

FOURTH DIVISION
November 7, 2013

No. 1-11-3193

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 87 CR 15089
)	
ROBERT SMITH,)	Honorable
)	Maura Slattery-Boyle,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Lavin and Epstein concurred in the judgment.

ORDER

¶ 1 *HELD:* We affirm the trial court's denial of leave to file a successive post-conviction petition with respect to defendant's *Brady* claim as that claim is waived. However, we reverse the trial court's denial of leave with respect to his coerced confession claim as defendant has established the requisite cause and prejudice necessary to be granted leave to file a successive post-conviction petition as to that claim.

¶ 2 Defendant Robert Smith was convicted of two murders in 1990 and sentenced to natural life in prison. In 2011, defendant filed a motion for leave to file a successive post-conviction petition, claiming he had new evidence of systematic police abuse in Area 2 that would corroborate his claim that his confession had been physically coerced. Specifically, the successive post-conviction petition includes two claims: a *Brady* violation claim and a coerced confession claim. The trial court denied defendant leave to file both claims contained in his successive post-conviction petition and dismissed the petition. For the reasons that follow, we affirm the trial court's denial of leave with respect to defendant's *Brady* claim as that claim is barred under the doctrine of waiver. However, given that defendant has established the requisite cause and prejudice necessary to be granted leave to file a successive post-conviction claim with respect to his coerced confession claim, we reverse the trial court's denial of leave with respect to defendant's coerced confession claim and remand for further proceedings on that claim.

¶ 3 BACKGROUND

¶ 4 On September 19, 1987, Edith Yeager and Willie Bell Alexander, defendant's mother-in-law and grandmother-in-law, were found dead in Yeager's home. Each of the woman's throats had

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been cut, and the house had been set on fire. Defendant was initially arrested for interfering with a police investigation and obstructing justice, but was later charged with both murders after confessing to each one while in custody. Following a jury trial, defendant was convicted of two counts of murder and sentenced to natural life in prison.

¶ 5 Motion to Suppress Hearing (February 1989)

¶ 6 Prior to trial, defendant moved to quash his arrest and confession. Only defendant's motion to quash his confession is relevant to this appeal. Defendant sought to quash his confession claiming that it had been physically coerced. At the hearing, defendant testified that after he was brought to Area 2, he was handcuffed to the wall in an interview room and an officer came in and kicked him in the chest a few times. He described this person as being about six feet tall, 180-190 pounds, with glasses, blond hair, and between 30-34 years of age. That officer left and two more came in. A tall blond-haired man called defendant a "cold blooded killer," shouted at him, and told defendant that they had found something with blood on it. Defendant testified that he then began screaming, calling for his wife and his uncle, and an officer responded by beating him in the chest, shoving a handkerchief down his throat and choking him until another officer told him to stop.

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¶ 7 These officers told defendant that he had almost committed the perfect crime, which angered defendant. The officer then offered defendant cigarettes and coffee, and defendant was able to calm down. Two more officers came in 10-15 minutes later and accused defendant of the murders. Defendant began cursing at them and one of the officers responded by slapping him in the head. Defendant described this man as white, about 5 feet 10 inches tall and 200 pounds with dark hair.

¶ 8 The officers then informed defendant that all the doors to his mother-in-law's house had been locked, and they knew that he had washed his clothes in the basement because he left a thumb print on the detergent jar. Defendant responded that he had not done anything and began asking to see a doctor because he had just gotten out of the hospital. He was told he could not see a doctor until they were done. One of the officers slapped defendant again and left, informing defendant that he was going to check on his alibi.

¶ 9 Defendant testified that two more detectives came in, one was a white guy who he knew to be officer Higgins and another was an African American man. The African American man told him that his wife had a "piece of sh*t" husband, and that she was currently taking a lie detector test. Higgins then asked defendant who helped him commit the murders, and defendant

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replied that he was playing pool in a tournament all night.

These detectives then left the room.

¶ 10 Two more detectives then came in, and they were "harder" than the others. One told defendant he "didn't like n*gg*rs" and that he was going to "splatter [his] black butt all against this doggone wall." One of the officers told defendant to take down his pants, which he did. Defendant stated that he did not have any underwear on because of a rash he had on his penis. The detective then showed him some bloody underwear, and defendant admitted that they were his. Defendant stated that he never told the detectives that he had dropped those underwear while washing his clothes after committing the murders.

¶ 11 Two more detectives then came into the interview room. One stated he was a man of God, and the other stated he was on his way to a party and "didn't have time to mess with no n*gg*r all night." Defendant testified that by this time he was tired and scared and his side hurt, as if he had broken ribs. He was also coming down from a high. Defendant stated that he told all the detectives how he was feeling.

¶ 12 Two more detectives came into the interview room. One was tall with glasses and one made defendant take off his shoes and socks. Upon observing blood on the side of defendant's foot and heel, they had another detective come in to take a sample of it.

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The "evangelical" detective, as defendant described him, told defendant to make it easy on himself and tell what he did.

Defendant stated he needed to see a doctor, and Lieutenant Cline told him he could go to the hospital if he gave a statement.

Defendant testified that he then agreed to give a statement, but that the "evangelical" detective told him what to say.

¶ 13 After making his statement to the detectives, Cline stated that defendant could see a doctor, but that he first needed to make his statement before a state's attorney. Defendant testified that he told Assistant State's Attorney Raymond Brogan that the detectives had beaten him and that Brogan responded, "Aw, they ain't doing nothing like that to you." Brogan left and then came back with Higgins. Eventually, defendant stated that he would cooperate. By that time, his nerves were shot, he did not have his medication, he had been up since 6:00 a.m. the day before, and he had not eaten since he arrived at Area 2. He stated that Brogan went over the questions he was going to ask and the answers defendant would be expected to give three or four times before they brought the in stenographer.

¶ 14 Defendant's statement was taken on September 20, 1987 at 12:05 a.m. in an interview room at Area 2. Brogan asked defendant the questions, and the statement was transcribed by a court reporter, Joseph Szybist. At the outset of the statement,

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Brogan advised defendant of his *Miranda* rights. Defendant then stated that he wished to talk, at which time he admitted that he was at his mother-in-law's house at approximately 1:30 a.m. on September 19, 1987 where he cut the throats of both Yeager and Alexander, each two times. Defendant stated that he cut both of them with part of a straight razor that he normally kept in his wallet. He then stated that after he cut their throats, he washed his clothes in the basement because they were bloody. Once his clothes were dry, he went back upstairs, poured gasoline in the dining room, and lit a match. He then left out the back door in the basement. Defendant further indicated that the underwear that was in the detectives' possession belonged to him, and that he left the underwear in the basement where he washed his clothes. In response to questions about his treatment while he was in custody, defendant stated that he was not threatened or promised anything in exchange for his statement, that he had no complaints about the way the police had been treating him, and that he was not under the influence of any drugs.

¶ 15 After giving the statement, defendant initialed mistakes in the statement transcript, but refused to sign the statement. Defendant did sign the back of a photograph of himself, which depicts him sitting in a chair between two tables, uncuffed, with a cigarette in his hand and a can of cherry coke on the table

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next to him. Higgins then gave defendant two hamburgers and a change of clothes.

¶ 16 Later that night, defendant testified that he saw two doctors. Defendant told the doctors what the police had done to him. The doctors gave him medication. Defendant testified that he had cuts, scratches, and bruises on his chest, underneath his clothes, and that his head was swollen.

¶ 17 In addition to defendant's testimony, the trial court heard testimony from Detectives Daniel McWeeny and John Yucaitis; Officers Martin Rios, William Higgins and Hervie Wells; Assistant State's Attorney Raymond Brogan; and court reporter Joseph Szybist. Each of them testified as to their involvement in the investigation, and each of them testified that they did not see anyone hit or physically abuse defendant in any way. Of relevance, defendant's wife testified that when she saw defendant in custody he looked dirty and like he had been crying. Defendant's uncle also testified, but only as to what he saw prior to defendant being taken into custody.

¶ 18 The trial court denied defendant's motions to suppress his arrest and confession finding that the testimony of the officers, state's attorney and court reporter to be credible. The trial court further found that defendant's statement had not been coerced.

¶ 19 Trial (August 1990)

¶ 20 In August 1990, the case proceeded to trial. Defendant's confession was entered into evidence, and the jury found defendant guilty of first-degree murder for both Yeager and Alexander. Defendant was then sentenced to natural life in prison.

¶ 21 Direct Appeal (July 1995)

¶ 22 Following the trial, defendant filed a direct appeal. On direct appeal he argued: (1) he was not proven guilty beyond a reasonable doubt; (2) his motion to suppress was improperly denied; (3) he was unlawfully arrested without probable cause; (4) the physical evidence and statements obtained after his arrest were the fruits of an illegal arrest; (5) his confession resulted from physical and mental coercion; (6) he did not voluntarily waive his *Miranda* rights; and (7) trial counsel was ineffective for failing to present evidence of his severe head injury, subsequent complications, and medication. The appellate court affirmed his conviction and sentence.

¶ 23 First Post-conviction Petition (April 1996)

¶ 24 In April 1996, defendant filed his first post-conviction petition asserting two claims: (1) that trial counsel improperly refused to allow him to testify at trial; and (2) trial and appellate counsel were ineffective for failing to assert that his

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right to a fitness hearing was violated because he was on psychotropic medication at the time of trial. The circuit court dismissed defendant's post-conviction petition at the first stage finding that defendant had not been on any medications and that defendant and his attorney clearly discussed whether defendant should testify at trial and decided that he should not. The appellate court affirmed the trial court's dismissal of defendant's post-conviction petition on appeal.

¶ 25 *Habeas* Petition (1998)

¶ 26 Defendant also filed a *habeas corpus* petition in federal court in 1998. In his *habeas* petition, defendant alleged: (1) ineffective assistance of counsel for failure to present evidence of his medical conditions; (2) appellate counsel was ineffective for failure to argue that trial counsel should have requested a fitness hearing; (3) the police lacked probable cause to arrest him and that his confession was coerced; and (4) there was insufficient evidence to convict. The district court denied the petition.

¶ 27 Petition for *Mandamus* Relief (1999)

¶ 28 In 1999, defendant filed a petition for *mandamus* relief requesting records and reports from his psychological and psychiatric evaluations in 1987 and 1988. The court denied this petition for *mandamus* relief.

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¶ 29 2-1401 Petition (October 2006)

¶ 30 In October 2006, defendant filed a section 2-1401 petition for relief from judgment, arguing that there was new evidence of systematic police abuse by the officers and detectives in Area 2 during the time he was in custody citing the Report of the Special State's Attorneys Edward Egan and Robert Boyle on systematic police abuse in Chicago (2006 Report). See 735 ILCS 5/2-1401 (West 2008). Upon reviewing the section 2-1401 petition, the trial court judge made the following observations:

"The murder charges, alleging newly discovered evidence, alleging fraudulent concealment, but had it been known the trial court would have granted his motion to suppress. Okay, it's a due process violation. And it does state that this is a constitutional claim, so I will appoint the public -- I will docket it as a post-conviction and appoint the Public Defender's office."

After the petition was redocketed as a post-conviction petition (recharacterized petition) and the court ordered a public defender be appointed, the matter was subsequently transferred to a new judge. During the transition, the Attorney General's

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office took over the case from the State's Attorney's office. The Attorney General then filed a motion to dismiss the 2-1401 petition arguing that: (1) defendant's 2-1401 claims were time barred; (2) defendant failed to claim that the "new" evidence was concealed from him in any way; (3) defendant's claim was barred by *res judicata* as he filed the same claim on direct appeal and on federal *habeas* review; (4) defendant was aware of the facts of systematic abuse at Area 2 prior to 2006; and (5) defendant's claim was without merit. A public defender never appeared on behalf of defendant for the motion, and the Attorney General's office served a copy of the motion on defendant personally. Defendant initially asked for an extension of time to respond; however, defendant did not respond, and the court dismissed the case based on the reasons set forth in the motion to dismiss. The attorney general was responsible for sending defendant a copy of the order dismissing his petition; however, defendant states he did not receive notice of this dismissal until May 2011, and there is nothing in the record to refute this.

¶ 31 Successive Post-conviction Petition (August 2011)

¶ 32 In August 2011, defendant filed the instant post-conviction petition, which claims: (1) his confession was involuntarily

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given as a result of physical coercion¹; and (2) the State violated *Brady v. Maryland*, 373 U.S. 83 (1963) by failing to disclose evidence of torture at Area 2. Defendant's claim that he was tortured by Area 2 detectives is based upon his testimony at the suppression hearing as well as (1) the Report of the Special State's Attorneys Edward Egan and Robert Boyle that was released in 2006 (2006 Report), and (2) his ability to specifically link detectives' names to their actions of abuse during his interrogation. Accordingly, defendant claims that Officer Martin Rios kicked him in the chest; Detective McWeeny repeatedly punched him in the sides with handcuffs wrapped around his fist; Detective McGovern choked him and stuffed a handkerchief in his mouth until he lost consciousness; Detectives William Higgins and William Pederson struck him in the face; Detectives Robert Rice and Steven Brownfield threatened to "slam [his] n*gg*r *ss all over this room"; and Lieutenant Philip Cline refused to let defendant see a doctor until he confessed.

¹Of note, "claim one" of defendant's successive post-conviction petition states:

"The Petitioner has obtained Newly Discovered Evidence by way of Special Prosecutor's, Edward Egan and Robert Boyle's Report, not available at the time of his Suppression Hearing and Trial Proceedings which corroborates his Claim that his confession was the product of torture by police officers at Area 2 Police Headquarters."

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¶ 33 On September 8, 2011, the trial court denied defendant leave to file his successive post-conviction petition and dismissed the petition. The trial court interpreted defendant's successive post-conviction petition as making a *Brady* claim and an "actual innocence" claim. With respect to the *Brady* claim, the trial court found that this claim was waived because it could have been raised in prior post-trial motions since abuse in Area 2 had been known prior to the publication of the 2006 Report. The court also found that there was no basis for a *Brady* claim because the 2006 Report would not have altered the outcome of the proceedings at trial. With respect to the "actual innocence" claim, the trial court found that it was barred by *res judicata* since this issue had previously been raised and because defendant had not presented any "new" evidence since much of the evidence attached to the petition pre-dates 2006 and none of the post-2006 evidence refutes any of the evidence that was presented at trial. There is no discussion in the trial court's order denying him leave to file his successive post-conviction petition of defendant's due process claim that his statement was made as a result of physical coercion.

¶ 34 Defendant timely filed a notice of appeal. For the reasons that follow, we affirm the trial court's denial of leave with respect to defendant's *Brady* claim as that claim is barred under

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the doctrine of waiver. However, given that defendant has established the requisite cause and prejudice necessary to be granted leave to file a successive post-conviction claim with respect to his coerced confession claim, we reverse the trial court's denial of leave with respect to defendant's coerced confession claim and remand for further proceedings on that claim.

¶ 35 ANALYSIS

¶ 36 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)), allows prisoners to collaterally attack a prior conviction and sentence where there was a substantial violation of his or her constitutional rights. *People v. Gosier*, 205 Ill. 2d 198, 203 (2001). In order for a defendant to successfully challenge a conviction or sentence pursuant to the statute, he or she must demonstrate that there was a substantial deprivation of federal or state constitutional rights. *People v. Morgan*, 187 Ill. 2d 500, 528 (1999).

¶ 37 The Act contemplates the filing of only one post-conviction petition. 725 ILCS 5/122-1(f) (West 2008); *People v. Evans*, 186 Ill. 2d 83, 89 (1999). Consequently, all issues actually decided on direct appeal or in an original post-conviction petition are barred by the doctrine of *res judicata* and all issues that could have been raised on direct appeal or in an original post-

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conviction petition, but were not, are waived. 725 ILCS 5/122-3 (West 2008); *People v. Blair*, 215 Ill. 2d 427, 443 (2005).

¶ 38 Nevertheless, leave to file a successive post-conviction petition is allowed when fundamental fairness so requires.

People v. Lee, 207 Ill. 2d 1, 4-5 (2003).² The cause-and-prejudice test is the analytical tool that is to be used to determine whether fundamental fairness requires that an exception be made to section 122-3, so that a claim raised in a successive petition may be considered on its merits. 725 ILCS 5/122-1(f) (West 2008); *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002).

Because the fundamental fairness exception applies to claims and not to petitions, and the cause-and-prejudice test must be applied to individual claims, not to the petition as a whole.

Pitsonbarger, 205 Ill. 2d at 462. Taking all well-pled facts as true (*People v. Williams*, 392 Ill. App. 3d 359, 367 (2009)), our review of the denial of a motion for leave to file a successive post-conviction petition is *de novo*. *People v. LaPointe*, 365 Ill. App. 3d 914, 923 (2006).

¶ 39 I. Defendant's *Brady* Claim is Waived

² Fundamental fairness would require that leave be granted to file a successive post-conviction petition where defendant can show "actual innocence." *People v. Edwards*, 2012 IL 111711, ¶23 (2012). Here, however, defendant makes it clear that he is not making any claim of "actual innocence."

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¶ 40 The trial court denied defendant leave to file his *Brady* claim as a successive post-conviction claim because that claim was barred by the doctrine of waiver. We agree. Illinois courts have long recognized that a criminal defendant's right to due process and a fair trial is violated by the prosecution's failure to disclose material evidence favorable to the defense and that such claims are cognizable in post-conviction proceedings.

People v. Harris, 206 Ill. 2d 1, 44 (2002).

¶ 41 Here, however, defendant raised a *Brady* claim for the first time in this successive post-conviction petition. He did not raise a *Brady* violation on his direct appeal, his 1996 post-conviction petition, his 1998 federal *habeas* petition, his 1999 *mandamus* petition, or in his 2006 recharacterized petition. Since defendant failed to raise a *Brady* violation on any of these prior occasions, his *Brady* claim in this successive post-conviction petition is waived. 725 ILCS 5/122-3 (West 2008) ("Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived.") See *Blair*, 215 Ill. 2d at 443 (all issues that could have been raised on direct appeal or in an original post-conviction petition, but were not, are waived).

¶ 42 We note that the 2006 Report, which discloses systematic torture by police, supporting defendant's *Brady* claim did not

exist at the time of his trial. Therefore, the prosecutors could not have disclosed this report to him at trial. Nevertheless, defendant had knowledge of torture claims against the police because defendant alleged he had been tortured himself and, accordingly, could have brought this claim within any of his prior proceedings.

¶ 43 While we are aware that the doctrine of waiver can be relaxed if the defendant can show cause and prejudice; here, defendant offered no argument as to why he should have been granted leave to file the *Brady* claim stated within his successive post-conviction petition even though he failed to raise it in prior proceedings. In order to be granted leave to make such a claim, defendant must establish cause and prejudice as to *each individual claim* asserted in a successive post-conviction petition. See *Pitsonbarger*, 205 Ill. 2d at 462-63. As such, this argument is waived. See Sup. Ct. R. 341(h)(7), eff. 1970; *Mayfield v. ACME Barrel Co.*, 258 Ill. App. 3d 32, 37 (1994).

¶ 44 II. Defendant's Claim That His Confession Was Physically Coerced Is Not Barred By *Res Judicata*

¶ 45 While the trial court denied defendant leave to file his coerced confession claim on the grounds that it was barred by *res judicata*, we find that fundamental fairness requires the doctrine of *res judicata* be relaxed so that defendant's claim that his

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confession was physically coerced may be decided on the merits. *People v. Hopley*, 182 Ill. 2d 404, 428 (1998) (the doctrine of *res judicata* will be relaxed "where fundamental fairness so requires.").

¶ 46 Recognizing that defendant raised nearly identical claims of coerced confession in his 2006 recharacterized petition as in his 2011 successive post-conviction petition, which would normally be grounds for dismissal under the doctrine of *res judicata*, we find that the 2006 proceedings were fundamentally unfair and deficient. The record is clear that upon filing his 2-1401 petition, the trial court judge reviewed the petition, recharacterized it as a post-conviction petition, and appointed the public defender's office to represent defendant in a second stage-proceeding. However, the case was subsequently transferred to a new judge, who clearly was not informed that the prior judge re-docketed the petition as a post-conviction petition and further not informed that the prior judge ordered a public defender be appointed. Accordingly, the new judge granted the attorney general's motion to dismiss defendant's 2-1401 petition while defendant was unrepresented by counsel. Moreover, defendant claims that he was not notified that his petition was recharacterized as a post-conviction petition or that it was dismissed until May 2011, and there is nothing in the record to

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refute this. The record shows that the attorney general undertook the task of notifying defendant that his petition was dismissed; however, there is nothing in the record to show that anyone, including the clerk of the court, notified defendant of the dismissal. Thus, because defendant was not represented by counsel when the motion to dismiss was granted, despite the former judge's order to appoint counsel for him, and because there is nothing in the record to show that defendant was informed of the dismissal of his petition at any time prior to 2011, thereby depriving defendant of his right to appeal this adverse finding, we find that fundamental fairness requires defendant's successive post-conviction petition claim of a coerced confession not be barred on the basis of *res judicata*.

¶ 47 III. Defendant Should Have Been Granted Leave to File his Successive Post-Conviction Petition Claim.

¶ 48 Having found that defendant's coerced confession claim is not barred by the doctrine of *res judicata*, we must now determine whether defendant should be granted leave to file his successive post-conviction petition. As stated above, leave will be granted where defendant shows good cause for failing to raise the claimed errors in a prior proceeding and actual prejudice resulted from the claimed errors. *Pitsonbarger*, 205 Ill. 2d at 460; 725 ILCS 5/122-1(f) (West 2008). "Cause" is defined as "any objective factor, external to the defense, which impeded the petitioner's

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ability to raise a specific claim at the initial post-conviction proceeding.” 725 ILCS 5/122-1(f) (West 2008); *Pitsonbarger*, 205 Ill. 2d at 462. “Prejudice” is defined as an error so infectious to the proceedings that the resulting conviction violates due process. 725 ILCS 5/122-1(f) (West 2008); *Pitsonbarger*, 205 Ill. 2d at 464. “[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 (2012).

¶ 49 In denying defendant leave to file his successive post-conviction petition in its entirety, the trial court misinterpreted defendant's due process claim as an "actual innocence" claim. Defendant's successive post-conviction petition, however, clearly includes a due process claim. Claim number one in the petition alleges that newly discovered evidence, not available at the time of his trial, corroborates defendant's claim that his confession was physically coerced. As a result of this misinterpretation, the trial court did not even address defendant's due process claim and, as a result, did not consider whether defendant had satisfied the cause-and-prejudice test such that he should be granted leave to file his successive post-conviction claim. For the reasons stated below, defendant is able to show both cause and prejudice as to his coerced confession claim and should have been granted leave to file that

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claim within a successive post-conviction petition.

¶ 50 Defendant argues that he has satisfied the "cause" portion of the cause-and-prejudice test because the 2006 Report was unavailable to him until 2006. Defendant further argues that he has shown "prejudice" because our supreme stated in *People v. Wrice*, 2012 IL 111860 (2012) that a physically-coerced confession that is used as substantive evidence against a defendant is never harmless error. Further, defendant argues that, like in *Wrice*, he has established prejudice because: (1) he has maintained since the outset that he was physically abused by the Area 2 officers; (2) he is African American, which is consistent with other incidents of abuse; (3) the abuse he sustained was about his body where it was not visible, which is consistent with the other incidents of abuse; (4) several of the officers he identified as his abusers were also identified in the 2006 Report; and (5) his claims of abuse took place in Area 2 during the time period when it was proven that police abuse had been occurring at the hands of Burge and those working under him. See *People v. Wrice*, 406 Ill. App. 3d 43, 53 (2010).

¶ 51 The State, in turn, argues that defendant has not shown cause because the 2006 Report defendant relies on was not attached to his successive post-conviction petition, and the 2006 Report contains evidence that was previously available to

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defendant when he filed prior petitions with the court. The State also argues that defendant did not satisfy the prejudice prong because defendant's claims of abuse have been inconsistent, the claims of abuse are not strikingly similar to those contained in the 2006 Report, and because defendant relies on documented reports of abuse not contained in the 2006 Report for his coerced confession claim.

¶ 52 We find, in light of our supreme court's ruling in *People v. Wrice* and the similarities between that case and the present case, defendant has shown both cause and prejudice and, as a result, should have been granted leave to file his successive post-conviction coerced confession claim. In *Wrice*, the defendant sought leave to file a second successive post-conviction petition challenging his convictions on the basis that newly discovered evidence supported his prior claim that his confession was the product of police torture and brutality. Prior to trial, Wrice filed a motion to suppress his confession arguing that he had been tortured at Area 2. His motion to suppress was denied. The defendant was thereafter convicted of multiple crimes, which were affirmed on direct appeal. The defendant filed an initial post-conviction petition in 1991 alleging abuse, but his petition was denied. He later requested leave to file his first successive post-conviction petition

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alleging abuse, which was also denied.

¶ 53 Later, the defendant sought leave to file a second successive post-conviction petition alleging abuse, wherein he relied on the 2006 Report as newly discovered evidence. That petition was also denied. On appeal, however, this court reversed and remanded for a third-stage evidentiary hearing, holding that the defendant had established cause and prejudice for a successive post-conviction petition. *Wrice*, 406 Ill. App. 3d at 52. This court concluded that the defendant had established cause because, while he may have raised torture claims in previous proceedings, he could not have cited the 2006 Report as corroboration because the 2006 Report had not been released. This court similarly found that the defendant satisfied the prejudice prong of the test because, based upon *People v. Wilson*, 116 Ill. 2d 29 (1987), "[t]he use of a defendant's coerced confession as substantive evidence of his guilt is never harmless error." *Wrice*, 406 Ill. App. 3d at 53.

¶ 54 On appeal to the supreme court, the State conceded that the defendant had satisfied the cause prong of the cause-and-prejudice test because the defendant had alleged and this court had found that the defendant could not have argued that the 2006 Report corroborated his claims of police torture in his prior post-conviction petitions because the report was not released

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until 2006. *Wrice*, 2012 IL 111860, ¶43. As to the prejudice prong of the test, the supreme court found that the *per se* rule in *Wilson*, as modified, still stands: "use of a defendant's *physically* coerced confession as substantive evidence of his guilt is never harmless error." (Emphasis in original). *Id.* at ¶¶71, 84.

¶ 55 Here, like in *Wrice*, defendant is claiming that the 2006 Report, which was unavailable at the time of his suppression hearing, trial and prior post-conviction proceedings, was new evidence that corroborates his claims that his confession had been physically coerced. Thus, like in *Wrice*, because the publish date of the 2006 Report is an objective factor that prohibited defendant from raising the 2006 Report in prior court proceedings, defendant has satisfied the cause prong of the cause-and-prejudice test.

¶ 56 Defendant has also satisfied the prejudice prong of the test because, as stated by our supreme court in *Wrice*, "[t]he use of a defendant's *physically* coerced confession as substantive evidence of his guilt is never harmless error." *Wrice*, 2012 IL 111860, ¶¶71, 84. We recognize that the State points out several inconsistencies in defendant's testimony and allegations of abuse, however, when we review the denial of leave to file a successive post-conviction petition, we must accept all well-pled

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facts as true. *Williams*, 392 Ill. App. 3d at 367. Defendant's successive post-conviction petition contains numerous facts that he was physically abused prior to giving his confession, and at this stage, we must accept those facts as true. Therefore, having satisfied both the cause and prejudice prongs of the test, we find that defendant should have been granted leave to file his successive post-conviction petition claim of coerced confession.

¶ 57 Although the State also argues that defendant's failure to attach the 2006 Report to his petition was fatal to his claim, we find that argument to be without merit. Not only did defendant, who was unrepresented by counsel at the time, request that the court take judicial notice of the 2006 Report, but he cited numerous cases that reference the substance of the 2006 Report, and the 2006 Report is readily and easily accessible to essentially anyone outside prison walls.

¶ 58 CONCLUSION

¶ 59 For the above reasons, we affirm the trial court's denial of leave with respect to defendant's *Brady* claim as that claim is barred under the doctrine of waiver. However, given that defendant has established the requisite cause and prejudice necessary to be granted leave to file a successive post-conviction claim with respect to his coerced confession claim, we reverse the trial court's denial of leave with respect to

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defendant's coerced confession claim and remand for further proceedings on that claim.

¶ 60 Affirmed in part; reversed in part and remanded for further proceedings.