B. New Evidence Shows the Murders Were the Result of a Mafia Contract

Defendant says that New Evidence Shows the Murders Were the Result of a Mafia Contract, and refers to 1. information from Roy Tyson; 2. information from a Telephone Operator Mrs. Zelenek, who purportedly overhears two local men discussing bloody overalls in the trunk of a Car; 3. information that Mrs Zelenek was honest; 4. information from Ms. Smith that her grandfather said he was involved in this mafia hit, and 5. that Ms. Smith told someone else that her grandfather was with the Mob and said this was a hit on One of the wives; 6. that Glen Pamatier was investigated regarding his ties to a man named Lupe "The Chief" Cardenas; 7. Lupe had ties to organized crime

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[12]The People are unsure if defendant is going to share the results of the testing done in this case, but believes that should be part of the defendant's petition. For defendant to not share any information regarding these hairs gives this Court an incomplete picture of this case. It puts the State in a trick box where the State has information but purportedly at this stage of proceedings cannot share with this Court. The information available also demonstrates how defendant's "new" "exculpatory" evidence is inconsistent with other "new" "exculpatory" evidence and with defendant's various theories of who purportedly committed these crimes.

as demonstrated by newspaper articles; 8. Glen Palmatier knew Robert Murphy; 9. Polygraph Examiner Stephen Kindig was Friends with Robert Murphy; 10. At some point the Illinois State police believed the Chicago Mafia was involved; 11. A newly discovered Newspaper article shows that an Illinois State Police Report suggested that the murders could have a Moline Gangland Connection; 12. the crimes scene evidence was consistent with there being Multiple Attackers, and 13. the injuries to Frances Murphy are consistent with the information from Ms. Smith. (Deft's petition, ¶¶ 151-192, pages 25-34).

The State will address 1 through 13. Beside for their relevance and materiality being what can only be described as highly overstated, one must ask at the end of the day, which theory is defendant going with? Did Smokey Wrona do it? Was it with the help of the Chicago Mafia, or Mr. Palmatier? Did Lupe "the Chief" do this crime, or was it a Moline Gangland crime? Did all the husbands want their wives killed? was polygraph Examiner Stephen Kindig part of the Chicago mob, and helped Mr. Murphy stay under the radar? Did the person whose hair was found on the scene commit the murder, and if so, did he have ties to any of these people? Simply put, what theory does the defense want this Court to believe. Defense counsel in one of his podcasts refers to all the pieces of a puzzle.[13] What defendant has is a bunch of pieces to several different puzzles, puzzles that have no relationship to one another.

1. Roy Tyson and Smokey Wrona

Roy Tyson's story is set forth in Defendant's exhibit 20, and is included in defendant's paragraph's 152-156. Roy Tyson's story is that he knew Smokey Wrona because he was friends with

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[13]Defense counsel in his podcast also insists that the hair found on Mrs. Murphys glove came from the killer. The information received thus far on this hair fits into none of defendant's various scenarios.

Wrona's son. One day out of the blue, Wrona decides to "confess" to Tyson, that he was involved in the Starved Rock murders. Wrona told Tyson that out of the blue he got a call, from someone who asked, "Is this Smokey?" That person apparently never told Smokey who he was, but that he had a friend that was friends with Smokey. That man informed Smokey that they needed to find a place where they could dispose of three bodies. Smokey decided this man was legitimate because it was "a friend" that had given this unknown person his name, although the friend is not identified. Smokey thinks about it for a couple of days, and decides to help this unknown stranger find a place to dispose of three bodies. Smokey is going to get $1000 for finding a spot.

So Smokey goes around looking for a spot, and goes to Starved Rock to meet someone for an appointment. He walks around and sees a kid walking. Smokey asks this kid (apparently supposedly defendant) if he knows his way around, and he does.[14] So Smokey asks him to show him around. He tells the kid he needs a place to hide three big bags filled with money. The kid knows a good place and shows Smokey, and Smokey is like "that's great."

Smokey then calls the "person", and says he found a good place. Smokey gets a thousand dollars for this information, finally meeting "the man" and showing him where the place at starved rock is. However, the man does not want to walk down there because he's in dress clothes, so he just takes Smokey's word for it. After this, the man tells Smokey that he will give him money for killing a man's wife, because the man hates his wife. Apparently, according to Smokey, that man was told that the much hated wife had two friends that are always with her, so that means all of the men are always together, and these men became good friends, and they all agreed that all three of

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[14] In fact, according to Alice Boehm, Smokey Wrona and defendant were friends since they were little, so this chance meeting with a stranger, is a fallacy.

the women should be killed. They all wanted the insurance money. So it's a hit on all three women, and Smokey is going to be paid $30,000 to do this three person hit. The man gives Smokey the original $1000 for finding a spot.

At first, Smokey thinks, "no way" but then decides to think about it for a day, and decides he is going to do it. Smokey asks the man, where the women will be and where he can maybe do it, what the women look like etc. The man says he will get some information. Smokey tells the man he needs two get-away drivers and a couple big blankets. The next day, Smokey gets the call that Mr. Murphy, (the head of the murderous husbands) told "the man" that the ladies have been planning a trip to Starved Rock! Smokey is like "No way!" "What luck!" Even though one of the women has been caring for her sick husband, she is going on the trip. The women would be bird watching. So the women just happened to be coming to the place where Smokey found the place to hide their bodies. In Smokey's words "he never in his life have heard of something so easy."[15] "The man" then knows that the three women will go to the restaurant, and have something to eat, and then they will walk around and birdwatch. Apparently, the man also knew the women would walk the very trail that the man and Smokey just scoped out! That's when they will be murdered, by Smokey and the other men Smokey has rounded up to do the murders. Smokey then goes and has a steak, and finds some items to use in the murder at the butcher shop.

After Smokey eats his steak he walks around his property and kicks a log, and decides to bring it to the murder scene. At this point Tyson adds that Smokey is really proficient at murder, and has done a lot for much less. So then Smokey calls "the man" and makes sure he has the two other

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[15] It is quite amazing that Mr. Tyson knows the exact words that Smokey told him when he was 21. Tyson says he was born in 1965, which would put this conversation in about 1986, 36 years previously. (Tyson late says this is about 1996 or 1997).

guys who are helping him, a total of "three big guys and two drivers." Smokey then informs the man that he will be collecting all the accomplices' clothing from their shoes up. He had a place for them to shower, and change. He then tells "the man" that they will subdue the women and kill them in a brutal manner. These were very large men that were his accomplices, like almost 300 pounds. Smokey told "the man" how this was going to go down on the phone, and on Monday, this all occurred. The three women appear, and Smokey says "I think we are in action." The men then attack the bird watching ladies, and brutally murder them.[16] The men then sat on blankets in cars because they were saturated in blood. The blankets went into Smokey's trunk, bloody side up, and he got his $30.000. He inventoried each man's clothing and put it all into the back of his trunk. The bloody log was a ruse, the men really asphyxiated the women. Afterward, they beat them to a pulp to hide the fact that they were asphyxiated.[17] One of the men had to run back down after the murders and cut off a fingertip. Apparently to prove that the job was done. Smokey did not find this out until the next day when he spoke to "the man" on the phone. Smokey also found out later down the line that someone had urinated and defecated on Mrs. Murphy.

Smokey also told Tyson that he burned the clothes days later in Bureau county. Smokey also had three $100 dollar bills from the year 1950. Smokey told Tyson this story because he felt bad, and Tyson promised not to say anything because it really had nothing to do with Tyson. Smokey

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[16] It appears that anything that was relayed to Tyson about what actually happened to the women, such as being asphyxiated, and that a man went back and cut off Mrs. Murphy's finger, and that the women were beaten to a pulp, and one man went back and defecated and urinated on Mrs. Murphys, was information Wrona got from "the man." This is double hearsay, uncorroborated, and not compiled during any investigation. In fact, the person purported relaying this information is not even identified. *People v. Brooks*, 2021 IL App (4th) 200573, ¶ 54.

[17] Not apparently because Mr. Murphy wanted his wife to suffer badly.

stated he felt bad because they blamed some young kid that he found out later was the kid that showed him where to hide the three bags of money. Smokey died in 2006, and Tyson came up with this story in 2022.

2, Information from a Telephone Operator who overhears two local men discussing bloody overalls in the trunk of a Car.

While defendant refers to this Illinois State Police report as "new" since counsel did not recall previously seeing the police report dated April 20, 1960 before he reviewed his file again after speaking with Mr. Tyson, "new" means what could not have previously been discovered. This report was in April, 1960. It is not "new." There is nothing to suggest that previous counsels were not, or could not have been aware of this report. It is not new, and should not be considered by this Court in considering defendant's "free-standing" claim of actual innocence.

In this report, included as defendant's exhibit 22, and referred to in his paragraphs, 157-162, pages 26-27) Mrs. Louis Zelensek said that somewhere between six and eight PM on March 21, 1960 she heard a telephone conversation between a person in Aurora, Illinois, and someone else talking about the murder. She heard someone in the conversation say "You know the kid had bloodstained overalls in the trunk of the car and he's getting a little anxious to know what he's going to do with them. He's afraid he'll get caught." The other party to this conversation from LaSalle says "We'll tell him to got rid of them. Burn them." That was the end of the conversation.

Purportedly, according to defendant, these were two men talking about a kid worried about the bloody clothes from the murder, and these two men told him to burn them. However, this was discounted as such by the Illinois State Police. Also, this version of events is inconsistent with Tyson's story of what Smokey said, that the next day after this crime, he was trying to figure out

what to do with the bloody clothes and his first thought was to burn them. But he decided that he would not do so because it would all be black smoke. So he went out to a bunch of different places where he had buddies, but he could not find anyone. So about a week later, he went to a bar called the Hollywood & Vine, and saw a story about Bureau County cleanup day, and that a person could bring metal and then garbage and burnables, so he went there and asked if he could throw some stuff onto the fire, and he burned the big bag. There is no mention in Smokey's story that he asked someone what to do with the bloody items.

Apparently, that telephone conversation was later traced (per information from newspaper articles described in defendant's exhibit 23 from 1960 thus making these "not new" as well) and the police determined that the phone conversation could be traced to a payphone in a tavern in Aurora, Illinois, owned by Glen Palmatier, and received by his brother, William Palmatier in Peru, Illinois. However, both men took polygraph examinations, and denied that what the telephone operator heard was a conversation that they had.

Again, regarding this particular piece of "evidence" defendant refers to, it is neither (a) new- the telephone operator talked to the police about the conversation on April 20, 1960, and the Palmatier brothers were questioned, and gave their statements in 1960, nor (b) material- (there is no corroboration that this call occurred, and even if it did occur, it is inconsistent with Smokey's story, and there is nothing to tie this conversation with the murders in this case. This information has been available since the 1960's.

3. Information shows that Lois Zelensek was Honest and Sincere, and a Highly Credible Witness.

Lois Zelensek is deceased. Defendant points to her daughter, and friend describing her as honest and sincere. (Deft's petition, ,¶¶ 163-165). However, that does not change the fact that her information she provided the police in 1960 was neither new nor material, and was discounted after the police spoke with the Palmatier brothers and they passed a polygraph examination. Additionally, a polygraph was administered to Ms. Zelensek on November 29, 1960, which concluded that Ms Zelensek was not being truthful in this particular instance, notwithstanding her apparently general character as honest and sincere. (Deft's exhibit 58).

4 Information from Ms. Smith, and that Ms. Smith told someone else that her grandfather was with the Mob and said this was a hit on One of the wives.

Defendant references another witness who contacted defense counsel in June, 2022 with her new information. (Deft's petition, ¶¶ 166-169). That particular information is that a woman contacted defense counsel in June, 2022, and told counsel that when she was in high school, 15 years old, she lived with her grandparents in the Chicago area. Her grandfather had been in the Chicago mafia, but was now older and dying of cancer, when he talked to his granddaughter. One day, her grandfather told her that the guy who was in prison for the Starved Rock murders was innocent and had nothing to do with the murders. Her grandfather knew this because back in 1960 he had been approached by one of his associates in the Chicago mob, to hand-pick five or six men who were going to Starved rock to murder the three women. Her grandfather told her that one of the husbands (not all three as in Smokey's story), who was in communications,[18] had hired the Chicago mob to murder his wife and that all three of the women would have to be killed. Her grandfather said he did not know what the wife had done to deserve this, but the husband wanted her to suffer. He told her

[18] The State does not believe Mr. Murphy was in communications.

that the "only reason all three of them had to die was because it was convenient for the husband not to be anywhere nearby, and the woman that was – the only person who was paid for, she brought her friends with her and they became collateral damage." The six men who killed the women "brought everything they needed to kill them and they took it back with them." The husband knew the mob (the grandfather's friend) through the man's communications job. Mrs Smith knew that at least one of the men had to come from the LaSalle/Peru area, and she knew this because her grandfather would not have just sent Chicago men down there blind. Ms. Smith said she spent years trying to get someone to listen to her story.

5. Ms. Smith's Account has been Corroborated by Another Witness.

In support of this "claim", set forth in defendant's petition in paragraph 170, at page 29, defendant points to the fact that an attorney provided a sworn statement that, decades earlier, Ms. Smith worked for his law firm as a legal assistant, and told him the information that her grandfather had told her about the Chicago Mafia being hired by one of the husbands to murder the women. However, this is not corroboration that the grandfather actually told Ms. Smith this information, it is corroboration that Ms. Smith said her grandfather told her that one of the husbands put a Mafia hit on the women.

6, that Glen Pamatier was investigated regarding his ties to a man named Lupe "The Chief" Cardenas.

Defendant's "newly discovered" evidence regarding documentation showing that the Illinois State Police investigated Glen Palmatier's ties to someone named Lupe "the Chief" Cardenas is set forth in his paragraphs 171-174 at pages 29-30. Defendant refers to a statement of Glen Palmatier, that was given to the Illinois State police on August 30, 1960. This Statement is neither new, nor

material. Defendant says he did not learn of this document until September 2022, when he received a tip that there were items located at the LaSalle Historical Society, and when he went to look he found this statement. This does not make the evidence "new." The question is whether this document could have been discovered previously. This document, made in August 1960, could have been discovered prior to September 2022.

In any event, that document contains nothing material. In that statement, Glen Palmatier stated he did not make the telephone call allegedly overheard by the telephone operator. (Deft's exhibit 30). In that statement, Glen Palmatier admitted that he knew a man named Lupe "the Chief" Cardenas, a known criminal to police, not Mr. Palmatier. Palmatier did not know Lupe was involved in criminal activity. In fact, had Palmatier known Lupe was Mexican, he would not even have served him at his bar. That information is not material, as it adds nothing to defendant's claim of innocence, except to say that Mr. Palmatier talked to someone who had a criminal background, who he thought was an Indian Chief.

7. Lupe had ties to organized crime as demonstrated by newspaper articles.

Defendant references the fact that "the Chief" had ties to the Chicago mafia, and his contentions herein are set forth in his paragraphs 175-176 of his petition at page 30. The People are unsure what this has to do with defendant's theories of the case. Defendant represents a conversation had between his investigator, and Lupe Cardenas's sister, wherein Lupe's 91 year old sister purportedly stated "I can't tell you about the ladies in the park because whatever you say, whatever I say, they're going to say something was wrong and they're going to come after me." This is included in defendant's exhibit 32. The People are unaware of how this fits into any of defendant's theories of the crime. Lupe's sister does not state she knows anything, or if she says anything who,

in fact, is coming after her. If defendant wants this Court to believe that this woman believed the 1960's mob was coming for her, that is not bore out by the statement. It is just as plausible that when the investigator mentioned Ottawa, Lupe's sister assumed it was about the Starved Rock murders, as it has been in the news, and she did not want anything she said to be taken out of context. There is absolutely nothing tying Lupe to this crime. What is the defendant's theory? That because Lupe had ties to organized crime, he therefore must have committed this crime (with Smokey? Without Smokey? On his own? With other mob people? The Chicago mob, or the Moline mob?).

Defendant refers to old newspaper articles regarding Lupe. (Deft's group exhibit 31). These are neither new nor material. The first article is dated March 30, 1965 and notes that Lupe was arrested near Elgin in connection with an armed robbery. According to a newspaper article from April 13, 1965, the LaSalle County state's attorney said he would seek charges against Lupe, for the stolen radios. A newspaper article from February 14, 1968 says that the government said that Lupe had "crime syndicate connections", but that his lawyer said he was "small potatoes." In a February 16, 1968 article it describes when Lupe was arrested, he was in possession of three cases of kitchen blenders. There is nothing to tie Lupe to this crime. This evidence is not material and is belied by other affidavits and exhibits submitted by defendant, if defendant wants you to believe that Lupe did it. Did Lupe and Palmatier do the crime? Or was it Smokey Wrona, who said 5 men from Chicago came? Did Mr. Murphy order the hit, and the other women were collateral damage? Or was Ms. Smith mistaken that her grandfather said only Murphy paid money, and all the husbands colluded to kill all three of the wives. Which story shows defendant is innocent?

8. Glen Palmatier knew Robert Murphy.

Defendant refers to this "new" revelation in his paragraphs 177-181 at page 31 of his petition. Apparently, in an August 30, 1960 transcript there are discussions between Harland Warren and the Illinois State Police officers involving their interview with Glen Palmatier earlier that day. (See defendant's exhibit 33). At the end of that transcript, an Illinois Police Officer stated that while talking to Mr. Palmatier prior to Palmatier's attorney arriving for the interview, Mr. Palmatier mentioned that he knew Robert Murphy. Defendant says that should have been "an enormous red flag to the murder investigation." (Deft's petition, ¶ 178). First this evidence is not "new" nor is it material. Apparently, when a trooper was alone with Palmatier, Palmatier told him that he knew Mr. Murphy because he used to run an appliances store and sold Stewart-Warner refrigerators and Murphy was connected with Berg-Warner or Stewart Warner. He did not know Murphy well, but knew who the man was. When he read of the murders he realized he knew one of the women's husbands. Apparently, defendant believes this information is material because it should have led to an investigation into Palmatier, a person who has never been shown, to this day, to have any connection to this crime. This is not material information. This is a claim of actual innocence, not a claim that the investigation should have focused on someone else, and defendant does not explain what this adds to his claim of actual innocence.

Defendant also believes that the husbands should have been considered suspects in this case. Defendant's second guessing the investigation done in 1960, with no basis in fact, does not show actual innocence. Nor is his claim that "[i]n virtually any case where a wife is murdered, some part of the investigation will focus on whether the husband may have been involved. That is standard Procedure." (Deft's petition, ¶ 179). There is nothing in this statement that shows that the husbands

were not questioned or their whereabouts confirmed. That Murphy knew someone who was identified as having no connection to this crime, is not material and is irrelevant.

9; Polygraph Examiner Stephen Kindig was Friends with Robert Murphy.

Defendant refers to this at paragraphs 182-183, pages 31-32 of his petition. He says that this relationship should have disqualified Stephen Kindig from working on defendant's case at all. The People are perplexed how this fits into defendant's claim of actual innocence, and in fact, it does not. If somehow defendant is trying to suggest that Kindig knew Murphy committed this murder, and because of his "link of friendship" with Murphy decided to frame defendant, that is ludicrous. It is not fact. And this is not newly discovered "evidence" as it was included in a November 18, 1960 newspaper article. Defendant says this personal relationship between the polygraph examiner and Murphy should have disqualified him from working on the Starved Rock murder case, but defendant does not explain why Kindig's failure to recuse himself, shows defendant is actually innocent. Defendant is again attempting to assail the investigation in this case, an investigation done in 1960, by 1960's standards.

10. At some point the Illinois State police Believed the Chicago Mafia was involved.

Defendant refers to this revelation at page 32 of his petition. Defendant references a newspaper article from March 13, 2000, wherein former LaSalle County State's attorney Harland Warren says, regarding the state police's investigation into this case that "[t]hey thought the Mafia in Chicago was involved." (Deft's petition, ¶ 184). Defendant does not even attempt to explain the materiality of this newspaper article. Is defendant saying that the Illinois State police once thought the Mafia was involved, therefore they must have been? Is defendant saying this theory was investigated and dispelled? Defendant does not explain what this supposed evidence shows, nor how

it would have "changed the outcome of the case." Again, defendant is simply throwing bits and pieces of different theories at this Court, theories that do not even match each other, asking this Court to believe one of them, and vacate defendant's conviction. This is not evidence.

11. A Newly Discovered Newspaper Article Shows that an Illinois State Police Report Suggested that the murders Could have a Moline Gangland Connection.

Defendant's information regarding this statement is included at paragraphs 185-186 of his petition at pages 32-33. Defendant references a newspaper article from September 15, 1960 that stated in part: "Rock Island and Moline police chiefs have scoffed at a suggestion by a 25-year-old criminology graduate that the triple Starved Rock Park slayings last March have a Moline gangland connection." That suggestion apparently came from William Jansen, Pekin, who in a 40-page report mentioned the Moline area and said "someone mixed up in the rackets" may be involved in the case. Defendant continues that Mr. Murphy once lived in Moline. (Deft's petition, ¶ 33). The newspaper report is defendant's exhibit 37, and that report also concluded that the slayers may have been poachers or hunters, and criticized the police handling of the case. According to the article, both police chiefs termed the Moline gangland reference as unfounded. This is not newly discovered, as it could have been discovered previously and is evidence of nothing. Is defendant now abandoning the theory that Mr. Murphy hired the Chicago mob and instead the murderers are now the Moline area mob? In any event, this is simply evidence of nothing, and thus cannot be material evidence.

12 The crimes scene evidence was consistent with there being Multiple Attackers.

Defendant references this theory at his paragraphs 187-192 at pages 33-34 of his petition. He says the crime scene evidence was consistent with there being multiple attackers. None of this is "newly discovered" evidence. It is also not material evidence. Defendant points to a statement

given of John E. Kovalik in an interview dated 3/19/60 in which he states he saw three women talking to a man by a car in the park at 2:00 p.m. on the Monday they were murdered, and there was a second man in that car. That does not show the three women were the murdered women, nor that they were murdered by those two men.

Defendant points to the statement of George Spiros given 10/4/60. That is not newly discovered evidence. According to Spiros he saw two cars, five men and three women. (Deft's petition, ¶ 192). One of the cars was Stanley Tucker's Cadillac, and he saw Stanley there. He also thought he may have seen Chester Weger. That is certainly not "evidence" and clearly not "material evidence" and is inconsistent with Smokey Wrona's account of what happened, as Smokey did not say he and his accomplices chatted with the women before murdering them.

Defendant refers to forensic pathologist David Fowler's report, (Deft's exhibit 8), that suggests there was more than one killer. A review of that report shows that Doctor Fowler does not state he believes there was more than one killer.

13. The injuries to Frances Murphy are Consistent with the Testimony of Ms. Smith.

Defendant believes that the injuries to Mrs. Murphy are consistent with the testimony of Mrs. Smith. (See Defendant's petition, ¶¶ 193-194). Defendant reaches this conclusion by pointing out that Ms. Smith says that her grandfather told her that the (one) husband who wanted his wife killed wanted her to suffer, and she indeed suffered during this horrific beating. The injuries to Mrs. Murphy are also consistent with any violent psychopath who murders three women. It does not appear that Smokey Wrona, who supposedly was the ringleader of the murder, informed Roy Tyson that the (husbands) wanted the women beaten viciously, and , in fact, he told Tyson they were beaten viciously to cover up that they were suffocated.

C. Dr. Brian Cutler's Expert Report Demonstrates That The Improper Tactics Used Against Petitioner in Extracting His Confession Have Led to Both False Confessions and Wrongful Convictions.

Defendant refers to a report of a Brian Cutler, PHD to highlight and educate the fact finder about false confessions in general and risk factors that give rise to false confession. (Deft's petition, ¶¶ 195-200). Defendant says that this report is to "illustrate what science has revealed about confessions as they were obtained here." Defendant does not cite to this report to highlight any particular claim before this Court, such as ineffective assistance of counsel in not hiring such an expert.[19] In fact, Dr. Brian Cutler's report does not purport to provide opinions about the accuracy of any statement made by defendant, and stresses he has no independent knowledge about the facts or evidence in this case. Cutler however does appear to rely heavily on Weger's factual recitation of what occurred during his interrogation, (Report, ¶ 99), and highlights "what likely occurred in the interrogations of Mr. Weger", and says "there is evidence that some of this occurred." (Report, ¶ 100). Dr. Cutler refers to defendant's testimony at his pretrial hearing, as it if was the truth. (Report, ¶ 100). However, as the various courts who have litigated this issue, in this case have found, defendant's confession was not coerced.

Notwithstanding defendant's assertion that he really is not providing this report for any proper purpose in a post-conviction setting, but only to educate this Court, the State would note that this type testimony would not be admissible even if defendant is granted an evidentiary hearing on actual innocence. In *People v. Harper*, 2017 IL App (1st) 152867-U, ¶¶ 53-57,[20] the defendant

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[19] A claim which of course would be barred by forfeiture.

[20] Although an unpublished order, *Harper* was cited as authority in a case wherein it was discussed whether seeking out new expert witnesses after the conclusion of trial to counter evidence and testimony properly presented at trial does not qualify as 'new and material evidence that,

contended that the court abused its discretion in granting the State's motion in limine to preclude James Trainum, an expert in police interrogation tactics and false confessions, from testifying at his post-conviction evidentiary hearing. That court stated:

> ¶ 54 The trial court has wide discretion in limiting the type of evidence that will be admitted in a postconviction evidentiary hearing. Id. at 162. A trial court's decision to exclude expert testimony is reviewed for an abuse of discretion. People v. Enis, 139 Ill. 2d 264, 289 (1990). An abuse of discretion will be found where the trial court's decision is arbitrary, fanciful, or unreasonable, or where no reasonable person would agree with the decision. People v. Baez, 241 Ill. 2d 44, 106 (2011).
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> ¶ 55 As noted above, issues that were raised and decided on direct appeal are barred from consideration in a postconviction proceeding by the doctrine of res judicata. Tate, 2012 IL 112214, ¶ 8. As the State correctly notes, this court addressed the voluntariness of the defendant's confession on direct appeal and held that the trial court did not err in finding the defendant's confession voluntary. See Brown, 253 Ill. App. 3d at 182–83 ("There is absolutely no evidence that [the] defendant was physically or mentally coerced into giving the statement."). Consequently, the defendant's claim that his confession was the result of coercion is barred by res judicata. See People v. Patterson, 192 Ill. 2d 93, 139 (2000).
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> ¶ 56 The defendant argues, however, that in our previous opinion reversing the second-stage dismissal of his post-conviction petition, we rejected the State's

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notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during trial.' " *See Woodward v. State*, 276 So. 3d 713, 760–61 (Ala. Crim. App. 2018).

argument that he was precluded from raising a claim of police coercion where he has come forth with newly discovered evidence. Harper, 2013 IL App (1st) 102181, ¶ 52. He argues, therefore, that he should have been permitted to introduce Trainum's expert opinion in support of his police-coercion claims. We disagree.

¶ 57 Our supreme court has stated that the doctrine of res judicata can be relaxed where a defendant comes forth with newly discovered evidence. See Patterson, 192 Ill. 2d at 139. Newly discovered evidence is evidence that was unavailable at trial and could not have been discovered sooner through due diligence. People v. Harris, 206 Ill. 2d 293, 301 (2002). Here, unlike Hingston's recantation and Bell's confession, the expert testimony of Trainum does not qualify as newly discovered evidence. Rather, Trainum's opinion regarding the reliability of the defendant's confession is based upon his review of the defendant's court-reported confession, police reports, and the testimony presented at the defendant's first and second trials. Since the evidence presented at both trials established the same set of facts, Trainum's opinions are based on facts that were known to the defendant prior to the second trial. See People v. Jones, 399 Ill. App. 3d 341, 364 (2010) ("evidence is not newly discovered when it presents facts already known to a defendant at or prior to trial"). In other words, since Trainum's opinions do not rest on any evidence that was not available to the defendant at or prior to the second trial, his expert opinion does not qualify as newly discovered evidence, and the defendant cannot assert an exception to res judicata. Patterson, 192 Ill. 2d at 140. As a consequence, we find no abuse of discretion in the

trial court's decision to bar Trainum's testimony at the third-stage evidentiary hearing on the defendant's petition for postconviction relief.

Additionally, while Dr. Cutler's report states he has consulted in more than 100 cases involving contested cases involving confessions and testified as an expert in court on this subject about 12 times, his CV is not attached to his report. It appears Dr. Cutler's expertise is in the field of eyewitness identification. *See Revels v. Warden*, No. CV15-4007240-S, 2023 WL 3992501, at *12 (Conn. Super. Ct. May 31, 2023). In fact, one court has suggested that Dr. Cutler is far less the expert than that defendant purported him to be. In *United States v. Rodriguez-Soriano*, No. 1:17-CR-197, 2017 WL 6375970, at *2 (E.D. Va. Dec. 11, 2017), beside for finding the reliability of false confession science, questionable, that Court had serious doubts about the reliability of Dr. Cutler's proposed testimony in particular. That court noted that Dr. Cutler's understanding of this subject matter appeared to be substantially derivative of a Dr. Richard. A. Leo's research in this field.[21] However, the court noted that numerous courts have excluded as unreliable testimony from Dr. Leo that was similar to the proffered testimony in the *Revels* case. *See, e.g., Yazzie*, No. 1:11-cr-01876-WJ, Doc. 145 at 4-5; *People v. Kowalski*, 492 Mich. 106, 133-34 (2012); *United States v. Deuman*, 892 F. Supp. 2d 881, 885-88 (W.D. Mich. 2012). Dr. Leo's work has also been the subject of academic criticism, in particular from a Judge Paul Cassell. Judge Cassell reviewed Dr. Leo's work and found that many of the suspects Dr. Leo claimed confessed falsely were actually almost certainly guilty. *See Paul G. Cassell, The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confession*, 22 HARV. J. L. & PUB. POL'Y 523 (1999). Cassell and other academics have also called Dr. Leo's methodology into doubt. See. e.g.,

[21] Dr. Cutler's report herein includes Dr. Leo as one of his references.

Major James R. Agar, II, The Admissibility of False Confession Expert Testimony, 1999-AUG Army Law. 26. 42-43 (1999). For those reasons, that Court also found that Dr. Cutler's proposed expert testimony was unreliable.

In any event, again, the voluntariness of defendant's confession is not before this Court, and has been litigated on many occasions before. The question is not one that is before this Court, defendant's motion for leave to file a successive post-conviction petition does not raise this as a grounds for relief, and could not, as it has been litigated previously. As such, Doctor Cutler's report should be disregarded as an exhibit in this case, as it does not bear on the issue before this Court.

D. Forensic Pathologist David Fowler's Expert Report.

Defendant next refers to a report of a Dr. Fowler, in his paragraphs 201-206 of his petition, who he says is an expert in forensic pathology and who has reviewed this case, and whose opinions he says invalidates the State's trial theory, and the details of the defendant's confession. However, seeking out new expert witnesses after the conclusion of trial to counter evidence and testimony properly presented at trial does not qualify as 'new and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during trial.' " *See Woodward v. State*, 276 So. 3d 713, 760–61 (Ala. Crim. App. 2018). Defendant takes issue with the doctor who conducted the autopsy in this case, who testified at trial that he was not qualified to give testimony about the weapons used to inflict the wounds and skull fractures.[22] (Deft's petition, ¶ 202). However, this has no bearing on defendant's petition alleging a "free standing" claim of actual innocence. If defendant is suggesting that trial counsel was ineffective in failing to call a forensic pathologist to testify, that issue is waived, and/ or forfeited, and time barred.

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[22] Which, of course, he was not, and did not so testify.

E. Dean Esserman's Expert Report Details Law Enforcement's Failure to Conduct a Proper Investigation.

Defendant next refers to a report of "expert witness Dean Esserman, J.D.," who opines that law enforcement in this case in 1960 failed in several regards. He opines that the investigation in this case was deeply flawed, and says that the actions significantly departed from generally accepted practices and procedures at the time. (Deft's petition, ¶ 207). However Mr. Esserman does not say what those generally accepted practices and procedures were. Mr. Esserman also does not opine that any of these "flaws" resulted in the conviction of an innocent man, or that they would have led to a person other than defendant as being the murderer. [23] He opines that there existed no probable cause to arrest defendant, however that issue could have been presented during defendant's trial, or some time before now. It is waived, and/ or forfeited, and time-barred.

F. John Palmatier's Expert Report Details Improprieties With John Reid & Associates' Polygraph Exams.

Defendant next refers to an expert report that highlights improprieties with the polygraph examinations in this case. (Deft's petition, ¶ 208). Yet again, defendant fails to explain this expert's significance to this case. Defendant cannot raise a claim regarding the polygraphs in this petition, he does not say what the constitutional issue is, and has not established cause or prejudice for not earlier raising any such claim. Again, defendant is interjecting irrelevant, immaterial matter into this petition, which purportedly is raising a claim of actual innocence, but does not actually raise a free-standing claim of actual innocence. Instead, defendant relies and refers to numerous improper and irrelevant matters which have nothing to do with a free-standing claim of actual innocence.

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[23] Defendant himself does not elaborate on how these purported failures in the investigation prejudiced him, as he cannot explain which of his theories of who the actual murderer is should be believed.

G. A recently discovered report shows that a forestry Expert was unable to Match The log to a tree in St. Louis Canyon.

Defendant says that a recently discovered report shows that a forestry expert was unable to match the log to a tree in St. Louis Canyon. (Deft's petition, ¶¶ 209-216). Defendant refers to a November 29, 1960 memorandum, that discussed the State's attempt to find the source of the log that the State presented at trial. (Deft's exhibit 42). However, while defendant says the fact that this memorandum, which shows that they would not find a match, shows the prosecutors withheld exculpatory evidence, as discussed previously, and below, *Brady* was not in place at the time of defendant's trial. Defendant says that even though *Brady* came out after defendant's trial, "withholding exculpatory evidence is now commonly considered to be unethical and improper conduct and it was also considered to be unconstitutional when Weger was tried," (Deft's petition, ¶ 214). Defendant cites to *Napue v. Illinois*, 360 U.S. 264 (1959) for the proposition that presenting false evidence to the jury has never been allowed or accepted under "any twisted interpretation of constitutional law and discovery law." (Deft's petition, ¶ 214). However, simply because no trees in the vicinity matched the log, does not mean the log was not there. As part of that memorandum, Warren asks the doctor if the wooden club could have come from a white oak tree which might have been cut down or have been blown down by the elements, and the piece broken off, and washed downstream, and the reply was that it was a possibility. It was thus not impossible that the tree log was in the vicinity of defendant when he struck the women with the log. That the source of the log was not in the immediate vicinity does not mean that it was not the murder weapon. In *Napue*, the Court was dealing with a well established rule that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth

Amendment. The People have no dispute that *Napue* utilized "due process" and "14th amendment" rights that were long in effect prior to 1960, however, it had not been applied to discovery rights prior to *Brady*. And, the defense was certainly capable of conducting their own investigation into origins of the log.

H. New Affidavits Demonstrate Weger Had a Corroborated Alibi.

This claim is presented at defendant's petition, paragraphs 217-228, at pages 38-40. Defendant apparently believes that his current alibi affidavit, attached to his 2005 clemency petition should be believed over his confession, a confession found voluntary. In that alibi affidavit, defendant says that he was getting a haircut when the women were murdered, and that Stanley Tucker was his ride to the barber shop, but Tucker at some point decided he was not going to tell the police that he gave defendant a ride to the Barber Shop that day. It was then defendant decided he should make up the story that he was in the Pow Pow room writing a letter. There is no affidavit of Stanley Tucker, nor any person from the Barber Shop, or the paper boy defendant supposedly talked to that day. There is simply defendant's affidavit, and alibi, prepared in order to receive clemency. Furthermore, defendant's story is belied by common sense. Why would someone change their story, for a different story that could not be verified?

Defendant also points to an affidavit (unsigned) by defendant's sister, who says that prior to defendant's trial, a man "Mr. Higgins" stopped and told her and her parents that he had given Chester a ride that day. He also gave them a note she could no longer find. She says they attempted to seek out Tucker on defendant's behalf, but they could not find him. That affidavit also says they went to hire an attorney John McNamara from Marseilles, but that he said without Tucker, he would

not be able to present at trial what "Mr. Higgins" had said. There is no affidavit of Attorney McNamara. (Deft's exhibit 44).

Defendant also refers to an affidavit of Steven Spearie an investigator from the Office of the State Appellate Defender's Office, who, along with Donna Kelly, interviewed Stanley Tucker on June 29-30, 2004, and says this affidavit "corroborates Weger's alibi." However, defendant fails to explain how this affidavit corroborates Weger's alibi, as it does not state that Tucker ever said that he gave defendant a ride anywhere on the day of the murders.

Defendant says that this case is factually analogous to *People v. Robinson*, 2020 IL 123849, relied on throughout defendant's filings. However, in *People v. Robinson*, the court reversed a trial court's decision to deny defendant's motion for leave to file a successive post-conviction petition. If a defendant has "made a prima facie showing of cause and prejudice," leave to file the petition should be granted. *Id.* The Court found that at the early leave-to-file stage, the petition does not have to make the "substantial showing" that will later be required at the second-stage hearing after counsel is appointed. *People v. Robinson*, 2020 IL 123849, ¶ 58. Satisfying the cause and prejudice test does not entitle a defendant to relief, but rather "only gives a petitioner an avenue for filing a successive postconviction petition." Id. (*quoting People v. Smith*, 2014 IL 115946, ¶ 29). At this point we are at a different standard. *See People v. Johnson*, 2023 IL App (1st) 220833-U, ¶ 64.

In should be noted too that in *Robinson*, 2020 IL 123849, ¶¶ 48, 56, the court stated that the new evidence "need not be entirely dispositive" but "requires only that the petitioner present evidence that places the trial evidence in a different light and undermines the court's confidence in the judgment." " However, that is not to say that this Court should conduct a *de novo* review of all of the evidence in this case, which it appears counsel is attempting to get this Court to do. The

question is does the "confession" of Smokey Wrona, place the trial evidence in a different light and undermine the court's confidence in the judgement. Roy Tyson's affidavit of what Wrona supposedly told him is uncorroborated, and is in fact, inconsistent with all the other exhibits attached to this petition. And as noted in the State's response under pages 53-57, the affidavits presented in Robinson, are completely different than what we have in this case, in addition to the differing procedural postures of the cases. Nothing undermines the evidence with which the defendant was convicted.

"Ultimately, the question is whether the evidence supporting the postconviction petition places the trial evidence in a different light and undermines the court's confidence in the judgment of guilt. [Citation.] The new evidence need not be entirely dispositive to be likely to alter the result on retrial. [Citations.] Probability, rather than certainty, is the key in considering whether the fact finder would reach a different result after considering the prior evidence *along with the new evidence*. [Citation.]" *Robinson*, 2020 IL 123849, ¶¶ 47-48. *People v. Thompson*, 2021 IL App (4th) 200237-U, ¶ 22, appeal denied, No. 128239, 2023 WL 6446346 (Ill. Sept. 27, 2023). When reviewing a post-conviction claim of actual innocence, the conclusiveness element means that the additional evidence, taken with the trial evidence, would probably lead to a different result on retrial. *Coleman*, 2013 IL 113307, ¶ 96. The question is whether the new evidence places the trial evidence in a different light and undermines the reviewing court's confidence in the verdict. *Id.* at 97. It is the State's position that given the various inconsistencies with all of defendant theories thrown at this Court, this Court should consider all of that in deciding whether defendant should be granted an evidentiary hearing.

I. New Evidence Reveals Sheriff Deputies William Dummett And Wayne Hess' Pattern and Practice of Misconduct.

Defendant next says that new evidence reveals that Sheriff Deputies William Dummett, and Wayne Hess had patterns and practices of misconduct. (Deft's petition, ¶¶ 229-237). Defendant refers to his Exhibit 45, which is a statement from a man, Robert Harris, who says that Dummett, and Hess framed him for a robbery of platinum from an industrial plant, in 1970.

Defendant refers to an affidavit of former public defender Daniel J. Bute, which states that Mr. Bute was representing a man named Steve Broadus who had been charged with first degree murder of a tavern owner. Prior to trial, Bute had asked the State for autopsy photos that Broadus said that Dummett had shown him to induce him to confess. Dummett had denied under oath taking any such photographs or showing any such photographs to Broadus. During the cross-examination of the pathologist during the jury trial, it was revealed that Dummett had taken such photographs, during the autopsy. Subsequently, the judge ordered that Dummett's office be searched and the autopsy photographs were discovered in Dummett's office. This was in 1980.

Defendant also refers to an affidavit from Edward Kuleck, Jr., a former Assistant State's Attorney of LaSalle County, and thereafter a former criminal defense attorney, which states that in 1979 or 1980, he defended a man named Linwood Sluder, who was charged with aggravated kidnaping. The complaining witness had alleged that Sluder held him at gunpoint, forced him to drive around, and threatened to kill him. Attorney Kuleck recounts how during trial, no law enforcement officer had testified the Mr. Sluder admitted to using such force. When Dummett, then a Captain with the Lasalle County Sheriff's Department was called to the stand, he testified that Mr. Sluder admitted he held a gun to Mr. Ernst's head and forced him to drive. Attorney Kuleck moved

for a mistrial, and the judge later struck Dummett's statement. Defendant refers to the appellate court, wherein the court noted that "Dummett testified at a suppression hearing that he was unaware that defendant had requested an attorney and, after initially contending defendant's statement had been volunteered, admitted that a police report indicated that defendant had been asked where he had gotten the gun." *People v. Sluder*, 97 Ill.App3d 459, 462 (3d Dist. 1981). Sluder's case was twenty years after defendant's case.

Apparently, based on these later actions of Dummett, defendant wants this Court to believe that Smokey Wrona committed these murders and that the evidence against him is suspect. Again, the reliability of the confession in this case has been litigated.

J. New Evidence Reveals That Sheriff's Deputy Wayne Hess Admitted That Weger Was Innocent.

Defendant next refers to a deposition of James Woods wherein Woods states that his father was friends with Mr. Wayne Hess, and sometime in about 1977 ot 1979, Woods' father said to his mother that Wayne had said to him, "Jimmy, what we did to that kid was not right." (Deft's petition, ¶¶238-240). (Deft's exhibit, 49). This is double hearsay, of persons who are both deceased and uncorroborated. Furthermore, that statement provides no further statements about this crime. While, of course, double hearsay is not inadmissible in a post-conviction petition at second stage proceedings, in *Velasco*, the First District also discussed how Illinois Rule of Evidence 1101(b)(3) affects third-stage postconviction proceedings and wrote the following:

> "By contrast [with a second-stage hearing], if a petition advances to a third-stage evidentiary hearing, a defendant will no longer enjoy[ ] the presumption that the allegations in his petition and accompanying affidavits are true. [Citation.] Instead,

as to a claim of actual innocence, the postconviction court at the third stage is to decide the weight to be given the testimony and evidence, make credibility determinations, and resolve any evidentiary conflicts. [Citation.] In determining the weight to be given the new evidence and whether all the evidence, new and old, is so conclusive that it is more likely than not that no reasonable juror would find defendant guilty beyond a reasonable doubt on retrial, the court at the third stage must necessarily consider whether the new evidence would *ultimately be admissible at a retrial.* Thus, in this case, at the third stage, the hearsay affidavits [at issue] would be subjected to credibility, reliability, and weight-testing, and the court in making its determination would consider the possibility of their admissibility at a new trial." (Internal quotation marks omitted.) *Velasco*, 2018 IL App (1st) 161683, ¶ 118, 430 Ill.Dec. 817, 127 N.E.3d 53.

People v. Brooks, 2021 IL App (4th) 200573, ¶ 49. None of this can be considered credible or reliable or admissible.

K. Evidence that Warren, Dummett, Hess, and Kindig All Received Substantial Financial Rewards Created a Strong Bias, Interest, and Motive to Lie that was Never Revealed to the Jury.

Yet, again, defendant complains of proceedings during, or after, the trial of this case, an issue not appropriate for this petition. (Deft's petition, ¶¶ 241-253). Defendant cannot bootstrap what he believes were infirmities at a trial in 1960, to support his claim of actual innocence. In any event, it appears that these rewards were given after defendant's trial, as such the People are unsure how they could have been disclosed to the jury. Defendant says state law prohibits prosecutors from receiving rewards, but does not cite to that State law. In any event, neither of the men who received

such awards was a prosecutor in 1963 when the awards were given. Defendant cites to *People v. Ellis*, 315 Ill.App.3d 1108 (1st Dist. 2000), and says "[i]t is well settled law that benefits, financial and otherwise, must be disclosed to the jury, as benefits for testimony favoring the State is a strong indicator of bias, interest, and motive to lie." Of course, defendant's citation is to post-*Brady* case law. And again, any rewards in this case were awarded after the trial in this cause.

Defendant continues that "[t]he other main issue is that the Illinois State Police was actively investigating Chicago mafia leads and links to the three husbands, who most certainly had influence as to which individuals would receive the $38,000 posted by the corporations, where they all held top managements positions." (Deft's petition, ¶ 254). This is a statement with absolutely no basis in fact. There is not one suggestions that the Illinois State Police ever investigated any of the husbands of these women as being involved in the Chicago mafia.

L. Newly Discovered Documents Do not Show Harlan Warren had an Illegal Plan of Coercion.

Next, defendant says there is newly discovered documents that confirm State's Attorney Harlan Warren's plan to get Weger to confess. Those notes do not show a "diabolical plan of intimidation, harassment and coercion." (Deft's petition, ¶ 256). The notes show that Harlan Warren suspected defendant based on defendant's past rapes, and that he made a plan to get defendant to confess. Police investigators attempting to obtain confessions is hardly a new concept. Letting defendant know they knew of his past rapes was hardly coercion. Writing down the obstacles that the State must prove at trial, such as convincing the jury that defendant's confession was voluntary is hardly "diabolical." And, nothing about these notes shows that defendant's confession was not voluntary. That issue has been litigated. And, nothing in this document is

"new." The defendant was well aware that the police were watching him, and that was presented at the hearing on the motion to suppress. That Warren wrote down that the police should tail the defendant does not change the fact that this is a fact that was known to have occurred, as the police admitted that they watched defendant prior to his arrest. This adds nothing to defendant's claim of actual innocence.

VI. THE NEW EVIDENCE DOES NOT DEMONSTRATE THAT WEGER WAS FRAMED, OR THAT HIS CONFESSION WAS INVOLUNTARY.

Defendant devotes paragraphs 257-307 reasserting various "facts" and says that the "newly"[24] discovered evidence demonstrates that Weger's case should have never gone to trial and should have been dismissed by the State's Attorneys office. It is not this Court's function, nor is it the function of the post-conviction hearing act, to determine if charges should have been brought in this case. It is not the function of this Court or of the post-conviction hearing act to determine if defendant should have been administered several polygraph exams.

Defendant once again references, telephone operator Lois Zelensek. (Deft's petition, ¶¶ 261-267). That has been discussed in this motion. Defendant says her information concerned "the murders" and bloody overalls. Her information never said she heard anyone say anything about "murder." This is just one example of defendant misstating the information obtained during the body of his post-conviction petition, and should be disregarded. Regardless of whether Mrs. Zelensek was "most sincere," (Deft's petition, ¶ 265), the information obviously was determined not to involve the starved rock murders.

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[24] As shown, much of what defendant refers to is not "new."

Defendant again involves the Palmatier brothers and a "big, burly man named Lupe 'the Chief' Cardenas' who had a criminal record." Defendant continues "it sure appeared that the Illinois State Police were wondering if the caller had actually been Lupe 'the Chief' Cardenas." (Deft's petition, ¶¶ 270-271). The People are unclear why the defendant is referencing certain individuals who may have been considered suspects, but were apparently found not to be involved. This is certainly not the only case where other individuals may have been questioned and found to not be involved. That others were investigated does not show that defendant is innocent. And once again, it does not fit in with any of the defendant's other theories, the main one apparently being that the Chicago mob hired Smokey Wrona to kill the women. Defendant refers to the fact that newspaper articles reference that Cardenas has a criminal history, and that one Kane and DuPage crime syndicate boss was somehow involved with Cardenas. But, nothing ties Cardenas to this crime. That he was a criminal, and may have committed some crimes with some crime syndicate boss from DuPage and Kane county, does not even fit into defendant's story as told supposedly by Smokey Wrona to Roy Tyson.

Defendant continues that "[t]here was nothing Glen Palmatier said during his interview that would have removed any suspicion of him having knowledge of, at the very least, an individual who had bloody overalls in the trunk of a car, and perhaps more." (Deft's petition, ¶ 274). The People are unsure of the basis for this statement. Glen Pamatier said he was not involved in this conversation overheard, and he passed a Polygraph regarding the same. The fact that nothing came of these leads, does not show that there was some conspiracy to let the real killers go, and frame Chester Weger.

Defendant continues by assaulting the polygraph examinations of the Palmatier brothers, and of Louis Zelensek. Defendant refers to Polygraph examiner's Kindig's findings as "ludicrous." (Deft's petition, ¶¶ 284). Defendant does not explain what this assertion is based on, and it is based on absolutely nothing. Defendant continues that "[w]ith the Palmatier brothers now given a free pass, State's Attorney Warren and his cohorts had to find someone else to take their place and he decided to focus on employees of the Starved Rock Lodge." (Deft's petition, ¶ 286). This is also based on nothing, and reads more like a crime novel, or a podcast, instead of a post-conviction petition, which is supposed to focus on actual facts and law. A fact is "that which actually exists or is the case; reality or truth, something known to exist or to have happened." Dictionary.com. Defendant's story as told in this petition is not based on facts.

Defendant recounts his story yet again in his paragraphs, 287-307 of his petition, starting with the fact that 20 strand twine was found at the scene. (Deft's exhibit 6). Defendant refers to what he say is a "a newly discovered report dated September 16, 1960" and that in the report, Warren refers to finding both 20-strand twine and 12-strand twine, and references Warren stating that if the one was 12-strand they have got the case solved and it was 12-strand. (Deft's petition, ¶ 289). Defendant believes this is relevant because there was no 12-strand twine found at the scene. However, there was no testimony presented at trial that there was 12 strand twine at the scene. The relevance of this may be that 20-strand twine was found at the lodge and at the scene, and therefore the lodge was the source of the twine. Perhaps the 20 strand twine had not been found previously, and only 12-strand twine had been found before. Both were found.

Defendant says Warren used this misrepresentation of the twin evidence to order a new polygraph exam of some of the employees. However, 20 ply was found, and was found at the scene

of the crime. The wording of Warren's statements in his memorandum are irrelevant to whether twine was found at the Lodge that matched the twine at the scene. There was.

Defendant continues in these paragraphs, basically coming up with his own narrative and what he believes occurred, and again attempting to attack his confession. (Deft's petition, ¶¶ 293-301). Then the defendant's story, continues how the polygraph exams were fake, and that led to defendant's "coerced" confession. It is a great story, but it is a fabricated story.

VII CLAIMS FOR POST-CONVICTION RELIEF

CLAIM I - DEFENDANT HAS NOT ESTABLISHED HIS ACTUAL INNOCENCE

Defendant again cites *People v. Robinson*, 2020 IL 123849 as instructive in this case. Defendant says that the *Robinson* court reversed the lower court's dismissal of a successive innocence petition where the defendant was convicted by a jury based upon a seventy-page court-reported confession. Defendant says, in his successive innocence petition, the *Robinson* defendant supplied two alibi affidavits and an explanation why he gave the false confession. Defendant says the trial court dismissed Robinson's innocence petition at the first stage and the Illinois Supreme Court reversed and remanded. Defendant asserts that certain statements made in *Robinson*, are indicative of what should happen in this case.

First, defendant is wrong concerning the procedural posture of *Robinson*. In *Robinson* the trial court denied defendant's petition for leave to file his successive post-conviction petition. It has been noted that at this early leave-to-file stage, the petition does not have to make the "substantial showing" that will later be required at the second-stage hearing after counsel is appointed. *People v. Robinson*, 2020 IL 123849, ¶ 58. Getting leave to file does not entitle the defendant to relief, but

rather "only gives a petitioner an avenue for filing a successive postconviction petition." *Id.* (*quoting People v. Smith*, 2014 IL 115946, ¶ 29).

Further, *Robinson* is completely different from this case, as the affidavits in support of the claim of actual innocence in *Robinson* were from actual, living persons who could contribute something to his case. In *Robinson*, the defendant and two codefendants were convicted of first degree murder. *Id.* ¶¶ 15-17. At trial, the State called two witnesses who testified they were stopped at an intersection facing a viaduct and they "observed two people standing over a person who was sitting on the ground against a car when a third person exited the vehicle and shot the person on the ground." *Id.* ¶ 8. The State also presented a lengthy signed confession from the defendant. *Id.* ¶¶ 14-15. Additionally, the State called witnesses to whom defendant had allegedly confessed, including a witness named Leonard Tucker. *Id.* ¶¶ 9-10. No eyewitnesses identified the defendant as the shooter, and the State did not present any physical evidence directly linking the defendant to the crime. *Id.* ¶ 16. After his conviction and sentences were affirmed on direct appeal, the defendant filed a postconviction petition, which was dismissed at the second stage of proceedings. *Id.* ¶ 20.

The defendant subsequently filed a motion for leave to file a successive postconviction petition, alleging actual innocence. *Id.* ¶ 21. The defendant claimed he had no involvement in the murder and that Tucker, a fellow gang member, had committed the murder. *Id.* ¶¶ 21-23. In support of the petition, the defendant attached affidavits from multiple witnesses who observed Tucker in the vicinity of the murder on the night in question, including one who averred he observed Tucker exit a car on the viaduct with two other men while holding an "A.K." and another who averred Tucker confessed to the killing. *Id.* ¶¶ 25, 28. The trial court denied the defendant's request for leave to file a successive postconviction petition, and the appellate court affirmed. *Id.* ¶¶ 30, 33.

The defendant next filed a petition for leave to appeal, which the supreme court allowed. *Id.* ¶ 34. The supreme court reversed and remanded the cause for second-stage postconviction proceedings, concluding the defendant stated an arguable claim of actual innocence. *Id.* ¶ 83. The supreme court noted the appellate court erroneously "believed that the evidence in the supporting affidavits was positively rebutted simply because it was contradicted by the evidence presented at trial." *Id.* ¶ 60. The supreme court clarified, stating "the well-pleaded allegations in the petition and supporting documents will be accepted as true unless it is affirmatively demonstrated by the record that a trier of fact could never accept their veracity." *Id.* In concluding the defendant presented an arguable claim of innocence, the supreme court noted "no physical or forensic evidence linked [the defendant] to the crimes, and no eyewitness identified him as being involved or even present at the time of the relevant events." *Id.* ¶ 82. Rather, the only evidence supporting the defendant's guilt was his own confession and testimony that the defendant had allegedly confessed to others. *Id.*

In *Robinson*, again, the facts are completely different from this case, where there is no one that can testify that someone other than the defendant committed this crime. There, live persons provided affidavits that they saw Tucker in the vicinity of the murders. *Robinson* reversed based on the fact that the trial court found the affidavits unacceptable as they were contradicted by the evidence at trial. Here, not only are defendant's affidavits contradicted by the record, they are from People with no actual knowledge of what occurred. And, here, defendant's claims and evidence in support of his claims contradict each other, as well as being contradicted by the trial evidence. Also, again, *Robinson* reversed for second stage proceedings, there is no indication that case ever proceeded to a third stage evidentiary hearing, which is what defendant seeks here, and no indication

that Mr. Robinson was ever granted a new trial. Defendant's contradictory, unsupported hearsay and double hearsay claims here do not show actual innocence.

Defendant in this section reiterates why he believes the evidence shows he is actually innocent at paragraphs 332-354. As set forth above, much of this evidence is either not "new" as defendant suggests nor material. The hair not belonging to Mr. Weger does not show he is innocent.[25] Evidence regarding Lois Zelensek is not new nor material. Evidence that Glen Palmatier knew[26] Mr. Murphy is not "new" nor material. Evidence that Stephen Kindig knew Mr. Murphy is not "new" nor material. Defendant's "new" experts cannot be considered at a third stage evidentiary hearing. There is no "new" evidence that the log was not the murder weapon. There is no evidence that defendant was "intentionally framed by the State." (Deft's petition, ¶ 348). There is no "new" evidence that State's Attorney Harland Warren, Sheriff's Deputy Dummett and Wayne Hess, and polygraph examiner Stephen Kindig had reason to lie, (Deft's petition, ¶ 346). They received rewards well after the trial in this case. There is no evidence of improprieties with the polygraph examinations of the Palmatier brothers.

Defendant concludes that "[h]ere there can be no doubt that the abundance of new evidence set forth herein would place the trial evidence in a different light and undermine confidence in the judgement of guilt." (Deft's petition, ¶ 364). However to the extent any or all of the evidence would

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[25] Again, the People are not sure if defendant is going to share all of the information regarding this hair with the Court, but believe that it should be, as Mr. Hale has identified this as the hair of the murderer on his podcast, and that hair fits into none of defendant's scenarios of who he believes might be the murderer.

[26] Defendant characterizes this as a friendship, (Deft's petition, ¶ 335) which is bore out by nothing.

even be admissible, which it would not be, it would merely serve to confuse a trier of fact as to what the defense actually was. Defendant has not shown actual innocence.

CLAIM II. WHETHER THE CLAIM THAT DEFENDANT'S 4TH AMENDMENT RIGHTS WERE VIOLATED IS FORFEITED, RES JUDICATA, AND NOT A CLAIM DEFENDANT CAN RAISE IN A SUCCESSIVE POST-CONVICTION PETITION, WHERE DEFENDANT CANNOT SHOW CAUSE AND PREJUDICE, AND WHERE POST-CONVICTION COUNSEL'S FAILURE TO RAISE THE CLAIM IN A PREVIOUS PETITION IS NOT A PROPER CLAIM IN A SUCCESSIVE POST-CONVICTION PETITION.

Defendant says that it is clear that he was denied a fair trial and that many of his constitutional rights were violated at that trial. He says his conviction cannot stand where the constitutional violation set forth in this section, and below were never raised on Weger's behalf over the years by appointed counsel. Of course, that is not the question that is solely to be presented in a successive post-conviction petition. A successive postconviction petition may be considered only when the petitioner (1) establishes "cause and prejudice" for the failure to raise the claim earlier, or (2) makes a claim of actual innocence. *People v. Ortiz*, 235 Ill. 2d 319, 329–30 (2009). This Court has made no finding that defendant has met the cause and prejudice test regarding any of these new claims of constitutional error, not included in his motion for leave to file a successive post-conviction petition. And, defendant cannot make that showing. "Cause" denotes an objective factor external to the defense which impaired the petitioner's ability to raise a claim in an earlier proceeding. *Id.* at 329. "Prejudice" refers to a constitutional error which " 'so infected the entire trial that the resulting conviction or sentence violates due process.' " *Id.* (*quoting People v. Pitsonbarger*, 205 Ill. 2d 444, 464 (2002)). Both elements of the test must be satisfied in order to allow for the filing of a successive postconviction petition. *People v. Davis*, 2014 IL 115595, ¶ 14. These new claims not included in the motion for leave to file should be dismissed, as the defendant has not

asked this Court to allow such claims in his motion, and defendant cannot make the requisite showing of cause and prejudice in any event.

Defendant has previously set forth what was raised on direct appeal, in his first post-conviction and in his second post-conviction petition which shows these particular claims were not raised. Of course, that shows that the claims are forfeited. In order to overcome forfeiture, defendant is alleging each of his prior counsel's ineffectiveness. However, as set forth above, and reiterated herein, defendant cannot show the cause necessary to raise these claims under *Flores*. Further, defendant cites *Pitsonbarger* for the contention that "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for failure to raise the claim in accordance with applicable state procedures." (Deft's petition, ¶ 372). Defendant asserts that is the case here, since defendant's case "briefly predated fundamental changes that were in progress concerning the State's accountability for honoring constitutional amendments in the 1960's and 1970's" (Deft's petition, ¶ 373). However, defendant does not show this would apply to his failure to raise these claims in his first and second post-conviction petitions filed well after these claims could have been raised.

Defendant sets forth what was included in his second post-conviction petition. He does not say why his new claims II-VIII could not have been raised in that petition, except for a bare allegation that each of his post-conviction counsels' were ineffective in not raising these claims previously. He does not analyze these claims utilizing the *Strickland* test. Pursuant to the decision of the Supreme Court of Illinois in *People v. Flores*, 153 Ill.2d 264 (1992)[27], it is well-established

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[27]Defendant's petition cites *People v. Pitsonbarger*, 205 Ill.2d 444 (2002), and correctly states that a successive post-conviction petitioner who is alleging a claim other than actual innocence must demonstrate "cause" for failing to raise the error and actual "prejudice" resulting from the

that, as a general rule, a petitioner cannot raise non-compliance with Rule 651(c) in a second post-conviction petition. Prior to that decision, at least two decisions of the Supreme Court of Illinois, *People v. Hollins*, 51 Ill.2d 68 (1972), and *People v. Slaughter*, 39 Ill.2d 278 (1968), had suggested that, when post-conviction counsel had not performed his responsibilities under Rule 651, subsequent filings would be allowed. *Flores*, however, made it very clear under what circumstances it would allow ineffective assistance of counsel claims to be raised in a successive post-conviction petition:

> In sum, where a defendant files a second or subsequent post-conviction petition in which he claims sixth amendment ineffective assistance of prior post-conviction counsel, because there is no right to sixth amendment counsel in post-conviction proceedings, such claims do not present a basis upon which relief may be granted under the Act. Further, where a defendant files a second or subsequent post-conviction petition wherein he claims ineffective assistance in his first post-conviction proceeding, because the Act is confined to errors which occurred in the original proceeding, only, such claims are beyond the scope of the Act.
>
> Where, however, a defendant files a second or subsequent post-conviction petition in which he raises meritorious claims of ineffective assistance of appellate counsel, which could not have been raised in a prior post-trial proceeding, the defendant is entitled to consideration of those claims.

People v. Flores. Consequently, after *Flores* substandard performance by state post-conviction counsel is no longer a basis for relief in a second stage post-conviction petition. Regarding the

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claimed errors. Defendant does not acknowledge Flores holding that a defendant cannot show cause when he is asserting ineffective assistance of post-conviction counsel in a successive petition.

assertion of ineffective assistance of counsel as a basis for a showing of cause necessary to permit a successive petition for postconviction relief, such claims constitute cause for purposes of the Act only when the alleged ineffective assistance occurred at the trial or appellate level, and only when such claims could not have been raised in the initial petition. *People v. Flores*, 153 Ill.2d 264, 280 (1992). Such claims do not, however, constitute cause, for purposes of the Act, if they relate to alleged unreasonable assistance of counsel in a prior postconviction petition because the Act applies only to errors which occurred in the original proceeding. *Id. People v. Newman*, 2012 IL App (5th) 100494-U. *See also People v. Szabo*, 186 Ill. 2d 19, 36–37 (1998)(post-conviction petitioners cannot present claims of ineffective assistance of post-conviction counsel based on the sixth amendment in subsequent post-conviction petitions.) In addition, "where a defendant files a second or subsequent post-conviction petition wherein he claims ineffective assistance in his first post-conviction proceeding, because the Act is confined to errors which occurred in the original proceeding [the actual trial] only, such claims are beyond the scope of the Act." *Flores*, 153 Ill.2d at 280.);); *People v. Jones*, 321 Ill. App. 3d 515, 519 (2001) (same).

While defendant cites to the proposition that in a post-conviction matter, where the same attorney or the same firm who represented the petitioner at trial also represented the petition on appeal or in a post-conviction matter, it is deemed unreasonable to expect counsel to argue his own incompetence, (Deft's petition, ¶ 376-377), and defendant asserts trial counsel handled defendant's first post-conviction petition, defendant does not assert trial counsel handled defendant's second post-conviction petition, and he did not.

As such, defendant cannot make any claim that prior post-conviction counsels were ineffective. Since each of his new claims could have been brought in a prior post-conviction

petition, but were not, they are each barred by the doctrine of forfeiture. And it should be added defendant does not allege that defendant's appellate counsels were ineffective in failing to raise claims regarding the supposed ineffectiveness of post-conviction counsels. Fundamental fairness requires that a court grant leave to file a successive petition when necessary to prevent a miscarriage of justice. *Id.* at 459. In order to avoid the application of the cause-and-prejudice test in cases not involving the death penalty, "a petitioner must show actual innocence." *Id.* Fundamental fairness may also require leave to file a successive petition if" 'the claimed error is one which could not have been presented in an earlier proceeding.' " *People v. Caballero*, 179 Ill.2d 205, 212 (1997) (*quoting People v. Flores*, 153 Ill.2d 264, 274–75 (1992)).

A defendant's right to postconviction counsel derives not from the constitution but from the Act. Once counsel is appointed, the defendant is entitled only to the level of assistance that the Act mandates, which is a "reasonable level" of assistance. 725 ILCS 5/122 (West 2008); *see People v. Greer*, 212 Ill.2d 192, 204 (2004); *People v. McNeal*, 194 Ill.2d 135, 142 (2000). *People v. Young*, 2015 IL App (1st) 112685-U, ¶ 26. Defendant here cannot show ineffective assistance of second post-conviction counsel as cause for his failure to raise any of these constitutional claims earlier.

CLAIM II. A ANY 4TH AMENDMENT VIOLATIONS COULD HAVE BEEN RAISED BEFORE, AND ARE FORFEITED, DEFENDANT HAS NOT ESTABLISHED CAUSE OR PREJUDICE AND HAS NOT ASKED THIS COURT FOR LEAVE TO FILE THIS CLAIM. FURTHERMORE, DEFENDANT CANNOT RAISE A CLAIM OF INEFFECTIVE ASSISTANCE OF FIRST POST-CONVICTION COUNSEL IN THIS SUCCESSIVE PETITION, OR OF SECOND POST-CONVICTION COUNSEL.

The People reiterate that this claim could have been raised on direct appeal, or in defendant's prior post-conviction petitions. And, again, after *Flores* substandard performance by state post-conviction counsel is no longer a basis for relief in a second stage post-conviction petition.

Regarding the assertion of ineffective assistance of counsel as a basis for a showing of cause necessary to permit a successive petition for postconviction relief, such claims constitute cause for purposes of the Act only when the alleged ineffective assistance occurred at the trial or appellate level, and only when such claims could not have been raised in the initial petition. *People v. Flores*, 153 Ill.2d 264, 280 (1992). Such claims do not, however, constitute cause, for purposes of the Act, if they relate to alleged unreasonable assistance of counsel in a prior postconviction petition because the Act applies only to errors which occurred in the original proceeding. *Id.*

Defendant in this claim says that he was arrested without probable cause, and had a motion been made on his behalf, it would have been successful. He says, however, that the violations were never raised via motion, at trial, on direst appeal, or in two prior post-conviction petitions. Defendant says the violations alone constitute the "cause" necessary to raise this claim in this successive post-conviction petition. However, that is not the standard for determining cause, as set forth above. A successive postconviction petition may be considered only when the petitioner (1) establishes "cause and prejudice" for the failure to raise the claim earlier, or (2) makes a claim of actual innocence. *People v. Ortiz*, 235 Ill. 2d 319, 329–30 (2009). This Court has made no finding that defendant has met the cause and prejudice test regarding any of these new claims of constitutional error, not included in his motion for leave to file a successive post-conviction petition. And, defendant cannot make that showing. "Cause" denotes an objective factor external to the defense which impaired the petitioner's ability to raise a claim in an earlier proceeding. *Id.* at 329.

Defendant says that appointed counsel who handled the trial, as well as counsel on the direct appeal and the two prior post-conviction petitions all provided ineffective representation that greatly prejudiced the defendant. However, again, defendant cannot raise the ineffective assistance of prior

post-conviction counsel in this proceeding, which would be the only way around the fact that the issue is forfeited. *People v. Flores*, 153 Ill.2d 264 (1992).

Regarding the substance of this claim, defendant has not shown he was arrested without probable cause. Defendant picks and chooses certain testimony from the hearing and trial in an attempt to show this supposed conspiracy against defendant, however, the fact remains that the issue was not litigated so there is no way of knowing what testimony would have been presented either to show lack of probable cause, or consent to accompany the officers and the voluntary giving of his statement.

Defendant cites *United States v. Lefkowitz*, 285 U.S. 452 (1932); *Agnello v. United States*, 269 (1925); *Gould v. United States*, 255 U.S. 298 (1921); *Bruno v. United States*, 308 U.S. 287 (1921) and *Weeks v. U.S.*, 232 U.S. 383 (1913), for the proposition that "4th amendment rights were conferred on Weger via the 14th amendment of the federal constitution as well as the Illinois constitution before 1960, yet were not honored." (Deft's petition, ¶ 389). *Lefkowitz* dealt with whether a search incident to arrest was improper, and the "pretext arrest" doctrine, a doctrine which has been assailed over the years. In that case, the deputy marshal and several prohibition agents, armed with only a warrant for the arrest of the defendant for violation of the National Prohibition Act, proceeded not only to effect the arrest but to search and seize papers found in the desks, cabinets and waste baskets for possible use as evidence of the defendant's guilt of the offense. In holding that the searches and seizures were violative of the defendant's rights under the Fourth and Fifth Amendments of the United States Constitution, Justice Butler closed with the dictum: "An arrest may not be used as a pretext to search for evidence." 285 U.S. at 467. In *State v. Garcia*, 794 S.W.2d 472, 474 (Tex. App. 1990), aff'd, 827 S.W.2d 937 (Tex. Crim. App. 1992), the Court stated:

Looking at the subsequent manipulation of that language, we marvel at the degree to which Justice Butler's "pretext" has been taken out of Lefkowitz' context.

Agnello dealt with searches of places incident to arrest. In *Gouled v. United States*, 255 U.S. 298, 309, 41 S.Ct. 261, 265, 65 L.Ed. 647, the Court said that search warrants 'may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding * * *.' *Bruno* dealt with whether a defendant who chose to testify should have the benefit of an instruction to the jury that the testimony should not be used against him. *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652, involved a prosecution in the federal courts and a search and seizure made by federal officers. The court said that because the evidence was illegally obtained, the defendant had a constitutional right to have the evidence excluded.

It appears that the right to be free from an arrest without probable cause was clearly established in law in the case of *Dunaway v. New York*, 442 U.S. 200, 213 (1979) (explaining that generally, "Fourth Amendment seizures are 'reasonable' only if based on probable cause"). In *Dunaway*, the court held that a person who accompanied police officers to a police station for purposes of interrogation undoubtedly "was 'seized' in the Fourth Amendment sense," even though "he was not told he was under arrest." *see United States v. Mendenhall*, 446 U.S. 544, 574 (1980). As such, even if defendant could somehow establish through what he has presented, that he was arrested without probable cause, which he cannot, that was not clearly established law in 1960, and, if it had been raised, defendant's confession would not be held the product of any illegal arrest.

CLAIM III. DEFENDANT'S 5TH AND 6TH AMENDMENT RIGHTS VIA THE 14TH AMENDMENT WERE NOT VIOLATED WHERE DEFENDANT WAS NOT INFORMED THAT HE COULD REMAIN SILENT OR REFUSE TO INCRIMINATE HIMSELF, AND

HE WAS NOT DENIED HIS 6TH AMENDMENT RIGHT TO COUNSEL UPON BEING CHARGED VIA WARRANTS/COMPLAINTS AND HE WAS NOT DENIED HIS RIGHT TO COUNSEL AT AN ADVERSARIAL PROCEEDING WHERE A CONTINUANCE WAS GRANTED DURING PRELIMINARY HEARING PROCEEDINGS BUT ONLY THE STATE PARTICIPATED IN THAT CONTINUATION HEARING, WHERE DEFENDANT HAS NOT SHOWN THESE RIGHTS WERE RIGHTS CONFERRED UPON SUSPECTS IN 1960. FURTHER, AS INDICATED ABOVE, DEFENDANT CANNOT MAKE THESE CLAIMS HEREIN, AS THEY ARE FORFEITED, AND DEFENDANT CANNOT RAISE INEFFECTIVE ASSISTANCE OF PRIOR POST-CONVICTION COUNSEL IN THIS PETITION.

The People reiterate that these claims could have been raised on direct appeal, or in defendant's prior post-conviction petitions. And, again, after *Flores* substandard performance by state post-conviction counsel is no longer a basis for relief in a successive post-conviction petition. Regarding the assertion of ineffective assistance of counsel as a basis for a showing of cause necessary to permit a successive petition for postconviction relief, such claims constitute cause for purposes of the Act only when the alleged ineffective assistance occurred at the trial or appellate level, and only when such claims could not have been raised in the prior petitions. *People v. Flores*, 153 Ill.2d 264, 280 (1992). Such claims do not, however, constitute cause, for purposes of the Act, if they relate to alleged unreasonable assistance of counsel in a prior postconviction petition because the Act applies only to errors which occurred in the original proceeding. *Id.*

Defendant in this section refers to defendant not being told of his rights to remain silent, or of his right to an attorney. (Deft's petition, ¶¶ 433, 438). While defendant had certain rights in 1960, defendant cites to no case which held that a defendant must be told of his right to an attorney or his right to remain silent prior to 1960, and the People are unable to find any such case. Prior to *Escobedo* and *Miranda*, courts reviewed the totality of circumstances surrounding defendant's confessions, in determining whether defendant's statements were voluntary. This was determined

in this case. In this case, the trial court, and other courts have found that defendant's confession was voluntary. Now, defendant appears to want to re-litigate this issue based on law that was not applicable at the time, that he was not told of his rights. However, the standards laid down in *Escobedo v. State of Illinois*, 378 U.S. 478 (1964), and *Miranda v. State of Arizona*, 384 U.S. 436 (1966), were not applicable at the time of defendant's statements (*People v. McGuire*, 35 Ill.2d 219 (1966)), as such, defendant cannot complain that he was not told certain rights. It was not until *Escobedo*, when it was held that if a defendant is not advised of his constitutional rights and requests and is denied the assistance of counsel, his subsequent confession is inadmissible as evidence against him. *See People v. Worley*, 37 Ill. 2d 439, 443 (1967).

Defendant complains that his rights to counsel at the preliminary hearing stage were violated, but cites to no case which established such a right in 1960. Beginning with *Massiah v. United States*, 377 U.S. 201 (1964), and *Escobedo*, the Supreme Court has held that the sixth amendment right to counsel attaches once the suspect reaches the status of an "accused." Though the logic of a line drawn at the point of accusation has often been criticized (*see, e.g., Uviller, Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 Colum.L.Rev. 1137 (1987)), the Court has consistently held that formal accusation triggers the suspect's right to counsel. (*See Moran v. Burbine*, 475 U.S. 412, 428 (1986)(sixth amendment right to counsel attaches at first formal charging proceeding).)

Defendant cites to *United States v. Wade*, 388 U.S. 218 (1967) and says defendant's demand for a prompt preliminary hearing was denied by both blatant misconduct and blatant disregard for the law. (Deft's petition, ¶ 440). However, *Wade* had nothing to do with a demand for a prompt

preliminary hearing. And, the right to a prompt probable cause determination was established in article I, section 7, of the 1970 Illinois Constitution, which provides in part:

> "No person shall be held to answer for a crime punishable by death or by imprisonment in the penitentiary unless either the initial charge has been brought by indictment of a grand jury or the person has been given a prompt preliminary hearing to establish probable cause." Ill. Const.1970, art. I, § 7.

There was no constitutionally cognizable right to a preliminary hearing prior to the effective date of section 7 of article I of the 1970 constitution. *People v. Moore*, 28 Ill.App.3d 1085, 1086–87 (5th Dist. 1975).

Even if defendant was denied his right to a prompt preliminary hearing, in this case, and the People do not believe defendant has shown such a violation, it is of no consequence now. Even where a defendant was held under a criminal charge for 65 days without giving him a prompt preliminary hearing or presenting his case to a grand jury violated the letter and intent of section 7 of article I of the 1970 Constitution, the question was, what consequences then flow from such a violation? The legislature has not fashioned a remedy of discharge for a violation of this section as it has for the violation of a defendant's right to a speedy trial. (Ill.Const. (1970), art. I, sec. 8; see Ill.Rev.Stat.1973, ch. 38, par. 103—5.) Courts acknowledged this absence of a remedy in *People v. Hendrix* and stated:

> 'The second paragraph of section 7 does not provide a grant of immunity from prosecution as a sanction for its violation. Nor would an interpretation make sense which required the dismissal of the present indictment and the discharge of the defendant, to be followed by his reindictment and rearrest upon a new indictment.

> What is a prompt preliminary hearing must, of course, depend upon an appraisal of all of the relevant circumstances, and in this case it does not appear that there was any violation of the defendant's constitutional right to a prompt preliminary hearing.

People v. Hendrix, 54 Ill. 2d 165, 169 (1973).

In *People v. Moore* the court quoted approvingly the following passage from *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54:

> '(A) conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause.'

It thus appears that unless the denial of the right to a prompt preliminary hearing deprives the accused of 'a substantial means of enjoying a fair and impartial trial,' such denial does not entitle a defendant to have his conviction vacated. Since the instant record contains no indication that the denial of a prompt preliminary hearing, if one were necessary and did not occur, deprived the defendant of 'a substantial means of enjoying a fair and impartial trial', the only remedy for a court was to recognize the violation of the defendant's constitutional rights and condemn the State's inaction which resulted in such violation. *See People v. Price*, 32 Ill. App. 3d 610, 613 (5th Dist. 1975). *United States v. Wade*, 388 U.S. 218, 225–27 (1967). *People v. Thompkins*, 121 Ill. 2d 401, 462 (1988). Defendant raises no cognizable claim in this section.

CLAIM IV. THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE WAS NOT REPEATEDLY VIOLATED AND DID NOT DENY WEGER A FAIR TRIAL, AND DEFENDANT HAS NOT MET THE CAUSE AND PREJUDICE TEST WHERE HE CANNOT SHOW THAT HE COULD NOT HAVE MADE THIS ARGUMENT IN ANY OF HIS PRIOR PROCEEDINGS, AND DEFENDANT CANNOT RAISE INEFFECTIVE ASSISTANCE OF PRIOR POST-CONVICTION COUNSEL IN THIS PETITION.

The People reiterate that this claim could have been raised on direct appeal, or in defendant's prior post-conviction petitions. And, again, after *Flores* substandard performance by state post-conviction counsel is no longer a basis for relief in a second stage post-conviction petition. Regarding the assertion of ineffective assistance of counsel as a basis for a showing of cause necessary to permit a successive petition for postconviction relief, such claims constitute cause for purposes of the Act only when the alleged ineffective assistance occurred at the trial or appellate level, and only when such claims could not have been raised in the initial petition. *People v. Flores*, 153 Ill.2d 264, 280 (1992). Such claims do not, however, constitute cause, for purposes of the Act, if they relate to alleged unreasonable assistance of counsel in a prior postconviction petition because the Act applies only to errors which occurred in the original proceeding. *Id.*

Defendant in this section basically raises a *Brady* claim, alleging he was denied a fair trial because the State failed to disclose, before trial, evidence favorable to the defendant, in violation of the rule in *Brady v. Maryland*, 373 U.S. 80 (1963). (Deft's petition, ¶¶ 466-467). In *Brady v. Maryland*, the United States Supreme Court held that an accused is denied a fair trial when the prosecution withholds exculpatory evidence from the accused until after trial. *People v. Parker*, 90 Ill. App.3d 1052 (1st Dist. 1980). In *United States v. Agurs*, 427 U.S. 97 (1976), the Supreme Court held that the prosecutor's failure to disclose exculpatory evidence must be material and result in the denial of a fair trial. The court defined materiality as omitted evidence which creates a reasonable doubt of guilt that did not otherwise exist. The *Agurs* court further held that the mere possibility that evidence "might have helped the defense, or might have affected the outcome of the trial, does not establish materiality in the constitutional sense." *Agurs*, 427 U.S. at 110. *Parker*, 90 Ill. App. 3d at 1059. *Brady* came out after defendant's trial.

Defendant complains that trial counsel did not have enough time to prepare his defense, and would like this Court to compare "the extensive defense resources later established for capital litigants in Illinois with what Petitioner faced defending three death penalty cases with no resources." (Deft's petition, ¶ 468). Defendant says this is "shockingly unfair." The State are unaware of what constitutional violation defendant is attempting to establish with these assertions, but if he is making a constitutional argument, it is not identified, and could have been raised before.

Defendant talks about his recent battle to view the evidence in this case. (Deft's petition, ¶ 472). The People are unaware what constitutional violation defendant is suggesting that occurred at his trial by throwing in this statement. Again in defendant's paragraphs 476-481 defendant complains of discovery violations he believes occurred during defendant's trial. Defendant recognizes that *Brady* came out after defendant's trial, but says "withholding exculpatory evidence is now commonly considered to be unethical and improper conduct and it was also considered to be unconstitutional when Weger was tried," (Deft's ¶ 481). Defendant cites to *Napue v. Illinois*, 360 U.S. 264, and *Green v. U.S.* 356 U.S. 184 (1957). However, in *Napue*, the Court was dealing with a well established rule that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. In *Green*, the court held that, "[t]he right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society, one that was dearly won and one that should continue to be highly valued. If such great constitutional protections are given a narrow, grudging application they are deprived of much of their significance." *Green v. United States*, 355 U.S. 184, 198 (1957). The People have no dispute that these two cases utilized "due process" and "14th amendment" rights and were in effect prior to 1960, however, they had not been applied to discovery rights prior to that time.

This is set forth clearly in an article Enrico B. Valdez, Practical Ethics for the Professional Prosecutor, 1 St. Mary's J. Legal Mal. & Ethics 250, 256–60 (2011), where Pre-*Brady* Due Process Requirements, and how *Brady* changed the legal framework, were discussed:

> B. Pre-Brady Due Process Requirements
>
> In the 1935 case of Mooney v. Holohan, the Supreme Court explained that due process in a criminal prosecution requires more than just notice and a hearing to protect an accused against an unfair conviction. When the prosecution used perjured testimony to secure a conviction as it did in Mooney, the trial becomes nothing more than a pretense. The use of perjured testimony is "inconsistent with the rudimentary demands of justice."
>
> The Supreme Court reiterated this holding seven years later in the case of Pyle v. Kansas. Pyle contended that the prosecution utilized perjured testimony and added that the government suppressed testimony that was favorable to him in order to secure a conviction. The Court wrote that the failure of the Kansas courts to consider these allegations was error since the allegations sufficiently raised "a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle [Pyle] to release" from prison.
>
> In 1959, the Court went even further in the case of Napue v. Illinois. During testimony, a State's witness falsely denied that he was promised consideration by the prosecution for his testimony. Although the false testimony did not directly concern the guilt or innocence of Napue, it did bear on the credibility of the witness. The Court reiterated that the State could not knowingly use false evidence and stressed

that it did not matter that the false testimony only went to the credibility of the witness. The Court explained, "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness."

While these cases represent a significant development in the applicability of the Due Process Clause to the conduct of the prosecution, they stopped short of creating a specific duty to disclose. In each of the cases, the due process violation arose from the prosecution's actual use of, or acquiescence in the use of, false evidence. It was this conduct that rendered the convictions unfair and resulted in the due process violation. Nonetheless, the reasoning behind these holdings laid the foundation for the Court's later holding in Brady.

C. Creation of the Duty

1. Brady v. Maryland, 373 U.S. 83 (1963)

Brady and a co-defendant were convicted of first-degree murder--murder in the perpetration of a robbery--and sentenced to death. Prior to trial, Brady's counsel asked to review the co-defendant's extra-judicial statements. Although several of the statements were provided to the defense, the prosecution withheld a statement in which the co-defendant admitted to committing the actual murder. At trial, Brady testified and admitted participating in the robbery but claimed that his co-defendant did the actual killing. After the trial was over, the co-defendant's statement came to the attention of the defense.

Brady then moved for a new trial based on the newly discovered evidence, alleging that the prosecution had suppressed the evidence. The trial court dismissed the pleading and Brady appealed. The Maryland Court of Appeals concluded that the suppression of the evidence by the prosecution was a violation of Brady's due process rights and remanded the case for a retrial on punishment. The Supreme Court granted certiorari to consider the issue.

The Supreme Court agreed with the lower court's reasoning and held, for the first time, that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." The Court noted that this holding was an extension of its earlier rulings dealing with false evidence.

In Brady, the Supreme Court added new elements to the due process equation. The good or bad faith of the prosecutor in suppressing evidence is irrelevant. Since the due process goal is a fair trial, and not to punish the prosecutor for withholding evidence, the reason the information was not disclosed is irrelevant.

2. United States v. Agurs, 427 U.S. 97 (1976)

In Brady, the Supreme Court was asked to review a case in which the defendant had requested the evidence prior to trial. In United States v. Agurs, the Court was given the opportunity to address whether the prosecution had to disclose exculpatory evidence even in the absence of a specific defense request. In concluding the disclosure of favorable evidence should not be predicated upon a defendant's request,

the Court focused on the nature of the evidence in question. According to the Court, "if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made." Thus, disclosure is required irrespective of the actions of the defense. With this new piece in place, the duty to disclose under the Due Process Clause was firmly established.

As such, it is clear that the due process clause did not require disclosure of evidence to the defense prior to *Brady*, and not during defendant's trial.[28] Regardless of whether defendant considers this "shockingly unfair" it is not a basis to conclude defendant is entitled to a new trial, as that "shocking unfairness" was not due in any way to anything but the law in effect at the time of defendant's trial.

CLAIM V. TO THE EXTENT THAT ALL OF THE CLAIMS ASSERTED IN THIS PETITION ARE WAIVED AND OR FORFEITED FOR FAILURE TO RAISE THEM PREVIOUSLY, DEFENDANT CANNOT SHOW CAUSE FOR THEIR FAILURE TO BE RAISED BEFORE. WHILE DEFENDANT REFERS TO INEFFECTIVENESS OF TRIAL, APPELLATE AND POST-CONVICTION COUNSEL, DEFENDANT CANNOT GET AROUND THE CLEAR HOLDING OF *FLORES*.

The People reiterate that all of defendant's constitutional claims could have been raised on direct appeal, or in defendant's prior post-conviction petitions. While defendant asserts that he has shown cause for the failure to raise these claims previously because all of his prior attorneys were ineffective, defendant again ignores *Flores*. Again, after *Flores* substandard performance by state post-conviction counsel is no longer a basis for relief in a second stage post-conviction petition. Regarding the assertion of ineffective assistance of counsel as a basis for a showing of cause

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[28] As such, the State is not going to reiterate its position that many of the items defendant now says were exculpatory and material, are not material nor exculpatory.

necessary to permit a successive petition for postconviction relief, such claims constitute cause for purposes of the Act only when the alleged ineffective assistance occurred at the trial or appellate level, and only when such claims could not have been raised in the prior petitions. *People v. Flores*, 153 Ill.2d 264, 280 (1992). Such claims do not, however, constitute cause, for purposes of the Act, if they relate to alleged unreasonable assistance of counsel in a prior postconviction petition because the Act applies only to errors which occurred in the original proceeding. *Id.* Defendant cannot establish cause for his failure to raise any of his new claims raised in this petition.

CLAIM VI. THE CUMULATIVE EFFECT OF ALLEGED ERRORS THAT INFECTED DEFENDANT'S TRIAL DID NOT DENY HIM DUE PROCESS RIGHTS TO A FAIR TRIAL.

Defendant asserts that, even if individually any alleged errors and other matters alleged in this petition are not found to be sufficiently prejudicial to grant defendant post-conviction relief, the cumulative effect of all matters alleged in the petition deprived defendant of his fundamental due process right to a fair trial. (Deft's petition, ¶ 499). However, since none of these claims can be found to be before this Court, based on the *Flores* decision, any cumulative effect of any alleged errors is not properly before this Court. The People would add that defendant's trial cannot be judged by 2024 standards and law, but by the standards and law in effect in 1961.

As such for all the above reasons, this Court should dismiss all of defendant's claims raised in this amended successive post-conviction petition.

Respectfully Submitted,
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STATE OF ILLINOIS)
) SS
COUNTY OF WILL)

AFFIDAVIT

Under penalties as provided by law pursuant to section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109), I certify that the above statements are true to the best of my knowledge and belief.

/s/ Colleen M. Griffin

Colleen M. Griffin