

2012 IL App (2d) 100790-U
No. 2-10-0790
Order filed March 30, 2012

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Du Page County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 04-CF-656
)	
ROBERT J. MUELLER,)	Honorable
)	Kathryn E. Creswell,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

RULE 23 ORDER

Held: The trial court properly dismissed defendant's postconviction petition at the first stage for failure to state the gist of a constitutional claim.

¶ 1 Defendant, Robert J. Mueller, a high school teacher and coach, was convicted of eight counts of criminal sexual assault (720 ILCS 5/12-13(a)(4) (West 2004)) for acts of sexual penetration with two students, S.V. and K.W. The trial court imposed the minimum sentence of four years on each count, to run consecutively, for a total of 32 years. Defendant appealed his conviction and sentence, and this court affirmed. See *People v. Mueller*, No. 2-07-0413 (2009) (unpublished order under

Supreme Court Rule 23). Defendant subsequently filed a petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). The trial court dismissed defendant's postconviction petition at the first stage, and that dismissal is the subject of this appeal. We affirm.

¶ 2

I. BACKGROUND

¶ 3

A. Pretrial Proceedings

¶ 4

1. 2004

¶ 5 Defendant was hired as a teacher and coach at Hinsdale Central High School in 1988. An anonymous letter to police of an alleged affair between defendant and a student, S.V., prompted an investigation in February 2004. On March 10, 2004, a two-count complaint alleged that defendant committed two acts of sexual penetration with S.V. between October 1, 2002, and February 29, 2004. Defendant was arrested on that date and posted bond. Though the arraignment was scheduled for March 29, 2004, the parties appeared in court on March 18, so that defense counsel could file an appearance and an order for preservation of evidence. Defense counsel asked the court to extend the court date of March 29 for purposes of investigation and stated that defendant was "certainly waiving" his right to a prompt preliminary hearing or indictment.

¶ 6

The parties appeared in court for the arraignment on April 12. According to the State, the parties were in the process of negotiating, and the case had not yet been presented to the grand jury. The case was continued to May 3 by agreement. On May 3, the State indicated that after some preliminary negotiations, it was proceeding with the grand jury proceeding. The case was continued to May 20 by agreement. On May 20, the State advised the court that it had tendered several items of discovery to defendant. The parties agreed to an arraignment date of June 2. On June 2, defense counsel asked the court to waive defendant's presence because his arraignment had been deferred

from time to time, and because he had “waived any right to prompt preliminary hearing or Grand Jury determination.” After discussing a marital privilege issue with respect to the grand jury proceeding, the parties agreed to handle that issue on June 10 and to schedule the arraignment for June 23. On June 10, the arraignment date was continued by agreement to June 30. On June 30, both parties agreed to continue the arraignment to July 14.

¶ 7 On July 13, 2004, defendant was charged by indictment with eight counts of criminal sexual assault alleging acts of sexual penetration with S.V. Two of the acts allegedly occurred in the high school fitness center in February 2004, and six of the acts allegedly occurred in a high school classroom and storage room, or in an unspecified area, between January 2002 and February 2004. On July 14, the parties appeared in court, and defendant pled not guilty to the charges. The case was continued by agreement until August 31, and then to October 14, at which time defense counsel filed a motion for a bill of particulars. At that time, the State advised the court that negotiations had “ultimately terminated recently,” and that it would probably seek new charges. The parties agreed to a subsequent court date of November 17, which was continued by agreement to December 15, 2004.

¶ 8 In the meantime, on November 23, 2004, defendant was charged by indictment with one count of criminal sexual assault as to another student, K.W. (count IX). In that charge, the State alleged that defendant committed an act of sexual penetration with K.W. in a high school equipment closet between December 1999 and May 21, 2001. At the December 15, 2004, hearing, the State filed an objection to defendant’s motion for a bill of particulars. In addition, the State informed the court of its intention to nol-pros count II of the indictment, to seek a new indictment with the remaining counts, and to file “some additional” counts. The court dismissed count II. Defense

counsel then inquired about the issuance of new counts, and the State answered that there were two separate victims, S.V., and K.W., with two separate times frames, meaning that they should be two separate cases numbers. Because count IX relating to K.W. should have been a separate case number, the State nol-prossed count IX and indicated that the new indictment would likely be returned by January 4, 2005. The parties agreed to January 4 as the next court date.

¶ 9

2. 2005

¶ 10 The parties appeared in court one day earlier, on January 3, and the State advised that it was not able to present a new indictment on January 4 because one of the two victims had been out of town. The State also advised the court that the new (superseding) indictment was going to have a lot more specificity than the original indictment, possibly rendering moot a hearing on the specificity of the original indictment. The superseding indictment would contain some additional counts as well. The parties agreed to continue the case to January 24 pending the superseding indictment. The January 24 date would be for arraignment and so that defense counsel could tailor its motion for a bill of particulars to the superseding indictment.

¶ 11 The parties appeared in court on January 24, and the State advised that because it had not yet received a report from the investigator, the case had not been presented to the grand jury. The parties agreed to a subsequent court date of March 7. However, by March 7, the State had still not obtained an indictment. The case was continued by agreement to April 11. The next order in the record is an “agreed order” dated April 8, stating that the case was continued to May 16. The order also stated that counsel “met with the court in chambers off the record to discuss an issue arising in Grand Jury related to this case.”

¶ 12 On May 10, defendant was charged by superseding indictment with 21 counts of criminal sexual assault. Eight of the counts, which pertained to S.V., appeared in the original indictment. The remaining 13 counts, labeled “additional counts,” pertained to K.W. (nine counts) and S.V. (four counts). The nine additional counts relating to K.W. alleged acts of sexual penetration in a high school equipment closet between October and November 2000 (two counts); acts of sexual penetration on the premises of the Burr Ridge Ramada Inn between January 2000 and May 21, 2001 (three counts); and acts of sexual penetration on the premises of the Burr Ridge Extended Stay America during the five-month period of January to May 2000 (four counts). The four additional counts relating to S.V. alleged acts of sexual penetration in a motor vehicle between January 2002 and February 2004 (three counts); and an act of sexual penetration in the high school storage room between January 2002 and February 2004. At the May 16 hearing, defense counsel asked for a June 27 court date due to defendant’s pending health issue.

¶ 13 On June 27, defendant filed a motion for a bill of particulars. The parties appeared in court on July 20, and the case was continued by agreement to August 4. On August 4, the State responded to defendant’s motion for a bill of particulars, and the case was continued to August 30 for a hearing on that motion. On August 30, the case was again continued to September 13 for the court’s ruling on defendant’s motion. On September 13, the court denied defendant’s motion for a bill of particulars. The case was then continued to October 17 for status, on which date the case was continued to November 1 for a defense motion. On November 1, the case was continued to November 8 so that defendant could file a motion to dismiss all counts of the indictment. On November 8, a hearing on defendant’s motion was scheduled for December 9. An order entered on December 9 stated that the case was continued by agreement to December 12.

¶ 14

3. 2006

¶ 15 Following the December 12 hearing, the court, on January 6, 2006, denied defendant's motion to dismiss all counts of the indictment. The case was continued to February 17 for status and to April 25 for a jury trial. On January 30, defendant moved to reset the trial date. The next court date was February 6, at which time defendant also moved to sever the multiple counts for S.V. and K.W. On March 6, the court granted defendant's motion to reset the trial date, and the next hearing was scheduled for March 17. On March 17, the State filed its first motion *in limine*, and the case was continued by agreement to April 14. On April 14, the court granted the State's motion *in limine*, and the case was continued by agreement to May 11 for status on defendant's motion for severance. On May 11, defendant withdrew his motion for severance, and the case was continued to June 20 for status and to September 12 for a jury trial.

¶ 16 On June 12, defense counsel moved to reset the court date of June 20. An order dated June 15 set the next court date for July 10. On July 10, an agreed order was entered setting a status date of July 19. On July 19, the case was continued to August 21 for status and motions by the defense and the State. On August 21, the case was continued to August 31 based on the State's second motion *in limine*. On August 31, the case was continued to September 5 for "motions and further status" as to a trial schedule. On September 5, the case was continued to November 28 for a jury trial based on a motion by the defense. The next status date was set for October 12, 2006. On October 12, the case was continued to October 26 for a hearing on the State's second motion *in limine* and for defendant's motion for additional discovery. On October 26, the court ruled on the State's second motion *in limine* and continued the case to November 15 for a ruling on defendant's motion for additional discovery. The parties appeared on October 31 and November 15 regarding

defendant's discovery motion. On November 27, the court ruled on a motion by the State, and the case was continued to November 28 for a jury trial. Trial commenced on December 1.

¶ 17 Following the trial, the jury found defendant guilty of 8 counts and not guilty of 13 counts. Defendant was found not guilty of any of the eight counts in the original indictment. He was found guilty of counts XII and XIII, which related to S.V., and counts XV through XX, which related to K.W. For each of the eight counts, defendant received the minimum four-year sentence, to run consecutively, for a total of 32 years.

¶ 18 B. Posttrial Proceedings

¶ 19 Defendant, still represented by trial counsel, appealed his conviction and sentence, raising five issues on appeal. He argued that: (1) he was not proven guilty beyond a reasonable doubt; (2) the trial court's denial of his request for a bill of particulars denied him a fair trial; (3) the trial court may have abused its discretion in denying his request to review all of S.V.'s psychiatric records; (4) the trial court erred by refusing to instruct the jury on the offense of fornication; and (5) his 32-year sentence was unconstitutional. This court affirmed, with one justice dissenting only as to the 32-year sentence. *Mueller*, No. 2-07-0413. Defendant filed a petition for leave to appeal to the Supreme Court, which was denied.

¶ 20 1. Postconviction Petition

¶ 21 Defendant then obtained new counsel and filed a 36-page postconviction petition. First, defendant argued that due to the State's failure to timely indict specific allegations of sexual penetration, he was "deprived of his constitutional rights to promptly be fully advised of the charges against him, due process, speedy trial, equal protection, and the effective assistance of counsel." Second, he argued that the State failed to disclose, prior to trial, the substance of detailed allegations

made by S.V. and K.W. This failure, according to defendant, deprived him of the right to a fair trial, due process, and equal protection, and resulted in a trial by ambush. Third, defendant argued that the consecutive sentencing statute violated the separation of powers clause and the prohibition against cruel and unusual punishment. Finally, he argued that his trial counsel and appellate counsel were ineffective for failing to raise these issues prior to trial or on direct appeal.

¶ 22

2. Trial Court's Ruling

¶ 23 On June 29, 2010, the trial court, which also handled defendant's underlying trial, dismissed defendant's postconviction petition at the first stage, reasoning as follows. With respect to the State's alleged failure to timely indict, the court noted that defendant never made a demand for a speedy trial; that defendant conceded that from the date of his arrest until December 2004, the parties were engaged in plea negotiations; and that defendant waived any delay in the return of the indictment. Therefore, defendant's contention had to be that the five-month delay between December 2004, when negotiations broke down, and the return of the superseding indictment, in May 2005, resulted in a violation of constitutional proportion.

¶ 24 Defendant argued that the delay in receiving the superseding indictment violated his due process in the sense that the State gained a tactical advantage by being able to prepare a focused trial strategy directed at specific allegations in the additional counts. According to the trial court, this argument had already been rejected in defendant's direct appeal and was barred by *res judicata*.

¶ 25 Also, the court determined that defendant's allegations of the State's lack of diligence in presenting the superseding indictment were positively rebutted by the record. The trial court noted that the five-month delay in presenting the case to the grand jury was occasioned, in part, by the State's "careful attempts to honor" defendant's rights. To this end, the court noted that on April 8,

2005, it met with both parties in chambers. During this meeting, the State advised the court that it had declined to seek additional charges before the existing grand jury because one of the grand jurors knew defendant and was familiar with the case. The State advised that the case would be presented to a different grand jury and the case was continued by agreement for that purpose. On the next court date, May 16, defendant was arraigned on the superseding indictment. As a result, the court found no lack of diligence. When reviewing all of the court orders of the case, the court was unable to locate any continuances that were not “agreed” to or requested by defendant.

¶ 26 As to the actual and substantial prejudice alleged by defendant, the court determined that the fact that defendant was acquitted of the eight charges in the original indictment did not mean that those charges were brought in bad faith, or that they were intended to sidetrack the defense and cause them to focus on charges that the State did not pursue. In short, none of the consequences cited by defendant, such as the cost of his defense, his inability to work or engage in other activities, and stress, were unique to his situation, and they fell far short of actual and substantial prejudice.

¶ 27 In addition, no existing case law supported defendant’s contention that speedy trial principles should apply to him even though he was not in custody. The court reasoned that defense counsel’s decision not to demand a speedy trial was a strategic decision, given the ongoing plea negotiations. Delays were by agreement, and counsel was not ineffective for failing to demand a speedy trial.

¶ 28 Defendant’s claim that the delay in returning the superseding indictment hindered his ability to engage in meaningful plea negotiations also failed because defendants have no right to negotiate a disposition. A defendant who rejects a proposed plea agreement proceeds at his own risk because the State has the authority and discretion regarding what charges to bring.

¶ 29 Next, the court rejected defendant's argument that the testimony of S.V. and K.W. was more definite than the vague information tendered to him in pretrial discovery, resulting in a trial by ambush. Once again, this court's decision on direct appeal that the discovery provided to defendant was sufficient to prepare his defense rendered that issue barred by *res judicata*.

¶ 30 Regarding defendant's argument that the mandatory nature of the sentencing statute violated the separation of powers doctrine, the court did not find this argument persuasive. The court noted that the purpose of the statute was constitutionally valid and still permitted the court broad discretion in fashioning the sentence (4 to 15 year-span on each count).

¶ 31 Finally, the trial court rejected defendant's claim that trial and appellate counsel, which were the same, were ineffective for failing to raise these issues at trial and on direct appeal. Because defendant's claims lacked merit, he suffered no prejudice.

¶ 32 Defendant timely appealed the first-stage dismissal of his postconviction petition.

¶ 33 II. ANALYSIS

¶ 34 Defendant argues that the trial court erred by dismissing his postconviction petition at the first stage. The Act provides a means by which a defendant may challenge his conviction for substantial deprivation of federal or state constitutional rights. *People v. Barkes*, 399 Ill. App. 3d 980, 985 (2010). At the first stage of postconviction proceedings, the trial court examines the petition independently, without input from the parties. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). "A petitioner need present only a limited amount of detail and is not required to include legal argument or citation to legal authority." *Id.* The trial court must summarily dismiss the petition if it is frivolous or patently without merit. 725 ILCS 5/22-2.1(c) (West 2010). A postconviction petition is frivolous or patently without merit when its allegations, taken as true and liberally

construed, fail to present the gist of a constitutional claim. *People v. Harris*, 224 Ill. 2d 115, 126 (2007). This standard presents a “low threshold,” requiring only that the petitioner plead sufficient facts to assert an arguably constitutional claim. *Brown*, 236 Ill. 2d at 184. In analyzing the petition, the trial court may examine the court file of the criminal proceeding, any transcripts of the proceeding, and any action taken by the appellate court. *Id.* We review the summary dismissal of a postconviction petition *de novo*. *Id.*

¶ 35 A. Failure to Timely Indict

¶ 36 1. Plea Negotiations

¶ 37 Defendant essentially makes three arguments regarding the State’s alleged “failure to timely indict specific allegations of sexual penetration.” First, he argues that the State’s failure to bring all the charges in a timely fashion affected his ability to engage in fully informed, meaningful plea negotiations. According to defendant, he was not advised “of the full scope of the nature and cause of the charges he was facing” and was thus incapable of making informed decisions during plea negotiations. While not alleging prosecutorial vindictiveness, defendant argues that the State exhibited “a lack of diligence amounting to ‘prosecutorial impassivity’ that tainted the fairness of the entirety of the proceedings.”

¶ 38 A defendant has no constitutional right to be offered the opportunity to plea bargain. *People v. Palmer*, 162 Ill. 2d 465, 476-77 (1994). A defendant who makes a knowing, voluntary, and intelligent choice to risk an increased sanction rather than plead guilty pursuant to a plea bargain will be held to that choice. *People v. Walker*, 84 Ill. 2d 512, 522 (1981). In *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), cited by defendant, a prosecutor’s threat to seek an additional indictment if the defendant did not plead guilty to the offense, for a recommended sentence of five years, did not

result in a denial of due process. The United States Supreme Court stated that while confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on his trial rights, the imposition of these difficult choices is an inevitable, and permissible, attribute of any legitimate system which encourages the negotiation of pleas. *Id.* at 668.

¶ 39 With respect to plea negotiations, the record shows as follows. John Donahue, the defense attorney who represented defendant in the underlying trial and on direct appeal, submitted an affidavit that was attached to defendant's postconviction petition. In attorney Donahue's affidavit, he averred that after the State returned an eight-count indictment of charges pertaining to S.V. in July 2004, it advised defendant that it had information of defendant's alleged sexual relationship with another student, K.W. The State further advised that it would not pursue charges related to K.W. if defendant pled guilty to charges relating to S.V. Attorney Donahue stated in his affidavit that defendant rejected the State's offer. He also stated in his affidavit that in December 2004, the State advised the court it would be filing a superseding indictment with additional counts, although it did not indicate how many additional counts.

¶ 40 The record further shows that as early as October 2004, the State advised the court that plea negotiations had terminated recently, and that it would likely seek new charges. In November 2004, the State returned a one-count indictment as to the second student, K.W. Then, in December 2004, the State advised the court that it would be seeking a superseding indictment with additional counts. In his postconviction petition, defendant admitted that it was in that month, December 2004, that plea negotiations broke down completely. In January 2005, the State reiterated that it would be filing a superseding indictment with additional counts. In May 2005, the superseding indictment added

13 counts to the original nine counts, with nine of them pertaining to K.W. and four of them pertaining to S.V.

¶ 41 Based on this record, defendant was aware that by declining the State's offer, he would be subjected to additional charges, and he proceeded at his own risk. See *Bordenkircher*, 434 U.S. at 668 ("In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion"); see also *People v. Hall*, 311 Ill. App. 3d 3d 905, 911 (2000) (a prosecutor's discretion to charge is broad, and in some circumstances the prosecutor may file additional and harsher charges against a defendant). Put simply, the State had the right to bring additional charges against defendant when plea negotiations failed, and defendant has failed to present the gist of a constitutional claim.

¶ 42 Moreover, regarding defendant's general claim that the State lacked diligence by failing to bring all the charges at once, the record positively rebuts that assertion. After plea negotiations broke down, and the State announced its intention to pursue additional charges, the five-month delay in returning the superseding indictment is explained by the record. In January 2005, the State advised the court that one of the victims had been out of town, so it was unable to obtain the superseding indictment. Later in January, the State advised the court that it was still waiting on a report from the investigator. The State had still not obtained the indictment by March 7. On April 8, a trial court order indicated that the parties had met with the court in chambers to discuss an issue arising with the grand jury. The trial court recalled this meeting when it found no lack of diligence on the part of the State, saying that the State was being "careful" to honor defendant's rights. Apparently, the State had discovered that one of the grand jurors knew defendant, meaning that it

was necessary to present the case to a different grand jury. The record therefore shows no lack of diligence on the part of the State in securing the superseding indictment.

¶ 43 2. Speedy Trial Violation

¶ 44 Defendant's second argument as to the State's failure to timely indict is that his right to a speedy trial was violated. According to defendant, the "unexplained and unwarranted delays" of 426 days (from arrest until the additional counts as to S.V. in the superseding indictment), and 168 days (from arrest until the additional counts as to K.W. in the superseding indictment) exceeded the statutory speedy trial limitation of 160 days for defendants on bond.

¶ 45 The right to a speedy trial is guaranteed by the Federal and Illinois Constitutions. U.S. Const., amends VI, XIV; Ill. Const. 1970, art. I, §8; *People v. Bonds*, 401 Ill. App. 3d 668, 671 (2010). There is also a statutory right to a speedy trial, which is at issue here. *People v. Huff*, 195 Ill. 2d 87, 91 (2001). Section 103-5(a) of the speedy trial statute (725 ILCS 5/103-5(a) (West 2004)) provides an automatic 120-day speedy trial right for a person held in custody on the pending charge and does not require the person to file a demand. *Bonds*, 401 Ill. App. 3d at 671. On the other hand, section 103-5(b) of the speedy trial statute contains a 160-day speedy-trial right for a person released on bond, as in this case, but the period begins to run only when the accused files a written speedy-trial demand. *Id.* at 672. In other words, the period does not begin until the demand is made. *People v. Garrett*, 136 Ill. 2d 318, 324 (1990). The problem with defendant's argument in this case is that no speedy-trial demand was ever filed, meaning that the 160-day period was never triggered.

¶ 46 Defendant attempts to circumvent this obstacle by arguing that equal protection requires that he be treated as though he were in custody. This argument is easily rejected as the speedy-trial statute plainly distinguishes between those in custody and those in bond. As stated, because

defendant was not in custody, a speedy-trial demand was required to trigger the 160-day period under section 103-5(b).

¶ 47 Defendant also attempts to sidestep this issue by arguing that the original and new charges were subject to compulsory joinder, meaning that the delays attributable to him on the original charges could not be attributed to him on the additional counts. First, as previously discussed, defendant never made a speedy-trial demand. Second, contrary to his assertion, the charges were not subject to joinder. See *People v. Williams*, 204 Ill. 2d 191, 199 (2003) (the compulsory joinder provision (720 ILCS 5/5-3 (West 2004)) is not intended to cover the situation in which several offenses - either repeated violations of the same statutory provision or violations of different provisions - arise from a series of acts which are closely related with respect to the offender's single purpose or plan). As the State points out, each act of sexual assault charged was independent of all the others, even if more than one act occurred during the same incident. Because there is no requirement of joinder where multiple offenses arise from a series of related acts (*id.* at 199), the compulsory joinder provision was not applicable here.

¶ 48 Defendant next makes the alternative argument that if a written speedy trial demand were required, his counsel was ineffective for failing to file such a demand.¹ The State answers this argument by calculating the delays attributable to the State and to defendant and concluding that the 160-day term was not violated for the charges regarding S.V. or K.W. As the State points out, the record reflects that defense counsel either requested continuances or agreed to the majority of continuances prior to trial. See *People v. Moore*, 263 Ill. App. 3d 1, 6 (1994) (an agreed continuance, made on the record, constitutes an affirmative act of delay attributable to a defendant

¹The standards for ineffective assistance of counsel are set forth in section C of this order.

and will suspend the speedy trial term). We agree with the State that defense counsel was not ineffective for failing to demand a speedy trial. Based on the agreed continuances and the delays attributable to defendant, the 160-day speedy trial term was not violated.

¶ 49 Moreover, defense counsel's decision not to demand a speedy trial was a matter of trial strategy. See *People v. Keys*, 195 Ill. App. 3d 370, 373 (1990) (while a defendant has the right to make decisions involving certain fundamental rights, strategic matters involving the superior ability of counsel, such as the decision whether to demand a speedy trial, are left for the attorney). Courts have recognized the importance of not demanding a speedy trial as a powerful delay tactic. *Id.* at 374. Likewise, plea negotiations fall within the realm of trial strategy or professional judgment. *Palmer*, 162 Ill. 2d at 478. It is undisputed in this case that the parties were involved in plea negotiations until December 2004. Pursuing plea negotiations and assessing the strength of the State's evidence rather than demanding a speedy trial was a matter of trial strategy in this case. Therefore, defendant has failed to present any evidence that defense counsel was ineffective or that his right to a speedy trial was violated.

¶ 50 3. Inability to Prepare a Defense

¶ 51 Defendant's third argument regarding the State's failure to timely indict is as follows. Defendant argues that while he was focused on the broad allegations in the original indictment, the State had the "tactical advantage of being able to prepare, with precision, a focused trial strategy directed at specific allegations as to the sex acts described" in the superseding indictment. Defendant goes on to argue that when the matter eventually proceeded to trial, he was acquitted of all of the original charges and found guilty only on additional counts in the superseding indictment "for which

the defense received eleventh hour disclosure as to specific details, on the eve of trial, and during the trial.”

¶ 52 Defendant’s argument is, in essence, a recycled argument from his direct appeal. On appeal, defendant argued that at trial, the testimony of S.V. and K.W. was more definite than the vague information tendered to him in pretrial discovery. Defendant argued that the specific details elicited during their testimony were details that he sought when he moved for a bill of particulars. The result, according to defendant, was that he was unable to properly prepare a defense.

¶ 53 This court rejected defendant’s argument, determining that the indictment and the discovery provided by the State sufficiently informed him of the charged offenses. *Mueller*, No. 2-07-0413, slip order at 40. Contrary to defendant’s assertion, this court found that the State’s discovery informed defendant of details of the charges pertaining to S.V. such as the nature of the vehicle involved, reports and photographs showing the apartment complex parking lots where the incidents occurred, and a narrowed time frame of basketball season. As for K.W., the State provided information that the acts usually occurred in the rear parking lot of the hotels in either defendant’s Ford Taurus or the back seat of his wife’s SUV; that the incidents occurred weekly at the Ramada Inn between K.W.’s junior and senior year; and that K.W. and defendant then met at the Extended Stay America from January or February to May 2000. The time frames alleged in the indictment corresponded with the reports tendered to defendant during discovery. Accordingly, defendant’s argument in his postconviction petition that he was unable to prepare a defense or that the State had a tactical advantage is barred by *res judicata*. See *People v. Sanders*, 238 Ill. 2d 391, 413 (2010) (a postconviction proceeding permits review of constitutional issues that were not and could not have

been adjudicated on appeal; therefore, issues that are decided on direct appeal are barred from consideration by the doctrine of *res judicata*).

¶ 54 In addition, this is not a case where the State abandoned the original eight counts and focused its efforts only on new charges. All of the original charges were included in the superseding indictment. Finally, there was a span of 1½ years between the superseding indictment and the commencement of trial, giving defendant ample time to prepare his defense. Defendant has not presented the gist of a constitutional claim that he was denied due process by the delay in presenting the superseding indictment.

¶ 55 B. Separation of Powers

¶ 56 Defendant next argues that section 5-8-4(a) of the Unified Code of Corrections (Code) (730 ILCS 5/5-8-4(a) (West 2000-04)), which mandates consecutive sentences, violates the separation of powers clause of the Illinois Constitution, which provides that “[t]he legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another.” Ill. Const. 1970, art. II, §1. According to defendant, the State possessed an inordinate power to manipulate the charges in this case, with each act subject to a mandatory, consecutive sentence. The result, defendant argues, is an “aggrandizement of the executive power,” to the exclusion of the judiciary.

¶ 57 Our supreme court recently stated:

“Our Constitution does not attempt to define legislative, executive and judicial power, as it is neither practicable nor possible to enumerate the myriad powers of government and to declare that a given power belongs exclusively to one branch for all time.

In both theory and practice, the purpose of the provision is to ensure that the whole power of two or more branches of government shall not reside in the same hands. [Citation.]

The separation of powers provision was not designed to achieve a complete divorce among the three branches of our tripartite system of government; '[n]or does it prescribe a division of governmental powers into rigid, mutually exclusive compartments.' [Citation.] 'By necessity, the branches of government do not operate in isolation, and between them there are some shared or overlapping powers.' [Citation.] The determination of when, and under what circumstances, a violation of separation of powers doctrine has occurred remains with the judiciary." *People v. Hammond*, 2011 IL 110044, ¶¶ 51-52.

¶ 58 A statute enjoys a strong presumption of constitutionality, and a reviewing court has a duty to construe a statute in a manner that upholds its validity whenever reasonably possible. *People v. Myers*, 359 Ill. App. 3d 341, 343 (2005). The legislature has broad authority to prescribe criminal penalties. *People v. Guevara*, 216 Ill. 2d 533, 543 (2005). Although the power to impose a sentence is a function of the judiciary, the legislature has the power to enact laws governing judicial practice which do not unduly infringe upon the inherent powers of the judiciary. *People v. Allen*, 202 Ill. App. 3d 487, 493 (1990).

¶ 59 We disagree that the mandatory consecutive nature of section 5-8-4(a) violates the separation of powers clause in this case. Section 5-8-4(a)(ii) provides that consecutive sentences must be imposed when one of the offenses, such as the offense involved here - criminal sexual assault - is a triggering offense. 730 ILCS 5-8-4(a)(ii) (West 2000-04). Our supreme court has recognized that the triggering offenses listed in section 5-8-4(a) are crimes of a singular nature, involving particularly serious invasions of the person. *People v. Curry*, 178 Ill. 2d 509, 538 (1997). The legislature sought

to punish the commission of triggering offenses more harshly than the commission of other crimes (*id.*), and this is a constitutionally valid purpose. See *Allen*, 202 Ill. App. 3d at 493 (where the defendant challenged the mandatory consecutive nature of two different subsections of section 5-8-4, there was no separation of powers violation because the purpose - remedying the threat posed by persons who commit crimes while on bond - was constitutionally valid).

¶ 60 In response to defendant's sentencing argument on direct appeal, this court noted that defendant's case did not involve a single act, but rather a course of conduct with two underage high school students that spanned a period of nearly 3½ years. *Mueller*, slip order at 49. Criminal sexual assault is a particularly serious invasion of a person, and it is within the legislature's discretion to punish that offense more harshly by mandating consecutive sentences. Also, we note that the trial court still maintained the discretion to impose a sentence of 4 to 15 years (730 ILCS 5/5-8-1(a)(4) (West 2000-04)) on each count, and that it imposed the minimum four-year sentence on each count. Accordingly, there is no violation of the separation of powers doctrine in this case.

¶ 61 C. Ineffective Assistance of Trial and Appellate Counsel

¶ 62 Defendant acknowledges that all of the issues in his postconviction petition could have been raised prior to trial and on direct appeal, but were not. As a result, he argues that trial and appellate counsel, which again, were one and the same, provided ineffective assistance of counsel.

¶ 63 The two-prong, performance-prejudice test first enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984), applies to claims of ineffective assistance of trial and appellate counsel. *People v. Jones*, 219 Ill. 2d 1, 23 (2006). In order to prevail on such a claim, the defendant must show that counsel's failure to raise the issue on appeal was objectively unreasonable and that this decision prejudiced him. *Id.* Appellate counsel is not required to brief every conceivable issue on appeal and

may refrain from developing nonmeritorious issues without violating *Strickland*, because the defendant suffers no prejudice unless the underlying issue is meritorious. *Id.*

¶ 64 We have explained why none of defendant's postconviction petition claims have merit or state the gist of a constitutional claim. Therefore, neither trial nor appellate counsel can be ineffective for failing to raise them.

¶ 65 D. Lack of Notarization

¶ 66 As a final matter, the State asks this court to affirm the trial court's summary dismissal of defendant's postconviction petition on the basis that was not verified by affidavit, in that the signatures were not notarized. Having already disposed of defendant's postconviction petition on the merits, we need not consider this issue. See *People v. Stroup*, 397 Ill. App. 3d 271, 275 (2010) (a reviewing court can affirm on any basis appearing in the record).

¶ 67 III. CONCLUSION

¶ 68 For the reasons stated, we affirm the judgment of the Du Page County circuit court summarily dismissing defendant's postconviction petition.

¶ 69 Affirmed.