FIRST DIVISION
June 4, 2018

No. 1-15-0326

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County.
	)	
v.	)	Nos. 97 CR 22627; 97 CR 22628
	)	
ANTONIO McDOWELL,	)	Honorable
	)	Rosemary Grant-Higgins,
Petitioner-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Pierce concurred in the judgment.
Justice Mikva dissented in part.

ORDER

¶ 1 *Held*: The circuit court's denial of leave to file a successive postconviction petition is affirmed where defendant has not shown cause and prejudice for failing to raise his claim that Detective Guevara coerced him and improperly influenced witnesses to falsely identify him in his initial postconviction petition. His sentencing issue, which this court addressed on direct appeal, is barred as *res judicata*.

¶ 2 Defendant, Antonio McDowell, appeals from the circuit court's order dismissing his successive post-conviction petition. On appeal, defendant contends the trial court erred in dismissing his petition where (1) the pattern of police detective Reynaldo Guevara's misconduct

is well-documented, and establishes the cause and prejudice necessary to allow his petition; and (2) his consecutive sentences are improper and violate his due process rights. For the following reasons, we affirm.

¶ 3 JURISDICTION

¶ 4 The trial court entered its order dismissing defendant's petition on December 22, 2014. A notice of appeal was filed on January 6, 2015. Accordingly, this court has jurisdiction pursuant to Article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, §6), and Rule 651(a) (eff. July 1, 2017), governing appeals in post-conviction proceedings.

¶ 5 BACKGROUND

¶ 6 Defendant was charged by indictment of first degree murder for the death of Mario Castro, attempted first degree murder for shooting at Alberto Varela, and aggravated vehicular hijacking and armed robbery for the offenses committed against Ruth Morales.

¶ 7 At trial, Mario Castro's wife, Marta, testified that around 1 p.m. on December 21, 1996, her husband left their apartment and drove to Menards to purchase parts to fix the sink. Mrs. Castro went upstairs to the second floor where her sister lived with her family, and around 3 p.m. she heard a scream. She and her nephew, Alberto Varela, looked out the back porch window and saw that the garage door was open and Mario's car was in the garage. She saw Mario lying on the step leading to the garage and someone was kneeling over him. The person seemed to be "searching him." Varela ran down to the yard ahead of her and he screamed as he ran after the person. When Mrs. Castro reached her husband, she told him to "hold on." She also ran into the alley but Varela tried to push her away. The fleeing person then fired a shot at her. Mrs. Castro testified that she could not tell whether the person was a man or woman, but the person wore black clothing.

¶ 8 Varela testified that he was visiting with Mario's family when he heard a scream. When he looked out the back porch window he saw defendant, who Varela identified at trial, searching his uncle Mario. Mario was lying face down outside of the garage. He ran down the stairs and when he got to the yard he saw defendant searching Mario and Varela hit him. He was close enough to defendant that he could see his face. After being hit, defendant picked up a gun that was on the ground. Varela described the gun as "big" and having "an L shape." Varela stepped back and defendant fired a shot towards him. Defendant started running towards the alley and Varela chased him. At some point, Mrs. Castro was with him in the alley and defendant fired a shot at them. Varela stopped chasing defendant and held Mrs. Castro. He testified that the shooter wore a black cap, black "puffed up" jacket, and black pants, and he noticed the Nike emblem on the clothing.

¶ 9 Juan Medina testified that he lived next door to the Castros and was Mrs. Castro's brother-in-law. On December 21, 1996, at approximately 3 p.m. he was home and on his second-floor porch looking for hangers. He heard a shot and looked out the window. He saw a black man with a gun searching Mario, who was lying face down on "the little stair." Medina opened the window and yelled, "hey, what you doing." Medina identified defendant in court as the person he saw searching Mario. Defendant, who was holding a gun in his hand, looked up and Medina saw his face for 15-30 seconds. Medina then left the porch to tell his wife and mother-in-law what was happening, and when he returned he saw defendant and Varela "trying to fight." He saw Varela punch defendant in the shoulder, and then defendant shot at Varela who was "very close" to defendant. When asked whether he could see defendant's face at the time, Medina answered, "Oh, yes." Medina testified that it was daylight and nothing obstructed his view. He saw defendant run into the alley, with Varela and Mrs. Castro following. Medina

described defendant as wearing "black pants, black jacket, a black baseball cap and a green shirt." The cap had a Nike emblem on it.

¶ 10 Evidence technicians recovered a bullet from the gangway and a fired shell from the alley, both having been fired from a semi-automatic 9-millimeter handgun. Mario was transported to the hospital where he died as a result of a close-range gunshot wound.

¶ 11 Ruth Morales-Santana testified that on December 21, 1996, at approximately 3:30 p.m., she was visiting family and had parked her car in an alley. She put an anti-theft device on the steering wheel and then exited the car and locked the doors. A man approached her with a gun in his hand and said, "Hey, lady, give me the car keys." She described the gun as "L-shape black." He pointed the gun at Morales-Santana's chest and said, "Give me the car keys or I will kill you, lady, I don't care." She gave him her keys. The man was standing about three feet from Morales-Santana, facing her. He saw her purse and demanded that she give it to him. She asked if she could keep her identification, but he responded, "No, I will kill you, lady, give me the purse." Morales-Santana gave him her purse and he fled in her car. After the offender drove away, she contacted the police. She described the offender as a black man with a medium dark complexion, 5'8" tall, and weighing 160 pounds. She described him as wearing a dark down jacket and baseball cap. Morales-Santana interacted with the offender for about four minutes during which she viewed him continuously and clearly saw his face. The car was later recovered 18 or 19 blocks away.

¶ 12 On July 12, 1997, Medina met with Detective Reynaldo Guevara at the police station and was asked to look at six photos. Medina chose defendant's photo as the person who resembled the shooter but asked Guevara whether he had "anymore recent pictures." On the evening of July 21, 1997, Guevara returned and showed Medina five computer-generated photographs from

which Medina identified defendant as the offender. Later that same evening, Guevara and another detective went to Morales-Santana's home to show her the same photograph array. Morales-Santana selected defendant's photograph as the person who robbed her on December 21, 1996. On July 22, 1997, Guevara showed Varela the computer-generated photos shown to Medina and Morales-Santana, and he also identified defendant as the offender.

¶ 13 On July 23, 1997, police officers located defendant and brought him to the police station. That evening, around 9 p.m., Guevara conducted a five-man lineup which Medina and Varela separately viewed. Each one identified defendant as the person who was with Mario Castro in the backyard on December 21, 1996. Morales-Santana also went to the police station later that evening to view the lineup. She positively identified defendant as the man who had robbed her and fled in her car on December 21, 1996.

¶ 14 Kenneth Beecham testified as an alibi witness for the defense. He stated that he was a co-worker and friend of defendant and on December 21, 1996, at around 2 p.m., he went to defendant's home. He and defendant drank beer until 5 p.m. and then went to the North Riverside Mall. They stayed at the mall until 7 p.m., when Beecham drove defendant home. When asked whether he knew defendant's last name, Beecham responded, "Spraggs."

¶ 15 Defendant had waived a jury trial and the trial court found him guilty of first degree murder, attempted first degree murder and aggravated vehicular hijacking. The court did not find Beecham to be a credible witness, and found that the State's witnesses were "not impeached in any significant way." When given an opportunity to speak at his sentencing hearing, defendant stated that he "was framed." He said that the "[p]olice know they framed me. Because when they arrested me I was a victim. *** I got shot at driveby. When they arrested me I was the victim.

They placed me in the lineup." The court sentenced defendant to consecutive terms of imprisonment of 59 years, 29 years, and 15 years, for his respective convictions.

¶ 16 Defendant appealed, arguing only that his sentence was excessive and the trial court abused its discretion by not considering mitigating factors and unduly emphasizing defendant's lack of remorse. On January 22, 2002, this court affirmed defendant's convictions and sentences, finding that the sentences were within the allowable range for the offenses. *People v. Antonio McDowell*, No. 1-99-1851 (2002) (unpublished order under Illinois Supreme Court Rule 23). The court further found that the trial court "carefully outlined its reasons for imposing relatively severe sentences for each crime and indicated why defendant would not be a good candidate for rehabilitation. The court also considered the deterrence and punishment aspects of the sentence." *Id*.

¶ 17 Defendant filed his first post-conviction petition on May 1, 2002. He alleged that he received ineffective assistance of appellate counsel where defendant did not receive "a full and meaningful as well as competent direct appeal." Defendant alleged that his appellate counsel failed to raise significant issues on direct appeal, including that (1) his indictment was obtained by perjured testimony, (2) he was arrested without probable cause, (3) he was not proved guilty beyond a reasonable doubt, and (4) he was denied a fair trial because the trial judge acted as a prosecuting attorney. Defendant alleged that Detective Bernard Brennan perjured himself when he testified about the investigation before the grand jury, because he seemed to indicate he was at the crime scene and interviewing witnesses when it was actually Guevara and Ernest Helvorsen who were involved in the investigation. Regarding his probable cause claim, defendant alleged that a computer-generated photo of him was presented to the witnesses in a suggestive manner with "little room to exclude him." He alleged that the description of the offender given by

witnesses was generally of "a black man wearing Nike clothing." Defendant emphasized that no physical evidence linked him to the crime.

¶ 18 The trial court denied his petition on June 6, 2002. Defendant appealed, and this court affirmed in *People v. Antonio McDowell*, No. 1-02-2410 (2003) (unpublished order under Illinois Supreme Court Rule 23). This court found that the record rebutted defendant's claim that Detective Brennan perjured himself. Addressing defendant's probable cause claim, we found that "defendant was arrested based on the photographic identifications of three witnesses ***. [Defendant's] allegation that the photographic identifications were suggestive was not supported by the record. There is no evidence that any of the people who identified defendant were told whom to identify. The record rebuts petitioner's allegation that he was arrested without probable cause." This court also found no ineffective assistance of counsel because "[t]he record reflects that three witnesses made separate, positive identifications of [defendant]" and this "evidence was sufficient to prove defendant guilty beyond a reasonable doubt." *Id.*

¶ 19 Defendant filed a *pro se* petition in federal court for a writ of *habeus corpus* on July 25, 2004, which raised similar claims as his post-conviction petition. He also alleged that Guevara framed him for the murder because he refused to falsely identify a suspect as the person who shot him in a prior incident. As new evidence, defendant presented his affidavit stating that Guevara framed him, as well as numerous affidavits and transcripts outlining Guevara's misconduct in other cases. Defendant's amended petition was denied and he appealed. The Seventh Circuit Court of Appeals affirmed the denial, ruling that defendant's claims were procedurally defaulted because he had not fairly presented them at all stages of his state court proceedings. *McDowell v. Lemke*, 737 F.3d 476, 484 (7th Cir. 2013).

¶ 20 Defendant also could not excuse his procedural default by showing a fundamental miscarriage of justice occurred. *Id*. at 483. This standard requires defendant to prove he is actually innocent of the crime based on new and reliable evidence. *Id*. The court found that although defendant did present new evidence, that evidence was not sufficient to meet the high bar of actual innocence. *Id*. It reasoned that defendant's affidavit "is obviously self-serving and contains no indicia of reliability. Such 'eleventh hour' affidavits, containing facts not alleged at trial and accompanied by no reasonable explanation for delay are inherently suspect." *Id*. at 484. The court also found that defendant's allegations "essentially counter[] the evidence the State presented at trial with his own version of the events; this relatively weak evidence cannot excuse his procedural default." *Id*.

¶ 21 On November 2, 2009, defendant filed a "motion for leave to reopen case for good cause" which alleged that he had newly discovered evidence concerning the misconduct of Guevara, and that a *Brady* violation occurred when the State failed to disclose three complaints against Guevara before defendant's trial. The motion also alleged ineffective assistance of counsel. The trial court believed it had no jurisdiction to hear the motion and denied the motion without comment. On August 7, 2013, defendant filed a "motion to vacate a void sentence" in which he alleged that his consecutive sentences were imposed without the trial court's finding that the sentences were necessary to protect the public. In response, the trial court stated on August 15, 2013, that "Order of Judge Salone to stand." The record contains no appellate proceedings regarding these determinations.

¶ 22 On August 14, 2014, defendant moved for leave to file a successive post-conviction petition in which he alleged that his convictions resulted from a rigged identification procedure orchestrated by Guevara. He alleged that police suggestively showed witnesses his photo before

showing them the photo arrays, and if more than one photo array was shown to a witness, defendant's photo was the only one to appear in both arrays. He further alleged that the second array contained photos of persons of multiple races even though the witnesses knew the offender was black. Defendant claimed that another detective, Richard Maher, showed defendant a photo of himself and told defendant that Guevara had been showing that photo to all the witnesses, but "you didn't hear it from me." Defendant also included news articles about numerous instances of witness tampering by Guevara, although none directly involved defendant's case.

¶ 23 Defendant attached his affidavit to the petition. In his affidavit, defendant stated that on July 10, 1997, he was taken to Laretia Hospital for treatment of a bullet wound to his left hand. While at the hospital, he spoke with police officers about the shooting but gave them no information about the identity of the shooter. On July 14, 1997, officers came to his mother's house to speak with defendant about the shooting but he was not home. The officers asked defendant's mother to let defendant know he needed to come to the police station and they asked her for a photograph of defendant. She declined to give them a photograph, but after the officers came to the house, they would return almost every day to the "neighborhood with a photo of [defendant] wearing a black coat and green shirt showing it to anyone that might know [him]."

¶ 24 Defendant further stated that on July 23, 1997, he rode with police officers to the police station and in the car he was shown the photograph of himself wearing a black coat and green shirt. He was taken to the second floor to look through a gang profile book. Defendant told Guevara that he did not see the person who shot him, but Guevara tried to convince him to identify a guy he had never seen before as the person who shot him. When defendant refused to cooperate, Guevara became angry and defendant was scared because of the detective's reputation. Defendant asked to go home, but Guevara instead sat him on a bench and handcuffed

him to a wall for two hours. Defendant was in pain due to his bullet wound but Guevara and other officers ignored him. Guevara kept asking defendant if he was ready to identify the person who shot him, but defendant repeated that he did not see the person who shot him.

¶ 25 Guevara told defendant he could go home, but first he needed to participate in a lineup. Afterwards, Guevara told defendant that someone had identified him "who indicated [defendant] in a murder." Defendant returned to the room where he had been handcuffed and while there, Detective Maher showed defendant a photograph of himself wearing a black coat and green shirt. He told defendant that the witnesses used the photo to identify him in the photo array and lineup, and Guevara was involved but "you didn't hear that from me." Later, Guevara came into the room and told defendant that all he had to do was come to the station and identify the person who shot him. Now, defendant was going to prison for the rest of his life. He suggested that defendant confess to the murder, but defendant stated"[t]hat wasn't going to happen."

¶ 26 Defendant also filed a "Supplemental Pro Se Brief" on September 8, 2014, alleging that his sentence was illegal because the trial court imposed consecutive sentences under the mistaken belief that such sentences were mandatory.

¶ 27 On October 1, 2014, the trial court denied defendant's motion for leave to file his successive post-conviction petition. The court found that defendant's allegations "are essentially identical to claims he raised and litigated in his federal *habeus corpus* petition," and "'defendant cannot raise issues in a postconviction proceeding that have already been addressed pursuant to a federal *habeus corpus* petition,'" quoting *People v. Terry*, 2012 IL App (4th) 100205, ¶ 29. Therefore, "they are barred by *res judicata* from being raised in proceedings under the Post-Conviction Hearing Act."

¶ 28 The trial court further found that even if *res judicata* did not apply, defendant failed to show the cause and prejudice necessary to file a successive petition. Defendant failed to show cause because he knew of the tainted identification procedures either before trial or at trial, and the fact that articles about Guevara's misconduct were not available at the time did not impede his ability to raise this specific claim in his initial post-conviction petition. Also, defendant failed to show prejudice because nothing in the record supported his claim that the identification procedures were tainted. The only support defendant provided was his affidavit containing his "own bare allegations." The trial court also determined that defendant's allegations failed to support a claim of actual innocence.

¶ 29 Defendant filed a motion to reconsider which the trial court denied. This appeal followed.

¶ 30 ANALYSIS

¶ 31 On appeal, defendant argues that he has established the cause and prejudice required to file a successive post-conviction petition pursuant to section 122-1(f) of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1(f) (West 2016)). The Act provides a method for defendant to assert that his constitutional rights were violated in his original trial or sentencing hearing. *People v. Towns*, 182 Ill. 2d 491, 502 (1998). A proceeding under the Act is a collateral one rather than an appeal of the underlying judgment, and allows only for consideration of issues that were not, and could not have been, adjudicated on direct appeal. *Id*. Issues raised and decided on direct appeal are barred by *res judicata*, and issues that could have been raised but were not, are waived. *Id*. at 502-03.[1]

[1] Although the trial court found that defendant's petition was barred as *res judicata* because he raised the same issues in his federal *habeus* petition, citing *People v. Terry*, 2012 IL App (4th) 100205, the parties agree *Terry* does not apply here because the federal court denied defendant's petition due to a procedural default rather than on its merits.

¶ 32 Additionally, the Act contemplates the filing of only one postconviction petition. Section 122-1(f), however, allows the filing of a successive petition if the petitioner "demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure." 725 ILCS 5/122-1(f) (West 2016).[2] The cause-and-prejudice test is the analytical tool "used to determine whether fundamental fairness requires that an exception be made *** so that a claim raised in a successive petition may be considered on its merits." *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002). Our supreme court likened the cause-and-prejudice test to the one used in the context of ineffective assistance of counsel claims and determined that, "[s]imilarly, a defendant's *pro se* motion for leave to file a successive postconviction petition will meet the section 122-1(f) cause and prejudice requirement if the motion adequately alleges facts demonstrating cause and prejudice." *Id.* ¶ 34. Therefore, leave 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." *Id.* ¶ 35. [3]

¶ 33 Defendant must show both cause and prejudice to obtain leave to file a successive petition. *Pitsonbarger*, 205 Ill. 2d at 464. "Cause" is "any objective factor, external to the defense, which impeded the petitioner's ability to raise a specific claim in the initial post-conviction proceeding." *Id.* at 462. Defendant argues that he has established cause because

[2] Leave to file a successive petition may also be granted if defendant shows actual innocence. *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002). However, defendant here does not raise actual innocence on appeal and consideration of the issue is therefore waived. *Id.* at 460.

[3] As to the applicable standard of review, there is some confusion whether an abuse of discretion or *de novo* standard applies. See *People v. Edwards*, 2012 IL 111711, ¶ 30. However, as our supreme court determined in *Edwards*, we need not decide this question here because our determination is the same under either standard of review.

Guevara's "pattern of misconduct was not reasonably available" to him in prior proceedings. Even if true, however, that fact is not sufficient to establish cause here because defendant knew of Guevara's misconduct in his case in 1997, prior to his trial. His affidavit, attached to his successive postconviction petition, alleged that Guevara handcuffed defendant to a wall and threatened him if he did not identify a person as the one who shot him. Guevara told defendant that all he had to do was come to the station and identify the person who shot him or he was going to prison for the rest of his life. Guevara then suggested that defendant confess to the murder, but defendant stated"[t]hat wasn't going to happen." Guevara told defendant he could leave if he participated in a lineup and after it was conducted, Guevara informed him that a witness had identified defendant as the murderer. Defendant also alleged that Detective Maher showed him the photograph Guevara used "to implicate [him] as the murderer in a photo and lineup array."

¶ 34 Although defendant knew of this alleged misconduct, he failed to raise this specific issue at trial or in his first postconviction petition. At trial, defense counsel argued that defendant was identified from overly suggestive photo arrays, but made no claim that Guevara physically coerced defendant or threatened to frame him in a murder. At his sentencing hearing, when given an opportunity to speak, defendant insisted he was framed by being placed in a lineup. However, he never indicated that Guevara first tried to coerce him into making a false identification by handcuffing him to the wall, or that Detective Maher told him Guevara showed witnesses a photo of him. In his initial postconviction petition, defendant continued to allege that he was identified using an overly suggestive photo array and lineup, and he named Guevara and Ernest Helvorsen as detectives who were involved in his investigation. However, defendant made no allegation that Guevara or any officer coerced him or singled him out to witnesses when they viewed the

photo arrays and lineup. Defendant does not point to any objective factor, external to the defense, which impeded his ability to raise the issue of Guevara's misconduct in a prior proceeding.

¶ 35 Our dissenting colleague argues that defendant has shown cause where newly discovered evidence of Guevara's past misconduct substantiates his claim that he was improperly identified as the offender in this case, citing *People v. Wrice*, 2012 IL 111860. In *Wrice*, the defendant argued at trial that Detective Peter Dignan and Sergeant Byrne beat and coerced him into making inculpatory statements, but the jury found him guilty on a theory of accountability. *Id.* ¶¶ 29-32, 37. The defendant continued to argue in all proceedings before the court that his statements were obtained through coercion. In support of his second successive postconviction petition, defendant cited to the Special State's Attorney's report which corroborated his consistent claims of police torture. Since the report was not released until 2006, and the defendant filed his prior postconviction petitions in 1991 and 2000, the State agreed that he satisfied the cause prong of the cause-and-prejudice analysis. *Id.* ¶ 49.

¶ 36 *Wrice*, however, has no application here where evidence of Guevara's past misconduct does not corroborate a consistent claim of coercion. While defendant has consistently maintained he was wrongly identified as the offender, he raises Guevara's coercion and misconduct for the first time in his successive petition. This is the issue that evidence of Guevara's past misconduct allegedly supports, and to which the cause-and-prejudice analysis applies. Although the supporting evidence may corroborate defendant's newly-raised contention, he does not point to any objective factor, external to the defense, which impeded his ability to raise this specific issue in a prior proceeding, especially where his affidavit states that prior to trial, Guevara handcuffed defendant to a wall to force him to identify a suspect in another case, and when he refused,

Guevara used his photo to show witnesses who identified defendant as the offender in this case. As such, he has not established the requisite "cause." *People v. Davis*, 2014 IL 115595, ¶ 56.

¶ 37 Although we may affirm based on defendant's failure to show cause, we also find that he has not established prejudice. In order to satisfy the prejudice prong, defendant must show that the claim not raised in his initial postconviction petition "so infected the entire trial that the resulting conviction or sentence violates due process."(fundamental fairness) *Pitsonbarger*, 205 Ill. 2d at 464. Where the supporting evidence is of a "substantial character that it would probably change the result on retrial," fundamental fairness requires consideration of the claim on its merits. *People v. Patterson*, 192 Ill. 2d 93, 139-40 (2000). Defendant may establish prejudice by showing that his new evidence satisfies the standard for granting a new trial. *People v. Orange*, 195 Ill. 2d 437, 450 (2001). "For new evidence to warrant a new trial, the evidence (1) must be of such conclusive character that it will probably change the result on retrial; (2) must be material to the issue, not merely cumulative; and (3) must have been discovered since trial and be of such a character that the defendant in the exercise of due diligence could not have discovered it earlier." *Id*. at 450-51.

¶ 38 In *Patterson*, our supreme court found that evidence of past police misconduct was material and would likely change the result upon retrial where the defendant "consistently claimed that he was tortured," his claims "are now and have always been strikingly similar to other claims involving the use of a typewriter cover to simulate suffocation," the officers he alleges were involved in his case are the same officers identified in other allegations, and his allegations "are consistent with the OPS findings that torture, as alleged by defendant, was systemic and methodical at Area 2 under the command of Burge." *Patterson*, 192 Ill. 2d 93 at 145. Similarly, this court in *People v. Nicholas*, 2013 IL App (1st) 103202, ¶ 40, found that the

defendant established prejudice where "he has consistently claimed that he was tortured," his claims and the manner in which the alleged beatings occurred "are strikingly similar to the physical abuse documented in the 2006 Report as to the time period, location, manner, method, participants and the role of the participants in securing coerced statements," and the detectives allegedly involved in the defendant's beatings were the same ones identified in other allegations of torture.

¶ 39 Unlike the defendants in *Patterson* and *Nicholas*, defendant here has not consistently alleged that Guevara coerced him and had witnesses identify him when he refused to cooperate, or shown why he could not have raised the issue in his first postconviction petition. Nonetheless, he argues that he has established prejudice where "[e]vidence of Guevara's pattern of misconduct, especially his willingness to coax, cajole, and threaten individuals to make false identifications, would have impeached Guevara's credibility and supported [defendant's] theory of misidentification." However, the cases he cites as support, *People v. Reyes*, 369 Ill. App. 3d 1 (2006), *People v. Almodovar*, 2013 IL App (1st) 101476, *People v. Montanez*, 2016 IL App (1st) 133726, and *People v. Serrano*, 2016 IL App (1st) 133493, are distinguishable.

¶ 40 The defendants in *Reyes* consistently alleged at trial and in all subsequent proceedings that they were coerced into giving an inculpatory statement by Guevara, although Guevara testified at trial that the defendants spoke voluntarily. *Reyes*, 369 Ill. App. 3d at 5-6. Thus, newly available evidence that Guevara used similar abusive tactics to extract confessions in other cases was relevant to establishing defendants' claims of coercion. *Id*. at 19. This court further found that "[i]f even a fraction of the allegations included in this evidence had been presented prior to trial, it appears likely that Guevara's credibility would have been damaged and defendants' confessions would have been suppressed. Without these confessions, the State's case against

defendants would have been severely weakened." *Id*. Defendant here did not give a statement to police, and his convictions were instead based on the positive identifications of three eyewitnesses. Additionally, *Reyes* involved an initial postconviction petition rather than a successive petition so the cause and prejudice analysis did not apply. Factually, *Reyes* is not applicable.

¶ 41 In *Almodovar*, *Montanez*, and *Serrano* the defendants alleged in their postconviction petitions that Guevara improperly influenced the witnesses' identification of them as the perpetrators. In each of these cases, the allegations were based on a witness who recanted his prior identification. The witnesses alleged that Guevara pointed out which photographs showed the perpetrator (*Almodovar*, 2013 IL App (1st) 101476, ¶ 42), or that the previous identification testimony was given in its entirety by Guevara, and was the result of threats, physical coercion and promises of special treatment (*Montanez*, 2016 IL App (1st) 133726, ¶ 11; *Serrano*, 2016 IL App (1st) 133493, ¶ 11). Thus, evidence of Guevara's past misconduct regarding witness coercion supported the defendants' postconviction allegations of Guevara's coercion and, "if true, would have a severe negative impact on the credibility of Detective Guevara's testimony that no such abuse occurred" in their cases. *Almodovar*, 2013 IL App (1st) 101476, ¶ 69. Given the fact that the defendants' convictions were based solely on the testimony of these witnesses, this supporting evidence was of a "substantial character that it would probably change the result on retrial." *Patterson*, 192 Ill. 2d at 139-40.

¶ 42 In contrast, no witness in defendant's case recanted their identification testimony or otherwise provided statements corroborating defendant's allegations that Guevara improperly influenced their identification of him. As we found in *McDowell*, No. 1-02-2410, there was "no evidence that any of the people who identified defendant were told whom to identify" and "[t]he

record reflects that three witnesses made separate, positive identifications of [defendant]" which was sufficient to prove him guilty beyond a reasonable doubt. *Id*. The only new evidence corroborating defendant's allegations was his affidavit, which the seventh circuit described as "self-serving and contain[ing] no indicia of reliability." *McDowell,* 737 F. 3d at 484. Without "some evidence corroborating defendant's allegations," mere evidence of Guevara's past misconduct is "insufficient to support a claim of coercion." *People v. Anderson,* 375 Ill. App. 3d 121, 138 (2007).

¶ 43 Furthermore, each of the State's three eyewitnesses gave positive and unwavering testimony at trial. Varela, Medina, and Morales-Santana testified that they had a good opportunity to view the offender's face in daylight. Varela was close enough that he hit the offender and chased him into the alley, Medina saw the offender in the yard from his second floor window, and Morales-Santana observed the offender from three feet away as he demanded her purse and car keys before fleeing in her car. Each witness separately and consistently identified defendant as the offender, first from the photo array, then in a lineup, and finally in person at trial. The trial court found that these witnesses were "not impeached in any significant way," and nothing in the record contradicts this finding. "The testimony of a single witness, if it is positive and the witness credible, is sufficient to convict." *People v. Smith,* 185 Ill. 2d 532, 541 (1999).

¶ 44 For these reasons, we find that defendant's evidence regarding Guevara's misconduct in other cases "was not of such a conclusive character that it would change the result on retrial in light of the evidence of the defendant's guilt; therefore, the defendant suffered no prejudice as a result of the claimed error." *Orange,* 195 Ill. 2d at 455.

¶ 45 The dissent argues that defendant "has at least drawn some connection between Detective Guevara's improper tactics and the witness identifications in this case," and would grant his request for a second-stage evidentiary hearing. However, we are mindful that the "cause-and-prejudice test for a successive petition involves a higher standard than the first-stage frivolous or patently without merit standard that is set forth in section 122-2.1(a)(2) of the Act." *People v. Smith*, 2014 IL 115946, ¶ 35. Otherwise, courts would treat successive petitions the same as initial petitions, which "ignores the well-settled rule that successive postconviction actions are disfavored by Illinois courts." *People v. Edwards*, 2012 IL 111711, ¶ 29.

¶ 46 To obtain leave to file a successive postconviction petition, defendant must demonstrate cause and prejudice and bear the burden of submitting sufficient documentation to allow a court to make that determination. *People v. Smith*, 2014 IL 115946, ¶ 32. The dissent points to defendant's argument that it is difficult for a *pro se* prisoner to obtain affidavits from eyewitnesses in his case, and would allow his successive petition to proceed to a second-stage hearing where "an attorney would have the opportunity to try to collect supporting evidence directly related to his case." The Act, however, does not allow defendant's case to advance to the next stage "in order to access the subpoena power available *** to embark on a search for unknown and unidentifiable evidence that might tend to show that Guevara engaged in any wrongdoing in this case." *People v. Gonzalez*, 2016 IL App (1st) 141660, ¶ 58. As discussed above, defendant's successive petition with supporting documentation was insufficient to justify further proceedings. Therefore, the trial court properly denied him leave to file his successive postconviction petition. *People v. Smith*, 2014 IL 115946, ¶ 35.

¶ 47 Defendant also alleged that his consecutive sentences violate due process because the trial court failed to make a specific finding that his consecutive sentences were necessary to

protect the public as required by section 5-8-4(b) of the Unified Code of Corrections (730 ILCS 5/5-8-4(b) (West 2016)). Defendant, however, makes no argument to show cause and prejudice as to this issue. In *Pitsonbarger*, our supreme court determined that section 122-3 of the Act "applies to claims and not to petitions," and thus defendant "must establish cause and prejudice as to each individual claim asserted in a successive petition, even if he demonstrates that his initial post-conviction proceeding was deficient in some fundamental way." *Pitsonbarger*, 205 Ill. 2d at 463.

¶ 48 Nonetheless, defendant cannot show cause or prejudice here. Defendant acknowledges that he raised this issue on direct appeal. He argues, however, that "for unknown reasons, [the appellate court] did not resolve it." Even taking defendant's allegation as true, he had knowledge of this particular oversight prior to the filing of his initial postconviction petition but failed to raise the issue in his petition. In *People v. Hicks*, 101 Ill. 2d 366, 374 (1984), our supreme court reiterated that the mandatory language of section 5-8-4(b) is permissive and therefore, this statutory requirement is subject to waiver. Where defendant does not request a specific finding regarding whether the sentence is necessary to protect the public, or "complain that a basis for the required statutory finding was not sufficiently articulated," he has waived consideration of the issue. *Id.* In the context of a successive postconviction petition, "the procedural bar of waiver is not merely a principle of judicial administration; it is an express requirement of the statute." *Pitsonbarger*, 205 Ill. 2d at 458.

¶ 49 Furthermore, the record shows that the trial court considered whether consecutive sentences were necessary to protect the public, and this court resolved the issue on direct appeal. Section 5-8-4(b) provides that "the court shall impose concurrent sentences unless *** it is of the opinion that consecutive sentences are required to protect the public from further criminal

conduct by the defendant, the basis for which the court shall set forth in the record." 730 ILCS 5/5-8-4(b) (West 2016). Defendant contends that the statute requires the trial court to make a specific finding that his sentences were necessary to protect the public. However, contrary to defendant's contention, the trial court "need not recite the language of the statute in reaching its determination." *Id*. at 375.

¶ 50 At sentencing, the State argued for a lengthy sentence because "defendant should never be allowed back out of jail. He is too dangerous, has too little regard for human life, for the rights of other people in our community." Prior to sentencing defendant, the trial court considered the presentence investigation report which revealed that in 1992, "defendant entered an admission as a juvenile for robbery." Also, "defendant had never been employed and had no contact with his two children whom he did not support." The court described the murder of Mario during the Christmas season as "senseless," and spoke of how Mario's family "will have to remember that this was the time when they lost their loved one in his own backyard." It recounted how after Mario was murdered, defendant pointed a handgun and fired shots at those who came to Mario's aid and "but for the grace of God *** would have fallen dead." After fleeing that scene, he encountered Morales-Santana only blocks away and took her car at gunpoint. It noted defendant's "unmitigated gall to commit these acts in broad open daylight." The trial court was "struck" by defendant's "apparent callousness" and was not optimistic about the possibility of his rehabilitation.

¶ 51 As our supreme court found in *Hicks*, "the record clearly indicates that the sentencing judge was convinced in light of all of the facts and circumstances before him that a consecutive term was necessary for the protection of the public. The statute requires nothing more." *Id*. at 376. On appeal, this court pointed to the trial court's findings and affirmed defendant's sentences

because the trial court "carefully outlined its reasons for imposing relatively severe sentences for each crime and indicated why defendant would not be a good candidate for rehabilitation." *McDowell*, No. 1-99-1851 (2002) (unpublished order under Illinois Supreme Court Rule 23). Since this issue was raised and decided at trial and on direct appeal, it is barred as *res judicata*. *Towns*, 182 Ill. 2d at 502-03.

¶ 52 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 53 Affirmed.

¶ 54 JUSTICE MIKVA, dissenting in part:

¶ 55 I dissent in reference to the claim that Detective Guevara improperly influenced witnesses. Mr. McDowell has made the necessary showing of cause and prejudice to file a successive post-conviction petition on this claim and proceed to a second stage-hearing, under section 122-1(f) of the Post-Conviction Hearing Act. 725 ILCS 5/122-1(f) (West 2016).

¶ 56 As the majority notes, "cause" to file a successive petition under the Post-Conviction Hearing Act is "any objective factor, external to the defense, which impeded the petitioner's ability to raise a specific claim in the initial post-conviction proceeding" *Pitsonbarger*, 205 Ill. 2d 444, 464 (2002). And our supreme court has held that that "cause" exists where "newly discovered evidence substantiate[s]" a claim that the defendant already knew of but lacked sufficient evidence to present. *People v. Wrice*, 2012 IL 111860, ¶¶ 35, 90.

¶ 57 Such cause exists in this case. Mr. McDowell has maintained, from the time of his trial in 1999, that his identification as the perpetrator of these crimes was wrong. He has known since his conversation with Detective Maher, when he was arrested in 1997, that Detective Guevara showed the three eyewitnesses a photo of him to ensure that they would identify him, and only him, in a

photo array and then in a line-up. But when Mr. McDowell was tried and convicted in 1999, Detective Guevara was a trusted member of the Chicago police force. At that time, Mr. McDowell had little to rebut the detective's unequivocal testimony that he had done nothing to influence the identifications.

¶ 58 The majority points out that by the year 2000, which was before Mr. McDowell filed his first postconviction petition in 2002, a newspaper article reported claims made by a number of incarcerated men about Detective Guevara's misconduct. *Supra* ¶ 33. However, at that point, those claims of misconduct had not yet been verified. In the following years, and continuing up until today, there have been a series of postconviction proceedings and civil suits in which significant evidence has been amassed to show that Detective Guevara engaged in a pattern of egregious misconduct in order to "solve" cases, some of which is remarkably similar to what Mr. McDowell claims occurred here.

¶ 59 For example, in *People v. Montanez,* 2016 IL App (1st) 133726, ¶¶ 16, 18, this court reversed a directed verdict in favor of the State in a third-stage postconviction evidentiary hearing, when a claim was raised based on Detective Guevara's misconduct. We noted that the following evidence had been included at the evidentiary hearing on May 15, 2013:

> "William Dorsch, a retired Chicago police department detective, testified about a case he worked on with Guevara a couple of years before this case came about. In that case, the detectives were conducting a photographic lineup with two supposed eyewitnesses. Dorsch testified that when one of the witnesses seemed unable to make an identification, Guevara pointed to one of the pictures and said 'that's him.' The witness then agreed with Guevara's suggestion and went on to identify the person in a live lineup.

* * *

> [A]ffidavits [by eyewitnesses] swearing that they were pressured by Guevara to identify an individual in a lineup whom they knew was not the perpetrator. Those affiants stated that Guevara and Halvorsen showed them photographs of the person they were supposed to pick out of the lineup or told them under which number in the lineup the person the detectives wanted selected would be located." *Id.*

¶ 60 And in 2016, in *People v. Gonzalez*, 2016 IL App (1st) 141660, ¶ 57, we noted this about the evidence accumulating against Detective Guevara:

> "Gonzales points out, and we acknowledge, that as criminal cases in Cook County involving Guevara have been gradually coming to light, he has begun to invoke his fifth amendment privilege against self-incrimination in various criminal and civil litigation matters. For postconviction analysis purposes, after reviewing Gonzalez's appendix there is little doubt that Guevara was engaged in a pattern of improperly influencing witness identifications." *Id.*

¶ 61 Mr. McDowell's *pro se* petition includes those details he could gather from his prison location to support his argument that new information supports his claim that Detective Guevara used these same techniques to cause witnesses to misidentify him as a murderer and carjacker. He attaches his own affidavit describing his conversation with Detective Maher, as well as a police report confirming that Detective Maher was present during the line-up conducted by Detective Guevara and indicating that one of the witnesses did not speak English which, as we noted in *Montanez*, is something that has made witnesses particularly attractive targets for Detective Guevara. See *Montanez*, 2016 IL App (1st) 133726, ¶ 34 (noting that "[a]lmost all of the purported

victims [were] Hispanic and many did not speak fluent English, giving Guevara the opportunity to coerce them more easily.").

¶ 62 For "new" evidence, Mr. McDowell includes a newspaper article, from 2009, describing how Juan Johnson, a former gang member, won a $21 million verdict because of Detective Guevara's improper tactics in persuading witnesses to identify him as a murderer. Mr. McDowell includes articles from 2010 and 2011, telling how other defendants have been able to persuade courts that Detective Guevara's illegal investigative techniques had put them in prison. Mr. McDowell has included supportive affidavits filed in other cases. One affidavit, prepared in 2008, is from a lawyer who details how Detective Guevara obtained a false confession. A second affidavit, the date of which is unclear, is from an expert who analyzes Detective Guevara's techniques to obtain confessions and identifications. The expert opines that the detective's identification procedures are "highly irregular" and that, on several occasions, witnesses who had not been able to make an identification "suddenly found themselves able to identify the suspect in a lineup or photo spread," after meeting with Detective Guevara.

¶ 63 Jennifer Bonjean, a New York civil rights lawyer, filed a motion to reconsider on behalf of Mr. McDowell in this case. She noted that "since the Juan Johnson verdict" in 2009, "an extraordinary amount of evidence has been amassed showing that Detective Guevara has engaged in a long pattern of manipulating witnesses, fabricating evidence, concealing exculpatory evidence, and causing the prosecutions of innocent persons." She estimated that there were 40 known cases in which Detective Guevara engaged in misconduct, "including many cases in which he manipulated eyewitness testimony—as he did in this case." She attached records from other postconviction cases, including trial court transcripts from recent cases in which Detective Guevara invoked his fifth amendment right to avoid self-incrimination. Mr. McDowell and Ms.

Bonjean have provided substantial information that postdates Mr. McDowell's original postconviction petition. Mr. McDowell has made the threshold showing of "cause" necessary for him to file a successive petition.

¶ 64 We found "cause" was satisfied on this basis in *People v. Almodovar*, 2013 IL App (1st) 101476, and the evidence against Detective Guevara has only continued to accumulate since that case was decided in 2013. In *Almodovar*, as here, there was a "the lack of evidence [at the time of the defendant's trial and first postconviction petition] as to Detective Guevara's alleged pattern and practice of improperly influencing witness identifications of suspects that he targeted." *Id.* ¶ 75. In *Almodovar*, we reversed the trial court's denial of the defendant's request to file a successive postconviction petition and remanded the case for a second-stage hearing. That is all that Mr. McDowell is requesting here.

¶ 65 Mr. McDowell has also shown prejudice. As the majority notes, prejudice is shown when the claim raised "so infected the entire trial that the resulting conviction or sentence violates due process." *Pitsonbarger*, 205 Ill. 2d at 464. If Mr. McDowell is able to show that misconduct by Detective Guevara tainted the eyewitness identifications in his case, that conduct would surely have "infected the entire trial." See *Foster v. California*, 394 U.S. 440, 443 (1969) (concluding that suggestive identification procedure "so undermined the reliability of eyewitness identification as to violate due process").

¶ 66 There was absolutely no evidence against Mr. McDowell other than the eyewitness identifications. If, as he claims, the identifications were improperly influenced, Mr. McDowell is likely innocent. The identifications came almost seven months after the crimes Mr. McDowell was charged with had occurred. Detective Guevara contacted the eyewitnesses and obtained the identifications, apparently out of the blue, just days after Mr. McDowell came into contact with the

police because he was the victim of a drive-by shooting. This raises the possibility that Detective Guevara found Mr. McDowell to be a convenient defendant for a crime in which the perpetrator had been described as a black man in his twenties. Mr. McDowell had only one prior felony conviction for robbery, which is not a criminal history that would suggest Mr. McDowell would brutally murder a stranger outside his garage, shoot someone who came to that man's aid, and then hijack a car. The witnesses were all Hispanic, and apparently one of the witnesses did not speak English. Mr. McDowell is black. As Mr. McDowell points out, "courts across the county now accept that *** cross-racial identifications are considerably less accurate than same race identifications." *State v. Guilbert,* 49 A.3d 705, 721-22 (Conn. 2012) (collecting cases). And, as we have recognized, part of Detective Guevara's *modus operandi* was to take advantage of Hispanic witnesses. *Montanez*, 2016 IL App (1st) 133726, ¶ 34. All of this leaves me with great concern that Detective Guevara's zeal for solving crimes at all costs could have resulted in life in prison for an innocent man. There can be no question as to prejudice.

¶ 67 The majority attempts to distinguish *Almodovar* on the basis that, at the original trial in that case, one of the witnesses recanted his identification and testified that Detective Guevara had told him which photograph showed the perpetrator, whereas here no witness has recanted or provided an affidavit confirming that Mr. Guevara employed his pattern and practice of improperly suggestive tactics with the eyewitnesses in Mr. McDowell's case. *Supra* ¶¶ 37-38. As Mr. McDowell points out, however, it would be very hard for him, as a *pro se* prisoner, to obtain any affidavits or testimony from the eyewitnesses in his case. While an attorney did prepare the motion to reconsider for him, she had only 30 days to do so and she was not based in Chicago. Mr. McDowell only asks at this point for a second-stage hearing at which an attorney would have the opportunity to try to collect supporting evidence directly related to his case. Mr. McDowell has at

least drawn some connection between Detective Guevara's improper tactics and the witness identifications in this case, through his own recounting of his conversation with Detective Maher, who told Mr. McDowell that Detective Guevara had shown witnesses Mr. McDowell's photograph so that they would identify him.

¶ 68 This evidence of Detective Maher's statement, which is corroborated in part by the police report showing that Detective Maher was, in fact, on the case and present when Detective Guevara met with the witnesses, distinguishes this case from our decision in *Gonzalez*. In *Gonzalez*, after a *second stage* proceeding, the defendant was unable to present "any evidence, however slight, that Detective Guevara coerced, improperly influenced or intimidate a witness" in his case, even with the help of appointed counsel. In this case, Mr. McDowell has presented evidence, which is more than slight, and he has not even had the opportunity to amend his petition with the assistance of appointed counsel at the second stage. That is all that he is seeking at this point. I dissent and would allow Mr. McDowell's request for leave to file his successive postconviction petition and for a second-stage hearing on the claim that Detective Guevara improperly influenced the three eyewitness identifications used to convict Mr. McDowell.

¶ 69 I concur in the remainder of the court's opinion.