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¶ 3 For the reasons stated herein, we affirm.

#### ¶ 4 BACKGROUND

¶ 5 In the early morning hours of July 28, 1991, defendant was arrested for the murder of Roberto Victoriano, whose body had been discovered approximately 40 minutes earlier.

Defendant was taken to the police station at Clark Street and Devon Avenue in Chicago. Later that morning, defendant was taken to another police station at Belmont Avenue and Western Avenue in Chicago.

¶ 6 In December, 1991, a grand jury indicted defendant on a number of charges, including first degree murder and armed robbery.

#### ¶ 7 Defendant's motion to suppress

¶ 8 Defendant filed multiple pretrial motions, including a motion to suppress statements he made "at the time of and/or subsequent to his being taken into custody." In the motion to suppress, defendant alleged that after he denied "any participation in the incident," Detectives Terry O'Connor and Ricardo Abreu beat defendant "about the body," kned him in the genitals, and tightened his handcuffs "far more than necessary to restrain him and tight enough to leave marks on his arms." Defendant sought suppression of his statements while in custody, claiming that such statements "were obtained as a result of psychological and mental coercion illegally directed against the defendant."

¶ 9 At the hearing on the motion to suppress, Detective Abreu testified that defendant was transported after his arrest to "Area Six Violent Crimes at Belmont and Western." Abreu stated that he gave defendant his Miranda warnings and then had a ten minute conversation with

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defendant. Abreu stated that neither he nor anyone in his presence beat or kneed the defendant, and that defendant was not handcuffed during an initial interview or during a second interview that same morning. Abreu also denied any physical abuse of defendant during the court-reported interview of defendant by Assistant State's Attorney George Berbas that occurred later that same evening; defendant was handcuffed during this interview but not tightly enough to leave marks on his arms, according to Abreu.

¶ 10 Detective O'Connor's testimony at the hearing on the motion to suppress was substantially similar to that of Abreu. A stipulation was read into the record that ASA Berbas would testify that defendant "told him he had been treated fine by the police, that no one threatened him, no one abused him, no one made any promises to him." A second stipulation provided that the court reporter who transcribed ASA Berbas's interview of defendant would testify that she observed nothing unusual about defendant's physical appearance or demeanor during the time she was present for defendant's statement at Area Six Violent Crimes.

¶ 11 Defendant testified at the hearing on motion to suppress that, after his arrest, he was initially taken to "Clark and Devon," where he stayed for approximately one hour. After leaving the Clark Street Police Station, defendant was taken to "Belmont and Western," identified as "Area Six." Defendant testified, that, contrary to the testimony of the detectives, he was not informed of his Miranda rights. Defendant further stated that he was "[b]eat about the body, punched, kicked, I mean – they handcuffed me to the wall." He testified that Detectives Abreu and O'Connor hit him in the chest, ribs, legs and stomach and kneed him in his genitals. Defendant stated that the physical abuse lasted "[f]or a couple of hours." Defendant was shown

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photographs of his hands taken "three days after the incident" in the "lockup area of Skokie," which he identified as "[m]y hands with marks, handcuff marks, on them." On cross-examination, defendant conceded that he had been handcuffed and transported a number of times during the course of the three days between the alleged physical abuse and the time the photographs were taken.

¶ 12 Select statements from the bond court hearing on the next night, July 29, 1991, were read into the record, including the bond court judge's statement, after directing defendant to remove his shirt, that "I see no marks whatsoever that would corroborate the allegation that he was beaten by the police." Another stipulation was read into the record from the paramedic at the Cook County jail who examined defendant; defendant did not tell the paramedic that the police had beaten him, and the paramedic observed no bruises, lacerations, scars, bumps or marks on defendant's body.

¶ 13 The court concluded that defendant was advised of his Miranda rights and that he was not kneed or beaten by the detectives. The court did not find any evidence that defendant was handcuffed to such an extent that marks were left on his hands. The court noted that the photograph of defendant's hands "do not indicate any marks to the court." The court further observed that any marks that may have been present when he was photographed three days later in Skokie "could well have been caused by subsequent handcuffing subsequent to July 28, 1991." The court denied the motion to suppress, concluding that defendant was not beaten or threatened and that "his statements in fact were freely and voluntarily made."

¶ 14 Trial

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¶ 15 The trial testimony included the following. Fernando Lemus testified that at approximately 4:00 a.m. on July 28, 1991, he heard a single gunshot. He looked out his bedroom window into the alley below and saw two African-Americans, a "young man" and a "young woman." He saw the man give the woman a revolver and then flee. Mr. Lemus called the police. He then saw a white car going quickly down the alley. After the police arrived, Lemus gave them a description of the two people. Mr. Lemus got into the police car and drove around the neighborhood. Mr. Lemus then recognized the man – whom he identified as defendant – and woman at a gas station near the scene of the shooting.

¶ 16 Agripina Lemus's testimony was substantially similar to the testimony of her husband, Fernando. Ms. Lemus also testified that later on the morning of July 28, she went to the police station at Belmont and Western. She identified defendant in a police line-up as the man she saw pass the gun. She also identified the woman who received the gun in a separate police line-up of women.

¶ 17 Robin Ross testified that she was 14 years old in July of 1991. She knew defendant and his co-defendants, Vanessa Miller and Pauletta Robinson, from the neighborhood. Ross agreed to testify against defendant; in exchange for her testimony, the State was to drop the murder charge against her and she would plead guilty to an armed robbery charge.

¶ 18 Ross testified that, on the evening of July 27, 1991, she was a passenger in a "white 98" Oldsmobile with Miller, Robinson and Marcia Samuels; defendant was driving the car. Defendant was "talking about doing a robbery." After defendant stopped to get a gun, the group discussed how they were going to commit the robbery. The girls were supposed to bring "some

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guys" into an alley; defendant would then "come out" and "try to rob them." After unsuccessfully approaching four men – who Ross speculated "knew what we was trying to do" – defendant said he would rob somebody by himself. The women got out of his car and defendant went to park the car. The group of women starting talking with Victoriano. Ross and Victoriano walked down the street and then through an alley so Victoriano could be robbed. Defendant approached Victoriano, pulled out a gun and told Victoriano to give his money. Victoriano slapped the gun, pulled out a knife and stabbed defendant in the hand. Then defendant shot Victoriano. After Victoriano fell, defendant went through his pockets and took some money. Defendant told Ross not to tell the other girls that he got any money. As Ross and defendant walking into a nearby parking lot, defendant passed the gun to Ross. Ross met up with the other women, and defendant picked them up after driving down the alley. Ross gave the gun back to defendant in the car. According to Ross, defendant "was like, 'By the time the police come, he going to be dead.' "

¶ 19 Ross then testified that defendant drove by another neighborhood because he wanted to rob someone else. Defendant eventually dropped Miller, Robinson and Samuels off, and defendant gave Miller the gun. Ross stayed in the car with defendant; the two drove to a gas station at Touhy and Sheridan. After defendant and Ross purchased snacks and some gas, the police arrived at the gas station and arrested them. Ross testified that she was initially taken to a police station at Devon and Clark and then to another police station at Belmont and Western. A few hours later, Miller, Robinson and Samuels showed up at the Belmont and Western police station. Ross participated in a police line-up at Belmont and Western.

¶ 20 Chicago police officer John Roberts testified that he responded to a radio call of a man

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shot on July 28, 1991. Officer Roberts spoke with Mr. and Mrs. Lemus; Mr. Lemus provided a physical description of the man and woman in the alley and described the "cream colored automobile flee the scene at a high rate of speed." After receiving information that another patrol car had stopped a cream colored automobile with two suspects, Officer Roberts transported Mr. Lemus to the gas station. Mr. Lemus identified the car and the two individuals from the events in the alley.

¶ 21 Chicago police officer Barrett Moran testified that he worked as a property crimes detective in Area 3. He testified that Area 3 used to be called Area 6 on July 28, 1991 and that the 24th district is encompassed within Area 3. After speaking with Officer Roberts on July 28, Officer Moran saw a white Oldsmobile parked in a gas station and two people that fit the description of the suspects. After Mr. Lemus arrived and identified them, defendant and Ross were both placed under arrest and transported to the 24th District. Officer Moran then arranged for a mobile crime lab to come to the 24th District to take photographs and do a gunshot residue test to determine if they recently fired any weapons. Officer Moran observed a puncture wound on defendant's hand.

¶ 22 After a police officer testified that he recovered a gun from the apartment of Vanessa Miller, a trace evidence analyst with the Chicago Police Department Crime Laboratory, Robert Berk, testified that defendant's hands tested "[s]ignificantly above the threshold" for the chemical elements associated with handling, firing, or being in close proximity to a weapon when discharged. Ms. Ross also tested positive for the elements; there was a "much heavier concentration" of the elements on defendant's hands than Ross's hands. Berk opined that the

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results were consistent with defendant firing the gun and then passing it to Ross.

¶ 23 Detective Abreu testified that he and his partner, Detective O'Connor, interviewed defendant in a interview room at Area 6. Abreu testified that he advised defendant of his Miranda warnings before the fifteen to twenty minute interview began. According to Abreu, defendant stated that he and the four women designed a plan to rob people and that he obtained a gun. After Ross and Victoriano walked into the alley, defendant approached the victim from behind, pointed the gun and announced the robbery. Defendant then stated that Victoriano produced a knife and "he was still pointing the gun at the victim and fired once where the gun misfired, and he fired again." Victoriano fell to the ground and began crawling around. Defendant went through Victoriano's pockets and took his money; defendant then gave the gun to Ross. Defendant got in his vehicle, picked up the women, and then dropped all of the women except Ross at another location. Defendant and Ross went to a gas station, where they were arrested.

¶ 24 After this conversation, defendant was part of a line-up; Mrs. Lemus identified defendant as the person who came out of the alley and handed what appeared to be a gun to Ross.

¶ 25 ASA Berbas testified that on July 28, 1991, he was assigned to "Area 6, which is on the North side, located at Belmont and Western." He confirmed that Area 6 was "now called Area 3." Berbas testified that he advised defendant of his Miranda rights. Berbas and defendant then had a twenty or thirty minute conversation. At the end of the conversation, Berbas asked defendant if he would like to have his statement recorded in some fashion; defendant wished to give a court-reported statement. After the court reporter arrived and transcribed defendant's

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statement, Berbas read over the transcript with defendant, and defendant read a portion of the statement aloud. Defendant initialed any corrections and signed the statement, along with Berbas and Detective Abreu. After the statement was given, the court reporter took a photograph of defendant.

¶ 26 ASA Berbas then published defendant's statement. The statement provided, among other things, that the interview had taken place "in an interview room at Area 6 Violent Crimes, Chicago Police Department, Belmont and Western." In the statement, defendant described the events leading up to the shooting, then the shooting, and then the events following the shooting. Specifically, defendant stated that after Victoriano pulled out a knife and was "walking up," defendant pulled the trigger but the gun did not fire. Then Victoriano swung and cut defendant on the hand; defendant pulled the trigger again and the gun fired. At the end of the statement, defendant indicated that he did not have any complaints about his treatment and that he gave his statement freely and voluntarily.

¶ 27 At the close of State's evidence, defendant moved for a directed verdict, which the trial court denied.

¶ 28 Defendant then testified. He described the events leading up to the shooting and the shooting itself. Specifically, defendant stated that Victoriano pulled out a knife and he pulled about a gun. Defendant testified that Victoriano walked toward him and "smashed the gun" with his hand. The gun did not fire at that point. Victoriano then swung the knife and stabbed defendant in the hand; the two "went into a tussle, and the gun went off."

¶ 29 Defendant testified that he asked for an attorney at the 24th District; he was told he would

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be able to make a call later. When he later arrived at Belmont and Western, defendant asked the two detectives for a lawyer. He testified at trial that "[t]hey told me here is your lawyer, and it was closed fists." Defendant testified that they hit him "[i]n my body, my stomach, my ribs, my chest, just kicking me as I was cuffed to the wall." According to defendant, this took place "off and on for about 2 hours." Defendant stated he was kept in the interview room at Belmont and Western for approximately five or six hours. After being placed in a line-up, he later was interviewed by ASA Berbas. Defendant stated that Berbas read him his rights and that the court-reported statement accurately reflected what he said to Berbas.

¶ 30 On cross examination, defendant stated that he did not pull the trigger and that the gun went off accidentally.

¶ 31 Detective O'Connor testified that neither he nor Detective Abreu ever punched, kicked, or mistreated defendant in any way. He stated that defendant never asked for a lawyer while he was at Belmont and Western. Detective Moran also testified that defendant did not ask for a lawyer while in custody at the 24th District and that he did advise defendant of his Miranda rights.

¶ 32 A jury found defendant guilty of first degree murder and armed robbery.

#### ¶ 33 Events subsequent to trial

¶ 34 After denying defendant's motion for a new trial, the trial court sentenced defendant to natural life in the Illinois Department of Corrections without the possibility of parole on the first degree murder conviction. Defendant's 30-year sentence for armed robbery runs concurrently with the natural life sentence.

¶ 35 On direct appeal, defendant alleged one issue: that the prosecution engaged in improper

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closing argument when it argued to the jury that defendant should be found guilty of armed robbery in light of the lack of evidence that he actually removed anything from Victoriano. The appellate court affirmed his conviction and sentence. See *People v. Brandon*, No. 1-93-3511 (Dec. 13, 1995) (unpublished order pursuant to Supreme Court Rule 23).

¶ 36 In February, 2001, defendant filed a *pro se* "Motion to Strike Unconstitutional Sentence Imposed," challenging the constitutionality of his sentence under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which the circuit court summarily dismissed as a post-conviction petition. The appellate court permitted the public defender representing defendant on appeal to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987) and affirmed the circuit court's judgment. See *People v. Brandon*, No. 1-01-2092 (Mar. 15, 2002) (order). Defendant subsequently filed a petition for relief from judgment pursuant to 735 ILCS 5/2-1401(f). On appeal from the dismissal of that petition, the appellate court granted the State's request for remandment for proceedings consistent with *People v. Laugharn*, 233 Ill. 2d 318 (2009). See *People v. Brandon*, No. 1-09-2099 (Aug. 6, 2010) (order).

¶ 37 Motion for Leave to File Successive Petition for Post Conviction Relief

¶ 38 Defendant filed a *pro se* Motion for Leave to File Successive Petition for Post Conviction Relief.<sup>1</sup> In the motion, defendant argued that he should be give leave to file his petition because the basis for his pretrial motion to suppress his statement—his allegation that he was physically

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<sup>1</sup>There is some ambiguity regarding the filing date of this motion. The parties' appellate briefs each reference the filing date at January 7, 2010. The motion was stamped by the clerk of the circuit court on both January 7, 2010 and July 28, 2010. Based on our review of the record, we believe that defendant's request for leave to file a successive post-conviction petition was filed on January 7, 2011.

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beaten into confessing by Area 3 detectives following his arrest in 1991—"has now been shown and proven to exist at the precise same Area (3), the same location where Jon Burge also commanded the violent crimes unit." Specifically, defendant argued that when he filed his 2001 post-conviction petition, it was "before evidence surfaced regarding Jon Burge and Associates [*sic*] at Area (2) and (3), which revealed the systematic conduct of beatings, intimidation and overall coercive and abusive tactics committed by police officials against african-american [*sic*] arrested persons." Defendant contended that his 1992 allegations of abuse were "given no credibility, since, what is generally known today, was not in the public domain then." Defendant argued that "absent the unconstitutional confession, derived from police beating and brutality, and but for trial and appellate counsel's ineffectiveness, no evidence remains which establish [*sic*] this petitioner's guilt, and the outcome would certainly have been been different."<sup>2</sup>

¶ 39 An affidavit of defendant's mother, Bernice Brandon, is appended to the motion. In the affidavit, Ms. Brandon states that, after learning her son was arrested on July 28, 1991, she "found out that he was at the Area (3) police lock up being held for questioning." When she attended defendant's hearing in bond court on July 29, 2011, she stated that she witnessed the following:

"My son came in the court room, and I saw that his face was bruised and red; his arms had marks on them. He was then told to pull his shirt up after he told the judge of his being beaten and abused by police. The judge was not really interested, but because he

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<sup>2</sup> The motion and petition discuss trial and appellate counsel's alleged ineffectiveness, but defendant appears to have abandoned these arguments on appeal.

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knew his family was in the audience \*\*\* the judge had Michael [*sic*] to pull up his shirt. There were red marks and bruises all over his back and sides, the judge said, I don't see any blood or anything, and me and my family started screaming at this judge that he was either blind or corrupt."

Ms. Brandon then stated, "we were removed from the court room." Ms. Brandon indicated that the public defender took pictures of the bruises, but the bruises were "dismissed as being caused by cuffs being to [*sic*] tight after Michael arrived in the Cook County Jail." She stated that the defense attorney did not call her to testify during the suppression hearing because "it was no use, since the judge would believe the police (the same police that have been torturing people under Burge)."

¶ 40 Also appended to defendant's motion and petition is his affidavit, which raises similar claims to those set forth in the motion and petition. Included in the "Documents and Records in Support of Petition" is a copy of the motion to suppress, and a print out of a 2008 article regarding Jon Burge. (<http://www.chicagobreakingnews.com/2008/10/feds-arrest-ex-chicago-cop-burge.html>). The article provides, in part, that "Burge was a Chicago police officer from 1970 to 1993, a detective at Area 2 police headquarters on the South Side from 1972 to 1974, and an Area 2 sergeant from 1977 to 1980." The article further provides, "From about 1981 to 1986 he was a lieutenant and supervisor of detectives in the Area 2 violent crimes unit. Later, he was commander of the Bomb and Arson Unit and later commander of the Area 3 detectives." According to the article, Burge was suspended from the police department in 1991 and fired in 1993.

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¶ 41 On February 4, 2011, the circuit court denied defendant's motion for leave to file a successive post-conviction petition as "baseless and without merit." Defendant filed this appeal.

#### ¶ 42 ANALYSIS

¶ 43 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010)) (Act) provides "a method by which defendants may assert that, in the proceedings which resulted in their convictions, there was a substantial denial of their federal and/or state constitutional rights." *People v. Wrice*, 2012 IL 111860, ¶ 47, citing 725 ILCS 5/122-1 (West 2010). A proceeding under the Act is a collateral attack on the judgment of conviction. *People v. Edwards*, 2012 IL 111711, ¶ 21.

¶ 44 The Act created a three-stage procedure for addressing a defendant's post-conviction petition. First, within 90 days of the filing of the petition, "the court shall examine such petition" and if "the court determines the petition is frivolous or is patently without merit, it shall dismiss the petition in a written order" constituting a final judgment. 725 ILCS 5/122-2.1(a) (West 2010). A petition may be summarily dismissed as frivolous or patently without merit only if it has no arguable basis either in law or fact. *People v. Tate*, 2012 IL 112214, ¶ 9. Second, if the court does not summarily dismiss the petition, then the petition may be amended and counsel shall be appointed if the defendant requests it and is indigent. 725 ILCS 5/122-2.1(b), -4, -5 (West 2010). However, the right to counsel in post-conviction cases beyond the first stage is wholly statutory, so that counsel owes a duty of reasonable assistance that is satisfied by compliance with Supreme Court Rule 651(c); that is, by (1) consulting with the defendant to ascertain the claimed deprivation of constitutional rights, (2) examining the record, and (3)

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making any amendments to the *pro se* petition necessary for an adequate presentation of the petitioner's contentions. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013); *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). Third, if the case is not dismissed upon the State's motion for failing to make a substantial showing of a constitutional violations, then an evidentiary hearing may be held on the allegations in the petition. 725 ILCS 5/122-5, -6 (West 2010); *Tate*, ¶ 10.

¶ 45 The Act contemplates the filing of only one postconviction petition. *People v. Guiterrez*, 2011 IL App (1st) 093499, ¶ 11. "Successive postconviction petitions are disfavored under the Act[,] and a defendant attempting to institute a successive postconviction petition, through the filing of a second or subsequent postconviction petition, must first obtain leave of court." *People v. Gillespie*, 407 Ill. App. 3d 113, 123 (2010). Such leave "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."<sup>3</sup> 725 ILCS 5/122-1(f) (West 2010). Cause is shown by identifying "an objective factor that impeded [the petitioner's] ability to raise a specific claim during his or her initial post-conviction proceedings." *Id.* In other words, "[c]ause may be shown by the petition pleading some objective factor external to the defense that impeded counsel or defendant from timely raising the claim in an earlier proceeding." *Gillespie*, 407 Ill. App. 3d at 123. A petitioner 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

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<sup>3</sup>Where a defendant in a non-capital case alleges a claim of actual innocence in a successive post-conviction petition, "the defendant is excused from showing cause and prejudice." *People v. Ortiz*, 235 Ill. 2d 319, 330 (2009). Although defendant repeatedly references "actual innocence" in his petition, he appears to have abandoned such argument on appeal, arguing only for application of the cause-and-prejudice standard.

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sentence violated due process." 725 ILCS 5/122-1(f) (West 2010). "[B]oth elements or prongs of the cause-and-prejudice test must be satisfied in order for the defendant to prevail." *People v. Guerrero*, 2012 IL 112020, ¶ 15.

¶ 46 We review the circuit court's denial of defendant's motion for leave to file a successive petition *de novo*. *People v. Thompson*, 383 Ill. App. 3d 924, 929 (2008).

¶ 47 "Cause and prejudice" standard

¶ 48 Defendant, citing *People v. LaPointe*, 365 Ill. App. 3d 914, 924 (2006), *aff'd on other grounds*, 227 Ill. 2d 39 (2007), contends that "a *pro se* petitioner need only state the 'gist' of a claim of cause and prejudice in order to file the petition in the trial court." In other words, defendant argues that his claims need only have "an arguable basis in law and fact." See *People v. Hodges*, 234 Ill. 2d. 1, 11-12 (2009). The State, citing *People v. Edwards*, 2012 IL 111711, ¶ 24-30, contends that our supreme court has "rejected the lower, 'gist' or 'arguable' standard, and applied the higher 'colorable claim' standard." The State acknowledges that the *Edwards* decision did not address successive post-conviction petitions that allege non-actual innocence claims, but contends that "successive post-conviction petitions alleging non-actual innocence claims have always been held to a higher standard than those petitions alleging actual innocence which are exempt from the 'more exacting' cause-and-prejudice test."

¶ 49 We conclude that while the test for initial petitions to survive summary dismissal is that the petition state the gist of a meritorious claim – that is, a claim of arguable merit – the cause and prejudice test for successive petitions is more exacting than the gist or arguable merit

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standard.<sup>4</sup> The Illinois Supreme Court in *People v. Conick*, 232 Ill. 2d 132, 142 (2008), stated that "[t]he trial court must still examine every request for postconviction relief whether it be an initial petition subject to review under the 'gist' standard [citation] or a proffered successive petition subject to the more exacting cause and prejudice standard. [Citation]." See also *People v. Edwards*, 2012 IL App (1st) 091651, ¶¶ 21-22. "A petition for leave to file a successive postconviction petition is not a postconviction petition and never advances to additional stages of review." *People v. Croom*, 2012 IL App (4th) 100932, ¶ 24.

¶ 50 Nonetheless, we begin our analysis of defendant's contentions in this appeal with the "gist" standard. If defendant "fails to satisfy the 'gist' standard, then it necessarily follows that he cannot meet a 'more exacting' standard." *Edwards*, 2012 IL App (1st) 091651, ¶ 22. A petition which "lacks an arguable basis either in law or in fact" is one that is based on "an indisputably meritless legal theory or a fanciful factual allegation." *People v. Hodges*, 234 Ill. 2d 1,16-17 (2009).

#### ¶ 51 "Cause"

¶ 52 Defendant claims he has "demonstrated cause by presenting authoritative, newly discovered evidence of systematic torture of suspects at Area 3 that was not available at the time of his suppression hearing, trial, or initial post-conviction proceedings." On appeal, defendant

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<sup>4</sup>In their respective appellate briefs, defendant and the State each referenced a case pending before the Illinois Supreme Court involving a successive *pro se* post-conviction petition in a non-actual innocence case. In its recently-issued opinion, the court declined to address the question of the legal standard applicable to a *pro se* petitioner's motion seeking leave to file a successive post-conviction petition. *People v. Evans*, 2013 IL 113471, ¶ 18. Justice Burke dissented, noting her disagreement "with the majority's decision to avoid the issue raised in this appeal by pleading to the legislature to clarify its intent." *Id.* ¶ 27 (Burke, J., dissenting).

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relies extensively on the Report of the Special State's Attorney, released July 19, 2006 (the 2006 Report or the Report).<sup>5</sup> Citing *People v. Wrice*, 406 Ill. App. 3d 43 (2010), *affirmed as modified*, 2012 IL 111860, defendant contends that the 2006 Report "found proof beyond a reasonable doubt that police officers under the command of Jon Burge at Area 2 and Area 3 had engaged in the torture of criminal suspects." *Id.* at 44. Defendant argues that, as with the petitioner in *Wrice*, he "has established cause because the Special State's Attorney did not release the report corroborating claims of abuse by suspects at Area 2 and Area 3 until July 19, 2006, and as a result, Michael could have [*sic*] submitted this newly-discovered evidence until after that date." Citing the 2006 Report, defendant further claims that "[n]ot only are the allegations that Michael was repeatedly hit by officers until he agreed to give an inculpatory statement similar to claims asserted by other defendants, Michael had consistently reiterated his claims prior to filing the instant petition."

¶ 53 Defendant's appellate brief states his successive postconviction petition "cited to the 2006 Report as newly-discovered evidence, and attached an affidavit from his mother which corroborated his claim that he had been abused and that she had witnessed his body during his night bond court appearance." Defendant's appellate brief further provides that "[a]lthough Michael was unable to attach a copy of the 2006 Report to his successive petition, because of the prevalence of these claims and the fact that the 2006 Report is readily available for the public,

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<sup>5</sup>"[I]n April 2002, the presiding judge of the criminal division of the circuit court of Cook County appointed a Special State's Attorney to investigate the allegations of police torture and abuse committed by Jon Burge, a commander within the Chicago police department during the 1980s and early 1990s, and the officers acting under his command at Area 2 and Area 3." *People v. Wrice*, 406 Ill. App. 3d 43, 49 (2010), *affirmed as modified*, 2012 IL 111860.

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this Court should take judicial notice of the 2006 Report in evaluating whether he established cause."

¶ 54 The State responds that defendant neither attached the 2006 Report to his successive post-conviction petition nor cited it therein. Citing the statutory requirements for a post-conviction petition, the State contends that the petition "shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2010).

¶ 55 Simply put, defendant's failure to attach the 2006 Report to his post-conviction petition precludes our consideration of the report in evaluating "cause and prejudice." See, e.g., *People v. Anderson*, 375 Ill. App. 3d 121, 138-39 (2007) (2006 Report was issued after circuit court ruled on defendant's successive postconviction petition and while case was on appeal; defendant not permitted to rely on 2006 Report for evidence of coercion where he failed to attach the report to his post-conviction petition for initial "scrutiny and evaluation" at the circuit court level).

¶ 56 Furthermore, defendant has failed to satisfy the "cause" prong of the test because he has failed to point to an objective factor that impeded him from raising his abuse claim in an earlier proceeding. *Anderson*, 373 Ill. App. 3d at 135. Evidence of the systematic torture was already widely available in 2001 when defendant filed his initial postconviction petition. *Id.* Defendant's affidavit, appended to his current successive post-conviction petition, does not provide any new evidence, as the allegations of coercion are the same as those raised in his motion to suppress, filed in 1992. Although defendant could not have included the 2006 Report in his direct appeal or his initial post-conviction petition – because such report did not yet exist – it still does not

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explain the failure of such earlier proceedings to raise the abuse claims at all. See *LaPointe*, 365 Ill. App. 3d at 924.

¶ 57 Even assuming *arguendo* that it would be appropriate for this court to take judicial notice of the 2006 Report – which we shall not do – our consideration of the report would not affect our conclusion that defendant failed to demonstrate "cause." As the State points out, "such Report is completely irrelevant to the facts of this case as petitioner was arrested on the north-side of the City of Chicago and was never detained in any police station or by police officers that had any connection whatsoever to Jon Burge or his cohorts." The State points out that defendant was arrested at Touhy Avenue and Sheridan Road—on the north side of the City of Chicago—and interviewed at Area 6, Belmont and Western—on the city's north side, "not on the south-side where Jon Burge was the commander of Area 2 and Area 3 (Brighton Park)." According to the State, Area 3 was at 39<sup>th</sup> and California – on Chicago's south side—during the Jon Burge era; it was closed and Area 6 at Belmont and Western—on Chicago's north side—was renamed Area 3.

¶ 58 The State argues that

"Although petitioner now claims, as does his mother, that he was detained at 'Area 3,' he clearly admitted during his trial testimony that he was brought to Area 6 after he was arrested. And as the record unquestionably proves, petitioner was, indeed, detained and interviewed at Belmont and Western which may be the 'new Area 3' but, at the time of his arrest, was known as Area 6. Although petitioner has clearly misrepresented and manipulated the facts in his brief to convince this Court that he was a 'victim' of the police actions which are documented in the 2006 Report, the record clearly demonstrates

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otherwise. Petitioner was not interviewed at the now 'infamous' Area 3 police headquarters, and petitioner's attempt to convince this Court otherwise is a blatant abuse of the judicial system."

The State thus contends that defendant's entire argument can be "summarily dismissed" because (a) he never relied on the Report in his petition, and (b) even if he had relied on the Report, "such Report is completely irrelevant to the facts of this case as petitioner was arrested on the north-side of the City of Chicago and was never detained in any police station or by any police officers that had any connection whatsoever to Jon Burge or his cohorts."

¶ 59 Simply put, the record is replete with references – including defendant's own trial testimony – that defendant was detained at Area 6 police headquarters. The record is also replete with references to Area 6's subsequent renaming as Area 3. Even if the less exacting "gist" standard were applicable herein—which we conclude it is not—the defendant's legal theory is completely contradicted by the record; his claims have no basis in law and fact and can be summarily dismissed.

#### ¶ 60 Prejudice

¶ 61 Defendant contends that "he has demonstrated prejudice where the admission of his coerced confession infected the integrity of the judicial process and violated his due process right to a fair trial." Citing *People v. Wrice*, 2012 IL 111860, defendant argues that "the use of a coerced confession is *per se* prejudicial." *Id.* ¶ 84. Specifically, defendant contends that he has demonstrated "prejudice" where he "could not impeach the credibility of Area 3 officers, including Detectives Abreu and O'Connor with other claims of abuse during his suppression

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hearing, and the subsequent admission of his coerced, involuntary statement violated his right to due process and a fair trial."

¶ 62 The appellate court in *Wrice* concluded that the defendant in that case:

"(1) consistently claimed, during his motion to suppress, at trial, and on postconviction review, that he was tortured; (2) his claims of being beaten are strikingly similar to those of other prisoners at Areas 2 and 3; (3) the officers involved, Sergeant Byrne and Detective Dignan, are identified in other allegations of torture; and (4) defendant's allegations are consistent not only with [Office of Professional Standards] findings (under the preponderance of the evidence standard of proof) of systemic and methodical torture at Area 2 under Jon Burge, but also with the [Special State's Attorney's Report's] findings of torture under the stricter standard of proof beyond a reasonable doubt." *Wrice*, 406 Ill. App. 3d at 53.

The court concluded that, "[a]s such, defendant has satisfied the 'prejudice' prong of the cause-and-prejudice test." *Id.*

¶ 63 The instant case involves substantially different circumstances than *Wrice*. Although defendant claimed he was abused during the suppression hearing and at trial, his claims of abuse were not always consistent. For example, defendant's trial testimony did not include any reference to the detectives "kneeing" him in the genitals, despite such claim in his motion to suppress. More significantly, he did not reference any abuse in his direct appeal or his initial post-conviction petition. Unlike in *Wrice*, defendant's claims of abuse are not "strikingly similar" to those of prisoners at Areas 2 and 3. Defendant's allegations that he was hit in the stomach,

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kneed in the genitals, and his handcuffs were too tight are not comparable to the baggings, hangings, and shock treatment referenced in the 2006 Report. Furthermore, there is no evidence that the officers involved in defendant's case, Detectives Abreu and O'Connor, were identified in any other allegations of abuse. Conversely, the officers in question in *Wrice* are specifically addressed in the 2006 Report. Absent "some evidence corroborating defendant's allegations, or some similarity between the type of misconduct alleged by defendant and that presented by the evidence of other cases of abuse" (*Anderson*, 375 Ill. App. 3d at 137-38), defendant has failed to provide the necessary support for his request to file a successive postconviction petition.

¶ 64 Even assuming *arguendo* defendant established "cause," there is no reasonable probability that if the 2006 Report evidencing brutality at Area 3 prevented the introduction of defendant's "confession," defendant would have been acquitted of the charged offenses. See *People v. Anderson*, 402 Ill. App. 3d 1017, 1039 (2010) (finding no "prejudice" even if cause was established in light of ample evidence offered by the state at the defendant's guilty plea hearing). During his trial testimony, defendant acknowledged that he held the gun that killed Victoriano. Although he referenced "pulling the trigger" in his court-reported statement to ASA Berbas—versus his reference to a "tussle" with Victoriano during his trial testimony—his statement and his trial testimony are similar. Eyewitness testimony and physical evidence further supported his conviction.

¶ 65 In his motion for leave to file a successive post-conviction petition, defendant contends that "had the trial court granted petitioner's Motion to Suppress Statements, the likelihood of petitioner being convicted could have been unlikely, and the outcome would certainly have been

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different." Based on the overwhelming evidence of defendant's guilt, we disagree. Defendant has failed to show that his claim of abuse "so infected the trial that the resulting conviction \*\*\* violated due process." 725 ILCS 5/122-1(f) (West 2010).

¶ 66 CONCLUSION

¶ 67 Defendant has failed to show "cause" or "prejudice" under section 122-1(f) of the Act. The circuit court's denial of defendant's motion to file a successive postconviction petition is affirmed.

¶ 68 Affirmed.