

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).

2015 IL App (4th) 130809-U

NO. 4-13-0809

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

July 28, 2015

Carla Bender

4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

JOHNATHON D. BROCK,

Defendant-Appellant.

)

)

)

)

)

)

)

)

Appeal from

Circuit Court of

Champaign County

No. 10CF773

Honorable

Thomas J. Difanis,

Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.

Presiding Justice Pope and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* We grant the office of the State Appellate Defender's motion to withdraw and affirm the trial court's dismissal of plaintiff's successive postconviction petition where defendant failed to (1) set forth a colorable claim of actual innocence, and (2) meet the cause-and-prejudice test with respect to his remaining claims.

¶ 2 This case comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as appellate counsel on the ground no meritorious issues can be raised in this case. For the reasons that follow, we grant OSAD's motion to withdraw and affirm the trial court's judgment.

¶ 3

I. BACKGROUND

¶ 4

**A. Defendant's Trial, Direct Appeal,
and Initial Postconviction Petition**

¶ 5

In May 2010, defendant, Johnathon D. Brock, was charged by information with unlawful possession of a controlled substance with intent to deliver within 1,000 feet of a public

park, a Class 1 felony (720 ILCS 570/407(b)(2) (West 2010)) (count I), and unlawful possession of a controlled substance with intent to deliver, a Class 2 felony (720 ILCS 570/401(d) (West 2010)) (count II). In October 2010, the State charged defendant with unlawful delivery of a controlled substance (720 ILCS 570/401(d) (West 2010)) (count III) based on the same transaction.

¶ 6 In October 2010, the matter proceeded to jury trial on count III, where the evidence showed the following. Samantha Morris testified she had two pending criminal cases in Champaign County: (1) unlawful possession of a controlled substance, which occurred on April 28, 2010; and (2) unlawful possession of a controlled substance, which occurred on July 31, 2010. Following her arrest on April 28, Morris agreed to be a confidential informant for the Urbana police department and purchase cocaine as part of a controlled buy. Though an offer was on the table, no plea agreement had been made in either of Morris's pending possession cases. Morris admitted she was hoping to avoid jail time in exchange for her cooperation with police. Further, Morris admitted she had been a drug addict since she was 14 years old.

¶ 7 On April 30, 2010, Morris agreed to perform a controlled purchase of cocaine from defendant. She met with Officer Jay Loschen and Sergeant Sylvia Morgan and was fitted with a wire and buttonhole camera. Sergeant Morgan searched Morris and determined she was not in possession of any contraband, drugs, or money. The officers gave Morris \$50 with which to purchase the cocaine. Morris then left the police station with her boyfriend, Devin Baxter, and both proceeded toward defendant's residence on their bicycles. At some point during their ride to defendant's residence, Morris stopped and called defendant. When Morris and Baxter arrived at defendant's residence, he opened the door and let them in. Morris told defendant she wanted \$50 worth of cocaine. According to Morris, defendant "told one of his buddies that was there

what he needed. The guy threw it to him and it landed on the pool table." Morris handed defendant the \$50, which he set on the pool table, and defendant picked the cocaine up from the pool table and handed it to her. The video recording of the controlled buy was played for the jury and was consistent with Morris's description of the transaction.

¶ 8 Baxter testified he had two pending drug cases in Champaign County. The State had made Baxter a plea offer, but no agreement had been made at the time of trial. After he and Morris were arrested in April 2010, he agreed to cooperate with the Urbana police department by participating in controlled buys. Baxter received nothing in exchange for his cooperation, but he did hope to avoid jail time. Additionally, he admitted he was a drug addict. On April 30, he and Morris met with Officer Loschen and Sergeant Morgan to set up the controlled buy. Officer Loschen searched him and found no contraband, drugs, or money on his person. Baxter corroborated Morris's description of the controlled buy that took place on April 30, except he indicated defendant retrieved the cocaine and handed it to Morris, instead of another man giving defendant the cocaine to give to Morris.

¶ 9 Sergeant Morgan testified once Morris and Baxter left the police station to proceed to defendant's residence, she and Officer Loschen followed the couple. After the buy had been completed, Baxter and Morris met Officer Loschen and Sergeant Morris in a predesignated parking lot. Morris handed her a small plastic Baggie containing suspected cocaine.

¶ 10 Officer Loschen testified he spoke with defendant while police were executing a search warrant at his residence on May 7, 2010. Officer Loschen told defendant the police had him on camera selling cocaine. Defendant explained he had not sold any cocaine but he had possibly given some cocaine to someone. At one point, defendant told Officer Loschen that if he

did sell cocaine, the last time he had done so was in January or February 2010. At all times, defendant was "adamant about not selling a lot of drugs."

¶ 11 During the search of the residence, Sergeant Morgan gave Officer Loschen a cell phone, which was found in the bedroom where defendant was located during the execution of the search warrant. Officer Loschen used his cell phone to call the number they had for defendant, and the cell phone recovered during the search rang.

¶ 12 Officer Loschen also identified a man named Chuckie James on a still photograph generated from the video recording made during the controlled buy. James was the man on the video who handed the suspected cocaine to defendant across the pool table.

¶ 13 Hope Erwin, a forensic drug chemist with the Illinois State Police, testified she weighed and analyzed the suspected cocaine given to Sergeant Morgan by Morris. Erwin determined the substance weighed 0.6 grams and tested positive for cocaine.

¶ 14 On this evidence, the jury convicted defendant of unlawful delivery of a controlled substance. In November 2010, the trial court sentenced defendant to 25 years' imprisonment, as defendant was eligible to be sentenced as a Class X offender based on his criminal history. See 730 ILCS 5/5-4.5-95(b) (West 2010). On November 29, 2010, defendant filed his notice of appeal.

¶ 15 On direct appeal, defendant argued his trial counsel was ineffective for failing to file a motion to suppress the video recording of him completing the drug transaction. In September 2012, this court affirmed defendant's conviction. *People v. Brock*, 2012 IL App (4th) 100945, 976 N.E.2d 631.

¶ 16 On December 1, 2010, while his direct appeal was pending, defendant filed his first postconviction petition pursuant to section 122-1 of the Post-Conviction Hearing Act (Act)

(725 ILCS 5/122-1 (West 2010)). In his petition, defendant claimed, *inter alia*, (1) his trial counsel was ineffective for failing to subpoena his codefendant, James, to testify; and (2) the State offered the perjured testimony of Morris, Baxter, and Officer Loschen.

¶ 17 Later that month, the trial court summarily dismissed defendant's initial postconviction petition, finding it frivolous and patently without merit. Defendant did not appeal the dismissal of his initial petition but has alleged he did not receive notice of the dismissal of his initial petition until February 3, 2011, more than 50 days after it was entered. We note the record contains two letters notifying defendant of the summary dismissal of his initial petition. One letter is dated December 17, 2010, and the other is dated February 3, 2011.

¶ 18 B. Defendant's Successive Postconviction Petition

¶ 19 1. *Defendant's Written Petition*

¶ 20 In August 2013, defendant filed a petition for leave to file a successive postconviction petition and attached his proposed successive petition. In his proposed successive petition, defendant set forth four claims: (1) actual innocence; (2) ineffective assistance of trial counsel; (3) denial of his right to a fair trial; and (4) denial of his right to due process.

¶ 21 a. *Petition for Leave*

¶ 22 In his petition for leave to file his proposed successive petition, defendant asserted he was unable to appeal the summary dismissal of his first postconviction petition because he did not receive notice of its dismissal until more than 50 days after its entry. Additionally, defendant argued where, as here, he set forth a claim of actual innocence based on "newly discovered" evidence, he need not show cause and prejudice to excuse his failure to bring his claims in his initial petition. See 725 ILCS 5/122-1(f) (West 2012) (leave to file a successive postconviction petition may be granted only when 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").

¶ 23

b. Actual Innocence Claim

¶ 24

In support of his claim for actual innocence, defendant stated he had obtained "[n]ewly discovered evidence which consists of an affidavit from [defendant's] co-defendant [James] which will state that [defendant] had absolutely no participation at all in said crime." Defendant claimed James's affidavit was of such a conclusive character it would probably change the result on retrial. Defendant also asserted he had "always been diligent in seeking evidence to prove his innocence," but no amount of diligence could have forced James to waive his fifth-amendment privilege against self-incrimination. Further, defendant stated if James were called to testify, he would state (1) defendant neither planned nor participated in the delivery of drugs to the informants, (2) he alone was guilty, and (3) defendant's counsel told him the State would file a petition to revoke his probation if he testified for defendant at trial. The record does not contain an affidavit executed by James stating he would testify consistent with these assertions. Appellate counsel has represented he requested the circuit clerk search for the affidavit, but the clerk's office was unable to locate it after several attempts.

¶ 25

c. Ineffective Assistance of Counsel Claim

¶ 26

As to his claim of ineffective assistance of counsel, defendant alleged his trial counsel was deficient for several reasons. First, defendant alleged counsel failed to use a peremptory strike to exclude jury foreman John Dorsey where Dorsey stated during *voir dire* that (1) he had, 15 years prior, allowed police to conduct surveillance of suspected drug dealers from his living room; and (2) his daughter had "a little problem with the law, and [he] had some dealings with the Urbana police department." Defendant claimed he told counsel to strike

Dorsey or, at a minimum, ask more questions about his dealings with law enforcement.

Defendant also noted Dorsey sent a letter to the trial judge two weeks after the verdict was entered discussing the prevalence of drug activity in his neighborhood, which demonstrated Dorsey was biased against him. Second, defendant claimed counsel was deficient for failing to move for a mistrial after he learned of Dorsey's letter to the trial judge. (The letter written by Dorsey is in the record and was on file with the circuit clerk as of November 1, 2010.)

¶ 27 Third, defendant asserted counsel was deficient for failing to file a pretrial motion *in limine* seeking to bar the State from introducing evidence of his criminal history. According to defendant, he asked counsel to file the motion *in limine* so he could testify in his own defense, but counsel refused because he did not want defendant to testify. Counsel allegedly told defendant "he's the lawyer [and] that he's made the decision that the defendant was not going to be testifying." Fourth, defendant claimed counsel was ineffective for failing to call James to testify. According to defendant, James contacted counsel "several times in an attempt to ensure that he be called as a witness" on behalf of defendant, but counsel told James the State would revoke his probation if he did so.

¶ 28 Fifth, defendant alleged counsel was ineffective because he failed to file a motion to reconsider his sentence "despite [his] many request [*sic*]." According to defendant, counsel told defendant he initially filed a motion to reconsider but "the court just wouldn't hear it," and he then told defendant it did not matter whether contentions of error in the sentence had been preserved for review because the appellate court would have denied any appeal as to the sentence. Sixth, defendant claimed counsel was ineffective for failing to make a *Batson* challenge (see *Batson v. Kentucky*, 476 U.S. 79 (1986)) when no African-Americans appeared on

his jury venire. Finally, defendant asserted counsel was ineffective for failing to request a jury instruction regarding the reliability of witnesses who are addicted to drugs.

¶ 29 d. Right to a Fair Trial

¶ 30 Defendant's third claim was he was denied his right to a fair trial by an impartial jury of his peers. Defendant alleged the jury contained no African-Americans and that counsel failed to take action when defendant noted this fact during jury selection.

¶ 31 e. Right to Due Process

¶ 32 Defendant's final claim was that he was denied his right to due process when the State knowingly used the "perjured" testimony of Morris and failed to correct it. According to defendant, Morris committed perjury when she testified she did not receive a deal from the State in exchange for her testimony against defendant. He contended Officer Loschen's testimony—that informants are typically "working off" pending cases—directly contradicted Morris's testimony.

¶ 33 2. *The Trial Court's Order*

¶ 34 In August 2013, the trial court entered a written order denying defendant's petition for leave to file a successive postconviction petition. Therein, the court found James was not a "newly discovered" witness because he was defendant's codefendant. Additionally, the court found James's testimony would probably not change the result on retrial because the evidence of defendant's guilt, as shown by the video recording and testimony, was overwhelming. As to the remaining claims, the court found defendant could show neither cause nor prejudice for his failure to raise these issues in his initial petition.

¶ 35 This appeal followed. The trial court appointed OSAD to represent defendant on appeal. In October 2013, OSAD moved to withdraw as counsel on appeal. On its own motion,

this court granted defendant leave to file additional points and authorities on or before March 4, 2015. Pursuant to leave of court, defendant filed a response on March 24, 2015. The State has responded to OSAD's motion. Defendant also filed a reply brief opposing OSAD's motion.

¶ 36

II. ANALYSIS

¶ 37 On appeal, OSAD contends no colorable argument can be made the trial court erred in denying plaintiff leave to file his successive postconviction petition. We agree.

¶ 38

A. Standard of Review

¶ 39 The Act contemplates the filing of only one postconviction petition. *People v. Pitsonbarger*, 205 Ill. 2d 444, 456, 793 N.E.2d 609, 619 (2002). Issues decided on direct appeal or in earlier postconviction proceedings are barred from successive petitions by the doctrine of *res judicata*. *People v. Blair*, 215 Ill. 2d 427, 443, 831 N.E.2d 604, 615 (2005). Further, any claim of substantial denial of constitutional rights not raised in the original or an amended petition is forfeited. 725 ILCS 5/122-3 (West 2012); see *People v. Davis*, 2014 IL 115595, ¶ 13, 6 N.E.3d 709. Thus, a defendant may not pursue a successive petition under the Act unless he obtains leave of court. 725 ILCS 5/122-1(f) (West 2012).

¶ 40

To obtain leave to file a successive postconviction petition, a defendant must either (1) show cause and prejudice for the failure to raise a claim in his or her earlier petition, or (2) set forth a colorable claim of actual innocence. *People v. Edwards*, 2012 IL 111711, ¶¶ 22-24, 969 N.E.2d 829; see also 725 ILCS 5/122-1(f) (West 2012) (setting forth the cause-and-prejudice test). We review *de novo* the trial court's denial of defendant's motion for leave to file a successive petition for postconviction relief. *People v. Green*, 2012 IL App (4th) 101034, ¶ 30, 970 N.E.2d 101. We may affirm the trial court's decision on "any basis supported by the record

if the judgment is correct." (Internal quotation marks omitted.) *Id.* (quoting *People v. Anderson*, 401 Ill. App. 3d 134, 138, 929 N.E.2d 1206, 1210 (2010)).

¶ 41 B. Defendant's Claim of Actual Innocence

¶ 42 In his proposed successive petition, defendant asserted a claim of actual innocence based on the "newly discovered" testimony of his codefendant, James. OSAD contends no colorable argument can be made the trial court erred in denying defendant leave to bring this claim where James's testimony, even if "newly discovered," would not likely change the result on retrial. We agree with OSAD.

¶ 43 To set forth a claim of actual innocence, the defendant must present evidence which is (1) newly discovered, (2) material, (3) noncumulative, and (4) of such conclusive character that it would probably change the result on retrial. *People v. Ortiz*, 235 Ill. 2d 319, 333, 919 N.E.2d 941, 950 (2009). Leave to file a successive postconviction petition based on such a claim should be granted only if the defendant's request for leave and supporting documentation "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, ¶ 31, 969 N.E.2d 829.

¶ 44 In this case, the purported testimony of defendant's codefendant, James, would state defendant neither planned nor participated in the drug transaction and that he alone was guilty of the offense. If this evidence was presented to the jury, it would probably not change the result on retrial. To the contrary, the evidence in this case overwhelmingly shows defendant's guilt. The State presented a video recording to the jury which showed defendant accepting money from Morris, picking up an object from the pool table, and handing it toward Morris. The State presented evidence Morris took this object to a designated meeting spot and gave it to

Sergeant Morgan. The State also presented evidence the object obtained by Morris contained 0.6 grams of cocaine. Further, the State presented the testimony of Morris and Baxter describing the transaction. Although Morris's and Baxter's credibility might reasonably be questioned, the jury was entitled to conclude, as they did here, defendant was guilty of the charged offense. Given the totality of the evidence in the case, we find James's testimony does not "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." *Id.* Accordingly, the trial court correctly determined defendant's petition for leave and proposed successive petition failed to set forth a colorable claim of actual innocence.

¶ 45 C. Defendant's Remaining Claims

¶ 46 OSAD also contends no colorable argument can be made the trial court erred in denying defendant leave to present his remaining claims: (1) ineffective assistance of counsel, (2) denial of his right to a fair trial, and (3) denial of his right to due process. We agree with OSAD.

¶ 47 With regard to claims not involving actual innocence, leave to file a successive postconviction petition will be granted where the defendant can demonstrate both cause for his failure to raise the issue in a prior postconviction petition and prejudice resulting from that failure. *Davis*, 2014 IL 115595, ¶ 14, 6 N.E.3d 709; 725 ILCS 5/122-1(f) (West 2012). "Cause" is established when the defendant shows some objective factor impeded his ability to raise the claim in the original postconviction proceedings. *People v. Tenner*, 206 Ill. 2d 381, 393, 794 N.E.2d 238, 246 (2002). "Prejudice" is established when the defendant shows the claimed error so infected his trial that the resulting conviction violated due process. *Id.*

¶ 48 1. *Defendant's Claims of Ineffective Assistance of Counsel*

¶ 49 Defendant's petition raised several claims of ineffective assistance of counsel. Such claims are judged under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a defendant must show (1) his counsel's performance was deficient as measured against an objective standard of reasonableness under prevailing professional norms, and (2) defense counsel's deficient performance prejudiced the defendant. *Id.* at 687-88. We will address each of defendant's ineffective assistance of counsel claims in turn.

¶ 50 a. Counsel's Failure To Use a Peremptory
Challenge on Juror John Dorsey

¶ 51 Defendant's proposed successive petition raised a claim of ineffective assistance of counsel based on counsel's failure to use a peremptory challenge to remove juror John Dorsey. Defendant contended counsel should have struck Dorsey where his *voir dire* testimony made it clear he was biased in favor of the State because he had allowed police to conduct surveillance from his home 15 years earlier.

¶ 52 Defendant cannot show cause for his failure to include this claim in his initial postconviction petition. First, we note defendant's petition for leave failed to point to any objective factor external to the defense that prevented him from raising this claim in his initial postconviction petition. See *Tenner*, 206 Ill. 2d at 393, 794 N.E.2d at 246. It simply stated he had cause to present this claim.

¶ 53 On appeal, defendant contends he could not have raised this claim in his initial petition because he filed his initial petition on December 1, 2010, two days after he filed his notice of appeal, and "before possessing any transcripts or having any knowledge of [juror John] Dorsey's letter to [the trial judge]." This factor is not external to the defense; rather, defendant chose to file his initial petition only eight days after he was sentenced. Defendant's choice to hastily file his initial petition, instead of waiting until the record had been prepared, is no excuse

for his failure to bring this claim in his initial petition. Accordingly, we conclude the trial court correctly found defendant failed to demonstrate cause for his failure to bring this claim in his initial petition.

¶ 54 b. Counsel's Failure To File a Motion for a Mistrial

¶ 55 Defendant's proposed successive petition also claimed counsel was ineffective where he failed to move for a mistrial when he learned of a letter written by juror John Dorsey, which was delivered to the trial court after trial but before defendant's sentencing hearing. According to defendant, Dorsey admitted in his letter he committed juror misconduct by talking about the case with his neighbor on the first day of trial. When counsel learned of this letter, defendant contended, he should have filed a motion for a mistrial based on Dorsey's misconduct.

¶ 56 The record rebuts defendant's characterization of Dorsey's letter. The letter does not state Dorsey discussed defendant's case with his neighbor; rather, it stated, in pertinent part:

"On the evening of the first day of the trial I was standing in my front yard conversing with my neighbor. My neighborhood [*sic*] bent over and picked up a plastic baggie with a twisted corner and stated to me that this twisted corner indicated that this baggie had contained an illegal drug. That very issue came up in court that day."

¶ 57 Additionally, defendant's petition for leave and proposed successive petition does not indicate any objective factor which would have prevented him from raising this claim in his initial petition and we see none in the record. See *id.* Further, regardless of whether defense counsel ever tendered defendant a copy of the letter and discussed it with him, the letter was filed in the record by the circuit clerk on November 1, 2010, 30 days before defendant filed his initial

petition. Again, defendant's choice to hastily file his initial petition, instead of waiting until the record had been prepared, is no excuse for his failure to bring this claim in his initial petition. Accordingly, we conclude the trial court correctly found defendant failed to demonstrate cause for his failure to bring this claim in his initial petition.

¶ 58 c. Counsel's Failure To File a Motion *In Limine*

¶ 59 Defendant's proposed successive petition next claimed his counsel was ineffective for failing to file a motion *in limine* to bar the State from introducing evidence of his criminal history if he had chosen to testify. According to defendant, he was clear with counsel he wanted to testify in his defense throughout the entirety of his case.

¶ 60 Defendant fails to identify any objective factor which prevented him from raising this claim in his initial petition and we see none in the record. See *id.* In fact, defendant could have raised this claim in his initial petition because he was well aware of counsel's alleged failure to file such a motion and allow defendant to testify, as this alleged conduct occurred in defendant's presence. Thus, having known all the facts necessary to raise this claim prior to the filing of his initial petition, defendant cannot establish cause for his failure to raise it in his initial petition. See *People v. Williams*, 394 Ill. App. 3d 236, 246, 914 N.E.2d 641, 650-51 (2009) (defendant could not show cause for his failure to include his claim in his initial postconviction petition where he was aware of the claim and supporting facts prior to his initial petition). Accordingly, we conclude the trial court correctly found defendant failed to demonstrate cause for his failure to bring this claim in his initial petition.

¶ 61 d. Counsel's Failure To Call James To Testify

¶ 62 Defendant's proposed successive petition additionally asserted his counsel was ineffective for failing to call James to testify. According to defendant, had counsel called James, James would have exonerated defendant.

¶ 63 This claim is barred by *res judicata*, as it was raised in defendant's initial petition and found to be frivolous and patently without merit. *Blair*, 215 Ill. 2d at 443, 831 N.E.2d at 615. Accordingly, we conclude the trial court correctly denied defendant leave to raise this claim in a successive petition.

¶ 64 e. Counsel's Failure To File a Motion To Reconsider His Sentence

¶ 65 Defendant's petition also contends his counsel was ineffective for failing to file a motion to reconsider his sentence. Had counsel filed such a motion, defendant asserts, he would have received a reduced sentence given the fact the crime was nonviolent and involved the distribution of only 0.6 grams of a controlled substance. Additionally, defendant alleged counsel initially told him he filed the motion but the trial court would not hear it. Then, according to defendant, counsel told him such a motion was not necessary because the appellate court would deny any appeal toward the sentence.

¶ 66 Again, defendant's petition for leave failed to present any objective factor which prevented from raising this claim in his initial petition. See *Tenner*, 206 Ill. 2d at 393, 794 N.E.2d at 246. His petition for leave states only that he had cause to present the claim to the trial court. We see nothing in the record which could have prevented defendant from raising this claim in his initial petition. By his own admission, defendant and his counsel discussed a motion to reconsider his sentence prior to him filing his notice of appeal and his initial petition. Thus, having known all the necessary facts to raise this claim prior to the filing of his initial petition, defendant cannot establish cause for his failure to raise it in his initial petition. See *Williams*,

394 Ill. App. 3d at 246, 914 N.E.2d at 650-51. Accordingly, we conclude the trial court correctly found defendant failed to demonstrate cause for his failure to bring this claim in his initial petition.

¶ 67 f. Counsel's Failure To Raise a *Batson* Challenge

¶ 68 Defendant's proposed successive petition also claimed counsel was ineffective for failing to raise a *Batson* challenge during jury selection. Defendant alleged he expressed his concern to counsel regarding the lack of any African-Americans in the jury pool during jury selection, but counsel "flat out" refused to address the issue.

¶ 69 Again, defendant's petition failed to identify any objective factor external to the defense which prevented him from raising this claim in his initial petition. See *Tenner*, 206 Ill. 2d at 393, 794 N.E.2d at 246. Instead, he made only the conclusory statement, "Petitioner has cause to present this issue to the [c]ourt." We see nothing in the record that could have prevented defendant from raising this issue in his initial petition. By his own admission, defendant was aware of this issue during jury selection and urged his counsel to "do something about it." Thus, having known all the necessary facts to raise this claim prior to the filing of his initial petition, defendant cannot establish cause for his failure to raise it in his initial petition. See *Williams*, 394 Ill. App. 3d at 246, 914 N.E.2d at 650-51. Accordingly, we conclude the trial court correctly found defendant failed to demonstrate cause for his failure to bring this claim in his initial petition.

¶ 70 g. Counsel's Failure To Request a Jury Instruction
Regarding the Reliability of Drug-Addicted Witnesses

¶ 71 Finally, defendant's petition claimed his counsel was ineffective for failing to request and tender a jury instruction regarding the reliability of witnesses who are addicted to

drugs. He notes the testimony of Morris, who is addicted to drugs, is of questionable reliability, and the jury should have been instructed to view her testimony with caution.

¶ 72 Defendant's petition for leave and proposed successive petition failed to point to any objective factor external to the defense which prevented him from raising this claim in his initial petition. See *Tenner*, 206 Ill. 2d at 393, 794 N.E.2d at 246. Defendant simply stated he had cause to bring this claim. Our review of the record shows nothing that could have prevented defendant from raising this claim in his initial petition. Defendant, who was present during trial, knew about Morris's testimony regarding her drug addiction and counsel's failure to request a jury instruction regarding Morris's credibility prior to the date he filed his initial postconviction petition. Thus, having known all the necessary facts to raise this claim prior to the filing of his initial petition, defendant cannot establish cause for his failure to raise it in his initial petition. See *Williams*, 394 Ill. App. 3d at 246, 914 N.E.2d at 650-51. Accordingly, we conclude the trial court correctly found defendant failed to demonstrate cause for his failure to bring this claim in his initial petition.

¶ 73 *2. Defendant's Claim He Was Denied His Right to a Fair Trial*

¶ 74 Defendant's proposed successive petition included a claim he was denied his right to a fair trial where African-Americans were excluded from his jury pool. Defendant's petition further contended his trial counsel "failed to do something about the racial makeup of the veniremen" despite his urging.

¶ 75 Defendant's petition for leave and proposed successive petition failed to point to any objective factor external to the defense which prevented him from raising this claim in his initial petition. See *Tenner*, 206 Ill. 2d at 393, 794 N.E.2d at 246. In fact, defendant was aware of the racial makeup of the jury and his counsel's failure to do anything about it prior to the start

of trial and well before he filed his initial petition. Thus, having known all the necessary facts to raise this claim prior to the filing of his initial petition, defendant cannot establish cause for his failure to raise it in his initial petition. See *Williams*, 394 Ill. App. 3d at 246, 914 N.E.2d at 650-51. Accordingly, we conclude the trial court correctly found defendant failed to demonstrate cause for his failure to bring this claim in his initial petition.

¶ 76 3. *Defendant's Claim He Was Denied His Right to Due Process*

¶ 77 Finally, defendant's proposed successive petition claimed he was denied his right to due process where the State knowingly used the perjured testimony of Morris and failed to correct it. According to defendant, Morris committed perjury when she testified she did not receive a deal and that no promises had been made in exchange for her testimony, as evidenced by Officer Loschen's testimony that informants are typically "working off" pending cases.

¶ 78 This claim is barred by *res judicata*, as it was raised in defendant's initial petition and found to be frivolous and patently without merit. *Blair*, 215 Ill. 2d at 443, 831 N.E.2d at 615. Accordingly, we conclude the trial court correctly denied defendant leave to bring this claim.

¶ 79 Based on the forgoing, we conclude no colorable argument can be made the trial court erred by denying defendant's petition for leave to file a successive postconviction petition.

¶ 80 III. CONCLUSION

¶ 81 For the reasons stated, we grant OSAD's motion to withdraw and affirm the trial court's judgment.

¶ 82 Affirmed.