

255 Ill. App. 3d 644 (1994). The defendant was given proper notice and was granted an extension of time to file briefs, objections, or any other documents supporting his appeal. He has filed a response. We have considered OSAD's motion to withdraw, as well as the defendant's response thereto. We have examined the entire record on appeal and find no error or potential ground for appeal. For the following reasons, we now grant OSAD's motion to withdraw as counsel and affirm the judgment of the circuit court.

¶ 3

BACKGROUND

¶ 4

Judgment of Conviction and Direct Appeal

¶ 5 On April 6, 2000, a jury found the defendant guilty of felony murder (720 ILCS 5/9-1(a)(3) (West 1998)) predicated upon armed violence (720 ILCS 5/33A-2 (West 1998)). The jury found him not guilty of felony murder predicated upon robbery (720 ILCS 5/18-1 (West 1998)). Subsequently, the circuit court sentenced the defendant to imprisonment for 30 years.

¶ 6 On direct appeal, the defendant's sole argument was that armed violence based on unlawful possession of a controlled substance with intent to deliver is not a forcible felony, and therefore it could not serve as the predicate felony for felony murder, requiring *vacatur* of the defendant's conviction. This court concluded that under the facts of this particular case, armed violence based on unlawful possession of a controlled substance with intent to deliver was indeed a forcible felony within the meaning of the felony murder statute (720 ILCS 5/9-1(a)(3) (West 2000)) and therefore the defendant could properly be convicted of felony murder predicated on that felony. The judgment of conviction was affirmed. *People v. Greer*, 326 Ill. App. 3d 890 (2002).

¶ 7 *The First Postconviction Proceeding and Related Appeals*

¶ 8 On June 17, 2002, the defendant filed *pro se* a petition for postconviction relief. He claimed that: (1) trial counsel was ineffective for failing (i) "to object to the insufficient charging instrument," (ii) "to argue speedy trial issues," and (iii) to argue that the defendant was convicted "under a void statute"; (2) his "state constitutional rights" were violated "when he was sentenced to a disproportionate sentence"; (3) "[t]he insufficient indictment failed to charge the petitioner with [sic] accountability, which is an element of the offense of which [he] was convicted"; (4) "his sentence under felony murder predicated on the offense of armed robbery is a void judgment"; and (5) "[his] sentence under felony murder is unconstitutionally disproportionate to a sentence under involuntary manslaughter."

¶ 9 The circuit court appointed attorney Rand Hale to represent the defendant in postconviction proceedings. On October 16, 2003, the defendant filed by appointed counsel a "supplemental petition" for postconviction relief. In the supplemental petition, the defendant claimed that: (1) trial counsel provided ineffective assistance by failing (i) to argue that the defendant had been deprived of "the right to a speedy trial," (ii) "to cross-examine" the State's witnesses and "attack[] their credibility before the jury," and (iii) to move to suppress "evidence seized from [the defendant]" and "any statements" made by the defendant; and (2) he was deprived of "his state and federal constitutional rights" where he was convicted of first-degree murder predicated on armed violence and the armed-violence statute had been found unconstitutional. The State did not file a motion to dismiss the supplemental petition.

¶ 10 On December 30, 2003, the court held a hearing on the postconviction petition. No evidence was presented, but the defendant's counsel argued in favor of the supplemental petition and asked the court to vacate the defendant's conviction. At hearing's end, the court took the matter under advisement. However, a ruling on the petition was not forthcoming.

¶ 11 On March 17, 2005, the defendant filed *pro se* a 35-page "supplemental brief" wherein he argued that (1) the evidence was insufficient to support the guilty verdict, (2) his direct appeal was wrongly decided, and (3) he was deprived of his right to effective assistance by trial counsel and direct-appeal counsel when they failed to argue that (i) armed violence based on unlawful possession of a controlled substance with intent to deliver is not a forcible felony within the meaning of the felony murder statute, and therefore he could not properly be charged with felony murder predicated on that particular felony, and (ii) the jury should be, or should have been, instructed on self-defense, second-degree murder, and manslaughter.

¶ 12 On August 31, 2005, the defendant filed *pro se* a "Motion for Leave to File Amendment and Additional Constitutional Claims to the Post Conviction" wherein he sought to raise several additional postconviction claims. Those additional claims were as follows: (1) probable cause for the defendant's arrest was not determined until more than 48 hours after the arrest; (2) his statement to police was used against him in violation of his right not to be compelled to be a witness against himself; (3) he was penalized with a longer sentence by taking his case to trial, where he had refused the State's pretrial offer that he testify against Gregory Greer in exchange for a prison sentence of only five years;

(4) trial counsel was ineffective for failing (i) to suppress "illegally obtained" evidence, (ii) "to properly argue the felony murder charge," (iii) "to properly preserve the challenging of the indictment," (iv) "to challenge the alleged substance, and testimony of Ventimiglia," (v) "to object to all perjured testimony" by various prosecution witnesses, and (vi) "to challenge evidence" and instead stipulating to evidence; (5) direct-appeal counsel was ineffective for failing to raise all "viable" claims contained in the original petition and the amendments; (6) the defendant was "twice put in jeopardy" when the State charged him with two counts of felony murder "where there was only one felony or alleged felony"; (7) the verdicts acquitting him of felony murder predicated on robbery but convicting him of felony murder predicated on armed violence were inconsistent; (8) the State "suppressed" and "failed to disclose material exculpatory evidence" that "it had promised to drop the murder charge against the defendant if he testified falsely against his co-defendant"; (9) the State failed to prove guilt beyond a reasonable doubt; and (10) the charges against the defendant, which did not include a charge of unlawful possession of a controlled substance with intent to deliver, "exposed" the defendant to "the risk of double jeopardy, where a directed verdict was denied." The circuit court never ruled on this motion.

¶ 13 On November 28, 2006, the circuit court entered an order apologizing to the parties for the long delay in ruling on the postconviction petition. The court stated that the postconviction petition was "denied."

¶ 14 The defendant appealed from the denial order. The record on appeal did not include a transcript of the December 30, 2003, hearing on the postconviction petition, and therefore this court had no way of knowing what transpired at that hearing, or even that the

hearing was held. Unaware of the hearing on the petition, this court eventually determined that the circuit court dismissed the petition at the second stage of postconviction proceedings. Therefore, the issue on appeal became whether the defendant made a substantial showing of a constitutional violation, entitling him to an evidentiary hearing at the third stage of postconviction proceedings. This court ultimately concluded that "several of the allegations in the petition indicate a substantial showing of constitutional violations." Accordingly, this court reversed the judgment of the circuit court and remanded the cause for an evidentiary hearing. *People v. Greer*, No. 5-06-0676 (Sept. 30, 2008) (unpublished order pursuant to Supreme Court Rule 23).

¶ 15 On remand, the defendant filed by counsel a "second supplemental petition" for postconviction relief on March 5, 2009. In the second supplemental petition, the defendant claimed that: (1) trial counsel provided ineffective assistance by failing (i) to argue that the defendant had been deprived of "the right to a speedy trial," (ii) "to cross-examine" the State's witnesses and "attack[] their credibility before the jury," (iii) to move to suppress "evidence seized from [the defendant]" and "any statements" made by the defendant, (iv) to challenge the constitutionality of the armed-violence statute, and (v) to argue that armed violence based on unlawful possession of a controlled substance with intent to deliver is not a forcible felony within the meaning of the felony murder statute; (2) direct-appeal counsel provided ineffective assistance by "fail[ing] to allege and argue ineffective assistance of trial counsel"; (3) the trial evidence was insufficient to establish guilt beyond a reasonable doubt; and (4) the armed-violence statute had been declared unconstitutional, and therefore he could not properly be convicted of felony murder

predicated on armed violence.

¶ 16 On April 2, 2009, the defendant filed by counsel a memorandum in support of the second supplemental petition. The defendant argued as follows: The armed violence statutes (720 ILCS 5/33A-1 to 33A-3 (West 1998)) originated in Public Act 88-680 (Pub. Act 88-680 (eff. Jan. 1, 1995)); in *People v. Cervantes*, 189 Ill. 2d 80 (1999), the Illinois Supreme Court held that Public Act 88-680 did not comply with the single subject rule of the Illinois Constitution (Ill. Const. 1970, art. IV, § 8(d)), and therefore was void *ab initio*; because Public Act 88-680 was void *ab initio*, the armed violence statutes were void *ab initio*; the armed violence statutes were not properly enacted until Public Act 91-696 (Pub. Act 91-696 (eff. Apr. 13, 2000)) was enacted; because armed violence was not an offense on the date of the defendant's alleged misdeeds—January 2, 1999—the defendant could not properly be convicted of felony murder predicated upon armed violence; the judgment of conviction was void and needed to be vacated.

¶ 17 On June 9, 2009, the court held a hearing on the postconviction petition. The State moved to dismiss the petition, and the court denied the motion. No evidence was presented, but the defendant's attorney argued in favor of the petition and asked the court also to consider the arguments he presented at the hearing held on December 30, 2003, the contents of the memorandum of law filed on April 2, 2009, and the contents of the "supplemental brief" that the defendant filed *pro se* on March 17, 2005. The defendant, who was present, told the court that he wanted to "save and preserve every issue in my Rule Order 23." At the end of the hearing, the court announced that it would take the matter under advisement.

¶ 18 On June 22, 2009, the court entered an order denying the State's motion to dismiss but also denying the postconviction petition. The court found that the defendant had failed to make a substantial showing of a constitutional violation.

¶ 19 The defendant appealed from the denial of his second supplemental petition. He argued that the circuit court failed to comply with the Appellate Court's directive in No. 5-06-0676 that it should conduct a third-stage evidentiary hearing. He maintained that neither the hearing of December 30, 2003, nor the hearing of June 9, 2009, qualified as an evidentiary hearing because evidence was not presented at either one. The defendant also presented various arguments related to his statutory right to a speedy trial. This court rejected all of the defendant's arguments and affirmed the judgment of the circuit court. *People v. Greer*, No. 5-09-0375 (Mar. 3, 2011) (unpublished order pursuant to Supreme Court Rule 23). This court specifically found that both the December 30, 2003, and June 9, 2009, hearings were third-stage evidentiary hearings.

¶ 20 *The Motion for Leave to File a Successive Petition*

¶ 21 On January 18, 2012, the defendant filed in the circuit court a motion for leave to file a successive petition for postconviction relief. In his motion, the defendant acknowledged that he was obligated to show cause and prejudice before he could be granted leave to file a successive petition. In regard to cause, the defendant stated the following:

"The petitioner states that cause is shown by the Objective of Deficient Performance by prior Post-conviction counsel (Rand Hale) see People vs Pitsonbarger[,] 793 N.E.2d 609, 624 (deficiency of prior post conviction counsel may render the initial

proceedings a nullity.) Counsel did not raise or file proper Amended Petition to argue additional claims such as:"

At that point, the defendant enumerated nine claims, quoted in their entirety as follows:

"(1) 48 hours passed without a probable cause determination;

(2) His statement was used against him in violation of his right against self-incrimination;

(3) he was penalized with a longer sentence by taking the case to trial;

(4) his attorney was ineffective for failing to suppress evidence, 'properly argue the felony murder charge,' preserve the 'challenge of the indictment,' challenge detective Ventimiglia's testimony, object to perjured testimony, challenge evidence, instead of agreeing to stipulations;

(5) direct appeal counsel was ineffective for failing to raise all 'viable' claims contained in the original petition and the amendments;

(6) The verdicts acquitting him of felony murder/robbery and convicting him of felony murder/armed violence were inconsistent;

(7) The prosecutor suppressed favorable evidence and failed to disclose material, exculpatory evidence, specifically that he was originally offered a plea deal to testify against Gregory Greer and that his confession was illegally obtained;

(8) the evidence was insufficient to support the verdict;

(9) The charge exposed him to double jeopardy[.]"

(These nine enumerated claims were essentially identical to the claims presented in the

"Motion for Leave to File Amendment and Additional Constitutional Claims to the Post

Conviction" that the defendant filed *pro se* on August 31, 2005, in the midst of the first postconviction proceeding.) The defendant's motion was not accompanied by any affidavit.

¶ 22 As for prejudice, the defendant stated that "he was prejudiced when he presented a constitutional error that so infected his trial that his conviction violated due process." In the final paragraph of the motion, the defendant mentioned actual innocence:

"The petitioner Mr. Greer states that post-conviction counsel's unreasonable level of assistance of deficient performance provided the need of cause and that the valid claim of Actual Innocence provided the require [*sic*] showing of prejudice. Therefore, the petitioner Mr. Greer is legally and factually innocence [*sic*] of all counts and this court may grant leave to file successive post-conviction [*sic*] for relief by vacating the conviction and sentence." (Emphasis in original.)

¶ 23 On March 8, 2012, the circuit court entered an order denying the motion for leave to file a successive petition. The written order stated that the defendant had shown neither the requisite cause nor the requisite prejudice for the filing of a successive petition. The defendant filed a timely notice of appeal, thus perfecting the instant appeal.

¶ 24 ANALYSIS

¶ 25 This appeal is from an order denying leave to file a successive postconviction petition under section 122-1(f) of the Post-Conviction Hearing Act (725 ILCS 5/122-1(f) (West 2012)). Such an order is reviewed *de novo*. *People v. LaPointe*, 365 Ill. App. 3d 914, 923 (2006), *aff'd*, 227 Ill. 2d 39 (2007). This court may affirm the judgment on any basis supported by the record. *People v. Johnson*, 208 Ill. 2d 118, 128-29 (2003).

¶ 26 The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 to 122-7 (West 2012)) provides a means whereby criminal defendants may assert that their state or federal constitutional rights were substantially violated in the proceedings that resulted in their convictions or sentences. 725 ILCS 5/122-1(a)(1) (West 2012); *People v. Coleman*, 206 Ill. 2d 261, 277 (2002). The Act generally contemplates the filing of only one postconviction petition in any one case: "Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2012); *People v. Guerrero*, 2012 IL 112020, ¶ 15. However, section 122-1(f) of the Act explicitly provides that a defendant may file a successive petition if the circuit court grants leave to do so. 725 ILCS 5/122-1(f) (West 2012). "Leave of court may be granted only if a petitioner 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." *Id.* Both cause and prejudice must be established in order to obtain leave of court. *Guerrero*, 2012 IL 112020, ¶ 15.

¶ 27 Section 122-1(f) defines the terms "cause" and "prejudice" as follows:

"For purposes of this subsection (f): (1) a prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings; and (2) a prisoner shows prejudice 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." 725 ILCS 5/122-1(f) (West 2012).

As our supreme court has observed, section 122-1(f) is clearly a codification of the

cause-and-prejudice test elucidated in *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002). *People v. Tidwell*, 236 Ill. 2d 150, 156 (2010). In *Pitsonbarger*, the court stated that in the context of successive postconviction petitions, " 'cause' *** refers to any objective factor, external to the defense, which impeded the petitioner's ability to raise a specific claim in the initial post-conviction proceeding." *Pitsonbarger*, 205 Ill. 2d at 462. Unlike *Pitsonbarger*, section 122-1(f) does not include the phrase "external to the defense" in its definition of cause. However, Illinois courts continue to look for an "objective factor external to the defense" when deciding whether cause has been established. See *People v. Coleman*, 2013 IL 113307, ¶ 82 ("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.")

¶ 28 The cause-and-prejudice test is applied to individual postconviction claims, not to the successive petition as a whole. *Pitsonbarger*, 205 Ill. 2d at 462. The test is "more exacting" than the gist-of-a-claim standard applicable to initial judicial evaluations of postconviction petitions that already have been filed with the court. *People v. Conick*, 232 Ill. 2d 132, 142 (2008).

¶ 29 In a memorandum of law in support of its *Finley* motion to withdraw, OSAD discusses *seriatim* the nine enumerated claims in the defendant's successive petition, and explains in considerable detail that the defendant has shown neither cause nor prejudice in relation to any one of the nine. The defendant has filed with this court a written response to OSAD's motion, but his response is wholly unenlightening, as it is devoid of any substantive discussion of issues. OSAD's analysis is sound as to both cause and prejudice.

However, this court will decide this appeal solely on the basis of cause, or rather the defendant's failure to establish cause.

¶ 30 In an attempt to meet the cause prong of the cause-and-prejudice test, the defendant wrote that his attorney at the first postconviction proceeding failed to include in an amended petition the nine claims that the defendant sought to raise in his proposed successive petition. It is true that counsel at the first postconviction proceeding did not include those nine claims in an amended petition. However, the defendant overlooks that counsel was in no way obligated to include them. Counsel was obligated only to investigate and properly present the claims or contentions raised by the defendant during that first postconviction proceeding; counsel was not obligated to search the record for additional issues. *People v. Pendleton*, 223 Ill. 2d 458, 472, 476 (2006). Nothing in the record indicates that the defendant ever brought any of those nine claims to the attention of counsel during that first postconviction proceeding. In his motion for leave to file a successive petition, the defendant certainly did not allege that he ever mentioned to postconviction counsel any of those nine claims. All of the nine claims were based on facts known to the defendant at the time the judgment of conviction was entered, or at the time of the direct appeal. Nothing prevented the defendant from informing postconviction counsel about those nine claims. (Indeed, nothing prevented the defendant from including the nine claims in his original *pro se* petition filed in June 2002.)

¶ 31 As previously mentioned, the nine claims that the defendant sought to raise in a successive petition were essentially the same as the points he included in his *pro se* "Motion for Leave to File Amendment and Additional Constitutional Claims to the Post

Conviction", which he filed with the circuit court on August 31, 2005. Even if postconviction counsel could fairly be charged with knowledge of the defendant's *pro se* motion (and this court sees no way that he could be so charged), counsel could not effectively have acted on that knowledge. The *pro se* motion was filed 20 months after the December 30, 2003, evidentiary hearing on the postconviction petition. Postconviction proceedings had concluded; all that remained was for the circuit court to issue its ruling on the petition. It was too late for the defendant or counsel to introduce a new postconviction claim, let alone nine new claims. *Cf. People v. Oaks*, 2012 IL App (3d) 110381, ¶ 30 ("Allowing a defendant to bring a new postconviction claim at the third stage of the proceedings, thereby bypassing the first and/or second stages, challenges the integrity of the Act.").

¶ 32 Having concluded that the defendant failed to satisfy the cause prong of the cause-and-prejudice test, this court need not address the matter of prejudice. See *People v. Brown*, 225 Ill. 2d 188, 207 (2007) ("In light of our conclusion that defendant has failed to establish a legally cognizable cause for his failure to challenge his sentence in the earlier proceeding, however, it is not necessary for our court to reach [the State's] argument [that defendant failed the prejudice prong of the cause-and-prejudice test].").

¶ 33 Finally, the defendant made a passing reference to "actual innocence" in his motion for leave to file a successive petition. "[W]here a defendant sets forth a claim of actual innocence in a successive postconviction petition, the defendant is excused from showing cause and prejudice." *People v. Ortiz*, 235 Ill. 2d 319, 330 (2009). In its order denying leave to file a successive petition, the circuit court did not mention an actual-innocence

claim. However, this court can easily determine that the defendant clearly failed to state the gist of a constitutional claim of actual innocence. The defendant merely wrote the phrase "actual innocence." He did not develop the claim to the slightest extent and did not present one iota of evidence suggesting that he is actually innocent. See *Ortiz*, 235 Ill. 2d at 333 (actual-innocence claim must be supported by newly-discovered, material, noncumulative evidence of such conclusive character that it would probably change the result on retrial); *People v. Washington*, 171 Ill. 2d 475, 489 (1996) (postconviction claims of actual innocence should be resolved according to the usual postconviction procedures).

¶ 34 Given the defendant's failure to show cause, the circuit court had no choice under section 122-1(f) but to deny the motion for leave to file a successive petition. There is no nonfrivolous issue for appeal. Accordingly, OSAD is allowed to withdraw as counsel, and the judgment of the circuit court is affirmed.

¶ 35 Motion granted; judgment affirmed.