

NOTICE
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2025 IL App (5th) 230113-U
NO. 5-23-0113
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Champaign County.
)	
v.)	No. 17-CF-759
)	
MARQUISE T. BURNETT,)	Honorable
)	Roger B. Webber,
Defendant-Appellant.)	Judge, presiding.

JUSTICE VAUGHAN delivered the judgment of the court.
Justices Barberis and Boie concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court’s denial of defendant’s postconviction petition is affirmed where postconviction counsel did not provide unreasonable assistance when he (1) failed to secure a witness at the evidentiary hearing in support of defendant’s actual innocence claim where the testimony was not sufficiently conclusive to alter the trial court’s judgment and (2) discarded defendant’s *Miller*-based proportionate penalties claim where defendant failed to articulate any basis for the claim.

¶ 2 Defendant, Marquise T. Burnett, appeals the denial of his postconviction petition. On appeal, he argues that his constitutional rights were violated because his postconviction counsel provided unreasonable assistance by failing to secure the appearance of a witness at the third-stage evidentiary hearing and failed to substantiate defendant’s *Miller*-based claim of a proportionate penalties clause violation. For the following reasons, we affirm.

¶ 3

I. BACKGROUND

¶ 4 On June 8, 2017, defendant was charged, by information, with four counts of first degree murder (720 ILCS 5/9-1(a)(1) (West 2016)) related to the death of Darien Carter. Each count carried a potential 20- to 60-year sentence of imprisonment along with an additional 25-year sentence enhancement if defendant personally discharged the firearm that killed Darien. The charges stemmed from a shooting on June 2, 2017, at which time Darien, who was with his brother, Jashaun Manning, was riding his bicycle on Eureka Street across from Douglas Park in Champaign, Illinois. Darien died after sustaining six gunshot wounds.

¶ 5 Following a trial, defendant was found guilty of first degree murder. The jury also found that defendant personally discharged the firearm causing Darien's death. The trial court sentenced defendant to a total of 55 years' incarceration comprised of 30 years' incarceration for the offense with an additional 25-year sentence enhancement. Defendant timely appealed the judgment and sentence, both of which were affirmed on October 8, 2020. *People v. Burnett*, 2020 IL App (4th) 180276-U, ¶¶ 1, 40. The underlying facts related to Darien's death and the evidence presented at trial were set forth in the previous decision, and therefore, we will only address the evidence relevant to the current appeal.

¶ 6 In February 2022, defendant filed a *pro se* postconviction petition in which he claimed actual innocence, prosecutorial misconduct, errors at trial, ineffective assistance of counsel, and that his *de facto* life sentence was unconstitutional as applied to him. Counsel was appointed to represent defendant.

¶ 7 Postconviction counsel filed an amended postconviction petition on August 16, 2022. The amended petition claimed that trial counsel was ineffective for failing to investigate a witness

named Aniezha Shakur¹ who stated defendant was with her on a different side of the park when the shooting occurred and that defendant did not shoot Darien. The amended petition further contended that trial counsel was ineffective for failing to impeach a State witness, James Mosley, with his prior convictions, failing to present case law following the court's denial of defendant's motion to dismiss, and cumulative error on the part of trial counsel. The amended postconviction petition also alleged that appellate counsel was ineffective for failing to raise a claim of ineffective assistance of trial counsel related to the failure to (1) investigate the alibi witness, (2) impeach Mosley, and (3) present case law following the denial of the motion to dismiss. The amended postconviction petition further claimed actual innocence based on Shakur's statements.

¶ 8 The amended petition also clarified that postconviction counsel would not be presenting claims of error previously alleged by defendant because postconviction counsel found them meritless. The waived postconviction claims included the claim of error in the trial court's denial of defendant's motion to dismiss, prosecutorial misconduct, the assignment of Judge Webber to the case, and that defendant's sentence was unconstitutional. As to the unconstitutional sentence, postconviction counsel indicated that defendant was unable to articulate a basis for this claim when postconviction counsel discussed the claim with defendant.

¶ 9 Postconviction counsel prepared an affidavit that was attached to the amended petition. The affidavit indicated the dates that counsel consulted with defendant, the dates counsel reviewed the court file and transcript, that she requested an investigation of two potential witnesses by Steven Guess, requested police reports, and after reviewing the reports sent an updated investigation request to Guess. The affidavit stated that Guess attempted to contact two possible

¹Aniezha Shakur is also referred to as Aniezha Fairman in the record. It is unclear which surname is correct so this court will use the name set forth in the postconviction petition.

witnesses but was unsuccessful except for obtaining possible addresses, and that certified letters were sent to the two potential witnesses. One letter was received; the other was returned and was stamped “unable to forward.” Counsel also filed a Rule 604(d) certificate (Ill. S. Ct. R. 604(d) (eff. July 1, 2017)) that stated counsel consulted with defendant to ascertain his “contentions of error in the entry of the plea of guilty,” examined the trial court file and transcript “of the plea of guilty and the report of proceedings in the sentencing hearing.” It further asserted that counsel made “any amendments to the motion necessary for the adequate presentation of any defects in those proceedings.”

¶ 10 Additional attachments to the amended petition included the court docket sheet, an affidavit from Steven Guess, and Guess’s investigative report. Guess’s affidavit stated that he was an investigator for the Champaign County public defender, and while working in that capacity, interviewed Aniezha Shakur and prepared a report. The affidavit further indicated that a true and correct copy of his report was attached. The report indicated that Aniezha stated that she was with defendant when the shots were fired and defendant did not fire the shots. She further asserted that she did not know who fired the shots because she did not see the shooting and only heard the shots. Aniezha further stated that she did not contact police because she was 14 or 15 years old at the time and her family did not want her to get involved.

¶ 11 On September 8, 2022, defendant’s affidavit for the postconviction petition was filed. The affidavit stated that defendant advised his trial counsel of the alibi witness. The affidavit further stated that defendant’s trial counsel (1) was aware of Mosley’s prior convictions but failed to impeach him, (2) failed to file any authority following the court’s denial of defendant’s motion to dismiss, and (3) that appellate counsel did not raise the issue related to trial counsel’s failure to

investigate the alibi witness. On September 12, 2022, the State moved to dismiss the amended postconviction petition.

¶ 12 A hearing on the motion to dismiss was held on November 21, 2022. At that time, the trial court advanced the ineffective assistance claims related to the potential alibi witness claim, the failure to impeach Mosley claim, and claim of actual innocence. The court denied the claim related to the case law supporting the motion to dismiss and found that the claims deemed meritless by postconviction counsel would not be advanced. It granted the State's motion to dismiss as to the claims concerning appellate counsel's alleged ineffectiveness in failing to raise the case law issue on direct appeal.

¶ 13 The advanced claims proceeded to hearing on February 22, 2023. Testimony was provided by Harvey Welch and defendant. Welch testified that he was defendant's trial counsel and never interviewed Aniezha Shakur. He stated that defendant never said anything to him about Aniezha and therefore he did not interview her. He agreed that he stated during oral argument that the only witness who would testify that defendant was the shooter was a multi-convicted felon and that witness was Mosley. Welch agreed that he knew Mosley had prior convictions. While Welch was reviewing the transcript to determine whether he impeached Mosley with that information at trial, the State stipulated that Welch did not cross-examine Mosley during the trial. The State also stipulated that it did not ask Mosley about his prior convictions during direct examination. The State also clarified to the court that Mosley's prior convictions consisted of unlawful use of credit card, theft, and retail theft with a prior conviction.

¶ 14 On cross-examination Welch testified that Mosley was not a cooperative witness for the State and "went south on" the State at trial. He agreed that the State had to impeach Mosley at trial with his prior statements made to the police. Welch stated that Mosley's trial testimony was

contradictory of the statements provided in his police interview. Mosley also denied stating that defendant was the shooter, so counsel did not “think it necessary to follow that up with prior conviction impeachment because he was, in effect, *** impeaching himself.” Welch reiterated his earlier testimony that he had no knowledge of any alibi witness and had no discussions with defendant or anyone else regarding any alibi witness. He agreed that if alibi evidence was provided to him, it would have been important and something worth investigating. He did not investigate the alibi witness because he “had no knowledge of any alibi witness.”

¶ 15 Defendant testified that he had appointments and spoke with Welch during his case. Defendant stated that he told Welch “about multiple people that he could interview and possibly get an alibi.” He stated that he told Welch about Aniezha and gave him Aniezha’s number the first time Welch came to see him at the county jail. He stated that was the only time he mentioned Aniezha. The State declined the opportunity to cross-examine defendant.

¶ 16 Postconviction counsel advised the court that it had no other witnesses but requested the court take judicial notice of the Champaign County investigation report written by Guess when he interviewed Aniezha on July 20, 2022. The State agreed that judicial notice could be provided as to the fact that Guess interviewed someone but not as to what was said. The State further noted there was no affidavit from Aniezha. The court then asked if Aniezha was available to testify in person and postconviction counsel stated, “no, [Y]our Honor, she is not.” The State noted that Guess’s affidavit stated he spoke to someone over the phone who identified herself and then provided hearsay statements made by the person on the phone which precluded cross-examination by the State. After a brief recess to examine the rules of evidence, the court returned and stated it would allow Guess’s report. Postconviction counsel rested. The State presented no evidence.

¶ 17 Following argument, the trial court noted its skepticism related to defendant's testimony that he provided Aniezha's name and number to his trial counsel. The court did not doubt that Guess accurately recorded what he was told by Aniezha but stated Aniezha did not sign an affidavit swearing to the truth of the statement and did not come to court to swear under oath that her statements were true and subject herself to cross-examination. The court also indicated skepticism with Aniezha's statements to Guess. It stated that the proffered testimony was not credible, and it did not believe that, had she testified, it was sufficiently damaging to the State's theory to raise a question about the reliability of the conviction. The court further found Welch's decision not to cross-examine or impeach Mosley was trial strategy. The court denied the postconviction petition and defendant timely appealed.

¶ 18 II. ANALYSIS

¶ 19 On appeal, defendant abandons his previous arguments and now contends that his postconviction counsel provided unreasonable assistance. Defendant's arguments are premised on postconviction counsel's failure to (1) secure Aniezha as a witness at the evidentiary hearing stating the testimony would have supported defendant's actual innocence claim and (2) substantiate defendant's claim that his sentence violated the proportionate penalties clause as applied to him because he was only 21 years old at the time the crime was committed. We disagree.

¶ 20 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2022)) "provides a statutory remedy to criminal defendants who assert claims for substantial violations of their constitutional rights at trial." *People v. Robinson*, 2020 IL 123849, ¶ 42. It is not a substitute for an appeal but instead allows a defendant to collaterally attack the final judgment. *Id.*

¶ 21 Here, defendant claims ineffective legal assistance by his postconviction counsel. "There is no constitutional right to the assistance of counsel in postconviction proceedings; the right to

counsel is wholly statutory ***.” *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). The Act requires counsel to provide “a reasonable level of assistance.” *Id.* “To ensure that postconviction petitioners receive this level of assistance, Rule 651(c) imposes specific duties on postconviction counsel.”

Id. Rule 651(c) states, that the

“record filed in that [trial] court shall contain a showing, which may be made by the certificate of petitioner’s attorney, that the attorney has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner’s contentions.” Ill. S. Ct. R. 651(c) (eff. July 1, 2017).

When the certificate is filed, there is a rebuttable presumption that postconviction counsel’s assistance was reasonable. *People v. Custer*, 2019 IL 123339, ¶ 32.

¶ 22 Here, postconviction counsel filed a Rule 604(d) certificate which is used for appeals involving guilty pleas. *People v. Carrizoza*, 2018 IL App (3d) 160051, ¶ 14. While Rule 604(d) has similar requirements as Rule 651(c), the certificates cannot certify the same duties as they involve different legal proceedings and “contain noticeable differences.” *Id.* ¶ 15 (citing *People v. Mason*, 2016 IL App (4th) 140517, ¶ 22). While there have been instances where a Rule 604(d) certificate has been found as substantial compliance with Rule 651(c) (see *People v. Kirkpatrick*, 2012 IL App (2d) 100898, ¶ 14 (reversal not required where certificate was simply miscaptioned and contained the required contents)), the same cannot be said when the pleading is both miscaptioned and contains the wrong contents. See *Mason*, 2016 IL App (4th) 140517, ¶¶ 24-25 (certificate did not substantially comply where it was miscaptioned and addressed only the guilty

plea instead of all the constitutional deprivations). The certificate filed in this case mirrored the erroneous language seen in *Mason*, as evidenced by counsel twice using the phrase “plea of guilty” in the certificate. A certificate that fails to address each Rule 651(c) requirement is not a substantially compliant certificate. *Id.*; see also *Carrizoza*, 2018 IL App (3d) 160051, ¶ 18.

¶ 23 While no substantially compliant certificate was filed, we must still determine whether postconviction counsel complied with the Rule 651(c) mandate. *Carrizoza*, 2018 IL App (3d) 160051, ¶ 19. Our review of the record reveals that in addition to the noncomplying Rule 604(d) certificate, postconviction counsel also filed an affidavit. Therein, counsel provided the dates she consulted with defendant, the dates she reviewed the court file and transcripts, the dates she requested and reviewed the police reports, and actions taken thereafter. Accordingly, the first two requirements of Rule 651(c), *i.e.*, consultation with defendant and examination of the record, occurred. The only issue remaining is whether postconviction counsel made the amendments necessary for the adequate presentation of petitioner’s contentions.

¶ 24 Postconviction counsel filed a seven-page amended postconviction petition on August 16, 2022. Therein, counsel amended defendant’s 89-page *pro se* petition that contained eight issues to now address six specific issues, some of which were not raised by defendant in his *pro se* petition. Counsel also specifically addressed other postconviction claims requested by defendant that counsel did not believe had merit. As such, on its face, the record supports a finding that counsel made the amendments necessary for the adequate presentation of petitioner’s contentions such that compliance with Rule 651(c) is seen.

¶ 25 Defendant disagrees and first claims that postconviction counsel provided unreasonable assistance because he failed to secure Aniezha’s presence at the third-stage evidentiary hearing which would have supported defendant’s actual innocence claim. When a defendant claims that

appointed counsel failed to provide reasonable assistance, “the defendant must show not only how the attorney’s performance was deficient or unreasonable but also what prejudice resulted from the deficiency” when the matter is being considered at the third stage. *People v. Landa*, 2020 IL App (1st) 170851, ¶ 58; *People v. Hotwagner*, 2015 IL App (5th) 130525, ¶¶ 37-51; *People v. Watson*, 2022 IL App (5th) 190427, ¶¶ 48-50.

¶ 26 Here, the claim of deficient performance stems from the undisputed fact that Aniezha was not present at the hearing on February 22, 2023. Indeed, after testimony by Welch and defendant was completed, postconviction counsel confirmed that Aniezha was unavailable to testify in person. As such, we must determine if counsel’s failure to secure Aniezha was prejudicial to defendant. On appeal, defendant claims that counsel’s failure to secure Aniezha as a witness at the evidentiary hearing undermined his actual innocence claim.

¶ 27 To gain relief under an actual innocence theory, “the evidence adduced by the defendant must first be ‘newly discovered.’ ” *People v. Morgan*, 212 Ill. 2d 148, 154 (2004). Newly discovered evidence is “evidence that was not available at defendant’s original trial and that the defendant could not have discovered through diligence.” *Id.* The evidence “must be of such conclusive character that it would probably change the result on retrial.” *Id.*

¶ 28 Here, we cannot find that postconviction counsel’s failure to secure Aniezha as a witness at the third-stage hearing was prejudicial. Defendant testified at that hearing that he provided Aniezha’s name and number to Welch at the first meeting between defendant and trial counsel. While Welch disputed defendant’s testimony, assuming *arguendo* that defendant’s statements were true, Aniezha’s statements to Guess indicated that Aniezha never spoke with the police because her family did not want her to get involved. While defendant’s knowledge of Aniezha’s presence at the scene is insufficient to undermine a finding of newly discovered evidence in and

of itself, Aniezha's statement falls short of the second prong requiring that "no amount of due diligence could have forced that witness to come forward and swear to those facts earlier" (*People v. Anderson*, 2021 IL App (1st) 200040, ¶ 59).

¶ 29 Regardless, even if we classified the evidence as "newly discovered" and postconviction counsel had secured Aniezha to testify at the evidentiary hearing, her testimony was insufficient to support defendant's actual innocence claim. In addition to requiring newly discovered evidence to make a claim of actual innocence, the evidence must be "of such conclusive character that it would probably change the result on retrial." *People v. Robinson*, 2020 IL 123849, ¶ 47. The conclusive character of the new evidence is the most important element of an actual innocence claim. *Id.* The conclusive-character element requires evidence "that places the trial evidence in a different light and undermines the court's confidence in the judgment of guilt." *Id.* ¶ 56.

¶ 30 Here, Aniezha's alleged testimony would have stated she was walking up to defendant when she heard the gunshots, she and defendant were not near the shooting, and she and defendant talked for a while after the shooting and then left the area together on foot once Aniezha felt safe. However, Aniezha's proposed testimony was contradictory to defendant's police interview statements about his location as well as other witness testimony regarding defendant's location at the time of and immediately after the shooting. As such, we cannot find that the proposed testimony, which we take as true (see *People v. Sanders*, 2016 IL 118123, ¶ 48), was of such conclusive character for this court to find that the result on retrial would change. Therefore, we cannot find that postconviction counsel's failure to secure Aniezha as a witness at the evidentiary hearing to support defendant's actual innocence claim was prejudicial to defendant. Without prejudice, we cannot find that postconviction counsel's failure to secure Aniezha as a witness at defendant's third-stage evidentiary hearing was evidence of unreasonable assistance.

¶ 31 Defendant also contends that postconviction counsel’s assistance was unreasonable because he failed to support defendant’s as-applied proportionate penalties clause claim related to the attendant characteristics of youth at the time the crime was committed, defendant’s age, and the 55-year sentence imposed by the trial court. We disagree. In the case at bar, postconviction counsel determined that defendant’s proportionate penalties clause claim had no merit. Rule 651(c) postconviction counsel’s obligations do “not require postconviction counsel to advance frivolous or spurious claims on defendant’s behalf.” *People v. Greer*, 212 Ill. 2d 192, 205 (2004). “If amendments to a *pro se* postconviction petition would only further a frivolous or patently nonmeritorious claim, they are not ‘necessary’ within the meaning of the rule.” *Id.*

¶ 32 The proportionate penalties clause of the Illinois Constitution “requires courts to determine all penalties both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship.” *People v. Moore*, 2023 IL 126461, ¶ 40 (citing Ill. Const. 1970, art. I, § 11). An as-applied challenge requires a showing that the statute is unconstitutional as it applies to the specific facts and circumstances of the challenging party. *People ex rel. Hartrich v. 2010 Harley-Davidson*, 2018 IL 121636, ¶ 12. Here, *Miller v. Alabama*, 567 U.S. 460 (2012), is the claimed basis of defendant’s challenge. However, *Miller* and its progeny directly apply only to juvenile offenders which were defined as individuals under the age of 18. *Roper v. Simmons*, 543 U.S. 551, 574 (2005); *Graham v. Florida*, 560 U.S. 48, 74-75 (2010); *Miller*, 567 U.S. at 465. The Illinois Supreme Court has also accepted, for sentencing purposes, that the age of 18 marked “the present line between juveniles and adults,” noting that an 18-year-old defendant “falls on the adult side of that line.” *People v. Harris*, 2018 IL 121932, ¶ 61. Defendant was 21 years old at the time of Darien’s murder.

¶ 33 Despite rejection of facial challenges to the mandatory firearm enhancement statute in murder claims (see *People v. Hilliard*, 2023 IL 128186, ¶ 22 (citing *People v. Sharpe*, 216 Ill. 2d 481, 524 (2005))), an emerging adult defendant is not precluded from bringing an as-applied challenge related to the mandatory firearm enhancement. *Id.* ¶ 27. Because *Miller* does not directly apply to young adults, however, a defendant must show that the evolving science on juvenile maturity and brain development underlying the *Miller* decision applies to the specific facts and circumstances. *Harris*, 2018 IL 121932, ¶ 46.

¶ 34 Here, defendant's *pro se* petition claimed that *Miller* applied because he was 21 years of age at the time of the murder. Defendant's *pro se* postconviction petition failed to identify any specific circumstances that rendered his brain more similar to a juvenile brain than an adult brain. Further, the amended postconviction petition explained that the claim was being discarded because when postconviction counsel spoke with defendant about this claim, defendant was unable to articulate a basis for the claim. We interpret the statement as indicating that defendant failed to provide counsel with sufficient facts to support the claim. While defendant attached correspondence from Dr. Jim Garbarino, the document was an offer to assist defendant for a fee. No evaluation was conducted, and the correspondence did nothing to provide support to defendant's *pro se* claim or the underlying question of whether defendant's 21-year-old brain was more similar to that of a juvenile than an adult at the time of the murder.

¶ 35 Here, defendant's *pro se* petition failed to cite any specific facts and circumstances that would warrant an as-applied *Miller*-based proportionate penalties clause claim. Further, defendant failed to articulate a basis for the claim when he spoke with postconviction counsel. A petitioner has the obligation to inform counsel of specific facts that might support general claims. See *People v. Johnson*, 154 Ill. 2d 227, 247-48 (1993). Only if such information is provided would

postconviction counsel be obligated to move forward with the claim. *Id.* at 248. Postconviction counsel is not obligated “to engage in a generalized fishing expedition in search of support for claims raised in a [*pro se*] petition.” *Id.* Under these circumstances, we cannot find it unreasonable assistance for postconviction counsel to find the claim was meritless and therefore decline to present such claim. See *Greer*, 212 Ill. 2d at 205. As such, we cannot find that omission of this claim from the amended postconviction petition was indicative of unreasonable assistance. Accordingly, we affirm the trial court’s denial of defendant’s postconviction petition.

¶ 36

III. CONCLUSION

¶ 37 For the above-stated reasons, we affirm the trial court’s denial of defendant’s postconviction petition.

¶ 38 Affirmed.