THIRD DIVISION
September 30, 2015

No. 1-12-1909

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court
Respondent-Appellee,	)	of Cook County.
	)	
v.	)	No. 93 CR-11350
	)	
RAMONE MCGOWAN,	)	Honorable
	)	Mathew Coughlan
Petitioner-Appellant	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant failed to establish sufficient cause and prejudice for his claims of ineffective assistance of trial and appellate counsel or an alleged *Brady* violation necessary to justify leave to file his successive postconviction petition.

¶ 2 Defendant Ramone McGowan appeals from the circuit court's order denying him leave to file his successive petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq*. (West 2006). Defendant contends the circuit court erred by denying leave to file his successive postconviction petition because he demonstrated the requisite cause and prejudice to raise his claim of ineffective assistance of both trial and appellate counsel. Defendant specifically contends trial counsel failed to properly litigate the voluntariness of his confession, which he maintains was coerced by Area 1 police, or subpoena police disciplinary records to

corroborate his claim. He also contends trial and appellate counsel failed to challenge a jury instruction error. Defendant lastly contends the State suppressed evidence in violation of his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963). We affirm.

¶ 3 BACKGROUND

¶ 4 We recite only those facts necessary to dispose of this case. A more detailed factual recitation is in defendant's direct appeal. See *People v. McGowan*, 1-97-1766 (1999) (unpublished order under Supreme Court Rule 23). In 1996, a jury found defendant guilty of first-degree murder by accountability and two counts of attempted armed robbery, and defendant was sentenced to 75 years in prison for the murder, plus a concurrent term of 15 years for the attempted armed robbery. Trial evidence showed that on the afternoon of April 13, 1993, defendant and codefendant, Andre Kidd, approached a parked car, where John Stoginski, 85, was sitting in the driver's seat and Stanley Kichler, 82, was in the passenger's seat. Codefendant held a gun to Stoginski's head and said, "I want your wallet and your money or I'll kill you." Meanwhile, Kichler placed defendant in an arm lock, and codefendant fatally shot Kichler in the back. Although Stoginksi was unable to identify the masked men, several witnesses from the neighborhood placed defendant and codefendant near the scene at the time of the shooting, and codefendant's fingerprints were later discovered on the side of the vehicle in which the elderly men were sitting. A witness at the scene also offered the license plate of the car the offenders entered, which was the same as defendant's. Defendant's confession and other circumstantial evidence, like the description of the defendant's outfit by witnesses and that outfit later discovered by police, supported the charges.

¶ 5 Prior to trial, defendant filed a motion to quash arrest and suppress admission of his confession. Defendant alleged that police lacked probable cause to arrest him and that at the time of his inculpatory statement, defendant was "very fearful and was not clear of mind."

Defendant alleged he did not have a clear and meaningful understanding of his rights and added his request for an attorney was not honored. Defendant testified over two different days on his motion. His combined testimony revealed that 15 to 20 non-uniformed police officers arrested defendant, then age 22, in the evening at his home without a warrant. They threw him on the police car, placed him in handcuffs, and an officer stated he wished defendant had run "so he could have shot [defendant] in the back." When defendant asked why he was being arrested, the officer said, "Don't play stupid with me, you fuck." An officer also told defendant to ""stop the bullshit and tell" them what happened, but according to defendant, nothing more was said in the car. Once at the Area 1 police headquarters, officers handcuffed defendant to the wall and, after about 10 minutes, Officer Szudarski and several other officers questioned him there. There were a total of five officers in the room at one point, and officers came and went. Again, they told him to stop the "bullshit" and tell the detectives what happened. When defendant asked for an attorney at various points throughout his detention, officers continued asking questions. Eventually, one officer grabbed defendant by the collar, stating, "You're going to stop jerking me off and tell me what happened," and "we going to get him." Officers relayed that codefendant was cooperating and, if defendant didn't also cooperate, he was "going to take all the weight" for the crime and they would make sure he got the death penalty. Defendant testified he had not been well treated by the police, but he thought the State's Attorney was working for the police and did not tell her of his treatment. Officers only informed defendant of his rights just before giving his statement to the State's Attorney.

¶ 6 In closing argument, counsel asserted the poor treatment and atmosphere made defendant feel compelled to talk to police officers in order to avoid being "wrongfully accused." Counsel further argued the State's Attorney did not ask defendant how he was treated until after he had already incriminated himself and challenged, "What else is he going to say?" The circuit court

denied defendant's motion, finding the police had probable cause to arrest defendant and defendant voluntarily waived his constitutional rights and was not coerced in any way, either physically, mentally, or psychologically, into giving a statement. The court specifically found defendant was not mistreated or "grabbed by the collar, slapped or threatened in any way."

¶ 7 Consistent with pretrial proceedings, at trial, defense counsel suggested defendant was pressured into giving his statement by police threats. Defense counsel emphasized this theme in his opening and closing statements, as well as during cross-examination. As stated, the jury found defendant guilty of the crimes charged. Defendant filed a motion for a new trial, which was denied.

¶ 8 *Initial Postconviction Petition*: On February 14, 1997, defendant, acting *pro se*, filed his first postconviction petition. Defendant alleged, in relevant part, that his trial counsel was constitutionally ineffective because "council did not confer with defendant on any issue," he was not prepared for cross-examination, and he failed to subpoena certain witnesses. In addition, defendant alleged his statement was involuntary because he was "manhandled (i.e. grabbed, shaken, and threatened with bodily harm)," "coerced, (i.e. promised to be charged with lesser offense, threatened to be wrongly charged as the shooter)," "tricked and lied to (i.e. officers showed co-defendant making a statement and told defendant that co-defendant identified defendant as the shooter and defendant would be charged and co-defendant would not, unless defendant made a statement)." Finally, defendant asserted that defense counsel failed to file a direct appeal even though one was requested.

¶ 9 The circuit court summarily dismissed the initial postconviction petition as frivolous and patently without merit on April 23, 1997. The court specifically noted that defense counsel's "performance was well above that of most trial counsels" and defendant's claim that his statement was involuntary was not supported by the facts or evidence. The court noted that the

State Appellate Defender's office had been appointed for the appeal, rather than trial counsel, and "they will be contacted to proceed on it." Defendant appealed the dismissal of his first postconviction petition, but this court granted the public defender's motion to withdraw under *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and affirmed the court's judgment. *People v. McGowan*, No. 97-1767 (1999) (unpublished order under Supreme Court rule 23).

¶ 10 *Direct Appeal under Late Notice of Appeal*: Subsequently, the State Appellate Defender was granted leave to file a late notice of appeal for the direct appeal. In his direct appeal, defendant alleged the police lacked probable cause to arrest him without a warrant, requiring suppression, but did not claim that his statement was involuntary. This court affirmed defendant's convictions and corrected the mittimus, per his request, to reflect only one conviction for first-degree murder. *People v. McGowan*, No. 1-97-1766 (1999) (unpublished order under Supreme Court Rule 23).

¶ 11 *Section 2-1401 Petition*: On November 28, 2000, defendant filed a *pro se* petition under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2000)) alleging an *Apprendi* violation, which the trial court dismissed as "outside the statute of limitations." This court affirmed the trial court's decision.[1] *People v.* McGowan, No. 1-01-1338 (2003) (unpublished order under Supreme Court Rule 23).

¶ 12 *Present Successive Postconviction Petition*: On August 8, 2011, defendant filed the present *pro se* motion for leave to file his second successive postconviction petition. In relevant part, defendant asserted trial and appellate counsel were ineffective for ignoring defendant's reports that the interrogating detectives "used excessive force and threats to overcome his will"

[1] On appeal, this court noted that the lower court had treated the section 2-1401 petition as a postconviction petition, but then affirmed the dismissal of the section 2-1401 petition. We note that the record of those proceedings does not in fact disclose the lower court treated the petition as one filed under the Act. Given that fact and that the appellate court appears to have ultimately treated the dismissal as one under section 2-1401, we conclude the petition was filed under section 2-1401. Contrary to the State's contention, the present postconviction is defendant's second, albeit still a successive, petition and not his third.

causing him to "admit to a crime that he did not commit." Defendant repeated many of his complaints against the interrogating detectives from his testimony at the motion to quash and suppress evidence. Defendant added in his successive postconviction petition that Detectives Szudarski, Clancy, and O'Brien all questioned him, whereas in his pretrial testimony only two unidentified officers questioned him after the group of five left the interrogation room. In his petition, defendant stated detectives told him he was going to "pay for killing a white man *** [and] grabbed [him] by the collar and shook him violently, choking him, in an effort to extract a confession" and they "physically attacked him." This contrasts with defendant's pretrial testimony, where he did not testify to any repeated physical attacks but testified an officer merely "grabbed" him "by the collar." In defendant's petition, he wrote that officers continued to coerce, grab, hit, and trick defendant, while lodging racial slurs against him. He again claimed his "will was overcome" into making a false confession. Defendant attached a number of his own affidavits describing his abuse by police and how his trial and appellate attorneys were ineffective. Defendant asserted his trial counsel failed to subpoena the officers' disciplinary files and other evidence he attached. Significantly, defendant claimed he obtained new and corroborating evidence that the detectives to whom he confessed regularly used torture, abuse, and coercion to extract other confessions.

¶ 13 The "new evidence" attached to defendant's postconviction petition included, for example, an "Appendix" identifying in list form the names of 24 alleged victims of police abuse, the officer who committed the abuse, along with a case number (for example, one reads: "(3)Eric and Oscar Gomez – RD #Y588250 case NO. 95CR22930 – coercion/abuse – James O'Brien – both acqutted [*sic*]."). Officer Clancy is also listed as an alleged abuser. The document is entitled "Chicago Police Departments Office of Professional Standards Complaints of Abuse" but otherwise has no official seal or affidavit verifying its status.

¶ 14 Defendant also attached what appear to be copies of four internal police department reports of the Office of Professional/Police Standards (OPS), which were from OPS investigators or prosecutors and mainly addressed to a special prosecutor. These reports, dated between 2004 and 2006, determined whether the complaints of various arrestees/defendants as to police abuse in the 1990s warranted further investigation or were worthy of prosecution. The OPS reports listed the arrestee's allegation of abuse; the officers involved; current court cases, if any, and relevant legal history; whether the abuse allegations were corroborated by physical or other evidence; and the recommendations of the prosecutor. Three reports named Detective O'Brien, among other officers, as an alleged abuser and noted a civil suit against Detective O'Brien had settled (we note parenthetically that the trial record in this case shows Detective O'Brien was present at Area 1, but he interrogated codefendant and not defendant). One OPS report named Detective Clancy, who was involved in defendant's interrogation. That report, for example, discussed Johnny Plummer's 1992 abuse complaint and stated Plummer had left a juvenile detention center with Detective Clancy, and a facility employee reported Plummer returned with bruises on his face. This report also mentioned that Plummer's lawsuit for brutality against Detective Clancy had settled. In spite of the abuse allegations, all of the reports recommended closing the complaints, as there was insufficient evidence to pursue prosecution.

¶ 15 In addition, defendant attached two civil complaints for malicious prosecution, one filed in state court and the other in federal district court, against the city of Chicago and various police officers, wherein the defendants alleged police coercion and abuse in the 1990s had led to false confessions. Defendant attached what appears to be the pretrial transcript of a defendant, Emmett Ezra White, wherein the defendant testified that Area 1 Chicago police handcuffed him to the wall, then physically assaulted him. Although he was unsure of their names, White testified Clancy was one of the officers. Defendant also attached the 2011 affidavit of a man,

George Anderson, explaining that his murder confession had been coerced during his interrogation where multiple detectives, including Detective O'Brien, had hung him from his handcuffs and slapped him.

¶ 16 Defendant further argued his trial counsel was ineffective for failing to object to Illinois Pattern Instruction 3.15, which listed the factors used to assess the reliability of a witness's identification, but erroneously stated them in the disjunctive. See Illinois Pattern Jury Instructions, Criminal, No. 3.15 (3rd ed. 1992) (hereinafter, IPI Criminal 3rd No. 3.15). Defendant argued appellate counsel was likewise ineffective for failing to raise the issue on appeal.

¶ 17 In addition to his ineffective assistance of counsel claims, defendant argued the State committed a *Brady* violation by failing to disclose this favorable and material evidence of police misconduct. He referenced the now notorious Goldston and Sanders reports, which were released in 1992 and detailed the abuse of suspects at Area 3 police headquarters under Commander Jon Burge. Defendant also referenced another special prosecutor's report naming pattern abuse by various officers. Defendant did not attach these reports, and appellate counsel has not now asked us to take judicial notice of them.

¶ 18 The circuit court denied defendant leave to file a successive postconviction petition. The court concluded defendant failed to establish cause because he could have raised his coercion claim earlier and also failed to establish prejudice because the "new evidence" was not material to defendant's claim. That is, the court determined the evidence mostly involved officers who did not interrogate defendant and dissimilar methods of abuse. Additionally, the trial court determined the evidence was not so conclusive that it would have changed the result at trial, and much of the "new" evidence was discoverable prior to the original trial. This appeal followed.

¶ 19 ANALYSIS

¶ 20 The Post-Conviction Hearing Act provides a means for a criminal defendant to assert that, in the proceedings resulting in his conviction, there was a substantial denial of his or her rights under the Constitution of the United States or the State of Illinois or both. *People v. Evans*, 2013 IL 113471, ¶ 10. The Act permits the filing of only one petition without leave of court, and so any claim absent from the original petition is waived. 725 ILCS 5/122-1(f), 122-3 (West 2010); *People v. Tenner*, 206 Ill. 2d 381, 392 (2002). In addition, a ruling on a postconviction petition has *res judicata* effect with respect to all claims that were raised or could have been raised in the initial petition. *People v. Flores*, 153 Ill. 2d 264, 274 (1992). Likewise, any issues which were decided on direct appeal are barred by *res judicata*; any issues which could have been raised on direct appeal are defaulted. *Tenner*, 206 Ill. 2d at 392.

¶ 21 Consequently, a defendant can only file a successive postconviction petition if he obtains leave of court, which is granted only when a defendant shows cause for his failure to bring the claim in his initial postconviction petition and prejudice resulting from that failure. 725 ILCS 5/122-1(f) (West 2010); *Evans*, 2013 IL 113471, ¶ 10. To show cause, a defendant must identify an objective factor that impeded his ability to raise a specific claim during initial postconviction proceedings. *Id*. To show prejudice, a defendant must demonstrate that the claim not raised so infected the trial that the resulting conviction or sentence violated due process. *Id*. Both cause and prejudice must be met for a petition to prevail. *People v. Pitsonbarger*, 205 Ill. 2d 444, 464 (2002). The supreme court in *People v. Smith*, recently clarified that "the cause-and-prejudice test for a successive petition involves a higher standard than the first-stage frivolous or patently without merit standard," and therefore is a more "exacting standard." 2014 IL 115946, ¶ 35; see also *People v. Edwards*, 2012 IL 111711, ¶¶ 22-29; *People v. Conick*, 232 Ill. 2d 132, 142 (2008). *Smith* further held that "leave of court to file a successive postconviction petition should be denied when it is clear, from a review of the successive petition and the documentation

submitted by the petitioner, that the claims alleged by the petitioner fail as a matter of law or where the successive petition with supporting documentation is insufficient to justify further proceedings." 2014 IL 115946, ¶ 35.[2] A defendant faces immense procedural default hurdles when bringing a successive postconviction petition, which are lowered in very limited circumstances because such petitions plague the finality of criminal litigation. *Tenner*, 206 Ill. 2d at 392. In short, such actions are generally disfavored by Illinois courts. *Edwards*, 2012 IL 111711, ¶ 29. We review *de novo* whether defendant has fulfilled his burden to justify further proceedings on his successive postconviction petition. See *People v. Wrice*, 2012 IL 111860, ¶ 50; *Smith*, 2014 IL 115946, ¶ 30, 35.

¶ 22 On appeal, defendant first argues his trial counsel was ineffective because counsel ignored defendant's complaints that police used excessive force to overcome his will and trial counsel failed to properly challenge defendant's confession as involuntary. Defendant thus maintains he established a meritorious claim that (1) counsel's performance was deficient, falling below the objective standard for reasonableness; and (2) he was prejudiced by this deficient performance. See *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Perry*, 224 Ill. 2d 312, 341 (2007).

¶ 23 We agree with the State that procedural bars apply to preclude defendant's current claim and defendant has not established cause and prejudice sufficient to overcome those bars. *Cf. People v. Mitchell*, 2012 IL App (1st) 100907, ¶ 63 (noting in certain cases, pervasive pattern of abuse has led courts to reconsider voluntariness of confessions in spite of *res judicata*). During pretrial proceedings, defense counsel already effectively litigated the voluntariness of defendant's confession by asserting that defendant was not of "clear mind" when he confessed to the crimes

[2] In his brief, defendant argues for a more lenient gist standard in evaluating successive postconviction petitions. Defendant, however, filed his brief before *Smith*, which disposes of that argument.

due to police coercion, which entailed verbal and physical abuse. Defendant, himself, testified to this abuse at the pretrial motion. Defendant offers no explanation as to why he did not then testify to the additional physical abuse and coercive statements from police that he cites in his petition. He also does not explain how Detective O'Brien came to be part of his interrogation. The trial record thus contradicts defendant's contention that counsel "ignored" defendant's complaints and also contradicts defendant's own assertions in his petition. In fact, the trial record demonstrates that during pretrial proceedings, counsel vigorously asserted defendant's confession resulted from police threats and coercion. Counsel also emphasized the coercion theme during trial through his cross-examination and argument. The trial court and jury, as the fact finders and in the face of contradictory testimony from the interrogating officer and ASA who took defendant's statement, apparently did not believe defendant's claims. In his postconviction petition, defendant "concedes that the voluntariness" of his "confession was litigated and decided in pre-trial suppression motions." While appellate counsel urges this court to gloss over defendant's admission, we cannot. Moreover, defendant already argued in his first postconviction petition that his confession was involuntary and his counsel was ineffective, although he did not combine those arguments. Defendant now repeats the same claims and to the extent he raises any new claims, he could have raised them earlier on direct appeal or in his initial postconviction petition.

¶ 24 Defendant nonetheless argues the initial postconviction proceedings were "so flawed in that they could arguably be disregarded entirely" because he filed his initial postconviction petition only because no direct appeal had been filed and, moreover, the prison was on indefinite lockdown precluding him from obtaining "legal advice." We find this contention disingenuous given that the State Appellate Defender was appointed following sentencing and later informed defendant as of December 1996 that there was no notice of appeal on file, but that defendant

could file a late notice of appeal. In spite of that letter, defendant instead filed a postconviction petition in February 1997. He raised issues beyond the fact that no direct appeal was on file. *Cf. People v. Little*, 2012 IL App (5th) 100547, ¶ 19 (holding that defendant's second petition was not successive where his initial petition *solely* asserted his right to a direct appeal, lost due to ineffective assistance of counsel); see also *People v. Wilson*, 2014 IL App (1st) 113570, ¶ 38 (same). Defendant therefore was not denied his right to file a direct appeal. Moreover, although defendant relies on *Pitsonbarger* in making his argument, he seems to ignore its mandate that a defendant must "show how the deficiency in the first proceeding affected his ability to raise *each specific claim*." (Emphasis added.) 205 Ill. 2d at 463. Defendant has not done so and makes only a generalized assertion of deficiency in the proceedings below. And, contrary to defendant's suggestion, the fact that he filed his initial petition *pro se* cannot serve as "cause" to overcome procedural bars. See *People v. Sutherland*, 2013 IL App (1st) 113072, ¶¶ 17-19, and discussion therein; *People v. Miller*, 2013 IL App (1st) 111147, ¶ 41, and discussion therein; see also *People v. Jones*, 2013 IL App (1st) 113263, ¶ 24 (the argument that a layperson did not realize he had a claim cannot constitute cause). This is especially true where, as here, in a June 1998 letter from direct appeal counsel Patricia Mysza to defendant, Mysza explained that she chose not to address issues involving trial error that defendant flagged in his initial postconviction petition because they "were frivolous."

¶ 25 We also reject defendant's assertion that direct appeal counsel was ineffective for failing to argue the ineffectiveness of trial counsel, which is an argument defendant raised for the first time in his reply brief. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("Points not argued are waived and shall not be raised in the reply brief."). Based on the foregoing, defendant's contention that his counsel was ineffective for failing to properly litigate the police coercion

claim is procedurally barred, and defendant has not established cause or prejudice sufficient to overcome the procedural bar.

¶ 26 Even procedural bars aside and touching on the merits of defendant's claim, we note that there is no physical or testimonial evidence corroborating defendant's contention of police abuse which would have justified further investigation by counsel of police disciplinary records. See *People v. Orange*, 168 Ill. 2d 138, 150-51 (1995) (noting, where the circumstances known to counsel at the time of his investigation do not reveal a sound basis for further inquiry in a particular area, it is not ineffective for the attorney to forgo additional investigation). As discussed immediately below, the documents defendant attached to his postconviction petition would not have necessarily made his claim that his confession was forced more believable. See *People v. Clemon*, 259 Ill. App. 3d 5, 9 (1994) (noting the totality of the circumstances considered in determining whether confession given freely and voluntarily, including age, education, threats, promises, or physical coercion, and whether the accused was advised of his constitutional rights). Those documents, many released after defendant's trial, do not provide sufficient corroboration to satisfy prejudice with respect to either the successive postconviction petition requirements or *Strickland*. See *People v. Orange*, 195 Ill. 2d 437, 450-51 (2001) (noting factors where newly discovered evidence warrants a new trial). Likewise, they do not help cure the internal inconsistencies between defendant's pretrial testimony and assertions in his petition.

¶ 27 Defendant alternatively contends that, assuming his counsel was not ineffective, the State committed a *Brady* violation by suppressing exculpatory evidence, including evidence of police misconduct. Under *Brady*, the State violates a defendant's right to due process by failing to disclose evidence that is favorable to the accused and material to either guilt or punishment. *People v. Beaman*, 229 Ill. 2d 56, 73 (2008). A *Brady* claim requires a defendant to demonstrate

that (1) the undisclosed evidence is favorable to the accused because it is either exculpatory or impeaching; (2) the evidence was wilfully or inadvertently suppressed by the State; and (3) the accused was prejudiced as a result because the evidence was material to guilt or punishment. *Id.* at 73-74. Thus, this rule encompasses impeachment evidence. *Strickler v. Greene,* 527 U.S. 263, 280 (1999). Evidence is material where a reasonable probability exists that had the evidence been disclosed, the outcome of the proceeding would have been different. *Smith v. Cain,* 565 U.S. ——, ——, 132 S.Ct. 627, 630 (2012). For the reasons to follow, we conclude that even assuming defendant could establish cause with respect to his *Brady* claim, he has failed to establish prejudice. *People v. Anderson,* 375 Ill. App. 3d 990, 1006 (2007) (prejudice exists where defendant can show the claimed constitutional error so infected his trial that the resulting conviction violated due process).

¶ 28 To the extent defendant raises general allegations of police abuse and misconduct, we cannot necessarily consider such evidence "suppressed" since the police abuse was made public in 1992, long before defendant's 1996 trial. See *Anderson*, 375 Ill. App. 3d at 1003 fn. 6 (2007) (noting the Office of Professional/Police Standards (OPS) investigation began in 1989). In addition, the OPS documents and legal complaints attached to defendant's petition are dated years after his trial and so could not have been suppressed within the meaning of *Brady*. See *Orange,* 195 Ill. 2d at 457. Furthermore, defendant has made no showing that the unconfirmed allegations in the reports were available to the State during defendant's pretrial hearing. See *Id.* The undated document entitled, "Chicago Police Departments Office of Professional Standards Complaints of Abuse," identifying alleged abuse victims in list form has no official seal or affidavit verifying its status or suggesting it needed to be disclosed. Moreover, as the State notes, that document is not necessarily exculpatory or impeaching since it does not contain any facts about the individuals or cases involved. Nor are the OPS reports and legal complaints

attached to defendant's postconviction petition. In the OPS reports, the special prosecutor concluded the other arrestees' abuse allegations did not warrant further investigation and most of the those documents detail abuse by officers who did not interrogate defendant or secure his confession (defendant admits Officers Szudarski and Clancy were the primary interrogating officers in defendant's case). *Cf. People v. Cannon*, 293 Ill. App. 3d 634, 641 (1997) (new motion to suppress hearing where 16 arrestees would testify about abuse by same police claimed to have abused the defendant). Only one report mentions Officer Clancy in connection with abuse against another arrestee, apparently resulting in a federal suit that settled. The report attached to defendant's petition, however, does not state when the lawsuit occurred or detail the abuse in connection with a confession.

¶ 29 Defendant also would hardpressed to establish these allegedly suppressed documents are material to his claim, since it's difficult to imagine a report with only a tenuous connection to defendant would somehow be material in affecting the outcome of his proceeding. Defendant acknowledges his interrogation took place at Area 1 and not at Burge's notorious Area 2, but he argues he is entitled to further postconviction proceedings to determine whether any officers involved in his case worked at the behest of Burge. In his appellate brief, defendant surmises that Detective O'Brien could have been one among the group of officers who interrogated defendant on arriving at the police station, even though Detective Szudarski testified defendant was only interrogated by himself and Officer Clancy. Officer Clancy testified no one else entered the interrogation room before defendant made his admission, thus contradicting defendant's present surmising. Successive postconviction proceedings are not intended to serve as fishing expeditions. Generalized claims of coercive activity, without other evidence, would not establish that this defendant was coerced into confessing. See *Orange*, 168 Ill. 2d 138; see also *Anderson*, 375 Ill. App. 3d at 1007. This allegedly new evidence does not necessarily

discredit pretrial testimony that defendant confessed to the crime within some 30-45 minutes of entering police headquarters; that he was of clear mind, not fearful; and that he reported no abuse or threats to the ASA who showed up later. See *Orange*, 195 Ill. 2d at 452. Based on the foregoing, the attached documentation is insufficient to justify further proceedings under the high bar for successive postconviction proceedings.

¶ 30 Defendant finally contends appellate counsel was ineffective for failing to argue trial counsel's ineffectiveness where he did not object to Illinois jury pattern instruction 3.15 (IPI Criminal 3rd No. 3.15). Defendant cites *People v. Gonzalez*, 326 Ill. App. 3d 629, 639-40 (2001), which determined that IPI 3.15 erroneously used "or" in separating the five eyewitness identification factors and therefore misstated the law. The court instruction read as though the presence of only one factor was sufficient in considering the reliability of witness identification, when in fact all five should be considered. *Id*. The supreme court later held that such an instruction constitutes plain error. *People v. Herron*, 215 Ill. 2d 167, 191 (2005).

¶ 31 The State argues, and we agree, that it is not objectively reasonable to expect lawyers to anticipate future developments in existing law. *People v. Ford*, 228 Ill. App. 3d 212, 216 (1992). Notably, the cases relied on were decided *after* defendant's 1996 jury trial and his 1999 direct appeal. See *People v. Oliver*, 2013 IL App (1st) 120793, ¶ 24 (trial counsel could not be ineffective for invoking a ruling that had not yet occurred regarding IPI 3.15 and issue inappropriate in postconviction petition), relying on *People v. Chatman*, 357 Ill. App. 3d 695, 700 (2005). We cannot say defense counsel acted in an objectively unreasonable manner by not objecting to an applicable jury instruction, which remained in use from at least 1992 to 2001. See *Smith v. McKee*, 598 F.3d 374, 384 (2010). Regardless, defendant cannot establish prejudice because the evidence of his guilt was substantial and he has not shown how giving the instruction

in the conjunctive ("and"), rather than the disjunctive ("or") would have had an impact on the jury's deliberation. Defendant's claim, in short, fails.

¶ 32 CONCLUSION

¶ 33 Based on the foregoing, we affirm the circuit court's decision denying defendant leave to file the present successive postconviction petition because he his claims are procedurally barred, he has not established cause and prejudice to excuse the procedural bars, and his claims are legally meritless.

¶ 34 Affirmed.