2013 IL App (4th) 120211-U

NO. 4-12-0211

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
July 23, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
MICHAEL L. WILLIAMS,	)	No. 01CF115
Defendant-Appellant.	)	
	)	Honorable
	)	Timothy J. Steadman,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Knecht and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: Because the amended postconviction petition and its attachments fail to make a substantial showing of a constitutional violation, the second-stage dismissal of the amended petition is affirmed.

¶ 2 Defendant, Michael L. Williams, who is serving a sentence of 50 years' imprisonment for the first degree murder of Stephen May (720 ILCS 5/9-1(a)(1) (West 1992)), seeks postconviction relief.

¶ 3 In our most recent decision in this postconviction case, we felt obliged, by the law of the case, to regard the petition that defendant filed *pro se* on March 22, 2006, as a successive petition, which, in the absence of a showing of cause and prejudice, section 122-1(f) (725 ILCS 5/122-1(f) (West 2006)) prohibited. *People v. Williams*, 2012 IL App (4th) 120211-U, ¶ 31.

¶ 4 Defendant petitioned the supreme court for leave to appeal. The supreme court

denied him leave to appeal, but on May 2, 2013, the supreme court issued a supervisory order. Therein, the supreme court ordered us to vacate our judgment in *Williams*, 2012 IL App (4th) 120211-U, to treat the postconviction petition that defendant filed in 2006 as an original petition, and to address the merits of that petition.

¶ 5 Accordingly, we vacate our judgment in *Williams*, 2012 IL App (4th) 120211-U, and henceforth we will regard the petition that defendant filed *pro se* on March 22, 2006, as an original petition rather than as a successive petition subject to the cause-and-prejudice requirements of section 122-1(f) (725 ILCS 5/122-1(f) (West 2006)).

¶ 6 It should be noted, though, that defendant has incorporated this *pro se* petition into an amended petition. On September 20, 2007, through appointed counsel, he filed an amended petition, which expressly incorporated, by reference, the *pro se* petition of March 2006.

¶ 7 The State moved to dismiss the amended petition, arguing that it failed to present a substantial claim of a constitutional violation and that, in any event, *res judicata* barred its claims. The trial court granted the State's motion for dismissal, and defendant appeals.

¶ 8 We interpret the supervisory order as implying that we should review this second-stage dismissal by addressing the merits of the amended petition, considering that defense counsel was duty-bound to make any necessary amendments to the *pro se* petition (see Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984)).

¶ 9 By the argument in his brief, defendant does not convince us that, in his amended petition, with its attachments, he presented a substantial claim of a constitutional violation. Therefore, in our *de novo* review, we affirm the trial court's judgment.

¶ 10 I. BACKGROUND

¶ 11 A. Evidence in the Jury Trial (August 2002)

¶ 12 1. *Bradley Horges*

¶ 13 a. His Agreement With the State

¶ 14 Bradley Horges and the State had an agreement, under which he was to testify truthfully and the State was to dismiss a murder charge against him and allow him, in lieu of being tried for murder, to plead guilty to obstruction of justice, for which he would be sentenced to imprisonment for two years and one month. Horges regarded this agreement as a "good deal," and he admitted he "would have done just about anything to get the deal [he] got."

¶ 15 b. His Testimony as to What Happened

¶ 16 Horges testified that in July 1993 he was a member of the Gangster Disciples. Adrian Maddox, Dejuane Blythe, and defendant likewise were members of this street gang.

¶ 17 Around 11 p.m. on July 21, 1993, the four of them arrived at Club 21 in Decatur. Since about 7 p.m., Horges had been smoking cannabis and drinking alcohol, and he continued drinking upon his arrival at Club 21.

¶ 18 The four of them left Club 21 at closing time, sometime between 2 and 4 a.m. As Horges put it, he was "doing pretty good" by then. Nevertheless, he insisted he clearly recalled what happened that night.

¶ 19 The four of them left Club 21 in a green Nissan Maxima belonging to Greg Hudson. Maddox was driving. As they went through the intersection of Decatur and Webster Streets, someone in the car said he heard a gunshot. Horges, however, neither saw nor heard any gunshot.

¶ 20 Maddox then drove to Hudson's residence. Blythe then got out of the car, entered the

residence, and returned with two pistols. Blythe got back in the car; handed defendant the largest pistol, which Horges believed to be a Tec-9; and told Maddox to drive back to the vicinity of Decatur and Webster Streets.

¶ 21 Maddox did so. Defendant was silent during the drive. Maddox stopped near the intersection of Decatur and Webster Streets. Blythe and defendant got out of the car and walked toward the intersection, out of Horges's view. Horges did not follow them.

¶ 22 A couple of minutes later, when the two returned and got back in the car, Blythe remarked that he had fired his pistol four times and that he believed he had hit someone. He expressed anger at defendant for not firing his pistol. He accused defendant of purposefully not shooting. Defendant responded that his pistol had jammed.

¶ 23 c. Prior Inconsistent Statements

¶ 24 Horges admitted he had spoken with the police four times and that he previously told the police someone had thrown a pistol in his lap and that he therefore was armed that night. Insomuch as his previous statements were inconsistent with his testimony at trial, he attributed the inconsistencies to his initial desire to conform his statements to the statement Maddox had given the police. Maddox had gotten a deal with the State, and Horges believed, at the time, that his own chances of getting a deal would be improved if his statement matched the statement Maddox had given. Horges had read Maddox's statement in a police report.

¶ 25 Horges insisted, however, that the statement he ultimately *signed* was a true account of what happened. He pointed out that he gave this signed statement to the police before the State ever offered to dismiss the murder charge against him.

¶ 26 2. *Adrian Maddox*

¶ 27 a. His Agreement With the State

¶ 28 Adrian Maddox admitted being a member of the Gangster Disciples in 1993, and he admitted he had an agreement with the State. In the agreement, the State promised not to prosecute him for first degree murder if he gave a truthful statement, as well as truthful testimony, regarding Stephen May's murder. Also, pursuant to the agreement, Maddox would plead guilty to violating his probation for unlawful possession of a controlled substance, for which he would be sentenced to imprisonment for two years. His attorney had advised him he "was looking at 30 years" if he were convicted of murder.

¶ 29 b. His Testimony as to What Happened

¶ 30 Maddox testified that, the night of July 21, 1993, he was with Horges, Blythe, and defendant at Club 21. Before arriving there, Maddox was smoking cannabis and drinking alcohol. He testified that, in all likelihood, he continued doing so upon his arrival.

¶ 31 When Club 21 closed for the night, Maddox gave Horges, Blythe, and defendant a ride in Hudson's Maxima. In the vicinity of Decatur and Webster Streets, shots were fired at the car— although Maddox did not personally see anyone fire a weapon, did not see a flash, and did not recall hearing any gunfire.

¶ 32 Maddox then drove to Hudson's house, where Blythe spoke with Hudson and obtained some firearms. When the four of them left Hudson's house—again in the Maxima, with Maddox driving—Blythe and Horges had pistols. Maddox did not know if defendant likewise was armed.

¶ 33 At Blythe's direction, Maddox drove to Lawrence Street, where Maddox took the pistol from Horges. Blythe and defendant then got out of the car and walked out of view. During the six or seven minutes when Blythe and defendant were gone, Maddox heard one or two gunshots.

Blythe and defendant then returned and got back in the car, and Blythe told Maddox to drive away.

¶ 34 c. Prior Inconsistent Statements

¶ 35 Maddox admitted that before the State promised not to prosecute him for first degree murder, he spoke four times with representatives of the State (the police, the prosecutor, or both) and that, each time, he changed some part of his account until he finally was truthful. When he first spoke with the police, he denied that anyone in the Maxima had a firearm. Then he told the police that two men had fired on the Maxima in the vicinity of Decatur and Webster Streets and that Blythe had returned fire. When a Decatur police officer, Rick Hazen, interviewed him in August 2001, Maddox agreed with Hazen's suggestion that defendant "was like an innocent bystander."

¶ 36 3. *Aaron Currie*

¶ 37 a. His Testimony as to What Happened

¶ 38 Aaron Currie testified that on July 22, 1993, he was 15 years old and a member of the Vice Lords. Shortly after midnight on that date, he was at the intersection of Decatur and Webster Streets when Stephen May fired shots at a green Nissan passing by that was occupied by four people. Later, Adrian Maddox and two others, nicknamed "Kojak" and Soldier," appeared beside a house across the street and fired at least four shots in the direction of Currie and May, striking May. Defendant was not among the three shooters.

¶ 39 b. Prior Inconsistent Statements

¶ 40 Currie admitted that, at the scene of the shooting, he "probably" told a police officer "that the only identification [he] could give for the shooters was one of them had on a red shirt and a red hat." He further admitted that, in his next two statements to the police, he named three Gangster Disciples as the shooters: Joshua Shaw; Thomas Ellzey; and his cousin, defendant. He

explained that he was "told at that time to lie" because Shaw, Ellzey, and defendant had been lying about members of the Vice Lords, getting them taken "off the street." Also, Currie had been upset with defendant for leaving the Vice Lords and becoming a member of the Gangster Disciples. Currie testified: "I don't recall who I lied to in '93, but I know everything I said was a lie."

¶ 41 In 1997, for instance, Currie stated to a police officer, Trevor Stalets, and also testified to a grand jury, that defendant was involved in the shooting of Stephen May. Currie testified that this representation to Stalets and the grand jury was a lie. The lie was motivated by Stalets's promise that if he implicated defendant in May's murder, a charge of attempt (murder) pending against Currie would be dismissed.

¶ 42 Stalets, on the other hand, denied promising Currie that the charge of attempt (murder) would be dismissed—or that Stalets would even try to get that charge dismissed.

¶ 43 As it turned out, the charge of attempt (murder) was reduced to domestic battery.

¶ 44 c. Currie's Criminal History

¶ 45 At the time of defendant's trial, Currie was serving a 20-year prison sentence for first degree murder. He had prior convictions of escape and obstruction of justice. Also, when he was a juvenile, a court adjudicated him as delinquent for having twice committed obstruction of justice.

¶ 46 d. Currie's Initial Recantation, Followed By a Warning From the State

¶ 47 During the trial in defendant's case, Currie was brought, pursuant to a writ, from prison to the Macon County jail. At first he did not know which side had obtained the writ.

¶ 48 Stalets and an assistant attorney general named Buh came to see Currie in the jail, and they informed him that the defense had obtained the writ. After learning this, Currie told Stalets and Buh he would not speak with the prosecution. They responded to Currie "that if [he] didn't implicate

the individuals that [he had] named in the grand jury that [*sic*] [he] would be charged with perjury."

¶ 49 Undeterred by this threat, Currie wrote a letter to defendant on August 21, 2002, stating that he, Currie, "had lied on him." This was the first time Currie ever suggested he had falsely implicated defendant in May's murder.

¶ 50 4. *Michael Nixon*

¶ 51 a. His Agreement With the State

¶ 52 At the time Stephen May was shot to death, Michael Nixon, a Gangster Disciple, was in the Logan County jail, facing criminal charges in several counties. Nixon knew nothing about the shooting, but because he wanted to get out of jail and then flee, he entered into an agreement with a detective, Carl Carpenter.

¶ 53 The agreement was as follows. For several hours on each of three days, Nixon would be released from jail, into Carpenter's custody and onto the streets of Decatur. During these periods outside of jail, Nixon would wear an electronic recording device and transmitter, and he would engage fellow gang members in conversation regarding the shooting of Stephen May. In return, Carpenter would "work on" the criminal charges pending against Nixon.

¶ 54 b. A Recorded Conversation Between Nixon, Defendant, and Others

¶ 55 During these three days on the street, Nixon smoked crack cocaine and used other drugs. Carpenter suspected him of drinking alcohol but was unaware he was using drugs.

¶ 56 On one of the days, Nixon talked with defendant and others about the shooting of Stephen May, and the conversation was surreptitiously recorded.

¶ 57 The day after the last recording was made, Nixon and Carpenter began listening to the audio recordings and preparing transcriptions of the conversations Nixon had had with gang

members.

¶ 58 Defense counsel asked Carpenter:

> "Q. Did [Nixon] indicate to you that he was having trouble recognizing anybody's voice on the tape?
>
> A. At times he would not know who the person was. We had some instances where people were just talking on the street and would talk to him and he had no idea who they were. All the people that he knew, you know, who he had talked to and like I say, you know, the debrief that took place was done right after he had been out on the street, and at that time it was pretty fresh in his memory. So, he could tell me who he talked to and what they had said."

¶ 59 Some parts of the recorded conversations were difficult to make out, and sometimes Carpenter and Nixon disagreed over what they heard in the recordings. Carpenter testified:

> "A. I don't recall it being a lot of times [that we disagreed]. We did a few. Matter of fact, some of the people we spoke with used the words or phrases or expressions that I had no idea what they meant. Excuse me, and at that time he would tell me what the meaning of those words were. If we had a hard time hearing a certain word, we'd try to put the word that we thought best suited it. If we couldn't decide, it was just placed an inaudible. It wasn't even transcribed or anything, just the word 'inaudible' was placed there.
>
> Q. My question is, there was considerable difficulty

understanding two things, Number 1, who said it and what they said and what they meant?

A. On portions of the tape, there were.

Q. Now, as I understand your testimony you didn't recognize anybody's voice except for Michael [Nixon] and the defendant; is that right?

A. On Exhibit 32, that's correct.

* * *

Q. Okay. So, what you're saying is the same tape that we listened to is the tape that you listened to and the distinctive voice you could hear was Mr. Williams?

A. That's correct.

* * *

Q. *** In regard to this case, how many times did you interview Michael Williams?

A. I believe it was on three separate occasions that I actually interviewed him."

¶ 60 Nixon and Carpenter identified People's exhibit No. 31 as the tape recording and People's exhibit No. 32 as a four-page transcript they had prepared of a portion of the recording. Nixon had written on the left side of People's exhibit No. 32 the names of the persons whose voices he had identified in the audio recording. And, again, Carpenter also recognized defendant's voice on the recording.

¶ 61 Nixon testified he was acquainted with defendant, whom he knew by the nicknames "Mandingo" and "Mang." (Horges testified that defendant's nickname was either "Main" or "Mandingo Main.")

¶ 62 People's exhibit No. 32 reads as follows:

"Mike [Nixon]: What yall get into tonight

Main: They be stealin and everythin man

Mike: Stealin they ass off damn boy yall niggas got the spot hotter than a mother fucker nigga cant even walk the street without worrying about getting shot straight up

Unaudible [*sic*]. . .

Mike: Gettin shot like a mother fucker man Shorty got dead n then god damn it what I ast [*sic*] other night mother fuckers them hooks came thru the view you heard about that shit aint you short view

Main: Yea

Mike: Mother fuckers come in there busin about 30 mother fuckin rounds and shit whats up bud ... shit man how yall end up poppin Shorty man why yall aint pop one of thes[e] big mother fuckers one of them niggas like hell who them big niggas down there Vice Lords whats whats his name Vincent whats some other niggas

* * *

Mike: What happen man yall ridin thru from the club and they

bust at yall and yall parked come back on they ass

Main: Went to Mr B's came back parked around the corner from there

* * *

Main: Parked by the ... came back they still sittin there

Kojac: Came back an hour later

Mike: They was still there

Main: We just drove ride thru again

Mike: Why you didn't shoot all them mother fuckers

Main: Cause we was in the cut like three houses down they like at that corner we like. . .

Mike: Why yall didn't have the tech and shit

Main: I had the tech the mother fucker jammed up the tech don't work

Mike: The tech jammed

Main: Somthin wrong with that mother fucker so we just busted the 380

Mike: The one they got which one the one with the breather so yall jus unloaded that you had the tech god damn it you had both gats

Main: Tech Soldger had the 380

Mike: So folks shot the little nigga and killed him

Main: Yea

* * *

Mike: ...What car yall in they bust at the folks car

Main: Gregs

Mike: When yall got bust at

Main: We was in the Maxima Gregs car that night at the club remember

Kojac: Shorty got popped

Mike: You was with em folks

John: No I had went home

Mike: Did he hit the car

Main: I don't think so 'rappin."

¶ 63 Nixon testified that Horges's nickname was "Kojack" and that Blythe's nickname was "Soldier." Carpenter identified May as "Shorty." Nixon interpreted or explained the following expressions in People's exhibit No. 32. "Bust" meant either "shoot" or "[g]et your head busted." "Mr Bs" was a liquor store. "Cut" could mean "anywhere unseen." "Tech" meant "Tec[] 9." "Gats" meant "guns." "Folks" meant "Gangster Disciples." Nixon cautioned, however, that there was "no clear cut definition for all these terms in slang."

¶ 64 5. *Carl Carpenter*

¶ 65 On January 3, 1994, Carpenter interviewed defendant, who insisted he had nothing to do with May's death. Defendant admitted, though, that in the early morning hours of July 22, 1993, he was in a car with Maddox, Horges, and Blythe. When Maddox stopped the car at the

intersection of Decatur and Webster Streets, Wayne Currie ran up to the car "with something tucked up under his shirt." (We are quoting Carpenter recounting what defendant had told him.) After Maddox drove through the intersection, defendant heard two gunshots. Blythe "made some comments about the Vice Lord [*sic*] shooting at them" and that "he was going to retaliate against them."

¶ 66 Maddox then drove to the residence of Marquetha Horges. She got in the car, and Maddox drove to defendant's house, where she and defendant were going to spend the night.

¶ 67 The next morning, defendant learned that May had been killed, and Blythe and Maddox bragged to him that they were the ones who had killed May. Defendant knew that the Gangster Disciples had two Tec-9 pistols and that the one fitted with a "breather" sometimes jammed.

¶ 68 On May 14, 1997, Carpenter spoke again with defendant about the shooting of Stephen May. Defendant repeated to Carpenter what he had told him three years ago, except that, this time, he told Carpenter that Marquetha Horges was in the car when Currie approached it at the intersection of Decatur and Webster Streets. He again denied involvement in May's death.

¶ 69 6. *Marquetha Horges*

¶ 70 Marquetha Horges testified that in July 1993 defendant was her boyfriend and that he had been her boyfriend for a couple of years. She was at Club 21 on July 21, 1993, and she saw defendant there, but she did not leave Club 21 with him. She denied being in a car with him that night when shots were fired at the car.

¶ 71 7. *Defendant's Relatives*

¶ 72 Patricia Walker is defendant's mother. Cameisha Walker is his sister. Tykeisha

Walker is another of his sisters. Deandre Walker is his brother.

¶ 73 All four of these witnesses testified that in July 1993 defendant lived with them (they all lived together) and that in the early morning hours of July 22, 1993, he arrived home in the company of Marquetha Horges.

¶ 74 Patricia Walker testified that defendant and Marquetha arrived at the house after 2 a.m. but not later than 2:30 a.m. She went back to bed after they arrived, and 45 minutes later she received a telephone call that May had been killed. She woke up all her children and told them the news.

¶ 75 She acknowledged that, prior to the trial, she did not divulge this information to the police. But she added that the police never approached her for any information.

¶ 76 Cameisha Walker testified she went to bed a few hours after midnight and that she saw defendant and Marquetha Horges immediately afterward.

¶ 77 Tykeisha Walker, who previously was adjudicated delinquent for retail theft, testified she went to bed around 2 a.m. and that defendant and Marquetha arrived at the house within the ensuing 45 minutes, certainly not later than 3 a.m.

¶ 78 In June 2002, Tykeisha sent a written statement to a defense investigator, but this statement did not mention any times, *e.g.*, the time when she went to bed, the time when defendant and Marquetha arrived at the house. Tykeisha had declined a request by Stalets to speak with her about the time when defendant came home.

¶ 79 Deandre Walker testified that around 2 a.m. he went down to his bedroom, in the basement, but that he was awake when defendant and Marquetha arrived home.

¶ 80 B. The Postconviction Proceeding

¶ 81 1. *The Pro Se Petition*

¶ 82 On March 22, 2006, defendant filed, *pro se*, a petition for postconviction relief, in which he made the following claims: (1) the trial court relied on materially false or unreliable information, thereby violating his right to due process; (2) defense counsel failed to file a motion to suppress the surreptitiously recorded conversation; (3) defense counsel failed to file a motion to suppress the Tec-9 pistol; (4) defense counsel failed to investigate the case against defendant; (5) defense counsel failed to review the transcripts before filing a posttrial motion, and there was no "certificate of compliance"; (6) defense counsel failed to tender an instruction on a lesser included offense; (7) defense counsel failed to request an instruction that defendant was not charged with unlawful use of a weapon, a necessary instruction considering that it "was improper to let the gun crimes into evidence"; (8) the State's only evidence in aggravation was Macon County case No. 01-CF-128, in which, however, defendant was acquitted, making the case invalid as evidence in aggravation; (9) defense counsel failed to file a motion to reduce the sentence; (10) the sentence was "unreasonably disparate" to the sentences that codefendants received; (11) defendant was not informed of the minimum and maximum punishments he faced; (12) the trial court failed to investigate a claim defendant made, in a pretrial hearing, that he should receive new counsel due to a conflict of interest; (13) a juror was asleep during part of the trial; (14) in the jury pool, there was no African-American; (15) defendant was rushed through trial, in violation of due process; (16) his right to a speedy trial was violated; and (17) defense counsel failed to file a motion to quash his arrest.

¶ 83 Among other exhibits attached to the *pro se* petition were two letters from Michael Nixon: exhibit Nos. 1 and 3.

¶ 84 Exhibit No. 1 is dated January 1, 2004; is addressed to "whomever it may concern"; and bears the signature of Nixon beside a notary stamp (without any oath clause, however, or any other language to the effect that Nixon swore to the contents of the letter). The letter reads as follows:

> "I am writing you this letter on behalf of Michael Williams, and my testimony against him in the Steven May's murder case.
>
> My name is Michael Nixon, and in 1993 through 2002 the Decatur police dets. had me informing against Michael Williams, William and Thomas Ellzy, among other members of the Gangster Disciples. During this period I was heavily using crack cocaine, before, during and after days working with the det's. The dets knew about my drug problem and my every day involvement in criminal activities to obtain my drugs, they often at times paid me cash and also a few times in crack, so that in hope I would not commit any more crimes.
>
> I was also directed to lie and give false and coached statements to U.S. Attorney office, State's Attorney office, federal grand jury proceedings, and state witness testimony. There were a lot of officers and agents involved, but the main one's I dealt with directly were Carl Carpenter, Trevor Stalets, Ed Root among others.
>
> These statements are true and made freely without any type of force, threat or promise made to me or indirectly at me."

¶ 85 Exhibit No. 3 likewise is an unsworn letter bearing the signature of Michael Nixon. The letter is dated November 13, 2003, from the Macon County jail and is directed to the attention of Keleigh Biggins. The letter reads as follows:

> "My name is Michael Nixon, and I am writing in behalf of Michael Williams, one your clients out of Decatur, IL.
>
> The reason that I am writing you is because I was an witness against him at his trial and was an informant for the police, and I actually lied with my testimony and was paid cash and drugs by the D.P.D. during the investigation of the murder case that he was charged and convicted of in 2002.
>
> I am currently in custody in Macon Co. Jail, and would like for you to come see me and get an statement from me as soon as you can."

¶ 86 On June 22, 2006, the trial court noted that the *pro se* petition had been on file for more than 90 days. Therefore, the court appointed counsel to assist defendant in the postconviction proceeding. See 725 ILCS 5/122-2.1(a)(1) (West 2006).

¶ 87 2. *The Amended Petition*

¶ 88 On September 20, 2007, postconviction counsel filed an amended petition, which alleged that trial counsel had rendered ineffective assistance in the following ways: (1) failing to interview witnesses, specifically, Michael Nixon, Bradley Horges, Adrian Maddox, and Aaron Currie; (2) failing to file a motion to suppress evidence, specifically, the audio recording made by Nixon with the assistance of the Decatur police department; (3) failing to file a motion to suppress

a Tec-9 pistol that was recovered at the house of an unrelated individual at an unrelated time; and (4) failing to file a motion to reduce the sentence.

¶ 89 The amended petition alleged that the trial court had erred in the following ways: (1) failing to properly arraign defendant, specifically, failing to explain to him the nature of the offense and the possible sentence he faced if convicted; (2) failing to direct a verdict of not guilty at the close of the State's evidence; (3) allowing the introduction of the Tec-9 pistol into evidence; (4) allowing into evidence defendant's prior written statement; (5) allowing into evidence portions of the transcript of the audio recording; (6) allowing the transcript of the audio recording to go back to the jury; (7) not allowing the actual audio recording to go back to the jury; and (8) considering improper factors in aggravation, specifically, the fact that defendant was charged in Macon County case No. 01-CF-128, a case in which he ultimately was acquitted.

¶ 90 Defendant further alleged: "[I]t has become known that at least one if not several of the State's witnesses committed perjury while testifying in this matter."

¶ 91 Finally, defendant realleged all the claims in his *pro se* petition.

¶ 92 Attached to the amended petition, as exhibit No. 1, was the transcript of a hearing on a motion to suppress a confession. The hearing occurred on November 20, 2003, and it was in Macon County case No. 03-CF-588, in which Michael Nixon was the defendant.

¶ 93 In this suppression hearing, Nixon testified that while he was in the Logan County jail on charges of attempt (murder) and stealing a car—charges arising from a high-speed chase on the interstate highway—he heard about Stephen May's murder on the news. He telephoned the Decatur police department and said he had information about the murder. Actually, he had no such information, but because of his acquaintance with the Gangster Disciples, he believed he would be

able to obtain information. The Decatur police sent Carpenter over to talk with him. That was the first time Nixon ever met Carpenter.

¶ 94 For three days, Nixon and the Decatur police followed a routine. In the daytime, the Decatur police picked him up from jail, put a wire on him, and let him loose on the streets, and at night they put him back in jail. Nixon testified:

> "Then they found out I knew what I was talking about. They got me released from jail. I was going around specific individuals trying to gain information about the murder of Steven May.
>
> During this time I was a drug addict. And I used to always tell them I need some drugs, some crack or whatever. And it was on the Steve murder and Micha[e]l May—on the Steven May, Michael Williams case, it is plenty times while I am in the custody of the Decatur department—Decatur Police Department, and I am actually smoking crack, smoking weed and drinking. And it is on these tapes and these detectives knew that and they just didn't care, they just wanted me to get the information."

¶ 95 Years later, on May 16, 2003, Nixon was arrested again, in Macon County case No. 03-CF-588, and a detective named Henderson came to interview him. Nixon would not talk with Henderson, because he did not trust him; he would speak only with Carpenter, whose nickname apparently was "Butch."

¶ 96 Nixon telephoned Carpenter at home on May 17, 2003. Nixon testified:

> "A. His wife answered the phone. I spoke with her for a few

minutes. She went and got Butch. I told Butch, uh, he said, 'I heard they was looking for you.' And I said, 'Yeah, they got me now.' He said, 'Well, what's it all about, Mike,' and I started telling him about the case, and I said, 'Man, you know, I got some things for you,' meaning information. He said, 'Yeah.' And let it be known that I never told him nothing that wasn't real. Anything that I told him it was like gold. So, he was always interested. I never knew a police that wasn't interested in information."

¶ 97 Carpenter came to the Macon County jail and talked with Nixon on May 21, 2003 (this was about 9 months after defendant's trial in the present case). Defense counsel asked Nixon:

"Q. And Detective Carpenter stated that he could get you a deal for ten years?

A. And everything that I come through with him, meaning a drug bust or raid or whatever, they deduct something off of that ten years and ultimately end up with some drug treatment."

¶ 98 Nixon then gave Carpenter some information about some drug-selling and gun-selling in Chicago as well as a possible terrorist plot being hatched there. Then, in return for his promise to "help" Nixon, Henderson persuaded Nixon to admit being involved in some crimes with which he actually had nothing to do—or so Nixon testified in the suppression hearing.

¶ 99 On cross-examination, the prosecutor asked Nixon:

"Q. When you were released from the Logan County Jail, did the officers and the judge do that out of the goodness of their heart or

was there some negotiation there?

A. It was for me to get gang information on the murder of Steven May.

Q. All right. Did you testify in front of a Federal grand jury about the Steven May murder?

A. I testified about that murder and other things that I did not know about but I was supposed to talk about by Carpenter and Trevor and some other Federal agent. If we was to go over those records you will find out I was in custody at the time to the statement that I made, but I was induced by the one, again, who I would do anything for.

Q. Sir, what you are telling us is that, are you admitting that you lied in front of a Federal grand jury?

A. I lied in Federal grand jury, and I lied in State murder cases for that man. That's what I am telling you.

Q. Why did you lie?

A. Because that was the one that was getting me out of prison. As he said, he then went to Springfield and had me released from prison. They called from Colorado and had my time cut from prison.

Q. So, what we have established then, Mr. Nixon, is that you are willing to lie to help yourself out?

A. Uh.

Q. Is that correct?

A. If that's—if that what you—if you was helping me out, and I was an informant for you, sure. But that's not what we are talking about. I am telling you my past history.

Q. Mr. Nixon, so we are clear, you are willing to lie to help yourself out of a bad situation?

A. I am willing to do what the police ask me to do on an individual to help myself; and whether it was to lie to help the police, I didn't care, I was a drug addict, and I was trying to get out to get some drugs, and they was helping me and giving me drugs.

Q. Didn't you indicate during your direct examination, Mr. Nixon, that everything that you told Officer Carpenter and the other officers was in your words 'gold?'

A. If I said you better believe it.

Q. All right. So, if it were—how could it both be a lie and gold, Mr. Nixon?

A. Because I am on the streets. See, if we wouldn't have had this conversation right now, people wouldn't know I was an informant. So, I have a lot of influence on people and things that I do. And they know that. So, if they needed to know something or they wanted something, they get me."

¶ 100 3. *The Second-Stage Dismissal*

¶ 101 On February 19, 2008, the trial court granted the State's motion to dismiss defendant's

amended petition for postconviction relief. The court held that defendant's claims either were barred by *res judicata* or they failed to make a substantial showing of a constitutional violation.

¶ 102 In so holding, the trial court concluded that the letters from Nixon and the transcript of the suppression hearing of November 13, 2003, in Nixon's case (Macon County case No. 03-CF-588) did not qualify as supporting documentation for purposes of a postconviction petition. The court stated:

> "1. In the January 1, 2004 notarized statement, Mr. Nixon never recanted his testimony at trial.
>
> 2. The statement dated November 13, 2003 is not an affidavit and is not supported by records or other evidence supporting its allegations. Further, there is a failure to state why the same are not attached in violation of 725 ILCS 5/122-2. The purported statement of November 13 is not well pled, and therefore cannot be taken as true, for purposes of ruling on the State's motion to dismiss. In *People v. Enis*, 194 Ill. 2d 361 the court held that a claim of failure to investigate and call a witness must be supported by an affidavit from the proposed witness. In *People v. Harris*, 224 Ill. 2d 115, the court upheld a summary dismissal of a post conviction petition in a situation where the trial court found that written statements did not qualify as affidavits because the[y] were unsigned. In the case at bar, the November 13 written statement likewise does not comply with 5/122-2."

¶ 103 II. ANALYSIS

¶ 104 On the authority of *People v. Smith*, 352 Ill. App. 3d 1095 (2004), defendant contends that the trial court erred by holding Nixon's two letters and his testimony in the suppression hearing to be invalid as supporting materials for purposes of a postconviction petition.

¶ 105 *Smith*, however, never held unsworn correspondence to be a permissible attachment to a postconviction petition. Section 122-2 of the Post-Conviction Hearing Act (725 ILCS 5/122-2 (West 2006)) provides that the "petition shall have attached thereto affidavits, records, or other evidence supporting its allegations." An affidavit is a sworn statement. If section 122-2 requires sworn statements, then by implication it excludes unsworn statements unless the statement is a "record."

¶ 106 Under the doctrine of *ejusdem generis*, if a statutory clause specifically describes several classes of things and then more generally includes "other things," the "other things" are to be understood as things resembling those specifically described. (Internal quotation marks omitted.) *People v. Davis*, 199 Ill. 2d 130, 138 (2002). Thus, if the "other evidence," to quote section 122-2, is a statement by a witness, the statement must resemble an affidavit: it must be sworn. 725 ILCS 5/122-2 (West 2006). "In the absence of such an affidavit"—or a statement under oath—"a reviewing court cannot determine whether the proposed witness could have provided testimony or information favorable to the defendant, and further review of the [postconviction] claim is unnecessary." *People v. Enis*, 194 Ill. 2d 361, 380 (2000).

¶ 107 Nixon's testimony in the suppression hearing presumably was under oath, and so defendant is correct that the transcript is a type of document that, under section 122-2, could support a petition for postconviction relief. The problem, though, is that defendant does not go on to address

the ultimate, crucial question of "So what?" Having established that a transcript of a suppression hearing is, under section 122-2, an acceptable type of document to attach to a postconviction petition, defendant has only begun to make his argument. He then must proceed to convince us that, contrary to the trial court's decision, his amended petition and accompanying documentation made a "substantial showing of a constitutional violation." *People v. Edwards*, 197 Ill. 2d 239, 246 (2001).

¶ 108 Such an argument would entail (1) identifying the relevant claim in the amended petition; (2) explaining, on the basis of cited authorities, how that claim is a constitutional claim—in other words, invoking the applicable legal theory; and (3) explaining how the transcript of the suppression hearing corresponds to the elements of that legal theory. In his brief, defendant does not clearly do (1), (2), and (3).

¶ 109 We can think of two different legal theories a defendant might raise in a postconviction proceeding if, as it turned out, a State's witness had lied in the trial. One theory might be actual innocence: the revelation that the State's witness lied totally vindicates, or definitively exonerates, the defendant of the offense of which he or she was convicted (*People v. Collier*, 387 Ill. App. 3d 630, 636 (2008)). Because Nixon was not the only witness who implicated defendant and because "recantations are regarded as inherently unreliable" (*People v. Beard*, 356 Ill. App. 3d 236, 242 (2005)), we assume defendant does not mean to raise a theory of actual innocence.

¶ 110 Another possible legal theory is the State's knowing use of perjured testimony. "The State's knowing use of perjured testimony to obtain a criminal conviction constitutes a violation of due process of law." *People v. Diaz*, 297 Ill. App. 3d 362, 372 (1998). But where, in the amended petition, does defendant allege that the State knew Nixon was perjuring himself in defendant's trial? "Any claim of substantial denial of constitutional rights not raised in the original or an amended

petition is waived," *i.e.*, forfeited. 725 ILCS 5/122-3 (West 2006).

¶ 111 Setting aside the question of whether the State's knowing use of perjured testimony is even pled, it is unclear how the transcript of the suppression hearing substantiates the elements of that legal theory. "The law is well settled that a prosecutor cannot knowingly use, or allow to go uncorrected, perjured testimony *that goes to the substance of a witness's testimony or to facts that bear on the witness's credibility*." (Emphasis added.) *Diaz*, 297 Ill. App. 3d at 372. If indeed Nixon lied in defendant's trial, *what, precisely, did he lie about*? Did the lie go to the substance of his testimony or to some fact relevant to his impeachment? See *id.*

¶ 112 In the transcript of the suppression hearing, the closest Nixon comes to saying he lied in defendant's trial is in the following testimony:

> "Q. All right. Did you testify in front of a Federal grand jury about the Steven May murder?
>
> A. I testified about that murder and other things that I did not know about but I was supposed to talk about by Carpenter and Trevor and some other Federal agent. If we was to go over those records you will find out I was in custody at the time to the statement that I made, but I was induced by the one, again, who I would do anything for.
>
> Q. Sir, what you are telling us is that, are you admitting that you lied in front of a Federal grand jury?
>
> A. I lied in Federal grand jury, and I lied in State murder cases for that man. That's what I am telling you."

¶ 113 Was defendant's case one of the "State murder cases" in which Nixon lied? If so,

what exactly were the lies? It is impossible that Nixon's entire testimony in defendant's case was a lie from start to finish. And if we interpret Nixon as testifying that he lied in defendant's case, how do we square that interpretation with Nixon's simultaneous insistence that everything he told Carpenter was "real" and "like gold" such that, if Nixon said it, "you better believe it"?

¶ 114 In sum, the most the suppression hearing establishes is that, in defendant's trial, Nixon *maybe* lied about *something or other*. In our *de novo* review, we do not find this to be a " '*substantial* showing of a constitutional violation.' " (Emphasis added.) *People v. Gacho*, 2012 IL App (1st) 091675, ¶ 16.

¶ 115 III. CONCLUSION

¶ 116 For the foregoing reasons, we affirm the trial court's judgment.

¶ 117 Affirmed.