

¶ 4

BACKGROUND

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In January, 1996, the defendant, Gerrodo Forest, was charged with first-degree murder while committing an armed robbery. On April 30, 1996, the defendant filed a motion for psychological evaluation. On May 1, 1996, he filed a motion to determine fitness to stand trial. On September 16, 1996, the defendant filed an amended motion to determine fitness to stand trial. On September 24, 1996, and October 23, 1996, the State filed motions for psychiatric evaluations. On October 23, 1996, the court granted the State's motions.

¶ 6

In a letter dated July 3, 1996, Dr. Daniel Cuneo, a clinical psychologist, wrote to the trial court that pursuant to court orders, he evaluated the defendant for the purpose of establishing his fitness to stand trial and his sanity at the time of the trial. Dr. Cuneo performed the Wechsler Adult Intelligence Scale - Revised test on the defendant and found, consistent with past intellectual assessments, that he was in the mildly mentally retarded range of intelligence. The defendant's vocabulary was extremely limited and he did not know the meaning of words such as ship or repair. His general information was also severely limited as evidenced by the fact that he did not know in what direction the sun rose, or how many months are in a year. He had difficulty with simple math problems and could not subtract 6 from 10. He had limited short-term memory, attention, and concentration. On the digit span subtest he could only accurately repeat back four numbers forward and two numbers backwards.

¶ 7

Dr. Cuneo noted that during his stay at the St. Clair County jail, the defendant tried to swallow a spoon and tried to hang himself twice. When the defendant turned his anger outward, he struck out at others, attacked an officer, and had to be placed

in the "Quiet Room." He beat his head against a wall in the "Quiet Room." Dr. Cuneo diagnosed the defendant with antisocial personality disorder.

¶ 8 Dr. Cuneo opined that the defendant was fit to stand trial. He noted that the defendant had an extremely limited vocabulary and suggested that sentences be kept simple and concepts broken down so that the defendant could understand them. He recommended special provisions be taken to assist the defendant at trial. He suggested periodically checking to be sure the defendant grasped the questions asked and the answers given.

¶ 9 On January 29, 1997, the court held a jury trial to determine whether the defendant was fit to stand trial. The jury was unable to reach a verdict, and the trial court declared a mistrial. On February 27, 1997, there was another jury trial to determine the fitness of the defendant to stand trial. Dr. John Rabun, a forensic psychiatrist, testified that he evaluated the defendant to determine his fitness to stand trial, his ability to proceed to court, and his mental state at the time of the charged offense. He stated that the defendant was in the mild to moderate range of mental retardation, that he had a history of alcohol and drug use, and that he heard voices. Dr. Rabun testified that during his interview with the defendant, the defendant often provided only one-word answers, had difficulty articulating certain words, and had restricted facial expressions. The defendant told Dr. Rabun that he had been hearing voices, but that since being placed on medication in jail, the voices disappeared or diminished in their intensity. Dr. Rabun opined that although the defendant had a mental defect, the mental defect did not render him incapable of standing trial. He elaborated that the defendant was able to understand the nature and purpose of the proceedings against him and was able to assist his attorney in his own defense. He stated that there was no need to diagnose the defendant with a psychotic disorder

because auditory hallucinations are commonly found in people with mental retardation. The jury found the defendant fit to stand trial.

¶ 10 On April 23, 1997, the trial court granted the defendant's motion for an evaluation to determine whether he understood his *Miranda* rights. Dr. Cuneo was appointed to evaluate the defendant's psychological, mental, emotional, and psychological status to determine whether he understood and appreciated his *Miranda* rights. Dr. Cuneo wrote a letter dated May 29, 1997, to the trial court setting out the results of his evaluation. Dr. Cuneo noted that the defendant is basically illiterate and cannot recognize all the letters of the alphabet. The results from the reading subtest of the Wide Range Achievement Test 3 showed that he scored at the kindergarten level. He could not read simple words such as cat or book and could not identify the letters V and Q. Dr. Cuneo asked the defendant to tell him the meaning of key words on the *Miranda* rights form, and he was unable to do so. He could not define words such as silent, statement, offense, executed, or appointment. When Dr. Cuneo read the rights to the defendant he could not explain them. He could not read the confession he had signed to Dr. Cuneo.

¶ 11 On October 1, 1997, the trial court heard the defendant's motion to suppress his confession. Dr. Cuneo testified that the defendant is mentally retarded with a full scale I.Q. of 56. He said that cognitively the defendant functions like a nine-year-old. He further stated that when the defendant is placed under stress, his abilities lessen, and he would be "more willing to admit to things, agree to things, try to acquiesce to people" in authority. Dr. Cuneo testified that the defendant cannot read and that because of his mental retardation, he could not knowingly and intelligently waive his *Miranda* rights. The trial court found that the defendant could not and did not knowingly and intelligently waive his *Miranda* rights, and as a result, suppressed his

confession.

¶ 12 On October 15, 1997, the defendant filed a motion for trial with special provisions and assistance. Attached to the motion was a letter from Honey Maggio, a consultant with Special Education Support Services, stating that she was willing to provide the defendant with the needed assistance. Following a hearing on the motion, the court found that it was not necessary to appoint someone to assist the defendant because, despite his intellectual limitations, it was not a situation where special provisions were needed to make him fit to stand trial. The motion was denied.

¶ 13 Following a jury trial, the defendant was found guilty of first-degree murder. On December 1, 1997, the defendant filed a motion to reconsider, to dismiss, for judgment notwithstanding the verdict, or in the alternative a motion for new trial. On December 31, 1997, the defendant was sentenced to 45 years' imprisonment. On the same day, following a hearing on the defendant's posttrial motion, the trial court denied the motion.

¶ 14 The defendant filed an appeal, and on August 26, 1999, this court affirmed the conviction and sentence. The mandate issued on December 30, 1999. On May 3, 2004, the defendant filed a *pro se* postconviction petition alleging he was denied effective assistance of counsel in violation of his constitutional rights, and that his arrest was without probable cause. On the same date he filed a motion for appointment of counsel. Counsel was appointed, and the defendant was granted leave to file an amended postconviction petition. The defendant's appointed counsel filed an amended postconviction petition alleging due process and equal protection violations and ineffective assistance of appellate counsel. On March 27, 2007, the State filed a motion to dismiss the amended postconviction petition on the grounds that it was untimely, that the allegations were forfeited for not having been raised on

direct appeal, and that the defendant failed to show that appellate counsel's failure to raise certain issues was objectively unreasonable and that the decision prejudiced him.

¶ 15 On May 2, 2007, defense counsel filed a second amended petition for postconviction relief. The defendant alleged various due process and equal protection violations including that the trial court improperly denied the petition for special assistance for the defendant at trial, that it improperly denied the posttrial motion raising the issue of denial of assistance, and that he was denied effective assistance of appellate counsel because his counsel failed to raise all issues ripe for appeal. On the same day the defendant filed a petition for a mental examination arguing that he lacked sufficient mental faculties to assist in his defense and that the trial court's denial of his petition for special assistance was improper. He also argued that the delays in filing his petition for postconviction relief were occasioned by his mental disabilities. The defendant alleged that a mental examination was required in order for the court to make a knowing determination of these issues.

¶ 16 The defendant's affidavit filed with the amended postconviction petition and petition for mental examination alleged that he suffers from severe mental limitations and lacks the ability to formulate a postconviction petition and the other necessary documents without assistance, that he was unable to secure assistance for the purpose of preparing a postconviction petition until 2004, that he filed his postconviction petition as soon as was practicable, and that the delays in filing were not the result of any culpable negligence on his part.

¶ 17 On June 1, 2007, the State filed a motion to dismiss the second amended petition for postconviction relief, alleging that the defendant's postconviction petition was untimely. It further argued that the defendant was evaluated prior to trial and

found fit to stand trial, and that the defense cited no case law to support the proposition that the defendant's current mental status bears any connection to whether the trial court's denial of his petition for special assistance denied him due process and equal protection or that he lacked culpable negligence. The State alleged that the defendant's allegations were forfeited because he did not raise them on appeal. It further argued that the allegations of ineffective assistance of appellate counsel did not satisfy the test set out in *Strickland v. Washington*, 466 U.S. 668 (1984).

¶ 18 On July 30, 2007, the trial court heard the defendant's motion for a mental examination. The defendant testified that he can read "a little bit." He stated that when he first went to prison he was tested and ordered to attend school. He began "feeling sick in the brain" and hearing voices and was taken out of school and placed in segregation, where he was placed on psychotropic medication. The defendant said that the medication helps control the voices, but does not eliminate them. He testified that once he was in segregation, he was not allowed to go to the law library. He testified that the following occurred immediately after his appeal was denied: "I was sick bad, and I wasn't worrying about no library at the time. When I got on medication and started being proper, right, that's when I started back trying to get to the library." Once he was on medication and started feeling "proper," he started trying to go to the library. The defendant testified that between 2001 and 2004, when he filed his postconviction petition, he was in "south mental." He stated that he asked if he could go to the library to work on his case, but was refused, so he started asking other inmates if they could help him. He stated that he tried continuously to find some assistance. The defendant stated that he finally found an individual named G. Money to prepare his postconviction petition. He stated that the postconviction petition was in G. Money's handwriting. The court granted the defendant's petition for a mental

examination and appointed Dr. Cuneo to examine him to determine whether he was able to assist in his defense as to his postconviction proceedings.

¶ 19 On October 12, 2009, the court heard the State's motion to dismiss. Dr. Cuneo testified that he examined the defendant on July 21, 2008, to determine his ability to assist in his defense during the postconviction proceedings. He stated that he also examined the defendant on May 30, 1996, and June 27, 1996, to determine his fitness to stand trial and his sanity at the time of the alleged offense, and on May 28, 1997, to determine his ability to waive his *Miranda* rights. Dr. Cuneo testified that the defendant is mentally retarded, is unable to read and write, and suffers from psychological problems. He stated that the defendant has an extremely low frustration tolerance level and decompensates into anger when put under even minimal stress. Medication has helped with that issue. Dr. Cuneo testified that when the defendant turns his frustration inward, he becomes suicidal and depressed. He stated that the defendant had made numerous suicide attempts, including swallowing a spoon while in St. Clair County jail, trying to hang himself in 1999 in Menard, and trying to burn himself to death in 1999 while in Stateville. Dr. Cuneo testified that in 2002 and 2003, the defendant was placed on forced medications, and since then he has not had any more suicide attempts. Dr. Cuneo explained that because the defendant experiences hallucinations, he has difficulty differentiating between his hallucinations and reality.

¶ 20 Dr. Cuneo testified that the defendant would not have the ability to prepare and file a legal document on his own. He felt that the defendant's mental instability coupled with the fact that he is illiterate and has the intellectual abilities of a nine-year-old would necessitate assistance in preparation of a postconviction petition. Dr. Cuneo testified that, with respect to the defendant's illiteracy, he would not be able to

read or write a postconviction petition. He stated that even if he could read and write a postconviction petition, the defendant lacks the cognitive skill to prepare such a document. Dr. Cuneo opined that from the time the defendant was incarcerated until the time of the hearing, the defendant's ability to prepare and file legal documents would have been substantially impaired.

¶ 21 Dr. Cuneo testified that when he initially evaluated the defendant, he recommended that the defendant have help during his trial. He felt that vocabulary would need to be kept simple and that periodic checks would need to be made to make sure that the defendant grasped what was being asked and being said. Dr. Cuneo stated that he would recommend that the same precautions be taken with respect to the postconviction proceedings. The trial court took the matter under advisement.

¶ 22 On July 6, 2010, the trial court found that the defendant's postconviction petition was untimely. The court further found that the defendant's inability to file his petition in a timely manner was due to his acting out aggressively which caused him to be in segregation rather than by any innate mental handicap from which he suffers. The court found that although the defendant is mildly mentally retarded and psychotic, he is mentally fit. The court noted that in October 1997, the defendant filed a *pro se* motion to suppress. The court found that the defendant was capable of filing some sort of pleading, even if very rudimentary, to put the court on notice that he was dissatisfied with the trial proceedings. The court concluded that the defendant's delay in filing his postconviction petition was due to his culpable negligence. The court granted the State's motion to dismiss the second amended postconviction petition. The defendant filed a timely notice of appeal.

¶ 23

ANALYSIS

¶ 24 The defendant argues that the trial court erred in dismissing his postconviction petition without an evidentiary hearing because the delay in filing the petition was not due to culpable negligence. The Illinois Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 to 122-8 (West 1996)) provides a mechanism by which criminal defendants can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution. 725 ILCS 5/122-1 (West 1996). The petition must be filed no more than three years from the date of conviction. 725 ILCS 5/122-1(c) (West 1996). The adjudication of the petition is a three-stage process. *People v. Boclair*, 202 Ill. 2d 89, 99 (2002). In the first stage, the trial court determines whether the petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 1996). At this stage, the trial court makes an independent assessment as to whether the allegations in the petition, liberally construed and taken as true, set forth a constitutional claim for relief. *Boclair*, 202 Ill. 2d at 99. If the petition states the gist of a constitutional claim, it advances to the second stage, and the court may appoint counsel to represent an indigent defendant. *Id.* at 100. Counsel will have the opportunity to amend the petition. *Id.* The State may then file a motion to dismiss the petition. 725 ILCS 5/122-5 (West 1996). If the State does not file a motion to dismiss or the motion is denied, the trial court proceeds to the third stage and will conduct an evidentiary hearing on the merits of the petition. 725 ILCS 5/122-6 (West 1996).

¶ 25 In the instant case, the State filed a motion to dismiss the defendant's postconviction petition as untimely. The trial court granted the State's motion. A trial court's dismissal of a postconviction petition without an evidentiary hearing is reviewed *de novo*. *People v. Walker*, 331 Ill. App. 3d 335, 339 (2002).

¶ 26 The defendant argues that he lacked culpable negligence in filing his

postconviction petition late. A defendant who files an untimely postconviction petition can maintain his request for relief provided he can show that the delay in filing was not due to his culpable negligence. 725 ILCS 5/122-1(c) (West 1996). Culpable negligence is something more than negligence—it involves a conscious choice to follow a course of action in disregard of the consequences. *Bocclair*, 202 Ill. 2d at 106. Culpable negligence is defined as something akin to recklessness. *People v. Rissley*, 206 Ill. 2d 403, 420 (2003). This ensures that the statutory language permitting a defendant to file an untimely petition, so long as he alleges facts showing that the delay was not due to his culpable negligence, does not stand for empty rhetoric. *Id.* "Rather, the definition gives heft to the exception contained in section 122-1, an exception which this court has historically viewed as a 'special safety valve' in the Act." *Id.* This definition also comports with the long-held view that the Act should be construed liberally to allow a defendant to present questions of deprivation of a constitutional right. *Id.* at 421. Whether a defendant lacks culpable negligence is a fact-specific determination that must be made on a case-by-case basis. *People v. Lander*, 215 Ill. 2d 577, 589-90 (2005).

¶ 27 The defendant alleges that he was not culpably negligent when he filed his petition late because, due to his mental retardation and psychological issues, he was unable to prepare a postconviction petition without assistance, and he was unable to obtain assistance because he was in segregation. Dr. Cuneo testified that the defendant has an I.Q. of 56 and has the intellectual abilities of a nine-year-old. He stated that the defendant is basically illiterate and, in a letter dated May 29, 1997, noted that the defendant could not identify the letters V and Q and could not read simple words such as cat or book. He said that when the defendant is under stress he decompensates and functions at a level lower than his I.Q. He further stated that the

defendant would not be able to read or write a postconviction petition and that even if he could, he lacked the cognitive skill to prepare such a document.

¶ 28 In addition to the defendant's severe intellectual limitation, he suffers from psychological issues. Dr. Cuneo testified that the defendant tried to swallow a spoon while in the St. Clair County jail, and that he tried to hang himself and burn himself to death in 1999. Dr. Cuneo stated that the defendant's psychotic episodes caused him to cut himself, strike out at others, and refuse to take his medication. Dr. Cuneo testified that the defendant acted out because he had an extremely low frustration tolerance level and because he was having auditory hallucinations. He stated that individuals who function at the defendant's intellectual level have a much lower frustration tolerance level than those operating with a normal intellectual level. He diagnosed the defendant with an antisocial personality disorder and borderline personality traits. He stated that the defendant was not stabilized until 2003. Dr. Rabun testified that the defendant experienced auditory hallucinations, but that they had diminished in their intensity since being put on medication. Dr. Rabun noted that the defendant had difficulty controlling his behavior when off of medication.

¶ 29 Dr. Cuneo testified that, given the defendant's mental retardation and mental instability and the fact that he is illiterate, his ability to file a postconviction petition would have been substantially impaired from the time he was incarcerated. As a result of his intellectual limitations, the defendant was reliant on finding assistance to prepare a postconviction petition. This reliance was reasonable given the fact that he can only read at a kindergarten level and has the mental capacity of a nine-year-old. Furthermore, his mental illness was not stabilized until 2003.

¶ 30 The State cites *People v. Lansing*, 35 Ill. 2d 247 (1966), in support of its argument that lack of education and lack of experience with legal proceedings will not

excuse a defendant from timely filing a postconviction petition. In *Lansing*, the defendant filed an untimely postconviction petition and argued that the limitation period was not applicable because he was not culpably negligent. *Id.* at 248. The court noted that the defendant did not make any allegations attempting to explain the delay in his petition, nor did he request leave to amend once the State filed a motion to dismiss. *Id.* The court found that because the burden was on the defendant to allege facts excusing the delay in filing but he failed to do so, there was no question of culpable negligence before the trial court. *Id.* The defendant first claimed, in a petition for writ of error, that because he had been raised in an orphanage, did not finish sixth grade, and was not familiar with the law, he was not guilty of culpable negligence. The court found, "Even if these allegations could properly be considered we are of the opinion that they are insufficient to demonstrate a lack of culpable negligence." *Id.*

¶ 31 The State argues that pursuant to *People v. Montgomery*, 45 Ill. 2d 94 (1970), mental illness is not sufficient to show a lack of culpable negligence for filing a late postconviction petition. In *Montgomery* the court stated that it examined several psychiatric classification reports and "special progress" reports which "generally indicate a condition of mental disturbance." *Id.* at 96. The court continued, "[I]t does not appear that defendant was incapable of exercising reasonable diligence in his pursuit of relief, and thus we do not find a sufficient showing that defendant's delay was due to causes other than his culpable negligence." *Id.*

¶ 32 The State also cites *People v. Diefenbaugh*, 40 Ill. 2d 73 (1968), for the proposition that lack of education and lack of experience with legal proceedings will not excuse a defendant from timely filing a postconviction petition. In *Diefenbaugh*, the defendant, after the State filed a motion to dismiss his postconviction petition as

untimely, amended his postconviction petition to allege that his delay in filing the petition was not due to his culpable negligence. *Id.* at 74. He argued that he was excused from culpability because he had only completed six grades of school and was not aware of the law regarding postconviction proceedings, that he was incarcerated during the limitations period and did not have the funds to hire an attorney, and that counsel was not appointed for him until the limitations period had run. *Id.* The court found, "None of these reasons are sufficient to demonstrate a lack of culpable negligence on the part of the petitioner and he does not rely upon them on this appeal." *Id.*

¶ 33 The instant case is distinguishable from *Lansing*, *Montgomery*, and *Diefenbaugh*. The decisions in *Lansing* and *Diefenbaugh* did not rest on a determination of culpable negligence resulting from lack of education. Additionally, the defendants in *Lansing* and *Diefenbaugh* both had limited education, but nothing in the opinions indicates that, like the defendant, they were mentally retarded or able to read at only a kindergarten level. The defendant in *Montgomery* had a mental disturbance, but other than stating that the defendant's condition did not render him incapable of exercising reasonable diligence in pursuit of postconviction relief, the court does not indicate how the mental disturbance affected the defendant. None of the defendants in *Lansing*, *Montgomery*, or *Diefenbaugh* suffered from both mental retardation and mental illness. It is the combination of mental retardation, mental illness, and being illiterate that prevented the defendant from preparing a postconviction petition without assistance.

¶ 34 The State argues that the defendant was prevented from filing his postconviction petition because he was in segregation due to his misconduct. The trial court found that the defendant's inability to file his postconviction petition in a

timely manner was caused by his aggressive acting out which resulted in him being placed in segregation, not by any innate mental handicap from which he suffers. Where a defendant is placed in segregation through no foreseeable fault of his own or is prevented from filing his postconviction petition for a period of time until and including the last day it may be timely filed, his failure to file in a timely manner is not culpable negligence. *People v. Scullark*, 325 Ill. App. 3d 876, 885 (2001). If the defendant was placed in segregation due to his own misconduct, then his failure to file in a timely manner due to his segregation status could constitute culpable negligence. *Id.* at 887.

¶ 35 Dr. Cuneo testified that the defendant's psychological problem and his mental retardation caused him to act in ways that resulted in him being placed in segregation. These issues cause the defendant to have a low frustration tolerance level and poor coping skills. His auditory hallucinations also caused him to act out. Dr. Cuneo testified that while the defendant was having hallucinations, he would have difficulty distinguishing reality from hallucinations. The State argues that had the defendant taken the medicine available to him, he would have had the opportunity to timely file his petition. It argues that because the evidence shows that the defendant refused to take antipsychotic medication which would have stabilized his mental condition and kept him out of solitary confinement, he cannot claim a lack of culpable negligence. This assumes that the defendant was of a rational mind and that the medicine would have stabilized the defendant's condition quickly. There is no evidence in the record to explain why the defendant did not take medication to control his hallucinations. Dr. Cuneo testified that the defendant was on a regimen of forced psychotropic drugs in 2002 and 2003 and that his condition did not stabilize until 2003. Both the defendant and Dr. Cuneo testified that even though the defendant was on medication,

he continued to hear voices. Clearly the defendant's mental condition was not easy to stabilize. The defendant's mental retardation and psychological problems caused him to be placed in segregation.

¶ 36 The defendant testified that once he went to prison he started "feeling sick in the brain" and hearing voices. He stated: "I caught a ticket for flooding the gallery. The reason why I flooded the gallery because I was hearing voices, and they took me to seg., and ever since I've been in seg." He stated that he had been in segregation and the infirmary since 1998, which affected his ability to file a postconviction petition. The defendant testified that after he received the last letter from the appellate court he "was sick bad, and [he] wasn't worrying about no library at the time." He stated that once he started taking medication and "started being proper" he asked to go to the law library, but was told that he could not go. He stated that he tried continuously to find someone to help him. Finally, G. Money came to "south mental" and the defendant spoke to him about helping. G. Money then prepared a postconviction petition for the defendant. The defendant did not act recklessly, but rather actively sought help in filing a postconviction petition.

¶ 37 The court noted that the defendant filed a *pro se* motion to suppress on October 31, 1997. It found that the defendant was capable, between August 1999 and May 2004, of filing a rudimentary pleading to put the court on notice that he was dissatisfied with trial proceedings. There is nothing in the record that illuminates who prepared the motion to suppress. Given that the defendant is illiterate with a kindergarten reading level, and unable to identify all the letters of the alphabet or read the word cat, there is no indication that he could prepare a petition that would state the gist of a constitutional claim. The State points to the fact that Dr. Cuneo testified that the defendant, in the three years after his conviction, would have been able to

