2016 IL App (4th) 130279-U

NO. 4-13-0279

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
February 26, 2016
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Vermilion County
JUAN REYES,	)	No. 05CF467
Defendant-Appellant.	)	
	)	Honorable
	)	Michael D. Clary,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Turner and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant failed to allege a claim of actual innocence.

(2) Defendant failed to allege cause and prejudice to justify the filing of a successive petition for postconviction relief.

¶ 2 Defendant, Juan Reyes, who is in prison for murder and other offenses, appeals from the denial of his motion for permission to file a successive petition for postconviction relief. Citing *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and *People v. Lee*, 251 Ill. App. 3d 63 (1993), the office of the State Appellate Defender (appellate counsel) has moved for permission to withdraw from representing defendant in this appeal, because appellate counsel does not think that any reasonable argument could be made in support of this appeal. Defendant has responded with additional points and authorities. The State also has filed a brief.

¶ 3 We agree with appellate counsel's assessment of the merits of this appeal. Therefore, we grant appellate counsel's motion to withdraw, and we affirm the trial court's judgment.

¶ 4 I. BACKGROUND

¶ 5 A. The Jury Trial (January 2007)

¶ 6 In the jury trial, the State presented evidence that, on January 28, 2004, William Thomas was shot to death at his residence in Danville, Illinois, and that one of his guests, Timothy Landon, was wounded by gunfire.

¶ 7 We will summarize the testimony of six of the witnesses in the trial: Timothy Landon, Emily Schendel, Theresa Smith, Misty Harden, Joseph Hernandez, and Alex Garcia.

¶ 8 1. *The Testimony of Timothy Landon*

¶ 9 Landon testified he was a longtime acquaintance of William Thomas, having grown up with him. Landon had been making a living doing side jobs and selling cannabis. Thomas had been his supplier of cannabis. Whenever Landon had made a sale, he gave Thomas a cut.

¶ 10 Thomas also was the supplier of Troy Hutchins, until the two of them got into a disagreement. The reason for the disagreement was that Hutchins, who owed Thomas a substantial sum, had tried to pay the debt with counterfeit money.

¶ 11 Thomas lived at 21 Cronkhite Avenue in Danville, and Landon went there every day. Often, Thomas's two daughters, Emily and Alyssa Schendel, were there, too.

¶ 12 Around 3 or 3:30 p.m. on January 28, 2004, Thomas and Landon picked up Emily from school and Alyssa from day care and returned to Thomas's house. Landon and Thomas

then sat in the living room, getting high and playing Xbox games on a big-screen television. In addition, Landon had a couple of beers.

¶ 13 They left the house around 8:30 p.m., taking the children with them, picked up some food from McDonald's, and returned to the house, whereupon the children ate their food and Landon and Thomas resumed their video game. Ten-year-old Emily was sitting beside Landon on a loveseat, and Alyssa was in the bathroom, taking a bath. Thomas was sitting on a couch.

¶ 14 Around 9 p.m., according to Landon's testimony, a man opened the front door of the house, walked in, and closed the door behind him nonchalantly, as if he belonged there. The man was wearing a red hoodie but no mask. The hoodie covered, at most, his forehead. Landon could see his face: he was a light-skinned Mexican or maybe a Puerto Rican. Landon did not recognize him; he had never seen him before. The man stood there about 15 to 20 seconds, gazing at the television, and no one said a word. Thomas was rolling a joint on the coffee table. Landon was sitting on the loveseat. Then the man pulled out a silver pistol and shot Landon in the left side of the abdomen. Thomas jumped over the coffee table and struggled with the man. Landon grabbed Emily, took her to the hallway, and told her to fetch her younger sister and hide. As he was running through the kitchen, toward the back door, Landon glanced behind him and saw Thomas and the man wrestling by the television. He heard two more shots.

¶ 15 Landon ran through the backyard and into the alley on Stroup Street. He sat in the alley for a couple of minutes, packing snow into his abdominal wound. Then he walked back through the alley, toward Thomas's house. That was when he heard more gunfire. Then he saw a black male jumping the fence at the corner of Cronkhite Avenue and East Williams Street. He did not know, however, if this black man had anything to do with the shooting.

¶ 16 Landon identified defendant, in court, as the man who had entered Thomas's house and shot him, Landon.

¶ 17 2. *The Testimony of Emily Schendel*

¶ 18 Emily Schendel, age 12, testified that Kevin Robbins was her biological father but that she considered Thomas to be her father because he had taken care of her since she was 2 years old and he and her mother used to live together.

¶ 19 On January 28, 2004, Emily, Thomas, and Landon were in the living room of Thomas's house. Thomas and Landon were sitting on the couch, and she was "sitting there doing [her] homework." Her sister, Alyssa (seven years old at the time of the trial), was in the bathtub.

¶ 20 A man came in through the front door and stood by the television. According to Emily, Thomas must have thought the man was his friend Glenn Austin. When Thomas stood up from the couch and saw it was not Austin, the two men started fighting. The television was knocked over, and Emily ran to her bedroom and crawled under her bed. Then she heard a gunshot and remembered that Alyssa was in the bathtub. She ran into the bathroom, got Alyssa out of the tub, dressed her, brought her back to the bedroom, and told her to stay there. Then Emily went into the hallway and saw Landon running for the back door. He stopped and told her to "stay there so [that she would not] get hurt." Against Landon's advice, she went out onto the enclosed front porch, looked outside, and saw Thomas rolling around in the snow.

¶ 21 The prosecutor asked Emily:

> "Q. Now, when the man came in the first time and stood by the [television], was he wearing a mask?
>
> A. Yes.
>
> Q. What did he look like?

A. I didn't really know, because he had on all black.

Q. Okay. Did he have something on his head?

A. No.

Q. To your knowledge, had you ever seen him before?

A. Not that I remember."

¶ 22 Defense counsel asked Emily:

"Q. And what made you think that your dad [(Thomas)] thought it was Glenn? Did he call out his name or something?

A. No. I just remember seeing a big guy.

Q. Okay. So, the guy you saw, was he kind of a big, heavy-set guy?

A. Yes.

Q. Six feet tall?

A. Yes.

Q. And heavy-set?

A. Yes.

Q. And you said he was wearing a mask?

A. Yes.

Q. Did that cover his face?

A. Yes.

Q. Okay. So, you weren't able to see his face?

A. Yes—no, I wasn't.

* * *

Q. And do you remember—is it correct that your description to the police was you thought it was—the gentleman was a male black?

A. Yes. I remember telling them that.

* * *

Q. And did you see only one man?

A. Yeah. I only saw one man.

* * *

[Q.] Were you in the room when anyone was shot, your father or Tim [Landon]?

[A.] Not that I remember.

Q. Okay. Did you hear anybody else in the room, or was there anything that gave you any indication that there was anybody in the room[] other than your father, Tim, and the man you've already described?

A. No."

¶ 23 The prosecutor asked Emily what Austin looked like. She answered:

"A. He's really big, like, he's really built, and he's tall.

Q. What—does he have—what kind of skin tone?

A. He's, like, mixed, but kind of, like—I don't know how to put it. He's mixed. He looks mixed.

Q. And light-skinned?

A. Yeah."

¶ 24 Defense counsel asked Emily:

"[Q.] Was the man [whom] you saw [and whom] you described as a male—a big, male black, whose face you couldn't see, did he look similar to Glenn Austin?

[A.] I just saw a big man, so I assumed it was Glenn.

Q. So, did he look somewhat similar to Glenn?

A. Yes."

¶ 25 3. *The Testimony of Theresa Smith*

¶ 26 Theresa Smith testified she was home, at 24 Stroup Street, at 9 p.m. on January 28, 2004, when she heard car doors closing. She looked out a window and saw a van parked in front of her house. The distance from her front porch to the curb was about 50 feet. Four men got out of the van and began talking, but she could not hear what they were saying. They were wearing "blue jean coats [with] hoods on them."

¶ 27 Defense counsel asked Smith:

"Q. *** And you believe one of them was Hispanic?

A. I believe two of them were Hispanic. One of them had thicker, coarser, Mexican hair.

Q. Okay. So, two appeared to be Hispanic?

A. Yes.

Q. But you are 100[%] positive about that?

A. Not about both of them. One of them I am.

Q. And the other two you don't know.

A. I knew that they were not black."

¶ 28 Smith testified that, later, she heard someone run across her front porch—she assumed he came from the alley behind her house. She looked out the window again and saw two men climbing into the van: one entering through the driver's door and the other through the rear sliding door. She did not see anyone carrying a firearm.

¶ 29 4. *The Testimony of Misty Harden*

¶ 30 Misty Harden testified she lived at 18 Cronkhite Avenue and that she heard shooting at 9 p.m. on January 28, 2004. She opened her front door a crack and saw the flash of gunfire coming from behind a car, but she could not see who was shooting. The flashes were darting out toward Thomas, who was holding onto the railing of his front porch as if to keep himself from falling. Then he fell down the stairs. Then she saw "a guy running down the street[,] all in black."

¶ 31 5. *The Testimony of Joseph Hernandez*

¶ 32 Hernandez testified that, in late January 2004, when he was living in Joliet, Illinois, he came to Danville to visit his younger brother. The evening of January 28, 2004, while Hernandez was in Danville, he visited Kenneth Wright, who went by the street name "Big Worm." Defendant, Alex Garcia, Troy Hutchins, and Andre Smith were also at Wright's house.

¶ 33 Eventually, they all left: Hernandez, Garcia, Smith, and defendant in a van and Wright and Hutchins in a Cadillac. They all drove to the east side of Danville. Hutchins and Garcia were communicating with one another by walkie-talkie. When Garcia gave the word, Hernandez got "gear[ed] up" "[f]or this lick" (that is, for this robbery): he put a bandana around his face and a beanie cap on his head. "Everybody was gearing up at the same time," including defendant.

¶ 34 The plan was for Smith to get "everybody [in the house] face down and what not," and after "everything was all right in the house," Hernandez was supposed to tie up the occupants with duct tape. Garcia got scared and decided not to participate. Both Smith and defendant had pistols. The three of them—Hernandez, Smith, and defendant—had to wait a minute until Hutchins gave the word, because he was supposed to make sure the door of the house was unlocked so they could simply walk in. Hutchins said on the walkie-talkie that "everything was a go." So, Hernandez, Smith, and defendant began walking to the house.

¶ 35 At the time, defendant was dressed all in black. He had no mask on. Instead, they all had bandanas tied around their faces. Hernandez waited outside while defendant and Smith entered the covered front porch. A car went by, and Hernandez turned around to watch it, so he did not actually see defendant and Smith enter the house. But he heard a gunshot from inside the house.

¶ 36 Hernandez testified: "I took off running. The only reason I took off running was because there wasn't supposed to be no gunshots at all": Hutchins had said "they was some sweet-ass white boys[] and they wasn't going to do nothing." As he was running, Hernandez flung away both the walkie-talkie and the roll of duct tape.

¶ 37 He eventually ended up back at Wright's house. Wright told him, " 'The shit wasn't supposed to go down like this.' "

¶ 38 On cross-examination, defense counsel asked Hernandez:

> "Q. *** Now, as [the prosecutor] pointed out in your direct testimony, you [pleaded] guilty in this case to conspiracy to commit armed robbery, correct?
>
> A. Yeah.

Q. And that was for six years?

A. Yeah.

Q. You were originally charged with that charge[] as well as home invasion, aggravated battery with a firearm, attempted first degree murder, and first degree murder, correct?

A. Yeah.

Q. And all those charges were dropped?

A. Yeah.

Q. You were also, at that time, being held on another felony, [case] No. 05[-]CF[-]388, correct?

A. Yeah; and that charge was dropped as well.

Q. And[,] in fact, you were charged in that case, [case No.] 05[-]CF[-]388, with retail theft and obstructing justice?

A. Yeah.

Q. Obstructing justice, essentially, you gave false facts to the police?

A. Yeah.

Q. Okay. And those charges were dropped as well, as a part of this plea agreement?

A. Yeah.

Q. What is your out date today?

A. My out date right now is December 12[], [20]07.

Q. Okay. So, you'll be out in less than a year?

A. Yeah.

Q. In return—and you got this plea in return for your testimony here today, correct?

A. Right.

Q. Now, you gave a statement to Officer Garrett in June [2005], correct?

A. Yeah. Yeah.

Q. And[,] in fact, you told him you had no involvement in this?

A. Yeah.

Q. So, at that time, you were not being truthful with Officer Garrett, according to your testimony today; is that true?

* * *

A. Yeah."

¶ 39 According to Hernandez, Garrett expressed disbelief at his initial denial of involvement. Garrett made it clear to Hernandez that he believed Hernandez was, in fact, involved, and Garrett told him that "if people would give statements, there was a possibility they could get a deal in this matter"—except for whoever went into the house: "the only people [who] were going to get a deal were people [who] were outside the house." Garrett told Hernandez that, earlier that same day (June 24, 2005), he went to Clinton, Illinois, and spoke with Wright, who was being held there on federal charges, and that Wright made a statement—a statement implicating Hernandez—for which Wright got a deal. Not only that, Garrett said, but Garcia likewise had made a statement implicating Hernandez. Garrett "wanted the guy who pulled the

trigger," and a deal would be available to everyone else. Garrett remarked that defendant had not yet given a statement and that the police were still looking for him.

¶ 40 Hernandez admitted that when he made his statement to the police, on December 28, 2005, he had had months to review the police reports and everyone else's statements, all of which had been provided to him in discovery.

¶ 41 6. *The Testimony of Alex Garcia*

¶ 42 Garcia testified he knew both Wright and defendant through his fiancée's family. The night of January 28, 2004, Garcia went to the east side of Danville and met with defendant at Wright's house. Hutchins and Hernandez were also there. They were playing pool, smoking cannabis, and talking. Defendant, Hernandez, and Garcia also were "doing cocaine." Andre Smith showed up about half an hour later.

¶ 43 Wright and Hutchins conferred with one another. Then, Garcia, Smith, and Hernandez got into Wright's purple van. Defendant was driving, and Garcia and Smith had pistols. Hutchins and Wright were leading in a white Cadillac. The van parked near Williams Street, and the Cadillac "kept driving around." Garcia told the others in the van that he was getting "a bad vibe" and that they "should not do this." Defendant grabbed the pistol that was on the carpet in front of Garcia, and defendant, Smith, and Hernandez got out of the van. At that point, both defendant and Smith were armed. They walked toward Williams Street and disappeared. Garcia remained in the backseat of the van.

¶ 44 Soon afterward, Smith jumped in the van, screaming, " 'Reyes shot the guy[!]' " Garcia panicked; he climbed into the driver's seat and pulled onto Williams Street. Then he saw defendant running up an alley. Defendant jumped into the van. Hernandez never showed up.

After two or three blocks, Smith took over driving, and the three of them returned to Wright's house.

¶ 45 The prosecutor asked Garcia:

"Q. Did [defendant] talk about what happened at the house?

A. Yeah. They had to shoot the guy.

Q. What did [defendant] say, as best [as] you recall?

A. That the guy attacked [him] and he had to shoot him.

Q. Okay. What else?

A. And then Andre Smith shot him, and then they shot another guy running out of the house.

Q. And who is saying this?

A. Andre Smith.

Q. And who else?

A. [Defendant] said he had to shoot the guy[] because the guy jumped on him."

¶ 46 Upon returning to Wright's house, defendant had blood on his clothing, and at first thought he had been shot. Garcia testified that defendant took off his clothes to make sure he had no bullet wound.

¶ 47 The magazine clips were empty.

¶ 48 The next night, at defendant's girlfriend's house, Garcia and defendant were "[j]ust getting high" on cannabis, and defendant said that he "[saw] the guy at the table [whom] they [had] killed."

¶ 49 Like Hernandez, Garcia had negotiated a plea bargain with the State. He originally was charged with home invasion, aggravated battery, attempt (first degree murder), first degree murder, and conspiracy to commit armed robbery. In January 2007, he pleaded guilty to conspiracy to commit armed robbery. He had been released from prison and was on parole.

¶ 50 He admitted that, while working as a drug informant, he defrauded the police by telling them about a drug deal that never happened.

¶ 51 The jury found defendant guilty of first degree murder (720 ILCS 5/9-1(a)(1) (West 2002)), attempt (first degree murder) (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2002)), aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2002)), home invasion (720 ILCS 5/12-11(a)(1), (a)(2) (West 2002)), and aggravating factors (730 ILCS 5/5-8-1(a)(1)(d)(ii), (a)(1)(d)(iii) (West 2002)). The trial court sentenced him to three consecutive terms of life imprisonment plus another 30 years of imprisonment.

¶ 52 B. The Direct Appeal

¶ 53 Defendant filed a direct appeal, in which he made two arguments: (1) the State failed to provide him a speedy trial, and (2) the photographic arrays that the police showed Landon were so suggestive as to violate due process. *People v. Reyes*, No. 4-07-0412, slip order at 1 (Oct. 7, 2008) (unpublished order under Supreme Court Rule 23).

¶ 54 In October 2008, we issued a decision disagreeing with both arguments and affirming the trial court's judgment. *Id.* at 102.

¶ 55 In January 2009, the supreme court denied leave to appeal. *People v. Reyes*, 231 Ill. 2d 648 (2009).

¶ 56 C. The Initial Postconviction Proceeding

¶ 57 In October 2009, defendant filed his first petition for postconviction relief, which the trial court summarily dismissed two months later. See 725 ILCS 5/122-2.1(a)(2) (West 2008) (providing for the summary dismissal of petitions the trial court finds to be "frivolous or *** patently without merit").

¶ 58 Defendant appealed, arguing that two claims in his petition were nonfrivolous, namely, that: (1) a Danville police officer, Keith Garrett, made inaccurate and deceptive representations in his testimony before the grand jury; and (2) defense counsel rendered ineffective assistance at trial by failing to impeach Garrett with the contradictions between his grand-jury testimony and his police reports. *People v. Reyes*, 2011 IL App (4th) 100183-U, ¶ 4. We held that (1) defendant had forfeited any error in the grand-jury hearing by failing to file a timely motion to dismiss the indictment and (2) the rules of evidence would not have allowed defense counsel to impeach Garrett with contradictions between his grand-jury testimony and his police reports. *Id.* ¶ 5.

¶ 59 On March 26, 2014, the supreme court directed us to vacate our judgment in *Reyes*, 2011 IL App (4th) 100183-U, and to reconsider our judgment in the light of *People v. Hommerson*, 2014 IL 115638, to determine whether a different result was warranted. *People v. Reyes*, No. 113559, 8 N.E.3d 1043 (Mar. 26, 2014) (nonprecedential supervisory order on denial of petition for leave to appeal).

¶ 60 Accordingly, we vacated our judgment in *Reyes*, 2011 IL App (4th) 100183-U. After reconsidering the case in the light of *Hommerson*, we decided that a different result was not warranted. Therefore, we again affirmed the summary dismissal of defendant's initial postconviction petition. *People v. Reyes*, 2014 IL App (4th) 100183-UB, ¶ 4.

¶ 61 The supreme court denied leave to appeal. *People v. Reyes*, No. 117987, 20 N.E.3d 1260 (Sept. 24, 2014).

¶ 62 D. The Petition To File a Successive Postconviction Petition

¶ 63 In January 2013, defendant filed a document entitled "Motion for Leave To File a Successive Post-conviction Petition and Successive Post-conviction Petition on Actual Innocence." Therein, he stated: "While most of the claims in petitioner's successive post conviction petition[] deal with his claims of actual innocence, one claim does not, and that is petitioner's claim that his indictment failed to adequately charge the offense of Home Invasion."

¶ 64 Defendant raised eight claims in his proposed successive petition for postconviction relief.

¶ 65 The first claim was that the State had violated due process by knowingly using perjured testimony in the grand-jury hearing, in hearings on defendant's motion to suppress evidence and motion to compel, and in the trial. In the grand-jury hearing and in the motion hearings, Garrett recounted what witnesses had told him. Defendant complained that Garrett's testimony of what the witnesses had said contradicted the witnesses' statements as summarized in police reports. Likewise, defendant complained that the testimony of Landon, Harden, and Garcia contradicted statements they had made to the police, as summarized in police reports.

¶ 66 The second claim was that the State had violated due process by adding Andre Smith to the witness list on the day of trial, thereby causing the defense to move for a continuance.

¶ 67 The third claim was that the trial judge had violated due process by being biased against defendant. In support of this claim, defendant cited various transcripts in the record.

¶ 68 The fourth claim was that trial counsel had rendered ineffective assistance by failing to call Landon, Emily Schendel, Gary Thomas, and Kyle Payne as exculpatory witnesses; failing to adequately cross-examine Harden, Brandy Kurkendall (the children's mother), Landon, and Garcia; and failing to have defendant present at a hearing on a motion to disqualify the prosecutor.

¶ 69 The fifth claim was that the State had violated due process by withholding a medical report by a physician named Ochoa. Allegedly, Dr. Ochoa had surgically removed a bullet from Landon, and his medical report would have shown that the bullet entered Landon's body at an angle that was inconsistent with Landon's testimony.

¶ 70 The sixth claim was that investigators had violated due process by "engag[ing] in a pattern of misconduct in order to connect [defendant] to the crime." This alleged "pattern of misconduct" consisted of misrepresenting, in judicial proceedings, what Landon and Garcia had told the police; telling defendant to push his head back, when photographing him for a photographic array, so that he would "look a little fatter in the face" and thus more "like the composite sketch"; and including two codefendants, Hernandez and Garcia, in the photographic array in which, on July 27, 2004, Landon identified defendant.

¶ 71 The seventh claim was that the State had violated due process in the sentencing hearing by misleading the trial court with false information about a prior conviction, namely, that defendant had taken a gun to school, whereas, in reality, defendant had "[pleaded] to a gun that was found by a school at [2 a.m.]"

¶ 72 The eighth claim—the only claim that, according to the proposed successive petition, was not a claim of actual innocence—was that the counts of the indictment charging defendant with home invasion, counts III to VI, failed to allege that he had entered the dwelling

place "without authority," making his conviction of that offense "void." Defendant wrote in his proposed successive petition: "Although this issue is not subject to the cause and prejudice test in section 122-1(f) [(725 ILCS 5/122-1(f) (West 2012))], [defendant] still provides cause and prejudice."

¶ 73 The alleged cause and prejudice for the eighth claim were this. Defendant got into a disagreement with his attorney, David J. Peilet, over fees, and Peilet refused to "send [defendant] back all his legal documents." Defendant reported Peilet to the Illinois Attorney Registration and Disciplinary Commission, which "helped [defendant] by having *** Pielet return all [defendant's] legal documents." Defendant "finally received [his] transcripts and discovery materials such as police reports and other documents in the institutional mail at the Menard correctional facility from *** Peilet in the middle of *** February 2009." Defendant was "on a six month deadline to file [his] post conviction petition," and the law clerk at the correctional center "put [him] down to come twice a week just until [his] six month deadline was up." Then, in March 2009, defendant received a petition to revoke his parental rights to his daughter. When he learned that Judge Clary would be the judge presiding over the parental termination case, he stopped working on his postconviction petition and began researching and working on a motion for a change of venue, because Judge Clary had been one of the judges in this criminal case and defendant did not think he had ruled fairly on the motion for suppression of evidence. While defendant was working on his motion for a change of venue, the correctional facility was locked down several times, preventing him from going to the law library and researching the law. He was under the false impression that he had only until June 2009 to file his postconviction petition. Consequently, with the help of a fellow inmate, who was not trained as a law clerk, defendant "hastily prepared a postconviction petition and left out a lot of issues

[be]cause [he] did not have the time to put them in [his] petition, because [he] had to go on a court writ for the guardianship hearing [in the parental termination case]." On top of that, "[defendant] was packed out on [June 16, 2009,] because [he] was being transferred to the Pontiac Correctional Center to appear in [the parental termination case]." From June 17 to July 22, 2009, while he was in Pontiac Correctional Center, defendant "kept writing Counselor Smith[,] asking [for his] help [in getting] his legal papers and postconviction petition," but to no avail.

¶ 74 On March 25, 2013, the trial court denied permission to file the proposed successive petition. The court gave the following reasons for the denial.

¶ 75 Four of the claims—the first, second, fourth, and sixth claims—were "very similar if not identical to claims raised by the [d]efendant during the course of the trial proceedings, on direct appeal[,] or in the first [p]ostconviction [p]etition. These claims were all previously addressed and denied by the trial court and appellate court. No newly discovered evidence [was] offered to support these claims."

¶ 76 The trial court said this of the remaining claims:

> "Claims 3, 5, 7[,] and 8 may not have been raised previously. There is no cause alleged as to why these claims were not presented in the first petition. Each of the matters should have been known to the [d]efendant during the trial and sentencing except for the Ochoa report. There is no indication when that report came into the possession of [d]efendant[,] and a copy of the report could not be found by the court in the attachments to the motion.

> There is no newly discovered evidence provided to support a claim of actual innocence except for possibly the Ochoa report. If that is in fact newly discovered, it is not material but would only be cumulative, nor would it probably change the outcome of the trial, since it would have been used to challenge the credibility of witnesses as to the angle of the bullet entry into the surviving victim's body.
>
> The wording of the charge of [h]ome [i]nvasion in the [i]ndictment is not newly discovered evidence. This could be construed as a claim of failure to state an offense, because 'without authority' was not alleged. Even if it is, the [d]efendant was on notice before trial as to the charge of [h]ome [i]nvasion against him[,] and the jurors were properly instructed as to the issues of [h]ome [i]nvasion in instruction [Nos.] 17, 18, 19, 20[,] and 21. There is no explanation for why this was not raised in the first petition[,] and there is no prejudice since the [d]efendant had notice of the charge and the jury was properly instructed before deliberating on a verdict."

¶ 77 Finally, apart from the cause and prejudice test, the trial court found that the proposed successive petition failed to allege a substantial denial of defendant's constitutional rights and that it was "generally frivolous and patently without merit."

¶ 78 This appeal followed.

¶ 79 II. ANALYSIS

¶ 80 A. Defendant's Motion To Strike the State's Brief or, Alternatively, for the Appointment of Appellate Counsel From a Different District

¶ 81 Defendant has filed, *pro se*, a motion that we strike the State's brief or that, alternatively, we appoint counsel from a different appellate district to represent him in this appeal.

¶ 82 He gives two reasons for the proposed striking of the State's brief. First, he argues that, under Illinois Supreme Court Rule 343(a) (eff. July 1, 2008), an appellee can file its brief only after the appellant files its brief and that, because appellate counsel's motion to withdraw is not an appellant's "brief" within the meaning of Rule 341(h) (Ill. S. Ct. R. 341(h) (eff. Feb. 6, 2013)) or Rule 343(a), the State has no right to file an appellee's brief.

¶ 83 Actually, Rule 343(a) does not say that the appellee can file its brief only after the appellant files its brief. Instead, Rule 343(a) says: "Within 35 days from *the due date* of the appellant's brief, *** the appellee shall file his or her brief in the reviewing court." (Emphasis added.) Ill. S. Ct. R. 343(a) (eff. July 1, 2008).

¶ 84 Second, defendant argues that "[t]he procedures for resolving a *Finley* motion (which are based on the procedures announced in *Anders* [*v. California*, 386 U.S. 738, 744 (1967)]) do not allow for intervention by the State on behalf of counsel's motion to withdraw or in support of the actions of the lower court." That is not our understanding. It appears that, in federal court, the government regularly responds to *Anders* briefs or chooses not to do so and that sometimes the court even orders the government to respond. See, *e.g.*, *United States v. Chavez-Nevarez*, 583 Fed. Appx. 283, 284 (4th Cir. 2014); *United States v. Burgess*, 478 F.3d 658, 660-61 (4th Cir. 2007); *United States v. Ferguson*, 226 Fed. Appx. 849, 850 (10th Cir. 2007).

¶ 85 And, besides, under Illinois Supreme Court Rule 361(b)(2) (eff. Jan. 1, 2015), the State, as a party to this appeal, has a right to respond to any motions filed in this appeal—including, presumably, motions to withdraw. Considering that the State has an interest in ensuring that justice is done (*People v. Ray*, 126 Ill. App. 3d 656, 664 (1984)), the State could oppose or agree with a motion to withdraw, depending on the State's perception of justice.

¶ 86 Therefore, we deny defendant's motion to strike the State's brief. We also deny his alternative motion to appoint appellate counsel from a different district. It would make no sense to require different appellate counsel to make frivolous arguments that, by granting the motion to withdraw, we are saving the present appellate counsel from making. See Ill. S. Ct. R. 375(b) (eff. Feb. 1, 1994).

¶ 87 B. The Mislabeling of the First Seven Claims as "Claims of Actual Innocence"

¶ 88 Defendant characterizes the first seven claims in his proposed successive petition as claims of actual innocence. If those claims really are claims of actual innocence, he is excused from showing cause and prejudice as to them (725 ILCS 5/122-1(f) (West 2012)). See *People v. Ortiz*, 235 Ill. 2d 319, 330 (2009).

¶ 89 Calling a claim a "claim of actual innocence" does not make it one. A "claim of actual innocence" has to satisfy four requirements to earn that label. First, the evidence in support of the claim must be newly discovered (*People v. Edwards*, 2012 IL 111711, ¶ 32), and "newly discovered" means that the evidence was unavailable at the time of the trial and could not have been discovered earlier through due diligence (*People v. Harris*, 206 Ill. 2d 293, 301 (2002)). Second, the newly discovered evidence must be material and not merely cumulative. *Edwards*, 2012 IL 111711, ¶ 32. Third, the newly discovered evidence must be so conclusive that it "probably [would] change the result" in a new trial (*id.*), that is to say, it probably would

bring "total vindication or exoneration, not merely present a reasonable doubt" (*People v. Adams*, 2013 IL App (1st) 111081, ¶ 36). *Edwards*, 2012 IL 111711, ¶ 32. Fourth, the claim of actual innocence must be "freestanding", and "freestanding" means that that, if the defendant uses evidence to claim a constitutional violation with respect to the trial, the defendant cannot use that same evidence to also make a claim of actual innocence. *People v. Brown*, 371 Ill. App. 3d 972, 984 (2007). "A 'free-standing' claim of innocence means that the newly discovered evidence being relied upon is not being used to supplement an assertion of a constitutional violation with respect to [the] trial." (Internal quotation marks omitted.) *People v. Hobley*, 182 Ill. 2d 404, 443-44 (1998).

¶ 90 Let us consider whether the first seven claims meet those requirements.

¶ 91 1. *The First Claim*

¶ 92 Again, the first claim is that the State violated due process by knowingly using perjured testimony in the grand-jury hearing, in hearings on defendant's motion for suppression and motion to compel, and in the trial. Specifically, the testimony in those proceedings allegedly contradicted the statements witnesses earlier made to the police.

¶ 93 This claim fails several of the requirements for a claim of actual innocence. For one thing, a claim of constitutional error in the trial cannot also be a claim of actual innocence. *Id.* Also, this evidence is cumulative, considering that, in the jury trial, defense counsel impeached witnesses with contradictions between their testimony and what they previously told the police. See *Edwards*, 2012 IL 111711, ¶ 32. To do that, defense counsel had to have the police reports, and thus the evidence is not newly discovered. See *Harris*, 206 Ill. 2d at 301. Finally, contradictions between testimony and what witnesses previously told the police do not conclusively exonerate defendant. See *Adams*, 2013 IL App (1st) 111081, ¶ 36.

¶ 94 Because we determine, in our *de novo* review (*People v. Gillespie*, 407 Ill. App. 3d 113, 124 (2010)), that the first claim is not really a claim of actual innocence, defendant had to show cause and prejudice as to that claim (see 725 ILCS 5/122-1(f) (West 2012); *People v. Lee*, 207 Ill. 2d 1, 5 (2003); *People v. Love*, 2013 IL App (2d) 120600, ¶ 26). He did not do so. Therefore, the first claim would not justify the filing of a successive postconviction petition.

¶ 95 2. *The Second Claim*

¶ 96 The second claim is that the State violated due process by adding Andre Smith to the witness list on the day of trial, thereby causing the defense to move for a continuance.

¶ 97 This claim fails all four requirements for a claim of actual innocence. See *Edwards*, 2012 IL 111711, ¶ 32; *Hobley*, 182 Ill. 2d at 443-44. Because defendant showed no cause and prejudice as this claim, it does not justify the filing of a successive petition. See 725 ILCS 5/122-1(f) (West 2012); *Lee*, 207 Ill. 2d at 5.

¶ 98 3. *The Third Claim*

¶ 99 The third claim is that the trial judge violated due process by being biased against defendant.

¶ 100 Because the evidence of this alleged bias consists of transcripts in the record, the evidence is not newly discovered. See *Harris*, 206 Ill. 2d at 301. Also, even if the trial judge was biased, that would have no tendency to exonerate defendant of the offenses of which the jury found him guilty. See *Edwards*, 2012 IL 111711, ¶ 32; *Adams*, 2013 IL App (1st) 111081, ¶ 36.

¶ 101 Given that this claim is not truly a claim of actual innocence, defendant was required to show cause and prejudice as to this claim. See 725 ILCS 5/122-1(f) (West 2012); *Lee*, 207 Ill. 2d at 5. He did not do so. Therefore, this claim does not justify the filing of a successive petition. See *id.*

¶ 102 4. *The Fourth Claim*

¶ 103 The fourth claim is that trial counsel rendered ineffective assistance.

¶ 104 Evidence that trial counsel rendered ineffective assistance would not bring "total vindication or exoneration" of defendant. *Adams*, 2013 IL App (1st) 111081, ¶ 36. Nor is this claim freestanding. See *Brown*, 371 Ill. App. 3d at 984. Evidence of "a constitutional violation with respect to [the] trial" cannot simultaneously serve as evidence of actual innocence. (Internal quotation marks omitted.) *Hobley*, 182 Ill. 2d at 443-44; *Brown*, 371 Ill. App. 3d at 984.

¶ 105 Because the fourth claim is not really a claim of actual innocence, defendant was required to show cause and prejudice as to this claim. See 725 ILCS 5/122-1(f) (West 2012); *Lee*, 207 Ill. 2d at 5. He did not do so. Therefore, the fourth claim does not justify the filing of a successive petition. 725 ILCS 5/122-1(f) (West 2012).

¶ 106 5. *The Fifth Claim*

¶ 107 The fifth claim is that the State violated due process by withholding a medical report by Dr. Ochoa. This report allegedly would have shown that the bullet entered Landon's body at an angle that was inconsistent with his testimony.

¶ 108 That Landon was inaccurate about his physical position or posture, or the shooter's physical position or posture, at the time Landon was shot is not evidence "of such conclusive character that it would probably change the result on retrial." *Edwards*, 2012 IL 111711, ¶ 32.

¶ 109 It follows that the fifth claim is not truly a claim of actual innocence and that defendant therefore was required to show cause and prejudice as to this claim. 725 ILCS 5/122-1(f) (West 2012); *Lee*, 207 Ill. 2d at 5. He did not do so. The proposed successive petition does not state when defendant obtained Dr. Ochoa's report, *i.e.*, whether he obtained it

before or after the filing of the initial postconviction petition. And without being provided Dr. Ochoa's report, we are in no position to say that the State's alleged withholding of the report "so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f) (West 2012). Thus, the fifth claim does not justify the filing of a successive petition. See *id.*

¶ 110 6. *The Sixth Claim*

¶ 111 The sixth claim is that investigators violated due process by "engag[ing] in a pattern of misconduct in order to connect [defendant] to the crime." This alleged "pattern of misconduct" consisted of misrepresenting, in judicial proceedings, what Landon and Garcia had told the police; telling defendant to push his head back, when photographing him for a photographic array, so that he would "look a little fatter in the face" and thus more "like the composite sketch"; and including two codefendants, Hernandez and Garcia, in the photographic array in which, on July 27, 2004, Landon identified defendant.

¶ 112 This evidence is not "of such conclusive character that it would probably change the result on retrial." *Edwards*, 2012 IL 111711, ¶ 32. In other words, it is unlikely that this evidence would result in "total vindication or exoneration," as opposed to being just another basis for arguing reasonable doubt. *Adams*, 2013 IL App (1st) 111081, ¶ 36.

¶ 113 Because the sixth claim, therefore, is not truly a claim of actual innocence, defendant was required to show cause and prejudice as to this claim. See 725 ILCS 5/122-1(f) (West 2012); *Lee*, 207 Ill. 2d at 5. He did not do so. It follows that the sixth claim does not justify the filing of a successive petition. See 725 ILCS 5/122-1(f) (West 2012).

¶ 114 7. *The Seventh Claim*

¶ 115 The seventh claim is that the State violated due process in the sentencing hearing by misleading the trial court with false information about a prior conviction, namely, that defendant had taken a gun to school, whereas, in reality, defendant had "[pleaded] to a gun that was found by a school at [2 a.m.]"

¶ 116 This is a sentencing issue, which has nothing to do with defendant's purported innocence of the offenses in the present case. Therefore, defendant was required to show cause and prejudice as to this claim. See *id.*; *Lee*, 207 Ill. 2d at 5. He did not do so. It follows that the seventh claim does not justify the filing of a successive petition. See 725 ILCS 5/122-1(f) (West 2012).

¶ 117 C. No Cause for Omitting the Eighth Claim in the Initial Petition

¶ 118 The final, eighth claim—the only claim that, according to defendant, is not a claim of actual innocence—is that the counts of the indictment charging him with home invasion, counts III to VI, omitted the statutory phrase "without authority."

¶ 119 We notice, from the docket entry of March 14, 2006, that, when defendant was arraigned on that date, he "acknowledge[d] receipt of [the] indictment." Thus, three years before he filed his initial petition for postconviction relief, he received a copy of the indictment, including counts III to VI. All he had to do was read those counts and compare them to the statute to see that the phrase "without authority" was omitted from counts III to VI. No objective factor impeded him from raising this claim in his initial postconviction petition. See *id.* Finding no "cause" within the meaning of section 122-1(f), we do not even reach the question of prejudice. The trial court was correct to deny defendant permission to file this claim.

¶ 120 III. CONCLUSION

¶ 121 For the foregoing reasons, we affirm the trial court's judgment. We award the State $50 against defendant in costs. See 55 ILCS 5/4-2002(a) (West 2014).

¶ 122 Affirmed.