

No. 1-11-2687

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 93 CR 24272
)	
AGAPITA ALVAREZ,)	Honorable
)	Joseph G. Kazmierski, Jr.,
Defendant-Appellant.)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Justice Palmer concurred in the judgment.
Presiding Justice Gordon dissented.

ORDER

¶ 1 *Held:* Second-stage dismissal of defendant's postconviction petition affirmed where postconviction counsel provided reasonable assistance and defendant failed to make a substantial showing of actual innocence.

¶ 2 Defendant, Agapita Alvarez, appeals from an order of the circuit court of Cook County dismissing his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2002)) at the second stage of proceedings. He maintains that postconviction counsel provided unreasonable assistance by not consulting with him regarding why his petition was untimely filed, and the record fails to reflect counsel's compliance with Illinois Supreme Court Rule 651(c). Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). He also contends that he made a substantial showing of actual innocence based on the affidavit of a witness to the crime.

¶ 3 The record shows that defendant and his two brothers, Jose Alvarez and Daniel Alvarez, were charged with two counts of first degree murder, two counts of attempted murder, and two counts of aggravated discharge of a firearm. In addition, defendant was also charged with unlawful use of a weapon by a felon. The charges were based on a gang shooting that occurred at about 2 a.m. on September 26, 1993. The three men were tried together in a bench trial. We discuss the facts from the bench trial only to the extent necessary for the current appeal.

¶ 4 The trial began on May 31, 1997. Manuel Guzman testified that at approximately 1:30 a.m. on September 26, 1993, he was unloading disc jockey equipment from his car into his house located at 2851 West 21st Street. As he was removing a turntable, he felt one shot hit him in the back and then, as he tried to run, he felt two more shots in the back and fell to the ground. After Guzman hit the ground, he looked up. The shooter was "standing in front of [Guzman] still shooting" and then the shooter turned and looked at Guzman. Guzman looked at the shooter for a second or two. On October 3, 1993, the police showed Guzman six photographs and asked him to identify the shooter. Guzman ultimately identified Daniel Alvarez as the shooter, but in response to questioning, stated that he had picked out three photographs, Jose Alvarez, Daniel Alvarez, and defendant, because the three "all looked alike."

¶ 5 Officer Jerry Volk testified that at approximately 1:45 a.m. on September 26, 1993, he responded to a call regarding a shooting at 2851 West 21st. At the scene, Volk observed that Guzman and another man had been shot. After interviewing the victims and three other men present, Volk obtained a description of the vehicle used in the shooting, a four-door gray Buick with tinted windows and a possible license plate number of TVW 252. Volk also received a description of the shooters as two Hispanic males, one wearing a "dark hood and a long, black trench [coat]" with a goatee and mustache, and the other wearing dark clothing.

¶ 6 Mario Camacho testified that on September 26, 1993, he was sitting on an upper level patio with Jose Barajas and Barajas's girlfriend at 3404 West 25th Street, the corner of 25th and Homan Avenue. At approximately 2 a.m., Barajas screamed, "flakes, flakes," signifying the presence of a rival gang. Camacho went downstairs to see what was happening and Rene Frayre was behind Camacho. About 15 to 20 feet away, Camacho saw two men shooting at him and his friends. They fired "[a] lot" of shots. In court, Camacho identified defendant as one of the two shooters. He said:

"I was just looking [at] [the shooter] 'cause I was the closest one to him. When he turned around, the only person he seen was me. He was shooting at me. He left again. We started running. He stopped again. He turned back looked at me again, he started shooting at me. He didn't get me. That's when they jumped in the car."

Camacho testified that the men ran into a four-door gray car; one jumped in the front passenger seat and the other jumped in the back of the car. A third man was in the driver's seat of the vehicle. When Camacho returned to 25th and Homan, he discovered his friend Rene Frayre had been shot once in the head. When police officers arrived at the scene, Camacho was placed in a police car where he told the officers that the man that shot at him was approximately Camacho's height, skinnier than Camacho, wearing a short leather jacket, black pants, dark hair, dark complexion, and had a goatee. At 7:15 a.m. the same day, Camacho viewed a lineup at the police station and identified defendant as the shooter. At trial, Camacho was shown a photograph of the lineup he had viewed, and identified defendant as the person he had chosen in the lineup on September 26, 1993.

¶ 7 Officer Rapp testified that at around 2:00 a.m. on September 26, 1993, he responded to a call regarding the shooting at 3404 West 25th, and received a description of the vehicle used in the shooting from witnesses: a 1980s, two-door, dark gray Buick with tinted windows carrying three Hispanic males, one wearing a black leather jacket with dark hair.

¶ 8 Officer Arnaldo Rendon Jr. testified that at about 1:45 a.m., he responded to a call regarding a shooting at 2851 West 21st. Based on witness information, he and his partner were looking for a dark gray Buick with a possible license plate of TVW 252. While Rendon and his partner drove around the area, they received a flash message relating to a shooting on the 3400 block of 25th Street, about a mile away from 2851 West 21st, involving a dark-gray Buick with a possible license plate of TVM 295 with three offenders inside. About 15 or 20 minutes later, the officers observed a dark, two-tone dark gray and light gray, two-door Buick with license plate TVW 295¹ and three passengers double-parked at 2659 West 24th Street. When the Buick started driving toward the police car, the officers "curbed" the Buick and asked the driver to produce a driver's license. Rendon observed that the driver was visibly shaking, and all three men were mumbling and appeared to be nervous. The driver and passengers were asked to step outside the vehicle. Rendon testified that Jose Alvarez was the driver, and defendant and Daniel Alvarez were the passengers. A black jacket was retrieved from the gray car. More police cars arrived, and as Jose Alvarez was getting into a police car, defendant asked Rendon, "what's this about?" Rendon responded, "you know what you did" and defendant began running. Defendant was apprehended between five and ten minutes later.

¹ Later, upon redirect examination, Rendon was asked whether the actual plate of the car that he pulled over with the three defendants inside had a license plate of "TVM 295" and Rendon answered in the affirmative.

¶ 9 The parties also stipulated that if a representative of the secretary of state's office of the State of Illinois were called, he would testify that the license plate TVM 295 was registered to Jose Alvarez.

¶ 10 Defendant did not present any evidence. On June 10, 1997, the court found defendant guilty of the murder of Frayre and aggravated discharge of a firearm toward Camacho, and not guilty of all the remaining charges. As to the attempted murder charges, the court also specifically found that the State failed to prove the specific intent needed for the offense with respect to both Camacho and "Mr. Barajas, the person that did not testify." On October 8, 1997, the trial court sentenced defendant to 45 years in prison. Defendant's convictions and sentences were affirmed on direct appeal (*People v. Alvarez*, No. 1-98-0870 (2001) (unpublished order under Supreme Court Rule 23)), and the supreme court denied his petition for leave to appeal (*People v. Alvarez*, 196 Ill. 2d 547 (2001)).

¶ 11 On April 8, 2002, defendant filed the postconviction petition at bar, alleging, in pertinent part, that Barajas was at the scene of the crime and would testify that defendant was not one of the two shooters during the incident. Although he did not attach an affidavit from Barajas, defendant asserted that this evidence could be considered newly discovered, and requested that the court "recognize that prison is a difficult place from which to litigate, much less organize an affidavit from an individual he has no way of contacting, and the failure to submit to the Court the needed evidentiary submission is not due to his culpable negligence."

¶ 12 On April 26, 2002, defendant filed a *pro se* motion to amend his postconviction petition to include Barajas's affidavit. In that document, Barajas stated that he is an inmate in the Illinois Department of Corrections, and is housed at the Menard Correctional Center. On September 26,

1993, he "was present when the incident occurred and I observed the shooters before they fled the scene. [Defendant] was not one of the persons that I saw."

¶ 13 On August 26, 2003, the circuit court appointed the public defender to assist defendant with his petition. The State filed a motion to dismiss, contending that the petition was untimely, and that defendant offered no basis to show why the delay in filing was not due to his culpable negligence. The State further asserted that even if the court were to reach the substance of defendant's claim regarding Barajas's affidavit, the petition should be dismissed because it was not newly discovered.

¶ 14 On March 28, 2006, defense counsel sent defendant a letter detailing a number of issues with his postconviction petition. In particular, counsel explained that the late filing of the petition caused "a major statute of limitations problem in your case. Since you filed your *pro se* petition late, we have to explain why it was not filed on time. The judge can dismiss your petition if the delay in filing was due to your 'culpable negligence.' "

¶ 15 Thereafter, counsel went on medical leave, and defendant filed a number of *pro se* pleadings and requested new counsel. The case was transferred to another public defender, and, on December 22, 2009, counsel filed a Supreme Court Rule 651(c) certificate of compliance (Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984)) stating that he had reviewed defendant's postconviction petition, the trial record and direct appeal, and had "consulted with [defendant] by letters and by telephone on numerous occasions to ascertain his contentions and deprivations of constitutional rights." He concluded that defendant's petition "adequately presents his claims of deprivations of constitutional rights, thus, there is nothing that can be added by an amended or additional supplemental petition."

¶ 16 On May 20, 2010, the State filed an amended motion to dismiss, alleging that the petition was untimely and that defendant failed to show that he lacked culpable negligence. The State also contended that Barajas's affidavit contained no new information, and, at best, merely contradicted the trial testimony of Mario Camacho. The State further noted that Barajas had not stated that he would testify to the facts alleged in the affidavit.

¶ 17 On January 12, 2011, defendant filed a response asserting that he was not culpably negligent for the untimely filing of his petition because he was waiting for the disposition of his direct appeal, citing *People v. Paleologos*, 345 Ill. App. 3d 700 (2003). He further asserted that his claim of actual innocence was not subject to the statute of limitations under the Act. 725 ILCS 5/122-1 *et seq.* (West 2005). In the same pleading, defendant moved the court to file the amended affidavit of Barajas, in which he generally repeated the contentions of his 2002 affidavit, but added that, had he been contacted by defendant's attorney before trial, he "would have testified to the above statements[,] and that he was "willing to testify in a third-stage postconviction proceeding" regarding the contents of his affidavit. This affidavit was filed on March 24, 2011.

¶ 18 On August 25, 2011, arguments were presented by respective counsel. The circuit court then granted the State's amended motion to dismiss defendant's petition, finding that the petition was untimely and that defendant had not provided an excuse for the delay. The court also found that the information in Barajas's affidavit was known to defendant at the time of trial, as Barajas was named as a witness to the offense in the reports and was referred to by defense counsel in post-trial proceedings.

¶ 19 In this court, defendant has filed a brief raising no arguments relating to the merits of his petition, but contends that postconviction counsel failed to comply with Supreme Court Rule

651(c) (Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984)) by not consulting with him regarding a reason for the untimely filing of his petition. Thereafter, defendant filed a motion for leave to file a supplemental brief on the merits of his actual innocence claim. This court granted defendant's motion and, in his supplemental brief, defendant contends that he made a substantial showing of actual innocence based on the affidavit of Barajas, requiring a remand for an evidentiary hearing.

¶ 20 We initially observe that, because defendant has concentrated his arguments solely on the assistance of his postconviction counsel and the claim of actual innocence based on Barajas's affidavit, he has abandoned the remaining arguments made in his postconviction petition and forfeited them for appeal. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008); *People v. Guest*, 166 Ill. 2d 381, 414 (1995).

¶ 21 Defendant first contends that postconviction counsel provided unreasonable assistance by failing to consult with him on the timeliness issue, and that the record fails to reflect counsel's compliance with Illinois Supreme Court Rule 651(c). He acknowledges that counsel filed a Rule 651(c) certificate, but contends, nonetheless, that counsel did not substantially comply with the requirements of the rule because he failed to consult with defendant regarding the untimeliness of his petition and failed to amend the *pro se* petition to overcome the resulting procedural bar. Defendant thus maintains that his case should be remanded for "fresh" second stage proceedings.

¶ 22 Under the Act, a defendant is only entitled to a reasonable level of assistance by counsel during postconviction proceedings. *People v. Moore*, 189 Ill. 2d 521, 541 (2000). To provide reasonable assistance, postconviction counsel must: (1) consult with the defendant either by mail or in person to ascertain his claims of deprivation of constitutional rights; (2) examine the trial record; and (3) amend the *pro se* petition where necessary for an adequate presentation of defendant's contentions. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984); *People v. Suarez*, 224 Ill. 2d 37,

42 (2007). When an attorney files a Rule 651(c) certificate, it creates a presumption that the defendant received the reasonable assistance required by the rule. *People v. Rossi*, 387 Ill. App. 3d 1054, 1060 (2009). The defendant has the burden to overcome the presumption by showing that postconviction counsel failed to substantially comply with Rule 651(c). *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19. We review an attorney's compliance with a supreme court rule *de novo*. *Id.* ¶ 18.

¶ 23 Here, we find defendant has not rebutted the presumption that postconviction counsel provided him with reasonable assistance. In coming to this conclusion, we find guidance from the supreme court in *People v. Perkins*, 229 Ill. 2d 34 (2007). There, the court-appointed postconviction counsel filed a Rule 651(c) certificate indicating that he met with the defendant in-person to ascertain the defendant's contentions of deprivation of constitutional rights, he examined the record, and he concluded that no amendment of the *pro se* petition was necessary. *Perkins*, 229 Ill. 2d at 38. The defendant's petition did not address timeliness and subsequently the State filed a motion to dismiss, arguing the petition was untimely. *Id.* At the hearing on the motion, postconviction counsel argued the merits of the defendant's petition and advanced a claim that the petition was filed within the applicable statute of limitations. *Id.* at 39. The trial court determined the petition was not timely filed and granted the State's motion to dismiss. *Id.* at 39-40. The appellate court vacated the petition's dismissal and remanded the matter to the trial court for further proceedings, concluding that postconviction counsel violated Rule 651(c) "because the record demonstrated he did not understand the filing deadline in the Act or the exception to the timeliness bar for lack of culpable negligence in the late filing." *Id.* at 40.

¶ 24 The supreme court granted leave to appeal and ultimately reversed the appellate court's decision. *Id.* at 52-53. The court first held that, under Rule 651(c), counsel is required to amend

an untimely *pro se* petition to allege any facts necessary to show that the delay was not due to the defendant's culpable negligence. *Id.* at 49. However, the court also found that, based on the record before it, counsel had provided reasonable assistance. *Id.* at 52. The court noted that counsel "in effect" argued the delay in filing was not due to the defendant's culpable negligence and determined that:

"Counsel's argument may not have been particularly compelling and his other arguments may have been legally without merit. Those factors, however, do not demonstrate that there was some other excuse counsel could have raised for the delay in filing. There is nothing in the record to indicate that petitioner had any other excuse showing the delay in filing was not due to his culpable negligence." *Id.* at 51.

¶ 25 Similarly here, in the response to the motion to dismiss and at the hearing on the motion, counsel "in effect" argued that defendant was not culpably negligent. Although the argument was not successful ultimately, nothing on the record shows that defendant had any other excuse showing the delay in filing was not due to his culpable negligence. Counsel filed a Rule 651(c) certificate stating that he "consulted with [defendant] by letters and by telephone on numerous occasions to ascertain his contentions and deprivations of constitutional rights" and, although counsel did not specifically state he consulted with defendant about the timeliness issue, Rule 651 does not require that counsel's certificate explicitly list and detail all of counsel's efforts. *People v. Jones*, 2011 IL App (1st)092529, ¶ 24. Under these circumstances, we find counsel substantially complied with Rule 651(c).

¶ 26 Defendant attempts to distinguish *Perkins* by noting that, in the present case, "unlike in *Perkins*, postconviction counsel was already on notice at the time of the filing of his Rule 651(c) certificate that the State would be asserting an untimeliness offense." Defendant argues that by addressing timeliness in his response to the State's motion to dismiss, counsel "effectively rendered the prior 651(c) certificate a nullity." However, defendant fails to cite any case law in support of this argument and the argument is therefore waived. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (the argument section of appellant's brief "shall contain the contentions of the appellant *** with citation of the authorities *** relied on").

¶ 27 In his supplemental brief, defendant argues that his petition makes a substantial showing of actual innocence based on the newly-discovered affidavit of Jose Barajas, who averred that defendant was not one of the two shooters. While defendant's petition was pending, the Act was amended to exempt claims of actual innocence from the limitations for timely filing a petition. 725 ILCS 5/122-1(c) (West 2004). Therefore, we will address defendant's claim of actual innocence.

¶ 28 The Act provides a procedural mechanism for criminal defendants to challenge their convictions or sentences based upon a substantial violation of their federal or state constitutional rights. *People v. Morris*, 236 Ill. 2d 345, 354 (2010). Where, as here, a petition survives the first stage of proceedings, the circuit court appoints counsel to represent defendant and the State may move to dismiss the petition. *People v. Harris*, 224 Ill. 2d 115, 126 (2007). In order to proceed to the third stage, where the circuit court conducts an evidentiary hearing, defendant must make a substantial showing of a constitutional violation. *Harris*, 224 Ill. 2d at 126. We review the circuit court's dismissal of a postconviction petition without an evidentiary hearing *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 29 To assert a claim of actual innocence based upon newly-discovered evidence, defendant must show that the evidence was: (1) newly discovered; (2) material and not merely cumulative; and (3) of such a conclusive character that it would probably change the result on retrial. *People v. Ortiz*, 235 Ill. 2d 319, 333-34 (2009).

¶ 30 Evidence is newly discovered when it has been discovered since trial and could not have been discovered sooner in the exercise of due diligence. *Ortiz*, 235 Ill. 2d at 334. Defendant claims that the evidence is newly discovered because he was unable to know that Barajas would affirmatively testify that defendant was not one of the shooters before he was able to secure his affidavit in 2002. Defendant acknowledges that the substance of Barajas's affidavit is "similar" to what counsel expected him to say in 1997, but maintains that, where he previously thought Barajas would be unable to identify him, he now knows that Barajas would affirmatively testify that he was not one of the shooters. Although defendant claims that this distinction makes the evidence "newly discovered," we find that, even if such a distinction exists, defendant has not met his burden of showing that the contents of Barajas's affidavit could not have been discovered sooner, had he exercised due diligence.

¶ 31 The record shows that defendant knew about Barajas before trial, because he was charged with his attempted murder, and he had access to police reports which included Barajas's interview at the scene. Further, defendant retained new counsel before sentencing, and, at the sentencing hearing, counsel specifically referred to Barajas and his expected testimony, and requested a continuance to investigate Barajas based on a belief that he would not identify defendant as one of the shooters. Defendant, however, did not file his amended postconviction petition attaching Barajas's affidavit until almost five years later.

¶ 32 Defendant now claims that "no amount of diligence" could have compelled Barajas, who had been charged with a homicide at the time of defendant's sentencing and did not want to implicate himself as a gang member, to come forward if he chose not to do so, citing *People v. Molstad*, 101 Ill. 2d 128, 135 (1984). There, the supreme court found that "the affidavits of codefendants attesting that the defendant was not present when the victim was assaulted satisfied the requirement of being 'newly discovered' notwithstanding defendant's awareness of the evidence before trial." *People v. Jones*, 399 Ill. App. 3d 341, 365 (2010) (citing *Molstad*, 101 Ill. 2d at 134-35).

¶ 33 In *Jones*, the defendant was convicted of first degree murder based on a gang-related shooting that resulted in the death of the victim. *Jones*, 399 Ill. App. 3d at 344, 351. Subsequently, the defendant filed a postconviction petition in which he alleged he was actually innocent based on the newly discovered evidence consisting of an affidavit from codefendant Melvin Jones and other witnesses. *Id.* at 353. In his affidavit, Melvin Jones stated that he was "solely responsible" for the murder of the victim, he had falsely accused the defendant of being his accomplice, and threatened the defendant or a close relative of the defendant with violence if the defendant did not admit to participating in the shooting. *Id.* The trial court summarily dismissed defendant's petition. *Id.* at 355.

¶ 34 On appeal, the reviewing court noted that "[a]n unbroken line of precedent holds that evidence is not newly discovered when it presents facts already known to a defendant at or prior to trial, though the source of those facts may have been unknown, unavailable or uncooperative." *Id.* at 364. The *Jones* court recognized the holding in *Molstad*, but still found that Melvin's affidavit did not constitute newly discovered evidence, recognizing that:

"[I]n *Molstad*, the affidavits were presented after the codefendants had been found guilty, but prior to sentencing. Therefore, the affiants put themselves at risk because their own credibility could be a factor in the assessments of their ultimate penalty. [Citation.] Conversely, here, Melvin Jones' affidavit was executed *** some 17 months after his own trial. Hence, his admissions could have no bearing upon his ultimate disposition." *Jones*, 399 Ill. App. 3d at 365.

¶ 35 Similarly here, Barajas was tried and convicted of first degree murder in 1999 in case number 97 CR 24542 and his conviction was affirmed by this court in May 2001. *People v. Barajas*, 322 Ill. App. 3d 541 (2001). The record shows no indication that defendant exercised due diligence to obtain Barajas's affidavit in the months immediately following Barajas's trial or direct appeal, when Barajas's statement would no longer have had a bearing on his ultimate disposition. Barajas's affidavit was not filed until April 2002. Unlike the affiants in both *Molstad* and *Jones*, here Barajas was not a codefendant in defendant's case; Barajas was a witness to the shooting rather than a participant in the shooting, and Barajas's testimony would not have implicated himself in this specific crime. Defendant's suggestion that Barajas could not be compelled to testify at his trial because he did not want to implicate himself as a gang member is a legal conclusion without support. See *People v. West*, 187 Ill. 2d 418, 425-26 (1999) ("[N]onfactual and nonspecific assertions which merely amount to conclusions are not sufficient to require a hearing under the Act"). Moreover, the information came from neither Barajas himself, nor Barajas's attorney. Rather, the information that Barajas was not willing to testify due to his pending case came from a statement that was made by defendant's post-trial attorney

orally at defendant's post-trial hearing. See *People v. Morales*, 339 Ill. App. 3d 554, 565 (2003) (hearsay affidavits are generally insufficient to support a claim of actual innocence). Not only is this information hearsay, but it was not even presented in a sworn affidavit. In addition, defendant's suggestion is contradicted by the record. According to the opinion from Barajas's direct appeal, an arrest warrant for Barajas was issued in that case on July 12, 1997, and Barajas was arrested on August 18, 1997. *Barajas*, 322 Ill. App. 3d at 547-48. Defendant's trial concluded on June 10, 1997, before the warrant for Barajas's arrest was issued. In fact, Barajas averred in his affidavit that, had he been contacted by defendant's attorney, he would have testified at defendant's trial. Finally, in his petition, defendant only stated that "prison is a difficult place from which to litigate, much less organize an affidavit from an individual he has no way of contacting." Beyond this conclusory statement, however, defendant did not explain why it took so long for him to obtain an affidavit from Barajas. See *People v. Snow*, 2012 IL App (4th) 110415, ¶ 21 ("The defendant bears the burden of showing no lack of due diligence on his or her part."). Under these circumstances, we conclude that the information provided in Barajas's affidavit is not newly discovered.

¶ 36 We also find that Barajas's statement is not of such a conclusive character that it would probably change the result on retrial. First, there was overwhelming evidence of defendant's guilt at trial. The record shows that Camacho was shot at by defendant and another man, and saw the shooters flee to a car that was waiting for them. He gave police a description of defendant, including that he was wearing a black leather jacket. Hours after the shooting, Camacho picked defendant out of a lineup, and identified defendant again at trial, stating "I was just looking [at] [the shooter] 'cause I was the closest one to him[,] and "I'm not gonna forgot [sic] nobody that's gonna shoot at me." In addition, about 15 minutes after the offense, defendant

and his two brothers were located in a gray Buick displaying the license plate TVM 295, which matched the description given by witnesses of the vehicle used in the shooting. The officers made contact, and noticed that the three passengers were stuttering, mumbling, and appeared very nervous. After the three men were ordered out of the car, defendant asked one officer "what's this about[?]" and the officer responded, "you know what you did[.]" Defendant then "broke away" from the officer, started running, and was apprehended five to ten minutes later, hiding in a garbage can in an alley approximately one block away. Evidence of flight was also presented as part of the State's case and may be considered as "proof of consciousness of guilt." *People v. Hommerson*, 399 Ill. App. 3d 405, 410 (citing *People v. Harris*, 225 Ill. 2d 1, 23 (2007)). In addition, the State presented testimony that the vehicle defendant was traveling in on the night of his arrest fit the description of the vehicle used in the shooting. The parties also stipulated that the license plate of that vehicle, TVM 295, was registered to defendant's brother, Jose Alvarez. Finally, although defendant was not wearing a black leather jacket when he was apprehended, a black leather jacket was recovered from the vehicle.

¶ 37 In contrast, Barajas stated that he observed the shooters before they fled towards a double-parked car and drove away, and that defendant was not one of the persons that he saw. Generally, evidence that "merely impeaches a witness" is not of such conclusive character as to justify a claim for actual innocence. *People v. Collier*, 387 Ill. App. 3d 630, 637 (2008). At best, Barajas's statement conflicts with the eyewitness testimony of Camacho. Given the totality of the evidence establishing defendant's guilt, Barajas's statement does not exonerate defendant as required for a claim of "actual innocence." *Collier*, 387 Ill. App. 3d at 636-37. In addition, Barajas is a convicted murderer who changed his initial statement to the police, taking away from his credibility as a witness. According to initial reports, Barajas told the police that he was

able to identify only one of the two shooters as defendant's brother, Daniel Alvarez. Several years later, Barajas now attests that defendant was not one of the persons he saw. As a result, we find no basis for concluding that the representations made by Barajas in his affidavit would probably change the result on retrial. *People v. Harris*, 206 Ill. 2d 293, 301-02 (2002).

Therefore, defendant failed to set forth a substantial showing of actual innocence and the trial court properly dismissed defendant's postconviction petition.

¶ 38 Based on the foregoing, we affirm the order of the circuit court dismissing defendant's petition at the second stage of proceedings.

¶ 39 Affirmed.

¶ 40 PRESIDING JUSTICE GORDON, dissenting:

¶ 41 I must respectfully dissent because I would remand for a third-stage evidentiary hearing. I summarize below a number of key facts concerning both of defendant's claims that were omitted from the majority's order.

¶ 42 On this appeal, defendant raises two claims: (1) that he made a substantial showing of actual innocence, such that his petition should be remanded for further proceedings; and (2) that there was a violation of Rule 651(c) necessitating a remand to the trial court for another second-stage proceeding. Below, I consider both claims and find them persuasive.

¶ 43 I. Actual Innocence Claim

¶ 44 A. Factual Background

¶ 45 Defendant's first claim is that he is actually innocent and I set forth the relevant facts for this claim below.

¶ 46 At a posttrial hearing, defendant retained new counsel and asked for a continuance of the hearing in order to obtain the testimony of Jose Barajas. Barajas was both an eyewitness to the shooting and one of the intended victims, according to the State's witnesses. Although the State charged defendant with the attempted murder of Barajas, the State failed to produce him at trial and, as a result, defendant was acquitted of that charge.

¶ 47 Defendant's posttrial counsel explained that defendant's trial attorney had obtained an order from the trial court prior to trial in order to permit a defense investigator to interview Barajas at a downstate juvenile facility. However, Barajas was released before the order could be executed, and no one was able to locate Barajas prior to trial. His whereabouts were unknown after his release from the juvenile facility.

¶ 48 At the posttrial hearing, the assistant State's attorney informed the court that Barajas was in jail at the time of defendant's trial, and that the defense knew this alleged fact. Actually, defendant's trial concluded on June 10, 1997, and Barajas was not arrested until a couple of months later, on August 18, 1997. *People v. Barajas*, 322 Ill. App. 3d 541, 547-48 (2001).

¶ 49 At the hearing, defense counsel stated that Barajas "would not identify" defendant as one of the shooters, but that Barajas was not willing to testify on the day of the posttrial hearing. In refusing to testify on this day, Barajas was acting on the advice of his counsel to not "say anything that would implicate himself in a gang since that might be evidence held against him in the other case."

¶ 50 The trial court held that, since Barajas would not testify even if he was present in court, defendant's request for a continuance was denied.

¶ 51 On October 3, 2001, the Illinois Supreme Court denied defendant's petition for leave to appeal the decision in his direct appeal. Then, six months and five days later, on April 8, 2002,

defendant filed a *pro se* postconviction petition raising three claims: (1) actual innocence; (2) ineffective assistance of trial counsel for failing to call an expert on eyewitness identification; and (3) that the lineup identification by eyewitness Mario Camacho was impermissibly tainted by police influence. Of these three claims, defendant is pursuing only the actual innocence claim on this appeal. (Defendant is also pursuing a Rule 651(c) claim that was obviously not in his original petition.)

¶ 52 In support of defendant's actual innocence claim, defendant presents the sworn affidavit of an eyewitness and alleged victim, namely, Jose Barajas, who did not testify at trial and who is now willing to come forward to testify that defendant was *not* the shooter. In his sworn and notarized affidavit, Barajas states unequivocally: "I observed the shooters before they fled the scene. Mr. Agapita Alvarez was not one of the persons that I saw." Barajas states that he would have been willing to testify at defendant's trial had he been located and called, and that he is now willing to testify in a third-stage evidentiary hearing. As I explain below, Barajas' affidavit is newly discovered evidence of the fact that defendant was affirmatively not the shooter, and defendant has made a sufficient showing to warrant a third-stage hearing.

¶ 53

B. Analysis

¶ 54

1. The Three-Part *Ortiz* Test

¶ 55 In *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009), our supreme court held that evidence in support of an actual innocence claim must be: (1) newly discovered; (2) material and not cumulative; and (3) of such a conclusive character that it would probably change the result on retrial.

¶ 56 On appeal, a reviewing court considers *de novo* the question of whether a defendant has made a sufficient showing of the three parts of the *Ortiz* test to warrant a third-stage evidentiary

hearing. *People v. Starks*, 2012 IL App (2d) 110324, ¶¶ 31-32. During our review, we accept as true all well-pleaded facts that are not positively rebutted by the record. *Starks*, 2012 IL App (2d) 110324, ¶ 32.

¶ 57 First, the evidence here was newly discovered. In *Ortiz*, our supreme court held that the testimony of a witness was newly discovered where he had "essentially made himself unavailable as a witness." *Ortiz*, 235 Ill. 2d at 334. Similarly, in the case at bar, Barajas' whereabouts were unknown after his release from a juvenile detention center. When the State failed to produce Barajas at trial, the factfinder responded by acquitting defendant of the attempted murder charge with respect to Barajas. Since Barajas, as one of the alleged victims, was central to the State's charges, it appears that the State could not locate him either. *C.f. People v. Starks*, 2012 IL App (2d) 110324, ¶ 26 (although the existence of the victim's vaginal swab was known, it still qualified as newly discovered evidence, where the State could not locate it until years later).

¶ 58 In addition, not only was Barajas unavailable during trial, he was also unavailable posttrial due to pending charges in another case. *Supra* ¶ 32. " '[N]o amount of due diligence' " could have compelled Barajas to come forward and implicate himself as a gang member, if he chose not to do so. *Supra* ¶ 32 (quoting *People v. Molstad*, 101 Ill. 2d 128, 135 (1984)).

¶ 59 However, the majority finds no "support" for defense counsel's representation that Barajas did not want to implicate himself as a gang member. *Supra* ¶ 35. Defense counsel's posttrial representation that Barajas did not want to implicate himself as a gang member is fully supported by our published opinion in Barajas' then-pending case. *People v. Barajas*, 322 Ill. App. 3d 541 (2001). In that opinion, we observed that Barajas' pending charges concerned a gang-motivated drive-by shooting, in which Barajas was accused of being a gang member.

Barajas, 322 Ill. App. 3d at 543-47. Barajas' trial counsel filed a motion *in limine* to exclude evidence at trial that Barajas was a gang member, and the primary issue on his appeal was whether the trial court erred in admitting gang evidence. *Barajas*, 322 Ill. App. 3d at 548, 552. Thus, defense counsel's representation is fully supported by the published record.

¶ 60 The majority also finds that defendant was not diligent in obtaining Barajas' affidavit, because the appellate court affirmed Barajas' conviction in May 2001, and denied his petition for rehearing in June 2001, and defendant did not file Barajas' affidavit until April 2002, 10 months later. *Supra* ¶ 35. What the majority overlooks is that Barajas subsequently filed a petition for leave to appeal to the supreme court (*People v. Barajas*, 196 Ill. 2d 548 (2001)) and retained private counsel for a postconviction petition (*United States ex rel. Jose Barajas v. Jones*, No. 04 C 4079 (N.D. Ill. 2007)), thereby explaining the 10-month delay. Defendant thus acted promptly to obtain and file Barajas' affidavit.

¶ 61 The majority concludes that Barajas' statement in his affidavit that he would have been willing to testify at defendant's trial (if anyone had been able to locate him then) contradicts defense counsel's posttrial statement that Barajas was unwilling to testify at the posttrial hearing due to his pending charges. *Supra* ¶ 35. There is no contradiction here. If anyone could have found him prior to the trial, Barajas avers that he would have been willing to testify at the trial that began on May 31, 1997, and concluded on June 10, 1997. However, a couple of months later, on August 18, 1997, Barajas was arrested on his own pending charges and thus was *no longer* willing to testify. Thus, there is no contradiction between defense counsel's statement at the posttrial hearing on October 8, 1997, that Barajas was *then* unwilling to testify, and Barajas' statement in his affidavit that, if found, he would have been willing to testify *earlier* on May 31, 1997.

¶ 62 Second, the potential testimony of Barajas, as one of the alleged intended victims, is material and not cumulative. *Ortiz*, 235 Ill. 2d at 333. At trial, one of the victims identified defendant; however, the only other eyewitness presented at trial identified defendant's brother, Daniel Alvarez, as the shooter and testified that the photographs of Daniel, defendant and their third brother Jose "all looked alike."

¶ 63 Third, Barajas' testimony has the potential of changing the result on retrial. *Ortiz*, 235 Ill. 2d at 333. In *Ortiz*, a third-stage evidentiary hearing had already been held. *Ortiz*, 235 Ill. 2d at 326. Our supreme court thus knew what the testimony was, and the question was whether the defendant should be granted a new trial on the basis of it. *Ortiz*, 235 Ill. 2d at 337. The question before us is slightly different. Our issue is whether defendant should be permitted a third-stage evidentiary hearing at which he could present the testimony, which could then serve as the basis for a request for a new trial. If Barajas testifies at a third-stage hearing, as he has stated in his affidavit, that defendant was affirmatively not one of the individuals shooting at him, this testimony would be of such a conclusive character that it would probably change the result at trial. Barajas' absence was enough to prompt an acquittal of the charge relating to him. His affirmative presence, as one of the intended victims, would have a powerful effect. Thus, defendant has satisfied the *Ortiz* test sufficiently to proceed to a third-stage evidentiary hearing.

¶ 64 The majority asserts that Barajas' testimony does not have the potential to change the result at trial because Barajas allegedly "changed" his statement from his initial statement to the police. *Supra* ¶ 37. However, there was no change. The majority states that, prior to trial, Barajas identified one of the two shooters as someone other than defendant; and that, in his affidavit, Barajas stated that defendant was not one of the shooters. *Supra* ¶ 37. Those statements are completely consistent. Barajas did not before -- and still does not --- identify

defendant as one of the shooters. In addition, the majority finds that Barajas' affidavit conflicts with the police report of his statements, although the police report is not in the appellate record. For the contents of the police report, the majority is relying on the description of the report made by defense counsel at the posttrial hearing.

¶ 65 The majority also concludes that Barajas' testimony would not change the result on retrial because the evidence at trial was "overwhelming." *Supra* ¶ 36. However, on direct appeal, this court never described the evidence as "overwhelming." *People v. Alvarez*, No. 1-98-0870 (2001) (unpublished order pursuant to Supreme Court Rule 23). Instead, this court acknowledged the conflicts and inconsistencies but concluded that the evidence was sufficient. *Alvarez*, No. 1-98-0870, at 12-13.

¶ 66 The majority relies heavily on the 2-to-1 decision in *People v. Jones*, 399 Ill. App. 3d 341 (2010) (Howse, J., dissenting). However, although *Jones* was decided on March 5, 2010, and *Ortiz* was decided four months earlier on November 19, 2009, the *Jones* opinion presents the elements of an actual innocence claim without once citing the now-seminal case in Illinois on the elements of an actual innocence claim, namely, *Ortiz*. It is as though the *Jones* opinion was trying to turn the clock back to a time before *Ortiz* existed, by citing only pre-*Ortiz* cases.

¶ 67 The holding in *Jones* cannot survive *Ortiz*. The *Jones* court held: "that evidence is not newly discovered when it presents facts already known to defendant at or prior to trial, though *the source of those facts* may have been unknown, *unavailable* or uncooperative." (Emphasis added.) *Jones*, 399 Ill. App. 3d at 364. This holding contradicts *Ortiz*, which held that the testimony of a witness was newly discovered, where the witness had "essentially made himself *unavailable*." (Emphasis added.) *Ortiz*, 235 Ill. 2d at 334; *People v. Knight*, 405 Ill. App. 3d 461, 467-68 (2010) (appellate court rejected an argument by the State based on *Jones* and limited

Jones to its particular facts). *Ortiz* is a supreme court case and *Jones* is an appellate decision in conflict with our supreme court's instructive opinion in *Ortiz*.

¶ 68 By holding that evidence of "facts already known to defendant" cannot be newly discovered, *Jones* held, in essence, that it is the fact that must be newly discovered rather than the evidence. Taken to its furthest conclusion, the *Jones* holding would always bar an innocent defendant from filing an actual innocence claim. Since a truly innocent defendant is always aware of the fact of his innocence, this fact can never be newly discovered. While the fact of his innocence is always known to an innocent defendant, *Ortiz* affords him the ability to present newly discovered evidence of this fact.

¶ 69 As a result, I do not find persuasive the majority's *Jones*-based argument that, because defendant knew the fact that an unavailable eyewitness existed somewhere, this knowledge precludes an actual innocence claim. This is particularly true where the assistant State's attorney informed the trial court that the witness was in jail at the time of trial, when he was not.

¶ 70 C. Not Time-Barred

¶ 71 I also want to address the primary basis upon which the trial court dismissed defendant's petition, namely, that it was time-barred. There is only one claim from defendant's petition that is before us on appeal and that is defendant's claim of actual innocence; and a claim of actual innocence cannot be time-barred. *People v. Ortiz*, 235 Ill. 2d 319, 331 (2009). Actual innocence claims, based on newly discovered evidence, are not and *never were* time-barred. *Ortiz*, 235 Ill. 2d at 330-31. Any other "interpretation of the [Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012))] is incompatible with a defendant's constitutional right to assert an actual innocence claim in Illinois." *Ortiz*, 235 Ill. 2d at 331.

¶ 72 In addition, on June 19, 2003 -- over a year after defendant filed this petition -- our supreme court held that, when calculating the time period in which a defendant must file a postconviction petition, one did not include the time period waiting for the supreme court to rule on a petition for leave to appeal. *People v. Rissley*, 206 Ill. 2d 403, 415 (2003). However, the supreme court also held that determining that the petition was untimely on this ground did not end the inquiry and that a court must next determine "whether defendant's allegations as presented to the circuit court are sufficient to establish a lack of culpable negligence so as to avoid dismissal of the petition on the basis that it was time-barred." *Rissley*, 206 Ill. 2d at 418. It would be hard to argue that defendant was culpably negligent when the *Rissley* case was decided after he filed his petition.

¶ 73 Thus, defendant's petition is not time-barred and the majority does not affirm the trial court on this basis.

¶ 74 II. Rule 651(c) Certificate

¶ 75 A. Factual Background

¶ 76 Defendant's second claim is that his attorney violated Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), and the relevant facts are summarized below.

¶ 77 In the case at bar, the trial court determined that defendant's postconviction claims were not frivolous and it appointed the public defender to represent him. The petition proceeded to the second stage, where it languished for almost 10 years. The case was transferred to five different assistant public defenders (APDs).

¶ 78 The half-sheet has five entries between April 17, 2002, and October 8, 2002, for which there are no transcripts in the record. Hence, it is possible that there was an APD before Harold

Winston, but I will assume that Winston, who is the first APD who appears in the transcripts, was defendant's first APD.

¶ 79 The second APD, Ingrid Gill, was initially under the impression that this was a "DNA petition." On August 26, 2003, during Gill's representation, the State filed its first motion to dismiss.

¶ 80 The third APD, Janet Stewart, represented defendant for over two years, starting in April 2004. She reported to the court that she had located several potential witnesses and she was conducting interviews with the intention of filing an amended petition. However, she went on medical leave, and the case was transferred to a fourth APD, Henry Hams.

¶ 81 Before the transfer to the fourth APD, defendant submitted a *pro se* motion, which was file-stamped April 12, 2006, and entitled "Motion to Withdraw Counsel on Post-Conviction Act." Defendant resent the motion and the second copy, which is also in the appellate record, is file-stamped April 26, 2006. Despite being mailed and filed twice, the motion was never heard or decided, and there is no acknowledgement of even its existence by counsel or the trial judge in the transcripts provided in the appellate record.

¶ 82 On April 26, 2006, defendant also filed an amended *pro se* petition with a supporting memorandum of law and exhibits. In pen, across the top of the first page, someone handwrote: "Petitioner not proceeding on this petition per attorney 5/21/11."

¶ 83 The fourth APD first appeared in court on February 8, 2007, and over a year later, on March 4, 2008, he reported to the court that he had had only "one telephone conversation with my client." On June 3, 2008, he reported that he was trying to set up another client telephone call.

¶ 84 On January 14, 2009, the fourth APD stated that he was trying to obtain the transcript for a hearing which occurred on August 10, 2006. He believed that there was a hearing on that date on a motion by the State to dismiss defendant's postconviction petition. He explained that he needed the transcript because otherwise he would have no idea "what arguments were made by previous counsel."

¶ 85 The assistant State's attorney (ASA) acknowledged that there was "a hearing that took place on August 10th, 2006," but that the court reporter had not transcribed it yet.

¶ 86 The appellate record does not contain a transcript for a hearing on August 10, 2006, and there is no entry on the half-sheet for this day to inform us what happened then. However, the absence of a half-sheet entry is not an indication that no hearing occurred because the half-sheet does not contain entries for five days for which there are transcripts in the appellate record.

¶ 87 On August 12, 2009, the fourth APD reported that he was "involved in an investigation on behalf of my client," and that he had just learned that his client had "filed some pleadings without [his] knowledge."

¶ 88 There are no pleadings – in fact, no documents at all – in the appellate record that were filed during the entire 2009 calendar year, except for the fourth APD's subsequently filed Rule 651(c) certificate in December 2009. Thus, the appellate record does not contain the *pro se* pleadings to which the fourth APD referred.

¶ 89 The fourth APD finally filed a Rule 651(c) certificate on December 22, 2009, over six years after defendant filed his *pro se* petition. Despite the lapse of over six years and the representations of the third APD to the contrary, the fourth APD stated in his certificate that defendant's claims were all properly presented and the petition did not have to be amended.

¶ 90 On May 20, 2010, the State filed an amended motion to dismiss. Before the State's motion could be heard, the fourth APD was arrested in June 2010 for aggravated battery and resisting arrest for choking an assistant State's attorney in a courthouse.

¶ 91 On July 15, 2010, APD Michelle Kalistak appeared on behalf of APD Hams and stated that APD Hams was working on a response to the State's motion. On October 14, 2010, yet another APD, Marsha Watt, appeared on behalf of APD Hams and stated that he was still working on a response but he could not appear in court because it was a condition of his bail "that he not be in a courthouse."

¶ 92 APD Watt thus became defendant's fifth APD since the fourth APD was barred from the courthouse. Although she represented defendant at all subsequent court appearances, she did not file either an appearance or her own Rule 651(c) certificate. Instead, she simply filed the response to the State's dismissal motion which had been drafted by the fourth APD and which stated: "Petitioner has raised a claim of actual innocence based upon self-defense."

¶ 93 Actually, petitioner's claim of innocence is based on the fact that he was not involved in the shooting. Nowhere in his *pro se* petition for postconviction relief, filed April 5, 2002, or in his *pro se* motion to amend his petition, filed April 25, 2002, does petitioner say anything about self-defense.

¶ 94 On November 17, 2010, the fifth APD stated that she had hoped to "file something prepared by my colleague." Two months later, on January 12, 2011, she filed a "Motion to File Amended Affidavit of Jose Barajas and Response to the State's Motion to Dismiss," which bears the fourth APD's undated signature. In court on January 12, the ASA acknowledged that the fifth APD had handed him the motion that morning, and he stated that he then observed "an inconsistency in this affidavit" which the APD said she would correct.

¶ 95 On March 24, 2011, the fifth APD filed a second affidavit from Jose Barajas, which was filed in open court. On April 20, 2011, the ASA brought to the APD's attention defendant's amended *pro se* 2006 petition, which this APD was not aware of. At the next court appearance on May 25, 2011, the fifth APD stated that her "understanding" of the 2006 amended *pro se* petition was "at the time the client was represented by counsel and this is something that the office and counsel decided not to adopt." The trial court then asked, "What's left?" and the fifth APD responded: "There are supplemental pleadings that Mr. Hams [the fourth APD] prepared."

¶ 96 Despite the fifth APD's assertion that there were supplemental pleadings prepared by the fourth APD, the appellate record contains no supplemental pleadings prepared by the fourth APD or any other APD.

¶ 97 The ASA also mentioned these supplemental pleadings. He stated that he filed a motion to dismiss "related to the original *pro se* pleading and what Mr. Hams [the fourth APD] filed." The phrase "what Mr. Hams filed" cannot possibly refer to the response that APD Hams had drafted because the State did not file a reply to it. The ASA stated that the 2006 *pro se* amended petition was yet an "additional pleading" to what APD Hams had filed.

¶ 98 Thus, the appellate record appears to be missing both (1) the transcript of a hearing on August 10, 2006, on a motion by the State to dismiss, and (2) supplemental pleadings filed by APD Hams.

¶ 99 On August 25, 2011, almost 10 years after defendant filed his petition, the trial court dismissed his *pro se* petition primarily on the ground that it was not timely.

¶ 100 B. Analysis

¶ 101 Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) provides for the filing of a certificate in a postconviction case showing that "the" attorney (1) has consulted with the

petitioner by mail or in person to ascertain the petitioner's contentions, (2) has examined the record of proceedings at trial, and (2) has made any amendments necessary to the petitions filed *pro se* that are necessary for an adequate presentation of the petitioner's contentions. On appeal, we review *de novo* the question of whether a postconviction attorney complied with the requirements of Rule 651(c). *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007).

¶ 102 "Our supreme court has held that, even if the allegations in a petition were insufficient to raise a constitutional issue, it is error to dismiss a postconviction petition on the pleadings where there has been inadequate representation by counsel." *People v. Schlosser*, 2012 IL App (1st) 092523, ¶ 30 (citing *People v. Suarez*, 224 Ill. 2d 37, 47 (2007), citing *People v. Jones*, 43 Ill. 2d 160, 162 (1969)). "[T]he Illinois Supreme Court 'has consistently held that remand is required where postconviction counsel failed to fulfill the duties of consultation, examining the record, and amendment of the *pro se* petition, regardless of whether the claims raised in the petition had merit.'" *Schlosser*, 2012 IL App (1st) 092523, ¶ 30 (quoting *Suarez*, 224 Ill. 2d at 47).

¶ 103 "Our supreme court's Rule 651(c) analysis has been driven, not by whether a defendant's claims have any merit or if he can establish substantial prejudice, but by the understanding that when postconviction counsel does not adequately complete the duties mandated by the rule, the limited right to counsel conferred by the Act cannot be fully realized." *Schlosser*, 2012 IL App (1st) 092523, ¶ 32 (citing *Suarez*, 224 Ill. 2d at 47).

¶ 104 "We cannot simply presume, however, that the trial court would have dismissed the petition without an evidentiary hearing if counsel had adequately performed his duties under Rule 651(c)." *People v. Johnson*, 154 Ill. 2d 227, 246 (1993).

¶ 105 The majority concludes that the fourth APD, namely APD Hams, provided reasonable assistance because he filed a Rule 651(c) certificate and made arguments "'in effect" in "the

response to the [State's] motion to dismiss and at the [second-stage] hearing on the motion."

Supra ¶ 25. This conclusion ignores the facts: (1) that the fourth APD neither filed the response nor represented defendant at the hearing; (2) that the fifth APD, who actually represented defendant at the second-stage hearing, never filed a Rule 651(c) certificate; (3) that, although the fourth APD drafted the response, he never filed it, thereby indicating that he may have intended it merely as a draft and not a final version, which the fifth APD then filed without signing.

¶ 106 In light of the constant shuffle of attorneys over a 10-year period of time and the fact that the attorney who ultimately represented defendant never filed a Rule 651(c) certificate and did file a response that was factually inaccurate about defendant's basic claim, and the fact that a prior attorney may have filed supplemental pleadings that are not in the appellate record, together with the affidavit with newly discovered information from an eyewitness who could not be located before, I would remand for a third-stage evidentiary hearing. I would also direct defendant's attorney to fulfill the duties proscribed in Rule 651(c) and file a Rule 651(c) certificate, and to obtain (1) the transcript of the hearing on August 10, 2006, if such a hearing occurred; (2) the supplemental pleadings filed by APD Hams, if such pleadings were prepared; and (3) the names of the several potential witnesses contacted by APD Stewart. The attorney who represents defendant and files the Rule 651(c) certificate must be an attorney who is not legally barred from stepping foot in a courthouse.

¶ 107

Conclusion

¶ 108 For the foregoing reasons, I would remand for a third-stage evidentiary hearing because I believe that defendant may be an innocent man wrongfully convicted of a crime he did not commit. Thus, I must respectfully dissent.