

NOTICE

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2014 IL App (4th) 120702-U

NO. 4-12-0702

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

October 3, 2014

Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
AARON WILBERT BOOTH,)	No. 05CF107
Defendant-Appellant.)	
)	Honorable
)	James E. Souk,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Pope and Knecht concurred in the judgment.

ORDER

- ¶ 1 *Held:* Because defendant failed to establish cause, the appellate court affirmed the trial court's judgment in denying defendant's motion for leave to file a successive postconviction petition.
- ¶ 2 In October 2006, the trial court found defendant, Aaron Wilbert Booth, guilty of criminal sexual assault and battery. In February 2007, the court sentenced him to 15 years in prison on the criminal-sexual-assault conviction and imposed a concurrent 364-day jail term on the battery conviction. Defendant appealed, and this court affirmed. In June 2009, defendant filed a petition for postconviction relief, which the trial court dismissed as frivolous and patently without merit. This court affirmed. In July 2012, defendant filed a *pro se* motion for leave to file a successive postconviction petition, which the trial court denied.
- ¶ 3 On appeal, defendant argues the trial court erred in denying him leave to file a successive postconviction petition. We affirm.

¶ 4

I. BACKGROUND

¶ 5 In November 2005, a grand jury indicted defendant on the offense of aggravated domestic battery (count I) (720 ILCS 5/12-3.3(a) (West 2004)), alleging he knowingly and without legal justification caused great bodily harm (facial bruising) to N.S., a family or household member, by hitting her. In January 2006, a grand jury indicted defendant on the offense of criminal sexual assault (count II) (720 ILCS 5/12-13(a)(1) (West 2004)), alleging he knowingly and unlawfully committed an act of sexual penetration with N.S. by the use of force or threat of force in that he inserted a whiskey bottle in her vagina. The grand jury also indicted defendant on the offense of battery (count III) (720 ILCS 5/12-3(a)(2) (West 2004)), alleging he knowingly and without legal justification made physical contact of an insulting or provoking nature with N.S. in that he grabbed her by the neck and choked her with his hands. Defendant pleaded not guilty.

¶ 6 In October 2006, the trial court conducted *voir dire* in preparation for defendant's jury trial. We set forth the pertinent part of the colloquy between the prosecutor and prospective jurors that defendant now on appeal contends was improper.

"Q. Does anybody believe that if a victim does not want to testify or be here to talk about something terrible that happened to them that the States Attorney's Office should drop charges?

THE JURORS: (No.)

* * *

Q. In that vein, though, you do understand that a person can have a relationship with a person and commit this type of offense. Correct?

JUROR MURPHY: Yeah.

Q. Now in this case, to the group in general, if the victim recants or doesn't want to talk about it, but if there is sufficient evidence, written statements, reported statements by themselves, if that is sufficient, would you return a guilty verdict if the evidence supported that, despite a witness's inability to convey what happened, if there's independent evidence?

JUROR COONAN: Could you say that again?

Q. If the victim doesn't want to talk about it, but the evidence is sufficient, for example, an audio-taped interview saying exactly what happened, if that was enough, would you be able to convict on that alone if there was corroborating evidence and the victim did not want to talk about it?

* * *

Q. And, likewise, if the evidence shows a person committed an offense and the victim wants to protect him because she's still in love with him, would you follow the evidence and what the evidence shows as a whole?

JUROR ROBERTS: We would need more evidence. It's too short-statured. We need more.

Q. Let me ask you this, Miss Roberts.

If the victim said it didn't happen, and there was a whole bunch of evidence, photographs of injuries, statements that she

made to multiple people, for example, an emergency room doctor and an audiotaped statement, and irregardless [*sic*] if the woman didn't want to talk about it, you would acquit the Defendant; is that what you're saying?

Q. Can you convict on independent evidence outside of the victim if there is enough there is my question?

JUROR ROBERTS: I don't know.

Q. So in that vein, if this case was made by independent evidence outside of the victim, you don't think you could be fair to my client, the People of the State of Illinois?

JUROR ROBERTS: I didn't say that. I said I didn't know.

Q. That's fair enough, but that is not a definitive yes; is that fair to say?

JUROR ROBERTS: Exactly.

Q. Okay, I thank you for your candor.

Does anybody else feel that way too? If you do, that's fine. I just kind of need to know that.

* * *

THE COURT: The following jurors are excused from further service on this case: Miss Wade, Miss Roberts, Miss Morrissey, Miss Murphy, Miss Harvey-Boitnott, and Mr. Fry.

* * *

Q. Generally, the entire panel, I ask the same general questions.

If the victim doesn't want to pursue charges or doesn't want to testify and go through something horrible that happened, are you going to hold that against the State to try to bring them here and make them come here to tell you what happened?

* * *

Is it fair to say that if there's other independent evidence, if the victim doesn't want to go through it, like if there's other evidence like statements that they made and physical evidence, could you convict on that alone?

* * *

Q. Does anyone on the jury think if somebody was attacked and they don't report it right away and wait 10 or 12 hours, would they say I don't believe any of this?

THE JURORS: (No.)"

After the jury panel had been selected, the following exchange took place:

"MR. WRIGHT [(defense counsel)]: Although I'm not sure if the issue will be moot or not, Mr. Booth advises me that he does not believe that he can get a fair trial with these jurors, and he believes he should be given another jury panel or pool, rather, from which to make his selections.

I advised him I don't see any legal basis for suggesting that

that would be appropriate, but he has indicated that that's what he would like.

On his behalf, I bring that up.

THE COURT: All right. No one is suggesting a legal reason.

Mr. Booth, is there some reason you thought this particular panel couldn't be fair?

THE DEFENDANT: The majority of everyone in the panel that has been up there to select from has some type of a conflict with the case that I'm at hand.

The majority of the people from like—how many people, 28 people—the majority of them, you know, has some type of conflict with my case at hand, and I think this group of people that I'm selecting wouldn't do me any justice to a fair trial, and I'd ax [*sic*] that I have another opportunity for another jury.

THE COURT: Did you want to point out somebody who has actually been picked on the case?

A number of people have indicated that they maybe have some issues with certain things, but your attorney has excused seven and the State[']s Attorney has excused four, and the Court has excused four, leaving 13 people, 12 and an alternate.

Of those 13 people left, are you suggesting there's somebody there who has indicated some sort of conflict that we

ought to take into account?

THE DEFENDANT: Just with the likelihood of they live, you know.

Mr. Horve brought to the jury—he basically set a picture up of what the case is going to be about and it kind of marked a scene they bring that, okay, this is how it's going to be, you know.

From me seeing that, I don't think this will be, you know, a fair jury trial for me and my case. I don't think the people that are selected will be fair, your Honor, so I'm asking you, if you don't grant me another opportunity to select, I would prefer to take a bench trial.

If you deny that, then okay. I'll cooperate. I have no other choice.

My lawyer said that he doesn't see any grounds why—he don't see any grounds why, but I'm sure that there's some type of a ground why I should be able to.

I'm not a lawyer. I don't have the books and things to do research and get the knowledge from it, so I wouldn't be—but I'm sure there's some type of reason why.

* * *

MR. WRIGHT: Yes, Judge, I've had an opportunity to speak to Mr. Booth.

He has indicated to me unequivocally that he does not

believe he can get a fair trial with his particular jury pool.

Therefore, he has indicated to me that he chooses to waive a jury and proceed on this matter on the basis of a bench trial.

* * *

THE COURT: Do you have a question, Mr. Booth?

THE DEFENDANT: Yeah, it seems like I'm being forced to do something that I don't want to do.

I mean I see right now that I won't get a fair trial out of this jury, even with the 12 that have been selected. I understand that now."

The court then informed defendant on the process of jury selection. Defendant, however, continued to complain that the members of the jury panel were "tainted" or "wouldn't be fair." He felt he "should have at least another opportunity to pick another group of people." The court indicated it understood defendant's feelings and noted that 16 of the 28 potential jurors had been excused "for one reason or another," and of the 12 picked, "not a single one of them has said they wouldn't be fair." Defendant continued to object to those particular 12 jurors and noted he did not "even see people of [his] creed or [his] color on the jury."

¶ 7 Since the trial court indicated no legal basis existed to call for a new jury pool, defendant indicated his desire to proceed with a bench trial. The court engaged in still more discussion with defendant, and he ultimately signed the jury waiver form.

¶ 8 Prior to the start of the bench trial, the State moved to dismiss count I. Dr. Kathryn Bohn, an emergency-room physician, testified she examined N.S. on January 26, 2005. Dr. Bohn found her "in pain and upset." N.S. complained of pain to her face, her throat, her

abdomen, and her vaginal area. N.S. stated her ex-boyfriend hit her in the face and neck, tried to choke her, penetrated her with his penis twice, and took a whiskey bottle and repeatedly introduced it into her vagina. During the examination, Dr. Bohn found a red mark on the victim's forehead, abrasions and lacerations to her neck, scratches on her breast, and a subconjunctival hemorrhage of the right eye. Dr. Bohn opined the lacerations to the neck could have been caused by choking. Dr. Bohn also testified a pelvic exam revealed swelling of the labia majora. Dr. Bohn found it to be an unusual amount of swelling and not the type of swelling generally expected from regular intercourse. Dr. Bohn opined the injury could have been caused by a bottle.

¶ 9 N.S. stated she did not want to testify. She testified defendant was her ex-boyfriend but still a friend. She remembered going to the hospital on January 26, 2005, because she "was beat up or something real bad." N.S. did not recall talking to officers at her home. She did not remember telling the doctor her ex-boyfriend choked her or penetrated her with a whiskey bottle.

¶ 10 Normal police officer Dwayne Harris testified he and Officer Mike Chiesi talked with the victim on January 26, 2005. Harris found her to be "very upset" and "visibly shaken." He stated her right eye was swollen shut and she had numerous scratches on her neck. N.S. told the officers she was beaten by defendant, her ex-boyfriend. She stated she was assaulted at a Motel 6 and "vaginally penetrated with a Hennessey bottle."

¶ 11 Normal police officer Michael Chiesi testified he observed N.S. with a swollen right eye and several scratches on her face. Chiesi stated she was "very upset" and crying. N.S. stated she had consensual sex with defendant earlier in the evening and then she fell asleep. She later awoke to find defendant extremely angry about some phone numbers he found in her cell

phone. N.S. stated she was sexually assaulted, slapped in the face, and penetrated with a Hennessey bottle by defendant. She told the officers defendant called her a "bitch" and a "ho" and told her several times he would kill her. When she tried to leave the motel room, defendant pulled her back by her hair.

¶ 12 Normal police sergeant Ryan Ritter testified he met with N.S. at the hospital in the afternoon of January 26, 2005. She did not show signs of being under the influence. He stated she was "very reluctant to speak to [him] at first." She also "seemed to be very sore" and "very shaken up." Her right eye was swollen and bloodshot, she had scratches on her neck and chest, and she had an injury to her pelvic region. Sergeant Ritter tape-recorded a conversation with N.S., and the recording was played for the trial court. During the conversation, N.S. named defendant as her attacker. She later confirmed his identity through a photograph.

¶ 13 Defendant exercised his constitutional right not to testify. Following closing arguments, the trial court found defendant guilty on counts II and III.

¶ 14 In November 2006, defendant filed a motion for a new trial. In February 2007, the trial court denied the motion. Thereafter, the court sentenced defendant to 15 years in prison on count II and 364 days in jail on count III. The sentences were to run concurrent to each other and consecutive to a 15-year sentence in McLean County case No. 04-CF-447.

¶ 15 Defendant appealed, arguing the State failed to prove him guilty of criminal sexual assault and battery beyond a reasonable doubt. This court disagreed and affirmed his convictions and sentences. *People v. Booth*, No. 4-07-0263 (Apr. 8, 2008) (unpublished order under Supreme Court Rule 23).

¶ 16 In June 2009, defendant, through counsel, filed a petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 2008)), setting

forth a claim of actual innocence. Therein, defendant claimed N.S. "remember[ed] the events" of January 26, 2005, and "her recollection completely contradicts her testimony at trial." Attached to the petition was a voluntary statement form signed by N.S. and dated June 11, 2009. N.S. stated she had sex with defendant at the motel before she decided to have a party. People were "coming in and out," drinking and "smoking weed." N.S. stated she got into an argument with a woman named Varquisha. Thereafter, "some of the girls at the party started beating [N.S.] up." After the party was over, N.S. went to sleep. She awoke and proceeded to the Baby Fold so she could visit her children, who were in the custody of the Department of Children and Family Services. Because of bruises on N.S.'s face, a caseworker did not want the children to see her in that condition. N.S. left and went home. An aunt then called an ambulance, and N.S. was taken to the hospital.

¶ 17 N.S. stated she did not remember what she told the police at the hospital because she was in pain and on medication for her injuries. At trial, N.S. stated the prosecutor was "badgering" her and not interested in her version of the events. In her statement, N.S. stated defendant never raped or beat her.

¶ 18 In July 2009, defendant's counsel filed a motion to withdraw. In August 2009, the trial court summarily dismissed the postconviction petition. The court noted the statement given by N.S. was "not verified, notarized or otherwise submitted under oath in any form that would constitute a proper affidavit." Even if N.S.'s statement was a proper affidavit, the court stated the petition would still be dismissed as frivolous and patently without merit. In part, the court stated N.S.'s statement "now purports to present yet another version from [her] claiming to now remember the event and alleging that her injuries were caused by certain females and that the defendant had nothing to do with them."

¶ 19 Defendant appealed. Because a timely filed motion to reconsider was still pending, this court struck the notice of appeal and remanded for a hearing on defendant's postjudgment motion. *People v. Booth*, No. 4-09-0667 (Sept. 3, 2010) (unpublished order under Supreme Court Rule 23).

¶ 20 On remand in November 2010, the trial court considered all of the previous petitions, motions, and supporting documents, including a March 2008 affidavit from N.S. and her August 2009 affidavit. The court found "significant inconsistencies" in N.S.'s various statements and affidavits, which "only strengthened" the conclusion that her affidavits were not newly discovered evidence. The court found it clear from N.S.'s inconsistencies "that she continues in an effort, as she did at trial, to mislead the Court and manipulate the outcome of this proceeding." The court dismissed defendant's motion for postjudgment relief, finding it frivolous and patently without merit.

¶ 21 On appeal, defendant argued (1) the trial court erred in summarily dismissing his postconviction petition and (2) he should be granted a new trial because he was forced to give up his right to a jury trial through prosecutorial jury indoctrination. This court affirmed. *People v. Booth*, 2012 IL App (4th) 100941-U, ¶ 46. On defendant's claim of actual innocence, we found N.S.'s statement and affidavit did not exonerate defendant and did not support his claim. *Booth*, 2012 IL App (4th) 100941-U, ¶¶ 40-41. On the issue of prosecutorial jury indoctrination, we found the issue forfeited because defendant did not raise it in his postconviction petition and it could not be raised for the first time on appeal. *Booth*, 2012 IL App (4th) 100941-U, ¶¶ 43-44.

¶ 22 In July 2012, defendant filed a *pro se* motion for leave to file a successive postconviction petition. Defendant argued he was forced to give up his right to a jury trial through prosecutorial jury indoctrination and he received ineffective assistance of trial and

appellate counsel for failing to argue the issue previously. The trial court denied the motion. This appeal followed.

¶ 23

II. ANALYSIS

¶ 24 On appeal, defendant argues he has a meritorious claim that he was compelled to forego a jury trial due to the prosecutor's improper indoctrination of the venire, and he was unable to present this claim previously due to the failure of prior defense counsel to raise the issue or obtain the transcripts of jury selection. Thus, defendant claims the trial court erred in denying him leave to file his successive postconviction petition and asks this court to reverse that decision and remand for further proceedings.

¶ 25 The Act "provides a remedy to criminal defendants who claim that substantial violations of their federal or state constitutional rights occurred in their original trials." *People v. Taylor*, 237 Ill. 2d 356, 371-72, 930 N.E.2d 959, 969 (2010). A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *People v. English*, 2013 IL 112890, ¶ 21, 987 N.E.2d 371. The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008). However, "issues raised and decided on direct appeal are barred by *res judicata*, and issues that could have been raised but were not are forfeited." *People v. Tate*, 2012 IL 112214, ¶ 8, 980 N.E.2d 1100. Moreover, "a ruling on an initial postconviction petition has *res judicata* effect with respect to all claims that were raised or could have been raised in the initial petition." *People v. Jones*, 191 Ill. 2d 194, 198, 730 N.E.2d 26, 29 (2000).

¶ 26 Consistent with these principles, the "Act generally contemplates the filing of only one postconviction petition." *People v. Ortiz*, 235 Ill. 2d 319, 328, 919 N.E.2d 941, 947

(2009). The Act expressly provides that "[a]ny 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); see also *People v. Pitsonbarger*, 205 Ill. 2d 444, 458, 793 N.E.2d 609, 620-21 (2002) (stating "the procedural bar of waiver is not merely a principle of judicial administration; it is an express requirement of the statute"). While noting "a defendant faces immense procedural default hurdles when bringing a successive postconviction petition" (*People v. Davis*, 2014 IL 115595, ¶ 14, 6 N.E.3d 709), our supreme court has found "the statutory bar to a successive postconviction petition will be relaxed when fundamental fairness so requires" (*People v. Lee*, 207 Ill. 2d 1, 5, 796 N.E.2d 1021, 1023 (2003)).

¶ 27 A successive postconviction petition may only be filed if leave of court is granted. 725 ILCS 5/122-1(f) (West 2012). "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 postconviction proceedings and prejudice results from that failure." 725 ILCS 5/122-1(f) (West 2012). "[A] successive petition 'is not considered "filed" for purposes of section 122-1(f), and further proceedings will not follow, until leave is granted, a determination dependent upon a defendant's satisfaction of the cause-and-prejudice test.' " *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 19, 966 N.E.2d 417 (quoting *People v. Tidwell*, 236 Ill. 2d 150, 161, 923 N.E.2d 728, 734 (2010)). Both prongs of the cause-and-prejudice test must be satisfied for a defendant to prevail. *People v. Guerrero*, 2012 IL 112020, ¶ 15, 963 N.E.2d 909; see also *Lee*, 207 Ill. 2d at 5, 796 N.E.2d at 1023 (stating to establish fundamental fairness, "the defendant must show both cause and prejudice with respect to each claim presented").

¶ 28 "While the test for initial petitions to survive summary dismissal is that the petition state the gist of a meritorious claim—that is, a claim of arguable merit—the cause and

prejudice test for successive petitions is more exacting than the gist or arguable merit standard." *People v. Miller*, 2013 IL App (1st) 111147, ¶ 26, 988 N.E.2d 1051; see also *People v. Edwards*, 2012 IL 111711, ¶ 25, 969 N.E.2d 829 (rejecting the argument that successive postconviction petitions should be evaluated under the same first-stage standard as an initial postconviction petition).

"To show cause, a defendant must identify 'an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings.' [Citation.] To show prejudice, a defendant must demonstrate '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.' [Citation.]" *People v. Evans*, 2013 IL 113471, ¶ 10, 989 N.E.2d 1096.

¶ 29 "Where a defendant fails to first satisfy the requirements under section 122-1(f), a reviewing court does not reach the merits or consider whether his successive postconviction petition states the gist of a constitutional claim." *People v. Welch*, 392 Ill. App. 3d 948, 955, 912 N.E.2d 756, 762 (2009). As the trial court did not engage in any fact-finding here, our review is *de novo*. *People v. Green*, 2012 IL App (4th) 101034, ¶ 30, 970 N.E.2d 101.

¶ 30 In the case *sub judice*, defendant argues he has established cause for failing to raise his claim that he was forced to waive his constitutional right to a jury trial where trial counsel was ineffective for failing to object to the State's improper indoctrination of the jury. Moreover, defendant contends he has also established cause since direct-appeal counsel failed to include jury selection in the record on appeal and because jury selection was not transcribed until

after the filing of his first postconviction petition.

¶ 31 We find defendant has failed to establish good cause for not raising this issue at the initial postconviction proceeding. The issue of trial counsel's alleged ineffectiveness could have been raised on direct appeal, and that issue, along with the alleged ineffectiveness of appellate counsel for not raising the issue, could have been raised in defendant's first postconviction petition. Defendant was well aware of the issue of jury indoctrination, as evidenced by his extensive discussion with the trial court following *voir dire*. Thus, he could have raised the issue at the initial postconviction proceeding. Nothing impeded his ability to raise the issue at that time.

¶ 32 Defendant argues the transcript of *voir dire* was not prepared for his direct appeal and was not made available to him until the appeal of his first postconviction petition. He also argues he had no means to obtain the transcript of jury selection. We note this court filed its order on direct appeal in April 2008. Defendant filed his postconviction petition in June 2009. The court reporter indicates she transcribed the *voir-dire* proceedings of October 10, 2006, in January 2012. However, the post-*voir-dire* proceedings of October 10, 2006, in which defendant complained about the selected jury and that the prosecutor "basically set a picture up of what the case is going to be about" were transcribed in a separate transcript in April 2007. In his motion for leave to file the successive postconviction petition, defendant acknowledges this latter transcript was available in the record on direct appeal. Also, defense counsel cited to this transcript in the postconviction petition. Thus, defendant had the ability to raise and support the issue, albeit with incomplete documentation, in his initial postconviction petition in June 2009.

¶ 33 While defendant contends he was without means to obtain the *voir-dire* transcript, it should be pointed out that defendant's initial postconviction petition was filed by counsel, and

not *pro se* as appellate counsel contends. Nothing prevented counsel from obtaining the transcript. Moreover, nothing in defendant's motion for leave indicates he ever brought the issue to postconviction counsel's attention.

¶ 34 Defendant, however, argues he has a substantial claim of ineffective assistance of counsel, and whether acting *pro se* or with ineffective postconviction counsel, he has established cause to excuse his procedural default. Defendant relies on the decisions of the United States Supreme Court in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013).

¶ 35 In *Martinez*, the Supreme Court created an exception to its earlier holding in *Coleman v. Thompson*, 501 U.S. 722 (1991). There, the Court found a defendant has no constitutional right to an attorney in state postconviction proceedings. *Coleman*, 501 U.S. at 752. Thus, a defendant cannot argue the ineffective assistance of postconviction counsel is cause to excuse his procedural default in a federal *habeas* proceeding. *Coleman*, 501 U.S. at 752-54. The Court also stated that "[i]n the absence of a constitutional violation, the petitioner bears the risk in federal habeas for all attorney errors made in the course of the representation." *Coleman*, 501 U.S. at 754.

¶ 36 In *Martinez*, 132 S. Ct. at 1315, the Supreme Court stated the need to modify *Coleman*—"that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default" in a federal *habeas* proceeding—to protect defendants with potentially legitimate claims of ineffective assistance of trial counsel. The Court stated "[t]his opinion qualifies *Coleman* by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Martinez*, 132 S. Ct. at 1315.

The Court noted its decision was an equitable ruling, not a constitutional ruling. *Martinez*, 132 S. Ct. at 1319.

"The rule of *Coleman* governs in all but the limited circumstances recognized here. The holding in this case does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts. [Citations.] It does not extend to attorney errors in any proceedings beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial, even though that initial-review collateral proceeding may be deficient for other reasons." *Martinez*, 132 S. Ct. at 1320.

¶ 37 Subsequently, in *Trevino*, the Supreme Court extended the rule in *Martinez*, stating the exception applies even when a State system does not explicitly bar a defendant from arguing his trial counsel's ineffectiveness on direct appeal but—"as a matter of its structure, design, and operation—does not offer most defendants a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal." *Trevino*, 133 S. Ct. at 1921.

¶ 38 Defendant argues we should apply the holdings in *Martinez* and *Trevino* in determining whether he has established cause for purposes of allowing a successive postconviction petition. We first note *Martinez* and *Trevino* concerned federal *habeas* proceedings, not a successive state postconviction petition as in this case. See also *People v. Sutherland*, 2013 IL App (1st) 113072, ¶ 18, 994 N.E.2d 185 (finding the defendant's reliance on *Martinez* and *Trevino* was misplaced because Illinois criminal-procedure rules generally allow

for ineffective-assistance-of-counsel claims to be raised after trial and on direct appeal).

Moreover, as the First District has recognized:

"[In *Martinez*, the] Supreme Court did not hold that Arizona had to excuse Martinez's procedural default. To the contrary, Arizona's rulings holding that Martinez's ineffective assistance of counsel claims were procedurally defaulted were not vacated and remained in place. Martinez, as a result of this ruling, could receive no further relief in the Arizona courts. Rather, the result of this ruling was simply that the federal courts, as a result of Arizona's particular rules of appellate procedure would find cause to avoid the federal doctrine of procedural default and thus he would be allowed to have a substantive review of his writ of *habeas corpus* in the *federal district court*." (Emphasis in original.) *People v. Jones*, 2013 IL App (1st) 113263, ¶ 30, 3 N.E.3d 891.

We agree with the First District that *Martinez* and *Trevino* do not require us to excuse defendant's forfeiture in this case. Further, we find no reason to adopt the analysis in *Martinez* and *Trevino*. See *Jones*, 2013 IL App (1st) 113263, ¶ 31, 3 N.E.3d 891 (finding *Martinez* had no effect on the decision); *Sutherland*, 2013 IL App (1st) 113072, ¶ 19, 994 N.E.2d 185 (declining to apply *Martinez* and *Trevino*); *Miller*, 2013 IL App (1st) 111147, ¶ 41, 988 N.E.2d 1051 (declining to apply *Martinez*).

¶ 39 A defendant must establish cause and prejudice to be granted leave to file a successive postconviction petition. *Pitsonbarger*, 205 Ill. 2d at 463, 793 N.E.2d at 623; 725 ILCS 5/122-1(f) (West 2012). Defendant's postconviction counsel's failure to include the issue

of trial and appellate counsels' alleged ineffectiveness regarding jury indoctrination does not constitute an objective factor that impeded defendant's ability to raise the claim during his initial postconviction proceeding. Defendant was well aware of the issue, and he could have raised it in his postconviction petition even after counsel moved to withdraw. As such, defendant has failed to establish cause. Because defendant has not established cause, we need not determine whether he has established prejudice.

¶ 40

III. CONCLUSION

¶ 41 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$75 statutory assessment against defendant as costs of this appeal.

¶ 42 Affirmed.