No. 129784

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, First District, No. 1-21-1553
Respondent-Appellee,	)	There on Appeal from the Circuit Court of Cook County, Illinois,
v.	)	No. 12 CR 13176.
ANTUAN JOINER,	)	The Honorable Vincent M. Gaughan,
Petitioner-Appellant.	)	Judge Presiding.

BRIEF OF RESPONDENT-APPELLEE
PEOPLE OF THE STATE OF ILLINOIS

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TABLE OF CONTENTS

POINTS AND AUTHORITIES

NATURE OF THE CASE

The circuit court summarily dismissed petitioner's postconviction petition at the first stage. On appeal, petitioner argued that the circuit court erred by summarily dismissing the petition more than 90 days after it was filed and docketed and in concluding that the claims set forth in the petition, including the ineffective assistance of counsel claim, were frivolous or patently without merit. The appellate court affirmed, this Court granted petitioner's petition for leave to appeal, and petitioner elected to allow his petition for leave to appeal to stand as his brief, *see* Ill. S. Ct. R. 315(h). The issue raised on the pleadings is whether the ineffective assistance claim is frivolous or patently without merit.

ISSUES PRESENTED FOR REVIEW

1. Whether the "docketing" of a postconviction petition has occurred under the Post-Conviction Hearing Act when a petitioner merely submits the petition to the circuit clerk.

2. Whether the circuit court correctly dismissed petitioner's postconviction petition because his claim of ineffective assistance of trial counsel is frivolous or patently without merit.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315, 612, and 615. On September 27, 2023, this Court allowed leave to appeal.

STATUTORY PROVISION INVOLVED

Section 122-2.1 of the Post-Conviction Hearing Act provides, in relevant part, that:

> (a) Within 90 days after the filing and docketing of each petition, the court shall examine such petition and enter an order thereon pursuant to this Section.
> . . . .
>
> (2) If the petitioner is sentenced to imprisonment and the court determines the petition is frivolous or is patently without merit, it shall dismiss the petition in a written order, specifying the findings of fact and conclusions of law it made in reaching its decision. . . . .

725 ILCS 5/122-2.1.

STATEMENT OF FACTS

I. The circuit court convicted petitioner of first degree murder and attempted murder.

Petitioner was charged with the first degree murder of Shakaki Asphy and the attempted murder of Leon and Thomas Cunningham. *See* C4-6, 72; CI38-88.[1] The charges alleged that on June 16, 2012, petitioner fired a gun in the victims' direction, causing Asphy's death and serious injury to Leon. C72.

At the ensuing bench trial, surviving victims Leon and Thomas gave consistent testimony describing the events on the evening of the shooting. Leon testified that at that time, he was a gang member affiliated with the

[1] Citations in this brief appear as follows: "C" refers to the common law record; "R" refers to the report of proceedings; "CI" refers to the impounded record; and petitioner's petition for leave to appeal (which he has elected to stand as his brief) is cited as "PLA."

"70th set," a faction of the Gangster Disciples. R131-32. He was confined to a wheelchair, R137, so his mobility was limited. Leon and Thomas both knew petitioner — by the nickname "Monkey Man" — because they all lived in the same neighborhood, and Leon believed petitioner to be a member of the rival "D block" faction of the Gangster Disciples. R129-30, 134, 138, 186-87.

On the evening of the shooting, at approximately 6:00 p.m., Leon, Thomas, Asphy, and others were gathered outside an abandoned house and celebrating a birthday, R185, when they noticed a grey car drive past, R126-28. Eventually, the others left and only Leon, Asphy, and Thomas remained; at about 7:00 p.m., they then saw a man wearing a black or grey hooded sweatshirt approach from the gangway and pull out a semiautomatic gun. R135-37, 186-87, 191. Leon was 10 to 15 feet away from the hooded man when the man pointed the gun at them and fired 12 or 13 rounds from an "extended clip." R135-37. Thomas saw the face of the shooter — whom he identified as "Monkey Man," R187, 191 — and Monkey Man began firing at Asphy and then at Thomas, R188-89.

Leon was hit, and an ambulance took him to a hospital, where detectives spoke with him. R139-41. Leon identified "Monkey Man" as the shooter but did not provide a physical description. R142. The following day, a detective visited Leon at the hospital and showed him a photo array, which did not include a photo of petitioner. R142-44. Leon did not identify anyone pictured in that photo array, and he provided the detective with additional

information about the shooter's appearance and past involvement in violence in the neighborhood. R145, 318-20. Based on this information, the detective obtained a photograph of a new suspect — petitioner — and prepared a second photo array to show Leon. R320-22. Upon being presented with the second photo array, Leon identified petitioner as the shooter. R146-50, 321-26. Two days after the shooting, on June 18, 2012, Thomas viewed an in-person lineup at the police station, and he identified petitioner as the shooter, R193-99. Leon again identified petitioner as the shooter in open court, R130, as did Thomas, R189.

On cross-examination, petitioner's trial counsel challenged Leon on the strength of his identification and differences between his grand jury and trial testimony. R156, 159-80. Leon agreed with counsel's characterization that because the grey car drove past quickly and did not stop, he was "just guessing" that he saw Monkey Man in the car. R160-61. Likewise, Leon agreed with counsel that he was "just guessing" whether Monkey Man was a member of the D block faction, in that Leon did not have personal knowledge of that fact. R161-63.

Trial counsel also cross-examined Thomas, who admitted that he and Leon had been smoking marijuana on the night of the shooting. R201-02. When responding police officers arrived, Thomas did not tell them that Monkey Man was the shooter. R207. Thomas visited Leon at the hospital two days after the shooting — before Thomas identified petitioner as the

shooter — but maintained that he did not speak with Leon about the shooter's identity during the visit. R208-09. When questioned about his prior knowledge of petitioner, Thomas explained that he knew petitioner "from the neighborhood," but could not elaborate further on how he knew petitioner and for how long. R210-11.

Petitioner's counsel also cross-examined the detective who presented Leon with the photo array at the hospital. R330-34. Counsel asked him whether there were any other suspects in the shooting. R333. The detective responded that petitioner was the only suspect who was ever named, *id.*, but acknowledged that he spoke to a woman — identified by trial counsel as Kenya Donner — who claimed to have information about another suspect. R333-34. The detective met with Donner, but based on the information she provided, he concluded that there was no need to follow up on her tip. R334. Donner subsequently refused to cooperate with police or to meet with prosecutors. *Id.*

An evidence technician testified that he recovered seven cartridge casings from the crime scene, which he believed were fired from a semiautomatic pistol. R249-50, 260-71. The technician also recovered from the scene a grey hooded sweatshirt, a semiautomatic pistol, and a loaded magazine. R289-98. The parties stipulated that the sweatshirt tested positive for gunshot residue, R335-39; that the recovered pistol had fired the cartridge casings recovered from the scene, R346-47; and that no suitable

fingerprints were recovered from the pistol, the magazine, or the cartridges, R342-45. The parties also stipulated that DNA analysis was conducted on the sweatshirt, pistol, and a baseball hat recovered from the scene, which analysis showed a mixture of DNA profiles, but excluded defendant as a potential donor to those mixtures. R339-341, 349-50. However, the parties also stipulated, it is possible to wear clothing or a hat, or handle a gun, and not leave enough DNA to be detected. R350. Further, the parties stipulated, another individual was excluded as a potential donor to the sweatshirt's DNA profile, but he could not be excluded as a potential donor to the hat or handgun's DNA profile. R351-54.

The defense called a single witness, a Chicago Fire Department paramedic, R359, who testified that she responded to the scene of the shooting, where she treated Leon, R359-60. Leon told her that he had been shot but did not tell her how he had been shot or who had shot him. R363, 366. The defense then rested. R370.

The circuit court found petitioner guilty on all counts, R400, and denied his posttrial motions to reconsider and for a new trial, R405. The court sentenced petitioner to an aggregate term of 71 years in prison. C61; R412-15.

II. The appellate court affirmed petitioner's convictions.

Petitioner appealed, arguing, in relevant part, that trial counsel was ineffective for not seeking to suppress unduly suggestive photo arrays and lineup identifications. *People v. Joiner*, 2018 IL App (1st) 150343, ¶¶ 1, 35.

The appellate court rejected petitioner's claim, holding that the photo arrays and lineup identifications were not unduly suggestive and that a motion to suppress would therefore have failed. *Id.* ¶ 46.

The appellate court affirmed petitioner's convictions, *id.* ¶¶ 1, 95, but vacated petitioner's sentence and remanded for resentencing, *id.* On remand, the circuit court sentenced petitioner to an aggregate 34 years in prison. CI185. Petitioner appealed the new sentence, C142, and the appellate court affirmed, *People v. Joiner*, 2020 IL App (1st) 191506-U.

III. Petitioner submitted a counseled postconviction petition on July 7, 2021, and the circuit clerk docketed the petition on August 4, 2021, the date on which petitioner's counsel paid the docketing fee.

On July 7, 2021, petitioner — through counsel — electronically submitted a petition for postconviction relief. C34; CI1484, 1571-98. As relevant here, the petition claimed that trial counsel was ineffective for failing to present testimony from Marquise Gist and Darkenya Donner. CI1571, 1582-90.[2] The petition relied on, and incorporated, affidavits of Gist and Donner. CI 1571, 1583-89.

Gist's affidavit asserted that in June 2012, he was friends with petitioner and frequently spent time with him. CI1563. On the day of the shooting, he and petitioner were playing basketball in a park. *Id.* Afterward,

[2] Although petitioner's PLA notes that his petition included an ineffective assistance allegation predicated on counsel's failure to cross-examine Leon and Thomas, *see* PLA 8, 10, he makes no argument on this point, so he has forfeited it and may not raise it in reply. *See* Ill. S. Ct. R. 341(h)(7); *People v. Aljohani*, 2022 IL 127037, ¶ 61.

they biked to West 73rd Street and South Seeley Avenue, where petitioner dropped off Gist and continued to a nearby gas station to obtain a blunt for smoking marijuana. CI1563-64. Gist and petitioner then met up again and went to smoke marijuana in an abandoned building at West 73rd Street and South Damen Avenue, then returned to the park, where someone informed them that there had been a shooting. *See* CI1564. Gist and petitioner did not leave the park until about 8:00 p.m., CI1564, or about an hour after the shooting occurred, *see* R191. The next day, Gist learned that petitioner had been arrested. CI1564.

In her affidavit, Donner stated that she knew petitioner and could identify him because she styled his hair. CI1565. Before the shooting, Donner saw two male teenagers — one of whom was wearing a hooded sweatshirt and neither of whom was petitioner — get out of a car and walk toward West 71st Street, near where the shooting occurred. CI1565-66. About a week after the shooting, Donner again saw the teenager who had worn the hooded sweatshirt on the day of the shooting, and she took a photo of him. CI1566. Donner then went to the police station, where detectives interviewed her. CI1566-67. At the end of that interview, a detective told Donner that police "[h]ad their guy," to which Donner responded that police "had the wrong child." CI1567. In her affidavit, Donner denied that she refused to cooperate with police or meet with prosecutors. *Id.*

The circuit court's electronic docket sheet[3] reflects a single entry on July 7, 2021 (the day petitioner's counsel submitted the postconviction petition to the circuit court's electronic filing system): "Post-Conviction Filed PC FEE NOT PAID." C34. No document is associated with the July 7, 2021, electronic docket entry, as the notation that appears next to electronic docket entries that have documents associated with them — a piece of paper and a magnifying glass — does not appear next to the July 7, 2021, electronic docket entry. *See id*. Excerpts of a copy of the petition, stamped with the July 7, 2021, date, appear in the clerk's records. CI1484, 1719-20.

Nearly a month later, on August 4, 2021, petitioner's counsel paid the required docketing fee[4] for the postconviction petition. C34; PLA 11. The electronic docket reflects this entry for August 4, 2021: "Post-Conviction Filed PC FEE PAID THROUGH EFILE." C34. A copy of the petition, bearing a file-stamp with the date of August 4, 2021, is associated with this docket entry. *See* C34, CI1640, 1719-47. The clerk's office set the petition for an August 18, 2021, initial review before a judge. C34. The criminal

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[3] An electronic docket sheet is also referred to as an electronic "half-sheet," which is a sheet on which the clerk's office enters a chronological history of events in the case. *People v. Begay*, 2018 IL App (1st) 150446, ¶ 47; *People v. Jones*, 2015 IL App (1st) 133123, ¶ 8 n.3. Docket sheets may be relied upon as evidence of legal events. *See Begay*, 2018 IL App (1st) 150446, ¶ 47.

[4] Courts refer to the fee that is due upon filing a postconviction petition either as a docketing fee, *see* Cook Cnty. Cir. Ct. R. 15.4 ("docket fee"), or a filing fee, *People v. Lentz*, 2014 IL App (2d) 130332, ¶¶ 2, 15. For consistency, this brief refers to the fee as a docketing fee.

disposition sheet for August 18, 2021, reflects that the petition was docketed on August 4, 2021, and the circuit court continued the matter to August 30, 2021. C182. The court then continued the matter again to November 1, 2021, for a ruling. C183.

IV. The circuit court dismissed petitioner's postconviction petition as frivolous or patently without merit.

On November 1, 2021 — the 117th day after counsel submitted the petition to the court's electronic filing system, and the 89th day after petitioner paid the docketing fee — the circuit court entered a written order summarily dismissing the petition as frivolous or patently without merit. C184-206. Petitioner appealed, C208-09, challenging the circuit court's summary dismissal both on the merits and as improper because it was made outside the 90-day time limit set by 725 ILCS 5/122-2.1(a).

The appellate court affirmed the circuit court's judgment. *People v. Joiner*, 2023 IL App (1st) 211553, ¶ 3. It held that because the petition was not docketed until August 4, 2021, the circuit court complied with 725 ILCS 5/122-2.1(a), in that it had not summarily dismissed the petition outside the 90-day window for first stage dismissals. *Joiner*, 2023 IL App (1st) 211553, ¶ 57. The appellate court further held that petitioner's ineffective assistance claim was properly dismissed at the first stage because petitioner did not arguably suffer prejudice from counsel's alleged errors. *Id.* ¶¶ 73-74.

The dissenting justice would have held that "the petition was not only filed but also docketed on July 7, 2021, when the entry on the docket sheet

states: 'Post-Conviction Filed[,] PC FEE NOT PAID,'" *id.* ¶ 92 (Walker, J., dissenting), opining that the majority had "[b]asically" held that "payment of a filing fee determines when a postconviction petition is docketed," *id.* ¶ 103.

STANDARDS OF REVIEW

This Court reviews de novo the circuit court's first stage dismissal of petitioner's postconviction petition, *People v. Knapp*, 2020 IL 124992, ¶ 42, his claim of ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984), *People v. Johnson*, 2021 IL 126291, ¶ 52, and the statutory construction of 725 ILCS 5/122-2.1(a), *People v. Kastman*, 2022 IL 127681, ¶ 29; *People v. Castillo*, 2022 IL 127894, ¶ 24.

ARGUMENT

I. Petitioner's Postconviction Petition was Not Docketed until It Was Entered on the Court's Official Docket for Further Proceedings.

The circuit court entered a written order dismissing petitioner's postconviction petition on November 1, 2021 — the 89th day after the circuit clerk docketed the petition on August 4, 2021. Thus, the circuit court timely dismissed the petition at the first stage of review.

The Post-Conviction Hearing Act (Act) requires that circuit courts "examine" postconviction petitions and, when appropriate, enter orders summarily dismissing them "[w]ithin 90 days after the filing and docketing of each petition." 725 ILCS 5/122-2.1(a). The Act's 90-day time requirement is mandatory. *People v. Brooks*, 221 Ill. 2d 381, 389 (2006). If a circuit court enters an order dismissing a petition after the 90-day period has expired, the

order is unauthorized, and the petition must be docketed for second stage proceedings. *See People v. Swamynathan*, 236 Ill. 2d 103, 114 (2010); *People v. Harris*, 224 Ill. 2d 115, 129 (2007). Here, the circuit court's order was timely made within the Act's 90-day window because the 90-day period starts when a petition is docketed, and not when it is merely initially transmitted to the circuit clerk.

A. *People v. Brooks* establishes that a postconviction petition is not docketed until the petition is placed on the court's docket and scheduled for further proceedings.

The question of statutory construction presented by this appeal has already been answered by this Court in *People v. Brooks*, 221 Ill. 2d 381 (2006). In *Brooks*, applying well-established canons of statutory construction, this Court construed "docketing" in section 2.1(a) of the Act to determine when the 90-day period in which a circuit court may summarily dismiss a petition begins to run. The Court rejected the petitioner's argument that "docketing" occurs when the clerk of court receives the petition, observing that "the verb 'docket' connotes more than the mere act of receiving the petition." *Brooks*, 221 Ill. 2d at 390-91. Rather, "[t]he plain meaning of the word connotes that the cause is entered on the court's official docket for further proceedings." *Id.* at 391. Although placement of the petition on a specific judge's calendar is not required, the Court held that the petitioner's "postconviction petition was 'docketed' within the commonly understood meaning of the word . . . when the clerk of the court entered the

petition into the case file and set it for a hearing," beginning the 90-day clock. *Id.*

Accordingly, by the Act's plain language — and under this Court's decision in *Brooks*, which construction is part of the Act, *People v. Casler*, 2020 IL 125117, ¶ 36 ("after this [C]ourt has construed a statute, that construction becomes a part of the statute," unless "the legislature amends it contrary to that interpretation") — petitioner's postconviction petition was not docketed until August 4, 2021, when petitioner paid the docketing fee, a file-stamped copy of the petition was entered into the court's docket, and the petition was scheduled for further proceedings. Thus, the circuit court complied with section 2.1(a) because it summarily dismissed the petition on the 89th day after it was docketed.

B. Petitioner's contrary interpretation ignores *Brooks* and renders the statutory term "docketing" meaningless.

Petitioner fails to cite *Brooks*, much less grapple with its definition of "docketing." *See* PLA 10-13. Yet *Brooks* controls as to that statutory term's meaning, as the appellate court below correctly recognized. *See Joiner*, 2023 IL App (1st) 211553, ¶¶ 45, 51. Petitioner's failure to acknowledge *Brooks*, much less provide any basis to depart from stare decisis, is an independently sufficient basis for rejecting his proposed alternative construction of the statutory term "docketing." *See People v. Espinoza*, 2015 IL 118218, ¶ 29 ("in the context of statutory construction, stare decisis considerations are at their apex," for "a departure from a statutory construction amounts to an

amendment of the statute itself rather than simply a change in the thinking of the judiciary with respect to common law concepts which are properly under its control") (internal quotation and citation omitted); *People v. Colon*, 225 Ill. 2d 125, 146 (2007) (any departure from stare decisis must be "specially justified").

Eschewing any discussion of *Brooks*, petitioner instead relies on two appellate court cases: *People v. Lentz*, 2014 IL App (2d) 130332, and *People v. Begay*, 2018 IL App (1st) 150446. *See* PLA 11-12. Neither case supports a departure from *Brooks*.

Petitioner's reliance on *Lentz* is misplaced because its reasoning cannot be squared with *Brooks*. There, the appellate court held that summary dismissal was unauthorized because the petition was filed and docketed when it was initially transmitted to the circuit clerk (on August 27, 2012) or, at the latest, on the following day, when the circuit clerk sent the petitioner's attorney a letter notifying the attorney that the filing fee was due. *Lentz*, 2014 IL App (2d) 130332, ¶¶ 15, 17.

Yet in finding that a computerized docket entry stating "post conviction petition filed" necessarily effects the docketing of a postconviction petition, the *Lentz* court failed to faithfully apply the holding of *Brooks*, which holds that a petition is not docketed until it is scheduled for "further proceedings," 221 Ill. 2d at 391, because a computerized docket entry merely stating "post conviction petition filed" does not necessarily contemplate any

further proceedings on the petition. Similarly, that the clerk sent a fee deficiency letter to Lentz's attorney also did not indicate that the petition was scheduled for further proceedings. Indeed, the circuit clerk did not docket Lentz's petition for further proceedings until January 25, 2013, when the clerk set a hearing date for the petition. *Lentz*, 2014 IL App (2d) 130332, ¶ 2. *Lentz*'s reasoning is therefore inconsistent with *Brooks* and the plain text of section 2.1(a).

Nor does *Begay* support petitioner's construction of section 2.1(a), for in that case, the appellate court correctly recognized that a petition is considered to be docketed under section 2.1(a) "'when the clerk of the court entered the petition into the case file *and set it for a hearing*,'" 2018 IL App (1st) 150446, ¶ 46 (quoting *Brooks*, 221 Ill. 2d at 391) (emphasis in *Begay*), and merely held that regardless of whether the petition was docketed when the circuit clerk stamped it "filed" (on May 21, 2014), or when the circuit clerk scheduled it for a hearing (on June 26, 2014), the July 18, 2014, dismissal order was timely made within 90 days following docketing, *id.* ¶¶ 47, 49.

Here, because there is no dispute that the circuit court summarily dismissed the petition within 90 days of the date on which the clerk first scheduled to the petition for further proceedings by setting it for a hearing, *i.e.*, within 90 days of August 4, 2021, the dismissal was timely under *Brooks*.

Not only does petitioner's construction of the Act conflict with controlling precedent, it also impermissibly elides the statute's use of the conjunctive "and" and renders the word "docketing" meaningless where it appears in section 2.1(a). But courts must avoid interpretations that would render any portion of a statute meaningless or void. *Espinoza*, 2015 IL 118218, ¶ 40; *In re Jaime P.*, 223 Ill. 2d 526, 534 (2006); *see also* A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 174 (2012) ("If possible, every word and every provision is to be given effect."). The Act's plain language provides for a 90-day period that begins after the "filing *and* docketing" of a petition. 725 ILCS 5/122-2.1(a) (emphasis added). Petitioner's interpretation effectively substitutes "filing" for the statutory phrase "filing and docketing." *See People v. Grant,* 2022 IL 126824, ¶ 25 (courts may not, under the guise of statutory construction, substitute provisions to depart from statute's plain meaning).

People v. Lighthart, 2023 IL 128398, illustrates the error inherent in petitioner's definition of "filing and docketing." There, this Court held that "a petitioner is to be found to have 'filed a direct appeal' if he or she files a notice of appeal that culminates in an appellate court order disposing of the appeal, whether by dismissal or on the merits." *Id*. ¶ 67. In other words, the Court held that an appeal was "filed" when a notice of appeal was transmitted to the appellate court and ultimately culminated in some type of judicial order. By analogy, a postconviction petition is *filed* when it is transmitted to the

circuit court and eventually results in some type of judicial order. Yet this is the same definition that petitioner proposes for the statutory term "filing and docketing," *see* PLA 11-12, which necessarily omits the conjunctive "and" and reads the word "docketing" out of that statutory phrase, in violation of established principles of statutory construction, *see Espinoza*, 2015 IL 118218, ¶ 40; *In re Jaime P.*, 223 Ill. 2d at 534. The conjunctive "and" is not synonymous with "or," but rather requires that all of a statute's requirements must be met. *See DG Enterprises, LLC-Will Tax, LLC v. Cornelius*, 2015 IL 118975, ¶¶ 31-32; *People v. Parcel of Prop. Commonly Known as 1945 N. 31st St., Decatur, Macon Cnty., Ill.*, 217 Ill. 2d 481, 500-01 (2005). Petitioner's assertion that he "was not required to pay the filing fee in order to have the Petition filed," PLA 10, thus ignores the statutory requirement that the petition be both filed *and* docketed before the 90-day period began to run.

Moreover, to interpret section 2.1(a) to mean that "docketing" of the petition has occurred when the petition is initially submitted to the circuit court, and before petitioners have paid the required fee or obtained a waiver, would produce absurd and unintended results. *See People v. Hanna*, 207 Ill. 2d 486, 498 (2003) (statutory language must be construed to avoid absurd results); *People v. Davidson*, 2023 IL 127538, ¶ 18 (same). Litigants, including postconviction petitioners, must pay docketing and filing fees or obtain a waiver, or else their causes are subject to dismissal. *See, e.g.*, Ill. S. Ct. R. 312(b) (providing for mandatory fees on appeal); Ill. S. Ct. R. 313(a)

(same); Ill. S. Ct. R. 298 (establishing procedures for seeking and obtaining fee waivers). Against this backdrop, many circuit courts — such as the Cook County Circuit Court — have imposed mandatory fees that are due at the time of filing a postconviction petition unless the petitioner obtains a waiver. *See* Cook Cnty. Cir. Ct. R. 15.4 (a petitioner must file the "original petition and a copy [] with the clerk of the Criminal Division, *accompanied by the docket fee*") (emphasis added). Petitioner's proposed construction would contravene this well-established system and encourage postconviction petitioners to intentionally violate circuit court rules by neither paying the required fee nor seeking a fee waiver.

Under petitioner's reading of the statute, postconviction petitioners could force circuit courts to consider the merits of a postconviction petition within 90 days of electronic submission — even when the fee has not been paid, and no fee waiver has been obtained — or else advance the petition to the second stage by default. But courts do not generally permit litigants to proceed with their cases without paying required fees or obtaining a waiver. Rather, initiating a judicial proceeding without paying the required fee "normally leads to dismissal for want of prosecution . . . by the court in which the pleading was filed." *Sperow v. Melvin*, 153 F.3d 780, 781 (7th Cir. 1998); *see also, e.g.*, *In re Adoption of M.W.*, 2023 IL App (5th) 220791-U, ¶ 12 (noting dismissal of appeal for lack of prosecution after appellant failed to file

docketing statement or pay filing fee);[5] *Universal Underwriters Ins. Co. v. LKQ Smart Parts, Inc.*, 2011 IL App (1st) 101723, ¶ 10 (noting appellant's failure to pay docketing fee as factor supporting appeal's dismissal).[6] If postconviction petitioners could simply ignore mandatory fee requirements and nevertheless compel courts to adjudicate their petitions, fee requirements would be meaningless. *Contra* Ill. S. Ct. R. 312(b) (an appellant "shall" pay the required filing fee); Ill. S. Ct. R. 313(a) (same); *cf. also* 735 ILCS 5/22-105(a) (requiring the circuit court to collect from a prisoner, at the time of filing, partial payment of any court costs associated with the prisoner's request for postconviction relief "when funds exist"); *People v. Alcozer*, 241 Ill. 2d 248, 255, 260-62, 265-66 (2011) (upholding that statute over a constitutional challenge based in due process). This Court should construe the Act to avoid such absurd and unintended results. *See Hanna*, 207 Ill. 2d at 498; *Davidson*, 2023 IL 127538, ¶ 18.

Finally, there is no merit to petitioner's suggestion, relying on Justice Walker's dissent, that the People's construction of "filing and docketing"

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[5] Copies of all nonprecedential orders cited in this brief are available at https://www.illinoiscourts.gov/top-level-opinions/. *See* Ill. S. Ct. R. 23(e)(1).

[6] So, too, in federal court, where "[t]he clerk of court is authorized to dismiss an appeal if the docketing fee is not paid when the case is filed or within 14 days after docketing." *Camacho-Valdez v. Garland*, 30 F.4th 675, 678 (7th Cir. 2022) (citing 7th Cir. R. 3(b)); *id.* at 678-79 (dismissing a petition for review because the petitioner failed to comply with Circuit Rule 3(b)); *see also* Fed. R. App. P. 3(e) (requiring appellants to pay all required fees upon filing a notice of appeal).

would disadvantage indigent or pro se petitioners. *See* PLA 10 (quoting *Joiner*, 2023 IL App (1st) 211553, ¶ 103 (Walker, J., dissenting)). For starters, petitioner could not have experienced any such disadvantage, as he was not pro se: his present counsel filed the petition on his behalf and apparently waited to pay the docketing fee. In any event, as explained, by statute and under this Court's rules, *see* 735 ILCS 5/5-105; Ill. S. Ct. R. 298, an indigent postconviction petitioner may seek a waiver of the docketing fee.[7] And seeking a waiver is neither burdensome nor costly, as Rule 298 includes a standardized form, *see* Ill. S. Ct. R. 298(a)(1), and no fee is charged to apply for a waiver, Ill. S. Ct. R. 298(b)(1). Nor do waiver requests engender undue delay, as the rule directs courts to rule on waiver applications "as soon as reasonably possible." Ill. S. Ct. R. 298(c)(1). Thus, the procedure for seeking and obtaining waivers protects the interests of postconviction petitioners who cannot afford to pay filing fees.

In short, under the plain language of the Act and this Court's decision in *Brooks*, petitioner's postconviction petition was not filed *and* docketed until August 4, 2021. On July 7, 2021, petitioner transmitted the petition to the clerk but did not pay the docketing fee or seek a fee waiver. C34; CI1484,

[7] Proceedings under the Post-Conviction Hearing Act are "civil in character," *People ex rel. Daley v. Fitzgerald*, 123 Ill. 2d 175, 181 (1988) (citation omitted), and the circuit court may enter orders on postconviction petitions "as is generally provided in civil cases," 725 ILCS 5/122-5. Accordingly, 735 ILCS 5/5-105 and Supreme Court Rule 298, which govern civil proceedings, apply to fees in postconviction cases.

1571-98. As a result, the clerk did not schedule the petition for further proceedings at that time. *See* C34. In addition, the electronic docket entry for July 7, 2021, notes that petitioner did not pay the fee and is not associated with a copy of the petition, indicating that the petition was not formally entered on the court's official docket. *See id.* In contrast, after petitioner paid the fee on August 4, 2021, a file-stamped copy of the petition was entered into the court's records. *Id.* Moreover, the circuit court's paper docket entry for August 18, 2021 — the date for which the clerk scheduled the initial hearing on the petition — notes that the petition was entered into the court's records for further proceedings on August 4, 2021. *See* C182 ("Petition on Aug. 4, 2021"). Because the circuit court clerk did not schedule the petition for a hearing until the required docketing fee was paid on August 4, 2021, C34; *see also* PLA 8, 12, the petition was not docketed until that date, *see Brooks*, 221 Ill.2d at 391, and, by extension, the circuit court's summary dismissal order was timely.

II. Petitioner's Postconviction Petition was Correctly Dismissed as Frivolous or Patently without Merit.

Not only was the circuit court's dismissal order timely, but the court correctly dismissed the petition at the first stage because petitioner's ineffective assistance claim is frivolous or patently without merit.[8]

[8] Petitioner also raised claims of a *Brady* violation, CI1739-41, and actual innocence, CI1742-44, in his postconviction petition. These claims are not included in petitioner's PLA, and thus he has waived any argument related to them. *See People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 283 (2003).

The Act directs the circuit court to dismiss a postconviction petition if "the court determines the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2). A petition is considered frivolous or patently without merit "if the petition's allegations, taken as true, fail to present the gist of a meritorious constitutional claim." *People v. Collins*, 202 Ill. 2d 59, 66 (2002); *see also People v. Hodges*, 234 Ill. 2d 1, 9 (2009).

A postconviction petition is properly dismissed as frivolous or patently without merit when the petition has "'no arguable basis either in law or in fact,'" *People v. Tate*, 2012 IL 112214, ¶ 20 (quoting *Hodges*, 234 Ill. 2d at 12), because it relies on "'an indisputably meritless legal theory or a fanciful factual allegation,'" *People v. Allen*, 2015 IL 113135, ¶ 25 (quoting *Hodges*, 234 Ill. 2d at 16). Despite petitioner's contention, *see* PLA 15-16, no evidentiary hearing is needed to test the affiants' credibility. Rather, at the first stage, a circuit court accepts the petition's allegations and supporting affidavits as true, *see id*., as the circuit court did here, C195.

The circuit court correctly dismissed petitioner's ineffective assistance claim because petitioner was not arguably prejudiced by trial counsel's decision not to call Gist or Donner. *See Hodges*, 234 Ill. 2d at 17 (at the first stage, petitioner must present an arguable basis that he was prejudiced by counsel's performance); *accord Tate*, 2012 IL 112214, ¶¶ 19, 22 (citing *Strickland*, 466 U.S. at 687-88). To prevail on his ineffective assistance claim, petitioner must show both deficient performance — that counsel's

performance "fell below an objective standard of reasonableness," *Hodges*, 234 Ill.2d at 17 (quoting *Strickland*, 466 U.S. at 687-88) — and that the deficient performance prejudiced the defense, meaning "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Hale*, 2013 IL 113140, ¶ 18 (quoting *Strickland*, 466 U.S. at 694). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*. Petitioner cannot make either showing.

A. Petitioner was not arguably prejudiced by trial counsel's decision not to call Gist or Donner.

To begin, the appellate court correctly concluded that it is not even arguable that there was a reasonable probability that the outcome of petitioner's trial would have been different with the addition of Gist's and/or Donner's proposed testimony. According to Gist's affidavit, he would have testified that during the afternoon and evening of the shooting, he played basketball with petitioner at a park, left the park with petitioner on a bike, briefly parted ways with petitioner while petitioner went to a gas station to obtain a blunt to smoke marijuana, and then smoked marijuana with petitioner at an abandoned building. *See* CI1563-64. Donner's affidavit states that she observed two male teenagers in the vicinity of the shooting, that neither of them was petitioner, and that she told police about her observations during a post-shooting interview. CI1565-67. Gist and Donner's

proposed testimony was aimed at establishing that petitioner was not the shooter. *See* PLA 15-16.

But there was extensive evidence at trial that petitioner *was* the shooter, such that he cannot establish even arguable prejudice. As the appellate court recognized, the People's case "primarily rested on the victims' identifications of defendant as the shooter." *Joiner*, 2023 IL App (1st) 211553, ¶ 69. The court noted that on direct appeal, it had affirmed petitioner's conviction over his contention that his trial counsel had been ineffective for failing to move to suppress the photographic and lineup evidence, reasoning that petitioner could not show prejudice given the strength of the victims' identifications. *Id.* (citing *People v. Joiner*, 2018 IL App (1st) 150343, ¶¶ 35, 47).

Specifically, the appellate court explained, Thomas viewed the shooter's face and Leon had "ample opportunity" to view the shooter, who was not a stranger but instead someone they knew as "Monkey Man" from the neighborhood. *Id.* ¶ 70. Leon testified that he was 10 to 15 feet away when he saw the shooter, who was wearing a hooded sweatshirt, pull out a gun with an extended clip and start firing. R135-38. Leon did not identify anyone from the first photo array, which did not include a photo of petitioner, R145, 318-19, and identified petitioner as the shooter from a second photo array, which did, R141-45, 147-50. Thomas likewise testified that he saw the shooter — whose face was clearly visible — fire numerous shots. R185-89,

191. Thomas viewed an in-person lineup, from which he identified petitioner as the shooter. R193-99. Given the strength of Leon and Thomas's identifications of petitioner as the shooter, the appellate court correctly concluded that petitioner could not establish that he was arguably prejudiced because neither Gist nor Donner testified at trial.

Nor is there any merit to petitioner's contention that Gist could have testified in support of an alibi defense, *see* PLA 14, for the record contradicts that theory, *see Allen*, 2015 IL 113135, ¶ 25 (petition is subject to dismissal at the first stage when it relies on a legal theory contradicted by the record). In his affidavit, Gist asserts that he was at a park with petitioner on the afternoon of the shooting, and that he and petitioner left the park and biked to West 73rd Street and South Seeley Avenue, where petitioner dropped off Gist and continued to a nearby gas station to obtain a blunt. CI1563-64. Gist and petitioner then went to smoke marijuana at an abandoned building at West 73rd Street and South Damen Avenue. *See* CI1564. That building is only approximately 0.3 miles from 2015 West 70th Place, which is where the shooting took place. *See* R185.

Accepting Gist's affidavit as true, Gist would have testified that at the time of the shooting, petitioner was either not with Gist (while petitioner went to obtain the blunt) or with Gist at a location very close to the building where the shooting occurred. An alibi defense requires a defendant to prove that "during the whole time, [he] was so far from the place where the crime

was committed that he could not have participated in it." *People v. Fritz*, 84 Ill. 2d 72, 76 (1981). But because Gist's affidavit both puts petitioner close to the crime scene and admits that he was not with petitioner throughout the relevant time period, Gist's proposed testimony could not have established that it was impossible for petitioner to have participated in the crime. *See People v. Henry*, 2016 IL App (1st) 150640, ¶ 60 & n.3 (affidavits did not establish an "airtight alibi" because they did not account for petitioner's whereabouts during entire pertinent time period, leaving open possibility that petitioner could have committed the crime and then returned to where affiants claimed to see him); *People v. Hernandez*, 2014 IL App (2d) 131082, ¶ 31 (holding, at first stage of postconviction proceedings, that petitioner was not prejudiced by counsel's failure to present an alibi defense, where evidence of guilt was overwhelming and the defense would not have been credible) Thus, Gist's proposed testimony could not have supported a viable alibi defense.

Donner's affidavit likewise falls short of presenting a basis for petitioner's contention that he suffered arguable prejudice from counsel's decision not to call her at trial. In her affidavit, Donner states that on the day of the shooting, she saw two male teenagers in the neighborhood where the shooting took place. CI1565-66. One of them was wearing a hooded sweatshirt, and Donner believed that the individual was not petitioner. *Id.* About a week later, Donner again saw the teenager whom she had seen

wearing the hooded sweatshirt on the day of the shooting; she reported this information to police. CI1566. But Donner does not assert that she witnessed the shooting. *See* CI1565-67. Because Donner's affidavit, taken as true, establishes only that she would have testified that she saw someone in a hooded sweatshirt (whom she believed was not petitioner) in the neighborhood where the shooting occurred, it is not even arguable that there was a reasonable probability of a different outcome had counsel had presented Donner's testimony at trial.

Because the record refutes petitioner's theories of prejudice, petitioner cannot overcome the Act's directive that circuit courts "shall" summarily dismiss petitions that are frivolous or patently without merit, 725 ILCS 5/122-2.1(a). "A court must assess prejudice realistically based on the totality of the evidence." *People v. Richardson*, 189 Ill. 2d 401, 416 (2000); *see also Watson v. Anglin*, 560 F.3d 687, 693 (7th Cir. 2009) ("[S]trong evidence" of guilt "vitiates [a petitioner's] claim that he suffered [*Strickland*] prejudice"). Here, weighed against the strong evidence of petitioner's guilt, there is no reasonable probability of a different outcome had defense counsel presented Gist and Donner's proposed testimony.

B. Trial counsel did not arguably render deficient performance by not calling Gist or Donner.

Although the appellate court did not discuss *Strickland*'s performance prong, *see Joiner*, 2023 IL App (1st) 211553, ¶ 74, this Court can also affirm on the ground that, given the information that was known to counsel, it is not

even arguable that counsel rendered deficient performance by not calling Gist and Donner. Petitioner's failure to demonstrate either prong of the *Strickland* test dooms his claim of ineffective assistance of counsel. *Colon*, 225 Ill. 2d at 135 (citing *Strickland*, 466 U.S. at 697).

Decisions about whether to call certain witnesses at trial are matters of trial strategy that fall within counsel's discretion. *People v. Enis*, 194 Ill. 2d 361, 378 (2000). Such decisions "enjoy a strong presumption that they reflect sound trial strategy," and they are "generally immune from claims of ineffective assistance of counsel." *Id.* A postconviction petition claiming ineffective assistance withstands summary dismissal on the performance prong only if "it is arguable that counsel's performance fell below an objective standard of reasonableness." *People v. Cathey*, 2012 IL 111746, ¶ 23. Here, the petition falls short of that standard.

Petitioner argues that counsel should have used Gist's and Donnor's proposed testimony to establish an alibi for petitioner and thereby undermine Leon and Thomas's eyewitness identifications of him as the shooter. *See* PLA 14. But the record makes clear that counsel reasonably elected to employ a different strategy: challenging Leon and Thomas's identifications of petitioner through cross-examination, and focusing the factfinder's attention on the asserted flaws with those identifications, rather than on whether the purported alibi witnesses — petitioner's friend and his hairdresser — were credible. *See People v. Brown*, 2017 IL App (1st) 150203, ¶ 31 (affirming first

stage dismissal of postconviction petition because "[c]ounsel's decision to focus on the weaknesses in the State's case . . . was a matter of reasonable trial strategy that cannot support a claim of ineffective assistance of counsel"); *Hernandez*, 2014 IL App (2d) 131082, ¶ 31 (affirming first stage dismissal of postconviction petition because counsel's decision not to present defendant's brother and co-defendant as an alibi witness was not even arguably unreasonable); *see also People v. Williams*, 2017 IL App (1st) 152021, ¶¶ 40, 42 (describing danger inherent in presenting a weak alibi defense, and finding no deficient performance on that basis).

For starters, the record shows that counsel knew that Gist and Donner were potential witnesses and knew what the substance of their testimony would have been. CI1584 (postconviction petition, alleging that counsel "was aware that Mr. Gist was present and could account for Defendant's whereabouts at the time of the shooting"); R333-34 (trial counsel's cross-examination of detective about his conversations with Donner, referencing Donner by name). This suggests that counsel's decision not to call them was strategic. *See, e.g.*, *People v. Marshall*, 375 Ill. App. 3d 670, 676-78 (1st Dist. 2007) (no deficient performance where counsel knew the substance of testimony that potential witness would have offered); *People v. Rodriguez*, 2018 IL App (1st) 160030, ¶ 59, *vacated on other grounds*, 144 N.E.3d 1196 (Ill. 2020) (unpublished table decision) (no deficient performance where

counsel knew what the potential witness could offer the defense and decided not to call her, in consultation with the defendant).

In addition, the record shows that instead of presenting testimony from Gist — who would have testified that he was with petitioner at a location close to the shooting during most, but not all, of the relevant time period — counsel reasonably decided to challenge the victims' identifications of petitioner. Counsel thoroughly cross-examined Leon and Thomas about their ability to perceive the shooting, their use of marijuana on the day of the shooting, and their familiarity with petitioner. R156, 160-63, 201-02, 206-11. Had counsel called Gist, he would have provided only a partial alibi, and given his friendship with petitioner, he would have been subject to potentially damaging impeachment about his motivations, which in turn could have shifted the factfinder's attention away from counsel's efforts to undermine the victims' identifications. *See People v. Guest*, 166 Ill. 2d 381, 400 (1995) (counsel reasonably decided not to call potential witness because, among other reasons, they would have been subject to damaging impeachment); *Marshall*, 375 Ill. App. 3d at 676-77 (same); *see also id*. at 678 (counsel reasonably decided not to call potential witness because his testimony would not have been credible). Counsel therefore reasonably could have concluded that Gist's potential testimony "would be of questionable value" and could have potentially harmed petitioner's defense. *Guest*, 166 Ill.

2d at 400. Accordingly, petitioner has not raised an arguable claim that counsel performed deficiently by not calling Gist.

Nor is it arguable that counsel rendered deficient performance by not calling Donner. Donner's affidavit does not claim she witnessed the shooting, but merely that she saw two male teenagers in the neighborhood where the shooting occurred. CI1565-67. Because Donner's testimony would not have cast doubt on the victims' identifications of petitioner as the shooter — and would have been subject to impeachment for bias on the basis of her relationship with petitioner — counsel could reasonably decide not to call her. *See Guest*, 166 Ill. 2d at 400 (counsel does not provide unreasonable assistance by not calling a witness whose proposed testimony would be of questionable value and would potentially harm defendant); *People v. Kubat*, 114 Ill. 2d 424, 433-34 (1986) (same).

In sum, it is not arguable that counsel performed deficiently by not calling Gist or Donner at trial, or that the decision not to call them prejudiced petitioner. This Court should therefore hold that the circuit court correctly dismissed petitioner's postconviction petition at the first stage.

CONCLUSION

This Court should affirm the appellate court's judgment.

January 24, 2024

Respectfully submitted,

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RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service is 32 pages.

/s/ Jeremy M. Sawyer
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CERTIFICATE OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. The undersigned certifies that on January 24, 2024, the foregoing **Brief of Respondent-Appellee People of the State of Illinois**, was filed with the Clerk of the Illinois Supreme Court, using the court's electronic filing system, which provided notice to:

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