



from that failure. 725 ILCS 5/122-1(f) (West 2008). A petitioner demonstrates cause by identifying an objective factor that impeded his ability to raise a specific claim during the initial postconviction proceeding. A defendant shows prejudice by showing that the claim of constitutional error not raised during the initial postconviction proceeding so infected the trial that the resulting conviction or sentence violated due process. 725 ILCS 5/122-1(f) (West 2008). Because we find that the defendant has failed to satisfy the prejudice requirement for leave to file a successive postconviction petition, we affirm the judgment of the circuit court.

¶ 4 The defendant, Roger Clay, was charged in the circuit court of Christian County by information filed March 29, 1995, with the murder of two-year-old Tiffany Carron, "by inflicting blows to such minor child's head causing craniocerebral trauma," causing her death. The State's theory of the case was that while alone with the child, the defendant had inflicted blows to the child's head either by hitting her head with an object such as a fist or by hitting her head against an object. The defense theory of the case was that while alone with her mother, the child had been shaken to death by her mother and had died of "shaken baby syndrome." This defense was based in part on the mother's admission to police that, after finding her baby unresponsive and having difficulty breathing, she had picked the baby up and shaken her. All of the expert witnesses, including the defendant's, opined that the child had died of severe inflicted blunt head trauma. The experts disagreed only as to the time the injuries were inflicted, whether when alone with the defendant or when alone with the mother.

¶ 5 A jury found the defendant guilty, and on September 29, 1997, he was sentenced by the circuit court of Christian County to an extended prison term of 80 years. The conviction and sentence were affirmed by this court on direct appeal.

*People v. Clay*, No. 5-97-0860 (Feb. 11, 1999) (unpublished order under Supreme Court Rule 23 (eff. July 1, 1994)).

¶ 6 On September 25, 2000, the defendant filed his first postconviction petition pursuant to section 122-1 of the Act (725 ILCS 5/122-1 (West 1998)), which was dismissed as untimely by the circuit court of Christian County. The dismissal by the circuit court was affirmed by this court on appeal. *People v. Clay*, No. 5-01-0003 (Mar. 10, 2003) (unpublished order under Supreme Court Rule 23).

¶ 7 On January 14, 2004, the defendant filed a *pro se* notice of intention to file a second petition for postconviction relief, and a second postconviction petition. Counsel was appointed to represent the defendant and the State filed a motion to dismiss the petition based in part on the ground that it was a successive post conviction petition and the issues raised therein were either waived or barred by *res judicata*. On February 22, 2005, the defendant's counsel filed an amended postconviction petition.

¶ 8 For some reason, no action was taken on the defendant's petition for several years. On December 10, 2009, the defendant's counsel filed a response to the State's motion to dismiss the second postconviction petition, arguing that leave should be granted the defendant to file his successive postconviction petition under section 122-1(f) because he can show cause for his failure to raise this issue in his first postconviction petition and resulting prejudice.

¶ 9 The defendant's counsel also filed a "motion for new trial based on new evidence and in the interests of justice." This motion alleged that the State's theory of the case had been that the defendant had shaken the baby to death and that new medical research on infant trauma that had not existed at the time of the defendant's trial supports the defendant's claim that he did not shake the baby to death. This new

medical evidence calls into question whether the diagnosis of "shaken baby syndrome" is generally accepted in the scientific community. The motion further alleges that this new medical research is newly discovered evidence and warrants the appointment of experts and a *Frye* hearing, as well as a new trial. This motion was considered as part of the second postconviction petition and the two pleadings were heard together. Both were denied.

¶ 10 The standard of review for the denial or dismissal of a postconviction petition after counsel has been appointed and given an opportunity to amend the defendant's *pro se* petition, but prior to an evidentiary hearing, is *de novo*. *People v. DeBerry*, 372 Ill. App. 3d 1056, 1058 (2007); *People v. Johnson*, 206 Ill. 2d 348, 357 (2002). Similarly, the standard of review for the denial of a motion to file a successive postconviction petition is *de novo*. *People v. Thompson*, 383 Ill. App. 3d 924, 929 (2008).

¶ 11 We note also that we review the circuit court's judgment and not the reasons given for that judgment. *DeBerry*, 372 Ill. App. 3d at 1058. Accordingly, we may affirm the dismissal of a postconviction petition for any reason warranted by the record, regardless of the reasons stated by the circuit court. *DeBerry*, 372 Ill. App. 3d at 1058-59.

¶ 12 On appeal, the defendant argues that his motion for new trial, which raised the issue of new evidence calling into question whether the diagnosis of shaken baby syndrome remains generally accepted in the scientific community, satisfies the "cause and prejudice" test for allowing the filing of a successive postconviction petition. The defendant argues as cause for his failure to include the claim in his initial postconviction petition that he was unable to previously raise the issue because the medical research on shaken baby syndrome did not exist until recently and was

unknown at the time of his trial. That the evidence did not exist at the time of trial may establish cause for failing to bring the claim in the initial postconviction petition. *People v. Thompson*, 383 Ill. App. 3d 924, 929 (2008) (cause may include a showing that a constitutional claim was so novel that its legal basis was not reasonably available to the defendant's counsel).

¶ 13 The defendant argues that prejudice results from his inability to present his claim because the State used unreliable and questionable science regarding the diagnosis of shaken baby syndrome to convict him and his conviction therefore violates due process. We reject the defendant's argument because neither the State's theory of the case nor the jury's verdict rested on the theory of shaken baby syndrome. Accordingly, the defendant cannot demonstrate that his claim of error, that the diagnosis of shaken baby syndrome is no longer a viable theory, so infected the trial that the resulting conviction violates due process.

¶ 14 As we have pointed out, the State's theory of the case was that the defendant beat the child to death, not that the baby died of shaken baby syndrome. The State introduced evidence of shaken baby syndrome only to rule it out as a cause of the baby's death, and to demonstrate that the defendant, and not the child's mother, killed the baby. All of the expert witnesses, including the defendant's, were definitely of the opinion that the child died of blunt force head trauma which caused fracturing of the skull, and not as a result of having been shaken. Any developments in the science regarding the diagnosis of shaken baby syndrome would have no impact on the defendant's case, and therefore his inability to present evidence of such new developments does not so infect his trial that the resulting conviction violates due process.

¶ 15 In *People v. Armstrong*, 395 Ill. App. 3d 606 (2009), a defendant charged with

involuntary manslaughter of his three-month old son moved for a *Frye* hearing to determine the admissibility of expert testimony regarding the diagnosis of shaken baby syndrome. The defendant presented evidence of new medical research questioning the validity of the diagnosis. The circuit court denied the motion, concluding that the diagnosis was generally accepted in the medical and legal communities and that Illinois courts had applied it universally. 395 Ill. App. 3d at 617. The circuit court further held that evidence regarding shaken baby syndrome was inapposite where the critical issue in the defendant's case involved a skull fracture indicating that blunt force trauma was the cause of death, not shaken baby syndrome.

¶ 16 The appellate court affirmed, stating that there was no direct evidence that the child's death was the result of shaken baby syndrome, rather than blunt force head trauma. 395 Ill. App. 3d at 627. The court held that any error in the circuit court's ruling was harmless where the guilty verdict rested on a finding of inflicted blunt force head trauma and not shaken baby syndrome:

"[T]he guilty verdict did not turn on the admission of the evidence relating to the syndrome. 'When a defendant challenges the admission of evidence, we may hold the admission to be harmless "[w]hen the competent evidence in the record establishes the defendant's guilt beyond a reasonable doubt and it can be concluded that retrial without the erroneous admission of the challenged evidence would produce no different result." ' " 395 Ill. App. 3d at 627-28 (quoting *People v. McKown*, 226 Ill. 2d 245, 276 (2007) (quoting *People v. Arman*, 131 Ill. 2d 115, 124 (1989)))".

¶ 17 Similarly in the case at bar, while Dr. Case testified that certain injuries to Tiffany were consistent with shaken baby syndrome, she definitively testified that Tiffany died of inflicted blunt force head trauma resulting in a skull fracture and not

from shaken baby syndrome. The two other expert witnesses, including the defendant's, concurred. Any doubt about the validity of the diagnosis of shaken baby syndrome has no impact on the reliability of the defendant's conviction in the case at bar, and the defendant is not prejudiced by his inability to present evidence about such doubt in his successive postconviction proceeding.

¶ 18 We note that even where a defendant cannot show cause and prejudice, his failure to raise a claim in an earlier postconviction petition will be excused if necessary to prevent a fundamental miscarriage of justice. *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002). To demonstrate such a miscarriage of justice, a defendant must show actual innocence. *Pitsonbarger*, 205 Ill. 2d at 459. In order to do so, the defendant must present supporting evidence that is new, material, noncumulative, and, most importantly, of such conclusive character as would probably change the result on retrial. *People v. Washington*, 171 Ill. 2d 475, 489 (1996). Where the defendant's conviction rested on a finding of death by blunt force head trauma and not shaken baby syndrome, the new evidence of medical research casting doubt on the validity of a shaken baby syndrome diagnosis is not of such conclusive character as would probably change the result on retrial. Accordingly, the defendant cannot establish a fundamental miscarriage of justice entitling him to proceed on a successive postconviction petition.

¶ 19 For the foregoing reasons, the judgment of the circuit court of Christian County is hereby affirmed.

¶ 20 Affirmed.

