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

FILED
McLEAN OCT 11 2022 COUNTY
CIRCUIT CLERK

THE PEOPLE OF THE
STATE OF ILLINOIS,

Plaintiff/Respondent,

Vs. 98 CF 633

Barton McNeil,

Defendant/Petitioner.

ORDER

This cause having come on for hearing on the Respondent's Motion to Dismiss in part, Defendant's Successive Post-Conviction Petition, filed herein on February 23, 2021, the court being fully advised in the premises, DOES HEREBY FIND AND ORDER:

1. That the court has jurisdiction of the parties and subject matter.
2. That following a bench trial, Petitioner was found guilty of Counts 1 and 2 and on July 7, 1991, was sentenced on Count 1, First Degree Murder, to natural life in the Illinois Department of Corrections. The Petitioner filed a notice of appeal.
3. The Appellate Court affirmed the Trial Court but remanded the case for a new sentencing hearing.
4. Following remand from the Appellate Court, the Petitioner was resentenced on July 18, 2002, to a term of 100 years in the Illinois Department of Corrections. The Petitioner filed notice of appeal.
5. The Appellate Court affirmed the Trial Courts sentence in a Rule 23 Order filed November 4, 2004, the Mandate issued on December 7, 2004.
6. The Petitioner filed a Petition for Post-Conviction Relief on September 28, 2005.
7. The Trial Court denied Petitioners initial Post Conviction Petition in a written order entered on September 28, 2005.

8. The Appellate Court affirmed the Trial Court in a Rule 23 Order dated March 7, 2008. The Mandate issued on November 10, 2008
9. Petitioner filed a Motion for Leave to File a Successive Post Conviction Petition on February 23, 2021, which was granted by the Trial Court on August 17, 2021, advancing the Successive Post Conviction Petition to second stage review.
10. The Respondent filed a Motion to Dismiss in part on April 1, 2022, and said motion was heard on May 12, 2022.
11. This court took the matter under advisement to provide the court an opportunity to review the record.

LEGAL PRINCIPLES

The Post-Conviction Hearing Act, (725 ILCS 5/122-1 et seq., hereinafter referred to as "the Act"), generally limits a petitioner to the filing of only one post-conviction petition, (People v. Holman, 191 Ill.2d 204 (2000)). The Act provides that any "claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived," (725 ILCS 5/122-3). Further, "a ruling on an initial post-conviction petition has *res judicata* effect with respect to all claims that were raised or could have been raised in the initial petition," (People v. Jones, 191 Ill.2d 354 at 358 (2000)).

A successive post-conviction petition may be filed where a claimed error could not have been presented in an earlier proceeding, (People v. Flores, 153 Ill.2d 264 (1992)). In the context of a successive post-conviction petition, the procedural bar of waiver is not merely a principle of judicial administration; it is an express requirement of the statute, (People v. Pitsonbarger, 205 Ill.2d 444 (2002), citing 725 ILCS 5/122-3).

A narrow exception to the waiver rule holds that a claim brought in a successive petition will be considered if the prior proceedings were deficient in some fundamental way, (People v. Britt-El, 206 Ill.2d 331 (2002)). In People v. Pitsonbarger, 205 Ill.2d 444 (2002), the Illinois Supreme Court announced a method for analyzing claims raised in a successive post-conviction petition to determine if there existed a fundamental deficiency in the prior proceedings. First, the court

noted that Section 122-3 of the Act provides that any "claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived," (Pitsonbarger, 205 Ill.2d at 462). Citing traditional principles of waiver, the court observed that the "strict application of this statutory bar" will be relaxed only when fundamental fairness so requires, (Pitsonbarger, 205 Ill.2d at 458, quoting People v. Flores, 153 Ill.2d 264 at 274 (1992)).

The court next held that the "cause-and-prejudice test" is the analytical tool that courts should use to determine whether fundamental fairness requires that an exception to the waiver rule be made, and successive claims be considered on their merits, (Pitsonbarger, 205 Ill.2d at 459). For purposes of the "cause-and-prejudice test," "cause" is defined as "some objective factor external to the defense [that] impeded counsel's efforts to raise the claim in an earlier proceeding," Pitsonbarger, 205 Ill.2d at 460, quoting Flores, 153 Ill.2d at 279). "Prejudice" will be found where "the petitioner [was] denied consideration of an error that so infected the entire trial that the resulting conviction or sentence violates due process," (Pitsonbarger, 205 Ill.2d at 464, quoting Flores).

This mechanism for evaluating successive claims shifts the focus from the sufficiency of the original post-conviction petition to whether the petitioner had the ability to raise the successive claim in the initial proceeding, (People v. McDonald, 364 Ill.App.3d 390 (3rd Dist., 2006)). Thus, rather than focusing on whether a successive petition will be allowed, courts should apply the cause-and-prejudice test to individual claims in the successive petition, (Pitsonbarger, 205 Ill.2d at 463). In other words, "the petitioner 'must show how the deficiency in the first proceeding affected his ability to raise each specific claim,'" (People v. Thompson, 331 Ill.App.3d 948 (1st Dist., 2002)). It is the petitioner's burden to demonstrate both cause and prejudice for each claim raised in the successive petition, (People v. Thompson, 383 Ill.App.3d 924 (1st Dist., 2008)).

A second avenue for pursuing a claim through a Successive Post Conviction Petition without establishing cause and prejudice exists where a Petitioner asserts a claim of actual innocence pursuant to People v. Washington, 171 Ill. 2d 475 (1996). (See People v. Jackson, 2021 IL 124818 P 41) To establish a claim of actual innocence, the supporting evidence must be newly

discovered, material and not cumulative, and of such conclusive character that it would probably change the result on retrial. People v. Robinson, 2020 IL 123849 P47. Within the context of an actual innocence claim, "newly discovered evidence" means evidence that was discovered after trial and that the petitioner could not have discovered earlier through the exercise of due diligence. People v. Jackson, 2021 IL 124818 at P42.

PETITIONERS CLAIMS FOR RELIEF

Claim I. - McNeil is innocent. Newly discovered evidence establishes that his conviction and continued detention violate his right to due process of law under the United States and Illinois Constitutions. In that:

I.A.- Newly discovered evidence reveals that the state's evidence that a crime occurred at all was junk science.

I.B.- Newly discovered evidence reveals that the state's evidence regarding motive was predicated on junk science.

I.C.- Newly discovered evidence demonstrates that Misook's hair was in Christina's bed.

I.D.- Newly discovered evidence demonstrates Misook's DNA was present in multiple locations on Christina's bedding.

I.E.- Susanne Burns' newly discovered affidavit regarding Misook's suspicious behavior the night Christina died.

I.F.- Dawn Nowlin's newly discovered affidavit averring that Misook confessed to Don Wang.

I.G.- Michelle Nowlin's newly discovered affidavit averring that Misook Confessed to Don Wang.

I.H.- Misook's 2011 murder of Tyda Wang is new evidence of her culpability for Christina's death.

I.I.- The Totality of the Evidence.

Claim II.- McNeil was denied his constitutional right to effective assistance of counsel under the 6th and 14th amendments of the United States Constitution and article 1, section 8 of the Illinois Constitution.

ANALYSIS

Claim I. - McNeil is innocent. Newly discovered evidence establishes that his conviction and continued detention violate his right to due process of law under the United States and Illinois Constitutions. In that:

I.A.- Newly discovered evidence reveals that the state's evidence that a crime occurred at all was junk science.

As its first claim Petitioner alleges that "nothing about the autopsy findings in Christina McNeil's case supports an objective, independent, diagnosis that she was smothered or that the manner of death was a homicide." Citing to Dr. Bakers Report at pg. 17 (Petition, pg. 44, Para. 216)

Within the context of an actual innocence claim, "newly discovered evidence" means evidence that was discovered after trial and that the petitioner could not have discovered earlier through the exercise of due diligence. People v. Jackson, 2021 IL 124818 at P42. Any "claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived," (725 ILCS 5/122-3). "[A] ruling on an initial post-conviction petition has *res judicata* effect with respect to all claims that were raised or could have been raised in the initial petition," (People v. Jones, 191 Ill.2d 354 at 358 (2000)).

While Dr. Baker's Report and affidavit provide contradictory evidence to that provided at trial by Dr. Hnilica, the sources cited by Dr. Baker in his report establish that through the exercise of due diligence, the information and opinion would have been available at the time of trial and 1st

Post Conviction Petition. Therefore, the report does not meet the criteria of newly discovered evidence. In addition, the court record contains a preservation order signed by Judge Dozier on June 19, 1998, at the request of Petitioners attorney, Amy Davis, preserving the body for purposes of further examination by a pathologist. The Petitioner alleged ineffective assistance of counsel in his 1st Post Conviction Petition asserting that his attorneys arranged for a supplemental defense forensic exam to be conducted by a Dr. Kirshner and then subsequently, by agreed order, cancelled said exam. (pg. C963 of original record on appeal) On June 24, 1998, an agreed order was entered by Judge Prall ordering Christina's body be returned from the funeral home to the county morgue for certain further testing. This would indicate a strategic decision relating to forensic pathology by defense counsel prior to trial. The Petitioners initial Post Conviction Petition was summarily dismissed, a decision that was affirmed on appeal. This claim does not assert newly discovered evidence, was not raised in Petitioners initial appeal, and was summarily dismissed in his 1st Post Conviction Petition and affirmed on appeal.

Claim I.A. is dismissed as not constituting newly discovered evidence and is not likely to change the result at trial. The claim is waived as it could have been raised in Petitioners original appeal and is barred by res judicata as it was or could have been addressed in Petitioner's 1st Post Conviction Petition.

I.B.- Newly discovered evidence reveals that the state's evidence regarding motive was predicated on junk science.

As its second claim, Petitioner alleges that the state's evidence of sexual abuse as a motive for this crime was misplaced. Petitioner alleges that based on Dr. Harpers affidavit and expert report attached to its petition, Dr. Hnilica's expert testimony at trial was wrong. Dr. Harper concludes that what Dr. Hnilica observed in her exam was a "normal anogenital examination in a prepubertal female." (Petition, Ex. 36, pg. 6)

Within the context of an actual innocence claim, "newly discovered evidence" means evidence that was discovered after trial and that the petitioner could not have discovered earlier through the exercise of due diligence. People v. Jackson, 2021 IL 124818 at P42. Any "claim of

substantial denial of constitutional rights not raised in the original or an amended petition is waived," (725 ILCS 5/122-3). "[A] ruling on an initial post-conviction petition has *res judicata* effect with respect to all claims that were raised or could have been raised in the initial petition," (People v. Jones, 191 Ill.2d 354 at 358 (2000)). In addition, as the trial judge correctly indicated in his ruling, the State does not have to prove motive. (People v. Smith, 141 Ill2d 40, 56 1990) While Dr. Harper's Report and affidavit provide contradictory evidence in relation to the hymen, anus and coloration of the hymen and genital tissues from that provided at trial by Dr. Hnilica, the sources cited by Dr. Harper in her report establish that through the exercise of due diligence, the information and opinion she sets forth would or could have been available at the time of trial and/or 1st Post Conviction Petition. The report does not meet the criteria of newly discovered evidence.

In addition, the Petitioner alleged ineffective assistance of counsel in his affidavit attached to his 1st Post Conviction Petition asserting that his attorneys arranged for a supplemental defense forensic exam to be conducted by a Dr. Kirshner and then subsequently, by agreed order, cancelled said exam. These facts are partially confirmed by the court record which contains a preservation order entered by Judge Dozier on June 19, 1998 (C23 of original record on appeal) and an agreed order for follow-up examination and testing entered by Judge Prall on June 24, 1998. This would indicate a strategic decision by defense counsel prior to trial.

The Petitioners initial Post Conviction Petition was summarily dismissed, a decision that was affirmed on appeal. This claim of deficient or contradictory pathological examination does not assert newly discovered evidence, was not raised in Petitioners initial appeal, and was raised or could have been further raised in Petitioner's 1st Post Conviction Petition which was summarily dismissed and affirmed on appeal.

Claim I.B. is dismissed as not constituting newly discovered evidence and is not likely to change the result at trial. The claim is waived as it could have been raised in Petitioners original appeal and is barred by res judicata as it was or could have been addressed in Petitioner's 1st Post Conviction Petition.

I.C.- Newly discovered evidence demonstrates that Misook's hair was in Christina's bed.

As its third claim, Petitioner alleges that post-conviction DNA test results establish that one of the hairs found inside a pillowcase on Petitioner's bed was conclusively not Christina's and is consistent with Misook Nowlin who cannot be excluded as a contributor.

The Petitioner and Misook Nowlin had a long-term relationship. They had last engaged in sexual intercourse on June 13, 1998, only days before Christina's death. Misook Nowlin had a biological daughter Michelle who also interacted with Christina and Petitioner. Christina was found dead in Petitioner's bed. The hair in question was recovered from inside the pillowcase on Petitioner's bed, where Christina slept alone on the night of her death while Petitioner remained in the living room because the Petitioner only had one bed in his apartment. The hair was subjected to Mitochondrial DNA testing. Mitochondrial DNA is inherited maternally. (Petitioners ex. 37, pg. 2 of 3, footnote 7) Therefore, a mtDNA match cannot exclude any biological female maternal relative, including Misook Nowlin's daughter Michelle.

Petitioner asserts a claim of actual innocence. To establish a claim of actual innocence, the supporting evidence must be newly discovered, material and not cumulative, and of such conclusive character that it would probably change the result on retrial. People v. Robinson, 2020 IL 123849 P47. Within the context of an actual innocence claim, "newly discovered evidence" means evidence that was discovered after trial and that the petitioner could not have discovered earlier through the exercise of due diligence. People v. Jackson, 2021 IL 124818 at P42.

Evidence of these strands of hair is not new evidence. While the mtDNA findings are new, it provides no new evidence of a conclusive nature. It was known at the time of trial and Petitioner argued in his initial Post Conviction Petition that some of the hair was of mixed Caucasian/Mongoloid origin. (Appellate record C978) Petitioner argued that Michelle Nowlin was a possible source of the hair pursuant to the microscopic examination done at the time. (pg. C978-C980 of appeal record) Petitioner alleged in his initial Post Conviction Petition that his

attorney was ineffective for not pursuing the hair evidence. Petitioner asserted that Misook Nowlin along with Andy (her ex-husband) and Michelle Nowlin conspired to kill Christina and that is how Michelle's hair ended up in Christina's bed. Petitioners first Post-Conviction Petition was summarily dismissed, a finding affirmed by the appellate court. This new mtDNA evidence makes that theory no more or less likely and is not of such a conclusive nature that it is likely to change the result at trial.

Claim I.C. is dismissed as not constituting newly discovered evidence nor conclusive evidence that is likely to change the result at trial.

I.D.- Newly discovered evidence demonstrates Misook's DNA was present in multiple locations on Christina's bedding.

As its fourth claim, Petitioner alleges that post-conviction DNA test results establish that Misook Nowlin's DNA was present on Petitioner's bedsheets and pillowcase. DNA results show that Misook Nowlin's DNA was found along with Petitioners and Christina's on the Petitioners bed. It is undisputed that the Petitioner and Misook Nowlin had a long-term relationship and had lived together for a period of time. Petitioner had recently tried to break off the relationship, but they continued to interact. They had last engaged in sexual intercourse on June 13, 1998, only days before Christina's death.

Petitioner asserts a claim of actual innocence. To establish a claim of actual innocence, the supporting evidence must be newly discovered, material and not cumulative, and of such conclusive character that it would probably change the result on retrial. People v. Robinson, 2020 IL 123849 P47. Within the context of an actual innocence claim, "newly discovered evidence" means evidence that was discovered after trial and that the petitioner could not have discovered earlier through the exercise of due diligence. People v. Jackson, 2021 IL 124818 at P42.

Evidence placing Misook Nowlin's DNA in Petitioners bed is no more surprising than the fact that Petitioners and Christina's DNA was present and is not evidence of such a conclusive nature that it would probably change the result upon retrial.

Claim I.D. is dismissed as not constituting evidence of a conclusive nature that is likely to change the result at trial.

I.E.- Susanne Burns' newly discovered affidavit regarding Misook's suspicious behavior the night Christina died.

As its fifth claim, Petitioner alleges that Susanne Burns, a neighbor of Misook Nowlin's, saw her in the early morning hours of June 16, 1998, going back and forth from her apartment to a storage closet in the hallway of her apartment building.

Burns worked at the post office and her shift was 11:00 p.m. to 7:30 a.m. On June 16, 1998, Burns had left work early for some reason that she does not recall. She does not recall what time she left work. When she arrived home, she heard movement in the common hallway and observed Misook Nowlin going into her apartment. Burns also observed the front door propped open and the door to the closet under the stairs open. Burns "knew" Misook was in the closet and heard her go back and forth between her apartment and the closet at least three times. (Pet ex. 53)

Taking all of this evidence as true, there is nothing relevant or probative in relation to a claim of actual innocence. From the court record, there is no dispute that Misook Nowlin was awake into the early morning hours. There is nothing of a conclusive nature that is likely to change the result at trial.

Claim I.E. is dismissed as not constituting evidence of a conclusive nature that is likely to change the result at trial.

I.F.- Dawn Nowlin's newly discovered affidavit averring that Misook confessed to Don Wang.

The State Concedes Petitioners Claim I.F. and as such it is **advanced to stage three hearing.**

I.G.- Michelle Nowlin's newly discovered affidavit averring that Misook Confessed to Don Wang.

The State Concedes Petitioners Claim I.G. and as such it is **advanced to stage three hearing.**

I.H.- Misook's 2011 murder of Tyda Wang is new evidence of her culpability for Christina's death.

As its eighth claim, Petitioner asserts that Misook Nowlin has been convicted of killing Linda Tyda and that this is material evidence that is likely to change the result upon retrial. In People v. Sanders, 2016 IL 118123 (2016), the Illinois Supreme Court rejected the argument that a ". . . trial court may consider the record of proceedings not involving the petitioner whose case is before the court." (Sanders at Para 44) The fact that Misook Nowlin has been convicted of killing Linda Tyda over 13 years after the murder of Christina McNeil is nothing more than an interesting fact and is in no way relevant or probative to defendants claim of actual innocence. It is not material nor conclusive and this claim is dismissed.

Claim I.H. is dismissed as not constituting relevant or material evidence nor such conclusive evidence that would be likely to change the result at trial.

I.I.- The Totality of the Evidence.

As its ninth claim, The Totality of the Evidence, Petitioner asserts that in an actual innocence claim, the Trial Court is required to consider "all the evidence, both new and old,

together." Citing People v. Coleman, 2013 IL 113307 at P97. Petitioners' argument would seemingly negate the need for a stage 2 hearing wherein, as in this case, the State may move to dismiss certain claims and may concede that others should move forward to stage 3 hearing. To advance to a third stage hearing based upon a claim of actual innocence, "a petitioner must show that the evidence is newly discovered, material and not merely cumulative, and of such conclusive character that it would probably change the result on retrial." People v. Sanders, 2016 IL 118123 P 46. As stated in People v. Coleman, 2013 IL 113307 at P 96, ". . . to succeed on a claim of actual innocence, the defendant must present new, material, noncumulative evidence that is so conclusive it would probably change the result on retrial. [citation omitted] New means the evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence. [citation omitted] Material means the evidence is relevant and probative of the petitioner's innocence. [citation omitted] Noncumulative means the evidence adds to what the jury heard. [citation omitted] And conclusive means the evidence, when considered along with the trial evidence, would probably lead to a different result. [citation omitted]"

Claim I.I. is advanced to third stage hearing only as it relates to claims I.F. and I.G. above to be considered along with the totality of the evidence presented at trial and **is dismissed** as it relates to all other claims contained within this Successive Post Conviction Petition.

Claim II.- McNeil was denied his constitutional right to effective assistance of counsel under the 6th and 14th amendments of the United States Constitution and article 1, section 8 of the Illinois Constitution.

In evaluating a claim of ineffective assistance of counsel, this court follows the two-pronged test of Strickland v. Washington, 466 U.S. 668, 687 (1984). Under this standard, petitioner must show that counsel's representation fell below an objective standard of reasonableness, and that but for this deficiency, there is a reasonable probability that counsel's performance was prejudicial to the defense, (People v. Hickey, 204 Ill. 2d 585, 613 (2001)). "Prejudice exists when 'there is a 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 (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 (1999)). Effective assistance of counsel in a constitutional sense means competent, not perfect, representation, (People v. Easley, 192 Ill. 2d 307, 344 (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). Moreover, "the fact that another attorney might have pursued a different strategy is not a factor in the competency determination," (People v. Palmer, 162 Ill. 2d 465, 476 (1994) (citing People v. Hillenbrand, 121 Ill. 2d 537, 548 (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 ("[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 (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). Finally, challenges to trial counsel's representation ordinarily are not cognizable under the Act unless the claim regards a matter outside the trial record, People v. Britz, 174 Ill. 2d 163 (1996); People v. Coleman, 267 Ill. App. 3d 895(1st Dist. 1994)).

For the reasons outlined above for each of the claims set forth by Petitioner, the Court finds that petitioner has failed to show that counsel's representation fell below an objective standard of reasonableness. The fact that post-conviction counsel may have, in hindsight, pursued a different trial strategy is not a factor in the competency determination. Counsel's strategic decisions when preparing for and during trial will not be second-guessed. Further, as set forth above in relation to each claim, the Court finds a failure to establish a reasonable probability that, but for trial counsel's alleged unprofessional errors, the result of the proceeding would have been different.

Claim I.I. is dismissed as Petitioner has failed to make the requisite showing of either deficient performance by trial counsel or sufficient prejudice to Petitioner.

WHEREFORE, the Respondent's motion to dismiss:

1- Is allowed as to Claims I.A., I.B., I.C., I.D., I.E., I.H. and Claim II.

2- Claim I.I. is dismissed as it relates to all claims except I.F. and I.G. and is advanced to Third Stage Hearing only as it relates to Claims I.F and I.G.

3- Claims I.F and I.G. are conceded by the state and are advanced to Third Stage Hearing.

Counsel are directed to coordinate a Status date with the Court in anticipation of Third Stage Hearing.

SO ORDERED:

DATE: 10/11/22

CIRCUIT JUDGE