

No. 1-16-3308

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 92 CR 28979
)	
ALBERT LEE,)	Honorable
)	Stanley Sacks,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Rochford and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm the denial of the defendant's motion for leave to file a second successive postconviction petition where the defendant could not establish cause for his failure to raise the issue of a coerced confession in his initial postconviction petition.

¶ 2 The defendant, Albert Lee, appeals from the order of the circuit court denying him leave to file his second successive postconviction petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). On appeal, the defendant argues that the circuit court erred when it denied him leave to file because his petition established cause and prejudice

for failing to raise his claim of a coerced confession in his initial postconviction petition. We affirm.

¶ 3 The facts of this case are adequately set forth in our prior order disposing of the defendant's initial appeal. See *People v. Lee*, No. 1-94-3621 (1996) (unpublished order under Supreme Court Rule 23). Therefore, we recite only the facts necessary to determine the issues on appeal.

¶ 4 The defendant was charged with, *inter alia*, first degree murder and armed robbery, stemming from the robbery of a jewelry store that resulted in the death of its proprietor. The defendant gave police a court reported statement in which he admitted his involvement in the murder and robbery.

¶ 5 Prior to trial, the defendant moved to suppress his statement to the police. At a hearing on the motion, the defendant testified that Detective James Cassidy struck him in the solar plexus causing him to double over, struck him repeatedly in the abdomen and chest, and told him that, if he gave a confession, "everything will be all right." He stated that, during his court reported statement, Detective Cassidy stood behind the court reporter and pantomimed answers when he did not know how to respond. The trial court denied the defendant's motion to suppress, stating: "I don't believe that [the defendant] was beaten by the police or that any untoward actions were taken by the police."

¶ 6 Following a 1994 bench trial, the defendant was found guilty of first-degree murder and armed robbery and sentenced to natural life in prison without parole for murder and a concurrent term of 50 years' incarceration for armed robbery. The defendant appealed, and this court ordered a new trial, finding that the defendant's jury waiver was involuntary. *People v. Lee*, No. 1-94-3621 (1996) (unpublished order under Supreme Court Rule 23).

¶ 7 Following remand, the defendant was tried before a jury and again found guilty of first-degree murder and armed robbery. The trial court again sentenced the defendant to natural life in prison for murder and a concurrent term of 50 years' incarceration for armed robbery. The defendant appealed, and we affirmed his conviction but vacated the sentences and remanded for resentencing, finding that the sentence imposed on the murder conviction violated the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). that a jury must make all findings of fact that by statute increase a sentence. *People v. Lee*, 318 Ill. App. 3d 417 (2000).

¶ 8 On remand, the trial court sentenced the defendant to consecutive terms of 60 years' imprisonment for murder and 30 years' imprisonment for armed robbery. On appeal, we affirmed the defendant's sentence. *People v. Lee*, No. 1-05-1359 (2007) (unpublished order under Supreme Court Rule 23).

¶ 9 In January 2007, the defendant filed a *pro se* postconviction petition. The petition alleged that both trial and appellate counsel rendered ineffective assistance by failing to assert his right to a speedy trial. The circuit court summarily dismissed the petition, and, on appeal, we affirmed. *People v. Lee*, No. 1-07-0974 (2009) (unpublished order under Supreme Court Rule 23).

¶ 10 In July 2008, the defendant filed a motion for leave to file a second postconviction petition alleging that his sentences was improperly ordered to run consecutively. The defendant argued, *inter alia*, that the imposition of consecutive sentences was not mandatory and contrary to statute. The circuit court denied the defendant leave to file a successive postconviction petition. The defendant appealed, and we affirmed under *Pennsylvania v. Finley*, 481 U.S. 551 (1987), after granting the Office of the State Appellate Defender leave to withdraw as his attorney. *People v. Lee*, No. 1-08-2330 (2010) (Summary Order).

¶ 11 In 2010 and 2011, the defendant filed two unsuccessful petitions for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)). See *People v. Lee*, 2013, IL App (1st) 110065-U.

¶ 12 On October 28, 2013, the defendant filed a second *pro se* motion for leave to file a successive postconviction petition. In the proposed petition, the defendant alleged that his conviction was based on a coerced confession. He argued that he had cause for failing to raise this claim earlier because it was not until he met Charles Johnson, a fellow inmate, and read the briefs filed by Johnson in his appeal, that he learned that Detective Cassidy had a pattern of obtaining false confessions. Neither the motion nor the successive postconviction petition included copies of the Johnson briefs. In the petition's argument on Detective Cassidy's alleged pattern of coerced confessions, the defendant cited *Chicago Tribune* articles from December 18, 2001, and September 20, 2005, two law review articles from 2004, and a Seventh Circuit case from 2004 (*A.M. v. Butler*, 360 F.3d 787 (2004)). The defendant also cited, by the trial court numbers, the "Dixmoor Five" case (*People v. Harden*, No. 95 CR 23475) and the "Englewood Four" case (*People v. Swift*, No. 95 CR 09678). The defendant did not include in his argument any discussion of the circumstances of Johnson's case.

¶ 13 On November 1, 2016, in its written order, the circuit court applied the *Patterson* factors (see *People v. Patterson*, 192 Ill 2d 93, 145 (2000)) in ruling on the defendant's motion. First, the court found that the defendant had not consistently claimed that his confession was the result of torture, because he did not raise the issue in either of his direct appeals or his prior postconviction petitions. Second, the court found that the defendant had not demonstrated that his claims of torture were strikingly similar to other claims of torture. The court noted that the defendant had provided

only “minimal details” of his own torture and no details of the purported torture in Johnson’s case or the cases cited in the Johnson briefs. Finally, the court found that the defendant had not presented any evidence to demonstrate that his allegations were consistent with the OPS (Chicago Police Office of Professional Standards) findings of systematic and methodical torture under John Burge. The circuit court concluded that the defendant had not demonstrated that his confession was the result of police coercion. The circuit court denied the defendant leave to file a successive postconviction petition, and this appeal followed.

¶ 14 On appeal, the defendant argues that his motion for leave to file a second successive postconviction met the “cause and prejudice” test. The defendant argues that the circuit court erred when it denied him leave to file his successive postconviction petition because the Johnson briefs “significantly corroborate[] his longstanding claim that a detective had coerced his statement.”

¶ 15 The Act provides a method by which persons under criminal sentence in this state can challenge their convictions on the basis that they were the result of a substantial denial of their rights under the United States Constitution, the Illinois Constitution, or both. *People v. Tate*, 2012 IL 112214, ¶ 8. A postconviction action is not an appeal from the judgment of conviction, but, rather, a collateral attack on the trial court proceedings. *Id.* Accordingly, issues raised and decided on direct appeal are barred by *res judicata*. *Id.*

¶ 16 The Act contemplates filing only a single postconviction petition, and issues that could have been raised on direct appeal or in an original postconviction petition, but were not, are forfeited. *People v. Nicholas*, 2013 IL App (1st) 103202, ¶ 31. Successive postconviction petitions are allowed only when fundamental fairness so requires or when a defendant can establish cause

and prejudice for failing to raise the issue during initial postconviction proceedings. See *Id.* ¶ 32 (citing *People v. Lee*, 207 Ill. 2d 1, 4-5 (2003)); see also *People v. Wrice*, 2012 IL 111860, ¶ 48.

¶ 17 A petitioner establishes 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.” 725 ILCS 5/122-1(f) (West 2012). A petitioner establishes 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 2012). Both prongs of the cause-and-prejudice test must be satisfied in order for a defendant to prevail. *People v. Guerrero*, 2012 IL 112020, ¶ 15. We review *de novo* the question of whether a motion for leave to file a successive postconviction petition adequately sets forth cause and prejudice. See *Wrice*, 2012 IL 111860, ¶ 50.

¶ 18 As an initial matter, we must first determine whether to consider the Johnson briefs, which the defendant has attached as an appendix to his brief. Generally, attachments to briefs cannot be used to supplement the record, and this court cannot consider evidence that is not part of the record. See *People v. Garcia*, 2017 IL App (1st) 133398, ¶ 35. The defendant argues that, even if these documents can not properly be used to supplement the record, we should take judicial notice of them. A court may take judicial notice of public documents, such as those included in the record of other courts and administrative tribunals, because they fall into the category of “readily verifiable” facts capable of instant and unquestionable demonstration. See *In re Linda B.*, 2017 IL 119392, ¶ 31 n. 7. The defendant asks that we take judicial notice of the briefs, the facts of Johnson’s case as alleged in the briefs, and of the various other cases referred to by Johnson and the *amicus curiae*. We decline to do so, because the defendant never asked the circuit court to take

such expansive judicial notice. Rather, in his motion for leave to file a successive postconviction petition, the defendant merely asked the circuit court to note the existence of the briefs, which he cited by name and appellate court number. The defendant never referred to the contents of the briefs or asked the circuit court to take judicial notice of their contents. The defendant is, in essence, asking us to take judicial notice of a wide range of facts and legal arguments that were never presented to the circuit court. We decline this invitation and will, instead, judge the merits of the circuit court's decision against the information presented to that court in the defendant's motion for leave to file a successive postconviction petition. See *People v. Barham*, 337 Ill. App. 3d 1121, 1130 (2003).

¶ 19 Next, we turn to the question of whether the defendant properly alleged cause for his failure to raise his claim of a coerced confession. After examining the motion presented to the circuit court, we conclude that the defendant did not establish cause for failing to raise his claim in his initial postconviction petition. The defendant alleged in his motion, and argues on appeal, that he was not aware of a pattern of abuse and false confessions involving Detective Cassidy until he read the Johnson briefs. The defendant is not, however, addressing the relevant question. The relevant question is not when the defendant became aware that Johnson had claimed a pattern of abuse, the relevant question is when the defendant, himself, knew or should have known of a pattern of abuse and false confessions.

¶ 20 The defendant's successive postconviction petition does not rely on the Johnson briefs to support his claims. Instead, the defendant relies on cases cited within the Johnson briefs. For example, the defendant's successive postconviction petition does not cite Johnson's affidavit for support that a pattern of abuse existed. Instead, the defendant cites *Chicago Tribune* articles, law

review articles and other criminal cases that predate by years his 2007 initial postconviction petition. The defendant does not allege any objective factor external to his defense that prevented him from including those articles in his initial postconviction petition as support of a claim that Detective Cassidy engaged in a pattern of coercing confessions. In fact, the defendant did not even allege, in his initial postconviction petition, that his confession had been coerced. Clearly, the defendant would have been aware of his allegation that his own confession was coerced, because he made those claims before trial. However, the defendant failed to include those claims in either of his direct appeals. The defendant contended in his successive postconviction petition that his claim was “more credible” in light of new evidence. That explanation, however, adds little to the defendant’s claim that he could not have raised the issue in his initial postconviction petition. The defendant must allege cause for his failure to raise the issue in his initial postconviction petition. The issue is not whether, with additional time and research, a defendant can make a stronger claim. The issue is whether a defendant identifies cause for his failure to raise a claim at his first opportunity. We conclude that the defendant has not demonstrated cause for failing to raise his claim of a coerced confession in his initial postconviction petition.

¶ 21 Having determined that the defendant did not establish cause for his failure to raise his claim of a coerced confession in his initial postconviction petition, it is unnecessary for us to address the prejudice requirement in a motion for leave to file a successive postconviction petition. See *Guerrero*, 2012 IL 112020, ¶¶ 15, 22. Accordingly, we affirm the judgment of the circuit court denying the defendant leave to file his second successive postconviction petition.

¶ 22 Affirmed.