2017 IL App (1st) 122172-U
No. 1-12-2172

THIRD DIVISION
March 22, 2017

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 80 C 1916
	)	
DERRICK KING,	)	
	)	The Honorable
Defendant-Appellant.	)	Stanley J. Sacks,
	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Lavin and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held:* The dismissal of the defendant's second amended postconviction petition was affirmed because (1) the defendant failed to demonstrate at the evidentiary hearing that the new evidence of a pattern and practice of police brutality would have affected the outcome of the defendant's motion to suppress hearing; and (2) the trial court did not err in concluding that the commutation of the defendant's death sentence to life imprisonment rendered moot his claim that he received ineffective assistance of trial counsel when trial counsel failed to present additional mitigating evidence at sentencing.

¶ 2 The defendant, Derrick King, appeals from the dismissal of two of the claims in his second amended postconviction petition. The first claim was that the defendant was entitled to a

new trial based on new evidence of a pattern and practice of abuse at Area Two of the Chicago Police Department. The defendant argues that this pattern and practice of abuse supports his claim that he was physically coerced into confessing to the murder and armed robbery of which he was convicted. The trial court dismissed this claim following an evidentiary hearing. The second claim was that the defendant's trial counsel was ineffective for failing to investigate and present substantial mitigating evidence at the defendant's sentencing. The trial court dismissed this claim without a hearing, concluding that then-Governor George Ryan's commutation of the defendant's death sentence to life in prison without the possibility of parole rendered the issue moot. On appeal, the defendant argues that the trial court erred in both dismissals. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 This case spans over 30 years and, therefore, has an extensive procedural history. Our supreme court provided a concise background of this case on the defendant's direct appeal. Seeing no need to reinvent the wheel, we adopt the relevant portions of that recitation, expanding only where necessary for a complete understanding of the issues before us.

¶ 5 "The offenses occurred in the evening of December 19, 1979, at a record and candy store named 'Pleasures Unlimited,' located at 1943 West 29th Street in Chicago. The victim, Dwayne Miller, was employed at the store as a salesclerk; he was shot once in the back of the head, and he died from the wound. There were two cash registers in the store, and the drawers of both were found open and empty of paper money. Various items, including phonograph records and change, were scattered on the floor. The victim was found behind a counter in the store.

¶ 6 On February 23, 1980, the defendant was arrested in connection with the murder and armed robbery. Under questioning, he made several inculpatory statements, culminating in a signed confession to the crimes. Following that, the defendant was charged by information with murder, armed violence, and armed robbery; before trial, the State nol-prossed the armed-violence charge." *People v. King*, 109 Ill. 2d 514, 521 (1986).

¶ 7 A. Motion to Suppress

¶ 8 After being charged, the defendant filed a motion to suppress his statements to police. In that motion, the defendant argued that his statements to police were the result of physical coercion and, thus, were involuntary. A hearing was held on the defendant's motion.

¶ 9 "At the suppression hearing, the defendant presented testimony regarding his condition before and after his arrest. Michael Berry, a friend, testified that the defendant spent the day of his arrest, February 23, 1980, drinking at another person's house. In the evening, Berry, the defendant, and another left, taking a bus. While walking, the defendant was arrested by a police officer who pulled up in a car. According to Berry, the defendant was intoxicated at that time.

¶ 10 Darlene Harland, a cousin of the defendant, visited the defendant in custody on February 24, 1980, the day after he was arrested. She testified that the defendant's eyes were very red, his face was swollen, and an arm was scratched. Harland had seen the defendant only two days before, and at that time he appeared normal. The defendant told her that he had been beaten following his arrest. Harland believed that the defendant looked worse when she saw him than he did in a photograph of a lineup that the defendant had appeared in.

¶ 11 The defendant testified that he spent the day of his arrest drinking at a friend's house. That evening, while walking with two others, he was arrested. A police car pulled up, and the officer ordered the defendant to get in the car. The defendant testified that police officers questioned him about a murder case and hit him on the knees with a baseball bat 20 to 40 times; they also struck him in the chest with the bat and hit him in the head once or twice with a book. According to the defendant, the police told him to cooperate and advised him not to say anything about his mistreatment to the assistant State's Attorney who took his confession. The defendant testified that he confessed to the crimes because of the beatings. He acknowledged that he was informed of his *Miranda* rights on several occasions.

¶ 12 Also testifying in the defendant's behalf was Leon White, manager of the Church's Chicken restaurant robbed by the defendant [in a separate incident]. White viewed the defendant in a lineup on February 24, 1980, at about 6 p.m. White said that at that time the defendant looked as though he had been injured: his face was swollen and an eye was bruised. White was shown a photograph taken after the lineup, and he noted that in it the defendant's face did not appear swollen, and he could not determine from it whether an eye was bruised.

¶ 13 The State presented the testimony of a number of police officers who saw the defendant during the period of his arrest and interrogation. According to this evidence, the defendant first was taken to the Sixth District police station and then later was transported to Area Two headquarters, where he was questioned about the murder and robbery at Pleasures Unlimited and also about the robbery at the Church's Chicken restaurant. The various teams of police officers who questioned the defendant said that

> they informed him of his *Miranda* rights, and they denied threatening or beating him. The defendant presented in rebuttal Donald Summage, who had been questioned by police in connection with the crimes here. Summage testified that police officers said that they had beaten the defendant and [Michael] Coleman [a co-defendant] and threatened him with the same treatment. This was disputed by an officer who arrested Summage." *Id.* at 523-25.

¶ 14 The defendant, in his statement of facts in his brief in the present appeal, refers to the testimony of Coleman from the motion to suppress hearing. A review of the record, however, reveals that Coleman's testimony was presented in support of Coleman's own motion to suppress, which was heard jointly with the defendant's. Nothing in the record indicates any effort on the part of the defendant to independently present Coleman's testimony or to adopt Coleman's testimony in support of the his motion to suppress. Accordingly, we do not recount it here.

¶ 15 After the presentation of evidence at the hearing on the defendant's motion to suppress, the trial court denied the defendant's motion, finding that the defendant had not been physically coerced and that the defendant's confession was voluntary.

¶ 16 B. Trial

¶ 17 The matter then proceeded to a jury trial, where the defendant's statements to police served as the primary evidence of his guilt. Police recovered from the crime scene only one fingerprint that was suitable for comparison, and that fingerprint was found to have belonged to the victim, Miller. Ballistics testing revealed that the bullet that killed Miller was fired from the same gun used in the Church's Chicken robbery a few days later.

¶ 18 Detective Robert Dwyer testified that on February 23, 1980, after the defendant was interviewed by other officers regarding the robbery at Church's Chicken, he interviewed the defendant about Miller's murder. Regarding that interview, he testified as follows:

> "Dwyer told the defendant that bullets fired at the two businesses had been shown to have come from the same gun. Initially, the defendant said that he waited outside Pleasures Unlimited and that another person, Summage, had shot the victim. The defendant also said that a third person, Coleman, was involved too and that Summage and Coleman would try to implicate him, that Summage would say that the defendant had shot the victim. The defendant then was asked whether he had in fact fired the fatal shot, and the defendant admitted that he had. He said that it was an accident, however. He explained that he was walking the victim toward the back of the store, where there was a second cash register, when the victim jerked away and the gun went off.

¶ 19 After the defendant gave that statement, he accompanied police officers to point out to them Coleman's residence. Later that night, Coleman surrendered a gun to police. The defendant identified it as the murder weapon and then agreed to make a formal statement; this final interview began about 2:40 a.m. on February 24." *Id.* at 522.

¶ 20 Assistant State's Attorney Margaret Stanton testified that in the early morning hours of February 24, 1980, she spoke with the defendant at Area Two headquarters. During her initial conversation with the defendant, while it was just the two of them in the room, she asked the defendant whether he had been treated okay by the police, to which he responded that he had. She also advised him of his rights before continuing the conversation. The defendant then proceeded to give Stanton a statement admitting his involvement in the Pleasures Unlimited and Church's Chicken crimes. At 2:40 a.m., Stanton had a second conversation with the defendant in

which the defendant again admitted shooting Miller at Pleasures Unlimited. This time, however, the defendant's statement was transcribed by a court reporter. Stanton read the defendant's written confession into the record.

¶ 21 "In the written confession, the defendant explained that he and two other persons, Donald Ray Summage and Michael Coleman, were outside the Pleasures Unlimited store in the evening of December 19, 1979. The defendant and Summage entered the store, intending to obtain money and drugs, which they believed were sold there by the owner, Demetrius Shaw. Inside the store, the defendant asked for Shaw. The youth behind the counter said that he was not in and did not know when he would return. The defendant then told the youth to give him the money in the cash register, and the youth complied, handing over $7. At that point the defendant was holding the youth, trying to move him toward another cash register. The youth jumped, and the defendant shot him once in the back of the head. While giving the statement, the defendant identified a gun, a .38-caliber revolver, as the weapon he had used in the murder and robbery. The defendant also confessed to the armed robbery at the Church's Chicken restaurant on December 22, 1979. On that day, the defendant and Summage entered the restaurant, located at 79th and Damen, across the street from the Pleasures Unlimited store, and Summage raised the gun and announced the holdup. The defendant took about $400. As they left, Summage fired a shot into the woodwork or paneling there. After the statement was typed, the defendant had Officer Dwyer add the sentence, 'I did not mean to kill the boy.' " *Id.* at 522-23.

¶ 22 Summage testified that on February 28, 1980, he was picked up and questioned by Chicago police regarding Miller's murder. The officers accused him of being involved in the

shooting. Summage testified that when he denied the accusation, the officers told him that if he did not tell them what happened, he would get the same treatment that the officers gave the defendant and Coleman. When Summage again denied involvement in the shooting, the officers showed him a picture of Coleman, which depicted Coleman as having a deep cut over his eye, and again reiterated that they would give Summage the same treatment as they gave Coleman.

¶ 23 Harland testified again that she visited the defendant at the Gresham police station on February 24, 1980. During that visit, Harland observed that the defendant had little spots of blood on his face, his face was swollen, his eyes were very puffy, and he had scratches and bruises on his arms. She characterized the defendant's appearance as "terrible."

¶ 24 Timothy Cox testified as follows. When he testified to the grand jury in the Pleasures Unlimited matter, Cox identified the defendant as one of Miller's killers, but that testimony to the grand jury was false. Cox testified that he lied to the grand jury because police officers had repeatedly gone to his house and job and told him that they would "make it bad" for him if he did not cooperate. He further testified that he was admitting that he lied to the grand jury because he wanted to clear his conscience.

¶ 25 Officer Victor Tosello of the Chicago Police Department testified that on February 28, 1980, he and Investigator Pete Dignan transported Summage from the Sixth District to the Area Two headquarters and placed him in an interview room. Dignan told Summage that the defendant and Coleman had implicated him in the murder of Miller. Summage denied any involvement in the murder and asked for a lawyer, after which the officers terminated the interview. Tosello denied that either he or Dignan had threatened, beaten, or shown any photographs to Summage. He also denied that either officer had told Summage that police officers had beaten the defendant and Coleman.

¶ 26 Assistant State's Attorney Jacqueline Cox (no relation to Timothy Cox) testified that she was present for a conversation between Timothy Cox and Assistant State's Attorney Cahill in which Cox told Cahill that the defendant had admitted to Cox his involvement in the Church's Chicken robbery and his role as the shooter in Miller's murder.

¶ 27 After deliberations, the jury found the defendant guilty of murder and armed robbery.

¶ 28 C. Sentencing & Direct Appeal

¶ 29 At his sentencing hearing, the only evidence presented in mitigation was the testimony of the defendant's aunt, Geneva Jackson, and his mother, Jaunita Rhymes. Both testified that the defendant's father was not present during his childhood, his mother was an alcoholic and drug addict, and he moved around a lot growing up, living with various family members. After arguments by the parties, the trial court sentenced the defendant to death.

¶ 30 The defendant appealed, raising a number of issues, including the denial of his motion to suppress. The Illinois Supreme Court affirmed the defendant's conviction and sentence. With respect the defendant's contentions regarding the denial of his motion to suppress, the court held that the trial court did not err in denying the motion. *King*, 109 Ill. 2d 514.

¶ 31 D. Postconviction Proceedings

¶ 32 The defendant filed a postconviction petition in 1987, which was then amended by appointed counsel in 1994. In the amended petition, the defendant argued, among other things, that there existed new evidence demonstrating a systematic pattern of brutality and abuse by police. The defendant argued that the new evidence would impeach the testifying officers' denials of having abused the defendant and would support the defendant's claim that his confession was not voluntary. The defendant also argued that his trial counsel was ineffective for failing to present additional mitigating evidence at sentencing. The trial court dismissed the

defendant's amended petition, but the Illinois Supreme Court reversed that ruling, concluding that the defendant was entitled to an evidentiary hearing on his claims of coercion and ineffective assistance in presenting mitigating evidence at sentencing. *People v. King*, 192 Ill. 2d 189 (2000).

¶ 33 In 2003, prior to an evidentiary hearing being held on the defendant's amended postconviction claims, then-Governor George Ryan commuted the defendant's sentence to life imprisonment.

¶ 34 The defendant filed a second amended postconviction petition in 2004. In that second amended petition, the defendant again raised, among other things, his claims that new evidence of a pattern and practice of abuse supported his contention that he was physically coerced into confessing and that trial counsel was ineffective for failing to present additional mitigating evidence at sentencing. Although the defendant's second amended postconviction petition referred to a large number of exhibits, none of the exhibits are included as a part of his petition in the present record on appeal.

¶ 35 In 2010, without an evidentiary hearing, the trial court granted the State's motion to dismiss the defendant's claim that trial counsel was ineffective for failing to present additional mitigating evidence at sentencing. The trial court found that the commutation of the defendant's sentence by the governor barred judicial review of the issue and rendered the defendant's claim moot.

¶ 36 With respect to his claims of physical coercion, in his written second amended petition, the defendant alleged that on the night of February 23, 1980, he was arrested and taken to the police station at 85th Street and Grand Avenue, where he waited until Dwyer transported him to

Area Two headquarters. Once there, the defendant was questioned by Detectives Gerald Corless and George Basile about the Church's Chicken robbery.

¶ 37 After Corless and Basile finished their questioning, Dwyer moved the defendant to a second interrogation room, where Dwyer handcuffed the defendant's arms to the steel chair in which the defendant was seated. Attached to the chair was a steel desk that sat across the defendant's legs. The defendant was barely able to move his legs and had little freedom of movement. While the defendant was handcuffed to that chair, Dwyer told the defendant that he was guilty and should confess. Sergeant John Burge then entered the room and joined Dwyer in telling the defendant that things would be easier for him if he would confess. The defendant continued to deny any involvement in the Church's Chicken robbery and the Pleasures Unlimited murder. The defendant also asked for an attorney, but Dwyer persisted in interrogating him. Dwyer would come into the room every thirty to forty minutes and would interrogate the defendant for five to seven minutes before leaving again.

¶ 38 At some point that night, Dwyer and Basile took the defendant out to look for Coleman. When they could not locate Coleman, the officers became upset and returned the defendant to Area Two. The defendant was returned to the interrogation room and again handcuffed to the steel chair/desk combo. The defendant again asked for an attorney, in response to which Dwyer took out a blackjack—a black, bat-like object approximately one inch thick and six to seven inches long—and pounded the side and top of the chair/desk in which the defendant was seated. Dwyer's strikes to the chair's legs and the desktop were just inches from the defendant's body, and the defendant did not know whether Dwyer was going to hit him. Over the course of the evening, Dwyer struck the defendant's chair forty to fifty times.

¶ 39 The defendant also alleged that Dwyer hit the defendant on the side of his head with the palm of his hand several times, pushed the defendant in the chest with the blackjack several times, pulled the defendant's legs out from under him while sitting in the chair, and struck the defendant on the left side of his face with a spiral-bound police book. The defendant tried to bite Dwyer, to which Dwyer responded, "Now I have you. I have broken you. This will not take much longer." When the defendant tried calling for help, Dwyer told him that the other officers and his boss knew what he was doing to the defendant and did not care. Dwyer told the defendant that he was not going to stop until he got what he wanted from the defendant.

¶ 40 After telling the defendant to cooperate, Dwyer brought Stanton into the room to take the defendant's statement. Once Dwyer left the room, the defendant refused to provide Stanton with a statement, and she left. When Dwyer returned to the room, he got the defendant out of his chair, but when the defendant stood up, Dwyer twice swung the blackjack at his knees, stopping just short of hitting the defendant. The fear nearly caused the defendant to pass out, and he sat back down. After four and a half hours of interrogation, the defendant gave his statement to Stanton.

¶ 41 The evidentiary hearing on the defendant's coercion claim took place over the course of many days and included the testimony of numerous witnesses. Robert Billingsley testified that in June 1984, he was abused by Dwyer, Burge, and other officers during their questioning of him about a shooting. During that abuse, the officers hit, kicked, and beat him with phone books in his head, face, body, and arms. The officers also stuffed newspaper down his throat so that he could not breathe. In addition, the officers drove him around his neighborhood in his injured state, so that others in his neighborhood could see him. Eventually, the person responsible for

the shooting came forward, and the officers released Billingsley. Dwyer later offered Billingsley money to keep quiet about the abuse.

¶ 42 Norris Harris testified that in December 1979 or January 1980, he was interrogated by two officers at Area Two about some unknown crime. During that interrogation, one of the officers put Norris's arm behind his back and hit him in the neck, while the other officer punched him in the throat and stuffed paper into his throat. While this was going on, three other officers looked into the room and one of them brought in a box that looked like a radio. He was able to later identify the officer who punched him in the throat and stuffed paper in his throat as Burge.

¶ 43 Clyde Rodgers testified that in June 1979, while incarcerated at Pontiac Correctional Center on a probation violation, he was questioned by two officers regarding a murder. The officers told him that if he did not give him the information they wanted, he would not get out of prison. When he was later released from prison, he was met by two officers, who took him to the State's Attorney's office and told him that if he did not cooperate, they would convict him of murder and see that he got the death penalty. The officers gave him a typed statement, which Rodgers signed even though it was not true, because he wanted to get out of prison. He was ultimately charged with and convicted of that murder.

¶ 44 Gregory Banks testified that in October 1983, he was arrested and taken to Area Two for interrogation. While his hands were handcuffed behind his back, Officer John Byrne stuck a gun in Banks' mouth and hit him in the chest with a 12-inch flashlight. When Banks fell out of his chair, Officer Grunhard kicked him in his side, inside his legs, and in his right ankle. Dignan then put a plastic bag over his head for one and a half to two minutes, making it difficult for Banks to breathe. The officers then left the room for five to ten minutes. When they returned, Banks continued to deny involvement in the alleged crime, and Dignan again placed the plastic

bag over Banks' head for another one and a half to two minutes. When Dignan removed the bag, Banks told them that he had done what they were accusing him of, just to make them stop. The officers handcuffed him to the wall of a room and left him there for 24 hours without any food or water. During that time, Dwyer asked Banks if he was ready to confess and threatened a repeat of the same abuse if he did not. Banks then gave a confession. During his testimony, Banks acknowledged that his statement to the Office of Professional Standards and his 2005 statement to the special prosecutor did not mention Dwyer's involvement in his abuse.

¶ 45 Larry Strickland testified that in November 1985, he was chased by police and shot in a finger. After he was pulled from his hiding place under a car by Dwyer, Dwyer stepped on his injured hand. Dwyer then placed Strickland on a nearby car and another officer hit Strickland in the back of his head with a gun. Strickland was taken to a police station and placed in a room with benches. Dwyer and two to three other officers entered the room, kicked Strickland off the bench, and began kicking and stomping on him. After a transfer to another police station and despite repeated requests for medical treatment, Dwyer and another officer interrogated Strickland and told him that he would get medical treatment if he answered their questions. An assistant state's attorney also told Strickland that he would not see a doctor until he signed a statement. Although Strickland never signed a statement, he was eventually taken to the hospital for treatment.

¶ 46 Stanley Howard testified that in November 1984, after being chased by officers, he was caught and taken to Area 2 for questioning about a robbery. He was not abused during that questioning and was even taken to the hospital for treatment of a hip he banged while going over a fence during the chase. After the hospital, he was returned to Area Two, took part in lineups, and then was placed in lockup. Later, Officers Lotito and Boffo took him to a room on the

second floor to be questioned by Byrne about a murder. During that questioning, Howard was slapped, kicked, and punched by Lotito and Boffo when he denied involvement in the murder. Lotito also placed a typewriter cover over his head to suffocate him after Lotito's attempt to do the same with a plastic bag was unsuccessful. Howard passed out and awoke to Lotito slapping him. The officers continued to beat him, and when they approached him again with the typewriter cover, Howard began to repeat what they wanted him to say. Byrne was present in the room during this time.

¶ 47 The officers then took him to the crime scene where Dwyer was. During that time, the officers gave him information on what he should say. When they arrived at the crime scene, Byrne removed Howard's handcuffs and told him to run, but drew his gun as if to shoot Howard if he did run. Howard was then returned to Area Two where Dwyer and Lotito continued to feed him information on what to say until the assistant state's attorney arrived to take his statement.

¶ 48 Finally, the defendant testified. After the defendant's arrest on February 23, 1980, he was taken to the Gresham police station, where Dwyer and another officer picked him up and transported him to Area Two. The officers brought the defendant to a second-floor interrogation room where there were four to five officers waiting for him. One of the officers asked if they could talk to him about Church's Chicken. When the defendant answered no, the officer told him he could leave, led him out of the interrogation room, and pointed to a second interrogation room. Dwyer and Burge stepped out of that second room and had him sit down in that room. They began to question him about Miller's murder. No threats or force were used at that point.

¶ 49 The officers then took the defendant to the area of Coleman's residence and asked him to point out where Coleman lived. The defendant refused, and Basile and Dwyer returned him to Area Two.

¶ 50 Upon their return, Dwyer took the defendant to an interrogation room and handcuffed him to the wall while he was seated at a metal chair/desk combo. Every 20 to 25 minutes, Dwyer would come into the room and smack the legs of the chair 4 to 5 times with a black rubber police stick. The defendant repeatedly asked Dwyer to leave and told him that he did not want to talk. Dwyer told the defendant that the defendant would cooperate before it was all over. This hitting of the chair legs occurred 8 to 9 times over the course of the evening. Although Dwyer never hit the defendant's legs, the defendant testified that he considered his body to be a part of the chair in which he was sitting. During this time, Dwyer also poked the defendant in the chest with the black rubber police stick and "tried to slap [the defendant] upside [the defendant's] head" with the palm of his hand.

¶ 51 When the assistant state's attorney arrived, the defendant told her that he did not want to talk, and she left the room. Dwyer returned and asked the defendant if he would give a statement. The defendant said he would not and Dwyer asked if the defendant had to use the restroom and stretch his legs. Dwyer unlocked the defendant's handcuffs and when the defendant stood up, Dwyer swung the black police stick at the back and front of the defendant's knees, stopping just short of hitting the defendant. The defendant's eyes rolled into his head and Dwyer sat him down. The defendant then started foaming at the mouth and Dwyer pushed the defendant's head back for 20 to 25 seconds. The defendant tried to bite Dwyer, in response to which Dwyer pushed on the defendant's left eye and told him to calm down.

¶ 52 Eventually, the defendant gave a statement to the assistant state's attorney because he felt that if he did not, he would still be in the interrogation room with Dwyer.

¶ 53 The defendant testified that he and Dwyer were the only ones in the room when the coercion was taking place. He also stated that his previous testimony regarding the number of officers in the room and being struck in the kneecaps with a baseball bat was incorrect.

¶ 54 After hearing arguments by the parties, the trial court dismissed the defendant's petition. The trial court stated that it found the defendant's testimony incredible, noting that the defendant's account of the claimed abuse had changed over time. The trial court also found it difficult to believe that after being beaten by police, the defendant would give the "self-serving" statement that he shot Miller accidentally. According to the trial court, the defendant's changing stories made it impossible to determine the relevance of the other men's claims of abuse to the defendant's case. In addition, the trial court found that the evidence of Dwyer's abuse of other individuals was not close enough in time to be relevant.

¶ 55 This timely appeal followed.

¶ 56 II. ANALYSIS

¶ 57 The defendant argues on appeal that the trial court erred in dismissing his claims because (1) the new evidence presented at the evidentiary hearing demonstrated that Dwyer engaged in a pattern of abuse and said evidence would have likely changed the outcome of the suppression hearing, and (2) his claim of ineffective assistance of trial counsel for failing to present additional mitigating evidence at trial was not rendered moot by the commutation of his death sentence. We address each of these contentions in turn, but find neither to warrant reversal.

¶ 58 A. New Evidence of Pattern of Abuse

¶ 59 The defendant first argues that the trial court erred in dismissing his claim that new evidence supported his contention that he was physically coerced into confessing, because it ignored the vast majority of evidence establishing Dwyer's pattern of abuse, which would likely

have changed the outcome of the defendant's motion to suppress. After reviewing the record, we conclude that the trial court's decision was not against the manifest weight of the evidence.

¶ 60 The Postconviction Act allows imprisoned defendants to collaterally attack their convictions based on alleged violations of their constitutional rights in the proceeding that resulted in their convictions. 725 ILCS 5/122-1(a) (2004). Postconviction proceedings may consist of up to three stages. Should the defendant advance to the third and final stage, an evidentiary hearing is held where the defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Whirl*, 2015 IL App (1st) 111483, ¶ 74. At that evidentiary hearing, the trial court makes fact-finding and credibility determinations, determinations that we may not disturb unless they are against the manifest weight of the evidence. *Id.* at ¶ 76. Manifest error occurs when the error is plain or indisputable or where the opposite conclusion is clearly evident. *Id.*

¶ 61 Where the defendant claims in a postconviction petition that the outcome of a motion to suppress would have been different had newly discovered evidence been presented, the question to be answered is not "whether the confession itself was voluntary but whether the outcome of the suppression hearing likely would have differed if the officer who denied harming the defendant had been subject to impeachment based on evidence revealing a pattern of abusive tactics employed by that officer in the interrogation of other suspects." *Id.* at ¶ 80.

¶ 62 In determining whether new evidence of a pattern of abuse is admissible, material and, thus, may have altered the outcome of the motion to suppress, factors to be considered include the consistency of the defendant's claim of abuse, the similarity between the defendant's claimed abuse and the alleged abuse of others, whether the same officers were involved in the defendant's claimed abuse and the alleged abuse of others, and the closeness in time between the

defendant's claimed abuse and the alleged abuse of others. *People v. Patterson*, 192 Ill. 2d 93, 115, 145 (2000). In addition, although the absence of physical injury does not, by itself, preclude the admissibility of prior acts of brutality by officers, it is nevertheless a relevant consideration in determining the admissibility of such evidence. *Id.* at 116.

¶ 63 Before addressing whether the evidence presented by the defendant would have likely altered the outcome of the motion to suppress, we must first address what evidence it is that we will consider in making that determination. According to our review of the second amended postconviction petition filed by the defendant, there were, at the time of filing, 116 distinct exhibits submitted in support. The record on appeal, however, does not contain a single one of them attached to the second amended postconviction petition. Because these exhibits are not in the record on appeal as a part of the second amended postconviction petition, we cannot consider them in determining whether the trial court's determination was against the manifest weight of the evidence. See *People v. Heaton*, 266 Ill. App. 3d 469, 476 (1994) ("[E]vidence which is not part of the record on appeal is not to be considered by a reviewing court…").

¶ 64 The defendant's attempts to rely on said exhibits on appeal by citing to summaries of the exhibits in his own second amended postconviction petition[1] or by citing to purported copies of those exhibits attached to other pleadings do not save him from the well-established rule that "[a]ny doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984). After all, we cannot verify that the summaries contained in the second amended postconviction petition are accurate representations of the exhibits, nor can we verify that the purported copies of exhibits attached to other pleadings

[1] Specific examples include the defendant's reliance on a news article in which Dwyer's sister is quoted as saying that she heard Dwyer boasting about beating suspects and his reliance on reports by the Office of Professional Standards on individual allegations of abuse.

are, in fact, the same documents that were submitted to the trial court in support of the defendant's postconviction claims.[2]

¶ 65 1. Defendant's claims of abuse are inconsistent.

¶ 66 We turn now to the factors to be considered in assessing whether the new evidence the defendant presented regarding Dwyer's alleged pattern of abuse would have altered the outcome of the defendant's motion to suppress. The first is the consistency of the defendant's claim that he was abused. Although the defendant has consistently claimed that he was coerced into confessing, his account of how he was coerced has changed dramatically over time. At the hearing on the defendant's motion to suppress, he testified that he was placed in an interrogation room with 4 to 5 police officers, none of whom he identified. The officers then struck the defendant's kneecaps with a baseball bat 20 to 40 times. They also hit him in the chest with the bat and struck him in the head once or twice with a book. The defendant testified that although these strikes did not cause him to bleed, they did cause him pain.

¶ 67 In stark contrast, at the evidentiary hearing on his postconviction claim, the defendant testified that while he was alone in an interrogation room with Dwyer, Dwyer used a black rubber police stick to strike the legs of the chair in which the defendant was seated 4 to 5 times on 8 or 9 separate occasions. At no point did Dwyer actually strike the defendant's legs. The defendant also testified that Dwyer poked him in the chest with the stick and that Dwyer "tried" to slap the defendant's head with the palm of his hand. Finally, the defendant testified that

[2] The one exception that we make is for the Goldston Report. Although it is not included in the record as a part of the second amended postconviction petition and the record citation provided by the defendant is to the copy attached to the defendant's first amended postconviction petition, there is in existence but one Goldston Report on the topic of police brutality in Area Two of the Chicago Police Department. Accordingly, there is no real concern that the Goldston Report attached to the first amended postconviction petition is not the same as the Goldston Report submitted to the trial court in support of the second amended postconviction petition.

Dwyer swung the stick at the defendant's knees, stopping just short, and when the defendant reacted by foaming at the mouth, Dwyer pushed the defendant's head back for 20 to 25 seconds.

¶ 68 Despite the defendant's attempts to characterize the differences in his accounts as slight changes or insignificant, there can be no doubt that these are completely different versions of events. In one, there are 4 to 5 officers involved in the defendant's abuse, while in the other only Dwyer was present. In one, the defendant was actually physically struck repeatedly in the knees, chest, and head, while in the other the only physical contact was a poke in the chest and Dwyer pushing the defendant's head back. There are other, lesser differences as well, *e.g.*, the appearance of the chair/desk combo and Dwyer's swinging the stick at the defendant's knees but stopping short.

¶ 69 It is also worth noting that there are obvious differences in the defendant's account of events in his written second amended postconviction petition and his testimony at the evidentiary hearing. Most notably, in his written petition, the defendant alleged that he was questioned by Corless and Basile regarding the Church's Chicken robbery before he was interrogated by Dwyer, but he testified at the hearing that when he was initially brought to the station, he was placed in an interrogation room with 4 to 5 officers, one of whom asked if they could speak to him about Church's Chicken. Defendant refused and he was passed on to Dwyer without any questioning about Church's Chicken.

¶ 70 In addition, he alleged in the petition that he was handcuffed to the chair/desk combo, but testified that he was handcuffed to the wall. In his petition, he alleged that Dwyer hit him in the head with the palm of his (Dwyer's) hand and struck him in the face with a spiral-bound police notebook, but testified only that Dwyer "tried" to hit him in the head with his hand. In the petition, the defendant alleged that Dwyer pulled his legs out from under him while seated in the

chair, but made no such allegation in his testimony. In his petition, the defendant alleged that after Dwyer swung the police stick at his knees, he passed out in fear, but at the hearing he testified that his eyes rolled into his head and he started foaming at the mouth. Finally, the defendant testified at the hearing that Dwyer pushed his head back for 20 to 25 seconds, but no mention of that was made in the defendant's written petition.

¶ 71 The defendant attempts to explain away some (not all) of these discrepancies by arguing that at the time his second amended postconviction petition was filed, he had been incarcerated for 24 years and there was evidence that he suffered from mental health issues. We find both of these contentions unavailing. First, we do not disagree with the length of time that the defendant was incarcerated, but the defendant does not explain how the fact that, as of 2004, he had been imprisoned for 24 years would have caused him to testify incorrectly (as he claims) at the motion to suppress hearing, which occurred in 1980. With respect to the defendant's claim of mental health issues, the trial court ruled that such evidence was inadmissible. The defendant does not contend that the trial court erred in so ruling and, thus, we will not consider that evidence.

¶ 72 Finally, the defendant relies on language from *Whirl* in support of his position that his changes in accounts are not material to the trial court's determination:

> "Therefore, the fact that some of the details of his testimony are slightly different now has marginal relevance to the central issue at the evidentiary hearing, *i.e.*, whether the new evidence of a pattern and practice of abusive tactics employed by Pienta, had it been presented at the suppression hearing, would likely have produced a different outcome. Thus, we disagree with the trial court's finding that Whirl 'needed to be credible in order to sustain his burden in this case.' " *Whirl*, 2015 IL App (1st) 111483, ¶ 84.

The defendant, in relying on this language, however, ignores vital language in the preceding paragraph:

> "As an initial observation, despite the well-settled principle that a trial court's credibility determinations are entitled to deference, the credibility findings at issue here are not related to new witnesses who have come forward and are presenting testimony for the first time, *nor is this a situation in which the defendant is providing new testimony that substantively contradicts previous testimony and credibility determinations are therefore critical to the issue that must be determined at an evidentiary hearing*." (Emphasis added.) *Id.* at ¶ 83.

He also ignores the sentence immediately preceding the language that he quotes: "This testimony is not new evidence that Whirl produced for the first time in his successive petition and at the evidentiary hearing." *Id.* at ¶ 84. This language demonstrates that the court in *Whirl* did not view the testimonial discrepancies in that case as wholesale abandonments by the witnesses of their previous versions of events. Even the court in *Whirl* acknowledged that in such situations, credibility determinations would be critical to determining whether the defendant should be granted relief. Here, there is no denying that the defendant completely changed his story. Accordingly, his credibility was a relevant consideration for the trial court, and its determination that the defendant was not credible or consistent in his claims of torture was not against the manifest weight of the evidence.

¶ 73 The great variation in the defendant's various accounts of the alleged abuse and his resulting lack of credibility distinguishes the present case from many of the cases in which this and other courts have granted defendants relief on their claims of police brutality. See, e.g., *Patterson*, 192 Ill. 2d at 145 ("In particular, we note that defendant has consistently claimed that

he was tortured. In fact, he made this claim during his first court appearance. Moreover, defendant's claims are now and have always been strikingly similar to other claims involving the use of a typewriter cover to simulate suffocation."); *Whirl*, 2015 IL App (1st) 111483, ¶87 (minor discrepancy in the defendant's account did not alter the fact that the defendant had consistently alleged that an officer had physically coerced him by slapping him and scraping his leg wound with a key); *People v. Wrice*, 406 Ill. App. 3d 43, 53 (2010).

¶ 74 2. There is little similarity between the defendant's claims and other abuse.

¶ 75 The next factor to consider is the level of similarity between the defendant's claims of abuse and the alleged abuse of others. Here, there appears to be little similarity between the defendant's claimed abuse and the evidence of alleged abuse of others by Dwyer. With respect to the witnesses who testified at the evidentiary hearing, Billingsley, Harris, and Strickland testified that officers hit, kicked, punched, and stomped on them; stuffed paper in their throats; put guns in their mouths, placed plastic bags over their heads, and refused them medical treatment. Banks, Rodgers, and Howard testified that officers only threatened physical abuse or convictions or looked on while other officers abused them. None of the witnesses testified to any abuse similar to what the defendant claims—more than mere threats, but only relatively minor physical contact and no claim that the physical contact caused pain or injury. Moreover, none of the witnesses testified to any abuse in the form of officers striking the furniture or areas around them, without ever striking them. Nor did any of the witnesses testify to any officers acting as if they were going to hit the witnesses but then stopping short. Rather, the witnesses testified that they either suffered pain-inflicting abuse or instead were verbally threatened. The defendant does not fall into either of these categories. Compare *Patterson*, 192 Ill. 2d at 110 (where the witness claimed that the officers verbally threatened him, his claims were too

different from the defendant's claims of physical abuse to be considered relevant), with *People v. Reyes*, 369 Ill. App. 3d 1, 19 (2006) (concluding that there were similar claims of abuse where the defendant and the witnesses both claimed that the officers hit them in the face and called them liars).

¶ 76 The defendant also references the abuse discussed in the Goldston Report and the cases of *People v. Hobley*, 182 Ill. 2d 404 (1998), and *People v. Riley*, 230 Ill. App. 3d 1013 (1992). The Goldston Report references only two incidents of abuse that involved Dwyer: the June 1985 "harassment" of James Daniel Sr. and the March 1985 hanging of Jesse Winston. Although we acknowledge that the term "harassment" is vague and could encompass a great many types of abuse, the burden in this context is on the defendant to make a substantial showing of a constitutional violation (*Whirl*, 2015 IL App (1st) 111483, ¶ 74), and on the evidence in the record, neither the case of James Daniel Sr. nor the case of Jesse Winston appears to include abuse similar to that alleged by the defendant. Likewise, the defendants in *Hobley* and *Riley* alleged abuse in the form of hitting, kicking, punching, and "bagging" (placing a bag over someone's head). *Hobley*, 182 Ill. 2d at 422; *Riley*, 230 Ill. App. 3d at 1017. The defendant does not allege this type of abuse.

¶ 77 3. Dwyer was involved in other instances of abuse.

¶ 78 The third factor is whether the same officers were involved in the defendant's claimed abuse as were involved in the other incidents of alleged abuse. In his most recent account of events, the defendant testified that during his initial meeting with Dwyer, Burge was present. At that time, however, no abuse occurred. It was only after the defendant was taken to Coleman's neighborhood and then returned to Area Two that the defendant was abused. The defendant specifically testified that Dwyer was the only one present in the room with him at the time of the

abuse, and Dwyer is the only one that the defendant testified (most recently) participated in his abuse. Billingsley, Banks, Strickland, and Howard all testified that Dwyer participated in or was present for their abuse. Harris and Rodgers did not identify Dwyer as being involved in their abuse. As for the Goldston Report, it identified only the cases of James Daniel Sr. and Jesse Winston as involving Dwyer, and the cases of *Hobley* and *Riley* both identify Dwyer as an active participant in those defendants' abuse. Accordingly, with the exception of Harris and Rodgers, the same officer—Dwyer—was involved in both the defendant's and the other cases of abuse.

¶ 79 The defendant attempts to expand the scope of the abuse cases to be considered by arguing, essentially, that all cases of abuse at Area Two under the command of Burge should be considered, because they are relevant to demonstrating the culture of systematic abuse and planned torture that existed at Area Two. We decline to do so for two reasons: first, as discussed above, we already conclude that most of the specific instances of abuse on which the defendant relies did involve the same officer; and second, to consider every instance of alleged abuse at Area Two, even if it did not involve the same officer, would render completely meaningless the well-established requirement that to be relevant in demonstrating a pattern of abuse, the various instances of abuse must involve the same officers. See *People v. Gillespie*, 407 Ill. App. 3d 113, 129-30 (2010) (evidence of misconduct by an officer that the defendant did not allege was involved in his interrogation or abuse was not relevant to the defendant's claims of a pattern of abuse).

¶ 80 4. Defendant's claims are not close in time to the other instances of abuse.

¶ 81 The next factor for consideration is the closeness in time between the defendant's claimed abuse and the incidents of abuse involving other individuals. The defendant alleges that he was abused in February 1980. The evidence in the record shows that the instance of other

abuse involving Dwyer that was closest in time was the abuse of Banks, which occurred over three years later in October 1983. The remaining instances involving Dwyer occurred regularly after Banks' abuse: June 1984 (Billingsley), November 1984 (Howard), March 1985 (Winston), June 1985 (Daniel), August 1985 (Riley), November 1985 (Strickland), and January 1987 (Hobley). In *Patterson*, our supreme court instructed that "a single incident years removed has little relevance" but that it may become relevant "*if the party presenting the evidence can present evidence of other incidents that occurred in the interim*." (Emphasis added.) *Patterson*, 192 Ill. 2d at 140. Here, more than three years passed before the next closest incident, yet the defendant offered no evidence (at least no evidence that is in the record) of any incidents involving Dwyer between 1980 and 1983. Given the more than three years that passed between the defendant's claimed abuse and the other instances, and given the defendant's failure to present at the hearing and include in the record any evidence bridging the gap between his 1980 abuse and Banks' 1983 abuse, we cannot say that the trial court's determination that the other instances were too remote was manifestly erroneous.

¶ 82 5. Defendant does not allege physical injury.

¶ 83 The final factor for consideration is whether the defendant sustained physical injury as a result of the claimed abuse. Although under his first version of the abuse the defendant claimed that he felt pain after being struck repeatedly with a baseball bat, he has never claimed—under any version of events—that he sustained actual injury as a result of Dwyer's mistreatment. Accordingly, this factor is not a relevant consideration here.

¶ 84 6. Defendant's award of reparations from the City of Chicago is irrelevant.

¶ 85 In addition to the above factors, the defendant urges us to consider the fact that he was awarded reparations by the City of Chicago for having been found to be a victim of torture,

pursuant to the Reparations for Burge Torture Victims Ordinance ("Ordinance"). Under the Ordinance, individuals who were determined by the Chicago Torture Justice Memorial and the City of Chicago to have credible claims of abuse were to be awarded reparations. The defendant argues that he was determined to have a credible claim of abuse and was awarded $100,000.00 in reparations from the City.

¶ 86 The State contends that we should not consider the defendant's reparations award because neither the Ordinance nor proof of the defendant's award is contained in the record on appeal. In response, the defendant contends that we may take judicial notice of his award because the award letter in the appendix to his brief is on the letterhead of the Chicago Torture Justice Memorials and because his name is listed on the Chicago Torture Justice Memorials' website as a torture victim. It is true that the defendant's award letter is on Chicago Torture Justice Memorials letterhead, and it is also true that his name is listed on its website as a victim of torture. Interestingly, however, the website describes the defendant's abuse as "beaten with a baseball bat to the body and with a phonebook." http://chicagotorture.org/files/2012/03/09/Names_of_Torture_Survivors.pdf. Accordingly, even if we were to agree with the defendant that we could take judicial notice of his reparations award, we see little relevance of a determination that the defendant was tortured when that determination was based on an account of events that even the defendant claims was incorrect. Moreover, the City's determination that the defendant was tortured has no binding effect on us, as it is not a court with jurisdiction over the issue. See *Talarico v. Dunlap*, 281 Ill. App. 3d 662, 665 (1996) (for collateral estoppel to apply, among other things, it must be established that "a court of competent jurisdiction rendered a final judgment on the merits in the prior action").

¶ 87 Based on the defendant's vastly disparate claims of abuse over time and the lack of similarity and temporal proximity between the defendant's most recent version of the abuse and the other incidents of abuse found in the record, we conclude that the trial court did not manifestly error in dismissing the defendant's second amended postconviction petition after the evidentiary hearing.

¶ 88 B. Ineffective Assistance of Counsel During Sentencing

¶ 89 The second issue on appeal is whether the trial court erred in not holding a third-stage evidentiary hearing, which had been ordered by Illinois Supreme Court, on the defendant's ineffective assistance of counsel claim. The trial court concluded that the hearing, which would have examined the defendant's claim that trial counsel was ineffective for failing to present additional mitigating evidence at sentencing, was unnecessary, because the defendant's claim was rendered moot by the governor's commutation of his sentence. The trial court reasoned that by commuting the defendant's death sentence to life imprisonment, the governor substituted an executively imposed sentence for the defendant's previous judicially imposed one, thereby making the defendant's new sentence unreviewable under separation-of-powers principles in the Illinois constitution.

¶ 90 The defendant argues that the trial court's dismissal of his ineffective assistance claim was erroneous for two reasons: (1) the trial court was required to obey the mandate of the supreme court, and (2) federal constitutional principles supersede state constitutional principles, such that remedying any violation of his federal sixth amendment rights to effective assistance of counsel trump the state principles of separation of powers. Our review of this issue is *de novo*, because it involves a pure question of law. *People v. Chapman*, 194 Ill. 2d 186, 217 (2000).

¶ 91 Because the Illinois Constitution precludes judicial review of an executively imposed sentence, we hold that the trial court did not err in concluding that the defendant's claim regarding his sentencing was moot.

¶ 92 1. Defendant's sentencing claim is moot due to the imposition of the unreviewable sentence imposed by the governor.

¶ 93 We first address the defendant's second contention—that the Illinois principle of separation of powers is trumped by the defendant's federal constitutional right to effective assistance of counsel—as it has bearing on our determination of the defendant's first contention. In making this argument, the defendant spends much of his time arguing that his claim cannot be considered moot because if he were successful on his claim of ineffective assistance of counsel, his full remedy would be a new sentencing hearing at which he might be sentenced to a term of years, rather than the life sentence imposed by Governor Ryan. The defendant, however, misconstrues the reason his claim of ineffective assistance of counsel is moot following the commutation of his sentence. The issue is not moot because there is no remedy available to the defendant; rather, the issue is moot because, even though there is a remedy available to the defendant, the courts have no power to award it to the defendant, as we lack the power to review an executively imposed sentence.

¶ 94 The Illinois Constitution states, "The Governor may grant reprieves, commutations and pardons, after conviction, for all offenses on such terms as he thinks proper. The manner of applying therefor may be regulated by law." Ill. Const. 1970, art. V., § 12. The Illinois Constitution further provides for the separation of powers between branches of government: "The legislative, executive, and judicial branches are separate. No branch shall exercise powers properly belonging to another." Ill. Const. 1970, art. II, § 1. Taken together, these provisions of

the Illinois Constitution provide the Governor with broad and seemingly unfettered powers to grant pardons and commutations in this state. As this court in *People v. Harris*, 357 Ill. App. 3d 330, 336 (2005), commented, "In divvying up the powers between the executive and judicial branches, Illinois has decided to entrust her governor, the chief executive, with an essentially unreviewable power to pardon or commute those imprisoned within her borders."

¶ 95 Based on this principle—that the governor's commutation of a sentence is an executive action that is unreviewable by the courts—this court, in a case nearly identical to the present one, followed a long line of Illinois precedent in concluding that the commutation of a defendant's sentence renders any sentencing issues moot. In *Harris*, the defendant alleged in his postconviction petition that his trial counsel was ineffective for failing to call any witnesses during the mitigation portion of his sentencing hearing. *Id.* at 331. On appeal from the dismissal of that postconviction petition, the Illinois Supreme Court ordered that the trial court hold an evidentiary hearing on the defendant's claim of ineffective assistance of counsel. *Id.* at 332. The supreme court's order to conduct an evidentiary hearing was issued in 2002, but in 2003, before the hearing could be held, the governor granted the defendant's petition for executive clemency, commuting the defendant's sentence to natural life in prison without the possibility of parole. *Id.* The State then filed a motion to dismiss the defendant's postconviction petitions, which the trial court granted based on the conclusion that the governor's act of commuting the defendant's sentence rendered his claim of ineffective assistance of counsel moot. *Id.*

¶ 96 On appeal from that dismissal, another panel of this court concluded, as it had in previous cases, that "the separation of powers constitutionally divided between the executive and judicial branches bar[] us from meddling with the terms and conditions of the defendant's newly commuted sentence, rendering moot the sentencing issue he had raised on appeal." *Id.* at 333.

This court emphasized that findings of mootness under these circumstances are not based on a specific sentencing error, but instead are based on the fact that the governor's commutation replaces the judicially imposed (and thus reviewable) sentence with an executively imposed (and thus unreviewable) sentence. *Id.* at 332-33.

¶ 97 It should be noted that this court's decision in *Harris* follows a long line of cases from the Illinois Supreme Court holding that sentencing issues become moot upon the commutation of a defendant's sentence. See *People v. Williams*, 209 Ill. 2d 227 (2004); *People v. Evans*, 209 Ill. 2d 194 (2004); *People v. Shum*, 207 Ill. 2d 47 (2003); *People v. Moore*, 207 Ill. 2d 68 (2003); *People v. Graham*, 206 Ill. 2d 465 (2003); *People v. Rissley*, 206 Ill. 2d 403 (2003); *People v. Ceja*, 204 Ill. 2d 332 (2003); *People v. Brown*, 204 Ill. 2d 422 (2002); *People v. Miller*, 203 Ill. 2d 433 (2002); *People v. Lucas*, 203 Ill. 2d 410 (2003).

¶ 98 The defendant does not refute the executive nature of the governor's commutation of his sentence, nor does he argue against the basic principle that the separation of powers precludes us from reviewing actions that are solely within the province of the governor. Instead, the defendant contends that any limitation on our powers to review the governor's action is overridden by his federal constitutional right to effective assistance of counsel. In support, the defendant relies on heavily on the federal case of *Madej v. Briley*, 371 F.3d 898 (7th Cir. 2004). There, the defendant was convicted of murder and sentenced to death. In 2002, the federal district court issued a writ of habeas corpus, directing Illinois to give the defendant a new sentencing hearing because he had received ineffective assistance of counsel at the original sentencing hearing. The new sentencing hearing was to be held by November 25, 2002. No resentencing hearing was held, and on January 10, 2003, the Illinois governor commuted the defendant's sentence to life in prison without the possibility of parole. *Id.* at 898-99.

¶ 99 On a petition for a writ of mandamus, Illinois asked that the federal court vacate the writ of habeas corpus. In affirming the denial of the petition, the Seventh Circuit noted that had the defendant received a proper sentencing hearing, he could have been sentenced to as little as 20 years' imprisonment. Accordingly, to fully remedy the constitutional deficiency of the ineffective assistance, the defendant was now entitled to seek that lower sentence. In response to Illinois's argument that state law precluded resentencing following the governor's commutation, the Seventh Circuit concluded that federal constitutional principles trumped any incompatible state principles. *Id.* at 899.

¶ 100 The defendant in the present case argues that "*Madej v. Briley* makes clear that the federal constitution entitles [him] to a full remedy for the violation of his Sixth Amendment right to effective assistance of counsel at his sentencing hearing which cannot be defeated by state law rules regarding the effect of a commutation." This argument was addressed and rejected in *Harris*, and we see no need to disturb that decision. As was discussed there, the United States Supreme Court has upheld the right of states to divide the powers of government as they see fit. In *Dreyer v. Illinois.*, 187 U.S. 71, 84 (1902), the Court stated that "[w]hether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State." Accordingly, as the Supreme Court stated in *Rose v. Hodges*, 423 U.S. 19, 22 (1975), "If [a state] chooses to allow the Governor to reduce a death penalty to a term of years without resort to further judicial proceedings, the United States Constitution affords no impediment to that choice." As discussed above, Illinois has chosen to instill in the

governor the power to grant pardons and commutations without review by the courts, and, thus, Illinois courts have consistently found that commutations render any sentencing issues moot.

¶ 101 We also note that a comparison of the present case and *Madej* is not a procedural apple-to-apple comparison. As the court in *Harris* noted, "*Madej's* holding springs from the State's alleged 'obduracy' in ignoring a validly issued order by the district court and stands for the principle that no party may intentionally disregard such an order simply because it believes that order is erroneous." *Harris*, 357 Ill. App. 3d at 335. There was no such "obduracy" here, either actual or alleged.

¶ 102 2. Because defendant's claim was moot, the trial court did not err in not holding an evidentiary hearing as ordered in the mandate.

¶ 103 We now return to the defendant's argument that the trial court erred in dismissing his ineffective assistance claim because the trial court was required to follow the mandate of the Illinois Supreme Court to hold an evidentiary hearing. Although we agree that a lower court is certainly under an obligation to comply with the mandate of a higher court, we cannot agree that a lower court is required to decide an issue that has been rendered moot since the issuance of the mandate, simply because the mandate required review of the issue when it was not moot. To decide an issue that had been rendered moot following the issuance of the mandate would be to issue an advisory opinion on the matter, which we are not permitted to do. *Condon v. American Telephone and Telegraph Co., Inc.*, 136 Ill. 2d 95, 99 (1990) ("Courts of review will not decide moot or abstract questions, will not review cases merely to establish precedent, and will not render advisory opinions."). That bar on deciding moot issues and rendering advisory opinions extends to circumstances where an issue is rendered moot by facts that occur while the matter is pending on appeal. *Benz v. Department of Children and Family Services*, 2015 IL App (1st)

130414, ¶ 31. Given that, we conclude that it does not follow that a trial court would be required to hold an evidentiary hearing on an issue that has been made moot by subsequent circumstances simply because they occurred after rather than before the mandate was issued. See *Harris*, 357 Ill. App. 3d 330 (affirming the dismissal of the defendant's claim of ineffective assistance where the commutation of his sentence rendered the issue moot).

¶ 104 In sum, there exists clear precedent in this state that an executively imposed sentence is not subject to review by the judiciary, out of deference to the enumerated authority granted to the governor in the Illinois Constitution. As the court noted in *People v. Watson*, 347 Ill. App. 3d 181, 187 (2004), "[i]t would be a curious logic to allow a convicted person who petitions for mercy to retain the full benefit of a lesser punishment with conditions, yet escape burdens readily assumed in accepting the commutation which he sought." Accordingly, we conclude that the trial court did not err in dismissing the defendant's claim of ineffective assistance as moot.

¶ 105 We note that our decision in no way bars the defendant from seeking his desired remedy elsewhere, namely re-petitioning the executive for a full pardon, a subsequent commutation to a set number of years, or an allowance of the chance for parole.

¶ 106 III. CONCLUSION

¶ 107 For the reasons stated above, the judgment of the Circuit Court of Cook County is affirmed.

¶ 108 Affirmed.