NOTICE
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2025 IL App (5th) 240865-U

NO. 5-24-0865

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 93-CF-547
	)	
JOHN ASHBURN,	)	Honorable
	)	Leah A. Captain,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE BOIE delivered the judgment of the court.
Justices Welch and Sholar concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err in denying the petitioner's motion to file a successive postconviction petition, where he failed to make a showing of cause and prejudice, and his speedy trial violation claim is barred by *res judicata.* As any arguments to the contrary would lack merit, we grant petitioner's appointed counsel on appeal leave to withdraw and affirm the circuit court's judgment.

¶ 2 The defendant, John Ashburn, was convicted of first degree murder and sentenced to 75 years' incarceration in the Illinois Department of Corrections (IDOC). He appeals from the July 3, 2024, denial of his motion to file a successive postconviction petition. The defendant's appointed attorney in this appeal, the Office of the State Appellate Defender (OSAD), has concluded that this appeal lacks substantial merit. On that basis, OSAD has filed a motion to withdraw as counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), along with a memorandum of law in support of that motion.

¶ 3 OSAD gave proper notice to the defendant. This court gave the defendant an opportunity to file a *pro se* brief, memorandum, or other document explaining why OSAD should not be allowed to withdraw as counsel, or why this appeal has merit, but the defendant has not done so. This court has examined OSAD's *Finley* motion and the accompanying memorandum of law, as well as the entire record on appeal, and has concluded that this appeal does indeed lack merit. Accordingly, OSAD is granted leave to withdraw as counsel, and the judgment of the circuit court is affirmed.

¶ 4 I. BACKGROUND

¶ 5 The defendant was served with the arrest warrant for the instant offense of first degree murder in June 1993. At the time of service, he was incarcerated at the Graham Correctional Center, where he was serving a sentence for unlawful possession of a weapon by a felon. He was arraigned 164 days later, in December 1993. During his arraignment, he attempted to demand a speedy trial, but the circuit court directed him to address this claim with his attorney.

¶ 6 On February 23, 1994, the defendant filed a petition for discharge, claiming that he was entitled to have the murder charge dismissed because the State had not brought him to trial within 120 days. Following a hearing, the circuit court denied his petition. In its order, the court explained that because the defendant was incarcerated in an IDOC facility on an unrelated charge and had not filed a speedy trial demand in accordance with the provisions of the intrastate detainer statute (730 ILCS 5/3-8-10 (West 1994)), he was not entitled to discharge. The defendant, through counsel, filed a speedy trial demand on July 5, 1994.

¶ 7 Following a jury trial, the defendant was found guilty of first degree murder on February 17, 1995. On April 3, 1995, he filed a posttrial motion for judgment notwithstanding the verdict or, alternatively, for new trial, raising a speedy trial violation as one of several alleged errors. The

circuit court denied his motion, specifically addressing the speedy trial claim to say that the circuit court's prior ruling on the defendant's petition for discharge would stand. The circuit court explained, "I believe that there was no denial of the speedy trial rights under the facts and circumstances of this case because he was previously in custody by virtue of a sentence in another case. I think the agreement on detainers in that section of the statute is applicable." On May 12, 1995, the defendant was sentenced to 75 years' incarceration in IDOC with credit for time served.

¶ 8 On direct appeal, we affirmed the defendant's conviction and sentence. *People v. Ashburn*, 288 Ill. App. 3d 1125 (1997) (table) (unpublished order under Illinois Supreme Court Rule 23). Appellate counsel did not raise a speedy trial argument on direct appeal. Following his direct appeal, the defendant filed a postconviction petition claiming, *inter alia*, that appellate counsel provided ineffective assistance by failing to bring a speedy trial claim on direct appeal. The circuit court held an evidentiary hearing on April 25, 2006, and denied the petition. In its order denying the petition, the circuit court specified that appellate counsel was not ineffective for failing to assert a speedy trial claim where the defendant had never invoked the provisions of the speedy trial statute.

¶ 9 The defendant appealed this decision. On appeal, this court reviewed the defendant's claim of ineffective assistance of appellate counsel, and determined that there was no merit to his speedy trial violation claim. *People v. Ashburn*, 384 Ill. App. 3d 1111 (2008) (table) (unpublished order under Illinois Supreme Court Rule 23). Therefore, we concluded that appellate counsel was not ineffective for failing to assert this claim.

¶ 10 We further found that the intrastate detainers statute governed the defendant's speedy trial rights, stating that both the speedy trial and intrastate detainers statutes were clear that the defendant bears the burden of making a speedy trial demand, and it was undisputed that the

defendant had never done so. Regarding the speedy trial demand filed on July 5, 1994, we noted that it was incorrectly submitted under the 120-day provisions of the speedy trial statute. We also found that all continuances since the defendant's filing of a speedy trial demand were made either at the defense's request or with the agreement of defense counsel. We affirmed the denial of the defendant's postconviction petition.

¶ 11 On July 17, 2020, the defendant filed a motion for order *nunc pro tunc* seeking 689 days of presentencing credit for the time he served in custody from June 22, 1993, to May 12, 1995. The circuit court granted the motion and issued an amended mittimus reflecting credit for time served. The defendant then filed a *pro se* petition for relief from judgment, claiming that this amended mittimus established June 22, 1993, as his custody date for the purposes of a speedy trial. He argued that once 120 days had elapsed from the custody date, the State lost its jurisdiction to prosecute the case, thus rendering the circuit court's judgment void.

¶ 12 The circuit court denied his petition. In its order, the circuit court stated that the petition was untimely, but, even if it had been timely filed, the speedy trial issue was barred by *res judicata* because it had been argued and denied on appeal. The defendant appealed, but the appeal was dismissed for want of prosecution.

¶ 13 The defendant filed a motion for leave to file a successive postconviction petition on November 13, 2023, raising one claim. He again argued that the amended mittimus that was issued on September 8, 2020—well after his first postconviction petition—first established his correct custody date of June 22, 1993. The circuit court denied the motion, noting that the defendant's speedy trial claim had been reviewed and rejected at both the trial and appellate levels. Thus, the circuit court concluded that the claim was barred by *res judicata*.

¶ 14 The circuit court concluded its denial by noting that the amended mittimus "does not correct the issues with Defendant's argument," and that this court had already determined on appeal "that it is undisputed that the defendant never filed a speedy trial demand under the appropriate provisions of either [the speedy trial or intrastate detainers] statute." This appeal followed.

¶ 15 II. ANALYSIS

¶ 16 OSAD argues that the circuit court properly denied the defendant's motion for leave to file a successive postconviction petition, and that there are no meritorious arguments to the contrary. In the memorandum supporting its *Finley* motion to withdraw as counsel, OSAD states that it considered raising three potential issues on appeal:

> (1) Whether the defendant demonstrated the cause and prejudice required for leave to file a successive postconviction petition;
>
> (2) Whether the defendant raised a meritorious claim that his right to a speedy trial was violated; and
>
> (3) Whether the doctrine of *res judicata* bars the defendant from raising this speedy trial claim.

OSAD has determined that these issues would be without arguable merit, and the circuit court's judgment was therefore proper. As we agree with counsel's assessment, we grant OSAD leave to withdraw.

¶ 17 A. Cause and Prejudice

¶ 18 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2022)) provides a statutory remedy to criminal defendants who claim that substantial violations of their constitutional rights occurred at trial. *People v. Taliani*, 2021 IL 125891, ¶ 53; *People v. Edwards*, 2012 IL 111711, ¶ 21. A postconviction petition is a collateral attack on the judgment, the purpose of which is to " 'allow inquiry into constitutional issues relating to the conviction or sentence that

were not, and could not have been, determined on direct appeal.' " *People v. Clark*, 2023 IL 127273, ¶ 38 (quoting *People v. Barrow*, 195 Ill. 2d 506, 519 (2001)). Therefore, "issues that were raised and decided on direct appeal are barred from consideration by the doctrine of *res judicata*, while issues that could have been raised, but were not, are forfeited." *Taliani*, 2021 IL 125891, ¶ 53 (citing *People v. Holman*, 2017 IL 120655, ¶ 25).

¶ 19 Furthermore, the Act contemplates the filing of only one postconviction petition and prohibits the filing of a successive petition without first obtaining leave of court to do so. 725 ILCS 5/122-1(f) (West 2022); see also *People v. Tidwell*, 236 Ill. 2d 150, 157 (2010). The defendant waives any claim not raised in his original or amended postconviction petition. *Taliani*, 2021 IL 125891, ¶ 53 (citing *Holman*, 2017 IL 120655, ¶ 25); 725 ILCS 5/122-3 (West 2022).

¶ 20 Our courts recognize two exceptions to the rule against successive postconviction petitions. *Taliani*, 2021 IL 125891, ¶ 55. The first, referred to as the cause and prejudice exception, has been codified in the Act. Section 122-1(f) of the Act states:

> "(f) Only one petition may be filed by a petitioner 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 2022).

A defendant invoking this exception must submit enough evidence to allow the circuit court to make a cause and prejudice determination. See *People v. Bailey*, 2017 IL 121450, ¶ 21; *Tidwell*, 236 Ill. 2d at 161.

¶ 21 If the defendant does not show cause and prejudice, his failure to raise a claim in a prior petition will be excused if the defendant can set forth a colorable claim of actual innocence. *People*

v. Pitsonbarger, 205 Ill. 2d 444, 459 (2002); *Taliani*, 2021 IL 125891, ¶ 55. As a claim of actual innocence is not relevant under the present facts, we need not review this potential argument.

¶ 22 Because the sufficiency of a postconviction petition is a purely legal question, we review the circuit court's denial of a defendant's motion for leave to file a successive postconviction petition *de novo*. *People v. Robinson*, 2020 IL 123849, ¶ 39. Our supreme court has further held that the denial of a motion for leave to file a successive petition alleging cause and prejudice is reviewed *de novo*. *Id.* (citing *People v. Wrice*, 2012 IL 111860, ¶¶ 49-50).

¶ 23 In his motion for leave to file a successive postconviction petition, the defendant contended that the amended mittimus, issued in response to his motion for order *nunc pro tunc* on September 8, 2020, established "the correct in-custody date" for the purpose of starting the speedy trial timeline. Because the amended mittimus was not available to him during the proceedings on his first postconviction petition, he argued that this established cause for the filing of a successive petition. We disagree.

¶ 24 We initially note that the defendant *did* bring his speedy trial violation claim—relying on the June 22, 1993, in-custody date—in his original postconviction petition. Our supreme court has held that a defendant cannot satisfy the first prong of the cause and prejudice test "when he did, in fact, raise the specific claim he seeks to raise again in his successive petition. 'There can be no cause for failing to raise a claim in the initial proceeding when the claim was, in fact, raised in that proceeding.' " *People v. Montanez*, 2023 IL 128740, ¶ 106 (quoting *People v. Conway*, 2019 IL App (2d) 170196, ¶ 25).

¶ 25 The amended mittimus was therefore clearly not necessary for the defendant to raise his speedy trial violation claim in his original petition. The amended mittimus did not provide him with any additional information or evidence that was not available to him during the original

postconviction proceedings, nor did its absence at the time of the original proceedings prevent him from raising this claim.

¶ 26 Lastly, as OSAD points out, the amended mittimus merely specified the amount of presentencing credit to which the defendant was entitled for time served at the time of sentencing—it did not establish his in-custody date for the purpose of determining whether the State brought him to trial within the requisite time period. We conclude that the defendant cannot rely on the issuance of the amended mittimus as an objective factor that impeded his ability to bring his speedy trial claim in the original postconviction proceedings. 725 ILCS 5/122-1(f) (West 2022). The record on appeal does not indicate any other possible objective factor that could be used to argue cause for filing a successive postconviction petition.

¶ 27 A defendant must satisfy both prongs of the cause and prejudice test in order to show that a successive postconviction petition is warranted. *People v. Guerrero*, 2012 IL 112020, ¶ 15 (citing *Pitsonbarger*, 205 Ill. 2d at 464). We find that the defendant is also unable to establish prejudice. As previously summarized, the defendant availed himself of several opportunities to pursue his claim of a speedy trial violation. At no point was he impeded by the lack of the amended mittimus, for the reasons explained above. He therefore cannot argue that he was denied consideration of the alleged error, such that either his conviction or sentence violated due process. See *Pitsonbarger*, 205 Ill. 2d at 464 (defining prejudice as where petitioner is "denied consideration of an error that so infected the entire trial that the resulting conviction or sentence violates due process").

¶ 28 B. Speedy Trial Claim

¶ 29 The defendant's underlying claim implicates the speedy trial statute (725 ILCS 5/103-5 (West 1992)), as well as the intrastate detainers statute (730 ILCS 5/3-8-10 (West 1992)). The latter applies to "persons committed" to an IDOC facility who have "untried complaints, charges

or indictments pending" anywhere within the state. 730 ILCS 5/3-8-10 (West 1992). Pursuant to this statute, any defendant wishing to demand a speedy trial on untried charges

> "shall include in the demand under subsection (b) [of 725 ILCS 5/103-5 (West 1992)], a statement of the place of present commitment, the term, and length of the remaining term, the charges pending against him or her to be tried and the county of the charges, and the demand shall be addressed to the state's attorney of the county where he or she is charged with a copy to the clerk of that court and a copy to the chief administrative officer of the Department of Corrections institution or facility to which he or she is committed." *Id.*

Subsection (b) of the speedy trial statute provides for a 160-day speedy-trial right, beginning to run upon the filing of a demand, for defendants released on bond or recognizance. 725 ILCS 5/103-5(b) (West 1992). The intrastate detainers statute applies this 160-day term to persons already incarcerated on unrelated charges.

¶ 30 In explaining the extension of the 160-day speedy trial term to defendants already in IDOC custody, our supreme court explained that " 'defendants *** serving prison terms for existing convictions at the time they face trial on additional charges *** do not suffer a loss of liberty while awaiting trial on the pending charges. To exercise their statutory right to be tried within 160 days, they need only to comply with section 3-8-10.' " *People v. Wooddell*, 219 Ill. 2d 166, 175 (2006) (quoting *People v. Staten*, 159 Ill. 2d 419, 428 (1994)).

¶ 31 Furthermore, our supreme court has emphasized that the legislature has seen fit to provide differently-situated defendants with differing speedy trial time periods, and this decision is presumed to be "the result of reasoned consideration and is not without consequence." *People v. Sandoval*, 236 Ill. 2d 57, 65 (2010) (citing *Staten*, 159 Ill. 2d at 428-29). The additional conditions imposed on incarcerated defendant by the intrastate detainer statute are neither "meaningless [n]or mere technicalities," and the legislature "intended to place the burden of compliance on the demanding defendant." *Id.* at 66.

¶ 32 In *Staten*, the defendant was charged with the underlying offense while in prison and made a speedy trial demand under section 103-5(b). *Staten*, 159 Ill. 2d at 421-22. In ruling that he failed to make an effective demand, the supreme court spoke of the need to comply with the appropriate speedy trial statute as follows:

> "[A] defendant who claims a violation of a speedy-trial right cannot prevail if the demand for trial fails to comply with the terms of the governing speedy-trial provision. To treat the informational requirements of section 3-8-10 as surplusage would be to infringe on the legislative prerogative to set reasonable conditions on an incarcerated defendant's right to receive a trial within 160 days of the demand." *Id.* at 429-30.

¶ 33 In the present matter, the defendant attempted to assert his speedy trial right at his arraignment, and later filed a speedy trial demand through counsel. However, neither of these requests complied with the requirements of the intrastate detainer statute. In a March 8, 1994, order ruling on the defendant's petition for discharge, the circuit court found that the defendant had not made any speedy trial demand in compliance with this statute, and therefore denied his petition. As we stated in our prior decision in this matter, the defendant's July 5, 1994, speedy trial demand was incorrectly filed under the 120-day provision of the speedy trial statute.

¶ 34 Because the defendant never filed a speedy trial demand that complied with the specific requirements of the intrastate detainer statute, he cannot raise a meritorious argument that his statutory right to a speedy trial was violated.

¶ 35 C. *Res Judicata*

¶ 36 For the purposes of postconviction relief, a reviewing court's judgment on a prior appeal will bar, under the doctrine of *res judicata*, review of all issues that were actually decided. *Edwards*, 2012 IL 111711, ¶ 21. In his initial postconviction petition, the defendant raised a claim of ineffective assistance of appellate counsel based on counsel's failure to raise a speedy trial

claim. After the circuit court denied his initial petition, the defendant appealed. We reviewed his speedy trial claim and determined as follows:

> "[T]he plain language of both the speedy-trial statute (725 ILCS 5/103-5(b) (West 1992)) and the intrastate detainers statute (730 ILCS 5/3-8-10 (West 1992)) places the burden on a defendant to make [a speedy trial] demand, and it is undisputed that the defendant never filed a speedy-trial demand under the appropriate provisions of either statute." *Ashburn*, 384 Ill. App. 3d 1111, slip order at 5.

We found no merit to the defendant's speedy trial claim, and concluded that appellate counsel was not ineffective for choosing not to raise this claim. *Id.*

¶ 37 In his motion for leave, the defendant argued that his statutory right to a speedy trial was violated, raising the same speedy trial claim that formed the basis of his ineffective assistance of counsel claim in his original postconviction petition. As we have previously ruled on the speedy trial issue, we find that even if this claim had merit, it is barred by *res judicata*. As there are no other claims raised in the defendant's proposed successive postconviction petition, we again conclude that the circuit court properly denied leave.

¶ 38 III. CONCLUSION

¶ 39 As this appeal presents no issue of arguable merit, we grant OSAD leave to withdraw and affirm the circuit court's judgment.

¶ 40 Motion granted; judgment affirmed.