SIXTH DIVISION
August 15, 2014

No. 1-12-3480

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 97 CR 1779-80
	)	
COREY MOORE,	)	
	)	Honorable
Defendant-Appellant.	)	Mary Margaret Brosnahan,
	)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Lampkin and Reyes concurred in the judgment.

ORDER.

¶ 1 *Held*: We affirmed the second-stage dismissal of defendant's amended postconviction petition where the claims of ineffective assistance of counsel contained therein had already been adjudicated on direct appeal and were barred by *res judicata*. We affirmed the second-stage dismissal of defendant's supplemental postconviction petition alleging a *Brady* violation where defendant failed to make a substantial showing thereof.

¶ 2 Defendant, Corey Moore, was convicted after a bench trial of the armed robbery and first-degree murder of Lonnie Williams, and the attempted first-degree murder of Melanie Williams. The trial court sentenced defendant to natural life in prison for the murder, and to two concurrent 30-year terms of imprisonment for the attempted murder and armed robbery. In a subsequent bench trial, defendant was convicted of the first-degree murder and aggravated unlawful restraint of his girlfriend, Kimberly Fort, and was sentenced to death. After exhausting

his direct appeals, defendant filed an amended postconviction petition seeking relief from the convictions and sentences in both cases. In pertinent part, defendant claimed his trial counsel provided ineffective assistance by: (1) failing to call him to testify in support of his motion to suppress statements in both cases; (2) deliberately misrepresenting to him that he would not receive a death sentence if he waived a jury and elected a bench trial in both cases; and (3) failing to investigate "important witnesses and significant evidence" in both cases. Defendant subsequently filed a supplemental postconviction petition, adding a claim that the State had committed a *Brady* violation in connection with both cases. The trial court dismissed defendant's amended and supplemental postconviction petitions at the second stage of postconviction proceedings. Defendant appeals the second-stage dismissal of his amended and supplemental postconviction petitions, contending the trial court erred as the petitions made a substantial showing of ineffective assistance of counsel and of a *Brady* violation. We affirm.

¶ 3 I. Statement of Facts

¶ 4 A. Pre-trial

¶ 5 In case number 97 CR 1779, defendant was charged with murder, attempted murder, and armed robbery for a September 1996 incident in which defendant was alleged to have robbed and killed Lonnie Williams (Lonnie), and attempted to kill Melanie Williams (Melanie). In case number 97 CR 1780, defendant was charged with murder, aggravated kidnapping, and aggravated unlawful restraint for a November 21, 1996, incident in which defendant was alleged to have killed his girlfriend, Kimberly Fort (Kimberly).

¶ 6 On April 20, 1998, defendant filed an amended motion to suppress statements in both cases. In pertinent part, the amended motion to suppress alleged his statements in both cases were involuntary because they were given only as the result of physical and mental coercion.

Specifically, defendant alleged he gave the statements only after he had been threatened, physically slapped and punched, denied sleep, and subjected to excessive detention/isolation. Defendant further alleged that the "physical assault included blows to the face and stomach, following the line-up at Area 2," and that Assistant State's Attorney (ASA) Rogers coerced him into making statements by promising that he would not receive the death penalty if he did so.

¶ 7 At the hearing on the suppression motion, Detective Andrew Abbott testified that he and Detective William Morrissette spoke with defendant at about 9:30 a.m. on December 12, 1996, at the Area 2 police station. Detective Abbott advised defendant of his *Miranda* rights and he stated he understood them. The detectives then had a short conversation with defendant about Kimberly's murder. At approximately 11:30 a.m. on December 12, 1996, defendant was placed in a line-up. Detective Abbott had a second conversation with defendant at about 6 p.m. on December 12, 1996, at the Area 2 police station and defendant, again, was given his *Miranda* warnings.

¶ 8 Detective Abbott testified that during their two conversations, defendant appeared to be relaxed, alert, and coherent, and gave no indication that he was unable to understand his *Miranda* rights. Detective Abbott denied defendant was physically assaulted by any officer, and he specifically denied defendant was struck in the face and stomach after he appeared in the line-up. Detective Abbott stated that during their conversations, defendant did not ask to speak to an attorney, or to family members. Detective Abbott denied depriving defendant of sleep, or of excessively isolating him.

¶ 9 ASA Mike Rogers testified he arrived at the Area 3 police station shortly before 2 a.m. on December 12, 1996, and spoke with Detective Mark Reiter and ASA Jeff Nesland. ASA Rogers learned that defendant was in custody, and he spoke with defendant at about 2 a.m. after giving

defendant his *Miranda* warnings. Defendant stated he understood his *Miranda* rights. ASA Rogers questioned defendant about Lonnie's murder, and defendant denied any involvement. ASA Rogers told defendant that Melanie was implicating him in the murder and that defendant's cousin had stated defendant had tried to get rid of the same type of gun which had been used in the murder. Defendant told ASA Rogers that he did not want to speak with him anymore, and the interview ended.

¶ 10 ASA Rogers testified that at about 6:30 p.m., on December 12, 1996, he went to the Area 2 police station in regard to the investigation of Kimberly's murder, and learned from Detectives Morrissette and Abbott that defendant was now in custody there. ASA Rogers spoke with defendant at about 6:45 p.m. and advised him of his *Miranda* rights again, which defendant stated he understood. ASA Rogers then told defendant he had been implicated in Lonnie's and Kimberly's murders, and ASA Rogers asked defendant whether he would take responsibility for his actions. Defendant began crying and stated: "I did it. I killed them both." ASA Rogers and defendant engaged in a 15- to 20-minute conversation about the murders.

¶ 11 ASA Rogers testified that he asked defendant how he had been treated, and defendant stated that he had been treated with respect. ASA Rogers asked defendant whether any threats or promises had been made to him in exchange for his statements, and defendant said no.

¶ 12 ASA Rogers testified that in the early morning hours of December 13, 1996, defendant gave two court-reported statements regarding Lonnie's and Kimberly's murders. ASA Rogers was present for the taking of both statements. While in police custody, defendant was given food, drinks, and cigarettes, and he was allowed to use the bathroom. ASA Rogers denied making any threats or promises to defendant.

¶ 13 Defendant presented no witnesses at the suppression hearing, and the State moved for a directed finding arguing that the defense had "offered no evidence whatsoever to substantiate any of their allegations." The trial court ruled the State had met its burden of proving the voluntariness of defendant's statements, and denied defendant's motion to suppress.

¶ 14 Bench trials for each case were held sequentially in the spring of 1999, beginning with the trial in Lonnie's case. Before the start of the trial in Lonnie's case, defense counsel told the court that he had explained to defendant "the differences and the consequences of waiving his right to a jury, and he has executed a jury waiver for both cases, 1779 [Lonnie's case] and 1780 [Kimberly's case] as to trial phase and as to sentencing." Defendant acknowledged to the court that he understood he had a right to a jury trial, for both trial and death penalty sentencing, and that he was giving up that right. The record on appeal contains written jury waivers for both cases, signed by defendant, waiving his right to a jury during trial and during any death penalty hearing.

¶ 15 B. Bench Trial-Lonnie Williams Case (97 CR 1779)

¶ 16 Melanie testified that in September 1996, she lived with her boyfriend, Lonnie, on the second floor of an apartment building at 3020 North Hoyne Avenue in Chicago. They were also business partners in a Baskin-Robbins ice cream store (Baskin-Robbins store) located at 8601 South Cottage Grove Avenue in Chicago. After several armed robberies at the Baskin-Robbins store, Lonnie hired defendant in late July or early August 1996 to act as security. Lonnie fired defendant three weeks later because he repeatedly failed to show up for work.

¶ 17 Melanie testified that on September 3, 1996, she and Lonnie closed up the Baskin-Robbins store and drove home. Lonnie brought with them a bag containing money from the store's sales for the week. They arrived home around 10:25 p.m. After parking the car, Lonnie

exited the vehicle first and walked to the front of the building, which has a porch and five to six steps leading up to the building. Melanie retrieved her purse from the back of the car and then followed Lonnie to the porch.

¶ 18 Melanie testified that as she approached the porch, she was grabbed on the left side by defendant. Melanie turned toward defendant and saw that he was holding a semi-automatic gun to her head. Melanie screamed, and defendant told her to be quiet. Defendant walked Melanie up the inner staircase toward the second-floor apartment. Melanie saw Lonnie at the top of the stairs. Lonnie said: "Corey, what's up, man?" Lonnie walked down three or four stairs, and the three of them met in the stairwell.

¶ 19 Melanie testified defendant took the gun and put it into Lonnie's stomach. Lonnie grabbed Melanie and pushed her behind him (Lonnie). Defendant told Lonnie: "Give me the money, give me the money." Lonnie then reached into his back pocket and handed defendant some money. Defendant told Lonnie: "This isn't enough. There's got to be more." Lonnie handed defendant the bag of money from the Baskin-Robbins store, after which defendant said: "You all shouldn't have done me like you did." At that point, Melanie, who was still behind Lonnie, heard a gun go off.

¶ 20 Melanie testified that she ran up the stairs and into her apartment. Defendant ran into the apartment behind her and pointed the gun at her. Melanie backed up into the living room, fell back onto a couch, and pleaded with defendant not to shoot her. Defendant approached her, put the gun to her chest, and pulled the trigger. The gun did not go off. Defendant pulled the trigger two more times; the gun did not go off either time. Defendant then ran out the front door and down the stairs.

¶ 21 Melanie testified she ran downstairs, locked the front door to the building, and called 911. Lonnie was taken to the hospital, where he was pronounced dead the next day, September 4, 1996, at 4:54 p.m. The parties stipulated that Dr. Tae Lyong An, a Cook County assistant medical examiner, performed an autopsy on Lonnie on September 6, 1996. Dr. An determined that Lonnie died from a gunshot wound to the face, and that the manner of death was homicide.

¶ 22 On cross-examination, Melanie denied telling police that she was already inside her apartment when she heard a struggle between defendant and Lonnie, followed by a shot being fired.

¶ 23 Romero Prince (Romero) testified that on September 3, 1996, he was living in a second-floor apartment at 3016 North Hoyne Avenue, two doors south of Lonnie's and Melanie's apartment. At about 10:20 p.m. on that date, Romero was in the living room of his apartment when he heard a loud crack, like a gunshot, coming from the north side of his building. Romero looked out the front window and saw defendant crossing in front of his building, coming from the north. Defendant had a gun in one hand and a rag in the other. Defendant crossed the street in front of Romero's building, entered a compact car, and drove away. On December 11, 1996, Romero viewed a line-up at the Area 3 police station and identified defendant as the person he saw outside of his apartment building on September 3, 1996.

¶ 24 Detective Mark Reiter testified that shortly before 11 p.m. on September 3, 1996, he was assigned to investigate Lonnie's shooting. After speaking with Melanie, he began looking for a person named Corey Porter. Detective Reiter went to a townhouse at 8320 South Mackinaw Avenue and spoke to Kimberly, who gave the detective a photograph of Corey Porter, as well as a possible address for him. Detective Reiter subsequently obtained a digital photograph of

defendant and showed the photograph to Kimberly and Melanie, both of whom identified defendant as the person they knew as Corey Porter.

¶ 25 Special agent Michael Greene of the Atlanta Office of the FBI testified that on December 2, 1996, he received information about the possible whereabouts of a fugitive named Corey Moore in Atlanta. He found and arrested defendant, who said his name was Michael Jackson and who carried four pieces of identification with that name. Defendant was taken to the Fulton County Jail to await extradition.

¶ 26 Detective Reiter testified defendant was returned to Chicago on December 11, 1996, and placed in a line-up and identified by Romero. Sometime after midnight on December 12, 1996, Detective Reiter and ASA Neslund had a conversation with defendant in the Area 3 police station. Defendant was given his *Miranda* warnings and he denied any involvement in Lonnie's shooting or robbery.

¶ 27 ASA Mike Rogers testified that at about 2 a.m. on December 12, 1996, he spoke with defendant at the Area 3 police station. ASA Rogers gave defendant his *Miranda* warnings and defendant stated he understood them. ASA Rogers then asked defendant what he knew about Lonnie's shooting. Defendant stated that he had worked for Lonnie at Baskin-Robbins store and that Lonnie had "shorted" him on some money, but he denied shooting Lonnie.

¶ 28 ASA Rogers testified he spoke with defendant again at about 6:30 p.m. on December 12, 1996, at the Area 2 police station and gave defendant his *Miranda* warnings again, which he stated he understood. ASA Rogers told defendant that multiple people had implicated him not only in Lonnie's murder, but also in Kimberly's murder. Defendant began crying and admitted he had "killed them both."

¶ 29 Defendant gave a court-reported statement, which was read into evidence. In his statement, defendant said he had been given his *Miranda* warnings, that he understood them, and that he wanted to talk. Defendant stated that as of September 3, 1996, he had known Lonnie for four months. Defendant had sold drugs for Lonnie and worked security in Lonnie's Baskin-Robbins store.

¶ 30 Defendant stated that he went looking for Lonnie on September 3, 1996, because Lonnie owed defendant $400 in back pay. Defendant waited outside Lonnie's apartment building in a car he had borrowed from his cousin. Lonnie eventually arrived home with his girlfriend, Melanie. Defendant yelled at Lonnie, who responded: "Who was that?" Defendant responded: It's me, CO, what's up with my money?" Lonnie told defendant to come upstairs with them.

¶ 31 Defendant stated he exited the car and followed Lonnie and Melanie up the stairs. As they walked up the stairs, defendant pulled out a loaded, .380-caliber gun which Lonnie had given to him for when he worked security at the Baskin-Robbins store. Melanie began making sounds indicating that she was frightened by the gun. Lonnie turned around, asked her what was wrong, and saw the gun. Lonnie said to defendant: "Oh, no, I know it's not that serious." Defendant responded that he just wanted his money.

¶ 32 Defendant stated that Lonnie thrust a bag toward him and said: "Here, take the money." Defendant reached for the bag, and Melanie made a sudden move toward the apartment. Defendant moved toward Melanie, and Lonnie grabbed defendant. Defendant threw Lonnie off him, and Lonnie "staggered" down two or three stairs. Lonnie then tackled defendant on the stairs. Defendant fell backward and fired one shot while Lonnie was on top of him. Lonnie fell sideways.

¶ 33 Defendant stated he grabbed the bag and ran into the apartment behind Melanie. She grabbed defendant's arm and said: "Please don't." Defendant pushed her off him and ran down the stairs and out of the apartment building. The gun was in his right hand and the bag of money was in his left hand. Defendant ran across the street, tossed the gun into the park, jumped in his cousin's car and drove away. Defendant rode around and smoked cocaine and "weed." About a week and a half later, defendant went to Atlanta with his father.

¶ 34 After the State rested, defendant presented two witnesses to impeach Melanie's version of how the shooting occurred. By way of stipulation, Officer Cariato testified he responded to the shooting and spoke with Melanie at the scene at 10:29 p.m. Melanie told the officer that when defendant ordered Lonnie to give him the money, she ran into the apartment to call the police. While inside the apartment, Melanie heard defendant and Lonnie struggling, then one gunshot.

¶ 35 Detective Richard Cauble testified he spoke with Melanie in the hospital at about 11 p.m. on September 3, 1996, and that she told him she was inside her apartment when she heard the struggle between defendant and Lonnie and the sound of a gunshot.

¶ 36 Following all the evidence, the trial court convicted defendant of the first-degree murder and armed robbery of Lonnie, and of the attempted murder of Melanie.

¶ 37 C. Bench Trial-Kimberly Fort Case (97 CR 1780)

¶ 38 Prior to trial, defense counsel reminded the trial court that defendant had waived his right to a jury for both trial and sentencing in this case. The trial court asked defendant whether he understood what his attorney had said, and defendant responded affirmatively. The trial court then specifically questioned defendant whether he understood he was waiving his right to a jury for both trial and death penalty sentencing, and defendant responded affirmatively. The cause proceeded to trial.

¶ 39 At trial, Detective Mark Reiter testified that on September 3, 1996, he became involved in the investigation of Lonnie's murder. After speaking with Melanie, he began looking for a suspect named Corey Porter who lived at 8320 South Mackinaw Avenue. That same night, Detective Reiter went to 8320 South Mackinaw Avenue and spoke with Kimberly. He spoke to her about Corey Porter's possible whereabouts, and she provided him with another possible address and a photograph of him. On September 4, 1996, Detective Reiter learned that Corey Porter's real name was Corey Moore (defendant). Detective Reiter obtained a digitally enhanced photograph of defendant and showed it to Kimberly. An arrest warrant was subsequently obtained for defendant.

¶ 40 Detective Patrick Harrington, who has been assigned to the FBI's Fugitive Task Force since 1988, testified that he was contacted by the Chicago police department in September 1996 regarding defendant and subsequently opened a file on him. On the morning of November 20, 1996, Detective Harrington received a phone call from Kimberly regarding defendant. After speaking with her, he and two other FBI agents met with Kimberly outside the building at 2501 West Monroe Street. Kimberly was afraid and agitated. She told Detective Harrington something about defendant. Detective Harrington then drove Kimberly and two of her children to their home at 8320 South Mackinaw Avenue. When they arrived, Detective Harrington and the two FBI agents went inside Kimberly's apartment and searched for defendant. He was not there. Detective Harrington noticed the television was on in one of the rooms and that there was fresh food on the stove. Kimberly used Detective Harrington's cell phone to contact building management and she requested that they change her locks. Detective Harrington left Kimberly his business card.

¶ 41 Synetta Smothers (Synetta) testified that on November 21, 1996, she lived at 8324 South Mackinaw Avenue, two houses away from Kimberly's residence at 8320 South Mackinaw Avenue. At about 9 a.m. that morning, Synetta was at home when she heard someone screaming. She went to her front door and looked out. She saw Kimberly, wearing a t-shirt and shorts, being pulled up the street by defendant. Defendant was wearing a black skull cap, a black down coat, black pants and black shoes and he was holding a shotgun. Kimberly was crying.

¶ 42 Synetta testified that defendant pulled Kimberly through the gate in front of her house. Defendant looked around and stared at Synetta. Then he told Kimberly to "get your ass in the house." At that point, Synetta returned inside her own home. A few seconds later she heard a loud boom that she thought was a shotgun blast. Synetta waited a few minutes because she was scared, then went outside to take a look. She saw a neighbor waving to her from Kimberly's yard. Synetta walked over and saw Kimberly lying in a gangway, bleeding and gasping for breath. Other neighbors gathered, and the police and an ambulance arrived shortly thereafter.

¶ 43 Synetta testified she remained in the area after the police arrived, and they showed her a photograph, which she recognized as defendant. She told the officer that defendant was the person who had dragged Kimberly through the front gate. On December 12, 1996, Synetta picked defendant out of a line-up at the Area 2 police station.

¶ 44 Synetta testified she had never seen defendant before November 21, 1996. She denied telling Detective Abbott that she knew defendant and had previously seen him on several occasions.

¶ 45 The parties stipulated that on November 21, 1996, Officer Staudohar completed a case report relative to Kimberly's shooting and spoke with Synetta, who told him that after she found

Kimberly lying wounded on the ground, she saw two men running away toward the rear of Kimberly's building.

¶ 46 Katherine McGue, a nurse, testified that in November 1996 she lived on the first floor of a two-flat building at 8320 South Mackinaw Avenue. Kimberly lived upstairs. Katherine knew that Kimberly had a boyfriend, but Katherine had not seen him for at least three months prior to November 21, 1996.

¶ 47 Katherine testified that at about 9 a.m. on November 21, 1996, she was at home when she heard a "big boom" coming from her window near the gangway. She went outside and saw Kimberly "full of blood" and lying in the gangway. Katherine looked toward the back gate and saw two people running. They were each wearing a long black jacket and a hood. Katherine ran in her house and told someone to call 911, then went outside with towels and tried to administer first aid to Kimberly, who was bleeding from the side. After the ambulance arrived, Katherine went into Kimberly's apartment, where she found Kimberly's kids trembling and shaking in a closet.

¶ 48 The parties stipulated that Dr. Larry Sims, a Cook County assistant medical examiner, performed an autopsy on Kimberly on November 22, 1996. Dr. Sims determined that Kimberly died from multiple gunshot wounds and that the manner of death was homicide.

¶ 49 Detective Andrew Abbott testified that sometime after 9 a.m. on November 21, 1996, he was assigned to investigate Kimberly's shooting death. He arrived at 8320 South Mackinaw Avenue at approximately 9:30 a.m. Other police personnel were already on the scene; Kimberly had already been removed. Detective Abbott observed a large pool of blood on the sidewalk in the south gangway of 8320 South Mackinaw Avenue. He also observed two shotgun waddings in the pool of blood and a blood-soaked towel.

¶ 50 Detective Abbott testified he went to the rear of the building and saw that the glass in the second-floor rear window was broken and the outside window screen was partially torn away from the window frame. After speaking with Katherine McGue and Synetta Smothers, Detective Abbott went inside Kimberly's second-floor apartment and discovered a photograph of Kimberly and a male black subject, as well as a business card belonging to Detective Harrington. Detective Abbott took the photograph outside and showed it to Synetta, who identified the male subject in the photograph as an individual known to her as Corey, who she had seen earlier that morning.

¶ 51 Detective Abbott testified that on December 12, 1996, he learned that defendant was in custody at the Area 2 police station. Synetta arrived at the police station at about 11:30 a.m. and viewed a line-up. Synetta immediately identified defendant as the person she had seen dragging Kimberly down the street on November 21, 1996.

¶ 52 ASA Rogers testified as he had at Lonnie's trial about his questioning of defendant. On December 13, 1996, defendant gave a court-reported statement admitting his guilt in Kimberly's shooting.

¶ 53 In the statement, defendant stated he had been advised of his *Miranda* rights, that he understood them, and he wished to talk. Defendant stated that at around 9 a.m. on November 21, 1996, he was on his way home to 8320 South Mackinaw Avenue. Under his coat he had a .12-gauge, double barreled, sawed-off shotgun. He was armed with the shotgun because he was under a death threat on the street for having killed Lonnie.

¶ 54 Defendant stated when he arrived home, he discovered that the lock had been changed. He went to the back window and tried to enter through the safety bars on the window. Kimberly, his girlfriend of four years, came to the window, and defendant told her to open the door.

Kimberly said no, and locked the window. Defendant asked why, and Kimberly responded that she did not want him in the house and that she was going to call the police.

¶ 55 Defendant stated he lost his temper and broke the window with the barrel of his shotgun. He stuck his head through the window and saw Kimberly running toward the front of the house. He heard the screen door open and close. Defendant then jumped down and ran to the front of the house, where he saw Kimberly running around the corner. Defendant chased Kimberly and caught up with her.

¶ 56 Defendant stated that he asked Kimberly why she was so scared, and why she was running from him. Kimberly simply screamed his name and said: "Don't shoot me." The gun was visibly hanging out of the side of his coat. Defendant wondered why Kimberly thought he was going to shoot her. Defendant told her to walk to the house.

¶ 57 Defendant stated that as they were walking to the house, with Kimberly in front of him, he thought to himself that "[s]omething real bad must have happened" for Kimberly to be that scared. Defendant realized that Kimberly must have identified him as Lonnie's murderer. Defendant shot Kimberly as she walked, approximately 10 feet in front of him. He used both triggers. Kimberly fell and made choking noises. Defendant saw tears on her face.

¶ 58 Defendant stated that after shooting Kimberly, he started running. As he ran, he threw the shotgun into the street and went to his cousin Marlon's house. After staying there for two hours, defendant bought some "weed" and beer, which he smoked and drank. He stayed the night at Marlon's house and then went to Atlanta, where he remained until he was brought back to Chicago.

¶ 59 The parties stipulated that Brian Mayland, a forensic scientist with the Illinois State Police, would testify he examined evidence recovered from the scene and the victim, and that the

wadding was a .12-gauge shot and the pellets were size 5, which can be fired from a .12-gauge shotgun.

¶ 60 Defendant's father, Michael Jackson (Jackson), testified for the defense. Jackson testified that he was currently at the Racine County Jail serving a work-release sentence for substantial battery. In early September 1996, defendant was not living with Jackson or in contact with him. At some point, Jackson had a conversation with defendant about moving to Atlanta, and they subsequently moved to Atlanta sometime in mid-September of that year. They lived together at a lodge for one week and then moved into a room at the Executive Inn in Atlanta. Jackson's girlfriend subsequently moved in with them, and from "time to time," Jackson's daughter stayed with them.

¶ 61 Jackson testified that in early or mid-October 1996, Kimberly visited defendant for a couple of days. Jackson rented them a separate room. Then Kimberly and defendant returned by bus to Chicago. About two or three days later, defendant returned to Atlanta and again stayed with Jackson in the Executive Inn. In early to mid-November 1996, defendant and Jackson had a discussion about defendant moving out. A couple of weeks later (still, in November 1996), defendant moved into a Salvation Army shelter for one or two days.

¶ 62 Jackson testified that defendant became dissatisfied with his living arrangements at the Salvation Army shelter, and Jackson subsequently provided defendant with his own room at the Executive Inn. Jackson saw defendant practically every day from early November 1996 until his arrest in December 1996. The longest time he went without seeing defendant during that time period was one or two days. Jackson had no knowledge that defendant left Atlanta in November 1996 and returned to Chicago.

¶ 63 On cross-examination, Jackson testified defendant moved out of the Executive Inn and into the Salvation Army shelter in mid-October 1996. Jackson also testified that defendant and Kimberly returned to Chicago in November 1996, *not* October 1996 as he testified to on direct examination. When defendant returned to Atlanta, Kimberly was not with him. Jackson testified he did not know defendant's whereabouts on November 21, 1996, the day of Kimberly's shooting; Jackson could not say whether defendant was in Atlanta or Chicago on that day.

¶ 64 Following all the evidence, the trial court convicted defendant of first-degree murder and aggravated unlawful restraint in connection with Kimberly's death.

¶ 65 II. Joint Death Penalty Hearing and Posttrial Proceedings

¶ 66 At a joint capital sentencing hearing, the trial court found that defendant was eligible for the death penalty in both cases and sentenced him to death for Kimberly's murder. The trial court sentenced defendant to natural life in prison for Lonnie's murder and to two concurrent 30-year terms of imprisonment for the attempted murder of Melanie and for armed robbery. Defendant's death sentence was later commuted by Governor Ryan in 2003 to a sentence of natural-life imprisonment without possibility of parole or mandatory supervised release.

¶ 67 At a hearing on his posttrial motions in both cases, defense counsel informed the trial court that defendant had prepared a *pro se* motion for the appointment of counsel other than the public defender. In his *pro se* motion, which was captioned with case number 97 CR 1779 (Lonnie's case), and case number 97 CR 1780 (Kimberly's case), defendant argued that his trial counsel, Assistant Public Defender John Carey [Carey], rendered ineffective assistance in both cases. The trial court directed counsel to proceed with his motions for new trials and, afterwards, the court would consider defendant's *pro se* motion for the appointment of other counsel. The trial court then considered, and denied, defense counsel's motions for new trials in both cases.

¶ 68 Defense counsel then reminded the trial court that defendant's *pro se* motion for other counsel relating to both cases was still pending. In response, the trial court appointed the State Appellate Defender to represent him on appeal.

¶ 69 III. First Appeals and Remand Proceedings

¶ 70 Defendant appealed his convictions and death sentence in Kimberly's case directly to the Illinois Supreme Court, and he appealed his convictions and sentence in Lonnie's case to the appellate court. In both appeals, defendant argued that the trial court erred by failing to consider the allegations of ineffective assistance of trial counsel contained in his *pro se* posttrial motion. In Kimberly's case, the supreme court agreed with defendant and held that the trial court failed to conduct the necessary preliminary examination as to the factual basis of defendant's allegations of ineffective assistance of trial counsel. See *People v. Moore*, 207 Ill. 2d 68, 81 (2003). Accordingly, the supreme court remanded that case to the trial court for the limited purpose of conducting the required preliminary examination. *Id.*

¶ 71 In Lonnie's case, the appellate court found that since the issue raised on appeal was identical to that raised in the supreme court in Kimberly's case, the supreme court's ruling and directions in Kimberly's case were binding on it through the doctrine of *res judicata*. Accordingly, the appellate court remanded the cause to the trial court with directions to conduct the required preliminary investigation into defendant's claims of ineffective assistance of trial counsel raised in his *pro se* posttrial motion. See *People v. Moore*, No. 1-99-2640 (2003) (unpublished order under Supreme Court Rule 23).

¶ 72 Upon remand, in a joint hearing for both cases, the trial court conducted the examination ordered by the supreme court. The trial court requested that defendant elaborate on his allegations of ineffective assistance, with as much specificity as possible. Defendant responded

that his trial counsel, Carey, told him he would not receive the death penalty in either case if he waived his right to a jury for his trials and sentencing. Defendant stated that if counsel had not told him this, he would not have waived his right to a jury trial in both cases. Defendant further contended that his counsel would not allow him to testify at the suppression hearing or at the trials. Defendant also contended, among other things, that trial counsel failed to investigate or interview a number of alibi witnesses who would have placed him in Atlanta at the time of Kimberly's murder.

¶ 73 Former Assistant Public Defender Phillip Coffey (Coffey), who assisted Carey as co-counsel in pre-trial preparation and at defendant's trials in both Lonnie's and Kimberly's cases, appeared at the hearing because Carey died prior to remand. The trial court asked Coffey whether defendant ever insisted on having a jury trial in either or both of the cases. Coffey replied that, at times, defendant indicated he wanted jury trials, but that defendant's desire for a jury trial in his cases was clearly against Coffey's and Carey's advice. Coffey stated that it was their professional opinion that defendant would fare better in a bench trial in both cases. Coffey explained that one factor they considered was that the jury would be death-qualified and, thus, would potentially favor the prosecution. They also considered the "brutal" facts involved in both cases, and determined that it would be difficult to persuade the jurors to spare defendant's life if they did not accept the defense theories. As Lonnie's trial commenced, Coffey's understanding was that defendant wanted to waive his jury rights. After Lonnie's trial, defendant never said to Coffey, or to Carey in front of Coffey, that he would have preferred to have had a jury.

¶ 74 Coffey also recalled Carey informing defendant not to testify at the hearing on the suppression motion because of the risk of impeachment at trial with conflicting hearing testimony.

¶ 75 Regarding defendant's contention that Carey failed to investigate or interview his potential alibi witnesses in Atlanta, Coffey stated that he recalled Carey stating that defendant's alibi defense "was not going anywhere." Coffey assumed Carey contacted those witnesses, but he was not sure whether that actually occurred.

¶ 76 Following this preliminary examination, the trial court made findings of fact regarding whether defendant had sufficiently alleged ineffectiveness of trial counsel necessitating the appointment of new counsel in both cases. In Lonnie's case, as to defendant's allegations of ineffective assistance of trial counsel with respect to counsel's advice to take a bench trial instead of a jury trial, and with respect to counsel's failure to call defendant to testify at the suppression hearing, the trial court stated:

> "I don't believe there has been enough evidence put forth that an attorney should be appointed. And as to that case I'll deny what I would call the *Krankel* hearing, based on the evidence that was presented. I believe it was clear and convincing. The allegations against Mr. Carey as to that case, I don't believe there was anything that would show that he was ineffective in that case at all."

¶ 77 As to defendant's *pro se* motion to appoint another attorney in Kimberly's case, the trial court found one allegation to have some potential merit, namely, that Carey failed to properly investigate alibi witnesses. To "be on the safe side," the trial court appointed counsel, Richard Kling, to represent defendant on the issue of the unexplored alibi in Kimberly's case.

¶ 78 The trial court subsequently held an evidentiary hearing about whether trial counsel, Carey, was ineffective for failing to properly pursue an alibi defense in Kimberly's case. At the hearing, defendant testified he told Carey that at the time of Kimberly's murder, he was living in Atlanta with his father, Michael Jackson, and his father's girlfriend, Shirley Rivera, and her

daughter, Lashawana. Defendant testified he informed Carey that there were video cameras in the hotel at which they had stayed in Atlanta, and that during his three months in Atlanta, he spoke with other guests and employees of the hotel. Defendant claimed he asked Carey to contact his father, Shirley Rivera, her daughter, and a woman named Cynthia to corroborate his alibi.

¶ 79 Defendant claimed that about one month after he gave Carey this information, Carey told him he was in the process of trying to contact those individuals. Defendant stated that each time Carey visited him in the jail, he informed defendant that he was still "looking into it." Defendant testified that as time passed, he began to believe that Carey was not really investigating his alibi defense.

¶ 80 Defendant acknowledged that his father testified at the trial as an alibi witness, but defendant complained that Carey did not interview him until one week before the trial began and only after the State interviewed him.

¶ 81 The videotaped interviews of Shirley Rivera and her daughter, made by the prosecution, were moved into evidence by defendant to support his contention that Carey never interviewed them about his alibi defense.

¶ 82 At the conclusion of the evidentiary hearing, the trial court found that defendant did not establish that Carey provided ineffective assistance of counsel by failing to properly pursue an alibi defense in Kimberly's case. The court noted that Carey called defendant's father as a witness and his father failed to provide an alibi for the date of Kimberly's murder. The court also noted that the Riveras' testimony would not have aided defendant at trial because, based on the videotaped interviews, neither of them could place defendant in Atlanta on the day of the murder. Having considered the evidence presented at the evidentiary hearing, the trial court

found that Carey made a reasonable investigation into defendant's alibi defense, even without having contacted the Riveras. The trial court denied defendant's motion for a new trial based on his claim of ineffectiveness of trial counsel for failure to properly pursue an alibi defense in Kimberly's case.

¶ 83 IV. Second Appeals

¶ 84 In Lonnie's case, defendant appealed from the trial court's denial, following remand, of his *pro se*, posttrial motion for the appointment of other counsel. Defendant argued that the trial court abused its discretion in denying his motion because it contained several potentially meritorious allegations of ineffective assistance necessitating appointment of other counsel. The appellate court affirmed. See *People v. Moore*, No. 1-04-0766 (2005) (unpublished order under Supreme Court Rule 23) (Lonnie Williams' case).

¶ 85 In Kimberly's case, defendant appealed from the trial court's denial, following the appointment of other counsel after the *Krankel* hearing, of his motion for a new trial based on ineffective assistance of trial counsel. Defendant contended the trial court erred by limiting the scope of posttrial counsel's appointment to the single claim of ineffective assistance related to his alibi defense, thus barring posttrial counsel from investigating the remaining claims defendant raised in his *pro se*, posttrial motion. The appellate court affirmed. *People v. Moore*, 389 Ill. App. 3d 1031 (2009) (Kimberly Fort case).

¶ 86 V. Postconviction Proceedings

¶ 87 Lonnie's and Kimberly's cases were consolidated for purposes of postconviction proceedings.

¶ 88 Defendant filed an amended, postconviction petition seeking relief from the convictions and sentences in both cases. In his amended postconviction petition, defendant claimed his trial

counsel provided ineffective assistance by: (1) failing to call him to testify in support of his motion to suppress statements in both cases; (2) deliberately misrepresenting to him that he would not receive a death sentence if he waived a jury and elected a bench trial in both cases; and (3) failing to investigate "important witnesses and significant evidence" in both cases. Defendant subsequently filed a supplemental postconviction petition, adding a claim that the State had committed a *Brady* violation in both cases by failing to disclose ASA Rogers' prior involvement in the taking of false statements.

¶ 89 The trial court dismissed defendant's amended and supplemental postconviction petitions at the second stage of the postconviction proceedings.

¶ 90 VI. The Present Appeal From the Dismissal of the Amended and Supplemental Postconviction Petitions

¶ 91 Defendant now appeals the second-stage dismissal of his amended and supplemental postconviction petitions. "A postconviction proceeding 'is not an appeal of a defendant's underlying judgment. Rather, it is a collateral attack on the judgment.' [Citation.] Such a proceeding 'allow[s] inquiry into constitutional issues relating to the conviction or sentence that were not, and could not have been, determined on direct appeal.' " *People v. Graham*, 2012 IL App (1st) 102351, ¶ 30.

¶ 92 "At the second stage of postconviction proceedings, the State may file a motion to dismiss the petition and the postconviction court must determine whether the petition and any accompanying documents make a substantial showing of a constitutional violation. [Citation.] The postconviction court takes 'all well-pleaded facts that are not positively rebutted by the trial record' as true. [Citation.] If the petition fails to make a substantial showing of a constitutional violation, it is dismissed; if such a showing is made, the petition advances to the third stage,

where the postconviction court conducts an evidentiary hearing. [Citation.] A second-stage dismissal of a postconviction petition is reviewed *de novo*." *Id.*, ¶ 31.

¶ 93 In the present case, the trial court dismissed defendant's amended and supplemental postconviction petitions at the second stage of proceedings without conducting an evidentiary hearing. Therefore, our standard of review is *de novo*.

¶ 94 First, we address defendant's appeal of the trial court's dismissal of his amended postconviction petition. Then, we address defendant's appeal of the trial court's dismissal of his supplemental postconviction petition.

¶ 95 A. The Dismissal of Defendant's Amended Postconviction Petition

¶ 96 Defendant contends the trial court erred in dismissing his amended postconviction petition, as it made a substantial showing that his trial counsel provided ineffective assistance by: (1) failing to call him to testify in support of his motion to suppress statements in both cases; and (2) deliberately misrepresenting to him that he would not receive a death sentence if he waived a jury and elected a bench trial in both cases.

¶ 97 The State responds that defendant's claims of ineffective assistance are barred by *res judicata*. "The doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties, or their privies, on the same cause of action." *Indian Harbor Insurance Co. v. MMT Demolition, Inc.*, 2014 IL App (1st) 131734, ¶ 28. With respect to the application of *res judicata* in postconviction proceedings, our supreme court has noted that "[a] post-conviction petition 'represents a collateral attack on a prior judgment; it is not an appeal from the underlying conviction and sentence.' [Citation.] As a result, in postconviction proceedings the '[d]eterminations of the reviewing court on the prior direct appeal are *res judicata* as to issues actually decided.'

[Citation.] A postconviction petitioner may not avoid the bar of *res judicata* simply by rephrasing issues previously addressed on direct appeal." *People v. Williams*, 186 Ill. 2d 55, 62 (1999).

¶ 98 We agree with the State that defendant's amended postconviction claims of ineffective assistance of trial counsel are barred by *res judicata*, as they were previously addressed on defendant's direct appeal from the trial court's denial of his posttrial motion for the appointment of other counsel in Lonnie's case. See *People v. Moore*, No. 1-04-0766 (2005) (unpublished order under Supreme Court Rule 23) (*Moore*). We proceed to quote the *Moore* decision in detail in order to show that the appellate court thoroughly addressed, and ultimately rejected, the same claims of ineffective assistance of trial counsel that defendant subsequently raised in his amended postconviction petition. First, *Moore* addressed defendant's claim that his trial counsel provided ineffective assistance regarding the recommendation that he waive a jury and elect a bench trial in both cases:

> "We *** find no merit in defendant's claim that counsel's advice to waive his right to a jury trial constituted ineffective assistance of counsel. Counsel's advice to waive a jury trial is the type of trial tactics and strategy that does not support a claim of ineffective assistance of counsel. [Citation.] Waiving the right to a jury trial is a legitimate trial strategy where the jury may not understand or accept the defense theory, or where credibility is at issue. [Citation.] The choice of a bench trial is a natural and logical strategy where the emotional factors in the case favor the prosecution [citation], or where counsel concludes that the trial court would be less likely to impose the death penalty than a jury [citation]. Where counsel indicates, in defendant's presence, that the case is going to be a

> bench trial, and defendant acquiesces or gives no indication or objection to waiving the jury, we can conclude that the jury waiver was made with defendant's knowledge and consent. [Citation.]
>
> At the hearing on remand, Coffey testified that after he and Carey analyzed defendant's cases, it was their professional opinion that defendant would fare better at a bench trial 'for all sorts of reasons,' including those set forth above. [The reasons included that the defense would be in a difficult position having to conduct a jury trial with 12 jurors who had been selected after stating they could sentence defendant to death, and the difficulty in persuading the jurors to spare defendant's life if they did not accept the defense theories]. Counsel further testified that defendant had ultimately decided to waive his jury rights, and that he never complained about that choice thereafter. The evidence thus showed that the decision to waive defendant's right to a jury constituted logical trial strategy based on counsels' assessment of the facts and circumstances involved in this case, in which defendant acquiesced. We therefore find that the trial court's determination that there was no merit to this allegation was not manifestly erroneous." *Id.*, pp. 11-12.

¶ 99 The appellate court decision in *Moore* also addressed defendant's claim that his trial counsel provided ineffective assistance by failing to call him to testify in support of his motion to suppress statements. The motion to suppress alleged that his statements in both cases were involuntary because they were given only as the result of physical and mental coercion. The appellate court found no ineffectiveness in trial counsel's failure to call defendant to testify in support thereof:

"Defendant next contends that counsel erroneously told him that he was not permitted to testify at the hearing on his motion to suppress and at trial. He maintains that he wanted to testify about the physical and emotional abuse he received from police, and that he acted in self-defense when he shot Lonnie Williams. Defendant notes that the trial court did not make a specific finding as to this allegation when it announced its ruling on remand.

Although it is ultimately defendant's decision whether or not to testify, his determination should be made with counsel's advice. [Citation.] Defendant must contemporaneously assert his right to testify by informing the trial court of his desire to do so, and if he does not, it is presumed that he has waived his right. [Citation.]

* * *

As to the pretrial motions, Coffey testified at the hearing on remand that Carey had advised defendant that it was in his best interest not to testify at the motion hearing[]. Coffey explained that Carey's concern was that if defendant chose to testify at the hearing[], it would make it more difficult if he later needed to testify at trial because any variance in his testimonies could affect his credibility. Based on this record, it was reasonable for the trial court to conclude that defendant's decision not to testify was trial strategy with which he agreed. [Citation.] Accordingly, we find no manifest error in the trial court's determination that the allegations contained in defendant's *pro se* posttrial motion were without merit, and that it properly denied defendant's

motion for the appointment of new counsel to further pursue his claims." *Id*., pp. 14-15.

¶ 100 Thus, on direct appeal in *Moore*, the appellate court addressed defendant's claims of ineffective assistance of trial counsel (*i.e.*, that his trial counsel erroneously recommended that he waive jury trials in both cases and failed to call him to testify at the suppression hearing) that were the same as those subsequently asserted by defendant in his amended postconviction petition. Accordingly, defendant's claims in his amended postconviction petition of ineffectiveness of trial counsel are barred by *res judicata*.

¶ 101 Defendant argues, though, that the appellate court in *Moore* never addressed the precise claim raised in his amended postconviction petition that his trial counsel's failure to call him to testify at the suppression hearing constituted ineffective assistance because success on the motion was impossible without his testimony about how he was physically and psychologically coerced into making statements in both cases. Defendant also argues that the appellate court in *Moore* never addressed the precise claim raised in his amended postconviction petition that his trial counsel was ineffective for misrepresenting to defendant that he would not receive a death sentence if he waived his right to a jury trial in both cases.

¶ 102 Defendant's contentions are without merit. As discussed, the appellate court in *Moore* specifically addressed, and rejected, defendant's claim of ineffective assistance of trial counsel based on counsel's alleged refusal to allow defendant to testify at the suppression hearing regarding his claims of physical and emotional abuse from police. *Id*., pp. 14-15. The appellate court in *Moore* also specifically addressed, and rejected, defendant's claim of ineffective assistance of trial counsel based on counsel's recommendation that he take a bench trial in both cases due to the difficulties in trying the cases before a death-qualified jury and in persuading the

jury to spare defendant's life. *Id*., pp. 11-12. Defendant may not avoid the bar of *res judicata* by rephrasing issues previously addressed on direct appeal. *Williams*, 186 Ill. 2d at 62. Accordingly, we affirm the dismissal of defendant's amended postconviction petition.

¶ 103 B. The Dismissal of Defendant's Supplemental Postconviction Petition

¶ 104 Next, defendant contends the trial court erred in dismissing his supplemental postconviction petition, which alleged that the State had committed a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), in both Lonnie's and Kimberly's cases by failing to disclose that ASA Rogers, who took defendant's confession, had previously taken two statements in another case that ultimately proved to be false.

¶ 105 In *Brady*, the United States Supreme Court held that the State violates a defendant's constitutional right to due process of law by failing to disclose evidence favorable to defendant and material to guilt or punishment. *Brady*, 373 U.S. at 87. "The standard for materiality under *Brady* is whether there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *People v. Harris*, 2013 IL App (1st) 111351, ¶ 50.

¶ 106 Defendant contends that his supplemental postconviction petition made a substantial showing that the State committed a *Brady* violation by failing to disclose that in 1992, ASA Rogers had taken statements from Harold Hill (Hill) and Dan Young (Young), two suspects in the sexual assault and murder of Kathy Morgan, in which they implicated a third man, Pete Williams (Williams). The statements implicating Williams were false, as the State learned shortly thereafter (and prior to the cases against defendant here) that Williams was in jail at the time of the sexual assault and murder. Defendant argues that his supplemental postconviction petition made a substantial showing that ASA Rogers' prior taking of false statements from Hill

and Young was material to defendant's guilt or punishment in Lonnie's and Kimberly's cases here; specifically, defendant contends that evidence of ASA Rogers' taking of the prior false statements from Hill and Young would have undermined ASA Rogers' credibility at defendant's suppression hearing and at the trials here, leading to the suppression of defendant's confessions and to his ultimate acquittal in each case.

¶ 107 We disagree, because defendant acknowledges that there is no evidence of any wrongdoing by ASA Rogers in the taking of Hill's and Young's statements. In the absence of any wrongdoing by ASA Rogers in the taking of those statements, there is no reasonable probability that the result of the suppression hearing or either of defendant's trials would have been different had the State made the disclosure. In so holding, we note that defendant's convictions here did not rest only on his confessions, but also on eyewitness testimony. Specifically, in Lonnie's case, Melanie testified to defendant's robbing and shooting of Lonnie. Melanie's testimony was corroborated by Romero's testimony to seeing defendant fleeing with a gun in his hand, as well as Special Agent Greene's testimony regarding defendant's flight to Atlanta and his possession of false identification. In Kimberly's case, Synetta testified to seeing defendant dragging Kimberly through the gate in front of her house, after which she heard the gunshot blast and saw Kimberly lying bleeding in a gangway. Defendant's motive in murdering Kimberly was provided by the police testimony that Kimberly had been helping them with their investigation of defendant in Lonnie's murder. Given all this evidence against defendant in both Lonnie's case and Kimberly's case, there is no reasonable probability that the result of either case would have been different even if the State had disclosed ASA Rogers' participation (without any wrong-doing) in an unrelated case in the taking of Hill's and Young's statements that were later discovered to be false. Accordingly, the standard for materiality under *Brady* has not been

met. Therefore, we affirm the trial court's dismissal of defendant's supplemental postconviction petition.

¶ 108 For the foregoing reasons, we affirm the circuit court. As a result of our disposition of this case, we need not address the other arguments on appeal.

¶ 109 Affirmed.