No. 129718

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellant, -vs- MICHAEL WILLIAMS, Petitioner-Appellee.	)	Appeal from the Appellate Court of Illinois, No. 5-22-0185. There on appeal from the Circuit Court of the Twentieth Judicial Circuit, St. Clair County, Illinois, No. 09-CF-1299. Honorable Julie Katz, Judge Presiding.

BRIEF AND ARGUMENT FOR PETITIONER-APPELLEE

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ISSUES PRESENTED FOR REVIEW

1. Whether this Court should remand for further second-stage proceedings where: (1) retained counsel, while not subject to Illinois Supreme Court Rule 651(c), provided unreasonable assistance, and (2) it is not possible to determine what would have occurred at the second stage had counsel performed reasonably by properly shaping and supporting Mr. Williams' post-conviction petition.

2. Whether the appellate court erred when it remanded for further second-stage proceedings with new counsel.

STATUTES AND RULES INVOLVED

Illinois Supreme Court Rule 651. Appeals in Post-Conviction Proceedings

Relevant Section:

Paragraph (c) Record for Indigents; Appointment of Counsel, provides in relevant part, that:

> The record filed in that 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.

725 ILCS 5/122. Post-Conviction Hearing

Relevant Sections:

725 ILCS 5/122-2; Contents of Petition, provides in relevant part, that:

> The petition shall identify the proceeding in which the petitioner was convicted, give the date of the rendition of the final judgment complained of, and clearly set forth the respects in which petitioner's constitutional rights were violated. The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached.

725 ILCS 5/122-7; Review, provides in relevant part, that:

> Any final judgment entered upon such petition shall be reviewed in a manner pursuant to the rules of the Supreme Court.

STATEMENT OF FACTS

Initial Charges & Guilty Plea

In 2009, Michael Williams was charged with two counts of armed robbery and two counts of aggravated battery with a firearm for allegedly shooting Allex Ehrhard in the torso and leg and causing great bodily harm while taking Ehrhard's property, a wallet. (C.42-45,49-52) The State dismissed count two, one of the armed robbery charges, on March 7, 2011. (C.121; R.205,210)

At the March 7, 2011, hearing, the State informed the court that Mr. Williams would be pleading guilty to counts three and four, the two aggravated battery with a firearm charges. (C.49-52; R.231-32) The State explained that it would ask for ten years on each count, for a total of 20 years, with Mr. Williams serving 85 % of the sentence. (R.231-32) Mr. Williams would be credited for time served, and the State would move to dismiss the remaining charge in count one, armed robbery. (R.232) Defense counsel confirmed that this was his understanding of the plea agreement. (R.232)

The trial court admonished Mr. Williams regarding the charges and explained that, if he proceeded to trial, the armed robbery charge carried a sentence of 31 years to life, while the aggravated battery charges had a sentencing range of six to 30 years in prison. (R.234) The court explained, "I also could run those sentences together or all at the same time, depending on how the evidence comes in." (R.234)

Mr. Williams pled guilty to the aggravated battery with a firearm charges in counts three and four. (R.238) The court accepted the plea. It then dismissed count one and sentenced Mr. Williams to ten years on count three and ten years

on count four, with the sentences to be served consecutively. (R.240)

On March 21, 2011, Mr. Williams filed a *pro se* motion to withdraw his guilty plea, in which he alleged: 1) that his plea counsel was ineffective; 2) that the plea was a result of threat and coercion, and; 3) that the factual basis did not support the plea. (C.124-27) Specifically, Mr. Williams argued in his motion that counsel had failed to adequately investigate and prepare for the case, had failed to act promptly and communicate effectively, had failed to inform Mr. Williams of his rights, and had failed to adequately present a defense. (C.126) The motion further alleged that counsel continuously told Mr. Williams he would spend the rest of his life in prison if he did not take the 20-year plea deal. (C.126) Finally, Mr. Williams claimed that he was innocent. (C.127)

Following a hearing, the trial court denied Mr. Williams' motion to withdraw his plea. (C.133; R.244-55) Mr. Williams appealed. (C.135)

Direct Appeals

In his direct appeal, Mr. Williams' appellate counsel argued that the trial court violated constitutional requirements and Illinois Supreme Court Rule 604(d) when the court failed to first determine whether Mr. Williams desired the assistance of counsel at the post-plea hearing and that the court failed to secure a waiver of his right to counsel. (C.174-75); *People v. Williams*, 2012 IL App (5th) 110144-U, ¶ 8. The appellate court agreed, reversed the circuit court's order denying Mr. Williams' *pro se* motion to withdraw the guilty plea, and remanded for further post-plea proceedings. (C.174-76); *Williams*, 2012 IL App (5th) 110144-U, ¶¶ 8-14. The mandate issued on October 4, 2012. (C.172)

On remand, the trial court appointed counsel to represent Mr. Williams. (R.266) Counsel filed a motion to withdraw the guilty plea on February 20, 2013, as well as a Rule 604(d) certificate. (C.186-88) The motion alleged the guilty plea was involuntary because Mr. Williams received ineffective assistance of counsel and because he did not understand the nature of the charges against him. (C.186) The motion also alleged that Mr. Williams had a defense worthy of consideration. (C.186) At the February 20, 2013, hearing, Mr. Williams testified that his appointed plea counsel was not prepared for trial and that counsel did not interview witnesses on his behalf. (R.273-75) Mr. Williams also said that he wanted to hire private counsel and told his appointed plea counsel of his intention to do so two weeks prior to trial. However, his appointed plea counsel attorney did not request a continuance until the day trial was scheduled to begin. (R.275-76) Mr. Williams explained that he pled guilty because he did not want to go to trial with his appointed plea counsel because he believed counsel was unprepared. (R.276-78)

Mr. Williams admitted that his plea counsel met with him multiple times, discussed the case with him, informed him of the State's plea offers, and allowed him to discuss those plea offers with his family. (R.278-80) Mr. Williams confirmed that his appointed plea counsel negotiated a plea deal for 20 years and that counsel filed motions to suppress. (R.280-81) Mr. Williams explained that he knew he had to go to trial or take the plea offer of 20 years and that he felt he "had to take the guilty plea." (R.285-86) According to Mr. Williams, his plea counsel made him believe that he was not ready for trial and that he "would definitely lose." (R.287)

The State called Mr. Williams' appointed plea counsel, Chet Kelly, as a

witness. (R.291) Kelly testified that he went over the charges, the facts of the case, and the sentencing ranges with Mr. Williams. (R.292) Kelly recalled that Mr. Williams insisted he was innocent, and Kelly informed him he had the right to a trial. (R.293) Kelly claimed that Mr. Williams never expressed being uncomfortable with his representation, though he did recall Mr. Williams asking for a continuance. (R.294) Kelly also testified that he was "very prepared" for trial, though he believed the State had a strong case. (R.294-95) Kelly explained that Mr. Williams spoke with his family and decided to plead guilty on the day of trial. (R.295) According to Kelly, he interviewed at least one witness, but there were others that Mr. Williams mentioned, but he failed to provide "good names or details" for them, and counsel was unable to locate them. (R.296-97) The trial court took the case under advisement but denied the motion to withdraw the plea. (C.183-85; R.302-03) Mr. Williams appealed. (C.190)

On appeal from that denial, Mr. Williams' appellate counsel filed a motion for summary relief, arguing that trial counsel failed to comply with Illinois Supreme Court Rule 604(d) because counsel failed to state that he had examined the trial court file or made the necessary amendments to the motion to withdraw the plea in order to present the defects in the guilty plea proceedings. (C.215, 216); *People v. Williams*, 2013 IL App (5th) 130148-U, ¶¶ 1, 6. The appellate court agreed and reversed the denial of the motion to withdraw the guilty plea and remanded for further post-plea proceedings. (C.217); *Williams*, 2013 IL App (5th) 130148-U, ¶¶ 9-10.

Following remand, appointed counsel, Brian Flynn, filed a motion to withdraw

plea of guilty on August 20, 2015, along with a Rule 604(d) Certificate. (C.228-30) The motion alleged that Mr. Williams was not properly admonished pursuant to Supreme Court Rule 402 and that the plea was involuntary since Mr. Williams received ineffective assistance and did not understand the charges against him. (C.228) The motion further alleged that Mr. Williams had a defense worthy of consideration. (C.229)

At the November 10, 2015, hearing, defense counsel asked the court to review the transcripts from the previous hearing on the motion to withdraw the guilty plea as well as the plea and sentencing transcripts. (R.307) Counsel explained that he was dropping the claim about improper admonishments from his motion. (R.307-08) The State agreed that the court should review the relevant transcripts and argued that Mr. Williams was properly admonished pursuant to Rule 402. (R.309) The court took the matter under advisement but ultimately denied the motion to withdraw the guilty plea. (C.233-34; R.310;) Mr. Williams appealed. (C.241-243)

On appeal from that denial, Mr. Williams' appellate counsel argued that post-plea counsel Flynn failed to comply with Rule 604(d) when he failed to certify that he consulted with Mr. Williams regarding his contentions of error in the sentence and the entry of the guilty plea. (C.294-95); *People v. Williams*, 2018 IL App (5th) 160076-U, ¶¶ 7-9. The appellate court agreed, vacated the trial court's judgment, and remanded for further post-plea proceedings. (C.294-96); *Id.* at ¶¶ 7-10.

On May 16, 2019, attorney Flynn filed a new Rule 604(d) Certificate. (C.311) At the June 19, 2019, hearing, defense counsel and the State asked the trial court

to take judicial notice of the transcript from the previous hearing on the motion to withdraw. (R.315) The court took the matter under advisement and noted it would review the transcript. (C.312; R.316) The court denied the motion to withdraw the guilty plea the following day. (C.313-14) Mr. Williams appealed. (C.316)

On appeal from that denial, Mr. Williams' appellate counsel argued that the case should be remanded again because the June 2019 hearing was perfunctory and did not result in a meaningful review of the merits of the motion to withdraw the guilty plea. (C.346); *People v. Williams*, 2020 IL App (5th) 190264-U, ¶ 21. The appellate court disagreed and affirmed the denial of the motion to withdraw the plea. (C.347-48); *Id*., ¶¶ 23-26. Mr. Williams' filed a petition for leave to appeal with this Court which, according to a trial court filing, was denied on November 18, 2020. (C.370)

Present Appeal: Post-Conviction Petition

In January 2021, retained counsel, Ryan Martin, entered his appearance as post-conviction counsel in Mr. Williams' case. (C.367) On September 23, 2021, counsel filed a "Verified Petition for Post-Conviction Relief" on Mr. Williams' behalf. (C.369-74) The petition alleged that: 1) Mr. Williams' due process rights under the State and federal constitutions were violated when the trial court failed to properly admonish him regarding possible consecutive sentences; 2) his State and federal due process rights were violated when the trial court sentenced him to consecutive ten-year sentences without the record showing that the sentencing court found consecutive sentences were necessary for the protection of the public; and 3) Mr. Williams was denied his state and federal constitutional rights to the

effective assistance of counsel. (C.371-74) The ineffective assistance of counsel claim alleged that trial counsel Kelly allowed C.J. Baricevic, the son of the judge presiding over Mr. Williams' case, to accompany counsel during a privileged attorney-client meeting where important points of the case were discussed. (C.373) The petition explained that counsel failed to inform Mr. Williams that Baricevic was the judge's son and failed to explain why he allowed Baricevic to attend the meeting. (C.373-74)

The petition further explained that Mr. Williams had informed post-plea counsel about this issue but that the attorney failed to raise the issue in any motion or argument to the court. (C.374) Exhibits filed with the petition included a transcript excerpt from the guilty plea proceeding and an affidavit from Mr. Williams. (C.375,378-79) Post-conviction counsel Martin filed a "Certificate of Compliance with Rule 651(c)" that stated, in pertinent part:

1. Counsel has consulted with Petitioner by telephone and in person.

2. Counsel has examined the trial record to ascertain his contentions of deprivation of constitutional rights.

3. Petitioner did not file a *pro se* petition. (C.376)

The trial court found that the petition raised the gist of at least one constitutional claim and advanced the petition for second-stage post-conviction proceedings. (C.381) The State filed a motion to dismiss the petition, arguing that: 1) Mr. Williams was unable to establish prejudice from the admonishments; 2) he received the sentence for which he bargained; 3) his petition failed to allege he would not have pleaded guilty had he received the proper admonishments;

4) the trial court was not required to find that consecutive sentencing was necessary to protect the public since one of the felonies was a Class X felony that resulted in severe bodily injury, and; 5) with respect to the claim that counsel allowed the judge's son to participate in privileged discussions about the case, the petition failed to demonstrate how attorney Kelly was deficient or how his performance prejudiced Mr. Williams. (C.383-89) Finally, the State argued that Mr. Williams had failed to raise the issues challenging his plea in his motion to withdraw his guilty plea and had failed to raise them on direct appeal and that, accordingly, these issues were waived or barred. (C.387-89) Counsel for petitioner did not file an amended petition or any written response to the State's motion to dismiss.

At the February 18, 2022, hearing, the State stood on the arguments in its written motion. (R.320) Post-conviction counsel acknowledged that the petition's claims about consecutive sentencing were not raised in the motion to withdraw the guilty plea or in the direct appeal. (R.321) However, counsel asked the court to "consider fundamental fairness in allowing [Mr. Williams] to receive an evidentiary hearing on those two points." (R.321) As for the claim that Mr. Williams was denied the effective assistance of counsel, counsel argued:

> On point number three, I don't believe that the ineffective assistance of counsel claims are waived because they contain matters that are outside the record. They're not apparent in the record themselves, and Mr. Williams has filled out an affidavit stating those claims that are attached to the verified petition. (R.321)

The trial court judge questioned counsel as to why Mr. Williams failed to raise his ineffective assistance claims previously in the appellate court, and counsel explained:

> Yeah, and that's why I think that we need an evidentiary hearing on it, Judge. I don't know from the appellate counsel's filings and stuff whether, you know, they had talked about that but he certainly alleges it now. I don't know – I know that, you know, obviously this is all, you know, outside the record stuff so I'm not 100 percent sure on the direct appeal issue, Judge. (R.322)

The court then questioned post-conviction counsel as to how the claim regarding the previous judge's son satisfied either prong of *Strickland*, and the court asked how this claim was related to Mr. Williams pleading guilty. (R.322-23) Post-conviction counsel cited Mr. Williams' affidavit that was attached to the petition and argued that it satisfied both prongs of *Strickland* and that the affidavit demonstrated that Mr. Williams "would have went to trial but for this incident." (R.323-24) The State responded that Mr. Williams had failed to establish the prejudice prong of *Strickland* and that there was no indication that Mr. Williams was pressured into taking the plea. (R.324-25) The court took the matter under advisement. (R.325)

On February 22, 2022, the trial court entered an order finding that the petition failed to make a substantial showing of a constitutional violation, and granted the State's motion to dismiss the petition. (C.399) Mr. Williams appealed (C.400-01)

On appeal from the denial of his post-conviction petition at the second stage, Mr. Williams' appellate counsel argued that his retained post-conviction counsel provided unreasonable assistance where counsel failed to adequately shape Mr. Williams' claims into the appropriate form, and that the appellate court should reverse the trial court's dismissal of the post-conviction petition without requiring Mr. Williams to demonstrate prejudice resulting from post-conviction counsel's

unreasonable assistance. (Resp. ILSC Br.9)[1] The appellate court agreed, reversing the trial court's dismissal of the petition and remanding the case for further second-stage proceedings with new counsel. *People v. Williams*, 2023 IL App (5th) 220185-U, ¶¶ 27, 29.

The State now appeals the appellate court's decision as to: 1) the unreasonable assistance of post-conviction counsel; 2) whether Mr. Williams is required to demonstrate prejudice resulting from said unreasonable assistance, and; 3) the appellate court's direction that Mr, Williams, on remand, proceed with new counsel. (Resp. ILSC Br.1)

[1] Citations to Respondent-Appellant's brief filed with the Illinois Supreme Court on February 14, 2024, appear as "Resp. ILSC Br."

ARGUMENT

I. This Court should remand for further second-stage proceedings where: (1) retained counsel, while not subject to Illinois Supreme Court Rule 651(c), provided unreasonable assistance, and (2) it is not possible to determine what would have occurred at the second stage had counsel performed reasonably by properly shaping and supporting Mr. Williams' post-conviction petition.

At first blush, this case is about the standard of prejudice that should be applied when counsel is not subject to Rule 651(c), but clearly failed to shape or support the petition. But that is not entirely true. This case is really about equal justice under the law. Where two parties are in nearly identical situations, the law demands the outcomes for those parties be relatively the same. If two petitioners, one with appointed counsel and one with private counsel, each submit an identical petition, fairness demands that the petitions be judged the same, regardless of whether counsel was appointed or hired. See *People v. Cotto*, 2016 IL 119006, ¶ 41 ("Rule 651(c) applies only to a postconviction petition initially filed by a *pro se* defendant."). This sentiment is echoed elsewhere in the law, particularly as it applies to counsel. *See infra* pp. 40-41.

However, the State would now have this Court rule that two identical petitions should be judged by different standards at the second stage, merely because one was filed by an attorney at the first stage before moving to the second stage, and one was filed *pro se* and then amended by an attorney at the second stage. This

makes no sense. Obviously, attorneys sometimes fail to amend and support petitions at the second stage, and this Court has ruled that those petitions must be sent back for failure to amend and support the petitions without reviewing them for harmless error or any prejudice analysis. *People v. Addison*, 2023 IL 127119, ¶¶ 37-38. So, why should a petitioner, who sought out counsel to file his petition, now be penalized at the second stage? The State argues that Mr. Williams, who hired an attorney to file his initial petition, should now have to prove prejudice even though it is clear from the record that counsel did not understand the Post-Conviction Hearing Act ("the Act"), nor did counsel frame the issues, support the claims, or respond to issues raised by the State in its motion to dismiss. (Resp. ILSC Br.9-25) There is no question that had Mr. Williams' counsel been hired at the second stage, this case would be remanded for further compliance with Rule 651(c), so why the disparate treatment here, merely because Mr. Williams hired him one stage sooner? Certainly, it can't be that private counsel never make mistakes. *Cuyler v. Sullivan*, 446 U.S. 335, 344-45 (1980) ("But experience teaches that, in some cases, retained counsel will not provide adequate representation.").

At the outset, Mr. Williams and the State agree on three things. First, because retained counsel filed Mr. Williams' initial petition, he is not subject to Rule 651(c). (Resp. ILSC Br.12); see also *Cotto*, 2016 IL 119006, ¶ 41. The parties also agree that counsel is subject to the normal standard of reasonable assistance of counsel. (Resp. ILSC Br.11); see also *People v. Agee*, 2023 IL 128413, ¶ 41 (applying reasonable assistance to both appointed and private counsel). Finally, the parties agree that, based on the record in front of this Court, Mr. Williams cannot establish

the prejudice prong for unreasonable assistance. (Resp. ILSC Br.22-26)

Despite those areas of agreement, the issue is not quite so simple as being unable to establish prejudice because the inability to establish prejudice is due entirely to counsel's poor performance. In other words, counsel did his job so poorly and unreasonably that his client cannot now win an argument that counsel was unreasonable. The irony, of course, is that if Mr. Williams had filed a *pro se* petition before being appointed or retaining counsel at the second stage, he would not now be in this conundrum. He could argue that counsel failed to comply with Rule 651(c), as explained by this Court in *Addison*, 2023 IL 127119 at ¶¶ 37-38, and his case would be remanded with direction that new counsel file a petition that adequately shapes and supports his claims. But, because Mr. Williams was diligent, hired counsel early, and placed his faith in a licensed attorney to know and follow the law in order to advocate for him, according to the State, he is now in a worse position – primarily because counsel did not do his job and develop the record sufficiently to either advance his claim or even support a claim that trial counsel was ineffective. (Resp. ILSC Br.20-21) (explaining that petitioners who hire counsel at the first stage must prove prejudice, but appointed/retained counsel at the second stage need only show counsel did not comply with Rule 651(c)).

The State's argument must fail. Mr. Williams should not be penalized merely because he hired counsel at the first stage of the post-conviction process and relied on his retained counsel's training and expertise to file a legally sufficient petition. Having retained counsel did not put him in a better position than any other *pro se* petitioner to determine whether his attorney was adequately representing his

claims at the first stage. Because he placed his trust and success in the hands of a licensed attorney and thereby was not required to perform his own research, learn the law, and draft his own petition, he may have been worse off than *pro se* petitioners who must manage control of their own case. See *Agee*, 2023 IL 128413 at ¶ 44 ("[*P*]*ro se* petitioners often raise incomplete legal claims, [so] postconviction counsel must shape them into appropriate legal form and present them to the court."), *citing People v. Suarez*, 224 Ill. 2d 37, 46 (2007).

Further, the State's argument that Mr. Williams must now prove prejudice because he hired counsel to file his petition results in an unfair catch-22 in that the more unreasonably retained post-conviction counsel fails in performing counsel's duty to amend or support the petition, the harder it is for these petitioners to prove unreasonable assistance. See *People v. Johnson*, 2022 IL App (1st) 190258-U,¶¶ 37-39, 42 (Where counsel's unreasonableness in shaping or arguing the petition "bleeds through the transcript," case remanded for further second stage proceedings regardless of merit because "it was simply not possible to determine what would have occurred at the second stage if reasonable assistance had been provided"). This should not be the law. Accordingly, Mr. Williams respectfully requests that where, as here, there is more than sufficient evidence of counsel's unreasonable assistance in that counsel failed to adequately shape and support the petition, failed to understand the law, and failed to adequately develop the record, our courts should remand for further second stage proceedings without a showing of prejudice.

Standard of Review

Whether post-conviction counsel provided reasonable assistance is a question of law that this Court reviews *de novo*. *Cotto*, 2016 IL 119006 at ¶¶ 22-24, *citing People v. Clemons*, 2012 IL 107821, ¶ 8. The dismissal of a post-conviction petition without an evidentiary hearing is also reviewed *de novo* by this Court. *Id*. ¶ 24, *citing People v. Hall*, 217 Ill. 2d 324, 334 (2005).

A. Mr. Williams was deprived of the reasonable assistance of counsel where counsel failed to shape and support the petition as necessary to properly present Mr. Williams' claims to the trial court.

Even though counsel is not subject to Rule 651(c), his performance was so woefully bad that it is impossible "to determine whether [the petitioner] was prejudiced by the lack of reasonable assistance." *Johnson*, 2022 IL App (1st) 190258-U at ¶ 41. The State would also have this Court believe that Mr. Williams' counsel shaped his claims into proper legal form and reasonably used the law to advocate for his client. (Resp. ILSC Br.13-18) However, this argument is a bit of a red herring. Counsel did an unreasonably poor job. Had counsel been subject to Rule 651(c), this case would certainly have been remanded, and it would not now be before this Court. Even if counsel is not subject to the standard of Rule 651(c), he must still adequately shape the petition to represent the client's claims. After all, Rule 651(c) " 'is merely a vehicle for ensuring a reasonable level of assistance' and should not be viewed as the only guarantee of reasonable assistance in postconviction proceedings." *Cotto*, 2016 IL 119006, ¶ 41, *quoting People v. Anguiano*, 2013 IL App (1st) 113458, ¶ 37. Even retained counsel must properly

shape the petition in order to comply with Rule 651(c) if he or she is hired after the first stage. *People v. Richmond*, 188 Ill. 2d 376, 381 (1999) ("[W]e can discern no apparent reason not to impose on retained counsel in this case the same requirements that we impose on appointed counsel representing a defendant who originally files a *pro se* post-conviction petition."). For similar reasons, retained counsel at the first stage must still meet the standards of reasonable assistance of counsel. *People v. Johnson*, 2018 IL 122227, ¶ 18 ("[W]ere we to hold that the Act imposes no standard of representation whatsoever at the first stage, a privately retained attorney could submit a wholly deficient petition, and meritorious claims could be lost."). Put another way, whether counsel is appointed or retained, and whether counsel appears at the first stage or the second stage, counsel must ensure that the petitioner's meritorious claims are not lost. It is axiomatic that counsel, retained or otherwise, must properly present claims in order to avoid their loss as envisioned by this Court in *Johnson, Richmond*, and *Cotto*. Thus, reasonable assistance must include shaping the petition and using the law to advocate issues on behalf of the petitioner.

The State disputes that counsel committed errors in shaping the petition, but the State's argument must fail. Here, the petition filed by Mr. Williams' post-conviction counsel alleged three claims: (1) that Mr. Williams was denied due process where the trial court failed to properly admonish him regarding possible consecutive sentences; (2) that Mr. Williams' right to due process was violated when the court failed to state on the record that consecutive sentences were necessary for the protection of the public, and; (3) that Mr. Williams was denied

effective assistance from plea counsel. (C.371-74) The attached affidavit from Mr. Williams stated, in pertinent part:

> 1. I didn't understand what the court meant [when the judge said] he could sentence me together or at the same time.
>
> 2. My attorney Chet Kelly came to visit me with C.J. Baricevic whom I discovered was the son of my trial judge and I could not continue to trial with Chet as my attorney.
>
> 3. During an interview with my attorney, while he and I discussed matters of my case, C.J. Baricevic was in the interview room.
>
> 4. I was appointed attorney Brian Flynn on my motion to withdraw guilty plea. I informed him of this issue with Chet Kelly bringing C.J. Baricevic on an interview and asked Mr. Flynn to include that issue into my motion to withdraw guilty plea and he did not. (C.378)

The State would have this Court believe that counsel "adequately pleaded petitioner's ineffective assistance claim by alleging both that plea counsel's performance was deficient, and that the deficient performance resulted in prejudice." (Resp. ILSC Br.13). In reaching this conclusion, the State cites to a *single conclusory sentence* included in the petition: "that plea counsel's deficient performance result[ed] in a substantial likelihood that the outcome of Petitioner's guilty plea and sentencing would have been different." (Resp. ILSC Br.14); (C.373). But of course, that is not sufficient to demonstrate prejudice, as this Court made clear. "A conclusory allegation that a defendant would not have pleaded guilty and would have demanded a trial is insufficient to establish prejudice." *People v. Valdez*, 2016 IL 119860, ¶ 29. As a matter of fact, later in its brief, the State only underscores this point by arguing that Mr. Williams cannot prove prejudice "given the sentencing exposure and the strength of the People's case…to accept a plea offer of 20 years." (Resp.

ILSC Br.18) In other words, the very thing Mr. Williams faults counsel for not including in his petition (i.e., facts to support prejudice in light of Mr. Williams' claims), the State now uses to argue *both* that counsel was reasonable, and *also*, that there is insufficient evidence to support a claim that Mr. Williams was prejudiced.

In any event, counsel utterly failed to argue prejudice as required by this Court. For the improper admonishments, counsel failed to allege either that Mr. Williams was denied real justice or that he suffered prejudice as a result of the trial court's unsatisfactory admonishment with respect to sentencing, even though the law requires such an allegation. (C.371-373); *People v. Davis*, 145 Ill. 2d 240, 250 (1991).

Perhaps more critically, Mr. Williams wanted to withdraw his guilty plea (W*illiams*, 2023 IL App (5th) 220185-U at ¶ 22), which meant that Mr. Williams had to prove prejudice. In the guilty plea context, that meant that he had to show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id*., *citing People v. Valdez*, 2016 IL 119680, ¶ 29, and *People v. Brown*, 2017 IL 121681, ¶ 47. Although Mr. Williams' petition alleged ineffective assistance of plea counsel, it did not reference the Sixth Amendment, *Strickland v. Washington*, 466 U.S. 668 (1984), *People v. Albanese*, 104 Ill. 2d 504 (1984), or any other relevant legal authority concerning claims of ineffective assistance of counsel. (C.369-374) Criminal defendants have a Sixth Amendment right to the effective assistance of counsel, including during the entry of a guilty plea. *Brown*, 2017 IL 121671 at ¶ 25. When asserting that the right

to the effective assistance of counsel has been violated, a defendant must satisfy the two prongs set forth in *Strickland*, that (1) the attorney's performance fell below an objective standard of reasonableness and (2) that the defendant was prejudiced by counsel's deficient performance. *Id.; Strickland*, 466 U.S. at 691-92.

The State in both its motion to dismiss and argument before the trial court pressed counsel on the prejudice prong of *Strickland*. *Williams*, 2023 IL App (5th) 220185-U at ¶ 23. According to the State, the petitioner failed "to articulate that, but for trial counsel's ineffectiveness, [Mr. Williams] would not have entered into his negotiated plea[s]." *Id*; (C.389). The trial court pressed counsel even further:

> You've got to satisfy the two prongs of *Strickland* and I'm not seeing the nexus between what about the fact that CJ Baricevic if, in fact, he did visit your client at the St. Clair County Jail [along with the defendant's plea counsel], what about that that satisfies either of the prongs of *Strickland*? How – what did it have to do with the fact that he ultimately pled guilty? (R.322-23)
>
> *Williams*, 2023 IL App (5th) 220185-U at ¶ 23.

Counsel's response was that Mr. Williams "would have went to trial but for this incident" with C.J. Baricevic. (R.323); *Id*. at ¶ 24. At the second-stage hearing, counsel acknowledged that some of the issues were not raised in the motion to withdraw his guilty plea or in the direct appeal, but rather than amending the petition or arguing the ineffectiveness of either post-plea counsel or appellate counsel, post-conviction counsel merely asked the court "to consider fundamental fairness in allowing [Mr. Williams] to receive an evidentiary hearing on those two points." (R.321) Additionally, counsel filed neither a response nor an amended petition addressing any of the State's arguments before the second-stage hearing. *Id*. at ¶ 7, 23, 26.

This Court has explained that the method by which a defendant may demonstrate he was prejudiced by plea counsel's performance depends on the ineffective assistance claim being raised. If a defendant asserts that he pled guilty based on erroneous advice from plea counsel regarding the consequences of the plea, then, to demonstrate prejudice, the defendant must show that he would have rejected the plea, would have insisted on proceeding to trial, and that it would have been rational to do so. *Brown*, 2017 IL 121681, ¶¶ 28-44; *People v. Pagsisihan*, 2020 IL App (1st) 181017, ¶ 21. If a defendant asserts that he pled guilty because of plea counsel's erroneous advice regarding defense strategies or his chance of acquittal, then, to demonstrate prejudice, the defendant must assert that he would not have pled guilty and would have insisted on going to trial, and the defendant must assert that he was either actually innocent or that he had a plausible defense that could have been raised at trial. *Brown*, 2017 IL 121681, ¶ 45; *Hall*, 217 Ill. 2d at 335-36; *Pagsisihan*, 2020 IL App (1st) 181017, ¶ 21.

Mr. Williams' post-conviction petition alleged that plea counsel was ineffective for bringing the son of the judge assigned to the case to an attorney-client meeting where important points of the case were discussed. (C.373) But when dealing with prejudice, counsel did exactly what this Court said he cannot: he made a single conclusory statement that Mr. Williams would not have pleaded guilty had he received the effective assistance of counsel. (C373) But this is not enough. This in no way satisfies *Brown* or *Valdez*. As the appellate court below explained:

> [C]ounsel's failure to include the required allegations and factual support in the [petition] and the defendant's accompanying affidavit, and his complete inability to muster facts and arguments - as opposed to vague and conclusory allegations - in support of prejudice at the

> hearing, meant that the defendant's [] claim of ineffective assistance of counsel had no chance of succeeding.
>
> *Williams*, 2023 IL App (5th) 220185-U at ¶ 26.

In other words, the pleading failed. It did not state facts or make the proper legal arguments to support a finding of prejudice for the claim of ineffective assistance of counsel.

The appellate court also found fault in counsel for failing to respond to the State's motion to dismiss in order to overcome *res judicata* or forfeiture. *Id.* The reasonable assistance of counsel has long since required counsel to make routine amendments and arguments to prevent dismissal based on waiver or forfeiture. *Id.*, *citing People v. Kluppelberg*, 327 Ill. App. 3d 939, 947 (1st Dist. 2002), and *People v. Russell*, 2016 IL App (3d) 140386, ¶ 11.

In *People v. Turner*, 187 Ill. 2d 406, 413 (1999), this Court held that counsel was unreasonable for failing to amend the petition to "include an allegation that petitioner was prejudiced by the allegedly ineffective assistance of his trial counsel and that the evidence allegedly withheld from the petitioner by the State was material." *Id.* at 413. Like in this case, counsel in *Turner* also failed to support the petition with affidavits. While it is true that in this case counsel attached an affidavit, it only established that C.J. Baricevic was present at a meeting between Mr. Williams and counsel. (R.328-29) It did not address prejudice or offer any details regarding the meeting or any of Mr. Williams' other claims. Thus, like the petitioner in *Turner*, Mr. Williams also received the unreasonable assistance of counsel, where counsel failed to "make a routine amendment to the post-conviction petition which would have overcome the procedural bar of waiver ... and [the petition]

contained virtually no evidentiary support." *Id*. at 414.

Finally, like counsel in *Turner*, Mr. Williams' counsel did not understand the Act. In finding counsel unreasonable in *Turner*, this Court also pointed to counsel's performance at the hearing on the motion to dismiss, noting that "Counsel's statement at the hearing…that an evidentiary hearing on petitioner's claims was warranted because petitioner alleged violations of his constitutional rights demonstrates that he was ignorant of one of the most basic principles of post-conviction proceedings." *Id*. at 415. Similarly, Mr. Williams' counsel, when pressed on the issue of prejudice and why the claim of ineffective assistance of counsel was not raised in the trial court, counsel responded:

> Yeah, and that's why I think that we need an evidentiary hearing on it, Judge. I don't know from the appellate counsel's filings and stuff whether, you know, they had talked about that but he certainly alleges it now.
>
> I don't know – I know that, you know, obviously this is all, you know, outside the record stuff so I'm not 100 percent sure on the direct appeal issue, Judge. (R.322)

This statement by post-conviction counsel indicates that, like *Turner's* counsel, Mr. Williams' counsel did not understand his duties at the second stage of the post-conviction process, and it demonstrates that counsel provided unreasonable assistance.

The State would have this Court believe that all these failures still add up to reasonable assistance. First, the State argues that counsel supported Mr. Williams' claim with the single affidavit, but as discussed above, this established a limited fact: that Bariceviec was present for the meeting. (Resp. ILSC Br. 14, 16) This did not go to the issue of prejudice or to any conversations Mr. Williams

had with direct appeal counsel to explain why this claim wasn't raised on direct appeal. The State points out that counsel "explained that petitioner could not have raised the claim on direct appeal because it was based on facts outside the record," (Resp. ILSC Br.15), but this ignores the crucial deficiency that counsel never amended the petition or identified any "facts" that would have supported the claim. What facts were outside the record that made this impossible to raise on direct appeal? Did appellate counsel consider raising it, or did it pass without notice? Either counsel needed to amend the petition to identify what facts made this impossible to raise previously, or counsel needed to allege appellate counsel ineffective. *Kluppelberg*, 327 Ill. App. 3d at 947; *Russell*, 2016 IL App (3d) 140386, ¶ 11. Counsel took neither action. Instead, counsel then pivoted and absurdly suggested that his failure to include these facts was why an evidentiary hearing was needed. (R.322) Certainly, this is not sufficient.

In arguing that the single, unsupported sentence in the petition was sufficient to establish prejudice, the State argues that counsel's statements to the trial court that Mr. Williams "felt pressured to plead guilty…and that…he would have went to trial but for this incident" were sufficient. (Resp. ILSC Br.15; R.324) But again, this does not satisfy prejudice for ineffective assistance of counsel claims involving motions to withdraw guilty pleas. More importantly, the State holds these statements up as an indicator that counsel understood prejudice was required for a *Strickland* claim (Resp. ILSC Br.15-16), but of course, knowing this and shaping a claim, including supporting the claim with facts, are very different. Counsel's knowledge is all well and good, but if he does not actually plead the issues properly,

it is for naught.

Finally, the State argues that perhaps counsel did the best he could with the facts he had. (Resp. ILSC Br.17-18) But as the appellate court explained:

> We note that counsel for the defendant on appeal is correct that it is well established that postconviction counsel is prohibited from advancing claims in the circuit court that counsel determines frivolous and patently without merit. See, e.g. , *People v. Greer*, 212 Ill. 2d 192, 209 (2004). Thus, PCP counsel must have believed that the claims in the PCP had merit. Yet, inexplicably, counsel did not plead, or argue, the basic elements necessary to sustain the claims, even after these deficiencies were noted in the State's motion to dismiss. See, e.g. , *People v. Al Momani*, 2016 IL App (4th) 150192, ¶ 12.
>
> *Williams*, 2023 IL App (5th) 220185-U at ¶ 27.

This Court's holding in *Greer* essentially holds that counsel has an ethical duty to not advance claims that have no merit. *Greer*, 212 Ill. 2d at 207. Prejudice is required to prove ineffective assistance of counsel claims, so counsel must have believed there was merit to Mr. Williams' claims. Thus, in filing the petition, he had an ethical duty to properly shape each claim and support them with essential facts. *Id.*

Relatedly, counsel here was not appointed at the second stage; he was retained to draft the initial petition. Thus, he did not have the option to stand on a *pro se* petition, as this Court recently explained in *People v. Huff* , 2024 IL 128492, ¶ 30 (holding that counsel could stand on the *pro se* petitioner rather than filing a *Greer* motion). Counsel chose to represent this petitioner. He took money from him and agreed to draft a petition to file in court. Had he found Mr. Williams' claims to have no merit, then he should have refused to take the case or file a petition on his behalf. *See infra* 37-38. Alternatively, if after further work on the

case or after the State filed its motion to dismiss, counsel believed the case no longer had merit, he was ethically bound to withdraw pursuant to *Greer*. What he could not do was nothing; he could not stand on a petition that did not plead prejudice for a *Strickland* claim. What this Court should not do is assume that Mr. Williams did not plead prejudice because he could not do so.

Finally, the State breaks down each of counsel's mistakes into individual ones and attempts to justify them one-by-one. Perhaps, if the petition itself were sufficient, an off-the-cuff comment by counsel about needing an evidentiary hearing might be overlooked. No one is, after all, perfect. But here, counsel failed in multiple ways: he failed to shape and support the petition or amend it as necessary, he did not understand the Act itself, and he did not consult with his client. Together, it is impossible to excuse counsel's mistakes.

It seems beyond the pale that counsel would file a petition without properly consulting with his client, but here, the record indicates that counsel did not make the necessary inquiries about facts related to critical portions of Mr. Williams' claims. Ill. S. Ct. Rule 651(c); (R. 322, counsel explaining that he couldn't answer the court's questions because he didn't know *factual issues* about conversations his client had with prior counsel). It is clear from the record that he had no idea what Mr. Williams would say about discussions between himself and his former counsel. But why wouldn't he know this information? After all, one of the primary duties of post-conviction counsel is to *consult* with the petitioner. Had counsel consulted with his client after the State's motion to dismiss was filed, counsel would have known about conversations that Mr. Williams had with Brian Flynn

and appellate counsel. It would be almost impossible and clearly unreasonable to respond to the State's motion to dismiss without discussing these conversations with Mr. Williams.

But counsel's mistakes did not stop with consultation. Like counsel in *Turner*, here, counsel's entire performance was generally unreasonable. He did not properly shape and present Mr. Williams' claims in the petition. He did not amend the petition or respond to the State's motion to dismiss when confronted with forfeiture issues. To top it all off, counsel demonstrated his misunderstanding of the law when he misstated the standard for when an evidentiary hearing is appropriate pursuant to the Act. (R.322, counsel explaining to the trial court that it needed an evidentiary hearing to resolve whether Mr. Williams could plead prejudice). As this Court said in *Turner*, "given the totality of circumstances in this case, we hold that post-conviction counsel's performance was unreasonable and fell below the level of assistance required by Rule 651(c)." *Turner*, 187 Ill. 2d at 414. Mr. Williams respectfully requests that this Court make a similar ruling here and find, given the totality of the circumstances, that counsel was unreasonable.

B. Where retained counsel wholly fails to shape and present a petitioner's claims, leaving the record so underdeveloped that it is impossible to determine prejudice, remand is required to determine what would have happened at the second stage had counsel not been unreasonable.

After enumerating the errors counsel made, including noting that some of counsel's actions "doomed the [petition] to failure," the appellate court remanded

Mr. Williams' case for further proceedings. *Williams*, 2023 IL App (5th) 220185-U, ¶¶ 26-27. The appellate court did not find that Mr. Williams was prejudiced by counsel's actions. Nor did it find that counsel was subject to Rule 651(c). Instead, the appellate court found that:

> The inescapable conclusion in this case is that PCP counsel provided unreasonable assistance of counsel when he drafted the PCP, and when he attempted to defend the PCP against the State's motion to dismiss it, and that PCP counsel's failures have left this court [] with a record that makes it impossible to determine whether the defendant was prejudiced by PCP counsel's multiple failures. *Id.* at ¶ 27.

In other words, the appellate court determined that counsel's representation was so unreasonable that it not only doomed the petition, but it also created a hole in the record whereby no one could determine whether counsel actually prejudiced his client or not. The appellate court reached this conclusion after relying on *People v. Johnson*, 2022 IL App (1st) 190258-U, ¶¶ 33-43.The principles of fairness relied on by the court in *Johnson* and the court below make sense and are in keeping with this Court's other rulings. Dismissal would be inappropriate where counsel was so unreasonable that the petitioner cannot now prove prejudice on the face of the record. Put another way, this Court should not uphold a rule that the more unreasonable the counsel, the less likely it is for any review of those errors to occur. See *Johnson*, 2022 IL App (1st) 190258-U at ¶ 41 (As the petitioner argued, "because of the deficiencies of his postconviction counsel, we simply cannot tell on this record whether the outcome might have been different if [the petitioner] had received reasonable postconviction representation.") As the appellate court noted, it could not determine whether Mr. Williams was prejudiced because of the "paucity of

the record *caused by* postconviction counsel's lack of reasonable assistance," so the "appropriate remedy ...[is] to remand for further second-stage proceedings." *Williams*, 2023 IL App (5th) 220185-U, ¶21 (emphasis in original).

This reasoning is also supported by this Court's jurisprudence on Rule 651(c), finding that a harmless error standard shouldn't apply when a reviewing court finds that post-conviction counsel failed to shape or support an amended claim. *Addison*, 2023 IL 127119, ¶ 41. In *Addison*, this Court emphasized that "it would not be appropriate to affirm the dismissal of the petitioner when counsel had not shaped the claims into the proper form." *Id.* at ¶ 41. This Court explained that to judge the merits of the petition before the petitioner had received reasonable assistance of counsel in shaping the petition would "render the appointment of counsel in post-conviction proceedings nothing but an empty formality." *Id.*, *citing People v. Garrison*, 43 Ill. 2d 121, 123 (1969) and *People v. Wilson*, 40 Ill. 2d 378, 381 (1968) ("representation by appointed counsel in post-conviction proceedings must be more than mere tokenism."). Ultimately, this Court held that a remand was proper for further second stage proceedings, regardless of merit, "when appointed counsel does not adequately fulfill his or her duties." *Id.* at ¶ 42. Put another way, a court should not rule on the merits until a petitioner has had the opportunity to have the actual, reasonable assistance of counsel, and where this has not occurred, it would be inappropriate to require the petitioner to show prejudice.

Here, Mr. Williams is in the same position as Addison or any other petitioner whose claims have advanced to the second stage where post-conviction counsel

has failed to shape and support the petition and argue it appropriately. Merely because Mr. Williams hired counsel at the first stage, he should not now be penalized and placed in a less equitable position by having to show actual prejudice when he has yet to receive the reasonable assistance of counsel. Equity and fairness demand more. Here, it is clear that counsel provided unreasonable assistance in drafting and supporting Mr. Williams' petition. It is impossible – based on the record before this Court – to determine whether Mr. Williams suffered prejudice as a result of counsel's failure to provide the reasonable assistance afforded by our legislature to Mr. Williams. Therefore, consistent with the principles of fairness, this Court's analogous reasoning in Rule 651(c) cases, and consistent with the reasoning in the appellate court's decisions in both this case and *Johnson*, 2022 IL App (1st) 190258-U, Mr. Williams asks this Court to remand for further second stage proceedings.

Mr. Williams recognizes that this Court has held that, where counsel is retained at the first stage, counsel is not required to comply with Rule 651(c). But as this Court has explained, the reasoning underscoring this rule is that there should be no need to amend a *pro se* petition, where the petition itself was first filed by counsel. *Agee*, 2023 IL 128413, ¶ 44 ("[P]ro se petitioners often raise incomplete legal claims, [so] postconviction counsel must shape them into appropriate legal form and present them to the court."), *citing People v. Suarez*, 224 Ill. 2d 37, 46 (2007)(same). However, nothing this Court has said would indicate that merely because private counsel drafted the initial petition that counsel would be exempt from shaping and supporting the petition appropriately; rather, the

implication is that counsel would, after having been hired and necessarily consulting with petitioner, draft a petition that would reasonably comply with the standards laid out by this Court in Rule 651(c). But, what if that doesn't happen? What if counsel's work on the petition is so bad that it "doomed" the petition, as the appellate court found in this case? *Williams*, 2023 IL App (5th) 220185-U, ¶ 26 (listing out post-conviction counsel's failures).

According to the State, Mr. Williams should be treated differently than petitioners whose counsel is not retained or appointed until the second stage, in that he should be required to show prejudice. (Resp. ILSC Br.19-20) The State's entire argument is that because Rule 651(c) does not apply, any challenge to counsel's shaping and supporting the petition must also include a showing of prejudice. In other words, the State would have this Court rule that two attorneys could do an equally unreasonable job in shaping a petition, but because one was hired at the first stage and the other at the second stage, the outcome is different. One has to show prejudice to gain relief, while the other does not. Yet the petitions could be identical. And neither petitioner would have reason to know that counsel did a poor job. So why the inequitable treatment? Why the different outcomes when the legal argument (a denial of reasonable assistance of counsel that makes the right to post-conviction counsel hollow) and the two petitioners are identical? The State gives no persuasive reason for this disparate and inequitable approach other than the blind application of Supreme Court Rules. What the State fails to account for is that those rules were drafted in order to ensure compliance with the Act. *Addison*, 2023 IL 127119 at ¶¶ 19-20 (explaining that post-conviction

counsel under the Act was "appointed not to protect postconviction petitioners from the prosecutorial forces of the State but to shape their complaints into the proper legal form and to present those claims to the court," and Rule 651(c) "ensure[s] that postconviction petitioners receive that level of assistance"); see also *People v. Suarez*, 224 Ill. 2d 37, 46 (2007) ("Rule 651(c) was promulgated by this court to implement its decision in *Slaughter*, as well as its decisions in *People v. Jones*, 43 Ill. 2d 160 (1969) (failure to consult is a failure to discharge an elementary responsibility of representation), and *Garrison*, 43 Ill. 2d 121 (1969) (holding that a failure to confer does not meet even a minimal professional standard and necessitates reversal)."). And even if the rule itself doesn't apply, then the statute it was designed to enforce most certainly does.

Consider the similarity of this Court's remand in *Addison*, 2023 IL 127119. Aside from the timing – Mr. Williams' counsel filed his initial petition, while Addison's counsel drafted an amended petition at the second stage – counsel's actions are virtually identical. In *Addison*, counsel did not adequately plead ineffective assistance of appellate counsel in order to overcome procedural bars. *Id.* at ¶ 24. This Court explained that even after the State filed a motion to dismiss premised on procedural bars and argued forfeiture at the hearing, counsel never amended the motion or "never once countered the State's assertion that she had failed to allege ineffective assistance of appellate counsel." *Id.* at ¶ 25.

Similarly, counsel here failed to argue and factually support "claims of ineffective assistance of counsel as a means to overcome bars of res judicata and forfeiture that the State raised in its motion to dismiss." *Williams*, 2023 IL App

(5th) 220185-U at ¶ 26. As the appellate court explained, counsel was unreasonable for failing to allege or support an allegation of prejudice for a *Strickland* claim, and "when this was brought to PCP counsel's attention by the State's motion to dismiss, [] counsel filed no written response or request to amend the [petition]." *Id*. Further, when counsel argued the motion at the second-stage hearing, counsel was unprepared to argue the point even though counsel had months to prepare. *Id*. The appellate court characterized counsel's work as a "failure to include the required allegations and factual support in the [petition] and the defendant's accompanying affidavit," and a complete "inability to muster facts and arguments - as opposed to vague and conclusory allegations - in support of prejudice at the hearing, meant that the defendant's [] claim of ineffective assistance of counsel had no chance of succeeding." *Id.* Finally, according to the appellate court, it was counsel's ineptitude that led to "a paucity of the record ... that makes it impossible for [the appellate court] to determine if the defendant suffered prejudice as a result of [] counsel's unreasonable assistance." *Id.*

Mr. Williams and Addison are in virtual lockstep. They have both made it to the second-stage of post-conviction proceedings based on a merit ruling by the trial court, and both have counsel that reviewing courts have found to be unreasonable at amending and supporting the petition. But, if the State's arguments are adopted by this Court, then Mr. Williams and Addison will end their appeals with completely different outcomes. *Addison*, per this Court, was remanded for further second-stage proceedings, because when "counsel does not adequately fulfill his or her duties under Rule 651(c), a remand is required regardless of whether

the petition's claims have merit." *Addison*, 2023 IL 127119 at ¶ 42. Mr. Williams, on the other hand, will not have the chance to receive reasonable assistance of counsel in amending his petition if this Court accepts the State's argument, because he must prove prejudice – which he cannot do for precisely the same reason he is entitled to remand – the unreasonable assistance of counsel.

Equity demands that Addison and Mr. Williams receive the same results. Where two petitioners have virtually the same issues encumbering their respective petitions and records due to receiving unreasonable assistance from counsel, their cases should be adjudicated according to the same standard and not be subject to such vastly different outcomes. The concerns this Court expressed in *Addison* do not simply vanish because Mr. Williams hired counsel at the first stage. He is no more legally sophisticated or educated than petitioners who filed their own petitions merely because he or his family scraped the money together to hire counsel.

Further, this Court has long since recognized a specific carve-out allowing petitioners to receive remands without a review on the merits, where counsel did not shape claims into proper form and argue the issues to the trial court. *Suarez*, 224 Ill. 2d at 48. This Court said in *Suarez*: "remand is required where postconviction counsel failed to fulfill the duties of consultation, examining the record, and amendment of the *pro se* petition, regardless of whether the claims raised in the petition had merit" because "it is error to dismiss a postconviction petition on the pleadings where there has been inadequate representation by counsel." *Id*. at 47. This Court has taken a similar stance numerous times in the past. In *People v. Jones*, 43 Ill. 2d 160 (1969), this Court acknowledged: "We have held it to be

error to dismiss a post-conviction petition on the pleadings, as occurred here, where there has been inadequate representation by counsel, though the [p]ro se petition itself fails to present a substantial constitutional claim." *Id.* at 162. Similarly, in *People v. Johnson*, 154 Ill. 2d 227 (1993), this Court explained: "We cannot simply presume, however, that the trial court would have dismissed the petition without an evidentiary hearing if counsel had adequately performed his duties under Rule 651(c). It is the duty of the trial court, and not this court, to determine on the basis of a complete record whether the post-conviction claims require an evidentiary hearing." *Id.* at 246. Finally, in *Turner*, 187 Ill. 2d 406 (1999), this Court rejected applying a harmless error review to a petition when "counsel has not complied with Rule 651(c) by shaping the claims into the appropriate form." *Addison*, 2023 IL 127119 at 42. While Rule 651(c) doesn't apply to Mr. Williams directly, nothing in this Court's reasoning for Rule 651(c) shouldn't apply to Mr. Williams. He was entitled to the reasonable assistance of counsel in shaping his petition, and where he did not receive that counsel, this Court's reasoning in Rule 651(c) cases should be applied to Mr. Williams as well.

This Court has consistently held for the better part of half a century that where counsel does not adequately frame the issues, present them to the court, and develop the record, a review of the merits is not appropriate because the reviewing court cannot have confidence that counsel has fulfilled his role. Now the State would suggest that none of this applies to Mr. Williams because he hired counsel at the first stage rather than filing a *pro se* petition, merely because Rule 651(c) does not apply to him. (Resp. ILSC Br. 12, 19-20). But the State does not

offer any reason beyond the most superficial to explain why Mr. Williams should be in a worse position than had he waited until the second stage to hire counsel.

In fact, the State has offered no reason why the tenets of Rule 651(c) should not also apply to Mr. Williams. In *People v. Brown*, 52 Ill. 2d 227 (1972), this Court quite forcefully explained the reasoning behind Rule 651(c). This Court iterated:

> "[T]he purpose underlying Rule 651(c) is not merely formal. It is to ensure that all indigents are provided proper representation when presenting claims of constitutional deprivation under the Post–Conviction Hearing Act. The fulfillment of this design would not be encouraged were we to ignore the rule's nonobservance in those cases appealed to this court." *Id.* at 230.

Mr. Williams is entitled to the same statutory right to the representation of reasonable counsel under the Act as an individual who obtains counsel at the second stage. He is entitled to consult with his attorney and to have that attorney shape the claims into the appropriate format. He is entitled to have his attorney respond with available arguments to any pleadings filed by the State. Regardless of whether Rule 651(c) technically applies to his case, he has the same right as any other petitioner under the Act to the reasonable assistance of counsel. And like any other petitioner, when counsel acts unreasonably and fails to develop the record, shape the issues, or amend the petition in light of the State's arguments, he should not have to prove prejudice. He should be treated like every other petitioner who has stood before this Court over the last half-century, and have his case remanded for further second-stage proceedings because a ruling on the merits cannot be reached with any confidence or fairness until Mr. Williams has had adequate representation.

Further, this Court should firmly reject the State's argument that merely

because Mr. Williams did not file a *pro se* petition, he should not be entitled to the underlying protections of Rule 651(c) at the second stage. That ruling would be illogical and create inequitable results. Merely because counsel filed the initial petition does not mean that an amendment will not be necessary.[2] Take Mr. Williams' case. Once the State filed its motion to dismiss, it became clear that either an amendment was necessary or counsel need to file a *Greer* motion if further consultation and investigation revealed his client's case had no merit. See *People v. Russell*, 2016 IL App (3d) 140386, ¶ 11. (The failure to make a routine amendment ... rebuts the presumption of reasonable assistance); *Greer*, 212 Ill. 2d at 207. Where counsel took neither action, he was unreasonable and should be judged in the same way as any other counsel at the second stage.

Further, Mr. Williams is no more sophisticated than the *pro se* petitioners who file their own claims in the trial court. Perhaps Mr. Williams' hiring of counsel is an acknowledgment of that. At the very least, it simply means that he or his family could scrape the money together to help him. In fact, given that Mr. Williams was able to hire counsel, his obligation to research and understand the law would have been even less so than his *pro se* counterparts. He was already in prison, so his opportunity to research was minimal, and after all, we do not expect clients to research legal issues once counsel has been hired.

Moreover, no one expects petitioners, who are not licensed attorneys, to know whether counsel is doing an adequate job of shaping claims. If petitioners

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[2]Though Mr. Williams was certainly represented by counsel at the first stage, counsel did not sign his name on the petition. (C.369)

were sophisticated enough to identify that counsel was unreasonable in shaping the issues, then there would be no need for counsel in the first place. Further, this Court does not demand that petitioners whose counsel has failed to shape and support their claims be questioned as to why they did not recognize that counsel was unreasonable. Nor does this Court require those same litigants to present evidence in the record that they were prejudiced by counsel's unreasonable representation at this particular stage in the process. Nothing more should be expected of Mr. Williams than is expected of any other petitioner that has counsel who did an unreasonably poor job of amending his petition or responding to the State. He is no better position to prove prejudice from the paucity of facts contained in the record due to counsel's unreasonable representation than the petitioners whose cases are remanded without a review of the merits. As such, Mr. Williams is asking nothing more than he be treated like any other petitioner whose attorney was unreasonable in framing the issue. He is asking that this Court remand his case for further second-stage proceedings.

The State, of course, disagrees. The State has argued that Mr. Williams should be required to show prejudice because, even "where counsel is constitutionally guaranteed, a petitioner is not entitled to relief based on counsel's deficient performance absent a showing of prejudice." (Resp. ILSC Br.19), *citing People v. Zareski,* 2017 IL App (1st) 150836, ¶ 54 (noting that, "in the constitutional context, only truly egregious failures allow for a new trial regardless of prejudice"). But this, of course, is not entirely true. To be clear, the Sixth Amendment right to counsel is not at issue here. But to the extent that the standards for constitutionally

guaranteed counsel are implicated, the State is wrong in asserting that an individual with constitutionally deficient counsel must always show prejudice.

Ironically, the cases where a defendant need not show prejudice per the Sixth Amendment are far more like Mr. Williams' claims here than traditional *Strickland* claims. For example, in *U.S. v. Cronic*, 466 U.S. 648 (1984), the Supreme Court held "there are some circumstances so likely to harm the defense that prejudice need not be shown under the *Strickland* test of ineffective assistance of counsel, but will be presumed." *People v. Simms*, 192 Ill. 2d 348, 402 (2000). This Court recognized that per *Cronic*, defense counsel must "at a bare minimum," act as a "true advocate," and where counsel does not test the State's case, "there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id.* at 402-403 (internal citations removed), *citing People v. Hattery*, 109 Ill. 2d 449, 459-60 (1986); see also *Cronic*, 466 U.S. at 692 (Prejudice can be presumed when counsel fails to subject the State's case to meaningful, adversarial testing).

Similar to *Cronic*, this Court has also recognized that defendants need not show prejudice when counsel labors under a *per se* conflict of interest. This Court has long held that when a *per se* conflict of interest arises between a defendant and his counsel, prejudice can be presumed. *People v. Miller*, 199 Ill. 2d 541, 545 (2002), *citing People v. Lawson*, 163 Ill. 2d 187, 210 (1994). The defendant need not show prejudice because, as this Court reasoned, "certain facts about the defense counsel's status, by themselves, * * * engender a disabling conflict." *Lawson*, 163 Ill. 2d at 211; see also *People v. Stovall*, 40 Ill. 2d 109, 113 (1968)(Defendant is

entitled to conflict-free counsel as part of the Sixth Amendment, and the mere existence of the conflict is enough to violate that guarantee).

Thus, the State is wrong that prejudice is always required to prove a Sixth Amendment violation. Rather, prejudice is only required, certainly in light of *Strickland* and *Cronic*, when counsel has undertaken the defense of his client, but perhaps did so erroneously. But where counsel utterly fails to test the State's case against his client, then prejudice is presumed. Although Mr. Williams' right to counsel is not one guaranteed by the constitution, the reasoning behind not forcing a defendant to prove prejudice in a *Cronic* case or in a *per se* conflict case can easily be applied here. Counsel's job is not to defend his client but to "shape [his] complaints into the proper legal form and present those complaints to the court." *Addison*, 2023 IL 127119 at ¶ 19. If counsel fails at this very job – shaping the complaint and presenting it to the court – he has failed at the "bare minimum," like his *Cronic* counterpart. And to the extent that the Sixth Amendment provides a relevant framework here, a petitioner in Mr. Willliams' circumstances should not have to prove prejudice to entitle him to a remand.

Further, this Court has already addressed similar arguments made by the State, but within the Rule 651(c) context. *Id.* at ¶ 37. In *Addison,* the State argued that it shouldn't be easier to succeed on a claim of "unreasonable assistance of postconviction than it is to succeed on a claim of ineffective assistance of counsel under *Strickland." Id*. Here, the State pursues the same argument: the reasonable standard is lower than the standard required by *Strickland*, so petitioners should be required to show prejudice like defendant's pursuing a *Strickland* claim, because

post-conviction counsel is "merely governed by the Act's reasonableness requirements." (Resp. ILSC Br.19) But as this Court has already decided, simply drawing equivalencies between the *Strickland* test and Rule 651(c) – or in this case, the independent duty to shape and present the petition – doesn't make sense. "There is a significant difference between what it means to succeed on a claim of unreasonable assistance of counsel at the second stage" versus a *Strickland* claim. *Id.* at ¶ 37. If a defendant wins a *Strickland* claim, then the defendant gets a new trial (or to withdraw his guilty plea), but if a second-stage petitioner is successful, he is merely "entitled to a remand for his attorney to comply with the limited duties required by Rule 651(c)." *Id.* In fact, he doesn't even move to a different stage in the proceeding. Or in Mr. Williams' case, if he is able to hire counsel on remand, he will only be entitled to have his case remanded for counsel to shape and present his complaints at the second stage.

In any event, despite the State's argument that Mr. Williams must prove prejudice, even it has recognized that this Court has already made an exception. (Resp. ILSC Br.20) ("This Court has recognized a limited exception to the prejudice requirement and held that a petitioner is not required to show prejudice where he demonstrates that his appointed counsel did not comply with Rule 651(c)."), *citing Addison,* 2023 IL 127117 at ¶ 37. And as Mr. Williams has pointed out *supra*, he should not be in a worse position at the conclusion of his second-stage proceedings than other similar petitioners merely because he hired his counsel sooner. After all, counsel's duty to provide reasonable assistance did not change.

Finally, the State argues that rather than "assuming that counsel could

have provided additional factual support for petitioner's claim, however, the appellate court should have presumed that the lack of additional factual support meant that none exists." (Resp. ILSC Br.26) But this argument must fail for several reasons.

First, as Mr. Williams has already argued, the law desires equity: people in similar situations being treated similarly. Assuming that this Court found counsel to be unreasonable, as the appellate court did (*Williams*, 2023 IL App (5th) 220185-U at ¶ 27) , as discussed supra, and had counsel been subject to Rule 651(c), Mr. Williams' case would have been remanded for further second-stage proceedings. In fact, the only reason that Mr. Williams wouldn't have received this remand, according to the State, is because he hired counsel at the first stage. But again, this doesn't change counsel's duties, and as this Court has made clear, counsel has a duty to amend and present claims. Where counsel is unreasonable in amending or shaping claims, this Court has made clear that remand is appropriate – not a ruling on the merits.

Moreover, this Court has repeatedly expressed an interest in ensuring that similarly situated individuals can harbor the same expectations of counsel and expect similar results. This Court found that there is no difference between private and appointed counsel for purposes of Rule 651(c) (*Cotto*, 2016 IL 119006, ¶ 41), and that private counsel is always subject to the same reasonable assistance standard as appointed counsel, even at the first stage. Other questions involving counsel have received similar results. *Agee,* 2023 IL 128413, ¶ 41. Regardless of whether defendants have public or private defenders, they are still entitled

to experts. *In re T.W.*, 402 Ill. App. 3d 981, 991 (1st Dist. 2010)(indigent defendant is entitled to money for experts regardless of whether counsel is appointed or private). Conflict-of-interest claims are likewise handled the same regardless of whether counsel is appointed or private. *Cuyler*, 446 U.S. at 344-45 ("But experience teaches that, in some cases, retained counsel will not provide adequate representation. ... [W]e see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers."). Finally, this Court has recognized that *Krankel* inquires should be treated te same regardless of whether counsel was appointed or retained. *In re Johnathan T*, 2021 IL 127222, ¶ 43 ("Consequently, the intent of a preliminary *Krankel* inquiry, allowing the trial court to decide whether there has been neglect on the part of counsel, is served whether counsel had been retained or appointed."). In following with the logic echoed throughout a wide-range of cases involving counsel's duties, petitioners should have the same standards applied at second-stage proceedings regardless of whether counsel was private or appointed, or whether they began acting unreasonably at first or second stage.

Finally, the State cites to several cases for the proposition that this Court should presume that the lack of factual support meant none existed. (Resp. ILSC Br.26) But none of those cases have any relevancy here. First, in *Huff*, 2024 IL 128492, this Court held that counsel did not have to file a motion pursuant to *Greer*, 212 Ill. 2d 192 (2004), but could instead stand on the *pro se* petition. *Id*. at ¶ 30. In *Huff*, this Court asked: "Must postconviction counsel, who was appointed without a first-stage ruling by the circuit court, move to withdraw when petitioner's

pro se petition posits a weak legal claim but the claim is presented in the best possible legal form and there is no indication that counsel knew the claim was frivolous?" *Id.* This Court held that counsel could, in fact, simply stand on the petition. *Id*.

But *Huff* is a far cry from Mr. Williams' case. Mr. Williams' case did not advance to the second stage because of the 90-day window; rather, the trial court here made a ruling that the petition stated the gist of a constitutional claim and could advance. Further, all of the ethical concerns of *Greer* are present here. In *Greer*, this Court found that "if appointed counsel knows that a petitioner's claims were frivolous or patently without merit, then counsel has an ethical duty to withdraw." *Huff,* 2024 IL 128492 at ¶ 18. "If appointed counsel knows that the contentions are patently without merit or wholly frivolous, counsel has an ethical duty to not needlessly consum[e] the time and energies of the court and the State by advancing frivolous arguments." *Id*. at 28, *citing Greer*, 212 Ill. 2d 207.

When *Huff* and *Greer* are applied to Mr. Williams' case, the State's arguments fall apart. Perhaps the only time it should matter that Mr. Williams hired counsel is now. Much like appointed counsel in *Greer*, when Mr. Williams hired private counsel to draft a petition, counsel was laboring under the same ethical duty as hypothesized in *Greer*. In fact, the same question that was posed in *Greer* could likewise be posed here: if upon consultation, private counsel knew that Mr. Williams' claims were patently without merit or wholly frivolous, then wouldn't counsel have a duty to not file Mr. Williams' claim? See *Huff*, 2024 IL 128492 at ¶ 18. The only difference is that Mr. Williams' counsel should have made that decision

much sooner than counsel hired or appointed at the second stage. Had counsel genuinely believed that Mr. Williams could not prove prejudice pursuant to *Strickland,* then counsel should never have filed the petition. Or at the very least, when the State filed its motion to dismiss and counsel engaged in the necessary amendments, counsel should have then either been able to amend the petition to comply with the law or withdraw pursuant to *Greer*. Alternatively, if counsel believed that Mr. Williams claims had merit, then he was obligated to shape the petition to meet the necessary elements of a *Strickland* claim. It cannot be as the State would wish: that counsel, who drafted the petition, both did a reasonable job in spite of failing to respond to the State and/or failing to allege prejudice per *Strickland,* but this Court should presume the scarcity of facts and support mean that none existed. Either counsel believed his client's claims and did an unreasonable job, or counsel was unethical.

The State also cites to *Agee*, 2023 IL 128413, but that case has nothing to do with prejudice. (Resp. ILSC Br.26) In fact, this Court did not make a finding in *Agee* that counsel was unreasonable in amending the petition, so this Court ruled on the merits of Agee's claims. *Id*. at 89. Similarly, *Johnson*, 154 Ill. 2d 227 (1993), is irrelevant, as there, "Post-conviction counsel filed an affidavit as a supplemental record in this appeal, which unequivocally establishes that counsel made no effort to investigate the claims raised in the defendant's post-conviction petition or to obtain affidavits from any of the witnesses specifically identified in the defendant's *pro se* petition." *Id.* at 241. In fact, *Johnson* was remanded to the second stage for further proceedings. *Id*. at 248-49.

The State has cited no authority that should persuade this Court to require a different outcome for Mr. Williams than any other petitioner at the second-stage. Counsel either acted unethically (which nothing in the record supports) or counsel believed Mr. Williams' claims had merit. If counsel believed the claims had merit, then counsel had an obligation under the Act to frame and support them, in which case he acted unreasonably. As a result, Mr. Williams should not be required to prove prejudice. Instead, upon a finding that counsel was unreasonable in amending or shaping the petition or understanding the Act, Mr. Williams would respectfully ask this Court to remand his case for further second-stage proceedings, where he can obtain the reasonable assistance of counsel before the merits of his claims are ruled upon.

II. The appellate court's order that Mr. Williams be appointed new counsel on remand does not impermissibly interfere with Mr. William's choice of counsel.

Standard of Review

Whether the appellate court's direction on remand that further second-stage post-conviction proceedings occur with new counsel impermissibly interferes with a petitioner's choice of counsel presents a question of law, which this Court reviews *de novo*. *People v. Gawlak*, 2019 IL 123182, ¶ 25; *People v. Webster*, 2023 IL 128428, ¶ 16.

Analysis

As an initial matter, the right to counsel of choice does not apply to individuals who are appointed counsel. Unlike defendants and petitioners who retain private counsel, those who qualify for the appointment of counsel due to indigence do not have the right to choose their appointed counsel. *People v. Lewis*, 88 Ill. 2d 129, 160 (1981) *citing People v. Cox*, 22 Ill. 2d 534, 537 (1961) (indigent defendants in criminal cases do not have the right to choose appointed counsel); *People v. West*, 137 Ill. 2d 558, 588 (1990) ("A defendant has the right to be represented by retained counsel of his own choosing, however, he does not have the right to choose appointed counsel."). Therefore, where a petitioner is represented by appointed counsel, he or she cannot exercise the right to choice of counsel. It follows that where a petitioner with appointed counsel has no right to choice of counsel, the appellate court's order on remand (i.e., that further second-stage proceedings occur "with new counsel") cannot be said to interfere – either permissibly or

impermissibly – with a right that doesn't exist. See *Williams*, 2023 IL App (5th) 220185-U, ¶¶ 1-2, 29. Accordingly, to the extent that Mr. Williams seeks the appointment of counsel in the trial court on remand, the appellate court's order that further proceedings occur with new counsel does not infringe on Mr. Williams' right to choice of counsel.

As to the State's suggestion that the appellate court's order "purport[s] to grant petitioner appointed counsel on remand", this interpretation has no basis in the text of the appellate court's order. (Resp. ILSC Br.27) See generally, *Williams*, 2023 IL App (5th) 220185-U. Nowhere in the order does the appellate court either appoint counsel or direct the trial court to do so. Neither does the appellate court suggest or otherwise express an opinion as to whether Mr. Williams may choose to seek the appointment of counsel in the trial court or whether he would even be eligible to do so. *Id*.

Given that a petitioner with appointed counsel does not have a right to choice of counsel, the only situation where the appellate court's order concerning new counsel on remand might conceivably present an issue is where the petitioner retains private counsel. *West*, 137 Ill. 2d at 588. This Court has held that the right to counsel of choice is rooted in both the Sixth Amendment to the U.S. Constitution as well as the Illinois Constitution. *People v. Baez*, 241 Ill. 2d 44, 104-05 (2011) *citing United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). See also U.S. Const. amend. VI; Ill. Const. art. I, § 8. Less clear is whether this constitutional right also exists within the statutory right to counsel accorded to post-conviction petitioners by the legislature.

This Court has previously determined that the statutory right to counsel provided under the Post-Conviction Hearing Act differs significantly from the constitutional right to counsel. It is well-established that unlike the constitutional right to counsel, which includes the right to the *effective* assistance of counsel, the statutory right provides only *reasonable* assistance. *Strickland v. Washington*, 466 U.S. 668, 669 (1984) ("The Sixth Amendment right to counsel is the right to the effective assistance of counsel."); *People v. Johnson*, 2018 IL 122227, ¶ 16 (although the Act does not explicitly provide for any particular level of assistance, this Court has long held that petitioners are entitled to a reasonable assistance). While the rationale for these two standards is rooted in the fundamental differences between criminal trials and post-conviction proceedings, these differing standards demonstrate that the statutory right to counsel does not embody the same right to counsel as the constitutional right to counsel. *People v. Owens*, 139 Ill. 2d 351, 364-65 (1990). In short, this Court has established that the statutory right to counsel and the constitutional right to counsel are not the same thing.

Just as the constitutional and statutory rights to counsel do not require the same level of attorney performance, neither are these rights absolute or inviolate. *People v. Baez*, 241 Ill. 2d 44, 105 (2011) Our courts exercise discretion with respect to the attorneys they allow to practice before the bench. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006) (recognizing the authority of trial courts to establish criteria for admitting lawyers to argue before them). The purpose for allowing courts to exercise their discretion with respect to counsel of choice was ably articulated by the Supreme Court when it held:

> [W]hile the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.
>
> *Wheat v. United States*, 486 U.S. 153, 159 (1988).

When examining our court's exercise of this discretion, this Court has held that the constitutional due process right to choice of counsel is not violated where a court "refuse[s] to hear from privately retained counsel in a criminal or civil case"; provided the court does not act arbitrarily. *People v. Gawlak*, 2019 IL 123182, ¶ 33, *citing Powell v. Alabama*, 287 U.S. 45, 69 (1932). Accordingly, where the court does not act in an arbitrary manner, they may permissibly invade a person's right to counsel of choice.

Furthermore, the right to counsel of choice is not absolute where a court may disqualify or remove chosen counsel if a conflict of interest exists. *People v. Holmes*, 141 Ill. 2d 204, 217 (1990) *citing Wheat,* 486 U.S. 153 at 159. Within the context of the statutory right to counsel and reasonable assistance contemplated by the Post-Conviction Hearing Act, this Court has identified a right to conflict-free counsel. *People v. Hardin*, 217 Ill. 2d 289, 300 (2005) In assessing the potential for a conflict of interest when a defendant files a disciplinary complaint against trial counsel, the appellate court, quoting the American Bar Association's Lawyers' Manual on Professional Conduct, at 51:406-51:407 (2/28/90) observed:

> The American Bar Association has also commented on this problem: "Clients' interests sometimes also clash with their lawyers' interests in their professional reputations as lawyers."
>
> *People v. Johnson*, 227 Ill. App. 3d 800, 814 (1st Dist. 1992)

The facts at issue in *Johnson* differ, admittedly, from the instant case in that the defendant in *Johnson* filed a complaint with this Court's Attorney Registration and Disciplinary Commission (ARDC) as well as a post-trial motion alleging trial counsel was ineffective. On appeal, defendant alleged that a *per se* conflict of interest arose from his filing of the ARDC complaint. *Id*. at 807-08. Regardless, the *Johnson* court's observation concerning the potential for conflict between a client's interests and an attorney's interest in protecting his or her professional reputation remain valid and germane to the case at bar.

While our court's have demonstrated a reluctance to broadly classify the potential conflict between a client's interests and an attorney's interest in his or her professional reputation as a *per se* conflict that must be affirmatively waived, our courts are not bound to accept a waiver of conflict and must also consider the effect a potential conflict of interest may have on the integrity of the justice system as a whole. *People v. Ortega*, 209 Ill. 2d 354, 361 (2004) *citing Wheat*, 486 U.S. at 164. Specifically, the courts have a duty to consider "whether the interests threatened by the conflict or potential conflict are weighty enough to overcome the presumption [in favor of the right to choice of counsel]." *Id*. In making this determination, trial courts are given wide discretion to consider a defendant's interest in the undivided loyalty of counsel, the State's right to a fair trial, the appearance of impropriety should the jury learn of the conflict, and the probability that continued representation by counsel of choice will provide grounds for overturning a conviction. *Id*. *citing Holmes*, 141 Ill. 2d at 226-27. While each of these factors are not necessarily present or even fit neatly within the context of

the post-conviction process, the over-arching imperative embodied in the court's consideration of these factors when determining if the underlying conflict outweighs the presumption in favor of choice of counsel is the effect the conflict may have on the actual fairness and perceived legitimacy of the proceedings. Where – like here – a court becomes aware of a potential for conflict of interest between a petitioner and counsel of choice, the court's duty to ensure the validity and credibility of the post-conviction process deserves no less consideration than those conflicts that present themselves in criminal trials.

For the appellate court to direct that further post-conviction proceedings occur with new counsel after holding that post-conviction counsel utterly failed to provide reasonable assistance serves as no more than a signal to the trial court that it is to exercise its inherent discretion to evaluate the potential conflict between Mr. Williams' interest in securing reasonable assistance and post-conviction counsel's interest in preserving his professional reputation by demonstrating that, perhaps, he had already provided reasonable assistance during the proceedings below. Alternatively, the appellate court's direction that further post-conviction proceedings occur with new counsel is a simple acknowledgment that Mr. Williams is not bound to proceed in the trial court with the same attorney who performed so poorly and whose numerous failures are the subject of the instant appeal.

Therefore, where counsel's desire to preserve his professional reputation has the potential to conflict with Mr. Williams' interest in receiving reasonable assistance and the trial court has both the duty and the discretion to scrutinize such conflicts, this Court should find that the appellate court's order does not

impermissibly interfere with Mr. Williams right to his choice of counsel, should he find himself in a position to exercise this right.

CONCLUSION

For the foregoing reasons, Michael Williams, petitioner-appellee, respectfully requests that this Court affirm the judgement of the appellate court.

Respectfully submitted,

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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 or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 14,972 words.

/s/Craig A. Hansen
CRAIG A. HANSEN
Assistant Appellate Defender

APPENDIX TO THE BRIEF

People v. Michael A. Williams, 2023 IL App (5th) 220185-U A-1-15

People v. Benjamin Johnson, 2022 IL App (1st) 190258-U A-16-32

A

2023 IL App (5th) 220185-U

NO. 5-22-0185

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 09-CF-1299
	)	
MICHAEL A. WILLIAMS,	)	Honorable
	)	Julie K. Katz,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Justices Welch and Cates concurred in the judgment.

ORDER

¶ 1 *Held*: Because the defendant did not receive reasonable assistance of counsel with regard to his verified petition for postconviction relief, we reverse the order of the circuit court of St. Clair County that dismissed the defendant's petition at the second stage of proceedings, and we remand for further second-stage proceedings with new counsel.

¶ 2 The defendant, Michael A. Williams, entered negotiated pleas of guilty to two counts of aggravated battery with a firearm. He was sentenced to two consecutive 10-year terms of imprisonment in the Illinois Department of Corrections. He thereafter tried, without success, to withdraw his guilty plea. He now appeals the dismissal, by the circuit court of St. Clair County at the second stage of proceedings, of his verified petition for postconviction relief. For the reasons that follow, we reverse the circuit court's order and remand for further second-stage proceedings with new counsel.

¶ 3 I. BACKGROUND

¶ 4 On September 23, 2021, counsel for the defendant filed the verified postconviction petition (PCP) that is the subject of this appeal. Prior to that, on January 21, 2021, PCP counsel filed an entry of appearance for purposes of subsequently filing the PCP. The PCP alleged that the defendant's constitutional rights "were substantially denied" in that (1) the defendant was denied due process because he was not properly admonished by the circuit court as to the possibility of consecutive sentences for the offenses to which he entered his pleas of guilty; (2) the defendant was denied due process because the circuit court handed down consecutive sentences without indicating, as required by law, that the circuit court found that the consecutive sentences were required to protect the public; and (3) he received ineffective assistance of counsel, because his plea counsel allowed the son of the judge presiding over the defendant's case to accompany plea counsel to a jail visit with the defendant at which "important points" related to the defendant's case were discussed in what should have been "a privileged" meeting. The relief requested by the PCP was that the defendant's "judgment of conviction and sentence be set aside." Also on September 23, 2021, counsel filed a certificate of compliance with Illinois Supreme Court Rule 651(c) (eff. July 1, 2017), in which he stated that he had consulted with the defendant "by telephone and in person," and that he had "examined the trial record to ascertain [the defendant's] contentions of deprivation of constitutional rights." He further noted that the defendant "did not file a *pro se* petition."

¶ 5 Counsel filed supporting documents on that date as well, including a two-page handwritten affidavit from the defendant in which the defendant claimed, with regard to the admonishments he received about consecutive sentences, that he did not "understand what the court meant" when the court advised the defendant that the court "could sentence [him] together or at the same time." With regard to ineffective assistance of counsel, the defendant's affidavit alleged that he "could

not continue to trial" with his previous counsel, after that counsel brought the son of the judge presiding over the case to a meeting with the defendant. The affidavit further alleged that the defendant told his new counsel, who represented the defendant on the defendant's motion to withdraw his guilty pleas, about the situation with his prior counsel, but new counsel failed to include the issue in the motion to withdraw the guilty pleas.

¶ 6 On October 7, 2021, the circuit court entered an order in which it found that the PCP raised "the gist of at least one constitutional claim," and which therefore ordered second-stage proceedings on the PCP. The order did not specify upon which claim or claims the circuit court believed the PCP raised the gist of a claim. On November 16, 2021, the State filed a motion to dismiss the PCP. Therein, the State contended that, *inter alia*, (1) the defendant was "unable to establish that he suffered prejudice as a result of" the allegedly defective admonishments, because the defendant "received exactly what he bargained for by way of the plea negotiations," and because the PCP was devoid "of any allegation that he would not have pleaded guilty had he received the proper admonishments, the trial court did not impose a sentence that exceeded the range of penalties he was told he could receive, and he received the exact sentence that was jointly recommended"; (2) all of the defendant's PCP claims were barred by *res judicata* and the forfeiture doctrine, because the defendant did not raise the claims in his direct appeal; (3) consecutive sentences were mandatory in this case, in light of the great bodily injury suffered by the victim, which means that the circuit court was not required to indicate that it believed consecutive sentences were necessary to protect the public; (4) the PCP failed to allege how plea counsel's assistance was defective, and failed to allege that the defendant was prejudiced by the alleged ineffective assistance of plea counsel, or of counsel who represented him on his motion to withdraw his guilty pleas; and (5) the PCP "further fail[ed] to articulate that, but for trial counsel's ineffectiveness, [the defendant] would not have entered into his negotiated plea[s]."

¶ 7 More than three months later, on February 18, 2022, a hearing was held on the State's motion to dismiss. Prior to the hearing, PCP counsel did not file a written response to the State's motion, and did not request leave to amend the PCP. At the hearing, the State elected to stand on the arguments it made in its written motion to dismiss. The remainder of the hearing—which comprises a total of seven transcript pages in the record on appeal—consisted of a brief statement by PCP counsel with regard to the motion to dismiss, followed by detailed questioning by the circuit court of PCP counsel. With regard to the State's *res judicata* and forfeiture arguments, PCP counsel stated that although it was true that the issues in question were not raised on direct appeal, counsel wanted the circuit court "to consider fundamental fairness in allowing [the defendant] to receive [a third-stage] evidentiary hearing on" the admonishment claims. Counsel added that he did not believe that the defendant's ineffective assistance of counsel claims were barred, "because they contain matters that were outside the record," the claims were "not apparent in the record themselves," and the defendant "filled out an affidavit stating those claims."

¶ 8 The circuit court then asked counsel to explain why on direct appeal the defendant "was not able to argue to the Appellate Court that he was denied effective assistance of counsel because what he alleges is the judge's son going to the jail with [the defendant's] attorney to talk to him about his case?" Counsel answered as follows:

> "Yeah, and that's why I think that we need [a third-stage] evidentiary hearing on it, Judge. I don't know from the appellate counsel's filings and stuff whether, you know, they had talked about that but he certainly alleges it now. I don't know—I know that, you know, obviously this is all, you know, outside the record stuff so I'm not 100 percent sure on the direct appeal issue, Judge."

¶ 9 The circuit court noted the State's arguments with regard to this issue in its motion to dismiss, then added as follows:

> "You've got to satisfy the two prongs of *Strickland* and I'm not seeing the nexus between what about the fact that CJ Baricevic if, in fact, he did visit your client at the St. Clair County Jail [along with the defendant's plea counsel], what about that that satisfies either of the prongs of *Strickland*? How—what did it have to do with the fact that he ultimately pled guilty?"

¶ 10 Counsel answered that his argument would be that because the defendant's affidavit stated that the defendant "could not continue to trial" with plea counsel after learning that CJ Baricevic was the son of the judge presiding over the case, the affidavit did in fact "satisfy both prongs of *Strickland*, that he would have went [*sic*] to trial but for this incident." He did not elaborate on why he believed this was true, or how, specifically, the affidavit satisfied the *Strickland* prongs. The circuit court thereafter stated, *inter alia*, "you have to I think at this stage show more than just 'oh, I would have.' There needs to be a stronger showing *** [of] what defense he would have posed if he had gone to trial and why he would have gone to trial and risk[ed] a life sentence." The circuit court added, "So go ahead, talk to me about that." PCP counsel asked for clarification of the circuit court's question. The circuit court responded as follows:

> "Ultimately he got 20, he got two 10-year sentences, but tell me—he has to do more than say 'I would have gone to trial.' He has to establish some reasonable defense that he would have posed that would convince me that he would have in fact gone to trial rather than to take a plea of guilty when he was facing the possibility of a life sentence. He was instead given two 10-year consecutive sentences. So what would—tell me why I should believe that he would have gone to trial rather than take that plea."

¶ 11 PCP counsel stated, "Well, I think he was sitting in there and he found out that Mr. Baricevic was the son of the trial judge and he felt pressured in that situation that, you know, he couldn't continue with [plea counsel] in that having this situation had occurred." Counsel added,

"So I mean I think that that there tells the Court that he would have went [*sic*] to trial but for this incident." The circuit court asked the State if it had anything to add. The State opined, as it did in its written motion, that "the prejudice prong of the *Strickland* test hasn't been satisfied at this point in time." Thereafter, the circuit court stated that it would take the matter under advisement and issue a decision within, approximately, one week.

¶ 12 On February 22, 2022, the circuit court entered the written order that is the subject of this appeal. Therein, the circuit court found that the defendant "failed to make a substantial showing of a constitutional violation for the reasons set forth by the State in its motion to dismiss." Accordingly, the circuit court granted the State's motion to dismiss. This timely appeal followed. Additional facts will be presented as necessary in the remainder of this order.

¶ 13 II. ANALYSIS

¶ 14 It is well established that most petitions filed under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2020)) are filed by *pro se* defendants with limited legal knowledge. See, *e.g.*, *People v. Allen*, 2015 IL 113135, ¶ 24. In those situations, when a petition for postconviction relief advances—as did the PCP in this case—to the second stage of proceedings, a *pro se* defendant is entitled to the appointment of counsel to assist the defendant. *People v. Wallace*, 2018 IL App (5th) 140385, ¶ 27. Appointed counsel may file an amended petition, and the State may file a motion to dismiss or an answer. *Id.* If the petition makes a substantial showing of a constitutional violation, it will be advanced to the third stage of proceedings, which ordinarily involves an evidentiary hearing on the defendant's claims. *Id.*

¶ 15 The source of the defendant's right to counsel at the second stage of proceedings is statutory rather than constitutional, and as a result, the level of assistance guaranteed is not the same as the level of assistance constitutionally mandated at trial or on direct appeal; instead, the level of assistance required is reasonable assistance. *Id.* ¶ 29. To provide reasonable assistance at

the second stage of proceedings, appointed postconviction counsel is required to perform the three duties set forth in Illinois Supreme Court Rule 651(c) (eff. July 1, 2017). *Id.* ¶ 30. Appointed counsel must (1) consult with the defendant to determine the claims the defendant wants to raise, (2) examine the appropriate portions of the record, and (3) make any amendments to the petition that are necessary in order to adequately present the defendant's claims to the circuit court. *Id.*

¶ 16 The filing, by appointed postconviction counsel, of a certificate of compliance with Rule 651(c) creates a rebuttable presumption that counsel has provided the statutorily required reasonable level of assistance. *Id.* ¶ 31. We review *de novo* the question of whether appointed counsel provided the reasonable level of assistance that is required. *Id.* If we determine that appointed postconviction counsel failed to provide reasonable assistance, we will remand for further second-stage proceedings on the petition, with new counsel to be appointed to represent the defendant on remand. *Id.* ¶ 53.

¶ 17 As we undertake our *de novo* review of whether appointed postconviction counsel provided reasonable assistance, we remain mindful of the fact that substantial compliance with Rule 651(c) is sufficient. See, *e.g.*, *People v. Profit*, 2012 IL App (1st) 101307, ¶ 18. We also remain mindful of the fact that the presumption of reasonable assistance that arises with the filing of a Rule 651(c) certificate may be rebutted by the record. *People v. Russell*, 2016 IL App (3d) 140386, ¶ 10. The failure to make a routine amendment, such as an amendment adding a claim of ineffective assistance of appellate counsel in order to prevent the dismissal of a petition on the basis of waiver or forfeiture, is an example of conduct on the part of postconviction counsel that rebuts the presumption of reasonable assistance. *Id.* ¶ 11. Moreover, there is no requirement that a defendant make a positive showing that appointed counsel's failure to comply with Rule 651(c) caused prejudice, because if appointed postconviction counsel failed to fulfill the duties of Rule 651(c), remand is required, regardless of whether the claims raised by the defendant in the petition had

merit. *Id.* ¶ 12. Likewise, appointed counsel's failure to comply with the rule will not be excused on the basis of harmless error, because a reviewing court will not engage in speculation as to whether the circuit court would have dismissed the petition at the second stage had appointed counsel complied with the rule. *Id.*

¶ 18 Although, as noted above, the foregoing law is applicable in situations where counsel has been appointed to assist a defendant who initially filed a *pro se* postconviction petition, a line of cases from this court holds that there are important differences where, as in this case, counsel who was privately retained by the defendant filed the initial petition. This line of cases does not dispute the fact that, as a general proposition, the Illinois Supreme Court has held that "there is no difference between appointed and privately retained counsel in applying the reasonable level of assistance standard to postconviction proceedings," because "[b]oth retained and appointed counsel must provide reasonable assistance to their clients after a petition is advanced from first-stage proceedings." *People v. Cotto*, 2016 IL 119006, ¶ 42. That said, the Illinois Supreme Court has made it equally clear that Illinois Supreme Court Rule 651(c) (eff. July 1, 2017), which requires counsel to consult with a defendant regarding the defendant's postconviction petition, applies only to those defendants who file their initial petition *pro se* and who are appointed counsel at the second stage of proceedings. *Id.* ¶ 41; see also *People v. Johnson*, 2018 IL 122227, ¶ 18. When the initial petition is filed by retained counsel, Rule 651(c) does not apply, and retained counsel's performance is governed by a general standard of reasonable assistance that does not incorporate the requirements of Rule 651(c). *People v. Zareski*, 2017 IL App (1st) 150836, ¶¶ 51, 58-61; see also *People v. Perez*, 2023 IL App (4th) 220280, ¶¶ 40-57 (agreeing with *Zareski* and finding no conflict between *Zareski* and subsequent Illinois Supreme Court decisions).

¶ 19 Accordingly—unlike in cases involving appointed counsel—under *Zareski* and its progeny, to obtain relief for a violation of the general standard of reasonable assistance recognized

in *Zareski*, a defendant must establish prejudice as a result of the alleged unreasonable assistance of retained counsel. 2017 IL App (1st) 150836, ¶¶ 59-61. This requirement is derived from the principle that "[s]trictly speaking, a defendant is entitled to less from postconviction counsel than from direct appeal or trial counsel," which means "that it should be even more difficult for a defendant to prove that he or she received unreasonable assistance than to prove that he or she received ineffective assistance under [the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984)]." *Id.* ¶ 50. The prejudice requirement exists to "prevent pointless remands to trial courts for repeated evaluation of claims that have no chance of success." *Id.* ¶ 59. In evaluating prejudice, *Zareski* and the cases following it apply the *Strickland* standard, inquiring whether there is at least a reasonable probability of a different outcome on the petition, had counsel provided reasonable assistance. *Id.* ¶ 49; see also *Perez*, 2023 IL App (4th) 220280, ¶¶ 54, 67, 71. As with appointed counsel, we review *de novo* the ultimate question of whether retained postconviction counsel provided unreasonable assistance. See, *e.g.*, *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007).

¶ 20 In this case, following supplemental briefing at the appellate level, counsel for the defendant urges this court not to follow *Zareski*, which counsel claims is poorly reasoned and leads to "absurd" and unfair results, such as providing more protection to a defendant who has filed a *pro se* petition than to a defendant who has been "able to scrape up enough money to" retain counsel, because pursuant to *Zareski*, the former type of defendant need not show prejudice resulting from unreasonable assistance of counsel at the second stage of proceedings, whereas a showing of prejudice is required of the latter type of defendant. The State's supplemental brief, on the other hand, urges us to follow *Zareski* and affirm the dismissal of the PCP in this case. The defendant's supplemental reply brief reiterates the defendant's contention that *Zareski* is hopelessly flawed and should not be followed.

¶ 21 After careful consideration of the Illinois decisions relevant to this issue, we conclude that we need not decide whether to follow *Zareski*, because we conclude that even if we were to assume, *arguendo*, that *Zareski* was correctly decided and should govern this appeal, the reasoning put forward in an unpublished decision by our colleagues in the First District persuades us that in certain rare and limited circumstances—the overall validity of *Zareski* notwithstanding—it is appropriate to depart from the *Zareski* requirement that a defendant must establish prejudice as a result of the allegedly unreasonable performance of retained counsel. In *People v. Johnson*, 2022 IL App (1st) 190258-U, ¶¶ 33-43, our colleagues in the First District concluded that, the well-reasoned analysis of *Zareski* notwithstanding, if it is clear from the record that the defendant did not receive reasonable assistance of postconviction counsel, and it is equally clear that, because of a paucity of the record *caused by* postconviction counsel's lack of reasonable assistance, the appellate court cannot tell whether the defendant was prejudiced thereby, the appropriate remedy is for the appellate court to reverse the order dismissing the petition, and to remand for further second-stage proceedings with new counsel. The *Johnson* court concluded that remand was required in that case because (1) no affidavits or other documents were attached to the petition, and no explanation was given for their absence, as well as because (2) "counsel's pleadings, statements, unreasonable delays, and general performance throughout" the proceedings amounted to "a multitude of errors." *Id.* ¶¶ 36-39. The *Johnson* court further concluded that the "straightforward application of *Zareski* [was] impossible *** due to the emptiness of the record, an emptiness which clearly stem[med], at least in part, from Mr. Johnson's attorney's performance." *Id.* ¶¶ 35, 41. Likewise, in this case, for the reasons that follow, we decline to conclude that the defendant's failure to demonstrate that he was prejudiced by the unreasonable assistance of PCP counsel results in forfeiture, or means that we should summarily affirm the circuit court's dismissal of the PCP.

¶ 22 In this case, as explained above, the relief requested by the PCP was that the defendant's "judgment of conviction and sentence be set aside." In other words, the defendant sought to withdraw his guilty plea, which is the act that led to his judgment of conviction and sentence. It is axiomatic that when a defendant wishes to withdraw a guilty plea on the basis of alleged ineffective assistance of plea counsel, the defendant must satisfy the prejudice prong of *Strickland*, which means that, "in the guilty plea context, 'the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.' " *People v. Valdez*, 2016 IL 119860, ¶ 29 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)); see also *People v. Brown*, 2017 IL 121681, ¶ 47. "A conclusory allegation that a defendant would not have pleaded guilty and would have demanded a trial is insufficient to establish prejudice." *Valdez*, 2016 IL 119860, ¶ 29. To the contrary, to obtain relief on such a claim, in most cases a defendant " 'must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.' " *Id.* (quoting *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010)).

¶ 23 As described above, the State argued in its motion to dismiss that one reason the PCP should be dismissed was because the PCP was devoid "of any allegation that [the defendant] would not have pleaded guilty had he received the proper admonishments." The State also argued that the PCP failed to allege how plea counsel's assistance was defective, and failed to allege that the defendant was prejudiced by the alleged ineffective assistance of plea counsel, or of counsel who represented him on his motion to withdraw his guilty pleas. The State argued as well that the PCP "further fail[ed] to articulate that, but for trial counsel's ineffectiveness, [the defendant] would not have entered into his negotiated plea[s]." Also as described above, prior to the hearing on the State's motion to dismiss, PCP counsel did not file a written response to the State's motion, and

did not request leave to amend the PCP. More than three months later, at the hearing on the motion to dismiss, the circuit court noted the State's written arguments, then added as follows:

> "You've got to satisfy the two prongs of *Strickland* and I'm not seeing the nexus between what about the fact that CJ Baricevic if, in fact, he did visit your client at the St. Clair County Jail [along with the defendant's plea counsel], what about that that satisfies either of the prongs of *Strickland*? How—what did it have to do with the fact that he ultimately pled guilty?"

¶ 24 PCP counsel answered that his argument would be that because the defendant's affidavit stated that the defendant "could not continue to trial" with plea counsel after learning that CJ Baricevic was the son of the judge presiding over the case, the affidavit did in fact "satisfy both prongs of *Strickland*, that he would have went [*sic*] to trial but for this incident." Beyond this conclusory allegation, he did not elaborate on why he believed this was true, or how, specifically, the affidavit satisfied the *Strickland* prongs pursuant to the precedent cited above. He did not, at any point, attempt to explain how a decision to reject the plea bargain would have been rational under the circumstances of this case, which, of course, is another point that was not addressed by the defendant in his two-page handwritten affidavit *at all*. The circuit court alluded to this when it noted that "you have to I think at this stage show more than just 'oh, I would have.' There needs to be a stronger showing." After further discussion, the circuit court stated explicitly to PCP counsel, "tell me why I should believe that he would have gone to trial rather than take that plea."

¶ 25 PCP counsel stated, "Well, I think he was sitting in there and he found out that Mr. Baricevic was the son of the trial judge and he felt pressured in that situation that, you know, he couldn't continue with [plea counsel] in that having this situation had occurred." Counsel added, "So I mean I think that that there tells the Court that he would have went [*sic*] to trial but for this incident." The circuit court asked the State if it had anything to add. The State opined, as it did in

its written motion, that "the prejudice prong of the *Strickland* test hasn't been satisfied at this point in time." Also as explained above, in the circuit court's written order, the circuit court expressly stated that the PCP failed "for the reasons set forth by the State in its motion to dismiss."

¶ 26 In light of the deeply-rooted principles of law, cited above and applicable when a defendant wishes to withdraw a guilty plea on the basis of alleged ineffective assistance of plea counsel, PCP counsel's performance in the written PCP and its supporting documents, and in response to the State's motion to dismiss the PCP, was objectively unreasonable where he put forward such a claim but (1) in the PCP, entirely failed to allege—and support factually—the prejudice required as an element of that claim, and (2) when this was brought to PCP counsel's attention by the State's motion to dismiss, PCP counsel filed no written response or request to amend the PCP, and at the hearing on the motion was unprepared to address this problem in accordance with the law related to the problem, despite the fact that more than three months had elapsed since the filing of the State's motion. PCP counsel's failure to include the required allegations and factual support in the PCP and the defendant's accompanying affidavit, and his complete inability to muster facts and arguments—as opposed to vague and conclusory allegations—in support of prejudice at the hearing, meant that the defendant's PCP claim of ineffective assistance of counsel had no chance of succeeding. Moreover, PCP counsel's pleading failure has led to a paucity of the record that, as was the case in *Johnson*, makes it impossible for this court to determine if the defendant suffered prejudice as a result of PCP counsel's unreasonable assistance, because the result of PCP counsel's pleading failure is that there are no factual allegations from which this court could determine whether a decision to reject the plea bargain would have been rational under the circumstances of this case. Equally objectively unreasonable was PCP counsel's failure to argue—and support factually—claims of ineffective assistance of previous counsel as a means to overcome the bars of *res judicata* and forfeiture that the State raised in its motion to dismiss. See, *e.g.*, *People v.*

Kluppelberg, 327 Ill. App. 3d 939, 947 (2002); see also, *e.g.*, *People v. Russell*, 2016 IL App (3d) 140386, ¶ 11 (failure to make routine amendment, such as amendment adding claim of ineffective assistance of previous counsel in order to prevent the dismissal of petition on basis of waiver or forfeiture, constitutes unreasonable assistance). This inaction, too, doomed the PCP to failure.

¶ 27 We note that counsel for the defendant on appeal is correct that it is well established that postconviction counsel is prohibited from advancing claims in the circuit court that counsel determines are frivolous and patently without merit. See, *e.g.*, *People v. Greer*, 212 Ill. 2d 192, 209 (2004). Thus, PCP counsel must have believed that the claims in the PCP had merit. Yet, inexplicably, counsel did not plead, or argue, the basic elements necessary to sustain the claims, even after these deficiencies were noted in the State's motion to dismiss. See, *e.g.*, *People v. Al Momani*, 2016 IL App (4th) 150192, ¶ 12 (when State files motion to dismiss postconviction petition, defendant has due process right to respond to State's motion; right may "be satisfied by allowing a hearing on the motion or by allowing defendant to file a written response to the motion"). The inescapable conclusion in this case is that PCP counsel provided unreasonable assistance of counsel when he drafted the PCP, and when he attempted to defend the PCP against the State's motion to dismiss it, and that PCP counsel's failures have left this court—like the court in *Johnson*—with a record that makes it impossible to determine whether the defendant was prejudiced by PCP counsel's multiple failures.

¶ 28 III. CONCLUSION

¶ 29 For the foregoing reasons, we reverse the order of the circuit court of St. Clair County that dismissed the PCP, and we remand for further second-stage proceedings with new counsel. We direct appellate counsel to provide copies of their briefs to circuit court counsel (including new postconviction counsel), and to the circuit court. See, *e.g.*, *People v. Bell*, 2018 IL App (4th) 151016, ¶ 37. We reiterate that it is well established that postconviction counsel is prohibited from

amending a petition to advance claims in the circuit court that counsel determines are frivolous and patently without merit. See, *e.g.*, *Greer*, 212 Ill. 2d at 209. Illinois courts of review have made it clear what counsel must do if, after the circuit court advances a petition to the second stage because the circuit court believes that the petition is not frivolous or is not patently without merit, counsel subsequently determines that it is. See, *e.g.*, *People v. Kuehner*, 2015 IL 117695, ¶¶ 20-22, 24, 27; see also, *e.g.*, *People v. Dixon*, 2018 IL App (3d) 150630, ¶¶ 21-22 (if counsel finds claims in petition are frivolous or patently without merit, the appropriate procedure is to stand on *pro se* petition or seek to withdraw as counsel). We remind new counsel of these principles of law and admonish new counsel to adhere to them when considering what claims, if any, legitimately may be advanced in this case.

¶ 30 Reversed; cause remanded with directions.

2022 IL App (1st) 190258-U

SIXTH DIVISION
July 29, 2022

No. 1-19-0258

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County.
	)	
v.	)	No. 06 CR 11543
	)	
BENJAMIN JOHNSON,	)	Honorable
	)	Carol M. Howard,
Petitioner-Appellant.	)	Judge Presiding.

JUSTICE MIKVA delivered the judgment of the court.
Justices Oden Johnson and Mitchell concurred in the judgment.

ORDER

¶ 1 *Held*: Judgment of the circuit court dismissing defendant's postconviction petition at the second stage is reversed and remanded for further second-stage proceedings where defendant's postconviction counsel failed to provide reasonable representation and it is impossible to determine on this record whether defendant was prejudiced by this failure.

¶ 2 Defendant Benjamin Johnson appeals from the second-stage dismissal of his petition for relief filed pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2020)). He argues that his case should be remanded for further proceedings because he was denied his right to reasonable assistance of counsel where his privately retained postconviction attorney

failed to provide reasonable representation. We agree that the record supports Mr. Johnson's assertion that his attorney's performance failed to meet the standard of reasonable representation. We also agree that since it is not possible to determine on this record whether Mr. Johnson suffered prejudice from his attorney's deficient performance, we should exercise our power, pursuant to Illinois Supreme Court Rule 615(b), to remand this case for further postconviction proceedings.

¶ 3 I. BACKGROUND

¶ 4 Following a September 2009 jury trial, Mr. Johnson was found guilty on charges of home invasion, aggravated kidnapping, armed robbery, aggravated vehicular hijacking, aggravated fleeing, escape, and two counts of aggravated criminal sexual assault. Mr. Johnson's sole defense was that he was insane at the time of these offenses. This defense was rejected by the jury. He was sentenced to 80 years in prison. We provided a full recitation of the facts established at Mr. Johnson's trial in our decision on direct appeal. See *People v. Johnson*, 2012 IL App (1st) 100372-U. In that appeal, Mr. Johnson argued that, among other things, the jury's rejection of his insanity defense was against the manifest weight of the evidence. *Id.* We affirmed. *Id.*

¶ 5 Mr. Johnson subsequently retained private counsel to represent him in postconviction proceedings. The adequacy of his representation in that collateral proceeding is the subject of this appeal.

¶ 6 A. First-Stage Proceedings

¶ 7 On December 7, 2012, Mr. Johnson filed his postconviction petition through retained counsel. The central argument in the petition was that his trial counsel was ineffective for relying on the expert testimony of psychiatrist Linda Grossman, whose conclusions were noncommittal on the determinative question of whether Mr. Johnson lacked the capacity to appreciate the criminality of his conduct. We summarized Dr. Grossman's trial testimony as follows in our

decision on direct appeal:

"Dr. Linda Sue Grossman was accepted as an expert witness in the field of forensic psychology and mental illnesses. Dr. Grossman was hired by the court as an independent evaluator and interviewed defendant twice. From her review of his medical records, Dr. Grossman concluded that defendant suffers from an intermittent psychotic disorder that is responsive to medication. Dr. Grossman testified that in her report, she had written that defendant was legally sane but mentally ill at the time he committed the crimes against [complainant]. She stated that she was rushed when she wrote the report but that, since that time, she had thought more about it and could not rule out that defendant was insane at the time. She explained that a number of his behaviors during the assault suggest the possibility that defendant may not have been aware of the criminality of what he was doing. Dr. Grossman further explained that some of defendant's behaviors suggested that he might have been thinking the encounter was more consensual than it actually was, such as comments he made that he was not raping [complainant] and that she liked it, talking with her afterward as though nothing bad had happened, telling her to put her arm around him, and appearing to be solicitous and almost kind at times as they left the apartment. Dr. Grossman concluded that she was not willing to say within a reasonable degree of medical and psychiatric certainty that defendant was insane, but she was also not willing to exclude that possibility. On cross-examination, Dr. Grossman acknowledged that in her report, she stated that defendant's actions at the time of the crime were consistent with an ability to appreciate the criminality of his alleged conduct, such as fleeing from the police. However, she stated that fleeing from the police could also indicate that a person is paranoid. Dr. Grossman again concluded that she could not say that defendant was insane, but she also

could not rule it out." *Id.* ¶ 31.

¶ 8 Mr. Johnson argued in his petition that, because Dr. Grossman refused to opine that he was insane at the time of these crimes, trial counsel should have called additional lay and expert witnesses, and that the failure to do so "fatally undermined" his insanity defense. On March 8, 2013, the circuit court advanced the petition to the second stage of the postconviction process.

¶ 9 B. Second-Stage Proceedings

¶ 10 During the next several years, Mr. Johnson's postconviction case cycled through an assortment of attorneys from the same law firm. At one appearance on November 8, 2013, one attorney from the firm candidly explained to the court that he lacked postconviction experience. When the court asked the attorney how much more time he would need to file a Rule 651(c) certificate on a related case of Mr. Johnson's on which the court had appointed the firm, the attorney remarked, "I'm not making any representations to the Court at this point, your Honor. I don't know what I need to put in this 651(c) disclosure. I'm a personal injury lawyer. I've never done criminal stuff, so I'm unfamiliar with these sections, your Honor, and I apologize about that."

¶ 11 On January 13, 2017, nearly four years after the circuit court had advanced Mr. Johnson's petition to the second stage, postconviction counsel filed an amended petition citing numerous additional arguments for why Mr. Johnson's trial counsel was ineffective. According to the amended petition,

> "[t]rial counsel prejudiced the petitioner and violated petitioner's right to due process of law by stipulating to qualifications of experts in forensics, stipulating to the chain of custody of DNA material, stipulating to the scientific validity of the procedures employed by forensic examiners of the scientific accuracy of the results of testing; the failure of trial counsel to present a motion within 30 days to reconsider the sentence of petitioner; the

neglect of trial counsel to follow the instructions of his client to file a notice of appeal; the neglect of trial counsel to file a notice of appeal after advising petitioner that he would so file; failure to obtain an updated or another psychiatric report or another psychiatrist to render an opinion; and trial counsel neglected to follow, his client's instructions to file a notice of appeal and neglected to file the notice of appeal after agreeing that he, trial counsel would do so."

¶ 12 In the body of the amended petition, counsel did not substantiate any of Mr. Johnson's claims. Counsel also failed to attach to the amended petition any affidavits or other documentary evidence from outside the trial record.

¶ 13 On June 9, 2017, the State filed a motion to dismiss, asserting that all the allegations of ineffective assistance of counsel were barred by waiver and *res judicata*, because they had been brought or could have been brought on direct appeal. The State further argued that even if the arguments were not barred, they must fail because none came close to satisfying the requirements of *Strickland v. Washington*, 466 U.S. 668 (1984), as all the challenged decisions made by trial counsel could be characterized as reasonable decisions of trial strategy. The State also pointed out that the claims in the petition regarding trial counsel's failure to file a notice of appeal were unfounded and contradicted by the record, as trial counsel did file a notice of appeal in this case.

¶ 14 On October 27, 2017, postconviction counsel filed a reply to the State's motion arguing that the *Strickland* standard had been satisfied. She then filed a supplemental reply on January 13, 2017, responding to the State's wavier and *res judicata* arguments, asserting that Mr. Johnson was "not looking to relitigate a new cause of action, but raise issues that a competent, capable attorney would have advanced." Counsel did not attach affidavits to either of these filings.

¶ 15 At the hearing on the motion to dismiss, held on July 12, 2018, the State reiterated its

position that any issues related to Mr. Johnson's mental health were barred by *res judicata*, as those issues were dealt with "in open court, they are all in the record and that was an issue on direct appeal." The State then proceeded to discuss the merits of Mr. Johnson's various ineffective assistance claims, arguing that they all concerned issues of trial strategy that could not satisfy *Strickland*. Finally, the State explained that, even putting aside the issue of *res judicata*, the allegation that Mr. Johnson's trial counsel was ineffective for failing to call more compelling witnesses to testify to his mental condition was not supported by anything in the record and Mr. Johnson had failed to present any affidavits that would "contradict anything in the record." Absent these affidavits, the State contended, Mr. Johnson was essentially asking the court to speculate "as to what witnesses would say or who those witnesses would even be," which was not sufficient to warrant further advancement in the postconviction process.

¶ 16 Mr. Johnson's postconviction counsel responded by saying that Mr. Johnson faced a 78-count indictment and asserting that his trial attorney was unprepared to present an affirmative defense of insanity. She did not respond directly to the State's arguments about trial strategy or the lack of affidavits. Instead, she said to the court that "[t]he *Strickland* case as you know is a criminal case, 1994 case which is still good law today. And it basically talked about the—there is two prongs to the test; the *Strickland* test, counsel's performance has to be deficient and because of counsel's deficiency, the defendant is deprived of a fair trial. And that was exactly the case here, Your Honor."

¶ 17 At this point, the court interrupted counsel, attempting to "focus this discussion." The court asked for an explanation for why Mr. Johnson's amended petition claimed that his trial counsel was ineffective for failing to file a notice of appeal when that claim "appears to be meritless" as "there was a direct appeal taken in this case and the appellate court affirmed it." Counsel responded

by discussing Mr. Johnson's mental health issues.

¶ 18 The discussion then moved to Mr. Johnson's claim that his counsel was ineffective for relying on Dr. Grossman's testimony. The court asked postconviction counsel:

> "Have you, in preparing this post-conviction petition *** identified another expert, have you attached the affidavit of another expert to this petition explaining—in which this other expert explains his or her findings that the defendant was insane at the time of the offense and why they reached that conclusion? Have you made a record that could lead this Court to conclude that but for the defense attorney's failure to present the proper expert testimony the outcome would have been different? What you're doing is questioning the testimony of the expert presented. But you haven't presented any other testimony indicating that the outcome would have been different if a different expert would have testified."

¶ 19 Counsel responded by saying: "Your Honor, what we've shown here is that the totality of the items in the trial itself and the posttrial prejudiced the defendant, and prejudiced the defendant to the extent that the defendant wasn't—did not receive a fair trial." The court then addressed the remaining claims about trial counsel's decisions related to stipulations, asking again if there were any affidavits supporting Mr. Johnson's claims. Counsel's response was that there were "only the certified transcripts of the trial itself."

¶ 20 In its concluding remarks, before the motion was taken under advisement, the State summarized the situation as follows:

> "Counsel can repeatedly say that the defense attorney didn't do a good job in this case; however, under the Post-Conviction Act which is why we're here *** [t]here must be something shown outside of the record for this Court to move it to a third stage. There

must be something. There is nothing presented in counsel's petition that is outside the record."

¶ 21 On August 30, 2018, the court issued a written order granting the State's motion to dismiss. The court addressed each of Mr. Johnson's claims of ineffective assistance of counsel. Regarding the testimony of Dr. Grossman and the alleged failure to call additional witnesses that could testify to Mr. Johnson's mental state, the court found that the claims in the petition were "entirely conclusory" and not legally sufficient under the Act. The court explained that such claims must be supported by "affidavits, records, or other evidence" and, citing our supreme court in *People v. Collins*, 202 Ill. 2d 59, 66 (2002), the court noted that the failure to include these necessary items, or explain their absence, is " 'fatal' to a petition for post-conviction relief and may alone justify the summary dismissal of the petition." Based on the lack of supporting evidence, the court concluded that Mr. Johnson did not make the requisite factual showing to justify further proceedings under the Act.

¶ 22 C. Failure to Return the Record

¶ 23 In addition to counsel's performance during postconviction proceedings, as outlined above, this court has learned that after Mr. Johnson's postconviction petition was dismissed, his counsel failed to return the record of his trial to the Clerk of the Circuit Court of Cook County. This was brought to our attention in a motion filed by the Office of the State Appellate Defender (OSAD) in this case on April 27, 2022, asking this court to order the court reporters to re-transcribe the report of proceedings for that trial. OSAD alleged in their motion that Mr. Johnson's postconviction counsel had withdrawn the now-missing record from the clerk's office on November 29, 2012, and never returned it. When OSAD contacted the law firm that had represented Mr. Johnson in this postconviction proceeding to try to get the record, the firm

informed OSAD that it had been destroyed in a fire in 2020. This failure to return the court file so that Mr. Johnson could pursue his appellate remedies is relevant insofar as it provides additional context for Mr. Johnson's assertion that the law firm representing him was unaware of its most basic responsibilities as postconviction counsel.

¶ 24 II. JURISDICTION

¶ 25 Mr. Johnson's petition was dismissed on August 30, 2018. Late notice of appeal from the second-stage dismissal was allowed on February 21, 2019. We have jurisdiction over this appeal pursuant to article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6) and Illinois Supreme Court Rule 606 (eff. July 1, 2017) and Rule 651(a) (eff. July 1, 2017), governing appeals from final judgments in postconviction proceedings.

¶ 26 III. ANALYSIS

¶ 27 The Act establishes procedures by which an incarcerated criminal defendant may challenge his conviction or sentence based on a substantial deprivation of his state or federal constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2020); *People v. Caballero*, 228 Ill. 2d 79, 83 (2008). A postconviction proceeding is a collateral attack on the trial court proceedings. *People v. Petrenko*, 237 Ill. 2d 490, 499 (2010). Its scope is limited to constitutional issues that were not, and could not have been, previously adjudicated. *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005).

¶ 28 Postconviction proceedings occur in three stages. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). At the first stage, the circuit court determines, without any input from the State, whether the defendant's petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2020); *Gaultney*, 174 Ill. 2d at 418. To survive dismissal at this stage, a petition need only present the "gist" of a constitutional claim. *Gaultney*, 174 Ill. 2d at 418. At the second stage, the circuit court may appoint counsel to represent the defendant and file an amended petition, and the State

must either answer or move to dismiss the petition. 725 ILCS 5/122-4, 122-5 (West 2020); *Gaultney*, 174 Ill. 2d at 418. "Where the State seeks dismissal of a post-conviction petition instead of filing an answer, its motion to dismiss assumes the truth of the allegations to which it is directed and questions only their legal sufficiency." *People v. Miller*, 203 Ill. 2d 433, 437 (2002).

¶ 29 A petition should be dismissed at the second stage when its allegations of fact, "liberally construed in favor of the petitioner and in light of the original trial record," fail to make a "substantial showing" of a constitutional violation. *People v. Coleman*, 183 Ill. 2d 366, 382 (1998). If such a showing is made—*i.e.*, if support for the allegations exists in the record or in accompanying affidavits—the petition advances to a third-stage evidentiary hearing on the merits. 725 ILCS 5/122-6 (West 2018); *People v. Silagy*, 116 Ill. 2d 357, 365 (1987). We review the dismissal of a postconviction petition at the second stage *de novo*. *People v. Sanders*, 2016 IL 118123, ¶ 31.

¶ 30 On appeal, Mr. Johnson argues that that the second-stage dismissal of his petition should be reversed and this case remanded for new second-stage proceedings because he was denied his right to reasonable assistance of counsel where his retained postconviction counsel failed to attach affidavits or any other evidence to support the claims in his petition, failed to explain the significance of proposed witnesses, and demonstrated a complete unfamiliarity with the record and the requirements outlined in the Act.

¶ 31 As our supreme court explained in *People v. Custer*, 2019 IL 123339, ¶ 30, because the rights afforded to postconviction petitioners derive from a legislative grant rather than from a constitutional entitlement, defendants pursuing relief in the postconviction system are not entitled to effective assistance of counsel. *Id.* Rather, they are entitled only to a "reasonable level" of assistance of counsel, a standard that is "significantly lower than the one mandated at trial by our

state and federal constitutions." *Id.*

¶ 32 Where counsel has been appointed to represent an indigent postconviction petitioner, Illinois Supreme Court Rule 651(c) (eff. July 1, 2017) sets out the basic responsibilities for such representation. That rule requires that the postconviction record:

> "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).

Our supreme court has recognized that by filing a Rule 651(c) certificate, "[p]ostconviction counsel may create a rebuttable presumption that reasonable assistance was provided." *Custer*, 2019 IL 123339, ¶ 32

¶ 33 In cases like this one, however, where postconviction counsel has been retained rather than appointed, the specific requirements of Rule 651(c) do not apply. *People v. Cotto*, 2016 IL 119006, ¶ 41; *People v. Richmond*, 188 Ill. 2d 376, 382 (1999). But Mr. Johnson's retained counsel also had an obligation to provide reasonable assistance. See *Cotto*, 2016 IL 119006, ¶¶ 41-42 (holding that all postconviction petitioners are owed reasonable assistance, regardless of whether they have retained or appointed counsel, and describing Rule 651(c) as "merely a vehicle for ensuring a reasonable level of assistance" but not "the only guarantee of reasonable assistance."). While our supreme court has not explicitly provided a standard for how to gauge whether reasonable assistance was provided where Rule 651(c) is inapplicable, we discussed this issue at length in *People v. Zareski*, 2017 IL App (1st) 150836, ¶¶ 58-61.

¶ 34 In *Zareski*, and in cases following it, we have used a *Strickland*-like analysis in these situations. We examine both the attorney's performance and whether any performance deficiency prejudiced the postconviction petitioner. *Id.* ¶ 59; see also *People v. Soto*, 2022 IL App (1st) 192484, ¶ 162. We noted that the assessment of both counsel's performance *and* whether that performance prejudiced the defendant is "well-established within Illinois criminal law, familiar to both the courts and attorneys" and "has been used to evaluate counsel in other Illinois non-criminal proceedings, such as involuntary commitment or parental rights terminations." *Zareski*, 2017 IL App (1st) 150836, ¶ 59. It also advances the interest of judicial economy by "prevent[ing] pointless remands to trial courts for repeated evaluation of claims that have no chance of success." *Id.* After considering the interests involved and reviewing how other jurisdictions deal with the issue, we concluded that "in evaluating the performance of postconviction counsel, whether the petitioner was prejudiced (at a minimum) should be part of the inquiry." *Id.* ¶ 60. In evaluating prejudice, we follow the *Strickland* standard and inquire whether there is at least a reasonable probability of a different outcome on the petition, had counsel provided reasonable assistance. *Id.* ¶¶ 63-75.

¶ 35 Here, relying primarily on *Zareski*, the State argues that Mr. Johnson's petition was properly dismissed because, even if he could show that his counsel's performance was unreasonable—which the State does not concede he can demonstrate—his claim would still fail because he cannot show how he was prejudiced by such performance. The problem with the State's argument, however, is that straightforward application of *Zareski* is impossible in this case due to the emptiness of the record, an emptiness which clearly stems, at least in part, from Mr. Johnson's attorney's performance.

¶ 36 In representing a postconviction petitioner, it is essential that counsel provide, or at least attempt to provide, evidentiary support for the claims asserted in a petition. The Act is clear that a

petition "*shall* have attached thereto affidavits, records, or other evidence supporting its allegations or *shall* state why the same are not attached." (Emphases added.) 725 ILCS 5/122-2 (West 2020). None of the filings submitted by Mr. Johnson's counsel in this case satisfied this fundamental criterion. Affidavits were never attached, and no satisfactory explanation was ever provided for their absence. As the circuit court inquired:

> "Have you *** identified another expert, have you attached the affidavit of another expert to this petition explaining—in which this other expert explains his or her findings that the defendant was insane at the time of the offense and why they reached that conclusion? Have you made a record that could lead this Court to conclude that but for the defense attorney's failure to present the proper expert testimony the outcome would have been different?"

These questions went unanswered.

¶ 37 In *People v. Johnson*, 154 Ill. 2d 227, 241 (1993), our supreme court explained that where a postconviction petition is unsupported by affidavits or other documents, a reviewing court "may reasonably presume that post-conviction counsel made a concerted effort to obtain affidavits in support of the post-conviction claims, but was unable to do so." However, the court also implied this presumption can be rebutted where the record flatly contradicts that a "concerted effort" was made. *Id.*; see also *People v. Waldrop*, 353 Ill. App. 3d 244, 250 (2004). Here, the record suggests that no such concerted effort was ever made in this case. Not only did counsel provide no evidentiary support for any of the claims asserted in the petition, it appears that counsel was not even aware that this was an expectation.

¶ 38 Based on counsel's pleadings, statements, unreasonable delays, and general performance throughout, it is quite apparent that counsel was not familiar with the record or the basic

requirements of the Act. Counsel's unfamiliarity with the record can be inferred from the inclusion of the erroneous assertion in Mr. Johnson's petition relating to his trial attorney's alleged failure to file a notice of appeal, an assertion which is flatly contradicted by the procedural history of this case. Counsel's ignorance of the basic structure of the Act bleeds through the transcript of the hearing on the State's motion to dismiss, where counsel seemed utterly bewildered and unable to respond whenever the court asked about the lack of affidavits.

¶ 39 Particularly where, as here, the claim being asserted is ineffective assistance of trial counsel, postconviction counsel had the opportunity to provide evidentiary support that is not in the trial record to demonstrate how trial counsel's failures prejudiced the defendant's rights and impacted the outcome at trial. Instead, postconviction counsel in this case relied strictly on the trial record itself which walked Mr. Johnson right into the State's argument that every issue raised in the postconviction petition was barred because it could have been raised on direct appeal. Considering the multitude of errors committed by postconviction counsel in this case, it is clear the assistance provided to Mr. Johnson in his postconviction proceeding was not sufficient to meet even the somewhat relaxed standard of reasonable assistance.

¶ 40 The primary allegation in Mr. Johnson's petition is that his trial counsel was ineffective for relying on the testimony of Dr. Grossman and that he should have called a different expert witness who would have provided evidence in support of his insanity defense. As the circuit court pointed out, because counsel provided no information about whether an alternative expert witness existed and what that witness would have been able to testify to, it was not possible to determine if trial counsel could have changed the outcome of the trial.

¶ 41 At this stage of the proceeding, we still have no answer to that question because postconviction counsel attached nothing that demonstrates either that such a witness exists or that

counsel made a reasonable attempt to find such a witness and could not. In other words, as Mr. Johnson argues on appeal, because of the deficiencies of his postconviction counsel, we simply cannot tell on this record whether the outcome might have been different if Mr. Johnson had received reasonable postconviction representation. Thus, we cannot determine whether Mr. Johnson was prejudiced by the lack of reasonable assistance.

¶ 42 Mr. Johnson argues that the proper course of action here is to remand pursuant to the specific power given to this court under Illinois Supreme Court Rule 615(b) (eff. Jan. 1, 1967), which allows this court to "modify" the judgment or "any or all of the proceedings subsequent to or dependent upon the judgment or order from which the appeal is taken." Mr. Johnson points to this court's opinion in *People v. Jackson*, 2021 IL App (1st) 190263, ¶ 46, where we relied on this discretionary power to "vacate the trial court's order and remand for further second-stage proceedings so that postconviction counsel may further amend and support the petition." In that case, as in this one, remand was warranted because regardless of whether the claims raised in the postconviction petition had merit, it was simply not possible to determine what would have occurred at the second stage if reasonable assistance had been provided. *Id.* ¶ 47. As the court noted, "the emptiness of the record created by postconviction counsel is [the] defendant's whole point on appeal." *Id.* ¶ 45.

¶ 43 We agree with Mr. Johnson, that, as in *Jackson*, a remand is appropriate in this case. See also *People v. Cooper*, 2021 IL App (1st) 190022 (remanding the case under Rule 615(b) for the limited purpose of holding a hearing on whether postconviction petition was timely put into the mailbox). As in *Jackson*, we believe that in order to properly assess Mr. Johnson's claim, this case must be remanded to the circuit court for additional second-stage proceedings during which new counsel can supplement the postconviction record with any additional evidence or affidavits that

it believes provides support for Mr. Johnson's postconviction petition.

¶ 44 As a final matter we address OSAD's motion referenced above (*supra* ¶ 23), asking that we order the court reporters to re-transcribe the report of proceedings issued for Mr. Johnson's direct appeal. We directed the State to file a response to this motion and then issued an order, taking the motion with the case.

¶ 45 OSAD's motion states that, in its opening brief on this appeal, it had relied on the facts as laid out in this court's Rule 23 order in *Johnson,* 2012 IL App (1st) 100372-U, which it had deemed "adequate" for the appeal. However, in its response brief the State asserted that "petitioner failed to provide the trial record on appeal" and that any doubts arising from this incomplete record must be resolved against Mr. Johnson, as the appellant. OSAD asked that the proceedings be re-transcribed free of charge, so that there was a "complete record" for this court. The State's response was that it had no objection but that it reserved the right to file supplemental or substitute briefing, if deemed necessary.

¶ 46 At this point, the court sees no basis for granting that motion and compelling the production of a new trial record. Because no specifics have yet been provided by postconviction counsel as to what trial counsel should have done to adequately present the insanity defense, the need for an in-depth review of the trial record remains speculative. Therefore, we deny the motion at this time. However, this denial is without prejudice to counsel for Mr. Johnson renewing this motion if a more specific need for the trial transcripts arises. We also note that where, as here, those transcripts no longer exist through no fault of Mr. Johnson, Mr. Johnson cannot fairly be accused of failing to provide this court with a complete record because the transcripts are not included.

¶ 47 IV. CONCLUSION

¶ 48 For the reasons stated herein, we vacate the second-stage dismissal and remand this case

to the circuit court with directions for further second-stage proceedings.

¶ 49 Vacated and remanded.

No. 129718

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellant, -vs- MICHAEL WILLIAMS, Petitioner-Appellee.	)	Appeal from the Appellate Court of Illinois, No. 5-22-0185. There on appeal from the Circuit Court of the Twentieth Judicial Circuit, St. Clair County, Illinois, No. 09-CF-1299. Honorable Julie Katz, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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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. On August 8, 2024, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the petitioner-appellee in an envelope deposited in a U.S. mail box in Mt. Vernon, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

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