No. 1-09-3326

FIFTH DIVISION
June 17, 2011

IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 80 C 5534
	)	
JESSE M. HATCH,	)	The Honorable
	)	Thomas M. Davy,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court. Justices Howse and Epstein concurred in the judgment.

ORDER

HELD: Defendant's motion for leave to file a successive postconviction petition alleging systemic torture by Area 2 police officers in obtaining his custodial statement was properly denied pursuant to section 122-1(f) of the Post-Conviction Hearing Act where, while he may have shown "cause," he failed to establish the prejudice prong of the required cause-and-prejudice test.

Defendant Jesse M. Hatch (defendant) appeals from the trial court's denial of his motion for leave to file a successive postconviction petition pursuant to section 122-1(f) of the Illinois Post-Conviction Hearing Act (725 ILCS 5/122-1(f) (West 2004)). He contends that the trial

court erred when it found that he failed to establish the requisite "cause and prejudice" which would permit him to proceed with his successive petition. For the following reasons, we affirm.

BACKGROUND

Defendant was charged with first degree murder and armed robbery following a shooting that occurred on the night of August 4, 1980, in a garage in the Area 2 police district in Chicago. The victim, Robert Magoon, subsequently died from multiple gunshot wounds.

Before trial began, defendant filed a motion to suppress an oral statement he made to police following his arrest. Defendant alleged that he had been physically and mentally coerced by Area 2 police into making an inculpatory statement regarding the victim's murder. In a subsequent affidavit and amended motion, defendant claimed that he was struck repeatedly in the head, kicked in the stomach and groin, threatened with guns and hit with a telephone book by police. He alleged that five to seven police officers were in the room when he was beaten; he described the officer who kicked him in the groin as 5'8" tall, of medium build and having sandy hair, and two other officers who beat him as 5'9" tall, of medium build and having brown hair and 5'8" tall and weighing 210 to 230 pounds, respectively.

At a hearing on defendant's pretrial motion, officer Jeffery Johnson, Detectives Frank Glynn, Gerald Corless and Peter Dignan, and Assistant State's Attorney (ASA) Patrick Calihan testified. Officer Johnson stated that he arrested defendant at 5 p.m. on the day after the murder and advised him of his *Miranda* rights. After stating that he understood these, officer Johnson transported defendant, along with his companion Marilyn Green, to Area 2 at 6:30 p.m. Officer Johnson further testified that he was in a room next to where defendant was kept until

approximately 8:30 p.m., and that he did not abuse defendant nor saw any other police officer do so. Detective Glynn testified that he received defendant from officer Johnson and placed him in an interview room where defendant was handcuffed to a wall. At 7:30 p.m., detective Glynn, along with detective Corless, entered the interview room and advised defendant of his rights, whereupon defendant stated he understood them and began having a conversation with the detectives which lasted until 8 p.m. and resulted in an oral statement. Detective Glynn further testified that he did not abuse defendant nor saw any other police officer do so. Detective Corless stated that when he first spoke to defendant in the interview room, he advised him of his rights. Once defendant indicated he understood these, detective Corless had a conversation with defendant for 30 minutes. As officer Johnson and detective Glynn, detective Corless testified that he did not abuse defendant and did not see any other police officer do so. Detective Dignan testified that he was present when defendant was brought to the police station and had limited contact with him, but was not involved in his interrogation.

Finally, ASA Calihan testified at the suppression hearing that he arrived at Area 2 at 11:30 p.m. He and detective Corless met with defendant in the interview room and ASA Calihan advised him of his *Miranda* rights and asked him how he had been treated. Defendant replied that he understood his rights and told ASA Calihan that he had been treated well. ASA Calihan then spoke with defendant about the murder, defendant made a second oral statement, and then ASA Calihan left the police station at 2 a.m. ASA Calihan further testified that at no time did defendant tell him he had been abused by police.

Defendant did not testify at the suppression hearing. Rather, he presented to the court a

black and white photograph of himself allegedly taken at the time of his police custody. He also attempted to present into evidence a court-reported statement by Green from September 1981. The trial court found this to be inadmissible, but allowed it to be published for the record. In the statement, Green averred that she was arrested with defendant and, while she was at the police station, she heard police beating him. She further claimed that police threatened her and that, when she saw defendant the next morning, he had a swollen lip, a black eye and a bloody wrist.

At the close of this testimony, the trial court denied defendant's motion to suppress, finding that there was no evidence presented of any physical or psychological abuse or brutality.[1]

Defendant's cause then proceeded to a bench trial, from which the following evidence was adduced.[2] At the time of the murder, defendant was living with Marilyn Green and her father, Louis Westry, at 9600 South Avalon in Chicago. A few months before the night in question, the victim approached Westry and asked him to obtain a stolen car for him. Westry told the victim that he was on probation and could not do so, but that defendant could; accordingly, Westry introduced the victim to defendant. On August 4, 1980, defendant told Westry that he had secured a car for the victim, and Westry informed the victim of this. The victim then told Westry that he would come right over to his home to meet defendant.

At 10:45 p.m., officer Martin Morrison and his partner responded to a call of shots fired

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[1]In addition to his motion to suppress his own statement, defendant also filed a motion *in limine* to bar any statement made by the victim after he was shot. While denying defendant's motion to suppress, the court also denied his motion *in limine*.

[2]These underlying facts have been set forth in defendant's direct appeal before this Court. See *People v. Hatch*, 190 Ill. App. 3d 1004 (1989).

at a garage at 121 West 112th Place. Officer Morrison entered the garage and found the victim locked in the trunk of a car, calling for help; he had been shot multiple times in the face, chest, back and neck. The victim was taken to the hospital, and officer Morrison recovered four .45 caliber casings and one bullet at the scene. At the hospital, the victim told officer Morrison that a man he knew as "Jeff" who lived at 9600 South Avalon had shot him and taken $300 from him.

Detectives Corless and Dignan arrived at the hospital soon after and also spoke with the victim. The victim told these detectives that he had gone to Westry's home to meet a man he knew as "Jeff," who was going to take him to see a car he was going to sell to the victim. After leaving Westry's house, the victim and defendant went to a garage at 121 West 112th Place, where defendant asked the victim to help him open the garage door. When the victim went to help him, defendant pulled out a .45 caliber semiautomatic pistol, told the victim this was a robbery, and shot him multiple times; defendant also took $300 cash from him. The victim further told police that defendant forced him to get into the trunk of a car in the garage, put the gun against his head and pulled the trigger; however, the gun failed to discharge, and defendant closed the trunk and left.

Further evidence was presented that on August 5, 1980, the day after the incident, defendant went to a currency exchange and attempted to cash a check on an account from National Acoustics, a company owned by the victim. When the owner of the currency exchange called the company to verify the check, she was told that the check had been stolen in a holdup. She called police and tried to detain defendant, but he left. Soon thereafter, police arrived at the currency exchange and obtained a description of defendant from the owner. Officers found

defendant nearby with Marilyn Green, stopped him, advised him of his rights and put him in their squad car. When defendant was brought to the currency exchange, the owner identified him as the man who had tried to cash the stolen check. Officers searched defendant and found a set of keys on his person which belonged to the victim. During transport to the police station, officers noticed that defendant was moving around in the backseat of the squad car suspiciously. They subsequently searched the backseat and found a white General Motors key, a notice to appear complaint form with defendant's name on it, and a live .45 caliber cartridge. Once defendant was brought into the police station, he was searched. During this search, police recovered two blood-soaked $50 bills in his sock.

Forensic evidence revealed that the live .45 caliber cartridge recovered in the backseat of the police car in which defendant was transported had been chambered in and extracted from the same gun as the four casings recovered at the scene of the murder. Also, laboratory testing on the blood from the two $50 bills recovered in defendant's sock revealed that it was the same type as the victim's blood. In addition, Rosemary Magoon, the victim's wife, testified that on the night the victim was shot, he had in his possession a set of keys (later recovered on defendant), National Acoustic's checkbook and a large amount of money. Rosemary further confirmed at trial that the signature on the National Acoustic check recovered in this cause was not the victim's signature.

Defendant's statement to police was published to the court by ASA Calihan. In that statement, defendant recounted that he was at Westry's home on the night of the murder and was waiting to meet the victim to sell him a stolen car he had obtained for him. The plan was for

defendant to drive the car to Wisconsin with the victim following in his own car, and the exchange would take place there. However, defendant became scared that evening and told the victim to go to a garage on 112th Place to pick up the car. After defendant told him this and gave him directions to the garage, the victim gave defendant a check for $250, got into his truck and drove away. Defendant then drove to his father's home and stayed there for the rest of the evening, drinking with friends. ASA Calihan further testified that, when confronted with the bloody $50 bills and the victim's keys recovered from his person at the time of his arrest, defendant shook his head and said "no, no" over and over; when confronted with the bullet found in the backseat of the squad car which matched those at the scene, defendant did not respond.

At the close of trial, the court found defendant guilty of murder and armed robbery, and sentenced him to natural life in prison.

Defendant's posttrial motion alleged, in part, that his statement should have been suppressed and excluded from trial because it had been coerced by police through abuse. The trial court denied his motion. Defendant then filed a direct appeal with this Court raising six issues: (1) he was not proven guilty of armed robbery beyond a reasonable doubt; (2) he was not proven guilty of murder beyond a reasonable doubt; (3) the trial court erroneously allowed the victim's statements; (4) these statements were erroneously admitted as evidence of the crimes; (5) a tainted *venire* forced him to waive his right to a jury trial; and (6) his sentence was an abuse of discretion. Following review of each of these issues, this Court affirmed defendant's conviction

and sentence.[3] See *Hatch*, 190 Ill. App. 3d at 1018. In so doing, this Court reviewed the evidence at trial and found it to be overwhelming of his guilt. In particular, the Court did not make any reference to defendant's statement to police, but based its decision solely on the victim's declarations and the physical evidence presented at trial, including defendant's attempt to hide the .45 caliber bullet which was found to be from the murder weapon and his possession of the blood-soaked money matching the victim's blood type. See *Hatch*, 190 Ill. App. 3d 1015-16.[4]

In November 1983, defendant filed a *pro se* postconviction petition, wherein he alleged that detective Corless had committed perjury when he testified that he found the victim's keys on defendant while in custody. The petition, however, was withdrawn, as defendant's direct appeal was pending before this Court. Later, in September 1991 (following his direct appeal), defendant filed an amended postconviction petition, to which he attached an affidavit from Green wherein she stated that she heard police beating defendant while they were in custody. Defendant also again raised the issue of detective Corless' perjury, and asserted ineffective assistance of trial and appellate counsel. The State filed a motion to dismiss defendant's postconviction petition, the trial court granted the State's motion, and this Court affirmed that dismissal upon defendant's

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[3]Before trial began, defendant filed a *habeas corpus* petition alleging the violation of his due process rights because he had been denied a preliminary hearing and a speedy trial. The petition was dismissed and he appealed. That appeal from the denial of his *habeas corpus* petition was consolidated with his direct appeal from his convictions. Upon affirming his convictions, this Court also affirmed the denial of his petition. See *Hatch*, 190 Ill. App. 3d at 1012.

[4]For the record, we note that defendant filed for review of his direct appeal with our state supreme court, which was denied. See *People v. Hatch*, 131 Ill. 2d 566 (1990). He also sought a *writ of certiorai* in the United States Supreme Court, which was also denied. See *Hatch v. Illinois*, 498 U.S. 845 (1990).

appeal. See *People v. Hatch*, No. 1-94-0492 (May 8, 1995) (unpublished order under Supreme Court Rule 23).

In September 2000, defendant filed another petition for *habeas corpus*, arguing that his sentence violated *Apprendi*. This petition was denied. Defendant moved for reconsideration and the trial court denied his motion, but modified his sentence to include a life sentence for murder and a 30-year term of imprisonment for armed robbery. However, the trial court then dismissed its modification. Defendant appealed from both the denial of his petition for *habeas corpus* and the denial of his motion to reconsider. In a consolidated matter, this Court once again affirmed and, "without disturbing [his] conviction and life sentence for murder," ordered the mittimus to be amended to reflect that no sentence was ever imposed for the armed robbery conviction. See *People v. Hatch*, Nos. 1-01-0475, 1-01-3411 (cons.) (March 31, 2003) (unpublished order under Supreme Court Rule 23).

During the pendency of that appeal, defendant filed a *pro se* motion for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2002)), asserting that the sentencing statutes which formed the basis of his life sentence were ambiguous and conflicting. The trial court dismissed that motion and, following the denial of a motion to reconsider together with a "Notice of Claim of Unconstitutionality of Statutes," this Court affirmed. See *People v. Hatch*, No. 1-03-0062 (September 26, 2003) (unpublished order under Supreme Court Rule 23). Soon thereafter, defendant filed a successive *pro se* motion for relief from judgment pursuant to section 2-1401 of the Code, repeating his argument that the sentencing statutes were in conflict. The trial court dismissed defendant's motion, along

with a motion to reconsider, and, upon review, this Court affirmed.[5] See *People v. Hatch*, No. 1-04-1467 (September 23, 2005) (unpublished order under Supreme Court Rule 23). Defendant then filed an "Emergency Petition for Order of *Habeas Corpus*," again challenging the constitutionality and propriety of his sentence. The trial court dismissed that petition.

On June 22, 2009, defendant filed a motion for leave to file a successive postconviction petition pursuant to section 122-1(f) of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1(f) (West 2008)). In this motion, defendant alleged, as he had in his initial postconviction petition, that he had been abused while in police custody at Area 2; this time, he specifically named his abusers as detectives Dignan and Corless. Claiming that he was presenting "newly discovered evidence" of "systemic torture at Area 2," defendant cited the Report of the Special State's Attorney released in 2006, appellate cases wherein the defendants raised similar allegations of abuse at Area 2[6], and the Chicago Police Department's Office of Professional Standards Report of Investigator Michael Goldston (Goldston Report). Defendant insisted that these constituted the requisite "cause and prejudice" necessary for leave to file a successive postconviction petition under section 122-1(f).

Upon consideration, the trial court denied defendant's motion. In its order, the court noted that, while the Goldston Report was not available at the time of defendant's trial, one of the

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[5]In the midst of these collateral proceedings, defendant in 2004 filed a *pro se* "motion for leave to file petition for mandamus" with our state supreme court, which that court denied, along with a motion to reconsider.

[6]These cases included: *People v. Banks*, 192 Ill. App. 3d 986 (1989); *People v. Bates*, 267 Ill. App. 3d 503 (1994); *People v. Orange*, 168 Ill. 2d 138 (1995); *People v. Cannon*, 293 Ill. App. 3d 634 (1997); and *People v. Patterson*, 192 Ill. 2d 93 (2000).

appellate cases he relied on (*People v. Banks*, 192 Ill. App. 3d 986 (1989)) as part of his "newly discovered evidence" claim was decided before he filed his initial postconviction petition; in addition, the court pointed out that all the other appellate decisions had been decided before defendant began his post-2000 series of collateral filings. However, in none of those filings did defendant ever raise torture as an issue. Thus, the court found a "substantial issue as to just how 'new' [defendant's] alleged newly discovered evidence is." Moreover, the trial court explained that, in now asserting actual innocence, defendant would have to show that the newly discovered evidence would result in his complete exoneration to satisfy the prejudice prong of section 122-1(f). Yet, the trial court, citing this Court's decision affirming defendant's direct appeal, revisited the evidence against defendant, which included the victim's declarations, his attempt to hide the bullet which was found to be from the murder weapon, and his possession of the blood-soaked money that matched the victim's blood type. Specifically ignoring defendant's statement presented at trial, just as this Court had done on direct appeal, the trial court found that "defendant's newly discovered evidence would not result in a complete exoneration," as required under section 122-1(f).

ANALYSIS

On appeal, defendant contends that the trial court erred in denying him leave to file a successive postconviction petition where he established cause and prejudice by presenting newly discovered evidence of systemic torture at Area 2 that was not available at the time of his pretrial suppression hearing or his initial postconviction proceedings. Again, this evidence consists of the 2006 Report of the Special State's Attorney, appellate cases which address allegations of

abuse, and the Goldston Report. He asserts that the admission of his coerced statement, stemming from this systemic torture, violated his right to due process and a fair trial. However, contrary to defendant's contention, and based on the analysis below, we find that the trial court properly denied him leave to file a successive postconviction petition.

As has been well-established, the Act provides a means by which a defendant may challenge his conviction for "substantial deprivation of federal or state constitutional rights." *People v. Tenner*, 175 Ill. 2d 372, 378 (1997). A postconviction proceeding is a collateral attack on a prior conviction and sentence; thus, it "is not a substitute for, or an addendum to, direct appeal" but, instead, allows inquiry into constitutional issues that were not, nor could have been, determined on direct appeal. *People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994); see *People v. Barrow*, 195 Ill. 2d 506, 519 (2001). Generally, the Act intimates the filing of only one postconviction petition. See 725 ILCS 5/122-1(f) (West 2004); *People v. Simmons*, 388 Ill. App. 3d 599, 605 (2009); see also *People v. Morgan*, 212 Ill. 2d 148, 153 (2004). Consequently, in order to file a successive postconviction petition, a defendant must first obtain leave of court. See *Simmons*, 388 Ill. App. 3d at 605; *People v. DeBerry*, 372 Ill. App. 3d 1056, 1060 (2007) ("section 122-1(f) unequivocally requires that a defendant *must* obtain leave of court *before* filing a successive petition" (emphasis in original)).

To obtain such leave, section 122-1(f) of the Act requires a defendant to "demonstrate[] cause for his or her failure to bring the claim in his or her initial post[]conviction proceedings and [that] prejudice results from that failure." 725 ILCS 5/122-1(f) (West 2004); see *People v. Pitsonbarger*, 205 Ill. 2d 444, 458 (2002) (successive filing allowed only when the defendant

meets this "cause-and-prejudice test"). To establish cause, the defendant must identify an objective factor that impeded his ability to raise a specific claim during his initial postconviction proceedings. See 725 ILCS 5/122-1(f) (West 2004); see *Morgan*, 212 Ill. 2d at 153-54; *Pitsonbarger*, 205 Ill. 2d at 458. Conjunctively, to establish prejudice, the defendant must demonstrate that the error not raised in his initial postconviction proceedings so infected the trial that his resulting conviction violated due process. See 725 ILCS 5/122-1(f) (West 2004); see *Morgan*, 212 Ill. 2d at 154; *Pitsonbarger*, 205 Ill. 2d at 458. We review the trial court's ruling on whether a defendant has satisfied the cause-and-prejudice test of section 122-1(f) pursuant to a *de novo* standard of review. See *People v. Williams*, 394 Ill. App. 3d 236, 242 (2009).

Accordingly, the issue before us is whether defendant's proposed successive postconviction petition, which alleges his statements to police were the result of torture committed by detectives Dignan and Corless, satisfies the cause-and-prejudice test.

First, regarding the cause prong of this test, the State contends that defendant has failed to satisfy it because, not only did he abandon this claim after last arguing it in his posttrial motion 30 years ago, but he also fails to point to an objective factor that prevented him from raising this claim earlier. Namely, the State notes that the Goldston Report was compiled in 1990, and all the appellate court decisions defendant cites were available by 2000--long before he filed his numerous petitions for collateral relief beginning in 2000 wherein he never made any mention of an abuse claim. And, while admitting the 2006 Report of the Special State's Attorney post-dates the majority of his collateral attacks, the State insists that defendant unreasonably waited almost three years after its release to argue that it corroborated his torture claim and that, in the

meantime, he "chose to pursue other avenues for collateral relief," including a challenge to his sentence in 2007.

After considering the State's argument, we find that defendant has satisfied the cause prong of section 122-1(f) of the Act. The record reflects that defendant filed his initial postconviction petition in November 1983; however, he withdrew this because his direct appeal was pending. Defendant refiled this petition in September 1991. While his November 1983 petition alleged only a claim of perjury against detective Corless regarding his testimony that he recovered certain evidence on defendant's person at the time of the police investigation into the victim's murder (*i.e.*, the victim's keys), defendant's refiled initial postconviction petition from 1991 did allege claims of abuse. That is, in this petition, defendant included the affidavit of Green, who was arrested with defendant and taken to Area 2 with him. In this affidavit, Green stated she heard officers beating defendant while in he was in their custody.

At the time defendant refiled his initial petition, then--wherein he did allude to police abuse--none of the newly discovered evidence of systemic torture at Area 2 which he alleges would have supported his abuse claims existed. For example, the State itself acknowledges that, while the Goldston Report was compiled in 1990, it was not released until 1992--long after defendant filed his posttrial motion, as well as after he filed his postconviction petition in 1991. Also, all but one of the appellate cases defendant relies on citing similar abuse of various defendants at Area 2--*Bates*, *Orange*, *Cannon*, and *Patterson*--were decided in 1994, 1995, 1997 and 2000, respectively. These dates, again, were after defendant filed his postconviction petition. And, clearly, the 2006 Report of the Special State's Attorney was not released until after

defendant filed his postconviction petition. Accordingly, the three categories of corroborative evidence attached to defendant's motion for leave to file his successive postconviction petition--the Goldston Report, the appellate cases of systemic torture, and the 2006 Report--were all objectively unavailable for defendant's use during his initial postconvcition proceedings.

We do recognize, as the State points out, that one of the appellate cases defendant cites, *Banks*, 192 Ill. App. 3d 986 (1989), predates his initial postconviction proceedings. We also acknowledge that, even with the release of the 2006 Report, defendant did not move for leave to file under section 122-1(f) until 2009, that he sought other avenues of collateral relief, and the State's assertion that, similar to *People v. Orange*, 195 Ill. 2d 437 (2001) (denying leave to file successive postconviction petition), defendant "has not consistently alleged who his abusers were" until he presented his successive postconviction petition. However, at this point, we are dealing only with the cause factor of the cause-and-prejudice test; namely, whether any objective factor external to defendant's defense existed that prevented his efforts to raise his abuse claim earlier. And, based on the information before us, we find that cause sufficient to meet this prong exists, despite the State's assertions otherwise.

Significantly, apart from *Banks*, as well as the other appellate cases and the Goldston Report, our Court has recently found that a defendant's citation to the 2006 Report of the Special State's Attorney is sufficient to establish cause under the cause-and-prejudice test. See *People v. Wrice*, 406 Ill. App. 3d 43, 52-53 (2010). In *Wrice*, the defendant, like defendant here, filed a pretrial motion to suppress statements he made to police, claiming that he had been tortured at Area 2. Following the testimony of police officers, the trial court denied his motion, finding no

such abuse. The defendant was eventually convicted of multiple crimes, including rape and armed violence. He appealed, but he did not assert police abuse as an issue for review. Upon the affirmance of his convictions, he filed an initial postconviction petition in 1991 wherein he asserted abuse, but his petition was dismissed. The defendant filed his first successive postconviction petition in 2000, again alleging abuse. This petition was dismissed. Following other motions, the 2006 Report of the Special State's Attorney was released, and defendant filed a motion for leave to file another postconviction petition in October 2007. The trial court again denied his motion, this time accepting the State's argument that defendant's reference to the 2006 Report was legally insufficient to meet the cause prong of the cause-and-prejudice test since he had already raised claims of torture in prior postconviction proceedings. See *Wrice*, 406 Ill. App. 3d at 51-52.

On appeal, this Court reversed and remanded the defendant's case. Specifically, this Court found the State's argument, and the trial court's conclusion, with respect to cause to be "unavailing." *Wrice*, 406 Ill. App. 3d at 52. The *Wrice* court noted that the defendant, in his motion for leave to file a successive postconviction petition of October 2007, "raised *for the first time* the argument that the Report of the Special State's Attorney significantly corroborates his torture claims." *Wrice*, 406 Ill. App. 3d at 52 (emphasis in original). Thus, while the defendant may have raised torture claims in previous proceedings, he had never before cited the 2006 Report. Indeed, the Court made clear that the defendant could not have done so in his earlier postconviction proceedings, mainly because the 2006 Report had not been released. See *Wrice*, 406 Ill. App. 3d at 52. The *Wrice* court concluded that, "[a]s such, [the] defendant has satisfied

the 'cause' prong to the test by identifying an objective factor (the release date of the Report) that impeded him from raising the Report in the earlier postconviction proceedings." *Wrice*, 406 Ill. App. 3d at 52.

The instant case is similar to *Wrice* and merits the same conclusion with respect to a finding that the cause prong of the cause-and-prejudice test of section 122-1(f) has been met. Like the defendant in *Wrice*, defendant here previously asserted torture claims, as can be found in his posttrial motion and his initial postconviction petition from September 1991. However, for the first time, he was able to raise his torture claims with corroborative evidence--the 2006 Report--in his motion for leave to file his successive postconviction petition. As the release date of the 2006 Report is, undeniably, an objective factor that impeded him from raising that Report in his earlier proceedings, we, like the *Wrice* court, conclude that he has met the cause prong of the cause-and-prejudice test. See *Wrice*, 406 Ill. App. 3d at 52; see also *People v. Anderson*, 402 Ill. App. 3d 1017, 1039 (2010) (concluding that, with respect to cause prong, the defendant "may well be able to establish cause in so far as he was objectively impeded from raising [his torture] claim earlier by pointing to the fact that he did not have the benefit of the [2006 Report] *** as [it] became available after the dismissal of his third successive postconviction petition").

The State's claim that *Wrice* is distinguishable, and its reliance instead on *Orange*, are misplaced. The State argues that defendant here waited almost 3 years after the 2006 Report's release before filing his motion for leave to file his successive postconviction petition, whereas the defendant in *Wrice* filed within 15 months of its release. This assertion, while true, is irrelevant. The State points to no statutory or case law mandating a specific window of time in

which defendant was required to file his motion under section 122-1(f). In fact, as per our reading of that section of the Act, we find no tolling provision or time requirement. See 725 ILCS 5/122-1(f) (West 2004).

The State also argues, in a limited paragraph in its brief on appeal, that *Orange*, not *Wrice*, is more "analogous" to the instant case. We disagree. In *Orange*, the defendant testified at trial that police at Area 2 abused and tortured him until he confessed to various crimes; he never referred to them by name or description, but only as " 'two guys' " and/or "police." In rebuttal, several officers who were involved in the defendant's interrogation testified that no abuse had occurred and, specifically, that officer Jon Burge was not present during the defendant's interrogation. Following his conviction and its affirmance on appeal, the defendant filed his first postconviction petition in 1993. In it, he asserted that his counsel had been ineffective for failing to investigate his abuse claims; he presented his abuse allegations but did not name or describe any of the officers allegedly involved, and he attached the Goldston Report to his petition. The trial court dismissed his petition, and the review court agreed, finding that he had presented only general allegations insufficient to allow consideration. The defendant filed a second postconviction petition and an amended second postconviction petition in 1998. Asserting police abuse, the defendant again attached the Goldston Report and, this time, named Burge as his abuser. The trial court again dismissed his successive petition, finding that it was merely an attempt to revisit an issue already decided. See *Orange*, 195 Ill. 2d at 442-447.

Upon review, our state supreme court examined whether the defendant had met the cause prong of the cause-and-prejudice test. It concluded that he had not. See *Orange*, 195 Ill. 2d at

450-452. The *Orange* court noted that the defendant had already submitted the Goldston Report as part of his first postconviction petition in 1993 to support his argument of abuse (and his counsel's failure to investigate this). See *Orange*, 195 Ill. 2d at 450. At that time, then, the report was clearly available to the defendant and he provided it to the trial court and the reviewing court, which took it under consideration in relation to his claim. See *Orange*, 195 Ill. 2d at 450. Those courts found that it amounted to only generalized allegations unsupportive of his claim. See *Orange*, 195 Ill. 2d at 450 (citing *Orange*, 168 Ill. 2d at 150-51). Despite these rulings, the defendant filed a second (and amended) postconviction petition in 1998, again asserting abuse and attaching the Goldston Report. See *Orange*, 195 Ill. 2d at 450. The *Orange* court determined that the defendant was raising "essentially the same claim that [he] raised in his first post[]conviction petition several years earlier" and provided the same evidence as corroboration. *Orange*, 195 Ill. 2d at 450. Moreover, with respect to his allegation that Burge was his torturer, the *Orange* court found that, in addition to the fact that the defendant never made any specific reference or description as to his identity, the evidence presented also showed the defendant knew Burge's identity as early as 1990--before he filed his first postconviction petition. See *Orange*, 195 Ill. 2d at 451. Accordingly, based on all this, the *Orange* court held that the defendant "failed to satisfy the 'cause' prong" of the cause-and-prejudice test. *Orange*, 195 Ill. 2d at 450.

The instant cause is wholly distinguishable from *Orange*. First, and most critically, *Orange* did not involve the 2006 Report of the Special State's Attorney, which contains evidence of "widespread, systematic torture of prisoners at Area 2" that has been "established by the

stricter, criminal-trial standard of proof beyond a reasonable doubt" than the Goldston Report and other similar investigative reports of Area 2. *Wrice*, 406 Ill. App. 3d at 53. Defendant here cited this report for the first time in his successive postconviction petition, as it was available only at that time. In contrast, the defendant in *Orange* cited the same report as evidence of alleged torture in both his first and successive postconviction petitions. Thus, whereas that defendant was asking for a second review of the exact same evidence, defendant here presented different evidence–evidence that was objectively not available to him during his earlier proceedings.

In addition, the State's claim that the instant cause is like *Orange* in that defendant here did not "consistently allege[]" who his abusers were but only mentioned them by name for the first time in his successive postconviction petition is equally unavailing. It is true that defendant only named his torturers (detectives Dignan and Corless) for the first time in his successive postconviction petition. However, when defendant first mentioned police abuse in his pretrial motion to suppress, he gave detailed physical descriptions of the particular officers and how each one in particular allegedly harmed him. Specifically, defendant described that the officer who kicked him in the groin was 5'8" tall, of medium build and had sandy hair; he further described two other officers who beat him as 5'9" tall of medium build and with brown hair, and 5'8" tall and weighing 210 to 230 pounds. This is a marked distinction from the defendant in *Orange*, who never provided a description or even made so much as a reference to the identity of his alleged torturers at trial or during his first postconviction proceedings. See *People v. Gillespie*, 407 Ill. App. 3d 113, 127-28 (2010) (noting the distinction that the defendant in *Orange* did not identify or describe the officers he alleged tortured him, nor were they named in any of the

internal police abuse investigations as having abused suspects); *cf. People v. King*, 192 Ill. 2d 189, 198 (2000), and *People v. Patterson*, 192 Ill. 2d 93, 107-08 (2000) (hearing on postconviction motion granted where the defendants identified or described the officers that had allegedly abused them at Area 2, and where these officers had also been named in internal police investigations as abusers). Also, the *Orange* court made clear that the evidence presented unmistakably proved that the defendant in that case knew his torture's (Burge) identity before he filed his first postconviction petition. We have not been provided with such evidence here, other than the State's assertion.

Again, the instant cause is more like *Wrice* than *Orange* with respect to the cause prong of the cause-and-prejudice test. Therefore, based on all this, we find that defendant has satisfied this prong under section 122-1(f) of the Act by identifying an objective factor--the release date of the 2006 Report of the Special State's Attorney--that impeded him from raising that Report in his earlier postconviction proceedings.

However, while defendant may have shown cause, we find that, ultimately, he fails to meet the prejudice requirement necessary for leave to file his successive postconviction petition.

As noted earlier, to establish the prejudice prong of the cause-and-prejudice test of section 122-1(f), the defendant must demonstrate that the error not raised in his initial postconviction proceedings so infected the trial that his resulting conviction violated due process. 725 ILCS 5/122-1(f) (West 2004); see *Morgan*, 212 Ill. 2d at 154; *Pitsonbarger*, 205 Ill. 2d at 458. Defendant here claims that he has demonstrated this prejudice because he could not impeach the credibility of the officers who testified at his suppression hearing with other claims

of abuse and, therefore, the subsequent admission of his statement violated his rights to due process and a fair trial. Defendant's argument focuses on detective Dignan, who has been referenced in the confirmed abuse cases cited in the Goldston Report, various appellate cases of Area 2 torture, and the 2006 Report of the Special State's Attorney.

Based on the record before us, we find that defendant cannot show actual prejudice from his claimed error regarding the admission of his statement at trial.

First, we examine detective Dignan's role in defendant's cause. The record reflects that detective Dignan testified at defendant's suppression hearing that, while he was present when defendant was brought to the station, he had only limited contact with him. Specifically, detective Dignan testified that he was not involved in defendant's interrogation, which defendant asserts led to his torture and resulted in his statement to police. Rather, detectives Corless and Glynn were the ones who conducted defendant's interrogation; neither of these detectives were ever named in the abuse cases or reports cited by defendant. In addition, we note that at defendant's trial, detective Dignan further testified that his primary role in defendant's case revolved around the victim. Detective Dignan was present at the hospital when the victim gave his statement about the robbery and shooting. He published this statement to the court at trial, and never testified with respect to the statement defendant gave police. Moreover, officer Morrison corroborated detective Dignan's recount of the victim's statement at trial, independently testifying as to what the victim recounted about the evening in question. There is no evidence, then, that detective Dignan had anything to do with defendant's statement, either at the time it was given or when it was published to the trial court, and his testimony at trial regarding the

victim's statement was fully corroborated by another witness.

Most significantly, however, is that, apart from defendant's statement to police, the evidence in support of his guilt was, to say the least, overwhelming. The victim gave a statement to officer Morrison that, on August 4, 1980, a man he knew as "Jeff," who was living in a red house at 9600 South Avalon with Westry, shot him multiple times, stole money from him, and locked him in a trunk after they had made a deal regarding the sale of a stolen car. Westry corroborated the victim's statement in several respects: defendant was living with him in his red house at 9600 South Avalon; he (Westry) introduced the victim to defendant for the purpose of arranging a deal wherein defendant would sell the victim a stolen car; and on August 4, 1980, the victim came to Westry's home to meet with defendant about the car. In addition, the owner of the currency exchange testified that, on August 5, 1980, the day after the incident, defendant came into her store to cash a check drawn on an account from National Acoustics. When she called to verify the check, which bore a signature, she was told by the company that the check had been stolen. She tried to detain defendant, but he left without the money. The victim's widow verified that the victim owned National Acoustics and that he was in possession of the company's checkbook on the night of the robbery and shooting, along with a set of keys; she affirmed that the signature on the back of the check that defendant tried to cash was not the victim's. Furthermore, the forensic evidence in this case was undisputed. When defendant was arrested, he as in possession of keys that belonged to the victim. During defendant's transport to the police station, he made suspicious movements in the squad car. A search of that car upon defendant's exit yielded the recovery of a live .45 caliber cartridge. This was the same caliber as

the murder weapon. Also, this cartridge was the same caliber as the four .45 casings and the .45 caliber bullet officer Morrison recovered from the crime scene (*i.e.*, the garage). In fact, the live .45 caliber cartridge recovered from the backseat of the squad car was conclusively found to have been chambered in and extracted from the murder weapon. Finally, upon being searched at the police station, two blood-soaked $50 bills were recovered in defendant's socks. The blood on these bills was a match to the victim's blood type.

Just as this Court found on direct appeal, ignoring defendant's statement to police, the evidence presented against him was overwhelming. Thus, even had the alleged evidence of defendant's torture allegations come to light, thereby preventing the presentation of his statement at trial, there is no likelihood that he would have been acquitted. Therefore, in light of this overwhelming evidence of defendant's guilt, there is no probability that the result of his trial would have changed and, accordingly, he cannot establish prejudice as required under section 122-1(f) of the Act.[7] See *People v. Anderson*, 375 Ill. App. 3d 121, 136-37 (2007) (leave to file successive postconviction petition properly denied where the defendant could not establish prejudice, since there was no probability outcome of trial would have been different due to overwhelming evidence of his guilt proffered by State); see, *e.g.*, *Simmons*, 388 Ill. App. 3d at

[7]We also note for the record the actual content of defendant's statement to police. In it, he admitted that he had made a plan with the victim to sell him a stolen car, that he obtained a car for him, and that he told the victim where to find the car after he got scared and decided not to deliver the car to him in person. Defendant then maintained that the victim gave him money and left him, and he went to his father's home for the rest of the evening in question. Defendant consistently denied either shooting or robbing the victim, or being in his presence when this occurred. Thus, his statement, which he alleged was the result of police torture, was ultimately exculpatory, not inculpatory.

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Finally, as an aside, we note that defendant here does not mention "actual innocence" anywhere in his brief on appeal, nor does he argue it. However, in his successive postconviction petition, he refers to the police reports of torture cited therein as "exonerating" evidence, he claims that he was "set-up" in regard to making a statement about the victim's murder, and he writes that his assertions of "torture and actual innocence" should be heard. As such, and because the vast majority of defendants do assert actual innocence claims in their successive postconviction petitions, we feel that a limited address on this topic is warranted.

A defendant in a successive postconviction petition situation may bypass the requirements of the cause-and-prejudice test of section 122-1(f) if he can show a valid freestanding claim of actual innocence. See *People v. Ortiz*, 235 Ill. 2d 319, 330-31 (2009) ("where a defendant sets forth a claim of actual innocence in a successive postconviction petition, the defendant is excused from showing cause and prejudice"); *Pitsonbarger*, 205 Ill. 2d at 459-60; *Gillespie*, 407 Ill. App. 3d at 124 (these requirements are excused when a defendant presents a claim of actual innocence in his successive postconviction petition). In order to obtain relief under this theory, however, the defendant must show that the evidence he is relying on was discovered since his trial and could not have been discovered earlier through due diligence, is material to the issue at hand and not merely cumulative, and is of such conclusive character that it will probably change the result on retrial. See *Gillespie*, 407 Ill. App. 3d at 124.

Defendant's claim of actual innocence in his successive postconviction petition is based on his allegations of police torture, and the newly discovered evidence material to his claim is,

again, comprised of the Goldston Report, the cited appellate cases, and the 2006 Report. Defendant argues that, but for the torture he experienced at Area 2, he never would have given a statement to police. However, even accepting that the evidence defendant points to could not have been discovered earlier and is material to his claim of abuse, it cannot be forgotten that "actual innocence" connotes complete exoneration. See *People v. Collier*, 387 Ill. App. 3d 630, 663 (2008) (citing *People v. Savory*, 309 Ill. App. 3d 408, 414-15 (1999)). We have already discussed at length the overwhelming amount of evidence of defendant's guilt--apart from his statement, no less. In light of that ample evidence, the information he cites here would have a very limited effect on a trier of fact and would not have the likelihood of exonerating him upon retrial. As such, we conclude that the evidence he now cites would not change the outcome of his case and, thus, he cannot establish a claim of actual innocence. See *Anderson*, 402 Ill. App. 3d 1017, 134-39 (2010) (concluding that the defendant's claim of actual innocence in successive postconviction petition based on police abuse could not stand because, while he cited similar documents of abuse and even accepting these to be previously unobtainable and material, they would not have exonerated him on retrial "in light of the amply supportive evidence of [his] guilt proffered by the State"); see also *Collier*, 387 Ill. App. 3d at 636 (where result on retrial would not change, actual innocence claim fails); see, *e.g.*, *Gillespie*, 407 Ill. App. 3d 113.

CONCLUSION

In sum, while defendant may very well be able to show cause under the cause-and-prejudice test of section 122-1(f), he cannot, based on the record in this case, demonstrate the required prejudice. Accordingly, we hold that defendant's motion for leave to file a successive

postconviction petition was properly denied pursuant to the Act and, for the foregoing reasons, we affirm the judgment of the trial court.

Affirmed.