FIRST DISTRICT
THIRD DIVISION
September 30, 2021

No. 1-17-2411

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 91 CR 29439 (01)
	)	
MICHAEL BRANDON,	)	Honorable
	)	Thomas Joseph Hennelly,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court, with opinion.
Justices McBride and Gordon concurred in the judgment and opinion.

OPINION

¶ 1 In 2017, defendant Michael Brandon filed a second successive postconviction petition, alleging—as he had done throughout his trial proceedings and in his first successive petition in 2010—that his confession to the 1991 murder of Roberto Victoriano was physically coerced by Detectives Ricardo Abreu and Terrance O'Connor of the Chicago Police Department.

¶ 2 After he was denied leave to file his 2010 petition, defendant unearthed new evidence to corroborate his allegations of abuse, primarily in the form of affidavits from others who attest to similar abuse at the hands of these same detectives, as well as the exoneration and federal civil-rights complaint filed by Daniel Taylor, whose murder conviction was vacated in 2013 upon proof that he had been beaten and framed by Abreu, O'Connor, and other Area 6 detectives.

¶ 3 Based on this same new evidence, defendant also alleged that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose evidence of a pattern-and-practice of abuse by these detectives, and by knowingly using their perjured testimony.

¶ 4 The circuit court denied leave to file. With respect to defendant's coerced-confession

claim, we reverse that ruling and remand for the appointment of counsel and second-stage proceedings. We affirm the denial of leave to file defendant's *Brady* claim.

¶ 5 BACKGROUND

¶ 6 For a full statement of the facts and procedural history of this case, see our previous order affirming the denial of leave to file defendant's 2010 petition. *People v. Brandon*, 2013 IL App (1st) 110652-U. Here, to provide context, we start with a brief recap of the underlying crime and the evidence that implicated defendant. We then set forth in more detail the facts that are relevant to the claims currently at issue.

¶ 7 I

¶ 8 Roberto Victoriano was murdered in an alley around 4:00 a.m. on July 28, 1991. From their bedroom window, Fernando and Agripina Lemus looked out into the alley, after hearing a single gunshot, and saw a young man hand a revolver to a young woman. The two fled the alley, and a white car sped away. Fernando described the young man and woman to the police and then rode around the neighborhood in a squad car looking for them. He soon recognized them at a nearby gas station. Defendant, then 20 years old, and 14-year-old Robin Ross were arrested at the gas station less than an hour after Victoriano's murder. Fernando and Agripina identified defendant and Ross in lineups.

¶ 9 Defendant and Ross were charged with the murder and armed robbery of Victoriano. The State later dropped all murder charges against Ross, in exchange for her guilty plea to the armed robbery and her testimony at defendant's trial. The State proceeded against defendant on a theory of felony murder, predicated on armed robbery, but dropped all other murder counts. Having confessed to robbing and killing Victoriano when he was interrogated by Detectives Abreu and

O'Connor, defendant took the stand in his own defense and maintained that his confession was beaten out of him by the police.

¶ 10 Ross testified that on the night of Victoriano's murder, she was with defendant, Vanessa Miller, Pauletta Robinson, and Marcia Samuels. They drank, smoke pot, and drove around town in defendant's white Oldsmobile. Along the way, defendant hatched a plan for a robbery: The girls would lure some guys into an alley with the promise of sex, and defendant would take their money at gunpoint. Defendant stopped to pick up a gun, and they proceeded with the plan.

¶ 11 Ross lured Victoriano into an alley. When defendant tried to rob him, Victoriano pulled out a knife, stabbed defendant in the hand, and slapped at defendant's gun. Defendant shot him once, took some money from his pocket, and gave Ross the gun. She later gave the gun back to defendant, who in turn gave it to Miller. The police eventually seized a .38 caliber revolver from Miller's apartment.

¶ 12 After dropping the others off, defendant and Ross stopped at a nearby gas station for a snack, where they were swiftly arrested. Forensic testing showed that they both had gunshot residue on their hands at the time. But defendant had far more. And that was consistent, in the opinion of the trace evidence analyst, with defendant firing the gun and then handing it to Ross.

¶ 13 Defendant's testimony was consistent, in essentials, with his custodial statement made at Area 6. The robbery, he said, was Samuels's idea. While driving around, they were approached by one Casanova—Samuels's and Miller's pimp—who demanded "his money" from Samuels. She said she could have it by the morning and asked Casanova for a gun, which he provided. He also gave defendant $5 for gas money, so he could take Samuels to do what she needed to do to get the money. Samuels talked a reluctant defendant into helping her. The plan, as devised by Samules, was for the girls to lure some guys into an alley, where defendant would scare them

with the gun and Samuels would take their money. Defendant denied that there was ever any intention to shoot anyone.

¶ 14 In due course, Ross managed to bait Victoriano. When defendant saw them kissing, he grabbed the gun, which he had hidden in a bush, followed them into an alley, and demanded money. Victoriano pulled out a knife—and only then did defendant brandish the gun. Victoriano swatted at the gun and stabbed defendant in his left hand. During the ensuing tussle, the gun at first jammed, but then went off, shooting Victoriano. Defendant was shocked and scared. He denied that he intended to shoot Victoriano or that he took anything from Victoriano's pockets.

¶ 15 The jury convicted defendant of felony murder and armed robbery, and the trial court sentenced him to life in prison.

¶ 16 II

¶ 17 Shortly after he was arrested, defendant was taken to what was then known as the Area 6 police station at Belmont and Western Avenues. That station would later become known as Area 3. (In fact, it was so known by the time of defendant's suppression hearing and trial.) But it is not to be confused with the station on the southwest side, also known for a time as Area 3, where Jon Burge commanded the violent crimes unit after his promotion and transfer from Area 2. To avoid confusion, we will continue to refer to the station at issue as Area 6.

¶ 18 At Area 6, defendant was interrogated—and, he claims, physically abused—by Violent Crimes Detectives Abreu and O'Connor. That alleged physical abuse was one of several grounds on which defendant moved to suppress his custodial statement before trial.

¶ 19 Defendant alleged in his motion, and then testified at the suppression hearing, that the detectives tightened his handcuffs excessively and cuffed him to a metal ring on the wall, with his hands behind his back. They denied his requests for an attorney and a phone call. After

defendant denied any involvement in Victoriano's murder, the detectives beat him, on and off, for "a couple of hours," in his estimate. In particular, the detectives punched and kicked him in the chest, ribs, legs, and stomach, and they kneed him in the genitals. Defendant cried out in pain. He sustained bruising, but he was not bleeding.

¶ 20 Later that day, Abreu told defendant that he was taking him to the State's Attorney and court reporter to "hear" his case, and that defendant should answer the questions "like it is on paper," or else Abreu would beat him some more. As defendant recalled, O'Connor was not present when Abreu made that threat. Defendant acknowledged that the detectives offered him food and water while he was in custody.

¶ 21 Defendant testified that when he arrived at the Cook County Jail on July 29, 1991—the day after the murder and his arrest—he told the deputy sheriffs, and a paramedic who examined him, about the beating. In stipulated testimony, however, the paramedic denied that defendant mentioned any alleged abuse; nor did the paramedic observe any bruises, lacerations, or other such injuries on defendant.

¶ 22 That same day, defendant told the bond-court judge that he had been beaten by the police. After asking defendant to lift up his shirt, the judge remarked that he did not see any "marks" on defendant that corroborated his allegations. The relevant portions of the bond-court hearing were read into the record at the suppression hearing.

¶ 23 The defense introduced photographs of defendant's hands taken "three days after the incident" in the "lockup area of Skokie," which defendant identified as "my hands with marks, handcuff marks, on them." On cross-examination, defendant acknowledged that he had been cuffed and transported a number of times during the three days that had passed since the alleged abuse at Area 6.

¶ 24 Abreu and O'Connor both testified at the suppression hearing and denied physically abusing defendant in any way.

¶ 25 The trial court found, among other things, that there was no evidence of physical abuse and denied the motion to suppress. Defendant's custodial statement was moved into evidence at trial, where defendant reiterated his claims of abuse. O'Connor testified in rebuttal that he never punched, kicked, or otherwise physically abused defendant, and that he never saw Abreu or anyone else do so, either.

¶ 26 Defendant preserved his suppression issues in his motion for new trial. In this context, he again alleged that he had been beaten by Abreu and O'Connor. Defendant did not raise any suppression issues on direct appeal or otherwise allege police abuse in that proceeding. We affirmed his conviction. *People v. Brandon*, No. 1-93-3511 (Dec. 13, 1995) (Rule 23 order).

¶ 27 III

¶ 28 In 2001, defendant, *pro se*, filed a "Motion to Strike Unconstitutional Sentence Imposed." Relying on *People v. Arna*, 168 Ill. 2d 107 (1995), for the proposition that a "void" sentence can be challenged at any time, he argued that his sentence violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The circuit court recharacterized the motion as an initial post-conviction petition and dismissed it at the first stage.

¶ 29 In 2010, defendant filed a post-conviction petition, acknowledging that it was considered a successive petition because of the recharacterization of his 2001 motion. In his 2010 pleading, defendant renewed his claims of police abuse and argued that new evidence to corroborate these claims had become available in the intervening years.

¶ 30 Specifically, defendant alleged that his earlier pleading had been filed "before evidence surfaced regarding * * * the systematic conduct of beatings, intimidations and overall coercive

and abusive tactics" used by "Jon Burge and Associates [*sic*] at Area (2) and (3)." Defendant attached various newspaper articles about Burge to his petition, in support of his argument that he satisfied the cause-and-prejudice test. On appeal, he argued that he should also be permitted to rely on the Report of the Special State's Attorney, released on July 19, 2006, which documented the abusive tactics used by Burge and his crew, even though he did not attach it to his petition.

¶ 31 The circuit court denied leave to file the 2010 petition, and we affirmed that ruling on various grounds. *Brandon*, 2013 IL App (1st) 110652-U, ¶¶ 52-65. Most importantly, any new evidence regarding Burge and his crew was irrelevant to defendant's claims, since Abreu and O'Connor were not Burge's subordinates, had no known association with Burge, and were not so much as mentioned in the 2006 Report. *Id.* ¶¶ 57-59. Defendant's petition conflated the northside police station where Abreu and O'Connor worked, and where he was interrogated—known at the time as Area 6 and later renamed Area 3, as we noted above—with the Area 3 on the southwest side where, for a time, Burge was in command. *Id.* ¶¶ 58-59. Recent revelations about Burge and his crew, important though they were, could not help *this* defendant establish either cause or prejudice, as required for leave to file his 2010 petition. *Id.*

¶ 32 IV

¶ 33 At issue here is defendant's second successive postconviction petition, filed on June 6, 2017, in which he again alleged that Abreu and O'Connor beat him and physically coerced his confession. This time, defendant supported his petition with evidence that Abreu and O'Connor, specifically, had been engaged in a longstanding practice of abusing suspects and physically coercing confessions. This evidence, he maintained, was previously unavailable to him.

¶ 34 Along with a fresh affidavit, reiterating his prior claims of abuse, defendant attached the following new evidence in support of his petition:

1. An affidavit from Curtis Holmes, dated April 22, 2015, and attesting, in sum, that he was interrogated by Abreu and O'Connor in September 1992. The detectives handcuffed him to a metal ring on the wall; denied his requests for a phone call and an attorney; beat him in the stomach, back, arms, and neck; and threatened to continue the beating until he confessed to several murders.
2. An affidavit from Jamal Jones, dated October 1, 2014, and attesting, in sum, that in January 1999, Abreu and O'Connor handcuffed him to a metal ring on the wall during his interrogation, demanded his confession to a murder, and denied his requests for a phone call and an attorney. When Jones refused to confess, Abreu picked him up by his sweater and threatened to kill him unless he told the detectives what they wanted to hear. Abreu then punched Jones in the chest, stomach, ribs, and lower back. This beating lasted around 10 minutes and took place while O'Connor was not in the room. Later, when O'Connor left the room again, Abreu again punched Jones repeatedly and threatened to kill him. After Jones denied committing the murder to an assistant state's attorney, Abreu beat Jones at least three more times when they were alone in the room together. Jones eventually signed an inculpatory statement after Abreu kicked him under the table.
3. An affidavit from Cornelius Laughlin, dated October 6, 2014, and attesting, in sum, that on February 1, 2001, Abreu and O'Connor handcuffed him to a metal ring on the wall, denied his requests for a lawyer and a phone call, and demanded that he confess to a murder. When he refused, Abreu picked him by his shirt, threw him against the wall, and screamed at him to confess.
4. A copy of the federal civil-rights complaint filed by Daniel Taylor on February 3, 2014, along with two news articles, dated February 4 and 5, 2014, about the case. Taylor had

been beaten and framed by the police for a double murder in 1992, when he was 17 years old. As it turned out, Taylor was in police custody, on a disorderly-conduct charge, at the time of the murders. As the complaint stated, Taylor's conviction was vacated in 2013, and the circuit court granted him a certificate of innocence on January 23, 2014.

The complaint alleged that a group of detectives at Area 6, including Abreu and O'Connor, engaged in a pattern and practice of physical abuse and coercion. In this case in particular, they handcuffed Taylor to the wall, punched him, hit him with a flashlight, and threatened to keep beating him until he confessed. The detectives similarly coerced Lewis Gardner, a juvenile with an IQ of 70, into implicating himself, defendant, and five others; and they coerced statements from several other juvenile witnesses.

The detectives also fabricated evidence—for example, records of an alleged encounter between Taylor and the detectives on the street, when, in fact, Taylor was in custody. And they deliberately withheld exculpatory evidence that they knew of—for instance, the lockup records showing that Taylor was in custody and therefore could not have committed the murders.

5. Printouts of pre-2000 complaint register histories for Abreu and O'Connor. The vast majority of the complaints lodged against the officers, as reflected in these documents, bear no relation to the allegations here (for instance, warrantless searches or "vehicle licensing") and are marked "NS" with regard to the "final finding," an unexplained notation that almost certainly indicates that the complaints were not sustained.

¶ 35 Defendant also alleged that the State violated due process, in particular *Brady*, 373 U.S. 83, by failing to disclose evidence of a pattern and practice of physical abuse and coercion by Abreu and O'Connor, and by knowingly using perjured testimony from the detectives.

¶ 36 In an oral ruling, and without further explanation, the circuit court found that defendant's claims were "*res judicata*" and "frivolous and patently without merit."

¶ 37 ANALYSIS

¶ 38 In his second successive petition, defendant raises two claims that he pursues on appeal. First, his confession was coerced, and its admission at trial thus denied him due process. The second claim, also sounding in due process, is that the State violated its *Brady* obligations by failing to disclose this pattern-and-practice evidence relating to Abrue and O'Connor before trial.

¶ 39 I

¶ 40 We start with defendant's claim that he was denied due process by the use of his physically coerced confession at trial. This time around, he supports his longstanding claim with new pattern-and-practice evidence—none of which, he says, was available to him until now, through no fault of his own.

¶ 41 To file a successive post-conviction petition, a defendant must first obtain leave of court by demonstrating "cause for his or her failure to bring the claim in his or her initial post-conviction proceedings," and that "prejudice results from that failure." 725 ILCS 5/122-1(f) (West 2016).

¶ 42 As this statutory provision has been interpreted, a defendant may also be granted to leave to file a successive petition raising a claim he *did* raise in an earlier petition, if he has since obtained new evidence to support that claim and can demonstrate cause for the failure to discover and present that new evidence in the earlier proceeding. See, e.*g.*, *People v. Wrice*, 406 Ill. App. 3d 43, 52 (2010) (leave to file granted where successive petition raised claim of coerced confession raised in initial petition but presented previously unavailable evidence), *aff'd*, 2012 IL 111860, ¶ 85.

¶ 43 At the leave-to-file stage, we must take the allegations in the petition and the supporting affidavits as true, unless they are positively rebutted by the trial record. *People v. Robinson*, 2020 IL 123849, ¶ 45. We are thus "precluded" at this initial pleading stage "from making factual and credibility determinations." *Id.* Leave to file should be granted unless it is "clear" that the claims "fail as a matter of law" or that the successive petition is otherwise "insufficient to justify further proceedings." *People v. Smith*, 2014 IL 115946, ¶ 35. We review the circuit court's ruling at the leave-to-file stage *de novo*. *People v. Bailey*, 2017 IL 121450, ¶ 13.

¶ 44 A

¶ 45 "Cause" means "an objective factor which impeded [the defendant's] ability" to raise a claim, or to present a particular piece of evidence in support of a claim, in an earlier proceeding. 725 ILCS 5/122-1(f) (West 2016); see *Wrice*, 406 Ill. App. 3d at 52. An "objective" impediment is one that is "external to the defense." *People v. Pitsonbarger*, 205 Ill. 2d 444, 462 (2002).

¶ 46 In what we're calling his first postconviction petition—the recharacterized sentencing motion filed in 2001—defendant did not allege that Abreu or O'Connor physically coerced his confession. But he did allege coercion in his first successive petition, filed in 2010, albeit without any of the pattern-and-practice evidence he now offers to support his claim. Thus, to obtain leave to file, defendant must show cause in two senses: (1) cause for his failure to present this evidence of pattern-and-practice in any previous filing; and (2) cause for his initial failure to raise the coerced-confession claim at all in his 2001 petition. We consider them in that order.

¶ 47 1

¶ 48 The State argues that there is no objective reason why defendant could not have discovered his new evidence of pattern-and-practice earlier—so much earlier, in fact, that he could have presented it in 2001, never mind 2010. We disagree.

¶ 49 Consider, for starters, defendant's newly discovered evidence that detectives at Area 6, Abreu and O'Connor among them, physically coerced a false confession from Daniel Taylor in November 1992, as part of their efforts (described in more detail above) to frame this innocent teenager for a double murder. How and when did the evidence of Taylor's abuse by Area 6 detectives come to light, then find its way into defendant's hands?

¶ 50 Taylor was eventually exonerated more than two decades later, in June 2013, when the State agreed to the vacatur of his convictions, the case against him having been exposed as a wholesale fabrication by law enforcement. The circuit court granted Taylor a certificate of innocence in January 2014, and in February of that year, he filed the federal civil-rights complaint (see 42 U.S.C. § 1983) that defendant attached to his current petition, along with two news articles, dated the same week as the complaint, about Taylor's case.

¶ 51 It is obvious enough that defendant learned of Taylor's abuse in the same way, and at the same time, as the rest of the general public: from Taylor's newsworthy exoneration and ensuing civil suit. All of that unfolded in 2013-2014. The State does not claim that it was defendant's fault that he failed, on his own, to unearth the abuse and coercion of a perfect stranger, Taylor, years before the State acknowledged the miscarriage of justice.

¶ 52 But the State *does* make that claim about the abuse to which Laughlin, Holmes, and Jones attested in their affidavits. Although their *affidavits* did not exist until 2014 or 2015, says the State, their *abuse* took place long ago, before defendant filed either of his previous petitions. Thus, the onus was on defendant to unearth their abuse and obtain their affidavits on his own, even before he filed his first petition in 2001, or suffer a procedural default.

¶ 53 The crux of the State's position is that a defendant should be able to discover the abuse and coercion of any other defendant, in any unrelated case, and obtain an affidavit for use in his

own petition, just as soon as the abuse and coercion has taken place, or at least in time to comply with the statute of limitations on filing an initial post-conviction petition.

¶ 54 The State's logic has consistently been rejected in cases involving allegations of police abuse and coercion. Stanley Wrice, for example, was abused by Area 2 detectives in 1982, but he was granted leave to file his second successive petition after the Report of the Special State's Attorney became available in 2006. *Wrice*, 406 Ill. App. 3d at 52.

¶ 55 That report was helpful to Wrice because it documented claims that were similar to his, and more importantly for our purpose here, of a similar vintage. See *id.* at 52-53. Even though the abuse documented in the Report occurred years before Wrice filed his first two petitions, we held that the Report had only recently become available, and thus Wrice was entitled to use it to obtain leave to file his second successive petition. *Id*. at 52. The supreme court affirmed our ruling, and indeed the State conceded in the supreme court that our ruling on this point was correct. *Wrice*, 2012 IL 111860, ¶¶ 49, 85.

¶ 56 We have reached the same result whether a defendant relied on the 2006 Report of the Special State's Attorney or any other similar piece of evidence. See, *e.g.*, *People v. Dixon*, 2021 IL App (1st) 161641, ¶¶ 8-9 (2008 report compiled by People's Law Office and published in the Chicago Sun-Times); *People v. Weathers*, 2015 IL App (1st) 133264, ¶ 35 (2012 database and report from Illinois Torture Inquiry and Relief Commission). No reviewing court in Illinois has ever accepted the State's logic that, while the proof may be new, the alleged abuse is old, so the proof came too late in the day, and the claim is defaulted. Our reasons for rejecting this logic bear repetition and elaboration here.

¶ 57 It is through no fault of his own that a defendant does not have immediate access to evidence of a broader pattern of similar abuse inflicted on others by the accused officers. This

evidence pertains to the conduct of the State's own agents, toward unknown individuals, during the investigation of other, usually unrelated, cases. The agents in question, the accused officers themselves, have every incentive to remain mum, if not to deny everything. And even the most diligent investigation of a defendant's own case will not reveal to him *who else* may have been abused by the same officers when they were interrogated in *their own* cases.

¶ 58 Uncovering that information is, of course, usually a herculean task for the defense. But the more important point is that this information generally has nothing to do with the facts of the defendant's own case. Thus, investigating the defendant's own case, as diligent counsel is required to do, will not uncover this information. See *Patterson*, 192 Ill. 2d at 109 ("beyond interviewing anyone who had ever been a prisoner at Area 2, we can conceive of no manner in which [defense counsel] reasonably could have obtained this information"); *People v. Tyler*, 2015 IL App (1st) 123470, ¶ 162 (same); *People v. Reyes*, 369 Ill. App. 3d 1, 20 (2006) (same).

¶ 59 In other words, the evidence a defendant needs to corroborate a claim of police abuse is as "external to the defense" as it could possibly be, and the barriers to obtaining it are entirely "objective"—that is, not of the defense's own making. See *Pitsonbarger*, 205 Ill. 2d at 462; 725 ILCS 5/122-1(f). So the defendant cannot be faulted for lacking this evidence at the start, and if it becomes available to him later, he may use it then in a successive petition. There is cause for his "failure" (so to speak) to find and use this pattern-and-practice evidence earlier.

¶ 60 Typically, evidence of this kind has been uncovered by third parties and made public in official or unofficial reports, news coverage, civil complaints implicating the accused officers in an alleged pattern and practice of police abuse, and the like. Defendants then attach this publicly available evidence to their successive petitions. Here, in contrast, defendant supports his claim, in part, with newly discovered affidavits, attesting to similar abuse, that he obtained through his

own efforts. Or more to the point, through his own investigation of matters that were factually unrelated to his case.

¶ 61 Neither party has cited, and we have not found, a case in which leave to file a claim of police abuse was granted, or for that matter denied, based on affidavits like these. But that may just underscore how difficult such affidavits are to obtain. True, defendant did manage to obtain them, and as a result he did not have to rely entirely on third-party, publicly disseminated sources. All the same, he still had to overcome entirely "external" or "objective" obstacles and investigate matters of fact that were unrelated to his own case. One way or another, something more than ordinary defense diligence is always necessary to find pattern-and-practice evidence. This case, though apparently novel to some degree, is no exception. Defendant cannot be faulted for not acquiring these affidavits any earlier than he did.

¶ 62 In sum, defendant has demonstrated cause for his failure to present the Laughlin, Holmes, and Jones affidavits, as well as the Taylor evidence, in his 2001 or 2010 petitions. We can leave aside his final submissions, the purported citizen-complaint logs for Abreu and O'Connor, since they add nothing of substance to the evidence we have already discussed.

¶ 63 2

¶ 64 That brings us to the question of cause in the second sense—cause for defendant's failure to allege his abuse at all in his initial 2001 petition. The State says that defendant should have raised the coercion issue in his initial postconviction filing in 2001, his *pro se* filing styled "Motion to Strike Unconstitutional Sentence Imposed" (which the trial judge converted into a postconviction petition). Thus, says the State, defendant's claim here is barred by *res judicata*.

¶ 65 But it is long settled that "the doctrines of *res judicata* and forfeiture are relaxed where fundamental fairness so requires or *** where the facts relating to the issue do not appear on the

face of the original appellate record." *People v. English*, 2013 IL 112890, ¶ 22; see *People v. Williams*, 209 Ill. 2d 227, 233 (2004). Defendant's new evidence here fits within each of those exceptions. To choose one: as previously noted, back in 2001, defendant did not possess, and could not reasonably have been expected to obtain, evidence of this pattern and practice of abuse at the hands of the detectives who secured his confession. He thus lacked any record to raise this claim in 2001.

¶ 66 For example, in *Tyler*, 2015 IL App (1st) 123470, ¶ 158, we rejected the State's claim of *res judicata*, as the evidence of systemic police abuse, though occurring long before defendant's trial and appeal, could not reasonably have been discovered through due diligence. As Justice Gordon noted there, "Given the sensitive nature of police investigations and the sheer scale of the criminal justice system, it is unreasonable to expect defense counsel to discover whom these individual detectives were abusing unless counsel interviewed every suspect who was detained by them." *Id*. For much the same reason, we likewise reject the State's argument here as well.

¶ 67 Contrary to the State's claim, nothing we said in our 2013 order concerning defendant's first successive postconviction petition held otherwise. As detailed above, in defendant's first successive postconviction petition filed in 2010, defendant tried to use evidence of systemic torture committed by *Commander Burge* as evidence that the detectives here (Abreu and O'Connor) committed abuse against him. See *Brandon*, 2013 IL App (1st) 110652-U, ¶¶ 38-40. We swiftly rejected any evidence of Burge-related abuse as "completely irrelevant" to alleged abuse committed by Abreu and O'Connor, given that they were not Burge's subordinates, had no known association with him, did not work in the same stations where Burge worked, and were never even mentioned in the 2006 Report aimed primarily at Burge. *Id*. ¶¶ 58-59.

¶ 68 We also noted in that order, as an additional basis for affirming the dismissal of that

petition, that "[e]vidence of systematic torture was already widely available" back in 2001, at the time of defendant's initial postconviction petition. *Id*. ¶ 56. The State uses that quote to support its claim of *res judicata* here—that defendant should have known, back in 2001, of Abreu's and O'Connor's alleged systemic torture. But it is patently obvious that we were talking about evidence of systemic torture committed by *Commander Burge*, the focus of the 2010 successive petition, whose abuse was publicly alleged long before the 2006 Report of the Special State's Attorney. We were not talking about Abreu and O'Connor. Given that the State was emphatically arguing to us, in the 2013 appeal, that Abreu and O'Connor were not linked in any way to Commander Burge, it is more than a little disappointing to us that the State, now, would pluck that language entirely out of context and try to bootstrap Abreu and O'Connor into that reference to Burge.

¶ 69 The complete absence of this new, relevant evidence in 2001 provides cause for defendant's "failure to bring the claim in his * * * initial post-conviction proceedings." 725 ILCS 5/122-1(f) (West 2018).

¶ 70 B

¶ 71 Leave to file also requires a showing of prejudice, meaning the alleged constitutional error—here, the use of defendant's physically coerced confession—"so infected his trial that the resulting conviction violated due process." *People v. Jackson*, 2021 IL 124818, ¶ 30; 725 ILCS 5/122-1(f) (West 2018).

¶ 72 To establish prejudice based on new evidence, defendant must show that the evidence, taken as true, is "conclusive" in the sense that "it will probably change the result upon retrial." *Jackson*, 2021 IL 124818, ¶ 31 (quoting *People v. Patterson*, 192 Ill. 2d 93, 139 (2000)); see *Robinson*, 2020 IL 123849, ¶ 45. But when the new evidence relates to the physical coercion of a

confession, the calculus alters slightly, as our supreme court has made it clear that the use of a defendant's physically coerced confession as substantive evidence of guilt at trial is *never* harmless error. *Wrice*, 2012 IL 110860, ¶ 71.

¶ 73 So the overall strength of the evidence against defendant at trial is irrelevant. See *Weathers*, 2015 IL App (1st) 133264, ¶ 38. All that we need decide is whether, taken as true, the new evidence documents abuse similar enough to the abuse alleged by defendant that "it may fairly be said the officers were acting in conformity with a pattern and practice of behavior." *Jackson*, 2021 IL 124818, ¶ 34 (rejecting appellate court's "strikingly similar" abuse standard as a misreading of *Patterson*, 192 Ill. 2d at 145).

¶ 74 Timing is also important. Evidence will generally provide stronger corroboration for defendant's allegations if it documents abuse close in time to his own. A single incident, years removed, will not establish a pattern and practice of police abuse, but "a series of incidents spanning several years" might. *Id.* ¶ 37 (quoting *Patterson*, 192 Ill. 2d at 140).

¶ 75 Taken together, and taken as true, the affidavits and Taylor evidence satisfy this standard. They tell of a pattern of abuse very similar to defendant's own, in which the same officers consistently handcuff a suspect to a ring on the wall; grab, punch, kick, and knee him in various parts of the body; and threaten continued violence until he confesses. Taylor and Holmes both allege that they were abused in 1992, not long after defendant's alleged abuse in 1991. And while the abuse that Jones and Laughlin attest to was further removed, dating from 1999 and 2001 respectively, overall this evidence reveals a series of incidents, spread out over years, that suggests a longstanding practice of abuse and coercion similar to that alleged by defendant.

¶ 76 In short, the new evidence tends to show that the detectives were acting in conformity with a pattern and practice when they (allegedly) physically coerced defendant's confession.

Taken as true, it thus provides strong corroboration for his claim of abuse, and if it is found to be credible at a hearing, defendant's confession would likely be suppressed as the product of physical coercion. The State never contests any of this.

¶ 77 Whether defendant's allegations and new supporting evidence will ultimately be found credible remains to be seen. We express no view on that question. But his claim deserves to be heard. Leave to file should have been granted. We reverse the trial court's judgment on this ground and remand the matter for the appointment of postconviction counsel and second-stage proceedings. See *Wrice*, 2012 IL 110860, ¶ 87.

¶ 78 II

¶ 79 Defendant next claims that the State violated *Brady*, 373 U.S. 83, by failing to disclose a pattern and practice of physical abuse and coercion by Abreu and O'Connor.

¶ 80 For purposes of this claim, the alleged pattern and practice comprises, at most, the abuse of Holmes and Taylor. Jones and Laughlin both attest to abuse that took place several years after defendant's trial. So while that evidence may help to corroborate defendant's coerced-confession claim, it cannot support his *Brady* claim at all. The State could not have disclosed, and could not have been required to disclose, abuse that had not yet taken place.

¶ 81 If in fact Abreu and O'Connor committed these acts, they were obviously aware of their own misconduct, whatever its precise scope—and regardless of whether the prosecutors trying this case had any inkling of it at the time. And that fact alone, defendant contends, triggered the State's *Brady* obligations. Our supreme court's controlling precedents, however, hold otherwise.

¶ 82 A

¶ 83 Due process, and the *Brady* rule in particular, requires the State to disclose evidence that is favorable to the defense and material to guilt or punishment. *Strickler v. Greene*, 527 U.S. 263,

280 (1999). Evidence is favorable if it is either exculpatory or impeaching; it is material if there is a reasonable probability that disclosure would have resulted in an acquittal. *Id.* And it doesn't matter whether the State's failure to disclose the evidence was willful or inadvertent. *Id.*

¶ 84 But the key point here is that the *Brady* rule applies as well to favorable evidence "known only to police investigators and not to the prosecutor" trying the case. *Kyles v. Whitney*, 514 U.S. 419, 438 (1995); *People v. Beaman*, 229 Ill. 2d 56, 73 (2008). For example, in *Kyles*, 514 U.S. at 441, the police withheld statements about the charged offense made by key eyewitnesses that cast doubt on the version of events the prosecutors ultimately presented to the jury through their testimony. The failure to disclose this evidence to the defense violated due process, even though the prosecutors were left equally in the dark by the police.

¶ 85 The *Kyles* principle, as we will call it, holds that what is known to the police is known to the prosecutors, as far as due process is concerned. The rule thus imposes on prosecutors "a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Id.* at 437.

¶ 86 Defendant argues that Abreu's and O'Connor's own knowledge of their illegal conduct was sufficient to trigger the State's *Brady* obligations, regardless of whether this conduct was known at the time to any of the prosecutors. On its face, this appears to be a straightforward application of the *Kyles* principle. The detectives were necessarily aware of their own illegal conduct. And that conduct was powerful impeachment evidence: It would allow defendant not only to challenge the voluntariness and reliability of his statement, but also to attack the detectives' credibility more generally, since a rational juror could conclude that an officer who serially abused and coerced suspects was untrustworthy to whatever degree. In short, the

detectives' pattern of abuse was "favorable" evidence "known" to at least these "police investigators"—which, as *Kyles* holds, is all that the *Brady* rule requires. See *id.* at 438.

¶ 87 But our supreme court has expressly declined to apply the *Kyles* principle to an officer's knowledge of his own misconduct in other, unrelated cases. In *People v. Orange*, 195 Ill. 2d 437, 456-58 (2001), the defendant alleged that the State violated *Brady* by failing to disclose evidence of a pattern and practice of abuse by Burge's unit at Area 2. (The defendant eventually acquired this evidence, long after his trial, through the OPS report.) And like defendant here, he expressly argued that the officers' knowledge of their own conduct was "imputed" to the State under *Kyles*, whether the prosecutors knew about the abusive practices at the time or not. *Id.* at 456.

¶ 88 Our supreme court rejected this application of the *Kyles* principle. Adhering to its holding in *People v. Mahaffey*, 194 Ill. 2d 154, 171-74 (2000), the court reiterated that the *Brady* rule did not require the State to disclose evidence of the abusive practices at Area 2 based solely on the fact that the detectives themselves were aware of those practices. Specifically, the State was not required "to disclose information about misconduct in unrelated cases known only to individual police officers where the nexus between the other cases of alleged abuse and the defendant's case was not known until years after the defendant's trial." *Orange*, 195 Ill. 2d at 458; see also *People v. Mitchell*, 2012 IL App (1st) 100907, ¶¶ 70-72 (under *Orange*, State did not violate *Brady* by failing to disclose that Burge subordinate battered suspects and committed perjury in other cases).

¶ 89 As we understand it, *Orange* rests on a distinction between two categories of undisclosed evidence. On the one hand, the police might fail to disclose some of what they learned about the charged crime, and hence the defendant's case, in the course of their investigation. That is what

happened in *Kyles*, 514 U.S. at 441, when the police withheld eyewitness statements from the prosecutors (and thus the defense). Evidence of this kind is subject to disclosure under *Brady*.

¶ 90 But in *Orange*, the prosecutors were not left in the dark about the facts of the defendant's own case. Whatever the police learned about the charged crime, they shared with the prosecutors (as far as the allegations in the petition were concerned). Rather, the police remained mum about their ongoing practice of abusing suspects and coercing confessions. In other words, they failed to reveal that they abused other suspects in other, "unrelated cases." See *Orange*, 195 Ill. 2d at 458. The *Kyles* principle, as our supreme court interpreted it, does not go so far as to impose on prosecutors an obligation to discover the abuse of one suspect and disclose that information to other defendants who were interrogated, and allegedly abused, by the same officers.

¶ 91 It is obvious which side of this line defendant's *Brady* claim falls on. In fact, his claim is indistinguishable from the claim rejected in *Orange*, which is thus the controlling precedent in this case. And defendant does not deny that. But at the same time, he says, *Orange* is "at odds with" *Kyles*, a United States Supreme Court ruling on a question of federal constitutional law, and he urges us to depart from *Orange* on this basis.

¶ 92 We have no authority to do that. In *Mitchell*, 2012 IL App (1st) 100907, ¶ 72 (Neville, J.), we wrote that "we do not see how to reconcile" *Orange* with *Kyles*—but, as we also recognized, our supreme court evidently did, and that determination binds us. See, *e.g.*, *People v. Fountain*, 2012 IL App (3d) 090558, ¶ 23 (appellate court bound by supreme court's determination that its precedents do not conflict with federal law); *Mekertichian v. Mercedes-Benz U.S.A., Inc.*, 347 Ill. App. 3d 828, 836 (2004) ("As an inferior court of review, our serving as a reviewing court on our supreme court's interpretation of federal law would inject chaos into the judicial process.").

¶ 93 In the two decades that have passed since *Orange* was decided, the problem of police abuse and coerced confessions has continued to loom large. The supreme court may one day revisit this holding in *Orange*. Until that time, we are bound by it.

¶ 94 B

¶ 95 One species of *Brady* violation occurs when "the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury." *United States v. Agurs*, 427 U.S. 97, 103 (1976); see *People v. Coleman*, 183 Ill. 2d 366, 394 (1998). Defendant asserts that this species of *Brady* violation is also present here: The "undisclosed evidence," he says, reveals that the prosecutors knew, or should have known, that Abreu and O'Connor gave perjured testimony at his suppression hearing and trial.

¶ 96 Unpacking this allegation yields the following: The pattern-and-practice evidence (more precisely, the Holmes affidavit and Taylor evidence, as the other alleged abuse took place long after defendant's trial) shows that the prosecutors either knew or should have known that Abreu and O'Connor were lying when they denied physically abusing defendant or seeing any other officer abuse him.

¶ 97 Even taking it as true that these detectives abused Holmes and Taylor, the pattern-and-practice evidence does not establish—or even purport to establish—that the detectives also abused defendant, that any of the prosecutors involved with defendant's case knew about the abuse, or that any of the prosecutors knew anything else about defendant's time at Area 6 that should have led them to affirmatively conclude that the detectives must have lied under oath. In short, the pattern-and-practice evidence does not directly establish anything about defendant's case: It does not speak at all to the question of what happened to *him* at Area 6, or what any of the prosecutors knew about *his* interrogation.

¶ 98 All that the pattern-and-practice evidence does—and we do not mean to imply that this is insignificant—is lend credence or plausibility to defendant's allegations of abuse, by revealing a pattern of similar abuse, in other cases, by the same officers. Thus, this species of defendant's *Brady* claim ultimately rests on this inference: Because the prosecutors knew of a pattern of abuse in other cases, they knew or should have known what really happened in this case, and so they knew, or should have known, that the detectives' version of events was untrue.

¶ 99 That inference fails for two reasons. First, we cannot impute knowledge of the alleged pattern of abuse to the prosecutors. That is the holding of *Orange*, which defendant would again have us disregard. Second, even if we could impute this knowledge, that would only establish that the prosecutors should have known that the detectives' credibility was suspect, and that there was a *possibility* that they were lying. It would not establish that the prosecutors knew, or should have known, that the detectives were, in fact, lying in this case. It would go too far to say, based on the pattern-and-practice evidence alone, that the prosecutors suborned perjury in this case. Taken as true—and the holding of *Orange* aside—defendant's evidence falls short of supporting this very serious allegation.

¶ 100 For these reasons, defendant's *Brady* claim in all its forms fails, as he cannot demonstrate prejudice. Leave to file this claim was thus properly denied. See *Mitchell*, 2012 IL App (1st) 100907, ¶ 72 (partial dismissals of successive petitions permitted); *People v. Lee*, 207 Ill. 2d 1, 5 (2003) (cause-and-prejudice test must be satisfied for each claim).

¶ 101 III

¶ 102 Defendant was sentenced to life in prison for a crime he committed at the age of 20. He did not allege in his current petition that his sentence is unconstitutional, under either the eighth amendment to the United States Constitution or the proportionate penalties clause of the Illinois

Constitution. Appellate counsel, however, asks us to "remand this matter to allow [defendant] to develop the record" he needs to mount an as-applied challenge to his sentence under one or both of these provisions.

¶ 103 The crux of defendant's argument is that *Miller*, 567 U.S. 460, which applies to juveniles, and also informs our proportionate-penalties analysis, should be applied to an "emerging adult" in his particular circumstances. The interests of "judicial economy," he says, would be better served by a remand for this purpose than by requiring him to file yet another successive petition raising this claim.

¶ 104 Our disposition of defendant's coerced-confession claim makes this relief unnecessary. In *Wrice*, 2012 IL 111860, ¶ 88, the supreme court held that, when a successive petition is remanded for second-stage proceedings on one or more claims, post-conviction counsel has the discretion to amend the petition to include a new claim. That route is open to defendant and post-conviction counsel here.

¶ 105 We note that *Miller* was decided in 2012, after defendant filed his 2010 postconviction petition. That fact alone demonstrates cause for his failure to raise his sentencing challenge in an earlier proceeding. *People v. Davis*, 2014 IL 115595, ¶ 42.

¶ 106 But nothing we say here should be taken to imply that defendant has demonstrated prejudice. This case is not like *People v. Warren*, 2016 IL App (1st) 090884-C, ¶¶ 45-51, cited here by defendant, in which a juvenile received a mandatory life sentence. That necessarily violates *Miller*, no matter what else the record may or may not show, so there was no reason to delay the inevitable relief in that case. Here, in contrast, we cannot give defendant's claim any meaningful consideration because the record has never been developed with an eye toward the *Miller* factors and their potential application to defendant's circumstances as an "emerging

adult." *Cf. People v. Harris*, 2018 IL 121932, ¶¶ 37-40, 46, 53 (finding record undeveloped to reach 18-year-old's as-applied challenges under *Miller* and proportionate penalties clause raised for first time on appeal); *People v. Thompson*, 2015 IL 118151, ¶¶ 16-17, 37-38 (as-applied challenges not raised in collateral petition could not be raised on appeal from its denial).

¶ 107 The circuit court will be in a position to consider defendant's claim, if he chooses to pursue it, based on whatever record appointed counsel assists him in developing on remand. We note that the State may seek dismissal of any such challenge, based on a failure to satisfy the cause-and-prejudice standard, at the second stage of proceedings. *People v. Johnson*, 2019 IL App (1st) 153204, ¶ 37. The issue of cause is perfectly clear, as we stated above, but the issue of prejudice is for the circuit court to decide in the first instance.

¶ 108 CONCLUSION

¶ 109 The judgment of the circuit court is reversed insofar as it denied defendant leave to file his second successive postconviction petition regarding his claim of a physically coerced confession. We remand for second-stage proceedings on that claim. We otherwise affirm the judgment.

¶ 110 Affirmed in part, reversed in part, remanded.

No. 1-17-2411

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Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 91 CR 29439 (01); the Hon. Thomas Joseph Hennelly, Judge, presiding.
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