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FIFTH DIVISION  
March 18, 2011

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IN THE APPELLATE  
COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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|--------------------------------------|---|------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the  |
|                                      | ) | Circuit Court of |
| Plaintiff-Appellee,                  | ) | Cook County.     |
|                                      | ) |                  |
| v.                                   | ) | No. 94CR23135    |
|                                      | ) |                  |
| SIDNEY PERRY,                        | ) | The Honorable    |
|                                      | ) | James B. Linn,   |
| Defendant-Appellant.                 | ) | Judge Presiding. |

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PRESIDING JUSTICE JAMES FITZGERALD SMITH delivered the judgment of the court.

Justices Howse and Epstein<sup>1</sup> concur in the judgment.

*HELD:* Dismissal of defendant's *pro se* successive post-conviction petition without an evidentiary hearing affirmed; sentence affirmed.

**ORDER**

Defendant Sidney Perry filed a *pro se* successive post-conviction petition for relief from judgment under the Post-Conviction Hearing Act (Act), 725 ILCS 5/122-1 *et seq.* (West 2006),

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<sup>1</sup>Justice Michael P. Toomin originally participated in this cause. However, he has since left this court. Justice Epstein, in Justice Toomin's stead, has reviewed all pertinent materials relevant to this cause and now joins in this order.

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relating to his conviction of first degree murder and two counts of armed robbery. The trial court appointed post-conviction counsel to represent defendant. Thereafter, defense counsel filed a supplemental successive post-conviction petition on defendant's behalf. The State filed a motion to dismiss this petition. After a hearing, the trial court granted the State's motion to dismiss, and dismissed defendant's successive post-conviction petition. Defendant appeals, contending that: (1) the trial court erred in dismissing defendant's claim of ineffective assistance of appellate counsel without an evidentiary hearing where counsel failed to raise an issue regarding an erroneous jury instruction; and (2) this court should modify his conviction and sentence.<sup>2</sup> For the following reasons, we affirm the trial court's judgment as well as the sentence imposed upon defendant.

## I. BACKGROUND

Defendant was charged with first-degree murder and two counts of armed robbery. The murder counts alleged that defendant killed victim William Yousef intentionally or knowingly

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<sup>2</sup>Previously, we affirmed the trial court's dismissal of this petition and modified defendant's sentence. *People v. Perry*, No. 1-07-3239 (unpublished order pursuant to Supreme Court Rule 23) (2009). Defendant brought a petition for rehearing, which we denied. Defendant then filed a petition for leave to appeal before our supreme court, which was also denied. Our supreme court, however, entered a supervisory order directing this court to vacate our prior judgment and reconsider the judgment in light of *People v. Petrenko*, 237 Ill. 2d 490 (2010). We vacated that judgment and, for the following reasons, we affirm the judgment of the trial court as well as the sentence imposed upon defendant.

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(720 ILCS 5/9-1(a)(1) (West 1994)), knowing that his acts created a strong probability of death or great bodily harm (720 ILCS 5/9-1(a)(2) (West 1994)), or while committing an armed robbery (720 ILCS 5/9-1(a)(3) (West 1994)). The two armed robbery charges alleged that they were committed against William Yousef and Hani Hamad. Defendant's jury trial took place in September 1995. He was tried simultaneously with co-defendant Moses Cathey (co-defendant), but before separate juries.

The following facts were adduced at trial. On September 12, 1994, William Yousef (William) and his cousin Hani Hamad (Hamad) were robbed while working in a closed food store at Central and Lake Streets. William was shot in the abdomen during the robbery. He died from the gunshot wound on September 22, 1994.

The State's position at trial, which was supported by victim Hamad's testimony, was that two men (defendant and co-defendant) entered the store, each armed with a gun, seeking money. Defendant shot William. Defendant testified, however, that he entered the store alone and unarmed, that William drew a gun, they scuffled over the gun, and William shot himself.

Hamad testified at trial that, on September 11, 1994, he, William, and Nayim Yousef (Nayim) were working to prepare Nayim's grocery store for its grand opening. Defendant entered and asked if any work was available. Defendant worked about two hours, then asked Hamad for payment. Hamad referred defendant to Nayim, who gave defendant \$20. Hamad, William, Yousef, and defendant then left the store for the day.

The following day, September 12, 1994, Hamad, William, and Nayim returned to work in the store. Defendant came to the store again asking for work, but was told that no help was

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needed. After defendant and Nayim left the store, Hamad and William continued to work in the store.

Hamad testified that defendant returned to the store with a “partner.” While the second man stood by William about 15 feet away, defendant stood in front of Hamad and said “give me all the money you have.” Hamad denied that he had any money. Defendant then drew a gun and fired one shot. The shot missed Hamad, hitting some glass behind him. Hamad turned to see his cousin William and observed co-defendant draw a gun and aim it at William’s face. Hamad told defendant, “Hold on, man. My money is in my pocket. Take anything you want. We have cigarettes. Take anything you want, just don’t shoot.”

Defendant told Hamad to remove his pants and, as Hamad complied, his wallet fell to the floor. Defendant took Hamad’s wallet, which contained about \$100, and told Hamad to “take the floor.” Hamad did so. Hamad gave defendant his watch. Hamad saw William assume the same position after being told to do so by co-defendant. William had also removed his pants, and co-defendant took William’s wallet.

Hamad then heard a second gunshot, but does not know who fired the second shot. When it was fired, Hamad was completely on the floor, unable to see William from that position. After the second shot, Hamad heard shelves fall and somebody run away. Hamad tried to stand up, but defendant saw him and fired shots at him. Hamad returned to the floor. William was still on the floor. The third shot fired went into the soda bottle in front of Hamad. After the two men left the store, Hamad closed and locked the security gate. William told Hamad “they shot me,” and Hamad saw blood on William’s stomach.

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The police arrived, cut the gate, and entered the store. William was taken to the hospital by ambulance. He died weeks later from the gunshot wound.

Hamad denied that William and defendant argued or fought, that William pulled a gun, that William and defendant struggled over a gun, and that the gun fired during the struggle.

Nayim Yousef testified that, in September 1994, he purchased a small grocery store near Lake Street and Central Street. On September 11, 1994, Yousef, Hamad, and William worked in the store in preparation of its opening. On September 11, Yousef hired defendant to do some work in the store. Defendant worked for two hours, and Yousef paid him \$20. On September 12, 1994, defendant returned to the store, asking for work. Yousef told him he did not need help that day because the store was almost ready. Defendant then left the store. Yousef left soon after.

After the shooting, Chicago police officer Witkowski canvassed the area around the store. While doing so, defendant approached Officer Witkowski, identified himself by name, and said he was “the guy you are looking for.” Defendant put his hands behind his back and Officer Witkowski handcuffed him. Hamad later identified defendant in a line-up at the police station

After transporting defendant to the police station, Officer Witkowski returned to the area of the store. While there, a young man approached Officer Witkowski’s police car and threw a bag inside. The bag contained a .380 Lorson semi-automatic pistol. Upon returning to the police station, Witkowski showed the gun to Hamad, who said it looked like the gun defendant had used.

Chicago police forensics investigator Thomas Reynolds testified that he went to the crime

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scene on September 12, 1994. There, he recovered three discharged cartridge cases, one fired bullet, and one copper jacket from a bullet. One discharged cartridge case was found on the floor near the coolers. William had been found lying on the floor in front of the cooler. The fired bullet was found inside a case of soda pop. The three discharged cartridges came from a .380-caliber bullet.

Chicago police officer Robert Smith, a firearms expert, testified that the bullet recovered from William's body had been fired from the recovered weapon. The bullet recovered from the inside of a soft drink case in the store was fired from the recovered gun to the exclusion of all others. Officer Smith was unable to form an opinion as to whether the cartridge casings of the fired bullets had been fired from only the recovered gun.

Assistant medical examiner Cynthia Porterfield testified that she performed an autopsy on William on September 23, 1994 (the day after his death). She testified that defendant died from a gunshot wound to the abdomen, and opined that the manner of death was homicide. Porterfield recovered a medium-caliber fully copperjacketed bullet from the muscles of William's right back.

Defendant testified that he worked about seven hours in Nayim Yousef's store on September 10, 1994, and about eight hours the next day, but was not paid for his work.

On September 12, 1994, defendant returned to the store seeking payment for his work. Defendant asked William for the money, and William refused, saying defendant had broken a shelf while working and the money he would have earned paid for the shelf instead. Defendant and William argued over the money, and William uttered a racial slur. William then swung at

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defendant, and defendant swung at William. During this struggle, William drew a gun from behind his back. Defendant identified the recovered gun as the gun belonging to William.

Defendant testified that he struggled with William while William held the gun. The gun discharged about three times. Initially, defendant testified that he did not know where the first shot went, but later he stated that the first shot went toward the ceiling. Defendant thought William was struck by the second or third shot. Defendant testified that the gun was in William's hand when William was shot. Defendant took the gun after the third shot was fired.

Defendant testified that he fled with the gun because he was afraid of going to jail. After leaving the store, defendant threw the gun in a trash can and ran to his apartment. He also threw away his bloodied shirt. Later, defendant surrendered to the police. Defendant testified that he did not feel responsible for the shooting because, "I didn't pull the trigger. [William] pulled the trigger, I didn't. So, how am I responsible for it?" Defendant said, "I didn't shoot him. He shot himself. \* \* \* We were struggling over the gun."

The defense called Chicago police detective Anthony Bongiorno as a witness. Detective Bongiorno testified that Hamad told him at the crime scene that only one man fired the shots. Detective Bongiorno thought that the sequence of events was that one offender hit one of the victims with the gun, the gun went off, the victims were made to lie on the floor, and then additional shots were fired.

The parties stipulated that defendant had five prior felony convictions (August 7, 1984; June 21, 1985; August 7, 1987; October 17, 1987; and July 13, 1990).

During the instructions conference, defense counsel requested jury instructions on both

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second-degree murder and involuntary manslaughter. The trial court allowed the instruction on involuntary manslaughter, but refused the instruction on second-degree murder.

The court instructed the jury on the three charged types of first degree murder, as well as involuntary manslaughter. The court also instructed the jury on accountability. The court then instructed the jury according to Illinois Pattern Instructions, Criminal 3d (IPI), 26.01R. Illinois Pattern Jury Instructions, Criminal, No. 26.01R (3d ed. 1992). The court included the sixth paragraph of this instruction, telling the jury:

“THE COURT: I think it’s clear to you Ladies and Gentlemen, if you find the State has proved the defendant guilty of both first degree murder and involuntary manslaughter, you should select the verdict form finding the defendant guilty of first degree murder and sign it as I have stated. Under these circumstances, do not sign the verdict form finding the defendant guilty of involuntary manslaughter.”

During deliberations, the jury sent a note asking, in relevant part, whether it was “legally possible for the jury to return a verdict of guilty of armed robbery and guilty of involuntary manslaughter.” After consulting with both the State and defense counsel, and with their approval, the trial court responded in a written note stating “[p]lease read the instructions and continue to deliberate.”

The jury found defendant guilty of first-degree murder for the death of William. The jury also found defendant guilty of two counts of armed robbery, one for the armed robbery of

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William and one for the armed robbery of Hamad.

After the jury rendered its verdict but before sentencing, defense counsel became aware that defendant was being treated with psychotropic medications. The court held a hearing on November 2, 1995, and found defendant fit to proceed to sentencing. On November 6, 1995, the trial court sentenced defendant to a term of natural life for first degree murder. The court did not enter sentences on the armed robbery counts.

On direct appeal, *People v. Perry*, 292 Ill. App. 3d 705 (1997), vacated by *People v. Perry*, 179 Ill. 2d 607 (1998), defendant raised several issues, including whether he was entitled to a new trial based on the trial court's answer to a jury question; his trial counsel's failure to object to the trial court's response to the jury; and his fitness to stand trial based on the 1994 version of section 104-21(a) of the Code of Criminal Procedure of 1963 (the Code). 725 ILCS 5/104-21(a) (West 1994). This court considered the issue under the amended version of the Code in effect on December 31, 1996, (725 ILCS 5/104-21(a) (West 1996)) and concluded that reversal was not required. See *Perry*, 292 Ill. App. 3d at 707, vacated by *Perry*, 179 Ill. 2d 607. On October 6, 1998, the supreme court entered a supervisory order directing this court to vacate its judgment and reconsider it in light of *People v. Kinkead*, 182 Ill. 2d 316 (1998). Pursuant to that mandate, we vacated our judgment, applied the 1994 version of the Code, reversed defendant's convictions, and remanded this cause to the circuit court for a new trial. See *People v. Perry*, 303 Ill. App. 3d 138 (1998), vacated by *People v. Perry*, 184 Ill. 2d 568 (1999). By supervisory order entered on June 2, 1999, the supreme court denied the State's petition for leave to appeal, vacated the judgment, and directed this court "to conduct a case-specific inquiry in

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order to determine whether the record supported a remand for a retrospective fitness hearing.”

*People v. Perry*, 184 Ill. 2d 568 (1999).

We did so and, in light of the specific facts of this case, found that the most appropriate remedy was to remand the matter to the trial court to determine whether there was evidence that defendant was ingesting psychotropic medication at a time proximate to his trial. *People v. Perry*, 307 Ill. App. 3d 552 (1999). The trial court determined that defendant was ingesting psychotropic medication at the time of his 1995 trial. On November 20, 2000, the trial court conducted a retrospective fitness hearing and found that defendant was fit for trial. Defendant then appealed, claiming: (1) the trial court misallocated the burden of proof to the defendant; (2) the trial court erred in finding defendant fit to stand trial; and (3) his life sentence violated *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000). We affirmed the decision of the trial court and remanded the case with instructions that the trial court enter a sentence on the two counts of armed robbery.

On September 16, 2002, defendant filed his first *pro se* post-conviction petition. The trial court found nothing in the petition raised “even a remote possibility of granting relief,” found the petition to be without merit, and denied it. In doing so, the court stated that defendant “is having a difficult time articulating himself.” On appeal, the public defender filed a motion to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551, 95 L. Ed. 2d 539, 107 S. Ct. 1990 (1987), stating there was no arguable basis for collateral relief. *People v. Perry*, No. 1-02-3694 (2003) (unpublished order under Supreme Court Rule 23). This court found no issues of arguable merit, allowed the motion to withdraw, and affirmed the dismissal of the petition. *People v. Perry*, No.

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1-02-3694 (2003) (unpublished order under Supreme Court Rule 23).

On March 24, 2003, the trial court sentenced petitioner to two concurrent sentences of 50 years' imprisonment for armed robbery. Defendant's natural life sentence runs consecutive to these concurrent sentences.

On March 9, 2006, defendant filed a *pro se* successive post-conviction petition. On March 15, 2006, the trial court appointed the Public Defender to represent defendant on the petition. On March 19, 2007, the court granted defense counsel leave to file a supplemental petition. Petitioner's counsel then filed a supplemental successive post-conviction petition (petition), which is the petition at issue here.

In this successive petition, defendant alleged that his appellate counsel was ineffective for failing to raise an issue regarding an improper jury instruction. Specifically, the petition alleged that defendant's appellate counsel failed to notice that, after instructing the jury on first degree murder and involuntary manslaughter, the trial court issued IPI 26.01R, including paragraph six, a paragraph prohibited by the IPI committee notes. Paragraph 6, as given to the jury, states that if the jury finds the State proved the defendant guilty of both involuntary manslaughter and first-degree murder, the jury must sign only the guilty verdict form for first degree murder. The committee notes state that when the greater offense is intentional or knowing first-degree murder, and the lesser offense is involuntary manslaughter, paragraph 7 should be used in lieu of paragraph 6. Paragraph seven informs the jury that it can find the defendant guilty only of either first-degree murder or involuntary manslaughter, each to the exclusion of the other. Defendant argued that the prejudice from the improper instruction was demonstrated by the jury note asking

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whether the jury could find defendant guilty of involuntary manslaughter and armed robbery. Perry attached an affidavit from his appellate counsel, Assistant Public Defender Elyse Krug Miller, in which she averred that she “should have reviewed the IPI instructions more carefully and caught the fact that the jury was erroneously instructed.” She further averred that the “failure to catch the improper jury instruction and to raise it as an issue on appeal was not appellate strategy.” Defendant argued that trial counsel was ineffective for failing to object and that appellate counsel on direct appeal was ineffective for failing to raise the issue.

The State filed a motion to dismiss in which it argued that the petition should be barred because of its successive nature. The State also alleged that the petition was barred by *res judicata* and waiver because this court on direct appeal decided the issue regarding the trial court’s response to the jury question and that defendant, according to his own affidavit, had actual knowledge of the jury instruction issue at the time of his first post-conviction petition, but failed to raise the issue. The State argued that defendant failed the cause-and-prejudice test because he failed to show an external factor that impeded him from raising an issue that was always available to him to raise and that, because defendant was charged with felony murder, his mental state was irrelevant.

On October 25, 2007, the court heard arguments on the motion to dismiss. Defense counsel argued that paragraph six of IPI 26.01R was given in error and in contradiction to the IPI committee notes, and that this error poisoned the jury’s verdict of guilty of first degree murder. The State conceded that the instruction was erroneous, but argued that the error was harmless because the conviction could be sustained on felony murder grounds. The court agreed that the

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jury was improperly instructed, and took the matter under advisement.

On November 15, 2007, the court granted the State's motion to dismiss. In its ruling, the court noted that defendant was charged with felony murder among the other counts in the indictment. It said:

“THE COURT: I have reviewed this matter and considered it at some length. The jury returned a verdict of guilty of armed robbery and murder. I don't know how the instruction could have been stated any differently that the jury might have found him guilty of armed robbery and involuntary manslaughter because we have the felony murder doctrine in the State of Illinois, even though the instruction may have been stated differently, I cannot say that this is anything more than harmless error that occurred. I am not going to grant this petition for collateral relief. This post conviction petition is respectfully denied.”

This appeal follows.

## II. ANALYSIS

In this appeal, defendant contends that the trial court erred in dismissing his successive post-conviction petition. Specifically, defendant argues that: (1) he was denied the effective assistance of appellate counsel where his appellate counsel failed to raise an issue regarding an erroneous jury instruction; (2) if this court accepts the post-conviction court's determination that

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the instructional error was harmless due to the felony murder count, then we should vacate his life sentence, vacate his conviction for the armed robbery of William, amend the mittimus, and remand to the trial court for a new sentencing hearing; and (3) even if this court does not accept the above arguments, we should modify defendant's sentences to run concurrently.

### The Instructional Error

The Post-Conviction Hearing Act (Act) provides a remedy to a criminal defendant whose federal or state constitutional rights were substantially violated in his original trial or sentencing hearing. *People v. Pitsonbarger*, 205 Ill. 2d 444, 455 (2002); 725 ILCS 5/122-1 *et seq.* (West 2006). Where the death penalty is not at issue, post-conviction petitions are adjudicated in three stages. *People v. Hobson*, 386 Ill. App. 3d 221, 230-31 (2008). If a petition is not summarily dismissed by the trial court, it advances to the second stage where an indigent defendant is provided assistance by counsel. *Hobson*, 386 Ill. App. 2d at 230-31. At the second stage, the petition under consideration must make a substantial showing of a constitutional violation or be subject to a motion to dismiss. See *People v. Vasquez*, 356 Ill. App. 3d 420, 422 (2005); 725 ILCS 5/122-5 (West 2006). If the State's motion to dismiss is denied, or no such motion is filed, the State must file a timely answer to the post-conviction petition. 725 ILCS 5/122-5 (West 2006). If, upon consideration of the petition, with any accompanying documentation and in light of the State's answer, the trial court determines that the requisite showing of a constitutional violation has been made, a third-stage evidentiary hearing must follow. *Hobson*, 386 Ill. App. 3d at 231. Our review of a dismissal of a post-conviction petition short of an evidentiary hearing is

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*de novo*. *People v. Coleman*, 183 Ill. 2d 366, 389 (1998).

An action for post-conviction relief is a collateral attack upon a prior conviction and sentence, rather than a surrogate for a direct appeal. *People v. Tenner*, 206 Ill. 2d 381, 392 (2002). Any issues which were decided on direct appeal are barred by *res judicata*; any issues which could have been raised on direct appeal are defaulted. *Tenner*, 206 Ill. 2d at 392. Further, the Act contemplates the filing of only one post-conviction petition. *People v. Morgan*, 212 Ill. 2d 148, 153 (2004); *Tenner*, 206 Ill. 2d at 392. Consequently, a defendant bringing a successive post-conviction petition faces immense procedural default hurdles that are lowered only where fundamental fairness so requires. *Pitsonbarger*, 205 Ill. 2d at 459; *People v. Flores*, 153 Ill. 2d 264, 274 (1992). The cause-and-prejudice test is the analytical tool used to determine whether fundamental fairness requires a court to make an exception to the waiver provision of section 122-3 of the Act and to consider a claim raised in a successive post-conviction petition on its merits. *Pitsonbarger*, 205 Ill. 2d at 459. The legislature codified the cause-and-prejudice test adopted in *Pitsonbarger* in section 122-1(f) of the Act (725 ILCS 5/122(f) (West 2006)); *People v. Brockman*, 363 Ill. App. 3d 679, 687 (2006). That section provides that a defendant must obtain leave of court to file a successive petition by demonstrating cause for his failure to raise the claim in his initial post-conviction proceedings, and prejudice resulting from that failure. 725 ILCS 5/122-1(f) (West 2006). Under this test, claims in a successive post-conviction petition are barred unless the defendant can establish good cause for failing to raise the claimed error in prior proceedings and actual prejudice resulting from the error. *Tenner*, 206 Ill. 2d at 393.

To establish cause, the defendant must show some objective factor external to the defense

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impeded his ability to raise the claim in the initial post-conviction proceeding. *Tenner*, 206 Ill. 2d at 393. To establish prejudice, the defendant must show the claimed constitutional error so infected his trial that the resulting conviction violated due process. *Tenner*, 206 Ill. 2d at 393. A defendant must show both cause and prejudice with respect to each claim raised in his successive petition. *People v. Britt-El*, 206 Ill. 2d 331, 339 (2002). However, even where a defendant cannot show cause and prejudice, his failure to raise a claim in an earlier petition may be excused to prevent a fundamental miscarriage of justice. *Pitsonbarger*, 205 Ill. 2d at 259.

The current petition was dismissed after the second stage of review. At the second stage of the process, the State is required to either answer the pleading or move to dismiss. 725 ILCS 5/122-5 (West 2006). Where, as here, the State filed a motion to dismiss, the trial court must rule on the legal sufficiency of the defendant's allegations, taking all well-pleaded facts as true. *People v. Ward*, 187 Ill. 2d 249, 255 (1999). A defendant is not entitled to an evidentiary hearing unless the allegations of the petition, supported by the trial record and any accompanying affidavits, make a substantial showing of a constitutional violation. *People v. Enis*, 194 Ill. 2d 361, 376 (2000).

Initially, the State errs in its reliance on *res judicata* as a procedural bar to defendant's petition. The State argues that, because we previously considered "the same or a quite similar issue on direct appeal regarding the trial court's response to the jury on the question of whether petitioner could be found guilty of armed robbery and involuntary manslaughter," we should affirm the dismissal of the petition on *res judicata* grounds. *Res judicata* bars consideration of issues that were raised previously and decided on direct appeal. *People v. Blair*, 215 Ill. 2d 427,

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447 (2005). The State's *res judicata* argument is premised on our previous—but now vacated—decision in *Perry*, 292 Ill. App. 3d 705, *vacated by Perry*, 179 Ill. 2d 607. A vacated judgment lacks force or effect, and places parties in the position they occupied before entry of the judgment. See *People v. Eidel*, 319 Ill. App. 3d 496, 504 (2001) (“The vacatur restores the parties to the *status quo ante*, as though the trial court judgment had never been entered”). Because *res judicata* bars consideration only of previously adjudicated claims, reliance on a vacated appeal does not support this procedural bar.

We note that, even if the direct appeal had not been vacated, this procedural bar would still not be applicable, as the arguments are distinct. In the now-vacated direct appeal, defendant argued that the trial court erred by not responding to a question sent by the jury during deliberations. *Perry*, 292 Ill. App. 3d 705, *vacated by Perry*, 179 Ill. 2d 607. An argument regarding the court's failure to answer a specific question is different from the present argument that appellate counsel was ineffective for failing to argue on appeal that the trial court erroneously instructed the jury.

The State also argues that this issue is barred by *res judicata* based on defendant's first post-conviction petition. In that petition, defendant cited to *People v. Childs*, 159 Ill. 2d 217 (1994), which this court had addressed in conjunction with the instructional issue on direct appeal. See *Perry*, 292 Ill. App. 3d at 715, *vacated by Perry*, 179 Ill. 2d 607. Defendant also claimed his counsel was ineffective for allowing the trial court to instruct the jury “to deliberate more, for another verdict.” Defendant claimed he was denied a fair trial where the jury's “question to return a lesser verdict, (of involuntary manslaughter) was not answered by the court,

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or advised upon the law.” Defendant alleged that the trial court “refused to answer a question (about a legal STAT);” that the court told the jury in an “indirect way he wants the murder verdict of guilty;” and that the jury “asked for a involuntary manslaughter charge,” and defense counsel failed to “challenge” the court’s response to the jury. We find the issues articulated in defendant’s first post-conviction petition, insofar as we are able to discern them, are distinct from this issue in the petition at bar. Accordingly, our review here is not barred by *res judicata*.

The State also argues that this court should affirm the dismissal of defendant’s petition without consideration of the issues raised therein because defendant failed to file a motion requesting leave to file his successive petition as required by section 122-1(f) of the Act. Defendant responds, *inter alia*, that the State forfeited this issue by failing to raise it in the court below. We note parenthetically that, although defendant failed to file a separate motion requesting leave, and the trial court, accordingly, did not rule on such a motion, the first sentence of defendant’s *pro se* successive post-conviction petition reads: [defendant] comes before the court and requests leave to file his *pro se* petition for Post Conviction Relief \* \* \*.”

In 2004, the state legislature amended the Act by adding subsection 122-1(f) which provides, in pertinent part:

“Only one petition may be filed by a petitioner under this Article without leave of the court. Leave of court may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial postconviction proceedings and prejudice results from that failure.” 725 ILCS 5/122-1(f) (West 2004).

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The statute's plain language prohibits a defendant from filing a successive post-conviction petition without first obtaining leave of court. *People v. LaPointe*, 227 Ill. 2d 39, 44 (2007).

Consequently, a successive petition cannot be considered filed until the circuit court "expressly" grants defendant leave to file in accordance with section 122-1(f). *LaPointe*, 227 Ill. 2d at 45.

Section 122-1(f) is a procedural prerequisite to obtaining review on the merits of a post-conviction petition. *People v. Spivey*, 377 Ill. App. 3d 146, 149-150 (2007). Accordingly, when a defendant fails to meet the requirements of the statute, the trial court need not and should not consider the merits of the petition. *Spivey*, 377 Ill. App. 3d at 150. The same proscription applies to the reviewing court. *Spivey*, 377 Ill. App. 3d at 150.

We find, however, that, as in *People v. Collier*, 387 Ill. App. 3d 630 (2008), the procedural history of this case warrants a relaxation of this rule. In *Collier*, the defendant filed a *pro se* petition for relief under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2004)), which, following recharacterization as a successive post-conviction petition, was dismissed. This court remanded the matter for admonishments pursuant to *People v. Shellstrom*, 216 Ill. 2d 45 (2005). After the defendant was admonished, he elected to treat the previously-filed 2-1401 petition as a successive petition for post-conviction relief. This court determined that, in granting the defendant's request to amend the petition, "the trial court implicitly acknowledged a request for leave to file and thus fulfilled the requirements of section 122-1(f)." *Collier*, 387 Ill. App. 3d at 635. Further, "[a]lthough we agree that the filing of a separate motion for leave to file a successive petition is the preferred mode of proceeding, given the unique circumstances presented here, the procedure did not hinder the trial court from

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performing its review under section 122-1(f).” *Collier*, 387 Ill. App. 3d at 636. Similarly, we find that the unique circumstances in the case at bar present a situation in which the trial court was not hindered from performing its review under section 122-1(f). Specifically, although defendant failed to file a separate motion requesting leave to file his successive post-conviction petition and the court, accordingly, did not specifically grant leave to file the petition, the court did appoint an attorney to represent defendant and amend his petition in the second stage of his successive post-conviction proceedings. By doing so, the trial court implicitly acknowledged a request for leave to file, thus fulfilling the requirements of section 122-1(f).

The State also argues that defendant’s petition is barred by waiver. Specifically, the State argues that petitioner “points to nothing subsequent to [the direct appeal], external to himself, that prevented him from raising this issue” previous to this petition. Defendant argues that he was unfit to participate in the initial post-conviction proceedings. Defendant cites to *People v. Johnson*, 191 Ill. 2d 257, 269 (2000) to argue that “[a] defendant is unfit to proceed with the post-conviction process when, because of a mental condition, he cannot communicate his allegations of constitutional deprivation.” Defendant has included several supplemental volumes of record on appeal pertaining to a previous fitness hearing held in the trial court. He notes that he has a “long history of mental illness and hospitalization” and has various disorders, including paranoid schizophrenia, major depressive disorder, schizoaffective disorder, and bipolar disorder. He argues defendant’s “rambling, nonsensical first *pro se* petition evinces the effects of his mental condition on his ability to participate in the post-conviction process, especially in light of the fact that his appellate counsel had told him about the issue she missed during the seven years

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of his direct appeal.”

The level of competence required during the post-conviction proceedings is lesser than that required during trial proceedings. *Johnson*, 191 Ill. 2d at 269. A defendant is considered unfit for post-conviction proceedings when, “because of his mental condition, he is unable to communicate his allegations of constitutional deprivations to counsel, thus frustrating his entitlement, under the Act, to a reasonable level of assistance.” *Johnson*, 191 Ill. 2d at 269, citing *People v. Owens*, 139 Ill. 2d 351, 359-65 (1990). However, the “mere fact that the petitioner suffers from mental disturbances or requires psychiatric treatment does not necessarily raise a *bona fide* doubt of his ability to consult with counsel. A petitioner may be competent to participate in post-conviction proceedings even though his mind is otherwise unsound.” *Owens*, 139 Ill. 2d at 362. Where a defendant has been found competent to stand trial, he is presumed competent to participate in post-conviction proceedings, and a substantial threshold showing of incompetence is required to trigger a psychiatric evaluation or a competency hearing. *Owens*, 139 Ill. 2d at 362.

Here, defendant was found competent to stand trial via a retrospective fitness hearing on November 20, 2000. We affirmed that decision on appeal. *People v. Perry*, No. 1-00-4091 (unpublished order pursuant to Supreme Court Rule 23) (2002). Defendant fails to direct us to anywhere in the record where he raised the issue of his incompetence to participate in post-conviction proceedings. Accordingly, absent a showing of a *bona fide* doubt of defendant’s ability to communicate with counsel, we presume defendant is competent to participate in these proceedings.

Defendant attached an affidavit to his petition from his appellate attorney, Elyse Krug Miller (Miller). In her affidavit, Miller averred:

“5. Following [defendant’s] last appeal of his fitness for trial I was reviewing his record and realized that I had failed to raise an extremely meritorious issue: that is, that the jury was improperly instructed on what to do while deliberating [defendant’s] guilt for first degree murder or involuntary manslaughter.

6. I contacted [defendant] by telephone and advised him to immediately file a *pro se* post conviction petition alleging my ineffectiveness in failing to raise the improper jury instruction. I gave him specific instructions about what to do.

7. [Defendant] filed a *pro se* post conviction petition on September 25, 2002. I did not receive a copy of it, to the best of my knowledge. It was, again to the best of my knowledge, summarily dismissed and that dismissal was upheld on appeal.

8. I grossly underestimated [defendant’s] ability to understand a complicated concept of the law. He clearly did not understand the law as I explained it to him as his post conviction petition is pretty much nothing more than gibberish. That is entirely my fault and I should not have allowed him to proceed on his own.”

From this supporting affidavit, it appears that defendant, had he fully understood his

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telephone conversation with Miller, could have raised this issue previously to this successive petition. By not doing so, defendant waived the issue. Waiver aside, as discussed below, the jury instruction at issue is nothing more than harmless error.

The State also argues that we should not address this petition on the merits because defendant failed to meet the cause-and-prejudice test as articulated in *Pitsonbarger*, 205 Ill. 2d at 460, and codified in 725 ILCS 5/122(f) (West 2006). The State argues that defendant is unable to show cause where, as discussed previously, he was directed by appellate counsel to raise this issue in his first post-conviction petition. The State argues that defendant cannot show prejudice where the error of which he claims is merely harmless error. Defendant responds that the “cause” requirement should be relaxed in this situation where, as discussed previously, he was mentally incompetent to assist his initial post-conviction counsel, and because the cause-and-prejudice test is not meant to preclude review of a fundamental miscarriage of justice such as that which occurred here. Defendant claims that he was prejudiced from the erroneous instruction because, were it not for that error, he may have been convicted of involuntary manslaughter rather than first-degree murder. Although defendant may have failed to show the requisite cause and prejudice required of a successive post-conviction petition, because the trial court moved this petition from the first stage to the second stage of the post-conviction process and heard arguments on this petition, our review focuses on the whether defendant has shown a substantial denial of a constitutional right such that he is entitled to a full evidentiary hearing. See *Vasquez*, 356 Ill. App. 3d at 422. We find that he has not.

To establish a claim of ineffective assistance of counsel, a defendant must show that: (1)

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his attorney's representation fell below an objective standard of reasonableness; and (2) he was prejudiced by this deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-688, 80 L. Ed. 2d 674, 693, 104 S.Ct. 2052, 2064 (1984); *People v. Palmer*, 162 Ill. 2d 465, 475 (1994). Failure to make the requisite showing of either deficient performance or sufficient prejudice defeats the claim. *Palmer*, 162 Ill. 2d at 475-76. A defendant who contends that his appellate counsel was ineffective for failing to raise a particular issue must show that the failure to raise that issue was objectively unreasonable, and that, but for this failure, his conviction or sentence would have been reversed. *People v. Johnson*, 154 Ill. 2d 227, 234 (1993). Unless the underlying issue is meritorious, the defendant cannot show prejudice from the failure to raise it on appeal. *Coleman*, 168 Ill. 2d at 523.

Defendant's claim of ineffective assistance of counsel fails because he is unable to show resulting prejudice. Specifically, defendant cannot show that, had his appellate counsel raised the jury instruction issue, his conviction would have been reversed.

Defendant was charged with three different theories of first degree murder—intentional, knowing, and felony murder. These theories embody the three mental states or conduct that can accompany the acts that cause the murder. A defendant can (1) intend to kill or do great bodily harm to the victim (intentional murder); (2) know that his acts create a strong probability of death or great bodily harm to the victim (knowing murder); or (3) attempt or commit a forcible felony other than second-degree murder (felony murder). See 720 ILCS 5/9-1(a) (West 2006). Here, a general first-degree murder verdict form was submitted to the jury, and the jury returned a verdict of guilty of first degree murder. Defendant did not object to the general verdict form. “It is well

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settled that when an indictment alleges three forms for a single murder—intentional, knowing and felony murder—and a general verdict is returned, the net effect is that the defendant is guilty as charged in each count and there is a presumption that the jury found that the defendant committed the most serious of the crimes alleged, which is intentional murder.” *People v. Davis*, 233 Ill. 2d 244, 263 (2009), citing *People v. Morgan*, 197 Ill. 2d 404, 448 (2001), *People v. Cardona*, 158 Ill. 2d 403, 422 (1994), *People v. Thompkins*, 121 Ill. 2d 401, 455 (1988).

The court instructed the jury, in relevant part:

“The defendant is charged with the offense of first degree murder. The defendant has pleaded not guilty. Under the law, a person charged with first degree murder may be found (1) not guilty of first degree murder and not guilty of involuntary manslaughter; or (2) guilty of first degree murder; or (3) guilty of involuntary manslaughter.

The defendant is also charged with two counts of the offense of armed robbery. The defendant has pleaded not guilty to these charges.” Illinois Pattern Jury Instructions, Criminal, No. 26.01R (3d ed. 1992).

And:

“A person commits the offense of first degree murder when he kills an individual if, in performing the acts which cause the death, he intends to kill or do great bodily harm to that individual

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or another;

or

he knows that such acts will cause death to that individual

or another;

or

he knows that such acts create a strong probability of death

or great bodily harm to that individual or another;

or

he is committing the offense of armed robbery.”

Illinois Pattern Jury Instructions, Criminal, No. 7.01A (3d ed.

1992).

And:

“To sustain the charge of first degree murder, the State must prove the following propositions:

First: That the defendant, or one for whose conduct he is legally responsible, performed the acts which caused the death of William Yousef; and

Second: That when the defendant, or one for whose conduct he is legally responsible, did so, he intended to kill or do great bodily harm to William Yousef or another;

or

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he knew that his acts would cause death to William Yousef  
or another;

or

he was committing the offense of armed robbery.

If you find from your consideration of all the evidence that  
each one of these propositions has been proved beyond a  
reasonable doubt, you should find the defendant guilty.

If you find from your consideration of all the evidence that  
any one of these propositions has not been proved beyond a  
reasonable doubt, you should find the defendant not guilty.”

Illinois Pattern Jury Instructions, Criminal, No. 7.02A (3d ed.  
1992).

And:

“A person commits the offense of involuntary manslaughter  
when he unintentionally causes the death of an individual by acts  
which are performed recklessly and are likely to cause death or  
great bodily harm to another.” Illinois Pattern Jury Instructions,  
Criminal, No. 7.07 (3d ed. 1992).

And:

“To sustain the charge of involuntary manslaughter, the  
State must prove the following propositions:

First: That the defendant, or one for whose conduct he is legally responsible, performed the acts which caused the death of William Yousef; and

Second: That the defendant, or one for whose conduct he is legally responsible, performed those acts recklessly; and

Third: That those acts were likely to cause death or great bodily harm.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty.”

Illinois Pattern Jury Instructions, Criminal, No. 7.08 (3d ed. 1992).

The court also instructed the jury via IPI Criminal No. 26.01R, which is the instruction at issue here. The instruction began correctly by informing the jury in the disjunctive that defendant could be found not guilty, or guilty of first-degree murder, or guilty of involuntary manslaughter. The jury was then informed it would receive three verdict forms: not guilty of first-degree murder and involuntary manslaughter, guilty of first-degree murder, and guilty of involuntary manslaughter. The jury was to select the one verdict form that reflected its verdict. The instruction to this point was fully correct. The jury had been instructed on the separate elements

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for first-degree murder and involuntary manslaughter. The instruction ended, however, inconsistently by including paragraph six, which instructed the jury that, if it found *both* first-degree murder and involuntary manslaughter, the jury should select first-degree murder:

“If you find the State has proved the defendant guilty of both first degree murder and involuntary manslaughter, you should select the verdict form finding the defendant guilty of first degree murder and sign it as I have stated. Under these circumstances, do not sign the verdict from finding the defendant guilty of involuntary manslaughter.” Illinois Pattern Jury Instructions, Criminal, No. 26.01R (3d ed. 1992).

This instruction was inconsistent because it instructs the jury that a defendant can act both intentionally and unintentionally. However, although this inconsistency is error, it is merely harmless error.

The IPI committee notes state that “when first degree murder (greater offense) is charged under \* \* \* (a)(1) or (a)(2) \* \* \* and involuntary manslaughter (lesser offense) is charged,” paragraph six “should *not* be given.” The notes instruct that paragraph seven should be used when paragraph six is not, noting that the two paragraphs are “mutually exclusive.” Paragraph seven instructs:

“Under the law, the defendant cannot be guilty of [first degree murder] and [involuntary manslaughter]. Accordingly, if you find the defendant guilty of [first degree murder], that verdict

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would mean that the defendant is not guilty of [involuntary manslaughter]. Likewise, if you find the defendant guilty of [involuntary manslaughter], that verdict would mean that the defendant is not guilty of [first degree murder].”

Defendant was charged with three forms of first degree murder, including felony murder predicated on armed robbery. Felony murder as described in petitioner’s indictment does not include a culpable mental state as to the killing, while the offense of involuntary manslaughter, as described in petitioner’s indictment, requires a reckless mental state. Intent is not an element of a charge of felony murder except as to the mental state towards the underlying felony. *People v. Phillips*, 383 Ill. App. 3d 521, 545-46 (2008). By not returning an involuntary manslaughter verdict, the jury rejected the reckless *mens rea*. Defendant was found guilty of first degree murder as well as two counts of armed robbery. Because defendant was charged with multiple forms of murder and the jury returned a general verdict of guilty, he was guilty as charged on each count to which the proof was applicable and, therefore, was properly convicted of first-degree murder notwithstanding any alleged error. See *Cardona*, 158 Ill. 2d at 411-12 (a general finding of guilt is presumed to be based on any good count in the indictment to which proof is applicable); *Davis*, 233 Ill. 2d at 263. This is precisely what the post-conviction court found when it dismissed defendant’s petition, stating:

“THE COURT: I don’t know how the instruction could have been stated any differently that the jury might have found him guilty of armed robbery and involuntary manslaughter because we have the

felony murder doctrine in the State of Illinois [.]”

The purpose of jury instructions is to convey to the jury the correct principles of law applicable to the evidence submitted to it so that the jury may reach a correct conclusion according to the law and the evidence. *People v. Hopp*, 209 Ill. 2d 1, 8 (2004). The jury received proper definitions of the offenses and, as a whole, the jury instructions here properly advised the jury of the law.

While the jury instruction at issue here is inconsistent, it does not rise to the level of an error that so infected the entire trial that the resulting conviction or sentence violates due process. Had his appellate counsel raised this issue, his conviction would not have been reversed.

Defendant contends that the jury’s note to the court shows that, if not for the instructional error, the jury was inclined to find defendant guilty of involuntary manslaughter rather than murder. Defendant’s speculation regarding what the jury may have believed is not well taken. The note from the jury asked, in relevant part, whether it was “legally possible for the jury to return a verdict of guilty of armed robbery and guilty of involuntary manslaughter.” The trial court responded in a written note stating “[p]lease read the instructions and continue to deliberate.” The jury clearly returned a verdict of guilty of first degree murder and armed robbery, and we will not speculate on what the jury may or may not have discussed in the jury room, at what point in the deliberations the discussion occurred, nor what effect the discussion had upon the deliberations. Most importantly, the jury’s note does not necessarily evince a belief that the defendant was not guilty of intentional murder. In *Cardona*, the jury sent a similar note asking whether it should automatically find the defendant guilty of murder if it found him guilty of the predicate felony. The defendant contended on appeal that the note evidenced an intention

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on the part of the jury to convict him only of felony murder, rather than any of the other two types of murder with which he was charged. *Cardona*, 158 Ill. 2d at 413. Our supreme court rejected the defendant's argument, finding that it was based on nothing more than speculation. *Cardona*, 158 Ill. 2d at 413. We also decline to participate in such speculation.

The circuit court correctly granted the State's motion to dismiss defendant's successive post-conviction petition, which failed to make a substantial showing of a constitutional violation.

#### The "Lesser Included" Offense

Next, defendant contends that if this court finds that the instructional error is harmless because of the felony murder count, we should vacate his sentence of natural life, vacate one count of armed robbery, and remand to the trial court for a new sentencing hearing because it was error to sentence him to a term of natural life absent a finding beyond a reasonable doubt that he killed the victim with intent or knowledge. We disagree.

This claim is barred by *res judicata*. Defendant raised a very similar issue on appeal from the trial court's retrospective fitness hearing determination. See *Perry*, No. 1-00-4091 (unpublished order pursuant to Supreme Court Rule 23) (2002). In that case, defendant argued that his sentence should be vacated in light of *Apprendi*, that the State failed "to prove [defendant] actually killed the deceased and that he did so with the culpable mental state of intent or knowledge beyond a reasonable doubt." He argued that the trial court invalidly found he was the actual killer and that he killed with a culpable mental state. We rejected these arguments, noting that, when a jury returns a general verdict of guilty, it is presumed that it found that the

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defendant intentionally killed the victim. *Perry*, No. 1-00-4091 (unpublished order pursuant to Supreme Court Rule 23) (2002), citing *Cardona*, 158 Ill. 2d 410-11. We noted that the trial court did not sentence defendant beyond the statutory maximum for the offense, and determined that “the jury found beyond a reasonable doubt that the murder was committed in the course of another felony, armed robbery.” *Perry*, No. 1-00-4091 (unpublished order pursuant to Supreme Court Rule 23) (2002). We held that “when a defendant is found guilty beyond a reasonable doubt of murder during the commission of armed robbery, the imposition of natural life imprisonment complies with the rules enunciated in *Apprendi*, 530 U.S. at 490, 147 L. Ed. 2d at 455, 120 S. Ct. At 2362-63.” *Perry*, No. 1-00-4091 (unpublished order pursuant to Supreme Court Rule 23) (2002).

This claim would fail even if it were not barred. The jury’s general verdict of guilty of first-degree murder, where defendant was charged with intentional, knowing, and felony murder, necessarily encompassed a finding by the jury that defendant acted intentionally. “A general finding of guilty is presumed to be based on any good count in the indictment to which the proof is applicable.” *Cardona*, 158 Ill. 2d at 411; *Morgan*, 197 Ill. 2d at 448. This is the “one good count rule,” which is a legal construct “where an indictment contains several counts arising out of a single transaction, and a general verdict is returned[,], the effect is that the defendant is guilty as charged in each count[.]” *Thompkins*, 121 Ill. 2d at 455, citing *People v. Lymore*, 25 Ill. 2d 305, 308 (1962). Where a general murder verdict is delivered for a defendant who is charged with murder in multiple counts alleging intentional, knowing, and felony murder, the defendant is presumed to be convicted of the most serious offense of intentional murder, and judgment and

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sentence should be entered on that count. *Davis*, 231 Ill. 2d 358; but see *People v. Smith*, 233 Ill. 2d 1 (2009) (while the different theories embodied in the first degree murder statute are simply differing ways to commit the same crime of first degree murder, where defendant has requested and the trial court has denied the request for separate verdict forms which would have made the jury's finding clear and could have resulted in favorable sentencing consequences, a reviewing court must consider the general verdict as a finding of guilty of felony murder for sentencing purposes).

Because the jury found defendant killed intentionally, defendant was eligible for the death penalty under section 5/9-1(b)(6) of the Criminal Code of 1961. 720 ILCS 5/9-1(b)(6) (West 1998); see also *Perry*, No. 1-00-4091 (unpublished order pursuant to Supreme Court Rule 23) (2002). The State opted not to seek the death penalty, and the court did not make a finding that the crime was brutal and heinous indicative of wanton cruelty. The sentencing court noted that defendant was found guilty of both first degree murder and armed robbery. *Perry*, No. 1-00-4091 (unpublished order pursuant to Supreme Court Rule 23) (2002). Therefore, defendant was sentenced under section 5/5-8-1(a)(1)(b) (West 1998) of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(1)(b) (West 1998), which allows for life imprisonment.

Defendant urges us to ignore the verdicts of the jury and the trial court's entering of judgment in accordance with those verdicts because the post-conviction court recharacterized defendant's claim as harmless error because of the felony murder rule. We disagree with this assessment. Defendant argues that the post-conviction court's apparent recharacterization of defendant's crime as a felony murder rather than intentional murder shows that the verdict failed

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to encompass a finding of intent or knowledge. We are not persuaded, and note that, after a careful reading of the record on appeal, the trial court did not precisely recharacterize defendant's crime as felony murder, but commented that the instructional error at issue was harmless error because, in Illinois, a general finding of guilt is presumed to be based on any good count in the indictment to which proof is applicable.

“THE COURT: I don't know how the instruction could have been stated any differently that the jury might have found him guilty of armed robbery and involuntary manslaughter because we have the felony murder doctrine in the State of Illinois [.]”

We are cognizant that a review of the dry record on appeal, particularly when statements are taken out of context, can lead to inconsistent conclusions. Here, however, it is clear to us that the post-conviction court was expressing its correct belief that, regardless of the instructional inconsistency, defendant could not have been convicted of involuntary manslaughter where there was no evidence he acted recklessly and, based on the jury's verdict, he acted intentionally when shooting the victim.

Moreover, a reviewing court can affirm a lower court on any basis supported by the record. See *People v. Dinelli*, 217 Ill. 2d 387, 403 (2005). Even if the post-conviction court had purposely recharacterized defendant's crime, its apparent recharacterization of the evidence would not bind this court. This jury's general verdict shows defendant killed intentionally. Accordingly, defendant was eligible for a life sentence.

We also reject defendant's argument that, if felony murder is the basis for a finding that

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the jury instruction was harmless error, we must vacate the lesser-included offense of armed robbery against William Yousef. While defendant is correct that armed robbery would be a lesser included offense of felony murder, it is not a lesser included offense of intentional murder. As discussed above, the verdict here is a general verdict, and defendant was sentenced according to the standards for intentional murder. See *People v. Moore*, No. 397 Ill. App. 3d 555, 564-65 (2009) (Opinion of Coleman, J., joined by Quinn, J., dissented to by Theis, J.) (Appellate court rejected the defendant's claim that his conviction and sentence for armed robbery had to be vacated as a lesser-included offense of felony murder. The jury's return of a general verdict constituted a determination that the defendant committed intentional murder, and any error was not prejudicial in view of evidence the defendant acted intentionally).

### Consecutive Sentences

Finally, defendant contends that the consecutive nature of his 50-year sentences for armed robbery is void because the trial court imposed these sentences consecutive to defendant's natural life sentence for murder. Specifically, defendant argues that any additional sentence running consecutive to a natural life sentence is void and may only be imposed to run concurrent with the sentence for natural life. Our supreme court recently held in *People v. Petrenko*, 237 Ill. 2d 490 (2010), that a sentence consecutive to a natural-life sentence is proper, except where the natural life sentence is imposed under the Habitual Criminal Act as opposed to the Unified Code of Corrections. As defendant's natural life sentence arose under the Unified Code of Corrections, his consecutive sentence is proper. Accordingly, we find no error in defendant's consecutive

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sentencing.

### III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

Affirmed.