

No. 1-09-2241

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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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
Plaintiff-Appellee,	)	of Cook County
	)	
v.	)	97 CR 23111
	)	
AUDREY KLIMAWICZE,	)	Honorable
	)	Mary Margaret
Defendant-Appellant.	)	Brosnahan,
	)	Judge Presiding

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JUSTICE McBRIDE delivered the judgment of the court.  
Presiding Justice Epstein and Justice Howse concurred in the judgment.

O R D E R

**HELD:** Where the trial court granted the State's motion to dismiss defendant's postconviction petition, that decision was affirmed.

¶ 1 Defendant, Audrey Klimawicze, appeals from an order of the circuit court of Cook County granting the State's motion to dismiss her petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). She seeks reversal of that order and a remand for an evidentiary hearing, contending that she made a substantial showing of

violations of her constitutional rights. For the reasons that follow, we affirm.

¶ 2 The underlying facts of this case are sufficiently set forth in our order from defendant's direct appeal (*People v. Klimawicze*, No. 1-00-3531 (2003) (unpublished order pursuant to Supreme Court Rule 23)) and in the opinion from defendant's appeal of the trial court's finding following an attenuation hearing (*People v. Klimawicze*, 352 Ill. App. 3d 13 (2004)). Therefore, we will discuss only those facts necessary to resolve the issues defendant raises in this appeal. In summary, defendant and co-defendant Hector Mercado were arrested for the suspected murder and armed robbery of defendant's mother. Prior to trial, defendant and Mercado filed motions to quash arrest and to suppress statements that each made to police. Defendant's motion alleged that she was arrested without probable cause. The trial court denied both motions and the case proceeded to trial.<sup>1</sup>

¶ 3 The testimony presented at the hearing on defendant's motion to suppress and at defendant's trial established the following facts. The police found the deceased in a garbage can on the morning of August 2, 1997. The victim had been stabbed and strangled. An eyewitness told police that she saw a man pushing a garbage can down the alley the previous night and the police prepared a composite sketch of this person. Another daughter of the deceased, who was defendant's half-sister, was attempting to enter her mother's apartment on the afternoon of August 2 when she saw defendant, Mercado and defendant's 5 year-old daughter, who all lived in another apartment in the building, leave in a cab without speaking to her. She found her mother's apartment ransacked and notified the police. She provided the police with the number of the cab

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<sup>1</sup>Defendant and Mercado were tried by simultaneous but separate juries.

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that defendant had entered and identified a photograph of the victim taken at the morgue as the deceased.

¶ 4 A police officer identified Mercado from the sketch, found Mercado and defendant together, and arrested them at approximately 7 p.m. August 2. The police traced the cab number to Joe Martinez and brought him to the police station. Martinez told police that he picked up defendant, her daughter, and Mercado at defendant's residence on the afternoon of August 2 and that, during the cab ride, defendant said she "messed up" and was in "big trouble." Defendant said that she had an argument with her mother during which her mother pulled out a knife. Defendant took the knife away and stabbed her mother with it. Defendant said that the Mercado "came through for her," and that her mother "deserved it." Mercado said "that bi\*\*\*" deserved it" and added, "besides, they can't prove anything."

¶ 5 Under questioning by detectives on the night of August 2, defendant initially denied any knowledge of her mother's death. Shortly thereafter, the eyewitness identified Mercado in a lineup as the person she saw pushing the garbage can. Police confronted Mercado with this identification, and he stated that defendant had told him that she killed her mother and that a homeless man helped her dispose of the body. The following morning, police confronted defendant with Mercado and Martinez's statements. Defendant told police that she walked in on Mercado stabbing her mother and that Mercado threatened to harm defendant and her daughter if she told the police. Police questioned defendant and Mercado throughout the day, and each continued to blame the other for the murder. Later that night, Mercado made a statement implicating both himself and defendant in the murder. When confronted with this information,

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defendant gave a statement to an ASA, which was later reduced to writing, admitting that she and Mercado killed her mother, stole money to buy drugs, and put her body in a garbage can and set it on fire.

¶ 6 Defendant was found guilty of first degree murder, armed robbery, and home invasion and was sentenced to an extended term of 92 years' imprisonment for murder and two concurrent 30-year sentences for the remaining counts of armed robbery and home invasion.<sup>2</sup> Defendant appealed that judgment, contending, among other things, that the trial court erred by denying her motion to quash arrest.<sup>3</sup> The appellate court found that defendant was arrested without probable cause and remanded the case for the trial court to hold an attenuation hearing. See *People v. Klimawicze*, No. 1-00-3531 (unpublished order pursuant to Supreme Court Rule 23). Following that hearing, the trial court found that defendant's statement to police was sufficiently attenuated from her arrest so as to be admissible at her trial. Defendant appealed that ruling, and the appellate court affirmed. Among other things, the court found that Mercado and Martinez's statements to police constituted intervening probable cause and that those statements provoked defendant's confession. *People v. Klimawicze*, 352 Ill. App. 3d 13 (2004).

¶ 7 Defendant filed a *pro se* postconviction petition on May 4, 2006. She claimed that she was denied effective assistance of appellate counsel on her "fourth amendment claim" and that appellate counsel, who also represented defendant at the attenuation hearing, did not present Jose Martinez as a witness at the attenuation hearing. Defendant asserted that Martinez's "tainted

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<sup>2</sup>Mercado was found guilty of the same offenses and received the same sentences.

<sup>3</sup>Mercado did not appeal the trial court's probable cause finding.

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statements to police" were used to induce her confession and that she was unable to obtain suppression of that statement without proof that Martinez was either illegally arrested or that his statements were the product of defendant's "tainted statement." Defendant also claimed that she had "new evidence" that her statement should have been suppressed as involuntary and that her trial counsel "did not file a motion." Finally, defendant claimed that her petition was timely filed pursuant to her "appellate counsel's assurances."

¶ 8 Defendant attached several documents to her petition. The first was her own affidavit, in which defendant explained the following circumstances surrounding the handwritten statement that she signed. Defendant stated that she was addicted to heroin at the time of her arrest and that she was suffering from "serious" withdrawal when she was questioned by police. Her symptoms included diarrhea, vomiting and sweats and she felt "so bad" that she could not keep her head upright. Although it took "great effort" to speak and all she wanted to do was sleep, defendant was forced to "stay up for more than 27 hours and then passed out from sheer exhaustion." Defendant was awakened by a detective and told to "get up, your [*sic*] going home to your daughter, sign your release papers." Defendant did not read the release papers because she was in "no shape to do so" and she would not have signed them had she been in the "right state of mind and coherent." Defendant informed her trial counsel of these circumstances "numerous times," but counsel did not file a motion to suppress defendant's statement on this basis. Defendant did not tell the police of her addiction or withdrawal symptoms because she was afraid of being "brought up on drug charges."

¶ 9 Defendant also attached an affidavit from an Assistant Public Defender who stated that she

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represented defendant at the attenuation hearing. Counsel stated that she did not present Martinez as a witness at the attenuation hearing because she “erroneously” believed that his testimony was unnecessary. Counsel provided Martinez’s last known phone number and current address. Counsel further stated that Martinez would testify to the following sequence of events.

¶ 10 Martinez was “roused” from his bed and detained over 24 hours against his will. During that time, the police told him that defendant had been arrested and that she told police that she sought Martinez’s help in removing a large package, which she told police contained the victim’s body, and that he drove her from her home to a restaurant after the crime. The police threatened to take Martinez’s cab license away and to charge him as an accessory to the murder. Martinez made a statement to the police implicating defendant in the crime because he feared he would be charged as an “accessory” to the crime.

¶ 11 In her affidavit, counsel noted that in the appeal following the attenuation hearing, the appellate court stated that it did not have to rely “exclusively” on Mercado’s statement as attenuation. Counsel claimed that because she did not present Martinez’s testimony, the appellate court relied on “erroneously attenuating” circumstances. Counsel also claimed that her “failures” were noted by the appellate court as ineffectiveness. Counsel cited to a portion of the appellate court opinion in which the court stated that it did not examine the legality of Martinez’s detention because defendant “simply stated Martinez was detained without probable cause” but did not sufficiently raise the issue by arguing specific facts and applicable law.

¶ 12 Counsel further averred that she should have presented defendant as a witness at the attenuation hearing to testify to her heroin addiction and withdrawal. Finally, counsel explained

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why she believed defendant was not culpably negligent in filing her petition.

¶ 13 Defendant also attached progress notes from Cermak Health Services to her petition.

According to the notes of a psychologist and a doctor that are dated August 6, 1997, defendant reported heroin withdrawal symptoms of nausea, vomiting, diarrhea, and hot and cold flashes, and she also reported last using heroin on Sunday, August 3, 1997.

¶ 14 Defendant's *pro se* petition was advanced to the second stage of proceedings. The trial court appointed the Public Defender's office to represent defendant. Postconviction counsel subsequently filed a certificate pursuant to Supreme Court Rule 651(c) attesting that she had consulted with defendant by letter to ascertain her contentions of deprivation of constitutional rights and that she examined the report of proceedings from defendant's trial and attenuation hearing. Counsel further attested that she reviewed defendant's *pro se* petition and that an amended petition was being filed in order to adequately present defendant's claims.

¶ 15 Postconviction counsel filed an amended petition on November 5, 2008. Among other things, the petition asserted that defendant received ineffective assistance of counsel for several reasons. First, defendant's trial counsel was ineffective because he did not file a motion to suppress defendant's statement on the grounds that defendant was suffering from heroin withdrawal when she made the statement, that the police threatened to have DCFS take custody of defendant's child, and that the police did not allow defendant to have contact with her father. The amended petition also asserted that defendant received ineffective assistance of counsel at the attenuation hearing based on counsel's failure to call Martinez and defendant as witnesses at that hearing. Finally, the amended petition explained why ineffective assistance of counsel led to

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the late filing of defendant's petition.

¶ 16 The State filed a motion to dismiss the petition, which the trial court granted. This appeal followed.

¶ 17 At the second stage of proceedings under the Act, the circuit court must determine whether the allegations in the petition, supported by the trial record and any accompanying affidavits, make a substantial showing of a constitutional violation. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). If no such showing is made, defendant is not entitled to an evidentiary hearing and the petition may be dismissed. *People v. Johnson*, 206 Ill. 2d 348, 357 (2002). Dismissal is also appropriate where the record from the original trial proceedings contradicts the allegations in defendant's petition. *People v. Rogers*, 197 Ill. 2d 216, 222 (2001). Because a proceeding under the Act is a collateral attack on a judgment of conviction, all issues that were decided on direct appeal are *res judicata* and all issues that could have been raised in the original proceeding are subject to forfeiture. *People v. Mahaffey*, 194 Ill. 2d 154, 170-71 (2000). We review the circuit court's second stage dismissal of defendant's postconviction petition *de novo*. *Coleman*, 183 Ill. 2d at 378-79.

¶ 18 Defendant first contends that she made a substantial showing that she received ineffective assistance of trial counsel. Defendant claims that counsel should have moved to suppress her statement as involuntary on the basis of the heroin withdrawal she was suffering from while being interrogated by police.

¶ 19 We find that this claim was properly dismissed because defendant has failed to make a substantial showing that her trial counsel was ineffective. Claims of ineffective assistance of

counsel are resolved under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court delineated a two-part test to use when evaluating whether a defendant was denied the effective assistance of counsel in violation of the sixth amendment. Under *Strickland*, a defendant must demonstrate that counsel's performance was deficient and that such deficient performance substantially prejudiced defendant. *Strickland*, 466 U.S. at 687. To demonstrate performance deficiency, a defendant must establish that counsel's performance fell below an objective standard of reasonableness. *People v. Edwards*, 195 Ill. 2d 142, 162 (2001). In evaluating sufficient prejudice, “[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. Defendant must satisfy both prongs of this test in order to prove ineffective assistance of counsel. *Strickland*, 466 U.S. at 687.

¶ 20 In order to prove ineffective assistance of counsel, defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy under the circumstances. *People v. Giles*, 209 Ill. App. 3d 265, 269 (1991). A decision that involves a matter of trial strategy will typically not support a claim of ineffective representation. *People v. Simmons*, 342 Ill. App. 3d 185, 191 (2003). Decisions such as whether to file a motion to suppress evidence and what theory to rely on are traditionally considered matters of trial strategy that are given deference and generally do not establish ineffective assistance. *People v. Rodriguez*, 312 Ill. App. 3d 920, 925 (2000). In order to establish prejudice resulting from the failure to file a motion to suppress, a defendant must show that the motion would have been

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granted and that there is a reasonable probability that the trial outcome would have been different if the evidence had been suppressed. *People v. Patterson*, 217 Ill. 2d 407, 438 (2005). The failure to file a motion to suppress does not establish incompetent representation when the motion would have been futile. *Patterson*, 217 Ill.2d at 438.

¶ 21 In this case, defendant cannot overcome the presumption that her counsel's decision was a matter of sound trial strategy. Defendant's trial counsel filed a motion to quash arrest and to suppress defendant's statement on the ground that defendant was arrested without probable cause. That motion proved to be successful when the appellate court reversed the trial court's denial of that motion and found that defendant was arrested without probable cause. However, the issue was remanded for an attenuation hearing and defendant's statement was found to be sufficiently attenuated from her illegal arrest and therefore admissible at trial. Defendant now looks back on counsel's decision with the benefit of hindsight and claims that counsel should have instead moved to suppress the statement as involuntary.

¶ 22 However, decisions such as whether to file a motion to suppress evidence and what theory to rely on are traditionally considered matters of trial strategy that are given deference and generally do not establish ineffective assistance. *People v. Rodriguez*, 312 Ill. App. 3d 920, 925 (2000). Moreover, neither mistakes in strategy nor the fact that another attorney with the benefit of hindsight would have handled the case differently indicates that counsel was incompetent. *People v. Bobo*, 375 Ill. App. 3d 966, 977 (2007). In this case, counsel's decision as to the theory underlying the motion to suppress was a matter of reasonable trial strategy. The reasonableness of counsel's decision is evidenced by the fact that the appellate court agreed with defendant that

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she was arrested without probable cause, notwithstanding that the court later found defendant's statement was sufficiently attenuated from her unlawful arrest.

¶ 23 Moreover, defendant has failed to show that counsel's strategy was objectively unreasonable because the record contradicts defendant's claim that her statement was involuntary. A court must consider the totality of the circumstances surrounding a defendant's statement when determining whether that statement was voluntarily made. *People v. Armstrong*, 395 Ill. App. 3d 606, 624 (2009). Factors to be considered include the defendant's age, education, background, experience, mental capacity, and intelligence, as well as the defendant's physical and emotional condition at the time of questioning, the duration of the questioning, and whether the defendant was subjected to physical or mental abuse by the police. *Armstrong*, 395 Ill. App. 3d at 624.

¶ 24 The record shows that defendant was approximately 31 years old at the time she gave her statement to police. She was literate and had finished three years of high school. Defendant initially made an oral statement to an Assistant State's Attorney (ASA) and then elected to memorialize that statement in a handwritten statement. Prior to doing so, the ASA asked the detectives to leave the room so that the ASA could speak with defendant alone regarding how she had been treated. Defendant told the ASA that she had been treated "fine" and then the ASA wrote out the statement as defendant again recounted the events regarding her mother's murder. The ASA read the handwritten statement to defendant and told her that she could correct any inaccuracies in the statement or make additions to it. Defendant directed the ASA to make a change to the statement. Defendant then read portions of the statement out loud to the ASA.

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Defendant was told to read each page of the statement and after she did so the ASA asked her if it reflected what she had said and, if so, to sign that page. After each page, defendant indicated that it reflected what she said and she, the ASA, and a detective signed each page. At the end of the statement, the ASA added a line stating that defendant had read each page of the statement and made any corrections to it that she wished. Defendant signed that portion of the statement as well. At the end of the statement, defendant also indicated that she had been treated "fine" by the police, that she was not threatened or promised anything, and that she was not under the influence of drugs or alcohol at the time. According to the ASA, defendant declined an offer of food during this time, was given something to drink, and was allowed to smoke cigarettes.

¶ 25 This record rebuts defendant's claims that she was suffering from such "severe" withdrawal that her statement was involuntary and that the police lied to her about signing "release papers" and threatened her in order to make her give a statement. Moreover, the medical records attached to defendant's petition are dated two days after defendant made her statement to police and reflect only what defendant told a psychologist and a doctor at that time. Given this record, we find that it was reasonable for counsel to forego filing a motion to suppress defendant's statement on the basis that it was involuntary and to instead base that motion on the lack of probable cause for defendant's arrest. Similarly, given this record, it is unlikely that a motion to suppress defendant's statement as involuntary would have been successful and we therefore also find that defendant has not shown that she was prejudiced by counsel's decision.

¶ 26 Defendant's second contention is that she received unreasonable assistance of postconviction counsel. Defendant asserts that counsel should have amended her postconviction

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petition to assert a claim that defendant's attenuation and appellate counsel was ineffective for failing to argue at the attenuation hearing and on appeal that Mercado and Martinez were arrested without probable cause and that their statements therefore could not serve as intervening circumstances that attenuated defendant's statement from her unlawful arrest. Defendant also asserts that the amended petition should have alleged ineffective assistance for failing to call Martinez as a witness

¶ 27 Because the source of the right to counsel in postconviction proceedings is statutory rather than constitutional, a postconviction petitioner is entitled only to the "reasonable" level of assistance provided by the Act. *People v. McNeal*, 194 Ill. 2d 135, 142 (2000). To meet that standard, appointed counsel is required to perform the specific duties set forth in Rule 651(c) (134 Ill. 2d R. 651(c)). *People v. Greer*, 212 Ill. 2d 192, 204-05 (2004). That rule requires the record on appeal to show that counsel: (1) consulted with defendant either by mail or in person to review his contentions of deprivation of his constitutional rights; (2) examined the record of proceedings; and (3) made any necessary amendments to defendant's *pro se* petition to adequately present defendant's contentions. 134 Ill. 2d R. 651(c). This showing may be made through the filing of a Rule 651(c) certificate of compliance. *McNeal*, 194 Ill. 2d at 143.

¶ 28 We initially find that there is no merit to defendant's claim regarding the failure to call Martinez as a witness. First, this claim was included in defendant's postconviction petition, which specifically alleged that counsel was ineffective for failing to present Martinez as a witness at the attenuation hearing. Second, Martinez testified at defendant's trial and, at the attenuation hearing, the parties stipulated to the testimony given at trial. Thus, Martinez's

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testimony was presented at the attenuation hearing. Moreover, Martinez's trial testimony was essentially the same testimony that counsel claims in her affidavit Martinez would have given at the attenuation hearing. Specifically, at trial, Martinez testified that the police brought him to an interrogation room and "pressured" him for information. He was kept in the interrogation room for a total of approximately 24 hours, but was allowed to return home for four hours at some point during this time. There was no telephone in the interrogation room and he was not allowed to eat. While he was being questioned, detectives threatened numerous times to charge him as an "accessory after the fact," which he understood to mean he would go to jail, and to take his car from him. Martinez gave a statement approximately seven hours after he was brought to the police station and was released approximately four hours later. This testimony closely tracks the testimony set out in counsel's affidavit and, most importantly, it includes all of the statements that defendant claims establish that Martinez was arrested without probable cause. Under these circumstances, we cannot say that postconviction counsel was required to take further action, nor do we find that counsel provided unreasonable assistance on this issue.

¶ 29 We also find that defendant's claim fails because she did not attach an affidavit from Martinez to her postconviction petition. A claim that counsel failed to investigate and call a witness must be supported by an affidavit from that proposed witness. *People v. Johnson*, 183 Ill. 2d 176, 192 (1998); *People v. Harris*, 224 Ill. 2d 115, 142 (2007). "In the absence of such an affidavit, a reviewing court cannot determine whether the proposed witness could have provided testimony or information favorable to the defendant, and further review of the claim is unnecessary." *People v. Enis*, 194 Ill. 2d 361, 380 (2000). In this case, defendant only attached

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an affidavit from her attenuation counsel in which counsel recites testimony that she claims Martinez would have provided had he been presented as a witness. However, to the extent that there is any difference between the testimony Martinez gave at trial and the alleged testimony set forth in counsel's affidavit, defendant cites no authority providing that such an affidavit meets the requirements of the Act and we find that counsel's affidavit fails to provide the necessary evidentiary support for defendant's claim.

¶ 30 As to defendant's claim regarding counsel's failure to challenge the legality of Martinez's arrest, we similarly find that this claim was included in defendant's petition. The petition specifically alleged that defendant received ineffective assistance of counsel based on counsel's failure to call Martinez as a witness at the attenuation hearing and that this failure allowed the court to rely in part on the statement Martinez made to police in finding attenuation. The petition argued the significance of this omission by referencing the affidavit attached to the *pro se* petition, in which counsel stated that Martinez was an important part of the attenuation analysis and that he was mistreated and unlawfully arrested and that his statement therefore could not serve as an attenuating factor. Defendant's petition also pointed out that defendant's counsel on appeal from the attenuation hearing failed to sufficiently raise the issue of whether Martinez was illegally arrested and that this failure precluded appellate review of his challenge to Martinez's arrest. Finally, defendant alleged in her petition that the appellate court was unable to grant her relief on appeal from the attenuation hearing without proof that Martinez was illegally arrested or that his statement was the fruit of defendant's illegally obtained statement. The implication of these arguments in the petition was that defendant's counsel at the attenuation hearing should

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have called Martinez as a witness and argued that he was arrested without probable cause and that counsel on appeal from the attenuation hearing should have more fully developed the argument regarding Martinez's alleged unlawful arrest. Under these circumstances, we again cannot say that postconviction counsel was required to make any further arguments on this issue, nor do we find that counsel provided unreasonable assistance on this issue.

¶ 31 We also find that counsel at the attenuation hearing and on appeal from that hearing was not ineffective because challenging Martinez's arrest would not have changed the outcome of the attenuation hearing. Even without Martinez's statement, Mercado's statement established intervening probable cause to attenuate defendant's statement from her arrest. On appeal from the attenuation hearing, the appellate court stated that a co-defendant's statement can constitute intervening probable cause and serve as an attenuating circumstance if it is reliable and legally obtained. *Klimawicze*, 352 Ill. App. 3d at 20. The court then held:

“In this case, Mercado's statement meets both requirements.

Although Mercado challenged his arrest before trial, he was unsuccessful and did not raise the issue again on appeal. Based on the record, we have no reason to doubt the legality of Mercado's arrest. Second, Mercado's statement was sufficiently reliable. The details of his statement were corroborated by Martinez's statement and the physical evidence. Additionally, Mercado's statement was against his penal interest because he admitted helping defendant dispose of the victim's body.” *Klimawicze*, 352 Ill. App. 3d at 20.

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Because Mercado's statement constituted intervening probable cause, challenging Martinez's arrest would not have changed the finding that defendant's statement was attenuated from her unlawful arrest. Therefore, attenuation and appellate counsel was not ineffective for failing to raise the issue and postconviction counsel did not provide unreasonable assistance by electing not to raise the claim in defendant's amended petition.

¶ 32 As to defendant's claim regarding Mercado, we initially observe that defendant did not include this claim in her postconviction petition. Our supreme court has held that claims not raised in a postconviction petition are forfeited and may not be raised for the first time on appeal. *People v. Jones*, 213 Ill. 2d 498, 505 (2004) (*Jones II*); *People v. Jones*, 211 Ill. 2d 140, 148 (2004) (*Jones I*); *People v. Coleman*, 183 Ill. 2d 366, 388 (1998) (“[t]he question raised in an appeal from an order dismissing a post-conviction petition is whether the allegations *in the petition*, liberally construed and taken as true, are sufficient to invoke relief under the Act”) (Emphasis added.); 725 ILCS 5/122-3 (West 2004) (“[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived”). Because this claim was not included in defendant's petition, we find that it is forfeited.

¶ 33 Defendant claims that postconviction counsel was unreasonable for failing to amend defendant's petition to assert this claim. However, postconviction counsel is not required to amend a *pro se* petition to assert a claim that was not included in the original petition. See *People v. Pendleton*, 223 Ill. 2d 458, 475-76 (2006). Rather, “Rule 651(c) only requires postconviction counsel to examine as much of the record ‘as is necessary to adequately present and support those constitutional claims raised by the petitioner.’” *Pendleton*, 223 Ill. 2d at 475 (quoting

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*People v. Davis*, 156 Ill. 2d at 164). In this case, because defendant did not include a claim regarding Mercado's arrest in her *pro se* petition, postconviction counsel was not required to raise that claim in an amended petition.

¶ 34 Defendant's attempt to challenge the legality of Mercado's arrest also fails because another court has already ruled on that issue. As noted in defendant's appeal following the attenuation hearing, Mercado unsuccessfully challenged the legality of his arrest before trial and did not raise the issue on appeal. See *Klimawicze*, 352 Ill. App. 3d at 21. Defendant appears to suggest that, despite that ruling, counsel at the attenuation hearing could have nevertheless challenged the legality of Mercado's arrest. Defendant does not articulate how counsel could have successfully raised such a claim at the attenuation hearing, which was a subsequent and entirely separate proceeding, and she does not provide any authority that would allow such a claim to be raised under these circumstances. Defendant relies upon a portion of the opinion from her appeal of the attenuation hearing where the court noted that Mercado did not appeal the denial of his motion to suppress and stated that "based upon the record, we have no reason to doubt the legality of Mercado's arrest." *Klimawicze*, 352 Ill. App. 3d at 21. We do not read this short statement by the court as providing authority for the claim defendant seeks to raise. Accordingly, postconviction counsel did not provide unreasonable assistance by failing to argue that defendant's attenuation and appellate counsel were ineffective for failing to raise that claim.

¶ 35 We also question whether defendant would have standing to contest the legality of Martinez or Mercado's arrest. Our supreme court has held that a defendant lacks standing to claim that his or her confession is the product of another person's illegal arrest. See *People v. James*, 118 Ill.

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2d 214, 225-26 (1987). The issue in *James* was whether a codefendant's uncorroborated statement implicating the defendant in a crime, which that co-defendant successfully suppressed as the product of his illegal arrest, was sufficient to establish probable cause to arrest the defendant. The court held that it did, finding that the co-defendant's statement was sufficiently reliable to establish probable cause for the defendant's arrest. *James*, 118 Ill. 2d at 225. The court rejected the defendant's argument that, because he confessed only after being confronted with the co-defendant's illegally obtained statement, his confession should have been suppressed as the tainted fruit of that co-defendant's illegal arrest. In holding that defendant lacked standing to assert this claim, the court reasoned:

"It is a fundamental principle that a claim to suppress the product of a fourth amendment violation can be asserted "only by those whose rights were violated by the search or seizure itself." Since the defendant's own rights were not violated, he may not vicariously seek suppression of evidence as a remedy for such a violation of another's fourth amendment rights." *James*, 118 Ill. 2d at 226.

Illinois courts have relied on *James* to find that a defendant lacks standing to contest statements made by witnesses in his case on the ground that those statements were coerced. See *People v. Wilson*, 309 Ill. App. 3d 235, 243 (1999); *People v. Barton*, 286 Ill. App. 3d 954, 959-60 (1997).

¶ 36 Notwithstanding the holding in *James*, a line of cases has held that a co-defendant's statement can constitute intervening probable cause and serve as an attenuating circumstance if it

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is *legally obtained* and reliable. See, e.g., *People v. Wilberton*, 348 Ill. App. 3d 82, 88 (2004); *Klimawicze*, 352 Ill. App. 3d at 20; *People v. Austin*, (1989); *People v. Beamon*, 255 Ill. App. 3d 63, 70 (1993) ("the State's use of evidence obtained as a result of the illegal arrest of [a co-defendant] may not serve to attenuate the taint of [another co-defendant's] illegal arrest"). The court in *Beamon* distinguished its holding from *James* on the ground that the issue in *James* was probable cause and the issue in *Beamon* was attenuation. See *Beamon*, 255 Ill. App. 3d at 70; *but see Austin*, 293 Ill. App. 3d at 789 (Quinn, J., specially concurring) (stating that the holding in *Beamon* conflicts with the holding in *James* and that "[i]t is difficult to understand why probable cause to arrest a defendant may be based on the statement of an illegally arrested co-defendant (as in *James*) but that this same statement cannot be used as attenuation").

¶ 37 We need not resolve the issue of whether defendant would have standing to challenge the legality of Martinez or Mercado's arrest because we have already found that defendant did not receive unreasonable assistance of postconviction counsel for the reasons set forth above.

¶ 38 Finally, defendant contends that the late filing of her petition was not due to her culpable negligence. We need not decide this issue because we have already concluded that defendant's petition was properly dismissed.

¶ 39 For the foregoing reasons, we affirm the dismissal of defendant's postconviction petition.

¶ 40 Affirmed.