



Defender, we find no error or potential grounds for appeal. Therefore, we now grant the motion of the State Appellate Defender to withdraw as counsel and affirm the judgment of the circuit court of Saline County based on the following.

¶ 3

### BACKGROUND

¶ 4 In 1984, defendant was convicted by a jury of the offenses of rape, armed violence, unlawful restraint, and aggravated assault. The circuit court sentenced him to 60 years for the rape, 60 years for armed violence, 6 years for unlawful restraint, and 364 days for aggravated assault. The sentences were to be served consecutively to sentences in another Saline County case (82-CF-179) and a Williamson County case (83-CF-134). On appeal to this court, the rape conviction was affirmed, but the other convictions were vacated. *People v. Newman*, 137 Ill. App. 3d 1170 (1985). Defendant filed his first petition for postconviction relief in 1987, which was dismissed. However, this court reversed and remanded because the circuit court's dismissal was untimely. *People v. Newman*, No. 5-87-0521 (1988) (unpublished order pursuant to Supreme Court Rule 23). Defendant filed an amended petition in 1988, and it was dismissed in 1989. In 1997, defendant filed another petition for postconviction relief, and it was dismissed. On appeal, the dismissal was affirmed by this court, and this court granted the State Appellate Defender's motion to withdraw as counsel. *People v. Newman*, No. 5-97-0390 (1998) (unpublished order under Supreme Court Rule 23). In 2000, defendant filed a third petition for postconviction relief, and it was dismissed. On June 4, 2010, defendant filed a motion for leave to file a successive petition for postconviction relief, which the circuit court denied. In the motion, the denial of which is the subject of this appeal, defendant seeks relief based upon the following claims: the prosecutor, in his opening statement, made reference to "the days when they use[d] to take a rope and hang/lynch a black man for the allege[d] rape of a white woman"; some jurors were either prejudiced against defendant or biased in favor of the prosecution; the

judge was prejudiced against him; and defendant received ineffective assistance of counsel because his trial, appellate, and postconviction counsel failed to object to these alleged errors.

¶ 5

#### ANALYSIS

¶ 6 Absent findings of fact, a circuit court's denial of a motion for leave to file a successive petition for postconviction relief is reviewed *de novo*. *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 25 (citing *People v. McDonald*, 405 Ill. App. 3d 131, 135 (2010)); see also *People v. Guerrero*, 2012 IL 112020, ¶ 13. The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 2010)) allows an individual convicted of a criminal offense to challenge the proceeding in which he or she was convicted under the United States or Illinois Constitution or both. *People v. Cathey*, 2012 IL 111746, ¶ 17 (citing *People v. Harris*, 224 Ill. 2d 115, 124 (2007)). "Postconviction relief is limited to constitutional deprivations that occurred at the original trial." *Guerrero*, 2012 IL 112020, ¶ 14 (citing *People v. Coleman*, 183 Ill. 2d 366, 380 (1998)). The Act generally limits a defendant to one petition. *Guerrero*, 2012 IL 112020, ¶ 15 (citing *People v. Holman*, 191 Ill. 2d 204, 210 (2000)). In *Guerrero*, the Illinois Supreme Court explained when successive petitions may be appropriate: "Section 122-1(f) of the Act provides the legislature's limited grant of authority for successive petitions:

'Only one petition may be filed \*\*\* under this Article without leave of the court. Leave of court may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure. For purposes of this subsection (f): (1) a prisoner 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; and (2) a prisoner 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.' 725 ILCS 5/122-1(f) (West 2006)." *Id.*

The court further advised that, "It is clear that both elements \*\*\* of the cause-and-prejudice test must be satisfied in order for the defendant to prevail." *Id.* (citing *People v. Pitsonbarger*, 205 Ill. 2d 444, 464 (2002), and *People v. Thompson*, 383 Ill. App. 3d 924, 929 (2008)). Regarding the assertion of ineffective assistance of counsel as a basis for a showing of cause necessary to permit a successive petition for postconviction relief, such claims constitute cause for purposes of the Act only when the alleged ineffective assistance occurred at the trial or appellate level, and only when such claims could not have been raised in the initial petition. *People v. Flores*, 153 Ill. 2d 264, 280 (1992). Such claims do not, however, constitute cause, for purposes of the Act, if they relate to alleged unreasonable assistance of counsel in a prior postconviction petition because the Act applies only to errors which occurred in the original proceeding. *Id.*

¶7 In the context of a successive postconviction petition, the requirement that a defendant show cause and prejudice will not be relaxed unless fundamental fairness requires it. *Pitsonbarger*, 205 Ill. 2d at 458. Fundamental fairness requires that a court grant leave to file a successive petition when necessary to prevent a miscarriage of justice. *Id.* at 459. In order to avoid the application of the cause-and-prejudice test in cases not involving the death penalty, "a petitioner must show actual innocence." *Id.* Fundamental fairness may also require leave to file a successive petition if " 'the claimed error is one which could not have been presented in an earlier proceeding.' " *People v. Caballero*, 179 Ill. 2d 205, 212 (1997) (quoting *People v. Flores*, 153 Ill. 2d 264, 274-75 (1992)).

¶8 In the present case, defendant does not claim actual innocence, nor does he assert that his claims could not have been stated in an earlier proceeding. Therefore, in order to succeed, defendant must show cause and prejudice with regard to each of the claims in his motion. In defendant's motion, he claims that the jury which convicted him was biased in

favor of the State's Attorney. He alleges that some "jurors were the prosecutor's friends, and one of the juror[s] [was] a client" of the prosecutor. He implies prejudice by indicating that he was convicted by "white jurors." Defendant demonstrates no objective, external factor that rendered him unable to assert these claims in his first postconviction petition. In fact, he has already asserted claims of jury prejudice in his first petition for postconviction relief. His first amended petition incorporated by reference all allegations contained in his initial *pro se* petition. His initial *pro se* petition alleged that "[t]he state \*\*\* did intentionally exclude all blacks and other minorities from the jury panel in order to prevent the defendant from a jury of his peers." He further alleged that he was convicted "by an all white jury."

¶9 Defendant next argues that he should be permitted to file a successive petition because the State's Attorney in his opening argument "referred to the days when 'they' use[d] to take a rope and hang/lynch a black man for the allege[d] rape of a white woman." He alleges that he failed to raise a constitutional claim related to these statements during his initial petition due to unreasonable assistance of counsel. As a preliminary matter, claims of unreasonable assistance of counsel in a prior postconviction proceeding are not contemplated by the Act because the Act relates only to errors at trial. Nonetheless, defendant made numerous allegations in his initial *pro se* petition, including claims of jury prejudice, and there is no indication of any objective, external factor that prevented him from stating a claim based on the comments of the State's Attorney during opening statements in defendant's initial petition. In any case, defendant's allegation is based on a creative expansion of the comments of the State's Attorney. The particular statement to which defendant refers was as follows:

"People that are jurors they get confused, they get nervous and they get upset and they don't like to do this type of work but in the old days all we had was two or three people and they were judge, jury, and prosecutor and they picked them out, convicted them and hung them all in one day. But the old days of the wild west are over, this

is the judicial system, this is where we decide the guilt or innocence of individuals charged."

¶ 10 Next, defendant argues that, because the circuit court ruled on his prior postconviction petition without a hearing, he should now be granted leave to file a successive petition. However, the Act does not require a hearing unless the petitioner "makes a substantial showing of a violation of constitutional rights." *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 35 (citing *People v. Coleman*, 183 Ill. 2d 366, 381 (1998)). Defendant further argues in his motion that the trial judge was prejudiced against him; however, he points to no objective, external factor that prevented him from stating such a claim in his initial petition.

¶ 11 Defendant has not claimed actual innocence or that his claims could not have been raised in his first petition, nor can he show cause as to why the claims in his motion for leave to file a successive petition for postconviction relief could not have been raised in his initial amended petition. The circuit court did not err in denying defendant's motion.

¶ 12 CONCLUSION

¶ 13 For the foregoing reasons, we affirm the judgment of the circuit court of Saline County and grant the State Appellate Defender's motion to withdraw as counsel.

¶ 14 Judgment affirmed; motion granted.