2012 IL App (1st) 1092850-U

SIXTH DIVISION
January 13, 2012

No. 1-09-2850

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County.
	)	
v.	)	No. 00 Cr 19128
	)	
MICHAEL A. HARRIS,	)	Honorable
	)	Arthur F. Hill, Jr.,
Petitioner-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE ROBERT E. GORDON delivered the judgment of the court. Justices Lampkin concurred in the judgment. Justice Garcia specially concurred.

ORDER

¶ 1 *Held:* Since defendant failed to establish prejudice as required under the *Pitsonbarger* cause-and-prejudice test, we affirm the trial court's denial of leave to file a second postconviction petition.

¶ 2 Defendant Michael A. Harris was convicted, after a bench trial, of the June 19, 2000, first-degree murder of Doylan Green. On March 16, 2004, he was sentenced to forty-five years imprisonment in the Illinois Department of Corrections. In this appeal, he contests the trial court's denial of leave to file a second postconviction petition

¶ 3 In this appeal, on September 9, 2011, this court previously entered an order, where we interpreted defendant's second petition as "asserting a freestanding claim of actual innocence" (*People v. Harris*, 2011 IL App (1st) 092850-U (September 9, 2011) ¶¶ 39), and we affirmed the denial on the ground that his petition did not present newly discovered evidence that probably would have changed the result at trial, as our supreme court required in *People v. Ortiz*, 235 Ill. 2d 319 (2009) for a claim of actual innocence. *Ortiz*, 235 Ill. 2d at 333. However, in a petition for rehearing, defendant asserted that his claim was "not based on newly discovered evidence of actual innocence" and stated that he had asserted his claim solely under the *Pistonbarger* test, which allows a defendant to file a second or successive petition if he can demonstrate a cause for his failure to bring the claim in his initial post-conviction proceeding and prejudice resulting from that failure. 725 ILCS 5/122-1(f) (West 2010); *People v. Pistonbarger*, 205 Ill. 2d 444,

459 (2002).

¶ 4 For the reasons explained below, we now affirm on the ground that defendant failed to establish the cause-and-prejudice required under *Pistonbarger*.

¶ 5 BACKGROUND

¶ 6 I. Pretrial Proceedings

¶ 7 On August 10, 2000, defendant was indicted on eight counts for the murder of Doylan Green and three counts of home invasion for entering the dwelling of Lisa Morrison. The indictment alleges that both the murder and home invasion occurred on June 19, 2000.

¶ 8 On April 11, 2001, defendant filed a motion to quash arrest and suppress evidence on the ground that the arrest was unsupported by a warrant or probable cause. After a the hearing on the motion, the trial court denied the motion, which is not at issue in this appeal.

¶ 9 On October 2, 2001, defendant filed a motion to suppress statements on the ground that he was interrogated by Detective Paul Alfini and other detectives at Area 2 and subjected to physical and psychological coercion. On January 14, 2002, the trial court held a hearing on this motion, and the sole witness was Detective Alfini. Before the hearing started, the defense asked the trial court

to strike the allegations of physical coercion. Then defendant was "sworn to the facts alleged in the motion." At the hearing, Detective Alfini testified that he did not make any threats of physical violence or use any other form of mental coercion. The trial court denied the motion stating that, "[o]ther than this written motion that was sworn to, this Court has heard no evidence" to support defendant's claim of threats and coercion.

¶ 10 II. Trial and Posttrial Proceedings

¶ 11 The evidence at trial has been described twice before by the appellate court, in our order denying his direct appeal *(People v. Michael Harris*, No. 1-04-3548 (June 30, 2006)) and in our order denying the appeal of his first postconviction proceeding (*People v. Harris*, No. 1-08-1602 (April 30, 2010)). Those orders are incorporated here by reference, and the facts will be described in our analysis as needed for the resolution of the issues now before us.

¶ 12 After a bench trial, defendant was convicted on February 28, 2004, of both first-degree murder and home invasion. The trial witnesses were: two event witnesses, Lisa Morrison and Agnes Murphy; Detective Alfini who introduced defendant's videotaped confession; and defendant. The trial court found both that the testimony of the event witnesses corroborated the videotaped confession, and

that the confession corroborated their testimony.

¶ 13 Concerning the allegedly coerced confession, defendant testified at trial that Detective Alfini threatened him and that the assistant state's attorney told defendant what to say. When asked by defense counsel on direct examination how he was threatened by Alfini, defendant replied that Alfini "suggested that if [defendant] wanted to continue being a hard a***, [defendant] was going to get [himself] f*** up." On direct, defendant also testified that the detective "rushed" or "lunged" at him. On redirect, defendant added that, although Alfini never pulled his gun out of his holster, Alfini kept "grabbing" his weapon, and Alfini stated that "he can get off a few rounds pretty quick hisself [sic] and get the adrenaline get to flowing." According to defendant, Detective Alfini also called defendant's denials "bull***." On redirect, defendant stated that his motive in providing the confession was to receive "immunity from violence," explaining:

> "As far as being harassed by the police, strangled, kicked, stomped, and all . I done been there before and I have a – I got a theft case where I had to sign a statement and all of that so I done been through that routine before."

¶ 14 However, defendant testified that it was the assistant state's attorney,

rather than Detective Alfini, who told defendant about the facts of the case and told him what to say on the video. Defendant testified that the assistant state's attorney told him what to say "[a]s far as the weapon and the nature of the wounds and all of that."

¶ 15 After defendant's testimony at trial, the parties stipulated that, at the suppression hearing, Detective Alfini had been asked whether he was armed with a weapon "[e]ach and every time" that he talked to defendant, and he had replied "yes." During his trial testimony, Detective Alfini had denied carrying a firearm into the interview room, explaining that there was a "lock box" outside the room for that purpose.

¶ 16 At the conclusion of the bench trial, the trial judge explained that he found the videotaped confession credible because, after having listened to defendant on the stand, the judge found that the confession was in defendant's voice. The trial judge stated: "In that videotaped admission, Mr. Harris lays out in detail his motivation in this incident, the mechanisms by which the victim's death occurred and the entire plot of the event. Perhaps more importantly it's continued again and again with things, elements, words that he chose to use, ways that he referred to other people that find their origins in his mind. *** They make it

something that comes from his mind and not from anywhere else."

¶ 17 The trial judge also explained that, in part, he rejected defendant's claims of mental coercion for this same reason: that the admission was in defendant's "own way of speaking." The trial judge stated: "[c]ertainly in the course of your testimony, Mr. Harris, you pointed out that you felt intimidated by Detective Alfini and the notions provided in the video were provided to you by the assistant state's attorney. In my view, that's nonsense because the statement is just too crowded with your own way of speaking. It's too crowded with your own biases and your own feeling[s]." The trial court reiterated that "[d]efendant's statement [was] so obviously in a dialogue of his own choosing."

¶ 18 The trial judge also found it "unbelievable" that a forty-year old man would confess to a murder because of an "implicit threat" that was not "actually ever, even by [defendant's] own admission, articulated by any sort of actual physical comment."

¶ 19 Commenting on defendant's testimony, the trial court also found it "impossible" to "believe a witness that won't even answer the questions that are posed.

¶ 20 The trial court then found defendant guilty of eight separate counts of

first-degree murder and two separate counts of home invasion. However, the trial court stated its intent to merge the murder counts at sentencing. The trial court also found that defendant personally fired the gun which killed the murder victim.

¶ 21 On March 16, 2004, the trial court granted, in part, defendant's posttrial motion for a new trial. Specifically, the trial court set aside its verdict on home invasion and granted defendant's motion for a new trial on the three home invasion counts. It also granted defendant's motion with respect to two of the murder counts, namely counts 7 and 8, which had charged defendant with committing the murder during a forcible felony. The trial judge then announced his intent to sentence defendant to the minimum, which he stated was forty-five years in prison.

¶ 22 Although the trial judge had previously stated his intent to merge the murder counts, the written sentencing order, which was also filed on March 16, 2004, stated that defendant was sentenced to six concurrent terms of forty-five years for six separate counts of first-degree murder.

¶ 23 III. Direct Appeal

¶ 24 On direct appeal, defendant raised 3 issues: (1) that the State failed to

prove him guilty beyond a reasonable doubt; (2) that the trial court erred by failing to suppress his videotaped confession; and (3) that defense counsel was ineffective for failing to present evidence with respect to defendant's state of mind at the time of his confession. The appellate court did not find his claims persuasive and affirmed his conviction. *People v. Michael Harris*, No. 1-04-3548 (June 30, 2006) (unpublished order pursuant to Supreme Court Rule 23).

¶ 25 First, rejecting defendant's claim of insufficient evidence, the appellate court held: "Although there were variances in the testimony, and defense counsel did impeach Morrison [the government's principal event witness] on several points in her testimony, a rational trier of fact could have found, as did the trial court, that Morrison's testimony corroborated defendant's videotaped admission." *People v. Michael Harris*, No. 1-04-3548, order at 10 (June 30, 2006) (unpublished order pursuant to Supreme Court Rule 23).

¶ 26 In support of his claim of a coerced confession, defendant claimed that the police, specifically Detective Alfini, had subjected him to psychological coercion and threats under circumstances that led him to believe he would be beaten or which otherwise defeated his will. He also argued that the appellate court should take into consideration the fact that Detective Alfini transported

defendant to Area 2 headquarters, which defendant alleged had " 'achieved an infamous reputation because numerous suspects have been beaten and tortured until they "confessed." ' " *People v. Michael Harris*, No. 1-04-3548, order at 10, 12-13 (June 30, 2006) (unpublished order pursuant to Supreme Court Rule 23).

¶ 27 Rejecting defendant's claim of a coerced confession, the appellate court in his direct appeal held: "The trial court specifically found that defendant's statements about his participation in the shooting were not the result of mental coercion by Detective Alfini or the product of ASA Kostouros. It determined that, based upon the evidence produced at the hearing and upon the testimony and credibility of the witnesses, defendant's statements were voluntary. *** We find that despite the conflicting testimony regarding the conditions under which defendant's statements were made, it was for the trial court to resolve those conflicts, which it did, and its finding of voluntariness was not against the manifest weight of the evidence." *People v. Michael Harris*, No. 1-04-3548, order at 12 (June 30, 2006) (unpublished order pursuant to Supreme Court Rule 23).

¶ 28 After the appellate court affirmed his conviction on direct appeal, defendant filed a petition for leave to appeal to the Illinois supreme court which was denied. *People v. Harris*, 222 Ill. 2d 614 (2007).

¶ 29 IV. First Postconviction Petition

¶ 30 In his first *pro se* postconviction petition filed on December 18, 2007, defendant raised several grounds, including that his six murder convictions violated the one act, one crime rule and that his appellate counsel was ineffective for failing to raise this issue. This first petition was summarily dismissed on February 8, 2008, and this dismissal was later affirmed on appeal. *People v. Harris*, No. 1-08-1602 (April 30, 2010). However, the appellate court did order the mittimus corrected to reflect only one conviction and one sentence for first degree murder. Defendant then filed a *pro se* petition for rehearing, which was denied on October 7, 2010, and a petition for leave to appeal to the Illinois supreme court, which was denied on January 26, 2011.

¶ 31 V. Current Appeal

¶ 32 This current appeal concerns defendant's second *pro se* postconviction petition filed on July 20, 2009, which was filed with a motion requesting leave to file it. In a written order dated September 24, 2009, the trial court found that defendant failed to establish the cause and prejudice which would have permitted a successive filing. As a result, the trial court denied defendant leave to file this second petition and assessed defendant $90 for filing a frivolous petition, as well

as $15 in mailing fees. This appeal followed.

¶ 33 ANALYSIS

¶ 34 Defendant appeals the trial court's order, dated September 24, 2009, which denied him leave to file a second postconviction petition.

¶ 35 First, defendant argues that he established a cause for failing to raise his present claim in his first postconviction petition. To demonstrate cause, defendant argues that (1) the State violated his right to due process under *Brady v. Maryland*, 373 U.S. 83 (1963) when it failed to disclose to defense counsel the circumstances of a false confession coerced by the same detective who obtained defendant's confession; and (2) his trial counsel was ineffective for failing to make himself aware of this other coerced confession and present that information as evidence at the hearing on defendant's motion to suppress his statement and at defendant's trial. Defendant argues that the prejudice is the same for both causes, namely that the lack of evidence of this other coerced confession prejudiced defendant's trial. *People v. Banks*, 192 Ill. App. 3d 986, 994 (1989) (evidence that two police officers used physical coercion against another suspect "tends to show the conduct that these two police officers employ *** and such evidence is therefore probative as to the conduct they employed in the present case").

¶ 36 Second, defendant claims that the trial court erred by assessing court costs and filing fees because the statute authorizing their assessment is unconstitutional and, in the alternative, that the statute permits the Department of Corrections to remove only the court costs, and not the filing fees, from a prisoner's trust account.

¶ 37 For the reasons discussed below, we find that defendant failed to establish cause and prejudice, and thus we affirm the denial of leave to file a second postconviction petition. Second, we also hold that the statute authorizing the challenged costs and fees is constitutional and thus we affirm the trial court's assessment of them. We also find that the statute authorizes the removal of court costs, as well as filing fees, from his prisoner trust account.

¶ 38 I. Procedural Bar to Successive Postconviction Petition

¶ 39 A postconviction proceeding is a collateral proceeding, as opposed to a direct appeal of the underlying judgment. *People v. Ortiz*, 235 Ill. 2d 319, 328 (2009). The Post-Conviction Hearing Act generally contemplates that a defendant will file only one postconviction petition. *Ortiz*, 235 Ill. 2d at 328. The purpose of the postconviction process is to permit review of constitutional issues that were not, and could not have been, reviewed on direct appeal. *Ortiz*, 235 Ill. 2d at 328.

Thus, issues that could have been or were raised on direct appeal or a prior petition are generally considered waived, for purposes of the postconviction process. See *Ortiz*, 235 Ill. 2d at 328.

¶ 40 II. Two Tests to Overcome Procedural Bar

¶ 41 However, there are two ways to overcome the procedural bar to filing a successive petition: (1) the *Pistonbarger* cause and prejudice test; and (2) the *Ortiz* actual innocence test. *People v. Ortiz*, 235 Ill. 2d 319, 330 (2009) (describing two ways to overcome the procedural bar); *People v. Pistonbarger*, 205 Ill. 2d 444, 459 (2002).

¶ 42 A. *Pistonbarger* Cause and Prejudice

¶ 43 The cause-and-prejudice test set forth by our supreme court in *Pistonbarger* was subsequently codified into statute by our General Assembly, when it added section 122-1(f) of the Code of Criminal Procedure of 1963. See Pub. Act 93-493, eff. January 1, 2004 (amending 725 ILCS 5/122-1). Section 122-1(f) provides, in full:

¶ 44 "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." 725 ILCS 5/122-1(f) (West 2010).

¶ 45 However, the *Pistonbarger* cause-and-prejudice test, set forth above, is not the only way to overcome the procedural bar against filing a successive postconviction petiton. In *Ortiz*, our supreme court stated: "we hold that in a nondeath case, where a defendant sets forth a claim of actual innocence in a successive postconviction petition, the defendant is excused from showing [the]

cause and prejudice," described in section 122-1(f) (725 ILCS 5/122-1(f) (West 2010)). *Ortiz,* 235 Il. 2d at 330. See also *People v. Anderson,* 401 Ill. App. 3d 134, 140 (2010) (our supreme court in *Ortiz* "specifically rejected the State's claim that all successive petitions are subject to that [cause-and-prejudice] test"). The *Ortiz* court held that "the due process clause of the Illinois Constitution affords postconviction petitioners the right to assert a freestanding claim of actual innocence on newly discovered evidence." *Ortiz,* 235 Il. 2d at 331. "Where a defendant presents newly discovered, additional evidence in support of a claim, collateral estoppel is not applicable because it is not the same 'claim'." *Ortiz,* 235 Il. 2d at 332.

¶ 46 B. *Ortiz* Actual Innocence

¶ 47 To overcome the procedural bar through the *Ortiz* actual innocence test, a defendant must show that the evidence in support of his actual innocence claim is: (1) newly discovered; (2) material and not merely cumulative; and (3) of such a conclusive character that it would probably change the result. *Ortiz,* 235 Il. 2d at 333. Evidence is considered "newly discovered" if (a) it has been discovered since the trial; and (b) the defendant could not have discovered it sooner through due diligence. *Ortiz,* 235 Il. 2d at 334. "Evidence is considered cumulative when

it adds nothing to what was already before the jury." *Ortiz*, 235 Il. 2d at 335. To determine whether the evidence "would probably change the result of retrial," the court must conduct a case-specific analysis of the facts and evidence. *Ortiz*, 235 Il. 2d at 336-37.

¶ 48 Satisfying either the *Pistonbarger* cause-and-prejudice test or the *Ortiz* actual innocence test will overcome the procedural bar against successive petitions.

¶ 49 III. Cause and Prejudice In This Case

¶ 50 In this appeal, defendant's appellate brief asked this court to consider only the *Pistonbarger* cause-and-prejudice test. Similarly, defendant's petition for rehearing stated that "the claims in [defendant's] successive petition were not based on newly discovered evidence of actual innocence," and that "this Court should [analyze] his petition using the 'cause' and 'prejudice' test. *People v. Pistonbarger*, 205 Ill. 2d 444, 458 (2002)." As a result, we will consider defendant's petition only under the *Pistonbarger* cause-and-prejudice test.

¶ 51 A. Standard of Review

¶ 52 Since the trial court was "not permitted to engage in any fact-finding or credibility determinations," our review is *de novo*. *People v. Scott*, 2011 IL App

(1st) 100122, ¶¶ 21, 23; *People v. Williams*, 394 Ill. App. 3d 236, 242 (2009) ("In reviewing a trial court's ruling on whether a defendant has satisfied the cause and prejudice test of section 122-1(f), the court applies the *de novo* standard of review") "[A]ll well-pleaded facts that are not positively rebutted by the original trial record are to be taken as true." *Scott*, 2011 IL App (1st) 100122, ¶ 23. "We review the trial court's judgment, not the reasons cited, and we may affirm on any basis supported by the record if the judgment is correct." *Anderson*, 401 Ill. App. 3d at 138.

¶ 53 B. Need Facts to Show Cause and Prejudice

¶ 54 Defendant argues that he need state only the "gist" of a claim of cause and prejudice, and cites in support *People v. LaPointe*, 365 Ill. App. 3d 914, 924 (2006), *aff'd on other grounds by People v. LaPointe*, 227 Ill. 2d 39 (2007). In *LaPointe*, the appellate court held that "a section 122-1(f) motion need state only the gist of a meritorious claim of cause and prejudice." *LaPointe*, 365 Ill. App. 3d at 924. See also *People v. Baugh*, 132 Ill. App. 3d 713 , 717 (1985) (counsel was not required for a successive petition, since petitioner had to state only the "gist" of his claim for the trial court's initial determination).

¶ 55 Defendant further argues that he states a "gist" if his claims of cause

and prejudice had "an arguable basis in law or fact," and he cites in support *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). See also *Anderson*, 401 Ill. App. 3d at 141 (finding that defendant's claim was "arguable," the appellate court stated that it would not affirm the trial court's denial of leave to file a successive petition on this ground). Defendant plucks this "arguable basis" phrase from the part of the *Hodges* opinion which defined "frivolous or patently without merit," not the part of the opinion which defined "gist." *Hodges*, 234 Ill. 2d at 11-12 (defining "frivolous or patently without merit"), 9-10 (defining "gist"). Defendant thereby confuses "gist" with not "frivolous."

¶ 56 The State argues that the "gist" standard has no application when considering "cause and prejudice."

¶ 57 Both parties are somewhat correct, and somewhat mistaken, and the confusion lies in a misunderstanding of what our supreme court meant by the term "gist." The meaning of this term was explained at length by our supreme court in *Hodges*. In *Hodges*, our supreme court stressed that the term "gist" appears nowhere in the statute and is not a legal standard. *Hodges*, 234 Ill. 2d at 11. "In our past decisions, when we have spoken of a 'gist,' we meant only that the section 122-2 pleading requirements are met, even if the petition lacks formal legal

arguments or citations to legal authority." *Hodges*, 234 Ill. 2d at 9; see also *Scott*, 2011 IL App (1st) 100122, ¶ 24 (defendant also does not have to include legal arguments or citations to legal authority). This is in recognition of the fact that these petitions are "drafted at this stage by defendants with little legal knowledge or training." *Hodges*, 234 Ill. 2d at 9. However, the lack of legal training is no reason to excuse a defendant from providing " 'some facts which can be corroborated and are objective in nature or contain some explanation as to why those facts are absent.' " *Hodges*, 234 Ill. 2d at 10.[1]

¶ 58 Since motions for leave to file successive petition are also typically filed by *pro se* defendants, the same considerations apply. While we do not expect citations to legal authority, defendants are still expected to set forth some facts which can be corroborated or some explanation as to why those facts are absent.

¶ 59 In *Hodges*, our supreme court made clear that the term "gist" is not to be confused with the term "frivolous or patently without merit," which is the legal standard set forth in the statute. *Hodges*, 234 Ill. 2d at 11. "Frivolous or patently

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[1]The State concedes later in its appellate brief that "a defendant attempting to show cause and prejudice need only advance facts within his knowledge explaining why he could not bring his claim before."

merit" is defined as lacking any "arguable basis in law of fact." *Hodges*, 234 Ill. 2d at 11. The "frivolous" standard is used when determining whether a first petition should be summarily dismissed at the first stage. *Hodges*, 234 Ill. 2d at 10.

¶ 60 In sum, while we do not expect defendant to provide formal legal arguments or cite cases, we do expect him to provide facts which can be corroborated or an explanation of why these facts are absent. Second, we will not equate the term "cause and prejudice" with the term "frivolous and patently without merit." They are two separate terms, set out in two different places in the statute, to accomplish two different tasks. The "frivolous" term, which was defined using the term "arguable basis," is used to determine which petitions may proceed to a second stage. By contrast, the "cause and prejudice" term is used to determine when a second or successive petition may be filed, and it is defined in the statute, quoted above in ¶ 43.

¶ 61 B. Specific Claim

¶ 62 To show cause and prejudice, a defendant must first identify a specific claim that he was unable to raise during his initial postconviction proceeding. 725 ILCS 5/122-1(f) (West 2010). To show cause, he must "identify[] an objective factor that impeded his or her ability to raise" this specific claim. 725 ILCS 5/122-

1(f) (West 2010). To show prejudice, a defendant must demonstrate how this specific claim, which was"not raised during his or her initial post-conviction proceedings[,] so infected his [prior] trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f) (West 2010).

¶ 63 The "specific claim" that defendant now raises, that he did not raise previously, was that evidence of a false confession by a suspect in another case would have increased the credibility of defendant's allegation that his confession was coerced by the same detective.

¶ 64 Defendant did previously raise the claim that his confession was coerced, and that claim was rejected at trial and in his direct appeal. In his direct appeal, defendant claimed that the police, specifically Detective Alfini, had subjected him to psychological coercion and threats under circumstances that led him to believe he would be beaten or which otherwise defeated his will. He also argues that the appellate court should take into consideration the fact that Detective Alfini transported defendant to Area 2 headquarters, which defendant alleges had " 'achieved an infamous reputation because numerous suspects have been beaten and tortured until they "confessed." ' " *People v. Michael Harris*, No. 1-04-3548, order at 10, 12-13 (June 30, 2006) (unpublished order pursuant to Supreme Court Rule

23).

¶ 65 However, the specific claim, which was not previously raised either on direct appeal or in his first postconviction petition and which he seeks to raise now, concerns the naming of one of the allegedly "numerous suspects" who had been coerced into confessing at Area 2 and specifically by Detective Alfini.

¶ 66 Defendant alleges that Corethian Bell, another suspect in another case was arrested on July 16, 2000, and transported to Area 2 where he confessed on July 18, 2000. Defendant's appellate brief states that "[w]hen DNA evidence eventually proved that Bell was not responsible for the murder, the State dismissed the charges against him, and released him from custody on January 4, 2002," ten days before defendant's suppression hearing. On this appeal, defendant argues that the lack of evidence about Bell's confession at defendant's suppression hearing and trial prejudiced defendant's trial.

C. Prejudice

¶ 67 For the following reasons, we find that defendant has failed to establish prejudice. As previously stated above, to show prejudice, a defendant must demonstrate that the specific claim "not raised during his or her initial post-conviction proceedings so infected his trial that the resulting conviction or sentence

violated due process." 725 ILCS 5/122-1(f) (West 2010).

¶ 68 Given the particular facts and circumstances of this case, we cannot conclude that the absence of evidence of the alleged physical coercion of another suspect "infected" defendant's own trial. At the conclusion of defendant's bench trial, the trial judge stated that he found it "unbelievable," even if defendant had been subjected to the words and acts that defendant described, that they would have been enough to cause this 40-year old defendant to confess to a murder he did not commit. According to defendant, the detective stated that defendant "was going to get [himself] f*** up" if he continued "being a hard a***," that defendant's denials were "bull***," that the detective "rushed" or lunged toward defendant, and that the detective kept grabbing his weapon. While we do not suggest that we condone any of these acts, we observe that defendant never alleged that the verbal threats were continuous or even repeated or carried out even once, to any degree, or that the detective physically touched defendant or pointed any kind of a weapon or instrument at defendant. After having listened to and observed defendant on the stand, the trial judge concluded that it was "unbelievable" that this defendant, given his age and experience, "would admit to a murder because of some implicit threat, one that isn't actually ever, even by your

own admission, articulated by any sort of actual physical comment."

¶ 69 In sum, the trial court was not persuaded that there was a causal link between the detective's alleged acts, even if they occurred, and defendant's subsequent confession. Although evidence that certain police officers used coercion against another suspect "tends to show the conduct that these two police officers employ" and "such evidence is therefore probative as to the conduct they employed in the present case" *(Banks*, 192 Ill. App. 3d at 994), the value of this evidence dissipates when the trial court makes a factual finding, amply supported by the record, that the conduct alleged by defendant –even if it occurred -- would not have been enough to have overborne the will of this defendant. Without a link between the detective's acts and defendant's confession, a lack of evidence about the detective could not have prejudiced defendant's trial.

¶ 70 For this reason, we find that defendant has failed to establish prejudice. Since defendant has failed to demonstrate prejudice, we do not reach the issue of cause. As our supreme court explained in *People v. Brown*, 225 Ill. 2d 188 (2007), since the *Pitsonbarger* test requires a defendant to show both cause and prejudice, "it is not necessary" for a court to consider one if the court has already found the other lacking. *Brown*, 225 Ill. 2d at 207. Thus, we affirm the trial

court's denial of leave to file a second petition, on the ground that defendant failed to establish the cause-and-prejudice required under *Pitsonbarger*

¶ 71 II. Costs and Fees

¶ 72 Second, defendant claims that the trial court erred in assessing costs and fees pursuant to section 22-105 of the Code of Civil Procedure (735 ILCS 5/22-105 (West 2006), because the statute authorizing these fees violated the due process and equal protection clauses of both the federal and Illinois constitutions. This section provides for the imposition of fees and costs upon summary dismissal of a postconviction petition that is summarily dismissed as frivolous or patently without merit pursuant to section 122-2.1 of the Post-Conviction Hearing Act (725 ILCS 5/122-2.1 (West 2006). However, in his appellate brief, defendant acknowledges that the Illinois Supreme Court had granted a petition for leave to appeal in a case that raised the same exact issue. *People v. Alcozer*, 236 Ill. 2d 509 (2010) (granting petition for leave to appeal). Our supreme court has now decided that case and held that this statutory section does not violate the due process or equal protection clauses of either the federal or the Illinois constitutions. *People v. Alcozer*, 241 Ill. 2d 248, 251 (2011). Thus, defendant's claim has already been decided and not in his favor.

¶ 73 In the alternative, defendant argues that the Illinois Department of Corrections is permitted by statute to remove only the court costs, and not the filing fees, from a prisoner's trust account. For this reason, defendant asks us to order the return of $90 to defendant's prisoner trust account.

¶ 74 First, we observe that this division of the appellate court has already been presented with this exact same issue and ruled that the statute authorizes the removal of both court costs and filing fees. In *People v. Smith*, 383 Ill. App. 3d 1078 (2008), the defendant in that case argued that "even if the assessment of the fee was proper, the court's order that the Illinois Department of Corrections (IDOC) dock her account for the fee was error because section 22-105(a) only permits the court to order IDOC to collect court costs from a prisoner's trust account." *Smith*, 383 Ill. App. 3d at 1093-94. The *Smith* defendant made the same exact argument that the defendant in this case does now: "that because the legislature referred to 'filing fees and actual court costs' when it made the prisoner responsible for payment but did not specifically refer to filing fees when it allowed for the collection of 'any court costs' from the prisoner's trust account, this demonstrates legislative intent to limit collection to only court costs." *Smith*, 383 Ill. App. 3d at 1094.

¶ 75 In *Smith*, we noted that our supreme court in *People v. Jones*, 223 Ill. 2d 560 (2006), had adopted the proposition that court costs include filing fees. *Smith*, 383 Ill. App. 3d at 1094, citing *Jones*, 223 Ill. 2d at 581-82. Relying on *Jones*, the Sixth Division held in *Smith* that "[w]e disagree with defendant and find that the legislature's use of the broad phrase 'any court costs' in delineating a means of collection was meant to include the assessed 'filing fees and actual court costs.' " *Smith*, 383 Ill. App. 3d at 1094.

¶ 76 We adopt the reasoning of the *Smith* case and make a further observation that supports our holding there. The first paragraph of the governing statutory section refers to both "filing fees and actual court costs," and defendant argues based on the use of these two terms that the legislature intended to draw a distinction between them. 735 ILCS 5/22-105(a) (West 2006). However, in the following paragraph, the legislature used the phrases "court costs" and "court fees" interchangeably. 735 ILCS 5/22-105(a) (West 2006). In addition, the melding of the terms "actual court costs" and "filing fees" into one phrase -- "court fees" – further shows the legislature's intent to use these terms interchangeably within this particular statutory section. 735 ILCS 5/22-105(a) (West 2006).

¶ 77 For the reasons that we already expressed in the *Smith* case and for the

additional reasons expressed above, we affirm the trial court's order to remove the fees and costs from defendant's prisoner trust account.

¶ 78 CONCLUSION

¶ 79 For the foregoing reasons, we find that defendant failed to established cause and prejudice, and thus we affirm the trial court's denial of leave to file a second postconviction petition. Second, we also hold that the statute authorizing the challenged costs and fees is constitutional and thus we affirm the trial court's assessment of them. We also find that the statute authorizes the removal of court costs, as well as filing fees, from defendant's prisoner trust account.

¶ 80 Affirmed.

¶ 81 JUSTICE GARCIA, specially concurring:

¶ 82 The question raised by this appeal is succinctly stated by the defendant: whether the defendant "has established an arguable basis of cause and prejudice" to render as error the circuit court's denial of leave to file a second postconviction petition. As the defendant made clear in his petition for rehearing, he has not raised a claim of actual innocence, which renders the majority's discussion of actual innocence outside the bounds of this appeal.

¶ 83 To support his claim of an arguable basis for both cause and prejudice, the defendant contends there is a link between a false confession by Corethian Bell, which allegedly came about through physical intimidation, and his own claim of "psychological" coercion to explain his confession. The only link offered by the defendant between the two confessions is that each was elicited by the same detective. In Bell's case, a case unconnected to the defendant's, he was eventually exonerated based on DNA evidence, resulting in the dismissal of all charges, including murder.

¶ 84 I find it sufficient to reject the defendant's efforts to file a second postconviction petition on the basis that he failed to bring forth any facts to show that the two purportedly coerced confessions are similar, other than the involvement of the same detective. The defendant's constitutional violation contentions that the State's failure to disclose the circumstances surrounding Bell's confession and his trial counsel's failure to "inform himself" about the circumstances of Bell's confession constitute due process violations are simply unsupported by any facts. See 725 ILCS 5/122-1(f) (West 2010) ("a prisoner shows prejudice [when he

demonstrates] that the resulting conviction *** violated due process").

¶ 85 The defendant's claim of a coerced confession was considered twice and rejected. The defendant's suppression motion was denied when he failed to present any evidence "to support defendant's claim of threats and coercion." Slip op. at 3. The defendant did not testify at the suppression hearing. At trial, the jury heard the defendant's testimony that both the detective and the felony review assistant State's Attorney coerced him into confessing. The jury was not persuaded. The claimed link between the defendant's confession and Bell's confession compels no consideration of the defendant's coerced confession claim for a third time.

¶ 86 More to the point, the defendant has made no showing of prejudice that the State violated his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), when it failed to disclose the circumstances of Bell's false confession, or that the defendant's trial counsel rendered ineffective assistance when he failed "to make himself aware of Bell's case," as the defendant claims. See *People v. Richardson*, 382 Ill. App. 3d 248 (2008) (claim of "new evidence demonstrating instances of police torture at Area 2 headquarters" in cases totally unrelated to the defendant's ruled insufficient to show postconviction counsel failed to comply with duties under Supreme Court Rule 651 (c)).

¶ 87 Whether the defendant was required to make a gist or an arguable basis (I question whether there is a difference between the two) of a constitutional violation, he did not make the necessary showing in this case. See *People v. Brown*, 225 Ill. 2d 188 (2007) (a failure to make either a showing of cause or prejudice results in the denial of leave to file a second postconviction petition).

¶ 88 I specially concur in the rejection of the defendant's first issue. I agree with the majority's reasons to reject the defendant's second issue.