

2014 IL App (1st) 122178-U
No. 1-12-2178
Order Filed December 31, 2014

SIXTH DIVISION

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County
Plaintiff-Appellee,)	
)	No. 99 CR 6398
v.)	
)	
MARCUS HUBBARD,)	
)	Honorable
Defendant-Appellant.)	William G. Lacy,
)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justice Rochford specially concurred in the judgment.
Presiding Justice Hoffman dissented.

ORDER

¶ 1 *Held:* The circuit court's denial of the defendant's motion for leave to file a successive postconviction petition was reversed. The defendant satisfied the cause-and-prejudice test required for filing a successive postconviction petition.

¶ 2 The defendant, Marcus Hubbard, appeals from an order of the circuit court of Cook County denying his motion for leave to file a successive postconviction petition. On appeal, the defendant contends that the denial of the motion was error. Based upon the record, we find that the defendant satisfied the cause-and-prejudice test required for filing a successive postconviction petition. We reverse the order of the circuit court and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 I. Trial Court Proceedings

¶ 5 A. Motion to Suppress

¶ 6 The defendant was charged by indictment with the February 3, 1999, murder of Kamal Kelly. The defendant filed a motion to suppress the statement he made to police after his February 8, 1999, arrest for the murder of Mr. Kelly. In the motion, the defendant alleged that he was interrogated "at relevant times by law enforcement officials or a person or persons acting on their behalf, including Milton Owen, #20498, D. Fidyk, #20863, M. McDermott, #20364, Airhart, #20931 and Assistant State's Attorney S. Anderson." ¹ The defendant alleged that he was not advised of his *Miranda* rights prior to questioning by the police. He further alleged as follows:

"That due to the physical, capacity and condition of the defendant, he was incapable and unable to appreciate and understand the full meaning of his *Miranda*

¹ The police officers' names are spelled various ways in the record. For consistency, the names will be spelled as follows: Owens, Fidyk, and Airhart.

rights because 2 six foot white cop[s], both [with] black hair and glasses slapped him several times in the face and any statement was therefore not the free and rational choice of the accused and was not made voluntarily, knowingly and intelligently
***."

Because the statements sought to be suppressed were obtained after he requested counsel and were the result of physical coercion, the defendant maintained the statements were involuntary under the 5th and 14th amendments to the United States Constitution.

¶ 7 A hearing on the defendant's motion to suppress was held on June 1 and June 6, 2000. Prior to the hearing, at the State's request, the defense clarified that the abuse alleged in the motion to suppress occurred during the "second interview" of the defendant, conducted at 5:30 p.m., on February 9, 1999, by detectives Owens and Fidyk.

¶ 8 Detective Milton Owens testified for the State at the suppression hearing as follows: Since 1996, Detective Owens had been assigned to the violent crimes unit at Area 2 of the Chicago police department. On February 9, 1999, at 5:30 p.m., Detective Owens and Detective Fidyk questioned the defendant about Mr. Kelly's murder. Detective Owens read the defendant his *Miranda* rights, and the defendant stated that he understood each right and agreed to speak to the detectives. The defendant denied any knowledge or involvement with Mr. Kelly's murder. The interview was terminated at that point.

¶ 9 At 6:30 p.m. on February 9, 1999, Detective Owens, accompanied this time by Detective Airhart, re-interviewed the defendant. After his *Miranda* rights were read to him by Detective Owens, the defendant stated he understood them and agreed to speak with the detectives. The defendant stated that he was in the vicinity of the area where Mr. Kelly was killed. At his request, the defendant was given a meal and cigarettes.

¶ 10 At 8 p.m., on February 9, 1999, the defendant was questioned again by detectives Owens and Airhart. Detective Owens again advised the defendant of his *Miranda* rights. After acknowledging that he understood his rights, the defendant spoke with the detectives for 30 to 40 minutes. At the end of their conversation, Detective Owens contacted the State's Attorney's office. Assistant State's Attorney (ASA) Sharon Kanter arrived at Area 2 at 10 p.m.²

¶ 11 At 10:30 p.m. on February 9, 1999, ASA Kanter advised the defendant of his *Miranda* rights. Acknowledging that he understood his rights, the defendant agreed to speak about the murder of Mr. Kelly. The defendant answered a series of questions put to him by ASA Kanter, and his answers were recorded by a court reporter. The only persons present were Detective Owens, ASA Kanter and the court reporter. After the court reporter typed up the defendant's statement, the detective and ASA Kanter reviewed the statement with him. The defendant stated that he had been treated "okay" by the police.

¶ 12 Detective Owens identified the State's exhibit No. 1, a color photograph of the defendant taken after he had given his statement and signed by ASA Kanter, Detective Owens and the defendant. The time and date, 2:45 a.m., February 10, 1999, were noted on the photograph.

¶ 13 Detective Owens denied that he or anyone in his presence slapped the defendant in the face. He denied that the defendant ever requested an attorney prior to giving his statement. Detective Owens did not know any police officers matching the descriptions in the defendant's motion to suppress. Detective Owens described Detective Fidyk as a white male, approximately 5 feet, 7 inches tall and Detective Airhart as a black male, approximately 5 feet, 7 inches tall with black hair. Detective Owens described Detective McDermott as

²While the spelling of ASA Kanter's name in the record is inconsistent, when called as a witness, she spelled it as "Kanter" for the court reporter.

approximately 5 feet, 10 inches tall with salt and pepper hair. Neither Detective Fidyk nor Detective McDermott wore glasses.

¶ 14 On cross-examination, Detective Owens testified that he did not know that the defendant had previously sustained a gunshot wound. The detective denied that the defendant was handcuffed to the wall of the interview room but acknowledged that the door was locked. Detective Owens did not see any lumps or bruises on the defendant but acknowledged that he did not look underneath the defendant's shirt to see if he was injured.

¶ 15 Billie Quinn, the defendant's grandmother, testified for the defendant at the suppression hearing as follows: Ms. Quinn visited the defendant at the county jail on a Saturday shortly after he was arrested. Two months prior to his arrest, the defendant had been shot. During her visit to the jail, the defendant told her that he had been beaten by police officers. Ms. Quinn observed that the left side of the defendant's face and head were swollen, and he was bent over. She told the defendant to get permission for medical treatment. She identified the defendant's exhibit No. 1 as a photograph of the defendant's face.³ Ms. Quinn maintained that in the photograph, the defendant's face was swollen and that was how he appeared when she visited him at the jail.

¶ 16 On cross-examination, Ms. Quinn acknowledged that she was not present when the defendant was arrested, and she had no knowledge of what occurred at the police station or at the time he gave his statement to the police. When she was shown the State's exhibit No. 1, she maintained that it showed swelling under his eye. Ms. Quinn did not identify which eye showed the swelling, and she admitted the swelling she observed could be due to the lighting. Ms. Quinn did not see any black and blue marks on the defendant's face. During that same

³ A search of the record on appeal failed to reveal the photographs offered as exhibits at the hearing on the motion to suppress.

Saturday visit to defendant, she did observe some black and blue marks in his stomach area when the defendant lifted his shirt up. The parties stipulated that the defendant was arrested on a Tuesday.

¶ 17 The trial court denied the defendant's motion to suppress. The court found no evidence of injury to the defendant on the State's exhibit No. 1. The court further found no evidence corroborating Ms. Quinn's testimony. Even if her testimony as to the injuries she observed on the defendant was accepted, the trial court found there was no evidence as to when he received the injuries she described.

¶ 18 B. Jury Trial

¶ 19 The evidence and testimony presented at the defendant's trial are set forth in the Rule 23 Order disposing of the defendant's direct appeal from the jury's verdict finding him guilty of Mr. Kelly's murder. See *People v. Hubbard*, No. 1-00-3437 (2000) (unpublished order under Supreme Court Rule 23). The State's evidence against the defendant consisted of his statement to police admitting he shot Mr. Kelly and his identification by Anthony Williams and Donte Askew, two eyewitnesses to the shooting, as the individual who shot Mr. Kelly. The defendant testified in his own defense, admitting he shot Mr. Kelly but claiming it was in self-defense.

¶ 20 Also testifying at the defendant's trial was Detective Michael McDermott. On February 8, 1999, Detective McDermott and his partner, Detective Fidyk, arrested the defendant in connection with the shooting of Mr. Kelly. Upon arriving at Area 2, the defendant was placed in an interview room. Later in the evening of February 8, 1999, the defendant was questioned by detectives McDermott and Fidyk. After the defendant was given his *Miranda* rights, he agreed to talk to the detectives. The defendant denied being in the area of the

shooting and claimed he knew nothing about it. Later that same evening, the defendant was placed in a lineup where he was identified as the shooter by Mr. Williams; in a second lineup he was identified as the shooter by Mr. Askew.

¶ 21 Following the lineups, Detective McDermott contacted the felony review unit of the State's Attorney's office. Around 11 p.m. on February 8, 1999, ASA Scott Anderson arrived at Area 2. After ASA Anderson orally advised the defendant of his *Miranda* rights, the defendant agreed to talk to ASA Anderson and Detective McDermott. When confronted with the fact that he had been identified as being in the area of the shooting, which occurred at 9:57 p.m., the defendant acknowledged that he was in the area but had gone home around 8:30 p.m. On cross-examination, Detective McDermott was questioned about his investigation of the shooting and the conduct of the lineup and the interview with the defendant and ASA Anderson.

¶ 22 II. Direct Appeal

¶ 23 The jury found the defendant guilty of first degree murder, and he was sentenced to a term of 40 years' imprisonment. On direct appeal, this court rejected the defendant's argument that the jury was misled as to the burden of proof and affirmed the defendant's conviction and sentence. *Hubbard*, order at 8-9.

¶ 24 III. Postconviction Proceedings

¶ 25 A. *Pro Se* Postconviction Petition

¶ 26 On April 4, 2003, the defendant filed his *pro se* petition pursuant to section 122-1 of the Post-Conviction Hearing Act (725 ILCS 5/122 *et seq.* (West 2002) (the Act)). The petition alleged, *inter alia*, that defense counsel was ineffective for failing to investigate and obtain the defendant's medical records indicating that he sought medical attention for the injuries

inflicted by the police, which he alleged would have supported his motion to suppress his statement. The defendant attached his medical records from Cermak Health Service of Cook County. The circuit court dismissed the petition as frivolous and without merit. On appeal, this court determined that the circuit court failed to rule on the petition within 90 days as required by section 122-2.1(a) of the Act (725 ILCS 5/122-2.1(a) (West 2002)). We reversed and remanded the case for second-stage proceedings. See *People v. Hubbard*, No. 1-03-3132 (2005) (unpublished order under Supreme Court Rule 23).

¶ 27

B. Amended Postconviction Petition

¶ 28

On June 30, 2008, the defendant's appointed postconviction counsel filed an amended petition asserting, *inter alia*, the defendant's claim of ineffective assistance of defense counsel for failing to present the defendant's medical records at the suppression hearing. Attached to the amended petition were the defendant's medical records from Cermak Health Service of Cook County. According to the February 17, 1999, progress notes and consultation request form, a gunshot wound suffered by the defendant in 1997, had reopened. According to the February 24, 1999, progress notes and consultation request form, surgery was performed to remove packing that had been left in the wound when it was originally treated.

¶ 29

In its motion to dismiss the *pro se* and amended postconviction petitions, the State argued that the defense counsel's failure to submit the defendant's medical records was not ineffectiveness of counsel. The State argued that according to his medical records, the defendant did not seek medical attention until seven days after he gave his statement, and he was treated for a pre-existing injury. Since the records did not advance the defendant's claim

that his statement resulted from a police beating, the State maintained that defense counsel was not ineffective.

¶ 30 The circuit court found that the defendant failed to make a showing that his constitutional rights were violated and granted the State's motion to dismiss the postconviction petitions. The defendant appealed the dismissal, and this court granted appellate counsel's motion to withdraw as counsel for the defendant and affirmed the judgment of the circuit court. *People v. Hubbard*, No. 1-09-0886 (2010) (unpublished order under Supreme Court Rule 23).

¶ 31 *C. Habeas Corpus*

¶ 32 On May 20, 2010, the defendant filed a petition for the issuance of a writ of *habeas corpus* alleging that his conviction for first degree murder was void because the circuit court lacked jurisdiction. The circuit court denied the petition, and the defendant appealed. This court granted appellate counsel's motion to withdraw as counsel for the defendant, denied the defendant's request to proceed *pro se* and affirmed the circuit court's order denying *habeas corpus* relief. *People v. Hubbard*, No. 1-10-2352 (2011).⁴

¶ 33 *D. Successive Postconviction Petition*

¶ 34 On April 19, 2012, the defendant filed his *pro se* motion for leave to file a successive postconviction petition. In the motion, the defendant alleged that his prior allegations of abuse by the Chicago police were supported the Report of the Special State's Attorney released on July 19, 2006 (the SSA Report), attached to his successive postconviction petition. The SSA Report found proof beyond a reasonable doubt that police officers under the command of Jon Burge at Area 2 and Area 3 engaged in the torture of criminal suspects.

⁴ On October 11, 2011, the defendant filed a petition for relief pursuant to section 2-1401(f) of the Code of Civil Procedure (735 ILCS 5/2-1401(f) (West 2010)). In the petition, the defendant alleged that his 40-year sentence was void. On June 8, 2012, the circuit court dismissed the section 2-1401(f) petition. The defendant did not appeal the dismissal.

See *People v. Wrice*, 406 Ill. App. 3d 43, 44 (2010), *aff'd as modified*, 2012 IL 111860. As additional support for his claim, the defendant attached a document, marked confidential, in which a number of organizations sought a hearing before the Cook County Board based on the contents of the SSA Report. The defendant alleged that he did not come into possession of a copy of the SSA Report until June 2011, and that he did not come into possession of the hearing request document until January 2012.

¶ 35 The defendant asserted that the only evidence against him was his confession and his identification by Mr. Williams and Mr. Askew that had also taken place at Area 2 headquarters. The defendant argued that, had the SSA Report and the Hearing Request document been available to the defendant at the time of his motion to suppress, his statement would have been suppressed. Because his confession was coerced by the police and was used as substantive evidence of his guilt, the defendant argued that he should be granted leave to file his successive postconviction petition. See *Wrice*, 2012 IL 111860, ¶ 84 (a harmless error analysis was inapplicable to the defendant's postconviction claim that his confession was the product of physical coercion by police officers at Area 2 headquarters); see also *Wrice*, 406 Ill. App. 3d at 53.

¶ 36 On June 8, 2012, the circuit court denied the defendant's *pro se* motion for leave to file his successive postconviction petition. The defendant appeals.

¶ 37 ANALYSIS

¶ 38 The defendant contends that the dismissal of his successive postconviction petition was erroneous because he satisfied the cause-and-prejudice test set forth in section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2012)).

¶ 39 I. Standard of Review

¶ 40 We review *de novo* the circuit court's ruling as to whether the defendant satisfied the cause-and-prejudice test. *Wrice*, 406 Ill. App. 3d at 51.

¶ 41 II. Discussion

¶ 42 A. *Res Judicata and Waiver*

¶ 43 The Act provides a procedure by which defendants can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois constitution or both. *People v. Petrenko*, 237 Ill. 2d 490, 495-96 (2010). A postconviction proceeding is not an appeal from the judgment of conviction, but is a collateral attack on the proceedings in the trial court. *Petrenko*, 237 Ill. 2d at 499. A postconviction proceeding is limited to constitutional issues that were not and could not have been adjudicated on direct appeal. *People v. Williams*, 394 Ill. App. 3d 236, 242 (2009). The doctrine of *res judicata* bars consideration of issues raised and decided on direct appeal, and issues that could have been raised but were not, are considered waived. *Williams*, 394 Ill. App. 3d at 242. A claim not raised in an original or amended postconviction petition is also waived. *Williams*, 394 Ill. App. 3d at 242 (citing 725 ILCS 5/122-3 (West 2004)).

¶ 44 To avoid the consequences of *res judicata* and waiver, a defendant must seek leave of court to file a successive postconviction petition. See 725 ILCS 5/122-1(f) (West 2012). Section 122-1(f) provides in pertinent part as follows:

"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 the 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 2012).

¶ 45 In determining whether leave to file a successive postconviction petition should be granted, our courts apply the cause-and-prejudice test. See *People v. Edwards*, 2012 IL 111711, ¶ 27 (no basis in the Act for applying first-stage analysis to a successive petition); *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 21.⁵ The cause-and-prejudice test is more exacting than the gist standard applicable to initial postconviction petitions and requires that a defendant "submit enough in the way of documentation to allow a circuit court to make that determination." *Edwards*, 2012 IL 111711, ¶ 24 (quoting *People v. Tidwell*, 236 Ill. 2d 150, 161 (2010)). All well-pleaded facts and supporting affidavits in the defendant's motion must be taken as true. *Edwards*, 2012 IL App (1st) 091651, ¶ 25. The defendant must establish both cause and prejudice to allow him to proceed on a successive postconviction petition. *People v. Davis*, 2014 IL 115595, ¶ 14.

¶ 46 B. *Wrice*

¶ 47 In the present case, the defendant identified the "objective factor" impeding his ability to raise his claim of a coerced confession as his failure to receive a copy of the SSA Report until June 2011. He maintained he demonstrated prejudice because the police tortured him into confessing to Mr. Kelly's murder, which violated his due process rights. The defendant relies on *Wrice*.

⁵ The two *People v. Edward* cases involve different defendants.

¶ 48 Stanley Wrice was charged with sexual assault in 1982. At the hearing to suppress his confession and at trial, Mr. Wrice testified that he was beaten by police. He denied confessing to the assistant State's Attorney that he had participated in the assault of the victim. While in his direct appeal, Mr. Wrice did not raise any claims of police brutality, in 1991, he filed a *pro se* postconviction petition alleging he was denied his constitutional rights when he was beaten by police at Area 2. The circuit court summarily dismissed the petition, and this court affirmed. *Wrice*, 406 Ill. App. 3d at 48. In 2000, Mr. Wrice filed his first successive postconviction petition alleging that his confession was involuntary because he was tortured by certain named police officers. The circuit court granted the State's motion to dismiss and denied Mr. Wrice's motion for reconsideration. This court affirmed. *Wrice*, 406 Ill. App. 3d at 49.

¶ 49 In 2002, an investigation was instigated by the presiding judge of the criminal division of the circuit court of Cook County and culminated in the issuance of the SSA Report in 2006. The report found that Jon Burge, a former Chicago police commander, was guilty of prisoner abuse and that police officers under his command followed his example in their treatment of prisoners. *Wrice*, 406 Ill. App. 3d at 50. The report named the two officers Mr. Wrice alleged had beaten him as officers accused of making false statements regarding their torture of prisoners. Due to the expiration of the statute of limitations and proof issues, the special assistant State's Attorney declined to prosecute. *Wrice*, 406 Ill. App. 3d at 50 (citing the Report of the Special State's Attorney 33-34 (July 19, 2006)).

¶ 50 On October 23, 2007, Mr. Wrice filed his second successive postconviction petition, citing the SSA Report as new evidence corroborating his claim that his confession and a witness's statement implicating him were the product of police torture. The circuit court

denied him leave to file his second successive petition. Mr. Wrice appealed. *Wrice*, 406 Ill. App. 3d at 51.

¶ 51 In reversing the circuit court's denial of leave to file a second successive petition, this court found that the release date of the SSA Report was the objective factor impeding Mr. Wrice from raising the SSA Report in earlier proceedings. Since the SSA Report was not released until July 19, 2006, Mr. Wrice could not have raised it in his earlier 1991 and 2000 petitions. Therefore, Mr. Wrice satisfied the cause prong of the test. *Wrice*, 406 Ill. App. 3d at 52.

¶ 52 This court further found that Mr. Wrice had satisfied the prejudice prong of the test. Noting that use of a coerced confession may never be used as substantive evidence, this court then determined that Mr. Wrice had established prejudice where: he consistently claimed in his motion to suppress, at trial and in postconviction proceedings that he was tortured; his claims of being tortured were strikingly similar to those of other prisoners at Areas 2 and 3; the officers involved in his case were identified in other allegations of torture; and the allegations were consistent with the systemic and methodical torture findings by the Office of Professional Standards and the SSA Report. *Wrice*, 406 Ill. App. 3d at 53; see *Wrice*, 2012 IL 111860, ¶ 84 (our supreme court held that for the "never harmless error" rule to apply, the coercion must be physical).

¶ 53 *C. Satisfaction of the Cause-and-prejudice test in this Case*

¶ 54 1. Cause

¶ 55 The State maintains that the defendant cannot establish cause because he had numerous opportunities during the trial court proceedings, on his direct appeal and during his prior

postconviction proceedings to raise his allegations of torture by Detective McDermott. We disagree.

¶ 56 In this case, the defendant filed his *pro se* postconviction petition on April 4, 2003. Since the SSA Report was not issued until July 19, 2006, the defendant could not have raised the SSA Report to corroborate his claim of police torture. See *Wrice*, 406 Ill. App. 3d at 52. The State responds that since the defendant's amended postconviction petition was filed on June 30, 2008, almost two years after the SSA Report was released, the release date of the report cannot serve as the objective factor preventing the defendant from using the SSA Report to support his claim that his statement admitting to Mr. Kelly's murder was coerced by the police. See *People v. Mitchell*, 2012 IL App (1st) 100907, ¶ 58 (where the SSA Report was not issued until 2006, the defendant showed cause for failing to present that evidence in any prior proceeding). For pleading purposes, the defendant's factual allegation and averment in his affidavit that he did not come into possession of the SSA Report until June 2011, must be taken as true and therefore constitutes an objective factor keeping him from raising the SSA report in the prior proceedings.

¶ 57 2. Prejudice

¶ 58 In *Wrice*, the appellate court considered the following factors in determining whether sufficient evidence had been presented at the pleading stage to entitle Mr. Wrice to an evidentiary hearing: (1) consistent claims of torture, (2) the claims of torture were very similar to other claims of torture, (3) officers inflicting torture were identified by victims in other claims of torture, and (4) the claims of torture are consistent with the reports of torture in Areas 2 and 3 under Jon Burge. *Wrice*, 406 Ill. App. 3d at 53.

¶ 59 In his successive postconviction petition, the defendant alleged that on February 8, 1999, he was arrested by Detective McDermott and Detective Fidyk and three unknown detectives. He was transported to Area 2 headquarters, where he was interrogated by Detective McDermott. According to the defendant, Detective McDermott verbally abused him and slapped him on the side of the head and kicked him. Detective McDermott and Detective Fidyk then left the room. Later, the defendant was twice taken from the interrogation room by these detectives and placed in a lineup and then returned to the interrogation room. After his return to the interrogation room following the second lineup, Detective McDermott told him he had been identified as the shooter. When the defendant continued to deny any involvement in the shooting, Detective McDermott slapped him on the side of the head and punched him repeatedly on his upper body. After the defendant admitted being in the area of the shooting, Detective McDermott left the room and returned with an assistant State's Attorney (the ASA). The defendant repeated that he had been in the area but had left prior to the shooting. Detective McDermott and the ASA left the room. Detective McDermott returned and began kicking the defendant who, fearing for his life, confessed to being the shooter. Detective McDermott left the room but returned with detectives Owens and Fidyk. The defendant then confessed to them that he was the shooter.

¶ 60 The defendant further alleged that, rather than being transferred to the jail, he was kept at Area 2 until the next day, February 9, 1999. Unlike his motion to suppress, the defendant did not claim he was abused during his interrogation on February 9, 1999. Instead, he claimed that during the February 9, 1999, interrogation, he was crying and asking for an explanation of why he was being held at the police station. Detective Fidyk told him they were waiting

for an assistant State's Attorney and got the defendant some food and cigarettes to help him get his nerves together.

¶ 61 The defendant's factual allegations, taken as true, together with his affidavit and the SSA Report, are sufficient to satisfy the prejudice portion of the test at the pleading stage. The defendant raised claims of abuse by the police in his motion to suppress and then on postconviction review. In his successive postconviction petition, the defendant alleged acts of torture that were similar to the torture claims of other defendants who were beaten by police at Area 2. He identified Detective McDermott as his abuser. Detective McDermott was named in the SSA Report. While Detective McDermott did not match the defendant's description of the police officers in his motion to suppress, the detective was listed in the defendant's motion to suppress as one of the officers who interrogated him. At trial, Detective McDermott acknowledged that he interviewed the defendant at Area 2.

¶ 62 CONCLUSION

¶ 63 Since the defendant satisfied the cause-and-prejudice test at the pleading stage, we reverse the order denying him leave to file his successive postconviction petition. The cause is remanded to the circuit court for the appointment of counsel and second-stage proceedings. See *Wrice*, 2012 IL 111860, ¶ 87 (modifying the appellate court's order remanding for an evidentiary hearing; instead, the cause was remanded for the appointment of counsel and second-stage proceedings).

¶ 64 Reversed and cause remanded with directions.

¶ 65 Justice Rochford, specially concurs.

¶ 66 I concur with Justice Hall's decision to reverse the order denying defendant leave to file his successive postconviction petition.

¶ 67 Defendant was arrested on February 8, 1999, by Detectives McDermott and Fidyk, and brought to Area 2 and placed in an interview room. Defendant was interviewed at various times at Area 2 by Detectives McDermott, Owens, Fidyk, and/or Airhart until he made a statement to an Assistant State's Attorney at 10:30 p.m. on February 9, 1999, and a recorded statement at about 1 a.m. on February 10, 1999.

¶ 68 In his unsuccessful motion to suppress his statements as being coerced, defendant explicitly listed the officers whom had interrogated him. The list included Detective McDermott. The hearing on the motion to suppress however, was limited to paragraph 4 of the motion which stated that "2 six foot white cop[s], both black hair and glasses slapped him several times in the face." Paragraph 4 did not include a date on which the abuse purportedly took place. Prior to the start of the hearing on the motion to suppress, the State had informed the court that it had asked defendant for clarification as to when the allegations in paragraph 4 occurred. The State further explained that it was informed that the allegations pertained to "the second interview" which took place on February 9, 1999, at 5:30 p.m. Defendant's trial counsel concurred with the State. The State then called Detective Owens who testified he began his shift at 4:30 p.m. on February 9, 1999, and Detective Fidyk had worked the earlier shift that day. Detective Owens testified to interviewing defendant at 5:30 p.m. with Detective Fidyk and at 6:30 p.m. and 8 p.m. with Detective Airhart. Detective Owens testified that by 5:30 p.m. on February 9, 1999, defendant had been in custody for 23 hours. At the hearing, Detective Owens described Detective McDermott as being 5-feet-10-inches tall with "salt-and-pepper, black and white" hair and stated Detective McDermott did not wear glasses. Detective Owens denied that defendant had been abused.

¶ 69 Defendant, in his successive postconviction petition, alleged that "his trial counsel failed to introduce any corroborating evidence" to support the claims of coercion and abuse set forth in his motion to suppress. His successive petition contains specific factual allegations of abuse which took place while he was in custody on February 8, 1999. Defendant's detailed account asserts that Detective McDermott engaged in a pattern of abuse which included threats, slaps, punches, and kicks. In the successive petition, defendant also alleged that the "brutality he was subjected to [at] area 2 on [February 8 through February 9], 1999," caused a prior gunshot wound to his abdomen to reopen.

¶ 70 Defendant attached to his petition the 2006 report of the Special State's Attorney; the "Confidential Request for a Hearing Before the Cook County Board on the Special Prosecutor's Police Torture Investigation and Report;" Cermak Hospital medical records; and the transcript of his grandmother Billie Quinn's testimony at the suppression hearing. The medical records show that on February 13, 1999, defendant received treatment for problems he was having with a gunshot wound in his abdomen. His grandmother's testimony at the suppression hearing was that she saw defendant at the jail on February 13, 1999. Ms. Quinn testified that defendant's face was swollen and that he was bent over and holding his midsection. Defendant told her that he had been beaten by the police.

¶ 71 Our supreme court in *People v. Smith*, 2014 IL 115946, recently addressed section 122-1(f) of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122(f) (West 2004)), and that section's "cause and prejudice" requirements. The supreme court noted that section 122-1(f) did not include an "express provision for fully resolving the cause and prejudice determination prior to proceeding with the three-stage postconviction process outlined in the Act." *Smith*, 2014 IL 115946, ¶ 28. The supreme court rejected the notion that a petitioner

was "required to establish cause and prejudice conclusively prior to being granted leave to file a successive petition." *Id.* ¶ 29. Instead, section 122-1(f) was intended to be an "avenue" which would lead to a successive petition being subjected to the "entire three-stage postconviction process." *Id.* The court also said that "[s]ection 122-1(f) does not provide for an evidentiary hearing on the cause-and-prejudice issues and, therefore, it is clear that the legislature intended that the cause-and-prejudice determination be made on the pleadings prior to the first stage of postconviction proceedings." *Id.* ¶ 33.

¶ 72 After considering its holdings in *People v. Pitsonbarger*, 205 Ill. 2d 444 (2002); *People v. Tidwell*, 236 Ill. 2d 150 (2010); and *People v. Edwards*, 2012 IL 111711; the supreme court concluded that leave to file a successive postconviction petition "should be denied when it is clear, from a review of the successive petition and the documentation submitted by the petitioner, that the claims alleged by the petitioner fail as a matter of law or where the successive petition with supporting documentation is insufficient to justify further proceedings." *Smith*, 2014 IL 115946, ¶ 35.

¶ 73 I agree defendant should be granted leave to file his successive petition in that he has submitted enough in the way of documentation at this stage to justify further postconviction proceedings under the Act. In light of *Smith*, I cannot say that as a matter of law, the cause and prejudice requirement for leave to file the successive postconviction petition has not been met here. I acknowledge that there are reasons to question whether defendant has made a sufficient showing as to cause. I believe those issues should be and will be addressed as the successive postconviction petition is subjected to further review under the Act.

¶ 74 PRESIDING JUSTICE HOFFMAN, dissenting:

¶ 75 I believe that the circuit court properly denied the defendant leave to a file successive postconviction petition, as the record positively rebuts the allegations contained therein. As a consequence, I dissent.

¶ 76 Following a jury trial, the defendant was convicted of the first-degree murder of Kamal Kelly and sentenced to a 40-year term of imprisonment.

¶ 77 The record reflects that the defendant filed a pre-trial motion to suppress his confession, alleging that he was physically coerced into confessing by “2 six foot white cop [*sic*], both black hair and glasses [who] slapped [him] several times in the face ***.” At the hearing on that motion, the defendant’s attorney verified that the physical coercion of which the defendant complained occurred during the course of his interrogation by Detectives Owens and Fidyk on February 9, 1999, at approximately 5:30 p.m. The defendant did not testify at the hearing; however, his grandmother, Billie Quinn, testified that, when she visited the defendant in the Cook County jail four days after he confessed, he was “swollen about the face and head and he was bent over[,] holding himself in the midsection.” Ms. Quinn acknowledged that she had no personal knowledge of how the defendant sustained the injuries which she observed. The trial judge denied the defendant’s motion to suppress, finding, *inter alia*, that the photographs taken of the defendant immediately following his confession failed to reveal any injuries.

¶ 78 At trial, the defendant raised no claim that his confession was coerced. Rather, he admitted that he fired the shots that killed Kamal Kelly. On direct appeal from his conviction for first-degree murder, the defendant raised no issue relating to the denial of his motion to suppress or to the physical coercion alleged therein. This court affirmed the defendant’s

conviction and sentence. *People v. Hubbard*, No. 1-00-3437 (2002) (unpublished order under Supreme Court Rule 23).

¶ 79 On April 4, 2003, the defendant filed a *pro se* postconviction petition alleging, *inter alia*, that he was repeatedly beaten by detectives until he gave and signed his inculpatory statement, and that his trial counsel was ineffective for failing to investigate and obtain records which would have revealed that, immediately after giving the statement, the defendant sought medical attention for injuries suffered at the hands of the police which would have supported his motion to suppress. The circuit court summarily dismissed the petition on July 7, 2003, more than 90 days after it was filed, in violation of section 122-2.1 of the Post-Conviction Hearing Act (Act), 725 ILCS 5/122-2.1 (West 2002). Consequently, this court reversed that dismissal and remanded the matter back to the circuit court with directions. *People v. Hubbard*, No. 1-03-3132 (2005) (unpublished order under Supreme Court Rule 23).

¶ 80 On remand, the circuit court appointed counsel for the defendant. On June 30, 2008, counsel filed a certificate pursuant to Supreme Court Rule 651(c) (eff. December 1, 1984), along with an amended postconviction petition. The amended postconviction petition contained allegations mirroring the physical abuse alleged in the defendant's pre-trial motion to suppress; namely, that he was subjected to acts of physical coercion by police officers, including being slapped in the face several times. The State filed a motion to dismiss both the defendant's *pro se* petition and the amended petition filed by counsel.

¶ 81 On March 26, 2009, the circuit court granted the State's motion, finding, *inter alia*, that the record failed to support the defendant's assertion that the aggravation of his prior gunshot wound, for which he received medical treatment subsequent to having confessed, was caused

by the police. The court further found that the fact that the defendant obtained medical treatment more than 7 days after executing his inculpatory statement actually “believes” his claim that his injuries were caused by the police. After granting the State Appellate Defender’s motion to withdraw as the defendant’s counsel, this court affirmed the circuit court’s order of March 26, 2009, dismissing the defendant’s *pro se* postconviction petition and the amended petition filed by counsel. *People v. Hubbard*, No. 1-09-0886 (2010) (unpublished order under Supreme Court Rule 23).

¶ 82 There is no suggestion in the defendant’s pre-trial motion to suppress, his testimony at trial, his initial *pro se* postconviction petition, or his amended postconviction petition, that he was physically abused by Detective Michael McDermott. Nevertheless, on April 19, 2012, the defendant sought leave to file a successive postconviction petition accompanied by a successive *pro se* postconviction petition, alleging that his constitutional rights were violated when he was severely beaten and coerced into confessing during his interrogation at the Chicago Police Area 2 headquarters. Attached to the defendant's pleadings were the report of the Special State’s Attorney released on July 19, 2006 (SSA Report), along with a document entitled "Confidential Request for a Hearing Before the Cook County Board on the Special Prosecutor’s Police Torture Investigation and Report" (Confidential Request), as proof that police officers under the command of Lieutenant Jon Burge committed systematic torture of criminal defendants interrogated at the Chicago Police Area 2 and Area 3 headquarters. Both of these documents mention Detective McDermott, who arrested the defendant and took part in some of his interrogation sessions, as having participated in the torture of detainees at the Area 2 Headquarters.

¶ 83 The defendant contended that he did not come into possession of the SSA Report until June 2011 or of the Confidential Request until January 2012. He argued that the documents constituted newly discovered evidence corroborating his claims of physical abuse which he did not obtain until after the dismissal of his original *pro se* postconviction and amended postconviction petitions. As such, the defendant contended that these documents demonstrated cause for the filing of a successive postconviction petition. He also argued that he was prejudiced because the documents constituted evidence that the State used a coerced confession as substantive evidence of his guilt. On June 8, 2012, the circuit court denied the defendant leave to file a successive postconviction petition, and this appeal followed.

¶ 84 The Act contemplates the filing of only one postconviction petition. *People v. Morgan*, 212 Ill. 2d 148, 153 (2004). The Act also provides, however, that the court can grant a defendant leave to file a successive postconviction petition if he “demonstrates cause for his *** failure to bring the claim in his *** initial post-conviction proceedings and [that] prejudice results from that failure.” 725 ILCS 5/122-1(f) (West 2012). Section 122-1(f) of the Act goes on to provide that a defendant shows cause by "identifying an objective factor" that impeded his ability to raise a specific claim during his initial post-conviction proceedings, and shows prejudice by "demonstrating that the claim not raised during his *** initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process.” 725 ILCS 5/122-1(f) (West 2012). The defendant bears the burden of demonstrating that his proposed successive petition qualifies for review under the cause-and-prejudice test codified in section 122-1(f) of the Act. *People v. Tidwell*, 236 Ill. 2d 150,157-58 (2010). That is to say, the defendant must demonstrate both cause and prejudice

to entitle him to proceed on a successive postconviction petition. *People v. Davis*, 214 Ill 115595, ¶14.

¶ 85 Based upon the record in this case, I believe that the defendant has not demonstrated cause for his failure to raise the claim of physical abuse by Detective McDermott at an earlier stage of the proceedings. Assuming for the sake of analysis that the defendant was actually unaware of the SSA Report and the Confidential Request until after the dismissal of his initial postconviction petitions, those documents in no way corroborate the allegation of physical abuse set forth therein. The defendant never made any allegations of physical abuse on the part of Detective McDermott until he filed his proposed successive postconviction petition. No such allegations appear in his pre-trial motion to suppress, in his initial *pro se* postconviction petition, or in the amended petition. Prior to the filing of his motion for leave to file a successive postconviction petition, the defendant's claims of physical coercion were directed against Detectives Owens and Fridyk during the interrogation which took place on February 9, 1999 at 5:30 p.m., as acknowledged by the defendant's attorney during the hearing on his pre-trial motion to suppress. As Detectives Owen and Fridyk are not mentioned as perpetrators of detainee abuse in either the SSA Report or the Confidential Request, the documents do not qualify as corroboration of any claim of abuse made by the defendant in his pre-trial motion to suppress or his initial postconviction petitions. Further, the defendant's lack of knowledge of the content of the SSA Report or the Confidential Request in no way prevented him from claiming physical abuse by Detective McDermott in either his initial *pro se* postconviction petition or in the amended petition. Had the defendant made such an allegation directed against Detective McDermott in his initial petitions, the SSA Report and the Confidential Request might well have corroborated his claim and

brought this case within the holding of this court in *People v. Wrice*, 406 Ill. App. 3d 43 (2010). However, the defendant made no such claim. Additionally, the record establishes that Officer McDermott did not take part in the interview session during which the defendant claimed that he suffered physical abuse, and did not fit the description of the officers that physically abused the defendant as set forth in his pre-trial motion to suppress.

¶ 86 Based upon the foregoing analysis, I would affirm the judgment of the circuit court which denied the defendant leave to file a successive postconviction petition.