

No. 1-12-1463

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 02 CR 3181
)	
ADAM TITUS,)	Honorable
)	Frank Zelezinski,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Hoffman and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly denied defendant's leave to file a successive postconviction petition, where it was barred by *res judicata*, and, even if not barred, defendant could not satisfy the requirements of the "cause and prejudice" test.

¶ 2 This appeal arises from an April 13, 2012 judgment entered by the circuit court of Cook County, which denied defendant Adam Titus leave to file a *pro se* successive postconviction petition following the summary dismissal of his initial postconviction petition. On appeal, the defendant argues that he had established "cause and prejudice" for filing the successive

postconviction petition. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3

BACKGROUND

¶ 4 The relevant facts pertaining to the defendant's conviction and sentence are partially reproduced from our supreme court's April 2, 2009 opinion on direct appeal of this case. See *People v. Smith*, 233 Ill. 2d 1 (2009).¹ The defendant was charged with three counts of murder (intentional murder, knowing murder, and felony murder) and one count of armed robbery in connection with the robbery and shooting death of a pizza deliveryman, Charles Gordon (Gordon). On March 9, 2005, a jury trial commenced. Nakeshia Banks (Banks) testified that on January 12, 2002, she was 15 years old and lived in an apartment on West 154th Street in Harvey, Illinois. At about 5:30 p.m., the defendant came to her apartment with another person, who was later identified as codefendant Demetrius Phipps (codefendant Phipps). Banks testified that the defendant told her to call Arnie's Pizza and use a false name to order a pizza to be delivered to the vacant apartment next door. Banks complied with the defendant's request, and the defendant and codefendant Phipps then left the apartment. Banks further testified that, about 10 minutes after ordering the pizza, she left her apartment to go to the store with her sister, Jerrica Phipps (Jerrica).² She saw the pizza deliveryman arrive and heard him ask if someone had ordered a pizza. Banks stated she told the pizza deliveryman that "Adam will be back to pay for it." As Banks continued toward the store, she looked back and saw the pizza deliveryman walk up the exterior staircase of her building and knock on an apartment door. When the pizza deliveryman received no response at the door, he started to leave. As the pizza deliveryman

¹ On direct appeal, the Illinois Supreme Court consolidated the defendant's case with another unrelated murder case involving Leratio Smith.

² Trial evidence revealed that Jerrica Phipps was not related to codefendant Phipps.

descended the stairs, Banks observed the defendant ascend the same staircase while codefendant Phipps remained at the bottom of the staircase. The defendant then passed the pizza deliveryman on the stairs, turned, and hit him on the back of the head "with something." As a result, the pizza deliveryman fell down the stairs to the cement slab below, where codefendant Phipps began to beat him. The defendant, using an object in his hand, joined in beating the man at the bottom of the stairs. Banks heard the pizza deliveryman plead for them to stop and she, too, screamed at the defendant to stop. The defendant paid no attention to their pleas. Banks then became frightened and started to run toward her sister. As she ran, she heard a gunshot. Banks testified that, initially, she did not tell the police what she had seen because she had been threatened by two of the defendant's friends.

¶ 5 Detective Eric Keyes (Detective Keyes) of the Harvey police department testified that, on January 12, 2002, at about 5:48 p.m., he received a "flash message" that there had been a robbery and shooting involving two black men at 198 West 154th Street. Detective Keyes and his partner, Detective Williams, responded within minutes of receiving the message. They observed three black men, who matched the description given in the flash message, huddled together. The detectives exited their unmarked car and approached the men to investigate. When they announced their office, one of the men, who was later identified as the defendant, pulled a gun from his waistband and began to run from the scene. The two detectives split up and pursued the defendant along different courses. During the chase, Detective Keyes saw the defendant discard the gun in front of a residence. Soon thereafter, the detectives caught up to the defendant and apprehended him.

¶ 6 After the defendant's arrest, the police recovered the gun from the location where Detective Keyes had seen the defendant discard it. The gun was later subjected to ballistic testing, which revealed that the bullet that killed the victim had been fired from that gun.

¶ 7 At the police station, after being advised of his *Miranda* rights, the defendant gave an oral statement to the police in which he implicated "Mr. Hogan" as the shooter. The next day, when Hogan was brought to the police station, the defendant recanted his earlier statement and identified codefendant Phipps as the shooter. Subsequently, Assistant State's Attorney Concannon (ASA Concannon) interviewed the defendant, who agreed to give a videotaped statement concerning his involvement in the crime. In the videotaped statement, which was played for the jury, the defendant admitted that, on January 12, 2002, he and his friend "Meechie" (codefendant Phipps) devised a plan to rob a pizza deliveryman. The defendant explained that he had in his possession a gun that he had taken from his girlfriend's house earlier that day. In his videotaped statement, the defendant claimed that he gave the gun to codefendant Phipps and that codefendant Phipps had been the one who approached and shot the victim. The defendant stated that, when codefendant Phipps approached the victim on the stairs, the victim "slipped" and fell to the ground. As the victim lay on the ground, codefendant Phipps held a gun to the victim's head and demanded money from him. The defendant then searched the victim's pockets and removed some dollar bills. Subsequently, the defendant heard a gunshot and realized that codefendant Phipps had shot the victim. After the shooting, the defendant and codefendant Phipps fled in opposite directions, but met up again shortly thereafter to split the money he had taken from the victim. The defendant claimed that the police arrived just as codefendant Phipps was handing the gun back to him, after which they ran to evade the police. The defendant admitted that, during the police chase, he threw the gun away before he was

caught by the police. At trial, the defendant did not testify and the defense presented no evidence.

¶ 8 Following Banks' testimony at trial, the jury left the courtroom for recess and a sidebar conference between the parties and the court was held. The State raised an issue regarding one of the jurors, Lloyd Mason (Juror Mason), who allegedly leaned back to alternate juror Larry Jordan (Alternate Juror Jordan) during Banks' testimony and said that "she's lying." The State asked that Juror Mason be *voir dired* by the court. Defense counsel then noted that she was concerned that Juror Mason was "one of the jurors that actually went to sleep" and that "[t]here's actually several jurors during the course of questioning that nodded off, and he was one of them." Defense counsel then asked the court to admonish the jurors as to the importance of listening to all the testimony and to admonish them not to discuss any of the testimony until the appropriate time for deliberation. The trial court then summoned and *voir dired* Juror Mason, who informed the court that he fell asleep for only "one second," that he did not miss any testimony, and that he never made comments to other jurors as to whether certain witnesses might be lying. When the State questioned Juror Mason as to how he knew he did not miss any testimony, Juror Mason explained that he only closed his eyes for one second. Juror Mason also told the court that the comment which he made to Alternate Juror Jordan during a witness' testimony related to the time. After Juror Mason left the courtroom, the trial court summoned and *voir dired* Alternate Juror Jordan, who confirmed that the only comment Juror Mason made to him during a witness' testimony was regarding the time. After Alternate Juror Jordan left the courtroom, the State argued for the removal of Juror Mason from the jury, while defense counsel argued that he should simply be admonished and remain on the jury. Thereafter, the trial court agreed with defense counsel and Juror Mason remained on the jury.

¶ 9 During the jury instruction conference at trial, the defense requested separate verdict forms for each count of murder charged, which the trial court denied. Subsequently, the jury returned general guilty verdicts of first-degree murder and armed robbery against the defendant. Consequently, the trial court sentenced the defendant to 38 years for first-degree murder, with an additional 18-year sentence to run consecutively for the armed robbery conviction.

¶ 10 On direct appeal, the defendant argued that: (1) he was entitled to a new trial because the trial court improperly refused to tender separate verdict forms for each of the murder counts; (2) the State's closing arguments were improper; (3) defense counsel was ineffective for failing to cross-examine Banks about potential bias; and (4) he was entitled to a new trial because the jury may have found him guilty of felony murder, a legally insufficient theory.

¶ 11 On October 14, 2007, this court affirmed the defendant's conviction on direct appeal, but modified his consecutive sentence for armed robbery to run concurrently with his murder sentence, by holding that it was error for the trial court to have refused the defendant's request for separate verdict forms. See *People v. Titus*, No. 1-05-1523 (2007) (unpublished order under Supreme Court Rule 23). On April 2, 2009, our supreme court affirmed the defendant's conviction and sentence for murder, but vacated the conviction and sentence for armed robbery, by holding that the trial court erred in refusing the defendant's request at trial for separate verdict forms for each of the counts of murder charged and the general verdict returned by the jury against him must only be interpreted as a finding on felony murder. See *Smith*, 233 Ill. 2d at 23, 28-29 ("where, as here, specific findings by the jury with regard to the offenses charged could result in different sentencing consequences, favorable to the defendant, specific verdict forms must be provided upon request and the failure to provide them is an abuse of discretion").

¶ 12 On December 14, 2009, the defendant filed an initial *pro se* petition for postconviction relief (initial postconviction petition), alleging: (1) ineffective assistance of trial counsel where counsel failed to call several witnesses to testify; (2) ineffective assistance of trial counsel where counsel failed to advise the defendant, and his mother, of the defendant's right to testify and also prevented him from testifying; (3) the trial court erred in failing to remove a juror who had allegedly fallen asleep at trial; (4) the trial court imposed an excessive sentence; (5) he was not proven guilty beyond a reasonable doubt; and (6) ineffective assistance of appellate counsel where counsel failed to challenge the charging instrument and the allegedly excessive sentence. Attached to the petition were three affidavits which were executed by the defendant on December 9, 2009.

¶ 13 On February 22, 2010, the trial court summarily dismissed the defendant's initial postconviction petition. Thereafter, the defendant appealed the trial court's February 22, 2010 summary dismissal of his initial postconviction petition, by challenging only the issues that: (1) he received ineffective assistance of trial counsel where counsel failed to call Jerrica as a witness to contradict certain testimony from her sister, Banks; and (2) he received ineffective assistance of appellate counsel where counsel failed to argue that his sentence was excessive. On September 30, 2011, this court affirmed the trial court's summary dismissal of the defendant's initial postconviction petition. *People v. Titus*, 2011 IL App (1st) 100900-U.

¶ 14 On March 16, 2012, the defendant sought leave to file a successive postconviction petition. In the successive postconviction petition, the defendant alleged, *inter alia*, that trial counsel was ineffective for failing to call a member of his family, "Talisha Hunt," to testify about jurors who had fallen asleep at trial; and that appellate counsel was ineffective for failing to raise the issue that defense trial counsel was ineffective for failing to advise him of his right to testify

at trial. Attached to the successive postconviction petition were a letter from defense trial counsel, Toya Harvey (Attorney Harvey), an affidavit from Talisha Hunt (Hunt), and two affidavits from the defendant.

¶ 15 On April 13, 2012, the trial court denied the defendant leave to file the successive postconviction petition, finding that "nothing here is new" and that matters "had previously been litigated before this court, and all matters could have been raised through direct appeal as well as the initial petition for post-conviction relief."

¶ 16 On May 14, 2012, the defendant filed a notice of appeal, seeking to appeal the trial court's April 13, 2012 ruling.

¶ 17 ANALYSIS

¶ 18 The sole issue presented to this court for review on appeal is whether the trial court erred in denying the defendant leave to file a successive postconviction petition, which we review *de novo*. See *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 25.

¶ 19 The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) provides a three-step procedural mechanism by which a convicted defendant can assert that there was a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. *People v. Harris*, 224 Ill. 2d 115 (2007). A postconviction proceeding is not an appeal from the judgment of conviction, but is a collateral attack on the trial court proceedings. *People v. Petrenko*, 237 Ill. 2d 490, 499 (2010). Consequently, issues that could have been raised on direct appeal but were not are forfeited. *Id.* Under the Act, a defendant bears the burden of establishing that a substantial deprivation of his constitutional rights occurred. *People v. Waldrop*, 353 Ill. App. 3d 244, 249 (2004). At the first stage, a postconviction petition may be summarily dismissed if the claims in the petition are frivolous and patently without merit.

People v. Hodges, 234 Ill. 2d 1, 10 (2009); see 725 ILCS 5/122-2.1(a)(2) (West 2010)). The filing of only one postconviction petition is contemplated under the Act. *People v. Williams*, 2012 IL App (1st) 111145, ¶ 35. A defendant seeking to institute a successive postconviction petition must first obtain "leave of court." See 725 ILCS 5/122-1(f) (West 2010); *People v. Tidwell*, 236 Ill. 2d 150, 157 (2010). Successive petitions are discouraged because "the defendant has already had one complete opportunity to show a substantial denial of his constitutional rights." (Internal quotation marks omitted.) *Edwards*, 2012 IL App (1st) 091651, ¶ 16. However, our supreme court has provided two exceptions under which the bar against successive proceedings will be relaxed. *People v. Edwards*, 2012 IL 111711, ¶ 22 (citing *People v. Pitsonbarger*, 205 Ill. 2d 444 (2002)). The first exception for relaxing the bar is when the defendant can establish "cause and prejudice" for failing to raise the claim earlier. *Edwards*, 2012 IL 111711, ¶ 22. The "cause and prejudice" test is codified by section 122-1(f) of the Act. See 725 ILCS 5/122-1(f) (West 2010). The second exception by which the bar to successive postconviction proceedings may be relaxed is when the defendant sets forth a colorable claim of actual innocence. *Edwards*, 2012 IL 111711, ¶¶ 23-24. Because the defendant makes no claims of actual innocence in the instant case, the bar against successive postconviction proceedings may only be relaxed if the defendant can satisfy the "cause and prejudice" test. "Cause" can be shown by identifying "an objective factor external to the defense that impeded [the defendant's] efforts to raise his claim in the earlier [postconviction] proceeding." *Edwards*, 2012 IL App (1st) 091654, ¶ 20; 725 ILCS 5/122-1(f) (West 2010). "Prejudice" requires a showing that "the claim not raised during [the defendant's] initial postconviction proceedings so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f) (West 2010).

¶ 20 The defendant argues that he has established "cause" for failing to raise this issue in an earlier proceeding because he did not find out about Hunt's observations regarding allegedly sleeping jurors at trial until after he had filed his *initial* postconviction petition; thus, he claims he had no opportunity until his *successive* postconviction petition to raise the issue of trial counsel's ineffectiveness in failing to bring to the trial court's attention Hunt's observations and in failing to call Hunt as a witness to testify about jurors who had fallen asleep at trial. Although the defendant acknowledges that he raised a similar issue with respect to Juror Mason in his initial postconviction petition, he distinguishes this issue as "clearly different" on the basis that it concerns the existence of "an unknown, second sleeping juror that defense counsel knew about." The defendant also contends that he has established "prejudice," arguing that his constitutional rights to due process and a fair and impartial trial were violated when two jurors slept during his trial. Specifically, he surmises that, had defense counsel brought Hunt's observations to the court's attention, Hunt would have been questioned by the court to determine if a violation of the defendant's rights had occurred and the jurors in question may have admitted to sleeping during trial proceedings. He further speculates that, had the sleeping jurors been dismissed and replaced by alternate jurors, trial proceedings could have resulted in a hung jury or an acquittal.

¶ 21 The State counters that the defendant has failed to satisfy the requisite "cause and prejudice" test to warrant granting him leave to file a successive postconviction petition. Specifically, the State argues that the allegations contained in his successive postconviction petition were neither new nor legitimate, where they have previously been considered and rejected by the court at trial and in the initial postconviction proceedings. The State also contends that this issue could have been raised by the defendant on direct appeal and in his appeal from the summary dismissal of his initial postconviction petition, and that the defendant

has offered nothing new to the claims except by reframing the issue as an ineffective assistance of counsel claim and by including an affidavit from a witness to the alleged sleeping jurors. Further, the State argues that the defendant cannot establish prejudice where he has failed to show how the presentation of Hunt's testimony regarding her observations would have changed the result of the proceedings.

¶ 22 As a preliminary matter, the defendant argues that leave to file his proffered successive postconviction petition should be granted so long as he makes a "gist" showing of cause and prejudice. However, this court in *Edwards*, referencing our supreme court's opinion in *People v. Conick*, 232 Ill. 2d 132 (2008), held that successive petitions are treated differently from initial petitions and are subject to a heightened "more exacting" cause and prejudice standard. See *Edwards*, 2012 IL App (1st) 091651, ¶¶ 21-23 (successive petitions require a "more exacting" cause and prejudice standard than the "gist" standard required for an initial petition. A "gist" is something more than a bare allegation, but something less than a fully stated claim, and includes " 'some facts which can be corroborated and are objective in nature' "). Nonetheless, the defendant argues that the holding in question was *dicta* by the *Edwards* court, and advocates for the lower "gist" standard on review. We decline to deviate from the *Edwards* court's express pronouncement that a defendant's proffered successive postconviction petition should be subject to the higher "more exacting" cause and prejudice standard.

¶ 23 At trial, the parties engaged in a sidebar conference with the court, during which the State raised an issue regarding Juror Mason, who allegedly leaned back to Alternate Juror Jordan during Banks' testimony and said, "she's lying." At that point, defense counsel informed the court that she was concerned that Juror Mason was one of the jurors who "actually went to sleep" and that "actually several jurors" had "nodded off" during witness questioning. Thereafter, the

trial court *voir dired* Juror Mason, who informed the court that he only fell asleep for "one second," and that he did not miss any testimony. Although the State argued for the removal of Juror Mason from the jury, the trial court allowed Juror Mason to remain on the jury. Following his conviction, the defendant filed a direct appeal in which he did not raise the issue regarding Juror Mason or any other allegedly sleeping jurors. Following this court's and our supreme court's affirmance of his murder conviction on direct appeal, the defendant filed an initial *pro se* postconviction petition. In the initial postconviction petition, the defendant argued, *inter alia*, that the trial court erred in failing to remove Juror Mason from the jury, where Juror Mason, "as well as a few more," were sleeping during trial. Subsequently, the trial court summarily dismissed the defendant's initial postconviction petition. On appeal from the trial court's summary dismissal of the initial postconviction petition, the defendant abandoned his claim regarding sleeping jurors. In the instant proffered successive postconviction petition, the defendant alleged, *inter alia*, that defense trial counsel was ineffective for failing to call Hunt to testify about jurors who had allegedly fallen asleep at trial, that counsel never informed the defendant about this witness, and that the defendant was not aware of Hunt's observations until *after* he had filed his initial postconviction petition. Attached to the successive postconviction petition was a letter from defense trial counsel, Attorney Harvey, which stated that she had reviewed her notes from trial and "saw only a note making reference to someone identifying someone sleeping." She stated that, because more than five years had passed since trial, she had no independent recollection of anyone falling sleeping at trial. Also attached to the successive postconviction petition was Hunt's affidavit, in which she averred that she observed two jurors sleeping at trial and that she brought it to defense counsel's attention during recess. The defendant also attached an affidavit to the successive postconviction petition, in which he

averred that he was never told by Attorney Harvey that "one of [his] family members" had advised her about a sleeping juror.

¶ 24 We find that the defendant has raised the same "sleeping jurors" issue in his initial postconviction proceedings and is now barred by *res judicata* from reasserting it in his successive postconviction petition. The doctrine of *res judicata* precludes a subsequent court from entertaining claims that were previously raised and decided on appeal or in a prior case. *People v. West*, 187 Ill. 2d 418, 425 (1999). As related to petitions filed under the Act, the doctrine of *res judicata* applies such that "a ruling on a post-conviction petition has *res judicata* effect with respect to all claims that were raised or could have been raised in the initial petition." *People v. Gosier*, 205 Ill. 2d 198, 203 (2001); see also 725 ILCS 5/122-3 (West 2010) ("[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived"). It is clear from the record that, at trial, defense counsel was aware of, and brought to the court's attention, her concern that Juror Mason was one of *several* jurors who had fallen asleep or "nodded off" during witness questioning. While the trial court subsequently *voir dired* Juror Mason and allowed him to remain on the jury, defense counsel never again raised the issue of any sleeping jurors during the remainder of the trial, nor did she request the court to question other jury members with regard to falling asleep. No issue regarding Juror Mason or any other allegedly sleeping jurors was raised on direct appeal. See *Petrenko*, 237 Ill. 2d at 499 (any issues that could have been raised on direct appeal but were not are forfeited and cannot be raised in postconviction proceedings). It was not until later, when the defendant filed the initial postconviction petition, that he finally challenged the trial court's decision in not removing Juror Mason from the jury, by arguing that Juror Mason, "as well as a few more," were sleeping during trial. Because the issue of "sleeping jurors" was raised in the initial postconviction proceeding,

the defendant cannot now resurrect the same issue in a successive petition by reframing it as an "ineffective assistance of counsel" claim and including an affidavit from a witness regarding the alleged sleeping jurors. See *People v. Flores*, 153 Ill. 2d 264, 277-78 (1992) ("a petitioner cannot obtain relief under the [Act] simply by 'rephrasing previously addressed issues in constitutional terms' in his petition") (quoting *People v. Gaines*, 105 Ill. 2d 79, 90 (1984) (the rephrasing in constitutional terms an issue previously decided on direct appeal was barred by *res judicata*)). Indeed, in his successive postconviction petition, the defendant acknowledged that he had raised this issue in the *initial* postconviction petition under the theory of "trial court's error," but that he now raises this issue as an "ineffective assistance of counsel" claim.

¶ 25 Nonetheless, the defendant insists that this was a new claim supported by new information contained in Hunt's affidavit. Specifically, he argues that while he raised a similar issue with respect to Juror Mason in his initial postconviction petition, the issue at hand is "clearly different because it concerns the existence of an unknown, second sleeping juror that defense counsel knew about." We reject this contention. First, the defendant's argument is flawed in that he assumes one of the two jurors whom Hunt observed had fallen asleep at trial was Juror Mason. Nothing in Hunt's affidavit indicates that Juror Mason was one of the two sleeping jurors she observed and brought to the attention of defense counsel during recess. Second, we reject the defendant's arguments that because there was no evidence that the jurors Hunt witnessed sleeping were the same jurors that defense counsel was aware of at trial, he has alleged a new claim in his proffered successive postconviction petition. It is irrelevant as to which two jurors Hunt allegedly observed sleeping at trial because the record reveals that, at trial, defense counsel was aware—whether by personal observation or by Hunt informing her—that more than one juror had allegedly fallen asleep during witness testimony but did not request

the court to question any juror other than Juror Mason with respect to the sleeping issue. Thus, because this claim could have been raised on direct appeal, was raised in the initial postconviction petition, but then abandoned on appeal from summary dismissal of the defendant's initial postconviction petition, it is not the proper subject in a successive petition.

¶ 26 Furthermore, contrary to the defendant's assertion, because he has raised the "sleeping jurors" issue in his initial postconviction petition, we find the "cause and prejudice" test to be inapplicable to the facts in this case, "since the test is couched in terms of 'cause' for the *failure to raise a claim in an earlier proceeding* and prejudice resulting therefrom." *People v. Tenner*, 206 Ill. 2d 381, 399 (2002) (Emphases in original.) (Freeman, J., specially concurring). As Justice Freeman reasoned in his special concurrence in *Tenner*:

"An issue that was previously litigated and is raised anew in a successive proceeding can never fall under the ambit of the cause and prejudice test because the issue had, indeed, been raised in the earlier proceeding. I believe it is this fact which makes the cause and prejudice test inapplicable in the present case. *** New claims, *i.e.*, those never before raised, are subject to waiver, or more appropriately procedural default, and would be excused only if the petitioner established both cause and prejudice for the failure to raise the issue sooner. On the other hand, same claims, *i.e.*, those issues raised in a previous post-conviction action, fall prey to the procedural bar of *res judicata*." *Tenner*, 206 Ill. 2d at 399-400 (Freeman, J., specially concurring).

¶ 27 Even if the defendant's "same claims" could be considered under the cause and prejudice test, he cannot satisfy the prejudice requirement so as to justify the filing of a successive petition. See *Edwards*, 2012 IL App (1st) 091651, ¶32 (both the "cause" and "prejudice" prongs must be met before leave to file a successive petition will be granted). In order to establish prejudice, the defendant must show that "the claimed constitutional error so infected his trial that the resulting conviction violated due process." *Tenner*, 206 Ill. 2d at 393.

¶ 28 The defendant argues that he has established prejudice because defense counsel was ineffective for failing to bring to the court's attention Hunt's identity and her observations regarding two sleeping jurors. Citing *People v. Jones*, 369 Ill. App. 3d 452 (2006) and various state and federal cases from other jurisdictions, he contends that sleeping jurors who missed portions of the evidence violated his constitutional rights to due process and a fair trial. He argues that, because Hunt's affidavit stated that she observed two jurors sleeping "during the trial," this strongly implies that they were sleeping for more than mere seconds. He further surmises that, had defense counsel brought Hunt's observations to the court's attention, Hunt would have been questioned by the court to determine if a violation of the defendant's rights had occurred and the jurors in question may have admitted to sleeping during trial proceedings. He further speculates that, had the sleeping jurors been dismissed and replaced by alternate jurors, trial proceedings could have resulted in a hung jury or an acquittal.

¶ 29 The underlying claim presented in the defendant's successive postconviction petition is one of ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A defendant must show that: (1) trial counsel's representation fell below an objective standard of reasonableness; and (2) there exists a reasonable probability that, but for

counsel's errors, the result of the trial would have been different. *Id.* A "reasonable probability" is one that sufficiently undermines confidence in the outcome. *Id.* at 694. However, a reviewing court may analyze the facts of the case under either prong first, and if it deems that the standard for that prong is not satisfied, it need not consider the other prong. *People v. Irvine*, 379 Ill. App. 3d 116, 129-30 (2008).

¶ 30 We find that the defendant has failed to establish the prejudice prong of the *Strickland* test and we need not, nor could we, address whether and to what extent the allegedly sleeping jurors observed by Hunt had missed hearing the trial evidence. Even had Hunt testified to her observations regarding the alleged sleeping jurors, and the court had dismissed and replaced the sleeping jurors with alternates after questioning Hunt and the jurors in question, there is no reasonable probability that the outcome of the proceedings would have been different before a different jury panel. The evidence of the defendant's guilt was overwhelming. Banks detailed the events leading up to the victim's shooting death; Detective Keyes observed the defendant discard a gun as he fled the crime scene; and ballistic testing later revealed that the bullet that killed the victim had been fired from the gun that the defendant was observed discarding. The defendant does not deny the propriety of the admission into evidence the videotaped statement to ASA Concannon, in which he admitted that he robbed the victim while codefendant Phipps shot and killed him. Thus, we find that the defendant has not shown that he suffered prejudice from defense counsel's alleged failure to bring to the court's attention Hunt's observations and his failure to call Hunt to testify or be questioned by the court. Therefore, the defendant's claim of ineffective assistance of counsel fails. Consequently, the defendant fails to make a "more exacting" showing to satisfy the cause and prejudice test. See *Edwards*, 2012 IL App (1st) 091651, ¶¶ 21-23 (successive petitions require a "more exacting" cause and prejudice standard

than the "gist" standard required for an initial petition). Accordingly, we hold that the trial court did not err in denying leave to file a successive postconviction petition. See *id.* ¶32 (both the "cause" and "prejudice" prongs must be met before leave to file a successive petition will be granted).

¶ 31 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 32 Affirmed.