2013 IL App (1st) 113194-U

FIFTH DIVISION
MODIFIED DECEMBER 13, 2013

Nos. 1-11-3194, 1-12-1733, cons.

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. 88 CR 13009
	)	
THEASTER HUNTER,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justice Taylor concurred in the judgment.
Justice McBride specially concurred.

ORDER

¶ 1 *Held:* Where the record does not show that defendant's original postconviction petition was ruled upon as provided by this court's previous mandate, the reviewing court has the inherent authority to compel compliance with its orders.

¶ 2 Following a jury trial, defendant Theaster Hunter was convicted of 10 counts of first-degree murder for the November 18, 1978, murders of Ezekial Rhoten and Sabrina Somerville. After considering factors in aggravation and mitigation, the trial court sentenced defendant on February 22, 1991, to a term of natural life imprisonment without parole, to be served

consecutively with a natural life sentence from an unrelated case. On direct appeal, we reversed 8 of defendant's 10 murder convictions, (*People v. Hunter*, No. 1-91-0866 (1996) (unpublished order pursuant to Supreme Court Rule 23)) and in a later appeal we modified his life sentences to run concurrently, rather than consecutively. (*People v. Hunter*, No. 1-06-0549 (2007) (unpublished order pursuant to Supreme Court Rule 23)).

¶ 3 On July 17, 1995, defendant filed his first of several *pro se* postconviction filings. The trial court initially advanced defendant's first postconviction petition to the second stage, but soon dismissed the petition on the grounds of timeliness prior to holding a second stage hearing. Defendant appealed, and on May 19, 2000, we remanded with instructions for the trial court to hold further second stage proceedings. *People v. Hunter*, No. 1-98-4801 (2000) (unpublished order pursuant to Supreme Court Rule 23). On remand, the trial court continued the cause several times, but the appellate record does not reveal that the trial court held a second stage hearing or entered a ruling on defendant's first *pro se* postconviction petition.

¶ 4 While defendant's appeal concerning his first *pro se* postconviction petition was still pending, defendant filed a second *pro se* postconviction petition that raised the same claims as first petition, in addition to new issues. On May 19, 2000, the same day that we remanded defendant's first postconviction petition, the trial court dismissed his second postconviction petition on the grounds of waiver, *res judicata*, and timeliness, while stating that defendant's appeal of his first petition was currently still pending. Defendant later filed a third *pro se* postconviction petition, which again contained the same claims as his first petition, plus new issues. The trial court subsequently dismissed defendant's third petition on the basis of waiver,

res judicata, and timeliness, while stating, incorrectly, that we had affirmed the trial court's dismissal of defendant's first postconviction petition.

¶ 5 Defendant later filed two additional *pro se* "amended" postconviction petitions, both of which contained claims that defendant previously raised in his first postconviction petition and on direct appeal, in addition to new issues. The trial court dismissed both filings at the first stage on the grounds of waiver and *res judicata*, and we remanded on appeal, holding that both petitions were improperly dismissed after the 90-day statutory period. *People v. Hunter*, No. 1-02-3280 (2003) (unpublished order pursuant to Supreme Court Rule 23). The appellate record does not reveal if the trial court held further proceedings on remand.

¶ 6 Prior to the remand, defendant filed another *pro se* postconviction petition, this time raising a new claim that the assistant public defender provided an unreasonable level of assistance when she, among other things, failed to inform defendant that his original postconviction petition had been dismissed. The rest of defendant's petition contained the same claims that he raised in his original petition. The trial court dismissed this petition 91 days after it was filed on the grounds of waiver and *res judicata*, and after we remanded for further proceedings (*People v. Hunter*, No. 1-03-1318 (2004) (unpublished order pursuant to Supreme Court Rule 23)), the trial court again dismissed the petition on the same grounds. Defendant appealed the second dismissal, arguing that the assistant public defender had a *per se* conflict of interest in arguing defendant's petition since she would have to establish her own ineffectiveness. We affirmed the trial court, finding that the assistant public defender was not in such a situation because the claims were not cognizable under the Post-Conviction Hearing Act (725 ILCS 5/122-

1 *et seq.* (West 2006)), and even if they were, waiver and *res judicata* barred them. *People v. Hunter*, No. 1-06-0549 (2007) (unpublished order pursuant to Supreme Court Rule 23). While we affirmed the trial court's dismissal, we modified defendant's natural life sentences to run concurrently, rather than consecutively. *People v. Hunter*, No. 1-06-0549 (2007) (unpublished order pursuant to Supreme Court Rule 23).

¶ 7 Defendant later filed another *pro se* "amended" postconviction petition that raised several claims that defendant argued in each of his prior petitions, plus a claim of actual innocence. The trial court dismissed the petition, and we affirmed on appeal. *People v. Hunter*, No. 1-08-2328 (2009) (unpublished order pursuant to Supreme Court Rule 23). Afterwards, defendant filed another *pro se* postconviction petition, which raised claims defendant previously argued in each of his prior petitions and direct appeal, plus the same claim of actual innocence. The trial court dismissed on the grounds of waiver, and we affirmed on appeal. *People v. Hunter*, 2012 IL App (1st) 111704-U (unpublished order under Supreme Court Rule 23).

¶ 8 Twelve years after his first *pro se* postconviction petition was remanded, defendant filed a motion for an order *nunc pro tunc* for the trial court to hold a second stage hearing. The trial court's denial of defendant's motion is at issue on defendant's appeal No. 1-11-3194.

¶ 9 On April 27, 2012, the trial court dismissed defendant's eighth *pro se* postconviction petition on the grounds that it did not satisfy the cause and prejudice test and that defendant's claim of actual innocence did not contain newly discovered evidence. Defendant appeals the dismissal of his eighth *pro se* postconviction petition in appeal No. 1-12-1733, which has been consolidated with his pending appeal concerning his motion for a trial court order *nunc pro tunc*.

¶ 10 On appeal, defendant argues that the trial court never entered a final ruling on his first *pro se* postconviction petition, and subsequently dismissed his successive *pro se* postconviction petitions on the grounds of waiver and *res judicata*. As a result, defendant requests that his first postconviction petition should be remanded to the trial court for second stage proceedings. In response, the State argues: (1) that we do not have jurisdiction to hear defendant's appeal because he did not properly notarize his notice of appeal; (2) that defendant did not state a specific trial court error; (3) that defendant provided this court with an insufficient appellate record; (4) that defendant's claims are barred by waiver and *res judicata*; and (5) that defendant is collaterally estopped from arguing that his original petition was never ruled upon. The State also raises an additional claim that defendant's life sentences should be reinstated to run consecutively, rather than concurrently. For the following reasons, we reverse and remand.

¶ 11 BACKGROUND

¶ 12 In 1987, defendant was charged with 10 counts of first-degree murder, among other crimes, arising out of murders of Ezekiel Rhoten and Sabrina Somerville. Prior to trial, defendant filed numerous *pro se* motions, including three pretrial motions for appointment of counsel other than the public defender, one motion for a bar attorney, four motions for substitution of judge, two motions for a decree of *nisi*, two motions to dismiss, three motions for discovery, and one motion for change of venue. Two assistant public defenders were initially assigned to represent defendant, but defendant later chose to represent himself at trial. On the day set for trial, defendant requested to be represented by the two public defenders who were originally assigned to his case.

¶ 13 I. Trial

¶ 14 The State's primary witnesses at trial were codefendants Delores Lamb and Ella Haymon, both of whom testified for the State in exchange for lenient treatment. The State promised Lamb that it would not seek the death penalty against her, and the State agreed to inform the trial court at their respective sentencing hearings that they cooperated with defendant's prosecution.

¶ 15 Lamb testified that, at 7 p.m. on November 18, 1978, defendant was at a pool hall in Chicago with his friends Robert Tenny and Johnnie Armstrong. There, defendant encountered Dolores Lamb, whom he had known for many years, and he ordered her out of the pool hall at gunpoint and admonished her for using drugs. While they were outside, defendant's ex-girlfriend, Ella Haymon, approached the group and asked if someone would drive her to Rhoten's home to retrieve some of her belongings. Defendant, Tenny, Armstrong, Lamb, and Haymon then entered Tenny's vehicle and drove to Rhoten's home.

¶ 16 Lamb testified that, on the way there, defendant asked Haymon if Rhoten, one of the two murder victims, had any money, and when she responded that he did, defendant stated that he wanted to "stick him up." Defendant instructed Haymon and Lamb to enter the home to collect Haymon's belongings, but to leave the front door open so that defendant, Tenny, and Armstrong could enter a few minutes later. Lamb and Haymon exited the vehicle and instead approached the house next door and spoke with Rhoten's neighbor. When they returned to the vehicle, Haymon told defendant that Rhoten was not home, and defendant responded that they needed to "get it right" or he would "do it" himself. Lamb and Haymon then approached Rhoten's home and rang the doorbell, and Rhoten and his friend, Sabrina Somerville, looked out the upstairs window.

Rhoten went downstairs and opened the door for Lamb and Haymon, both of whom entered the house. While inside, they conversed with the two murder victims, Rhoten and Somerville, in the front room of the house.

¶ 17 Lamb testified that defendant then entered the front door holding a handgun, with Tenny, who was also armed, and Armstrong following. Defendant pointed his gun at Rhoten's head and announced that he was performing a "stick-up." Rhoten attempted to retrieve a handgun that was hidden under his chair, and defendant hit Rhoten in the head with his gun. Rhoten stumbled on the chair, and defendant reached under the chair, retrieved Rhoten's gun, and handed it to Armstrong. Somerville then tried to help Rhoten, but Armstrong hit her on her head with a vase, causing her to lose consciousness and fall onto the couch.

¶ 18 Lamb testified that defendant ordered everyone upstairs, while Tenny stayed in the front room to watch Somerville, who was still unconscious. Defendant ordered Rhoten to enter his bedroom and lie on his bed. Defendant then demanded money from Rhoten, and defendant struck Rhoten in the head twice when he stated that he did not have any money in his house. On defendant's instructions, Armstrong, Lamb, and Haymon searched Rhoten's room for money, pulling out drawers and overturning objects, but they did not find any. Defendant lifted the mattress and threw it to the floor.

¶ 19 Lamb testified that defendant then ordered Haymon to beat Rhoten with a belt, and when she did not strike him to defendant's satisfaction, he handed the belt to Lamb and demanded that she beat Rhoten instead. Defendant then used a rope to tie Rhoten to the box spring, and defendant again demanded money. Rhoten insisted that he did not have any money in the house,

and defendant responded by cutting Rhoten's neck and body more than 30 times with a butcher knife. Defendant then stabbed Rhoten six times in the chest and four times in the back with the same knife. Rhoten cried out that defendant could not kill him, to which defendant responded, "Motherf***er, you will die." Defendant then placed a pillow over Rhoten's face and shot him once in the head.

¶ 20 Lamb testified that defendant returned downstairs and retrieved a hammer in the kitchen and then beat Somerville in the head with it. Defendant covered her body with a sheet and continued to search the house for valuables. Defendant ultimately collected Rhoten's watch and ring, television, radio, clothes, and other belongings. Before he left, defendant turned on a radio and placed it on high volume. Defendant then wrapped the bloody butcher knife, hammer, and Rhoten's keys in a sheet, which he took with him and threw out the vehicle's window on his way home, where he stayed until sunrise.

¶ 21 Lamb was arrested on April 22, 1987, and she provided the police with a statement in which she confessed to her involvement in the crime and identified defendant as the person who planned the robbery, stabbed and shot Rhoten, and beat Somerville. Lamb also named Tenny and Armstrong as two accomplices. Lamb's statement, which was substantially similar to her testimony, was admitted into evidence at trial over defendant's objection.

¶ 22 Haymon's testimony was substantially similar to Lamb's but her version of the events differed in the following areas. First, Haymon testified that, after she and Lamb spoke with Rhoten's neighbor and returned to Tenny's vehicle, Lamb told defendant that Haymon did not want to participate in the plan to rob Rhoten, and defendant responded that he would kill

Haymon if she did not follow through. Second, Haymon testified that, once she and Lamb entered Rhoten's house, she told him that there were people outside who intended to rob him, and Rhoten replied that he was not worried. Third, Haymon testified that, after the group searched Rhoten's bedroom, defendant and Lamb went downstairs, while Haymon and Armstrong stayed with Rhoten. Haymon then told Rhoten to run, but Lamb caught him running down the stairs, and defendant retrieved a rope, led Rhoten back upstairs, and tied him to the bedspring. And fourth, Haymon testified that defendant hit Somerville twice with a gun, not a hammer, before covering her body with the bed sheet.

¶ 23 Haymon was arrested on April 23, 1987, and she provided the police with a statement in which she confessed to her involvement in the crime and identified defendant as the person who planned the robbery, stabbed and shot Rhoten, and beat Somerville. Lamb also named Tenny and Armstrong as two accomplices. Her statement was admitted into evidence over defendant's objection, and the substance of her statement was substantially similar to her testimony at trial.

¶ 24 Chicago police officer Herman Robinson testified that, the following evening, he checked on the house because the front door had been left open. Robinson entered the house and observed furniture knocked over and drawers pulled out of cabinets. Every room in the house was in disarray, and a radio had been left on at a high volume. Robinson did not observe any damage to the windows or doors, or any other sign of forced entry.

¶ 25 Robinson testified that he observed Somerville's body lying on the couch covered by a floral print sheet, and that she had significant injuries to her head, ears, and face. Upstairs, Robinson found Rhoten's body lying on the box spring covered by a bloody blanket. Rhoten's

neck and feet were tied together, his mouth was gagged, and he had multiple stab wounds throughout his body. The mattress was lying on the floor, drawers had been pulled out of the dresser, and the closets appeared to have been searched. There were several items lying on the floor, including an empty wallet.

¶ 26 Robinson testified that the police later photographed the scene and processed the evidence. During the investigation, police recovered fingerprints from a cup in the living room, a glass jar on an ironing board in the bedroom, and a dresser drawer in the bedroom. Several of the fingerprints were identified as the victims' prints, while others remained unidentified.

¶ 27 In April 1987, the police ran the fingerprints through the new Automatic Fingerprint Identification System, and identified several possible matches to the still-unknown fingerprints recovered from the crime scene. Based on this information, the police arrested Lamb and Haymon, both of whom provided statements in which they confessed to their involvement in the crime and named defendant, Tenny, and Armstrong as accomplices. Defendant and Tenny were arrested on April 23, 1987, and charged with the murders. Armstrong previously died on December 20, 1978.

¶ 28 Dr. Robert Stein testified that he is the Chief Medical Examiner for Cook County, and that he performed the autopsies on Rhoten and Somerville. Stein opined that Rhoten died as a result of multiple stab wounds to his chest, while Somerville's death resulted from cranial cerebral injuries from blunt trauma.

¶ 29 After the State rested, the defense presented an alibi defense. Defendant's sisters, Lillie Williams and Wanda Faye Gardner, and his mother, Velma Hunter, all testified that defendant

was with them the night of the murders. All three witnesses testified that Williams' children were ill that night and that she transported them to a hospital. Defendant, Williams, and Gardner all went to the hospital at some point between 6 p.m. and 8 p.m. Defendant and Gardner stayed at the hospital for a while, then drove to visit their mother, who was hosting a party at her house that evening. Williams called Gardner at 11 p.m. that night, and defendant and Gardner drove back to the hospital to pick up Williams and her children. They drove Williams to her apartment and spent the night there with her. The defense rested, and after closing arguments, the jury found defendant guilty of all 10 counts of first-degree murder.

¶ 30 After hearing factors in aggravation and mitigation, the trial court found that defendant was death-eligible on February 22, 1991. The trial court found that defendant deserved a sentence of death, and expressed its belief that "of the more than one hundred people who have been executed in the United States that this defendant will be in the top twenty or the top ten insofar as evil, debased and debauched natures." However, the trial court sentenced defendant to two terms of natural life imprisonment to run consecutively to a previously imposed life sentence in an unrelated case. The trial court noted that the sentence did not reflect the sufficiency of the evidence and that it agreed with the jury's finding of guilt, but it felt that the lack of "objective evidence" such as defendant's fingerprints was a "non-statutory mitigating factor" that warranted a lesser sentence than death.

¶ 31 II. Posttrial Proceedings

¶ 32 Defendant appealed his conviction and sentence, in which we reversed 8 of his 10 murder convictions but otherwise affirmed the trial court. Since his direct appeal in 1995, defendant filed

numerous postconviction petitions that alleged similar claims of ineffective assistance of counsel and trial court errors. Defendant's first postconviction petition was remanded on appeal, but the appellate record does not reveal that the trial court ever entered a final ruling on the petition. On the same day that we remanded defendant's first petition, the trial court dismissed defendant's second petition on the basis of waiver and *res judicata*, stating that his appeal was still pending. The trial court subsequently dismissed defendant's third petition on the grounds of waiver and *res judicata*, this time stating, incorrectly, that we affirmed the dismissal of defendant's first petition. Defendant's subsequent postconviction filings were dismissed on the grounds of waiver and *res judicata*, and the trial court never considered the merits of defendant's claims.

¶ 33 A. Direct Appeal

¶ 34 The public defender's office initially represented defendant on direct appeal, but later withdrew. A bar attorney was subsequently appointed to represent defendant, but he never filed a brief because defendant did not pay the agreed-upon retainer fee. The appeal was dismissed on September 28, 1994, but defendant filed a motion to reinstate the appeal on June 5, 1995. We granted defendant's motion on July 5, 1995 and appointed the State Appellate Defender's Office to represent defendant.

¶ 35 On his direct appeal, defendant claimed: (1) that he had established a *prima facie* case of racial discrimination in jury selection; (2) that the trial court erred when it admitted Lamb and Haymon's prior consistent statements into evidence; and (3) that 8 of defendant's 10 convictions for murder must be vacated under the "one act, one crime" rule. We reversed 8 of defendant's 10 murder convictions, but otherwise affirmed the two convictions and consecutive life sentences

for the murders of Rhoten and Somerville. *People v. Hunter*, No. 1-91-0866 (1996) (unpublished order pursuant to Supreme Court Rule 23).

¶ 36 B. First *Pro Se* Postconviction Petition

¶ 37 On July 17, 1995, while defendant's direct appeal was still pending, defendant filed his first *pro se* postconviction petition, in which he alleged multiple claims of ineffective assistance of counsel and trial court errors. Defendant argued, *inter alia*: (1) that his trial counsel was ineffective for failing to call additional alibi witnesses; (2) that the State suppressed evidence; (3) that his appellate counsel was ineffective for not filing a brief on appeal; (4) that the trial court improperly convicted him despite a reasonable doubt of his guilt; and (5) that the circuit court system in general is racially biased against blacks. The trial court advanced defendant's petition to the second stage and appointed the public defender's office to represent him. The State filed a motion to dismiss, arguing that the postconviction petition was not filed timely since it was filed more than three years after defendant's conviction, and that defendant did not establish a lack of culpable negligence. Defendant's attorney did not dispute the State's claim and the trial court dismissed the petition on December 15, 1995.

¶ 38 Defendant appealed the dismissal and argued that the trial court had relied on the wrong statute in determining that his petition was not filed timely. Defendant argued that he filed his petition on time since he mailed it on June 28, 1995, before the July 1, 1995, deadline. On May 19, 2000, the State admitted that the dismissal of defendant's first *pro se* postconviction petition was in error, and we remanded defendant's petition to the circuit court for a second stage

postconviction proceedings. *People v. Hunter*, No. 1-98-4801 (2000) (unpublished order pursuant to Supreme Court Rule 23).

¶ 39 The trial court received our mandate on June 30, 2000, and the matter was set for a July 7, 2000, status conference. The proceedings were continued several times until September 13, 2000, so that the assistant public defender could be present in the courtroom. At the next proceeding, the assistant public defender advised the court that defendant's case had not yet been assigned to a specific attorney, and the case was continued twice more until May 7, 2001.

¶ 40 On that day, a new assistant public defender did not address the first *pro se* postconviction petition, and instead requested a continuance, stating that the original assistant public defender, who was unavailable that day, intended "to file a second [postconviction petition]." The proceedings were continued until August 1, 2001, but the appellate record does not contain a transcript from that court date. A computer printout of the memoranda of orders indicates that, on that date, defendant's counsel requested a continuance to November 1, 2001, and that the proceedings were subsequently continued by agreement until February 7, 2002. However, the appellate record contains a letter addressed to defendant from his assistant public defender that indicates that the remanded petition was set for a December 14, 2001, status conference, and that it was then continued until February 6, 2002. The assistant public defender wrote that the issues concerning the first *pro se* postconviction petition had not yet been considered, and she encouraged defendant to write or call her if he had "any specific input." The appellate record does not contain the transcripts from the trial court proceedings on November 1, 2001; December 14, 2001; February 6, 2002; or February 7, 2002; and the record does not

indicate that the trial court took any further action concerning defendant's first *pro se* postconviction petition after these proceedings.

¶ 41 C. Second *Pro Se* Postconviction Petition and *Pro Se* Petition for *Habeas Corpus*

¶ 42 While defendant's appeal concerning the dismissal of his first *pro se* postconviction petition was still pending, defendant filed a second *pro se* postconviction petition on February 23, 2000. In his second petition, defendant argued *pro se* that his appellate counsel was ineffective for not raising certain claims on direct appeal, and that Lamb, whose affidavit was attached to the petition, testified falsely at trial. Defendant's second *pro se* postconviction petition also reiterated some of the same arguments from his first *pro se* postconviction petition, including the claim that his trial counsel was ineffective for failing to call 12 additional alibi witnesses at trial. Defendant then filed a *pro se* petition for *habeas corpus* on April 4, 2000.

¶ 43 On May 19, 2000, the same day that we remanded defendant's first *pro se* postconviction petition, the trial court dismissed defendant's second *pro se* postconviction petition, as well as defendant's April 4, 2000, *pro se* petition for *habeas corpus*. In its order, the trial court stated that defendant's first postconviction petition had been dismissed, but that defendant's appeal of the dismissal was still pending. The trial court did not address the individual claims raised in defendant's second postconviction petition, and instead dismissed it on the grounds of waiver, *res judicata*, and timeliness, stating that defendant's petition was "frivolous and patently without merit." The trial court also considered the claims raised in defendant's *habeas corpus* petition as constitutional challenges brought under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2000)), and it dismissed defendant's *habeas corpus* petition on the same grounds of

waiver and *res judicata*. Defendant appealed the dismissal of his second postconviction petition, and on August 3, 2001, we granted defendant's motion to dismiss his own appeal. *People v. Hunter*, No. 1-00-2288 (2001) (dispositional order).

¶ 44 D. Third Set of *Pro Se* Postconviction Petitions and Petition for *Habeas Corpus*

¶ 45 After we remanded defendant's first *pro se* postconviction petition, but while defendant's appeal of the dismissal of his second *pro se* postconviction petition was pending, defendant filed a third set of *pro se* postconviction petitions. Defendant first filed four *pro se* postconviction petitions on February 22, 2001. The first successive postconviction petition claimed that defendant's natural life sentences violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Defendant's second successive petition raised substantially the same claims as his first two *pro se* postconviction petitions, plus three new issues concerning: (1) ineffective assistance of trial counsel; (2) trial court errors during sentencing; and (3) a *Batson v. Kentucky*, 476 U.S. 79 (1986), claim. The third successive postconviction petition raised new claims of ineffective assistance of trial and appellate counsel, and the fourth successive petition was a photocopy of defendant's second *pro se* postconviction petition, with changes written in pen altering references to other petitions as his first or second petition, as well as inserting case names to various arguments.

¶ 46 Defendant next filed a fifth successive *pro se* postconviction petition and a *pro se* petition for *habeas corpus* on March 7, 2001. Defendant's fifth successive petition raised allegations of prosecutorial misconduct. Defendant's *habeas corpus* petition, which is a word-for-word duplicate of his April 4, 2000, *habeas petition*, appears in the appellate record, but it does not

contain a filing stamp from the clerk of the circuit court. During the proceeding on March 7, 2001, the assistant public defender informed the trial court that she had just received copies of the five successive *pro se* postconviction petitions that morning, and the case was continued until May 7, 2001.

¶ 47 On May 18, 2001, the trial court dismissed all five *pro se* postconviction petitions, as well as defendant's March 7, 2001, *habeas corpus* petition. In the background section of its order, the trial court incorrectly stated that we affirmed the dismissal of defendant's original *pro se* postconviction petition. The trial court rejected the jurisdictional challenge in defendant's *habeas corpus* petition, and it found that the other claims raised in the *habeas corpus* petition were constitutional challenges under the Post-Conviction Hearing Act. 725 ILCS 5/122-1 *et seq.* (West 2000). As a result, the trial court determined that all of the claims raised in defendant's *habeas corpus* petition and his five successive postconviction petitions were either waived or barred by *res judicata* since the claims could have been raised, or were raised, on direct appeal or in previous postconviction petitions, and that defendant's successive petitions were not filed timely. The trial court stated that "successive" petitions are permitted where the proceedings on the initial petition were deficient in some fundamental way, but that "the trial court's dismissal orders were affirmed on appeal on two separate occasions." While the trial court did not substantively consider defendant's individual claims, it stated that defendant's petitions were "frivolous and patently without merit" since they were barred by waiver, *res judicata*, and timeliness.

¶ 48 Defendant subsequently appealed, and defendant's counsel filed a motion for leave to withdraw, submitting a brief pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1990), in which he stated that there were no issues of arguable merit on appeal. Defendant filed a response, and on March 29, 2002, we granted counsel's motion to withdraw and affirmed the trial court's dismissal of defendant's five successive postconviction petitions, as well as his *habeas corpus* petition. *People v. Hunter*, No. 1-01-2580 (2002) (unpublished order pursuant to Supreme Court Rule 23).

¶ 49 E. Fourth Set of *Pro Se* Postconviction Petitions and Motion for Rehearing

¶ 50 While defendant's appeal of the dismissal of his third set of *pro se* postconviction petitions was still pending, defendant filed a fourth set of *pro se* postconviction petitions. On November 1, 2001, defendant filed two *pro se* postconviction petitions. The first one was titled "Amended Petition for Post-Conviction-Relief [*sic*]" and it reasserted the same ineffective assistance of counsel claims that defendant raised in his original *pro se* postconviction petition. The second one, entitled "Amended Petition in Support for Petition of Postconviction-Relief [*sic*]," contained photocopies from defendant's brief on his direct appeal. Specifically, defendant raised a *Batson v. Kentucky*, 476 U.S. 79 (1986), claim and argued that the prior consistent statements of Haymon and Lamb were improperly admitted at trial. Defendant also renewed the sentencing issue that he raised on direct appeal, but instead argued that his sentence violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and that he should have been sentenced under the prior law to a term of 20 to 40 years rather than a term of natural life.

¶ 51 The trial court dismissed the fourth set of *pro se* postconviction petitions on January 31, 2002, 91 days after the petitions were filed. In dismissing defendant's petitions, the trial court again incorrectly stated that we had previously affirmed the trial court's dismissal of defendant's original postconviction petition. The trial court considered both of defendant's filings together as a "successive" fourth postconviction petition, and it determined that the proceedings on defendant's initial petitions "were not deficient in any fundamental way." Although defendant's fourth set of postconviction filings were labeled as "amended" postconviction petitions, the trial court found that these postconviction filings were successive and that the claims were barred by *res judicata* and waiver since defendant could have raised them in previous petitions. The trial court did not consider the substantive merits of defendant's individual claims, but it instead found that the filings were barred by waiver and *res judicata*, which rendered them "frivolous and patently without merit."

¶ 52 On February 19, 2002, defendant filed a "Motion for a Rehearing and for Certain Other Relief," in which he argued that his postconviction filings dismissed on January 31, 2002, were amendments to his initial postconviction petition, which had been improperly dismissed by the trial court and then remanded on appeal for further postconviction proceedings. Defendant stated that an assistant public defender had been appointed to represent him in the proceedings after remand, and that defendant should be permitted to file amended petitions. Defendant claimed that it would be prejudicial and a violation of his right to effective assistance of counsel if the trial court were to bar him from amending the original *pro se* postconviction petition. Defendant also argued that the assistant State's Attorney knowingly misconstrued his filing as a successive

postconviction petition, rather than an amended petition. Attached to defendant's motion is a December 14, 2001, letter addressed to him from the assistant public defender, in which she advised defendant that his initial postconviction petition had been continued that day and was set for further proceedings on February 6, 2002. She explained that the prior proceeding was a status date, which meant that the issues in the initial petition were not discussed.

¶ 53 The trial court denied defendant's motion for rehearing on March 20, 2002, though the trial court's written order does not appear in the appellate record. During the proceedings on defendant's motion, the trial court stated the following:

> "1/31 was the day I denied his petition. This appears to be a motion for a rehearing on that and -- and an attempt to amend his Post-Conviction Petition, which I had previously denied. Motion for rehearing and to amend Post-Conviction -- Post-Conviction petition previously denied on 1/31/02 is denied."

¶ 54 Defendant filed a notice of appeal on September 16, 2002, but the trial court denied it nine days later. On November 13, 2002, we allowed defendant to file a late notice of appeal concerning the denial of his motion to reconsider, and we designated the case as appeal No. 1-02-3280. On December 20, 2002, defendant filed another notice of appeal concerning the trial court's orders on January 31, 2002, March 20, 2002, and December 12, 2002.[1] The appeal was designated appeal No. 1-03-0337 and was subsequently dismissed for want of prosecution on August 12, 2003, because defendant did not file a record pursuant to Illinois Supreme Court Rule 326 (eff. Feb. 1, 1994). *People v. Hunter*, No. 1-03-0337 (2003) (dispositional order). On

[1] The appellate record does not reveal any trial court orders entered on December 12, 2002.

October 14, 2003, we granted defendant's motion for remand in appeal No. 1-02-3280 since the trial court dismissed his fourth set of *pro se* postconviction petitions after the 90-day statutory period. *People v. Hunter*, No. 1-02-3280 (2003) (unpublished order pursuant to Supreme Court Rule 23). Despite our remand, the appellate record does not reveal further proceedings with respect to defendant's fourth set of *pro se* postconviction petitions.

¶ 55 F. Fifth *Pro Se* Postconviction Petition

¶ 56 On December 20, 2002, after the fourth set of *pro se* postconviction petitions was dismissed, but before they were remanded, defendant filed a fifth *pro se* postconviction petition, in which he claimed that the assistant public defender did not provide a reasonable level of assistance handling defendant's fourth set of petitions and did not fulfill her obligations under Illinois Supreme Court Rule 651(c) (eff. Jan. 1, 1967). Defendant also claimed that the supervisor of the postconviction unit of the public defender's office personally told him in August 2002 that defendant's first postconviction petition was denied on March 20, 2002,[2] and that neither his counsel nor the clerk of the circuit court informed him of the dismissal or of his right to appeal. Additionally, defendant reasserted many of the same claims concerning his trial counsel that he raised in his first *pro se* postconviction petition. Defendant also claimed that the trial court made several errors when it denied his fourth set of *pro se* postconviction petitions.

¶ 57 The trial court dismissed the fifth *pro se* postconviction petition on March 21, 2003, 91 days after it was filed. In its order, the trial court stated, incorrectly, that we affirmed the

[2] While the appellate record does not contain a trial court order dismissing defendant's first pro se postconviction petition on March 20, 2002, the record does reveal that, on that date, the trial court denied defendant's motion to reconsider the dismissal of his fourth set of pro se postconviction petitions.

dismissal of defendant's original *pro se* postconviction petition, and that defendant's December 20, 2002, filing was his fourth postconviction petition, rather than his fifth. The trial court did not consider defendant's claims on their individual merits, and it found that defendant's "successive" petition was "frivolous and patently without merit" since it was barred by waiver. Moreover, the trial court determined that defendant did not satisfy the "cause and prejudice" test that relaxes the rule against filing successive petitions since he could have raised his claims in previous proceedings. The trial court further found that defendant's claims of unreasonable assistance of postconviction counsel were not cognizable under the Post-Conviction Hearing Act. 725 ILCS 5/122-1 *et seq.* (West 2002).

¶ 58 Defendant appealed and we remanded for further proceedings on the fifth *pro se* postconviction petition since it was improperly dismissed after the 90-day statutory period. *People v. Hunter*, No. 1-03-1318 (2004) (unpublished order pursuant to Supreme Court Rule 23). On remand, the assistant public defender was appointed to represent defendant, and on November 2, 2005, the State filed a motion to dismiss. On December 7, 2005, the assistant public defender filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Jan. 1, 1967) in which she stated that, after communicating with defendant and reviewing the trial record, she determined that his petition adequately presented his claims and that "there is nothing that can be added by an amended or supplemental petition."

¶ 59 On November 11, 2005, the State filed a motion to dismiss defendant's fifth postconviction petition. In its motion, the State incorrectly asserted that we affirmed the

dismissal of defendant's original postconviction petition. The State also referred to defendant's December 20, 2002, filing as his fourth postconviction petition, rather than his fifth.

¶ 60 The trial court granted the State's motion to dismiss on January 23, 2006. The trial court's written order is not contained in the appellate record. During arguments on the State's motion to dismiss, the State claimed that the issues raised in defendant's successive postconviction petition were waived since they could have been raised in his previous postconviction petitions, and that defendant's claims of unreasonable assistance of postconviction counsel were not cognizable under the Post-Conviction Hearing Act. 725 ILCS 5/122-1 *et seq.* (West 2004). The trial court stated that it agreed and it granted the State's motion to dismiss.

¶ 61 Defendant appealed, arguing that the assistant public defender had a *per se* conflict of interest in the proceedings concerning defendant's fifth *pro se* postconviction petition since that petition claimed that she failed to provide reasonable assistance during prior proceedings on his original *pro se* postconviction petition. We rejected defendant's argument and found that the assistant public defender was never in a position to advance or investigate her own ineffectiveness since defendant's claims were not cognizable under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2004)). *People v. Hunter*, No. 1-06-0549 (2007) (unpublished order pursuant to Supreme Court Rule 23). Furthermore, we found that, even if defendant's claims of unreasonable assistance of counsel were cognizable, the assistant public defender did not have a *per se* conflict of interest since the claims were barred by waiver and *res judicata*. *People v. Hunter*, No. 1-06-0549 (2007) (unpublished order pursuant to Supreme Court

Rule 23). We noted that defendant waived his new allegation that the assistant public defender did not notify him of the purported dismissal of his first postconviction petition since defendant did not include that claim in his successive postconviction petitions or explain its absence. *People v. Hunter*, No. 1-06-0549 (2007) (unpublished order pursuant to Supreme Court Rule 23). We also stated that defendant's other claims of unreasonable assistance of counsel were barred by *res judicata* since he already raised them in his third set of *pro se* postconviction petitions. *People v. Hunter*, No. 1-06-0549 (2007) (unpublished order pursuant to Supreme Court Rule 23). Moreover, we rejected defendant's attempts to avoid the "roadblocks" of waiver and *res judicata*, and we found that the assistant public defender was not required to advance frivolous or meritless petitions. *People v. Hunter*, No. 1-06-0549 (2007) (unpublished order pursuant to Supreme Court Rule 23). While we found that defendant's claims were frivolous on the grounds of waiver and *res judicata*, we did not consider his individual claims on their merits. We also noted that the record did not reveal further proceedings on defendant's original postconviction petition.

¶ 62 Although we rejected defendant's claims concerning his previous postconviction petitions, we granted defendant's request to modify his consecutive natural life sentences to run concurrently, rather than consecutively, in light of our supreme court's opinion in *People v. Palmer*, 218 Ill. 2d 148, 170-71 (2006). *People v. Hunter*, No. 1-06-0549 (2007) (unpublished order pursuant to Supreme Court Rule 23). Defendant's petition for leave to appeal was denied. *People v. Hunter*, 227 Ill. 2d 590 (2008).

¶ 63 G. Sixth *Pro Se* Postconviction Petition

¶ 64 On April 20, 2008, defendant requested leave to file a sixth *pro se* postconviction petition, entitled "Petition Amending First Post-Conviction-Petition-Relief [*sic*]," in which he asserted a claim of actual innocence based on previously filed affidavits of Lamb and Haymon. The rest of the petition, totaling 144 pages, repeated claims that defendant already raised in his five successive *pro se* postconviction petitions. In addition, defendant filed a four-page document entitled "In support of Petitioner Amending First Post-Conviction-Petition Relief [*sic*]," in which defendant further argued his claim of actual innocence.

¶ 65 The trial court denied defendant leave to file a sixth *pro se* postconviction petition on July 18, 2008. This time, the trial court correctly stated that we accepted the State's confession of error concerning the dismissal of defendant's initial postconviction petition, but the trial court did not state the disposition of the petition after remand. The trial court also did not address the ultimate disposition of defendant's fourth postconviction petition, while only stating that his third and fourth postconviction petitions were dismissed and then affirmed on appeal; however, the trial court only cited our order in *People v. Hunter*, No. 1-01-2580 (2002) (unpublished order pursuant to Supreme Court Rule 23), which only affirmed defendant's third petition, not his fourth. Although defendant labeled his sixth postconviction filing as an amendment to his first postconviction petition, the trial court construed this as a "successive" postconviction petition. The trial court did not consider the substantive merits of defendant's individual claims, but it found that defendant's petition was "frivolous and patently without merit" since defendant's

claims were barred by waiver. The trial court also stated that defendant's petitions did not satisfy the cause and prejudice test required for leave to file his successive postconviction petition.

¶ 66 Defendant appealed, and the State Appellate Defender, who represented defendant on appeal, filed a motion to withdraw as counsel and submitted a memorandum pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1990), stating that no issues of arguable merit existed in defendant's appeal. We granted the State Appellate Defender's motion to withdraw and affirmed the trial court's order on December 24, 2009. *People v. Hunter*, No. 1-08-2328 (2009) (unpublished order pursuant to Supreme Court Rule 23).

¶ 67 H. *Pro Se* Motion to Reinstate First *Pro Se* Postconviction Petition

¶ 68 On December 11, 2008, defendant filed a *pro se* motion, entitled "Motion to Reinstate Petitioner [sic] First Postconviction Petition." In his *pro se* motion, defendant claimed that the trial court never ruled on his first *pro se* postconviction petition, and he pointed to our statement in *People v. Hunter*, No. 1-06-0549 (2007) (unpublished order pursuant to Supreme Court Rule 23), in which we stated that the appellate record in that case "did not reveal further proceedings with respect to defendant's first postconviction petition." As a result, defendant requested that his initial petition "be reinstated on the trial court's call, with the appointment of counsel." Attached to the motion were letters addressed to defendant written by the assistant State Appellate Defender that discussed the possible reinstatement of defendant's first *pro se* postconviction petition. The appellate record does not reveal that the trial court held any proceedings concerning this motion, and the handwritten common law record indicates that defendant's motion was taken "off call" on January 30, 2009. No appeal was filed concerning this motion.

¶ 69 I. Seventh *Pro Se* Postconviction Petition

¶ 70 On October 14, 2010, defendant requested leave to file what he intended to be a 391-page *pro se* postconviction petition, but nearly 300 pages were missing. Defendant filed a *pro se* motion of clarification on December 2, 2010, in which he claimed that an Illinois Department of Corrections officer removed the remaining pages in an attempt to "sabotage" defendant's petition. In his seventh *pro se* postconviction petition, the entire written portion of which is contained in the appellate record, defendant claimed that he obtained new evidence that established that he was actually innocent, including an affidavit and videotape from Lamb in which she claimed that the State coerced her into testifying falsely. Defendant also provided affidavits from several additional family members who stated that defendant was with them on the night of the murders. The rest of the petition repeated claims that defendant previously raised in prior petitions and on direct appeal.

¶ 71 The trial court denied defendant leave to file a seventh *pro se* postconviction petition on May 6, 2011, finding that defendant's claims were barred by waiver and that they did not satisfy the cause and prejudice test. In its order, the trial court stated that defendant's seventh postconviction petition totaled 97 pages, rather than the 391-page document that defendant intended to file and which appears in the appellate record. The trial court also correctly stated that we remanded defendant's initial postconviction petition, but it did not address the disposition of defendant's first or fourth petitions after remand. In dismissing defendant's petition, the trial court determined that defendant's claims were "simply an attempt to reformulate" issues that he raised in previous postconviction petitions and on direct appeal, and

that defendant's claim of actual innocence did not contain newly discovered evidence. While the trial court did consider defendant's individual claims substantively, it found that defendant's petition to be "frivolous and patently without merit," since it was barred by waiver, and it ordered defendant to pay $105 in filing fees and actual court costs as a result.

¶ 72 On appeal, defendant's counsel, the State Appellate Defender, filed a motion to withdraw, accompanied with a brief pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), which stated that defendant's appeal contained no issues of arguable merit. Defendant filed a *pro se* response. We granted counsel's motion to withdraw and affirmed the trial court, finding that there were no issues of arguable merit on appeal. *People v. Hunter*, 2012 IL App (1st) 111704-U (unpbulished order pursuant to Supreme Court Rule 23).

¶ 73 J. *Pro Se* Motion for Order *Nunc Pro Tunc*

¶ 74 On August 23, 2011, defendant filed a *pro se* "Motion for Order Nunc Pro Tunc," in which he argued that his first *pro se* postconviction petition was remanded for further proceedings but the trial court never entered a ruling on it. Defendant also argued that, after remand, he filed several petitions in an attempt to amend his initial postconviction petition. Defendant requested that the trial court reinstate his petition at the second stage for further proceedings, including the appointment of postconviction counsel. The trial court denied defendant's motion on August 30, 2011, and defendant appealed the trial court's order in the instant appeal designated No. 1-11-3194.

¶ 75 K. Eighth *Pro Se* Postconviction Petition

¶ 76 On November 29, 2011, defendant requested leave to file an eighth *pro se* postconviction petition that totaled 391 pages. Defendant's eighth postconviction petition is the same document that defendant intended to file as his seventh *pro se* postconviction petition, except this time he successfully filed the entire petition, including the nearly 200 pages that were missing from his previous filing. The petition raises more than 100 allegations of error, which substantially mirror the issues raised in his seventh *pro se* postconviction petition, including claims of: (1) actual innocence; (2) ineffective assistance of trial counsel; (3) ineffective assistance of appellate counsel; (4) prosecutorial misconduct; and (5) reasonable doubt. Defendant attached several affidavits to his eighth petition, many of which he had attached to previous petitions.

¶ 77 The trial court denied defendant leave to file his eighth *pro se* postconviction petition on April 27, 2012, finding that his claims were barred by waiver, and that his actual innocence claim did not contain newly discovered evidence. In its order, the trial court noted that we remanded defendant's first and fourth postconviction petitions, but it did not state the disposition of either petition after remand. While the trial court did not consider defendant's claims substantively, it found that his "successive" petition was "frivolous and patently without merit" since it was barred by waiver and did not satisfy the cause and prejudice test. As a result, the trial court again assessed defendant court costs and filing fees.

¶ 78 Defendant appealed the dismissal in appeal No. 1-12-1733, which was consolidated with appeal No. 1-11-3194 concerning defendant's motion for a second stage proceeding for his initial postconviction petition. It is these two appeals that are now before us.

¶ 79 ANALYSIS

¶ 80 On appeal, defendant argues that the trial court never entered a final ruling on his first *pro se* postconviction petition, and subsequently dismissed his successive *pro se* postconviction petitions without considering the substantive merits of his claims. As a result, defendant asks us to remand his first postconviction petition to the trial court for second stage proceedings. In response, the State argues: (1) that we do not have jurisdiction to hear defendant's appeal because he did not properly notarize his notice of appeal; (2) that defendant did not state a specific trial court error; (3) that defendant provided this court with an insufficient appellate record; (4) that defendant's claims are barred by waiver and *res judicata*; and (5) that defendant is collaterally estopped from arguing that his original petition was never ruled upon. The State also raises a new claim that defendant's concurrent natural life sentences should be modified to run consecutively. For the following reasons, we reverse and remand for a second stage hearing on defendant's first postconviction petition.

¶ 81 I. Jurisdiction

¶ 82 As an initial matter, we must determine whether we have jurisdiction to consider defendant's appeals. A timely notice of appeal is required to establish jurisdiction (*People v. Maiden*, 2013 IL App (2d) 120016, ¶ 9), and a trial court will lose jurisdiction over the matter within 30 days unless a timely postjudgment motion is filed (*People ex rel. Alvarez v. Skryd*, 241 Ill. 2d 34, 40 (2011)). In appeal No. 1-11-3194, defendant's motion for a trial court order *nunc pro tunc* was denied on August 30, 2011, and his notice of appeal was filed on October 6, 2011, more than 30 days after the trial court's order. Likewise, in appeal No. 1-12-1733, defendant's

eighth *pro se* postconviction petition was dismissed on April 27, 2012, but his notice of appeal was filed on June 5, 2012, which was also more than 30 days after the trial court's order. When a notice of appeal is filed after the due date, the time of mailing is deemed the time of filing, and proof of that mailing shall be as provided in Illinois Supreme Court Rule 12(b)(3) (eff. Jan. 1, 1967). Ill. S. Ct. R. 373 (eff. Dec. 29, 2009). Defendant's notices of appeal were filed timely because each notice contains an affidavit that the mailing date was within 30 days of the respective trial court orders. The notice in appeal No. 1-11-3194 was placed in the mail on September 27, 2011, and the notice in appeal No. 1-12-1733 was mailed on May 21, 2012.

¶ 83 The State argues that defendant did not satisfy the requirements of Illinois Supreme Court Rule 373 (eff. Dec. 29, 2009), because he did not notarize either of his affidavits. Illinois Supreme Court Rule 12(b)(3) (eff. Jan. 1, 1967) requires an affidavit of the person who deposited the document in the mail. An affidavit for the purpose of compliance with Rule 12(b)(3) must be " 'a declaration, on oath, in writing, sworn to by a party before some person who has authority under the law to administer oaths.' " *People v. Tlatenchi*, 391 Ill. App. 3d 705, 714 (2009) (quoting *Roth v. Illinois Farmers Insurance Co.*, 202 Ill. 2d 490, 493 (2002)). (Internal citations omitted.)

¶ 84 However, Illinois Supreme Court Rule 12(b)(3) (eff. Jan. 1, 1967) is to be liberally construed to accommodate imprisoned defendants, and an affidavit that substantially complies with the rule satisfies its requirements. *People v. Smith*, 2011 IL App (4th) 100430, ¶ 16. Since defendant was incarcerated in the Illinois Department of Corrections when he mailed both

notices of appeal, his affidavit was sufficient because it substantially complied with the requirements set forth in Illinois Supreme Court Rule 12(b)(3) (eff. Jan. 1, 1967).

¶ 85 The State also argues that we do not have jurisdiction to consider appeal No. 1-11-3194 because defendant's notice of appeal does not specify the judgment from which he is appealing. Illinois Supreme Court Rule 303(b) (eff. June 4, 2008) requires that a notice of appeal shall specify the judgment or part thereof or other orders appealed from and the relief sought from the reviewing court. "A notice of appeal confers jurisdiction on a court of review to consider only the judgments or parts thereof specified in the notice of appeal." *People v. Smith*, 238 Ill. 2d 95, 104 (2009). The notice must serve its purpose to inform the prevailing party in the trial court that the other party seeks review of the judgment, and a notice is sufficient when it fairly and adequately specifies the judgment complained of and the relief sought. *Smith*, 238 Ill. 2d at 104-05. Defendant's motion for a trial court order *nunc pro tunc* was filed on August 23, 2011, and denied on August 30, 2011. However, defendant's notice of appeal states that he is appealing the trial court's order entered on August 8, 2011, and the notice does not specify the character of the judgment he is appealing or what type of relief he is seeking.

¶ 86 The State compares the facts of this case to *Smith*, which found the defendant's notice of appeal insufficient where it specified that the defendant was appealing his conviction entered on November 10, 2004, rather than the trial court's February 21, 2006, order dismissing his motion for a sentence correction, and where the notice of appeal did not describe the relief sought. *Smith*, 238 Ill. 2d at 104-05. However, the facts in *Smith* are distinguishable from the case at bar since the date of the judgment specified in defendant's notice of appeal has the correct month and year,

and there was only one order relating to defendant issued in August 2011. The date in the notice is off by only 22 days, not 18 months, and defendant wrote the wrong date for the trial court's order, rather than state a specific judgment that was substantially different from the one he was appealing.

¶ 87 Moreover, our supreme court in *Smith* stated that a notice of appeal is to be construed liberally and a deficiency in form, rather than substance, which does not prejudice the opposing party, will not be held to deprive a court of jurisdiction. *Smith*, 238 Ill. 2d at 104. Here, the defect in the notice of appeal is one of form since defendant merely transcribed the wrong date. As stated, the appellate record reveals that the there were no other motions filed or orders entered by the trial court in August 2011, so the State was not prejudiced by defendant's typographical error. As a result, we have jurisdiction to consider defendant's consolidated appeals.

¶ 88 II. Defendant's *Pro Se* Postconviction Filings

¶ 89 Next, we consider defendant's claims in his consolidated appeals that he is entitled to a remand because the trial court never held a second stage hearing or entered a ruling on his first *pro se* postconviction petition. Once a reviewing court issues a mandate remanding a case, the circuit court has no authority to act beyond the scope of the mandate (*People v. Graham*, 324 Ill. App. 3d 26, 30 (2001)), and a circuit court must obey the clear and unambiguous directions in a mandate issued by a reviewing court (*People v. ex rel. Daley v. Schreier*, 92 Ill. 2d 271, 276 (1982)). A reviewing court has the inherent authority to compel compliance with its orders. *People v. Gonzalez*, 407 Ill. App. 3d 1026, 1036 (2011).

¶ 90 The appellate record indicates that the trial court received our mandate, but failed to comply with it and merely continued the proceedings several times and never ruled on defendant's first postconviction petition. The appellate record reveals that, on May 19, 2000, we remanded defendant's first *pro se* postconviction petition and ordered the trial court to hold further second stage postconviction proceedings. *People v. Hunter*, No. 1-98-4801 (2000) (unpublished order pursuant to Supreme Court Rule 23). The trial court received our mandate on June 30, 2000, and set the cause for a July 7, 2000, status conference. The proceedings were continued several times, and on August 17, 2000, the State informed the trial court that the petition had been remanded. The trial court continued the matter until September 13, 2000, so that an assistant public defender could be present in the courtroom. At the next proceeding, an assistant public defender advised the court that defendant's case had not yet been assigned to a specific attorney, and the case was continued twice more until May 7, 2001.

¶ 91 On that day, a new assistant public defender did not address the first *pro se* postconviction petition, and instead requested a continuance, stating that the original assistant public defender, who was unavailable that day, intended "to file a second [postconviction petition]." The proceedings were continued until August 1, 2001, but the appellate record does not contain a transcript from that court date. A computer printout of the memoranda of orders indicates that, on that date, defendant's counsel requested a continuance to November 1, 2001, and that the proceedings were subsequently continued by agreement until February 7, 2002. However, the appellate record contains a letter addressed to defendant from his assistant public defender that indicates that the remanded petition was set for a December 14, 2001, status

conference, and that it was then continued until February 6, 2002. The assistant public defender wrote that the issues concerning the first *pro se* postconviction petition had not yet been considered.

¶ 92 The appellate record does not contain the transcripts from the trial court proceedings on November 1, 2001; December 14, 2001; February 6, 2002; or February 7, 2002; and the record does not indicate that the trial court took any further action concerning defendant's first *pro se* postconviction petition after these proceedings. In 2007, we noted in our Rule 23 order concerning defendant's fifth postconviction petition that the appellate record in that case did "not reveal further proceedings with respect to defendant's first postconviction petition." *People v. Hunter*, No. 1-06-0549 (2007) (unpublished order pursuant to Supreme Court Rule 23).

¶ 93 As stated, we determined that defendant was entitled to second stage proceedings on his initial postconviction petition, and we remanded the cause back to the trial court. *People v. Hunter*, No. 1-98-4801 (2000) (dispositional order). However, the appellate record reveals that the trial court did not comply with our mandate since it never held a second stage hearing or entered a ruling on defendant's initial petition. As a result, we again remand the cause so that defendant may receive the second stage proceedings as we originally ordered.

¶ 94 Furthermore, the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2006)) should be liberally construed to afford a convicted person an opportunity to present claims concerning the deprivation of his constitutional rights. *People v. Pack*, 224 Ill. 2d 144, 150 (2007). The appellate record indicates that defendant's repeated filings have been attempts to make his claims heard. In November 2001, while proceedings on defendant's initial

postconviction petition was still being continued, defendant filed two postconviction filings that he labeled as amendments to his original petition. The trial court dismissed these filings as a fourth "successive" petition on the grounds of waiver and *res judicata*. Defendant subsequently filed a motion for rehearing on March 20, 2002, explaining that he intended the amend his first postconviction petition rather than file a successive one, but the trial court denied his motion as an attempt to amend his *fourth* successive petition. Defendant stated that, five months later, a supervisor at the public defender's office advised him that his initial postconviction petition was dismissed on March 20, 2002. The record further reveals that, during this time, both the trial court and the State stated that we affirmed the trial court's dismissal of defendant's initial petition, despite the fact that we remanded it for further proceedings. *People v. Hunter*, No. 1-98-4801 (2000) (unpublished order pursuant to Supreme Court Rule 23).

¶ 95 In 2007, we noted on appeal of defendant's fifth *pro se* postconviction petition that the appellate record did not reveal further proceedings on defendant's original petition. Afterwards, April 20, 2008, defendant requested leave to file a sixth *pro se* postconviction petition which he again labeled as an attempt to amend his initial postconviction petition, but the trial court denied his request. Less than six months later, defendant filed a motion to reinstate his original postconviction petition, but the record does not indicate that the trial court ever ruled on that motion. Defendant tried again on August 23, 2011, when he filed a motion for a trial court order *nunc pro tunc*, in which he requested the trial court to reinstate his initial postconviction petition at the second stage, but the trial court again denied his motion.

¶ 96 The record establishes that there was much confusion concerning the disposition of defendant's initial postconviction petition, since the trial court, defendant, and the State all at various points believed that the petition had been dismissed. However, when informed otherwise, defendant made repeated attempts to raise his claims before the trial court since he never received a ruling on his initial petition. Each of defendant's postconviction filings, which were referred to by the trial court "successive" petitions, contained some claims that defendant originally raised in his original petition. As a result, the trial court should have held second stage proceedings and entered a ruling on defendant's original postconviction petition.

¶ 97 The State argues that defendant is not entitled to a remand because the trial court properly dismissed his motion for a trial court order *nunc pro tunc*. The use of *nunc pro tunc* orders or judgments is limited to incorporating into the record something which was actually previously done by the court but inadvertently omitted by clerical error, and it may not be used for supplying omitted judicial action, or correcting judicial errors under the pretense of correcting clerical errors. *People v. Melchor*, 226 Ill. 2d 24, 32-33 (2007). The State argues that, even if the trial court never held a second stage proceeding concerning defendant's first *pro se* postconviction petition, defendant could not enforce our mandate with a motion for a *nunc pro tunc* order since it would exceed the scope of a *nunc pro tunc* order, which is limited to the correction of something that was already done, but inadvertently omitted by clerical error. *Melchor*, 226 Ill. 2d at 32. Furthermore, the State claims that defendant had conceded that the trial court rulings were correct since he did not point to specific errors in the denial of both his motion for an order *nun pro tunc*, and his eighth postconviction petition. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013)

("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."). Also, the State argues that, since the trial court correctly dismissed defendant's motions, the issue that defendant now raises concerning his original petition is not properly before the court because we do not have jurisdiction to enter an order concerning our mandate that was received by the trial court on June 20, 2000.

¶ 98 However, we have the inherent authority to compel compliance with our orders. *Stephens*, 2012 IL App (1st) 110296, ¶ 123. See *Sanders v. Shephard*, 163 Ill. 2d 534, 540 (1994) ("Vital to the administration of justice is the inherent power of courts to compel compliance with their orders." (citing *Shillitani v. United States*, 384 U.S. 364, 370 (1966))). We recognize that the trial court has not followed our mandate and as a result, defendant has been denied an opportunity to have his claims heard. Defendant has argued this issue in his brief and states that he is entitled to a remand since the trial court never ruled on his first postconviction petition, which implicitly asserts that the trial court erred when it denied his both his motion for an order *nunc pro tunc* and his motion to file a successive petition. As a result, we will again remand the cause so that defendant may receive the second stage hearing to which we already determined that he is entitled.

¶ 99 We recently applied this principle in *People v. Stephens*, 2012 IL App (1st) 110296. In *Stephens*, we remanded the defendant's case on direct appeal for resentencing, and on remand, the trial court resentenced defendant outside the presence of the defendant and his counsel. *Stephens*, 2012 IL App (1st) 110296, ¶¶ 65-66. The defendant appealed the dismissal of his postconviction petition, and raised the additional argument on appeal that the trial court did not

comply with our mandate since it did not hold a new sentencing hearing. *Stephens*, 2012 IL App (1st) 110296, ¶ 123. We agreed and remanded the case a second time. *Stephens*, 2012 IL App (1st) 110296, ¶ 123. Likewise, in the case at bar, the trial court did not comply with our mandate since it never held a second stage hearing or entered a ruling on his original postconviction petition. As a result, we remand the cause and the trial court shall comply with our mandate and provide defendant an opportunity to have his claims heard in a second stage hearing as we already ordered.

¶ 100 The State next argues that the trial court did not err when it dismissed defendant's eighth petition since defendant raised identical claims in several of his pervious postconviction petitions, all of which were dismissed on the basis of either waiver or *res judicata*. In a successive postconviction petition, *res judicata* acts as a bar to issues that were decided on direct appeal or in defendant's original postconviction petition, and waiver applies to issues that could have been raised in the original proceeding, or in the original petition, but were not. *People v. Blair*, 215 Ill. 2d 427, 443 (2005). The Post-Conviction Hearing Act provides that "only one petition may be filed by a petitioner under this Article without leave of the court." 725 ILCS 5/122-1(f) (West 2006). A petitioner may be granted leave to file another postconviction petition "only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial postconviction proceedings and prejudice results from that failure." 725 ILCS 5/122-1(f) (West 2006). "To establish 'cause,' the defendant must show some objective factor external to the defense impeded his ability to raise the claim in the initial postconviction proceeding." *People v. Coleman*, 2013 IL 113307, ¶ 82 (citing *People v. Pitsonbarger*, 205 Ill. 2d 444, 460

(2002)). "To establish 'prejudice,' the defendant must show the claimed constitutional error so infected his trial that the resulting conviction violated due process." *Coleman*, 2013 IL 113307, ¶ 82 (citing *Pitsonbarger*, 205 Ill. 2d at 464).

¶ 101 The State contends that waiver and *res judicata* bar defendant's eighth petition since he is attempting to relitigate issues that have already been considered by the trial court, and that he has not explained why he was unable to raise his claims in his initial postconviction petition. The State further asserts that the trial court has repeatedly dismissed defendant's successive petitions on these grounds, and we have affirmed those dismissals on four separate appeals. *People v. Hunter*, No. 1-01-2580 (2002) (unpublished order pursuant to Supreme Court Rule 23); *People v. Hunter*, No. 1-06-0549 (2007) (unpublished order pursuant to Supreme Court Rule 23); *People v. Hunter*, No. 1-08-2328 (2009) (unpublished order pursuant to Supreme Court Rule 23); *People v. Hunter*, 2012 IL App (1st) 111704-U (unpublished order pursuant to Supreme Court Rule 23).

¶ 102 However, *res judicata* cannot act as a bar to defendant's successive *pro se* postconviction petition when the trial court *never* considered the merits of defendant's claims. On May 19, 2000, the trial court dismissed defendant's second *pro se* postconviction petition on the grounds of waiver and *res judicata*, but that same day, we remanded defendant's original petition for second stage proceedings. Since then, each successive postconviction petition has been dismissed on the grounds of waiver or *res judicata*, even though the trial court never held a second stage hearing on defendant's first petition. As a result, we cannot say that *res judicata* bars defendant's eighth *pro se* postconviction petition when the trial court never considered his initial petition on the merits.

¶ 103 Furthermore, while defendant has already filed an initial postconviction petition, the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2006)) should be liberally construed to afford a convicted person an opportunity to present claims concerning the deprivation of his constitutional rights. *People v. Pack*, 224 Ill. 2d 144, 150 (2007). The appellate record indicates that defendant's initial postconviction petition was never ruled on, and his repeated filings have been attempts to make his claims heard. Several of his subsequent *pro se* postconviction petitions, although considered as "successive" petitions by the trial court, were actually entitled as amendments to his first postconviction petition, and all of his petitions contained some claims that he originally raised in his first petition. Defendant also filed a motion to reinstate his first postconviction petition, as well as a motion for an order *nunc pro tunc* that contemplated the same relief. As a result, the trial court should have held second stage proceedings on defendant's original postconviction petition.

¶ 104 Next, the State argues that defendant is not entitled to the relief he requests because the appellate record is insufficient to consider his claims. In this case, defendant has the burden to file a record that is sufficient to support his claims of error, and that any doubts arising from the incompleteness of the record are to be resolved against him. *People v. Deleon*, 227 Ill. 2d 322, 342 (2008). The State claims that defendant did not file a sufficiently complete record because it does not unequivocally establish that error occurred.

¶ 105 The record before us does not indicate that the trial court considered defendant's original petition, and it has repeatedly stated, incorrectly, that we previously affirmed the dismissal in *People v. Hunter*, No. 1-98-4801 (2000) (unpublished order pursuant to Supreme Court Rule 23).

In its brief, the State does not challenge the notion that the trial court never ruled on defendant's original petition, and we accept defendant's position unless we are presented with a supplemented record that establishes the contrary.

¶ 106 The State additionally argues that, since defendant knew that his first postconviction petition had not been ruled on, he waived the issue by not raising it in a timely manner. The State claims that the record shows that defendant was aware that his first petition had not been ruled on when he submitted two postconviction filings that attempted to amend his initial petition on November 1, 2001. This claim is further established by defendant's February 19, 2002, motion for a rehearing, in which he explained to the trial court that his filings were an attempt to amend his first postconviction petition. The State argues that defendant cannot seek a remand now because he knowingly and willingly waived the issue since he failed to pursue the claim despite awareness of the issue. *People v. Blair*, 215 Ill. 2d 427, 444 (2005).

¶ 107 However, the *Blair* case cited by the State does not support its argument and the citation instead points to our supreme court's discussion of the basic definition of the terms "waiver" and "forfeiture." The State has presented no other authority to support its claim that defendant has waived the issue on this appeal by not seeking a remedy for several years. The State did not present a case in support of this claim at oral arguments either, and when we requested the State to provide us with a case to support its argument, the State advised us that it will submit a citation later, but we have not yet received one. Since the State has not cited relevant authority in support of its argument, we cannot say that defendant has waived his claim. Moreover, while defendant did not argue in any of his successive postconviction petitions that his original petition

was never considered, he made several attempts to amend that petition, and he filed motions in an attempt to reinstate. Even if the State's unsupported principle were to apply, the record demonstrates that defendant did in fact attempt to raise the issue before the trial court.

¶ 108 Similarly, the State avers that defendant cannot raise this issue because of the doctrine of *laches*. The doctrine of *laches* is a civil equitable doctrine grounded on the principle that courts are reluctant to aid a party who has knowingly slept on his rights to the detriment of the opposing party. *Tully v. Illinois*, 143 Ill. 2d 425, 432 (1991). Application of the *laches* doctrine requires a showing of: (1) a lack of due diligence by the party asserting the claim; and (2) prejudice to the opposing party. *People v. McClure*, 218 Ill. 2d 375, 389 (2006). The State claims that *laches* bars the defendant from raising this claim on appeal since defendant had numerous opportunities to present the claim prior to this appeal, but failed to pursue the issue with diligence, which resulted in prejudice that naturally ensues from an extended delay.

¶ 109 The two cases relied on by the State, *Tully* and *McClure*, are both civil cases, and the State does not cite a criminal case applying the *laches* doctrine to a defendant in a criminal case. Even if the doctrine were to apply to defendants in a criminal case, the State would not prevail since it has not shown a lack of due diligence or prejudice. The record indicates that, at the time that the State claims that defendant "knew" his first postconviction petition had not been ruled on, in November 2001, the proceedings on the initial petition was still being continued in the trial court. Defendant then filed postconviction petitions in an attempt to amend his initial petition, and afterwards filed a motion for a rehearing less than two weeks after the last known proceeding on his original petition. Less than six months after this motion was denied, defendant was told

that his initial petition was dismissed. Both the trial court and the State repeated this assertion, and defendant did not attempt to reinstate his initial petition until after we noted in 2007 that the trial court apparently did not rule on it. *People v. Hunter*, No. 1-06-0549 (2007) (unpublished order pursuant to Supreme Court Rule 23). Afterwards, defendant attempted to reinstate his original petition by filing another amended petition, a motion to reinstate, and a motion for a trial court order *nunc pro tunc*. We cannot say that defendant lacked due diligence in asserting his claim, since he has repeatedly tried to reinstate his initial petition over the course of several years. Moreover, the State has not shown prejudice other than a conclusive allegation that prejudice naturally ensues from the passage of time. As a result, *laches* does not bar defendant from asserting his claims on appeal.

¶ 110 The State asserts that, if defendant's original postconviction petition was never ruled on, then it was defendant's own fault since the initial petition was lost amidst a barrage of incessant filings, and that defendant should not obtain the boon of remand as a result of the confusion he caused. In support, the State cites *People v. Johnson*, 119 Ill. 2d 119, 135 (1987), which held that "a defendant should not be permitted to frustrate the trial court's efforts to conduct an orderly, fair and expedient trial, and then benefit from an alleged error by the court which he invited through his own conduct."

¶ 111 However, *Johnson* is distinguishable because, in that case, the defendant attempted to manipulate the proceedings by refusing the services of his counsel and at the same time refusing to represent himself. *Johnson*, 119 Ill. 2d at 135. The defendant was appointed counsel by the trial court, and when the trial court denied his request for a new attorney, the defendant stated

that he would "accept" his current counsel and that he intended to be absent during the proceedings. *Johnson*, 119 Ill. 2d at 135. The next day, however, the defendant appeared in court and refused to represent to the trial court whether he intend to proceed *pro se*. *Johnson*, 119 Ill. 2d at 135. On appeal, the defendant claimed that he did not receive the proper admonishments pursuant to Illinois Supreme Court Rule 401(a) (eff. July 1, 1984). Our supreme court disagreed, and in affirming the trial court on a number of grounds, it noted that the defendant should not "benefit from an alleged error by the court which he invited through his own conduct." *Johnson*, 119 Ill. 2d at 135. In the instant case, the appellate record does not reveal a similar pattern of intentionally obstructive conduct. Defendant has a statutory right to seek relief for constitutional violations (725 ILCS 5/122-1 (West 2006)), and the record indicates that his successive filings were attempts to make his claims heard since he never received the ruling on his initial petition to which he was entitled.

¶ 112 Next, the State claims that, since defendant argued in a prior appeal that his initial postconviction petition was dismissed, collateral estoppel bars him from asserting a contrary argument on this appeal. "The doctrine of collateral estoppel 'bars relitigation of an issue already decided in a prior case.' " *In re A.W.*, 231 Ill. 2d 92, 99 (2008) (quoting *People v. Tenner*, 206 Ill. 2d 381, 396 (2002)). "There are three requirements for application of collateral estoppel: '(1) the issue decided in the prior adjudication is identical with the one presented in the suit in question, (2) there was a final judgment on the merits in the prior adjudication, and (3) the party against whom estoppel is asserted was a party or in privity with a party to the prior adjudication.' " *In re A.W.*, 231 Ill. 2d at 99 (quoting *Gumma v. White*, 216 Ill. 2d 23, 38 (2005)).

¶ 113 On appeal of the dismissal of his fifth *pro se* postconviction petition, defendant argued, among other things, that his postconviction counsel had a *per se* conflict of interest in advancing defendant's fifth petition since defendant alleged that she provided unreasonable assistance of counsel. Specifically, defendant's claim asserted that he was informed in August 2002 by a supervisor from the public defender's office that his original petition had been dismissed on March 20, 2002, and as a result, the assistant public defender provided unreasonable assistance because she failed to inform defendant that his initial postconviction petition had been dismissed and that he had a right to an appeal. We affirmed the trial court's dismissal, and the State now argues that defendant is collaterally estopped from asserting the contrary position in the instant appeal that his initial petition was never ruled on.

¶ 114 However, the facts in this case do not satisfy all three elements required for collateral estoppel to apply because the trial court never considered the merits of defendant's claim. To satisfy the first two prongs, the issue decided in the prior adjudication must be identical to the one presented in the matter in question, and a final judgment must be entered on the merits in the prior adjudication. *In re A.W.*, 231 Ill. 2d at 99. Specifically, as it applies to this case, the doctrine of collateral estoppel applies " ' " when a party *** participates in two separate and consecutive cases arising on *different* causes of action and some controlling fact or question material to the determination of both causes has been adjudicated against that party in the former suit by a court of competent jurisdiction." ' " (Emphasis in original.) *People v. Tenner*, 206 Ill. 2d 381, 396 (2002) (quoting *People v. Moore*, 138 Ill. 2d 162, 166 (1990), quoting *Housing Authority v. Young Men's Christian Ass'n of Ottawa*, 101 Ill. 2d 246, 252 (1984)). Here, the causes of action

are different: (1) in defendant's fifth postconviction petition, he alleged that his counsel provided unreasonable assistance; and (2) the instant appeal concerns the issue of whether we should remand defendant's cause so that the trial court may hold second stage proceedings on his original petition. Although each claim is based on a different cause of action, they both rely on the same material fact regarding whether the trial court actually dismissed defendant's initial petition.

¶ 115 Collateral estoppel cannot apply here since the trial court never considered the merits of defendant's claim and instead found that the issue was not cognizable under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2006)). After we remanded defendant's fifth postconviction petition, the trial court granted the State's motion to dismiss. The trial court's written order does not appear in the appellate record, but a transcript of the arguments on that day indicates the trial court's reasoning. The State first argued that defendant's claims concerning unreasonable assistance of counsel were not cognizable under the Post-Conviction Hearing Act (725 ILCS 5/122-1 (West 2006)) since the claim was statutory in nature, and not a constitutional issue. Second, the State argued that the claims in defendant's fifth postconviction petition were barred by *res judicata* and waiver since several issues were raised in previous postconviction petitions, which were dismissed, and defendant could have raised the new issues in previous petitions, but he did not. The trial court stated that it agreed with the State's position and it dismissed defendant's fifth postconviction petition. On appeal, we affirmed the dismissal on the same grounds. The Illinois Supreme Court subsequently denied Defendant's leave to appeal. *People v. Hunter*, 227 Ill. 2d 590 (2008).

¶ 116 As a result, neither this court, nor the trial court, considered the merits of defendant's claim of unreasonable assistance of counsel. Since the trial court found that defendant's claim was not cognizable under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2006)), it was not required the trial court to consider whether defendant's initial postconviction was ultimately dismissed. Moreover, the dismissal of defendant's other claims on the grounds of *res judicata* and waiver did not apply to claim at issue. In his fifth petition, defendant claimed that he learned in August 2002 that his initial petition had been dismissed. At that time, defendant's fourth petition had already been dismissed on March 20, 2002, long past the 30-day statutory period to file a timely notice of appeal. *Skryd*, 241 Ill. 2d at 40. Defendant then filed a fifth *pro se* postconviction petition in December 2002. The doctrine of *res judicata* does not apply to defendant's claim because it was a new issue raised in his fifth postconviction petition, and the trial court never considered the claim in his previous petitions. Also, waiver also does not apply to this claim because defendant could not have raised the issue in his previous postconviction petitions since he asserted that did not learn of the material facts until several months after his fourth petition was dismissed.

¶ 117 The multiple claims in defendant's fifth postconviction petition were dismissed for various reasons, but the claim at issue here was dismissed solely because it was not cognizable under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2006)). Since the trial court did not consider the merits of defendant's claim, the doctrine of collateral estoppel does not apply to the material facts underlying that claim because there is no prior adjudication on those facts. *In re A.W.*, 231 Ill. 2d at 99. We also did not consider the merits of the specific claim on

appeal, which is underscored by the fact that we specifically mentioned in the background section of our order that the appellate record did not reveal further proceedings on defendant's initial postconviction petition. *People v. Hunter*, No. 1-06-0549 (2007) (unpublished order pursuant to Supreme Court Rule 23).

¶ 118 Additionally, we note that we have the inherent authority to enforce our prior mandate that the trial court hold further second stage proceedings on defendant's original petition. *Stephens*, 2012 IL App (1st) 110296, ¶ 123. Even if collateral estoppel applies here, we find it in the best interests of justice to remand the cause so that the trial court may comply with our order. Despite what appears to be years of confusion shared by the parties and the court, defendant is still entitled to a ruling on his first postconviction petition, which he has yet to receive.

¶ 119 Next, the State argues that, even though this court was aware that the appellate record in defendant's prior appeal did not reveal further proceedings on his initial petition, we still affirmed the trial court's denial of defendant's request to file his sixth and seventh *pro se* postconviction petitions. As a result, *res judicata* should preclude defendant's claim of error based on the same record.

¶ 120 However, although we affirmed the trial court in two subsequent appeals, we acknowledge that those holdings were in error. As stated, *res judicata* cannot act as a bar to defendant's successive *pro se* postconviction petition when the trial court never considered the substantive merits of defendant's individual claims. The trial court dismissed each of defendant's "successive" postconviction petitions at least in part on the grounds of *res judicata*, and we affirmed several of the trial court's dismissals on the same grounds, despite the fact that the

original petition was never ruled on. We cannot say that *res judicata* mandates this court to continue this succession of holdings, despite our acknowledgment of error. Furthermore, we find no alternative basis to hold that, in spite of the error, the result reached by the court was correct.

¶ 121 The State also raises the argument that defendant is not entitled to a remand because he was already appointed an attorney who reviewed the claims raised in his fifth *pro se* postconviction petition and determined that no issues of merit existed. After we remanded defendant's fifth petition, the trial court appointed the assistant public defender to represent defendant. Counsel then filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Jan. 1, 1967) in which she stated that, after communicating with defendant and reviewing the trial record, she determined that his petition adequately presented his claims and that "there is nothing that can be added by an amended or supplemental petition." Since defendant received attorney review of his claims at the second stage, the State contends that he is not entitled to remanded proceedings on his initial petition.

¶ 122 Although the assistant public defender reviewed defendant's claims in his fifth postconviction petition, it is unclear whether she was aware at that time that defendant's initial petition had not been ruled on, and whether she opined that defendant's fifth petition was meritless solely on the basis that it was barred by waiver and *res judicata*. Regardless of counsel's review, the trial court ultimately dismissed the fifth petition as a "successive" petition on the grounds of waiver and *res judicata*. Since the trial court never substantively considered defendant's individual claims, defendant is still entitled to second stage proceedings on his initial petition and to have his claims heard by the trial court.

¶ 123 Finally, the State admits that, in subsequent dismissals, the trial court never considered defendant's original petition as having been advanced, but instead dismissed each subsequent petition on the grounds of waiver and *res judicata*. The State argues, however, that it is the result reached by the trial court, not its reasoning, that is at issue on appeal (*People v. Johnson*, 208 Ill. 2d 118, 128 (2003); *People v. Adams*, 338 Ill. App. 3d 471, 475 (2003)), and that the trial court's dismissals were correct since we affirmed four of them on separate appeals. Moreover, the State claims that defendant has not argued that his claims establish a substantial showing of a constitutional violation that warrants further postconviction proceedings.

¶ 124 Although we may affirm on any basis in the record, we may only do so if we find that the trial court's rulings were ultimately correct. *Johnson*, 208 Ill. 2d at 128. As stated above, the trial court's denials of defendant's motions were in error, and we have found no alternative basis to affirm the trial court's dismissals.

¶ 125 Despite our mandate, which was issued 13 years ago, the trial court has never considered defendant's claims. Defendant's claims or petition may or may not advance past the second stage, but he has a right to a ruling on his original postconviction petition, as we have previously ordered. As a result, we remand the cause so that the trial court shall comply with our mandate and provide defendant an opportunity to have his claims heard in a second stage hearing as we already ordered.

¶ 126 At the second stage, the trial court must appoint counsel for defendant if he cannot afford one (*People v. Perkins*, 229 Ill. 2d 34, 42 (2007)), and counsel must make any amendments "that are necessary for an adequate presentation of petitioner's claims." Ill. S. Ct. R. 651 (c) (eff. Feb.

6, 2013). If defendant fails to amend his petition to bring a claim at this time, and if defendant attempts to bring the claim in the future, he must demonstrate both cause for his failure to bring the claim in this initial proceeding and prejudice resulting from that failure. 725 ILCS 5/122-1(f) (West 2006).

¶ 127 III. Concurrent Natural Life Sentences

¶ 128 Finally, the State raises the separate issue that defendant's concurrent natural life sentences should be modified to run consecutively. After trial, the trial court sentenced defendant to two natural life sentences to be served consecutively, and on direct appeal, we reversed 8 of defendant's 10 convictions but left his life sentences undisturbed. *People v. Hunter*, 1-91-0866 (1996) (unpublished order pursuant to Supreme Court Rule 23). In 2007, defendant appealed the dismissal of his fifth *pro se* postconviction petition and argued that his life sentences should run concurrently, rather than consecutively, in light of our supreme court's recent finding that the imposition of consecutive natural life sentences was impermissible both under the sentencing statute and under natural law. *People v. Palmer*, 218 Ill. 2d 148, 168 (2006) (citing 730 ILCS 5/5-8-4(a) (West 2006)). The State conceded that the holding in *Palmer* required the result, and we modified defendant's life sentences to run concurrently. *People v. Hunter*, No. 1-06-0549 (2007) (unpublished order pursuant to Supreme Court Rule 23).

¶ 129 In 2010, the Illinois Supreme Court found that "a mistake" was made in *Palmer* concerning the proscription against consecutive life sentences. *People v. Petrenko*, 237 Ill. 2d 490, 505 (2010). The *Petrenko* court found that it was within the purview of the legislature, which had the power to set the appropriate punishment for criminal conduct, to determine that

the imposition of consecutive natural life sentences served a legitimate public policy goal, even if its effect was purely symbolic. *Petrenko*, 237 Ill. 2d at 506. As a result, it found that courts shall "enforce section 5-8-4(a) as written and without regard to the practical impossibility of serving the sentences it yields." *Petrenko*, 237 Ill. 2d at 506-07. In light of our supreme court's holding in *Petrenko*, the State argues that defendant's natural life sentences should be modified to run consecutively, as the trial court initially sentenced him.

¶ 130 However, our supreme court in *Petrenko* stated that enforcement of section 5-8-4(a) as written shall begin "[f]rom this point forward," and would not be retroactive to existing concurrent life terms. *Petrenko*, 237 Ill. 2d at 506-07. Since defendant was already serving his natural life sentences concurrently at the time *Petrenko* was decided, we will not retroactively modify defendant's existing sentence.

¶ 131 CONCLUSION

¶ 132 For the foregoing reasons, we reverse the trial court's order dismissing defendant's successive *pro se* postconviction petition and remand to the trial court for second stage proceedings on defendant's original postconviction petition. At the second stage, the trial court must appoint counsel if defendant cannot afford one, and counsel must make any amendments necessary for an adequate presentation of defendant's claims. We decline to modify defendant's concurrent natural life sentences.

¶ 133 Reversed and remanded with instructions to conduct a second stage hearing on defendant's first postconviction petition.

¶ 134 JUSTICE McBRIDE, specially concurring,

¶ 135 Although I agree with the majority decision in all respects, I write to add the following.

¶ 136 Because there have been a substantial number of postconvictions filed since defendant's convictions, and those petitions have generated numerous posttrial proceedings, and many appeals have been filed and disposed of in regard to those proceedings and finally because the record does not affirmatively demonstrate that the defendant's initial petition has ever been ruled upon, I agree that the order of remand is appropriate.

¶ 137 However, it is possible that at one of the many hearings conducted over the course of many years, the defendant's original postconviction petition was actually ruled upon by the trial court. It is equally possible however, that the petition for some unknown reason was not decided.

¶ 138 I write to make clear that I do not believe the mandate of this court was ever intentionally ignored and I do not fault the trial judge if the mandate was not followed because of some procedural mishap.

¶ 139 Before oral arguments, we ordered the State to supplement the record with transcripts of the trial court proceedings which, the State argued, could demonstrate that a ruling on the original petition took place. We have since withdrawn that order. Rather than further delay ruling on the defendant's original petition, I agree to the remand so that the original petition may be ruled upon swiftly. I also believe the most efficient method for resolution of this issue belongs in the trial court where it began.

¶ 140 Because I agree with the reasoning, analysis and remand order in this case, I specially concur.