

No. 1-16-0229

**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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|--------------------------------------|---|---------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the     |
|                                      | ) | Circuit Court of    |
| Plaintiff-Appellee,                  | ) | Cook County         |
|                                      | ) |                     |
| v.                                   | ) | 91 CR 1637303       |
|                                      | ) |                     |
| ANTONIO NICHOLAS,                    | ) | Honorable           |
|                                      | ) | Matthew E. Coghlan, |
| Petitioner -Appellant.               | ) | Judge Presiding.    |

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PRESIDING JUSTICE PIERCE delivered the judgment of the court.  
Justices Harris and Mikva concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court erred in granting the State’s motion to dismiss petitioner’s successive postconviction petition at the second stage.

¶ 2 Petitioner appeals from the circuit court’s dismissal of his successive postconviction petition at the second stage and argues that the trial court erred in granting the State’s motion to dismiss his petition because he has made a substantial showing of a constitutional violation that police detectives under the command of Jon Burge coerced his confession and that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963). Petitioner argues that he is entitled to a third stage evidentiary hearing on his claim. For the following reasons, we affirm the court’s dismissal

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of petitioner's *Brady* claim and reverse the court's ruling that defendant failed to make a substantial showing of a constitutional violation with respect to his claim that his confession was involuntary and remand for a third stage evidentiary hearing.

¶ 3

### BACKGROUND

¶ 4 A lengthy recitation of the facts of this case can be found in our order affirming petitioner's conviction, *People v. Nicholas*, No. 1-93-4215 (May 2, 1996) (unpublished order pursuant to Supreme Court Rule 23), and in our most recent opinion reversing the trial court's decision to deny petitioner leave to file his successive postconviction petition, *People v. Nicholas*, 2013 IL App (1st) 103202.

¶ 5 The sole issue here is whether the trial court erred in granting the State's motion to dismiss petitioner's successive postconviction petition at the second stage and, if so, should petitioner's *Brady* claim be reinstated. Therefore, we will briefly discuss the procedural history of this case.

¶ 6 Petitioner filed a *pro se* postconviction petition on September 19, 2007, wherein he alleged the 2006 Report of the Special State's Attorney (2006 Report) corroborated his claim that his confession was coerced and that the evidence, apart from the confession, was insufficient to support his convictions. On November 27, 2007, the circuit court summarily dismissed petitioner's *pro se* petition. The court found that petitioner had waived his coercion claim because the issue was not raised on direct appeal. On appeal of the denial of his postconviction petition, appellate counsel filed a motion to withdraw under *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and averred that there were no meritorious issues to be presented on appeal. This court reviewed the record, counsel's brief and petitioner's response and found that there were no meritorious issues on appeal and affirmed the judgment of the circuit court. *People v. Nicholas*, No. 1-08-0670

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(Dec. 17, 2008) (unpublished order pursuant to Supreme Court Rule 23).

¶ 7 Petitioner filed a *pro se* successive postconviction petition on December 14, 2009, wherein he raised the following claims: (1) his confession was coerced and newly discovered evidence supported this claim; and (2) he was actually innocent and provided an affidavit of an individual who allegedly supported this claim. The circuit court denied petitioner leave to file his successive petition. We reversed the judgment of the circuit court that petitioner failed to show cause and prejudice for failing to raise in a prior proceeding his claim that his confession was physically coerced and remanded to the circuit court for second-stage proceedings with directions that the circuit court appoint counsel. We affirmed the court's dismissal of petitioner's actual newly discovered evidence of actual innocence claim. *People v. Nicholas*, 2013 IL App (1st) 103202.

¶ 8 On remand, petitioner was afforded counsel and filed an amended verified petition with attachments. The State filed a motion to dismiss the amended verified petition and argued that petitioner had failed to make a substantial showing of a constitutional deprivation because petitioner's new discovery of the identification of Detective McWeeney as the "good cop" was not of such conclusive character to change the result on retrial. The State likewise argued that petitioner's claim of abuse was inconsistent and contradicted by witnesses and that petitioner was not entitled to relief under *Brady*.

¶ 9 The circuit court granted the State's motion to dismiss the amended successive petition at the second stage. The court found that petitioner's claims that his confession was involuntary and the product of physical and psychological coercion were rebutted by the record and the testimony of the detectives, assistant state's attorneys, medical personnel and his own family. In addition, the court found that because petitioner received a full and fair hearing on his motion to suppress

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statements, his claim that his statement was physically coerced was barred by the doctrine of *res judicata*. The court further found that petitioner had not consistently claimed that he was tortured and therefore could not make a substantial showing of a constitutional violation. Petitioner timely appealed.

¶ 10 ANALYSIS

¶ 11 Petitioner argues that the circuit court erred when it dismissed his successive petition at the second stage. He claims that he is entitled to a third stage evidentiary hearing where he has made a substantial showing of a constitutional violation on his claim that detectives under the command of Jon Burge coerced his confession.

¶ 12 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)), allows prisoners to collaterally attack a prior conviction and sentence where there was a substantial violation of his or her constitutional rights. *People v. Gosier*, 205 Ill. 2d 198, 203 (2001). In order for a petitioner to successfully challenge a conviction or sentence pursuant to the statute, he or she must demonstrate that there was a substantial deprivation of federal or state constitutional rights. *People v. Morgan*, 187 Ill. 2d 500, 528 (1999).

¶ 13 The Act contemplates the filing of only one postconviction petition. *People v. Evans*, 186 Ill. 2d 83, 89 (1999); 725 ILCS 5/122-1(f) (West 2010). Consequently, all issues actually decided on direct appeal or in an original postconviction petition are barred by the doctrine of *res judicata* and all issues that could have been raised on direct appeal or in an original postconviction petition, but were not, are waived. *People v. Blair*, 215 Ill. 2d 427, 443 (2005); 725 ILCS 5/122-3 (West 2010).

¶ 14 The petition that is the subject of this appeal was a successive postconviction petition

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dismissed at the second stage. The standards at the second stage of postconviction proceedings apply equally to successive petitions. *People v. Sanders*, 2016 IL 118123, ¶ 31. At the second stage, the State must either answer or move to dismiss the petition. 725 ILCS 5/122-5 (West 2012). The question for the court at this stage is “whether the petition and any accompanying documentation make a substantial showing of a constitutional violation.” *People v. Edwards*, 197 Ill. 2d 239 (2001). On review, the allegations of the petitioner's petition will be taken as true, but nonfactual and nonspecific assertions, which are merely conclusions, are insufficient. *People v. Barnslater*, 373 Ill. App. 3d 512, 519 (2007) (citing *People v. Rissley*, 206 Ill. 2d 403, 412 (2003)). The postconviction court accepts as true all assertions that are not directly rebutted by the original trial record. *People v. Coleman*, 183 Ill.2d 366, 380-81, 385 (1998). Since there are no factual issues at the dismissal stage of the proceedings, the question is essentially a legal one, which requires the reviewing court to make its own independent assessment of the allegations of the petition and supporting documentation. *Id.* If the petitioner establishes a substantial showing of a constitutional violation, then the petition advances to the third stage, at which time the circuit court holds an evidentiary hearing on the claims raised in the petition. 725 ILCS 5/122-6 (West 2012). The dismissal of a postconviction petition without an evidentiary hearing is reviewed *de novo*. *People v. Sanders*, 2016 IL 118123.

¶ 15 The State argues that petitioner's claim here is barred by the doctrine of *res judicata*. As we stated in *Nicholas*, 2013 IL App (1st) 103202, petitioner acknowledges that he argued that his confession was physically coerced in his suppression hearing and in his initial postconviction petition. He maintains however, that the law of the case now dictates that the strictures of *res judicata* should be relaxed here.

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¶ 16 In this appeal, we find, consistent with our finding in *Nicholas*, that because petitioner has raised the most serious allegations of police misconduct, and because we have previously found that petitioner established cause where postconviction appellate counsel's failure to raise petitioner's claims on appeal was unreasonable and petitioner suffered prejudice (had counsel provided effective assistance, it is likely that petitioner's first *pro se* petition would have been remanded for second-stage proceedings), we will relax the strictures of *res judicata* and consider the merits of petitioner's claim. See *Nicholas*, 2013 IL App (1st) 103202; *People v. Patterson*, 192 Ill. 2d 93, 139-45 (2000); *People v. King*, 192 Ill. 2d 189, 193-99 (2000); *People v. Cannon*, 293 Ill. App. 3d 634, 640 (1997) (courts reconsidering the voluntariness of alleged confessions that would otherwise be barred by *res judicata* in several cases due to the pervasive pattern of criminal conduct by police officers in Area 2).

¶ 17 We must now determine whether the amended successive petition and any accompanying documentation make a substantial showing of a constitutional violation.

¶ 18 We are aware of the systemic physical abuse levied at the hands of Commander Jon Burge. Numerous officers under the command of Burge, including officers O'Brien, Stehlik and McWeeney, have been implicated in many of those instances of physical abuse. However, the fact that those officers were involved in petitioner's arrest and subsequent questioning does not automatically entitle petitioner to an evidentiary hearing here. Petitioner must plead sufficient facts to be entitled advance to a third stage evidentiary hearing.

¶ 19 Although he was arrested on June 11, 1991, the first time petitioner's claim of abuse was documented was on July 18, 1991, a little over a month after he was arrested. We find nothing in the record to indicate that prior to July 18, 1991, petitioner told anyone that he was tortured or

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abused while being arrested or interrogated, despite being in contact with numerous court and jail personnel. However, since July 18, 1991, petitioner has consistently claimed that he was physically and psychologically abused. This issue was first litigated at petitioner's motion to suppress his confession. The 2006 Report of the Special State's Attorney was not available during the November 1992 hearing on the motion to quash arrest, the hearing on the motion to suppress statement, petitioner's October 1993 trial, or petitioner's direct appeal. Although the report was available at the time of petitioner's first postconviction petition, postconviction counsel chose not to pursue a claim based on the report even though petitioner had consistently claimed abuse at the hands of the police.

¶ 20 We are required to accept as true all of petitioner's assertions that are not directly rebutted by the original trial record. *People v. Coleman*, 183 Ill. 2d 366, 380-81, 385 (1998). In reviewing the dismissal of petitioner's *pro se* successive petition, we found in *Nicholas* that the petitioner "has consistently claimed his confession was the product of physical abuse which occurred during a period of time and under circumstances strikingly similar to those documented in the 2006 Report. However, he has not been afforded a review of his claim that others in similar circumstances have received." *Nicholas*, 2013 IL App (1st) 103202, ¶ 47. We found that the petitioner met the cause and prejudice test and his claim attacking the voluntariness of his confession was not barred under the principles of *res judicata*. *Id.* ¶ 46.

¶ 21 In dismissing the second stage petition, the circuit court stated "[I]n this court's view, the actual facts are so different from those relied on by the reviewing court as to require a different interpretation of whether petitioner has consistently denied torture." While the circuit court is entitled to its opinion, it is not entitled to effectively ignore our decision and make a directly

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contrary finding regarding petitioner's torture claims. The postconviction judge reviewed the amended petition and a substantial number of attachments that contained more detail that enhance the claims advanced in the petition we reviewed. We reiterate for the postconviction judge:

“Defendant has sufficiently pled a consistent claim of abuse at the hands of Detectives O'Brien and Stehlik, along with the intervention of a “good cop,” McWeeny, who induced him to cooperate in order to terminate the beating. There is little doubt that the later identification, by name, of the “good cop” adds a significant detail that, when compared to the other similar abuse claims involving the same named officers, lends considerable corroborative weight to defendant's claim.” *Nicholas*, 2013 IL App (1st) 103202, ¶ 42.

¶ 22 The postconviction judge went to great lengths to detail contradictions between the amended petition and the testimony that is part of this record. But contradictions alone do not affirmatively rebut petitioner's claims. Resolving any conflict between petitioner's version of the circumstances surrounding his confession and his treatment by the officers and the testimony of the officers denying misconduct requires credibility determinations that can only be made after a third stage evidentiary hearing. Any way we look at this case, the serious assertions petitioner makes here may be contradicted by the historical testimony but they are not rebutted by the original trial record. This is not a case where the record affirmatively establishes what occurred in the interrogation room. In finding that petitioner's allegations were rebutted by the record, the postconviction judge was noting testimonial contradictions or denials of petitioner's claim and directly failed to grasp this court's finding in *Nicholas* by reassessing petitioner's testimony at the motion to suppress and the evidence presented at trial, pointing out the inconsistencies in

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petitioner's testimony and engaging in credibility determinations. However, that is not what the postconviction court was tasked with. There are no factual issues to resolve at the dismissal stage and certainly no credibility findings should be made. The sole question for the postconviction court was whether the petitioner made a substantial showing of a constitutional violation.

¶ 23 In *Nicholas*, 2013 IL App (1st) 103202, we concluded that petitioner satisfied both cause and prejudice for failure to raise his allegation of physical coercion in his earlier petitions. We found that petitioner had sufficiently pled a consistent claim of abuse at the hands of Detectives O'Brien and Stehlik, along with the intervention of a "good cop", McWeeny, who induced him to cooperate in order to terminate the beating. We stated that his claim of being beaten and the manner in which the alleged beating occurred were strikingly similar to the physical abuse documented in the 2006 Report as to the time period, location, manner, method, participants and the role of the participants in securing coerced statements from other prisoners in Areas 2 and 3. Detectives O'Brien, Stehlik, and now Detective McWeeny, were identified by the petitioner. These same detectives were also identified in other allegations of torture advanced by other prisoners in the 2006 Report, which found that torture occurred under the standard of proof beyond a reasonable doubt. We also found that the later identification, by name, of Detective McWeeny as the "good cop" added a significant detail that, when compared to the other similar abuse claims involving the same named officers, lent considerable corroborative weight to petitioner's claim. We readily acknowledge that these findings were made in *Nicholas* as part of our determination as to whether petitioner established cause and prejudice. However, we definitively state that the amended successive petition and attachments do not change our earlier findings that petitioner has made a substantial showing of a constitutional violation and fundamental fairness entitles him to a

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third stage evidentiary hearing to establish whether this information regarding Detectives O'Brien, Stehlick and "the identification, by name, of the "good cop" [McWeeney] adds a significant detail that lends considerable corroborative weight to petitioner 's claim" ( *Nicholas*, 2013 IL App (1st) 103202, ¶ 42) and would have likely changed the result of his motion to suppress. Illinois courts have consistently held that a "pervasive pattern of criminal conduct by police officers" is enough for courts to reconsider the voluntariness of a defendant's confession. *People v. Mitchell*, 2012 IL App (1st) 100907, ¶ 63, (citing *People v. Patterson*, 192 Ill. 2d 93, 13945 (2000)); *People v. King*, 192 Ill. 2d 189, 193-99; *People v. Cannon*, 293 Ill. App.3d 634, 640 (1997). Accordingly, we remand for a third stage evidentiary hearing on this issue.

¶ 24 At oral argument, the State, in support of its position that we should find *res judicata* principles bar this successive petition, argued that had we found in *Nicholas* that the petition entitled petitioner to a third stage evidentiary hearing we would have so ordered. While this may have been more efficient, it would likely have been in conflict with *People v. Bailey*, 2017 IL 121450, (after granting leave to file successive petition, "the State would have an opportunity to seek dismissal of the petition on any grounds, including the petitioner's failure to prove cause and prejudice for not having raised the claims in the initial postconviction petition). The second stage proceeding was necessary in this case for the appointment of counsel and for the filing of an amended petition and supporting exhibits, if any. Given that we previously determined in *Nicholas* that the petition satisfied the cause and prejudice test, the amended petition with approximately 400 pages of attachments filed by appointed counsel is equally sufficient and, for the reasons stated in *Nicholas*, is also not barred by *res judicata* principles.

¶ 25 Petitioner also claims that the postconviction court erred in dismissing his *Brady* claim

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because assuming the truth of the allegations in the petition, petitioner made a substantial showing that exculpatory evidence was withheld at trial.

¶ 26 Under *Brady v. Maryland*, 373 U.S. 83 (1963), prosecutors are required to disclose exculpatory evidence to the defendant. Prosecutors are responsible for disclosing evidence of innocence, including witnesses' statements or physical evidence. See Ill. S.Ct. R 412(c) (eff. Mar. 1, 2001). To establish a *Brady* violation, a defendant must show that: "(1) the undisclosed evidence is favorable to the accused because it is either exculpatory or impeaching; (2) the evidence was suppressed by the State either willfully or inadvertently; and (3) the accused was prejudiced because the evidence is material to guilt or punishment." *People v. Beaman*, 229 Ill. 2d 56, 73-74 (2008). Furthermore, a defendant "must establish that he requested the evidence in question, and that the State in fact possessed it and failed to disclose it." *People v. House*, 141 Ill. 2d 323, 387 (1990).

¶ 27 Petitioner acknowledges that the 2006 Report was unavailable at the time of his trial in 1993, but argues that "regardless of whether the prosecutors knew about the pattern and practice of police misconduct at the time of the trial, if the police themselves knew about it but the evidence was not disclosed to Nicholas, there was a *Brady* violation."

¶ 28 In order to establish a *Brady* violation, petitioner must show that the evidence was suppressed by the State. As petitioner points out, some of the claims of abuse did not exist until after trial. In addition, the document that petitioner relies on to support his claims of abuse, the 2006 Report, was not in existence at the time of petitioner's motion to suppress or trial and therefore could not have been disclosed. See *People v. Tyler*, 2015 IL App (1st) 123470, ¶ 210. While petitioner did attach records of testimony from other defendants who claimed to be abused

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by Area 2 detectives that preceded his trial, the systemic pattern and practice of the officers identified by petitioner was not officially recognized until the 2006 Report. While it is true that the *Brady* rule normally “encompasses evidence ‘known only to police investigators and not to the prosecutor’” (*Strickler v. Green*, 527 U.S. 263, 280-281 (1999) (quoting *Kyles v. Whitley*, 514 U.S. 419, 438 (1985))), the *Brady* rule does not require the prosecution 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. *People v. Orange*, 195 Ill. 2d 437, 458 (2001). As the nexus between the alleged incidents of abuse of other suspects by Area 2 detectives and those alleged by petitioner was not in existence at the time of petitioner’s motion to suppress or trial, the State did not violate *Brady*.

¶ 29 In any event, whatever evidence of police misconduct that could have been attributed to the police officers involved that defendant claims was not disclosed at the time of his motion to suppress or trial, is now available as part of the 2006 Report. The systemic pattern and practice of abuse has been identified and widely documented. It is for the third stage evidentiary hearing judge to determine the admissibility and significance of this evidence and whether it affects the credibility of the witnesses.

¶ 30 Petitioner also requests that a judge other than the postconviction judge be assigned to the third stage hearing. Petitioner argues that the postconviction judge has twice reviewed this petition and, after his review of the record, suppression hearing testimony and trial proceedings he expressed credibility opinions that may call into question future rulings in this case. While we have

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twice reached a different conclusion, we have no criticism of the postconviction judge's handling of this postconviction proceeding. Although we are confident in the postconviction judge's integrity and ability to fairly and competently preside over the third stage evidentiary hearing in this case, we see no reason to create a potential issue in a future appeal, if any. Out of an abundance of caution, we order this cause to be reassigned to a different judge on remand. Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994).

¶ 31 CONCLUSION

¶ 32 Based on the foregoing, we affirm the judgment of the circuit court granting the State's motion to dismiss petitioner's *Brady* claim and reverse the judgment of the circuit court granting the State's motion to dismiss petitioner's claim that his confession was involuntary and remand to the presiding judge of the criminal division of the circuit court with instructions to assign this case to a different judge to adjudicate the third-stage postconviction proceedings.

¶ 33 Affirmed in part; reversed and remanded in part.