2018 IL App (1st) 170315-U

No. 1-17-0315

Order filed April 6, 2018

Sixth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 1857
	)	
YSOLE KROL,	)	Honorable
	)	Gregory R. Ginex,
Defendant-Appellant.	)	Judge presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 ***Held*:** We affirm the circuit court's denial of defendant's motion for leave to file a successive postconviction petition. The defendant did not establish her claim of actual innocence, nor did she establish cause and prejudice for her claim that her 35-year sentence was unconstitutional or for her claims related to ineffective assistance of trial and appellate counsel.

¶ 2 Defendant Ysole Krole appeals from the circuit court's denial of her motion for leave to file a successive postconviction petition under the Post-Conviction Hearing Act (725 ILCS

5/122-1 *et seq.* (West 2014)). On appeal, defendant contends that the court erred when it denied her leave to file a successive postconviction petition because (1) she demonstrated a colorable claim of actual innocence, (2) the court failed to address her claims related to ineffective assistance of appellate counsel, and (3) it improperly dismissed her argument that her 35-year sentence was unconstitutional. We affirm.

¶ 3 Following a bench trial, defendant was convicted of first degree murder (720 ILCS 5/9-1(a)(1), (2) (West 2008)) based on an accountability theory and sentenced to 35-years in prison. We affirmed that judgment on direct appeal. *People v. Krol*, 2013 IL App (1st) 112514-U. We also affirmed the trial court's summary dismissal of defendant's initial postconviction petition. *People v. Krol*, 2015 IL App (1st) 142182-U.

¶ 4 Defendant and codefendant, Sergio Martinez, were charged with, *inter alia*, two counts of first-degree murder based on the shooting death of Christopher Rivera. Defendant and Martinez's trials were separate but simultaneous. Defendant elected a bench trial; Martinez had a jury trial. The evidence established that, before the shooting on December 18, 2009, Christopher and his brothers, Isaac Sanchez and Jonathan Rivera, were at their home.[1] Although the brothers had once been friends of defendant and Martinez, they were not friends of theirs on December 18, 2009.

¶ 5 Sanchez testified that, at about 8 p.m. on December 18, 2009, he heard Christopher arguing with Martinez over the telephone. After the call, Christopher grabbed a hoodie, yelled out "Sergio," and "darted out the door." Sanchez and Jonathan followed. Sanchez did not see Christopher grab any weapons. When Sanchez got outside, he recognized defendant's car, which Martinez was driving "really slowly." Two men were in the back seat but Sanchez did not see

[1] As the victim, Christopher Rivera, has the same last name as the witness Jonathan Rivera, we will refer to them by their first names.

defendant in the car. The three men in the car were yelling and making hand gestures out of the windows and "[b]asically like inviting, come on, come on." Christopher "ran after them." Sanchez saw a "gun flash" and heard a gunshot come from the driver's side of the car. Christopher immediately fell to the ground. The car "floored it, peeled rubber" and Sanchez saw that Christopher had been shot in the head. Sanchez had not seen Christopher throw anything or threaten anyone in the car and Sanchez did not have a BB gun or weapon on him.

¶ 6 Jonathan testified that, on December 18, 2009, he heard Christopher get into a confrontation over the telephone. Christopher and Sanchez then "rushed out" and Jonathan followed. When Jonathan got outside, Christopher was across the street going toward a car, which Jonathan recognized as defendant's car. The car was "luring" them towards it and "egging [them] on." As Christopher followed the car, Jonathan saw Martinez "go out the window" and a "flash." Christopher collapsed and the car immediately drove off. Jonathan testified that neither he nor his brothers had a BB gun or threw anything at the car.

¶ 7 Joshua Bzdusek testified that, on December 18, 2009, Martinez picked up Bzdusek and Jose Martinez to go "cruising."[2] Defendant was in the passenger's seat and Bzdusek and Jose were in the back seat. At some point, they saw Sanchez and Jonathan and then stopped at a gas station to pump air into the tires. Martinez made a phone call to Christopher asking for money and then drove to Christopher's house.

¶ 8 When they arrived, Christopher, Sanchez, and Jonathan ran towards their car. Christopher's hand was pointed at the car and, although Bzdusek did not see a gun, he assumed Christopher was pointing a gun. Bzdusek told Martinez to leave, but another car was blocking them. Bzdusek heard a loud "thud" and something "smashed" into the back of the car, which he

[2] As the codefendant, Sergio Martinez, has the same last name as the witness, Jose Martinez, we will refer to Jose Martinez by his first name.

assumed was a brick. Bzdusek testified that he heard gunshots and he knew he heard a "gunshot" because he heard, "pop, pop, pop." It was loud enough for him to "assume it was a gun." Martinez did not drive away because the car was still blocking them. Bzdusek testified that then "[Martinez] had told [defendant], [p]ass me the gun" and Martinez "grabbed the gun and shot one time." Bzdusek saw "somebody start to fall" and then ducked. Martinez "took off." Bzdusek did not see defendant pass Martinez the gun and Martinez never told defendant to look into the glove box for the gun.

¶ 9 As they drove away, Bzdusek testified that "we were discussing whether or not" the gun that Christopher had fired was "fake," as they did not hear any glass break. No one in the car called the police or stopped to see what happened to Christopher. At some point, defendant switched seats with Martinez and drove.

¶ 10 Bzdusek acknowledged giving a statement to an Assistant State's Attorney (ASA) and detective after the incident. He admitted stating that, when Martinez was talking to Christopher on the phone, Martinez yelled, "you ain't on nothing," meaning that Christopher "didn't have the guts to come out and fight." Bzdusek admitted stating that Martinez said, "Give me the gun," and that "[defendant] handed him the gun." He admitted stating that, after he heard the loud "thud" hit the back of the car, Martinez yelled, "what the fuck and slammed on his breaks [*sic*]" and then "reached into his lap, picked up the gun, leaned his head and arms out of the window and fired one time in the direction of the three guys."

¶ 11 On cross-examination, Bzdusek testified that Martinez yelled at defendant to "give me the gun" and it was chaotic in the car, with yelling and screaming.

¶ 12 Jose testified that Martinez was his brother. On December 18, 2009, Martinez and defendant picked up him and Bzdusek to go to a shopping mall. At some point, they stopped at a

gas station, where he saw Christopher walking across the street. Martinez pumped air into the tires and made a phone call to Christopher and, in a "normal" demeanor, told him, "I just saw you. You need to pay me my money." After the phone call, they drove to Christopher's house.

¶ 13 When they were near Christopher's house, Christopher, Sanchez, and Jonathan came outside and started running towards them. One of the brothers threw something at the car. Defendant said, "get the hell out of here." Martinez did not drive away because there was a car blocking them. Jose testified that Christopher was running with what appeared to be a gun, he heard "pop, pop, pop" come from that gun, and "something hit the car." Martinez said to defendant, "[h]and me the gun." Jose did not see defendant hand Martinez the gun because he ducked after he heard something hit their car. About ten seconds later, he heard Martinez shoot the gun outside the window. They drove off and Martinez told Jose that he thought the gun was fake. They drove to defendant's home and parked the car in the garage.

¶ 14 Jose acknowledged he gave a statement to an ASA after the incident. He admitted stating that, after the "loud thud" hit the car, defendant and Martinez were angry because the car was damaged. He admitted stating that Martinez said that the "gun was fake" "[b]ecause no bullets hit the car."

¶ 15 Berwyn police officer Richard Novotny testified that his investigation of the shooting led him to the residence of Rosa Krol, defendant's mother. Krol signed a search waiver form. Inside the garage at her residence, Novotny found a vehicle matching the description of the vehicle involved in the shooting. He identified photographs of the vehicle as it looked when he found it in the garage and testified that it was "completely wiped down and clean," but it should have had "salt and dirty snow-like features" on it.

¶ 16 Berwyn police detectives Gavin Zarbock and Robert Arnony testified that, after defendant received her *Miranda* warnings, they interviewed her. The interview was videotaped and the recording was played at trial.

¶ 17 In the videotaped recording, defendant told detectives that Christopher and Sanchez called and sent harassing text messages to her and Martinez for over a year. On the night of the shooting, she was in the car with Martinez, Bzdusek, and Jose. When they were driving on a street in Berwyn, she saw Christopher and Sanchez running behind them. She heard multiple pops and what sounded liked gunshots and then something hit her car. Christopher threw something at her car, which she thought could have been a rock.

¶ 18 Defendant denied handing the gun to Martinez and stated that he had it on him in his lap. Later in the interview, she acknowledged taking the gun from glove box and handing the gun to Martinez. She remembered the gun being heavy and thought Martinez was going to "scare them" with the gun. She also stated that the gun was not "directly" in her hands, she probably grabbed it with her fingertips at the same time Martinez was reaching for it, and she used a shoveling motion to show how she handed the gun to Martinez. She admitted driving the car into the garage and cleaning the outside of it with a sweater.

¶ 19 After the State rested, Martinez's counsel informed the court that Martinez was going to testify in his trial. The State noted that, if Martinez testified, defendant's counsel "still had a right under People vs. Ruiz if [Martinez] takes the stand, he has the right to cross examine him, the particular defendant as a witness. So I'm aware of that. He's aware of that." Defendant's counsel responded that "I guess, Judge, maybe just how this works out, if we rest now, our case is essentially over. So even if Martinez testifies, I don't know if your Honor is considering that in

our case because our case is already concluded." The State responded: "Which you could consider as well. If he rests now, then you wouldn't consider it against him."

¶ 20 Defendant's counsel then informed the court that defendant was not going to testify in her case but requested the court give him a few minutes "to make sure it's [defendant's] decision." After a recess, defense counsel informed the court that he spoke with defendant and it was defendant's "wish to not take the witness stand and for us to rest." The court asked defendant if she understood it was her right to give her defense and present witnesses on her behalf. Defendant indicated she understood and that it was her decision not to testify, present any witnesses, or engage in any other attorneys' arguments. Defendant acknowledged that it was her decision not to present a defense and that it was made voluntarily. Defendant rested and Martinez's case continued.

¶ 21 Martinez testified in his case that, when Christopher was running behind his car and after he had heard a "big thud," he told defendant "[o]pen the glove box and give me the gun." He testified that "And she opened the glove box. As she was reaching - - she froze. She reached for it. I reached with her. She probably slightly touched it. I grabbed and that's when I heard multiple pops again. I stuck my arm out of the window and shot one time."

¶ 22 Following argument, the court found defendant guilty of first degree murder based on a theory of accountability. The jury found Martinez guilty of first degree murder, including that he personally discharged a firearm that proximately caused death to another person during the commission of the offense. It found that, "[w]hile there is no evidence of any participation in the discussion of a plan to shoot and kill the victim, when defendant handed the gun to the co-defendant, defendant knew or should have known that her co-defendant intended to shoot at the victim and that such conduct created a strong possibility of death or great bodily harm." The

court also found that defendant facilitated Martinez's escape when she placed the gun back in the glove compartment, switched seats with him, cleaned off the car, and did not report the crime. The court denied defendant's motion to reconsider and sentenced her to 35 years in prison: 20 years for first-degree murder and 15 years for the firearm enhancement.

¶ 23 Defendant appealed, arguing that there was insufficient evidence to convict her of first degree murder under an accountability theory and the 15-year firearm sentencing enhancement was improper. We affirmed the conviction and sentence. *People v. Krol,* 2013 IL App (1st) 112514-U.

¶ 24 In March 2014, defendant, through private counsel, filed a postconviction petition, alleging ineffective assistance of trial counsel based on, as relevant here, counsel's failure to present Martinez's testimony in her defense. She asserted that Martinez's testimony would have changed the outcome of her case. The circuit court dismissed the petition as frivolous and patently without merit, finding, *inter alia*, that the record showed that "counsel consulted with the defendant and it was her trial decision not to present evidence."

¶ 25 We affirmed that judgment on appeal. *People v. Krol,* 2015 IL App (1st) 142182-U. We concluded that defendant forfeited her claim of ineffective assistance of trial counsel because the original appellate record was sufficient to support the argument and she did not raise her claim on direct appeal. *Id.* ¶ 26. We noted that "[t]he record makes clear that [the election not have to the court consider [Martinez's] testimony] was defendant's decision after consultation with trial counsel." *Id.* ¶ 27. We also determined that the 15-year firearm enhancement was valid. *Id.* ¶

¶ 26 In November 2015, defendant, through new private counsel, filed a motion for leave to file a successive postconviction petition. Defendant attached affidavits of Hugo Mandujano and

Martinez, which she claimed Martinez had proffered in support of his own *pro se* postconviction petition.

¶ 27 In Mandujano's affidavit, he attested that he was an eyewitness to the incident and that he saw four men come out of an apartment building and run toward a black car. Two of the men yelled, "get your ass out of the car." According to Mandujano, one of the men threw a brick at the car and yelled "go get them go go get them" and another came running toward the car with a gun in his hands, while two of them shouted, "shot [*sic*] it, shot [*sic*] it." Mandujano attested that he heard tires squeaking and a lot of "pops." It went quiet for a second and then he heard "more pops," followed by a louder one. Mandujano saw someone fall to the ground and two other guys "[d]ucked" and ran to the sidewalk. One man ran back toward the apartment building "with a gun on [*sic*] [h]is hands," yelled "[h]e shot my [b]rother," and ran inside the building.

¶ 28 In Martinez's affidavit, he attested, as relevant here, that he told his attorney "on numerous occasions" before trial that he had "first hand knowledge of Christopher's violent acts and that Christopher had prior convictions that demonstrated he had a propensity to exhibit violent behavior." Martinez attested that he wanted the court and jury to know about Christopher's prior acts and convictions because it "would of [*sic*] helped my defense," as it would have demonstrated that "Christopher was the aggressor" and Martinez acted in self-defense. Defendant alleged that the affidavits were newly discovered evidence and supported her actual innocence.

¶ 29 Defendant also alleged ineffective assistance of appellate counsel. She claimed counsel was ineffective for failing to argue ineffective assistance of trial counsel on direct appeal, based on trial counsel's failure to present Martinez's testimony in her defense. Defendant asserted that, because her initial postconviction counsel was the same counsel who represented her on direct

appeal, she could not have presented her claim of ineffective assistance of appellate counsel in her initial petition. Defendant claimed that Martinez's testimony "provided exculpatory testimony that she did not actually hand him the gun" and "would have absolved [defendant] of the only conduct upon which she could have been accountable – handing the gun to Martinez." Defendant lastly alleged that her mandatory 35-year sentence was unconstitutional because it violated the proportionate penalty clause of the Illinois constitution (Ill. Const. Art. I, § 11). The circuit court denied defendant's motion for leave to file a successive postconviction petition. This appeal followed.

¶ 30 Under the Post-Conviction Hearing Act, a defendant may attack a conviction by asserting that it resulted from a "substantial denial" of his constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2014); *People v. Tate*, 2012 IL 112214, ¶ 8. A postconviction action is not a direct appeal from a conviction but is a collateral attack on the judgment. *Id.* Therefore, "issues that could have been raised on direct appeal but were not are forfeited." *People v. Petrenko*, 237 Ill. 2d 490, 499 (2010). "[T]he Act contemplates the filing of only one post-conviction petition." *People v. Pitsonbarger*, 205 Ill. 2d 444, 456. "Successive postconviction petitions are disfavored under the Act." *People v. Jones*, 2017 IL App (1st) 123371, ¶ 41. Therefore, to file a successive petition, the Act requires a defendant to obtain leave of court. *People v. Sutherland*, 2013 IL App (1st) 113072, ¶ 16.

¶ 31 To file a successive petition, the trial court must determine that "the petition (1) states a colorable claim of actual innocence [citation omitted] or (2) establishes cause and prejudice [citation omitted]." *People v. Jackson*, 2016 IL App (1st) 143025, ¶ 19. This is a higher standard than the standard applied to an initial postconviction petition, where the trial court may summarily dismiss the petition at the first stage if it is "frivolous or patently without merit."

Id. ¶¶ 18-19. Whether under actual innocence or cause and prejudice, it is a defendant's burden to obtain leave of court before any further proceedings. *People v. Edwards*, 2012 IL 111711, ¶ 24. We review a trial court's ruling on a motion for leave to file a successive postconviction petition *de novo*. *People v. Warren*, 2016 IL App (1st) 090884-C, ¶¶ 74-75. Defendant asserts claims based on both actual innocence and cause and prejudice.

¶ 32 Defendant first contends that the circuit court erred when it denied her motion for leave to file a successive postconviction petition because she set forth a colorable claim of actual innocence based on the affidavits of Mandujano and Martinez. She argues that the affidavits qualify as newly discovered evidence and they are of "such conclusive character that it would probably change the result of trial." She asserts the Mandujano affidavit shows Martinez and defendant were acting in self-defense or at least under an unreasonable belief of self-defense that does not qualify as first degree murder. Defendant claims the Martinez affidavit shows Christopher had a violent and aggressive nature and supports Mandujano's affidavit that Christopher was the initial aggressor.

¶ 33 Leave of court to file a successive postconviction petition on the basis of actual innocence should be denied only where it is clear that the petition "cannot set forth a colorable claim of actual innocence." *Edwards*, 2012 IL 111711, ¶ 24. "[T]he hallmark of 'actual innocence' means 'total vindication,' or 'exoneration.' " *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008) (quoting *People v. Savory*, 309 Ill. App. 3d 408, 414-15). A claim based on actual innocence "is a claim that the defendant is free of *any* criminal involvement, either in the crime for which he was convicted or any lesser included offense." (Emphasis in original.) *People v. Evans*, 2017 IL App (1st) 143268, ¶ 30.

¶ 34 "[T]o establish a claim of actual innocence, a defendant must show that the evidence in support of his or her claim is: (1) newly discovered; (2) material and not merely cumulative: and (3) of such a conclusive character that it would probably change the result on retrial." *People v. Jones*, 2016 IL App (1st) 123371, ¶ 64. "Newly discovered" evidence means that it "was not available at defendant's original trial and that the defendant could not have discovered [it] sooner through diligence." *People v. Morgan*, 212 Ill. 2d 148, 154 (2004). It is a defendant's burden to show "no lack of due diligence on his or her part." *People v. Snow*, 2012 IL App (4th) 110415, ¶ 21. Evidence is considered cumulative if "it adds nothing to what was already before the jury." *People v. Jones*, 2017 IL App (1st) 123371, ¶ 43. At this stage, "we take as true all well-pleaded facts in defendant's successive petition." *Warren*, 2016 IL App (1st) 090884-C, ¶ 77.

¶ 35 We find that defendant has not met her burden to set forth a colorable claim of actual innocence based on the Mandujano and Martinez affidavits.

¶ 36 Even if we assume that the Mandujano affidavit is newly discovered evidence and that defendant could not have been discovered it earlier through due diligence, the affidavit is cumulative to the evidence established at trial. Specifically, Bzdusek and Jose testified that Christopher, Sanchez, and Jonathan ran out of the apartment building towards their car. Bzdusek heard a loud "thud" hit their car, which he assumed was a brick. Jose saw Christopher running with what appeared to be a gun, he heard "pop, pop, pop" come from that gun, and something hit the car. Bzdusek and Jose testified that, after the "pop, pop, pop," Martinez told defendant to pass her the gun and Martinez grabbed the gun and shot it at Christopher. The evidence technician recovered a BB gun near Christopher's body. This evidence at trial was consistent with Mandujano's affidavit and supports defendant's theory that Martinez acted in self-defense and Christopher and his brothers were the initial aggressors. Mandujano's affidavit therefore

does not add anything to what the court already heard. Thus, defendant has not met her burden of proving that Mandujano's affidavit was not cumulative.

¶ 37 Further, Mandujano's affidavit was not of such conclusive character that it would have probably changed the outcome on retrial. The court heard similar evidence supporting defendant's theory that Martinez acted in self-defense, or an unreasonable belief in self-defense, from Jose and Bzdusek. Given it found defendant guilty of first degree murder based on accountability, the court necessarily rejected the self-defense theory.

¶ 38 Likewise, Martinez's affidavit, offered to support Mandujano's affidavit and defendant's self-defense theory, did not conclusively exonerate defendant. Martinez's affidavit merely attested that he had knowledge of Christopher's prior acts of violence and that Christopher "had a propensity to exhibit violent behavior," thus demonstrating that Christopher was the initial aggressor and Martinez acted in self-defense. However, as previously discussed, the court heard evidence supporting that Martinez acted in self-defense and Christopher was the initial aggressor and necessarily rejected a self-defense theory when it found defendant guilty. Accordingly, defendant has failed to set forth a colorable claim of actual innocence based on the affidavits of Mandujano and Martinez.

¶ 39 Defendant next claims that the circuit court failed to consider her claims related to ineffective assistance of trial counsel and appellate counsel and that she established cause and prejudice for her failure to raise these claims in her initial petition.

¶ 40 Under the Act, leave of court to file a successive postconviction petition may be granted if the defendant "demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure." 725 ILCS 5/122-1(f) (West 2014). Cause is demonstrated if a defendant identifies "an objective factor that impeded his or

her ability to raise a specific claim during his or her initial post-conviction proceedings." *Id.* Prejudice is established "by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." *Id.* "These elements serve as a procedural prerequisite to obtaining review on the merits" and defendant must establish both cause and prejudice. *Sutherland*, 2013 IL App (1st) 113072, ¶ 16. "A defendant faces 'immense procedural default hurdles when bringing a successive post-conviction petition,' which 'are lowered in very limited circumstances' because successive petitions 'plague the finality of criminal litigation.' " *Id.* (quoting *People v. Tenner*, 206 Ill. 2d 381, 392 (2002).

¶ 41 Defendant first argues appellate counsel was ineffective for failing to raise on direct appeal ineffective assistance of trial counsel based on trial counsel's failure to present Martinez's testimony in defendant's case. She argues she established cause because her postconviction counsel was the same attorney who represented her on direct appeal and, therefore, could not have raised the issue in her initial petition, as it is a *per se* conflict of interest for attorneys to argue their own ineffectiveness. Defendant claims she established prejudice because Martinez's testimony that she did not hand him the gun would have resulted in her acquittal.

¶ 42 Defendant has not established that her underlying claim of ineffective assistance of trial counsel based on failure to present Martinez as a witness had an arguable basis. Therefore, her claim that appellate counsel was ineffective for failing to raise this claim on direct appeal fails, as she cannot establish prejudice under the cause and prejudice test. See *People v. Childress*, 191 Ill. 2d 168, 175 (2000).

¶ 43 Under *Strickland v. Washington*, 466 U.S. 668 (1984), to establish a claim for ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient and

(2) that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. "As with the successive postconviction petition test, defendant would have to satisfy both prongs of the *Strickland* test." *Sutherland*, 2013 IL App (1st) 113072, ¶ 20.

¶ 44 "To establish deficient performance, the defendant must overcome the strong presumption that counsel's action or inaction was the result of sound trial strategy." *People v. Perry*, 224 Ill. 2d 312, 341-42 (2007). To establish the prejudice prong under *Strickland*, a defendant must show that there was a " 'reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.' " *People v. Miller*, 393 Ill. App. 3d 629, 632-33 (2009) (quoting *People v. Paleologos*, 345 Ill.App.3d 700, 706 (2003)). Defendant cannot establish either prong with regard to appellate counsel's performance, as she cannot establish either prong for trial counsel's performance.

¶ 45 Defendant has not established that trial counsel was deficient for failing to present Martinez's testimony. As we found in our earlier decision, albeit in *dicta*, it is "clear that the decision not to present any witnesses, including Martinez, was made by defendant after consultation with her trial counsel, as exemplified by the on-record discussion among defendant, trial counsel, the State, and the trial court" and "the record makes clear that this was defendant's decision after consultation with trial counsel." *People v. Krol*, 2015 IL App (1st) 142182-U, ¶¶ 26-27. Accordingly, there was no basis for appellate counsel to argue that trial counsel was ineffective for failing to present Martinez as a witness, where the record shows defendant herself made that decision.

¶ 46 Even if we assume trial counsel's performance was deficient for failing to present Martinez's testimony in defendant's defense, defendant cannot establish prejudice under

Strickland, as she has not demonstrated that there was a reasonable probability that the result of the trial would have been different with Martinez's testimony.

¶ 47 Martinez testified that defendant opened the glove box, "reached for it" and "probably slightly touched [the gun]." He, however, did not provide testimony that would exculpate defendant, such as testimony that defendant never touched the gun or never handed it to him. Crucially, the evidence at trial established, contrary to Martinez's testimony, that defendant did more than "slightly" touch the gun. In her videotaped statement, defendant herself acknowledged she took the gun out of the glove compartment and handed it to Martinez. She also stated the gun was heavy, supporting the inference that she more than "slightly" touched it, enough to feel its weight. Further, in Bzdusek's statement to the ASA and detective after the shooting, he stated that defendant handed Martinez the gun. Specifically, he stated that Martinez said "Give me the gun" and "[defendant] handed him the gun." Given the evidence presented at trial, we cannot find that there was a reasonable probability that Martinez's testimony that defendant "probably slightly touched [the gun]" would have changed the result of trial.

¶ 48 We recognize that, in the videotaped statement, defendant also made statements similar to Martinez's testimony when she stated that the gun was not "directly" in her hands and she probably grabbed it with her fingertips at the same time Martinez reached for it. However, after the court heard all the evidence, it nevertheless made the factual finding that defendant "took the gun from the glove compartment and gave it to [Martinez]." We affirmed the court's judgment on direct appeal, stating: "First and foremost, she handed [Martinez] the gun he used to kill [Christopher]" and "[a] reasonable trier of fact could infer that, in giving [Martinez] a gun under such circumstances, defendant knew that she and [Martinez] were creating a strong probability of death or great bodily harm to Christopher or one of his brothers." *People v. Krol*, 2013 IL App

(1st) 112514-U, ¶ 30. Accordingly, even if the court heard Martinez's testimony in defendant's defense, it would not have changed the result of trial. There was therefore no basis for appellate counsel to argue ineffective assistance of trial counsel based on the failure to present Martinez as a witness, where the record shows defendant was not prejudiced by not presenting Martinez as witness.

¶ 49 To the extent defendant claims the trial court erred when it did not consider her ineffective assistance of trial counsel claim based on not presenting Martinez as a witness, her argument fails. We already found that defendant forfeited this ineffective assistance of trial counsel claim in our previous order. *People v. Krol*, 2015 IL App (1st) 142182-U, ¶ 26. "[A] ruling on an initial post-conviction petition has *res judicata* effect with respect to all claims that were raised or could have been raised in the initial petition." See *People v. Jones*, 191 Ill. 2d 194, 198 (2000).

¶ 50 Because defendant failed to establish her underlying claim of ineffective assistance of trial counsel based on failure to present Martinez as a witness, she did not establish prejudice under the cause and prejudice test for her claim that appellate counsel was ineffective for failing to argue this issue on direct appeal. The court therefore did not err in denying defendant leave to file her successive postconviction petition on this basis.

¶ 51 Defendant asserts that the circuit court erred when it failed to consider her claim that "trial counsel was ineffective for failing to present evidence of [Christopher's] propensity for violence," as demonstrated by Martinez's affidavit. Defendant argues in her reply brief that her counsel failed to investigate whether Martinez's counsel had knowledge about this claim. She also seems to argue ineffective assistance of Martinez's counsel, arguing that, had Christopher's "propensity for violence been admitted, it is more likely than not that Martinez would have

prevailed on a theory of self-defense" or second degree murder "based on an unreasonable belief in self-defense." She asserts she established prejudice because the evidence would have altered the outcome of trial.

¶ 52 Defendant has forfeited the claim that her trial counsel was ineffective for failing to present Christopher's propensity for violence because she did not raise this issue in her motion for leave to file a successive petition. See *People v. Jones*, 213 Ill. 2d 498, 508 (2004) (the "appellate court is not free ***, to excuse, in the context of postconviction proceedings, an appellate waiver caused by the failure of a defendant to include issues in his or her postconviction petition"). In defendant's motion, she argued that she could demonstrate cause under the cause and prejudice test for "*her* failure to raise the contents of Martinez's affidavit," not her trial counsel's failure. (Emphasis added.) She did argue: "Martinez's counsel was informed of [Christopher's] prior conduct and failed to investigate the allegations or present evidence of the same." However, her motion does not mention her trial counsel's performance in relation to Martinez's affidavit. Thus, because defendant did not raise ineffective assistance of trial counsel based on the failure to present evidence of Christopher's propensity for violence in her motion for leave to file successive petition, her claim is forfeited on appeal.

¶ 53 Moreover, even if her claim was preserved, it fails for the same reason as the claim underlying her claim of actual innocence. In finding defendant guilty, the court necessarily rejected a self-defense theory. Thus, evidence that Christopher had prior convictions "that demonstrated he had a propensity to exhibit violent behavior," as claimed in Martinez's affidavit, was cumulative and would not have changed the result at trial. Defendant has therefore not established prejudice, as she did not demonstrate that failure to present this evidence so infected the trial that the resulting conviction violated due process.

¶ 54 Defendant lastly contends that the circuit court erred in denying her petition where she claimed that her mandatory 35-year sentence for an offense committed when she was 19 years old is unconstitutional because it violates the proportionate penalties clause. Defendant argues she established cause for her failure to raise this claim in her initial petition because the relevant cases regarding juvenile sentencing and scientific studies showing that the brain does not finish developing until a person reaches her mid-20s had not been published at that time. She claims she demonstrated prejudice because she was sentenced to a substantial sentence that was imposed without considering her age, rehabilitative potential, or relative culpability.

¶ 55 In *Miller v. Alabama*, 567 U.S. 460, 479 (2012), the United States Supreme Court held that a "sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders" is unconstitutional. In *Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016), the United States Supreme Court held that the rule announced in *Miller* was retroactive. *Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016). Our supreme court has found that "sentencing a juvenile offender to a mandatory term of years that is the functional equivalent of life without the possibility of parole constitutes cruel and unusual punishment in violation of the eighth amendment." *People v. Reyes*, 2016 IL 119271, ¶ 10 (legislatively mandated 97-year sentence for juvenile defendant who was 16-years old at the time of offense was "*de facto* life-without-parole sentence" and therefore unconstitutional).

¶ 56 In *People v. House*, 2015 IL App (1st) 110580, ¶ 101, which defendant relies upon, this court concluded that the non-juvenile 19-year-old defendant's mandatory life sentence was unconstitutional. Noting the defendant was "barely a legal adult and still a teenager" when he committed the offense, we reasoned "the designation that after age 18 an individual is a mature adult appears to be somewhat arbitrary." *House*, 2015 IL App (1st) 110580, ¶ 101. We concluded

that recent research and articles discussing "the differences between young adults, like defendant, and a fully mature adult *** illustrate the need to expand juvenile sentencing provisions for young adult offenders." *Id.* ¶¶ 95-96. Subsequently, in *People v. Harris*, 2016 IL App (1st) 141744, ¶¶ 58, 69, we found the mandatory 76-year sentence for the defendant who turned 18 a few months before the offense was unconstitutional because it was a *de facto* life sentence. In *People v. Buffer*, 2017 IL App (1st) 142931, ¶¶ 62, 64, *pet. for leave to appeal granted*, No. 122327 (Nov. 22, 2017), we held that a 50-year sentence for the defendant who was 16 years old at the time of the offense was an unconstitutional mandatory *de facto* life sentence.

¶ 57 Here, as an initial matter, we will assume that defendant demonstrated cause for her failure to raise her sentencing challenge in her initial postconviction petition because, at the time she filed that petition, the cases on which she based her claim had not been issued. See *People v. Evans*, 2017 IL App (1st) 143562, ¶ 10.

¶ 58 However, we find that defendant has not established prejudice because she has not demonstrated that her sentence is unconstitutional. The court sentenced defendant to a total of 35 years in prison: 20 years for first degree murder, which has a sentencing range of 20 to 60 years (730 ILCS 5/5-4.5-20(a) (West 2010)), and 15 years for the firearm enhancement (730 ILCS 5/5-8-1(d)(i) (West 2010)).

¶ 59 We recognize that defendant was only 19 years old at the time of the offense. However, the trial court sentenced defendant to 35 years, not a mandatory life sentence such as that imposed on the 19-year-old defendant in *House*. Nor is defendant's 35-year sentence a *de facto* life sentence. Her sentence is not nearly as long at the 76-year and 50-year sentences that we found were *de facto* life sentences in *Harris* and *Buffer*. Defendant would complete her sentence in her 50's. Further, this court has found that a potential 45-year sentence for a defendant who

was 17 years old at the time of the offense was not a *de facto* life sentence (*People v. Evans*, 2017 IL App (1st) 143562, ¶¶ 15-18) and our supreme court has held that a 32-year sentence for a defendant who was 16 years old at the time of the offense was not a *de facto* life sentence (*Reyes*, 2016 IL 119271, ¶¶ 10, 12).

¶ 60 Moreover, the record shows that, when the court imposed defendant's mandatory minimum sentence, it expressly considered the mitigating factors. See *Reyes*, 2016 IL 119271, ¶ 9 ("*Miller* makes clear that a juvenile may not be sentenced to a mandatory, unsurvivable prison term without first considering in mitigation his youth, immaturity, and potential for rehabilitation."). The court reviewed the presentence investigation report (PSI), as shown by its comment that defendant was an "unusual defendant" based on the letter her sister read to the court and the PSI, which showed defendant's lack of criminal history and her age at the time of sentencing. At sentencing, the court expressly noted defendant's education and that she was taking care of her child. And, in imposing sentence, the court noted that the minimum 35-year sentence was appropriate "because the possibility of rehabilitation is so great." Thus, the court considered the requisite mitigating factors and defendant's potential for rehabilitation when imposing its 35-year sentence.

¶ 61 Accordingly, because defendant was not sentenced to mandatory life in prison and her 35-year sentence is not a *de facto* life sentence, defendant has not established prejudice for her failure to raise her sentencing challenge in her initial postconviction petition. We affirm the trial court's order denying defendant leave to file a successive postconviction petition.

¶ 62 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 63 Affirmed.