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November 9, 2005

Mr. Barton McNeil
Register No. K-75924
Menard Correctional Center
P.O. Box 711
Menard, IL. 62259

RE: ***People v. Barton McNeil***
McLean County No. 98-CF-633
Appellate Court No. 4-05-0892

Dear Mr. McNeil:

This office has been appointed to represent you in the above case on appeal. We are enclosing an information sheet that explains appellate procedure in a criminal case. During the past few years the number of criminal cases handled by this office on appeal has grown dramatically. This office has been appointed to almost 1,100 cases in the last two years and each Assistant Defender now has an active caseload of 25 to 40 unbriefed appeals. Because we do our oldest cases first, your case may not be assigned to an attorney for briefing for at least a year. When your record is filed, an Assistant Defender or I will examine it as quickly as possible. If I feel your case has a good chance of being successful, I will immediately assign it to a staff attorney. The reality is, however, that the Appellate Court grants no meaningful relief in the vast majority of our cases. I will be brutally honest in my review of your case and you may not agree with my assessment of your chances on appeal. But, if I determine that your case does not have a clear cut winning issue, I will not put your appeal ahead of the cases of other clients who have been waiting for our services longer than you have. Until you hear differently, all letters and calls about your case should be directed to me, unless your case involves an appeal in a post-conviction case. Letters and calls in post-conviction cases should go to Assistant Deputy Defender Arden Lang.

I am sorry this letter contains such grim news. The State has been in a financial crisis for over two years now and this office, which could use a dozen new lawyers, has instead lost the services of panel attorneys because of budget shortfalls. I will answer questions about your case as promptly as possible, but at this point I cannot promise you that your case will be assigned to an attorney or briefed at anytime in the near future. I also want to emphasize at this time that even though we have an overwhelming caseload, we do not want to do anything to jeopardize the quality of our work. It is very difficult to win a case on appeal and it often takes a lot of time and effort to find successful issues. I am sure you would not want to rush other cases through the system and risk missing issues any more than you would want us to rush your case and possibly harm your chances for success. I can only tell you at this point that we will try to do the best job we can and do our work on your case as quickly as possible. I should also tell you at this point to ignore the present due date of your brief. The Appellate Court knows we have a major backlog of cases and allows us to file all of our briefs late. Your appeal will not be dismissed by the court because of a late filing.

Despite the fact that it is taking longer to decide an appeal, the Fourth District Appellate Court has not been inclined to grant bond motions. Realistically, no decision as to whether or not to even ask for a bond on appeal can be made until after we have read your entire transcript. Moreover, because we are trying to concentrate the majority of our efforts on preparing briefs, we do not want to expend time on bond motions that have no chance of success.

If you have any particular questions about your case, please let me know. I would ask three favors. First, if you are transferred at anytime, please let us know of your new address. The Department of Corrections does not forward this information to us and valuable correspondence can be lost if we do not know where you are. Second, please add our office phone number (217-782-3654) to your PIN list. Third, please list "The Office of the State Appellate Defender" as your attorney on your visitors list, and do so every time you are transferred to a different institution. This can be a big help if we have to contact you quickly.

Sincerely,

Daniel D. Yuhas

DANIEL D. YUHAS
Deputy Defender
DDY:tb
Enclosure

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
COUNTY OF McLEAN

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
vs.	)	NO. 98 CF 633
BARTON McNEIL	)	

ORDER

Petitioner, Barton McNeil (hereinafter petitioner), seeks relief from the conviction entered against him on August 11, 1999. Following a bench trial defendant was found guilty of committing two counts of first degree murder and was subsequently sentenced to a mandatory natural life sentence, which was later reversed by the Appellate Court and on July 18, 2002, he was resentenced to an extended term of 100 years in the penitentiary.

PROCEDURAL HISTORY

A direct appeal was taken to the Illinois Appellate Court, Fourth Judicial District wherein Petitioner contended: 1) there was error in rejecting the offer of proof that his ex-girlfriend (hereinafter Misook) had motive and opportunity to kill and sexually abuse the victim (hereinafter Christina); 2) the sentencing statute regarding mandatory life imprisonment was unconstitutional. The appellate court affirmed his conviction but remanded the case for resentencing. (Rule 23 order No. 4-99-0679). Petitioner was resentenced to 100 years and the sentence was affirmed

on appeal November 14, 2004 (Rule 23 order No. 4-02-0849). In his post-conviction petition, petitioner claims: 1) trial counsel was ineffective and 2) his jury waiver was not knowingly and voluntarily made.

ANALYSIS

I. PRELIMINARY CONSIDERATIONS

A. Summary Dismissal

The instant petition was filed on August 3, 2005, and is before the court for an initial determination of its legal sufficiency pursuant to Section 2.1 of the Post-Conviction Hearing Act. 725 ILCS 5/122-2.1 (West 2002); People v. Holiday, 313 Ill.App.3d 1046, 1048, 732 N.E.2d 1, 2 (2000). A post-conviction petition is a collateral attack on prior judgment, People v. Simms, 192 Ill.2d 348, 359, 736 N.E.2d 1092, 1105 (2000), and is limited to constitutional issues which were not and could not have been raised on direct appeal. People v. King, 192 Ill.2d 189, 192, 735 N.E.2d 569, 572 (2000). Where the petitioner raises non-meritorious claims, the court may summarily dismiss them. People vs. Richardson, 189 Ill.2d 401, 407, 727 N.E.2d 362, 367 (2000).

Under the Act, a petitioner enjoys no entitlement to an evidentiary hearing. People v. Cloutier, 191 Ill.2d 392, 397, 732 N.E.2d 519, 523 (2000). In order to obtain a hearing, the petitioner has the burden of establishing that a substantial violation of his constitutional rights occurred at trial or sentencing. People v. Johnson, 191 Ill.2d 257, 268, 730 N.E.2d 1107, 1111 (2000). However,

a pro se post-conviction petition may be summarily dismissed as frivolous or patently without merit during the first stage of post-conviction review unless the allegations in the petition, taken as true and liberally construed, present the "gist" of a valid constitutional claim. People v. Edwards, 197 Ill.2d 239, 244, 757 N.E.2d 442, 445 (2001).

Further, a post-conviction proceeding is not a direct appeal, but rather is a collateral attack on prior judgment. People v. Barrow, 195 Ill.2d 506, 519, 749 N.E.2d 892, 901 (2001). Therefore, the issues raised on post-conviction review are limited to those that could not or were not previously raised on direct appeal or in prior post-conviction proceedings. People v. McNeal, 194 Ill.2d 135, 140, 742 N.E.2d 269, 272 (2001).

II. DOCTRINES OF WAIVER AND *RES JUDICATA*

Petitioner has failed to raise one of his claims on direct appeal and therefore, it is now barred by the doctrine of *res judicata*/waiver. In Illinois, the law is clear: "Rulings on issues that were previously raised at trial or on direct appeal are *res judicata*, and issues that could have been raised, but were not, are waived." People v. Miller, 203 Ill.2d 433, 437, 786 N.E.2d 989, 992 (2002). Moreover, summary dismissal of post-conviction petitions based on the doctrines of waiver and *res judicata* is appropriate. People v. Rogers, 197 Ill.2d 216, 221, 756 N.E.2d 831 (2001). Although this court recognizes that there is a split of authority in various panels of the appellate court as to whether the doctrines of waiver and *res judicata*

may be applied at the first stage of post-conviction proceedings, the court is bound to follow the mandate of the Illinois Supreme Court as expressed in Rogers and other decisions. Therefore, because petitioner failed to raise them on direct appeal, all claims challenging the waiver of jury in the instant matter are barred by the doctrine of *res judicata* / waiver.

A. Voluntariness of Jury Waiver.

Petitioner claims that his jury waiver was not voluntary. However, following the waiver of jury the petitioner never challenged its voluntariness, filed a motion to withdraw the waiver or raised the voluntariness of his jury waiver on direct appeal. Moreover, the trial court duly admonished the petitioner prior to accepting his jury waiver and petitioner does not rely on any newly discovered evidence or material outside the record. Contrary to the defendant's contention the record shows that the court offered the defendant more time to think about his jury waiver before waiving jury, but defendant declined the offer of more time. (R vol III page 42-43). This claim is frivolous and without merit.

III. INEFFECTIVE TRIAL COUNSEL

1. Standard of Review

In examining petitioner's claims of ineffective assistance of counsel, this court follows the two-pronged test of Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed.2d 674, 693, 104 S.Ct. 2052, 2064 (1984). Under this standard, petitioner must show that counsel's representation fell below an objective

standard of reasonableness, and that because of this deficiency, there is a reasonable probability that counsel's performance was prejudicial to the defense. People v. Hickey, 204 Ill.2d 585, 613, 792 N.E.2d 232, 251 (2001). "Prejudice exists when 'there is reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" People v. Erickson, 183 Ill.2d 213, 224, 700 N.E.2d 1027, 1032 (1998) (citations omitted). A petitioner's failure to make the requisite showing of either deficient performance or sufficient prejudice defeats a claim of ineffectiveness. People v. Morgan, 187 Ill.2d 500, 529-30, 719 N.E.2d 681, 698 (1999).

Significantly, effective assistance of counsel in a constitutional sense means competent, not perfect, representation. People vs. Easley, 192 Ill.2d 307, 344, 736 N.E.2d 975, 999 (2000). Notably, courts indulge in the strong presumption that counsel's performance fell within a wide range of reasonable professional assistance. Strickland, 466 U.S. at 690, 80 L.Ed.2d at 695, 104 S.Ct. at 2066; People v. Edwards, 195 Ill.2d 142, 163, 745 N.E.2d 1212, 1223 (2001). Moreover, "the fact that another attorney might have pursued a different strategy is not a factor in the competency determination." People vs. Palmer, 162 Ill.2d 465, 476, 643 N.E.2d 797, 802 (1994) (citing People v. Hillenbrand, 121 Ill.2d 537, 548, 521 N.E.2d 900, 904 (1988).

Further, counsel's strategic decisions will not be second-guessed. Indeed, to ruminate over the wisdom of counsel's advice is precisely the kind of

retrospection proscribed by Strickland and its progeny. See Strickland, 466 U.S. at 689, 80 L.Ed.2d at 694, 104 S.Ct. at 2065 ("[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight"); see also People v. Fuller, 205 Ill.2d 308, 331, 793 N.E.2d 526, 542 (2002) (issues of trial strategy must be viewed, not in hindsight, but from the time of counsel's conduct, and with great deference accorded counsel's decisions).

2. Failure to Call Witnesses

Petitioner alleges that trial counsel was incompetent for failing to investigate or call certain witnesses. "In general, whether to call a particular witness is a matter of trial strategy." People v. Flores, 128 Ill.2d 66, 85-6, 538 N.E.2d 481, 487-88 (1989) (citations omitted). Such a claim cannot form the basis for a claim of ineffective assistance of counsel unless the trial strategy is so unsound that counsel can be said to have entirely failed to conduct any meaningful adversarial testing of the State's prosecution. People v. Jones, 323 Ill.App.3d 451, 457, 752 N.E. 2d 511, 516 (1st Dist. 2001). "When the defendant attacks the competency of his counsel for failing to call or contact witnesses, he must attach to his post-conviction petition affidavits showing the potential testimony of such witnesses and explain the significance of their testimony." People v. Roberts, 318 Ill.App.3d 719, 723, 743 N.E.2d 1025, 1028 (1st Dist. 2000). In the instant matter, petitioner has not made the requisite factual showing. Petitioner has failed to submit an affidavit from any of these potential witnesses. Additionally, petitioner

has failed to explain the significance of their testimony. Therefore, his claim that counsel was ineffective for failing to contact the proposed witnesses must fail.

3. Failure to Investigate or Prepare for Trial

Defense counsel's failure to adequately prepare for trial or to conduct adequate investigations may support an ineffectiveness claim. People v. Witherspoon, 55 Ill.2d 18, 21, 302 N.E.2d 3, 4 (1973); People vs. Coleman, 267 Ill.App.3d 895, 900, 642 N.E.2d 821, 824 (1st Dist. 1994). However, "a particular decision not to investigate must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgments." Strickland v. Washington, 466 U.S. 668, 691, 80 L.Ed.2d 674, 695, 104 S.Ct. 2052, 2066 (1984). Indeed, "to prevail on a claim of ineffective assistance for failure to investigate, petitioner must show that substantial prejudice resulted and that there is a reasonable probability the final result would have been different had counsel properly investigated." People v. Rush, 294 Ill.App.3d 334, 342-43, 689 N.E.2d 669, 674 (5th Dist. 1998).

4. Specific Claims of Ineffective Assistance

A. Inappropriate appointment of trial counsel by the Chief Public Defender. Defendant claims that he in effect has the right to choose his public defender. This court is aware of the qualifications of the two trial counsel for defendant and they had sufficient experience to serve in this capacity. Contrary to defendant's argument this was not a death penalty case so there was no

requirement that either counsel be certified under the capital litigation laws. The petitioner does not have right to choose appointed counsel. People v. Lewis, 88 Ill.2d 129, 430 N.E.2d 1346 (1981).

B. The defendant claims that his trial counsel failed to investigate in a number of ways. He claims that the trial counsel was required to have an independent pathologist examine the victim's body. Essentially the petitioner's argument is that defense counsel is required to redo every state forensic examination of evidence on the chance he may discover something contrary to the state's position. There is nothing in the defendant's conclusory allegations and own affidavit which show any grounds to challenge the medical examiners testimony as to time of death.

C. Failure to pursue computer related evidence

This is clearly a strategic decision by defense counsel. The Defendant claims his computer records would show he was on-line in the overnight hours during the time his daughter was murdered. Defense counsel may well have made the strategic decision that defendant being alone, awake late at night in a small residence, and stating during his computer "chat" with a friend that he had checked on his sleeping daughter and noticed her "unusual" wakened state and a "mysterious" noise, could be viewed by the trier of fact as the self-serving statements of someone making a crude attempt to cover-up a murder.

D. Failure to obtain an alleged video by a deputy coroner

The only evidence of any video by the deputy coroner is defendant's unsupported allegation that he observed him videotaping something. Defendant did not testify to this at trial nor does he produce any affidavits on if or what was being videotaped. Also, defendant's counsel did cross examine the police officer who videotaped the window at 8:00 p.m. that evening. He established that the policeman had not videotaped the window earlier in the morning when the police were originally at the scene. Defendant's contention in this regard is pure speculation and conjecture.

E. Failure to interview witnesses.

Petitioner contends that the witnesses would establish his theory that the murder was committed by a conspiracy involving his former girlfriend Misook Nowlin, her ex-husband Andy Nowlin and their daughter Michelle. Defendant contends that Christina was strangled by Michelle, age eight, who entered the residence through a window in the middle of the night and strangled Christina with a rope. (petition for post-conviction relief page 21). To state the defendant's theory is to refute it. Certainly there were no affidavits from any of the witnesses attached. The theory is totally speculative and without merit. Attorney Smith called many of the witnesses listed by defendant in his offer of proof. Similarly

the defendant's claim as to the lack of an official death certificate is irrelevant and without merit.

F. Mishandling of scientific evidence and forensics

Petitioner claims his counsel failed to pursue forensic evidence that would have supported the theory that the eight year old Michelle committed this murder. The evidence consists of lint, smudged fingerprints and DNA consistent with Christina. This claim is frivolous and totally without merit.

CONCLUSION

Based upon the foregoing discussion, the court further finds that the issues raised and presented by petitioner are frivolous and patently without merit. Accordingly, the petition for post-conviction relief is hereby dismissed. Petitioner's request for leave to proceed *in forma pauperis* and for appointment of counsel is likewise denied. Clerk to mail a copy of this order in compliance with Supreme Court Rule 651.

ENTERED: 9/28/05

HON. G. MICHAEL PRALL
CIRCUIT JUDGE

STATE OF ILLINOIS
COUNTY OF McLEAN

I, the undersigned Clerk of the Circuit Court in and for the County of McLean, State of Illinois, do hereby certify that the foregoing is a true copy of the original instrument filed in my office.

Given under my hand and seal this 29th day of September, 2005.

Sandra K Parker
Clerk of the Circuit Court

Theresa Lambert
Deputy