



County. 720 ILCS 570/401 (West 2000). Count I alleged defendant knowingly possessed with intent to deliver 100 grams or more but less than 400 grams of a substance containing cocaine on November 15, 2001, a Class X felony with a nonextended penalty range of 9 to 40 years in prison. 720 ILCS 570/401(a)(2)(B) (West 2000). Count II alleged defendant knowingly possessed with intent to deliver more than 15 grams but less than 100 grams of a substance containing cocaine on December 20, 2001, a Class X felony with a nonextended penalty range of 6 to 30 years in prison. 720 ILCS 570/401(a)(2)(A) (West 2000). Count III alleged defendant knowingly possessed with intent to deliver more than one gram but less than 15 grams of a substance containing cocaine on December 20, 2001, a Class 1 felony. 720 ILCS 570/401(c)(2) (West 2000). (Count III was later dismissed by the State.) Additionally, defendant was indicted with a fourth count, permitting unlawful use of a building on December 20, 2001, a Class 4 felony. 720 ILCS 570/406.1 (West 2000).

¶ 5 In May 2002, a jury convicted defendant on all three counts (counts I, II, and IV). In July 2002, the trial court sentenced defendant to 15 years in prison on count I to be served consecutively to a term of 25 years in prison on count II, and a concurrent 3-year prison term on count III, with 140 days' credit for time served, which applied to counts I and III. Defendant was also ordered to pay the following within five years of his release from prison: \$100 crime lab fee; \$100 to the trauma center fund; \$3,000 drug-assessment fee; and \$15,100 drug street-value fine. He was given credit for \$700 (\$5 per day credit for 140 days spent in custody).

¶ 6 On July 11, 2002, the trial court denied defendant's motions for judgment notwithstanding the verdict and for a new trial, and sentenced defendant as stated. On July 12, 2002, OSAD filed notice of appeal on defendant's behalf (docketed No. 4-02-0571). Defendant

argued the State failed to prove him guilty beyond a reasonable doubt of possession with intent to deliver and evidence was insufficient to support his conviction for unlawful use of a building because the State failed to prove he controlled the house or allowed someone to sell cocaine from the house. In December 2004, this court affirmed defendant's conviction on his direct appeal. *People v. Gavin*, No. 4-02-0571 (Dec. 8, 2004) (unpublished order under Supreme Court Rule 23). On January 20, 2005, defendant filed a petition for leave to appeal to the Illinois Supreme Court, which was denied on March 20, 2005. (No. 99922.)

¶ 7 In February 2005, defendant filed a *pro se* petition for postconviction relief (725 ILCS 5/122-1 through 122-8 (West 2004)). In March 2005, the trial court appointed counsel to represent defendant and an amended petition was filed in April 2006. The amended petition alleged (1) defendant was denied effective assistance of counsel at trial and (2) defendant's sentences violated (a) the cruel-and-unusual punishment clause, (b) the right to due process, (3) equal protection of the laws, and (4) the right to travel. In June 2006, the State filed a motion to dismiss the amended petition for postconviction relief. In July 2006, defendant filed a second amended petition for postconviction relief, which (1) incorporated all the allegations in the first amended petition and defendant's *pro se* petition, and (2) added a claim that defendant had been denied effective assistance of counsel in the direct appeal because appellate counsel failed to raise claims of (a) ineffective assistance of trial counsel and (b) the sentencing issues laid out in the first amended petition. In August 2006, the State filed a supplement to the motion to dismiss. After allowing counsel to argue the pending motions on September 7, 2006, the trial court granted the State's motion to dismiss and denied all defendant's petitions for postconviction relief in October 2006.

¶ 8 Defendant appealed the order dismissing the second amended postconviction petition, and counsel was appointed to represent him. *People v. Gavin*, No. 4-06-0912 (Aug. 27, 2008) (unpublished order under Supreme Court Rule 23). The only issue defendant raised in this appeal was whether "an evidentiary hearing [was] needed to determine if defense counsel was ineffective for failing to help defendant perfect his appeal of sentencing issues by first filing a motion to reconsider his sentence." *Id.* at 7. In affirming the dismissal order, we held defendant "failed to establish a substantial showing his constitutional rights were violated" because he did not "demonstrate his [trial or appellate] counsel's performance was deficient and the deficiency prejudiced him." *Id.* at 8.

¶ 9 In June 2010, defendant filed a *pro se* petition for leave to file a successive post-conviction petition. The petition stated the following:

"PURSUANT TO 725 ILCS 5/122-1 OF THE POST CONVICT-  
TION HEARING ACT, PETITION[ER] EZRA U. GAVIN PRO SE, PETITIONS  
THIS COURT FOR LEAVE TO FILE A SUCCESSIVE POST-CONVICTION  
PETITION.

1. Appellant counsel[']s failure to brief issues from post-conviction on Appeal violated petitioner[']s right to counsel and due process.
2. Petitioner was prejudice[d] by statements from the prosecution which violated defendant[']s right to a fair trial."

In July 2010, the trial court entered an order denying defendant's petition after finding defendant had failed to meet the statutory requirements for obtaining leave to file a successive post-conviction petition. The court found that defendant "failed to state any cause for [his] failure to

raise the current issues in this petition." Further, the court stated defendant had either failed to raise the "current issues" in prior proceedings or had raised them and received adverse rulings on those issues. Defendant filed a timely *pro se* notice of appeal and OSAD was appointed to represent him in this appeal.

¶ 10 In June 2011, OSAD moved to withdraw, including in its motion a brief in conformity with the requirements of *Pennsylvania v. Finley*, 481 U.S. 551 (1987). The record shows service of the motion on defendant, who is currently in prison. On its own motion, this court granted defendant leave to file additional points and authorities by July 21, 2011.

Defendant timely filed additional points and authorities. The State responded. After examining the record and executing our duties in accordance with *Finley*, we grant OSAD's motion and affirm the trial court's judgment.

¶ 11 II. ANALYSIS

¶ 12 OSAD argues this appeal presents no meritorious claim upon which defendant could realistically expect to obtain relief. We agree.

¶ 13 A trial court's decision to grant or deny a motion for leave to file a successive postconviction petition is controlled by statute and is subject to *de novo* review. *People v. Thompson*, 383 Ill. App. 3d 924, 929, 890 N.E.2d 1119, 1124 (2008).

¶ 14 To obtain leave of court to file a successive postconviction petition, a defendant must either (1) demonstrate both that he has sufficient "cause" for not raising his claims in prior postconviction proceedings and would suffer "prejudice" if not allowed to raise the claims in the new petition; or (2) set forth a claim of actual innocence, such that a "fundamental miscarriage of justice" would occur if his conviction were allowed to stand. *People v. Pitsonbarger*, 205 Ill. 2d

444, 459, 793 N.E.2d 609, 621 (2002); 725 ILCS 5/122-1(f) (West 2010). Defendant did not assert actual innocence, so the crucial issue is whether he satisfied the "cause and prejudice" test. For purposes of this test, "cause" is defined as "an objective factor that impeded [the defendant's] ability to raise a specific claim during his or her initial postconviction proceedings." 725 ILCS 5/122-1(f) (West 2010). The impeding factors must not only be "objective" but also "external to the defense." *Pitsonbarger*, 205 Ill. 2d at 460, 793 N.E. 2d at 622 (quoting *People v. Flores*, 153 Ill. 2d 264, 279, 606 N.E.2d 1078, 1085 (1992)). "Prejudice" is shown by "demonstrating that the claim not raised during [the defendant's] initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f) (West 2010).

¶ 15 Although a trial court has the authority to make a *sua sponte* decision whether to grant leave to file a successive postconviction petition, it is not required to grant such leave absent a motion or request. *People v. Tidwell*, 236 Ill. 2d 150, 157-58, 923 N.E.2d 728, 732-33 (2010). In fact, most cases will require "a motion or request and an articulated argument" to explain why leave should be granted. *Id.*, 236 Ill. 2d at 157, 923 N.E.2d at 733. In this case, defendant filed a request for leave and is thereby required, at the very least, to establish "the gist of a meritorious claim of cause and prejudice." *People v. LaPointe*, 365 Ill. App. 3d 914, 924, 850 N.E.2d 893,901 (2006), *aff'd*, 227 Ill. 2d 39, 879 N.E.2d 275 (2007).

¶ 16 Defendant's request for leave to file a successive petition fails to meet either the "articulated-argument" standard contemplated in *Tidwell* or the more lenient "gist" standard set forth in *LaPointe* for applying the "cause and prejudice" test. One claim alleges defendant was "prejudice[d] by statements from the prosecution which violated [his] right to a fair trial."

Defendant fails to state what prosecutorial statements made his trial unfair. It is impossible to determine whether his claim satisfies the "prejudice" prong. Further, this claim cannot be raised in a successive postconviction petition because it refers to statements made during the trial. Defendant should have argued this in his direct appeal. The only claim made on direct appeal was the State failed to prove each charge beyond a reasonable doubt. This issue has been forfeited. *Pitsonbarger*, 205 Ill. 2d at 456, 793 N.E.2d at 619. Defendant has failed to demonstrate "cause" because he indicated no reason why his original *pro se* postconviction petition or the amended petitions filed by counsel did not specifically include a claim of ineffective assistance of direct appeal counsel for failing to raise the alleged prejudicial prosecutorial statements.

¶ 17 Defendant's *pro se* petition, which was incorporated by reference into the second amended petition, did allege the following: (1) trial counsel was ineffective for not objecting to certain "opening remarks" by the prosecutor, *i.e.*, suggesting defendant had a valid lease to premises where search warrant was executed; (2) defendant was denied a fair trial because of "inflammatory, bias [*sic*] and prejudicial statements by the prosecutor," *i.e.*, suggesting "the sack fit like a piece of the puzzle" in closing remarks; and (3) direct appeal counsel failed to raise issues that would have led to a different outcome in the direct appeal. None of the prior petitions, however, claimed direct *appellate* counsel had been ineffective for failing to raise the prosecutorial statements at issue. Therefore, any claim of ineffective assistance of direct appeal counsel on this specific issue has been forfeited for postconviction review. 725 ILCS 5/122-3 (West 2010). Even if we construed the record to show defendant raised the issue, which we do not, he would still be foreclosed from such a claim because it would have already been litigated.

*Flores*, 153 Ill. 2d at 274, 606 N.E.2d at 1083.

¶ 18 Defendant's other claim alleges "[defendant's] counsel[']s failure to brief issues from postconviction on appeal violated [defendant's] right to counsel and due process." This claim lacks the specificity required to meet the "cause and prejudice" test and is ambiguous. In defendant's additional points and authorities, he attempts but fails to clarify the ambiguity by stating "counsel on appeal of postconviction only brief [*sic*] on [*sic*] issue which did not allow the appellate court or the Illinois Supreme court to rule on the issues within [his] post-conviction petition. This also did not allow [defendant] to file [his] issues in federal court because [the] issues had not been exhausted in state court."

¶ 19 The first possible interpretation of this claim is direct appeal counsel was ineffective because counsel only raised the reasonable-doubt issue in the direct appeal, thus forcing defendant to file a postconviction petition to raise other issues. In this light, the claim fails because the issue has already been raised in defendant's original postconviction proceeding, and defendant had the opportunity to litigate this claim. Defendant's original *pro se* postconviction petition alleges as follows:

"Had appellate counsel briefed issues contained in record, and those raised by Petitioner months before counsel briefed appeal, the outcome of the proceedings would have been different, where appellate counsel raised single issue."

Defendant fails to point to any specific issues direct appellate counsel should have raised but adds to this allegation in his second amended postconviction petition.

In his second amended postconviction petition, defendant alleged he was denied

effective assistance of counsel on appeal because appellate counsel failed to raise the following constitutional issues on appeal, which resulted in prejudice to defendant: (1) trial counsel failed to (a) file a motion to sever the trials, (b) object to the lack of foundation in expert's testimony regarding the substance tested and the weight of the substance, (c) file a motion to suppress certain evidence when defendant was in custody but not given *Miranda* rights (*Miranda v. Arizona*, 384 U.S. 436 (1966)); and (2) appellate counsel failed to raise numerous constitutional claims regarding his sentences. Defendant had the opportunity to litigate these issues in prior postconviction proceedings and failed to raise them on appeal following the dismissal of his second postconviction petition. Defendant is barred from doing so now. *Flores*, 153 Ill. 2d at 274, 606 N.E.2d at 1083.

¶ 20 The second possible interpretation is defendant was deprived of effective assistance of counsel in the first postconviction appeal, rather than in the direct appeal. In this case, the claim fails because it does not amount to a violation of a constitutional right. In non-capital cases, postconviction petitions may only be used to vindicate constitutional issues. 725 ILCS 5/122-1(a) (West 2010). The federal constitutional right to counsel terminates with the first appeal of right. *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S. Ct. 1990, 1993 (1987). A criminal defendant has no federal constitutional right to the assistance of counsel in mounting a collateral attack on his conviction. *Id.*; *People v. Ligon*, 239 Ill. 2d 94, 113, 940 N.E.2d 1067, 1078 (2010). In Illinois, the right to counsel in a postconviction proceeding is a matter of legislative grace, not a constitutional requirement. *People v. Pinkonsly*, 207 Ill. 2d 555, 567, 802 N.E.2d 236, 244 (2003). Accordingly, a defendant cannot use a successive postconviction petition to raise a claim that he was deprived of the effective assistance of counsel in a prior

postconviction proceeding. *Id.*, 207 Ill. 2d at 567, 802 N.E.2d at 244.

¶ 21

### III. CONCLUSION

¶ 22

For the reasons stated, we grant OSAD's motion to withdraw as counsel for defendant and affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 23

Affirmed.