

No. 1-09-3486

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IN THE APPELLATE COURT  
OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS, )  
 ) Appeal from the  
 ) Circuit Court of  
 Plaintiff-Appellee, ) Cook County  
 )  
 v. ) No. 96 CR 32942  
 )  
 BENYAMIN SMITH, ) Honorable  
 ) Charles P. Burns,  
 Defendant-Appellant. ) Judge Presiding.

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JUSTICE STERBA delivered the judgment of the court.  
Presiding Justice Neville and Justice Hyman concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant failed to meet his burden of presenting evidence to overcome the presumption that he received reasonable assistance from postconviction counsel, who filed a certificate demonstrating her compliance with Illinois Supreme Court Rule 651(c)'s requirements. Defendant also failed to meet his burden of establishing that his untimely filing of postconviction petition was not due to his culpable negligence.

¶ 2 Defendant Benjamin Smith appeals the trial court's dismissal of his postconviction petition at the second stage of postconviction proceedings. Defendant was convicted of three

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counts of armed robbery and sentenced to 18 years' imprisonment. On appeal, defendant claims that appointed postconviction counsel failed to satisfy Illinois Supreme Court Rule 651(c)'s (eff. Dec. 1, 1984) (Rule 651(c)) requirements because counsel did not consult with him regarding the reasons for the untimely filing of his postconviction petition (petition) and counsel did not plead all available facts regarding the untimeliness in the supplemental and amended petition.

Defendant also claims that he alleged sufficient facts to establish that the failure to file a timely petition was not due to his culpable negligence because he suffers from a severe learning disability. Defendant further claims that he made a substantial showing that his appellate counsel provided ineffective assistance where counsel did not allege on appeal that the trial court erred in the witness identification instruction that it provided to the jury when it included the word "or" instead of "and" between each of the six propositions. According to defendant, appellate counsel was also ineffective because he did not raise the prosecutor's improper comments during the closing arguments on appeal. For the reasons that follow, we affirm.

¶ 3

### BACKGROUND

¶ 4 The relevant facts underlying defendant's conviction for three counts of armed robbery of a grocery store are summarily stated as follows. On November 18, 1996 at approximately 4:30 p.m., defendant and another offender, who both wore masks and carried guns, entered a grocery store at 958 West 73<sup>rd</sup> Street in Chicago, Illinois. The grocery store's owner, an employee and a customer were inside the store at the time of the robbery and witnessed the robbery. The witnesses described the two masked men, but the employee was the only individual who identified defendant. The employee was able to identify defendant because during the course of the robbery, defendant briefly lifted his mask to adjust his braided hair that was protruding from

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the mask's eye holes. A police officer saw defendant and the other offender fleeing the grocery store carrying guns. The officer started to chase defendant and the other offender, but he lost sight of them. Another officer later apprehended defendant following a chase on foot. Near the location where defendant was apprehended, the police recovered a bag containing money, a mask and a wallet with the identification of the grocery store's worker.

¶ 5 During his trial, defendant presented four alibi witnesses who testified that he was on the porch at a friend's house at the time of the incident and that the police called him off of the porch and beat him prior to his arrest. Defendant testified in his own defense and his testimony was consistent with the alibi witnesses' testimony.

¶ 6 On March 13, 1998, a jury found defendant guilty of three counts of armed robbery. On May 5, 1998, trial counsel informed the court that defendant was placed in the psychiatric ward of the Cook County jail. On July 30, 1998, a psychiatrist from forensic clinical services evaluated defendant and determined that he had a learning disorder. During the sentencing hearing, defendant's mother testified that defendant was born with fluid on the brain. She also testified that the Chicago school system found defendant to have a severe learning disability. According to defendant's mother, throughout elementary school and the first two or three years of high school, defendant attended special education classes, and through the school, defendant saw a psychiatrist. In 1994, defendant's mother applied for and received social security benefits on defendant's behalf as a result of his severe learning disability. After hearing the relevant testimony, the trial court sentenced defendant to 18 years' incarceration.

¶ 7 Defendant appealed claiming that his sentence should be reduced or remanded for re-sentencing because the trial court considered unsubstantiated facts and the court's personal views

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regarding the offense. Defendant also alleged on appeal that the trial court failed to consider his youth, lack of any criminal history and mental retardation as mitigating factors. On March 10, 2000, this court affirmed the trial court's judgment. On January 29, 2001, the Illinois Supreme Court denied defendant's petition for leave to appeal.

¶ 8 On April 2, 2002, defendant mailed a verified *pro se* post-conviction petition alleging that his constitutional rights were violated because: (1) the State knowingly used perjured testimony by one of the victims; (2) the trial and appellate counsel were ineffective for not challenging the State's use of perjured testimony and for not challenging the trial court's communication with the jury outside of defendant's presence during jury deliberations; (3) trial and appellate counsel were ineffective for not challenging the prosecutor's improper rebuttal argument; (4) trial counsel was ineffective for failing to file a pretrial motion to suppress statements; (5) appellate counsel was ineffective for failing to raise on appeal trial counsel's ineffectiveness in his presentation of the motion to quash arrest and suppress evidence; and (6) trial counsel was ineffective for failing to raise defendant's mental condition and fitness until after trial. The trial court summarily dismissed the post-conviction petition at the first stage of post-conviction proceedings finding that the petition was frivolous and patently without merit because: (1) the petition was untimely filed and defendant failed to establish that he was not culpably negligent for his late filing; (2) the doctrine of *res judicata* and waiver barred his claims; and (3) the petition was insufficient under the statute because it was not supported by "affidavits, records, or other evidence."

¶ 9 Defendant appealed the trial court's summary dismissal of his petition and this court remanded the case for second stage proceedings because the trial court did not issue its ruling summarily dismissing the petition within 90 days after the filing and docketing of the petition.

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725 ILCS 5/122-2.1(a) (West 1996).

¶ 10 On April 21, 2004, defendant filed an amended *pro se* post-conviction petition and supporting memorandum of law. On September 8, 2004, the trial court appointed the public defender's office to represent defendant. On September 24, 2008, appointed counsel filed a Rule 651(c) certificate (certificate) and a supplemental and amended petition for post-conviction relief. The certificate stated that counsel communicated with defendant "by letters and by phone to ascertain his claims of deprivation of his constitutional rights," examined the trial court's file, the common law record and the report of proceedings from his trial. Counsel also stated in the certificate that an Illinois Department of Corrections (IDOC) personnel informed her of the contents of computer records relating to the educational testing of defendant, but the underlying documents supporting the information that counsel received regarding defendant's educational testing were unavailable. Counsel prepared a petition on defendant's behalf that amended and supplemented the claims he raised in his *pro se* petition and asserted that no further amendment of the petition was necessary to adequately present defendant's contentions of error.

¶ 11 On December 17, 2008, the State filed a motion to dismiss the supplemental and amended petition for post-conviction relief because: (1) the petition was untimely; (2) the petition was barred by the doctrines of *res judicata* and waiver; (3) defendant failed to establish a substantial showing of a deprivation of a constitutional right; (4) defendant failed to establish the ineffective assistance of trial counsel; (5) defendant failed to establish a substantial violation of a constitutional right with regard to the witness identification instruction given to the jury; (6) defendant failed to establish a violation of the confrontation clause or any ineffectiveness of counsel claim based on the description given over police radio; (7) defendant failed to establish a

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cognizable postconviction claim based on the allegations of an improper accountability instruction and the alleged lack of the petitioner's presence when jury questions were answered; and (8) defendant's claim of improper rebuttal argument failed to establish a cognizable postconviction claim.

¶ 12 Defendant argued that the State's motion should be denied because the allegations in his petition were not rebutted by the record and he sufficiently pled claims for the violation of his constitutional rights. During a hearing on the motion to dismiss on July 21, 2009, the State argued that defendant failed to meet his burden of providing actual evidence to prove that he was mentally incapable of filing a petition on time. In response, defendant claimed that the Illinois Supreme Court's decision in *People v. Gonzalez*, 165 Ill. 2d 409 (1995), holding that the relevant witness identification instruction should not be tendered to the jury incorporating the conjunction "or" after each proposition was issued only ten weeks before defendant filed his *pro se* petition. Defendant also responded that his severe learning disability caused him to take a little longer to file his petition. The trial court granted the State's motion to dismiss finding that defendant failed to establish that he was not culpably negligent for filing his petition beyond the statute of limitations. Because the trial court concluded that defendant failed to timely file his petition, it did not review the merits of defendant's claims. On October 21, 2009, defendant filed a motion to reconsider the dismissal of his supplemental and amended petition. On December 9, 2009, the trial court denied his motion. Defendant timely filed the instant appeal.

¶ 13

#### ANALYSIS

¶ 14 On appeal, defendant first claims that postconviction counsel failed to provide a reasonable level of assistance. Defendant acknowledges that postconviction counsel filed a

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certificate, but contends that she, nonetheless, did not substantially comply with the rule's requirements because she failed to consult with him regarding the untimeliness of his petition and failed to amend his *pro se* petition to overcome the timeliness procedural bar. Defendant maintains that his case should be remanded and new counsel should be appointed to represent him for additional second stage proceedings.

¶ 15 The Postconviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2006)) provides a procedural mechanism for criminal defendants to challenge their convictions or sentences based upon on a substantial violation of their federal or state constitutional rights. *People v. Morris*, 236 Ill. 2d 345, 354 (2010). In noncapital cases, the Act provides for a three-stage process. *Id.* At the first stage, the trial court must evaluate the petition and determine, within 90 days of its filing, whether it is frivolous or patently without merit. *Id.* A petition that survives the first stage of the proceedings advances to the second stage where the trial court appoints counsel to represent the defendant and the State may move to dismiss the petition. *People v. Harris*, 224 Ill. 2d 115, 126 (2007). The defendant must make a substantial showing of a constitutional violation for the petition to proceed to the third and final stage, where the trial court conducts an evidentiary hearing regarding the defendant's claims. *Id.*, citing 725 ILCS 5/122-6 (West 2002).

¶ 16 Under the Act, counsel appointed during the second stage proceedings must provide a "reasonable level of assistance" to a defendant. *People v. Turner*, 187 Ill. 2d 406, 410 (1999). To ensure that defendants receive a "reasonable level of assistance," appointed counsel must abide by Rule 651(c)'s requirements. *Id.* Rule 651(c) states in relevant part that:

"The record filed in [the trial] court shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner by

phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984).

Counsel's compliance with Rule 651(c)'s requirements is generally evidenced through the filing of a certificate, but the failure to file such a certificate is considered harmless error where the record establishes that appointed counsel satisfied the rule's requirements. *People v. Marshall*, 375 Ill. App. 3d 670, 681 (2007). Filing a certificate creates the presumption that counsel provided the required representation during second stage proceedings, but this presumption may be rebutted by the record. *Id.* at 680. Defendant bears the burden of overcoming that presumption by demonstrating that his counsel failed to substantially comply with Rule 651(c)'s requirements. *People v. Jones*, 2011 IL App (1st) 092529, ¶23 (2011). Counsel's compliance with Rule 651 is reviewed by this court *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007).

¶ 17 In the case *sub judice*, postconviction counsel filed a certificate on September 24, 2008, which created a presumption that defendant received the representation required by Rule 651. *Id.* The burden was then on defendant to establish that counsel failed to substantially comply with the rule's requirements. *Id.* Here, defendant did not meet that burden.

¶ 18 We first address defendant's claim that counsel failed to comply with Rule 651(c)'s requirements because she did not consult with him regarding the timeliness of his petition. Defendant acknowledges that counsel consulted with him regarding his constitutional claims and raised timeliness arguments, but contends that counsel did not ask him whether there was an excuse for the delay in the filing of his petition.

¶ 19 Both parties cite to *People v. Perkins*, 229 Ill. 2d 34 (2007), which is the seminal case establishing the assistance postconviction counsel must provide relating to untimeliness issues. In *Perkins*, the Illinois Supreme Court held that Rule 651(c) requires counsel to consult with a defendant and amend a petition to establish the lack of culpable negligence in the late filing of a petition, in addition to completing those same tasks regarding defendant's constitutional claims. *Id.* at 44. The *Perkins* court explained that postconviction counsel at the second stage of proceedings must provide the reasons why the petition was filed late to establish lack of culpable negligence thereby precluding the dismissal of the petition as untimely. *Id.* To comply with that responsibility, counsel must amend the petition to allege any available facts showing that the delay in filing was not due to the defendant's culpable negligence. *Id.* at 48. Counsel must also ask the defendant if there is any excuse for the delay in filing the petition because, as a practical matter, any excuse for the untimely filing will often be discovered from a discussion with the defendant. *Id.* at 49. After establishing the duties of counsel with respect to an untimely filed petition, the *Perkins* court concluded that counsel adhered to the rule's requirements when counsel filed a certificate, specifically attesting that no amendments were necessary for an adequate representation of defendant's contentions and nothing in the record contradicted counsel's assertions. *Id.* at 52.

¶ 20 Unlike the counsel in *Perkins* where no amendment to the petition was made, counsel here did amend and supplement the petition and, in doing so, counsel incorporated additional factual allegations regarding defendant's mental limitations as an excuse for the untimely filing. The Supreme Court in *Perkins* found counsel's certificate confirming his "in-person consultation with petitioner to ascertain petitioner's contentions of deprivation of constitutional rights,

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examination of the record of proceedings, and his conclusion that no amendment to the *pro se* petition was necessary for an adequate presentation of petitioner's contentions" adhered to Rule 651(c)'s requirements. *Id.* at 38. Because the certificate in *Perkins* is similar to the certificate here in all material respects, relying on *Perkins*, we too must give effect to counsel's official representation that he complied with Rule 651(c).

¶ 21 We are not persuaded by defendant's contention that he and counsel did not discuss why he filed an untimely petition. Although counsel's certificate indicates that IDOC personnel informed her of the results of educational testing given to defendant at the IDOC, counsel undoubtedly acquired information about defendant's learning disability from her discussions with defendant. The record contains ample support that counsel and defendant engaged in discussions about his case, and the record also supports a conclusion that the subject matter of those discussions entailed his mental fitness, especially while he was at the IDOC. We note that during the June 14, 2006 hearing, counsel stated that she spoke with defendant and needed to obtain some records from the IDOC relating to his claims of unfitness. Counsel further stated that she sent defendant forms to sign for the release of information and for social security records. Counsel requested additional time to retrieve the forms from defendant and to obtain the applicable records. On June 13, 2007, counsel informed the trial court that she obtained a release from defendant to obtain his mental health records from the IDOC, but the IDOC was not cooperating with the release. Counsel requested another continuance because she was still investigating the case due to some allegations defendant raised in correspondence. On December 12, 2007, counsel informed the trial court that the IDOC was still not cooperating regarding the request for defendant's mental health records. Counsel explained that the records were relevant

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to the issue of timeliness because one of the reasons for the untimeliness of the petition was defendant's mental condition while he was in prison. On August 6, 2008 and September 17, 2008, counsel explained to the trial court that she had not received documents from the IDOC that she was waiting for, but she spoke on the telephone with someone there who read to her a summary of the relevant documents regarding the testing performed to determine defendant's educational level. We can reasonably deduce from the foregoing representations that counsel and defendant discussed his case.

¶ 22 Defendant is correct that counsel's certificate stated only that she communicated with defendant "by letters and by phone to ascertain his claims of deprivation of his constitutional rights." We are equally not persuaded by defendant's claim, however, that because counsel did not explicitly state that she consulted with him regarding the reasons for the untimely filed petition, that the absence of such a separate statement indicates that counsel did not, in fact, consult with defendant regarding that matter. Rule 651 does not expressly require the certificate to be a comprehensive recounting of all of postconviction counsel's efforts. *People v. Jones*, 2011 IL App (1st) 092529, ¶24. Here, counsel's petition not only indicates that she communicated with defendant regarding his claims of deprivation of constitutional rights, but she also communicated with IDOC personnel in an effort to obtain information explaining why defendant did not timely file his petition. It is unlikely that counsel would have expended effort to obtain IDOC records unless she learned from her communications with defendant that he suffered from limited mental capabilities.

¶ 23 Moreover, there is nothing in the record to indicate that defendant would have provided counsel with an excuse for the untimely filing other than his severe learning disability, assuming

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*arguendo* that no discussion occurred with his counsel. Having filed a certificate, a presumption arose that counsel provided the required representation during second stage proceedings and defendant did not overcome that presumption by demonstrating that his counsel failed to substantially comply with Rule 651(c)'s requirements. Indeed, the record is devoid of any evidence supporting defendant's claim that counsel did not consult with him regarding the timeliness matter. Accordingly, we reject defendant's contention that he did not receive reasonable representation as required by Rule 651(c).

¶ 24 In a related claim, defendant contends that counsel provided unreasonable assistance because counsel failed to allege all the available facts to establish that defendant was not culpably negligent and counsel did not make every effort to overcome the timeliness bar. As support for his position, defendant claims that counsel's certificate was filed before she offered any timeliness related advocacy. Defendant also claims that counsel's certificate states that no further amendment of the petition is necessary to adequately present his contentions of error, but no reference is made regarding the need to amend the petition to address the timeliness of the petition, which is a procedural bar and not a substantive claim. He claims that even though counsel noted his learning disability and low education level, the recitation of those facts cannot establish that she "alleged any available facts" as is necessary. Defendant further claims that counsel misunderstood the burden of proof as it relates to timeliness of the petition because she alleged that it was the State's burden to prove that defendant acted recklessly where it is the defendant's burden to prove the lack of culpable negligence. Because counsel misunderstood the burden of proof as belonging to the State, defendant claims that counsel did not "allege all available facts" to overcome the timeliness procedural bar.

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¶ 25 Similar to defendant's previous contention, he has failed to meet his burden of overcoming the presumption that counsel complied with the rule's requirements that arises from the filing of a certificate. In the amended and supplemental petition, counsel included the following facts regarding defendant's learning disability: (1) a psychiatrist from Forensic Clinical Services evaluated defendant on July 30, 1998; (2) testing by the IDOC revealed that defendant's educational level was at a 2.6 grade overall and a 2.1 grade in reading; (3) defendant received a mandated 90 days of school in the IDOC; and (4) after the IDOC schooling, defendant's educational level increased to a 4.9 grade level. Defendant did not allege these facts in his *pro se* petition, which, contrary to defendant's assertion, indicates that counsel did incorporate additional available facts in the amended and supplemental petition concerning the untimeliness issue. Significantly, we note that defendant does not assert what additional "available facts" he could have provided to counsel regarding the timeliness of the petition or that should have been included in the petition.

¶ 26 Defendant correctly classifies the timeliness of a petition as a procedural bar, which is distinguishable from substantive claims. However, we reject his attempt to rely on semantics as a basis for finding that he received unreasonable assistance where the record reveals that counsel dutifully litigated his timeliness issue. We note that during the motion to dismiss hearing, counsel advanced an argument that the petition was filed shortly after the Illinois Supreme Court issued its decision in *People v. Gonzales*, which addressed defendant's substantive claim that the trial court tendered an improper witness identification jury instruction. 165 Ill. 2d 409 (1995). Thus, not only did counsel advance defendant's severe learning disability as a basis to find that he was not culpably negligent regarding the untimely filing, but counsel also advanced the argument

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that the law regarding his substantive claim was unsettled prior to the *Gonzales* decision. Hence, the record reveals that counsel provided defendant with assistance regarding the timeliness procedural bar even though procedural issues were not delineated in the certificate.

¶ 27 We acknowledge, as defendant points out, that counsel initially misstated the applicable burden of proof during the hearing on the motion to dismiss when counsel asserted that the State bore the burden of establishing that defendant's conduct amounted to recklessness. Subsequent to that statement, however, counsel argued that it was not reckless for defendant to fail to timely file a petition where the area of the law was evolving. This subsequent statement demonstrates that counsel understood that defendant bore the burden of establishing that his conduct was not reckless. Accordingly, defendant's counsel rendered reasonable assistance because she amended the petition to incorporate any available facts.

¶ 28 Next, defendant claims that he made a substantial showing that his mental deficiency precluded him from timely filing his petition and that filing the petition less than eight months late did not amount to reckless conduct. Defendant contends that his allegations of having a severe learning disability were supported by his mother's testimony during the sentencing hearing who stated that he was enrolled in special education classes through high school, as well as the IDOC designating him at an elementary school reading level. Because defendant presented that evidence, he maintains that his allegations of mental limitations were not conclusory and establish that he was not culpably negligent in filing an untimely petition. The State responds that defendant's claim, in the most basic terms, is that his severe learning disability in and of itself frees him from culpable negligence.

¶ 29 According to the Act, a postconviction petition must be filed within 6 months after the

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denial of a petition for leave to appeal, or the date for filing such a petition if none was filed, or 45 days after the defendant files a brief, or the date for filing such a brief if none was filed, in the appeal before the Illinois Supreme Court, or 3 years from the date of conviction, whichever is earlier, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence. 725 ILCS 5/122-1(c) (West 1996); *People v. Rissley*, 206 Ill. 2d 403, 415, 417 (2003). The Act requires the trial court to dismiss a petition as untimely at the second stage absent allegations of facts establishing lack of culpable negligence for the late filing. *Perkins*, 229 Ill. 2d at 43, citing 725 ILCS 5/122-1(c) (West 2002). Thus, a defendant must allege lack of culpable negligence to present constitutional claims when a petition is not timely filed. *Id.*

¶ 30 To comply with the Act, defendant was required to file his petition the earlier of either six months from the date the Illinois Supreme Court denied his petition for leave to appeal or three years from the date that the trial court entered final judgment against defendant. Defendant's leave to appeal was denied on January 29, 2001; thus, July 29, 2001 was six months after that date. The trial court entered final judgment against defendant on August 12, 1998; thus, August 12, 2001 was three years from that date. Accordingly, July 29, 2001 was the sooner of the two dates and defendant's petition was due on that date for it to be considered timely filed.

Defendant, however, mailed his initial petition on April 2, 2002, which was past July 29, 2001, rendering his petition as being untimely filed.

¶ 31 Despite an untimely filing, the Act allows review of a petition if the lack of timeliness was not due to the defendant's culpable negligence. For purposes of the Act, the term "culpable negligence" is understood to mean "something greater than ordinary negligence and is akin to recklessness." *People v. Boclair*, 202 Ill. 2d 89, 108 (2002). Culpable negligence is also

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understood to mean unintentional, but negligent conduct that demonstrates a disregard of consequences that are likely to follow from an individual's actions. *Id.* at 106. Even a functionally illiterate individual bears the burden of establishing that he was not culpably negligent in filing a late petition. See *People v. Robinson*, 324 Ill. App. 3d 553, 555-56 (2001). Determining whether a defendant was culpably negligent is a fact specific determination made on a case-by-case basis. *People v. Lander*, 215 Ill. 2d 577, 589 (2005). This court reviews the dismissal of a petition without an evidentiary hearing *de novo*. *Id.* at 600.

¶ 32 We disagree with defendant's contention that he has established the lack of culpable negligence. Defendant claims that his intellectual functioning was too limited to finish the petition sooner; however, his claims are unsupported by evidence and are based on his own allegations. During the hearing on the motion to dismiss, counsel asserted that a person who has learning disabilities simply takes a little longer to file a petition; however, needing additional time does not automatically establish that the individual was not culpably negligent. The parties do not dispute that defendant has a learning disability; rather, the parties disagree on whether that disability sufficiently establishes that defendant was not culpably negligent in filing the petition late.

¶ 33 Defendant cites to *People v. Robinson*, 324 Ill. App. 3d 553 (2001), to support his claim that a petitioner is not reckless where a petition could not be timely filed based on the defendant's mental deficiencies. After hearing evidence of defendant's mental deficiencies, which included confusion of the concepts of before and after, this court determined that defendant's severe mental problems could have possibly prevented defendant from filing a timely petition. *Id.* at 557. This court remanded the matter not based solely on the existence of defendant's disabilities,

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but because defendant's counsel did not advise the trial court that defendant's mental condition may have caused petitioner to file an untimely petition. *Id.* In fact, counsel never argued that defendant's severe mental condition could have possibly excused defendant's late filing of the petition. *Id.* Defendant's reliance on *Robinson*, however, is misplaced because defendant's counsel here did inform the trial court about defendant's severe learning disabilities and that the untimely filing of the petition was due to his disabilities.

¶ 34 We consider the Illinois Supreme Court's holding in *People v. Montgomery*, 45 Ill. 2d 94 (1970), more on point. The defendant in *Montgomery* failed to timely file his petition for postconviction relief, but alleged in the petition that the untimeliness was due to mental illness. *Id.* at 95. To support his untimeliness claim, the defendant included psychiatric classification reports and special progress reports, which generally indicated a condition of mental disturbance. *Id.* at 96. After reviewing the reports, the court concluded that it did not appear from the reports that the defendant was incapable of exercising reasonable diligence in his pursuit of postconviction relief and held that defendant failed to demonstrate a sufficient showing that the delay in filing was due to causes other than his culpable negligence. *Id.*

¶ 35 Similarly, here, defendant made allegations of severe learning disabilities and asserted that after a mandated education class during his incarceration, his education level was equivalent to a fourth grade level. Defendant also asserted that he was born with fluid on his brain, which resulted in learning disabilities throughout his life. His assertions, however, were not supported by medical reports or specific factual allegations of how his learning disabilities precluded him from timely filing the petition or how the mental disturbance affected the defendant. Adopting the reasoning set forth in *Montgomery*, defendant in the case *sub judice* similarly failed to

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establish that he was not capable of exercising reasonable diligence in his pursuit of postconviction relief.

¶ 36 Defendant also alleges that his eligibility for social security disability benefits necessarily shows that he cannot engage in any substantial gainful employment, which then necessarily demonstrates that he could not engage in the skills commonly used in the job market. Defendant claims that those are the same skills that would be required to timely file a petition. In advancing those claims, though, defendant failed to cite to applicable case law. Moreover, we note defendant's mother testified during the sentencing hearing that while defendant was free on bond, he occasionally worked for neighborhood construction companies performing cleanup and similar tasks. When defendant worked at the various jobs during the pendency of the underlying case, he was paid for the work that he performed. Defendant's mother also testified that he contacted Metropolitan Family Services, which is an instruction group that teaches individuals the construction trade and provides assistance obtaining a GED. This evidence rebuts defendant's claims that his learning disability precluded him from entering the work force. Defendant's illiteracy argument is also belied by the record because he previously filed a *pro se* postconviction petition raising many of the same issues raised in his successive petition" and cited to relevant case law.

¶ 37 Notably, defendant has not alleged any specific factual allegations that due to his mental illness he was placed in segregation where he did not have access to the law library or assistance to file a postconviction petition. Similarly, defendant has not alleged that he reasonably relied upon erroneous legal advice rendered to him regarding his postconviction petition from an attorney, which would support a finding that a defendant was not culpably negligent in filing an

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untimely petition. *Rissley*, 206 Ill. 2d at 421, contrast with *Lander*, 215 Ill. 2d at 587-88 (holding that the defendant's reliance on advice given to him by jailhouse lawyers, law clerk or librarian was not reasonable where the defendant did not plead facts that these individuals had any specialized knowledge in postconviction matters.) Accordingly, defendant failed to establish that the delay in filing a timely petition was not due to his culpable negligence.

¶ 38 CONCLUSION

¶ 39 The trial court did not err in dismissing the petition because “absent allegations of lack of culpable negligence, the Act directs the trial court to dismiss the petition as untimely at the second stage upon the State's motion.” *Perkins*, 229 Ill. 2d at 43. Obviously, a defendant “cannot present any constitutional claim if the petition is dismissed on the State's motion as untimely.” *Id.* Because defendant's petition was untimely, we decline to address the remaining issues raised in the petition, including his ineffective assistance of counsel claims.

¶ 40 For the reasons stated, we affirm the judgment of the trial court.

¶ 41 Affirmed.