

**NOTICE**  
Decision filed 05/28/14. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2014 IL App (5th) 120036-U

NO. 5-12-0036

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

**NOTICE**  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Massac County.
	)	
v.	)	No. 98-CF-105
	)	
JEFFERY MORRISON,	)	Honorable
	)	James R. Williamson,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE CHAPMAN delivered the judgment of the court.  
Presiding Justice Welch and Justice Schwarm concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where the record supports appointed counsel's compliance with the requirements of Supreme Court Rule 651(c) (eff. Feb. 6, 2013), failure to file a 651(c) certificate of compliance is harmless error. Where the defendant cannot make a substantial showing of actual innocence, the trial court's order dismissing his successive postconviction petition was correct.

¶ 2 The defendant appeals from the trial court's dismissal of his postconviction proceeding in which he alleged that newly discovered evidence would establish his right to a new trial. The trial court appointed an attorney to represent him. The appointed attorney opted not to file an amended petition. The defendant claims on appeal that his court-appointed attorney neglected to file a Supreme Court Rule 651(c) document. The

defendant also claims that the dismissal of his petition violated his due process rights because he made a substantial showing of innocence with the new evidence outlined in two affidavits filed with the court.

¶ 3 A jury convicted the defendant of the shooting death of his brother's girlfriend, Roxanne. Initially, the State charged the defendant's brother, Glen Morrison, with her murder, but later dismissed the charge.

¶ 4 At trial, a neighbor testified that on October 23, 1998, he heard a gunshot that sounded like it came from the direction of Roxanne's house. The neighbor looked in the direction of Roxanne's house, saw Glen and Jeffery Morrison carrying Roxanne's body into her house, and then come back out and get into Roxanne's vehicle. The neighbor testified that he saw one of the two men walk back into the house and come out with Roxanne's four-year-old twin boys. Before the men drove away with the twins, the neighbor testified that he heard one of the twins say, "Jeff shot my mommy—shot her dead." The neighbor proceeded to Roxanne's house, entered the house, and found Roxanne's body.

¶ 5 The defendant's brother, Glen Morrison, testified at trial. On the day Roxanne was shot, he got up early in the morning and began drinking beer and whiskey. He estimated that he drank at least 12 beers that morning. He testified that the defendant was also drinking. He, Roxanne, the defendant, and a man by the name of R.D. Riley drove two vehicles to Riley's house. One of the vehicles belonged to Riley, but Riley did not drive. Roxanne drove one vehicle and the defendant drove the other. After dropping Riley and his vehicle off, he, Roxanne, and the defendant returned to Roxanne's house. Glen

testified that he and the defendant continued to drink in the afternoon. He gave conflicting testimony that he had stopped drinking alcohol earlier and began drinking coffee. Glen testified that he overheard Roxanne and the defendant have an argument in which Roxanne accused the defendant of stealing a gun from Riley. Glen said that the defendant threatened to shoot Roxanne, and she replied that he lacked the nerve to do so. Glen said that he next saw the defendant shoot Roxanne in the back as she was walking out the front door of the house. The defendant then turned to Glen, pointed the gun at him, and threatened to shoot him as well. Glen testified that the defendant wiped the gun with a white cloth, presumably to remove any fingerprints. They then picked up Roxanne's body and brought it into the house. The defendant, Glen, and Roxanne's twins left the house and headed outside to her car. On the way, one of the twins yelled out that the defendant shot his mother dead. The defendant drove Glen and the twins to Kentucky. The defendant referred to the twins as hostages. Sometime after crossing the border, Glen noticed a sheriff's car. In order to get the sheriff's attention, he "hit" the steering wheel, which caused the vehicle to swerve. Both Glen and the defendant were taken into custody.

¶ 6 Glen Morrison testified that during his police interview that evening, he told the police that his brother must have purchased the gun from a Kentucky pawn shop. He acknowledged that this statement conflicted with his trial testimony that Roxanne accused the defendant of stealing the gun from Riley, but stated that due to his drinking, he had been hazy right after the shooting and did not recall Roxanne's theft accusation until later.

¶ 7 The jury convicted the defendant of first-degree murder, aggravated kidnapping of the twin boys, unlawful possession of a stolen motor vehicle, and armed violence based upon the vehicle charge. The trial court sentenced him to 40 years for murder, 10 years each for the kidnapping convictions, and 12 years for armed violence. This court affirmed his convictions and sentences on April 16, 2002. *People v. Morrison*, No. 5-00-0054 (Apr. 16, 2002) (unpublished order pursuant to Supreme Court Rule 23).

¶ 8 The defendant filed his first petition for postconviction relief in 2003. He alleged that the prosecutor committed misconduct by allowing perjured testimony and by making improper comments during closing argument. After the trial court dismissed his petition as being patently without merit, the defendant appealed to this court, and we affirmed. *People v. Morrison*, No. 5-03-0147 (Oct. 24, 2005) (unpublished order pursuant to Supreme Court Rule 23).

¶ 9 On May 5, 2011, the defendant filed his motion for leave to file a successive petition for postconviction relief in the state court. He asserted that he was innocent of the crimes, that the court denied his due process and equal protection rights at trial, and that he was denied the effective assistance of counsel at trial and on direct appeal. He attached affidavits from inmate Shawn Hollowell and from himself. He claimed that in light of the new evidence in the form of Shawn Hollowell's testimony, no reasonable juror would convict him. On his second claim, the defendant listed numerous alleged abuses and errors by the prosecutor and by his defense attorney.

¶ 10 The affidavit of Shawn Hollowell detailed a Massac County jailhouse conversation between Hollowell and the defendant's brother. At the time, the defendant's

brother was in jail charged with the murder of Roxanne Colley. The defendant's brother allegedly told Hollowell that he committed the murder. However, he allegedly told Hollowell that he was not concerned about the murder charge because he had "set it up" to blame the defendant. The defendant's brother told Hollowell that he was going to blame the defendant for the murder in order to get revenge because his girlfriend had a sexual relationship with the defendant. The State later transferred Hollowell to Menard Correctional Center where he then met the defendant.

¶ 11 The defendant's affidavit simply stated that he met Hollowell at Menard Correctional Center in February 2008 and had not previously know him.

¶ 12 The trial court granted the defendant's request for leave to file a successive postconviction petition. The trial court also appointed postconviction counsel to represent the defendant.

¶ 13 The State filed a motion to dismiss the petition. The State argued that Hollowell's affidavit was unsubstantiated, and that it was unlikely that his testimony would result in a jury's acquittal, but could serve as impeachment of the defendant's brother's account. The fact that Hollowell was incarcerated when he provided his affidavit would subject Hollowell to purposeful impeachment. The State concluded the defendant's actual innocence claim did not merit an evidentiary hearing.

¶ 14 Defense counsel filed a response to the State's motion to dismiss. The defendant argued that at this stage of the postconviction process, the court should consider the allegations within the petition and any supporting affidavits as true, and should not weigh evidence, assess witness credibility, or draw inferences.

¶ 15 The trial court granted the State's motion to dismiss. The trial court's order stated, "Had the evidence been known at the time of trial, it would not have likely changed the result at trial."

¶ 16 The defendant first claims that his postconviction attorney did not comply with Supreme Court Rule 651(c) and that this failure necessitates that we remand this case for further proceedings. Because the trial court dismissed the defendant's postconviction petition without an evidentiary hearing, our review on appeal is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89, 701 N.E.2d 1063, 1075 (1998).

¶ 17 Individuals who are serving an Illinois criminal sentence can file a petition pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2008)) alleging that their Illinois and federal constitutional rights were denied. *Coleman*, 183 Ill. 2d at 378-79, 701 N.E.2d at 1070-71. A proceeding under the Post-Conviction Hearing Act has three stages. *People v. Gaultney*, 174 Ill. 2d 410, 418-19, 675 N.E.2d 102, 106-07 (1996). This case was dismissed before the third stage. At the second stage, the trial court appoints an attorney to represent the indigent defendant. 725 ILCS 5/122-4 (West 2008). The State must file its answer or file a motion to dismiss. 725 ILCS 5/122-5 (West 2008). The next step requires the trial court to determine whether the defendant has made a substantial showing of a constitutional violation. *People v. Edwards*, 197 Ill. 2d 239, 246, 757 N.E.2d 442, 446 (2001). The trial court must accept all well-pleaded factual allegations as true, and the court must not engage in any fact-finding or credibility determinations. *Coleman*, 183 Ill. 2d at 385, 701 N.E.2d at 1073. The trial court must dismiss the petition if the defendant has not made that showing. *People v. Ward*, 187 Ill.

2d 249, 255, 718 N.E.2d 117, 123 (1999). If the defendant gets past this second stage to the third stage, the court holds an evidentiary hearing. 725 ILCS 5/122-6 (West 2008).

¶ 18 All attorneys who represent defendants in postconviction proceedings must provide "a reasonable level of assistance." *People v. Owens*, 139 Ill. 2d 351, 364, 564 N.E.2d 1184, 1189 (1990). One aspect of "reasonable assistance" is compliance with Supreme Court Rule 651(c). *People v. Daniels*, 388 Ill. App. 3d 952, 960, 905 N.E.2d 349, 357 (2009) (citing *People v. Bashaw*, 361 Ill. App. 3d 963, 967, 838 N.E.2d 972, 976 (2005)).

¶ 19 On appeal from a postconviction petition, Supreme Court Rule 651(c) provides a framework for our review. To ensure reasonable assistance, Rule 651(c) imposes three specific obligations on postconviction counsel. *People v. Lander*, 215 Ill. 2d 577, 584, 831 N.E.2d 596, 600 (2005). Counsel must (1) consult with the defendant to ascertain his claims of error, (2) examine the trial court record, and (3) make any amendments to the petition that are necessary to adequately present the defendant's claims to the postconviction court. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). The duty to amend the petition requires postconviction counsel to "shape[ ] the petitioner's claims into proper legal form." *People v. Perkins*, 229 Ill. 2d 34, 43-44, 890 N.E.2d 398, 403 (2007). This requires the appointed attorney to add any allegations that are essential to the claims the defendant raised in the *pro se* petition. *People v. Turner*, 187 Ill. 2d 406, 413, 719 N.E.2d 725, 729 (1999). However, it does not include a requirement that counsel take any steps to present claims other than those raised by the defendant himself. *People v. Davis*, 156 Ill. 2d 149, 164, 619 N.E.2d 750, 758 (1993). Similarly, postconviction

counsel's duty to examine the record encompasses only a requirement that counsel "examine as much of the [record] as is necessary to adequately present and support those constitutional claims raised by the petitioner." *Id.*

¶ 20 Defense counsel's failure to file a certificate of compliance with Rule 651(c) may be harmless error, as long as the record confirms that counsel fulfilled the duties. *People v. Szabo*, 144 Ill. 2d 525, 532, 582 N.E.2d 173, 176 (1991); *People v. Richmond*, 188 Ill. 2d 376, 380, 721 N.E.2d 534, 536-37 (1999).

¶ 21 In this case, the defendant's appointed postconviction attorney did not file a Rule 651(c) certificate. To determine whether this oversight amounts to harmless error, we review the record on appeal.

¶ 22 The first requirement is consultation with the defendant in person or by mail in order to ascertain their contentions in this postconviction petition. The record in this case reflects consultation by phone and mail. In a motion to extend the time to respond to the State's motion to dismiss filed in 2011, defense counsel states, "Defendant and Defendant's attorney have been communicating via mail and prescheduled collect calls \*\*\*." While the substance of those communications is not listed, because of the timing with the State's motion to dismiss, the clear inference is that they were conferring about the motion to dismiss the defendant's postconviction petition and how best to respond to the arguments within the motion. Additional support for communication between the defendant and his appointed attorney is contained within the attorney's itemized statement for services. There were numerous references in defense counsel's bill to communication between the two by mail and by telephone calls. Having reviewed the record on appeal,

we find that the records, including signed pleadings and an itemized legal fees statement, substantiate that postconviction defense counsel communicated with the defendant as mandated by Rule 651(c).

¶ 23 The next Rule 651(c) requirement mandates that defense counsel review the record of trial proceedings. From examination of the record, including motions for extension of time as well as the defense counsel statement for services rendered, there are several references to substantiate counsel's review of the record. In his motion to extend the time to respond to the State's motion to dismiss, defense counsel states that he "has been in the process of reviewing the above-captioned cause's voluminous record, which consists of previous petitions for post-conviction relief, post-trial motions, appellate court orders and the Court's file." He indicated that he needed additional time to review the briefs submitted in the appellate court as well as trial transcripts. In the defendant's production request, his attorney sought trial transcripts and stated that he only had a brief opportunity to review "the transcripts of Glen Morrison's [the defendant's brother] sworn testimony at trial, for the Grand Jury, and at pre-trial hearings and investigations" because he did not have copies and had to review them in the clerk's office. He indicated that because the transcripts were only available to him in the clerk's office, review was inconvenient and difficult. Defense counsel filed two petitions with the court in which he stated that he was in the process of reviewing the trial transcripts. Defense counsel states in a third petition that he had reviewed the entirety of the trial transcript. His bill of services also contains several references to review of the record and transcripts. As with

the first requirement, we find that the record contains sufficient references to review of the record to satisfy the second Rule 651(c) requirement.

¶ 24 The third requirement of Rule 651(c) is that appointed counsel amend the *pro se* petition necessary to present the defendant's claims adequately. Despite the wording of this requirement, it is not mandatory that appointed counsel file an amended petition if the *pro se* petition adequately presents the defendant's claims. *People v. Rankins*, 277 Ill. App. 3d 561, 564, 660 N.E.2d 1317, 1319 (1996); *People v. Spreitzer*, 143 Ill. 2d 210, 221, 572 N.E.2d 931, 936 (1991); *People v. Ford*, 99 Ill. 2d 973, 975, 426 N.E.2d 340, 342 (1981). "A mere failure to amend the *pro se* petition is not enough to establish inadequacy of representation in the absence of a showing that the petition could have been successfully amended." *People v. Johnson*, 232 Ill. App. 3d 674, 678, 597 N.E.2d 1258, 1261 (1992). In this case, the defendant acknowledges that his appointed attorney filed a response to the State's motion to dismiss, but contends that there is nothing to "conclude that counsel made any necessary amendments for an adequate presentation of his contentions." The defendant does not tell us what changes or additions his attorney could or should have made to his petition in order to present his contentions adequately. In order to assess this claim, we must have a reason to believe that there were allegations or affidavits that counsel could have added or attached to the original *pro se* petition. *People v. Smith*, 40 Ill. 2d 562, 564, 241 N.E.2d 413, 415 (1968); *Ford*, 99 Ill. 2d at 975, 426 N.E.2d at 342-43. When the defendant provides no hint as to what counsel omitted from his petition that should have been included, we will not conclude that the

representation was deficient. *People v. Wollenberg*, 9 Ill. App. 3d 1028, 1030, 293 N.E.2d 728, 730-31 (1973).

¶ 25 In this case, the trial court specifically found that the defendant did not make a substantial showing of a constitutional violation, and further found that even if the jury had known this "new" evidence at the defendant's trial, the outcome would not likely have changed. The defendant's postconviction attorney argued every one of his points from the *pro se* petition in the response to the State's motion to dismiss as well as at the hearing on the motion. Given the primary thrust of this postconviction argument—that there was a witness to the confession of his then-incarcerated brother—the *pro se* petition adequately sets forth that claim.

¶ 26 As we stated earlier, if the record adequately demonstrates compliance with Supreme Court Rule 651(c), there is no need for appointed counsel to file the certificate. *Szabo*, 144 Ill. 2d at 532, 582 N.E.2d at 176; *People v. Lilly*, 291 Ill. App. 3d 662, 668-69, 687 N.E.2d 1070, 1075 (1997). In this case, the record amply supports consultation by mail and phone calls, review of the record of the trial court, and no need to amend the *pro se* petition already on file. For these reasons, we affirm the dismissal of the defendant's successive postconviction petition.

¶ 27 In his second issue on appeal, the defendant claims that he made a substantial showing that he was innocent in light of the exonerating evidence he presented.

¶ 28 The Illinois due process clause provides the opportunity for postconviction defendants to assert a claim of actual innocence due to newly discovered evidence. *People v. Ortiz*, 235 Ill. 2d 319, 333, 919 N.E.2d 941, 949-50 (2009). To make a

substantial showing of actual innocence that would warrant an evidentiary hearing, the defendant must present newly discovered evidence that: (1) could not have been discovered sooner through due diligence, (2) is material and not merely cumulative, and (3) is of such a conclusive character it would probably change the outcome of the trial.

*Id.*

¶ 29 On appeal from a trial court's dismissal of a postconviction petition without an evidentiary hearing, when actual innocence is alleged, we give plenary review. *Coleman*, 183 Ill. 2d at 387-89, 701 N.E.2d at 1075.

¶ 30 Having reviewed the affidavits attached to the petition, we note that the majority of the information amounts to inadmissible hearsay about what the defendant's brother told another inmate. When a defendant claims actual innocence based on newly discovered evidence, hearsay affidavits are generally insufficient. *People v. Morales*, 339 Ill. App. 3d 554, 564-65, 791 N.E.2d 1122, 1131-32 (2003).

¶ 31 The affidavit at issue consists of Shawn Hollowell's written statements that while he was incarcerated in the Massac County jail with Glen Morrison, Glen made inculpatory statements to him that he murdered Roxanne Colley and that he intended to blame his brother for the murder. These statements are not within Hollowell's personal knowledge but consist of a recitation of what he claims the defendant's brother told him. Hearsay evidence is evidence outside of the witness's personal knowledge, and is a repetition of what he heard. *People v. Tenney*, 205 Ill. 2d 411, 432-33, 793 N.E.2d 571, 584-85 (2002). The hearsay evidence is offered to prove the truth of the matter asserted. *Id.* In Illinois, hearsay evidence is not admissible. Ill. R. Evid. 802 (eff. Jan. 1, 2011).

¶ 32 Even if the defendant could get past the problems with the hearsay nature of Hollowell's testimony, he characterizes that testimony as conclusive proof that his brother committed the murder. Because the testimony in the affidavit amounts to inadmissible hearsay, the testimony does not prove the defendant's actual innocence, and his contention that the trial court was bound to take Hollowell's allegations as true is incorrect. The defendant has not met the *People v. Ortiz* threshold of evidence to make a substantial showing of actual innocence warranting an evidentiary hearing. Any newly discovered evidence must be conclusive in that the outcome would be different if a retrial was granted. *Ortiz*, 235 Ill. 2d at 333, 919 N.E.2d at 949-50.

¶ 33 In addition to the inadmissibility of Hollowell's testimony to prove the truth of the matter asserted, we must consider the character and believability of Hollowell. At the time that he made these statements to the defendant, he was incarcerated for a crime of deceit—writing bad checks. Hollowell would be subject to impeachment with this deceitful behavior. As the trial court stated in its order, "Had the evidence been known at the time of trial, it would not have likely changed the result at trial." We agree with the trial court's order dismissing the defendant's successive postconviction petition.

¶ 34 For the foregoing reasons, we affirm the judgment of the circuit court of Massac County.

¶ 35 Affirmed.