2014 IL App (1st) 112037-U

FOURTH DIVISION
July 24, 2014

No. 1-11-2037

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. 92 CR 26928
	)	
	)	
ALFRED PORTER,	)	The Honorable
	)	Joseph M. Claps,
Defendant-Appellant.	)	Judge Presiding.
	)	

JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Epstein concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's postconviction attorneys provided unreasonable assistance of counsel because they failed to amend defendant's postconviction petition by notarizing an affidavit in support of his constitutional claim or by explaining why they did not notarize the affidavit. Defendant's appointed counsel also represented that he would further amend the petition. We reverse the second-stage dismissal of defendant's postconviction petition.

¶ 2 Defendant Alfred Antoine Porter appeals from the second-stage dismissal of his postconviction petition, filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2012)). Defendant contends the circuit court erred in dismissing his postconviction petition (18 years after it was filed) on the State's motion because he claims to have sufficiently

alleged his actual innocence in the fatal 1992 gang-related shooting, for which he was found guilty of murder and attempted murder following a bench trial and for which he is now serving 70 years in prison. For the reasons set forth below, we reverse and remand the matter for further second-stage proceedings.

¶ 3 BACKGROUND

¶ 4 The facts of the case are sufficiently set forth in defendant's direct appeal, *People v. Porter*, 277 Ill. App. 3d 194 (1995), but we will provide the factual background necessary for understanding the procedural posture of the case. Defendant was tried jointly with codefendant James Auston. Having said that, the State did not present evidence against Auston, and it is not entirely clear from the record why Auston was charged or tried.[1] This led the trial court to grant Auston's motion for a directed verdict of not guilty following the State's evidence. This evidence revealed that around 8:30 p.m. on October 5, 1992, a number of men, including Mickey Cobras and defendant, were standing on a street corner in Chicago when five members of the Latin Kings gang drove by in a Chevy Blazer. One of the gang members rolled down the car window and asked, "what's up?" This apparently prompted defendant to tell a short dark male next to him to "get the shit," which prompted that unidentified man to start shooting at the Blazer, causing it to crash into a dumpster. The gunfire ceased briefly but then resumed. As a result, Jose M. Colon, a passenger in the vehicle died and several others were wounded. Several of the vehicle's occupants later identified defendant either in a photographic array and/or a line-up as the instigator who stated, "get the shit." Several also testified to seeing defendant holding a gun and shooting after the car crash.

[1] The original common law record, which apparently discloses the charges filed and mittimus issued, is not part of the record on appeal, nor is the record of pretrial proceedings. Defendant acknowledges the absence of these records but asserts that they are missing and that counsel continues to search for them. The State notes the missing records but does not otherwise argue they are dispositive in this case.

¶ 5 Defendant presented three witnesses who countered that although defendant was at the scene, he was not involved with the shooting. Defendant likewise testified that he neither ordered nor participated in the shooting and that he ran from the scene after shots were fired along with the rest of the dispersing crowd. The trial court credited the State's witnesses and found defendant guilty of murder and attempted murder. He was then sentenced to consecutive prison terms totaling 90 years. Defendant, who had no prior criminal history, maintained he was innocent at allocution prior to sentencing.

¶ 6 Defendant filed a direct appeal challenging his sentence as illegal and excessive while also challenging the sufficiency of the evidence to sustain his conviction. *Porter*, 277 Ill. App. 3d at 197-98. This court determined that defendant's two sentences for attempted murder should not be served consecutively to the other sentences and, accordingly, reduced his aggregate sentence to 70 years but otherwise upheld his conviction as being justified by evidence beyond a reasonable doubt. *Porter*, 277 Ill. App. 3d at 199-200; see also *People v. Porter*, 166 Ill. 2d 550 (April 3, 1996) (leave to appeal denied).

¶ 7 The procedure which has resulted in this case being again reviewed began nearly 18 years ago when private counsel Erika Cunliffe (who represented defendant on direct appeal) filed a postconviction petition on defendant's behalf in October 1996. A month later, Cunliffe appeared in court and requested leave to file an amended petition, explaining that she had filed the initial petition only to meet the filing deadline, but "[t]here were a number of witnesses out there" who had "come forward indicating that Mr. Porter was not involved in the shooting." In the motion, she stated some trial witnesses had also recanted. Cunliffe stated she intended to obtain the requisite affidavits to support the petition. The court granted Cunliffe leave to file an "amended supplemental motion" for postconviction relief. In January 1997, Cunliffe filed a

"first amended petition for post-conviction relief." Therein, defendant alleged that he was denied his right to a fair trial, due process, and the right to present a defense because the Latin Kings created an atmosphere of intimidation inside and outside of the courtroom, which precluded defendant from calling witnesses in support of his case. Defendant specifically alleged that several witnesses, unavailable to testify at trial due to gang intimidation, had come forward stating defendant did not participate in the shooting. Defendant added that trial counsel's failure to raise the issue of witness intimidation constituted ineffective assistance of counsel. Defendant further alleged, in relevant part, that his trial counsel was ineffective for failing to sever defendant's trial from that of codefendant Auston. Although inartfully stated, the petition similarly asserted that trial counsel was ineffective for failing to present Auston as a defense witness, which affected defendant's right to present a defense and to a fair trial. Defendant alleged that codefedant Auston, whom the trial court acquitted after the State presented no evidence against him, stated that he was with defendant on the evening in question and defendant did not order or participate in the shooting and in fact had no weapon. Defendant attached Auston's handwritten statement, dated September 23, 1996, stating the same and also relating, "[n]one of us, including Alfred Porter[,] knew ahead of time that there was going to be a shooting." Auston signed each page of his statement, explaining that he was then incarcerated in Illinois prison and had provided the statement to a man he believed to be a private investigator working for defendant's attorney.

¶ 8 Although defendant alleged that Auston also stated that he would have testified on defendant's behalf but for his own defense counsel recommending against it at trial, Auston's handwritten statement does not specifically confirm this representation. In addition, Auston's statement was not otherwise notarized or verified. Defendant also attached the properly

notarized affidavit of his mother who attested that trial counsel failed to inform her and defendant that defendant would be tried jointly with Auston and also failed to inform them of the possibility of filing a motion to sever the case. She further stated that the Latin Kings filled the "spectator section of the courtroom" making threatening noises and flashing gang signs throughout trial. They used their hands like guns and pretended to shoot at defendant, his family, and defense counsel. She stated her son could not have received a fair trial in that environment and further stated that one of the defense witnesses feared for her safety at trial and afterwards.

¶ 9 The petition proceeded to the second stage of proceedings under the Act. In February 1997, Cunliffe appeared on defendant's behalf and stated that although she had met with defendant, he had "never" paid her for her postconviction representation, and she thus requested to withdraw from the case. The court allowed Cunliffe to withdraw and appointed the public defender's office in her stead. In 1998, the State filed a motion to dismiss, but the motion apparently was never ruled upon by the circuit court. Defendant's case cycled through several assistant public defenders and, in February 1999, Assistant Public Defender (APD) Ronald Haze was appointed. The case then sputtered along for 12 years with numerous continuances being granted, usually with precious little in the way of representations that any work had been done by counsel with respect to fleshing out the postconviction petition.

¶ 10 At the admitted risk of being repetitive, we will fully delineate the many years of inaction. In February 2001, APD Haze represented to the court that he had "been doing a number of witness interviews and investigative inquiries." These interviews were never referred to in a more specific manner and they were never actually produced at a later date. The case was continued. Over a year later, in July 2002, APD Haze represented that he had "been doing a lot of investigation over the last two months on this, and I'm still trying to find witnesses that we can

supplement the *pro se* documents with." The case was continued. In July 2004, APD Haze appeared stating, "[i]t's in the same posture that the investigation has been quite involved." Nothing more concrete was stated at that time. The case was continued. In April 2005, APD Haze did not appear, but the State's Attorney did. The State's Attorney said she had spoken with APD Haze, who was then tied up in another courtroom, and "[h]e said he is still conducting his investigation on the case," and represented that "there is a new witness that they're attempting to locate." By agreement, the case was continued. In July 2005, APD Haze appeared and again stated that he had been attempting to complete the investigation in defendant's case and had just "recently" received information from family that would "require some additional investigation" involving a visit to Indiana. The case was continued. In September 2005, APD Haze stated that the individual in Indiana was in federal prison, but he had not yet been able to interview him. APD Haze stated he would "try and move this expeditiously." The case was continued for another month at which time it was revealed that nothing was done expeditiously with regard to this interview, prompting another continuance. In June 2006, APD Haze related that he still had not been able to "get down to Indiana to speak" with the prisoner even though he stated in January that it would only take a "couple weeks" more.

¶ 11 In January 2007, the case was presented to a different postconviction judge. Staying on theme, APD Haze stated he had experienced "some problems with interviewing witnesses" due to unidentified "bureaucratic red tape." He lamented that he still had not completed the interview with the federal prisoner. APD Haze stated there were also witnesses in Chicago he was attempting to locate "without any luck" and that he was trying to determine whether he could "file a supplement." The court took some pains to note that the case was taking an unreasonably long time – eight years – and this conflicted with "the administration of justice."

For the first time, the court also noted the State's 1998 motion to dismiss and queried how witness credibility affected the constitutional issues in this case. APD Haze then assured the court that the "relevance would come in" and countered that it had "been an unusual case." The court stated "[r]esolution, whatever the resolution is, agrees with the administration of justice" in contradistinction to "cases that take eons to determine what it is anybody is going to file." The court stated that its "patience will soon come to an end," and, with that, the case was further continued.

¶ 12 In March 2007, APD Haze requested another two-month court date so he could locate, with the help of an investigator, four witnesses for whom he had addresses. Nine months later, APD Haze was "still in the process of talking to some witnesses." Flash forward seven more months and he stated that it was "a very complicated case in terms of investigation" and noted that he had "an interpreter out looking for people" because there were "language issues." In August 2008, he "worked up the file" but had "an investigator out trying to talk to some witnesses." In October 2008, APD Haze was still "trying to find some [of] the witnesses," in "this very complicated discovery case." Five months later, he reported there was "an investigator looking into this case" and requested a two-month continuance. In May 2009, APD Haze was "still trying to interview some witnesses," without a solid representation that he had even conducted a single interview. Seven months later, he represented that he was looking for a witness believed to be in Indiana. He asked for a continuance to find the individual. In January 2010, APD Haze was "still trying to track down some" of the "possible witnesses" identified by defendant and his family.

¶ 13 In April 2010, he was "still looking for some witnesses on this," including some prosecution witnesses who were apparently recanting. Remarkably enough, the State finally

objected to the request for a continuance, noting with a litigator's understatement that the case had been pending since 1996 with the last filing being in 2001. Undaunted, APD Haze responded that it was an "unusual case" and a "long case," but he would "try to have all the witness interviews completed" in two months. There was still nothing in the record to truly establish that any had been conducted. In July 2010, APD Haze stated his investigator had been "out" and they had "gotten a lot done." This merely meant that he had spoken to *a single* State witness. He nonetheless requested 60 more days so he could talk to two more State witnesses. In October 2010, APD Haze stated that he had interviewed two of the four witnesses for the State, but he was "still looking for the other two." He requested a continuance so he could locate them and also discuss his "research findings with the defendant." APD Haze also noted defendant had filed a *pro se* petition raising investigative issues that should be discussed, although this petition does not now appear in the record on appeal. The State objected, but the court allowed a "final" continuance to December 7, noting that APD Haze could amend the petition. APD Haze responded: "It might be a 651C certificate." As more fully explained below, Supreme Court Rule 651(c) (eff. Feb. 6, 2013) requires postconviction counsel to consult with a defendant regarding his constitutional contentions, examine the trial record, and amend the petition if necessary.

¶ 14 On December 7, APD Haze did not appear because he was sick, and the case was continued. In January 2011, APD Haze appeared and stated "we are looking for one more witness in this case." He still needed to confer with defendant. The State objected, but the court allowed one more continuance, noting this was again "final." A month later in February 2011, APD Haze reported that he had filed a Rule 651(c) certificate. And then, even after the

innumerable continuances and investigations conducted over 12 years, APD Haze merely rested on the amended pleading as originally filed in 1997.

¶ 15 In his Rule 651(c) certificate, APD Haze stated: "(a) I have reviewed the following materials in connection with this matter: Petition for Post-Conviction Relief; First Amended Petition for Post-Conviction Relief; trial counsel's file; police reports and other discovery materials produced at trial; the trial transcript and the common law record; the opinion issued on direct appeal; and the file of prior post-conviction counsel in this matter. (b) I have spoken with Petitioner in person and over the telephone to discuss his claims that his constitutional rights were violated. (c) I have interviewed or investigated a number of witnesses in an effort to further substantiate Petitioner's claims." Although APD Haze stated he had filed a supplemental claim on defendant's behalf relating to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), he was unable to further "supplement or amend the pleadings on file." APD Haze noted the *Apprendi* issue in his supplemental pleading was moot based on Illinois supreme court law, but he declined to withdraw the claim in an effort to preserve it for federal review.

¶ 16 The State subsequently filed an amended motion to dismiss defendant's postconviction petition. The State argued defendant failed to set forth a meritorious ineffective assistance of counsel claim because severing the trial was a matter of strategy and regardless should have been raised on direct appeal. The State added that Auston's testimony was nothing but cumulative. In addition, the State argued that Auston's affidavit was flawed insofar as it was not notarized and Auston failed to state that he would testify as to the content of the statement. The State also argued defendant's claim that his trial was affected by gang intimidation was a conclusory allegation not otherwise supported and did not constitute a constitutional claim of deprivation.

¶ 17 On June 2, 2011, the circuit court granted the State's motion to dismiss after holding that defendant's postconviction petition failed to make a substantial showing of a constitutional violation. Even though defendant's claims regarding ineffective assistance of counsel and gang intimidation would clearly seem to rest on evidence outside the record on direct appeal, the circuit court held that defendant had waived the claims and also determined they were without merit. In particular, the court determined Auston's statement was not a valid affidavit because it was not properly notarized and the affidavit otherwise failed to support defendant's allegation that the trial should have been severed. The court wrote that defendant failed to show requesting a severance would have altered the result at trial. In addition, the court rejected defendant's claim of gang intimidation, writing that even assuming defendant's mother's affidavit were true, there was no evidence regarding what the witnesses who failed to come forward would have testified to. After the court entered its written determination, defendant appealed.

¶ 18 ANALYSIS

¶ 19 Defendant now challenges the dismissal, on the State's motion, of his postconviction petition at the second stage of proceedings under the Act, a matter which we review *de novo*. See *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007).

¶ 20 The Act serves as a vehicle for inmates to collaterally challenge their convictions and sentences by showing they resulted from a substantial deprivation of a constitutional right. 725 ILCS 5/122-1 (West 2012); *People v. Harris*, 206 Ill. 2d 1, 12 (2002). The purpose of the proceeding is to resolve allegations that constitutional violations occurred at trial, when those allegations have not been, and could not have been, adjudicated previously. *People v. Evans*, 186 Ill. 2d 83, 89 (1999). To that end, the Act provides a three-stage process for adjudicating postconviction petitions. *People v. Hommerson*, 2014 IL 115638, ¶ 7. The first stage measures

the petition's substance over procedural compliance to determine whether it presents the gist of a constitutional claim, and if the petition is not dismissed within the 90-day period, it is docketed for further consideration. 725 ILCS 5/122-2.1 (West 2012); *People v. Perkins*, 229 Ill. 2d 43, 42 (2007). At the second stage, a court may appoint counsel to represent an indigent defendant, and counsel may amend the petition if necessary. *Hommerson*, 2014 IL 115638, ¶ 8. The State may file a motion to dismiss (see 725 ILCS 5/122-5 (West 2012)), and if such a motion is not filed or if it is denied, the petition proceeds to a third-stage evidentiary hearing. *Id*. The defendant bears the burden of making a substantial showing of a constitutional violation to warrant an evidentiary hearing. *People v. Domagala*, 2013 IL 113688, ¶ 35. A postconviction petitioner is not entitled to an evidentiary hearing as a matter of right, but must set forth well-pleaded factual allegations in the petition, supported by the record and accompanying affidavits where appropriate, to establish a constitutional violation; factual allegations that are not positively rebutted by the record are accepted as true. *People v. Hall*, 217 Ill. 2d 324, 334 (2005); *Harris*, 206 Ill. 2d at 13. Nonspecific and nonfactual assertions merely amounting to conclusions are insufficient to necessitate an evidentiary hearing under the Act. *People v. Hobson*, 386 Ill. App. 3d 221, 231 (2008).

¶ 21 Defendant now contends his petition, together with codefendant Auston's statement, sets forth a claim of actual innocence warranting a third-stage evidentiary hearing. The State, in urging this court to affirm the judgment below, counters that defendant never specifically fashioned an actual innocence claim in his postconviction petition and, regardless, Auston's statement lacks proper notarization so that it cannot support defendant's claim. Notably, our supreme court has held that a statement in writing which is not sworn to before an authorized individual is not an affidavit but, rather, is a nullity. *Roth v. Illinois Farmers Insurance Co.*, 202

Ill. 2d 490, 494, 497 (2002); see also *People v. Niezgoda*, 337 Ill. App. 3d 593, 597 (2003) (affirming dismissal of second-stage postconviction petition because supporting affidavits were not properly notarized). Defendant, acknowledging that Auston's 1996 statement lacks proper notarization and verification to satisfy the affidavit rule, argues alternatively that postconviction counsel failed to provide reasonable assistance under Rule 651(c) because counsel did not obtain a notarized affidavit from Auston. For the reasons to follow, we conclude the disposition of this case turns not on the "actual innocence" claim, but whether defendant's postconviction attorneys properly complied with their obligations in representing defendant throughout the lengthy collateral proceedings.

¶ 22 An indigent defendant has a statutory right to *reasonable* assistance of counsel during second-stage proceedings under the Act. 725 ILCS 5/122-4 (West 2012); *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). To ensure this reasonable assistance required by the Act, Rule 651(c) imposes specific duties on counsel. *Id*. Under Rule 651(c), the record or certificate filed by the attorney must demonstrate that postconviction counsel (1) consulted with the petitioner by mail or in person to ascertain his contentions of constitutional deprivation; (2) examined the record of the proceeding of the original trial; and (3) made any amendments to the *pro se* petition necessary to adequately present the petitioner's constitutional contentions. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013); *People v. Johnson*, 154 Ill. 2d 227, 238 (1993); *People v. Profit*, 2012 IL App (1st) 101307, ¶ 18. The purpose of this mandatory rule is to ensure that postconviction counsel shapes the defendant's claims into proper legal form and presents them to the court. *Perkins*, 229 Ill. 2d at 50; *Profit*, 2012 IL App (1st) 101307, ¶ 18.

¶ 23 With regard to Rule 651(c), defendant specifically contends that counsel failed to satisfy the third requirement of making necessary amendments to the petition in order to

adequately present defendant's constitutional claims of deprivation because counsel failed to secure a notarized affidavit[2] from codefendant Auston. At oral arguments in this case, the State noted in passing that it was questionable whether Rule 651(c) even applied, given that privately retained counsel filed defendant's initial postconviction petition. However, in the State's brief before this court, no such argument exists. Rather, the State argues that APD Haze adequately complied with Rule 651(c) when he filed his certificate of compliance, and the record does not refute his compliance with the strictures of the rule.

¶ 24 We observe, however, that it was privately retained counsel who filed defendant's initial petition in 1996 and amended petition in 1997. Our supreme court has held that where private counsel files the initial postconviction petition, Rule 651(c) is inapplicable. *People v. Mitchell*, 189 Ill. 2d at 358; *People v. Richmond*, 188 Ill. 2d 376, 383 (1999); see also *People v. Anguiano*, 2013 IL App (1st) 113458, ¶ 25 (holding same). As a result, defendant in this case cannot benefit from the protections of Rule 651(c). See *Anguiano*, 2013 IL App (1st) 113458, ¶ 25.

¶ 25 Nonetheless, retained counsel's representation of defendant was relatively short-lived before defendant was found indigent. Section 122-4 of the Act (725 ILCS 5/122-4 (West 2012)) provides that where, as here, a defendant at the second stage of proceedings is without means to procure counsel and counsel is so requested, he is entitled to appointed counsel. Moreover, as our previous decision in *Anguiano* confirmed, the Act requires a reasonable level of assistance. *Anguiano*, 2013 IL App (1st) 113458, ¶29, citing among other cases, *People v. Turner*, 187 Ill. 2d 406, 410 (1999). In accordance with *Anguiano*, we hold that "case law and

[2] The State argues Auston's statement "never purports to be an affidavit or a sworn statement." We disagree, otherwise Auston would not have signed and dated each page, initialed a scratched-out word to indicate his approval, or have stated he was providing the statement to the defense counsel's private investigator. In addition, the statement was attached to defendant's petition, along with a properly notarized affidavit of defendant's mother. If Auston's statement does not purport to be an affidavit, what does it purport to be?

common sense strongly suggest that all defendants represented by counsel have the right to a reasonable level of assistance at the second stage." *Anguiano*, 2013 IL App (1st) 113458, ¶¶ 26-27, relying on *Mitchell*, 189 Ill. 2d at 358. This standard also makes sense in a case like the present where the record calls into question the extent of retained postconviction counsel's representation of defendant and thus helps prevent the anomalous result that a defendant potentially could be better off by filing his initial petition, *pro se*. Here, retained counsel apparently filed defendant's initial postconviction petition to satisfy the filing deadline, then requested to amend it and represented to the court that she would obtain additional affidavits exonerating defendant. The amended petition bears only Auston's unnotarized statement (the same that was attached to the initial petition) and the affidavit of defendant's mother. Shortly after filing the amended petition, retained counsel stated that defendant had not paid her for her representation, and the court granted her leave to withdraw, then appointed the public defender's office, without ever considering the petition's baseline merits. Following his appointment, APD Haze also stated to the court that he was attempting to locate witnesses so he could "supplement the pro se [*sic*] documents." The parties and the court thereafter essentially treated the petition as though it had been initially filed *pro se* with 651(c) applying. As stated, we find 651(c) does not apply.

¶ 26 Having noted the standard under which we proceed, we return to defendant's contention at hand that his appointed counsel at the second stage of proceedings was unreasonable because he failed to notarize the attached affidavit of codefendant Auston in spite of the lengthy period this case remained pending on counsel's watch.

¶ 27 It is well-established that postconviction attorneys have a duty to attempt to overcome procedural bars, such as forfeiture, *res judicata*, and untimeliness. *Anguiano*, 2013 IL

App (1st) 113458, ¶ 44. For example, in *People v. Nitz*, 2011 IL App (2d) 100031 ¶ 19, postconviction counsel's failure to attach to the defendant's petition a properly notarized self-verification affidavit, establishing that the allegations were truthful and in good faith, constituted unreasonable assistance at the second stage of proceedings, requiring reversal and remand of the petition's dismissal. See also *Hommerson*, 2014 IL 115638, ¶ 14. Especially relevant to our analysis, the Act also requires that a defendant attach to his petition "affidavits, records, or other evidence to support its allegations *or* state why the same are not attached" (emphasis added) in order to show that defendant's allegations can be objectively and independently corroborated; such an omission is fatal to a defendant's claims. 725 ILCS 5/122-2 (West 2012); *Turner*, 187 Ill. 2d at 413-14 (postconviction counsel was unreasonable because he failed to make necessary amendments to the defendant's *pro se* petition, where counsel failed to allege ineffective assistance of appellate counsel, resulting in waiver of the claim, and failed to attach supporting documents or explain their absence); see also *People v. Collins*, 202 Ill. 2d 59, 65-66 (2002) (holding that because defendant's petition had neither affidavits, records, or other evidence, nor an explanation for the absence of such documentation, that justified summarily dismissing the petition).

¶ 28 Notably, here, appointed counsel held onto this case for an inordinately long time – 12 years –, and it has now been pending for 18 years. Defendant, who was age 19 at the time of the crime, is now age 40. During the period that defendant's petition remained pending, both retained and appointed counsel should have obtained a notarized affidavit from codefendant Auston or at least stated why codefendant Auston's affidavit and others were not properly attached; counsel, in the alternative, could have obtained an affidavit from defendant, himself, describing the evidence and witnesses who had knowledge of the evidence. See *Turner*, 187 Ill.

2d at 414; *People v. Wideman*, 2013 IL App (1st) 102273, ¶¶ 16, 18. Indeed, through appointed counsel's 12 years of repeated requests for continuances, APD Haze represented and certainly gave the impression that he believed he needed to amend defendant's postconviction petition as set forth immediately above. *Cf. Perkins*, 229 Ill. 2d at 52 (noting that nothing in the record on appeal contradicted counsel's certificate asserting that there were no amendments necessary for adequate presentation of petitioner's claims). For example, in January 2007, as justification for yet another continuance, APD Haze assured the court that the relevance of the witnesses' credibility "would come in." Instead, in the end, APD Haze rested on defendant's amended petition filed in 1997, making only the perceived contribution of an admittedly defunct supplemental *Apprendi* claim. He offered no explanation for the delay and lack of a simple amendment to the petition, which would have helped adequately present defendant's claims. See *People v. Kelly*, 2012 IL App (1st) 101521, ¶ 40. Moreover, the State has not developed an argument on appeal that the claims raised in defendant's petition were necessarily without merit.

¶ 29 This case is similar to *Kelly*, wherein this court held that the 12-year delay between when the defendant filed his initial *pro se* postconviction petition and when it was dismissed demonstrated that the appointed and privately retained attorneys representing the defendant had provided unreasonable representation, even though the defendant's final attorney filed a Rule 651(c) certificate. *Kelly*, 2012 IL App (1st) 101521, ¶ 40. This court noted additionally that the postconviction private counsel in that case, failed to shape the petitioner's claims into appropriate legal form while also demonstrating a lack of basic knowledge of the Act. *Id.*

¶ 30 Here, we conclude that the failure of both attorneys to amend the postconviction petition to include Auston's properly notarized affidavit or to explain why the same was not attached, together with appointed counsel's oral representations to the court, precluded the circuit

court from considering the full merits of defendant's claim and contributed to the dismissal of the petition absent an evidentiary hearing. See *Turner*, 187 Ill. 2d at 413. Under these less than ordinary circumstances and on these specific facts, we hold the attorneys' representation of defendant during the second stage of proceedings was unreasonable.

¶ 31 CONCLUSION

¶ 32 For all the foregoing reasons, we remand the cause to the circuit court with direction that it allow defendant the opportunity to replead his postconviction petition with the assistance of new counsel. See *Turner*, 187 Ill. 2d at 417; *People v. Lyons*, 46 Ill. 2d 172, 175 (1970).

¶ 33 Reversed; remanded.