2011 IL App (4th) 100019-U

Filed 8/29/11

NO. 4–10–0019

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOSEPH P. HICKEY, Defendant-Appellant.	)	Appeal from Circuit Court of Logan County Nos. 05CF107 05CF113 Honorable Thomas M. Harris, Jr., Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Knecht and Justice Cook concurred in the judgment.

ORDER

¶ 1 *Held:* Nonfactual and nonspecific assertions in a postconviction petition, assertions that amount to mere conclusions, do not make a substantial showing of a constitutional violation, for purposes of the second stage of a postconviction proceeding, and thus do not merit an evidentiary hearing.

¶ 2 In ruling on the State's motion to dismiss a postconviction petition, the trial court assumes the well-pleaded factual allegations of the petition to be true and liberally construes those allegations in the defendant's favor, but the court does not consider the allegations to be true insomuch as the record positively refutes them.

¶ 3 In a postconviction proceeding, the doctrine of *res judicata* bars any claim that previously was decided on direct appeal, and the defendant cannot avoid *res judicata* by reasserting the previously adjudicated claim in the guise of a different legal theory.

¶ 4 If the defendant could have raised, but did not raise, a claim in the direct appeal, the defendant will be deemed, in a subsequent postconviction proceeding, to have procedurally forfeited that claim.

¶ 5 Even the well-pleaded facts in a postconviction petition must be corroborated by an attached affidavit or other evidence unless the record already provides such corroboration. Otherwise, the petition must explain why such materials are not attached.

¶ 6 Through an assistant public defender, defendant, Joseph P. Hickey, filed an amended petition for postconviction relief in two cases: Logan County case No. 05–CF–107, in which he is serving two concurrent 10-year terms of imprisonment for intimidation (720 ILCS 5/12–6(a)(1) (West 2004)), and Logan County case No. 05–CF–113, in which he is serving a consecutive 15-year term of imprisonment for possession of contraband in a penal institution (720 ILCS 5/31A–1.1(b) (West 2004)). The trial court granted a motion by the State to dismiss the postconviction petition, and defendant appeals. The court appointed the office of the State Appellate Defender (OSAD) to represent him in this appeal.

¶ 7 OSAD has filed a motion to withdraw from representing defendant, because, in OSAD's opinion, the appeal so clearly lacks merit that any argument made in support of the appeal would be frivolous. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987). Defendant opposes OSAD's motion, and he has responded to it with additional points and authorities. He also has filed, *pro se*, a reply brief in response to the State's brief. After considering all these arguments in the context of the record, we agree with OSAD's assessment of the merits of this appeal. Therefore, we grant OSAD's motion to withdraw, and we affirm the trial court's judgment.

¶ 8 I. BACKGROUND

¶ 9 A. Case No. 05–CF–107 (Intimidation)

¶ 10 The indictment in case No. 05–CF–107 charged defendant with two counts of intimidation (720 ILCS 5/12–6(a)(1) (West 2004)). Both counts alleged he telephoned Wendy Adye

and that, with the intent to cause her to post $3,000 bond for him, threatened to physically harm her or to kill her. He allegedly made this threat to her on two occasions: July 13, 2005 (count I), and June 28, 2005 (count II).

¶ 11 The evidence at trial tended to show that while defendant was in the Logan County jail on an unrelated charge, he made numerous telephone calls to Adye. Inmates' calls were automatically recorded and stored on the hard drive of a computer in the jail. On November 14, 2005, defense counsel filed a motion *in limine* in this case, objecting to the use, at trial, of any recorded telephone conversation between defendant and Adye other than their conversations on June 28 and July 13, 2005. The other recordings were, defense counsel argued, irrelevant. The motion specifically objected to the telephone conversation defendant had with Adye on August 8, 2005, in which he told her:

> "They take my fuckin' kids[']lives from me, the rest of it–I get out, I'm killin' everyone. I swear to God, that fuckin' [State's Attorney] Huyett, I will kill him. I'll kill his whole fuckin' family. I ain't takin[']this shit. I didn't do nothin' to be here[,] and I'm not takin' it. I'm gonna sit in there and stew till the day I get out[,] and when I get out, I will kill him and his whole family. I swear to God I will."

The motion contended that this recording was not only irrelevant but "unduly prejudicial and inflammatory toward[] the defendant."

¶ 12 That same day, the trial court held a hearing on the motion *in limine*. The State's Attorney opposed the motion. He argued:

"Track 10 [of the compact disc] is the one where he threatens to kill Mr. Huyett, the State's Attorney, and we are not putting it on simply because I happen to be that person. It is obvious that this expresses an *** intent to harm those who Mr. Hickey believes are not helpful to his legal status and [who] are, in fact, placing him in jeopardy of doing the time ***, [and] in one of the other tracks[,] *** he [said he] just cannot go back to prison anymore.

This[,] then[,] goes toward[] it [*sic*] because he perceives Wendy as not being helpful and he perceives [me] as not being helpful. When he's threatening me, it is relevant to show his state of mind when he threatens Wendy[,] who is also not being helpful in the case[,] at least in his world."

¶ 13 After hearing the arguments of the defense counsel and the State's Attorney and after reading the transcripts of the telephone conversations, the trial court reasoned as follows:

"THE COURT: Well, certainly there are a lot of conversations here, but this is basically an intent, a crime of intent. The State must prove the intention of the words and what result those had, have on a reasonable person and a person that they are communicated to.

In this particular case[,] none of these conversations are really remote in time. They were all from the Logan County [j]ail to basically Wendy Adye. They do reflect a mental state of Mr. Hickey,

> and they do contain various threats to harm or kill people that Mr. Hickey views as people that are keeping him in jail and not getting him out. He made threats to kill Mr. Huyett and his family. To rip Wendy Adye's head off and kill her. The sorriest day of her life was the day she met him. [(Here the court is paraphrasing what Hickey told Adye in one of the recorded telephone conversations.)] All of these things are continuing to show his escalation of his threats and basically show his state of mind, and I think they are admitted for that purpose[,] and the court is going to deny the [m]otion *in [l]imin[]e*."

¶ 14 On November 15, 2005, immediately before the jurors were called into the courtroom and the trial began, defense counsel renewed his objection to all of the recorded telephone conversations except for those of June 28 and July 13, 2005. The trial court declined to change its ruling. The attorneys gave their opening statements. Through Mark Landers, a detective in the Logan County sheriff's department, the State authenticated a compact disc containing 12 telephone conversations between defendant and Adye. While the jury followed along in the transcripts, the State played the compact disc, including the conversation of August 8, 2005, quoted above, in which defendant expressed his resolve to kill State's Attorney Huyett and his family after he was released from prison.

¶ 15 The evidence revealed that defendant and Adye had lived together in the same house for many years and that they had three children together. On June 28, 2005, defendant telephoned Adye from the jail and asked her to post bond for him. An automatic message notified defendant and Adye that their conversation was being recorded. Adye told defendant she did not "have enough

money yet," bills were falling due, and she had to "wait on another check." Defendant told her: "You don't pay another fuckin' bill. I don't care if the [g]oddamn electricity gets fuckin' shut off and the house gets repossessed. You don't pay nothin' till I'm outta here. You understand that?" Adye insisted she did not "have the money to get [him] out yet." "You rob a fuckin' bank, bitch," he replied. "You get the fuck up here and get me out of fuckin' jail." Adye was employed at the IGA grocery store in Lincoln. Defendant forbade her to go to the IGA and work another minute until he was out of jail. She said she could not afford to lose her job; she had too many bills. She asked him:

> "[ADYE]: Do you know how many bills we have?
>
> [HICKEY]: I will fuckin' break out of here[] and rip your fuckin' head off, do you understand that?
>
> [ADYE]: I'm going to get you out as soon as I get this check [on Friday].
>
> * * *
>
> [HICKEY]: No[,] not by Friday, Wen. I'm not staying here till Friday. Look, you can't borrow it *** off Charlie or anybody[?]"

Charlie Lee was one of her bosses at the IGA. Defendant told her: "Look, *** I don't give a fuck if you have to get on your fuckin' knees and suck his fuckin' dick. You get me the fuck out of here." Adye explained that she had $2,000 but that she needed to borrow another thousand. Defendant said: "Look, I want [$2,000]. I want it on my books. *** If you don't have me out of here within 24 hours, you will regret the day you met me. I ain't playin', Wen." He assured her he loved her, but he said he could not "take it" any longer in jail.

¶ 16 On July 13, 2005, defendant telephoned Adye again and asked her "[w]hat[] [was] the hold[-]up" on paying his bond. She explained that creditors had been calling and she had "panicked and paid some bills," but she promised to "have [him] out before the weekend." He demanded that she "come up [t]here and *** get [him] out right now" or else when he "g[o]t out," he would "kill." Again she promised:

> "[ADYE]: I'll get you out before the weekend.
>
> [HICKEY]: No, Wendy! No, Wendy!
>
> [ADYE]: Joe, I'm sorry.
>
> [HICKEY]: No, Wendy. You come get me, I'm gonna break your fuckin' head off, bitch. You understand that? You just forget it. You used to get everything. 'Cause I am gonna kill you. Do you understand me?
>
> [ADYE]: Yes.
>
> [HICKEY]: I ain't fuckin' playin'."

He told her he had already made arrangements to obtain the funds to pay her back but that by failing to post bond, she was defeating these arrangements and that he could not keep on making such arrangements only to cancel them. Then he told her: "If you don't, I'm goin' off and I'm goin' off [inaudible]. Sorry, hon, but I can't take no more. You understand me?" Again he urged her to "get [him] out now." Then he asked her:

> "[HICKEY]: You got a way to do it?
>
> [ADYE]: I'm trying.

[HICKEY]: No, not [']I'm tryin'[,'] Wen! Do you have a way to do it?

[ADYE]: I don't know. I'm thinkin'.

[HICKEY]: I ain't playin'–fuckin'–I ain't playin'. Wen, you get me out[.] I'm killin' myself tonight[,] you understand that."

¶ 17 The State next called Adye, who testified that defendant was "a polite person when[] he was not in jail" and that he normally did not talk the way he did on June 28 and July 13, 2005. The State's Attorney responded:

"Q. He's a polite person when he's not in jail.

A. Well, he was yelling then because he was in jail. He normally don't go around screaming.

Q. Okay. So this is not the normal way he talks to you?

A. No.

Q. Okay. This is totally out of character?

A. Well, just like I told Dick [Koritz, the defense counsel:] I said you didn't play no good tapes. You only played the bad tapes[,] so there is–

Q. And have you–

A. –two sides.

Q. And have you attempted to help Mr. Koritz find out[,] of those 40 some CDs[,] a good tape where he is nice to you?

A. I didn't know I'm suppose[d] to.

Q. Well, you just want to criticize our selection[,] but you haven't added–

A. No. You got to know there are two sides to every person, and you've picked really mean tapes[,] and I understand why."

¶ 18 The State's Attorney asked Adye:

"Do you remember this?

And Joe says, apparently he doesn't talk like this all the time, 'They take my fuckin' kids' lives from me, the rest of it--I get out, I'm killin' everyone. I swear to God, that fuckin' Huyett, I will kill him. I will kill his whole fuckin' family. I ain't taking this shit. I didn't do nothing to be in[,] and I'm not takin' it. I'm gonna to [sic] sit in here and stew till the day I get out[,] and when I get out, I will kill him and his whole family. I swear to God I will.' "

Do you remember that?

A. I don't remember him saying your name. I told you that before."

¶ 19 The State's Attorney obtained permission from the trial court to question Adye as a hostile witness. She denied that defendant "tried to scare [her] into getting the $3,000 bond." She remarked to the State's Attorney: "A lady at the IGA says she will murder somebody every[]day[,] and nobody ever questions her in the deli. I don't think all of them were intended that way. I don't know."

¶ 20 On cross-examination by defense counsel, Adye insisted that during her relationship

with defendant in the last 10 years, she never felt threatened by him. She did not find his telephone calls of June 28 and July 13, 2005, to be intimidating. She was not afraid of him then, and she was not afraid of him now.

¶ 21 Defendant took the stand in his own behalf. He testified that in the past five years, he had no steady employment, although he did part-time mechanical work on cars in his garage. He had physical impairments that limited his ability to maintain employment. He testified: "I fell three stories, and then[,] a year later[,] I wrecked my motorcycle on a hundred[-]foot jump at a cross country track." He admitted that in the telephone calls he made to Adye on June 28 and July 13, 2005, he "spoke despicabl[y]," but he insisted that he never intended to do any physical harm to her. "I love Wendy more than life itself," he said. "I would die with her. I would never hurt her. She knows that." He said: "I haven't done any physical harm to anyone in years. In 15 or 16 years that I have had children[,] I have smacked two of them once each. I don't use physical force for anything. I try to be a friend to my family."

¶ 22 On cross-examination, defendant testified that on June 28 and July 13, 2005, he was pleading with Adye to get him out of jail because he had "just got into a fight with a black man," Cornelius Jackson. Defendant testified that, in his opinion, black people had "different morals," they lacked "manners," and they behaved "like a pack of wolves." The State's Attorney asked him:

> "Q. You can have manners. Is that what you said?
>
> A. I try to be a mannerly person. Sometimes I lose my cool.
>
> Q. Like when you threatened to kill me before we even brought up the intimidation charges?

A. I didn't threaten to kill you. I was making a predication about what I would be like in [10] years from now[,] when I got out of prison.

Q. A prediction that you would kill me?

A. It would be a prediction of what [10] years of prison would do to me.

* * *

Q. Did you fight with Cornelius the day you were making that prediction?

A. I don't remember exactly, possibly, possibly not.

Q. The threats to kill me have nothing to do with the irritation toward[] the black pack of wolves, right?

A. Excuse me?

Q. That has to do with the fact that you don't like the fact that I'm attempting to enforce the law as it pertains to you, right?

A. I think you have taken it beyond its limits.

Q. Right. You believe that I have[,] in your mind[,] so that is why you feel justified in threatening to kill me. Is that accurate?

A. I tell my kids to do the dishes or I will spank them, but I don't get charged with intimidation charges from it."

¶ 23 The State's Attorney questioned defendant about an incident in which he "snapped" at a correctional officer who was bringing him medication. Defendant testified:

"Q. He snapped at me first[,] and I snapped back.

A. Okay. And Wendy did not snap at you?

Q. She told me to quit talking like this.

A. Did Wendy ever snap at you?

You have had ample time to go over this discovery[,] so find me an example where Wendy snapped at you.

A. She told me to quit acting like that on the phone last night.

Q. I'm talking about during the charged counts, any of the counts[–]did Wendy ever snap at you?

A. She knew I was extremely upset. She wanted to help me calm down."

¶ 24 The defense rested, and the State presented no evidence in rebuttal. After a jury instruction conference, the attorneys gave their closing arguments. The State's Attorney began his closing argument as follows:

"Ladies and gentlemen, Joe Hickey does what Joe Hickey wants[,] is what Mr. Hickey said at the last trial, and he confirmed today that's his state of mind.

We listened to these tapes[,] and they are chilling. They are not the product of some relationship gone bad. They are the product of Joe Hickey gone bad predicting my demise, despising me for enforcing the law, and predicting that I will be dead when he gets out if he sits and stews in prison.

I asked why he threatened me. It is just a prediction, but it is not a threat[,] apparently[,] to Wendy ***."

¶ 25 The State's Attorney quoted from defendant's telephone conversation of June 15, 2005: " 'I'll be a raving lunatic and kill everyone that put me in here. I swear to God I will.' That was before the prediction that he and I talked about of my demise, that one he doesn't name me by name."

¶ 26 The State's Attorney also quoted from a telephone conversation of June 19, 2005:

" 'Go get me $3,000 right now. Please. You don't understand how imperative it is, and I can't tell you on the phone. Please.' Again he's escalating. 'I have a way of getting out of this[,] and I don't even have to talk to Lisa.' [(Evidently, one of the reasons why defendant was in jail was that he was charged with the domestic battery of Lisa Canedy.)] He doesn't have a way of demonstrating his innocence just getting out of it."

¶ 27 A third time in his closing argument, the State's Attorney brought up the death threat against himself and his family:

"[A]nd I have touched upon the August 8[] [telephone call, in which] Hickey is upset about his continued incarceration and he's going to kill me and my family. Now, that is just not in there just for the shock value, if you will, saying he's threatening to kill the prosecutor. It's in there to demonstrate that what he says to Wendy Adye he means because[,] as he so clearly told us today[,] he despises me for

my role in the case. He's almost chilling to listen to to describe the prediction. It's like the tough guy will say[,] ['A]re you threatening me[?'] [']No, I don't threaten. That's a promise. That wasn't a threat, Mr. Huyett. That's a prediction.['] What is that? That's a demonstration that Joe Hickey says what he means. He didn't back off of it. He means it. He meant it when he said[] what he said to Wendy Adye. He meant it to compel her to do the act. I don't care if he would not have killed her. The fact is that he wanted her to believe that he would[,] and that is the crime, and this demonstrates the threat to myself and my family."

¶ 28 Again, in his surrebuttal, the State's Attorney argued:

> Mr. Koritz says, ['W]ell, he's in jail[,] so how could he actually do it[?] *** Therefore, [Adye] can't be intimidated into these acts.['] *** [W]hen he was talking about me, he says stew for [10] years and then he's going to do it. See how he does that. Believe me[,] Joe wants me to sit here and know that when he says that[,] [it] is a prediction. He wants me to know that. He wants her to know that. It is irrelevant that he's locked up ***."

The jury found defendant guilty of both counts of intimidation.

¶ 29 B. Case No. 05–CF–113 (Unlawful Possession of Contraband in a Penal Institution)

¶ 30 The indictment in case No. 05–CF–113 charged that on June 9, 2005, defendant committed the offense of unlawful possession of cocaine in a penal institution (720 ILCS

5/31A–1.1(b) (West 2004)) in that he knowingly possessed cocaine, a schedule II controlled substance, in the Logan County jail.

¶ 31 During *voir dire*, the State's Attorney told the first panel:

> "The burden of proof would be beyond a reasonable doubt, and what I want to ask actually for all of you, you understand that is the burden. We have to prove the case beyond a reasonable doubt. It is not–sometimes you hear on TV beyond all doubt or beyond a shadow of a doubt. Those aren't the burden. It is beyond a reasonable doubt."

After one panel member was excused, the State's Attorney discussed reasonable doubt with the new prospective juror: "As you may have heard me talk to the other three jurors in your box with you[,] *** it doesn't mean beyond all doubt or beyond a shadow of a doubt but beyond a reasonable doubt." Defense counsel objected to the "continued comments about defining [']beyond a reasonable doubt,[']" but the trial court overruled the objection. The State's Attorney asked another prospective juror, "And you do understand the burden of proof is beyond a reasonable doubt[?] Not beyond all doubt or beyond a shadow of a doubt[;] it is beyond a reasonable doubt?"

¶ 32 After the second group of four jurors was empaneled, the State's Attorney asked them, "Do each of you understand that the burden of proof is beyond a reasonable doubt as opposed to beyond a shadow of a doubt or beyond all doubt?" He continued to ask this question or some variant of it throughout *voir dire*. Defense counsel moved to strike the entire *voir dire* because the State's Attorney had indoctrinated the jurors with his own definition of "beyond a reasonable doubt." The trial court responded: "He didn't try to define it. He just said it is beyond a reasonable doubt. It is

not beyond this doubt and not beyond that doubt. I don't think it was actually defining. It was just stating what it is. We will show that objection made and denied."

¶ 33 In his opening statement at trial, the State's Attorney disavowed any intention to charge Hickey with bringing contraband into the jail. He predicted that the evidence would show the following. When searching Hickey's person in the booking area of the jail, a police officer found cocaine in Hickey's pants pocket. The officer laid the cocaine on a counter. Then, in an effort to avoid prosecution, Hickey snatched the cocaine off the counter, put it in his mouth, and swallowed it. As the State's Attorney emphasized to the jury, it was Hickey's act of retrieving the cocaine off the counter that constituted the offense of unlawful possession of contraband in a penal institution, not his bringing the cocaine into the jail in the first place.

¶ 34 In his own opening statement, defense counsel told the jury:

> "Actually you will get an instruction at a later time in this case that having an [il]licit substance on you at the time of the arrest is not a crime. As you sit back--
>
> MR. HUYETT [(State's Attorney)]: I don't believe that will be the instruction. It is not the crime of bringing it in.
>
> THE COURT: Ladies and gentlemen, you will receive the instruction as to what the law says."

¶ 35 The State called Matthew Vlahovich as its first witness. He testified he was a patrol officer for the Lincoln police department and that on June 9, 2005, around 9 p.m., he arrested defendant for an unrelated offense. The arrest occurred near defendant's residence. He patted defendant down for weapons, cuffed his hands behind his back, and brought him to the Logan

County jail. He walked defendant into the booking area, where he performed a more thorough search of defendant's person. He removed some items (he did not remember what) from defendant's right pants pocket and laid them on a nearby counter. In the left pants pocket, Vlahovich found a jagged, somewhat sparkly, off-white rocklike substance about the size of a pencil eraser. From his training and experience as a police officer, Vlahovich knew what crack cocaine looked like, and he believed this object to be crack cocaine. He laid it on the counter, too. When the search was concluded, he told defendant to bend over so he could remove the handcuffs. A correctional officer, Todd Bauer, was standing nearby. When his right hand was free, defendant turned and grabbed something off the counter and put it in his mouth. A video recording from the jail's surveillance system (People's exhibit No. 1) shows him doing so. "Did you see that?" Vlahovich asked Bauer. "Yes," Bauer replied. The small rocklike object was gone from the counter.

¶ 36 Vlahovich then sat defendant down and began filling out the booking form and inmate questionnaire. Defendant reached into his mouth, broke off a rotten tooth, and handed it to Vlahovich, saying, " ['T]his is what you found in my pants. It was a tooth.['] " People's exhibit No. 3 was the tooth. According to Vlahovich, it looked nothing like the object he had taken out of defendant's left pants pocket.

¶ 37 After putting defendant in the holding cell, Vlahovich went to the radio room to get some papers and information, and while he was there, he saw defendant walking in circles in the cell and drinking copious amounts of water. As defendant drank, he was stooped over, and his knee was shaking. When Vlahovich returned, defendant was holding, in his bloody fingers, another tooth or a fragment of a tooth. " ['H]ere is my tooth[,'] " defendant said. " [']This is what you found.[']" "

[']I don't want that[,'] " Vlahovich replied. " [']Throw it on the floor.['] " After donning rubber gloves, Vlahovich picked up the second tooth, People's exhibit No. 4.

¶ 38 Vlahovich requested defendant's pants. "I asked Joe to take his pants off," he testified. "I was going to take them into evidence [for possible residue of crack cocaine in the left pocket]. I didn't let him know that. I said, [']Joe, I need your pants. I'm going to change you. I'm going to exchange your pants for a pair of jail uniform pants.['] " Defendant removed his pants, pulled the pockets inside out, and slapped and shook their linings, saying, " ['T]here is nothing in there.['] " The pants are People's exhibit No. 2.

¶ 39 On cross-examination, Vlahovich admitted that when defendant reached toward the counter in the booking area, neither he nor Bauer made any effort to intercept his hand. They never searched his mouth. They never ordered him to spit anything out. They never tried to remove anything from his mouth. Vlahovich merely uncuffed defendant's other hand without saying a word to him. He admitted that a pulled tooth could be jagged, white, sparkly, and the size of a pencil eraser, but he insisted that the object he removed from defendant's left pants pocket was not a tooth.

¶ 40 The State next called Detective Landers. He testified that on June 10, 2005, he obtained a search warrant authorizing him to do two things (through the assistance of medical personnel): (1) collect a blood sample from defendant and (2) obtain an X ray and computerized tomography (CT) scan of defendant's digestive tract. The purpose of the first procedure was to check for the presence of cocaine in defendant's bloodstream. The purpose of the second procedure was to determine whether defendant had swallowed a broken tooth instead of crack cocaine. On June 10, 2005, a deputy sheriff brought defendant to Abraham Lincoln Memorial Hospital, and Landers met them there. After the nurse drew three vials of blood from defendant, Landers telephoned the

forensic laboratory in Springfield and learned that the vials would not fit the machines in the laboratory and that, besides, a urine test was a more reliable method of detecting cocaine than a blood test. Landers asked defendant if he would consent to a urine test. Defendant consented, but he complained that these procedures were a waste of time because he had already admitted–and continued to admit–that cocaine was in his system. No X ray or CT scan was performed.

¶ 41 According to the testimony of a forensic scientist, the urine specimen contained cocaine and cocaine metabolites. Cocaine was detectable in the bloodstream up to 24 hours after ingestion. Cocaine metabolites were the by-products of cocaine after the body had broken it down, and they were detectable up to seven days after ingestion of the cocaine. Also, the pockets of defendant's pants contained a residue of cocaine.

¶ 42 The State next called Justin Harriman, who testified he had been defendant's cell mate in the Logan County jail from August 11 to 16, 2005. A couple of days after Harriman arrived at the jail, he and defendant got into a discussion of why they were there. Defendant said he had got caught with crack cocaine inside the jail and that when the police officer took it from him and put it on top of the desk, he grabbed it and ate it. He said the police had no evidence against him because he had pulled out the pockets of his pants and shaken them out. According to Harriman, no one had promised him anything for his testimony. He admitted, however, that he and defendant had got into an altercation while sharing a cell and that they had almost come to blows, making it necessary for Harriman to move to a different cell. Harriman denied nursing a grudge against defendant, but he admitted that his feelings toward defendant were not friendly.

¶ 43 The State also called Bauer, who testified he was about two feet away from defendant as Vlahovich was searching him in the booking area. From defendant's left pants pocket, Vlahovich

removed a crystalline rock-like substance about the size of a pencil eraser and laid it on the counter. It looked to Bauer like crack cocaine. When Vlahovich uncuffed defendant's right hand, defendant turned around, snatched the object off the counter, and put it in his mouth. Bauer saw defendant bite down, and he saw the object turn to powder in defendant's mouth. Vlahovich asked defendant what he had swallowed, and defendant answered it was a tooth. Bauer was positive it was not a tooth. On cross-examination, Bauer admitted standing motionless, with his hand resting on a printing machine, as he watched defendant grab and eat the alleged contraband. The State rested.

¶ 44 Defendant took the stand in his own behalf. He testified that about half an hour before his arrest, he was home, lying underneath a car, changing the oil, when he dropped a ratchet wrench on his mouth, chipping and loosening a tooth. He pulled out the tooth and slipped it into his pants pocket, intending to put it in a jewelry box, in which he kept his children's baby teeth. People's exhibit Nos. 3 and 4 were fragments of that tooth. The object that Vlahovich pulled out of defendant's left pants pocket was, according to defendant, a fragment of his busted tooth, not crack cocaine. Defendant had grabbed the tooth off the counter in the booking area and had put it in his mouth so that the police would not misconstrue what it was and use it as an excuse to keep him in detention. Once, during a traffic stop, the police saw a Tic Tac on the floorboard of his car and used that as an excuse to detain him for hours and search him and his car with dogs. Defendant testified that, eventually, he began having second thoughts about hiding the tooth from Vlahovich, so he decided to be up front with him and hand it to him. It was no surprise to defendant that the police had found cocaine in his bloodstream and the residue of cocaine in his pants pockets, for he had been using cocaine every day for the past 20 years. He denied bringing cocaine, however, into the Logan

County jail or possessing cocaine there. In his conversation with Harriman, defendant was merely describing the State's understanding of the facts, not his own.

¶ 45 In an instruction conference, defense counsel requested an instruction on the affirmative defense that defendant possessed the contraband at the time of his arrest. See Illinois Pattern Jury Instructions, Criminal, No. 22.61 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 22.61). The trial court refused to give the instruction because defendant had "completely denied that this [was] anything other than a tooth."

¶ 46 Before the defense rested, the trial court read to the jury the following stipulation by the parties: "The parties stipulate that the contraband *** which the defendant is charged with possessing in a penal institution on June 9, 2005, relates to the rocklike substance placed on the counter-top at the Logan County [j]ail by Lincoln [p]olice [o]fficer Vlahovich and not to any cocaine residue found on the pants of the defendant."

¶ 47 The jury found defendant guilty of the charged offense of unlawful possession of contraband in a penal institution. Defense counsel filed a posttrial motion arguing the trial court had erred in (1) denying the motion for a mistrial on the ground of the State's Attorney's definitions of "beyond a reasonable doubt" and (2) refusing to give an instruction on the affirmative defense of arrest while possessing contraband. The court denied the posttrial motion.

¶ 48 C. The Consolidated Sentencing Hearing

¶ 49 The two cases, Nos. 05–CF–107 and 05–CF–113, were consolidated for sentencing. The trial court denied defendant's posttrial motions and sentenced him to 10 years' imprisonment for each of the two counts of intimidation and 15 years' imprisonment for possession of contraband in

a penal institution. The 15-year term was consecutive to the 10 year terms, which were concurrent with each other.

¶ 50 D. The Direct Appeal

¶ 51 Defendant filed a direct appeal from the judgments in case Nos. 05–CF–107 and 05–CF–113. In case No. 05–CF–107, he made two arguments. First, he argued the trial court had erred in admitting evidence of his threat against State's Attorney Huyett and Huyett's family, because, according to defendant, the probative value of this evidence was substantially outweighed by the danger of unfair prejudice. *People v. Hickey*, No. 4–06–0070, slip order at 26 (December 31, 2007) (unpublished order under Supreme Court Rule 23). Over Justice Cook's dissent (*Hickey*, slip order at 35-36 (Cook, J. dissenting)), a majority of the panel disagreed with that argument (*Hickey*, slip order at 28-29). The majority reasoned that, arguably, under a deferential standard of review, the probative value of the evidence was high in that defendant wanted to portray himself to Adye as a "raving lunatic," someone who was sufficiently enraged and sufficiently irrational to make good on his threat to kill Adye–thereby making his threats to her all the more impressive. *Id.*

¶ 52 Second, defendant argued, in case No. 05–CF–107, that the State's Attorney had shifted the burden of proof to the defense by asking Adye if she had ever pointed out to defense counsel any telephonic recordings containing benign conversations between herself and defendant. *Hickey*, slip order at 30. We disagreed, reasoning that the State's Attorney was merely testing the validity of Adye's accusation of him that he had created a misleading picture of the interaction between herself and defendant by presenting to the jury only the "bad" telephone conversations. *Id.*

¶ 53 In case No. 05–CF–113, defendant made two arguments on direct appeal. First, he argued the trial court had erred in refusing to give the jury an instruction on the affirmative defense

of possessing the contraband at the time of his arrest (IPI Criminal 4th No. 22.61). *Hickey*, slip order at 22. We held the proposed instruction to be inapplicable because the State's Attorney had made clear to the jury, both in his opening statement and in a stipulation, that the State was not charging defendant with bringing cocaine into the jail but that, instead, the State was charging him with retaking possession of the cocaine after Vlahovich removed it from his possession. *Id.* at 23.

¶ 54 Second, defendant argued, in his direct appeal in case No. 05-CF-113, that during *voir dire*, the State's Attorney improperly defined "reasonable doubt," and de-emphasized the State's burden of proof, by telling prospective jurors that "reasonable doubt" did not mean "beyond all doubt or beyond a shadow of a doubt." *Hickey*, slip order at 24. We held that all the State's Attorney did was emphasize the correct wording of the State's burden of proof, and we found no impropriety in his doing so. *Id.* at 25.

¶ 55 Therefore, this court affirmed the judgments in case Nos. 05–CF–107 and 05–CF–113. *Id.* at 32.

¶ 56 On March 26, 2008, the supreme court denied leave to appeal. *People v. Hickey*, 227 Ill. 2d 589 (2008) (No. 106006).

¶ 57 E. The Postconviction Proceeding

¶ 58 1. *The Amended Postconviction Petition*

¶ 59 On November 2, 2007, while his direct appeal in case Nos. 05–CF–107 and 05–CF–113 was still pending, defendant filed, *pro se*, a petition for postconviction relief in the two cases. Four "affidavits" were attached to his *pro se* petition, but none of the "affidavits" appear to discuss the facts or circumstances in case Nos. 05–CF–107 and 05–CF–113. (We are putting "affidavits" in quotes because (1) although three of the written statements are signed and stamped

by a notary public, they contain no oath clause; and (2) the fourth statement, though signed by a notary public, recites the verification language from section 1–109 of the Code of Civil Procedure (Code) (735 ILCS 5/1–109 (West 2008)), which creates a substitute for an affidavit *only in proceedings under the Code*.)

¶ 60 On November 15, 2007, the trial court appointed the public defender to represent defendant in the postconviction proceedings. On May 12, 2009, defendant wrote the court, requesting a status hearing on his postconviction petition. On June 30, 2009, an assistant public defender filed an amended postconviction petition along with a supporting affidavit by defendant.

¶ 61 The amended petition mostly asserts ineffective assistance of counsel. Trial counsel, Richard Koritz, allegedly rendered ineffective assistance by failing to perform adequate investigations, failing to present evidence favorable to the defense, failing to do a good enough job cross-examining witnesses, and failing to make objections during the prosecutor's closing argument. In paragraph 9, the amended petition complains of the following acts and omissions by Koritz:

> "(a) Richard Koritz failed to properly investigate and present evidence requested by Joseph Hickey or his spouse and further failed to allow Joseph Hickey to adequately prepare his defense by failing to seek either modification or vacation of an order of no-contact that prevented Joseph Hickey from discussing relevant evidence with his spouse Wendy Adye.
>
> (b) Richard Koritz failed to challenge said no-contact order as violative of Joseph Hickey's right to present a defense to the charges

placed against him, a right guaranteed under the United States and Illinois Constitutions.

(c) Richard Koritz failed to properly investigate testimony of law enforcement officials called to testify at trial and as a result failed to effectively cross-examine those witnesses and impeach the testimony presented at trials.

(d) Richard Koritz failed to adequately and properly view audio and video evidence presented against Joseph Hickey and by that failure did not allow a full and complete presentation of that evidence to be considered by the jury in the trials.

(e) Richard Koritz failed at numerous times to object at trial to improper evidence admitted at trial and improper comments by the prosecutor in closing arguments. The failure to object and to preserve these issues for appellate review denied Joseph Hickey the opportunity for a full appellate review of his claims of error at his trials.

(f) In addition to the errors set forth in paragraph (e), Richard Koritz failed to file pre-trial motions to limit the testimony of other crimes offered against Joseph Hickey at trial. This evidence served to prejudice the jury against Mr. Hickey.

(g) Richard Koritz failed to investigate information provided by Joseph Hickey that Lisa Canedy received promises of leniency

> from Logan County authorities in exchange for her testimony. Specifically, a promise was made that charges of domestic battery pending in Minnesota would be dismissed in exchange for her cooperation in providing testimony against Joseph Hickey."

The amended petition does not specify what evidence Koritz failed to properly investigate and present, which portions of the testimony of law enforcement officials he failed to investigate and what the investigation would have revealed, what portions of the audio and video evidence he overlooked, and which improper evidence and improper comments to which he failed to object. Defendant's accompanying affidavit is equally vague on these points.

¶ 62 In addition to the mostly nonspecific allegations of ineffective assistance, the amended petition alleges that defendant was denied his constitutional right to confront adverse witnesses and his constitutional right to the due process of law. Paragraphs 10 and 11 of the amended petition read as follows:

> "10. Joseph Hickey was denied the right of confrontation afforded to him under the Sixth Amendment of the United States Constitution and under section 8, article 1 of the Illinois Constitution when the prosecution repeatedly presented evidence of uncharged criminal conduct at his trial including evidence [of] the use of cocaine and threatening the life of the Logan County State's Attorney. Presenting such evidence to the jury also lowered the burden of proof and denied Joseph Hickey due process of law as guaranteed by the United States Constitution and the Illinois Constitution.

> 11. Joseph Hickey was further denied his constitutional right to due process guaranteed under the United States and Illinois Constitution when evidence material to guilt was withheld by Logan County law enforcement officials. Specifically such evidence included videos of booking procedures at the Logan County Jail and reports of jail authorities regarding the booking of Joseph Hickey. Such information if provided to Joseph Hickey might have corroborated his defense at trial."

The amended petition does not explain how the videos of booking procedures and reports of jail authorities would have corroborated defendant's defense, and no evidence is attached to the amended petition as to how they would have done so.

¶ 63 2. *The State's Motion for Dismissal*

¶ 64 On July 30, 2009, the State filed a motion to dismiss the amended petition for postconviction relief. In its motion, the State contended that the allegations in paragraph 9 of the amended petition, in addition to abounding in speculation and naked conclusions, merely complained of Koritz's trial strategy and that, in any event, the alleged substandard performance had caused no prejudice to the defense. Further, the State pointed out that paragraphs 9(a), (b), and (f) were actually rebutted by the record. The State observed:

> "Contrary to the defendant's allegations in 9(a) and (b), a review of the Court's docket shows that Attorney Koritz not only did file a motion for visitation on September 20, 2005, to allow the defendant contact with Wendy Adye but also argued said motion on September

> 22, 2005. Contrary to defendant's allegations in 9(f), a review of the Court's docket shows that Attorney Koritz received discovery on 9-13-05 and not only did file pre-trial motions for: Motion to Suppress Lab Results filed and argued on 9-26-09; Motion In Limine to Suppress Audio Recordings filed and argued on 11-14-05; Motion to Exclude Tapes of Uncharged Conduct renewed by Attorney Koritz on 11-15-05; Motion to Exclude Impeachment Tapes made by Attorney Koritz on 11-16-05, and defendant elected to testify against advice of counsel on 09-28-2005. Contrary to defendant's allegations in 9(g), a review of the Court's docket shows that Lisa Canedy did not testify in these cases."

¶ 65 As for paragraph 11 of the amended petition, the State argued that defendant already raised the allegation therein on direct appeal and that the appellate court's decision was *res judicata*.

¶ 66 As for paragraph 12 of the amended petition, the State argued that not only was that paragraph speculative, conclusory, and unsupported by affidavits, the record, or other evidence, but the theory in that paragraph was procedurally forfeited because defendant could have raised that theory on direct appeal.

¶ 67 3. *The Trial Court's Dismissal Order*

¶ 68 In its order granting the State's motion for dismissal, the trial court concluded that the claims of ineffective assistance were vague and uncorroborated, barred by *res judicata* and procedural forfeiture, or positively rebutted by the record. Defendant did not identify the evidence that he and Adye allegedly had requested Koritz to investigate and to present at trial. Nor did

defendant present any affidavits or other evidence to substantiate his assertion that there were videos taken from other camera angles that would have helped his defense. His allegation that Koritz had failed to challenge the no-contact order was, as the State argued, flatly disproved by the record. And insomuch as defendant accused Koritz of ineffective assistance in that Koritz had failed to preserve issues of prosecutorial misconduct for review, the court held that *res judicata* barred that claim because, in the direct appeal, the appellate court addressed claims of prosecutorial misconduct. The trial court further held that defendant had failed to show any prejudice from the failure to bring out that a promise of leniency had been made to Lisa Canedy, considering that Canedy never testified at trial in either case No. 05–CF–107 or case No. 05–CF–113.

¶ 69 Finally, as for defendant's remaining claim that the State had violated his right of confrontation by making reference to uncharged misconduct, the trial court held that *res judicata* or procedural forfeiture barred that claim because, on direct appeal, the appellate court addressed the issue of uncharged misconduct.

¶ 70 Therefore, the trial court granted the State's motion to dismiss the amended petition for postconviction relief.

¶ 71 This appeal followed.

¶ 72 II. ANALYSIS

¶ 73 A. Precisely Which Cases Are Before Us?

¶ 74 The covers of the common-law record and of the State's brief bear the numbers of not two but three cases: case Nos. 05–CF–107, 05–CF–113, and 05–CF–124. The notice of appeal that defendant filed *pro se* on January 5, 2010, names only case Nos. 05–CF–107 and 05–CF–113, but the notice of appeal that the circuit clerk filed for him on January 6, 2010, names case No.

05–CF–124 as well. We have already discussed case Nos. 05–CF–107 and 05–CF–113, but what is case No. 05–CF–124?

¶ 75 According to a bill of indictment attached to defendant's points and authorities as exhibit A, defendant was charged with intimidation (720 ILCS 5/12–16(a)(1) (West 2004)) and harassment of a witness (720 ILCS 5/32–4a(a)(2) (West 2004)) in case No. 05–CF–124, and the victim in both counts was Lisa Canedy. But according to the web site of the Logan County circuit clerk, case No. 05–CF–124 was dismissed on April 28, 2009, pursuant to a plea agreement in case No. 05–CF–71 (a case that is not before us). See Logan County Circuit Clerk, http://www.judici.com/courts/cases/case_history.jsp?court=IL054025J&ocl=IL054025J,2005CF124,IL054025JL2005CF124D1 (last visited on July 8, 2011). Cf. *People v. Mitchell*, 403 Ill. App. 3d 707, 709 (2010) (taking judicial notice of the official website of the Department of Corrections). Further, according to the web site of the Illinois Department of Corrections, defendant is serving no sentence in case No. 05–CF–124–a fact that tends to confirm that the case was indeed dismissed. See Illinois Department of Corrections, http://www.idoc.state.il.us/subsections/search/inms.asp (last visited on July 8, 2011). We presume that defendant has no objection to the dismissal of criminal charges against him and that he therefore does not intend to appeal from the favorable judgment in case No. 05–CF–124. Consequently, by our understanding, only two cases are actually before us in this appeal, case Nos. 05–CF–107 and 05–CF–113, and the references to case No. 05–CF–124 are erroneous.

¶ 76 B. Our Standard of Review

¶ 77 If, as in the present case, the trial court does not summarily dismiss the postconviction petition as "frivolous" or "patently without merit" (725 ILCS 5/122–2.1(a)(2) (West 2008)), the

postconviction proceeding advances to the second stage, in which the court appoints counsel to represent the defendant, if the defendant is indigent (725 ILCS 5/122–4 (West 2008)); appointed counsel amends the petition, if necessary (Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984)); and the State, if it sees fit to do so, files a motion to dismiss the petition (725 ILCS 5/122–5 (West 2008)).

¶ 78 In ruling on the State's motion for dismissal, the trial court must decide whether the defendant has carried his or her "burden of making a substantial showing of a constitutional violation." *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). For this purpose, the court takes as true "all well-pleaded facts that are not positively rebutted by the trial record" (*id.*), and the court liberally construes those factual allegations in the defendant's favor (*People v. Coleman*, 183 Ill. 2d 366, 382 (1998)). "Nonfactual and nonspecific assertions which merely amount to conclusions" do not entitle the defendant to advance to the third stage of the postconviction proceeding, in which an evidentiary hearing would be held. *Id*. at 381. Further, any claim omitted from the petition is considered to be forfeited. 725 ILCS 5/122–3 (West 2008).

¶ 79 We review *de novo* the dismissal of a postconviction petition in the second stage. *People v. Pack*, 224 Ill. 2d 144, 147 (2007). In other words, we decide anew, without any deference to the trial court, whether the postconviction petition and attached affidavits and other evidence make a substantial showing of a constitutional violation.

¶ 80 C. The Allegations of Ineffective Assistance

¶ 81 1. *Nonspecific Assertions*

¶ 82 Many of the allegations of ineffective assistance of counsel, in paragraph 9 of the amended petition, are "nonspecific assertions which merely amount to conclusions." *Coleman*, 183 Ill. 2d at 381. We refer to paragraphs 9(a), (c), (d), and (e). The amended petition does not specify

what evidence Koritz failed to "properly investigate" and to "present" at trial. It does not specify how he could have more effectively cross-examined law enforcement officials and how he could have impeached them. It does not specify what "audio and video evidence" was omitted at trial and how that evidence would have helped the defense. It does not specify the "improper evidence" and "improper comments" to which Koritz failed to object. These vague conclusions do not earn the right to evidentiary hearing. See *id.*

¶ 83 Again, only a "substantial showing of a constitutional violation" deserves an evidentiary hearing. *Pendleton*, 223 Ill. 2d at 473. When referring to a statement or to reasons, "substantial" means "[b]ased upon a solid substratum; firmly or solidly established." 10 Oxford English Dictionary 55 (1970). Nonspecific boilerplate assertions, unsupported by an affidavit or by other sufficient evidence, fail to meet this description.

¶ 84 2. *The No-Contact Order*

¶ 85 Paragraphs 9(a) and (b) of the amended petition allege that Koritz rendered ineffective assistance by failing to challenge the trial court's order to defendant to have no contact with Adye, thereby causing defendant to be inadequately prepared for trial. Insomuch as the record positively rebuts that allegation, we do not take that allegation to be true. See *Pendleton*, 223 Ill. 2d at 473. As the State and the trial court observed, that allegation is indeed false in light of the record. The record reveals that on September 20, 2005, Koritz filed a motion requesting that defendant be allowed to have contact with Adye and that on September 22, 2005, the court heard and denied the motion.

¶ 86 Apart from this negation, by the record, of the alleged substandard performance by Koritz, paragraphs 9(a) and (b) suffer from a lack of specificity as to what a consultation with Adye

would have yielded. In other words, these paragraphs fail to specify how the no-contact order actually prejudiced defendant in his defense, *i.e.*, what evidence he would have presented but for the no-contact order and how this evidence was obtainable only by a personal meeting between defendant and Adye.

¶ 87 3. *Pretrial Motions*

¶ 88 In paragraph 9(f) of the amended petition, defendant alleges that "Koritz failed to file pre-trial motions to limit the testimony of other crimes offered against Joseph Hickey at trial." In addition to failing to specify what the "other crimes" were, this paragraph is false in light of the record, or at least it is false in its absolute generality. As the State pointed out in its motion for dismissal, on November 15, 2005, Koritz filed a "Motion To Exclude Tapes of Uncharged Conduct."

¶ 89 4. *Promises of Leniency Made to Lisa Canedy*

¶ 90 Paragraph 9(g) of the amended petition complains that Koritz "failed to investigate information *provided by Joseph Hickey* that Lisa Canedy received promises of leniency from Logan County authorities in exchange for her testimony." (Emphasis added.) For two reasons, this allegation fails to make a substantial showing of a constitutional violation. First, defendant has attached to his amended petition no affidavit or other evidence corroborating that Canedy did in fact receive a promise of leniency from the Logan County authorities; nor has he offered any explanation for the absence of such an affidavit. See 725 ILCS 5/122–2 (West 2008). Second, assuming that Canedy did receive a promise of leniency from the State, it is unclear by what reasoning the trial court could have allowed Koritz to present evidence of this promise of leniency, considering that Canedy never testified in the trials in case Nos. 05–CF–107 and 05–CF–113. To be impeached for bias or self-interest, Canedy would have had to be a witness in the trial, and the impeachment would

have been accomplished by cross-examining *her* about her deal with the State. See *People v. Eckert*, 194 Ill. App. 3d 667, 674 (1990) (referring to the constitutional right to "cross-examine a *witness* as to the witness'[s] biases, interests, or motives to testify").

¶ 91 D. The Right of Confrontation

¶ 92 In paragraph 11 of his amended petition, defendant claims that by "repeatedly present[ing] evidence of uncharged conduct at his trial including the use of cocaine and threatening the life of the Logan County State's Attorney," the State denied him his constitutional right to confrontation (U.S. Const., amend. VI; Ill. Const. 1970, art. I, §8) and violated due process by "lower[ing] the burden of proof." On direct appeal, however, the majority held that evidence of defendant's threat against the State's Attorney was relevant and admissible. *Hickey*, slip order at 28-29. That holding is *res judicata*. See *People v. Palmer*, 352 Ill. App. 3d 877, 884 (2004). Defendant cannot relitigate this issue by dressing it up in a different legal theory, a constitutional theory. See *People v. Franklin*, 167 Ill. 2d 1, 23 (1995) ("[A] defendant cannot obtain relief under the Post-Conviction Hearing Act by rephrasing previously addressed issues in constitutional terms.").

¶ 93 Likewise, claims that could have been raised, but were not raised, in the direct appeal are considered to be procedurally forfeited. *People v. Towns*, 182 Ill. 2d 491, 503 (1998). Defendant could have argued, on direct appeal, that the evidence of his use of cocaine violated his constitutional rights. He did not do so. Therefore, that claim is forfeited.

¶ 94 E. Withholding Evidence Material to Guilt or Punishment

¶ 95 In paragraph 12 of the amended petition, defendant alleges he was denied his right to due process when the Logan County police withheld "evidence material to guilt or to punishment that might have exculpated Mr. Hickey ***. Specifically such evidence included videos of booking

procedures at the Logan County jail and reports of jail authorities regarding the booking of Joseph Hickey." Defendant alleges that "[s]uch information if provided to [him,] might have corroborated his defense at trial." All we have is defendant's assertion that the "videos of booking procedures" and the "reports of jail authorities" "might have corroborated his defense." He has attached to his amended petition no affidavit or other evidence substantiating the theoretical benefit from these materials; nor has he offered any explanation for the absence of this affidavit or other evidence. See 725 ILCS 5/122–2 (West 2008). Hence, this claim does not merit an evidentiary hearing. See *Coleman*, 183 Ill. 2d at 381.

¶ 96 III. CONCLUSION

¶ 97 For the foregoing reasons, we grant OSAD's motion for withdrawal, and we affirm the trial court's judgment. We award the State $50 in costs against defendant.

¶ 98 Affirmed.