2016 IL App (1st) 132459-U

SIXTH DIVISION
Order filed: February 11, 2016

No. 1-13-2459

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 02 CR 16669
	)	
JAMES FLETCHER,	)	Honorable
	)	Angela Munari Petrone,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Rochford and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's denial of the petitioner's motion for leave to file a successive postconviction petition was affirmed where his claim of actual innocence was not supported by newly discovered evidence of such a conclusive character that it would probably change the outcome on retrial. The petitioner's alternative claims, that he was denied his right to due process, the State committed a *Brady* violation, and he was denied effective assistance of trial and post-trial counsel, failed to satisfy the cause-and-prejudice test.

¶ 2 The petitioner, James Fletcher, appeals from the circuit court's order denying him leave to file a successive petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS

5/122-1 *et seq*. (West 2012)). On appeal, he contends that the court erred by denying him leave where his petition (1) presented a colorable claim of actual innocence based upon newly discovered evidence; and (2) satisfied the cause-and-prejudice test (725 ILCS 5/122-1(f) (West 2012)) on his alternative claims that: he was denied his right to due process, the State committed a *Brady* violation, and he was denied effective assistance of trial and post-trial counsel. For the reasons that follow, we affirm.

¶ 3 In May 2002, a grand jury indicted the petitioner on multiple counts of first degree murder in connection with a December 21, 1990, armed robbery that resulted in the shooting death of Willie Sorrell.

¶ 4 At trial, Edward Cooper testified that, on December 21, 1990, he was working as a truck driver for Holsum Bread. Sometime between 1 and 1:30 p.m., he double parked his Holsum Bread truck outside Uncle Remus, a restaurant located near Madison Street and Central Avenue, to make a delivery. As he was returning bread trays to his truck, he encountered an acquaintance, Sheenee Friend, who asked him for some change for the laundromat. Cooper told her to wait while he put the trays into his truck. Cooper testified that he opened the door to his truck to put the trays inside when a man came from behind, stuck an object into his back, and ordered him to get into the truck. Cooper explained that two men followed him into the truck and demanded money. Both men were carrying revolvers. Cooper stated that he took the money from his left pocket and gave it to one of the men. The other man, whom Cooper identified as the petitioner, reached into Cooper's right pocket, took the rest of his money, and then ordered his accomplice to shoot Cooper. Both men exited the truck and ran west on Madison Street. Cooper testified that he reached for his gun, which he kept for protection, and chased after his assailants. As he pursued, Cooper exchanged gunfire with both men. Another person, Terry

Rogers, also ran after the offenders, but Cooper and Rogers ceased their pursuit when the offenders ran into an abandoned building. As Cooper returned to his truck, he noticed a man lying on the sidewalk outside a liquor store, adjacent to the Uncle Remus restaurant. Cooper spoke with the police at the scene and one of the officers took him back to the abandoned building, but the petitioner and his accomplice were no longer inside.

¶ 5 Cooper testified that the petitioner had collar length "Jheri" curls, was wearing a baseball cap, Starter jacket, dark pants, stood between 5-feet-8-inches and 6-feet-tall, and weighed between 160 to 170 pounds. The petitioner's accomplice was also wearing a Starter jacket and baseball cap, had his hair combed back in a ponytail, stood between 5-feet-8-inches and 5-feet-10-inches-tall, and weighed between 150 to 160 pounds. Both men were in their late 20's to early 30's.

¶ 6 Five years later, in 1995, detectives showed Cooper a photo array but no identification was made. Seven years later, in February 2002, two detectives came to Cooper's house and showed him a photo array of seven photographs. Cooper testified that the detectives spread the photographs on his front stairs and he identified the petitioner as one of the men who robbed him on December 21, 1990. Cooper acknowledged, however, that he told detectives he was not sure of his identification and wanted to see an in-person lineup. In April 2002, detectives invited Cooper to the police station to view a lineup. Cooper testified that he viewed the lineup behind a glass mirror and was accompanied by two detectives and another, unknown person. He identified the petitioner and told the detectives he was positive that the petitioner was one of the men who robbed him. On cross-examination, Cooper admitted that he told an investigator in September 2004 that he was "only about 75 percent sure" of the identity of his assailants.

¶ 7 Sheenee Friend testified that, in the early afternoon of December 21, 1990, she was at the laundromat across the street from the Uncle Remus restaurant when she observed Cooper making a delivery. She approached him and asked for money. According to Friend's recollection, she entered Cooper's truck and was having a conversation with him when she noticed two unfamiliar men standing nearby. After receiving money from Cooper, Friend began to step out of the truck when one of the men, whom she identified as the petitioner, grabbed her arm and cursed. She pulled her arm away and the two men entered Cooper's truck. Friend testified that she stood outside of the Uncle Remus restaurant and watched as the petitioner searched Cooper, and his accomplice pointed a gun at Cooper. The petitioner and his accomplice then ran out of the truck and Cooper followed, chasing them. Friend saw Cooper pull out a gun and shoot at the men as they were running. The two men fired back, striking a man who was coming out of a liquor store. Friend testified that the petitioner was wearing a skullcap and she could not see his hair.

¶ 8 Twelve years later, in February 2002, Friend went to the police station and identified the petitioner in a photo array. Two months later, she identified him in a lineup. Friend testified that although the petitioner looks older and bigger, he is "still the same person," and after 15 years, there is no doubt in her mind that he is one of the men who robbed Cooper. When asked on cross-examination whether the detectives told her who to identify in the photo array, Friend testified that "[t]hey didn't tell me anything." She also denied that the detectives told her that one of the men depicted in the photographs was a suspect.

¶ 9 Emmett Wade testified that, at approximately 1:20 p.m. on December 21, 1990, he was sitting in his van waiting for family members when he noticed the driver of a Holsum Bread truck running towards him with a gun. The driver pointed the gun in Wade's direction and fired

a shot, which struck and ricocheted off the windshield of Wade's van. Wade also observed people in hoodies run past his van, but he was not able to see their faces. He heard more gunshots coming from behind him and then saw a man coming out of a liquor store fall to the ground after being struck by some of the gunfire. Wade testified that the man was not shot by the bread truck driver, but by one of the other shooters. On cross-examination, Wade testified that detectives came to his house in March 2002 and showed him a photo array, but he was not able to make an identification. Defense counsel inquired whether the detectives pointed to any of the photographs or told him who they suspected of committing the crime, but the State objected to these questions and the trial judge sustained the objections.

¶ 10 Chicago police detective Jerome Bogucki testified that, in March 1995, he and his partner, Detective Raymond Schalk, were assigned to investigate the December 21, 1990, murder of Willie Sorrell. During the course of their investigation, Detectives Bogucki and Schalk learned that one of the witnesses gave the name "Fletcher"; the police were searching for two male, black offenders; and a witness named Terry Rogers needed to be interviewed. Detective Bogucki testified that he was not able to locate Rogers and, as a result, he issued a "stop order" to alert law enforcement officers that Rogers was wanted for questioning in connection with the armed robbery. In February 2002, Rogers was arrested in an unrelated matter and Detectives Bogucki and Schalk were able to meet and interview him. Following their interview, the detectives interviewed Cooper at his home and showed him a photo array. Cooper identified the petitioner's photograph as one of the men who robbed him. Detective Bogucki also interviewed Friend and showed her the same photo array as Cooper. She also identified the petitioner as one of the offenders who robbed Cooper. Detective Bogucki testified that the petitioner was arrested

on April 19, 2002, and on April 20, 2002, Cooper and Friend separately identified him in a lineup.

¶ 11 After the State rested, the defense called the petitioner's father, Jim Fletcher, Sr., who generally testified that his son had short hair in 1990. The petitioner's ex-wife, Deborah Sanders, testified and corroborated Fletcher, Sr.'s testimony that the petitioner had a "bald fade" haircut. The defense also called the petitioner's pre-trial attorney who testified that she was at the in-person lineup, but the detectives did not allow her to be in the same room as the witnesses.

¶ 12 During closing arguments, the defense argued that Cooper and Friend were mistaken in their identification and had been influenced by the identification procedures employed by the detectives. The defense further claimed that since 12 years had passed, Cooper's and Friend's identifications were not reliable, their physical descriptions of the petitioner were inconsistent, and they falsely identified the petitioner as one of the offenders.

¶ 13 Following deliberations, the jury found the petitioner guilty of first-degree murder and the circuit court sentenced him to natural life in prison. On direct appeal, this court affirmed the petitioner's conviction. *People v. Fletcher*, No. 1-05-3447 (March 23, 2007) (unpublished order under Supreme Court Rule 23).

¶ 14 In October 2008, the petitioner filed his first postconviction petition pursuant to section 122-1 of the Act (725 ILCS 5/122-1 (West 2008)). In that petition, he claimed, *inter alia* that: (1) the State presented the perjured testimony of Friend at the grand jury proceedings; (2) his due process rights were violated where the photo array and lineup procedures were unduly suggestive; and (3) his trial counsel was ineffective for failing to investigate witnesses and failing to litigate a motion to suppress identification. The petition was summarily dismissed and

this court affirmed. *People v. Fletcher*, No. 1-09-1250 (Nov. 4, 2010) (unpublished order under Supreme Court Rule 23).

¶ 15 In December 2012, the petitioner filed a motion for leave to file a successive postconviction petition. In his proposed successive petition, the petitioner alleged, *inter alia*: (1) actual innocence based on newly discovered evidence that Friend and Cooper recanted their testimony and detectives coerced them to identify the petitioner; (2) ineffective assistance of counsel where his trial and post-trial attorneys failed to investigate and present evidence to support the defense theory of misidentification; (3) the State committed a *Brady* violation by failing to disclose evidence that Wade and Friend were shown a single photograph of the petitioner and were told to identify him as one of the offenders; and (4) the police employed unduly suggestive identification procedures to coerce witnesses to identify the petitioner in violation of his right to due process.

¶ 16 In support of his proposed successive petition, the petitioner attached an affidavit from Friend, dated August 26, 2011. In her affidavit, Friend attests, in pertinent part, as follows:

> "3. While [at the police station], two police detectives showed me a group of photos of men, all on one page. They asked me who did the shooting in December 1990, and I pointed at one picture.
>
> 4. The police then pointed at a photo of a different man on that page and said something like, 'That's right. This is the one.' They said he was 'Fletcher' and told me Terry Rogers knew Fletcher and they planned the robbery together. I marked or initialed the photo that the police pointed out to me."

Friend also stated that she identified the petitioner in the lineup because she recognized him from the photo array. In a supplemental affidavit, dated April 5, 2012, Friend averred that she

"honestly don't [*sic*] remember what the guy really looked like" and "[a]ll I remember about him was he was a big guy." She explained that she could not see the petitioner's face "because he snatched me back through the truck." Friend also stated that, during the photo array, the detectives told her that the petitioner "was a really bad guy," his background was "messed up," he had a violent history, and Terry Rogers said the petitioner shot and killed Willie Sorrell. Friend attests that she has always wondered if she "put the wrong person away" and is coming forward now because "[i]f I did, I want to correct it."

¶ 17 The petitioner also attached affidavits from Wade and Cooper. In Wade's affidavit, Wade averred that the detectives showed him a single photograph of the petitioner and said that he was in custody, was a "bad guy," and they wanted to "keep him off the streets." Wade believed the detectives were trying to persuade him to identify the petitioner as the person who shot and killed Sorrell. Additionally, Wade stated that he was prepared to tell the jury that the detectives showed him a single photograph of the petitioner, but defense counsel could not figure out how to properly phrase the question.

¶ 18 Cooper's affidavit was consistent with his testimony at trial. He added, however, that he refused to appear before the grand jury because he "was not sure of being 100% of [his] identification ***." Cooper also explained that he told investigators in 2004 that "it has been so long ago that I can't even remember their faces after so many years."

¶ 19 In another affidavit, the petitioner's father, Fletcher, Sr., stated that, on the day of the petitioner's trial, Wade told him that the detectives showed him a photo of the petitioner and said that the petitioner was the perpetrator. Fletcher attests that he told the petitioner's trial attorney, Joe Saltiel, about his conversation with Wade. Fletcher's affidavit also sets forth in detail the investigative steps he took to obtain affidavits from Friend, Cooper, and Wade.

¶ 20 Finally, the petitioner's proposed petition asserted that the holdings in *Jimenez v. City of Chicago*, 877 F. Supp. 2d 649 (N.D. Ill. 2012), and *Warfield v. City of Chicago*, 679 F. Supp. 2d 876 (N.D. Ill. 2010)), constitute "newly discovered" evidence that Detectives Bogucki and Schalk engaged in a pattern and practice of coercing false identifications.

¶ 21 In July 2013, the circuit court entered a written order denying the petitioner's motion for leave to file a successive postconviction petition. In rejecting the petitioner's claim of actual innocence, the court found that the information contained in the affidavits of Friend, Cooper, Wade, and Fletcher was not "newly discovered" because it existed at the time of trial, and that Friend's recantation is not of "such conclusive character" to justify postconviction relief. As to the petitioner's remaining constitutional claims, the court found they were raised at trial and in the initial postconviction petition and were therefore barred by *res judicata*. This appeal followed.

¶ 22 On appeal, the petitioner argues that the circuit court erred in denying him leave to file a successive petition for postconviction relief where he (1) presented a colorable claim of actual innocence; and (2) satisfied the cause-and-prejudice test on his constitutional claims. We address each claim in turn.

¶ 23 The Act contemplates the filing of only one postconviction petition without leave of court (725 ILCS 5/122-1(f) (West 2012)), and "any claim not presented in an original or amended petition is waived." *People v. Sanders*, 2016 IL 118123, ¶ 24. Our supreme court has identified two bases upon which the bar against successive petitions will be relaxed. "The first is when the petitioner satisfies the cause and prejudice test." *Id.*; 725 ILCS 5/122-1(f) (West 2012). The second exception is known as the fundamental miscarriage of justice exception and requires the petitioner to demonstrate actual innocence. *Sanders*, 2016 IL 118123, ¶ 24. To set forth a claim

of actual innocence, the petitioner must present evidence that is "(1) newly discovered, (2) not discoverable earlier through the exercise of due diligence, (3) material and not merely cumulative, and (4) of such conclusive character that it would probably change the result on retrial." *Id.* Leave to file a successive postconviction petition should be denied only where it is clear from a review of the petition and attached documentation that, as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence. *People v. Edwards*, 2012 IL 111711, ¶ 24. In other words, leave of court should be granted where the petitioner's supporting documentation raises the probability that it is more likely than not that no reasonable juror would have convicted the petitioner in light of the new evidence. *Id.* We review the denial of a motion for leave to file a successive petition *de novo*. *People v. Almodovar*, 2013 IL App (1st) 101476, ¶ 59.

¶ 24 In support of his claim of actual innocence, the petitioner relies upon the affidavits of Friend and Cooper, allegedly recanting their trial testimony, as well as Wade's affidavit, in which he attests that the detectives employed suggestive identification procedures and pressured him to falsely identify the petitioner. The petitioner also supports his actual-innocence claim by referencing *Jimenez*, 877 F. Supp. 2d 649, and *Warfield*, 679 F. Supp. 2d 876, in which Detectives Bogucki and Schalk were found liable for misconduct. The petitioner asserts that the affidavits and federal cases are newly discovered evidence because they were not available at trial. We disagree.

¶ 25 Initially, we note that "newly discovered" evidence is evidence that was unavailable at trial and that a petitioner could not have discovered sooner through due diligence. *People v. Harris*, 206 Ill. 2d 293, 301 (2002). We note, it is the *facts* comprising the evidence that must be new and undiscovered as of trial, despite the exercise of due diligence. *People v. Montes*, 2015

IL App (2d) 140485, ¶¶ 23-24. As such, the affidavit of an eyewitness is not considered newly discovered where it "does not contain any facts that defendant would not have known at or prior to his trial." *People v. Davis*, 382 Ill. App. 3d 715, 724 (2010).

¶ 26 In this case, we agree with the State that the facts contained in Cooper's affidavit are not newly discovered evidence because the content of his affidavit merely corroborates his testimony at trial. Although his affidavit included the additional facts that he did not testify at the grand jury proceeding and cannot remember his assailant's face after so many years, these facts are nevertheless consistent with his trial testimony that he was not certain of his identification. The record rebuts the petitioner's characterization of Cooper's affidavit as evidence that he recanted. The information contained in Cooper's affidavit was comprised solely of facts already known to the petitioner at or before trial. Therefore, Cooper's affidavit does not qualify as newly discovered evidence.

¶ 27 Likewise, the facts contained in Wade's affidavit are not newly discovered. The record reveals that Wade told the petitioner's father, Fletcher, Sr., that the detectives showed him a single photograph of the petitioner and pressured him to identify the petitioner as one of the offenders. Fletcher, Sr. stated in his affidavit that he told the petitioner's trial attorney about his conversation with Wade, and Wade attested that he was prepared to "tell the jury" about the detectives' coercive identification tactics. Clearly, the petitioner was aware of these facts at or before trial as evidenced by his trial attorney's cross-examination of Cooper, Friend, and Wade regarding the detectives' conduct during the photo array and lineup. Moreover, the petitioner's original postconviction petition admits, "Emmitt Wade told attorney Hill that detectives told him to pick out the [petitioner], but he did not." Since Wade's affidavit contains facts already known to the petitioner at or prior to his trial, it does not qualify as newly discovered evidence.

¶ 28 We similarly find that Friend's affidavit is not newly discovered because the facts contained therein are similar to the facts contained in Wade's affidavit. Although the petitioner argues he did not have Friend's affidavit at the time of trial, he was nevertheless aware of the allegation that the detectives engaged in coercive tactics. Defense counsel vigorously cross-examined Friend, but Friend testified that the detectives "didn't tell [her] anything" and she was not aware the police had a suspect. Friend's unwillingness to recant at trial does not transform her affidavit into newly discovered evidence. See *People v. Jones*, 399 Ill. App. 3d 341, 364 (2010) ("evidence is not newly discovered when it presents facts already known to a defendant at or prior to trial, though the source of those facts may have been unknown, unavailable or uncooperative").

¶ 29 Even if this court were to agree with the petitioner that Friend's affidavit is newly discovered evidence, his claim of actual innocence must fail because the evidence contained therein is not of such a conclusive nature that it would probably change the result on retrial. *Edwards*, 2012 IL 111711, ¶ 32. Here, Friend does not aver that the petitioner did not participate in the commission of the offense, nor does Friend provide any information as to the petitioner's whereabouts at the time of the offense. Rather, her proposed testimony that she could not see the petitioner's face and does not remember what he looks like other than "he was a big guy," merely impeaches or contradicts her trial testimony. Even taking the well-pleaded facts as true, we conclude that her recantation is not of such conclusive character as would probably change the result on retrial. See *Sanders*, 2016 IL 118123, ¶ 52 (evidence was not of such conclusive character where the recantation testimony merely added conflicting evidence to the evidence adduced at the trial).

¶ 30 We also find that the "evidence" of police coercion—namely, the findings in the two federal civil rights cases, *Jimenez* and *Warfield*—insufficient to support a colorable claim of actual innocence.

¶ 31 In *Warfield*, 679 F. Supp. 2d 876, a group of bystanders, who were unlawfully detained by the police following a police shooting, filed suit against the city of Chicago and various police officers, including Detectives Bogucki and Schalk, alleging unlawful detention and false arrest. The evidence in that case established that Detectives Bogucki and Schalk did not personally commit any misconduct; rather, they were found liable because they had overall responsibility for the investigation. *Id.* at 893. Moreover, *Warfield* did not involve claims that the police coerced witnesses to make false identifications. Consequently, *Warfield* does not provide any new evidence to corroborate the petitioner's allegations that police coercion was deployed against Friend or Cooper. As such, the "evidence" in *Warfield* is not of such a conclusive character that it would probably change the result of the petitioner's case on retrial.

¶ 32 In *Jimenez*, 877 F. Supp. 2d 710, the plaintiff filed suit against the city of Chicago and Detective Bogucki alleging malicious prosecution and violation of due process. The evidence showed that Detective Bogucki used coercive tactics to convince two witnesses to falsely identify Jimenez as the shooter in a murder case. Detective Bogucki also tainted the testimony of other witnesses by arranging for one of them to see a picture of the victim's corpse next to a picture of Jimenez before she was shown a lineup. He also placed in the minds of the witnesses the idea that the shooter was wearing a blue and white Duke University jacket. *Id.* at 713. Like *Warfield*, we find that *Jimenez* does not prove the petitioner's actual innocence. Detective Schalk was not named as a defendant and *Jimenez* does not refer to any misconduct on his part. At best, *Jimenez* identifies a single instance of misconduct by Detective Bogucki in 1993, nine

years prior to the alleged misconduct in this case. See *People v. Reyes*, 369 Ill. App. 3d 1, 18-19 (2006) (stating that evidence of prior allegations of brutality was relevant and material where it "occurred at or near the time of the defendant's allegations"). Moreover, *Jimenez* says nothing about the use of unduly suggestive photo arrays and nothing in that case links Detective Bogucki to this case. We conclude that the "evidence" in *Jimenez* is not of such conclusive character as would probably change the result on retrial. In sum, neither *Warfield* nor *Jimenez* support the petitioner's claim of actual innocence.

¶ 33 For all these reasons, we conclude that the circuit court did not err in denying the petitioner leave to file a successive postconviction petition based on his claim of actual innocence.

¶ 34 Next, the petitioner argues that the circuit court erred in denying him leave to file a successive postconviction petition on his alternative claims that: (1) he was denied his right to due process; (2) the State committed a *Brady* violation; and (3) he was denied effective assistance of counsel. The petitioner asserts that he satisfied the cause-and-prejudice test for failing to raise these claims in his original postconviction petition.

¶ 35 With regard to claims not involving actual innocence, leave to file a successive postconviction petition will be granted where the petitioner can demonstrate both cause for his failure to raise the issue in a prior postconviction petition, and prejudice resulting from that failure. *People v. Davis*, 2014 IL 115595, ¶ 14; 725 ILCS 5/122-1(f) (West 2012). "Cause" is established when the petitioner shows that some objective factor impeded his ability to raise the claim in the original postconviction proceedings. *People v. Tenner*, 206 Ill. 2d 381, 393 (2002). "Prejudice" is established when the petitioner shows that the claimed error so infected his trial that the resulting conviction violated due process. *Id.*

¶ 36 We first address the petitioner's contention that his petition established cause and prejudice on his claim that the State knowingly used perjured testimony of Friend and Cooper.

¶ 37 As to Friend's alleged perjury, the petitioner asserts he established cause for his failure to raise this claim earlier because he could not prove that Friend lied in her trial testimony until she gave him her signed affidavit. We disagree. The petitioner's initial postconviction petition did, in fact, allege that the State presented the perjured testimony of Friend, albeit at the grand jury proceedings. He specifically alleged that "the [S]tate used perjury and presented a distorted factual picture to the Grand Jury," including "statements which were designed to boost her credibility, but were untrue, and made it appear that she had actually saw the petitioner shoot the victim." The upshot of these facts is inescapable. The petitioner cannot establish that any objective factor impeded his ability to raise the Friend-perjury claim in his initial petition—because the initial petition itself shows that the petitioner was aware of all the facts that he needed to raise that claim. Since the petitioner raised this claim in his initial petition, then, logically, he cannot demonstrate "cause" for his failure to raise the claim in that petition. Moreover, the petitioner cannot meet the "prejudice" prong because the summary dismissal of his initial petition means that the claim is barred by *res judicata*. See *People v. Blair*, 215 Ill. 2d 427, 443 (2005).

¶ 38 With respect to Cooper's alleged perjury, even if the petitioner could show cause for failing to raise this claim in his initial postconviction petition, he has not shown prejudice. "The rule is well-established that the State's knowing use of perjured testimony to obtain a criminal conviction constitutes a violation of due process of law." *People v. Olinger*, 176 Ill. 2d 326, 345 (1997). "A conviction obtained by the knowing use of perjured testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's verdict."

Id. When raising an allegation of false or perjured testimony in trying to establish a constitutional violation, a petitioner must allege that the State knowingly used the alleged false testimony, or at the least exhibited some lack of diligence in allowing the testimony to go forward. *People v. Brown*, 169 Ill. 2d 94, 106 (1995).

¶ 39 In this case, the affidavit of Cooper does not show that he committed perjury. First, his affidavit never states that he lied when he testified at trial. And, as noted above, his affidavit is consistent with his testimony at trial, *i.e.*, he was not certain he identified the correct person in the photo array; he wanted to see the defendant in an in-person lineup; and he told an investigator in September 2004 that he was "75 percent sure" of his identification. To the extent Cooper attests that he refused to testify before the grand jury because he was not 100% certain of his identification, we find that this additional fact does not amount to perjury. See *People v. Craig*, 334 Ill. App. 3d 426, 439 (2002) ("inconsistencies in testimony cannot be equated with perjury, nor does it establish or show that the State knowingly used perjured testimony"). Consequently, the petitioner's proposed successive petition is insufficient to justify further proceedings on his due-process claim. *Smith*, 2014 IL 115946, ¶ 35.

¶ 40 We also reject the petitioner's argument that his due process rights were violated based upon a pattern and practice of police misconduct. In support of this claim, the petitioner cites to *Jimenez* and *Warfield*. We recognize that our supreme court has found that allegations of police misconduct can support granting leave to file a successive postconviction petition. *People v. Wrice*, 2012 IL 111860 (petitioner granted leave to file a second successive postconviction petition on basis of newly discovered evidence showing police torture and brutality). However, generalized claims of abuse are not sufficient to support a claim of coercion; there must be a

direct link to specific abuses in the petitioner's case. *People v. Anderson*, 402 Ill. App. 3d 1017, 1036 (2010). Our supreme court has also observed:

> "Even incidents that are remote in time can become relevant, however, if the party presenting the evidence can present evidence of other incidents that occurred in the interim. Thus, a single incident years removed has little relevance. However, a series of incidents spanning several years can be relevant to establishing a claim of a pattern and practice of torture." *People v. Patterson*, 192 Ill. 2d 93, 140 (2000).

¶ 41 In this case, assuming the petitioner can establish cause based upon the fact that *Warfield* and *Jimenez* were not available until after the dismissal of his original postconviction petition, he cannot establish prejudice. For the reasons already discussed above with respect to the petitioner's claim of actual innocence, *Warfield* and *Jimenez*, at best, identify a single instance of misconduct by Detective Bogucki in 1993, nine years prior to the alleged misconduct in this case. A single incident years removed has little relevance. *Patterson*, 192 Ill. 2d at 140. Additionally, Cooper has never claimed that Detectives Bogucki and Schalk coerced him to falsely identify the petitioner and, given his testimony at trial, there is no reasonable probability that the result on retrial would be different. We, therefore, conclude that the petitioner failed to satisfy the prejudice prong of the cause-and-prejudice test on his claim that Detectives Bogucki and Schalk engaged in a pattern and practice of police misconduct.

¶ 42 We next address the petitioner's contention that his petition established cause and prejudice on his claim that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963). Under *Brady*, the State violates a petitioner'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 petitioner 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. Evidence is material where a reasonable probability exists that, had the evidence been disclosed, the outcome of the proceeding would have been different. *People v. Hobley*, 182 Ill. 2d 404, 433 (1998).

¶ 43 The petitioner asserts the State violated *Brady* when it failed to disclose evidence that Detectives Bogucki and Schalk coerced witnesses to falsely identify the petitioner. More specifically, the petitioner's proposed successive petition alleges that the State failed to disclose evidence that Friend and Wade were shown a single photograph of the petitioner and told that he was the person who committed the crime.

¶ 44 Here, the petitioner has failed to satisfy the "cause" prong of the cause-and-prejudice test because he has failed to point to an objective factor that impeded his counsel's efforts to raise the issue in an earlier proceeding. As discussed above, the petitioner and his trial attorney were well aware of Wade's allegation that detectives attempted to coerce him to identify the petitioner as one of the shooters. The record shows that the petitioner previously asserted, in his original postconviction petition, the claim that detectives used unduly suggestive identification procedures in violation of his due process rights. See *Fletcher*, No. 1-09-1250 (Nov. 4, 2010). Although Friend's affidavit may arguably be *additional* evidence to support that claim, that does not make that claim new. See *People v. Green*, 2012 IL App (4th) 101034, ¶ 40 (although the petitioner uncovered additional evidence to support his *Brady* claim, that does not make that claim new). Accordingly, we conclude the circuit court properly denied the petitioner leave to

file a successive petition on his claim that the State committed a *Brady* violation.

¶ 45 Finally, the petitioner asserts that he should have been granted leave to file a successive postconviction petition where he demonstrated cause and prejudice on his claim of ineffective assistance of trial and post-trial counsel. In his proposed successive petition, the petitioner contends that he received both ineffective assistance of trial counsel and post-trial counsel because they failed to investigate and present Wade's allegations. According to the petitioner, had counsel interviewed Wade, he would have obtained evidence raising serious doubts about the reliability of Friend's and Cooper's identifications and a reasonable probability exists that the outcome of the trial would have been different. (We note, the petitioner does not allege that his postconviction counsel was ineffective for failing to raise these claims in his initial petition.)

¶ 46 The petitioner fails to identify any objective factor which prevented him from raising this claim in his initial petition, and we see none in the record. As discussed above, the petitioner was well aware of trial and post-trial counsels' alleged failure to interview Wade, and his postconviction attorney could have raised this claim in his initial petition. In fact, our review of the record reveals that the ineffective-assistance-of-counsel claim was raised in his initial petition. Thus, having known all of the facts necessary to raise this claim prior to the filing of his initial petition, the petitioner cannot establish cause for his failure to raise it in his initial petition. See *People v. Williams,* 394 Ill. App. 3d 236, 246 (2009) (the petitioner could not show cause for his failure to include his claim in his initial postconviction petition where he was aware of the claim and supporting facts prior to his initial petition). Accordingly, we conclude the circuit court correctly found that the petitioner failed to demonstrate cause for his failure to bring this claim in his initial petition.

¶ 47 Since we affirm the circuit court's denial of the petitioner's motion for leave to file a successive petition for postconviction relief, we need not address his request that we remand this matter to a new judge.

¶ 48 For the foregoing reasons, we affirm the judgment of the circuit court denying the petitioner's motion for leave to file a successive postconviction petition.

¶ 49 Affirmed.