2015 IL App (1st) 132272-U

FIFTH DIVISION
JUNE 26, 2015

No. 1-13-2272

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

	)	Appeal from the
THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of
	)	Cook County
Respondent-Appellee,	)	
	)	
v.	)	No. 00 CR 11759
	)	
RUSSZELL RUSSELL,	)	
	)	Honorable
Petitioner-Appellant.	)	Jorge Luis Alonso,
	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Palmer and Justice McBride concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming denial of leave to file successive postconviction petition, where (a) a "newly discovered lockup report" that allegedly corroborated petitioner's claim that his confession was physically coerced failed to satisfy the cause-and-prejudice test and (b) petitioner failed to state a colorable claim of actual innocence based on the affidavit of a "newly discovered eyewitness."

¶ 2 Following a jury trial, petitioner Russzell Russell was convicted of first degree murder and sentenced in 2005 to 70 years in the Illinois Department of Corrections. His conviction stems from the fatal shooting of Stephon Peden in 2000. Petitioner appeals from an order of the

circuit court of Cook County denying him leave to file a successive *pro se* petition for relief under section 122-1(f) of the Illinois Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1(f) (West 2012)). On appeal, petitioner contends that he "should have been granted leave to file a successive post-conviction petition where the petition included a newly discovered lockup report supporting his longstanding claim that he was kept all night in an interrogation room before his confession, corroborating his allegation that his statement was the product of physical coercion by police." Petitioner further contends that the "circuit court erred in denying [him] leave to file a successive post-conviction petition where he stated a colorable claim of actual innocence with the affidavit of Burt Robinson, a newly discovered eyewitness who would testify that [petitioner] did not commit the crime." For the following reasons, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 In the early afternoon of April 11, 2000, near 4742 West Washington Street in Chicago, 16-year-old Stephon Peden (Peden) was shot in his head. In May, 2000, a grand jury indicted petitioner on multiple counts relating to Peden, including first degree murder.

¶ 5 Motion to Suppress Statements

¶ 6 On February 6, 2003, petitioner filed a motion to suppress statements, seeking to suppress his oral and written statements made prior to, during, or after his arrest; the words "amended 7/24/03" were handwritten on the first page of the motion. The motion stated that "defendant was arrested on April 11, 2000, at or near the vicinity of 132 North Paulina" in Chicago. According to the motion, petitioner was subsequently "interrogated at Area 4 by law enforcement officials or a person or persons acting on their behalf[.]" Petitioner alleged that, prior to the interrogation, he was not informed of his rights, including his rights to remain silent

and to have a lawyer present during the interrogation. The motion further provided, in part:

> "5. That the statements sought to be suppressed were obtained as a result of physical coercion illegally directed against the defendant and that such statements were, therefore, involuntary, in violation of the 5th & 14th amendments to the United States Constitution. Defendant was kept in the same room for a long period of time until he was taken to another police station for a polygraph. When he refused to take the polygraph 'test', defendant was beaten and choked by police officers."

The words "Two detectives who spoke to him after the polygraph" were handwritten after the foregoing paragraph.

¶ 7 During the hearing on the motion to suppress, prior to witness testimony, the following exchange occurred between counsel and the court regarding "[t]he fifth point" in the motion:

> [PROSECUTOR]: I want to clarify that was the only allegation of physical coercion, but there is a line that says physical coercion and [defense counsel] indicated that was the only –
>
> THE COURT: In the fifth paragraph, it says that the statement sought to be suppressed were obtained as a result of a physical coercion illegally directed against the defendant, et cetera. And the only allegation in this paragraph is that he was beaten and choked by the officers after he refused to take the polygraph.
>
> Is that the only allegation that anyone ever, during the course of the investigation –
>
> [DEFENSE COUNSEL]: Yes, your Honor."

The court stated that it "wrote on the motion to suppress statements that was filed February the

6th, 2003 the words amended, 7/24/03" and asked petitioner to confirm, under oath, that he had "looked at this amended motion to suppress statement" and that the "facts *** stated in this motion to suppress" were "true and correct." Other than providing such confirmation, petitioner did not testify at the hearing.

¶ 8 The testimony during the hearing on the motion to suppress statements included the following. A female assistant State's attorney (the female ASA)[1] testified that she had arrived at Area 4 at approximately 8:15 p.m. on April 11, 2000. Between 8:15 p.m. and 1:30 a.m. the following day, she interviewed and took handwritten statements from witnesses. At approximately 1:30 a.m., the female ASA met with petitioner and Detectives Puttin and Vucko; petitioner was "in one of the interview rooms in Area 4." The female ASA identified herself as an assistant state's attorney and advised petitioner of his rights. Petitioner agreed to speak with the female ASA regarding Peden's murder; they spoke for thirty minutes. When asked during the hearing "would you characterize that interview with the defendant's statement as an alibi," the female ASA responded, "Yes." At approximately 2:00 a.m., the female ASA, Puttin and Vucko exited the interview room and discussed the investigation. According to the female ASA, they "decided that the alibi needed to be examined. The detectives needed to do some investigation." The female ASA testified that, after leaving the interview room, she did not at any point meet with petitioner again.

¶ 9 Detective Michael Puttin (Puttin) testified he was involved in petitioner's arrest on April 11, 2000 at approximately 6:40 p.m. After his arrest, petitioner was transported to Area 4 violent crimes; Puttin could not recall if he had transported petitioner, noting that "[i]t might have been some other detectives." When asked whether he had contact with petitioner between the time of

[1] Two assistant State's attorneys are discussed in this order. As noted herein, we do not refer to the attorneys by name, instead referencing "the female ASA" and "the male ASA."

the arrest and the 1:30 a.m. interview, Puttin responded, "I don't believe so, no" and then stated, "With the exception of maybe letting him use the bathroom, I would say that would be it." Puttin testified that he entered the interview room with the female ASA and Detective Vucko. Puttin's testimony about the interview was substantially similar to that of the female ASA. When asked "after that case was continued for an investigation into the alibi, what did you do?" Puttin responded, "That evening, we took the defendant down to the district lockup and I went home." Puttin testified that he had no further contact with petitioner during the investigation. When asked on cross-examination about the time between petitioner's arrival at the station and 1:30 a.m., Puttin testified, in part: "Now that I remember, I and other detectives conducted several lineups with Mr. Russell being involved in the lineup and I would have had some contact with putting him in a lineup or with that aspect of it." Puttin confirmed that, after the lineups, petitioner was "taken back to the first interview room that he was taken to after he was arrested." On redirect examination, Puttin testified that petitioner never indicated that he wanted to speak to an attorney or "anybody" during any of the time Puttin had contact with petitioner.

¶ 10 Detective Robert Mihajlov (Mihajlov) testified that at some point after approximately 8:00 p.m. on April 11, 2000, he met with petitioner in an interview room in Area 4; no one else was present. Mihajlov stated that he advised petitioner of his *Miranda* rights. Mihajlov characterized the 10-minute interview as a "denial" by petitioner. Mihajlov testified that he had no further contact with petitioner that evening. On the following day, April 12, at approximately 3:00 p.m., Mihajlov met with petitioner again; also present were Detective Vucko and a male assistant State's attorney (the male ASA). After advising petitioner of his *Miranda* rights, the male ASA primarily conducted the interview. According to Mihajlov, petitioner agreed to a polygraph examination during the conversation. Mihajlov, Vucko and the male ASA "left the

room and made arrangements for a polygraph exam." The three transported petitioner from Area 4 to "11th and State" in a single squad car.

¶ 11 Detective Mihajlov further testified that when petitioner met with the polygraph examiner, Mihajlov, Vucko and the male ASA were "[i]n an office across the hall" from the room where the polygraph examination was to be conducted (the polygraph examination room). According to Mihajlov, after "ten-fifteen minutes," the polygraph examiner exited the polygraph examination room. The polygraph examiner stated petitioner "wanted to speak more about the case" and "no longer wished to do the polygraph exam." Mihajlov, Vucko and the male ASA entered the polygraph examination room. According to Mihajlov, petitioner indicated he did not want to do the polygraph examination and implicated himself in Peden's murder. Mihajlov denied beating or choking petitioner – or witnessing anyone else beating or choking petitioner – when petitioner indicated he did not want to take the polygraph examination. Mihajlov, Vucko, the male ASA and petitioner returned to Area 4 in a single vehicle; they stopped at McDonald's on the way to obtain food for petitioner and the male ASA.

¶ 12 Mihajlov then testified that, upon their return to Area 4, petitioner was placed in an Area 4 interview room. According to Mihajlov, petitioner was in the interview room alone for approximately "half an hour." Then Mihajlov, Vucko, and the male ASA entered the room and interviewed petitioner regarding Peden's death. Mihajlov testified that petitioner implicated himself in Peden's murder. Mihajlov, Vucko and the male ASA exited the interview room; the male ASA subsequently entered the room "alone" for approximately five minutes. At approximately 8:46 p.m., petitioner "gave a videotaped confession." Mihajlov stated he was present for the videotaped confession. When asked whether "at any time during any of the contact that you had with the defendant, did you see any detectives, state's attorney or any other

individuals beat or choke the defendant in any way," Mihajlov responded "No."

¶ 13 The male ASA testified that he arrived at Area 4 at approximately 11:40 a.m. on April 12, 2000. At approximately 3:00 p.m., he met with petitioner. The male ASA testified, "I think Vucko and Mihajlov" were present when he met petitioner. He introduced himself as an assistant state's attorney and gave petitioner his *Miranda* warnings. During that conversation, petitioner denied involvement in Peden's murder and agreed to take a polygraph examination. The male ASA testified that petitioner never indicated that he wished to remain silent or to speak to an attorney. The male ASA's testimony about the events at the polygraph examination location and their return to Area 4 was substantially similar to that of Mihajlov. When he entered the Area 4 interview room alone with petitioner, the male ASA presented petitioner with different options for memorializing his statement; petitioner indicated that he would be willing to be involved in a video. Also while alone with petitioner, he asked petitioner "what is commonly referred to as treatment questions, how he was treated by the police, have you had enough to eat, allowed to use the bathroom." According to the male ASA, petitioner "said he was treated good[.]"

¶ 14 During the male ASA's testimony, the court heard portions of the videotaped statement that "deal with the treatment by police and the Miranda rights." The court briefly summarized on the record "what I just heard on the videotape." Among other things, the court indicated that petitioner had stated in the video that he was advised of his rights during his earlier conversation with the state's attorney. The court noted that petitioner was again advised of his rights during the videotaping. The court further stated:

> "Now, I just heard on the videotape the state asked defendant how have the police treated him, he said pretty good and he asked him how he, the state's

attorney treated him and said just as good.

He asked him if he had food and he said McDonald's, coke, cigarettes, fries. That he was allowed to use the restroom. He asked him if the statement was true that he had given and he said yes. He asked him if the statement was given freely and voluntarily and he said yes. He asked him if there were any threats or promises given to him in order to have him give the statement and he said no."

On cross-examination, the male ASA testified that he could not recall "whose idea it was" to take the polygraph test. When asked "when you went back to Area 4 after you stopped at McDonald's, was Detective Vucko or Detective Mihajlov ever in the interview room alone with [petitioner] that you saw?," the male ASA responded "No."

¶ 15 Ralph Vucko (Vucko) testified that in April, 2000, he was employed by the Chicago Police Department as a detective. Vucko was present when petitioner was arrested. He was not involved in transporting petitioner to Area 4; Vucko "transported the vehicle that [petitioner] was driving when he was arrested." Vucko met with petitioner at Area 4 at approximately 1:30 a.m. on April 12, 2000, together with Detective Puttin[2] and the female ASA. Vucko's testimony regarding the 1:30 a.m. meeting with petitioner and subsequent events was substantially similar to the testimony of Puttin and the female ASA. Vucko then testified that he had no contact with petitioner between 2:00 a.m. and 3:00 p.m. on April 12. Vucko's testimony regarding the 3:00 p.m. meeting with petitioner was similar to that of Mihajlov and the male ASA; however, Vucko testified that he asked petitioner "if he was willing to take a polygraph examination." When asked whether "[a]t any time did you or anyone in your presence use any sort of physical

[2] The hearing transcript references "Detective Mike Button" instead of "Detective Mike Puttin." This appears to be a transcription error.

coercion against the defendant," Vucko responded, "No, ma'am."

¶ 16 On cross-examination, the following exchange occurred:

"[DEFENSE COUNSEL]: Well, was [petitioner] in the same interview room – you said you talked to him in an interview room at 1:30 a.m. on April 12th.

[VUCKO]: Yes.

[DEFENSE COUNSEL]: Was he in the same interview room when you next saw him or spoke to him at 3 p.m.?

[VUCKO]: I can't say if it was. I don't know if it was in the same room or not.

He was taken down to the lockup that night and then brought up the next day back to the interview room, ma'am.

[DEFENSE COUNSEL]: Well, did you take him down to the lockup that night?

[VUCKO]: I don't know if it was myself or not."

Vucko further testified that he could not recall whether he brought petitioner into an interview room at any time after 1:30 a.m.

¶ 17 During closing argument, defense counsel argued, in part, that "from 1:30 a.m. or 2 a.m. when that conversation supposedly ended, *** [petitioner] is just sort of left there." The court stated, "He is not left there. He is taken to the lockup." Defense counsel responded, "But by whom? Nobody knows by whom." The court denied the motion to suppress statements, noting that "[t]here is absolutely no evidence whatsoever that the petitioner was ever threatened, forced, coerced in any manner."

¶ 18 Trial

¶ 19 In an earlier decision of this court (*People v. Russell*, No. 1-05-0961 (unpublished order pursuant to Supreme Court Rule 23)), we summarized portions of the trial testimony as follows:

> "[Keith] Stevens, the victim's cousin, testified that he was selling drugs in the vicinity of Washington and Cicero at the time of the shooting, along with the victim and two individuals known as Iesha and Chill. Stevens and Chill were working 'security' on the south side of Washington, while Iesha and the victim were selling drugs on the north side of the street. At approximately 12:25 p.m., a white car traveling west approached Iesha and the victim. The driver, whom Stevens later identified as defendant, rolled down his window and asked if they were working. Defendant got out of the car. Stevens testified that he was looking in another direction, watching for police, when he heard a gunshot.
>
> After the shooting, Stevens saw defendant get back into the white car. Defendant made a U-turn and headed east on Washington. Meanwhile, Iesha ran down the street and yelled to Stevens: 'He just shot your cousin!' Stevens crossed the street to where the victim had fallen and saw smoke coming out of his head. Later that evening, Stevens identified defendant in a police lineup and identified the white car.
>
> [Clarence] Prewitt, the other eyewitness, testified that he was parking his car on the north side of Washington when he saw a man and a woman running out of a gangway and away from a man carrying a gun. The man slipped on the parkway grass, and the woman ran across the street. Prewitt, still seated in his car, saw the gunman shoot the victim and then get into a white four-door car,

make a U-turn, and head east on Washington. Prewitt was about 15 feet away from the shooter as he entered his car.

After the shooting, Prewitt chased the white car for about a half-mile but eventually lost it. However, Prewitt wrote down the car's license plate number. Prewitt returned to the scene of the shooting and gave the license plate number to a police officer. Later that evening, Prewitt identified defendant in a police lineup as the gunman.

Detective Puttin testified that, at about 6:40 p.m. on April 11, he was driving with his partner, Detective Vucko, in an unmarked squad car when they received a radio transmission regarding a white 1991 Toyota Camry bearing the license plate number Prewitt had recorded. Puttin spotted the Camry and activated his car's emergency equipment. A chase ensued for a short distance until the Camry slowed down and the car's driver and passenger jumped out and fled. Puttin chased defendant, who had been driving the car, and caught and arrested him.

Puttin testified that defendant was taken to Area 4 police headquarters, where both Stevens and Prewitt identified him in a lineup. At approximately 1:30 a.m. the next morning, [the female ASA] interviewed defendant, accompanied by Puttin and Vucko. [The female ASA] advised defendant of his *Miranda* rights, which defendant indicated he understood. He did not ask to speak with a lawyer. When asked where he was the previous afternoon, defendant said he was at home.

[The male ASA] testified that he interviewed defendant on the afternoon of April 12, accompanied by Detectives Vucko and Mihajlov. [The male ASA]

advised defendant of his *Miranda* rights. Defendant indicated his willingness to talk about the shooting and did not ask for a lawyer. [The male ASA], Vucko and Mihajlov accompanied defendant to a downtown police station, where defendant was to take a polygraph test. However, before the test was administered, defendant admitted that he was present at the shooting but denied killing the victim. Later, defendant proffered a different statement, which he chose to memorialize on videotape. Before the recording began, [the male ASA] asked defendant how he had been treated while in custody. Defendant indicated he had been treated well. He signed a written consent to be videotaped. At 8:46 p.m. on April 12, defendant began recording his statement.

The defense case at trial consisted solely of defendant's testimony. Defendant testified that at the time of his arrest, he was in a white Camry at the invitation of a man named Michael. Michael had offered defendant a ride home but asked defendant to drive while Michael rode in the passenger's seat. When police stopped the car, defendant fled because he presumed he was driving a stolen car.

Defendant testified that at Area 4, he was held in a small room where police officers physically abused him. During his confinement, he was handcuffed with his hands behind his back. He was not provided food, water, or use of a toilet. Defendant asked to use a phone, but admitted on direct examination that he did not ask to speak with a lawyer.

Defendant saw [the male ASA] in the interview room the night of his arrest as well as the next day. Defendant deduced it was the next day because,

when [the male ASA] returned, he was wearing different clothes. During [the male ASA]'s second visit, defendant told [the male ASA] that two detectives came during the night and beat him up, but [the male ASA] seemed indifferent.

[The male ASA] left defendant alone in the room. Defendant testified that his hands were numb from the tightness of the handcuffs and that his request that the cuffs be loosened was denied.

Defendant testified that Detective Puttin came into the room, grabbed him by the shirt, stood him up, and punched him in the stomach. Defendant said he fell to the ground in a fetal position and Puttin kicked him in the side, in the arms, and in the stomach. Ten or fifteen minutes later, [the male ASA] returned alone to the interview room and had a brief conversation with defendant, after which he, [the male ASA], Mihajlov and Puttin left for the polygraph test.

Defendant testified that he refused to take a polygraph test because he would not be released afterwards. He was brought back to Area 4 and eventually confessed to the shooting because he thought he would be physically abused if he did not. [The male ASA] never asked defendant if he was willing to memorialize his statements on videotape.

Defendant testified that his taped statements were not true. He stated that before the confession was recorded, [the male ASA] and Mihajlov spent two hours rehearsing everything they were going to ask and what they wanted defendant to say. Defendant testified that the only remarks that were his own were that he was treated well by the police and [the male ASA] and that he was allowed to use the bathroom.

In rebuttal, Mihajlov testified that he was alone with defendant for about 10 minutes the evening of April 11 and was in contact with him again the following afternoon. Mihajlov accompanied defendant on the aborted polygraph trip, along with [the male ASA] and Vucko. Mihajlov was also present during the videotaping. Mihajlov denied beating the defendant or hearing him complain of ill treatment. Mihajlov did not rehearse or suggest any of the answers that defendant gave during his videotaped confession.

It was stipulated that Detective Puttin would testify in rebuttal that he was not alone with defendant in the interview room. Vucko's testimony was consistent with testimony given by the State's other witnesses. Vucko said that he accompanied [the male ASA], Mihajlov and defendant on the trip downtown for a polygraph, but Puttin did not. Vucko denied defendant's claim of physical abuse.

[The male ASA] testified that defendant never complained he had been beaten. When [the male ASA] met with defendant, he was not handcuffed. After his first interview with defendant, [the male ASA] did not leave and return wearing different clothes. [The male ASA] spoke with defendant before obtaining his consent to be videotaped. [The male ASA] denied telling defendant what to say but said he did show defendant a list of questions."

¶ 20 Following jury instructions and deliberations, petitioner was convicted of first degree murder; the court denied petitioner's motion for a new trial. Petitioner was sentenced to 45 years for murder and an additional 25 years for personally discharging a firearm that proximately caused Peden's death. Petitioner's motion to reconsider sentence was denied.

¶ 21 Direct Appeal

¶ 22 On direct appeal, petitioner "raise[d] a single issue: that his counsel was ineffective for failing to call him to testify in support of the motion to suppress his confession." *People v. Russell*, No. 1-05-0961 (unpublished order pursuant to Supreme Court Rule 23). Petitioner argued "that because the standard of proof at a suppression hearing is the preponderance of the evidence, his counsel was ineffective *per se* for failing to present any evidence to support his contention that he was brutalized by police and denied access to counsel." In affirming the judgment of the trial court, this court noted that "the defense had no corroborating medical evidence that defendant sustained an injury while in police custody." We concluded that "[d]efense counsel's choice not to call defendant to testify at the suppression hearing did not amount to ineffective assistance because (1) counsel's decision was strategic; (2) defendant has not shown a reasonable probability that his testimony would have changed the outcome of the hearing; and (3) even if the videotaped statement had been suppressed, defendant had not shown that the trial verdict would have been different." The Illinois Supreme Court denied petitioner's petition for leave to appeal. *People v. Russell*, 226 Ill. 2d 628 (2008) (table).

¶ 23 Initial Postconviction Petition

¶ 24 On August 25, 2008, petitioner filed an initial postconviction petition in which he asserted various violations of his constitutional rights. Petitioner claimed (1) he was placed in an unfair line-up without the benefit of counsel; (2) "the police failed to properly take the Petitioner before a judge for a probable cause hearing after his warrantless arrest"; (3) the trial court abused its discretion by denying petitioner's motion to suppress "his out of court inculpatory statement"; (4) the trial judge gave improper jury instructions; (5) trial counsel "failed to object to the In-Court and Out-of-Court identification and failed to argue the same in the Post-Trial Motion for a

New Trial"; (6) petitioner was deprived of effective assistance of counsel "where counsel failed to object to and preserve appealable viable constitutional claims for appellate review"; and (7) appellate counsel failed to provide effective assistance during petitioner's direct appeal. In support of his claims, petitioner asserted, among other things: Detective Mihajlov "smacked him around"; "during the night two detectives came in and beat him up"; and Detective "Puttin came in, stood Petitioner up, punched him in the stomach, and when [petitioner] fell the fetal position, kicked him in the side, arm and stomach." In an eight-page order entered on September 30, 2008, the trial court summarily dismissed petitioner's postconviction petition. On appeal, this court allowed the motion of the public defender of Cook County for leave to withdraw as counsel and affirmed the judgment of the circuit court. *People v. Russell*, 1-09-0722 (unpublished order pursuant to Supreme Court Rule 23). The Illinois Supreme Court denied petitioner's petition for leave to appeal. *People v. Russell*, 235 Ill. 2d 601 (2010) (table).

¶ 25 Leave to File Successive Postconviction Petition

¶ 26 On April 19, 2013, petitioner filed a *pro se* motion for leave to file a successive postconviction petition[3] pursuant to section 122-1(f) of the Act, raising three claims; two are relevant to this appeal.[4]

¶ 27 His first claim was that "he is actually innocent of the offense of murder." Attached to his motion is an affidavit signed by Burt Robinson (Robinson) dated December 12, 2012. After describing the shooting "[i]n April of 2000," Robinson stated, in part:

"I got a good look at the shooter. He was about 19 to 25. About 5'10" to 6'1".

[3] Defendant's filing is captioned "Leave To File Successive Post-Conviction Petition 122-(F)." The trial court referred to this filing as a "*motion* for leave to file a successive petition." (Emphasis added.) For ease of reference, we use the same term herein.

[4] The third claim involved the trial counsel's failure to move for a substitution of judge prior to trial. The circuit court rejected defendant's argument, and defendant has not raised the issue in this appeal.

> Dark brown skin. 160 to 180 lbs. Lots of bumps in his face. He was wearing a black hoodie with faded light blue jeans. I've had the images of that guy in my mind for years and I've replayed the events of that day over and over in my head because it was the first time that I had ever witnessed something like that up close plus it happened on one of my daughters [*sic*] birthday."

After the shooting, Robinson "turned around and kept walking" because he was "afraid to get involved plus at the time [he] had a case pending" and he had "bad experiences with the police so [he] wasn't gonna wait to talk to them[.]" Robinson further averred: "In 2006 I met the guy that's accused of that crime. And I immediately knew that he wasn't the guy that did the crime that I witnessed six years earlier. I didn't tell him because like befor [*sic*] I didn't want to get involved." Robinson's affidavit concluded, "Russzell Russell is not the guy that I saw shot [*sic*] another man Tuesday, April 11, 2000 at about or a little bit later then [sic] 12:00 p.m. in Chicago Illinois on the 4700 block of West Washington Street." In his motion for leave to file a successive postconviction petition, petitioner contended that Robinson's "unrebutted eye-witness account" constituted "newly discovered evidence," was "non-cumulative and material" and would "change [the] results on retrial."

¶ 28 Petitioner's second claim was that "[e]vidence of Chicago Police Pattern of abuse[,] both physical and mental, to obtain coerced or forced confessions support Russell's prior assertions pre-trial, at trial and initial post-conviction petition, in violation both State and Federal Const. [*sic*] ***." Petitioner asserted that "cause" existed because "he specifically instructed counsel to call him to testify at the pre-trial motion to suppress statement, where he was sworn in to testify, but was never called." He stated that the "specific factual basis of Russell's conversation with counsel prior to the suppression hearing instructing counsel to call him during the motion to

suppress to testify, was not placed in original post-conviction petition which Russell filed *pro se*, raises a specific fact outside original appellate record a fact Russell did not realize was essential as an unprofessional applicant." In a section entitled "Facts," petitioner detailed police abuse, including: petitioner was "handcuffed ***; arms behind his back, seated in a chair, and was left alone for hours"; he was "deprived of food, water, toilet, [s]ink, bed, window to tell if it was day or night, or a clock"; he was "cuffed in a painful position" for approximately five hours; a "large" detective "yanked [petitioner] out of the chair, grabbing him by the neck, and shoved him against the wall"; Detective Puttin "smacked [petitioner] several times"; when petitioner denied involvement in the shooting, Detective Mihajlov "began smacking" him; the male ASA ignored his complaints; and after the male ASA left the room, Puttin "came in an punched [petitioner] in the stomach" and "kicked him in the arms and sides when he fell to the floor."

¶ 29 Petitioner stated that he had "consistantly [*sic*] claimed *** that he was tortured." He asserted that his claim was "supported by the [Special State's Attorney's Report] which [petitioner] could not gain access to in 2008, when he filed his original [p]ost-conviction." According to petitioner, "[s]uch report of Egun's Report and O.P.S [*sic*] findings are outside the scope of the original appellate record to establish an independent torture claim. See *Wrice* at 11."[5]

¶ 30 Petitioner also asserted that his counsel "was egregiously erroneous for failing to research [his] claims of physical and mental abuse ***." Petitioner stated, in part, that he "learned

[5] Edward J. Egan was appointed in 2002 by the presiding judge of the criminal division of the circuit court of Cook County to investigate allegations of torture and other offenses by police officers "under the command of Jon Burge at Area 2 and Area 3 police headquarters beginning in 1973." *People v. Wrice*, 2012 IL 111860, ¶ 41. The defendant in *Wrice* also referenced reports regarding police abuse and coerced confessions prepared by the Chicago Police Department's Office of Professional Standards (OPS). *Id.* ¶ 40. We assume that defendant's motion refers to the foregoing reports.

through legal aids at the Menard C.C., of an address to the state police for the purpose of obtaining arrest reports and police reports, which he had tried unsuccessfully for years to obtain through trial counsel, post-trial counsel and the Clerk of the Court, Dorothy Brown." According to petitioner, he was "sent copies of police reports, arrest reports, interview of witnesses during their investigation." "[A]fter reading one particular arrest report," petitioner stated that he "realized that it clearly contradicts the testimonies of three detectives that testified at [petitioner's] suppression hearing." Included with petitioner's motion were three excerpts of testimony, which petitioner described as follows:

> "Detective Mihajlov testified at Russell's suppression hearing that he first met with Russell 4/11/00 at approximately 8:00 p.m. and that interview was brief, approximately ten minutes. He also testified that he had no further contact with Russell until 4/12/00 at approximately 3:00 p.m. (Ex. D)
>
> Detective Puttin testified that after a 1:30 a.m. interview that took approximately 30 minutes, that Russell was taken downstairs to the district lock-up and he went home. (Ex. E)
>
> Detective Vucko testified that he was a part of Russell's arrest, seen Russell at Police Station while line-ups were being conducted and may have interacted with Russell during those line-ups. Detective Vucko goes on to testify that he, [the female ASA] and partner for that day, Detective Puttin met with Russell at about 1:30 AM, 4/12/00 in an interview room and that interview lasted approximately 30 minutes, and after [the female ASA] decided it was too late to go knocking on doors, and suggested Detectives continue to investigate. Detective Vucko testified that Russell was taken downstairs to the lock-up area,

and brought back up to an interrogation the next day. (Ex. F)"

"However," petitioner asserted, "according to an arrest report obtained from the Illinois State Police, Russell was taken downstairs to the lock-up area at 2:29 AM, 4/12/00, where he was fingerprinted and a photo was taken." Petitioner stated that he "was then signed out of the lock up at 3:30 AM 4/12/00 by Officer Wright #21065. Russell was brought back to the lock-up at 9:41 PM by Officer Lazzara #12306, 4/12/00, approximately 18 hours after being signed out." An arrest report and a document entitled "Moving of Arrestee Out of & Into Arrest/Detention Facility" (the lock-up report) were appended as exhibits. Russell contended that "[w]hile attached exhibit does not prove physical or mental abuse, it does however, cast doubt of the testimony given by three Detectives whose testimonies were highly depended upon to deny Russell's motion to suppress."

¶ 31 In his motion, petitioner "also asserts that his trial and Post-trial [*sic*] counsels were both ineffective for failing to conduct an adequate investigation into the State's charges against him," *e.g.*, "neither counsel found arrest report contradicting the testimonies of three detectives[.]" In petitioner's own affidavit, he averred, in part: "*** I informed trial counsel that I needed to, and wanted to testify at motion to suppress well before hearing. I would have testified to the abuse of Chicago Police, at area four, and that I was aware this was a common pattern at areas 1, 2, 3 and 4 as it was a known, but ignored fact in the criminal division of Cook County."

¶ 32 On June 5, 2013, the circuit court issued a 13-page order denying petitioner leave to file the successive postconviction petition. The court concluded that petitioner's actual innocence claim fails, stating: "This court cannot say that, in light of the new evidence, it is more likely than not that no reasonable juror would have convicted petitioner in light of Robinson's testimony." The court further found that petitioner's claim that counsel was ineffective for

failing to call him to testify at the suppression hearing did not meet the cause-and-prejudice test because it was barred by *res judicata*. The court rejected petitioner's "attempts to put a slightly different spin on his claim by citing the 2006 special prosecutors' report on systemic police torture under the command of Jon Burge," noting that petitioner did not assert that "any of the detectives who actually interviewed him were implicated in police abuse in the Burge report or elsewhere[.]" The court stated that "[t]his new evidence does not transform petitioner's previously-litigated ineffective assistance claim into a new claim, and petitioner cannot avoid the bar of *res judicata* by merely rephrasing or adding details to a previously adjudicated claim." Even if the claim were not barred by *res judicata*, the court concluded that "it would not meet the cause and prejudice test" because, among other things, "[n]o objective factor *** prevented petitioner from citing the [Burge] report in his original petition" and "no evidence corroborated petitioner's allegation that police abused him and coerced his confession."

¶ 33 On July 8, 2013, petitioner's *pro se* notice of appeal was filed with the clerk of the circuit court.

¶ 34 ANALYSIS

¶ 35 On appeal, petitioner contends he should have been granted leave to file a successive postconviction petition because he satisfied the cause-and-prejudice test and sufficiently alleged a claim of actual innocence. Prior to analyzing the merits, we must address the threshold issue of appellate jurisdiction.

¶ 36 Jurisdiction

¶ 37 Although not raised by the parties, we have an independent duty to determine whether we have jurisdiction. *Secura Insurance Co. v. Illinois Farmers Insurance Co.*, 232 Ill. 2d 209, 213 (2009). A timely filed notice of appeal is mandatory to establish this court's jurisdiction. *Id.*

Illinois Supreme Court Rule 651(d) provides that appeals in postconviction proceedings are governed by the rules applicable to criminal appeals. Ill. S. Ct. R. 651(d) (eff. Feb. 6, 2013). Pursuant to Illinois Supreme Court Rule 606(b), petitioner was required to file his notice of appeal within 30 days of the entry of the order denying him leave to file a successive postconviction petition. Ill. S. Ct. R. 606(b) (eff. Feb. 6, 2013). The trial court denied such relief on June 5, 2013. Pursuant to Rule 606(b), petitioner's notice of appeal was required to be filed by Friday, July 5, 2013.

¶ 38 Upon reviewing the record on appeal, we observed that petitioner's notice of appeal was file-stamped with a date of July 8, 2013, more than 30 days after the denial of his motion. Therefore, on its face, petitioner's notice of appeal appears to be untimely filed. On April 29, 2015, we entered an order directing the parties to file supplemental briefs addressing the issue of appellate jurisdiction; we also granted the parties leave to file a supplemental record with documents pertaining to the issue of jurisdiction. Petitioner supplemented the record with the envelope used for mailing his notice of appeal. The envelope is postmarked July 2, 2013, three days before the July 5, 2013 filing deadline. In his supplemental brief, petitioner stated that he "had the notice of appeal notarized, but he did not include a certificate of mailing with the notice of appeal."

¶ 39 Illinois Supreme Court Rule 373, a civil appeals rule, applies to criminal appeals pursuant to Illinois Supreme Court Rule 612(s). Ill. S. Ct. R. 373 (eff. Dec. 29, 2009); Ill. S. Ct. R. 612(s) (eff. Feb. 6, 2013). Rule 373 provides, in pertinent part:

> "Unless received after the due date, the time of filing records, briefs or other papers required to be filed within a specified time will be the date on which they are actually received by the clerk of the reviewing court. If received after the due

> date, the time of mailing *** shall be deemed the time of filing. Proof of mailing *** shall be as provided in Rule 12(b)(3). This rule also applies to the notice of appeal filed in the trial court." Ill. S. Ct. R. 373 (eff. Dec. 29, 2009).[6]

Rule 12(b)(3) provides that service is proved:

> "in case of service by mail or by delivery to a third-party commercial carrier, by certificate of the attorney, or affidavit of a person other than the attorney, who deposited the document in the mail or delivered the document to a third-party commercial carrier, stating the time and place of mailing or delivery, the complete address which appeared on the envelope or package, and the fact that proper postage or the delivery charge was prepaid." Ill. S. Ct. R. 12(b)(3) (eff. Jan. 4, 2013).[7]

Because the clerk's office received petitioner's notice of appeal after the July 5, 2013 due date, we must examine whether the timely postmark on the envelope provides sufficient proof of mailing.

¶ 40 The State contends that "a postmark alone is not sufficient proof of service to deem petitioner's notice of appeal as timely filed." Petitioner acknowledges that "[t]here is a split of authority in the appellate court on whether a timely, legible postmark is sufficient proof of the date of mailing."[8]

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[6] Rule 373 was amended effective September 19, 2014; the amendment is unrelated to the issues addressed herein.

[7] Our supreme court subsequently amended Rule 12 by the addition of a new subsection. Rule 12(b)(4) provides that "in case of service by mail by a *pro se* petitioner from a correctional institution," service is proved: "by affidavit, or by certification as provided in section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109 (West 2012)) of the person who deposited the document in the institutional mail, stating the time and place of deposit and the complete address to which the document was to be delivered[.]" Ill. S. Ct. R. 12(b)(4) (eff. Sept. 19, 2014). In light of its September 19, 2014 effective date, Rule 12(b)(4) is inapplicable in this case. We further note that Rule 373 has not been amended to reference Rule 12(b)(4).

[8] Defendant filed, and subsequently withdrew, a motion for a supervisory order with the

¶ 41 In a number of cases, the Illinois Appellate Court has concluded that a postmark is insufficient proof of mailing under Rules 373 and 12(b)(3).[9] For example, in *People v. Blalock*, the Fourth District stated that "[o]ur supreme court has chosen to require a certificate or affidavit of mailing, rather than a postmark date, as proof of mailing under Rule 12(b)(3)." *People v. Blalock*, 2012 IL App (4th) 110041, ¶ 11. In *People v. Lugo*, a Second District case, the majority concluded:

> "The language of Rule 373 specifically provides that '[p]roof of mailing *shall* be as provided in Rule 12(b)(3).' (Emphasis added.) 155 Ill.2d R 373. '[G]enerally, use of the word 'shall' indicates a mandatory obligation unless the statute indicates otherwise.' [Citation.] Thus, under the plain language of Rule 373, proof of mailing *must* be as provided in Rule 12(b)(3). Rule 12(b)(3) provides that proof is by certificate or affidavit of mailing. It does not provide for proof in any other form. Thus, the language of Rule 373 is unambiguous in providing that proof of mailing must be by certificate or affidavit of mailing. Accordingly, if proof of mailing must be by certificate or affidavit of mailing, then it cannot be by postmark, as a postmark is neither a certificate nor an affidavit or mailing." (Emphasis in original.) *People v. Lugo*, 391 Ill. App. 3d 995, 998 (2009).

See also *People v. Tlatenchi*, 391 Ill. App. 3d 705, 716 (2009) (the First District concluded that "the proof of service attached to defendant's motion is not notarized, *i.e.*, sworn to before a

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Illinois Supreme Court regarding this issue.

[9] In a civil appeal recently decided by the Illinois Supreme Court, the plaintiff contended that "the affidavit requirement was not intended to supplant other objective, competent proof of mailing, and that a legible postmark must be accepted as proof of mailing." *Huber v. American Accounting Ass'n*, 2014 IL 117293, ¶ 14. Because the "date" at issue was included on an "Automated Postal Center (APC)" label, not an actual postmark, our supreme court stated that it "need not address" the issue of whether "Rule 12(b)(3) allows other methods of proof of mailing." *Id.* ¶ 18.

person who has authority under the law to administer oaths, and therefore does not constitute the affidavit required by Rule 12(b)(3)").

¶ 42 After reviewing the case law interpreting Rules 373 and 12(b)(3), we agree with the Second District majority in *People v. Hansen*, 2011 IL App (2d) 081226, that *Lugo* "is too literal and narrow in its reading and interpretation of Rules 373 and 12(b)(3)." *Id.* ¶ 13.[10] The *Hansen* court noted that the committee comments to Rule 373 state, in part:

> "As originally adopted the rule provided that the time of mailing might be evidenced by the post mark affixed by a United States Post Office. Because of problems with the legibility of post marks, and delay in affixing them in some cases, the rule was amended in 1981 to provide for the use of affidavits of mailing or United State Postal Service certificates of mailing. Ill. S. Ct. R. 373, Committee Comments (revised July 1, 1985)." *Id.* ¶ 13.

We share the view of the *Hansen* court that Rule 373 was "revised to address the problems of illegible postmarks and late-placed postmarks; it was not written to compel courts to disregard clear evidence that a postmark provides of the timely mailing of a document." *Id.*

Like the *Hansen* court, we will not "overlook a clearly legible postmark" showing that petitioner's notice of appeal was "processed by a disinterested third party, such as the post office," on or before the date upon which his notice of appeal was required to be mailed. *Id.* ¶ 14. We conclude that the postmark on the envelope containing petitioner's notice of appeal was sufficient to establish that petitioner's appeal was timely. We turn to the merits.

¶ 43 The Post-Conviction Hearing Act

¶ 44 The Act (725 ILCS 5/122-1 *et seq.* (West 2012)) "provides a method by which

[10] We observe that Justice McLaren, who dissented in *Lugo*, authored the majority opinion in *Hansen.*

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; 725 ILCS 5/122-1(a) (West 2012). Postconviction relief is "limited to constitutional deprivations which occurred at the original trial." *People v. Coleman*, 183 Ill. 2d 366, 380 (1998). "The Act is not a substitute for an appeal, but rather, is a collateral attack on a final judgment." *People v. Edwards*, 2012 IL 111711, ¶ 21.

¶ 45 The Act contemplates the filing of a single petition: "Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2012); *People v. Coleman*, 2013 IL 113307, ¶ 81. Successive postconviction actions are disfavored by Illinois courts. *Edwards*, 2012 IL 111711, ¶ 29; see also *People v. Davis*, 2014 IL 115595, ¶ 14 ("[A] defendant faces immense procedural default hurdles when bringing a successive postconviction petition. Because successive petitions impede the finality of criminal litigation, these hurdles are lowered only in very limited circumstances.") Nevertheless, our supreme court, in its case law, has provided "two bases upon which the bar against successive proceedings will be relaxed." *Edwards*, 2012 IL 111711, ¶ 22.

¶ 46 The first basis for relaxing the bar, articulated in *People v. Pitsonbarger* (205 Ill. 2d 444, 459 (2002)), is "when a petitioner can establish 'cause and prejudice' for the failure to raise the claim earlier." *Edwards*, 2012 IL 111711, ¶ 22. The Illinois General Assembly codified the cause-and-prejudice exception in section 122-1(f) of the Act after the *Pitsonbarger* decision. *Edwards*, 2012 IL 111711, ¶ 22. Section 122-1(f) of the Act provides:

> "(f) Only one petition may be filed by a petitioner under this Article without leave of the court. Leave of court may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial

> post-conviction proceedings and prejudice results from that failure. For purposes of this subsection (f): (1) a prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings; and (2) a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." 720 ILCS 5/122-1(f) (West 2012).

¶ 47 "The second basis by which the bar to successive postconviction proceedings may be relaxed is what is known as the 'fundamental miscarriage of justice' exception." *Edwards*, 2012 IL 111711, ¶ 23. In order to demonstrate a miscarriage of justice to excuse the application of the procedural bar, a petitioner must show actual innocence. *Id*. Although this exception was not codified by the legislature, the Illinois Supreme Court has "reaffirmed its use in relaxing the bar against successive postconviction proceedings." *Edwards*, 2012 IL 111711 ¶ 23; *People v. Ortiz*, 235 Ill. 2d 319, 330-31 (2009).

¶ 48 "Where, as here, a defendant seeks to institute a successive postconviction proceeding, the defendant must first obtain leave of court." *Wrice*, 2012 IL 111860, ¶ 47; 725 ILCS 5/122-1(f) (West 2012). A defendant not only has the burden to obtain leave of court, but also "must submit enough in the way of documentation to allow a circuit court to make that determination." *People v. Tidwell*, 236 Ill. 2d 150, 161 (2010). "This is so under either exception, cause and prejudice or actual innocence." *Edwards*, 2012 IL 111711, ¶ 24.

¶ 49 This court has held that our review of a circuit court's denial of a motion to file a successive postconviction petition is *de novo*. See, *e.g.*, *People v. Almodovar*, 2013 IL App (1st) 101476, ¶ 59; *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 25. We recognize that the

Illinois Supreme Court in *People v. Edwards* (2012 IL 111711, ¶ 30) declined to decide whether an "abuse of discretion" or *de novo* standard of review applies to decisions granting or denying leave to file a successive petition raising a claim of actual innocence. However, applying either standard, our conclusion is the same. See, *e.g.*, *People v. Simon*, 2014 IL App (1st) 130567, ¶ 58.

¶ 50 Cause-and-Prejudice Test – The Lock-up Report

¶ 51 On appeal, petitioner contends that he "should have been granted leave to file a successive post-conviction petition where the petition included a newly discovered lockup report supporting his longstanding claim that he was kept all night in an interrogation room before his confession, corroborating his allegation that his statement was the product of physical coercion by police." As discussed above, a "defendant's *pro se* motion for leave to file a successive postconviction petition will meet the section 122-1(f) cause and prejudice requirement if the motion adequately alleges facts demonstrating cause and prejudice." *People v. Smith*, 2014 IL 115946, ¶ 34. Both prongs must be satisfied for the defendant to prevail. *Davis*, 2014 IL 115595, ¶ 14.

¶ 52 A petitioner shows "cause" by identifying an objective factor external to the defense that impeded his efforts to raise his claim in the earlier proceeding. *Id.*; *Edwards*, 2012 IL App (1st) 091651, ¶ 20; 725 ILCS 5/122-1(f) (West 2012) (providing that "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"). Petitioner asserts that he "sufficiently demonstrated 'cause' " because he "identified an objective factor that impeded his ability to raise this specific claim during his initial post-conviction proceedings – namely, his trial attorney's failure to thoroughly investigate[.]" Petitioner further claims that he "was only recently able to acquire on

his own these documents that he did not previously know existed[.]"

¶ 53 The State counters that by the time petitioner's initial postconviction petition was filed in 2008, "his arrest report and accompanying lock-up report had been available for over eight years." According to the State, petitioner "knew that he was transported in and out of the lock-up on April 12, 2000, so his failure to previously present the issue is unrelated to his alleged lack of knowledge about the report." The State further contends that "with the least bit of diligence, petitioner could have obtained the lock-up report prior to the filing of his initial post-conviction petition, as it was on the reverse side of his arrest report."

¶ 54 We agree with the State that petitioner failed to demonstrate "cause." Petitioner has not identified an objective factor that impeded his ability to obtain the report during the years between its creation and his request for leave to file his successive postconviction petition. Simply put, the lock-up report "is not of such character that it could not have been discovered earlier by the exercise of due diligence." *Davis*, 2014 IL 115595, ¶ 56.[11]

¶ 55 Even assuming *arguendo* that petitioner satisfied the "cause" test, petitioner also must satisfy the "prejudice" prong of section 122-1(f) of the Act. " 'Prejudice' refers to a claimed constitutional error that so infected the entire trial that the resulting conviction or sentence violates due process." *Davis*, 2014 IL 115595, ¶ 14; *Smith*, 2014 IL 115946, ¶ 37 (citing *Pitsonbarger*, 205 Ill. 2d at 464); 725 ILCS 5/122-1(f) (providing that "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").

[11] Furthermore, defendant's argument regarding the lock-up report is part of a broader claim of ineffective assistance of counsel; his appellate brief identifies his "trial attorney's failure to thoroughly investigate" as the "objective factor that impeded his ability to raise this specific claim." Defendant advanced multiple arguments regarding ineffective assistance of counsel in both his direct appeal and his initial postconviction petition. Although we need not decide the issue, we note that the doctrine of *res judicata* arguably bars defendant's claim.

¶ 56 Citing *People v. Wrice* (2012 IL 111860, ¶ 71), petitioner claims that his "well-pled allegations of physical coercion *** establish at least an arguable claim of prejudice because the Illinois Supreme Court has declared that the introduction of a physically coerced confession is never harmless error." According to petitioner, his allegations that his videotaped statement "was physically coerced are not only longstanding, but are now corroborated by the newly discovered lockup in-and-out record, which also conflicts with the testimony of the officers denying the abuse." Petitioner contends:

> "[A]ccording to the police's own records, [petitioner] was not quietly left alone for the night in the lockup, but was only in lockup for about an hour to get fingerprinted and photographed and then was taken out again for 'investigation.' While the police and State's attorneys claimed that the investigation ended for the night at 2:00 a.m., the reports indicate that the investigation continued and that it involved [petitioner]'s removal from the lockup."

Petitioner asserts that "the newly discovered evidence corroborates [his] claim that he was held almost continuously in a tiny six by six interrogation room with no bed, no independent access to the bathroom, and no windows or clocks." He claims that the lock-up report corroborates his "claims of abuse alleged to have occurred after the investigation was suspended for the night at approximately 2:00 a.m."

¶ 57 As the State observes, petitioner has expressly acknowledged that the lock-up report "does not prove physical or mental abuse ***." Furthermore, the lock-up report does not corroborate petitioner's claim regarding the size of any investigation room, his access to a bed or bathroom, or the absence of windows or clocks. The salient information provided by the lock-up report was that petitioner was in and out of lock-up on April 12, 2000, and that, during the lock-

up keeper's visual check, petitioner did not have "obvious pain or injury."

¶ 58 Based on our review of the appellate record, we also agree with the State that "the lock-up report does little more than corroborate the testimony of the detectives, [the female ASA] and [the male ASA]." Contrary to petitioner's suggestion, no witness testified during the hearing on the motion to suppress or during the trial that petitioner "spent a quiet night in the lockup." Although not necessary for our analysis, we observe that the lock-up report is arguably inconsistent with *petitioner's* trial testimony; he never mentioned during trial that he was taken to, or removed from, lock-up on April 12, 2000.

¶ 59 The State further asserts that petitioner "erroneously claims that he has 'consistently maintained from the outset of this case that his confession was obtained as a result of physical abuse by Area 4 detectives.' " We agree that petitioner's allegations of abuse have not been consistent throughout his various legal proceedings. For example, in the motion to suppress, petitioner claimed that "[w]hen he refused to take the polygraph 'test', petitioner was beaten and choked by police officers." During the hearing on the motion, defense counsel clarified that the sole allegations of abuse related to physical abuse following petitioner's refusal to take the polygraph examination. The motion was amended to, among other things, add the words "Two detectives who spoke to him after the polygraph" after the relevant paragraph of the motion. After the modifications to the motion, the court directed petitioner to read the amended motion and "make sure these allegations are correct." Petitioner then confirmed under oath that the statements in the amended motion to suppress statements were accurate. However, during his trial testimony, petitioner detailed various other instances of alleged abuse, but made no mention of any physical abuse after his refusal to take the polygraph examination. As the State observes, petitioner's "claims of abuse have been anything but consistent ranging from a single instance of

abuse after the polygraph examination to regular and repeated abuse by several detectives prior to the polygraph."

¶ 60 In sum, petitioner has failed to present any facts demonstrating cause for his failure to timely present the lock-up report. Petitioner has also failed to demonstrate prejudice, *i.e.*, that the court's failure to consider the report "so infected the trial that the resulting conviction or sentence violated due process." Because he cannot make the statutorily mandated showing of "cause" and "prejudice," petitioner was not entitled to successive postconviction proceedings.

¶ 61 Actual Innocence Claim – The Robinson Affidavit

¶ 62 Petitioner claims that his petition "states a colorable claim of actual innocence based on newly discovered evidence", *i.e.*, Burt Robinson's affidavit. "[E]ven without showing cause and prejudice, a defendant may bring a claim of actual innocence to prevent a fundamental miscarriage of justice." *People v. Coleman*, 2013 IL 113307, ¶ 83; *Ortiz*, 235 Ill. 2d at 329. As articulated by our supreme court, "the question is whether petitioner set forth a colorable claim of actual innocence. In other words, did petitioner's request for leave of court and his supporting documentation raise the probability that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence?" *Edwards*, 2012 IL 111711, ¶ 31. "[I]n order to succeed on a claim of actual innocence, the defendant must present new, material, noncumulative evidence that is so conclusive it would probably change the result on retrial." *Coleman*, 2013 IL 113307, ¶ 96.

¶ 63 "New means the evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence." *Id.* ¶ 96; *People v. English*, 2014 IL App (1st) 102732-B. ¶ 36 ("To obtain relief under a theory of actual innocence based on 'newly discovered' evidence, the defendant must offer evidence that was not available at the original trial and that

could not have been discovered sooner through diligence "). Petitioner contends that "Robinson's testimony was unavailable at trial as nothing could have made [petitioner] suspect Robinson was an eye-witness to the shooting." Even after meeting Robinson in 2006, petitioner contends he "had no way to know that Robinson had information related to his case." According to petitioner, "[t]he evidence remained unavailable to [petitioner] until Robinson chose to disclose it to him in 2012."

¶ 64 "Material means the evidence is relevant and probative of the petitioner's innocence" and "[n]oncumulative means the evidence adds to what the jury heard." *Coleman*, 2013 IL 113307, ¶ 96. Petitioner contends that Robinson's affidavit "is material to the issue at trial – who shot Stephon Peden – and not cumulative to any evidence presented at trial." Petitioner asserts that "Robinson's testimony would add to what was already before the jury in that Robinson is the only occurrence witness to say he got a good look at the shooter and to give a detailed physical description."

¶ 65 "[C]onclusive means the evidence, when considered along with the trial evidence, would probably lead to a different result." *Coleman*, 2013 IL 113307, ¶ 96; *Ortiz*, 235 Ill. 2d at 336-37. According to petitioner, the "new evidence would simultaneously cast doubt on the two pillars of the State's case – the witnesses' identification of [petitioner] as the shooter and [petitioner]'s confession of the shooting."

¶ 66 The State responds that Robinson's affidavit is not "newly discovered" evidence because petitioner "knew of Robinson at the outset of the case." During petitioner's videotaped confession, petitioner stated that when Peden ran away from him, petitioner "saw a guy" who was "[a]cross the street kneeling down by a car." In his affidavit, Robinson claims to have been "on one knee in a ducked down position." The State asserts that the "record is devoid *** of any

showing of petitioner's effort to ascertain Robinson's identity prior to trial, even though he knew Robinson had the potential to exonerate him." The State further contends that Robinson's affidavit is "not reliable evidence" and "not a trustworthy eyewitness account." Robinson waited twelve years after the crime to come forward with his affidavit, which was six years after he allegedly realized petitioner was wrongfully incarcerated. The State points out that, unlike Prewitt and Stevens, Robinson "did not make a spontaneous statement to police officers about the murder[.]" Finally, the State contends that petitioner's guilt "was established by overwhelming evidence," and "[t]his outweighs defendant's new unreliable evidence – Robinson's affidavit."

¶ 67 Our supreme court stated that "a petitioner's request for leave of court and his supporting documentation must set forth a colorable claim of actual innocence, *i.e.*, they must raise the probability that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Edwards*, 2012 IL 111711, ¶ 33. Robinson's evidence does not meet this standard. As the circuit court stated regarding the Robinson affidavit:

> "True, Robinson states that he saw the shooter's face and the shooter was not petitioner, but if Robinson testified to that effect at a new trial, his testimony would stand opposed to directly contrary evidence, including petitioner's own videotaped statement and the testimony of Stevens and Prewitt, who also saw the shooter's face at close range and testified that the shooter *was* petitioner. Although petitioner claimed that his videotaped statement was coerced, the trial court rejected that claim and denied petitioner's motion to suppress the confession, the appellate court affirmed the trial court's decision, and petitioner has failed to demonstrate that there was any error in it (see section II. of this

> Order below). As for the eyewitness testimony of Stevens and Prewitt, the appellate court stated on appeal that this evidence was 'ample' and sufficiently reliable by itself to support petitioner's conviction: 'Stevens and Prewitt positively identified defendant at a lineup and in court. Significantly, Prewitt's identification of the Camry that defendant was driving [when he was arrested] went unchallenged.' *See People v. Russell*, 1-05-0971 (unpublished order under Supreme Court Rule 23), at 14. While Robinson's testimony would provide an account of the shooting contrary to that provided by the State's evidence at trial, it would not explain why Stevens and Prewitt believed the shooter was petitioner, when neither apparently had any compelling reason to lie, nor would it explain why petitioner confessed to the crime." (Emphasis in original.)

We agree with the circuit court's assessment that "although Robinson provides significant evidence of petitioner's innocence when he states directly that he saw the shooting and petitioner was not the person who fired the shots that killed Stephon Peden, his account remains directly rebutted by the evidence adduced at trial, and nothing explains the contradiction."

¶ 68 In *People v. Harris*, the Illinois Supreme Court considered whether the circuit court properly dismissed a defendant's first and second amended postconviction petitions. *People v. Harris*, 206 Ill. 2d 293, 299 (2002). One of the defendant's claims was that he was actually innocent based, in part, on the affidavits of two codefendants who stated that defendant was not present at the time of the crime and that they conspired to frame defendant. *Id.* at 300. Our supreme court affirmed the circuit court's decision to dismiss this claim without an evidentiary hearing, stating that "[b]ased upon the overwhelming evidence of guilt, the affidavits of [the codefendants] are not of such a conclusive character that they would probably change the

outcome on retrial." *Id.* ¶ 302. In the instant case, we similarly conclude that the evidence is not of such "conclusive character" – based on, among other things, the timing and circumstances of the creation of Robinson's affidavit – that it would probably change the result on retrial. *Edwards*, 2012 IL 111711, ¶ 40 (citing *People v. Morgan*, 212 Ill. 2d 148, 154 (2004)). Like the circuit court, we believe that "[a] reasonable juror could choose to believe that the petitioner's own videotaped statement and the testimony of Stevens and Prewitt represented the truth of the matter and reject the contrary testimony of Robinson, a witness who came forward only after meeting petitioner in prison years after the crime." In sum, we agree with the circuit court that "Robinson's testimony *** does not meet the high standard for claims of actual innocence, and petitioner's actual innocence claim must fail."

¶ 69 CONCLUSION

¶ 70 For the foregoing reasons, we affirm the circuit court's denial of leave to file a successive postconviction petition. The State's request for fees and costs is denied.

¶ 71 Affirmed.