



Thompson for Robinson's death. *People v. Thompson*, No. 99-CF-245 (Cir. Ct. Champaign Co.). Defendant and Thompson were tried separately. At defendant's May 1999 trial, the State presented evidence and argued Thompson shot Robinson and defendant was accountable for Thompson's actions. In doing so, the State presented the testimony of 16 witnesses, including Billy Wayne Mullins, who was with defendant and Thompson the night of the murder, and Champaign police detective John Schweighart, who interviewed defendant on February 4, 1999, about Robinson's death. A discussion on the record, but outside the jury's presence, indicates defendant and his counsel were aware of Thompson's recorded statements to the police. However, such statements were not presented to the jury. At the conclusion of the trial, the jury found defendant guilty of first degree murder. In July 1999, a jury found Thompson also guilty of first degree murder.

¶ 5 Defendant filed several posttrial motions, which the trial court denied in August 1999. On September 1, 1999, the court sentenced defendant to 55 years' imprisonment. Defendant appealed, asserting (1) the trial court erred in denying his motion to suppress his February 4, 1999, statement to police; (2) the State failed to prove him guilty beyond a reasonable doubt based on an accountability theory; (3) he did not receive effective assistance of counsel; and (4) the court failed to investigate his pretrial allegations of ineffective assistance of counsel. His appellant brief was filed on January 28, 2004. In October 2004, this court affirmed defendant's conviction and sentence. *People v. Harris*, No. 4-99-0800 (Oct. 19, 2004) (unpublished order under Supreme Court Rule 23). In January 2005, the supreme court denied defendant's petition for leave to appeal. *People v. Harris*, 213 Ill. 2d 567, 829 N.E.2d 791 (2005).

¶ 6 On August 30, 2002, defendant mailed his *pro se* postconviction petition, which this court file stamped on September 4, 2002. In the petition, defendant noted (1) the three-year statute of limitations for filing a postconviction petition was set to expire on September 1, 2002 (see 725 ILCS 5/122-1(c) (West 2002)), and (2) his direct appeal still had not been decided. He also asserted the following claims: (1) he was denied his constitutional right to an unbiased jury when the trial court and counsel failed to propound *voir dire* questions that would expose juror biases toward illegal drugs, drug users, and drug dealers; (2) trial counsel was ineffective in numerous respects; (3) he was denied a fair trial by the prosecutor's use of peremptory challenges to dismiss jurors on the basis of race; (4) he was denied a fair trial because of a violation of *Brady v. Maryland*, 373 U.S. 83 (1963); (5) he was denied due process and a fair trial by the cumulative effects of claims one through four; and (6) he received ineffective assistance of appellate counsel when appellate counsel failed to timely file a brief and to raise several issues.

¶ 7 On September 27, 2002, the trial court summarily dismissed defendant's *pro se* postconviction petition as frivolous and patently without merit. On October 25, 2002, defendant filed a motion to reconsider the dismissal, which the court denied on November 4, 2002. Defendant appealed the dismissal of his petition, and this court stayed the appeal pending the resolution of defendant's direct appeal. When this court rendered its decision on the direct appeal, we lifted the stay on the postconviction appeal. On the postconviction appeal, defendant argued the trial court erred in dismissing his postconviction petition because (1) his direct appeal was pending; (2) it ruled 23 days after the petition was filed even though he had requested a continuance, leave to amend, and discovery; (3) the petition was not frivolous and patently without merit; and (4) the court had not reviewed his ineffective-assistance-of-appellate-counsel

claims. In November 2005, we affirmed the trial court's summary dismissal of defendant's postconviction petition. *People v. Harris*, No. 4-02-1005 (Nov. 17, 2005) (unpublished order under Supreme Court Rule 23). Defendant filed a petition for leave to appeal, and the Illinois Supreme Court allowed the petition. *People v. Harris*, 218 Ill. 2d 548, 850 N.E.2d 810 (2006). In January 2007, the supreme court affirmed our decision. *People v. Harris*, 224 Ill. 2d 115, 862 N.E.2d 960 (2007).

¶ 8 In March 2007, defendant filed a motion for leave to file a successive postconviction petition, which the trial court denied. Defendant appealed, and this court affirmed the denial. *People v. Harris*, No. 4-07-0743 (June 10, 2009) (unpublished order under Supreme Court Rule 23). Defendant again sought leave to appeal to the supreme court, which was denied in March 2010. *People v. Harris*, 236 Ill. 2d 522, 930 N.E.2d 412 (2010).

¶ 9 In October 2010, defendant filed another motion for leave to file a successive postconviction petition, asserting his rights to due process and a fair trial were violated by the State's knowing and intentional presentation of fundamentally inconsistent facts in his and Thompson's trials. Defendant had noted that, due to a lack of funds, he did not receive the transcripts from Thompson's trial until 2010. In November 2010, the trial court entered a written order, denying defendant's motion. The court found defendant had failed to show cause because the office of the State Appellate Defender represented both defendant and Thompson on their direct appeals, and thus that office had the transcripts of Thompson's trial well before 2001. It noted "[t]he only objective factor that impeded Petitioner's ability to obtain the transcripts and raise the claims here is that he did not ask."

¶ 10 In December 2010, defendant filed (1) a motion to reconsider the November 2010

judgment, and (2) a motion for leave to file an amended motion for leave to file a successive postconviction petition and an amended successive postconviction petition, which included the amended motion for leave to file and the amended postconviction petition. The trial court denied both motions and noted the proposed successive petition referenced and tried to allege matters from a petition that the court had already denied leave to file.

¶ 11 On January 26, 2011, defendant filed the motion for leave to file a successive postconviction petition at issue in this appeal. In this motion, defendant asserts error based on appellate counsel's failure to raise the due process claim based on the inconsistencies in his and Thompson's trials. On May 12, 2011, the trial court denied defendant's motion, finding defendant had not established cause and prejudice. It disagreed with defendant's contention the Thompson's trial transcripts were just recently obtained by defendant and criticized defendant for only providing small portions of the transcripts. The court noted it had no way of knowing if the inconsistencies were later clarified in other portions of the testimony.

¶ 12 On June 6, 2011, defendant filed a motion to reconsider and a motion for certification of trial transcripts. On June 21, 2011, the trial court denied both motions. On July 5, 2011, defendant filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606(d) (eff. Mar. 20, 2009). See Ill. S. Ct. R. 651(d) (eff. Dec. 1, 1984) (providing the supreme court rules governing criminal appeals apply to appeals in postconviction proceedings). Thus, this court has jurisdiction of the cause pursuant to Illinois Supreme Court Rule 651(a) (eff. Dec. 1, 1984).

¶ 13

## II. ANALYSIS

¶ 14 On appeal, defendant challenges the trial court's denial of his motion for leave to

file a successive postconviction petition, arguing he satisfied the cause-and-prejudice test. The State disagrees, asserting defendant failed to meet both prongs of the test. When the trial court has not held an evidentiary hearing, this court reviews *de novo* the denial of a defendant's motion for leave to file a successive postconviction petition. See *People v. Gillespie*, 407 Ill. App. 3d 113, 124, 941 N.E.2d 441, 452 (2010).

¶ 15 The Postconviction Act (725 ILCS 5/art. 122 (West 2010)) grants criminal defendants a means by which they can assert their convictions resulted from a substantial denial of their rights under the United States Constitution, the Illinois Constitution, or both. *People v. Guerrero*, 2012 IL 112020, ¶ 14, 963 N.E.2d 909, 915. Relief under the Act is only available for constitutional deprivations that occurred at the defendant's original trial. *Guerrero*, 2012 IL 112020, ¶ 14, 963 N.E.2d at 915. Moreover, the Act generally limits a defendant to one postconviction petition and expressly states any claim cognizable under the Act that is not raised in the original or amended petition is deemed forfeited. *Guerrero*, 2012 IL 112020, ¶ 15, 963 N.E.2d at 915 (citing 725 ILCS 5/122-3 (West 2006)). However, section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2010)) provides the following:

"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 post-conviction proceedings and prejudice results from that failure. For purposes of this subsection (f):

(1) a prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her

initial post-conviction proceedings; and (2) a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process."

Thus, for a defendant to obtain leave to file a successive postconviction petition, both prongs of the cause-and-prejudice test must be satisfied. *Guerrero*, 2012 IL 112020, ¶ 15, 963 N.E.2d at 915. In determining whether a defendant has established cause and prejudice, the trial court may review the "'contents of the petition submitted.'" *People v. Gutierrez*, 2011 IL App (1st) 093499, ¶ 12, 954 N.E.2d 365, 372 (quoting *People v. Tidwell*, 236 Ill. 2d 150, 162, 923 N.E.2d 728, 735 (2010)).

¶ 16 Citing the Second District's decision in *People v. LaPointe*, 365 Ill. App. 3d 914, 924, 850 N.E.2d 893, 901 (2006), *aff'd on other grounds*, 227 Ill. 2d 39, 45, 879 N.E.2d 275, 278 (2007), defendant argues he need only state the "gist" of a claim of cause and prejudice to obtain leave to file a successive postconviction. We disagree. Unlike with the first-stage review of an initial postconviction petition, our supreme court has not used the "gist" language in analyzing cause and prejudice to determine whether leave to file a successive postconviction petition should be allowed. See *Guerrero*, 2012 IL 112020, ¶ 15, 963 N.E.2d at 915; *People v. Wrice*, 2012 IL 111860, ¶ 48, 962 N.E.2d 934, 946. In fact, the supreme court noted the difference between the "gist" standard and the cause-and-prejudice standard when it stated the following: "The trial court must still examine every request for postconviction relief whether it be an initial petition subject to review under the 'gist' standard [citation] or a proffered successive petition subject to the more exacting cause and prejudice standard [citation]." *People v. Conick*, 232 Ill.

2d 132, 142, 902 N.E.2d 637, 643 (2008). Moreover, with a successive postconviction petition seeking to raise an actual-innocence claim, the supreme court rejected the argument defendant had to only state a gist of a claim of actual innocence and held defendant had to set forth a colorable claim of actual innocence. *People v. Edwards*, 2012 IL 111711, ¶¶ 24-29, 969 N.E.2d 829, 836-37. "A colorable basis is some evidence tending to show the essential elements of the claim." (Internal quotation marks omitted.) *People v. Peterson*, 397 Ill. App. 3d 1048, 1056, 923 N.E.2d 890, 897 (2010) (quoting *United States v. Benson*, 941 F.2d 598, 611 (7th Cir. 1991)).

¶ 17

#### A. Cause

¶ 18 As defendant's appellant brief notes, his primary postconviction claim is his due process rights were violated by the State's presentation of inconsistent facts and theories at his and Thompson's trials and argues cause based on that claim. The State also only addresses the due process claim. However, in the January 2011 motion for leave to file a successive postconviction petition at issue in this appeal, defendant raises the due process claim in terms of ineffective assistance of appellate counsel based on counsel's failure to raise the issue on direct appeal. Thus, we must analyze cause as it relates to ineffective assistance of appellate counsel.

¶ 19 Defendant's initial postconviction petition was filed on August 30, 2002, which was two days before the expiration of the statute of limitations. See *Harris*, 224 Ill. 2d at 118, 862 N.E.2d at 963. Our records show defendant's appellant brief in his direct appeal was not filed until January 2004, more than 16 months after the expiration of the statute of limitations for defendant's initial postconviction petition. In defendant's appeal from his initial postconviction petition, our supreme court stated "[i]t is difficult to conceive of a more obvious case of cause for failing to raise a claim of ineffective assistance of appellate counsel in the initial proceeding than

that the statute of limitations required that the petition be filed before the defendant's brief had been filed in the direct appeal." *Harris*, 224 Ill. 2d at 134, 862 N.E.2d at 972. It further stated the following: "Defendant will be granted leave of court to file a successive petition if he demonstrates cause and prejudice, and he would seemingly have an obvious case of cause. Thus, he must be allowed leave to file a successive petition if he can meet the prejudice prong." *Harris*, 224 Ill. 2d at 135, 862 N.E.2d at 972. Since defendant's postconviction petition had to be filed before his appellant brief on direct appeal, it was impossible for defendant to have raised the ineffective-assistance-of-appellate-counsel argument at issue in his current successive petition, and thus he clearly satisfied the cause prong of the cause-and-prejudice test.

¶ 20

#### B. Prejudice

¶ 21 As to prejudice, defendant argues he adequately pleaded prejudice that resulted from his claim that his due process rights were violated when the prosecution took factually inconsistent positions at his and Thompson's trials. The State asserts the facts defendant presented do not rise to the level of a due-process violation. We evaluate ineffective assistance of appellate counsel claims under the two-prong test of *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Jones*, 219 Ill. 2d 1, 23, 845 N.E.2d 598, 610 (2006). To prevail on such a claim, the defendant must show (1) counsel's failure to raise the issue on appeal was objectively unreasonable and (2) he or she suffered prejudice as a result. *Jones*, 219 Ill. 2d at 23, 845 N.E.2d at 610. Under *Strickland*, appellate counsel does not have to brief every conceivable issue on appeal and may refrain from developing nonmeritorious issues since the defendant does not suffer prejudice unless the underlying issue has merit. *Jones*, 219 Ill. 2d at 23, 845 N.E.2d at 610. Accordingly, we examine the underlying merits of defendant's due process claim to assess

whether he was prejudiced by appellate counsel's failure to raise the issue on direct appeal.

¶ 22 In *People v. Caballero*, 206 Ill. 2d 65, 82, 794 N.E.2d 251, 263 (2002), our supreme court recognized a defendant's due process rights are violated by the State's use of inconsistent theories at the separate trials of codefendants. In recognizing the due process violation, the *Cabellero* court noted four federal cases: *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000); *Thompson v. Calderon*, 120 F.3d 1045 (9th Cir. 1997), *rev'd on other grounds*, 523 U.S. 538 (1998); *United States v. Paul*, 217 F.3d 989 (8th Cir. 2000); and *Drake v. Francis*, 727 F.2d 990 (11th Cir. 1984), *rehearing en banc granted*, 727 F.2d at 1003. Our supreme court found the aforementioned cases demonstrated a party was not as bound by prior arguments as it was by prior assertions of fact. *Caballero*, 206 Ill. 2d at 83-84, 794 N.E.2d at 264. On the facts in *Caballero*, the court concluded a due process violation did not occur because the State's shifting positions involved matters of opinion, not of underlying fact. *Caballero*, 206 Ill. 2d at 84, 794 N.E.2d at 264.

¶ 23 Unlike *Caballero*, defendant claims the State presented inconsistent facts. In *Smith*, 205 F.3d at 1048, 1050, the Eighth Circuit addressed a case where, in one trial, the State asserted the victims died after the defendant participated in the burglary and, in the other, argued the victims were dead before the burglary occurred. It concluded the State's inconsistent factual theories violated the defendant's due process rights. *Smith*, 205 F.3d at 1051. The *Smith* court emphasized it did not hold the State must present precisely the same evidence and theories in trials for different defendants but, rather, held "the use of inherently factually contradictory theories violates the principles of due process." *Smith*, 205 F.3d at 1052. Stated differently, "[t]o violate due process, an inconsistency must exist at the core of the prosecutor's cases against

defendants for the same crime." *Smith*, 205 F.3d at 1052. Minor variations in testimony or defects in memory are expected with the passage of time between trials. *Smith*, 205 F.3d at 1052. The *Smith* court noted the State could not have convicted the defendant of felony murder under both theories of when the murders occurred. *Smith*, 205 F.3d at 1051.

¶ 24 In *Thompson*, 120 F.3d at 1058-59, the Ninth Circuit also found a due process violation where the State argued at the defendant's trial he alone committed the murder but argued at a subsequent trial another defendant committed the same murder. The *Thompson* court pointed out that, in the second trial, the prosecutor discredited the very evidence he had offered in the defendant's trial and had argued different motives, different theories, and different facts for the two defendants. *Thompson*, 120 F.3d at 1058-59.

¶ 25 On the other hand, in *Paul*, 217 F.3d at 998-99, the Eight Circuit did not find a due process violation where the prosecutor argued at the defendant's trial he pulled the trigger and at his codefendant's trial argued the codefendant pulled the trigger. The *Paul* court noted the theory that either the defendant, or his codefendant, or both shot the victim was not factually irreconcilable and supported by the evidence. *Paul*, 217 F.3d at 998. In closing arguments, the defense had admitted the evidence was conflicting as to who shot the victim. *Paul*, 217 F.3d at 998. The *Paul* court also emphasized the defendant could have been convicted of aiding and abetting in the victim's murder under either theory. *Paul*, 217 F.3d at 998.

¶ 26 In *Drake*, 727 F.2d at 994, the court also did not find a due process violation. However, we find it has no persuasive value because, on rehearing *en banc*, the court granted relief on a different issue, and the majority did not address the due process issue. *Drake v. Kemp*, 762 F.2d 1449, 1451 (11th Cir. 1985).

¶ 27 Despite the fact the underlying due process claim that defendant raises has not been specifically address by Illinois courts, neither party discusses the application of the holdings in the aforementioned cases mentioned by the supreme court in *Caballero* to the facts alleged in defendant's successive postconviction petition. Those cases clearly indicate not all factual differences in two separate trials for the same crime create a due process violation. Defendant does cite *State v. Watkins*, 659 N.W.2d 526, 532 (Iowa 2003), which addressed *Smith* and *Thompson*. The Iowa Supreme Court reached the following conclusion about those two cases:

"We are convinced that these two decisions only stand for the proposition that a selective use of evidence by the prosecution in order to establish inconsistent factual contentions in separate criminal prosecutions for the same crime may be so egregious and lacking in good faith as to constitute a denial of due process. We view those situations as a narrow exception to the right of the prosecution to rely on alternative theories in criminal prosecutions albeit that they may be inconsistent. [Citation.] This right is particularly obvious in cases in which the evidence is not clear concerning which of two persons is the active perpetrator of the crime and which of them is an aider and abettor of the active perpetrator. [Citation.] There is, after all, a safeguard against abuse as a result of the prosecution's burden to prove any theory it asserts by evidence beyond a reasonable doubt." *Watkins*, 659 N.W.2d at 532.

¶ 28 On appeal, defendant focuses on the inconsistency that, at his trial, the State's factual assertion was he handed Thompson the gun before the shooting, while at Thompson's trial, the State's factual assertion was Thompson picked up the gun from the couch, which according to defendant's petition came from Detective Schweighart's testimony about Thompson's statements to police. Defendant also notes (1) the April 24, 2006, affidavit of Mullins where Mullins stated he did not disclose consideration he received and lied in his testimony at defendant's trial; and (2) the State introduced evidence (Mullins's testimony) at Thompson's trial that defendant ordered Thompson to remain in the van and later told Thompson that he should not have entered the victim's residence. We note defendant does not cite any authority for the relevance of Mullins's affidavit, which was executed long after the two trials at issue in this case, to the merits of his due process claim based on the inconsistencies between the two trials. Accordingly, we find Mullins's affidavit is irrelevant to defendant's due process claim at issue and consider only the two alleged inconsistencies.

¶ 29 At this point in the successive postconviction proceedings, defendant had to present some evidence tending to show the inconsistent factual contentions in his and his codefendant's trial were so egregious and lacking in good faith that they violated his due process rights. A comparison of the alleged inconsistencies in defendant's and Thompson's trial with those of the defendant's and codefendant's in *Smith* and *Thompson* demonstrate the inconsistent evidence here is not so egregious as to rise to the level of a due process violation. First, defendant asserts he might not have been found guilty if the jury heard the evidence in Thompson's trial, not that the evidence in Thompson's trial made it impossible for a trier of fact to find him guilty on an accountability theory like in *Smith* with the timing evidence. If defendant had



costs of this appeal.

¶ 33            Affirmed.