

No. 1-13-3644

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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. 05 CR 27148
)	
RAUL FERNANDEZ,)	Honorable
)	Kevin M. Sheehan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Ellis concurred in the judgment.

O R D E R

¶ 1 *Held:* Appointed counsel's representation was unreasonable under Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), where counsel did not amend defendant's *pro se* petition to include a freestanding actual innocence claim by withdrawing a clearly meritless ineffective assistance of counsel claim.

¶ 2 Defendant Raul Fernandez appeals from the second-stage dismissal of his amended petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West

2012). Defendant contends that his petition set forth a substantial showing of actual innocence. While defendant acknowledges that his innocence claim is not free-standing, he argues that the caselaw requiring a free-standing claim is misguided and has been abrogated. He contends alternatively that postconviction counsel did not fulfill his duties under Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), because he failed to amend defendant's *pro se* petition to present a free-standing claim of actual innocence by withdrawing his related, but clearly meritless ineffective assistance of counsel claim. We hold that the requirement that a petition's actual innocence claim be free-standing has not been abrogated, and thus defendant's substantive claim is barred. However, we find that counsel's failure to amend defendant's petition to present a free-standing claim was unreasonable representation, and accordingly reverse and remand with instructions.

¶ 3 The evidence at trial showed that defendant met with Esteban Perez and codefendant Luis Torres on the evening of September 19, 2005. According to Perez, both he and defendant belonged to the same gang. Torres had recently been robbed and sought the gang members' help. The three learned that "Deuce," a member of a rival gang, was responsible for the robbery. Testimony of several witnesses established that Deuce's real name was Jose Santos. The three men subsequently drove to Santos's car, intending to burn it in retribution. According to Perez, once they arrived at the car, defendant tried to burn the car with gasoline additive. However, police investigators who later encountered the car did not notice any odor of accelerants and found no indications that the car had been burned. At some point, Santos appeared and walked towards his car with 13-year-old David Woodhouse and David's 11-year-old brother Nicholas. According to both of the boys, a man called to Santos from across the street. Santos approached

the man and spoke briefly, before turning around and running back towards the boys. According to David, another man "came out from somewhere" and began to shoot at Santos. Neither boy got a good look at the shooter, but both described him as having a dark complexion. Santos was struck once and died.

¶ 4 At trial, Perez stated that he left the area when Santos approached defendant and the two began to argue. He heard two gunshots and began to run south on Francisco Avenue. Perez claimed he did not remember much of the night or of his later encounters with police and prosecutors due to memory loss. According to Perez's earlier grand jury testimony and written statement to prosecutors, which were introduced at trial, Torres called Santos over when he approached the car. Defendant then shot twice at Santos as he attempted to run away. As Perez fled the area on foot, he saw Torres and defendant drive away in their car. They later arrived at Perez's home, where defendant bragged that he had "got caught up" but that he had "shot him" and "got him."

¶ 5 According to Curtis Collins, another member of defendant's gang, he heard shots on the night of the shooting and walked several blocks to see the body. He testified that he did not see defendant, Perez, or Torres in the area. In prior statements to police and the grand jury, however, Collins said that he saw defendant get into a car with Perez and another man. The car drove off but returned 5 or 10 minutes later without Perez. Defendant got out of the car, stating "I got him." He then told Collins to walk towards Richmond Street. When Collins asked why, defendant replied, "You will find out when you get there." Collins walked to Richmond and found a man dying on the ground. He then returned to defendant and told him that police officers were everywhere and that the man had died. Defendant "panicked" and told Collins to "forget

about it. It never happened. Just pretend it never happened." At trial, Collins stated that he made the previous statements because the police had beaten him and told him what to say. According to the two prosecutors who spoke with Collins, he previously stated that the police officers had not mistreated him and bore no injuries or signs of physical abuse when he made his statements.

¶ 6 Defense witness Kyenan Harden heard gunshots on September 19, 2005, and found a person lying in an alley. At trial, he denied telling police officers and an assistant state's attorney that he saw Perez running down Augusta Boulevard while holding his waistband following the shooting. However, Detective Jeffrey Adamik and Assistant State's Attorney Steve Krueger testified for defendant and indicated that Harden had previously made such a statement.

¶ 7 The jury found defendant guilty of first-degree murder, but did not find that he personally discharged the firearm that caused Santos's death.

¶ 8 On direct appeal, defendant argued that the trial court erroneously denied defendant's request for an accomplice-witness instruction, allowed the State to misrepresent defendant's theory in closing arguments, and admitted Perez's grand jury testimony into evidence. This court affirmed defendant's conviction on direct appeal. *People v. Fernandez*, No. 1-07-2637 (2010) (unpublished order under Supreme Court Rule 23). Torres pled guilty to first-degree murder in a separate proceeding.

¶ 9 On March 11, 2011, defendant filed the postconviction petition which is the subject of the current appeal. In the petition defendant alleges, *inter alia*, that he is actually innocent because he was not present and had no knowledge of the murder. He cites an attached affidavit from codefendant Torres, asserting that his attorney never contacted Torres regarding potential exculpatory testimony. In arguing this claim in the petition, defendant asserts that trial counsel

was constitutionally ineffective for failing to investigate and call Torres as a witness, again citing the attached affidavit from Torres. Defendant's petition also alleges that he is actually innocent because the State knowingly put forth the false testimony of Collins.

¶ 10 In the attached affidavit, Torres states that Collins called Perez on September 19, 2005, and indicated he had seen Santos. Torres and Perez then drove to the location and waited by Santos's car. When Santos approached, Torres called to him. Santos began to flee as he realized who Torres was and Perez shot at him twice. Perez ran down Augusta Boulevard before jumping into Torres car. Torres states that defendant was not involved in the shooting and that Perez decided that they should blame defendant for the killing. Defendant also attached an affidavit from Collins to the petition. Collins states that he told Perez Santos' location and that defendant was not in the area on the day of the shooting. He also states that it was Perez's idea to blame the shooting on defendant.

¶ 11 The trial court advanced defendant's petition to the second stage and appointed counsel on May 5, 2011. On June 2, 2011, defendant filed a *pro se* document entitled "Supplemental Petition for Post-Conviction Relief" and a motion asking that his petition be treated as an extension of his original petition. The supplemental petition argued, *inter alia*, that defendant was actually innocent based on Torres and Collins's affidavits without arguing an ineffective assistance of counsel claim.

¶ 12 On April 26, 2012, defense counsel filed a certificate under Illinois Supreme Court Rule 651(c) (eff. April 26, 2012) asserting that defendant's initial *pro se* petition adequately presents his claims and that nothing could be added by amendment or supplemental petition. On September 20, 2012, the State moved to strike defendant's supplemental petition and defense

counsel indicated he had "no problem with that." The trial court granted the motion but left the documents in the court file in case defense counsel "decided to file something based on that." Defense counsel later told the court that he had considered the supplemental petition when he filed his Rule 651(c) certificate and did not want to include it with the original petition.

¶ 13 The State filed a motion to dismiss defendant's petition and a hearing was held on September 19, 2013. During oral arguments on the motion, the State argued that defendant's actual innocence claim was not free-standing because it relied on the same affidavit as his claim of ineffective assistance of counsel. It also admitted that Torres's affidavit was exculpatory, newly discovered, and material. The State asserted, however, that the affidavit was not of such a conclusive nature that it was likely to change the result at retrial because Torres was not a reliable, trustworthy witness and his potential testimony could be impeached on retrial.

¶ 14 The trial court granted the State's motion and dismissed defendant's petition. It explained that defendant's actual innocence claim "was not free-standing. That's involved in another claim. It would be false testimony. So it's not a free-standing claim of innocence, so it's dismissed on that claim alone." Defendant appeals.

¶ 15 Defendant first contends that his petition set forth a substantial showing of actual innocence. He asserts that the petition provided conclusive new evidence of innocence because Torres's affidavit alleges that Perez, the only eyewitness to identify defendant as the shooter, was the real shooter and developed a plan to frame defendant. He also argues that the affidavit from Collins corroborates Torres. While defendant acknowledges that his innocence claim relies upon the same evidence as his petition's claim of ineffective assistance of counsel for failure to

investigate, he argues that the caselaw requiring actual innocence claims to be free-standing is misguided and has been abrogated, citing *People v. Coleman*, 2013 IL 113307.

¶ 16 The State responds that defendant has forfeited his claim because he could have raised it on direct appeal. It also argues that defendant has waived his actual innocence claim because he has changed his theory of actual innocence on appeal. Alternatively, the State contends that defendant's actual innocence claim is barred because it is not free-standing.

¶ 17 Before addressing the merits of defendant's claim, we must determine if it has been forfeited as the State contends. The Act allows defendants to challenge their convictions based on a substantial violation of their rights under the federal or state constitution. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008); 725 ILCS 5/122-1 *et seq.* (West 2012). Proceedings under the Act are not a substitute for an appeal, however, and consequently any issues which could have been raised on direct appeal, but were not, are procedurally defaulted. *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005). Therefore, when a claim is based entirely on facts contained in the trial court record, it is forfeited. *People v. Petrenko*, 237 Ill. 2d 490, 499 (2010). Defendant's present claim relies on the affidavits attached to his petition. None of these documents were included in the trial record. Thus, the issue could not have been raised on direct appeal and is not forfeited. See *id.*

¶ 18 The State also asserts that defendant has waived his claims on appeal because he did not include them in his petition. A petitioner forfeits any claim he or she fails to raise in an original or an amended petition. 725 ILCS 5/122-3 (West 2012). Therefore, we may only review those claims that were presented in the postconviction petition before the trial court. *People v. Jones*, 211 Ill. 2d 140, 148 (2004) (Appellate court reviews "whether the allegations *in the petition*,

liberally construed and taken as true, are sufficient to invoke relief under the Act.” (Emphasis in original.)) We view *pro se* petitions with a "lenient eye" to determine whether they "clearly set forth" a defendant's claim that his or her rights were violated. *People v. Mars*, 2012 IL App (2d) 110695, ¶ 32. In order to survive forfeiture, the pleading must bear some relationship to the issue raised on appeal. *Id.* Defendant's petition adequately sets forth a claim that he is actually innocent based on Torres's assertions that he was not involved in the murder. Construing defendant's petition liberally, we find that defendant's claims bear a sufficient relationship to the claim raised on appeal. As such, we address the claim on its merits.

¶ 19 The Act provides a three-stage mechanism for a defendant who alleges that he suffered a substantial deprivation of his constitutional rights. *People v. Clark*, 2011 IL App (2d) 100188, ¶ 15. At the second stage of the proceeding, as in this case, the State may either file an answer to the defendant's petition or a motion to dismiss it. *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 27. Before a postconviction petition moves to the third stage, an evidentiary hearing, the trial court must determine if the petition and any attached documents "make a substantial showing of a constitutional violation." *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). In making this determination the court takes all well-pleaded facts in the petition and attached documents as true, unless contradicted by the record. *People v. Coleman*, 183 Ill. 2d 366, 381-82 (1998). When a petition is dismissed at the second stage, review is *de novo*. *Id.* at 389.

¶ 20 Under the Act, a defendant bears the burden to establish a substantial violation of his or her constitutional rights. *People v. Waldrop*, 353 Ill. App. 3d 244, 249 (2004). The Illinois Supreme Court has recognized that such violations may include a " 'free-standing' claim of actual

innocence." *People v. Hobley*, 182 Ill. 2d 404, 443 (1998), quoting *People v. Washington*, 171 Ill. 2d 475 (1996).

¶ 21 A claim of actual innocence is characterized as free-standing where "the newly discovered evidence being relied upon 'is not being used to supplement an assertion of a constitutional violation with respect to [the] trial.'" *Id.* at 443-44. In *Hobley*, the defendant was convicted of arson and later filed a postconviction petition alleging, in part that he was actually innocent based upon several affidavits attached to the petition. *Id.* However, the defendant also relied upon those same affidavits in support of his claim that prosecutors had violated their duties under *Brady v. Maryland*, 373 U.S. 83 (1963), and his claim that police officers had coerced his confession. *Hobley*, 182 Ill. 2d at 444. The supreme court held that the defendant had not properly raised a free-standing claim of innocence because the affidavits he cited were also used to supplement separate assertions of constitutional violations. *Id.* Consequently, it held that he was not entitled to an evidentiary hearing on his innocence claims. *Id.*

¶ 22 The supreme court reiterated its holding three years later in *People v. Orange*, 195 Ill. 2d 437 (2001). Quoting *Hobley*, the supreme court again noted that a free-standing claim could not rely upon evidence " ' "used to supplement an assertion of a constitutional violation with respect to [the] trial." ' " *Orange*, 195 Ill. 2d at 459, quoting *Hobley*, 182 Ill. 2d at 443-44, quoting *Washington*, 171 Ill. 2d at 479. In *Orange*, the defendant's successive postconviction claim of actual innocence relied upon various documents supporting an indication that defendant was tortured and coerced into confessing by police. *Id.* at 446-47. The defendant used the same documentation to argue that his trial was unconstitutional because his confession was involuntary. *Id.* at 459. The supreme court ruled that defendant was not entitled to an evidentiary

hearing on his innocence claims because his evidence was also used to supplement other constitutional claims, and thus his innocence claim was not free-standing. *Id.* at 460.

¶ 23 Since the decisions in *Hobley* and *Orange*, this court has held that a defendant cannot bring a postconviction claim of actual innocence where it is not free-standing. See, e.g., *People v. Brown*, 371 Ill. App. 3d 972, 984 (2007). In interpreting *Hobley*, this court has explained that an innocence claim is not free-standing where its evidentiary support is also used to support separate claims. *Id.* ("[Affidavit] cannot also be used to support a free-standing claim of actual innocence" where "it is being used by defendant to assert ineffective assistance of counsel claims with respect to his trial"); see also *People v. Collier*, 387 Ill. App. 3d 630, 637 (2008) ("Freestanding claims of innocence contemplate that the newly discovered evidence is not also being used to supplement the assertion of another constitutional violation.")

¶ 24 Defendant's actual innocence claim is not free-standing; it is clearly intertwined with an ineffective assistance of counsel claim. While defendant's petition initially phrased his claim as one of "actual innocence" and stated that he "is raising a 'free standing' claim of innocence," it proceeded to argue that claim by asserting that his attorney failed to contact or call Torres. It then provided an analysis of counsel's performance citing *Strickland v. Washington*, 466 U.S. 668 (1984). Moreover, even liberally viewing the petition as putting forth two separate claims of innocence and ineffective counsel, both solely rely upon the affidavit documenting Torres's potential testimony in support. Consequently, under *Hobley* and *Orange*, defendant's actual innocence claim cannot be deemed free-standing and he is not entitled to an evidentiary hearing. See *Hobley*, 182 Ill. 2d at 443-44; *Orange*, 195 Ill. 2d at 459.

¶ 25 Defendant does not contest that both claims rely upon the same evidence for support. However, he argues that the requirement that an actual innocence claim be free-standing is no longer applicable, relying upon the supreme court's opinion in *People v. Coleman*, 2013 IL 113307. In *Coleman*, the defendant filed a successive petition claiming actual innocence based on newly discovered evidence which the trial court denied after an evidentiary hearing. *Id.* ¶¶ 49, 77. On appeal, the State asked the supreme court to adopt a stricter evidentiary standard for proving free-standing actual innocence claims, based upon *Schlup v. Delo*, 513 U.S. 298 (1995). The Illinois Supreme Court declined and explained that "[i]n Illinois, a postconviction actual-innocence claim is just that, a postconviction actual-innocence claim," and noted that unlike the federal courts, Illinois had never distinguished between free-standing or ancillary innocence claims when determining what evidentiary standard to use. *Id.* at ¶ 91. Defendant argues that this language has abolished the requirement that an Illinois defendant's postconviction claims of actual innocence be free-standing. We disagree. In *Coleman*, the supreme court was considering the application of evidentiary standards. *Id.* It does not mention its prior opinions in *Hobley* and *Orange*, nor does it analyze or elaborate on the meaning of "free-standing." Without further guidance from the supreme court, we find defendant's argument that *Hobley* and *Orange* have been overruled unpersuasive.

¶ 26 Defendant also cites several appellate court cases which he asserts contradict this court's opinions in *Brown* and subsequent cases. He cites *People Williams*, 2012 IL App (1st) 111145, *People v. Lofton*, 2011 IL App (1st) 100118; *People v. Munoz*, 406 Ill. App 3d 844 (2010); and *People v. Sparks*, 393 Ill. App. 3d 878 (2009), as establishing a more convincing line of cases rejecting our free-standing doctrine. None of these opinions provide any analysis of whether their

defendant's claims were free-standing. Of the four opinions, none reference the supreme court's opinion in *Orange*, and only *Munoz* discusses the supreme court's ruling in *Hobley*. See *Munoz*, 406 Ill. App 3d at 853-854. Furthermore, while the appellate court in *Munoz* describes *Hobley*, it does not discuss whether the supreme court opinion applies to the facts before it. As such, we find defendant's reliance on these cases unpersuasive. Under *Hobley* and *Orange* defendant's actual innocence claim is not free-standing, and therefore he is not entitled to an evidentiary hearing on his petition as filed.

¶ 27 Defendant contends alternatively that if his actual innocence claim must fail because it is not free-standing, then defense counsel violated Rule 651 by not amending the *pro se* petition by removing his claim of ineffective assistance of counsel. Conceding that his ineffectiveness claim is meritless, he argues that Rule 651 required counsel to convert his innocence claim into a free-standing claim by withdrawing the clearly meritless ineffectiveness argument. The State responds that counsel's Rule 651(c) certificate raises a presumption that his performance was reasonable and argues that counsel was not required to amend defendant's petition.

¶ 28 The right to counsel in postconviction proceedings is not constitutionally mandated. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). Instead, the "wholly statutory" right to postconviction counsel is derived solely from the Act. *Id.*; see also 725 ILCS 5/122-4 (West 2012). The Act requires only a reasonable level of assistance by counsel during postconviction proceedings. *People v. Moore*, 189 Ill. 2d 521, 541 (2000). The purpose of Illinois Supreme Court Rule 651(c) (eff. April 26, 2012) is to implement the right to reasonable assistance provided by section 122-4. See *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). The rule requires appointed counsel to: (1) consult with the defendant to determine his or her claims of

constitutional deprivation; (2) examine the record; and (3) make any amendments to the *pro se* petition previously filed by the *pro se* defendant that are “necessary” to present the claims to the court. See also *People v. Johnson*, 154 Ill. 2d 227, 237-38 (1993) (the attorney appointed will ascertain the basis of the defendant's claims, shape those claims into appropriate legal form and present the defendant's constitutional contentions to the court).

¶ 29 The purpose of the rule is to ensure that postconviction counsel shapes a defendant's allegations into a proper legal form and presents them to the court. *People v. Profit*, 2012 IL App (1st) 101307 ¶ 18. Postconviction counsel is not required to advance frivolous or spurious claims. *People v. Greer*, 212 Ill. 2d 192, 205 (2004), nor must counsel amend a *pro se* petition in all cases, *People v. Turner*, 187 Ill. 2d 406, 412 (1999). However, he or she must make “any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner’s contentions.” S. Ct. R. 651(c) (eff. Feb. 6, 2013); see also *id.* Such amendments include those “routine amendments” which overcome procedural bars of waiver. *Turner*, 187 Ill. 2d at 414. For example, our supreme court has held that appointed counsel acts unreasonably where he or she fails to amend a *pro se* petition recharacterizing a defendant's waived claims as claims of ineffective assistance of appellate counsel in order to overcome the procedural bar. See *id.* at 413-14.

¶ 30 Compliance with Rule 651(c) may be shown by the filing of a certificate by counsel. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). The filing of a facially valid Rule 651(c) certificate creates a rebuttable presumption that counsel acted reasonably and complied with the rule. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23. A defendant has the burden to overcome this presumption by demonstrating that postconviction counsel failed to substantially comply with

the duties required by Rule 651(c). *Profit*, 2012 IL App (1st) 101307, ¶ 19. Appointed counsel's compliance with the rule is reviewed *de novo*. See *Suarez*, 224 Ill. 2d at 41-42.

¶ 31 Defendant concedes that counsel filed a facially valid Rule 651(c) certificate, but he argues that the record rebuts the presumption of compliance because it is clear from the record that counsel did not make necessary amendments to his claims. We agree. Defendant's claim that trial counsel was ineffective for failing to call codefendant Torres to testify is clearly meritless. See, e.g., *People v. Brown*, 371 Ill. App. 3d 972, 982 (2007) (Claim of ineffective assistance for failure to call codefendant as witness "must fail" where codefendant did not "affirmatively aver" that he would have testified if called.) In the affidavit, Torres does not state that he would have waived his right to silence and testified for defendant if called; rather he specifically states that he did not bring the information forward because he feared being incriminated. Furthermore, because of the "free-standing claim" doctrine, the meritless ineffectiveness claim's presence in the petition procedurally barred defendant's actual innocence claim from being considered, as we have already determined. Consequently, if appointed counsel had amended the *pro se* petition to remove the clearly meritless claim, defendant's actual innocence claim could have been considered on its merits.

¶ 32 We note that the requirement that an actual innocence claim be free-standing is a technical pleading requirement and bar to defendant's claim which would not rise intuitively in the mind of a *pro se* prisoner. *Pro se* petitioners are not expected to understand every complex nuance of legal procedure, evidenced by the low threshold they face at first stage proceedings where they need not include legal argument or citation. See *People v. Brown*, 236 Ill. 2d 175, 184 (2010). This is precisely why counsel is appointed for petitioners who reach the second stage

of proceedings: to review *pro se* claims and make the necessary amendments to ensure that any potentially meritorious claims are in the "appropriate legal form" so the claims are adequately presented to the trial court. See *People v. Schlosser*, 2012 IL App (1st) 092523, ¶ 18.

¶ 33 Here, defendant's actual innocence claim was not adequately presented to the trial court because the presence of a clearly meritless ineffective assistance claim prevented consideration of the innocence claim's merits. Defense counsel could have ensured that the trial court reviewed the merits of defendant's actual innocence claim by amending the *pro se* petition to withdraw the ineffective assistance claim. Moreover, we see no practical distinction between such an amendment and an amendment recharacterizing a petition's claims to avoid procedural bar. See *Turner*, 187 Ill. 2d at 413-14. As such, we find that the failure to amend defendant's petition was likewise unreasonable, and defendant has rebutted the presumption created by counsel's certificate.

¶ 34 The State argues that counsel's failure to amend was not unreasonable because counsel was not required to preserve a meritless claim and the actual innocence claim was clearly meritless. It notes that the trial court found Torres's affidavit to be unreliable. It is true that appointed counsel need not advance a postconviction petition's "frivolous or spurious claims." *People v. Greer*, 212 Ill. 2d 192, 205 (2004). However, we disagree with the State's assertion that defendant's actual innocence claim was evidently frivolous or spurious. In order to succeed on a claim of actual innocence, defendant must present (1) new, (2) material, (3) noncumulative evidence that is (4) so conclusive it would probably change the result on retrial. *Coleman*, 2013 IL 113307, ¶ 96. The State admits that it conceded the evidence was new, material, and noncumulative in arguing before the trial court; it argues only that the affidavit is not conclusive.

Conclusive means the new evidence, considered along with the trial evidence, "would probably lead" to a different verdict. *Id.*

¶ 35 The State's argument that defendant's claim is meritless rests on the assertion that Torres's account is unreliable. The State argues that it would have impeached any testimony by Torres with a videotaped confession that was not presented at trial. However, such credibility determinations are not to be considered at the second-stage of post-conviction review. *People v. Sanders*, 2016 IL 118123, ¶ 40; see also *People v. Smith*, 2015 IL App (1st) 140494, ¶ 21. At the second-stage, all well-pleaded facts and accompanying affidavits must be taken as true. *Hobley*, 182 Ill. 2d at 428. The State presented a single witness who positively identified defendant as the shooter at trial. Perez was also the only witness to positively indicate that defendant was present at the shooting. Torres's account, taken as true, indicates that defendant was neither present at the shooting nor involved in its planning and implicates the State's primary witness in the crime. It therefore supports defendant's claim that he was not criminally liable for murder. We need not presently determine whether or not defendant's claim substantially shows that he has conclusive evidence of innocence and whether they should survive second-stage review. See *Turner*, 187 Ill. 2d at 416. The question before this court is whether that claim was so spurious or frivolous that appointed counsel was reasonable in failing to amend the petition to remove a technical procedural bar and present them for review. See *Greer*, 212 Ill. 2d at 205. Taking Torres affidavit as true, we find that defendant's claim is not clearly spurious or frivolous and hold that appointed counsel's failure to amend defendant's petition was unreasonable. Accordingly, because postconviction counsel rendered unreasonable assistance, the dismissal of defendant's petition must be reversed and the cause remanded for additional second-stage proceedings,

1-13-3644

during which defendant is permitted to amend his postconviction petition with the assistance of counsel. See *Turner*, 187 Ill. 2d at 417.

¶ 36 For the foregoing reasons, we find that defendant was not entitled to an evidentiary hearing on his petition as filed because his asserted actual innocence claim was not free-standing. However, appointed counsel's failure to amend the *pro se* petition to present a free-standing claim constituted unreasonable assistance. Accordingly, we reverse the judgment of the circuit court of Cook County and remand for the appointment of new counsel and further second-stage proceedings.

¶ 37 Reversed and remanded with directions.