2016 IL App (1st) 160136-U
No. 1-16-0136

THIRD DIVISION
December 21, 2016

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. TOMAS RIVERA, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County. No. 88 CR 15736 The Honorable Diane Gordon Cannon, Judge Presiding.

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's successive postconviction petition failed to meet the cause-and-prejudice test to defeat the bar of forfeiture due to defendant's failure to bring claims of compensatory judicial bias and ineffective assistance of counsel in his initial postconviction petition; newly discovered evidence was not of such conclusive character that it would probably change the result on retrial and defendant failed to make a substantial showing of innocence.

¶ 2 Defendant, Tomas Rivera, appeals from the second-stage dismissal of his second amended successive petition filed under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq*. (West 2014). On appeal, defendant contends that the circuit court of Cook County

erred in dismissing his petition because his claims of denial of due process due to compensatory judicial bias[1] and violation of his sixth amendment right to effective assistance of counsel satisfied the cause-and-prejudice test required for successive postconviction petitions. Defendant also contends that he made a freestanding claim of actual innocence and that newly discovered evidence was so conclusive that it would probably change the result on retrial. We affirm.

¶ 3 BACKGROUND

¶ 4 This court has previously described the facts underlying defendant's conviction and sentencing in our opinion on his direct appeal. See *People v. Rivera*, No. 1-90-1791 (1991). Thus, we will summarize only the pertinent facts necessary for disposition of the issues raised in this appeal.

¶ 5 Following a bench trial before circuit court Judge Thomas J. Maloney, defendant was convicted of two counts of first degree murder and sentenced to life imprisonment for the 1988 killing of William Brock and Michelle Rodriguez. Brock and Rodriguez were killed in the evening of September 12, 1988, as a result of gunshot wounds inflicted by defendant. Defendant and Brock knew each other from previous encounters between the two; however they were not friends at the time of the shooting.

¶ 6 Kimberly McGhee testified for the State at trial. On September 12, 1988, Kimberly was talking to her friends at the corner of North Hoyne Avenue and West Huron Streets in Chicago, Illinois. At around 7:30 p.m., her cousin, Brock pulled up in his vehicle with his friend, William Heron. While Kimberly was talking to Brock through the car window, Rodriguez, Brock's girlfriend, entered the passenger side of the vehicle and Heron climbed into the back seat. Kimberly testified that a youth, whom she later identified as defendant, approached the car, stood

[1] Due process claims based on compensatory judicial bias are premised on the belief that a judge has an interest in convicting a defendant who did not pay a bribe as a means of deflecting suspicion that the judge was taking bribes in other cases. *Bracey v. Gramley*, 520 U.S. 899, 905 (1997).

about one foot away from the driver's door, and fired into the car. According to Kimberly, the lighting was very good because "there is all kinds of light shining off from the grocery store" and defendant's face was no more than three feet away. She stated that defendant fired at least five shots before he turned to face her from a couple of feet away. Kimberly testified that she thereafter identified defendant in a police lineup.

¶ 7 William Heron testified that on September 12, 1988, while seated in the back seat of Brock's car, he heard four shots. He ducked behind the seat during the shooting. He then observed a man running from the car but could not identify the individual who fatally shot Brock and Rodriguez.

¶ 8 Jeffery Heron, William's brother, testified that just after 7:30 p.m., he heard four shots as he drove north on Hoyne, which was well-lit. At that point, defendant and another person ran just in front of his van. Jeffery stated that he could easily observe that defendant, whom he had known for several years, was holding a gun.

¶ 9 Rosa Ramirez testified that at about 6 p.m., on September 12, 1988, she was on a school playground, which was in close proximity to the location of the murders, with defendant, Myrna Rivera, and another acquaintance, Tony Gonzalez. Rosa stated that at about 7 p.m., she and defendant left the playground together, but separated "when we got to his house." Rosa heard approximately four gunshots but did not see the shooting and later heard a scream after which she went back to the playground about 7 p.m. or 7:30 p.m.

¶ 10 Defendant testified in his own behalf. He stated that earlier on the evening of the shooting, he was in the schoolyard with Rosa, Rivera and Gonzalez. Defendant indicated that he left with Rosa, but then "returned back to the schoolyard" at around 7 p.m. He conversed with Rosa when she returned to the schoolyard at around 7:30 p.m., then he left for his home and was

arrested on the way. Defendant further testified that in August 1988, Brock had hit him on the head with a baseball bat. He also testified to a previous altercation with Brock, which stemmed in part from their participation in different neighborhood gangs. Upon cross-examination, defendant admitted that both Kimberly and Jeffrey Heron would have reason to recognize him.

¶ 11 Police officer Thomas Pufpaf testified in rebuttal that an assistant State's Attorney had written out the substance of that attorney's conversation with Rosa. According to this report, Rosa had witnessed the incident and "then returned to the playground where she again met Tomas Rivera [defendant], Myrna Rivera, and Tony Gonzalez." The State then rested its case.

¶ 12 The trial court found defendant guilty of two counts of first degree murder. In so finding, the court determined that "the testimony of Kimberly Mcghee who knew the defendant from her neighborhood, and had seen him many times, and who was within three feet of him when he fired five shots in to the automobile in question, * * * was clear, concise, unhesitating and uncontradicted." In addition, the court stated that "her testimony was supported by that of Jeffrey Heron who observed the defendant fleeing the scene of the shooting with the silver gun in his hand, which gun had been described by Miss McGhee." The court found that the "testimony of the witnesses for the defendant on the other hand was often hesitant, contradictory to prior statements, improbable and at times even suggestive of perjury." Accordingly, the court entered a judgment of conviction on both counts. Following defendant's conviction, the State requested a death penalty hearing. At that time, defense counsel withdrew and new counsels, Michael Kreiter and Thomas Gibbons, filed their appearance on behalf of defendant for the death penalty hearing.

¶ 13 Prior to that hearing, Kreiter informed the trial court that his post-trial investigation had uncovered new evidence that defendant was not the shooter and that two other offenders had a motive to shoot Brock. Kreiter explained that a young woman had come to his office and told

him that she was driving down the street and saw two men in hoods carrying guns. She could not identify the men, but neither person was defendant. She told Kreiter that the girlfriend of one of the men had been shot prior to September 12, 1988. Kreiter told the court that he had investigated the information and verified with Chicago police that Yolanda Torres had been shot on September 11, 1988. Kreiter told the court that his investigation suggested that Brock had been the shooter in that case. Kreiter went on to inform the court that Yolanda was the girlfriend of Reynaldo Hernandez, who he believed to have been involved in that incident. Kreiter intended to file a supplemental motion for new trial based on this new information.

¶ 14 The trial court denied the motion for a new trial and impaneled a jury for the death penalty hearing. On May 30, 1990, the jury returned a verdict indicating that they could not unanimously find that defendant was eligible for a death sentence. On May 31, 1990, the trial court sentenced defendant to life imprisonment.

¶ 15 On direct appeal, defendant argued that the State had failed to prove him guilty beyond a reasonable doubt because Kimberly's testimony was incredible, contradictory and contrary to testimony from other witnesses. This court affirmed defendant's convictions. *People v. Rivera*, No. 1-90-1791 (1991) (unpublished order under Illinois Supreme Court Rule 23).

¶ 16 In 1992, defendant, through his attorney, filed a petition for post-judgment relief pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 1990)). The petition alleged that, after his conviction, Elva Mendez came forward and spoke to defendant's mother, Georgina Flores, telling her that people she knew as "CoCo" and "Apples" were the actual perpetrators of the crime. Mendez told Flores that the motive for the shooting was retaliation for Brock shooting Apples' girlfriend, Yolanda Torres. Mendez told Flores that she was afraid to come forward earlier and that she believed defendant would be acquitted.

Defendant supported the petition with a notarized affidavit from Flores, but there was no sworn statement from Mendez. Flores indicated in her affidavit that Mendez had recently moved to Puerto Rico. Defendant also filed a memorandum of law attacking the sufficiency of the evidence and arguing that Mendez's testimony would change the result of trial. The State filed a motion to dismiss based on the lack of an affidavit from Mendez. The circuit court granted the State's motion, explaining that based on the information before it, there was nothing to indicate that Mendez witnessed the incident, as the Flores affidavit just said sometime around the incident Mendez saw two other individuals with handguns. This court affirmed the dismissal. *People v. Rivera*, No. 1-94-3257 (1995) (unpublished order under Illinois Supreme Court Rule 23).

¶ 17 In 2000, defendant filed his initial *pro se* postconviction petition arguing that his sentence was unconstitutional. Specifically, defendant argued that the court erroneously considered aggravating factors in relation to death penalty eligibility when imposing his sentence. Defendant further claimed that the statute under which he was sentenced to life imprisonment unconstitutionally precluded the trial court from considering mitigating factors. Finally, defendant argued that his sentence was void because it was based on statutes that were unconstitutional. The circuit court summarily dismissed the petition in a written order, and this court affirmed the dismissal. *People v. Rivera*, No. 1-01-1462 (2002) (unpublished order under Illinois Supreme Court Rule 23).

¶ 18 On October 17, 2003, defendant filed a successive *pro se* postconviction petition, contending that (1) he was actually innocent based on the affidavit from Elva Mendez; (2) the trial court was biased against him based on Judge Maloney's corruption; (3) the trial court violated the sentencing rule announced in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); and (4) his sentence violated separation of powers and *ex post facto* principles. The petition was

supported by affidavits from Rosa Ramirez and Elva Mendez and also a new affidavit from his mother, Georgina Flores. In December 2003, the circuit court advanced the petition to the second stage and appointed counsel to represent defendant. Postconviction counsel filed his appearance in March 2008.

¶ 19 In May 2012, defendant filed an amended postconviction petition, asserting essentially the same claims as the October 2003, petition. On June 30, 2015, defendant filed a second amended successive postconviction petition, which is the subject of the current appeal. In that petition, defendant alleged that (1) his right to due process was violated by Judge Maloney's compensatory judicial bias; (2) his trial and appellate counsel were ineffective; (3) the State engaged in misconduct through improper closing arguments and by mistreating a witness during cross-examination; (4) he is actually innocent of the crimes for which he stands convicted; (5) the trial court erroneously denied his post-trial motion for a new trial; and (6) the State failed to prove him guilty beyond a reasonable doubt.

¶ 20 In support of his petition, defendant attached several police reports, affidavits from William Heron, Mitchell Kreiter, Myrna Rivera, Miguel Rodriguez, Edward Klimara, and two affidavits from Elva Mendez, one from 2003 and another from 2012. In addition, defendant furnished a videotape of an interview postconviction counsel conducted with William Heron in 2014.

¶ 21 On October 6, 2015, the state filed a motion to dismiss. After a hearing, the circuit court found that each of defendant's claims were procedurally deficient. The court determined that defendant had failed to show cause for failing to raise these claims sooner and, therefore, the claims must fail. The court further found that the claim of actual innocence was not freestanding

and was not supported by the accompanying affidavits. Thus, the court granted the state's motion to dismiss. Defendant now appeals.

¶ 22 ANALYSIS

¶ 23 Before proceeding with our analysis we note the several deficiencies in defendant's briefs which are, of course, violative of Illinois Supreme Court Rule 341 (eff. Jan. 1, 2016). Specifically, defendant's statement of facts violates Rule 341(a) in that most of the text is not double spaced. Rule 341(a) requires that the text of an appellant's briefs must be double spaced; however the headings may be single spaced. Ill. S. Ct. R. 341(a) (eff. Jan. 1, 2016). Defendant's briefs also violate Rule 341(h)(6) in that assertions of fact are not supported with citations to the record. Rule 341(h)(6) requires an appellant's brief to contain a statement of facts "which shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment, and with appropriate reference to the pages of the record on appeal." Ill. S. Ct. R. 341(h)(6) (eff. Jan. 1, 2016). Additionally, defendant has violated Rule 341(j) by arguing for the first time in his reply brief that the postconviction judge should be removed from this case based on the fact that she was reversed in two prior cases involving compensatory judicial bias. Reply briefs, if any, shall be confined strictly to replying to arguments presented in the brief of appellee. Ill. S. Ct. R. 341(j) (eff. Jan. 1, 2016); *People v. Borello,* 389 Ill. App. 3d 985, 998 (2009).

¶ 24 Supreme Court rules are neither suggestions nor are they aspirational. Where a party's briefs lack compliance with the high court's rules, it is within this court's discretion to strike the briefs and to dismiss the appeal. *Miller v. Lawrence,* 2016 IL App (1st) 142051, ¶ 18. We elect, however, not to dismiss this appeal. Even so, we will confine our review to those issues and the supporting evidence that is properly presented in defendant's briefs.

¶ 25 On appeal, defendant contends that the circuit court erred in dismissing his second amended successive postconviction petition because it satisfied the cause-and-prejudice test with regard to his claims of (1) denial of due process due to Judge Maloney's compensatory judicial bias; and (2) violation of his sixth amendment right to effective assistance of counsel. Defendant also contends that he made a freestanding claim of actual innocence and that newly discovered evidence was so conclusive that it would probably change the result on retrial.

¶ 26 The Act provides a three-stage mechanism for a defendant who alleges that he suffered a substantial deprivation of his constitutional rights. *People v. Clark*, 2011 IL App (2nd) 100188, ¶ 15. Where, as here, a petition advances to the second stage of the postconviction process, the State may file a motion to dismiss. 725 ILCS 5/122–5 (West 2014). To survive such motion, a defendant must make a "substantial showing" that his constitutional rights were violated by supporting his allegations with the trial record or accompanying affidavits where appropriate. *People v. Simpson*, 204 Ill. 2d 536, 546–47, (2001). At the second stage of proceedings, all well-pleaded facts that are not positively rebutted by the trial record are taken as true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006).

¶ 27 As the Act contemplates the filing of a single petition, any claim of substantial denial of constitutional rights not raised in the original or an amended petition is forfeited. 725 ILCS 5/122–3 (West 2014); see also *People v. Ortiz*, Ill. 2d 319, 328 (2009). That statutory bar will be relaxed only "when fundamental fairness so requires." *People v. Pitsonbarger*, 205 Ill. 2d 444, 458 (2002) (quoting *People v. Flores*, 153 Ill. 2d 264, 274 (1992)). There are two such instances, or two exceptions, to this procedural default rule. *People v. Edwards*, 2012 IL 111711, ¶ 22. First, a defendant may raise a forfeited constitutional claim by satisfying the "cause-and-prejudice" test. 725 ILCS 5/122–1(f) (West 2014); *Pitsonbarger*, 205 Ill. 2d at 459. To establish

"cause," the defendant must show some objective factor external to the defense impeded his ability to raise the claim in the initial postconviction proceeding. *Id.* at 460. To establish "prejudice," the defendant must show the claimed constitutional error so infected his trial that the resulting conviction violated due process. *Id*. at 464. Second, even without showing cause and prejudice, a defendant may bring a claim of actual innocence to prevent a fundamental miscarriage of justice. *Ortiz,* 235 Ill. 2d at 329. We review a circuit court's dismissal of a postconviction petition at the second stage *de novo*. *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 28.

¶ 28 Defendant's first contention on appeal is that the circuit court erred in dismissing his claim of denial of due process due to Judge Maloney's compensatory judicial bias because it met the cause-and-prejudice test. We note that Judge Maloney's pattern of judicial corruption is well-documented (see, e.g., *Bracy v. Gramley*, 520 U.S. 899 (1997); *United States v. Maloney*, 71 F. 3d 645 (7th Cir.1995)), and it need not be recounted here, except to say that Maloney has been shown to have accepted bribes to "fix" murder cases. Defendant maintains that he was a victim of compensatory judicial bias because he did not pay a bribe to Maloney, whose corruption deprived him of a fair trial.

¶ 29 A fair trial in a fair tribunal is a basic requirement of due process. *People v. Hawkins*, 181 Ill. 2d 41, 50 (1998) (citing *Bracy,* 520 U.S. at 904-05). A defendant who alleges that his trial judge's corruption violated his right to a fair trial must establish (1) a nexus between the judge's corruption or criminal conduct in other cases and the judge's conduct at the defendant's trial; and (2) actual bias resulting from the judge's extrajudicial conduct. *People v. Fair*, 193 Ill. 2d 256, 261 (2000) (citing *People v. Titone*, 151 Ill. 2d 19, 30–31 (1992)).

¶ 30 Defendant argues that he established both a nexus and cause because the issue of compensatory judicial bias did not exist for a "non-paying" defendant prior to "creation" of the claim in *Bracy v. Schomig*, 286 F. 3d 406 (7th Cir. 2002), which was decided after he filed his initial post-conviction petition in 2000. This circumstance, defendant urges, establishes cause for his delay in now asserting this claim. Having reviewed the opinion in *Bracy*, and having traced its somewhat complicated procedural history, we must disagree. As is apparent from our summary of the progression of *Bracy* in the federal courts below, at no point in any of the federal proceedings are the defendants' claims of Maloney's compensatory bias, which are first asserted in *United States ex rel. Collins v. Welborn*, 868 F. Supp. 950 (N.D. Ill. 1994), rejected as not cognizable. Even had that been the case, we maintain that nothing precluded defendant from presenting a claim of judicial bias based upon non-payment of a bribe in state court, the situs of Maloney's criminal conduct, even if novel.[2]

¶ 31 Briefly stated, subsequent to their convictions and sentences for murder and other offenses being affirmed, (see *People v. Collins, 106 Ill. 2d 237 (1985*)), and post-conviction relief was denied (see *People v. Collins, 153 Ill. 2d 130 (1992)*), defendants William Bracy and Roger Collins sought federal habeas corpus relief in the federal courts (*Welborn, 868 F.Supp. 950).* In their habeas petition, defendants argued, without success, that they were entitled to discovery in order to prove Maloney's compensatory bias against them. Defendants had not been solicited, neither had they paid Maloney a bribe. They argued, however, that Maloney habitually came down harder on defendants who had not bribed him than he would have done

[2] The court in U.S. ex rel. Collins v. Welborn noted that defendants Collins and Bracy had raised a claim of judicial bias regarding Judge Maloney for the first time in their reply brief for postconviction relief, which is when Maloney's conduct first became public information. However, the Illinois Supreme Court declined to consider the claim. The Welborn court further noted that at the time the information regarding Maloney's corruption was first discovered the time for filing a postconviction petition had already expired and there was no direct precedent that the Illinois courts would excuse the delay. Further, the court commented, "it is presumed that no remedy was still available in state court at the time the new evidence was discovered." (868 F.Supp. at 991.)

had he not been taking bribes. Maloney did this, according to the defendants, to cover up the fact that he accepted bribes from defendant in some cases. Defendant sought discovery in the hopes of proving that Maloney was tougher in cases where bribes were not paid. (*Id. at 990 991*). Finding the petitioners allegations speculative, the court held that they had failed to show good cause entitling them to proceed with discovery. Thus, the court denied their petition.[3] (Id. *at 990-91, aff'd, Bracy v. Gramley, 81 F.3d 684 (7th Cir.1996).* The U.S. Supreme Court held otherwise and reversed and remanded the case for further proceedings. (*Bracy v. Gramley, 520 U.S. 899, (1997).* In so doing, the Court held that "if it could be proved, such compensatory, camouflaging bias on Maloney's part in petitioners' own case would violate the Due Process Clause of the Fourteenth Amendment." (*520 U.S. at 905*). On remand, the federal district court held that evidence supported a finding that "Maloney's pecuniary and penal interest (his compensatory bias) motivated him to be biased against petitioners," who had not paid him a bribe, during the penalty phase of their trial. *U.S. ex rel. Collins v. Welborn, 79 F.Supp.2d 898, 911, (1999).* Subsequently, in a 2-1 panel decision, the court of appeals reversed the district court on the sentencing issue. (see *Bracy v. Schomig, 248 F.3d 604 (7th Cir. 2001).* On rehearing, *en banc*, however, the court affirmed the ruling of the district court in vacating the defendants' death sentences based upon claims of compensatory bias. *Bracy v. Schomig, 286 F.3d 406 (2002).*

¶ 32 Based upon our review of *Bracy*, a claim for compensatory judicial bias was available as early as early as 1994, and clearly by the time of the Supreme Court's 1997 opinion, three years prior to the time which defendant here filed his first post-conviction petition. Even so, as our own supreme court has made clear, the lack of precedent for a position differs from cause for

[3] Unlike in an ordinary civil suit, because collateral attack on a criminal judgment that has become final is an extraordinary remedy, a petitioner for habeas corpus must demonstrate good cause in order to be permitted to conduct discovery. *Bracy v. Gramley, 81 F.3d 684, 691 (1996).*

failing to raise an issue, and a defendant must raise the issue, even when the law is against him, in order to preserve it for review. *People v. Guerrero*, 2012 IL 112020, ¶ 20 (affirming finding of failure to show cause where petitioner's claim existed in the law and could have been raised in the petitioner's original postconviction petition); see also *People v. Johnson*, 392 Ill. App. 3d 897, 908 (2009) (finding possibility that defendant's claim would have been unsuccessful does not equate to an objective factor external to the defense which precluded him from raising it in his initial postconviction petition). As we have demonstrated, the facts concerning Maloney's corruption was known and a claim of compensatory judicial bias was available to defendant when he filed his initial post conviction petition. Thus, defendant has not demonstrated cause for failing to raise his claim earlier. See 725 ILCS 5/122-1(f) (West 2014), and we therefore deem the claim to have been forfeited. 725 ILCS 5/122-3 (West 2014).

¶ 33 Even if we could find cause, defendant's claim would nonetheless fail for his failure to establish either the prejudice required for post conviction relief, or actual bias. Defendant maintains that he has established both based on Judge Maloney's rulings, demeanor and treatment of defense witnesses at defendant's trial. Defendant also argues Maloney's comments prior to the death penalty hearing, advising defense counsel to take a jury because the judge had already determined that he would sentence defendant to death, further establishes judicial bias.

¶ 34 Defendant has not presented any objective evidence to support his conclusions regarding Judge Maloney's motivations in the conduct of the trial. He contends that "the mere possibility that Maloney yielded to the temptation of denying petitioner due process by engaging in judicial bias is sufficient to vacate the judgment in this case and grant a new trial." Defendant simply concludes that because Maloney was corrupt in other proceedings, he must have been corrupt in his case. This type of speculation is insufficient under the Act, which requires specific factual

allegations. *Bracy*, 286 F. 3d at 411 (holding compensatory bias must be proved to have been operative in defendant's own case). Moreover, there is no *per se* rule that a judge who is corrupt is considered to be corrupt in every case over which he presides. *Id*. at 410. Further, we find significant that Maloney informed defense counsel to request a jury for the death penalty hearing, because, he, the judge, would not hesitate to give defendant the death penalty. Ultimately, the jury found defendant ineligible for the death penalty.

¶ 35 Defendant has failed to satisfy the cause-and-prejudice test as established in *Pitsonbarger*. He has also failed to establish that compensatory judicial bias deprived him of due process. In the absence of a substantial showing of a constitutional violation we find the trial court's dismissal of defendant's claim of judicial bias to have been proper.

¶ 36 The defendant's second contention on appeal is that the circuit court erred in dismissing his claim that his sixth amendment right to effective assistance of counsel was violated because it also met the cause-and-prejudice test. See U.S. Const., amend VI; *Strickland v. Washington*, 466 U.S. 668 685-86 (1984). He argues, *inter alia*, that his constitutional right to effective assistance of counsel was violated when his trial counsel (a) failed to adequately investigate the facts and prepare for trial in a capital murder case; (b) failed to argue a stipulation in closing argument when it clearly contradicted the testimony of Kimberly McGhee as to where the shooter stood when he fired; (c) elicited testimony from defendant on direct-examination that showed a pattern of violence and hate between defendant and Brock; (d) failed to properly cross-examine prosecution witnesses; (e) argued in the alternative in closing argument when his opening statement unequivocally denied that defendant killed either of the victims; and (f) failed to rehabilitate on re-direct examination both defense witnesses after the prosecutor's badgering cross-examination of them. Defendant additionally argues that defense counsel's failure to object

to numerous instances of improper and prejudicial argument by the prosecutor and his failure to attempt to counter the prosecutor's prejudicial argument in his own closing argument fell below an objective standard of reasonableness. Defendant asserts that the cumulative effect of trial counsel's errors and deficiencies satisfies the prejudice requirement of *Strickland*. Defendant also contends that appellate counsel and section 2-1401 counsel violated his sixth amendment right to effective assistance of counsel since they did not raise the issue of ineffective assistance of trial counsel.

¶ 37 In response, the State argues that the defendant has failed to satisfy the cause-and-prejudice test with respect to his claim of ineffective assistance of counsel. The State also points out that a postconviction claim is limited to those claims that were not and could not have been previously adjudicated on direct appeal or in initial postconviction proceedings, and therefore it is waived.

¶ 38 After thoroughly reviewing both defendant's petition and the supporting record, we conclude that the circuit court properly dismissed defendant's claim that his sixth amendment right to effective assistance of counsel was violated. To begin with, we note that claims that were raised and decided on direct appeal are barred by *res judicata* and those claims that could have been raised, but were not, are considered forfeited. *People v. Snow*, 2012 IL App (4th) 110415, ¶ 30; *People v. Tenner*, 206 Ill. 2d 381, 392 (2002). Here, defendant's claim concerning trial counsel's failures is based mainly on facts contained in the trial court record. That claim therefore could have been raised on direct appeal and in his initial postconvivtion petition, and defendant's failure to do so results in its procedural default. See 725 ILCS 5/122-3 (West 2014) (any claim of substantial denial of constitutional rights not raised in the original or an amended petition is forfeited).

¶ 39 Further, to the extent that defendant relies on the 2012 affidavits attached to the petition, such reliance is unavailing. Noticeably, defendant does not show why these affidavits could not have been earlier discovered. *People v. Davis*, 2014 IL 115769, ¶ 56 (finding affidavit testimony is not of such character that it could not have been discovered earlier by the exercise of due diligence). As defendant has not identified why he was not able to raise this claim during his initial postconviction proceedings, he cannot demonstrate cause under the Act. 725 ILCS 5/122–1(f) (West 2014); *People v. Wideman*, 2016 IL App (1st) 123092, ¶ 72; *Pitsonbarger*, 205 Ill. 2d. at 460.

¶ 40 Even so, based upon our review of the record, defendant would be hard-pressed to establish that counsel's alleged ineffectiveness so infected the trial as to deny him his sixth amendment right. To establish ineffective assistance of counsel under *Strickland*, 466 U.S. at 685-86, a defendant must demonstrate, not only that trial counsel's performance was objectively unreasonable; but additionally that this deficient performance led to substantial prejudice. *People v. Harris*, 206 Ill. 2d 293, 303 (2002). Defendant has established neither.

¶ 41 Defendant's conviction was based on eyewitness testimony, which was corroborated. Further, his request to have his conviction overturned has been twice denied by this court. Thus, even if we could say that counsel's performance fell below an objective standard of reasonableness, defendant has not met the second prong of the *Strickland* test because he has not proved that a reasonable probability exists that, but for counsel's alleged errors, the result of the trial would have been different. See *Strickland*, 466 U.S. at 694 (explaining that a reasonable probability is a probability sufficient to undermine the confidence in the outcome).

¶ 42 Regarding defendant's contention that appellate counsel and section 2-1401 counsel violated his sixth amendment right to effective assistance of counsel, we again find that

defendant failed to explain why he did not raise these claims in his initial postconviction petition, which was filed after his 2-1401 petition had been dismissed and the dismissal was affirmed on appeal. Thus, defendant has failed to show cause. See *Pitsonbarger,* 205 Ill. 2d at 460. Having failed to establish cause and prejudice as defined in *Pitsonbarger,* defendant has likewise failed to meet the prejudice prong of *Strickland.* In the absence of a substantial showing of a constitutional violation, we hold that this claim was properly dismissed.

¶ 43 We next consider defendant's final contention on appeal that the circuit court erred in dismissing his claim of actual innocence based on its finding that it was not a freestanding claim, but was interwoven with his other claims. Defendant contends that his claim is freestanding and that he established his actual innocence based on newly discovered evidence. In support of this claim, defendant relies on a video interview and affidavit of William Heron taken by defendant's postconviction counsel 26 years after defendant's trial. To prevail under a theory of actual innocence, the evidence adduced by a defendant must be newly discovered, material and noncumulative, and of such conclusive character that it would probably change the result on retrial. *People v. Coleman*, 2013 IL 113307, ¶ 84; *People v. Morgan*, 212 Ill. 2d 148, 154 (2004).

¶ 44 Defendant maintains that Heron gave a statement in his interview and affidavit that McGhee was nowhere near the car when the shooting happened. Heron also stated that the shooting happened in the alley and not at the corner of Huron and Hoyne. Heron further stated that McGhee was and is lying. Defendant contends that Heron's statements are corroborated by the hand written notes of officer Pufpaf, which indicated that the car was several car lengths south of the corner when the shooting happened. Defendant maintains that this was omitted from Pufpaf's typewritten report since it would impeach the only eye witness and was undisclosed to the defense. Finally, defendant argues that the contradictions in trial testimony pertaining to the

proximity of McGhee to the car and the shooter, the positioning of the shooter's arm, the location of the car, and also the stipulation of the entry and exit wounds of the victims, make it clear that he could not have been found guilty beyond a reasonable doubt.

¶ 45 Initially, we must note that defendant has failed to make the purported video or affidavit of Heron, or written notes of Pufpaf, part of the record on appeal. This court has long recognized that to support a claim of error, the appellant has the burden to present a sufficiently complete record such that the court of review may determine whether there was the error claimed by the appellant. *People v. Carter*, 2015 IL 117709, ¶ 19; *In re Marriage of Gulla*, 234 Ill. 2d 414, 422 (2009). Without an adequate record preserving the claimed error, the court of review must presume the circuit court's order conforms with the law. *Id*.; see also *In re Jonathon C.B.*, 2011 IL 107750, ¶ 72 (presuming that a trial judge knows and follows the law unless the record affirmatively indicates otherwise); *People v. Gaultney*, 174 Ill. 2d 410, 420 (1996) (same). Any doubts which may arise from the incompleteness of the record will be resolved against the appellant. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984).

¶ 46 To the extent that defendant argues that Heron's affidavit and interview support a freestanding claim of actual innocence, we reject it as forfeited for failure to raise it in his initial postconviction petition or to show due diligence why he could not bring it earlier. 725 ILCS 5/122–3 (West 2014); *Snow*, 2012 IL App (4th) 110415, ¶ 22 (requiring a showing of due diligence in the discovery of the supporting evidence). Furthermore, any evidence being relied upon to support a freestanding claim of actual innocence means that it is not being used to supplement an assertion of a constitutional violation with respect to the defendant's trial. *People v. Hobley*, 182 Ill. 2d 404, 443–44 (1998). Here, defendant relies on the Heron affidavit in support of his ineffective assistance claims at trial. That same evidence cannot also be used to

support a freestanding claim of actual innocence. *People v. Brown*, 371 Ill. App. 3d 972, 984 (2007).

¶ 47 Additionally, even if we were to consider the evidence, we find that Heron's statements are not of such conclusive character that they would probably change the result on retrial because, even now, Heron admits that he did not see the face of the shooter and cannot identify him. See *Coleman*, 2013 IL 113307 at ¶ 96 (holding that "conclusive means the evidence, when considered along with the trial evidence, would probably lead to a different result").

¶ 48 With regard to defendant's claim concerning contradictions in trial testimony as evidence of actual innocence, we note that all of these alleged contradictions were contained in the original trial record. Further, they were also contained in the statement of facts in defendant's *pro se* postconviction petition filed in 2000. Clearly, defendant is relying on material that is not "newly discovered."

¶ 49 As we have noted above, to advance to the third stage of postconviction proceedings based upon a claim of actual innocence, a defendant must show that the evidence is newly discovered, material and not merely cumulative, and of such conclusive character that it would probably change the result on retrial. *Ortiz*, 235 Ill. 2d at 336. *People v. Sanders*, 2016 IL 118123, ¶ 46. Because the defendant's claimed evidence of innocence fails to meet any of the requisite criteria, defendant's claim of actual innocence must fail. We hold that defendant failed to carry his burden to make a substantial showing of a claim of actual innocence. Accordingly, this claim was properly dismissed.

¶ 50 CONCLUSION

¶ 51 For the foregoing reasons, the order of the circuit court of Cook County dismissing defendant's second amended successive postconviction petition is affirmed.

¶ 52 Affirmed.