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comply with Supreme Court Rule 651(c) (eff. Dec. 1, 1984). In both instances, he maintains that remand for further proceedings is warranted.

This court previously affirmed defendant's 1993 jury convictions of felony murder and armed robbery, and sentence of 38 years' imprisonment. *People v. Conde*, No. 1-93-4610 (1996) (unpublished order under Supreme Court Rule 23). In June 1997, defendant, through private counsel, filed his initial post-conviction petition alleging ineffective assistance of trial counsel, and claiming that the delay in filing was due to the transferring of defendant's files. In October 1999, defendant filed a second *pro se* post-conviction petition alleging ineffective assistance of appellate counsel, and that his prior post-conviction proceedings were inadequate. This court affirmed the dismissals entered on both petitions. *People v. Conde*, No. 1-98-2414 (1999) (unpublished order under Supreme Court Rule 23); *People v. Conde*, No. 1-00-0135 (2001) (unpublished order under Supreme Court Rule 23).

On February 28, 2003, defendant filed his third *pro se* post-conviction petition alleging, in relevant part, ineffective assistance of trial and post-conviction counsel. He also alleged that his private direct-appeal attorney, Joseph I. Solon, abandoned his appeal by allowing a non-attorney, Michelle Moore, to handle it. Defendant claimed that had his attorney represented him as required under *Strickland v. Washington*, 466 U.S. 668 (1984),

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his conviction would have been overturned. He also claimed he was denied his constitutional right to an attorney on appeal.

Defendant further alleged that he could not have raised this issue earlier because he did not receive the file which contained this information and the supporting exhibits until after November 1, 2002. Defendant explained that he requested the trial court transcripts and common law records relating to his case from Mr. Solon, who sent him a letter informing him that his file was at the firm that drafted his first post-conviction petition. Defendant sent a request to that firm for his file, which he did not receive until after November 1, 2002.

In support of his claim that a non-attorney drafted his direct appeal brief, defendant attached a letter from a non-attorney, Ms. Moore, to Mr. Solon which defendant contends he discovered by reviewing the file he received. In the letter, Ms. Moore stated that she had enclosed three file-stamped copies of the brief, proof of service to the state's attorney's office, and a receipt for the binding of the briefs. Ms. Moore also stated that she appreciated the opportunity and Mr. Solon's faith in her abilities. Ms. Moore also expressed her wish that there "wasn't so damn much evidence against [defendant]," and was grateful that Mr. Solon asked her to help out with this case. Defendant also attached a copy of the invoice Ms. Moore received for the purchase of the brief preparation materials sent to Mr. Solon, and also a copy of a notarized notice of filing of a motion in defendant's direct

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appeal. In the proof of service section of that notice, Ms. Moore certified that she is a non-attorney and delivered the required number of copies of the motion to the appellate court and the state's attorney's office. A copy of that motion was included and is signed by Mr. Solon. Defendant also included a copy of Mr. Solon's letter to him, dated June 24, 1999, informing defendant of the location of his file. In the letter, Mr. Solon stated that he had performed legal services for defendant above and beyond what was called for in their contract, including arguing his appeal.

On May 6, 2003, counsel was appointed for defendant. However, defendant then hired private counsel who filed a "second-stage" amended petition on March 4, 2008. The amended petition alleged *inter alia*, that defendant was deprived of his due process rights to effective assistance of appellate counsel when a non-attorney, Ms. Moore, wrote his brief, and that prejudice is based on Mr. Solon's abandonment of his appeal. Defendant further alleged that Ms. Moore has "repelled" his attempts to secure her affidavit. Defendant's post-conviction counsel filed a Rule 651(c) certificate, certifying that he reviewed and read the trial and appellate proceedings, that based on that review, the amendments made are true and correct to the best of his knowledge and belief, and that he has communicated with defendant regarding the content of the amended petition.

On March 20, 2008, defendant's post-conviction counsel filed a motion for leave to file the successive post-conviction petition

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alleging that when the *pro se* petition was filed, leave to file was not required under the Act. Counsel also alleged that the State was judicially estopped from opposing this motion because cause and prejudice was implicitly found when the circuit court advanced the petition to the second stage.

The State filed a response requesting that the court dismiss defendant's petition. The State alleged defendant must demonstrate cause and prejudice to be granted leave to file his successive petition, and that he had failed to do so.

On June 9, 2009, the parties appeared before the circuit court and argued their respective positions on the issue. The State asserted defendant was prohibited from filing his petition without obtaining express leave of court, and post-conviction counsel responded that he was seeking leave. The court noted defendant has not shown cause to obtain leave to file, and counsel replied that he was taken aback by the State's argument because he did not anticipate the State would take that position since, at the second stage, the State may file a motion to dismiss on the merits to which defendant may respond.

The circuit court denied defendant leave to file the petition in a written order. The court found defendant's claims of ineffective assistance of trial, appellate and post-conviction counsel were barred by the doctrine of *res judicata*, and that he had failed to demonstrate cause and prejudice to allow the filing of a successive petition.

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On appeal, defendant challenges that ruling. He maintains his claim that he was denied his right to appellate counsel on direct appeal based on his private counsel, Mr. Solon, allowing a non-attorney, Ms. Moore, to write his appellate brief was not barred by *res judicata*, and he demonstrated cause and prejudice to allow the filing.

As an initial matter, we will address the procedural posture of this case. Contrary to what was stated below, the parties were not at the second stage of proceedings, or at any stage, as leave had not been granted to file the third successive petition.

Defendant filed his third and present petition in February 2003. By that time, the supreme court had held that while the Act contemplates the filing of only one post-conviction petition (*People v. Erickson*, 183 Ill. 2d 213, 222 (1998)), defendant may file a successive petition upon leave of court which may be granted once defendant demonstrates cause for failing to raise the claim in his earlier petition and prejudice resulting from that failure (*People v Pitsonbarger*, 205 Ill. 2d 444, 459 (2002)). This standard has since been codified in section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2004)), and our supreme court has further clarified it, observing that, until leave of court is granted, a successive petition, though received or accepted by the circuit court clerk, is not deemed filed for purposes of further proceedings under the Act (*People v. Tidwell*, 236 Ill. 2d 150, 158 (2010)).

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Defendant's present post-conviction petition is his third and successive petition, and, as such, his claims are subject to waiver and his petition cannot be filed unless he satisfies both prongs of the cause-and-prejudice test set forth in the statute. 725 ILCS 5/122-1(f) (West 2009); 724 ILCS 5/122-3 (West 2008); *Pitsonbarger*, 205 Ill. 2d at 464. We review the circuit court's ruling on this matter *de novo* (*People v. Williams*, 392 Ill. App. 3d 359, 367 (2009)), and may affirm on any basis supported by the record. *People v. Johnson*, 392 Ill. App. 3d 897, 913 (2009).

Although defendant did not specifically fashion his argument in terms of cause and prejudice, he did allege the factors which he claimed precluded him from raising his claim in an earlier petition. He also claimed that he was prejudiced by the denial of counsel on direct appeal.

With regard to the first prong, cause, defendant maintained he could not raise the issue that a non-attorney represented him on direct appeal previously because he did not receive the file which contained this information and documents until November 2002, *i.e.*, after he filed his prior petitions. The record, however, positively rebuts defendant's claim. Defendant indicated in his 2003 *pro se* petition, and in Mr. Solon's letter, dated June 24, 1999, that the firm that drafted his first post-conviction petition in 1997 had the file. In addition, he indicated in his first post-conviction petition that the delay in filing that petition was due to the transferring of the file. Accordingly, since the file

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containing the information and documents for his allegation was available when he filed his first petition, he could have raised it at that time. Defendant, therefore, has not satisfied the cause prong. *People v. Smith*, 341 Ill. App. 3d 530, 547 (2003).

Moreover, defendant's contention he suffered prejudice because he was deprived of the right to appellate counsel where Mr. Solon allowed a non-attorney, Ms. Moore, to represent him on direct appeal is not supported, but, rather, rebutted by his documentation. Ms. Moore's letter to Mr. Solon only shows she filed the brief, obtained proof of service and sent Mr. Solon a receipt for the cost she incurred in binding the brief, not for drafting it. We observe that an attorney may hire non-attorneys to bind and file a direct appeal brief and obtain proof of service.

In addition, Mr. Solon sent defendant a letter informing him that he argued his direct appeal. We also observe defendant's claim that he was prejudiced since Mr. Solon could have done more and his conviction would have been overturned if he wrote his appellate brief, is conclusory in that he does not explain what more could have been done on appeal, and, as such, is insufficient to support his claim. *People v. Brown*, 236 Ill. 2d 175, 206 (2010).

Defendant, however, maintains the allegations in his petition must be taken as true. While all well-pleaded facts in the petition are to be taken as true, defendant cannot merely state conclusions and must have supporting documentation for his

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allegations. *People v. Rissley*, 206 Ill. 2d 403, 412 (2003).

Here, defendant's conclusion that Ms. Moore allegedly represented him on direct appeal was not supported by his attached documentation, and his claim that he could not raise this issue earlier was positively rebutted by the record. Accordingly, defendant failed to satisfy the cause-and-prejudice test, and the circuit court thus did not err in denying him leave to file his petition. *People v. Tripp*, No. 1-09-3337, slip op. at 13 (Ill. App. Feb. 17, 2011).

In the alternative, defendant contends his post-conviction counsel failed to comply with Rule 651(c). He maintains counsel failed to make the necessary amendments to adequately present his contentions.

The Act provides for a reasonable level of assistance to post-conviction petitioners. *People v. Greer*, 212 Ill. 2d 192, 204 (2004). To that end, Rule 651(c) imposes specific duties on both retained and appointed post-conviction counsel. *People v. Richmond*, 188 Ill. 2d 376, 380-81 (1999). The rule requires counsel to consult with defendant to ascertain his contentions of deprivation of constitutional rights, examine the trial record and make amendments to the *pro se* petition where necessary to adequately present defendant's claims. However, counsel has no obligation to amend the petition (*People v. Jennings*, 345 Ill. App. 3d 265, 272 (2003)), and a Rule 651(c) certificate creates a presumption of compliance with the rule. *People v. Johnson*, 232

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Ill. App. 3d 674, 678 (1992).

Defendant claims counsel violated the requirement that he make necessary amendments to the petition to adequately present defendant's claims where he failed to amend it to attempt to overcome the cause-and-prejudice test. Counsel, however, filed a Rule 651(c) certificate certifying that he reviewed and read the record, and based on that review, the amendments made are true and correct to the best of his knowledge and belief, and he consulted with defendant regarding the content of the amended petition. It is thus presumed counsel complied with Rule 651(c). *Johnson*, 232 Ill. App. 3d at 678.

Defendant further claims counsel was unaware of the cause-and-prejudice test. Although counsel erroneously believed the petition was at the second stage, based on our examination of the petition under the cause-and-prejudice test, which is different than considering the merits of the petition (*People v. Thompson*, 383 Ill. App. 3d 924, 932 (2008)), counsel was not required to amend it with defendant's unsupported claim. *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006). No amendment would have overcome the test where defendant's claim was available when he filed his first petition and was not supported by his attached documentation. We also observe defendant has not stated how post-conviction counsel could have overcome the test and that counsel was not required to actively search outside the record for sources to support defendant's claim. *People v. Mendoza*, 402 Ill. App. 3d 808, 815-16

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(2010).

Defendant further maintains counsel had a duty under Rule 651(c) to attempt to overcome the procedural hurdle, citing to *People v. Perkins*, 229 Ill. 2d 34 (2007). In *Perkins*, the supreme court held Rule 651(c)'s mandate that counsel make any amendments necessary to adequately present defendant's claims requires counsel to allege available facts to rebut the procedural bar of untimeliness. *Perkins*, 229 Ill. 2d at 44. We find *Perkins* distinguishable.

Here, any further amendment to defendant's petition would not have overcome the procedural bar of cause and prejudice as defendant had already alleged the available facts in his *pro se* petition, which were unsupported and rebutted by the record. Thus, the amendment was not necessary to adequately present his contention, and counsel, therefore, did not have a duty to rebut it as in *Perkins*. Accordingly, we conclude that post-conviction counsel provided defendant a reasonable level of assistance with his petition and complied with the requirements of Rule 651(c).

In light of the foregoing, we affirm the judgment of the circuit court of Cook County.

Affirmed.