

No. 1-10-1368 and 1-10-2399 (consolidated)

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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.)	No. 99 CR 23271
)	
JIMMY VELASQUEZ,)	Honorable
)	Charles P. Burns,
Defendant-Appellant.)	Judge Presiding.

JUSTICE STERBA delivered the judgment of the court.
Presiding Justice Neville and Justice Pierce 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 his compliance with Illinois Supreme Court Rule 651(c)'s requirements.

¶ 2 Defendant Jimmy Velasquez appeals the trial court's dismissal of his postconviction petition at the second stage of postconviction proceedings. On appeal, defendant claims that appointed postconviction counsel failed to satisfy Illinois Supreme Court Rule 651(c)'s (eff. Dec.

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1, 1984) requirements even though he filed a Rule 651(c) certificate ("certificate") because counsel: (1) did not consult with him; (2) did not review the record and was unfamiliar with the facts of his case; and (3) did not amend or supplement the filed *pro se* postconviction petition. For the reasons that follow, we affirm.

¶ 3

BACKGROUND

¶ 4 The relevant facts underlying defendant's conviction for armed robbery and first degree murder are summarily stated as follows. On September 16, 1999 at approximately 1 p.m., Virginia (Quiroz) Robleo and her husband at the time, Jamie Quiroz, were talking just outside of their home. While they were talking, they noticed a green vehicle passing by slowly and then the driver tried to exit out of the moving vehicle, but became tangled with the seat belt and fell down onto the ground. The green vehicle kept moving for approximately 10 to 15 steps and stopped when it hit the curb. Defendant, the passenger in that vehicle, then exited the vehicle and walked to the vehicle's driver's side and fired approximately three gunshots at the driver, who was still on the ground. After the shooting, Virginia and Jamie both saw a white vehicle drive by and the shooter jumped into that vehicle, which then drove away. Approximately five minutes elapsed from the time that they saw the driver of the green vehicle fall out of the vehicle onto the street until the shooter got into the white vehicle that drove away. After the shooting, Virginia went inside the house and called the police.

¶ 5 Virginia and Jamie went to the police station where they were shown a photo array. Virginia identified defendant as the shooter from the photo array, but Jamie could not identify defendant. On the next day, Virginia viewed a line-up through a one-way mirror and made a tentative facial identification of the shooter. Jamie also separately viewed a line-up and

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identified defendant. After viewing a photograph of the line-up while testifying at trial, Virginia put her initials over the man that she tentatively identified as the shooter. Virginia used the initials V.R., which stood for Virginia Robleo. Jamie also viewed a photograph of the line-up during his trial testimony and placed his initials over defendant in the picture. Both Virginia and Jamie made an in-court identification of defendant as the shooter.

¶ 6 Marcos Zuazua also witnessed the shooting. As he was waiting in a vehicle for his girlfriend in the general vicinity of 2840 West 22nd Place in Chicago, he heard a gunshot coming from behind him. Looking in the vehicle's rearview mirror, he saw a man laying down in the street and someone standing above him pointing a gun at him. Zuazua then heard another gunshot. After shooting the victim, the shooter reached into a green vehicle's backseat and pulled out books, the radio box or something similar to it and ran to the passenger side of a white vehicle. The white vehicle then drove off passing by him, and he wrote down the vehicle's license plate number. When the police arrived at the scene, he was unable to give them a description of the shooter. Zuazua viewed a line-up at the police station, but was not able to identify the shooter because he did not see the shooter's face.

¶ 7 In the early evening of September 16, 1999, defendant was at Joel Escotor's house seeking to purchase marijuana. Escotor's mother, niece and cousin were also there at that time. Escotor did not sell any marijuana to defendant because Escotor did not have change for the \$100 bill that defendant wanted to use to pay for the marijuana. Instead, the men went upstairs into Escotor's living room and smoked marijuana together. Defendant did not say much to Escotor, but he made several telephone calls while Escotor was in the kitchen and defendant was in the bathroom. When defendant was still at Escotor's home, the police banged on the front door and

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then broke the door down. When the police were inside, Escotor saw defendant climb back inside the house through a window, which lead to the roof, that defendant previously used to leave the house. The police placed defendant under arrest, and also arrested Escotor. While he was at the police station, Escotor spoke with an assistant state's attorney and he told her that defendant told him that "he did something bad but wanted to do something good. He jacked and shot someone." Escotor explained that "jacked" meant "robbed." Defendant also stated that he "jacked" a "Brazer," which is a slang word for a Mexican who does not speak English.

Defendant elaborated that it was a robbery that went bad and that defendant would have let the victim live, but he did not want the Brazer to do anything to his family. Escotor signed a handwritten statement reflecting the information that he told the assistant state's attorney.

¶ 8 During cross-examination at trial, Escotor acknowledged that on the day of the arrest, the police recovered 135 grams of marijuana from his house. Escotor stated that he sold some marijuana, and when the police arrived at his house, he and defendant were smoking marijuana and had been doing so for approximately two hours. Escotor also stated that when the police entered his house, they hit him on his chest three times, hit him in the stomach and kicked him in the groin. When he was at the police station, the detectives told him that his mother was in custody because of the marijuana and that his niece was in the Department of Children and Family Services' (DCFS) custody. Escotor further stated on cross-examination that he fabricated his previous statement to the assistant state's attorney because he thought that his mother was in custody and that his niece was in DCFS foster care. He also lied before the Grand Jury when he testified under oath about the statements defendant made to him. During re-direct, Escoto explained that he made up the story about what defendant said not because he was afraid of

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getting arrested because of the marijuana, but because his mother was going to be charged with marijuana possession.

¶ 9 While in police custody and speaking to a detective in the early morning on the day following the shooting, defendant admitted to shooting the victim. He told the detective that the incident was a drug deal that had "gone bad." Defendant asked to speak to his sister, and the detective granted his request. After speaking with his sister, defendant told the detective where to locate the white vehicle, which belonged to his sister. When defendant was later interviewed by another detective, he refused to discuss any of the information that he discussed with the previous detective. During his trial testimony, defendant denied killing the victim.

¶ 10 Following jury deliberations, defendant was found guilty of armed robbery and first degree murder. The trial court sentenced defendant to 48 years' imprisonment. Defendant appealed his conviction claiming that he was denied his statutory right to a speedy trial (725 ILCS 5/103-5(a) (West 1998)) because the trial court improperly granted the State's motion for an extension. Defendant also argued on direct appeal that trial counsel was ineffective because counsel failed to file a motion for discharge, and failed to raise the speedy trial issue in his posttrial motion. This court affirmed defendant's conviction and sentence.

¶ 11 Defendant filed a *pro se* postconviction petition alleging that: (1) the State failed to meet its burden of proof beyond a reasonable doubt; (2) he received ineffective assistance of trial counsel; and (3) the State used perjured testimony to secure the armed robbery charge. The petition was not file stamped, but the notice of filing was dated December 30, 2005. Attached to the petition was a signed affidavit of verification, but the affidavit was not notarized. Defendant supplemented his initial petition by alleging that his indictment was void and invalid because the

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first degree murder statute, as amended, did not exist at the time of his conviction. The successive petition also was not file stamped, but the notice of filing was dated February 27, 2006. This petition also had a signed affidavit of verification attached to it, but it was not notarized.

¶ 12 The trial court appointed counsel to represent defendant during postconviction proceedings on March 31, 2006. On August 7, 2008, public defender Bruce Landrum informed the trial court that he was currently investigating defendant's postconviction claims and that the case was unassigned in the State's Attorney's office. At the next hearing date on November 8, 2008, Landrum stated that he was still investigating defendant's postconviction petition. On February 15, 2009, Landrum informed the trial court that he was currently reading the trial transcripts and was investigating defendant's postconviction claims. After further questioning by the trial court, Landrum indicated that he had not read the transcripts yet. The trial court set a status date for March 19, 2009. On that date, Landrum indicated that he was just beginning to work on defendant's postconviction petition, and stated that defendant sent him two supplemental petitions within the last couple of months. On the May 7, 2009 status date, Landrum stated that he was just starting his investigation and that defendant called him yesterday to inform him that he was in the process of obtaining affidavits and wanted an extended court date. During the August 13, 2009 status hearing, Landrum informed the trial court that he just completed his investigation and planned to file a Rule 651(c) certificate on the next court date without filing an amendment to defendant's *pro se* petition. Landrum requested October 22, 2009 as the next court date to allow time for him to communicate with defendant because defendant may have additional claims that required investigation. On October 22, 2009, postconviction counsel filed

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a Rule 651(c) certificate without filing an amendment attesting the following: (1) "I have consulted with petitioner, Jimmy Velasquez, by letter and phone to ascertain his contentions of deprivation of constitutional rights;" (2) "I have examined the Report of Proceedings of the trial concerning Indictment Number 99 CR 23271-01 which trial was heard by the Honorable Dennis Dernbach;" and (3) "I have examined petitioner's *Pro Se* Petition for Post-Conviction Relief and as it adequately presents his claim of deprivation of constitutional rights there is nothing that can be added by an amended or supplemental petition."

¶ 13 On December 8, 2009, defendant filed a motion for appointment of new counsel alleging a conflict of interest with his appointed counsel, and that counsel had not consulted with him by either letter or telephone to ascertain his claims of deprivation of constitutional rights. On February 16, 2010, defendant filed a motion for appointment of a Chicago Bar Association attorney due to a conflict of interest with his appointed public defender since that same office represented him during trial and he alleged ineffective assistance of that trial counsel. The trial court orally denied his motion on March 18, 2010 during the hearing on the State's motion to dismiss the postconviction petition.

¶ 14 During the December 17, 2009 hearing date, the State informed the trial court that defendant's supplemental petition was not in the clerk's computer system and neither side had a file stamped copy. It was unclear whether the supplemental petition was filed after Landrum's appearance, but the State indicated that it would be moving to dismiss the supplemental petition as a precaution. Landrum responded that he would be filing another Rule 651(c) certificate at the next court date to specifically include the supplemental petition.

¶ 15 At the next court date on February 25, 2010, postconviction counsel asked for leave to

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file a second Rule 651(c) certificate to incorporate defendant's supplemental petition. Also on February 25, 2010, the State filed a motion to dismiss defendant's *pro se* petition and supplemental petition because the petitions failed to establish a constitutional violation warranting postconviction relief or an evidentiary hearing. The State also argued that both petitions were untimely. Regardless of the petitions' untimeliness, the State claimed that defendant failed to meet the "cause" and "prejudice" requirements necessary for further postconviction relief.

¶ 16 On the March 18, 2010 hearing date, the trial court heard the State's argument on its motion to dismiss. Landrum rested on defendant's *pro se* petitions and did not present a separate argument in response to the State's motion to dismiss. On April 22, 2010, the trial court entered an order dismissing defendant's petitions as untimely and lacking merit. The trial court also found that the untimely filing was due to his culpable negligence. At the conclusion of the trial court's ruling, Landrum filed a notice of appeal. The trial court asked counsel whether he consulted with defendant about filing the notice of appeal. Landrum responded that defendant previously informed him that he “wanted to take it as far as he can take it.” Even though the trial court was unsure what defendant meant by that statement, he allowed counsel to file the notice of appeal. Defendant filed an untimely *pro se* motion to reconsider the trial court's dismissal of his petition, which the trial court denied on June 28, 2010. The trial court also denied defendant's second motion, which was to strike the notice of appeal, because his motion was not timely filed. Defendant timely filed the instant appeal.

¶ 17 ANALYSIS

¶ 18 In this appeal, defendant does not challenge the trial court's dismissal of his

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postconviction petitions based on the merits of the petitions, but, instead, claims that his postconviction counsel provided unreasonable assistance. Defendant acknowledges that postconviction counsel filed a Rule 651(c) certificate, but contends that counsel's performance fell below the minimum standard of assistance and he, nonetheless, failed to comply with Rule 651(c)'s requirements. Specifically, defendant claims that postconviction counsel provided unreasonable assistance because he: (1) failed to amend his *pro se* postconviction petition to include a notarized verification affidavit; (2) repeatedly misrepresented to the trial court the work he performed on the petition; and (3) failed to adequately examine the record, which became evident based on counsel's comments after he filed the first certificate. Because of counsel's unreasonable assistance, defendant maintains that his case should be remanded and new counsel should be appointed to represent him for additional second stage proceedings.

¶ 19 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).

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¶ 20 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 the requirements set forth in Illinois Supreme Court Rule 651(c). *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 Rule 651(c) 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 Rule 651(c) 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).

¶ 21 In the case *subjudice*, postconviction counsel filed a Rule 651(c) certificate on October 22, 2009 and asked for leave to file another certificate on February 25, 2010, which incorporated defendant's *pro se* petition and supplemental petition. Thus, counsel's filing of a Rule 651(c)

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certificate created a presumption that defendant received the representation required by Rule 651(c). *Id.* Because counsel filed a Rule 651(c) certificate, the burden was on defendant to establish that counsel failed to substantially comply with the rule's requirements. *Id.* Here, defendant did not meet that burden.

¶ 22 We first address defendant's claim that counsel's failure to amend his petition to include his notarized verification affidavit demonstrates counsel's failure to comply with Rule 651(c)'s requirements. In response, the State asserts that because it did not raise this as a deficiency against defendant, this claim cannot support a finding that postconviction counsel provided unreasonable assistance. We agree with the State. The trial court did not dismiss defendant's postconviction petition based on the procedural deficiency of not having a notarized verification statement attached to his petitions. Despite the procedural shortcoming, the trial court, nonetheless, considered the merits of defendant's petitions and found defendant's petitions to be untimely and meritless. Although the required notarized verification statement is absent from the record, its absence did not preclude the trial court from considering the merits of defendant's postconviction claims that he raised in his petitions. Accordingly, this contention fails to support a conclusion that defendant did not receive reasonable representation as required by Rule 651(c).

¶ 23 Next on appeal, defendant claims that counsel provided unreasonable assistance because he repeatedly misrepresented and provided inconsistent information to the trial court regarding the investigation of defendant's postconviction claims, and the record establishes that counsel failed to comply with his duty to review the record. As support for his position, defendant claims that counsel repeatedly requested and received three month continuances informing the trial court that he was currently investigating the postconviction claims, when, in fact, he was not.

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Defendant also relies on the following colloquy during the February 5, 2009 hearing to demonstrate counsel's misrepresentations to the trial court:

MR. LANDRUM [Public Defender]: "Judge, this is a PC that I'm currently reading the transcript and currently investigating. This case is unassigned in the State's Attorney's Office.

THE COURT: How long has this been on Judge Dernbach's call?

MR. LANDRUM: I'm not sure, Judge, but I've had it for about a year and a half, I think.

THE COURT: Well, I think it has probably been a lot longer than that. As a matter of fact, I think it's probably been on the call in - petition was denied in 2005, re-filed in January 2006, so we're talking three years; is that about right?

MR. LANDRUM: Could be, Judge.

THE COURT: Well, we're beyond what I believe is reasonable.

MR. LANDRUM: Well, Judge, we have a tremendous backlog.

THE COURT: I understand that.

MR. LANDRUM: And when I first got the case I had around 20 cases that were ahead of it. Right now I'm down to two cases and I'm scheduled to start reading this case by the end of the month.

THE COURT: So you haven't read the transcripts yet?

MR. LANDRUM: No.

THE COURT: I thought you said you read the transcripts.

MR. LANDRUM: No, I didn't.

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THE COURT: Oh, you're reading the transcripts.

MR. LANDRUM: Right, right."

Defendant maintains that, as reflected above, counsel provided inconsistent information regarding his progress on defendant's case. Specifically, counsel first indicated that he was currently reading the transcripts, but moments later represented to the trial court that he was scheduled to start reading defendant's case by the end of the month. Defendant claims that counsel's misrepresentation to the trial court regarding his investigation of defendant's postconviction claims from 2008 through 2009 establishes that his representations stated in his Rule 651(c) certificate are, too, false. We disagree.

¶ 24 We note that postconviction counsel made various statements to the trial court to convey that he had not finished reading the transcripts. Defendant characterizes these statements as inconsistent. These statements, however, do not create an inference that counsel provided defendant with unreasonable assistance or that counsel intentionally attempted to misrepresent the work that he performed relating to defendant's postconviction claims. Regardless of counsel's actual statements to the trial court, the gist of his statements was that he had not yet finished reading the transcripts, which was clearly and consistently conveyed to the trial court. Also, counsel's multiple requests for a continuance do not demonstrate his failure to provide reasonable assistance, but, the opposite, that counsel was seeking additional time to allow him to adequately investigate defendant's claims. Indeed, by requesting the continuances, counsel chose not to represent defendant when he was not adequately prepared or merely dismissing his claims without consideration. Rather, counsel's requests for continuances demonstrated his desire to allow sufficient time for him to review defendant's claims based on his current workload, which

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involved a significant backlog. Contrary to defendant's assertions, counsel's various statements regarding the status of his investigation of defendant's postconviction claims do not give rise to a conclusion that counsel provided unreasonable assistance or establishes that his representations in the Rule 651(c) certificate were false.

¶ 25 Similarly, postconviction counsel's comments after he filed the first certificate do not demonstrate a lack of knowledge relating to defendant's postconviction claims. Defendant contends that counsel indicated that he would be filing an amended Rule 651(c) certificate only after the State informed the trial court that it would be moving to dismiss both petitions. In particular, defendant notes that counsel's original Rule 651(c) certificate refers only to defendant's *pro se* petition and it does not mention his supplemental petition, which it should have if counsel did, in fact, review and investigate both petitions. We are not persuaded by defendant's contention.

¶ 26 In reviewing the record, we note there was confusion surrounding the filing of defendant's *pro se* supplemental petition because it did not appear in the trial court's computer system and neither side had a file stamped copy, but the half sheet revealed the existence of that petition. Specifically, during the December 17, 2009 hearing, the State voiced its concern that it was unable to determine if the supplemental petition was filed before or after postconviction counsel filed an appearance and whether the petition was properly filed. The State indicated that if the petition was filed before appointed counsel filed an appearance, then it would be filing a motion to strike that petition in addition to the original *pro se* petition. The uncertainty surrounding when the supplemental petition was filed prompted the State to file a motion to dismiss incorporating that petition "to make matters safe." Following the same sentiment, counsel

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responded that he would be filing an amended certificate to include both the petition and the supplemental petition at the next hearing date.¹ Counsel's decision, however, to amend the certificate, which he made after the State decided that its motion to dismiss would include both petitions, does not automatically create the inference that counsel did not know about the existence of the second petition. Rather, the record indisputably establishes that counsel did, indeed, know about the supplemental petition. We note that during the March 19, 2009 hearing, counsel stated that defendant sent him two supplemental petitions within the last couple of months, which were just as thick as defendant's *pro se* petition. Counsel's statement clearly refutes defendant's claim that counsel was not aware that defendant filed a supplemental petition until the State made reference to it during a subsequent hearing on December 17, 2009.

¶ 27 Also on appeal, defendant claims that counsel rendered unreasonable assistance because he lacked knowledge relating to his postconviction claims and failed to adequately examine the record. Specifically, defendant claims that counsel did not: (1) amend the *pro se* petitions; (2) respond to the State's motion to dismiss during oral arguments on that motion; and (3) know that defendant filed a motion for new counsel. Additionally, defendant claims that counsel's October 7, 2009 letter to him establishes his failure to investigate defendant's postconviction claims because counsel did not address his ineffective assistance of trial counsel claims in his correspondence. More significantly, defendant claims that counsel repeatedly referred to witnesses in his letter using wrong names, which demonstrates his unfamiliarity with his case.

¹ Although the record is devoid of the second certificate, counsel asked for leave to file the second certificate during the February 25, 2010 hearing and the State acknowledged receipt of that certificate. Thus, we accept as true that counsel filed the second certificate, which incorporated the supplemental petition.

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¶ 28 We again reject defendant's claims. Defendant claims that counsel provided unreasonable assistance because counsel did not file an amended petition. Based on our review of defendant's *pro se* petition, we note that it was comprehensive and consisted of 45 total pages. We also note that defendant sent to the trial court a supplemental petition in addition to his initial petition. We find those petitions to have adequately addressed defendant's substantive claims regarding trial counsel's ineffective assistance and the invalidity of the first degree murder statute (720 ILCS 5/9-1-A(1), (3) (West 1998)) rendering the filing of an amended petition to be unnecessary. See *People v. Turner*, 187 Ill. 2d 406, 412 (1999) (recognizing that Rule 651(c) merely requires postconviction counsel to make "any amendments to the petitions filed *pro se* that are necessary for an adequate representation of petitioner's contentions.") Contrary to defendant's claim, a postconviction counsel is not required to file an amended petition on defendant's behalf, but is only required to investigate and present defendant's claims in legal form to the trial court. *Id.*; *People v. Suarez*, 224 Ill. 2d 37, 46; *People v. Pendleton*, 223 Ill. 2d 458, 475 (2006). Here, given the comprehensive nature of defendant's petitions, counsel's decision not to amend the petitions does not create an inference that he provided unreasonable assistance to defendant or that defendant was deprived of adequate representation. An amendment was not warranted because defendant's petitions adequately set forth his claims of the deprivation of constitutional rights and were sufficiently formulated into a legal form allowing the trial court to rule on the merits of his claims.

¶ 29 Regarding defendant's second claim of postconviction counsel's error, counsel's decision not to respond to the State's motion to dismiss during oral arguments was a strategic decision, and counsel was not required to orally respond to the motion to dismiss. Rather than orally

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respond to the State's motion to dismiss, counsel stated that he would rest on defendant's *pro se* petitions and present no arguments. Again, given the comprehensive nature of defendant's *pro se* petitions, counsel did not provide unreasonable assistance by not orally responding to the State's motion to dismiss arguments and resting on the petitions.

¶ 30 Similarly, defendant's claim that counsel's lack of knowledge regarding the filed motion for appointment of new counsel establishes unreasonable assistance is rejected. Defendant's motion for the appointment of a CBA attorney filed on February 16, 2010, was based on defendant's perceived conflict of interest allegedly created by his postconviction counsel investigating claims that defendant raised against an attorney from his same office. Although counsel acknowledged that he was not familiar with that motion, that lack of knowledge is not sufficient to overcome the presumption that counsel provided reasonable assistance that arose from counsel's filing of the certificate.

¶ 31 Turning next to postconviction counsel's October 7, 2009 letter to defendant, we note counsel correctly stated that defendant's first few ineffectiveness of counsel claims relate to trial counsel's failure to either interview or subpoena police officers or impeach the State's witnesses. We find that the content of counsel's correct statement indicates that counsel did, indeed, consider defendant's ineffectiveness claims. We also note that postconviction counsel correctly informed defendant that the State's witnesses were cross-examined by his trial attorney, but defendant's petitions do not reflect this fact. Thus, we can reasonably conclude that postconviction counsel learned that information from his review of the record and not merely his review of the petitions.

¶ 32 We further note that postconviction counsel also reiterated to defendant that his

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conviction was based on the eyewitness testimony of Jamie Quiroz, Virginia (Quiroz) Robleo and Marcos Zuazua, in addition to defendant's confession and Joel Escoto's testimony.

Defendant argues that counsel was unfamiliar with his case because he referred to Virginia as Virginia Quiroz instead of, according to defendant, the correct name of Virginia Robleo.

Although it is true that Virginia stated her name as Virginia Robleo during her testimony at trial, the record reveals that on September 16, 2009 when the underlying events leading to the shooting death of the victim occurred, she was married to Jamie Quiroz. During the interim period between the shooting and trial, Virginia became divorced and remarried with Robleo being her new last name. Particularly noteworthy is that defendant, himself, referred to Virginia as Quiroz in his own petition. Because defendant is surely familiar with his own case and chose to refer to Virginia by the name of Quiroz in his petition, counsel's use of Quiroz in the certificate cannot establish that he was unfamiliar with defendant's case as he suggests. Moreover, when asked what Virginia's last name was, Virginia's former husband stated during his testimony at trial that he did not know. Therefore, the record itself reflects confusion regarding how Virginia should be referred to as, specifically whether it is by her current last name or her last name at the time of the shooting. In fact, during the cross-examination of Jamie Quiroz, when asked whether his former wife goes by a different name today, he answered yes, but he did not know her current name and on the day of the shooting, her last name was Quiroz. Regardless, Virginia's name at one time was in fact Quiroz. Thus, contrary to defendant's claim, counsel's use of Quiroz as Virginia's last name instead of Robleo does not support a conclusion that counsel was not familiar with defendant's case or that he did not read the record. Referring to Virginia by her former married name that she was known by on the day of the shooting does not establish that

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counsel was unfamiliar with the witnesses testifying against defendant because at one point in time, that was her name.

¶ 33 Similarly, defendant claims that counsel was unfamiliar with his case because in counsel's October 7, 2009 letter, he incorrectly referred to Joel Escoto as Joe Escoto and Marcos Zuazua as Marcos Zuagua. Although those individual's names were spelled incorrectly in the letter, the errors are merely typographical errors that do not reflect on and have no bearing on counsel's investigation of defendant's case. Finally, we note that postconviction counsel in his letter informed defendant that Escoto's cross-examination revealed that he was not charged with narcotics possession. Even though defendant's petition did state that Escoto was not charged with narcotics possession, the petition, however, did not disclose that Escoto made that acknowledgment during his cross-examination. Accordingly, postconviction counsel again learned that information based on his review of the trial record and not merely a review of defendant's petitions. In sum, most of defendant's perceived deficiencies in counsel's performance actually support a finding that postconviction counsel reviewed the trial record and the other deficiencies amount to insignificant typographical errors.

¶ 34 Moreover, the record clearly establishes that counsel consulted with defendant by both telephone and mail as required by Rule 651(c). During the May 7, 2009 hearing date, counsel informed the trial court that a continuance was necessary because defendant told him that he was in the process of obtaining affidavits that would support his claims. Also, at the May 7, 2009 hearing date, counsel informed the trial court that defendant called him yesterday and requested an extended continuance date because defendant was in the process of obtaining some affidavits. Furthermore, after the trial court entered its ruling dismissing the petition, counsel immediately

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tendered to the trial court a notice of appeal. The trial court asked counsel whether defendant wished to file that motion, and counsel responded that he had not talked with defendant since the State filed its motion to dismiss, but in previous conversations, defendant stated that "he wanted to take it as far as we can take it." Counsel also sent defendant the letter dated October 7, 2009 where he communicated to defendant the results of his investigation of the postconviction claims. Thus, the record reveals that counsel consulted with defendant through both telephone conversations and mail.

¶ 35 Defendant, however, claims that counsel's certificate is false because counsel did not "consult" with defendant, which, according to defendant, meant that counsel did not ask him for his advice or opinion regarding his claims. It appears that defendant's understanding was that his appointed counsel was required to contact him and ask him for his advice and opinion on how to proceed in his case. Rule 651(c), however, expressly requires counsel to consult with the defendant "to ascertain defendant's claims of the deprivation of constitutional rights," but it does not expressly require counsel to seek defendant's advice on how to investigate his claims. Defendant's misconception regarding the nature of counsel's required communication cannot form the basis of an allegation that counsel provided unreasonable assistance because counsel did, in fact, communicate with defendant to the extent required by the rule to determine his claims of deprivation of constitutional rights. Moreover, the record clearly reveals that there was not a complete absence of consultation between defendant and appointed counsel, which would provide a sufficient basis to find that counsel did not provide reasonable assistance. *Turner*, 187 Ill. 2d at 410-11.

¶ 36 In sum, defendant failed to present claims and support in the record that rebuts the

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presumption that arose when counsel filed a Rule 651(c) certificate indicating that postconviction counsel provided adequate representation. Rather, the record establishes that all three requirements of Rule 651(c) were satisfied because: (1) counsel communicated and consulted with defendant; (2) counsel's October 7, 2009 letter to defendant establishes that he reviewed the record; and (3) counsel is not required to amend a *pro se* petition where defendant's claims of the deprivation of constitutional rights are adequately set forth in the petition, which was the scenario presented here. We are also mindful that Rule 651(c) does not require the certificate to be a comprehensive recounting of all of counsel's efforts in investigating defendant's case. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 24. In the instant case, the certificate sufficiently recounts counsel's efforts regarding defendant's case and establishes that he complied with Rule 651(c)'s requirements.

¶ 37 Defendant's last contention on appeal claims that counsel provided unreasonable assistance because he did not procure necessary affidavits. First, defendant claims that counsel should have obtained an affidavit from the pro-bono committee of the Mexican consulate establishing his nationality and detailing the length of time that they spent reviewing his petition, which was a right afforded to defendant under the Vienna Convention on Consular Relations (Vienna Convention). Under the Vienna Convention, consular officers have the right to visit a national of its State who is in prison or in custody to arrange for his legal representation. In the instant case, the trial court articulated that it was dismissing defendant's petition not only because it was untimely, but also because the claims set forth in it had no merit. Accordingly, counsel's decision not to include the requested affidavit from the Mexican consulate was not unreasonable because the affidavit would be inconsequential since the trial court did not render its decision

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dismissing the petition on timeliness grounds alone.

¶ 38 Defendant's other related claim is that a counsel providing reasonable assistance would have obtained affidavits from the missing eyewitnesses mentioned in the police reports that defendant used as a basis for his ineffective assistance of trial counsel claims. Defendant's petition alleges that trial counsel was ineffective because he did not identify the unknown witness who provided a description of the shooter to the police and did not determine the identity of the other suspect. Defendant, however, has the obligation to inform counsel of the identity of witnesses with specificity who should have been called in his defense. *People v. Johnson*, 154 Ill. 2d 227, 247-48 (1993). In fact, counsel has no obligation "to engage in a generalized fishing expedition in search of support for claims raised in a petition." *Id.* at 248. Here, defendant generally refers to an unknown and unnamed witness, as well as the existence of another suspect, but does not reveal the identity of those individuals. The failure of postconviction counsel to obtain affidavits from unknown individuals does not give rise to a finding that he provided unreasonable assistance where he had no duty to engage in such a "fishing expedition."

¶ 39 In the case *subjudice*, not only did counsel file a Rule 651(c) certificate creating the presumption that he satisfied the rule's requirements, but the record also independently supports a finding that the requirements were satisfied. Accordingly, remand and appointment of a different counsel for second stage proceedings on the basis that postconviction counsel provided unreasonable assistance is not warranted.

¶ 40 CONCLUSION

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

¶ 42 Affirmed.

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