

FOURTH DIVISION  
November 14, 2013

No. 1-11-0505

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

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County.
	)	
v.	)	No. 94 CR 28835
	)	
ALONZO FRANKLIN,	)	Honorable
	)	Thomas Joseph Hennelly,
Petitioner-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE HOWSE delivered the judgment of the court.  
Justices Lavin and Epstein concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court’s order denying leave to file a successive petition is affirmed. The failure to admonish petitioner regarding recharacterizing his posttrial motion as a successive postconviction petition was cured by the appointment of counsel and Illinois Supreme Court Rule 651(c) did not apply. Petitioner failed to file additional successive petitions raising new claims and petitioner cannot pass the cause and prejudice test for his properly raised claim, where the evidence in support of that claim was not newly discovered.

¶ 2 In 1995, the circuit court of Cook County convicted petitioner, Alonzo Franklin, of one count of first degree murder and one count of aggravated battery, and sentenced him to concurrent terms of imprisonment of 60 and 20 years, respectively. This court affirmed petitioner's conviction and sentence on direct appeal. In 1998, petitioner filed his first petition for postconviction relief. The trial court summarily dismissed the petition and this court affirmed. In 2007, petitioner filed a *pro se* petition for *habeas corpus* relief. The trial court recharacterized the pleading as a successive petition for postconviction relief and appointed counsel. The trial court denied leave to file a successive petition for postconviction relief, finding that petitioner failed to demonstrate cause and prejudice. For the following reasons, we affirm.

¶ 3

### BACKGROUND

¶ 4 Our unpublished orders disposing of petitioner's direct appeal of his conviction and sentence and first petition for postconviction relief set forth the background of this case leading up to petitioner's *pro se* petition for *habeas corpus* relief. On December 2, 2007, petitioner filed a document *pro se* titled "Petition of *Habeas Corpus*-State" in which petitioner sought an order for his immediate release "from his wrongful conviction due to the prosecution [*sic*] suppression of evidence." The *pro se* pleading alleged the State failed to provide a copy of the results of a test on petitioner for gunshot residue (GSR) in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The pleading argued that the negative GSR test result would have supported petitioner's defense. The pleading alleges that the State continued discovery while the public defender

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represented petitioner with knowledge that petitioner was obtaining private counsel, but the State failed to inform petitioner's new attorney of the discovery continuance. Petitioner "was aware of the activity taken [sic] place during the line up but was not aware of the evidence being inventoried" including the GSR testing kit. The petitioner also complains that petitioner's attorney failed to conduct an investigation or to call any expert witnesses.

¶ 5 On February 29, 2008, petitioner appeared before the trial court on his request for *habeas corpus* relief. The court admonished petitioner as follows:

"Mr. Franklin, the reason I brought you in I need to make some inquiries. You filed this under the Civil Procedure Code. Therefore you wouldn't be entitled to have an attorney to represent you. You have to represent yourself on this petition.

Or I can ask you, it would be your second postconviction petition, if I recharacterize this as a postconviction petition, then I would appoint an attorney from the public defender's office to represent you if you could not afford one.

You raised an issue concerning the gunshot residue test. I was not the trial judge in this case and I have not reviewed the record in your case. So you've indicated that your constitutional rights were violated because the state withheld the gunshot residue test from you.

\*\*\*

THE COURT:           So, I don't know. But if they did and if it's a false allegation, I'll warn you now I'm going to assess you fines and fees and your good time will be taken away from you because of a frivolous petition being filed.

                          The first thing I want to know do you want to go forward on the petition for *habeas corpus*?

DEFENDANT:           Yes, I do.

THE COURT:           Do you want me to recharacterize this as a postconviction petition?

DEFENDANT:           I wish you characterize [*sic*] it as a postconviction.

THE COURT:           The public defender will be appointed."

¶ 6     The trial court informed petitioner a public defender would contact petitioner and that he would have a hearing in a couple of months. The court stated: "That will be the order. Petition for *habeas corpus* characterized as a postconviction petition and the public defender will be appointed."

¶ 7     On October 20, 2008, the parties appeared in the trial court. Petitioner's counsel informed the court he had not received the record from the appellate court, but that petitioner was sending counsel petitioner's copy of the appellate court record "so we can at least get started with this thing." Petitioner's counsel also informed the court he would be issuing subpoenas. The State acknowledged receipt of petitioner's subpoena and then requested leave from the court to

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file a motion to dismiss pursuant to section 122-1(f) of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1(f) (West 2008)) on the ground petitioner had not sought leave to file a successive petition. The State informed the court it would be objecting to petitioner's subpoenas because petitioner had not shown good cause. The court continued the matter for petitioner's response to the State's motion.

¶ 8 On January 8, 2009, petitioner filed his response to the State's motion to dismiss. Petitioner attached a copy of the trial record to the response. The trial court continued the matter for a hearing on the State's motion to dismiss.

¶ 9 The State's written motion argues that because the petitioner must demonstrate that the cause and prejudice test is satisfied for each claim in the successive petition before the petition may be filed for further consideration, the petition was "erroneously \*\*\* on the docket in order for second stage proceedings to take place." The State argued that because petitioner had failed to file a pleading demonstrating that the cause and prejudice test was satisfied his subsequent petition should be dismissed without consideration of its merits.

¶ 10 At the hearing on the State's motion to dismiss on June 24, 2009, petitioner's counsel informed the court he did not receive the record until after the State filed its motion to dismiss. Counsel sought an order from the trial court to obtain the appellate court record and stated he did not receive the record from the circuit court. Counsel stated he "had to get what Mr. Franklin had of the record. I still don't have the record--the official record from anyone. So basically, I did the best I could with what Mr. Franklin presented to me."

¶ 11 Petitioner's counsel argued that despite the State's assertion that the GSR test kit is listed

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on the arrest report, is indicated on the inventory sheets from the trial, and the GSR kit is listed in the State's response to petitioner's discovery request as "discovery that was tendered to defense counsel," the State had failed to cite any evidence it actually tendered the results of the test.

Counsel noted the absence of a receipt signed by defense counsel at trial. Petitioner's counsel also argued that the result of the GSR test was exculpatory in the context of the facts of petitioner's case, where petitioner was charged with firing a TEC-9 handgun ten times and was arrested within 20 minutes of allegedly having fired the weapon.

¶ 12 The court found that petitioner did not satisfy the requirement of cause and prejudice and ruled that "the petition, although considered, \*\*\* is denied." The court found that petitioner failed to satisfy the cause and prejudice test because the court did not believe that the gunshot residue test was not tendered. The court found "it was given by way of arrest report, it was given by way of inventory sheet, and there was also a reference in the detective's supplemental report that a gunshot residue test was given." The court found the defense was aware of the test and that the defense was able "to present that if they so chose." The court also mentioned as a potential "third element" a claim of actual innocence, but the court stated that the results of the GSR test would not reach that point, either. The trial court denied leave to file a successive petition. The court stated, "I do not believe the petitioner has sustained its burden under 122(1)(f), the state's request the postconviction be dismissed is granted."

¶ 13 This appeal followed.

¶ 14 ANALYSIS

¶ 15 In addition to the merits of the petition itself, petitioner argues that procedural errors

occurred during the postconviction proceedings that require remand. Before addressing the merits of the petition, we will decide whether remand is required for compliance with any procedural rules. “Our review of an attorney’s compliance with a supreme court rule, as well as the dismissal of a postconviction petition on motion of the State, is *de novo*.” *People v. Profit*, 2012 IL App (1st) 101307, ¶17. “We review *de novo* the question of whether the trial court has used the proper procedure.” *People v. Corredor*, 399 Ill. App. 3d 804, 806 (2010).

¶ 16

#### 1. Admonishments

¶ 17 Petitioner argues that the trial court’s order must be reversed because the trial court failed to properly admonish him before recharacterizing his *habeas corpus* petition as a successive postconviction petition as required by *People v. Shellstrom*, 216 Ill. 2d 45 (2005). In *Shellstrom*, our supreme court held that:

“when a circuit court is recharacterizing as a first postconviction petition a pleading that a *pro se* litigant has labeled as a different action cognizable under Illinois law, the circuit court must (1) notify the *pro se* litigant that the court intends to recharacterize the pleading, (2) warn the litigant that this recharacterization means that any subsequent postconviction petition will be subject to the restrictions on successive postconviction petitions, and (3) provide the litigant an opportunity to withdraw the pleading or to amend it so that it contains all the claims appropriate to a postconviction petition that the litigant believes he or she has.” *Shellstrom*, 216

Ill. 2d at 57.

¶ 18 In *People v. Pearson*, 216 Ill. 2d 58, 68 (2005), our supreme court extended *Shellstrom* to recharacterizations of pleadings as successive postconviction petitions. The court held that:

“prior to recharacterizing as a successive postconviction petition a pleading that a *pro se* litigant has labeled as a different action cognizable under Illinois law, the circuit court must (1) notify the *pro se* litigant that the court intends to recharacterize the pleading, (2) warn the litigant that this recharacterization means that the petition will be subject to the restrictions on successive postconviction petitions, and (3) provide the litigant an opportunity to withdraw the pleading or to amend it so that it contains all the factors and arguments appropriate to a successive postconviction petition that the litigant believes he or she has.” *Pearson*, 216 Ill. 2d at 68.

¶ 19 Petitioner argues that in this case the trial court did not admonish him that his successive postconviction petition would be subject to the additional restrictions on such petitions and did not provide petitioner an opportunity to withdraw and amend the petition. The State responds that any error in admonishing petitioner was rectified by the appointment of counsel to represent him during postconviction proceedings. The State argues that *People v. Stoffel*, 239 Ill. 2d 314, 328 (2010), applies at any stage of postconviction proceedings to cure a failure to admonish because the admonishments:

“are designed to protect the rights of *pro se* defendants and, in particular, to inform them of the limitations on filing successive post-conviction petitions and the need to amend their initial petition to include all possible post-conviction claims. [Citation.] [T]his is precisely the role performed by appointed counsel, who is required to consult with the defendant and make any amendments to the *pro se* petition that are necessary.” *Stoffel*, 239 Ill. 2d at 328.

¶ 20 The State argues that *Shellstrom* and *Pearson* do not apply where a petitioner has counsel because counsel is required to provide the safeguards to the petitioner’s rights which the admonishments are meant to protect. Petitioner recognizes our supreme court’s holding in *Stoffel*, 239 Ill. 2d at 328, that “where, as here, a defendant’s *pro se* petition is not summarily dismissed but is instead advanced for further review, and counsel is appointed to represent the defendant, *Shellstrom* admonitions are unnecessary.” *Stoffel*, 239 Ill. 2d at 328. Petitioner argues that *Stoffel* is not controlling in this case because the holding--that advancing a petition to the second stage and appointing counsel cures any error in failing to give the required admonishments--was *dicta* in the *Stoffel* decision. Additionally, petitioner argues that the *dicta* in *Stoffel* is less persuasive here because that holding presumed the petition was advanced to the second stage of postconviction proceedings, and in this case it is not clear the petition was advanced to the second stage.

¶ 21 “Statements in a judicial opinion that are something less than a holding are, of course, *dicta*.” *People v. Petrenko*, 237 Ill. 2d 490, 517 fn. 2 (2010) (Freeman, J., specially concurring.)

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Our supreme court's holding that *Shellstrom* admonitions are unnecessary when counsel is appointed to represent the petitioner on a recharacterized postconviction petition is not *dicta*. See *Stoffel*, 239 Ill. 2d at 328 (“We agree and *hold* that where, as here, a defendant's *pro se* petition is not summarily dismissed but is instead advanced for further review, and counsel is appointed to represent the defendant, *Shellstrom* admonitions are unnecessary.”) (Emphasis added.)

¶ 22 Petitioner is correct that a question in *Stoffel* was whether the trial court in that case had indeed recharacterized the defendant's pleading as a postconviction petition for purposes of further proceedings under the Act. See *Id.* at 332 (Karmeier, J., dissenting). However, petitioner is incorrect that the *Stoffel* court's holding regarding *Shellstrom* admonitions was unnecessary to the disposition of that question. See *People v. Starks*, 2012 IL App (2d) 110273, ¶36 (“Both *obiter* and judicial *dicta* are ‘comments in a judicial opinion that are unnecessary to the disposition of the case.’”). The *Stoffel* court held that its “conclusion that defendant's petition was recharacterized by the trial court is not at odds with our holding in *Shellstrom* that unless the *pro se* defendant is first notified of recharacterization ‘the pleading can not be considered to have become a postconviction petition for purposes of applying to later pleadings the Act's restrictions on successive postconviction petitions. [Citation.]” *Stoffel*, 239 Ill. 2d at 327-28. Thus, absent the holding that admonitions were not required because counsel was appointed, the court would not have been able to conclude that the pleading in *Stoffel* had been recharacterized. The holding at issue was, therefore, “necessary” to the disposition of the case.

¶ 23 Although *Stoffel* was a second-stage case, we believe the *Stoffel* court's logic applies with

equal force to the instant case. In both cases, counsel was appointed following recharacterization and had an opportunity to amend the pleading. Given counsel's guidance in this case, it is difficult to see what harm could have resulted from the *Shellstrom-Pearson* error.

¶ 24 Accordingly, we hold that the failure to provide all of the *Shellstrom* admonitions was harmless where the trial court appointed counsel to represent petitioner. Petitioner's request for remand to permit the trial court to admonish him regarding the recharacterization of his pleading is denied.

¶ 25 2. Compliance with Rule 651(c)

¶ 26 Next, petitioner argues this case must be remanded for postconviction counsel to comply with Illinois Supreme Court Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984)). Rule 651(c) provides, in pertinent part, as follows:

“The record [of the postconviction proceedings] shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional right, has examined the record of proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions.” Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984).

¶ 27 Compliance with Rule 651(c) is mandatory. *People v. Perkins*, 229 Ill. 2d 34, 50 (2007).

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“[R]emand is required where postconviction counsel failed to fulfill the duties of consultation, examining the record, and amendment of the *pro se* petition, regardless of whether the claims raised in the petition had merit.” *People v. Suarez*, 224 Ill. 2d 37, 47 (2007). “An adequate or proper presentation of a petitioner’s substantive claims necessarily includes attempting to overcome procedural bars \*\*\* that will result in dismissal of a petition if not rebutted.” *Perkins*, 229 Ill. 2d at 44. See also *Profit*, 2012 IL App (1st) 101307, ¶29 (petitioner’s argument that postconviction counsel did not comply with Rule 651(c) by failing to amend postconviction petition in response to procedural bars raised by State failed to overcome presumption of compliance with Rule 651(c) where petitioner failed to identify what arguments in particular counsel could have made).

¶ 28 Rule 651(c) applies only to petitions that advance to second-stage proceedings. *People v. Marshall*, 375 Ill. App. 3d 670, 683 (2007); 725 ILCS 5/122-4 (West 2008) (if petition is not summarily dismissed, the court may appoint counsel). Here, although the trial court appointed counsel and allowed the parties to file additional pleadings, this cause was never advanced to the second stage. Specifically, as the parties concede, the trial court denied petitioner leave to file a successive petition.

¶ 29 In *People v. LaPointe*, 227 Ill. 2d 39, 45 (2007), our supreme court held that a successive petition “will not be considered filed until leave to file is expressly granted by the circuit court in accordance with section 122-1(f) of the Act.” Section 122-1(f), in turn, is a codification of the cause-and-prejudice test set forth in *People v. Pitsonbarger*, 205 Ill. 2d 444, 458 (2002). 725 ILCS 5/122-1(f) (West 2008). Here, the trial court found that petitioner failed to demonstrate

cause and prejudice and therefore denied him leave to file a successive petition. Because the petition was never filed, it could not have been advanced to the second stage. In reaching this conclusion, we recognize that our supreme court has not yet decided whether cause and prejudice is evaluated prior to or in conjunction with the first stage. See *People v. Evans*, 2013 IL 113471, ¶18. Regardless, no such debate exists as to the cause-and-prejudice test and second-stage proceedings.

¶ 30 Even if we were to find this cause had advanced to the second stage, we would hold that postconviction counsel substantially complied with Rule 651(c). Petitioner’s counsel for his successive postconviction petition did not file a certificate pursuant to Rule 651(c). However, “[t]he formality of filing a Rule 651(c) certificate has been considered harmless error where the record establishes that appointed counsel met the rule’s requirements. [Citation.] Thus, if the record shows that counsel consulted with the defendant, examined the record and amended the petition to present the defendant’s claims, the absence of a Rule 651(c) certificate in the record is not fatal.” *People v. Marshall*, 375 Ill. App. 3d 670, 681 (2007). Petitioner argues that the record in this case does not affirmatively show counsel’s compliance with Rule 651(c), therefore remand is required.

¶ 31 Petitioner argues that the record affirmatively shows counsel’s lack of compliance because the record demonstrates that petitioner’s attorney participated in the proceedings on the State’s motion to dismiss without the benefit of the complete record of petitioner’s trial. Petitioner argues that counsel’s motion to reconsider the trial court’s order granting the State’s motion to dismiss and counsel’s supplements to that motion demonstrate that counsel was unable

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to comply with Rule 651(c) before the hearing on the motion to dismiss. The motion to reconsider and the supplements thereto demonstrate that counsel received new information regarding petitioner's case ultimately demonstrating petitioner's actual innocence.

¶ 32 The State responds, correctly, that examination of the entire record is not required. Our supreme court has found that:

“Rule 651(c) does not require, for substantial compliance, that appointed post-conviction counsel examine the entirety of a petitioner's trial proceedings. \*\*\* Consistent with the purpose of post-conviction proceedings and the requirements of Rule 651(c), we hold that appointed counsel is required to examine as much of the transcript of proceedings as is necessary to adequately present and support those constitutional claims raised by the petitioner.”

*People v. Davis*, 156 Ill. 2d 149, 164 (1993).

¶ 33 The State argues that the record shows that petitioner's counsel had enough of the record to amend and support petitioner's claims, therefore remand is not required. The State asserts that petitioner's attorney amended the *pro se* filing to both adequately present petitioner's contention of a deprivation of his constitutional right as well as to address any procedural bars to filing a successive postconviction petition. The State argues that the addition of claims to the motion to reconsider is irrelevant to petitioner's argument of lack of compliance with Rule 651(c) because counsel is not required to add new claims.

¶ 34 We agree that postconviction counsel's addition of contentions of deprivations of

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petitioner's constitutional rights in supplements to the motion to reconsider the trial court's order dismissing the successive postconviction petition is not a factor we should consider in determining whether postconviction counsel complied with Rule 651(c). See *Davis*, 156 Ill. 2d at 164 ("Post-conviction counsel is only required to investigate and properly present the *petitioner's* claims.") (Emphasis in original.). See also *People v. Cleveland*, 2012 IL App (1st) 101631, ¶64 ("appointed counsel is under no obligation to add new claims to a *pro se* petition in carrying out his duty to provide reasonable assistance under Illinois Supreme Court Rule 651(c)."). However, petitioner's reply argues that after the hearing on the State's motion to dismiss, counsel was still amending petitioner's *original* claim, as well as finding new claims. If, after the hearing on the motion to dismiss, subsequent review of previously unavailable portions of the record permitted petitioner's counsel to further amend and present petitioner's original contention of a deprivation of his constitutional right, or to overcome the procedural bar on successive postconviction petitions, then counsel was not in compliance with Rule 651(c) before the hearing on the motion. See *Perkins*, 229 Ill. 2d at 49-50 (citing *Davis*, 156 Ill. 2d at 164).

¶ 35 On January 8, 2009, postconviction counsel filed a combined motion for leave to file a successive postconviction petition and response to the State's motion to dismiss pursuant to section 122-1(f) of the Act. The amended petition states that any arguments made in response to the State's motion to dismiss "would be made without a complete record to base these arguments on." The petition then argues that petitioner meets the cause standard of section 122-1(f) because he did not have the information necessary to make his claim that the State committed a *Brady* violation by failing to turn over the result of the GSR test performed on petitioner until

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November 2007. The petition argues the prejudice standard is met because the evidence was material to petitioner's guilt.

¶ 36 The petition referenced the trial record, including the parties' arguments as well as testimony from Spivey and the first police officer on the scene. Postconviction counsel also attached supplemental police reports, the result of the GSR test, trial counsel's motion for discovery, the State's answer to discovery, the response to petitioner's Freedom of Information Act (FOIA) request for the result of the GSR test, this court's order on petitioner's appeal from the dismissal of his initial postconviction petition, and the affidavit of Marcus O'Neal stating that petitioner was with the affiant in the affiant's apartment at the time of the shooting.

¶ 37 On July 22, 2009, petitioner filed a motion to reconsider the trial court's order. Petitioner's motion to reconsider the trial court's order granting the State's motion to dismiss argues that in its ruling, the trial court made two findings of fact that were unsupported by evidence. The first was that the result of the GSR test on petitioner was not exculpatory, and the second was that petitioner's trial counsel chose not to use the GSR test results in petitioner's defense. We find neither of those arguments result from additional review of the record of petitioner's trial.

¶ 38 On March 18, 2010, petitioner filed a document titled "Further Addenda to Motion to Reconsider." The addenda argued that if the trial court dismissed the successive petition on the grounds no motion for leave to file a successive petition was filed, its order was erroneous under our supreme court's then-recent decision in *People v. Tidwell*, 236 Ill. 2d 150 (2010). The addenda also urged the court to revisit its holding that petitioner's trial counsel chose not to use

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the result of the GSR test. Petitioner's postconviction counsel attached an affidavit from trial counsel stating trial counsel did not recall receiving the result of the test and if he had, he would have used the result in petitioner's defense. Again, neither of these arguments resulted from additional portions of the record becoming available to postconviction counsel.

¶ 39 Next, on July 29, 2010, postconviction counsel filed a document titled "Further Supplementation of Motion to Reconsider" seeking to further supplement the motion to reconsider with the affidavit of Kavin [*sic*] Spivey. The document states that Spivey's affidavit recants his testimony at petitioner's trial that petitioner was the shooter. The pleading also alleges the State committed a *Brady* violation by failing to reveal an agreement with Spivey regarding a separate case pending against Spivey when the State subpoenaed him to testify at petitioner's trial.

¶ 40 Petitioner filed a "Further Supplement to the Motion for Rehearing" submitting the affidavit of Willa Cephus, who averred that she witnessed events on the day of the crime. Willa Cephus is petitioner's aunt. She averred that she arrived home from work and parked her car in the parking lot where the shooting occurred. Neighbors informed her of the shooting and that the perpetrators were running to the back of the building complex. She saw two people running from the scene. Of the first, she could only see his leg and that he was wearing dark pants. Of the second, she could see that he was wearing a checkered blue, white, and black jacket. A short time later, petitioner, whom Cephus also knew as Julio, came out of one of the buildings. Cephus averred that Julio visited that building from time to time to visit a girl. Cephus spoke with petitioner for a short time. Petitioner seemed normal to Cephus and his hands were

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exposed. She did not smell gunshot residue on petitioner's hands. Petitioner saw some men he knew approaching on foot and started to walk away with them. Cephus averred that she was told that another person took the gun used in the shooting back to his apartment, then returned to stand outside. Cephus and others gave this information to police. Sometime later, Cephus said she saw a man whom she was told was the shooter. Cephus averred that she confronted him about the shooting and the man became physically ill. She was later told that the man left the state but returned. She is not sure she would recognize that man if she saw him again.

¶ 41 The pleading argued that the Cephus affidavit further showed that petitioner is innocent, in addition to the GSR test result showing that petitioner's hands tested within normal handblank limits.

¶ 42 On August 20, 2010, petitioner filed a "Further Addenda to Petitioner's Motion to Reconsider" arguing that "questions exist concerning the veracity of the case of the prosecution even beyond the negative GSR test that shows that [petitioner] did not fire a weapon on the date of the incident in question." The pleading notes Spivey's trial testimony that he saw petitioner with a gun to Spivey's face and that petitioner started shooting at him from less than a foot away. The pleading argues that the testimony is contradictory in that Spivey testified the gun was pointed to his face but he also testified that the first shot hit him in the leg. The pleading argues that it "does not seem likely that if [petitioner] were standing within a foot of Kevin Spivey and if the gun was pointed at this face that the first shot would have hit Spivey in the left leg." The pleading argues that the physical evidence also contradicts Spivey's testimony in that the evidence is that bullet holes appeared on the door of the car in which Spivey sat, and it is not

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likely that bullet holes would appear in the car's door "if he was firing into the driver's side window of the car." The pleading also alleges a disparity between Spivey's testimony that no one drank or used drugs at the gathering Spivey and others attended before the shooting, and physical evidence that Stephen Joseph had Benzoyllecgonine and opiates in his system. Petitioner again requested the trial court reconsider its ruling and allow him to file a successive postconviction petition.

¶ 43 Petitioner's challenge to the strength of the State's case based on possible inconsistencies in the evidence is not a matter which was necessary to properly present petitioner's claim or to overcome a procedural bar to his successive postconviction petition. Moreover, to support a claim of actual innocence such that the bar against successive postconviction petitions should be relaxed (*People v. Edwards*, 2012 IL 111711, ¶24), new evidence must be of such conclusive character that it would probably change the result on retrial (*People v. Harper*, 2013 IL App (1st) 102181, ¶46). Cephus's affidavit is not inconsistent with petitioner's guilt. See *Harper*, 2013 IL App (1st) 102181, ¶49 ("where newly discovered evidence is both exonerating and contradicts the State's evidence at trial, it is capable of producing a different outcome at trial.") Although Spivey's affidavit might support a claim of actual innocence, the question is whether petitioner's postconviction counsel was not in substantial compliance with Rule 651(c) at the time of the hearing on the State's motion to dismiss such that remand is required on that basis. The supplementation of the motion to reconsider with Spivey's affidavit does not lead us to conclude that postconviction counsel was not in substantial compliance with Rule 651(c). There is nothing in the pleadings or in the affidavits themselves to suggest that either the Spivey or Cephus

affidavits resulted from postconviction counsel's review of the record of petitioner's trial. In fact, on appeal, petitioner has not suggested what additional portions of the record of the trial that were not available to postconviction counsel prior to the hearing on the State's motion to dismiss would have supported either his claim of a *Brady* violation--the only claim raised in petitioner's *pro se* pleading and thus the only claim relevant to determining postconviction counsel's compliance with Rule 651(c)--or that the trial court should have granted leave to file a successive postconviction petition. See *Davis*, 156 Ill. 2d at 165 (finding substantial compliance with Rule 651(c) where postconviction counsel averred he examined the record of the proceedings which were made available to him for an adequate presentation of the petitioner's claims and the petitioner did not suggest that additional portions of the trial transcript would have supported his claim).

¶ 44 In light of the above, we find that Rule 651(c) is inapplicable, where the trial court denied petitioner leave to file a successive petition. Because the trial court never allowed petitioner to file his pleading, he did not have a statutory right to counsel, much less the reasonable assistance of counsel pursuant to Rule 651(c). However, even if this cause had been advanced to the second stage, we would hold that postconviction counsel substantially complied with the Rule.

Accordingly, petitioner's request for remand for counsel to comply with Rule 651(c) is denied.

¶ 45 **3. Petitioner's Constitutional Claims**

¶ 46 Having determined that no procedural anomalies require us to remand for compliance, we now turn to the merits of the successive petition.

“The Act contemplates the filing of a single petition: Any

claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived. [Citation.] That statutory bar will be relaxed only when fundamental fairness so requires. [Citations.]

We have stated that, outside the context of capital litigation, there are two such instances, or two exceptions, to this procedural default rule. [Citation.] First, a defendant may raise a defaulted constitutional claim by satisfying the so-called ‘cause-and-prejudice’ test. [Citation.] To establish ‘cause,’ the defendant must show some objective factor external to the defense impeded his ability to raise the claim in the initial postconviction proceeding. [Citation.] To establish ‘prejudice,’ the defendant must show the claimed constitutional error so infected his trial that the resulting conviction violated due process. [Citation.]

Second, even without showing cause and prejudice, a defendant may bring a claim of actual innocence to prevent a fundamental miscarriage of justice.” *People v. Coleman*, 2013 IL 113307, ¶¶81, 82, 83.

¶ 47 Further, even “when ‘cause’ is based on a fundamental deficiency in the first post-conviction proceeding, the petitioner must show that the deficiency directly affected his ability to raise the specific claim now asserted.” *People v. Pitsonbarger*, 205 Ill. 2d 444, 462

(2002). The “narrow” exceptions to successive postconviction petitions apply following the summary dismissal of a *pro se* postconviction petition. See *People v. McDonald*, 364 Ill. App. 3d 390, 394 (2006) (where *pro se* postconviction petition was summarily dismissed and petitioner did not claim actual innocence in his successive petition court found that claims raised in second and amended second petition must be considered waived unless application of the cause and prejudice test indicated otherwise).

¶ 48

A. Actual Innocence

¶ 49 Petitioner’s first substantive argument on appeal is that he presented a colorable claim of actual innocence such that the procedural bar on his successive postconviction petition should be lifted and his claim of actual innocence based on newly discovered evidence should proceed. Petitioner contends that the newly discovered evidence of actual innocence consists of (1) Spivey’s affidavit obtained after trial and (2) the negative GSR test result.

¶ 50 First, however, we must address the State’s argument that petitioner may not use the same evidence--the result of the GSR test--to support both a claim of a *Brady* violation and a claim of actual innocence.

“Under the due process clause of the Illinois Constitution of 1970 (Ill. Const. 1970, art. I, § 2), a defendant can raise in a post-conviction proceeding a ‘free-standing’ claim of actual innocence based on newly discovered evidence. [Citation.] A free-standing claim of innocence means that the newly discovered evidence being relied upon is not being used to supplement an

assertion of a constitutional violation with respect to [the] trial.

[Citations.]” (Internal quotation marks omitted.) *People v.*

*Orange*, 195 Ill. 2d 437, 459 (2001) (citing *People v. Hobley*, 182

Ill. 2d 404, 443-44 (1998)).

¶ 51 Here, the State claims that petitioner is arguing that the GSR test result combined with Spivey’s affidavit demonstrates actual innocence while at the same time arguing that the GSR test result supports a *Brady* violation, which is impermissible under *Hobley*. Petitioner replies that the cases upon which the State relies only stand for the proposition that a claim of actual innocence is cognizable under the Act but our supreme court has not held that a claim of actual innocence must be raised alone or created a rule prohibiting a postconviction petitioner from relying on the same piece of newly discovered evidence to support both a claim of actual innocence and a claim that the petitioner’s constitutional rights were violated in some other way.

¶ 52 We disagree with petitioner’s contention that our supreme court has not created a prohibition against using the same newly discovered evidence to raise a claim of actual innocence and to supplement an assertion of a constitutional violation with respect to trial. In *People v. Washington*, 171 Ill. 2d 475 (1996), the issue was whether due process is implicated in a claim of innocence based upon new evidence such that the claim can be raised in a petition under the Act. *Washington*, 171 Ill. 2d at 476. The *Washington* court began by noting that the newly discovered evidence was not offered in that case to supplement an assertion of a constitutional violation with respect to trial. *Id.* at 479. Rather, the claim of actual innocence based on the newly discovered evidence was “free standing.” *Id.* In *Hobley*, 182 Ill. 2d at 444,

our supreme court wrote as follows:

“In this appeal, we have already held that the State’s actions regarding the fingerprint report and second gasoline can may establish a violation of defendant’s constitutional right to due process under *Brady*. Consequently, this evidence does not support a ‘free-standing’ claim of actual innocence. Rather, the newly discovered evidence defendant points to here *is* being used to supplement his assertions of constitutional violations with respect to his trial. Defendant has therefore not properly raised a claim of actual innocence under *Washington*.” (Emphasis in original.) *Hobley*, 182 Ill. 2d at 444.

¶ 53 In this case, petitioner is offering newly discovered evidence--the GSR test result--to supplement his assertion of a constitutional violation with respect to his trial--a *Brady* violation. Petitioner implicates *Hobley* by also arguing on appeal that his petition should proceed because the GSR test result raises a colorable claim of actual innocence. We have found that, pursuant to *Hobley*, petitioner cannot raise a claim of actual innocence based on the GSR test result in this proceeding because petitioner filed this petition as a claim of a constitutional violation at his trial based on the GSR test result. *People v. Brown*, 371 Ill. App. 3d 972, 984 (2007) (“the evidence being relied upon to support a free-standing claim of actual innocence means that it is not being used to supplement an assertion of a constitutional violation with respect to the defendant’s trial.”). The amended successive petition claims that “[t]he failure of the prosecution to turn over

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the [GSR] test results to trial counsel for [petitioner] clearly violated [*Brady*.]” The amended successive petition does not make a free standing claim that because of the negative GSR test result, petitioner is actually innocent. If petitioner wishes to raise a free standing claim of actual innocence based on the GSR test result, the proper method of doing so is to file a successive petition on those grounds. *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002) (“failure to raise a claim in an earlier petition will be excused if necessary to prevent a fundamental miscarriage of justice. To demonstrate such a miscarriage of justice, a petitioner must show actual innocence”).

¶ 54 We note that nothing in the Act prevents petitioner from raising a free standing claim of actual innocence based on the GSR test result, and specify that our judgment is without prejudice to petitioner’s right to raise that claim in a successive petition. “In Illinois, a postconviction actual-innocence claim is just that--a postconviction actual-innocence claim. Where a defendant makes a claim of trial error, as well as a claim of actual innocence, in a successive postconviction petition, the former claim must meet the cause-and-prejudice standard, and the latter claim must meet the *Washington* standard.” *People v. Coleman*, 2013 IL 113307, ¶91. See also *People v. Barnslater*, 373 Ill. App. 3d 512, 523-24 (2007) (“To qualify as newly discovered evidence, the evidence must, among other things, have been discovered since the *trial*. [Citations.] Usually, to qualify as new evidence, it is the facts comprising that evidence which must be new and undiscovered *as of trial*, in spite of the exercise of due diligence. Generally, evidence is not newly discovered when it presents facts already known to the defendant *at or prior to trial*, though the source of those facts may have been unknown, unavailable, or uncooperative.”) (Emphases added and internal quotation marks omitted.)

¶ 55 Petitioner next argues that the trial court erred in granting the State’s motion to dismiss his claim of actual innocence based only on Spivey’s alleged recantation of his identification of petitioner as his assailant. A threshold issue with regard to Spivey’s affidavit is whether it can be considered with regard to petitioner’s amended successive postconviction petition, which was based on an alleged *Brady* violation. Neither petitioner’s *pro se* pleading nor his amended successive postconviction petition raised a claim of actual innocence based on Spivey’s affidavit. Petitioner presented Spivey’s affidavit as newly discovered evidence of actual innocence for the first time in a “Further Supplementation of Motion to Reconsider” filed on July 29, 2010, after the trial court ruled on the State’s motion to dismiss and after petitioner filed his initial motion to reconsider. At the hearing on the motion to reconsider, the trial court began by stating that:

“I realize that I allowed [petitioner] to file additional affidavits.

Frankly, \*\*\* I am in agreement with the state. This is strictly for me to review or to see if I should change my mind on my entire ruling. For me to clarify a ruling, I am not going to consider changing a part of the prior ruling.

Those additional affidavits that the state points out, if you want to incorporate those in a request for a successive petition. But I am not going to consider that. I am simply going to consider what was before me at the time that I ruled.”

¶ 56 The court went on to rule on petitioner’s claim of a *Brady* violation. In concluding, the

trial court again stated that:

“Now as to the other affidavits, if you wish to seek leave to file a successive petition, that’s within your right to file that and I will rule on that. I will not consider Spivey’s affidavit or the other affidavit of his aunt in this motion to reconsider. The only thing that’s appropriate as the state correctly I think points out.”

¶ 57 Postconviction counsel did not seek leave to file a second successive postconviction petition or leave to amend the first successive postconviction petition. Instead, counsel responded: “The only thing that I would ask, Judge, could we possibly have this written some way?” The trial court informed counsel its ruling was on the record and counsel could order a transcript. Postconviction counsel then indicated his intention to seek leave to appeal.

¶ 58 This issue was addressed in the context of a summary dismissal of an initial postconviction petition in *People v. Coleman*, 2012 IL App (4th) 110463. In *Coleman*, the trial court summarily dismissed the petitioner’s postconviction petition as frivolous and patently without merit. *Coleman*, 2012 IL App (4th) 110463, ¶28. The petitioner filed a *pro se* motion to reconsider, to which he attached an affidavit from a private investigator. *Id.* at ¶¶38, 41. The trial court denied the motion to reconsider and the petitioner appealed. *Id.* at ¶¶42, 43. On appeal, the court addressed “The Threshold Question of Which Materials in the Record We Should Consider When Reviewing This Claim.” *Coleman*, 2012 IL App (4th) 110462, ¶58. The state argued that by submitting the affidavit in support of his motion for reconsideration, instead of moving to amend the petition to include the affidavit before the dismissal, the petitioner was

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attempting to avoid the procedural default mandated by section 122-3 of the Act, which states that any claim not raised in the original or in an amended petition is waived. See 725 ILCS 5/122-3 (West 2008). The court disagreed, finding that the “affidavit was not a new claim; rather, it was additional evidence in support of the preexisting claim. [The petitioner] requested the trial court to reconsider the summary dismissal of that claim in the light of additional evidence.” *Id.* at ¶61.

¶ 59 The *Coleman* court then held that “[a] defendant may file a motion to ‘reconsider,’ or to vacate, the summary dismissal of a postconviction petition [citations], and one of the purposes of a motion for reconsideration is to bring to the court’s attention newly discovered evidence [citation]. If the motion for reconsideration presents new evidence, it lies within the trial court’s discretion whether to consider the new evidence.” (Internal quotation marks omitted.) *Coleman*, 2012 IL App (4th) 110462, ¶62. The court found that the trial court had considered the affidavit and that it would do the same on appeal.

¶ 60 This case is distinguishable because Spivey’s affidavit is not additional evidence in support of petitioner’s preexisting claim for a *Brady* violation based on the State’s alleged failure to turn over the GSR test result. We do not find that his preexisting claim included a claim of actual innocence based on the GSR test result. As we have already held, because petitioner is using the GSR test result to assert a constitutional violation with respect to his trial, that test result cannot also support a free standing claim of actual innocence in these proceedings.

*Hobley*, 182 Ill. 2d at 444.

¶ 61 We find that Spivey’s affidavit is not additional evidence in support of an existing claim

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of actual innocence. Rather, petitioner's claim of actual innocence was a new claim raised for the first time in his motion to reconsider. Petitioner did not move to amend the successive postconviction petition. "Any claim \*\*\* not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2008). But "[s]ection 122-3 of the Act does not forbid the filing of a successive petition." *Pitsonbarger*, 205 Ill. 2d at 462. Neither case cited by petitioner for the proposition that a claim of actual innocence is subject to fewer procedural barriers stands for the proposition that a postconviction petitioner can raise a new claim of a deprivation of his constitutional right for the first time in a motion to reconsider rather than in a successive petition.

¶ 62 In *People v. Ortiz*, 235 Ill. 2d 319, 331 (2009), our supreme court once again recognized that the due process clause of the Illinois Constitution affords postconviction petitioners the right to assert a freestanding claim of actual innocence based on newly discovered evidence, and in *Edwards*, 2012 IL 111711, ¶¶22, 23, our supreme court merely reiterated that the bar against successive proceedings will be relaxed when a petitioner can establish cause and prejudice for the failure to raise the claim earlier or shows actual innocence. Neither *Ortiz* or *Edwards* involved a new claim raised in a motion to reconsider. *Ortiz*, 235 Ill. 2d at 325-27; *Edwards*, 2012 IL 111711, ¶¶9-18. In fact, the petitioner in *Ortiz* had filed a third postconviction petition (*Ortiz*, 235 Ill. 2d at 326), and the petitioner in *Edwards* was seeking leave to file a fourth postconviction petition (*Edwards*, 2012 IL 111711, at ¶12). We find that the cases stand only for the proposition that petitioner may have been able to successfully file a second successive petition, not that he is relieved of the obligation of doing so. *Ortiz*, 235 Ill. 2d at 333 ("Defendant is not precluded from raising multiple claims of actual innocence where each claim

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is supported by newly discovered evidence.”); *Edwards*, 2012 IL 111711, ¶24 (“We also made clear in *Tidwell* that it is the petitioner’s burden to obtain ‘leave’ before further proceedings on his claims can follow. \*\*\* [L]eave of court should be denied only where it is clear, *from a review of the successive petition* and the documentation provided by the petitioner that, as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence.”). (Emphasis added.)

¶ 63 The Act allows a successive petition when new evidence comes to light, giving rise to a new claim. *People v. Green*, 2012 IL App (4th) 101034, ¶40. That is precisely what occurred here, and the trial court was correct that petitioner should have brought that new claim in a successive petition. See also *People v. Griffin*, 321 Ill. App .3d 425, 428 (2001) (“Defendant does not cite, nor are we aware of, any case in which the Act has been construed as permitting a defendant to raise on appeal from the dismissal of a postconviction petition an issue he never raised in that petition.”); *River Plaza Homeowner’s Ass’n v. Healey*, 389 Ill. App. 3d 268, 280 (2009) (“A reconsideration motion is not the place to raise a new legal theory or factual argument. [Citation.]”). (Internal quotation marks omitted.)

¶ 64 We decline to consider Spivey’s affidavit and petitioner’s claim of actual innocence based thereon in resolving this appeal from the trial court’s order denying leave to file a successive postconviction petition. Neither Spivey’s affidavit nor that claim were part of the petition and have no bearing on whether petitioner demonstrated cause and prejudice for his failure to raise his *Brady* claim in his initial postconviction petition.

¶ 65

B. Brady Violation

¶ 66 We next address petitioner’s claim that the State violated *Brady* when it allegedly failed to turn over the result of a GSR test performed on petitioner which tested consistent with normal hand blank limits (or showed an absence of GSR). Petitioner argues that his failure to present the *Brady* violation sooner is not a bar to his successive petition because he can demonstrate cause for failing to bring the claim sooner and prejudice from the error at trial.

“To establish a *Brady* violation, suppressed evidence must be both favorable to the accused and material. Favorable evidence is material in this context only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. [Citation.] A ‘reasonable probability’ of a different result is a probability sufficient to undermine confidence in the outcome.” (Internal quotation marks omitted.) *Hobley*, 182 Ill. 2d at 432-33.

¶ 67 First, petitioner argues that his petition states a claim of a *Brady* violation because (1) the result of the GSR test was suppressed because the State did not make the defense aware of the result of the test; (2) the result of the test is favorable to petitioner because it tends to prove that he did not fire the gun that killed Stephen Joseph and injured Kevin Spivey; and (3) the result of the test is material because the result of the test would have put the State’s case, which was based primarily on Spivey’s questionable identification, in such a different light as to undermine confidence in the verdict. Specifically, petitioner argues that despite the fact that the State’s discovery response lists the GSR kit as an item turned over in discovery, the record contains no

evidence that the State disclosed that the test was actually performed on the GSR kit or that the State disclosed the result of any tests. Petitioner argues the conclusion that the State did not disclose the result is bolstered by the fact trial counsel argued during closing that the State failed to produce any GSR evidence to link petitioner to the shooting.

¶ 68 Second, petitioner argues that by establishing a *Brady* violation, he has also demonstrated cause and prejudice for failing to bring the *Brady* violation sooner under the United States Supreme Court’s decision in *Banks v. Detke*, 540 U.S. 668 (2004). The petitioner in *Banks* for *habeas corpus* relief in federal court would only be entitled to an evidentiary hearing on his claim of a *Brady* violation if he could show cause for his failure to develop the facts of that violation in anterior state court proceedings and actual prejudice resulting from that failure. *Banks*, 540 U.S. at 690-91. Our supreme court “has in the past relied on *habeas* case law in interpreting and applying the Act. See, e.g., *People v. Flores*, 153 Ill. 2d 264, 278-79 (1992) (relying on *McCleskey v. Zant*, 499 U.S. 467 (1991), a federal *habeas* case, in defining relevant terms in the ‘cause and prejudice’ test for filing successive postconviction petitions).” *People v. Hodges*, 234 Ill. 2d 1, 12 (2009).

¶ 69 In *Banks*, the United States Supreme Court held as follows:

“ ‘[C]ause and prejudice’ in this case parallel two of the three components of the alleged *Brady* violation itself. [Citation.] Corresponding to the second *Brady* component (evidence suppressed by the State), a petitioner shows ‘cause’ when the reason for his failure to develop facts in state-court proceedings

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was the State’s suppression of the relevant evidence; coincident with the third *Brady* component (prejudice), prejudice within the compass of the ‘cause and prejudice’ requirement exists when the suppressed evidence is ‘material’ for *Brady* purposes.” *Banks*, 540 U.S. at 691.

¶ 70 However, the United States Supreme Court applied the inverse analysis to that urged by petitioner, finding that “if *Banks* succeeds in demonstrating ‘cause and prejudice,’ he will at the same time succeed in establishing the elements of his \*\*\* *Brady* \*\*\* claim.” *Banks*, 540 U.S. at 691.

¶ 71 In sum, petitioner argues that the *Brady* violation is sufficient to satisfy the cause and prejudice test, therefore the trial court’s order should be reversed and the cause remanded for an evidentiary hearing. The State responds it did not commit a *Brady* violation because it disclosed the existence of a GSR test kit in discovery before petitioner’s trial.

¶ 72 The State argues that because petitioner was “aware of the essential facts enabling him to take advantage of [the] exculpatory evidence,” no *Brady* violation occurred and petitioner cannot demonstrate cause for failing to bring his claim in his first postconviction petition. The State also argues that the disclosure of the existence of a GSR test kit eliminated the possibility of surprise from the admission of the result of that test, therefore, the State did not violate *Brady*. Because no *Brady* violation actually occurred, petitioner cannot show prejudice from any alleged failure to disclose the result of the test. The State also argues the result of the test is not favorable to petitioner in the constitutional sense because the result was not so conclusive as to

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probably change the result of the trial. The State argues that even had petitioner admitted the negative test result at trial, the State would have admitted evidence to explain the absence of GSR, including the time between the shooting and the test and the fact petitioner's hands were exposed to the elements during that time and petitioner had ample opportunity to wipe his hands. Finally, the State argues the result of the test is not material because the result would not have changed the result of the trial. The State points to trial counsel's argument that the State failed to produce GSR evidence to link petitioner to the crime, yet the jury still convicted petitioner, as well as Spivey's positive identification of petitioner as the shooter at trial.

¶ 73 In support of his argument he has demonstrated cause and prejudice for failing to raise the *Brady* claim sooner, petitioner relies on *Banks*, 540 U.S. 668, which stated that *Strickler v. Greene*, 527 U.S. 263 (1999), is “the controlling precedent on the issue of ‘cause.’” *Banks*, 540 U.S. at 692 fn. 12. In both *Banks* and *Strickler*, the Court found cause for failing to raise a *Brady* claim in earlier proceedings because (1) the prosecution withheld exculpatory evidence, (2) the petitioner reasonably relied on the prosecution's representation that it disclosed all exculpatory evidence, and (3) the prosecution confirmed the petitioner's reliance on the prosecution's representation that it fully disclosed all exculpatory evidence. See *Banks*, 540 U.S. at 692-93 (citing *Strickler*, 527 U.S. at 289). The *Banks* court concluded that “because the State persisted in hiding [the evidence] and misleadingly represented that it had complied in full with its *Brady* disclosure obligations, [the petitioner] had cause for failing to investigate.” *Id.* at 693.

¶ 74 In *Strickler*, much like this case, the respondent in the federal *habeas* proceeding argued that the factual basis for the assertion of a *Brady* violation was available in earlier proceedings.

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*Strickler*, 527 U.S. at 284. But the *Strickler* court found that in light of information that was known, it was unlikely that counsel for the earlier proceedings would have suspected that additional impeaching evidence was being withheld. *Strickler*, 527 U.S. at 285. The respondent also argued that the Court’s decisions in *Gray v. Netherland*, 518 U.S. 152 (1996), and *McCleskey*, 499 U.S. 467, precluded finding that “the cause for [the] petitioner’s default was adequate.” The *Strickler* Court distinguished both cases because in each, “the petitioner was previously aware of the factual basis for his claim but failed to raise it earlier.” *Strickler*, 527 U.S. at 287. However, the *Strickler* Court did not reach the question of “the impact of a showing by the State that the defendant was aware of the existence of the [evidence] in question and knew, or could reasonably discover, how to obtain [it].” *Id.* at 288 fn. 33.

¶ 75 The State argues that the *Brady* violation, if any, was not the cause of petitioner’s failure to bring his claim of an alleged *Brady* violation in his initial postconviction petition. In this case, the State argues that petitioner was aware of the existence of a GSR test (and, consequently, the State argues it did not actually commit a *Brady* violation) and nothing prevented him from seeking the result sooner. At issue in *McCleskey* was a subsequent federal *habeas* petition based on a newly discovered *document* which proved that a witness against the petitioner had been acting in concert with state officials during inculpatory conversations between the witness and the petitioner, and that the state had deliberately elicited inculpatory admissions from the petitioner in violation of the Sixth Amendment. *McCleskey*, 499 U.S. at 474.

¶ 76 The *McCleskey* Court began by stating that the court’s power to excuse defaulted claims “derives from the court’s equitable discretion.” *McCleskey*, 499 U.S. at 490. The Court

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continued: “[i]n *habeas*, equity recognizes that a suitor’s conduct in relation to the matter at hand may disentitle him to the relief he seeks. [Citation.] For these reasons [we] concentrate on a petitioner’s acts to determine whether he has a legitimate excuse for failing to raise a claim at the appropriate time.” *Id.*

“Objective factors that constitute cause include interference by officials that makes compliance with the State’s procedural rule impracticable, and a showing that the factual or legal basis for a claim was not reasonably available \*\*\*. [Citation.] In addition, constitutionally [i]neffective assistance of counsel \*\*\* is cause. [Citation.] Attorney error short of ineffective assistance of counsel, however, does not constitute cause and will not excuse a procedural default.” *McCleskey*, 499 U.S. at 494.

¶ 77 Applying the appropriate standard to the facts of the case before it, the *McCleskey* Court held that the prohibition on subsequent *habeas* consideration of claims not raised, and thus defaulted, in the first federal *habeas* proceeding:

“examines petitioner’s conduct: the question is whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition and pursue the matter through the *habeas* process, [citations]. The requirement of cause in [this] context is based on the principle that petitioner must conduct a reasonable and diligent investigation aimed at including

all relevant claims and grounds for relief in the first federal *habeas* petition. If what petitioner knows or could discover upon reasonable investigation supports a claim for relief in a federal *habeas* petition, what he does not know is irrelevant. Omission of the claim will not be excused merely because evidence discovered later might also have supported or strengthened the claim.”

*McCleskey*, 499 U.S. at 497-98.

¶ 78 The *McCleskey* Court drew a clear distinction between the question of whether the petitioner knew of or could have discovered a *document* containing exculpatory evidence, and whether petitioner “knew about or could have discovered the *evidence* the document recounted.” (Emphasis added.) *McCleskey*, 499 U.S. at 498. The Court accepted as true that “the document itself was neither known nor reasonably discoverable at the time of the first federal petition.” *Id.* at 499 fn. \_\_\_\_\_. But the Court found that the petitioner “has had at least constructive knowledge all along of the facts he now claims to have learned only from the \*\*\* document.” *McCleskey*, 499 U.S. at 500.

¶ 79 On the question of whether petitioner’s demonstrable knowledge of a GSR test (despite petitioner’s contention on appeal that he did not know why his hands were being swabbed--an unpersuasive argument in light of clear disclosure of a GSR test kit at trial)<sup>1</sup> disentitles petitioner

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<sup>1</sup> Petitioner’s amended successive postconviction petition alleges that the fact petitioner did not have the GSR test result at trial “is even more incredible when one views the prosecution’s answer to discovery, which included not only a mention of the [GSR] kit but also the name of the officer who tested the kit.”

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to a successive postconviction petition raising a claim of a *Brady* violation for failing to disclose the result, we find *McCleskey* instructive. We find that petitioner, through “a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first” postconviction petition, could have discovered the negative GSR test result. Petitioner argues he was not aware of a negative GSR test result. However, petitioner knew that police performed a GSR test on his hands. Because the State did not produce the result at trial, a point his trial attorney argued, petitioner should have reasonably inferred the test was favorable to him. In fact, petitioner’s brief argues that “the fact that defense counsel did not introduce the negative GSR results *at trial* further supports the conclusion that the State suppressed that evidence.”

(Emphasis added.) Thus petitioner “has had at least constructive knowledge all along of the facts he now claims to have learned only from the \*\*\* document” obtained as result of his FOIA request. Petitioner therefore had sufficient facts to establish his claim of a *Brady* violation when he filed his first postconviction petition.

¶ 80 Although we do not address the merits of petitioner’s *Brady* claim itself, limiting our analysis to whether petitioner has satisfied the cause and prejudice test for failing to raise the claim in his initial postconviction petition, *People v. Smith*, 46 Ill. 2d 430, 432-33 (1970), in which the defendant attempted to allege a *Brady* violation, is instructive. In *Smith*, which involved a rape, shortly after his arrest the defendant’s pants and undershorts were taken from him and sent to the crime laboratory for examination. “These articles were never offered in evidence at the trial nor were any reports made as to analysis or findings.” *Id.* at 432. The defendant argued that failure by the state to produce any evidence in this regard raises a

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presumption that it was favorable to the defense and that the suppression of this evidence by the state violated due process. *Id.* at 432-33. Our supreme court held that:

“the evidence was equally accessible to both parties. Defendant knew that his shorts and pants had been sent to the crime laboratory for examination. He had the right and the opportunity, had he desired to do so, to demand that they be produced in court together with any laboratory reports or findings resulting from that examination. Having failed to do so, he cannot now be heard to contend that the prosecution is guilty of deliberate suppression of evidence favorable to him which was in its exclusive possession and control.” *Smith*, 46 Ill. 2d at 433.

¶ 81 Here, petitioner knew his hands were swabbed and, based on his filings, petitioner knew a GSR test was performed. Even after the trial, petitioner had the right to demand the result of that test be produced before he filed his initial postconviction petition. Having failed to do so, he cannot now be heard to say the State’s failure to provide him with the result in the first instance is sufficient cause to excuse his failure. See also *U.S. ex rel. Brisbon v. Fry*, No. 95 C 5033 (N.D. Ill. 2004) (“for *Brady* purposes, evidence is suppressed if \*\*\* the evidence was not otherwise available through the exercise of reasonable diligence.”) (citing *United States v. Fallon*, 348 F.3d 248, 252 (7th Cir. 2003)).

¶ 82 Petitioner has pointed to no interference by officials that made compliance with the procedural rule generally limiting him to only one postconviction petition impracticable.

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Petitioner does not claim that a response to his FOIA request was delayed. Petitioner offers no explanation for not requesting a copy of the test result sooner or what prompted him to do so in 2007. Petitioner's only complaint about the unavailability of the test result is the State's failure to tender it to trial counsel. The fact the State failed to turn over the test result is not itself "cause" for petitioner's failure to raise the *Brady* claim in his first postconviction petition. The *McCleskey* Court held that "even if the State intentionally concealed the [document,] the concealment would not establish cause here because, in light of [the petitioner's] knowledge of the information in the document, any initial concealment would not have prevented him from raising the claim in the first federal petition." *McCleskey*, 499 U.S. at 502. Similarly, here, any initial concealment of the test result would not have prevented petitioner from obtaining the result and raising the *Brady* claim in the first postconviction petition. Petitioner has failed to show cause for his failure to raise his claim of a *Brady* violation in his initial postconviction petition. Accordingly, the trial court's judgment is affirmed.

¶ 83 Alternatively, petitioner argued to this court that, should we find that the GSR test result was turned over to defense counsel before trial, the GSR test result makes a substantial showing that trial counsel rendered ineffective assistance of counsel for failing to introduce the negative test result at trial, and petitioner has demonstrated cause and prejudice for failing to raise his claim of ineffective assistance of counsel sooner. As to ineffective assistance, petitioner argues that no valid trial strategy justifies failing to introduce evidence to contradict the State's theory of the case and which supports the defense theory that Spivey misidentified petitioner as the shooter. As to cause and prejudice, petitioner argues that he could not have raised the claim of

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ineffective assistance of counsel sooner because he did not learn of the existence of the negative test result until 2007, and the exclusion of that evidence prejudiced him at trial because it prevented the jury from hearing affirmative evidence refuting the State's case, rather than a mere inference about the absence of evidence of a GSR test result.

¶ 84 First, we clarify that we do not reach the question of whether or not the GSR test result was turned over to the defense prior to trial. Our holding that petitioner cannot satisfy the cause and prejudice test with regard to his *Brady* claim is limited to our determination that nothing prevented petitioner from obtaining the result and raising the *Brady* claim in the first postconviction petition. Second, petitioner's claim of ineffective assistance of trial counsel in this proceeding must fail for the same reason we declined to address petitioner's claim of actual innocence based on Spivey's affidavit. Petitioner's amended postconviction petition did not raise a claim of ineffective assistance of trial counsel. Petitioner did not seek leave to amend the petition or to file a second successive postconviction petition. None of petitioner's supplements to his motion to reconsider argue ineffective assistance of counsel. This claim is raised for the first time on appeal, which is impermissible. *Griffin*, 321 Ill. App. 3d at 428.

¶ 85 For the reasons stated above, petitioner must raise new claims of a deprivation of his constitutional rights in a successive postconviction petition. *Healey*, 389 Ill. App. 3d at 280. The trial court made no rulings on petitioner's claim of ineffective assistance of trial counsel, and absent such ruling we will not make any statement on the validity of that claim, which was not filed in this proceeding. Compare *Tidwell*, 236 Ill. 2d at 161-62 ("no separate motion seeking leave is mandated by section 122-1(f) in its current form, nor, as we have demonstrated, is an

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explicit request even required *if* the circuit court sees fit to consider the matter and rule of its own accord. \*\*\* Pursuant to our holding, there was no jurisdictional bar to the circuit court's *sua sponte* ruling on the matter, and there is, consequently, no viable rationale for the appellate court's declination of review." (Emphasis in original.)

¶ 86

#### CONCLUSION

¶ 87 For all of the foregoing reasons, the trial court's judgment denying petitioner leave to file a successive postconviction petition is affirmed.

¶ 88 Affirmed.