

¶ 5 The defendant was retried in 1998. Due to the notoriety of the case and the potential for juror bias, the court conducted an extensive individual *voir dire* examination of each potential juror. Bart Masters, who ultimately served as the jury foreman, was selected to serve on the defendant's jury. Bart testified that he would afford the defendant the presumption of innocence. Counsel for the defendant objected to his inclusion on the jury on the ground that his brother, Brett Masters, was among a group of campers who discovered the victim's body. Brett was listed as a witness at trial because his fingerprints were found on the car in which the victim was discovered. After discussion, counsel for the defendant withdrew his challenge for cause. Ultimately, Brett was not called as a witness.

¶ 6 The defendant was convicted of first-degree murder and was sentenced to life imprisonment. The defendant filed a posttrial motion for a new trial arguing that Bart should have been stricken for cause because of Brett's involvement in discovering the body. Following a hearing, the trial court denied the motion.

¶ 7 At the sentencing hearing, the trial court stated, "The court believes that Mr. Nitz was dangerous when he murdered Mr. Miley and is still dangerous." On August 5, 1998, Bart sent a letter to the trial judge stating: "I recently learned of the sentence that you handled [*sic*] down in this case. I too, thought that Mr. Nitz was a danger to society 10 years ago and is still a threat."

¶ 8 The defendant appealed his conviction and sentence. The defendant argued that the letter from Bart indicated predisposition, bias, or prejudice during *voir dire*. In an unpublished portion of its decision, this court ruled that the language of the letter merely parroted the comments made by the trial court at the defendant's sentencing hearing and provided no basis for determining that Bart lied during *voir dire*. This court affirmed the conviction, but reduced the sentence from life imprisonment to 60 years' imprisonment in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *People v. Nitz*, 319 Ill. App. 3d 949

(2001).

¶ 9 The defendant filed a *pro se* postconviction petition alleging various claims of constitutional deprivation, including juror bias. The trial court found that the issues were either raised or could have been raised on the defendant's direct appeal and were either waived or barred by *res judicata*. The trial court dismissed the defendant's petition as frivolous or patently without merit. The defendant appealed, and this court affirmed the lower court's ruling.

¶ 10 The Illinois Supreme Court issued two supervisory orders. In the second order it directed this court to issue a single decision disposing of all the issues in the defendant's appeal. *People v. Nitz*, 209 Ill. 2d 594 (2004) (supervisory order). This court affirmed the defendant's conviction and sentenced him once more to a 60-year prison term. On direct appeal, the supreme court affirmed the defendant's conviction but overturned this court's reduction of his sentence to 60 years' imprisonment and affirmed the circuit court's sentence of life imprisonment based on its own *Apprendi* analysis. The supreme court found that on August 10, 1998, the court received Bart's letter and entered it into the record. The court found that the defendant had the opportunity to raise Bart's letter when he renewed his posttrial motion or when the trial court heard arguments on that motion. The court held that any argument regarding Bart's letter had been procedurally defaulted.

¶ 11 The defendant filed a motion for leave to file a successive petition for postconviction relief arguing that the supreme court's finding that Bart's letter was known to trial counsel before the posttrial hearing were incorrect. Counsel for the defendant withdrew that motion after realizing that the record contradicted the allegations in the motion. The defendant filed another motion for leave to file a successive postconviction petition. He alleged that the supreme court's ruling that any issue dealing with Bart's letter had been procedurally defaulted voided this court's previous ruling on the letter and gave rise to an ineffective

assistance of counsel claim for creating the procedural default when the defendant's trial counsel did not make any arguments about the letter in postconviction motions or at the hearing. The trial court denied his motion, and the defendant appealed.

¶ 12 This court found that an evidentiary hearing was the proper vehicle to determine the meaning of Bart's letter and whether he testified falsely during *voir dire* when he claimed that he would be impartial and would afford the defendant the presumption of innocence. This court reversed the trial court's denial of leave to file a successive postconviction petition and remanded the cause to the trial court for further proceedings.

¶ 13 On remand the defense did not formally file the successive postconviction petition that had been attached to the motion for leave to file it. On May 27, 2011, the case was called for an evidentiary hearing. Defense counsel called Bart as a witness. Bart testified about how he became jury foreman, how he learned his brother Brett found the body, that he had not discussed the discovery with Brett, what he meant when he wrote the letter, and that he did not have any preconceived notions about the defendant's guilt before he heard the evidence at trial.

¶ 14 The court found that after considering the testimony and evidence presented, the credibility of the witnesses, the arguments of counsel, and the applicable law, the defendant did not meet his burden of proof on his successive petition for postconviction relief. The court found that Bart was a credible witness, and that the evidence established that he testified truthfully during *voir dire* that he would be impartial and give the defendant the presumption of innocence. The court went on to state that "[t]he testimony and evidence today cleared up the meaning of the letter about which the Appellate Court was concerned and established that Mr. Masters when he wrote the letter and included the language 'I, too, thought that Mr. Nitz was a danger to society ten years ago and is still a threat,' was merely parroting the Court's language from the sentencing hearing which had been reported to the—in

the newspaper and which Mr. Masters read after the sentencing hearing." The court denied the defendant's successive petition for postconviction relief and other appropriate relief. The defendant filed a timely notice of appeal.

¶ 15

ANALYSIS

¶ 16 The defendant raises the issue of whether his postconviction counsel failed to provide reasonable assistance for not adequately questioning jury foreman Bart Masters about any bias he harbored against the defendant prior to trial. He argues that when Bart was called to be a juror on the case, his brother Brett was a remote suspect for having discovered the victim's body, and his other brother Mark was associated with the victim and had a motive to murder him. The defendant alleges that Bart's brothers were two very good reasons for Bart to try to ensure that his family's name and honor would be exonerated, and that he had the opportunity to attain that exoneration by convicting the defendant. He argues that although the record contained information as to Brett being a remote suspect, and Mark being in a homosexual bar on the night of the murder, and having a motive to murder the victim, postconviction counsel failed to confront or challenge Bart with the information. The State filed a motion to dismiss this appeal and the defendant filed a motion for limited remand. This court ordered the motions be taken with the case. Because of our decision on the motions, we do not reach the merits of this case.

¶ 17 We first address the State's motion to dismiss this appeal.

¶ 18 The State filed a motion to dismiss the appeal on the ground that the defendant's second petition for postconviction relief was never filed, therefore, the trial court lacked jurisdiction and its order was void. The State argues that because the trial court's order was void, there is no final order for the defendant to appeal.

¶ 19 Section 122-1(f) of the Illinois Post-Conviction Hearing Act (the Act) provides that only one postconviction petition may be filed without leave of court. 725 ILCS 5/122-1(f)

(West 2006). Leave of court may be granted only if a defendant demonstrates cause for his failure to bring the claim in his initial postconviction proceeding and prejudice results from that failure. 725 ILCS 5/122-1(f) (West 2006).

¶ 20 The defendant's successive postconviction petition was not in the record on appeal. The State filed a motion to supplement the record on appeal. In the motion it stated that the defendant's successive petition for postconviction relief was attached to his motion for leave to file a successive petition for postconviction relief. It also stated that all parties at the evidentiary hearing as well as the trial court had copies of the successive petition for postconviction relief, and the hearing proceeded on the basis of that petition. The State asked to supplement the record with the petition as a document that was before the trial court but not contained in the record on appeal. This court granted the motion.

¶ 21 The defendant's successive petition for postconviction relief was attached to his motion for leave to file a successive postconviction petition. At the hearing on February 15, 2008, on the motion for leave to file the second successive postconviction petition the court stated, "I mean, it's not been filed, it's—the proposed second petition is here, they sent it along if the court grants leave, but it's not been filed." On December 4, 2012, Becky A. Ray swore in an affidavit that she was an assistant State's Attorney for Williamson County, Illinois, and that on November 13, 2007, her office received a copy of the defendant's motion for leave to file a successive postconviction petition with a proposed successive postconviction petition attached. There is no doubt that the successive petition was attached to the defendant's motion for leave to file a successive postconviction petition.

¶ 22 With respect to the defendant's motion for leave to file a successive postconviction petition, this court previously found that the defendant met the cause-and-prejudice test to file a successive postconviction petition. This court, in reversing the trial court's determination, found that "an evidentiary hearing on the matter is the proper vehicle to

determine the meaning of the letter. This would be the best method to determine whether Bart Masters testified falsely during *voir dire* when he claimed that he would be impartial and give the defendant the presumption of innocence." *People v. Nitz*, No. 5-08-0146 (2010), order at 11 (unpublished order under Supreme Court Rule 23). Thus, this court granted the defendant's motion for leave to file his successive postconviction petition, constructively filed the defendant's postconviction petition attached to his motion for leave to file a successive postconviction petition, and ordered the trial court to conduct an evidentiary hearing on his petition.

¶ 23 On March 21, 2011, the trial court held a scheduling conference. At that time the court read portions of this court's order to the attorneys and then stated, "So I'll listen to what anybody else thinks, and we'll see what we're going to do, but it seems to me we just need to pick a date for an evidentiary hearing, and I suppose somebody will subpoena the juror, and we'll have a hearing on it." The attorney for the State responded, "The State's in agreement with that, and we are prepared." The defense attorney also agreed. The following colloquy took place:

"COURT: I don't see that they're—I mean, I think the Appellate Court directive to me is crystal clear, and I know I suppose there could be other evidence about it, but it seems to me that the juror would be the main evidence, if not the only evidence.

MR. SCHIEDEL [defense attorney]: That would certainly be my view, Your Honor.

COURT: Ms. Ray?

MS. RAY [Assistant State's Attorney]: I'm in agreement, Judge. I mean, it is pretty clear that the Appellate Court feels we need to have a hearing on it."

A date was scheduled for the hearing. The trial court then stated, "I'm going to call it the Evidentiary Hearing on Defendant's Successive Post-Conviction Petition." Neither party

objected to this.

¶ 24 On May 27, 2011, the trial court announced, "The matter for hearing today is the evidentiary hearing." The court outlined the relevant parts of the procedural history of the case including its denial of the defendant's petition to file a second successive postconviction petition. The court stated, "That matter was appealed to the Appellate Court which reversed my decision, and after the mandate came back, I set a scheduling conference, and it was agreed the matter be set today for an evidentiary hearing on the Second Successive Post Conviction Petition with the issue being that framed by the Appellate Court." The court went on to state, "I believe at the last hearing we determined that the Appellate Court had basically determined that the Second Successive Post Conviction Petition was filed—should be filed, and that this issue about Juror Masters had to be subject to an evidentiary hearing." The court asked the State if that was its understanding. The State responded, "It is, Judge." The defense called Bart Masters as a witness. The State cross-examined him. The State had no witnesses. Both parties presented closing arguments. At no time did the State argue that the successive petition for postconviction relief had not been filed therefore the court did not have jurisdiction to hear the case. At the conclusion of the case, the trial court stated: "The Court finds that the defendant—I am going to call it the actual petition to the Second Petition for Post Conviction Relief and Other Appropriate Relief. Everybody knows what we are talking about. I believe the Appellate Court might have referred to it as Successive Petition or Second Successive Petition. For our purpose, the defendant actually styled it Second Petition for Post Conviction Relief and Other Appropriate Relief." The court then denied the defendant's "Second Petition for Post Conviction Relief and Other Appropriate Relief."

¶ 25 In her December 4, 2012, affidavit, Ms. Ray swore that she represented the State at the evidentiary hearing on the defendant's successive postconviction petition and that "[a]t the May 27, 2011, hearing, all parties, including myself, relied on copies of the defendant's

successive post-conviction petition, which was attached to his motion for leave to file a successive petition."

¶ 26 The defendant, postconviction counsel, the State, and the trial court, by their actions, treated the proposed successive petition for postconviction relief as constructively filed, they were clearly aware of its contents, and the arguments presented arose directly from the successive petition for postconviction relief. "There is *** a commonsense acknowledgment that a defendant who submits a successive postconviction petition wants to 'file' it and institute proceedings thereon." *People v. Tidwell*, 236 Ill. 2d 150, 161 (2010). When the court ordered that the successive postconviction petition be filed, it was constructively filed, despite never being file marked. Thus, the State's motion to dismiss the appeal is denied.

¶ 27 Next we address the defendant's motion for limited remand.

¶ 28 The defendant filed a motion for limited remand and objection to the State's request to supplement the record on appeal with a purported certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013). The defendant alleged that there was a factual dispute concerning postconviction counsel's duties under Supreme Court Rule 651(c). This court granted the State's motion to supplement the record with the Rule 651(c) certificate of trial counsel Aviva Futorian and ordered that the defendant's motion for limited remand be taken with the case. If the record does not contain a Rule 651(c) certificate, the State is permitted to supplement the record with a Rule 651(c) certificate during the pendency of the appeal. *People v. Hultz*, 51 Ill. App. 3d 663, 665 (1977).

¶ 29 "There is no constitutional right to assistance of counsel in postconviction proceedings; the right to counsel is wholly statutory (see 725 ILCS 5/122-4 (West 2000)), and petitioners are only entitled to the level of assistance provided for by the Post-Conviction Hearing Act." *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). The Act provides only reasonable assistance. *Id.* To ensure that a defendant's complaints are adequately presented, the Act

provides that appointed counsel should ascertain the basis of the defendant's complaints, shape those complaints into the appropriate legal form, and present the defendant's constitutional complaints to the court. *People v. Waldrop*, 353 Ill. App. 3d 244, 246 (2004). Supreme Court Rule 651(c) delineates the specific requirements that postconviction counsel must fulfill in representing postconviction petitioners. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). Under Rule 651(c), the record must "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." *Id.*

¶ 30 Ms. Futorian was the defendant's counsel since his initial postconviction pleading in 1992, and she authored his motion for leave to file a successive postconviction petition and the petition attached to it. In her Rule 651(c) certificate Ms. Futorian swore that she consulted with the defendant by telephone, examined the record of the proceedings at the trial, and "prepared his petition in a manner that provides an adequate presentation of [the defendant's] contentions."

¶ 31 The filing of a Rule 651(c) certificate creates a presumption of compliance with the requirements of the rule. *People v. Johnson*, 232 Ill. App. 3d 674, 678 (1992). "It falls on the defendant to overcome that presumption by demonstrating counsel's failure to substantially comply with the duties mandated by Rule 651(c)." *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23.

¶ 32 The defendant contends that the late-filed Rule 651(c) certificate should not be considered conclusive evidence that postconviction counsel provided reasonable assistance in compliance with the rule. He argues that he provided an affidavit that contradicts the

assertions in the Rule 651(c) certificate. He alleges that Ms. Futorian did not amend his *pro se* postconviction petition, did not read the entire court file, and did not consult with him to learn all of his contentions of error. In addition, he alleges that she never mentioned that jury foreman Bart had two brothers involved in the case, Brett who found the body and Mark who was "familiar with the decedent's homosexual lifestyle, and familiar with seeing the decedent at a homosexual bar, and interrogated by the police about that familiarity." The defendant provided an affidavit swearing that Ms. Futorian had "never said or done anything to suggest to me that she has reviewed the entire court file in my case," that she did not amend the *pro se* postconviction petition that he filed in 2002, and that she did not consult with him to learn every one of his contentions of error. In his affidavit, the defendant stated that he did not learn until the brief was filed in this case that there were police reports in the court record showing that the police questioned Bart's brother Mark concerning his whereabouts on the night the victim was murdered and concerning his personal knowledge of the victim's homosexual lifestyle. He further stated that Ms. Futorian never told him about Mark's existence or that the police interviewed him. He stated he did not think she knew about Mark until she read the brief.

¶ 33 The defendant attached two additional affidavits to his motion for a limited remand. One affidavit was from Charles Schiedel. Mr. Schiedel stated that he was one of the attorneys who represented the defendant. He said that he did not believe he reviewed the portion of the common law record containing the police report of an interview with Mark Masters and had he known that Mark was Bart's brother, he would have brought that fact to the attention of the trial court in the motion for leave to file a second postconviction petition. He further stated that had he learned of that information prior to the May 2011 hearing, he would have suggested that Bart be questioned about any knowledge he had regarding contact between his brother Mark and the victim.

¶ 34 An affidavit from Ms. Futorian was also attached to the motion. In the affidavit, Ms. Futorian swore that during the appeal, she learned for the first time that police reports in the court record showed that the police questioned Mark concerning his whereabouts on the night the victim was murdered and concerning his personal knowledge about the victim's homosexual lifestyle. She stated that had she known of the police reports she would have given them to attorney Timothy Capps to use during his examination of Bart on May 27, 2011.

¶ 35 The defendant contends that his postconviction counsel did not consult with him about his contentions of deprivation of his constitutional rights. Ms. Futorian, in her Rule 651(c) certificate, contends that she did consult with the defendant. There is nothing in the record that demonstrates that counsel consulted with the defendant. Thus, a factual issue of whether defendant's appointed postconviction counsel complied with Rule 651(c) exists. Whether postconviction counsel conferred with the defendant concerning his *pro se* allegations of deprivation of constitutional rights is a question of fact for the trial court to resolve. *People v. Finklea*, 186 Ill. App. 3d 297, 301 (1989). "Matters which require fact finding based on oral and written evidence *dehors* the record are primarily within the realm of the circuit court." *People v. Frey*, 67 Ill. 2d 77, 85 (1977). The trial court must rule on the factual issue of whether postconviction counsel complied with Rule 651(c). Thus, we grant the defendant's motion for limited remand so that a proper record can be made and an evidentiary hearing can be conducted in which postconviction counsel is allowed to explain her actions as recounted in her Rule 651(c) certificate and the defendant is allowed to cross-examine her about whether she consulted with him concerning his *pro se* allegations of deprivation of constitutional rights.

¶ 36 Accordingly, we must vacate the trial court's order denying the defendant's successive postconviction petition so that the foregoing factual issue can be resolved. If the trial court

finds that postconviction counsel adequately complied with Rule 651(c) in consulting with the defendant, reviewing the record, and amending the petition, no additional proceedings will be necessary and an order should again be entered denying the successive postconviction petition. If, however, the court finds that postconviction counsel did not comply with Rule 651(c), the defendant should be allowed to plead anew and a new hearing should be conducted on the successive postconviction hearing.

¶ 37

CONCLUSION

¶ 38 The State's motion to dismiss the appeal is denied, the defendant's motion for limited remand is granted, the order denying the successive postconviction petition is vacated, and this cause is remanded to the circuit court of Williamson County for further proceedings consistent with this order.

¶ 39 Order vacated; motion to dismiss denied; motion for limited remand granted; cause remanded with directions.