No. 2—09—0984
Order filed May 26, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 92—CF—937
RONALD R. ALVINE,	)	Honorable Peter J. Dockery,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

Held: The trial court improperly characterized defendant's petition as a successive postconviction petition; we reverse and remand with instructions that the trial court consider the claims in defendant's initial petition, which was never ruled upon.

Defendant, Ronald R. Alvine, appeals the trial court's dismissal of his *pro se* successive postconviction petition which sought postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122—1 *et seq.* (West 2008)). We reverse and remand with instructions.

The procedural posture of this case is convoluted, and we briefly outline the history of the case. Following a jury trial, defendant was originally convicted of first-degree murder based on the

knowing murder of a policeman in the course of his official duties (Ill. Rev. Stat. 1991, ch. 38, par. 9—1(b)(1) (West 1992)), burglary, and possession of a stolen motor vehicle. The conviction stemmed from events that took place on April 20, 1992, which resulted in the death of a West Chicago police officer, Michael Browning. The evidence adduced at trial is summarized in *People v. Alvine (I)*, 173 Ill. 2d 273 (1996). Defendant was sentenced to death, and he appealed to the supreme court. Prior to the supreme court's 1996 decision, defendant filed a *pro se* postconviction petition on December 18, 1995. In that petition, defendant claimed that: (1) his due process rights were violated when the State failed to produce documents regarding a pending police brutality complaint against the State's witness, West Chicago Police Officer Donald Reever, which was relevant to his self-defense claim; (2) he was improperly denied his right to testify; (3) he received ineffective assistance of counsel because his trial attorneys failed to investigate his allegation that the State tampered with evidence; and (4) he was improperly declared fit to be tried. Defendant further requested appointment of counsel. On December 29, 1995, the court appointed postconviction counsel for defendant. The case was then continued on March 1, 1996, May 24, 1996, July 26, 1996, and September 27, 1996.

The supreme court then vacated defendant's knowing murder conviction based on inadequate and confusing jury instructions related to the mental states required for knowing murder and felony murder. See *Alvine (I)*, 173 Ill. 2d at 290-91. However, the supreme court affirmed the felony murder conviction and remanded the cause for sentencing. *Id.* After the supreme court vacated the knowing murder conviction, the State elected not to pursue the knowing murder count and instead sought the death penalty on the felony murder count. Defendant's pending postconviction petition was last continued on November 20, 1996. The proceedings in defendant's case then turned back

to sentencing issues with defense counsel moving for a fitness examination. After mental health treatment and evaluation, defendant was deemed fit to be sentenced on May 6, 1998.

On August 11, 1998, defendant was sentenced to death for the felony murder conviction. Defendant again appealed to the supreme court, arguing he was improperly denied a new sentencing hearing. While that appeal was pending, defendant, through counsel, filed an "Amendment to Post-Conviction Petition" on July 27, 1999. This amendment stated that defendant was also including in his petition an attack on the order granting the State's motion to impose the death penalty on the felony murder conviction. The court scheduled a status hearing on the postconviction petition for March 14, 2000. There is no report of proceeding from that date. Another status hearing was set for July 25, 2000. An order dated July 25, 2000, stated "10/23/2000 1:30 [Room] 4012 for status on defendant's appeal to Supreme Court."

The supreme court issued its opinion on August 10, 2000. It agreed with defendant's argument on appeal that he was entitled to a new sentencing hearing. The court therefore vacated defendant's sentence and remanded the cause for a new sentencing hearing. See *People v. Alvine (II),* 192 Ill. 2d 537, 538 (2000). On October 12, 2000, a trial court order was entered indicating that the case was continued. On November 7, 2000, the trial court ordered a fitness examination to determine whether defendant was fit to be sentenced. No mention of the postconviction petition was made. For the next several months, the case focused on defendant's fitness for the new sentencing hearing. On August 21, 2002, the trial court determined that defendant was unfit to be sentenced, and he was ordered to undergo psychiatric treatment.

On January 10, 2003, Governor George Ryan commuted defendant's death sentence, stating he would only be eligible for a natural life sentence. On November 9, 2005, the court determined

that defendant was fit to be sentenced.[1] On August 24, 2006, after conducting the new sentencing hearing, the trial court sentenced defendant to natural life without the possibility of parole. On September 19, 2006, defendant moved for reconsideration of his sentence, which was denied on October 25, 2006. Defendant appealed to this court, arguing that his sentence must be vacated because the trial court could not impose the life sentence unless one or more aggravating facts were proved to a jury beyond a reasonable doubt. We rejected defendant's argument and affirmed the judgment of the trial court. See *People v. Alvine (III)*, No. 2—06—1090 (2008) (unpublished order under Supreme Court Rule 23).

On June 24, 2009, defendant filed a *pro se* document stating "Do you have a form that gets a post convition [*sic*] petition" because "I did not have the real recourd [*sic*] + real transcrips [*sic*] + box of exhsibits [*sic*] to put in" with the postconviction petition that he filed. On July 13, 2009, defendant filed a form petition. Next to the title "Petition," defendant wrote "call me to court for this." Question 11 of the form asked "Have any other applications, petitions, or motions been filed or made in regard to the same detention or restraint?". Defendant wrote "yes" and circled the word. He wrote "post convition breif [*sic*]" and "not done right—didnt get no where." Question 12 asked for the name of the court, the disposition, the date of disposition, and the issues raised in that petition. Defendant wrote that his petition was filed in "Elgin Appellet [*sic*] and Dupage" courts. He wrote next to the space for "disposition," that "the breif [*sic*] can not be done + still cant get real transcrips!" Next to the date of disposition, defendant wrote "It wont go no were [*sic*]". Next to

[1] Throughout this time, defendant filed numerous *pro se* motions that were largely incoherent. Most of the motions referred to missing transcripts, false evidence, and a conspiracy between the public defenders and state's attorneys to convict him.

issues raised, defendant wrote: "false evidence + need real transcrips [*sic*] attempted of murder by them on me + they don't file what I need + consperiscy [*sic*] - Big One to. [*sic*]."

As to ground one, defendant wrote "invaled inditment [*sic*] - All false evidence used aginst [*sic*] me + all court apointed ideits wont [*sic*] file-my-issues aginst [*sic*] the police + states attoreny [*sic*]. The ideits [*sic*] are the jerks that they apoint [*sic*] to me. They refuse to file compently [*sic*]." As to ground two, defendant wrote:

> "I need the real record + real trancrips [*sic*]. I have been sent phonies every time I got to court. + I need a lawyer to help me file the rest of this. I need a court hearing + real transcrips [*sic*] + what I've said in court. + what I've filed. + I do-got a law suite [*sic*]-held for 17 years for no reson.[*sic*] The court apointed [*sic*] ideit [*sic*] jerks–refuse to file–compent + for the real transcrips.[*sic*]".

Later in the form, defendant wrote again that nothing came out of his previous filings. He wrote "I cant file–because nothing came out–at the post convition [*sic*] petition + call me to court so you can hear the rest of it–big consperiscy [*sic*] + ideits [*sic*] representing me." Defendant signed the form but noted that he did not have access to a notary.

On July 15, 2009, defendant filed a *pro se* "Post Conviction Petition." In this petition, defendant stated that he needed the "real record" and a lawyer appointed to help him because he had been represented by "ideit [*sic*] jerks that refuse + will not file what he needs." Defendant wrote that "even his trial lawyers screwed him over + refused to the case right." Defendant stated that counsel "entered the defendants evidence in the case after the trial–jurry [*sic*] trial was over." Additionally, the jury was not instructed to "find the defendant not guilty." Defendant needed the "real transcrips" (*sic*) to prove that his constitutional, civil and human rights were all violated. Defendant stated that

he "did not take a plea bargan [*sic*] of natural life in prison" but that all the "court apointed [*sic*] jerk ideits [*sic*] that represented [him] only toalty [*sic*] fucked [him] over." Defendant's petition continued to repeatedly request the "real" transcripts to prove that the court had conspired against him.

Under heading "2", defendant wrote that "the breif [*sic*] can not be done in the 2nd district court of appelles [*sic*] because nothing came out at the first post convition [*sic*] petition–and still the defendant was not sent the real record." Again, defendant stated that his attorneys would not file motions for him to get the "real" record and that he was convicted based on false evidence, including that it was never proven that the victim was a "cop or a cadet or just some ideit [*sic*] acting as a cop + not a cop." Defendant then wrote statements regarding his stay at the psychiatric facilities and that he was aggravated by six people; that Du Page County targeted white, Swedish, blue-eyed males; and that he wanted to be brought to court for the hearing on his postconviction petition. He reiterated his need for the real record and transcripts, and stated "Alvine needs to testafie [*sic*]–all so–+to tell–who–ever how they tricked him–firther [*sic*] how it–was said he wasent [*sic*] soust [*sic*] to testafie [*sic*] –because the case was a–automatice [*sic]* mistrial + automatice [*sic*] dismisle [*sic*]." Defendant closed the petition with a wish that everyone die for what they have done to him and that he would like to sue over this.

On September 8, 2009, the trial court stated in open court, in the presence of the Du Page County State's Attorney, that it had received defendant's *pro se* petition. It stated that it was defendant's second postconviction petition and could be dismissed merely because defendant did not seek leave of court to file it. However, the trial court stated that it reviewed the contents of the petition, including defendant's repeated request for the "real" transcripts without ever articulating

what the purported real record would contain. After summarizing the contents of the petition, the trial court stated that "defendant's second postconviction petition is frivolous and patently without merit and is dismissed on the court's motion." The trial court issued a written order stating the following:

> "The court has received defendant's pro se post-conviction petition mailed from the Department of Corrections on July 13, 2009 and reviewed the same. The court finds this to be defendant's second post-conviction petition and filed without leave of court and that the petition is frivolous and patently without merit. On the court's motion, the petition is dismissed."

The court also denied defendant's writ to be brought in to court as it was unnecessary. On September 7, 2009, defendant wrote the Honorable Peter Dockery a letter inquiring about the status of his petition and making numerous threats to state employees, complained of his inability to get a lawyer and access to legal books at the prison, and made repeated allegations regarding phony transcripts and conspiracies. Judge Dockery wrote back to defendant, informing defendant of the court's order dated September 8. Defendant timely appealed.

II. ANALYSIS

On appeal, defendant argues that the trial court erred in dismissing his successive postconviction petition because it never ruled on the first postconviction petition. He further argues that his second petition should not have been dismissed because it was a properly filed successive petition, satisfying the cause-and-prejudice test.

The Act provides a method by which persons under criminal sentence can assert that their convictions were the result of a substantial denial of their constitutional rights. *People v. Ligon*, 239

Ill. 2d 94, 103 (2010). A postconviction proceeding is civil in nature and is a collateral attack on the prior conviction or sentence that does not relitigate a defendant's innocence or guilt. *Id.* Any issues considered by the court on direct appeal are barred by the doctrine of *res judicata*, and issues which could have been considered on direct appeal are deemed procedurally defaulted. *Id.*

Proceedings under the Act are commenced by filing a petition in the circuit court in which the original proceeding took place. *Id.* The Act contemplates a three-stage process for non-death penalty cases. *Id.* At the first stage, the trial court must review the petition within 90 days of its filing to determine whether it is frivolous or patently without merit. 725 ILCS 5/122—2.1(a)(2) (West 2008). If the trial court determines that the petition is either frivolous or patently without merit, it must dismiss the petition in a written order. *Id.* If the trial court does not dismiss the petition within that 90-day period, it must docket it for further consideration. 725 ILCS 5/122—2.1(b) (West 2008). At this first stage, the trial court evaluates only the merits of the substantive claims to determine whether the petition presents a gist of a constitutional claim. *People v. Perkins*, 229 Ill. 2d 34, 41 (2008).

At the second stage of the proceedings, an indigent petitioner is entitled to appointed counsel. 725 ILCS 5/122—4 (West 2008). The right to counsel in postconviction proceedings is wholly statutory. *Perkins*, 229 Ill. 2d at 42. If counsel is appointed, Supreme Court Rule 651(c) (eff. Dec. 1, 1984)) requires appointed counsel to consult with the petitioner and make any necessary amendments to the previously filed *pro se* petition. *People v. Lacy*, No. 1—09—2863 (Feb. 10, 2011), slip op. at 29. During the second stage, the State may move to dismiss the petition. *Id.* at 30. If the State moves to dismiss, the trial court may hold a dismissal hearing, at which the court may not engage in any fact-finding because all well-pleaded facts are to be considered true at this stage.

Id. at 31. At this stage, the court may dismiss the petition if the allegations, when liberally construed in light of the trial court record, fail to make a substantial showing of a constitutional violation. *People v. Barkes*, 399 Ill. App. 3d 980, 985 (2010).

A petition that survives the first and second stages without being dismissed advances to the third stage, at which an evidentiary hearing is held. *Id.* A postconviction petitioner is not entitled to an evidentiary hearing as a matter of right. *Id.* Rather, to require an evidentiary hearing, the allegations in the petition must be supported by the record or by accompanying affidavits. *Id.* Nonspecific or nonfactual assertions that merely amount to conclusions are insufficient to require a hearing under the Act. *Id.*

Section 122—2.1(a)(1) provides that when the petitioner *is* under a sentence of death and is without counsel, the court shall appoint counsel if the petitioner requests and the court is satisfied that the petitioner has no means to procure counsel. 725 ILCS 5/122—2.1(a)(1) (West 2008). The court shall then order the petition to be docketed for further consideration and hearing within one year of the filing of the petition. 725 ILCS 5/122—2.1(b) (West 2008). Continuances may be granted as the court deems appropriate. 725 ILCS 5/122—2.1(b) (West 2008).

The Act generally contemplates the filing of only one postconviction petition. *People v. Ortiz*, 235 Ill. 2d 319, 328-29 (2009). The Act provides that any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived. 725 ILCS 5/122—3 (West 2008); *id.* The supreme court has held that the statutory bar to a successive postconviction petition will be relaxed when fundamental fairness so requires. *Ortiz*, 235 Ill. 2d at 329. Fundamental fairness allows the filing of a successive postconviction petition only where the petition complies with the cause-and-prejudice test. *Id.* For purposes of the test, "cause" is defined as some

objective factor external to the defense that impeded counsel's efforts to raise the claim earlier. *Id.* "Prejudice" is shown where the claimed constitutional error so infected the defendant's trial that the resulting conviction or sentence violates due process. *Id.* Even where a petitioner cannot show cause and prejudice, " 'his failure to raise a claim in an earlier petition will be excused if necessary to prevent a fundamental miscarriage of justice.' " *Id.*, quoting *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002). " 'To demonstrate such a miscarriage of justice, *a petitioner must show actual innocence* or, in the context of the death penalty, he must show that but for the claimed constitutional error he would not have been found eligible for the death penalty.' " (Emphasis added.) *Id.*, quoting *Pitsonbarger*, 205 Ill. 2d at 459.

Section 122—1(f) of the Act provides that the petitioner may not file more than one petition without leave of court, and leave of court may be granted only if the petitioner demonstrates cause and prejudice. 725 ILCS 5/122—1(f) (West 2008). Section 122—1(f) does not require, however, that a petitioner establish cause-and-prejudice when setting forth a claim of actual innocence in a successive postconviction petition. *Ortiz*, 235 Ill. 2d at 330. The supreme court has determined that the "leave of court" language in section 122—1(f) does not "explicitly *or* necessarily mandate the filing of a motion as a prerequisite to, or the impetus, for court action." (Emphasis in original.) *People v. Tidwell*, 236 Ill. 2d 150, 158 (2010). Thus, the trial court has the authority to grant leave *sua sponte,* after finding the petitioner satisfied cause-and-prejudice, but it is not required to do so. *Id.* Regardless, "until such time as leave is granted, a successive petition, though received or accepted by the circuit clerk, will not be considered 'filed' for purposes of further proceedings under the Act." *Id.*

In this case, defendant's initial postconviction proceeding and amendment contained the following claims: (1) he was deprived of due process when the State failed to produce documents pertaining to a police brutality complaint against a State witness, which was relevant to defendant's self-defense claim; (2) he was improperly denied his right to testify; (3) ineffective assistance of counsel for his trial attorneys' failure to investigate his allegation that the State tampered with evidence; (4) he was improperly declared fit to stand trial; and (5) an attack on the order granting the State's motion to impose the death penalty on the felony murder conviction. Defendant's more recently filed *pro se* postconviction petition complained that his trial lawyers "screwed him over" and that he was not allowed to testify, while reiterating his need for the "real record" and "real" transcripts. Defendant also referred to the fact his previous petition went nowhere.

The procedural posture of this case, as we stated earlier, is complex. We will first address the initial postconviction proceeding, which encompasses the amendment filed in July 1999. Per the Act's provisions, the trial court properly appointed postconviction counsel after defendant, while under a sentence of death, filed his initial *pro se* petition. The matter was then docketed for further consideration. At the time of the initial filing, defendant's supreme court appeal was pending. See *People v. Harris*, 224 Ill. 2d 115, 126 (2007) ("There is no provision in the Act barring a postconviction case from proceeding at the same time as a direct appeal"). Although the Act provides that the petition is to be docketed and heard within one year of the filing, the Act also provides that continuances may be granted. Here, the case was continued several times and in the meantime, the supreme court's decision in *Alvine (I)* was issued. Defendant was then resentenced after receiving mental health treatment and evaluations. While the second appeal was pending, counsel filed an amendment to the postconviction petition adding an attack on the sentencing order.

Defendant's appeal was pending at that time. The trial court granted further continuances and again, in the meantime, the supreme court's decision in *Alvine (II)* was issued. Defendant's fitness was then in controversy with the trial court ultimately determining that he was unfit for sentencing.

Defendant's fitness necessarily affected his ability to continue with postconviction proceedings. See *People v. Johnson*, 191 Ill. 2d 257, 269 (2000) ("A defendant is presumed to be fit to stand trial, to plead, and to be sentenced. *** A defendant is also presumed to be fit at the time of post-conviction proceedings"). However, the *Johnson* court stated that the "level of competency required during post-conviction proceedings is less than that required at trial." *Id.* The court explained that a defendant is unfit to stand trial when his mental or physical condition causes him to be unable to understand the nature and purpose of the proceedings against him or prevents him from assisting in his defense. *Id.,* citing 725 ILCS 5/104—10 (West 1998). "In contrast, a defendant is considered unfit to proceed with the post-conviction process when, because of a mental condition, he cannot communicate his allegations of constitutional deprivations to counsel, thus frustrating his entitlement, under the Act, to a reasonable level of assistance." *Id.* Accordingly, the court held that if a defendant was competent to communicate allegations of constitutional violations to counsel, that defendant was competent to participate in post-conviction proceedings. *Id.* Here, while defendant's fitness proceedings focused solely on his fitness for sentencing, it was likely that defendant was also unfit to proceed with postconviction proceedings as counsel had moved for the fitness evaluation because of his difficulties in communicating with defendant. Defendant's postconviction petition seemingly was forgotten or abandoned after defendant was deemed fit in late 2005 and resentenced in late 2006. The State never moved to dismiss the petition. The court never ruled upon the petition. Appellate counsel appealed defendant's sentence and that was rejected by this court in late 2008.

This brings us to defendant's 2009 *pro se* form petition and *pro se* postconviction petition. The trial court characterized the petition as successive but ruled on its merits using the standard for initial postconviction petitions; that is, whether the petition was frivolous or patently without merit instead of whether it satisfied the cause-and-prejudice standard applicable to successive petitions. Defendant argues that the trial court erred in dismissing the successive petition because it never ruled upon the initial petition; alternatively, the court erred in dismissing it because the petition satisfied the cause-and-prejudice test. The State counters that the successive petition fails the cause-and-prejudice test. Regarding the absence of a ruling on the initial petition, the State argues that "nothing precludes the defendant, perhaps with the assistance of his appellate counsel, from having the original petition brought before the trial court."

Whether a case involves an initial or successive postconviction filing is an issue that we review *de novo*. *People v. Williams*, 392 Ill. App. 3d 359, 367 (2009). The Act should be liberally construed to afford a convicted person an opportunity to present questions of deprivation of constitutional rights. *People v. Pack*, 224 Ill. 2d 144, 150 (2007). Given the facts, circumstances, and history of this case, we disagree with the trial court's characterization of defendant's recent *pro se* filings. Considering the context of the entire record, defendant's form petition and *pro se* petition, albeit inarticulately written, did make it clear that he previously filed a petition that was "not done right" and "didn't go no where." Defendant is not incorrect in these statements. The initial petition was never ruled upon by the trial court. Defendant's *pro se* petition also made some of the same claims as his initial petition, including ineffective assistance of trial counsel and his inability to testify at his trial. It appears that defendant's form petition and *pro se* petition were an attempt to restate his original claims and have them heard, rather than an attempt to file new claims following

a denial or dismissal of a prior petition. Accordingly, the trial court should have considered the claims in defendant's initial postconviction petition. We therefore reverse the trial court's finding that defendant's filings constituted a "successive" petition and remand the cause to the trial court for consideration of the claims filed in his initial postconviction petition. Since defendant had counsel appointed during the initial postconviction petition proceedings, he should have the assistance of counsel upon remand.

III. CONCLUSION

For the reasons stated, we reverse the Du Page County circuit court order dismissing defendant's postconviction petition and remand for further proceedings consistent with this order.

Reversed and remanded with instructions.