

No. 1-09-0681

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IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	93 CR 26477
)	
FRED WEATHERSPOON,)	Honorable
)	Joseph G. Kazmierski,
Defendant-Appellant.)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Justice Cahill concurred in the judgment.
Justice R. E. Gordon dissented, with opinion.

ORDER

HELD: The trial court’s second-stage dismissal of defendant’s postconviction petition was affirmed where the issues defendant sought to raise on appeal were not included in his *pro se* petition and where postconviction counsel was not required to file an amended petition and include those issues.

¶ 1 Defendant, Fred Weatherspoon, appeals from an order of the circuit court of Cook County granting the State’s motion to dismiss his *pro se* petition for relief under the Post-

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Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). He seeks reversal of that order and a remand for an evidentiary hearing, contending that he made a substantial showing of violations of his constitutional rights.

¶ 2 The underlying facts of this case are sufficiently set forth in our order from defendant's direct appeal. See *People v. Fred Weatherspoon*, No. 1-98-3415 (unpublished order pursuant to Supreme Court Rule 23). Therefore, we will discuss only those facts necessary to resolve the issues defendant raises in this appeal. In summary, following a 1998 jury trial, defendant was found guilty of two counts of first degree murder and two counts of aggravated kidnapping. Defendant was sentenced to natural life imprisonment on each of the murder convictions and to a concurrent sentence of 30 years' imprisonment for the aggravated kidnapping convictions. The evidence adduced at trial established the following. Eunice Clark testified that there was an ongoing war between two factions of a gang over control of drug sales in an area of Chicago, Illinois. Defendant was loyal to one faction while the two victims were members of the other faction. On September 12, 1993, a member of the faction to whom defendant was loyal was selling drugs at a corner when he was beaten and robbed of the money and drugs in his possession by members of the other faction. The following day, two members of that faction arrived at a street corner and began to sell the drugs that were taken from the gang member the previous day. The leader of the faction from whom the drugs and money were stolen drove by the corner with defendant and observed the men selling drugs. Subsequently, that gang leader, along with approximately ten to fifteen other armed men, returned to the corner. Clark testified that defendant was one of these men. The men surrounded the two gang members selling drugs

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and defendant pointed his gun at them. The two gang members were forced into a vehicle. Defendant approached the vehicle, pointed his “mini uzi” at the window, and either fired the weapon at the two gang members in the car or hit them with it. Clark heard a loud noise and saw blood on the car window. She also saw one of the gang members lean over onto the other. The leader of defendant’s gang then drove off with the two gang members while defendant and the rest of the men ran away. Clark acknowledged that she was serving an eleven year sentence for two unrelated attempt murder convictions and that part of the agreement in those cases was that she would remain at an all-female facility. She received no promise, however, regarding her testimony in defendant’s case. Clark also acknowledged that prior to her incarceration she received money from the State to relocate and that she used this money for other things such as food and her children. Clark further admitted that prior to the trial she agreed to accept money from individuals related to the gang factions who had written to her in jail in an attempt to change her testimony, but stated that she was lying to them.

¶ 3 Barry Williams, Clark’s boyfriend, testified that he was at the scene and that he did not see anyone kidnapped or shot. Williams also testified that he did not remember defendant yelling at the victims or firing a shot into the car. Williams gave a handwritten statement to an Assistant State’s Attorney (ASA) in which he corroborated Clark’s testimony regarding defendant and the approximately ten other armed men surrounding the victims and forcing them into the backseat of the car. He also admitted telling a grand jury that it “seemed” to him that defendant fired a shot into the car. Williams admitted using heroin prior to testifying before the grand jury.

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Chicago police officers testified that Clark identified defendant at the police station and that, after being arrested, defendant admitted being at the scene when the victims were placed into the vehicle. Defendant admitted being armed and placing the victims into the car but denied shooting into the car. Defendant told police that he left the scene in another car and drove to an area where the car with the victims was parked. Defendant was instructed to watch out for the police and later heard gunshots while he was doing so. An ASA testified that defendant gave a handwritten statement and that defendant also told the ASA that he was a member of one of the gang factions. Defendant also told the ASA that he placed the victims in the back of the car and that he later arrived at the scene where the victims had been taken. Defendant told the ASA that he knew the victims were going to be shot, that he acted as a lookout, and that he heard gunshots while doing so.

¶ 4 Defendant testified on his own behalf that he was not a member of one of the gang factions but that he sold drugs for one of the gang's leaders. Defendant denied any involvement in the murder or kidnapping of the victims and testified that although he went to sell drugs at the scene that day, he immediately returned home because Clark told him a kidnapping had occurred. Defendant claimed he was not allowed to sleep at the police station and that officers told him he could go home if he admitted placing the victims in the car and later acting as a lookout. He also testified that he memorized everything a police officer told him to say and repeated that information to the ASA.

¶ 5 After defendant was convicted and sentenced, he filed a direct appeal. He claimed that the trial court erred in allowing Clark to testify to statements she made to the police, the grand

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jury, and an ASA and by allowing the State to introduce certain evidence. Defendant also claimed that the prosecution made improper closing remarks and that the court committed errors in sentencing him on the two armed robbery convictions. This court affirmed defendant's convictions but remanded the case to the trial court for resentencing on the armed robbery convictions. See *People v. Weatherspoon*, No. 1-98-3415 (unpublished order pursuant to Supreme Court Rule 23).

¶6 On April 25, 2002, defendant filed a *pro se* postconviction petition in which he asserted five claims. First, defendant asserted that it was error not to instruct the jury that the State had to prove accountability beyond a reasonable doubt. Second, defendant claimed that the statutory scheme under which he was sentenced violated *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) because it did not require that he be given notice in the pleadings that his two convictions qualified him for a mandatory enhanced term. Third, defendant asserted that the trial court abused its discretion when it denied the defense motion for a directed verdict because the State failed to meet its burden of proof beyond a reasonable doubt. Defendant claimed that the State presented no eyewitnesses to the murder, that no weapons were recovered from him, and that there were credibility issues with the State's witnesses, Clark and Williams. Fourth, defendant claimed that the trial court abused its discretion in denying his pretrial motion to suppress. Finally, defendant claimed that his trial counsel was ineffective for failing to call his mother, Maxine Weatherspoon, to testify at the hearing on the motion to suppress. Attached to defendant's petition were the affidavits of Clark and Weatherspoon. Clark averred that she lied as a witness at trial in exchange for money from the State. Clark claimed that she did not

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identify defendant from a photo array, and that she did not hear gunshots, did not witness a kidnapping, and did not see anyone murdered. Weatherspoon averred that she was present when defendant was questioned at the police station, that she did not hear defendant tell the ASA that the information in his statement was true but rather that defendant told the ASA that the information in the statement was untrue. Weatherspoon also stated that she was available to testify at the motion to suppress but that defense counsel did not ask her to testify.

¶7 The petition was advanced to the second stage of proceedings. The trial court also appointed the Public Defender's office to represent defendant. On March 14, 2007, postconviction counsel filed a certificate pursuant to Supreme Court Rule 651(c) attesting that he had consulted with defendant by letter and phone to ascertain his contentions of deprivation of constitutional rights and that he examined the report of proceedings from defendant's trial. Counsel further attested that he reviewed defendant's *pro se* petition and that, because it adequately set forth his claims, no supplemental petition would be filed. The State then filed a motion to dismiss, which the trial court granted. This appeal followed.

¶8 At the second stage of proceedings under the Act, the circuit court must determine whether the allegations in the petition, supported by the trial record and any accompanying affidavits, make a substantial showing of a constitutional violation. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). If no such showing is made, defendant is not entitled to an evidentiary hearing and the petition may be dismissed. *People v. Johnson*, 206 Ill. 2d 348, 357 (2002). Dismissal is also appropriate where the record from the original trial proceedings contradicts the allegations in defendant's petition. *People v. Rogers*, 197 Ill. 2d 216, 222 (2001). Because a

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proceeding under the Act is a collateral attack on a judgment of conviction, all issues that were decided on direct appeal are *res judicata* and all issues that could have been raised in the original proceeding are subject to forfeiture. *People v. Mahaffey*, 194 Ill. 2d 154, 170-71 (2000). We review the circuit court's second stage dismissal of defendant's postconviction petition *de novo*. *Coleman*, 183 Ill. 2d at 378-79.

¶9 Defendant first contends that he was denied his Sixth Amendment right to confront the witnesses against him. He claims that he was denied this right by certain objections that the trial court sustained during defense counsel's cross-examination of Clark and Williams.

¶10 We observe, however, that defendant did not raise this issue in his postconviction petition. Our supreme court has clearly held that claims not raised in a postconviction petition are forfeited and may not be raised for the first time on appeal. *People v. Jones*, 213 Ill. 2d 498, 505 (2004) (*Jones II*); *People v. Jones*, 211 Ill. 2d 140, 148 (2004) (*Jones I*); *People v. Coleman*, 183 Ill. 2d 366, 388 (1998) (“[t]he question raised in an appeal from an order dismissing a post-conviction petition is whether the allegations *in the petition*, liberally construed and taken as true, are sufficient to invoke relief under the Act”) (Emphasis added.); 725 ILCS 5/122-3 (West 2004) (“[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived”).

¶11 Here, in his petition, defendant only claimed that the trial court abused its discretion when it denied the defense motion for a directed verdict because the State failed to meet its burden of proof beyond a reasonable doubt. Defendant asserted that the State failed to meet its burden because it presented no eyewitnesses to the murder, there were no weapons recovered

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from defendant, and the State's witnesses, Clark and Williams, were not credible. Defendant claimed that both witnesses were drug addicts and used the State to obtain money for their drug addictions and that Williams testified at trial that he did not remember making any of his prior statements and that he was threatened and coerced by the police. In other words, defendant essentially claimed that the trial court failed to consider the credibility issues regarding Williams and Clark when it denied the defense motion for a directed verdict. This is entirely distinct from a claim that defendant was denied his confrontation rights by certain limitations on defense counsel's cross-examination of these witnesses. Defendant contends that the allegations in his petition were an attempt to assert a claim that he was denied his Sixth Amendment right to confront the witnesses against him. However, defendant made no mention in his *pro se* petition of his Sixth Amendment confrontation rights or of the various objections sustained by the trial court during defendant's cross-examination of Clark and Williams. Based on the above, we find that the claim defendant now seeks to raise was not included in his petition and is therefore forfeited. See *Jones*, 213 Ill. 2d at 505.

¶12 Defendant attempts to circumvent forfeiture by claiming that his postconviction counsel was obligated to amend the petition and frame the claim in that petition as a violation of his Sixth Amendment right to confront the witnesses against him and that counsel provided unreasonable assistance by failing to do so.

¶13 Because the source of the right to counsel in postconviction proceedings is statutory rather than constitutional, a postconviction petitioner is entitled only to the "reasonable" level of assistance provided by the Act. *People v. McNeal*, 194 Ill. 2d 135, 142 (2000). To meet that

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standard, appointed counsel is required to perform the specific duties set forth in Rule 651(c) (134 Ill. 2d R. 651(c)). *People v. Greer*, 212 Ill. 2d 192, 204-05 (2004). That rule requires the record on appeal to show that counsel: (1) consulted with defendant either by mail or in person to review his contentions of deprivation of his constitutional rights; (2) examined the record of proceedings; and (3) made any necessary amendments to defendant's *pro se* petition to adequately present defendant's contentions. 134 Ill. 2d R. 651(c). This showing may be made through the filing of a Rule 651(c) certificate of compliance. *McNeal*, 194 Ill. 2d at 143.

¶14 In this case, postconviction counsel filed a Rule 651(c) certificate attesting that he had performed the duties outlined in the rule, and that, because defendant's *pro se* petition adequately set forth his claims, no supplemental petition would be filed. Defendant claims that this was insufficient and that counsel was obligated to amend his petition to assert a claim that he was denied his Sixth Amendment confrontation rights.

¶15 In *People v. Pendleton*, 223 Ill. 2d 458 (2006), our supreme court considered whether postconviction counsel was required to amend a *pro se* petition to assert a claim that was not included in the original petition. There, the defendant filed a *pro se* postconviction petition asserting, among other things, that improper evidence was presented at his sentencing hearing and that his trial counsel was ineffective for failing to file a motion to withdraw the defendant's guilty plea after the defendant told counsel he wished to withdraw his plea. *Pendleton*, 223 Ill. 2d at 466-67. Postconviction counsel filed an amended petition in which counsel incorporated the allegations in the defendant's *pro se* petition and asserted specific claims regarding evidence presented at the sentencing hearing. *Pendleton*, 223 Ill. 2d at 467. The defendant appealed the

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dismissal of his petition and argued for the first time that the trial court failed to properly admonish him pursuant to Supreme Court Rule 605(b) and that postconviction counsel provided unreasonable assistance for failing to include the admonishment issue in the amended petition.

Pendleton, 223 Ill. 2d at 469. The appellate court found that the defendant had forfeited the admonishment because it was not included in his postconviction petition but nevertheless found that postconviction counsel was ineffective for failing to include the issue in the petition, notwithstanding that counsel had filed a Rule 651(c) certificate. *Pendleton*, 223 Ill. 2d at 470.

¶16 Our supreme court reversed the appellate court's decision and found that postconviction counsel was not required to raise the admonishment issue because the issue was not included in the defendant's *pro se* petition. *Pendleton*, 223 Ill. 2d at 475-76. The court first found that the defendant had forfeited the admonishment issue, noting that "even a liberal reading of defendant's petitions reveals no reference to an admonishment issue." *Pendleton*, 223 Ill. 2d at 475. The court then found that postconviction counsel did not render deficient assistance in failing to raise the issue, because "[p]ostconviction counsel is only required to investigate and properly present the *petitioner's* claims." (Emphasis in original.) *Pendleton*, 223 Ill. 2d at 475 (quoting *People v. Davis*, 156 Ill. 2d 149, 164 (1993)). The court further observed that "Rule 651(c) only requires postconviction counsel to examine as much of the record 'as is necessary to adequately present and support those constitutional claims raised by the petitioner.'" *Pendleton*, 223 Ill. 2d at 475 (quoting *People v. Davis*, 156 Ill. 2d at 164). The court finally noted that the defendant had not raised an admonishment issue in his petition and that, while postconviction *may* conduct a broader review of the record and *may* raise additional issue not included in the

petition, “there is no obligation to do so.” *Pendleton*, 223 Ill. 2d at 476.

¶17 Other decisions both prior and subsequent to *Pendleton* have similarly held that postconviction counsel is not required to amend a *pro se* petition in order to raise claims not included in that petition. For example, in *People v. Rials*, 345 Ill. App. 3d 636, 643 (2003), the defendant raised only sentencing issues in his postconviction petition but claimed on appeal that his appellate counsel was ineffective for failing to raise a claim that the State did not prove his guilt beyond a reasonable doubt because an expert chemist’s testimony lacked the necessary foundation. After finding the claims raised on appeal forfeited because they were not included in the defendant’s postconviction petition, the court rejected the defendant’s claim that he was denied reasonable assistance of postconviction counsel where counsel did not amend his petition to include the claims that the defendant sought to raise on appeal. *Rials*, 345 Ill. App. 3d 640, 643. The court observed that “counsel is obligated to amend defendant’s *pro se* petition only when necessary to adequately present the claims defendant had already raised in his petition and while counsel may add new claims, he is not required to amend defendant’s *pro se* postconviction petition to include new issues.” *Rials*, 345 Ill. App. 3d 641. Therefore, the court held that because the claims the defendant sought to raise on appeal were not included in his *pro se* petition, “counsel was not required to review the record to ascertain any potential claims of error not raised in defendant’s original petition or to amend the petition to include these claims.” *Rials*, 345 Ill. App. 3d 643.

¶18 Similarly, in *People v. Richardson*, 382 Ill. App. 3d 248 (2008), the defendant filed a *pro se* petition alleging, among other things, that he was beaten by an arresting detective. That

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petition was dismissed, and the defendant later filed a successive *pro se* petition in which he only asserted a claim based on *Apprendi*. His appointed counsel filed an amended petition asserting that the defendant's sentence violated *Apprendi* for reasons not asserted in a subsequent supreme court decision. *Richardson*, 382 Ill. App. 3d at 251. On appeal from the dismissal of his petition, the defendant claimed that his postconviction counsel did not fulfill her duties under Supreme Court Rule 651(c) because counsel failed to amend the defendant's petition to include claims that he was beaten by police and that his appellate counsel was ineffective for failing to challenge two of his convictions as lesser included offenses. *Richardson*, 382 Ill. App. 3d at 251-52. On appeal, this court initially recognized that "even a most liberal reading of the complaints" in the defendant's petition did not make out a claim other than one based on *Apprendi*. *Richardson*, 382 Ill. App. 3d at 255. Relying on *Pendleton*, this court found that postconviction counsel was not obligated to amend the defendant's *pro se* petition to include the claims he argued should have been added. *Richardson*, 382 Ill. App. 3d at 256. Finally, this court noted that postconviction counsel filed a Supreme Court Rule 651(c) certificate and held that "the duty to amend under Rule 651(c) is limited by " "the constitutional claims raised by the petitioner." " *Richardson*, 382 Ill. App. 3d at 258.

¶19 In this case, as we have already found, defendant did not raise a claim in his *pro se* petition that he was denied his confrontation rights by the trial court's limitation on his cross-examination of Williams and Clark. Therefore, we find that postconviction counsel was not required to amend defendant's petition to assert these claims and that defendant was not denied reasonable assistance of postconviction counsel by counsel's failure to do so. See *Pendleton*,

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223 Ill. 2d at 474-75; *Rials*, 345 Ill. App. 3d at 643; *Richardson*, 382 Ill. App. 3d at 256, 258; see also *Davis*, 156 Ill. 2d at 163 (stating that a postconviction petitioner is “not entitled to the advocacy of counsel for purposes of exploration, investigation and formulation of potential claims”). Moreover, because postconviction counsel was not required to raise this new claim in an amended petition, it follows that counsel was not ineffective for failing to raise a claim that appellate counsel was ineffective for not raising the issue on direct appeal.

¶20 Defendant next contends that he made a substantial showing that he was denied effective assistance of trial counsel based on counsel’s failure to call his mother, Maxine Weatherspoon, to testify at trial. Defendant claims that Maxine could have corroborated his testimony by testifying that she was present and heard defendant state that he refused to sign the statement because it was not true.

¶21 Again, we find that defendant did not include this claim in his *pro se* postconviction petition. In his petition, defendant only claimed that trial counsel was ineffective for failing to call Maxine at the pretrial hearing on his motion to quash arrest and suppress his statement to police. Defendant asserts that when his postconviction claim is liberally construed, it actually relates to trial counsel’s failure to call Maxine at trial. However, the failure to call a witness at a motion to suppress is not the same issue as the failure to call a witness at trial. A motion to suppress involves the circumstances under which a statement was given for purposes of a determination as to whether that statement is admissible at trial. See, e.g., *People v. Polk*, 407 Ill. App. 3d 80 (2010). On the other hand, any testimony given at trial as to the circumstances under which a statement was given would go only to the weight to be assigned to that testimony.

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In this case, defendant made no mention in his petition of the failure to call Maxine as a witness at trial. In support of our conclusion that defendant's claim was confined solely to the motion to suppress, we note that in the affidavit attached to defendant's petition, Maxine stated that she was available to testify at the "motion to suppress" but was not called by defense counsel. Further, defendant states in his petition that Maxine could have refuted the police officer's testimony "that petitioner made the statement, a statement petitioner denied making from the stand." This is clearly a reference to defendant's testimony at the suppression hearing and not at trial. At the hearing, defendant denied making a statement whereas at trial defendant claimed that he was coerced into making the statement. For these reasons, we conclude that defendant has forfeited his claim that counsel was ineffective for failing to call Maxine at trial because that claim was not included in his *pro se* postconviction petition.

¶22 Defendant again attempts to avoid forfeiture by claiming that his postconviction counsel provided unreasonable assistance because counsel did not amend his *pro se* petition to include this claim. Defendant claims that postconviction counsel was required to present defendant's claim in a legally cognizable manner and asserts that the legally cognizable version of this claim is that trial counsel was ineffective for not calling Maxine at trial. However, defendant does not explain why the legally cognizable version of his claim is counsel's failure to call Maxine at trial as opposed to the motion to suppress. In any event, as discussed above, postconviction counsel is not required to amend defendant's *pro se* petition to raise new claims not included in the *pro se* petition. See *Pendleton*, 223 Ill. 2d at 474-75. Therefore, because defendant did not raise a claim in his petition regarding trial counsel calling Maxine to testify at trial, postconviction

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counsel did not provide unreasonable assistance by failing to amend defendant's *pro se* petition to include this claim.

¶23 Defendant next contends that he made a substantial showing that he was actually innocent based upon newly discovered evidence. Defendant claims that he made this showing through Clark's affidavit, which was attached to defendant's petition and in which Clark averred that her trial testimony was a lie and that she did not see the kidnapping.

¶24 As with his other claims, defendant did not include a claim of actual innocence in his *pro se* petition. In his petition, defendant used Clark's affidavit in support of his claim that the trial court abused its discretion by denying defendant's motion for a directed verdict. He specifically claimed that Clark was a drug addict who used the State to obtain money for her addiction and further claimed that this assertion was supported by Clark's affidavit. Nowhere in defendant's petition is there a claim that Clark's affidavit supports a claim of actual innocence. Therefore, because defendant's claim of actual innocence based upon Clark's affidavit was not included in his *pro se* petition, we find that the claim is forfeited and may not be raised for the first time on appeal.

¶25 Defendant claims that even if he did not raise an actual innocence claim in his *pro se* petition, his postconviction counsel was required to raise that claim in an amended petition. However, as we have already found with defendant's other claims, postconviction counsel was not obligated to raise this new claim in an amended petition and counsel did not provide unreasonable assistance by failing to do so. See *Pendleton*, 223 Ill. 2d at 474-75.

¶26 We also note that to succeed on a claim of actual innocence, the defendant must show

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that the evidence he is relying on (1) is of such conclusive character that it will probably change the result on retrial; (2) is material to the issue and noncumulative, and (3) was discovered since trial and is of such character that the defendant in the exercise of due diligence could not have discovered it earlier. *People v. Gillespie*, 407 Ill. App. 3d 113, 124 (2010). However, "actual innocence" is not within the rubric of whether a defendant has been proved guilty beyond a reasonable doubt. *People v. Anderson*, 402 Ill. App. 3d 1017, 1037 (2010). Rather, the hallmark of "actual innocence" means "total vindication," or "exoneration." *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008).

¶27 In this case, Clark's affidavit is not of such a conclusive character that it would probably change the result on retrial. First, although Clark recants her trial testimony in the affidavit, she does not specifically state that defendant did not commit the crime or that the crime was committed by another person. What she now says is "I saw no kidnapping, I heard no shots, and I didn't hear or see anyone murdered period." Also, Clark makes the vague and conclusory claim that she "lied for the States [*sic*] on an innocent man." When reviewing a first stage postconviction petition, although all well-pled facts in the petition and affidavit are to be taken as true, nonfactual and nonspecific assertions which merely amount to conclusions are insufficient. *People v. Risley*, 206 Ill. 2d 403, 412 (2003). More importantly, the recantation of testimony is regarded as inherently unreliable and a court will not grant a new trial on that basis except in "extraordinary circumstances." *People v. Barnslater*, 373 Ill. App. 3d 512, 523 (2007). This is particularly true where the recantation relied upon involves a confession of perjury. *People v. Steidl*, 142 Ill. 2d 204, 254 (1991). Additionally, evidence that merely impeaches a

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witness will typically not be of such a conclusive character as to justify postconviction relief.

Barnslater, 373 Ill. App. 3d at 523. Here, Clark's affidavit would not erase the contrary testimony that she gave at defendant's trial but instead would merely impeach or contradict that testimony. As such, the affidavit raises an issue of Clark's credibility as a witness that goes to whether defendant was proved guilty beyond a reasonable doubt and not to whether defendant is actually innocent. See *Collier*, 387 Ill. App. 3d at 637; *Barnslater*, 373 Ill. App. 3d at 523.

¶28 Defendant's final contention is that section 5-8-1(a)(1)(c)(ii) of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 1998)) is unconstitutional as applied to him because it does not consider defendant's age (17 years old at the time of the offense) and level of culpability during the offense, as well as other mitigating factors, and therefore violates the Proportionate Penalties clause of the Illinois and United States Constitutions. That section requires the trial court to sentence the defendant to a term of natural life, irrespective of the defendant's age at the time of the offense, when the defendant is convicted of murdering more than one victim. 730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 1998). Defendant's argument is based upon *People v. Miller*, 202 Ill. 2d 328 (2002), where our supreme court held section 5-8-1(a)(1)(c)(ii) to be unconstitutional as applied to a 15-year old defendant.

¶29 We find that this claim is forfeited and may not be raised on appeal because it was not included in defendant's *pro se* petition. In his petition, the only challenge defendant raised to his sentence was one based upon *Apprendi*. He specifically claimed that his sentence violated *Apprendi* because the statutory scheme under which he was sentenced to natural life "did not require that he be given notice in the pleadings that his two convictions qualified him for a

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mandatory enhanced term.” This claim is entirely distinct from the one that defendant now seeks to raise on appeal.

¶30 In *Jones*, our supreme court reiterated that a defendant is not without recourse when he has failed to include an issue in his original or amended postconviction petition. The court noted that, while precluded from raising such an issue for the first time on appeal, he may raise the issue in a successive petition if he can meet the strictures of the cause and prejudice test. *Jones*, 213 Ill. 2d at 508. Under the mandate in *Jones*, this court is not free to excuse “an appellate waiver caused by the failure of a defendant to include issues in his or her postconviction petition.” *Jones*, 213 Ill. 2d at 508.

¶31 We also find that, contrary to defendant’s claim, postconviction counsel did not provide unreasonable assistance for failing to raise this issue in an amended petition. Defendant did not include the issue in his *pro se* petition and therefore counsel was not required to include it in an amended petition. See *Pendleton*, 223 Ill. 2d at 474-75.

¶32 We note that all of defendant’s claims, except for his claim of actual innocence, are based upon matters contained in the record and therefore could have been raised on direct appeal. See *Mahaffey*, 194 Ill. 2d at 170-71. In each of these claims, defendant contends that postconviction counsel provided unreasonable assistance by failing to amend his petition to include a claim that appellate counsel was ineffective for failing to raise these issues on appeal. However, given our conclusion that postconviction counsel was not required to raise these new claims in an amended petition, it follows that counsel was not ineffective for failing to raise a claim that appellate counsel was ineffective for not raising the issues on direct appeal.

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¶33 For the reasons stated, the judgment of the circuit court of Cook County is affirmed.

¶34 Affirmed.

¶35 JUSTICE ROBERT E. GORDON, dissenting:

¶36 I respectfully dissent.

¶37 In this postconviction appeal, defendant claims: 1. that he was denied his sixth amendment right to confront the witnesses against him; 2 that he was denied his sixth amendment right to effective trial counsel; and 3. that he is actually innocent.

¶38 The majority dismisses all of defendant's claims solely on the basis of forfeiture. The majority finds that defendant's *pro se* petition failed to use the correct and distinct legal terminology for each of these claims, that his *pro se* petition thus failed to raise these claims, and that they are now forfeited.

¶39 In response, defendant observes that, although postconviction counsel was appointed, his counsel failed to amend defendant's *pro se* petition, at all. As a result, his *pro se* petition was never refashioned into the appropriate legal terminology. I agree with petitioner that his *pro se* petition is entitled to a liberal reading by this court. I will not hold a *pro se* petition to the same standard as a petition filed by a practicing attorney, and thus I must respectfully dissent.

¶40 In the sections below, I will discuss each of defendant's claims in turn.

¶41 I. Confrontation Claim

¶42 In the case at bar, defendant's *pro se* petition alleged that the trial court failed to consider credibility issues regarding the State's two principal witnesses, Clark and Williams. Order at ¶11; *pro se* petition at 14-15. Defendant alleged, among other things, that the trial court failed to

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consider the fact that both witnesses were drug addicts, and that they used the State to obtain money for their drug addictions. Order at ¶11; *pro se* petition at 14-15. Defendant attached supporting affidavits to his petition, including an affidavit from Clark, one of the two principal witnesses, in which she stated: "I lied for the States [sic] on an innocent man just for a little money." Affidavit of Eunice Clark, dated October 1, 2001. See also order at ¶6.

¶43 As noted, defendant's postconviction counsel failed to make any changes or amendments to defendant's *pro se* petition. Order at ¶7.

¶44 On this appeal, defendant states that the allegations in his *pro se* petition were his *pro se* attempt to assert a claim that he was denied his sixth amendment right to confront the witnesses against him. Order at ¶11. Specifically, defendant claims that he was denied his confrontation right when the trial court sustained certain objections during his trial counsel's cross-examination of Clark and Williams. Order at ¶9.

¶45 The majority dismisses this claim solely on the ground of forfeiture. The majority states that: "credibility issues" are "entirely distinct" from a sixth amendment confrontation claim; that defendant's petition therefore failed to raise a sixth amendment claim; and that this claim is now forfeited. Order at ¶11. As a result, the majority never reaches the underlying substantive issue raised by defendant

¶46 I cannot find that, when a *pro se* prisoner fails to understand the legal distinction between "credibility" and confrontation, he therefore loses all rights to a substantive consideration of his claims.

¶47 The cases upon which the majority principally relies, *People v. Pendleton* and *People v.*

Richardson, are distinguishable because they concerned the review of petitions amended and reshaped by counsel into appropriate legal language, rather than the review of an entirely *pro se* petition as we have in the case at bar. Order at ¶15 and ¶18 (noting that the postconviction counsel in *Pendleton* and *Richardson* filed amended petitions); *Pendleton*, 223 Ill. 2d at 467; *Richardson*, 382 Ill. App. 3d at 251.

¶48 For example, in *People v. Pendleton*, our supreme court found that defendant had forfeited an issue only because “even a liberal reading of defendant’s petitions” did not reveal the issue. Order at ¶16, quoting *Pendleton*, 223 Ill. 2d at 474. See also *Richardson*, 382 Ill. App. 3d at 255 (using a “liberal reading”). Although the *Pendleton* court was reviewing a petition filed by an attorney, our supreme court still found that, before it applied the bar of forfeiture, it was still necessary to give the petition “a liberal reading.” Order at ¶16, quoting *Pendleton*, 223 Ill. 2d at 474.

¶49 In the case at bar, where defendant did not receive the benefit that the *Pendleton* defendant did -- of a petition reshaped by a lawyer into legal terms -- defendant certainly deserves at least the same consideration of a liberal reading. Thus, I would find that his *pro se* petition adequately raised his confrontation claims.

¶50 II. Ineffective Assistance of Trial Counsel

¶51 “Again,” the majority dismisses defendant’s claim of ineffective assistance solely on the ground that he allegedly failed to include it in his *pro se* petition. Order at ¶21.

¶52 On this appeal, defendant claims that he was denied effective assistance of trial counsel when his counsel failed to call his mother, Maxine Weatherspoon, to testify that she was present

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and heard defendant state that he refused to sign the statement because it was not true. Order at ¶20; affidavit of Maxine Weatherspoon, dated April 11, 2002 ("I did hear my son say to the State's Attorney that the information in the statement was not true and therefore he would not sign the statement.").

¶53 The majority finds that defendant's *pro se* petition did, in fact, discuss counsel's failure to call Weatherspoon to testify about this particular point. Order at ¶21.

¶54 However, the majority finds that his allegations were insufficient because they made a specific reference to the pretrial suppression hearing. Thus, the majority finds that his claim is limited to only the pretrial suppression hearing, and that defendant thus forfeited the issue of counsel's failure to call her at trial.

¶55 This is splitting hairs, and this hair splitting is particularly troubling when we have in front of us a solely *pro se* petition. In his petition, defendant claims: "Had counsel called Mrs. Weatherspoon, to testify, she could have refuted the police officer[s] testimony. *Pro se* petition at 16. The question for us on appeal is "whether the allegations in the petition, liberally construed and taken as true, are sufficient to invoke relief under the Act." *People v. Coleman*, 183 Ill. 2d 366, 388 (1998). See also order at ¶10 (quoting this same quote from *Coleman*).

¶56 "Due to the elimination of all factual issues" at the first and second stages of a postconviction proceeding, "the question is, essentially a legal one, which requires the reviewing court to make its own independent assessment of the allegations. Thus, a court of review should be free to substitute its own judgment for that of the circuit court in order to formulate the legally correct answer." *Coleman*, 183 Ill. 2d at 388.

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¶57 Again, I would find that defendant's *pro se* petition, liberally construed, has sufficiently raised the issue of failing to call his mother at trial, and that he is entitled to a substantive consideration of his right to relief. Therefore, I must respectfully dissent.

¶58 III. Actual Innocence Claim

¶59 Defendant claims that he has made a substantial showing that he is actually innocent. Order at ¶23; *pro se* petition at 15. In support of his claim of actual innocence, defendant attached an affidavit in which Clark, one of the State's two principal witnesses, confessed to framing "an innocent man for a little money." Affidavit of Eunice Clark, dated October 1, 2001. She also admitted that her trial testimony was a complete "lie." Order at ¶23; affidavit of Eunice Clark, dated October 1, 2001.

¶60 Again, the majority dismisses this claim because defendant's *pro se* petition failed to use the proper legal term, "actual innocence." The requirements for an actual innocence claim were set forth in the fairly recent Illinois Supreme Court case of *People v. Ortiz*, 235 Ill. 2d 319, 330-31 (2009) (setting forth the requirements "to assert a freestanding claim of actual innocence based on newly discovered evidence"). Instead, defendant's *pro se* petition relied on the legal jargon that he knew, namely, that the State had failed to prove him guilty beyond a reasonable doubt.

¶61 I cannot agree with the majority's liberal use of the forfeiture doctrine against a *pro se* petition to bar substantive consideration of any of defendant's claims. Therefore, I must respectfully dissent.

¶62 After finding that defendant's actual innocence claim was forfeited, the majority then

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goes on to make an assessment of his proffered witness and her anticipated testimony – which should be done in the first instance by the trial court – and concludes that he would not have succeeded on his actual innocence claim, even if we had remanded for an evidentiary hearing. Order at ¶27. The majority also relies on the appellate court case of *Collier* decided prior to *Ortiz*, in an attempt to equate the term "actual innocence" with "total vindication," instead of relying on how our supreme court actually defined the claim in *Ortiz*. Order at ¶26 (citing *Collier*, 387 Ill. App. 3d at 636 ("total vindication") and *Anderson*, 402 Ill. App. 3d at 1037 (quoting *Collier* in a parenthetical))¹. Compare with *Ortiz*, 235 Ill. 2d at 337 (" 'this does not mean that [defendant] is innocent, merely that all of the facts and surrounding circumstances, including the testimony of [defendant's] witnesses, should be scrutinized more closely to determine the guilt or innocence of [defendant].") I find that defendant has pled sufficient facts to survive a second-stage dismissal and to warrant a third-stage evidentiary evaluation of his actual innocence claim by the trial court.

¹The point for which the majority cites *Anderson* is not actually in the text of *Anderson*; rather it is a quote from a parenthetical describing *Collier*. *Anderson*, 402 Ill. App. 3d at 1037. In its text, *Anderson* quoted and applied *Ortiz*. *Anderson*, 402 Ill. App. 3d at 1028, quoting *Ortiz*, 235 Ill. 2d at 330-31.