

defendant's conviction was affirmed as the evidence of his guilt was "overwhelming," but his sentence was vacated and the cause remanded for resentencing because it was unclear from the record what basis the trial court used to impose the extended-term sentence. *People v. Fletcher*, No. 5-00-0323 (Dec. 27, 2001) (unpublished order pursuant to Supreme Court Rule 23(b) (eff. July 1, 1994)). On remand, the trial court imposed a 60-year nonextended-term sentence in the Department of Corrections. This court affirmed the 60-year sentence in *People v. Fletcher*, No. 5-03-0074 (Nov. 26, 2003) (unpublished order pursuant to Supreme Court Rule 23(b) (eff. July 1, 1994)). The facts underlying defendant's conviction have been set forth sufficiently in the past, and we see no need to repeat them here.

¶ 5 On September 20, 2004, defendant filed his first petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2004)). On September 22, 2004, the trial court summarily dismissed the petition as "frivolous and patently without merit." This court affirmed the trial court's summary dismissal in *People v. Fletcher*, No. 5-04-0673 (July 20, 2007) (unpublished order pursuant to Supreme Court Rule 23(b) (July 1, 1994)). On October 29, 2008, defendant requested leave to file a successive petition for postconviction relief. On November 25, 2008, the trial court denied defendant's request for leave to file a successive petition. Defendant now appeals.

¶ 6

ANALYSIS

¶ 7 The issue we are asked to address is whether the trial court erred in denying defendant leave to file a successive petition for postconviction relief. Defendant argues that his postconviction petition presented sufficient facts to satisfy the cause-and-prejudice test for filing a successive postconviction petition and that, therefore, the trial court erred in summarily dismissing his successive petition. Defendant raises five allegations of cause and prejudice: (1) speedy trial violation, (2) concealment of information that the State contacted

the federal prosecutor in order to help the jailhouse informant, Jody Wesley, (3) failure of the State to disclose a police report that indicated that Nekemar Pearson was seen alive on July 3, 1995, (4) suppression of evidence by the State that it gave Larry Greer favorable treatment to testify against defendant, and (5) suppression of other evidence favorable to the defense. The State replies that the trial court did not err in dismissing his successive petition because defendant failed to meet the cause-and-prejudice test with regard to all five allegations. After careful consideration, we agree with the State.

¶8 A dismissal of a postconviction petition without an evidentiary hearing before the trial court is reviewed *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 389, 701 N.E.2d 1063, 1075 (1998). We point out that there are difficult obstacles to be overcome before a successive postconviction petition will be granted. Pursuant to section 122-3 of the Act, "Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2006). Moreover, a ruling on an initial postconviction petition has the effect of *res judicata* with respect to all of the claims that were raised or could have been raised in the initial petition. *People v. Flores*, 153 Ill. 2d 264, 274, 606 N.E.2d 1078, 1083 (1992). However, an exception to the waiver language contained in section 122-3 will be made in cases in which fundamental fairness requires such an exception. See *People v. Pitsonbarger*, 205 Ill. 2d 444, 459, 793 N.E.2d 609, 621 (2002).

¶9 *Pitsonbarger* adopted the cause-and-prejudice test as the analytical tool for determining whether fundamental fairness allows for a relaxation of the waiver rule contained in section 122-3 of the Act. *Pitsonbarger*, 205 Ill. 2d at 459, 793 N.E.2d at 621. The cause-and-prejudice test adopted by our supreme court in *Pitsonbarger* is codified in section 122-1(f) of the Act, which states as follows:

"Only one petition may be filed by a petitioner under this Article without leave of the court. Leave of court may be granted only if a 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. For purposes of this subsection (f): (1) a prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings; and (2) a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f) (West 2006).

In the instant case, the trial court specifically found defendant "failed to demonstrate sufficient cause and prejudice to consider his claims." The trial court, therefore, denied defendant's successive petition.

¶ 10 With regard to the alleged speedy trial violations, defendant contends, *inter alia*, that he was unaware his trial counsel obtained repeated continuances and that this was done without defendant's consent or knowledge. We first point out that this is not the first time defendant could have raised this argument. After his conviction, defendant immediately appealed, and while his conviction was affirmed, the cause was remanded for a new sentencing hearing. After he was resentenced, defendant again appealed. Contrary to defendant's assertions, the record before us indicates that defendant received copies of both the transcripts and the common law record during these appeals; thus, pursuant to section 122-3 of the Act, defendant has waived the issue by not raising it in his initial postconviction petition.

¶ 11 Even assuming, *arguendo*, that the issue was not waived and defendant did not receive the record prior to 2008, we are unconvinced by defendant's argument. Defendant was represented by counsel, and we agree with the State that the record need not always show that defense counsel received defendant's permission to seek or agree to continuances. *People v. Bowman*, 138 Ill. 2d 131, 142, 561 N.E.2d 633, 639 (1990). Such a requirement "would

intolerably burden the trial courts." *Bowman*, 138 Ill. 2d at 142, 561 N.E.2d at 639. Moreover, a party that fails to promptly repudiate his attorney's unauthorized act upon receiving knowledge of such an act effectively ratifies the act. *Bowman*, 138 Ill. 2d at 143, 561 N.E.2d at 639. Defendant has also failed to convince us that appellate counsel was ineffective for failing to challenge a 7-day delay between January 10, 2000, and January 18, 2000, because as the State points out, defendant cannot show prejudice because the delay would not have made any difference in calculating 120 days. Defendant has failed to convince us that he was denied his right to a speedy trial and effective assistance of counsel because he has failed to show either cause or prejudice.

¶ 12 We next consider defendant's allegation that the State suppressed information that it contacted a federal prosecutor to help in the federal case of Jody Wesley, who testified against defendant. Wesley denied that his testimony was the product of any deal. The fact that a Madison County unlawful restraint charge and an aggravated battery charge were dismissed after Wesley testified against Larry Greer does not show sufficient prejudice because we have no idea what evidence there was against Wesley on either of the charges that were dismissed. There very well may have been insufficient evidence on both of the charges. Moreover, Wesley merely stated that he believed it was possible that someone may have contacted the federal prosecutor about his pending federal charges. That person is never identified, but, even more importantly, Wesley testified that he ultimately ended up getting a longer federal sentence than anticipated. Under these circumstances, defendant has failed to show the requisite amount of prejudice to advance this claim further.

¶ 13 Defendant also argues that the State failed to disclose *Brady* evidence consisting of a police report that indicated that Nekemar Pearson was seen alive on July 3, 1995. We are aware that the State presented evidence at trial that defendant's motive for killing the victim, Brian Warr, was gang-related and was done in revenge for the killing of Nekemar Pearson.

Pearson's murder allegedly occurred on June 24, 1995. Pearson's mother reported him missing on June 26, 1995. Brian Warr gave a statement to police that he was present when James Evans shot and killed Pearson. Warr was killed two days later. Evans was eventually convicted of murdering Pearson. In his successive petition, defendant attached a purported copy of an incident report prepared by a detective which stated that the detective observed Nekemar Pearson in the company of another person on July 3, 1995. Defendant purportedly received the incident report from James Evans in 2008, so this is newly discovered evidence, which the State failed to provide him. Defendant contends that, based upon the detective's report, Pearson was alive on July 3, 1995, and, therefore, Warr could not have been a witness to Pearson's murder, and, therefore, he would not have any reason to kill Warr because Evans would not have had a reason to pay defendant to kill Warr.

¶ 14 The State is constitutionally required to disclose evidence that is both favorable to the accused and material to either guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Evidence is material where there is a reasonable probability that if the evidence was disclosed to the defense, the result of the proceeding would have been different. *People v. Burt*, 205 Ill. 2d 28, 48, 792 N.E.2d 1250, 1263 (2001). In order to succeed on a *Brady* claim, a defendant must show that (1) the evidence is favorable to him because it is either exculpatory or impeaching, (2) the evidence was wilfully or inadvertently suppressed by the State, and (3) prejudice resulted to him. *Burt*, 205 Ill. 2d at 47, 792 N.E.2d at 1263.

¶ 15 Whatever the motive for Warr's killing, the evidence in the instant case was overwhelming that defendant killed Warr, and the incident report was not exculpatory to defendant. We know for sure that Nekemar Pearson and Brian Warr are both dead. We also point out that in defendant's initial appeal, defendant did not even raise a challenge to the sufficiency of the evidence. See *People v. Fletcher*, No. 5-00-0323 (Dec. 27, 2001) (unpublished order pursuant to Rule 23). Numerous witnesses testified that defendant

confessed to them that he killed Warr. On the day Warr was murdered, several witnesses heard defendant say he was going to kill somebody that evening. Evidence placed defendant in a car that was seen at the Chess Club, the nightclub where Warr was shot, moments before gunshots were heard. Other evidence linked defendant to the same type of gun that was used in killing Warr. Finally, numerous witnesses testified that defendant threatened to harm them if they testified against him at trial. Under these circumstances, we do not believe defendant was prejudiced by not receiving the incident report in question.

¶ 16 The next reason cited by defendant in his quest to file a successive posttrial motion is that the State suppressed evidence that it gave Larry Greer favorable treatment to testify against him and offered Greer six years in exchange for his testimony. While Greer's pretrial counsel, Thomas Hildebrand, did testify at Greer's trial that Greer had been offered a 6-year deal, it is clear that Greer did not take that deal and has since been tried before a jury, convicted, and sentenced to 40 years in the Department of Corrections for first-degree murder in the death of Brian Warr based upon a theory of accountability. *People v. Greer*, No. 5-09-0257 (Feb. 22, 2012) (unpublished order pursuant to Supreme Court Rule 23 (eff. Jan. 1, 2011)).

¶ 17 Moreover, we point out that Greer was not even called as a witness by the State in defendant's trial. It was defendant who attempted to call Greer as a witness, but Greer asserted his fifth amendment (U.S. Const., amend. V) right against self-incrimination and refused to testify. Even after receiving a grant of immunity by the State, Greer still refused to testify against defendant. Under these circumstances, we agree with the State that any information relating to favorable treatment given to Greer by the State is irrelevant. Given the fact that Greer did not testify against defendant, defendant cannot show how he was prejudiced by any favorable treatment allegedly given to Greer.

¶ 18 The final argument raised by defendant is that the State suppressed other evidence

favorable to defendant and that there were inconsistent theories presented by the State in the prosecution of defendant and Greer which require us to ignore the waiver rule for the filing of a successive posttrial motion. We see no reason to belabor the point. The evidence in this case was overwhelming that defendant killed Brian Warr. Greer was not the triggerman, but his failure to do anything to stop defendant from killing Warr was his ultimate downfall. Greer gave the police numerous statements, and, while there were inconsistencies, the gist of them was that Warr's shooting was gang-related and in retaliation for the killing of Pearson. Defendant was convicted because he incriminated himself by both his words and his actions. We fail to see how defendant was prejudiced by the alleged suppression of any of the evidence of which he now complains, as none of it was exculpatory. We find that the circuit court properly denied defendant's petition for the filing of a successive postconviction petition on this or any other basis raised herein.

¶ 19 For the foregoing reasons, the judgment of the circuit court of Madison County is affirmed.

¶ 20 Affirmed.