

No. 1-12-1657

**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. 00 CR 13555
	)	
ANTOINE SMITH,	)	Honorable
	)	Lauren Gottainer Edidin,
Defendant-Appellant.	)	Judge Presiding.

---

JUSTICE McBRIDE delivered the judgment of the court.  
Justices Palmer and Taylor concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where defendant made repeated clear and unequivocal requests to proceed *pro se*, the circuit court abused its discretion by striking his *pro se* filings without considering his request.

¶ 2 Defendant Antoine Smith appeals from the second-stage dismissal of his petition for relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010).

On appeal, defendant contends that: (1) the circuit court erred by not allowing defendant to represent himself and striking defendant's *pro se* filings despite unequivocal and repeated requests from defendant to proceed *pro se*; (2) postconviction counsel provided unreasonable assistance by failing to respond to the State's allegation that his petition was untimely filed, by failing to amend defendant's petition to ensure his claims were adequately presented to the circuit

court, by failing to obtain defendant's affidavit, and by failing to present any argument to the circuit court on defendant's behalf; and (3) the circuit court erred in dismissing defendant's petition where he made a substantial showing that he received ineffective assistance of trial counsel for failing to elicit available impeachment testimony that would have called into question the reliability of the identification of the State's only eyewitness. For the following reasons, we vacate the judgment of the circuit court and remand with directions.

¶ 3 After a jury trial, defendant was convicted of first degree murder and attempted armed robbery based on the April 13, 1998, murder of James Pappas, the victim. The following facts are taken from our opinion on defendant's direct appeal. See *People v. Smith*, 362 Ill. App. 3d 1062 (2005). We present the facts only to the extent necessary to understand the present appeal.

¶ 4 At trial, Dawn Lockhart testified that at approximately 6:35 a.m. on April 13, 1998, she and her mother stopped at the Citgo gas station while driving to work. Lockhart went into the store, but did not see the cashier. When she looked behind the cashier's counter, she saw defendant bent down on his knees moving his fist up and down while holding something in his hand, hitting a man who was lying on the floor. At some point, she and defendant looked at each other, and then Lockhart ran back outside to her mother's car. Lockhart testified that she recognized defendant because she had seen him "around" for about a year prior to April 1998. She further testified that she was not friends with defendant, and may not have known his name, but she "knew his face" from the streets. As she was leaving, Lockhart saw a Hispanic couple drive into the gas station, and she motioned for them not to enter the store.

¶ 5 Lockhart went to the police station later that day and looked through various mug books, but did not see defendant's photo. She described the man she had seen to a sketch artist, but said that she did not "fully cooperate with the making of that sketch" or the investigation because she

No. 1-12-1657

"really did not want to be involved with any of this." On April 22, 1998, Lockhart viewed an in-person lineup. Although defendant was present in the lineup, Lockhart testified that she did not identify him because she was nervous and scared. When she saw defendant, she told the police officers in the room that she "wanted to go home," that she would not cooperate, and that she would not "tell them anything."

¶ 6 In March 2000, Detectives Glenn Cannon and Jim Hutton went to Lockhart's house and asked her to "get involved again" in the case. She initially refused, but eventually returned to the police station and said she would cooperate. Lockhart viewed a series of photographs and identified defendant as the man she had seen at the gas station. She also identified defendant in a photograph of the lineup that had been held on April 22, 1998.

¶ 7 Jose Cruz Torres testified that at approximately 6:35 a.m. on April 13, 1998, he was driving with his wife and pulled into the Citgo gas station. As he was walking toward the door, two women came out "in a hurry." The woman whom he eventually learned was Lockhart looked afraid and signaled to him not to enter the store. The women then got into a car and drove away. Shortly after, a man in "black pants, black [Nike] shoes, black sweatshirt with a hoodie and blue ski mask" exited the store. Because he was wearing a ski mask, Torres could only see the man's eyes. The man was wearing black gloves and looked like he was "hiding something" in his right hand. He looked at Torres and then ran across Green Bay Road toward Ashbury Street. Torres went inside the store and saw the victim lying against a file cabinet in the cashier's area. Torres ran outside and eventually flagged down a police officer he saw driving past the gas station.

¶ 8 Detective Glenn Cannon testified that on April 22, 1998, he conducted a lineup. He further testified that Lockhart was nervous, convulsing, violently shaking, crying, sobbing, and

No. 1-12-1657

clutching Evanston Police Chief Frank Kaminski's arm while viewing the lineup. She repeatedly said she wanted "it to be over" and that she wanted to leave. When he realized that they "weren't going to get anywhere that evening," he ended the lineup.

¶ 9 In March 2000, Cannon testified that he and Hutton went to Lockhart's home and asked her if she remembered anything she had not previously told them about the murder. She said she did not remember anything new. On April 13, 2000, Cannon met with Lockhart at the police station, where she told him she knew who killed the victim and wanted to identify him. Lockhart identified defendant from a photo array.

¶ 10 Dean Hasapis, the victim's godfather and owner of the Citgo gas station, testified that there was a safe located in the washroom where he would put the money earned each day. Each Monday, someone would take the money out of the safe and bring it to the bank. Hasapis was the only person with a key to the safe. Hasapis also testified that the video cassette recorder (VCR) for the security camera at the store had not been working. He had told his employee Robert Fomond to fix it, but on the day of the murder it had not been fixed.

¶ 11 Jimmy Tillman testified that at approximately 7 a.m. on April 13, 1998, he saw defendant wearing dark clothes and walking south on Green Bay Road away from the Citgo gas station. Tillman knew defendant and crossed the street to talk to him. Although defendant gestured at Tillman, he continued walking past Tillman. Tillman looked back as Tillman continued to walk, and saw defendant cross the street, turn around, and then head north toward the gas station. Later, Tillman heard about the attempted robbery and murder at the Citgo gas station. In January 2000, Tillman identified defendant as the man he had seen on the morning of the murder.

¶ 12 Robert Fomond testified that he was currently living in the witness protection program in the Cook County jail. In exchange for his testimony, as part of an agreement with the State's

No. 1-12-1657

Attorney's office, the murder charges against him had been dismissed and he was to serve an 11-year prison sentence for attempted armed robbery. Fomond said that he started working at the Citgo gas station in 1995 and returned to the job after he was released from prison in 1997. At that time he also became friends with defendant. Fomond testified that Dean Hasapis, the Citgo gas station owner, normally opened the store on Mondays and was the only one with a key to the safe. On April 10, 1998, Fomond saw defendant at a bar and, after discussing how they were both in need of money, they decided to rob the gas station. Fomond told defendant where the safe was located and the best time to commit the robbery. Defendant told Fomond that he would get "one of them things" to commit the robbery, which Fomond took to mean a gun. Defendant also said he would wear a mask and dark clothing so that he could not be identified. On April 11, 1998, defendant went to the gas station while Fomond was at work. Defendant noticed a security camera and asked about Fomond it. Fomond told defendant the VCR was broken.

¶ 13 On April 13, 1998, at about 7:30 a.m., a detective woke Fomond and told him that a murder had occurred at the gas station. Fomond went to the police station but did not mention his plan with defendant to rob the gas station. At approximately 4 p.m. that day, Fomond saw defendant while driving. They flagged each other down and defendant told Fomond that "it didn't go down right." Defendant said "he got into a tussle with the gun and – and he had to give it to him," which Fomond took to mean that defendant shot the victim. Defendant reassured Fomond that he "didn't leave them nothing to go on." The police picked up Fomond for questioning again on April 14, April 16, and April 17. Fomond did not tell the police about his plan with defendant to rob the gas station. Instead, he told the police about an incident where he allowed a man to use a stolen credit card at the gas station. Fomond also met with defendant on a few occasions during which defendant would tell Fomond not to worry. On April 21, 1998, the

No. 1-12-1657

police picked up Fomond and told him the credit card story "wasn't matching out." At that point, Fomond told the police about his conversation with defendant at the bar and their meetings after the murder.

¶ 14 The State rested and the court denied defendant's motion for a directed verdict.

¶ 15 Officer Christine Bell testified that at approximately 9:30 a.m. on the morning of the murder, she interviewed Lockhart who described the man she saw as wearing a black sweatshirt-type hooded jacket, dark pants, and a black nylon-type hat on his head. The nylon hat had a knot tied on top and band with some writing on it. The band was pulled over the man's eyes and rested on the lower part of his nose. Lockhart was unsure of the man's shoes and whether he was wearing gloves, but said he was dark skinned, possibly black. On cross-examination, Bell testified that Lockhart was very nervous, could not sit still or catch her breath, and was crying.

¶ 16 Lieutenant Richard Weiner testified that, on the day of the murder, Lockhart gave him a description of the man she had seen. Based on her description, he generated a computer composite of the suspect offender. Lockhart told Weiner that the sketch looked like the suspect. On cross-examination, Weiner said that throughout the process Lockhart was "quite nervous, agitated, kept wanting to get up, have a cigarette, stand up, sit down, stand up."

¶ 17 Officer Jim Charter, an evidence technician, testified that he was assigned to the murder and, while canvassing the area, he discovered two bloodstains about one block from the gas station. He was unable to determine the age of the stains.

¶ 18 Tracey Reppen, a forensic scientist, testified that she tested the samples taken from the bloodstains found by Officer Charter, but that neither matched the victim nor defendant.

¶ 19 Ron Walczak testified that at approximately 6:23 a.m. on April 13, 1998, while driving to work on Green Bay Road, he saw a nervous-looking man standing on a corner about 50 to 60

No. 1-12-1657

yards away from the Citgo gas station. He described the man as black, light to medium complexion, in his early 20s, about 5'7", 150 to 170 pounds, wearing dark clothing, dark pants, and a waist-length jacket.

¶ 20 The jury found defendant guilty of first degree murder and attempted armed robbery and the court sentenced defendant to a term of natural life imprisonment.

¶ 21 Defendant made several arguments on direct appeal, including that the evidence at trial was insufficient to sustain his convictions. This court affirmed defendant's convictions and sentence. Then, pursuant to a supervisory order from the supreme court, we vacated our opinion and reconsidered the case in light of the supreme court's decision in *People v. Herron*, 215 Ill. 2d 167 (2005). See *People v. Smith*, 216 Ill. 2d 725 (2005). Upon reconsideration, we again affirmed defendant's convictions and sentence. *People v. Smith*, 362 Ill. App 3d 1062 (2005).

¶ 22 According to the record, defendant mailed his *pro se* petition for postconviction relief to the Clerk of the Circuit Court of Cook County in September 2006, along with a *pro se* motion for appointment of counsel. The certificate of service attached to the petition is file-stamped September 20, 2006. In his petition, defendant alleged, in pertinent part, that the lead investigator, Detective Glenn Cannon, testified falsely that he had been present for the April 1998 lineup and observed Lockhart behaving nervously. Defendant argued that Cannon could not have been present for the lineup because he was executing a search warrant at defendant's apartment on the same day, April 21, 1998, at the same time. In support, defendant attached reports from Detectives Cannon and Hutton. Cannon's report stated that Cannon, along with Sergeant McConnell, had a search warrant signed for defendant's residence on "04/21/98 at 1740 hours" and then executed the search warrant "at about 1900 hours." Hutton's report stated that

the line-up was held on "21APRIL98 at approximately 1910 Hrs" and that Detective Stonequist, Sergeant Hollander, and Chief Kaminski were present for the lineup.

¶ 23 An attorney from the public defender's office, Gwyndolette Brown, was appointed to represent defendant. In October 2009, she filed a certificate pursuant to Rule 651(c) stating that she had consulted with defendant by mail "to ascertain his contentions of deprivations of his constitutional rights," she had obtained and examined the record, and she had determined that the petition adequately represented defendant's constitutional claims as written so she would not supplement the petition.

¶ 24 On August 6, 2010, the State filed a motion to dismiss the petition, alleging that: (1) the petition was untimely filed on April 26, 2007<sup>1</sup>; (2) defendant's claims were otherwise barred by the doctrines of *res judicata* or waiver; and (3) defendant did not receive ineffective assistance of appellate counsel.

¶ 25 The record includes multiple *pro se* filings from defendant that have not been file stamped but have been stamped received by "Crim. Dept. Dist. 2" (the CDD). On August 31, 2010, the CDD received defendant's *pro se* motion for the appointment of counsel "outside of the public defender office." In it, he stated that he believed there was a conflict of interest because the public defender's office was representing both defendant and his co-defendant. He also stated that his appointed counsel would not amend his petition, would not "set up a legal call to discuss the issues" of the petition, and that appointed counsel had "misrepresented the truth of the status" of his petition.

---

<sup>1</sup> Although the State argued that defendant's petition was untimely filed on April 26, 2007, in the argument section, we note that in the introduction the State alleges the petition was filed on June 8, 2007.

¶ 26 On September 27, 2010, the CDD received from defendant a *pro se* motion for continuance, requesting time to "properly respond to the State's motion to dismiss."

¶ 27 On September 28, 2010, the CDD received from defendant a *pro se* motion to "Allow Appointed Counsel to Withdraw and Allow Petitioner to Proceed *Pro Se*." In the motion, defendant specifically requested "that the Court allow Appointed Counsel to withdraw, and allow petitioner to proceed pro-se." Defendant alleged that:

"[He had] made numerous 'attempts' to discuss the merits of his presented claims, as well as additional claims that petitioner believes that counsel should 'Amend', however, assigned counsel 'refuses' to discuss the present issues and has told the petitioner 'That it is not her job to file an Amended Petition', Thus depriving the petitioner of effective representation.

[ ] Petitioner on August 31st, 2010 filed a 'MOTION FOR THE APPOINTMENT OF COUNSEL OUTSIDE OF THE PUBLIC DEFENDER OFFICE', which has yet to be ruled on by this Court \*\*\*. Here, if the Court fails to grant this motion, then Petitioner has no other alternative then, but to proceed Pro-se, and request Leave of Court to file an 'Amended Petition for Post-Conviction Relief.'

\*\*\*

**WHEREFORE**, If the Court should deny the previously filed Motion to Appoint Counsel Outside the Public defenders [*sic*] Office, Then the Petitioner would respectfully pray that this

Honorable Court Grant this Motion and allow appointed/assigned counsel to withdraw, and allow the Petitioner to proceed Pro-se in these post-Conviction proceedings, and thereafter give the Petitioner the opportunity to file an 'Amended[] Pro-se Petition for Post-Conviction Relief' to include those claims that appointed counsel has declared to petitioner 'That it's not her job to file an Amended Petition.' " (Emphasis in original.)

¶ 28 On September 29, 2010, defendant filed a *pro se* response to the State's motion to dismiss, alleging that he timely filed his petition; and arguing that his claims were not subject to *res judicata* or waiver. Defendant also alleged that he was deprived of effective representation because appointed counsel "refused" to consult with him or amend his petition. Defendant then stated that he had "previously filed motions for the Court to appoint New Counsel, and in the alternative to allow counsel to withdraw and allow Petitioner to proceed Pro-se, and Thereafter give Petitioner an opportunity to file an 'Amended Petition for Post-Conviction Relief.' " In his prayer for relief, defendant requested that the court either appoint other counsel to represent defendant or allow appointed counsel to withdraw and defendant to proceed *pro se*.

¶ 29 On January 14, 2011, at a status hearing before the circuit court, defense counsel indicated before the court that she would be filing a response to the State's motion to dismiss, but that she was waiting for the "trial file."

¶ 30 On March 3, 2011, defendant filed a *pro se* amended postconviction petition alleging several claims of error including, in pertinent part, that he was deprived of effective assistance of trial counsel because counsel failed to impeach a key State witness at the hearing on his motion

No. 1-12-1657

to suppress and at trial. In support, defendant again attached the Cannon report and the Hutton report. Defendant also noted:

"Petitioner on September 23rd, 2010 filed a 'Pro-se Response to Respondent's Motion to Dismiss,['] wherein the Petitioner asserted that appointed Post-Conviction Counsel had not complied with Illinois Supreme Court Rules, by not consulting with the Petitioner, and failing to 'Amend' the Post-Conviction Petition, Wherein Petitioner requested that the Court deny the premature Motion to Dismiss, and allow the Petitioner an opportunity either to have other counsel 'Amend' his Post-Conviction Petition, and/or in the alternative allow appointed counsel to withdraw, and allow Petitioner to proceed pro se and thereafter give the Petitioner an opportunity to Amend his Post-Conviction Petition[.]"

¶ 31 On April 1, 2011, defense counsel again indicated before the court that she was responding to the State's motion to dismiss but was waiting to hear back from the Forensic Science Division about possible DNA testing.

¶ 32 On January 3, 2012, defendant filed a *pro se* petition for writ of *habeas corpus*, stating that he had "filed several motions for appointment of new counsel or to allow petitioner to proceed pro se \*\*\*due to counsel's failure to [comply] with Illinois Supreme Court Rule 651(c) and neglect in representation of petitioner's interest in these proceedings." Defendant asked that the court "writ[ ] him in to court, where he can properly request to represent himself in the alternative to the court providing him other counsel to represent him in the proceedings."

¶ 33 On April 13, 2012, at a status hearing, Lindsay Huge appeared to represent defendant on behalf of Gwyndollette Brown. The court indicated it had received a *pro se* petition for writ from defendant. The following exchange then occurred:

"THE COURT: Did [defendant] take a public defender? I just see documents in here filed January 3, 2012, where he's filing these documents *pro se*.

DEFENSE COUNSEL: I do not know. Often sometimes these individuals will file something extracurricularly.

THE COURT: Did you get copies of these?

THE STATE: I did not, Judge.

THE COURT: Would you like to look at these? I just pulled out what was in the front hoping it might be something helpful.

DEFENSE COUNSEL: Yeah. It's habeas corpus.

THE STATE: Judge, as it stands right now, I would object to any *pro se* pleadings being filed right now. Defendant is represented by counsel.

THE COURT: Well, he filed them in January.

THE STATE: Right. I never received copies of this and I never received notice. The People would not waive notice of any filings. But more importantly, Judge, to the extent he's represented by counsel, the only motions to be filed in front of the Court would

be one for – to fire his court-appointed counsel. And that hasn't been filed, to my knowledge.

THE COURT: Right. No, that I don't see.

THE STATE: But I move to strike any additional pleadings at this point.

THE COURT: Okay. What were the dates of those filings I just showed you, defendant's filings?

DEFENSE COUNSEL: Petition for writ of habeas corpus filed on January 3rd, 2012.

THE COURT: And that will be stricken, improper filing."

Gwyndolette Brown appeared near the end of the status hearing and indicated that she had not filed anything other than the Rule 651(c) certificate and she was not filing anything further.

¶ 34 At the following hearing date, on May 18, 2012, the court stated that it had the State's motion to dismiss and a *pro se* response to the motion to dismiss from defendant, filed on September 29, 2010. The State moved to strike defendant's *pro se* response, arguing that defendant had appointed counsel and "he is not entitled to advance his own pleadings." The court granted the motion and defendant's *pro se* response was stricken. The court then heard arguments on the State's motion to dismiss. The State argued that defendant untimely filed his petition, and that nonetheless his claims were barred by *res judicata* and waiver. Defense counsel stood on defendant's petition as filed. The court dismissed defendant's petition.

¶ 35 On appeal, defendant first argues that the circuit court erred by not allowing defendant to represent himself and striking his *pro se* filings, despite his unequivocal and repeated requests to proceed *pro se*. The State responds by arguing that defendant does not have a statutory right to

No. 1-12-1657

represent himself or, in the alternative, that he did not make a timely or unequivocal request to proceed *pro se*. Therefore, we must first consider whether a defendant has a statutory right to represent himself in postconviction proceedings. We find guidance from a decision in which another panel of this division considered the same question. See *People v. Gray*, 2013 IL App (1st) 101064.

¶ 36 In *Gray*, after being convicted of first degree murder and attempted armed robbery and having those convictions affirmed on appeal, the defendant filed a *pro se* postconviction petition. *Gray*, 2013 IL App (1st) 101064, ¶ 1, 8. The defendant also filed a *pro se* motion for appointment of counsel and the public defender was appointed to represent him. *Id.* ¶ 8. The State filed a motion to dismiss the defendant's petition in June 2002. *Id.* ¶ 9. Subsequently, between May 2003 and March 2008, the defendant filed several *pro se* motions to amend his original petition. *Id.* ¶¶ 10-13. In October 2008, after filing a Rule 651(c) certificate stating that he was "unable to further supplement or amend the claims raised" by the defendant in his *pro se* filings, appointed counsel informed the court that the defendant "wished to proceed *pro se*, with counsel withdrawing, so that the issues in his *pro se* amendments would be considered by the court." *Id.* ¶¶ 14, 15. The State filed a motion to strike the defendant's *pro se* amendments and filings because the defendant had been represented by counsel when they were filed. *Id.* ¶ 16. The defendant then filed a *pro se* motion asking the court to consider his *pro se* amendments, "or in the alternative allow [him] to proceed *pro se*." *Id.* ¶ 17. After a hearing on the State's motion to strike, the circuit court struck the defendant's *pro se* filings and ultimately dismissed the defendant's petition. *Id.* ¶¶ 18, 19.

¶ 37 On appeal, the defendant argued that "the court violated his right to represent himself in the postconviction proceedings by not granting his requests to proceed *pro se* and by striking his

No. 1-12-1657

*pro se* amendments to his petition." *Id.* ¶ 20. The reviewing court first determined that the Act itself provides defendants with a right to proceed *pro se*, finding that section 122-4 of the Act "grants a defendant the initial decision to invoke the right to counsel." *Id.* ¶¶ 21, 22 (citing 725 ILCS 5/122-4 (West 2010)). The court continued:

"While the Act does not expressly contemplate a defendant making a request for counsel and later revoking it, \*\*\* it clearly does not contemplate compelling a defendant who does not want counsel to accept counsel nonetheless. The Act creates a statutory right to counsel [citation] that the statutory language expressly leaves to the defendant-petitioner to invoke at his choosing. We shall not hold that a defendant can choose to proceed *pro se* when he files his postconviction petition but, having chosen at that time to request counsel, is irrevocably bound by that decision throughout the proceedings on his petition. In sum, we find a right to proceed *pro se* under the Act." *Gray*, 2013 IL App (1st) 101064, ¶ 22.

The State acknowledges that this holding supports defendant's position but maintains that defendant does not have a right to proceed *pro se* "after requesting and receiving the appointment of counsel because the plain language of the Act does not so provide." However, the defendant in *Gray* similarly requested to proceed *pro se* after having requested receiving appointment of counsel. Like the court in *Gray*, we conclude that a defendant's request for appointment of counsel does not necessarily preclude the defendant from later requesting to proceed *pro se*. *Id.* ¶ 22. Although we acknowledge that the circuit court did not have the benefit of the *Gray* decision, we see no reason to depart from the well-reasoned holding in *Gray*, and therefore agree

that, pursuant to the Act, a defendant has the right to proceed *pro se* in postconviction proceedings.

¶ 38 "However, the right to self-representation is not absolute[.]" *Id.* ¶ 23. Where a defendant may proceed *pro se*, he must knowingly and intelligently waive his right to counsel. *Id.* (citing *People v. Baez*, 241 Ill. 2d 44, 115-16 (2011)). As the *Gray* court explained:

"Waiver of counsel must be clear and unequivocal, not ambiguous, so that a defendant waives his right to self-representation unless he articulately and unmistakably demands to proceed *pro se*.

[Citation.] In determining whether a defendant's statement is clear and unequivocal, a court must determine whether the defendant truly desires to represent himself and has definitively invoked his right of self-representation. [Citation.] \*\*\* The determination of whether there has been a right to counsel depends upon the particular facts and circumstances of the case, including the background, experience, and conduct of the defendant. [Citation.]

We review the trial court's determination for abuse of discretion.

[Citation.]" *Gray*, 2013 IL App (1st) 101064, ¶ 23 (citing *Baez*, 241 Ill. 2d at 116).

¶ 39 In the present case, we find the circuit court erred when it struck defendant's *pro se* filings and when it did not rule on defendant's request to proceed *pro se*. At a minimum, the record shows that in both his *pro se* response to the State's motion to dismiss and his *pro se* petition for writ of *habeas corpus* defendant requested that the court either appoint new counsel or allow him to proceed *pro se*. In his response to the State's motion to dismiss, defendant asked

No. 1-12-1657

the court to appoint new counsel or "allow appointed counsel to withdraw, allow Petitioner to proceed Pro se and give Petitioner an Opportunity" to amend his petition. In his petition for writ of *habeas corpus*, defendant also specifically referred to having filed "several motions for appointment of new counsel or to allow petitioner to proceed pro se" and asked to be writ into court so he could "properly request to represent himself in the alternative to the court providing him other counsel." Both of these filings were acknowledged and struck by the court, but defendant's actual request to proceed *pro se* was never addressed. Similarly to the defendant in *Gray*, here defendant "made it clear that he wanted to raise his *pro se* claims and would proceed *pro se* if that was the only way to do so." *Gray*, 2013 IL App (1st) 101064, ¶ 24. Although some of the *pro se* filings included in the record do not have a file-stamp and it is unclear whether they were ever received by the circuit court, they nonetheless show that beginning as early as September 2010, defendant was requesting the appointment of new counsel or to proceed *pro se*. Defendant was consistent in his request to proceed *pro se* and did not waver. Under these circumstances, we find that defendant clearly and unequivocally requested to represent himself and conclude that the court should have ruled on his request.

¶ 40 The State argues that defendant did not make a clear and unequivocal request to represent himself, but rather that his "desire clearly was to have counsel other than APD Brown appointed to represent him \*\*\*. Defendant only requested that the court allow him to proceed *pro se* if the trial court refused to appoint a different attorney." However, the State has failed to cite any case law in support of the argument that when a defendant presents his request to proceed *pro se* as an alternative option, his request is not clear and unequivocal. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (the argument section of the brief "shall contain the contentions of the [appellee] \*\*\* with citation of the authorities and pages of the record relied on.") In addition, this court has

No. 1-12-1657

held that defendant's desire to proceed *pro se* only if the court refused to appoint new counsel does not render his request to proceed *pro se* any less clear or unequivocal. See *Gray*, 2013 IL App (1st) 101064, ¶ 24 ("While the request was arguably contingent upon the preclusion of defendant's preferred course \*\*\* that does not render the request ambiguous.").

¶ 41 The State also claims that defendant's request to represent himself was untimely because he did not "reference continuing *pro se* until well after counsel filed her 651(c) petition in 2009." In support, the State relies on *People v. Burton*, 184 Ill. 2d 1 (1998), a case which we find to be distinguishable. In *Burton*, the supreme court recognized that a defendant's request to represent himself is untimely "where it is first made just before the commencement of trial, after trial begins, or after meaningful proceedings have begun." *Burton*, 184 Ill. 2d at 24. However, in *Burton*, the court concluded that the defendant did not clearly and unequivocally invoke his right to represent himself. *Id.* The defendant presented his request to proceed *pro se* as a conditional willingness to do so if he could not get access to defense counsel's records. *Id.* at 24-25. However, defendant received access to the records, expressed no other dissatisfaction with counsel's representation, and gave no further indication that he wanted to represent himself. *Id.* at 25. The supreme court also noted that the defendant made the statements at issue at sentencing, after a fitness hearing had been conducted, after he entered a plea of guilty, and after he was found eligible for the death penalty. *Id.* at 7, 25. The supreme court concluded that because counsel had an "intimate and lengthy involvement in the case," the circuit court did not abuse its discretion by requiring counsel's continued representation. *Id.*

¶ 42 Here, in contrast, defendant made specific requests to proceed *pro se* during the second stage of postconviction proceedings. In addition, at the time defendant filed his *pro se* response to the State's motion to dismiss and his *pro se* petition for writ of *habeas corpus* asking to

No. 1-12-1657

proceed *pro se*, no meaningful proceedings had occurred: no hearings had been conducted in regard to defendant's petition and appointed counsel had not filed anything beyond a Rule 651(c) certificate. The State argues that counsel had "a lengthy involvement" in the case and had done a "thorough investigation of the forensic aspects of the case" but, at best, this argument is speculative. Regardless, the State has failed to cite the record in support of these allegations. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (the argument section of the brief "shall contain the contentions of the [appellee] \*\*\* with citation of the authorities and pages of the record relied on.") Moreover, the record shows only that counsel asked for a continuance on one occasion because she was waiting for the "trial file" and on another occasion because she was waiting to hear back about possible DNA testing. See *Gray*, 2013 IL App (1st) 101064, ¶ 25 (agreeing with the defendant that he should not be held responsible for the delays by his counsel in reviewing the record and evaluating claims). Counsel never filed a response to the State's motion to dismiss or and did not amend defendant's petition.

¶ 43 We recognize that a defendant's request to represent himself "may reasonably be rejected where it 'come[s] so late in the proceedings that to grant it would be disruptive of the orderly schedule of proceedings' or where a defendant 'engages in serious and obstructionist misconduct.' (Internal quotation marks omitted.)" *Gray* 2013, IL App (1st) 101064, ¶ 25 (quoting *People v. Woodson*, 2011 IL App (4th) 100223, ¶24). However, here defendant requested to proceed *pro se* just a few months after the State filed its motion to dismiss in a *pro se* response to the motion to dismiss and before any hearing on the motion. His request did not come so late that it would have been disruptive to the proceedings and there is no indication that defendant was engaging in obstructionist misconduct. Defendant consistently and repeatedly requested to be allowed to proceed *pro se* and we conclude that defendant's requests were timely.

No. 1-12-1657

¶ 44 In conclusion, we find that the circuit court erred when it failed to consider defendant's request to proceed *pro se* and, accordingly, this case is remanded for further proceedings where defendant's request is given due consideration. Once the court considers defendant's request to proceed *pro se*, it should admonish him regarding the implications of such a decision to determine whether defendant has knowingly and intelligently relinquished his right to counsel. Furthermore, because we have decided the case on this basis and are remanding the case for further second stage proceedings, we need not address defendant's other arguments.

¶ 45 For the forgoing reasons, the judgment of the circuit court is vacated and this cause is remanded for further proceedings consistent with this order.

¶ 46 Vacated and remanded with directions.