2015 IL App (3d) 140007-U

Order filed April 1, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-14-0007 Circuit No. 03-CF-199
JENNIFER DEL PRETE,	)	Honorable Carla Alessio-Policandriotes,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice McDade and Justice Holdridge concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in denying defendant's petition for leave to file a successive postconviction petition.

¶ 2 Following a bench trial, the trial court found defendant, Jennifer Del Prete, guilty of first degree murder (720 ILCS 5/9-1 (West 2002)) based on the theory of shaken baby syndrome (SBS). On appeal, this court affirmed defendant's conviction. *People v. Del Prete*, No. 3-05-0868 (2007) (unpublished order under Supreme Court Rule 23). Defendant filed an initial petition for postconviction relief, which the trial court dismissed. On appeal, this court affirmed

the trial court's dismissal of the petition. *People v. Del Prete*, No. 3-08-0431 (2009) (unpublished order under Supreme Court Rule 23). Thereafter, defendant filed a petition for a writ of *habeas corpus* in federal court, which is still pending. Defendant filed a motion for leave to file a successive postconviction petition, which the trial court denied. Defendant appeals, arguing that: (1) she established cause and prejudice; (2) she demonstrated a colorable claim of actual innocence; and (3) the untimeliness of her request was not due to her culpable negligence. We reverse and remand.

¶ 3 FACTS

¶ 4 The State charged defendant with two counts of aggravated battery of a child (720 ILCS 5/12-4.3(a) (West 2002)) on February 11, 2003, after 3½-month-old I.Z. collapsed while in her care on December 27, 2002. Defendant was working alone at I.Z.'s daycare facility at the time I.Z. collapsed. Defendant called 911 and performed cardiopulmonary resuscitation (CPR) on I.Z. When paramedics arrived at the daycare facility, I.Z. was not breathing and did not have a pulse. I.Z. was taken to Provena St. Joseph Medical Center (Provena) in Elgin. A computerized tomography (CT) scan of I.Z.'s brain taken that day documented abnormalities. I.Z. died on November 9, 2003; the State then charged defendant with her murder.

¶ 5 Defendant's case went to a bench trial, where the State prosecuted defendant under the theory of SBS. At trial, Romeoville Detective Kenneth Kroll testified that he interviewed defendant at the police station on December 29, 2002. Defendant told Kroll that I.Z. was dropped off at daycare shortly after 7 a.m. by her mother. Defendant gave I.Z. a bottle between 8 and 9 a.m., and then I.Z. slept in a swing for the duration of the morning. Sometime after noon, defendant took I.Z. out of the swing to feed her and saw that I.Z. had soiled her diaper and clothing. Defendant changed I.Z.'s diaper and clothes and propped I.Z. up on the couch for a

moment while she stepped a few feet away to get I.Z.'s diaper bag. I.Z. appeared to be sleeping. When defendant picked up I.Z., I.Z. made a snort sound, her head fell backward, and she seemed limp. Defendant tried to give I.Z. a bottle, but I.Z. did not suck or swallow the milk. Defendant picked I.Z. up underneath her armpits, held her out, shook her slightly, and said her name. She then turned I.Z. over onto her stomach and gave her three to five pats on her back to dislodge anything that might have been in her throat. Defendant then called 911.

¶ 6 Kroll testified that after further questioning, defendant stated that I.Z.'s head flopped more violently when defendant turned I.Z. onto her stomach than when she gave her a slight shake. Later in the interview, Kroll told defendant he believed that she was involved in I.Z's collapse. Defendant began to cry and stated she could not remember exactly what took place because she panicked when I.Z. was unresponsive. Defendant stated she "could have shaken [I.Z.] a little harder than she thought." Kroll brought up SBS and told defendant that her story was not consistent with what the police had learned from the doctors. Defendant asked "[s]omething to the effect of even if I did panic, aren't I responsible? Am I going to go to jail?" Kroll testified that defendant never indicated she had tried to hurt I.Z. and maintained throughout the interview that she had not handled I.Z. roughly. Defendant did not say she had shaken I.Z. at any point before I.Z. lost consciousness.

¶ 7 On December 27, paramedics responding to defendant's 911 call took I.Z. to Provena. Dr. Adrian Nica, an emergency room intensive care physician who had treated I.Z. at Provena, testified that when I.Z. arrived at the hospital she had an elevated white blood cell count, high blood sugar, and a bloody spinal tap, which was abnormal. A neurologist reported to Nica that I.Z.'s CT scan showed an apparent fracture to the right temporal area of the skull and both acute and chronic changes in the brain, which resulted from bleeds in different levels of I.Z.'s brain.

Nica testified that when he saw this type of injury in children I.Z.'s age, who were not involved in car accidents, he "ha[d] to assume that it was a child abuse or baby shaking."

¶ 8 I.Z. was transferred to the University of Illinois at Chicago hospital (UIC) where she was treated by Dr. Howard Hast, a pediatric critical care physician. When Hast first examined I.Z., her anterior fontanel was slightly full. Hast put I.Z. on a ventilator to support her breathing. Hast testified that according to I.Z.'s medical records, a large amount of blood was present within I.Z.'s retinas when she was examined by an ophthalmologist on December 31, 2002. Hast believed I.Z. had suffered seizures. He ordered several X-rays and CT scans of I.Z. None of the X-rays showed signs of a skull fracture. Hast concluded that I.Z. had bifrontal subdural hematomas. Hast found no bleeding tendency or metabolic disease to explain the subdural hematomas and opined that the most likely cause was shaking or "some other acceleration-deceleration injury." Hast opined that I.Z. had suffered from an acute life threatening event (ALTE), which occurs when an infant stops breathing and experiences changes in muscle tone and skin color. Hast testified that he did not know the cause of the ALTE in I.Z.'s case and that doctors cannot explain ALTEs in approximately 40% of the cases.

¶ 9 Dr. Jeffery Harkey, the forensic pathologist employed by the Du Page County coroner's office who performed I.Z.'s autopsy, testified for the State as an expert in the field of forensic pathology. Harkey testified that X-rays taken before the autopsy showed no evidence of trauma. Harkey's examination of I.Z.'s brain was not optimal because she had been diagnosed with encephalomalacia—softening of the brain—following her injury in December 2002. Immediately before the autopsy, I.Z. had spent more than 24 hours on a respirator while essentially brain dead. During this time, her brain began to digest itself. Harkey opined that the cause of I.Z.'s death was due to multiple system organ failure due to anoxic-ischemic injuries,

which was caused by abusive head trauma (AHT). Based on I.Z.'s medical records, Harkey opined that the AHT occurred 10 to 11 months before her death. Harkey believed that the injury I.Z. suffered the day before she died was a direct result of the injury she suffered 10 to 11 months before. Harkey testified that he relied solely on I.Z.'s medical records and Dr. Emalee Flaherty's report to determine that I.Z. suffered from AHT.

¶ 10 Flaherty testified for the State as an expert in child abuse and pediatrics. She reviewed I.Z.'s medical records and imaging studies from UIC, police reports, and emergency medical service reports. She also examined I.Z., interviewed one of I.Z.'s treating physicians, and spoke with I.Z.'s parents. As a result of her investigation, Flaherty concluded that I.Z. suffered from AHT, or, as it is more commonly known, SBS.

¶ 11 Flaherty testified that AHT was an all-encompassing term that does not describe exactly how a particular child was injured. AHT is a type of child abuse where a child suffers acceleration/deceleration injuries to the brain. AHT could be caused by trauma other than shaking, but shaking is the most common. Young children are more vulnerable to AHT due to their weak neck muscles, disproportionately large heads, and small body sizes.

¶ 12 Flaherty testified that I.Z. had subdural hemorrhages, subarachnoid hemorrhages, diffusing brain injury, a parenchymal laceration, and contusions. Flaherty further testified that shaking can cause retinal hemorrhaging, which was seen in I.Z. I.Z. had extensive retinal hemorrhages that went out to the ora serrata and vitreous hemorrhages in both eyes. Flaherty had only seen hemorrhages out to the ora serrata in children who have suffered acceleration/deceleration forces or AHT.

¶ 13 Flaherty opined that extensive subdural hematomas over extensive areas of the head, like I.Z. had, were only caused by acceleration/deceleration forces like shaking. The force needed to

cause such an injury would be "so severe that if anyone witnessed that shaking occurring *** they would know that that child would suffer severe injury." I.Z. suffered from severe encephalomalacia.

¶ 14 Flaherty opined that since I.Z. was described as eating normally in the morning, the abuse had to have occurred later. She stated that I.Z. was reported waking up at about 1 p.m. smiling but "crabby," which indicated she had not yet suffered a severe brain injury. Flaherty opined that the effects of the abuse that caused I.Z.'s injuries would be immediate. Flaherty further opined that I.Z.'s injuries could not have occurred from CPR, a normal fall, or from a child under the age of five. Rather, the types of injuries seen in I.Z. were caused by someone of adult strength shaking her violently. Flaherty testified that bruising on the arms or trunk, where the child would have been grabbed, was not part of the definition of SBS, but that she would typically look for bruises. She testified that there was no bruising in I.Z.'s case and that it was "pretty uncommon" to have bruising in an SBS case. Flaherty stated that it was her opinion, within a reasonable degree of scientific and medical certainty, that I.Z. had suffered from AHT.

¶ 15 Dr. Wayne Tucker testified for defendant as an expert in the fields of pathology and pediatrics. Tucker had reviewed I.Z.'s medical records, autopsy report, and police reports, as well as Flaherty's report. Tucker opined that I.Z.'s injuries occurred 18 to 24 hours before she collapsed. Tucker stated the fact that I.Z. took a bottle around 9 a.m. on the day of her collapse did not rule out that she had already been injured at the time of her feeding because the sucking reflex of an infant would overcome cerebral or physical damage. Tucker opined that based on I.Z.'s history of feeding problems, a seizure related to reflux possibly caused the onset of her symptoms. Tucker further testified that retinal bleeding to the ora serrata was not uncommon and could occur in an infant under the age of six months by turning over, coughing, sneezing, or

holding her breath, all of which increased intraocular pressure. Retinal hemorrhaging can occasionally be caused by CPR or lack of oxygen. Tucker testified that the definition of SBS in Taber's Cyclopedic Medical Dictionary included external bruising and that he had never seen a shaken baby without bruising.

¶ 16 Tucker testified that it appeared from I.Z.'s medical records that she was given an adult dosage rather than an infant dosage of an antibiotic for an ear infection. Toxicity could lead to a seizure, and a seizure could lead to an ALTE. Reflux could also lead to an ALTE. Tucker opined that I.Z.'s injuries were not a result of SBS. Tucker further testified that I.Z. had a chronic subdural hematoma that was up to 7 to 10 days old which could have rebled due to coughing, sneezing, holding of breath, quickly turning the head, falling, or almost anything that caused an increase in intracranial pressure.

¶ 17 The court found defendant guilty of first degree murder and sentenced her to 20 years' imprisonment. Defendant appealed her conviction, arguing that the evidence at trial was insufficient to prove her guilty beyond a reasonable doubt. This court affirmed defendant's conviction. *Del Prete*, No. 3-05-0868. Thereafter, on March 24, 2008, defendant filed an initial postconviction petition, alleging ineffective assistance of trial counsel, which was summarily dismissed by the trial court as being frivolous and patently without merit. This court affirmed the trial court's dismissal. *Del Prete*, No. 3-08-0431. The Illinois Supreme Court denied defendant's subsequent request for leave to appeal. *People v. Del Prete*, No. 109219 (Ill. Nov. 25, 2009).

¶ 18 Thereafter, defendant filed a petition for a writ of *habeas corpus* in United States District Court for the Northern District of Illinois (the district court). In her petition, defendant raised the following issues: (1) the evidence at trial was insufficient to find defendant guilty; and (2) trial

counsel was ineffective for failing to: (a) investigate and present sufficient expert testimony to rebut the State's theory of SBS; and (b) challenge the admission of expert testimony on the theory of SBS under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The district court found the *Frye* issue procedurally defaulted as defendant had not raised it; the district court found that defendant presented a facially plausible claim of actual innocence in her petition and ordered an evidentiary hearing to allow defendant to fully develop her claim. Eleven expert witnesses testified at the evidentiary hearing. After the conclusion of the evidentiary hearing but before the district court issued its ruling on defendant's *habeas corpus* petition, defendant discovered the existence of a letter written by Kroll, one of the lead detectives on defendant's case, that was addressed to Flaherty, the State's SBS expert (the Kroll letter). Journalism students from the Medill Justice Project at Northwestern University (Medill Justice Project) obtained the letter in response to a Freedom of Information Act (FOIA) request to the Romeoville police department. The State never disclosed the letter at any point during the criminal proceedings. The letter, dated November 10, 2003, stated:

> "If you haven't already heard, [I.Z.] died 11-09-03. I'm writing to inform you of a 'twist' in our case presented by the DuPage County Medical Examiner. On 11-09-03, I received a phone call from an Attorney who notified me that [I.Z.] would undergo a 'post' medical exam on 11-10-03[.] This Attorney specifically called to inform me that the pathologist scheduled to perform the autopsy does not agree with SBS, and has testified for the defense in two DuPage County SBS cases[.]

> On 11-10-03, I spoke to a Plainfield Police Evidence Tech (ET) who was present at the autopsy[.] The ET advised that Dr. Jeff Harky [*sic*] did in fact question the diagnosis of SBS[.] I was told that Dr[.] Harky [*sic*] specifically looked for fractures in the ribcage (adult grabbing point) and found none[.] Dr. Harky [*sic*] intends to summons all of [I.Z.'s] medical records to see who determined this was SBS, and why they reached that diagnosis[.]
>
> I have great confidence in your findings, and our investigation[.] This correspondence is FYI[.] However, I anticipate having to answer several questions for my prosecuting Attorney[.] Please call me when you have a few minutes to discuss the case[.]
>
> THANKS!!!"

¶ 19 On March 22, 2013, defense counsel learned of the Kroll letter. On May 24, 2013, defendant filed a motion for leave to file a successive petition for postconviction relief in the circuit court proceedings alleging a recently discovered *Brady* violation and a claim of actual innocence. Additionally, defendant sought leave to reopen her actual innocence hearing in the district court to present evidence related to the Kroll letter. On June 21, 2013, the actual innocence hearing was reopened, and defendant presented testimony from Kroll, Harkey, Flaherty, and Tracey Caliendo (Plainfield police evidence technician who was present at I.Z.'s autopsy and who informed Kroll of Harkey's statements).

¶ 20 At the reopened actual innocence hearing, Harkey testified in response to defense counsel's questioning that he could not independently recall expressing doubts regarding an SBS diagnosis in I.Z.'s case. However, at the time of I.Z.'s death in 2003, he had disagreements with

SBS in general. Harkey stated that he generally disagrees with SBS because "[t]he name of the syndrome implies a mechanism that [he does not] believe can be separated from blunt force trauma." Harkey further testified:

> "I do believe that children can be shaken and that children can be injured and that children can die of that. I don't know of any pathognomonic finding that you can't get with blunt force trauma, too.
>
> So when you see a constellation of injuries in a child, I don't have faith in somebody being able to say this head injury came from shaking and not from blunt force trauma. It is possible that they have reason to believe that it's shaking because of neck injury, that the neck injury might have caused the head injury, and in that case, then they have a reason to do it. Then they have a reason to say this is shaken baby type of injuries. If they catch the whole thing on a nanny cam, they have got a reason to say this is shaken injuries.
>
> But when I am looking at pathology in an autopsy, I don't believe that I can say this child was shaken rather than this child was hit."

¶ 21 Harkey further testified that he did not believe that an SBS or AHT diagnosis could pinpoint a perpetrator:

> "The problem with head injuries is that a child can go unresponsive at a time that is remote–depending upon the type of injury–that is remote from the actual injury, and so if the child has been in the care of a number of different people, which one inflicted the trauma that eventually led to the child's collapse.

> With the shaken baby philosophy, this was supposed to solve all of our problems because it's obvious that the type of injury that you get from shaking is going to make the baby go unresponsive immediately. And, therefore, it's whoever the baby was with that is the perpetrator. And that would be magic for us. We could solve lots of problems.
>
> ***
>
> And solve lots of problems, that is, as to who did it.
>
> But the problem that I have with it is that the people that purport to be able to say these injuries are due to shaking and not due to blunt trauma that may have occurred earlier, I don't agree with them. I don't agree that they're able to divine that."

¶ 22 Harkey testified that an autopsy could not pinpoint the perpetrator of AHT as the last person with the child before the collapse. He opined that a child with subdural hematomas, retinal hemorrhages, and brain swelling could drink a bottle before collapsing. Harkey stated that he had these beliefs in 2003 and 2005 and would have testified accordingly if he had been asked at defendant's trial. Harkey's conclusion that I.Z. suffered from AHT had nothing to do with his autopsy findings but, rather, was based on the reports of other doctors who examined I.Z. during her life.

¶ 23 Harkey further testified that he did not recall looking for ribcage fractures on I.Z. and finding none, but stated that he would have looked for healed or fresh ribcage fractures. Fresh rib fractures could have been either resuscitative or abusive. Healed ribcage fractures would be evidence that I.Z. had been abused rather than suffering from some other sort of head trauma. Harkey testified that AHT did not necessarily result in bruising or fractures. However, the

presence of either can help distinguish between abusive trauma and accidental trauma. The term "abusive head trauma" does not describe a certain mechanism of injury, and it includes head injuries resulting from blunt force trauma, shaking, or a combination both.

¶ 24 Harkey also testified that he was not aware at the time he wrote his autopsy report that I.Z. had a chronic subdural hematoma. Harkey opined that the term "chronic" meant that the subdural hematoma was older than three weeks. Harkey testified that I.Z.'s chronic subdural hematoma could have rebled, spontaneously or traumatically, which could have caused a seizure. He stated he did not know whether I.Z. suffered new bleed, impact to the skull resulting in increased intracranial pressure a day or two later, or a rebleed of a chronic subdural hematoma. Harkey testified that he was not informed of I.Z.'s chronic subdural hematoma at the time he made his autopsy findings and therefore it was not a consideration he made.

¶ 25 On January 27, 2014, after testimony regarding the Kroll letter had been heard in defendant's federal actual innocence hearing, the district court held that defendant had established by a preponderance of the evidence that no reasonable jury could find her guilty beyond a reasonable doubt of first degree murder. *Del Prete v. Thompson,* __ F. Supp. 2d __, 2014 WL 296094 (2014). Consequently, the court stated that it would consider the merits of each of her three *habeas corpus* claims, including an ineffective assistance of counsel claim that was procedurally defaulted.

¶ 26 On January 3, 2014, defendant's motion for leave to file a successive petition for postconviction relief was denied by the trial court. Defendant appeals, arguing that: (1) she established cause and prejudice; (2) she demonstrated a colorable claim of actual innocence; and (3) the untimeliness of her request was not due to her culpable negligence.

¶ 27 ANALYSIS

¶ 28 On appeal, defendant argues that the trial court erred in denying her leave to file a successive postconviction petition alleging a violation of *Brady v. Maryland*, 373 U.S. 83 (1963) because she established cause and prejudice as required by section 122-1 of the Code of Criminal Procedure of 1963. We review the trial court's denial of leave to file a successive postconviction petition *de novo*. *People v. McDonald*, 405 Ill. App. 3d 131, 135 (2010).

¶ 29 Pursuant to section 122-1, a petitioner may file only one petition for postconviction relief unless the trial court grants leave based on a showing of cause for failure to bring the claim in an initial petition and prejudice resulting from this failure. 725 ILCS 5/122-1(f) (West 2012). A petitioner "shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings[.]" *Id.* A petitioner "shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." *Id.*

¶ 30 Defendant argues that she has demonstrated cause and prejudice based on the State's failure to turn over the Kroll letter in violation of *Brady*, 373 U.S. 83. In *Brady*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused *** violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. The prosecution must disclose said favorable evidence whether or not there has been a request by the accused. *United States v. Agurs*, 427 U.S. 97, 107 (1976). Evidence is sufficiently material for its suppression to constitute a *Brady* violation if there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v.*

Bagley, 473 U.S. 667, 682 (1985). A *Brady* violation occurs even if the suppressed evidence was not known to the prosecutor but only to police investigators. *People v. Hobley*, 182 Ill. 2d 404, 438 (1998).

¶ 31 I. Cause

¶ 32 Defendant has demonstrated cause for failing to raise the issue of the Kroll letter in her initial postconviction petition filed in March 2008. The prosecution never turned over the letter at any point in the proceedings. Defendant was not aware of the Kroll letter until police released it to students from the Medill Justice Project. Medill Justice Project posted the letter on its Web site; defense counsel became aware of it in March 2013.

¶ 33 Defendant reasonably relied upon the State's representation that it was disclosing all information within its possession or control that tended to negate defendant's guilt. See *Strickler v. Greene*, 527 U.S. 263, 283-84 (1999) (holding that it was reasonable for postconviction counsel to rely on the presumption that the prosecutor would perform his duty to disclose all exculpatory material and that such materials would be included in open files tendered to defendant for inspection).

¶ 34 The State argues that defendant failed to establish cause for her failure to bring her claim in her initial postconviction petition, while the prosecution sat on the letter, defendant knew "or should have been reasonably aware" of the contents of the letter. The State takes the position that the Kroll letter merely stated that Harkey had concerns with SBS in general and planned to review more medical records before arriving at a conclusion as to the cause of I.Z.'s death. The State argues that defendant knew this information, or could have known it had she conducted a reasonable investigation.

¶ 35 The State emphasizes that defendant was aware that Harkey reviewed additional medical

records after the autopsy before rendering his conclusions because his preliminary report, which was attached to the autopsy report, stated as much. However, the crux of the *Brady* violation alleged by defendant is that her due process rights were violated when the State suppressed evidence that Harkey questioned the SBS diagnosis in her case and in general.

¶ 36 Contrary to the State's assertions, a reasonable interpretation of the Kroll letter is that Harkey questioned SBS both generally and in this particular case. The State offers no explanation as to how defendant could have discovered that Harkey had questioned SBS in her particular case without the Kroll letter. Additionally, there is no evidence that defendant was actually informed of Harkey's concerns about SBS in general. The State argues that defendant could have found out about Harkey's general concerns if she had conducted a reasonable investigation. The State cites an article from the Chicago Tribune, published in 2001, which stated that Harkey was expected to testify for the defense in an SBS case. Jeff Coen, Baby-Sitters Trial Nearing, Chi. Trib., Apr. 23, 2001, http://articles.chicagotribune.com/2001-04-23/news/0104230195_1_head-injury-shaken-baby-toddler. The article stated that based on particular facts of that case (*i.e.*, because a child refused to eat, vomited, and had an apparent seizure after arriving at daycare), Harkey disagreed that the child was injured after she arrived at daycare. Even if defense counsel had read the article, the facts that led to Harkey's conclusions in that case were not present in I.Z.'s case, and the article does not state that Harkey disagreed with SBS in general. The State has not demonstrated how the contents of the Kroll letter would have been available to defendant had she conducted a reasonable investigation.

¶ 37 II. Prejudice

¶ 38 Defendant has also sufficiently demonstrated that she was prejudiced as a result of the State's failure to turn over the Kroll letter because it constituted a *Brady* violation. To establish a

Brady violation, a defendant must show: "[t]he evidence at issue [is] favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence [was] suppressed by the State, either willfully or inadvertently; and prejudice *** ensued." *Strickler*, 527 U.S. at 281-82.

¶ 39 The State suppressed the Kroll letter. The Kroll letter is favorable to the accused, as it could have led directly to exculpatory testimony from Harkey. Since the letter is written by Kroll and recounts the statements of Harkey and his evidence technician, it would have been inadmissible hearsay at trial. The State argues that because the Kroll letter was inadmissible hearsay, suppression of the letter cannot violate *Brady*. In support of its position, the State cites *Wood v. Bartholomew*, 516 U.S. 1 (1995), for its holding that inadmissible polygraph results were not evidence at all and could not constitute *Brady* material. However, while a minority of jurisdictions have interpreted the holding in *Wood* to render all inadmissible evidence immaterial for *Brady* purposes (see, *e.g.*, *Hoke v. Netherland*, 92 F.3d 1350, 1356 (4th Cir. 1996)), the majority of jurisdictions have interpreted the holding in *Wood* to allow inadmissible evidence to be material for *Brady* purposes if the inadmissible evidence would have directly led to the discovery of admissible evidence. See *Johnson v. Folino*, 705 F.3d 117, 130 (3d Cir. 2013); *Ellsworth v. Warden*, 333 F.3d 1, 5 (1st Cir. 2003); *United States v. Gil*, 297 F.3d 93, 104 (2d Cir. 2002); *Bradley v. Nagle*, 212 F.3d 559, 567 (11th Cir. 2000); *United States v. Phillip*, 948 F.2d 241, 249 (6th Cir. 1991).

¶ 40 The United States Court of Appeals for the Seventh Circuit (the Seventh Circuit) recently stated that although its approach has been to find inadmissible evidence immaterial for *Brady* purposes, it finds the majority approach to be compelling. *United States v. Morales*, 746 F.3d 310, 315 (7th Cir. 2014). The Seventh Circuit reasoned that in *Wood*, the Supreme Court did not

end its inquiry when it found that the undisclosed evidence was inadmissible even for impeachment purposes under State law, but went on to analyze if the withheld evidence might have led to discovery of " 'additional evidence that could have been utilized.' " *Id.* at 315 (quoting *Wood*, 516 U.S. at 6). The *Wood* court concluded that the undisclosed evidence would not have led to additional usable discovery and held that it was not reasonably likely that disclosure of the evidence at issue would have resulted in a different trial outcome. *Morales*, 746 F.3d at 314-15 (citing *Wood*, 516 U.S. at 8). The Seventh Circuit concluded that "the Court's methodology in *Wood* [is] more consistent with the majority view in the courts of appeals than with a rule that restricts *Brady* to formally admissible evidence." *Morales*, 746 F.3d at 315. However, the Seventh Circuit declined to expressly adopt the majority view as it was not necessary for the resolution of that case. *Id.*

¶ 41 We find the majority position to be the more accurate interpretation of *Wood* and the reasoning articulated by the Seventh Circuit in *Morales* to be persuasive. Additionally, before *Wood* was decided, the Illinois Supreme Court expressed the view that inadmissible evidence could be material for *Brady* purposes if it could have led to admissible evidence. See *People v. Olinger*, 112 Ill. 2d 324, 342-43 (1986) (holding that nondisclosed evidence was not material because it was inadmissible hearsay and because the defendant could point to no admissible evidence to which the nondisclosed evidence would have led). Therefore, the suppression of inadmissible evidence can constitute a *Brady* violation if the inadmissible evidence would have led directly to the discovery of admissible evidence.

¶ 42 In this case, Harkey's testimony in defendant's federal *habeas corpus* proceedings showed that discovery of the letter would have led defendant to elicit exculpatory testimony from Harkey concerning SBS at her trial. At defendant's trial, Harkey testified that he relied

completely on I.Z.'s medical records and Flaherty's report to determine that I.Z.'s injuries were caused by AHT. No testimony was elicited from Harkey at trial that contradicted Flaherty's opinions regarding the manner in which I.Z.'s injuries were inflicted.

¶ 43 During the federal proceedings, Harkey testified that he could not independently recall having doubts about an SBS diagnosis in I.Z.'s case specifically. However, he testified that ribcage fractures were something he would have looked for in I.Z.'s case. Harkey testified that, although a child could be abused and have no external bruising or fractures, the presence of fractures would be significant because they could help distinguish between abusive trauma and accidental trauma. Had Harkey's testimony regarding the significance of ribcage fractures been elicited at trial, it would have undercut Flaherty's testimony that external signs of trauma like bruising were not commonly seen in SBS cases.

¶ 44 Harkey also testified at the federal hearing regarding his doubts about SBS in general. Specifically, he testified that all the injuries present in cases where an infant is shaken can also be present in cases of blunt force trauma. He did not believe that a child having head injuries without more—*e.g.*, neck injuries or a "nanny cam" recording showing the child being shaken—could establish that a child was shaken as opposed to being hit. He further testified that a child can collapse due to a head injury at a time remote from the time the trauma occurred and that the perpetrator of abuse was not necessarily the last person with the child.

¶ 45 However, Flaherty, on whose report Harkey relied on in concluding that I.Z.'s death was a direct result of AHT, testified that "[i]t would have taken someone of adult strength shaking [I.Z.] violently to cause these kinds of injuries" and that I.Z.'s injuries were such that she would have collapsed immediately after being abused. Harkey's testimony that a diagnosis of AHT alone could not pinpoint a mechanism of injury or a perpetrator of the injury was in direct

opposition to Flaherty's testimony at trial. If the Kroll letter had been disclosed to defendant, she would have been alerted to Harkey's doubts and concerns regarding SBS and would have been able to elicit testimony regarding these concerns at trial.

¶ 46 Although Tucker testified as an expert for the defense and opined that he believed I.Z.'s injuries were not caused by SBS, Harkey's testimony would have cast doubt on the State's ability to pinpoint a mechanism of injury and perpetrator based on I.Z.'s injuries alone even if the AHT diagnosis was correct. Further, the trial court may have given more weight to evidence favorable to defendant elicited from a State witness than to testimony of an expert paid by the defense. In this case, Flaherty's expert testimony was key to the State's case against defendant. There was no confession from defendant and no eyewitness to I.Z.'s injuries. The only State witness whose testimony pointed to defendant as the only possible perpetrator of I.Z.'s abuse was Flaherty. We cannot find that there was no prejudice to defendant where evidence was withheld that would have led defendant to elicit testimony from a State witness that would have cast doubt on Flaherty's ability to pinpoint a perpetrator based on I.Z.'s head injuries alone. Consequently, we find that defendant showed sufficient cause and prejudice to be granted leave to file a successive postconviction petition.

¶ 47 III. Actual Innocence and Timeliness

¶ 48 Because we find that defendant showed sufficient cause and prejudice to be granted leave to file a successive postconviction petition, we need not address her claim of actual innocence based on the discovery of the Kroll letter.

¶ 49 We find that the untimeliness of defendant's request to file a successive postconviction petition was not due to her culpable negligence for the reasons previously discussed. *Supra* ¶ 32.

¶ 50 CONCLUSION

¶ 51 The judgment of the circuit court of Will County is reversed, and the case is remanded for further proceedings.

¶ 52 Reversed and remanded.