

No. 1-12-2408

**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).

---

IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

---

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 02 CR 9220
	)	
ROBERTO MATA,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge Presiding.

---

JUSTICE HARRIS delivered the judgment of the court.  
Presiding Justice Cunningham and Justice Connors concurred in the judgment.

**O R D E R**

¶ 1 *Held:* Circuit court did not err in denying defendant leave to file a successive *pro se* postconviction petition where he failed to address cause and prejudice in his successive petition.

¶ 2 Defendant Roberto Mata appeals the circuit court's denial of leave for him to file a successive petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). On appeal, defendant contends the circuit court erred in denying him leave

because he satisfied the cause-and-prejudice test by making a claim that his postconviction appellate counsel was ineffective. We affirm.

¶ 3 Defendant was sentenced to natural life imprisonment after a jury returned verdicts of first-degree murder for killing Adrian Padilla and Sandar Mosqueada, and aggravated battery with a firearm for shooting Edwin Delgado.

¶ 4 The evidence at trial established that on March 16, 2002, Delgado, the sole eyewitness witness to the shooting, was involved in a gang-related fight with Reynaldo Mares, defendant's friend, on the street near the 2100 block of West 18th Place in Chicago. After Delgado pinned Mares to the ground, Mares called out to defendant who was standing nearby for help. Defendant took out a firearm and pointed it at Delgado, which caused Delgado to release Mares and begin to retreat. Defendant, however, shot Delgado in the buttocks, but he survived. Defendant also shot and killed Delgado's friends, Padilla and Mosqueada, who were at the scene.

¶ 5 Following defendant's arrest, he told the police that after he left a party with his girlfriend, Esmeralda Herrera, Mares and other friends, he observed four or five men outside. He then heard gunshots and ran away. He later told the police he saw Mares with a firearm, and it "just kind of went off."

¶ 6 After defendant's initial conversations with the police, he gave a videotaped statement. He stated that after he left the party, he observed two men holding Mares and two other men surrounding Mares. Mares called for defendant's help, and defendant shot a firearm once in the direction of the men, causing them to back away. While defendant attempted to help Mares off the ground, defendant observed one of the men reaching into his pocket. Fearing the man was reaching for a firearm, defendant fired his weapon multiple times in the direction of the men,

whose backs were to defendant and walking away at the time. Defendant acknowledged he never actually saw any of the men with a weapon.

¶ 7 Defendant testified at trial that he witnessed three or four men attacking Mares. Defendant fired a gunshot in the air in order to help Mares. Although the men backed away from Mares, they did not leave. Defendant observed one of the men reach toward his waist, which caused defendant to shoot several times in the group's direction. Defendant could not remember how many times he fired his weapon or if he hit anyone. Afterward, defendant ran toward a friend's vehicle and heard gunshots. Once inside the vehicle, he saw a man running down the street shooting a firearm.

¶ 8 Defendant presented several witnesses, including Herrera and Mares, who testified that a group of men attacked Mares. After the attack ended, Herrera and Mares both observed an unidentified man running down the street shooting a firearm, though they acknowledged never providing this information in their handwritten statements or in their grand jury testimony.

¶ 9 Defendant argued to the jury that, although he shot at Padilla, Mosqueada and Delgado, he was justified in using deadly force because he believed it was necessary to defend both him and Mares. Following argument, the jury convicted defendant of the first-degree murders of Padilla and Mosqueada, and aggravated battery with a firearm of Delgado. The circuit court sentenced him to two terms of natural life imprisonment for murder and 10 years' imprisonment for aggravated battery with a firearm, to be served consecutively.

¶ 10 Defendant appealed, arguing his trial counsel was ineffective for failing to impeach Delgado with several prior inconsistent statements and the circuit court improperly sentenced him to consecutive terms in prison. In *People v. Mata*, No. 1-05-0527 (2007) (unpublished order

under Supreme Court Rule 23), this court affirmed defendant's convictions, but corrected his mittimus to reflect three concurrent, rather than consecutive, sentences.

¶ 11 In June 2008, defendant filed his initial *pro se* postconviction petition, alleging in part that the State failed to disclose exculpatory evidence, namely "the whereabouts of a crucial potential eyewitness William Rivera," who, he alleged, moved during the pendency of defendant's case. The petition also claimed that defendant's trial counsel failed to investigate, locate and present Rivera as a witness, and that Rivera allegedly told the police that "someone other th[a]n [defendant] was shooting a gun when this crime happened." Additionally, the petition alleged that defendant's trial counsel was ineffective for failing to argue that his videotaped statements should have been suppressed and his appellate counsel was ineffective for failing to argue trial counsel's ineffectiveness therefrom. The circuit court summarily dismissed the petition as frivolous and patently without merit.

¶ 12 Defendant appealed, arguing his claim of ineffective assistance of trial counsel for failing to litigate the motion to suppress had arguable merit. In *People v. Mata*, No. 1-09-0657 (2011) (unpublished order under Supreme Court Rule 23), this court affirmed the summary dismissal because the claim concerning trial counsel's ineffectiveness could have been, but was not raised, on direct appeal. The court also addressed the issue, which was not raised by postconviction appellate counsel, of whether appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness concerning the motion to suppress. The court found the claim was without arguable merit because the substantive issue, *i.e.*, the voluntariness of defendant's statements, was rebutted by the record, and appellate counsel could not be faulted for not raising a meritless argument.

¶ 13 In February 2012, defendant filed the instant successive *pro se* postconviction petition, alleging in relevant part that his trial counsel was ineffective for failing to investigate and present Rivera as a witness, and in turn, his appellate counsel was ineffective for not raising trial counsel's ineffectiveness therefrom. The petition asserted that Rivera, who testified before a grand jury, would have corroborated the defense's theory of the case that Mares was attacked by multiple people and defendant only fired his weapon to defend Mares. Further, defendant alleged that Rivera's testimony would have contradicted Delgado's testimony in various ways. Defendant did not submit a motion for leave to file his successive petition nor did he address the required cause-and-prejudice test.

¶ 14 Defendant attached Rivera's testimony before the grand jury to the petition. Rivera, a member of the Satan Disciples street gang, testified that after he left a party, he went to a nearby alley to smoke cannabis. A friend of his came and told him "something was going on in the front." When Rivera went to the front of the building, he did not see anything and began to walk away. He then saw two men, including defendant who he had previously seen at the party, exit the building where the party was located. The other man began to fight with Rivera's friends, Padilla and Mosqueada, which Rivera described as "a big old scuffle." Rivera approached the fight to help his friends, but defendant, a rival gang member, pulled out a firearm. Rivera turned around, ran away and heard eight or nine gunshots. When he looked back, he saw Padilla fall to the ground. Mosqueada ran toward Rivera and told him that he had been shot. Rivera observed defendant and his companion run to a vehicle and continue shooting as they left the scene. The only person Rivera observed with a firearm was defendant.

¶ 15 The circuit court observed that defendant's postconviction petition was a successive petition and found he had failed to provide the court with any explanation as to why he could not

have included these claims in his initial postconviction petition. Therefore, the court concluded that defendant failed to establish the requisite cause to satisfy the cause-and-prejudice test and denied him leave to file his successive petition. The court also noted that defendant did not include an affidavit from Rivera in his petition, and that Rivera's testimony actually supported the State's theory of the case. This appeal followed.

¶ 16 Defendant contends the circuit court erred in denying him leave to file a successive postconviction petition where he established cause and prejudice to file the petition based upon the ineffectiveness of postconviction appellate counsel. Specifically, defendant argues that in his initial petition he raised the issue of trial counsel's ineffectiveness for failing to investigate and present Rivera as a witness. Consequently, on appeal from the circuit court's summary dismissal of his initial petition, postconviction appellate counsel's failure to argue his trial counsel was ineffective concerning Rivera was ineffective.

¶ 17 The Act provides a means by which a defendant may challenge his conviction or sentence for violations of his federal or state constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2012). Generally, the Act contemplates a defendant filing only one postconviction petition (*People v. Ortiz*, 235 Ill. 2d 319, 328 (2009)), and provides that any claim not raised in the initial or amended petition is forfeited. 725 ILCS 5/122-3 (West 2012). The circuit court, however, may grant a defendant leave to file a successive petition. 725 ILCS 5/122-1(f) (West 2012). Relevant here, the court may grant leave when the defendant can establish cause and prejudice for failing to raise the claim in the initial petition. *Id.*; *People v. Sanders*, 2016 IL 118123, ¶ 24. Cause may be shown " 'by identifying an objective factor that impeded [the defendant's] ability to raise a specific claim during his or her initial post-conviction proceedings.' " *People v. Wrice*, 2012 IL 111860, ¶ 48 (quoting 725 ILCS 5/122-1(f) (West 2010)). Prejudice may be 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.' "

*Id.* The cause-and-prejudice test thus "acts as a procedural hurdle to any consideration of the claims in the postconviction petition." *People v. McDonald*, 405 Ill. App. 3d 131, 135 (2010).

"Where a defendant fails to first satisfy the requirements under [the cause-and-prejudice test], a reviewing court does not reach the merits or consider whether his successive postconviction petition states the gist of a constitutional claim." *People v. Welch*, 392 Ill. App. 3d 948, 955 (2009). We review the circuit court's denial of leave to file a successive petition *de novo*. *People v. Adams*, 2013 IL App (1st) 111081, ¶ 30.

¶ 18 Here, the circuit court properly denied defendant leave to file his successive postconviction petition because he failed to satisfy the procedural hurdle to establish cause and prejudice by completely failing to address them. Defendant's successive petition is not styled as a motion for leave to file a successive petition or even a successive petition. Instead, the petition is titled "Pro-Se Post Conviction Petition," as if it was his initial postconviction petition. Critically, the petition does not request leave to file a successive petition, never mentions his initial petition and never presents any argument concerning either cause or prejudice. In *People v. Jellis*, 2016 IL App (3d) 130779, ¶¶ 26-30, this court found an "unsupported, ambiguous explanation" for cause and an absence of any allegation demonstrating prejudice were insufficient to satisfy the cause-and-prejudice test. Consequently, here, where defendant has wholly failed to address either cause or prejudice, he cannot satisfy the cause-and-prejudice test. Therefore, the circuit court properly denied defendant leave to file his successive postconviction petition.

¶ 19 Moreover, although defendant argues on appeal that he satisfied the cause-and-prejudice test by making a claim of ineffective assistance of postconviction appellate counsel, his

successive petition contains no such allegation. In *People v. Jones*, 213 Ill. 2d 498, 504-09 (2004), our supreme court held that claims not included in a postconviction petition cannot be raised for the first time on appeal, thus resulting in forfeiture of the claim on appeal. Our supreme court noted it was a "laudable" goal for appellate counsel to raise a new claim on appeal so as to "zealously guard[] the client's rights" and "attempt[] to conserve judicial resources by raising the claim expeditiously at the first available chance." *Id.* at 505. However, our supreme court also observed that doing so "conflict[s] with the nature of appellate review and the strictures of the Act." *Id.*

¶ 20 Here, in defendant's successive petition, nowhere does he make a claim concerning postconviction appellate counsel's ineffectiveness. Instead, he restated the same argument he made in his initial petition that his trial counsel was ineffective for failing to investigate and present Rivera as a witness and additionally, his direct appellate counsel was ineffective in failing to raise trial counsel's ineffectiveness therefrom. His successive petition never mentions his initial postconviction petition or his postconviction appellate counsel, which is essential to his argument on appeal. Consequently, defendant's argument that his postconviction appellate counsel was ineffective for failing to raise the ineffectiveness of trial counsel concerning Rivera was presented for the first time in this appeal in violation of *Jones*.

¶ 21 Although we acknowledge the holding in *Jones* concerned claims in an initial postconviction petition and raised on appeal, we find our supreme court's reasoning in *Jones* applicable to the instant situation. As this court has previously stated, "[i]t is axiomatic that arguments may not be raised for the first time on appeal." *People v. Estrada*, 394 Ill. App. 3d 611, 626 (2009). Therefore, defendant additionally has forfeited the only cause argument he has raised on appeal.

¶ 22 Accordingly, the circuit court of Cook County did not err in denying defendant leave to file a successive postconviction petition, and its judgment is affirmed.

¶ 23 Affirmed.