



affirm.

¶ 3 On August 31, 2001, the defendant was arrested and taken into custody in connection with a July 6 home invasion, sexual assault, and murder. An autopsy revealed that the victim was strangled to death with a telephone cord. In addition, the autopsy showed that she suffered defensive wounds, indicating that a struggle had occurred. The defendant became a suspect when DNA samples from blood found on the victim's clothing and in her apartment matched the defendant's sex offender's DNA sample in the Combined DNA Index System (CODIS) data bank.

¶ 4 On September 4, 2001, the defendant was charged by information with one count of first-degree murder (720 ILCS 5/9-1(a)(1) (West 2000)). On September 20, a grand jury indicted the defendant on three counts of first-degree murder (720 ILCS 5/9-1(a)(1), (a)(3) (West 2000)), one count of home invasion (720 ILCS 5/12-11(a)(2) (West 2000)), and two counts of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(2), (a)(4) (West 2000)). The matter was set for a preliminary hearing the following day.

¶ 5 At the beginning of the scheduled preliminary hearing, the attorneys informed the court that the defendant had entered into a negotiated plea agreement with the State. Under the terms of that agreement, the defendant would plead guilty to one count of first-degree murder under a theory of felony murder based on home invasion (720 ILCS 5/9-1(a)(3) (West 2000)). In exchange for his plea, the State agreed to drop the remaining charges and recommend a sentence of natural life in prison rather than seeking the death penalty. The court explained to the defendant the nature of each of the charges against him and the possible penalties for each charge. The court further explained the rights the defendant was giving up by pleading guilty. The court asked the defendant if he understood, and the defendant indicated that he did. The

prosecutor then presented a detailed factual basis for the charges. The court accepted the defendant's plea and sentenced him to natural life in prison in accordance with the plea agreement.

¶ 6           Shortly thereafter, the defendant filed a *pro se* motion to withdraw his guilty plea. The court granted the defendant leave to file an amended motion to withdraw setting forth the allegations in support of his motion. The defendant filed an amended motion to withdraw his plea through counsel. After a hearing, the court denied the amended motion. The defendant appealed that ruling. He argued that (1) the court failed to adequately admonish him about the potential for a natural life sentence on the felony-murder charge, (2) his natural life sentence was not permissible for a felony-murder charge, (3) the court did not determine that he had the intent necessary to qualify for a natural life sentence, and (4) the court did not determine that the defendant understood what the State was required to prove about his intent to support a natural life sentence. This court affirmed his conviction.

¶ 7           In April 2004, the defendant filed his first petition seeking relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-8 (West 2002)). He alleged that (1) newly discovered evidence rendered his conviction unreliable, (2) his plea was not voluntary and intelligent, (3) plea counsel was ineffective for failing to file a motion to quash the defendant's arrest and suppress evidence, and (4) his sentence exceeded the statutory range. The matter proceeded to a third-stage evidentiary hearing. Witnesses included the defendant, defense counsel, and a police officer who was present when the defendant confessed to killing the victim. The evidence showed that plea counsel learned through discovery that the State had DNA evidence showing that the blood found at the scene was the defendant's. The evidence at the hearing further showed that defense counsel consulted with the defendant multiple times

before entering into the plea agreement, and that the defendant wanted to plead guilty to avoid the death penalty. The postconviction court denied the petition, finding that all claims of ineffective assistance of plea counsel were either *res judicata*, forfeited, or not of constitutional magnitude.

¶ 8 On appeal from that ruling, this court initially noted that the defendant forfeited his claims of ineffective assistance of counsel by not raising them in his direct appeal or alleging in his postconviction petition that he received ineffective assistance of appellate counsel. *People v. Hotz*, No. 5-06-0401 (Feb. 5, 2008), order at 11 (unpublished order pursuant to Illinois Supreme Court Rule 23). We also noted, however, that in spite of this forfeiture, the adequacy of plea counsel's representation was "exhaustively explored at the three hearings on the defendant's petition." *Hotz*, No. 5-06-0401, order at 11. We went on to note that the evidence against the defendant "was truly overwhelming." *Hotz*, No. 5-06-0401, order at 11. We therefore concluded that the postconviction court properly denied the petition. *Hotz*, No. 5-06-0401, order at 12.

¶ 9 On June 13, 2011, the defendant filed a *pro se* petition for leave to file a successive postconviction petition. He alleged that the procedures followed by the State to convict him were "fundamentally deficient in form and substance." He alleged that, as a result, he had been denied the opportunity to demonstrate a substantial denial of his constitutional rights "*until now*." (Emphasis in original.) He further alleged that fundamental fairness required that he be allowed to present his arguments because "all parties privy to Petitioner's case, as a whole, has [*sic*], in fact, 'dropped the ball' and/or 'failed to raise a claim' " and "by-passed" critical issues. His petition raised the following claims: (1) he was denied the right to a determination of probable cause because the court denied him a preliminary hearing, (2) he was denied

due process of law by the State's "unsworn misrepresentations that Petitioner had been indicted," (3) he received ineffective assistance of trial counsel "at critical stages," (4) he received ineffective assistance of appellate counsel, (5) postconviction counsel did not provide adequate representation on the defendant's first postconviction petition, and (6) he did not have any assistance briefing the appeal of the court's denial of his first postconviction petition.

¶ 10 On August 9, 2011, the court entered an order denying the defendant's petition for leave to file a successive postconviction petition. The court found that the defendant did not raise any issues that had not previously been raised and decided. This appeal followed.

¶ 11 The Post-Conviction Hearing Act provides a procedure by which an incarcerated defendant may raise claims that his conviction or sentence was obtained by a substantial violation of his constitutional rights. It provides a three-step process for resolving such claims. *People v. Makiel*, 358 Ill. App. 3d 102, 104, 830 N.E.2d 731, 736 (2005). At the first stage of postconviction proceedings, a court reviews the petition to determine whether it is frivolous and patently without merit. If the court finds the claims to be frivolous and patently without merit, it must dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2010). However, if the court does not make this finding within 90 days, the court must appoint counsel and docket the matter for second-stage proceedings. *Makiel*, 358 Ill. App. 3d at 104, 830 N.E.2d at 736; 725 ILCS 5/122-2.1(b) (West 2010).

¶ 12 In addition, the Post-Conviction Hearing Act "contemplates the filing of only one post-conviction petition." *People v. Pitsonbarger*, 205 Ill. 2d 444, 456, 793 N.E.2d 609, 619 (2002) (citing *People v. Flores*, 153 Ill. 2d 264, 273, 606 N.E.2d 1078, 1083 (1992)). Before a successive petition will even be deemed "filed," a

defendant must obtain leave of the court to file it. *People v. Tidwell*, 236 Ill. 2d 150, 161, 923 N.E.2d 728, 734 (2010). To do so, the defendant must either raise a claim of actual innocence or satisfy the cause-and-prejudice test. *Pitsonbarger*, 205 Ill. 2d at 459, 793 N.E.2d at 621. That test requires a defendant to demonstrate that (1) objective factors prevented him from raising each claim in his petition in an earlier petition and (2) each claim not previously raised "so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f) (West 2010). Our review is *de novo*. *Pitsonbarger*, 205 Ill. 2d at 456, 793 N.E.2d at 619.

¶ 13 The defendant argues that the court did not apply the cause-and-prejudice test. He argues that, contrary to the court's conclusion that all of the issues raised in his petition had been addressed previously, only one issue had been previously addressed (his claim that he received ineffective assistance of counsel during his plea proceedings). The State argues, however, that we may affirm the court's ruling because the defendant does not meet the cause-and-prejudice test. See *People v. Green*, 2012 IL App (4th) 101034, ¶ 31, 970 N.E.2d 101 (noting that an appeals court may affirm for any basis appearing in the record). In reply, the defendant argues that the usual rule that we may affirm a trial court's ruling for any reason appearing in the record is inapplicable to proceedings under the Post-Conviction Hearing Act. We agree with the State.

¶ 14 In support of his contention, the defendant cites *People v. Carter*, 383 Ill. App. 3d 795, 892 N.E.2d 1082 (2008). We find *Carter* distinguishable. There, the trial court dismissed a postconviction petition, finding it to be a successive petition. *Carter*, 383 Ill. App. 3d at 797-98, 892 N.E.2d at 1085. On appeal, however, the State conceded that the petition was actually the defendant's first. The Fourth District noted that the confusion may have occurred because the defendant had a petition for

collateral relief pending simultaneously in a separate case involving the same victim. *Carter*, 383 Ill. App. 3d at 798, 892 N.E.2d at 1085. The State argued that the appeals court could affirm the trial court's decision on any basis appearing in the record, and urged the court to affirm on the basis that the petition was frivolous and patently without merit (see 725 ILCS 5/122-2.1 (West 2010)). *Carter*, 383 Ill. App. 3d at 798, 892 N.E.2d at 1085. The Fourth District refused to do so, explaining that the legislative scheme behind the Post-Conviction Hearing Act requires the trial court to determine *within 90 days* whether a petition is frivolous and patently without merit, "and, if it does not so decide, \*\*\* then proceed to the second stage of postconviction proceedings." *Carter*, 383 Ill. App. 3d at 798, 892 N.E.2d at 1085.

¶ 15 The defendant cites this language from *Carter* and contends that the same principle is applicable to the determination of whether to grant leave to file a successive petition. His argument overlooks the rationale of the *Carter* court's decision.

¶ 16 This court had occasion to elaborate on the principle involved in *Carter* when we addressed a similar issue in *People v. Inman*, 407 Ill. App. 3d 1156, 947 N.E.2d 319 (2011). There, a defendant filed a postconviction petition successfully challenging his sentence on the basis of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). As a result, the trial court vacated the defendant's sentence and resentenced him. He then filed another postconviction petition, challenging the new sentence on different grounds. *Inman*, 407 Ill. App. 3d at 1157, 947 N.E.2d at 320. On appeal from the trial court's dismissal of that petition, this court found that the petition was not a "successive petition" because it was the first petition to challenge the order of conviction imposing the new sentence after the original sentence was vacated. *Inman*, 407 Ill. App. 3d at 1162, 947 N.E.2d at 324. Thus, we concluded, the defendant did

not require leave of the court to file it. *Inman*, 407 Ill. App. 3d at 1162, 947 N.E.2d at 325.

¶ 17 The *Inman* defendant specifically raised the issue of the proper procedure to be followed on remand. *Inman*, 407 Ill. App. 3d at 1162, 947 N.E.2d at 325. He argued that, because the court did not find the petition to be frivolous and patently without merit within 90 days, as required by statute (see 725 ILCS 5/122-2.1(a)(2) (West 2006)), the trial court was required to appoint counsel and docket the case for second-stage proceedings. *Inman*, 407 Ill. App. 3d at 1162-63, 947 N.E.2d at 325. We agreed. Our holding was based on the statutory provision that a court must docket a postconviction petition for second-stage proceedings if it does not dismiss the petition as frivolous and patently without merit within 90 days after the petition is filed. *Inman*, 407 Ill. App. 3d at 1162, 947 N.E.2d at 325 (citing 725 ILCS 5/122-2.1(a)(2) (West 2006)); see also *Carter*, 383 Ill. App. 3d at 798, 892 N.E.2d at 1085 (remanding with directions to docket the petition for second-stage proceedings). (We note that the defendant does not contend that his petition should be docketed for second-stage proceedings; he only argues that we should remand this cause to the trial court for a determination of whether the claims not previously raised meet the cause-and-prejudice test.)

¶ 18 This 90-day window is not applicable to requests for leave to file a successive postconviction petition. See 725 ILCS 5/122-1(f) (West 2010). *Inman* and *Carter* thus carve out a narrow exception to the rule that we may affirm a trial court's ruling on any basis appearing in the record, which is otherwise applicable in appeals from proceedings under the Post-Conviction Hearing Act. See, e.g., *People v. Couch*, 2012 IL App (4th) 100234, ¶ 18, 970 N.E.2d 1270; *Green*, 2012 IL App (4th) 101034, ¶ 31, 970 N.E.2d 101. As such, we may affirm the trial court's ruling in this case on any

basis appearing in the record.

¶ 19 As noted previously, a defendant cannot file more than one postconviction petition without first obtaining leave of the court. *Tidwell*, 236 Ill. 2d at 155, 923 N.E.2d at 731. It is the defendant's burden to demonstrate to the court that leave to file the successive petition should be granted. *Tidwell*, 236 Ill. 2d at 157, 923 N.E.2d at 733. Unless the defendant sets forth a claim of actual innocence, this means he must satisfy the cause-and-prejudice test. *Pitsonbarger*, 205 Ill. 2d at 459, 793 N.E.2d at 621.

¶ 20 To demonstrate cause, the defendant must allege that an objective factor impeded his ability to raise a claim during the proceedings on his initial postconviction petition. *Pitsonbarger*, 205 Ill. 2d at 462, 793 N.E.2d at 622-23; 725 ILCS 5/122-1(f)(1) (West 2010). To demonstrate prejudice, he must show that he was "denied consideration of an error that so infected the entire trial that the resulting conviction or sentence violates due process." *Pitsonbarger*, 205 Ill. 2d at 464, 793 N.E.2d at 624 (citing *Flores*, 153 Ill. 2d at 279, 606 N.E.2d at 1085); see also 725 ILCS 5/122-1(f)(2) (West 2010). If the defendant would not have been entitled to an evidentiary hearing on a claim had it been raised in a previous petition, he fails to satisfy the prejudice element of the cause-and-prejudice test. *Pitsonbarger*, 205 Ill. 2d at 469-70, 793 N.E.2d at 627.

¶ 21 In order to obtain leave of the court to file the petition, a defendant must satisfy both of these elements. *Pitsonbarger*, 205 Ill. 2d at 464, 793 N.E.2d at 624. In addition, the defendant must satisfy the test with respect to each claim in his petition individually. *Pitsonbarger*, 205 Ill. 2d at 462, 793 N.E.2d at 623. With these principles in mind, we turn to the claims in the defendant's petition.

¶ 22 The defendant made three allegations related to his plea proceedings. He

alleged that (1) he was denied the right to have a determination of probable cause because the court denied him the opportunity to have a preliminary hearing, (2) he was denied due process by the prosecutor's "unsworn misrepresentation" that he had been indicted, and (3) he received ineffective assistance of counsel. We may dispose of the last of these claims quite easily. As we discussed earlier, the defendant's claims of ineffective assistance of plea counsel were addressed during the proceedings on his first postconviction petition. The successive petition does not identify any specific new allegations regarding counsel's assistance. As a threshold matter, in order to obtain leave of the court to file a successive petition, a defendant must raise claims that are, in fact, new claims. See *Green*, 2012 IL App (4th) 101034, ¶ 40, 970 N.E.2d 101. Thus, the trial court correctly found that this claim had been raised and decided in earlier proceedings.

¶ 23 We must now consider whether the remaining claims in the defendant's petition meet the cause-and-prejudice test. We first find that the defendant has failed to show cause for failing to bring the claims in his earlier petition. He alleges that he received ineffective assistance of both appellate counsel and postconviction counsel and further alleges that he had no attorney to help him brief his appeal from the denial of his first postconviction petition. However, to demonstrate cause based on deficiencies in previous postconviction proceedings, a defendant must show that the deficiency directly impacted his ability to bring the claims. *Pitsonbarger*, 205 Ill. 2d at 462, 793 N.E.2d at 622-23. General allegations that he received inadequate assistance of appellate and postconviction counsel are not sufficient. In addition, the State points out that the defendant chose to represent himself in the appeal from the denial of his first postconviction petition. As the State correctly contends, he was not entitled to the assistance of counsel while proceeding *pro se*. See *People v. Patrick*, 406 Ill.

App. 3d 548, 564, 956 N.E.2d 443, 458 (2010). Thus, the allegation that he had no assistance briefing that appeal does not demonstrate cause for failing to bring either claim previously.

¶ 24 Moreover, the defendant cannot demonstrate prejudice with respect to either claim. The record refutes the defendant's claim that there was no determination of probable cause. A police detective testified before a grand jury. He testified that the defendant admitted to being inside the victim's apartment, having consensual sex with her, and accidentally strangling her after tying her up as part of "kinky sex." The detective further testified that the defendant led police to the place where he disposed of the victim's phone. As previously noted, she was strangled with the cord from her phone. Finally, the detective testified that DNA evidence showed that blood found on the victim's clothing and at the scene was the defendant's blood. Based on this evidence, the grand jury found probable cause to indict the defendant on the charges. Because the record affirmatively refutes the defendant's claim, he would not have been entitled to a hearing on it had it been raised in his earlier petition.

¶ 25 The defendant's final new claim is that he was denied due process by the State's "unsworn misrepresentation" that he had been indicted. It is not clear what the defendant means by this. Presumably, he means that the prosecutor stated that the defendant had been indicted at some point prior to the grand jury hearing, although it is not clear what impact he claims this had on the proceedings. In any case, the misrepresentation could not have so infected the plea proceedings that the resulting conviction and sentence violated due process for two reasons. First, as just discussed, the defendant was indicted by a grand jury before his plea hearing. In addition, the evidence against him was overwhelming. The defendant cannot show prejudice with respect to this claim. Because the petition did not raise any new claims that satisfy

the cause-and-prejudice test, the trial court properly denied the defendant's request for leave to file a successive petition.

¶ 26 For the reasons stated, we affirm the court's order denying the defendant's request for leave to file a successive postconviction petition.

¶ 27 Affirmed.