No. 129718

IN THE
SUPREME COURT OF ILLINOIS

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

REPLY BRIEF OF RESPONDENT-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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ORAL ARGUMENT REQUESTED

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ARGUMENT

I. Petitioner Failed to Overcome the Presumption That His Counsel Performed Reasonably.

As the People's opening brief demonstrated, Peo. Br. 11-19, petitioner's postconviction counsel performed reasonably when he adequately pleaded petitioner's claims to survive first-stage dismissal, C381, argued during second-stage proceedings that petitioner's claims either were not forfeited or that a forfeiture should be forgiven, R321-22, correctly articulated the standards governing petitioner's ineffectiveness claim at the second-stage hearing, R323-24, and argued that the facts of petitioner's case warranted a third-stage hearing, R324.[1]

Petitioner's argument that his counsel did not perform reasonably because counsel did "not state facts or make the proper legal arguments to support a finding of prejudice for the claim of ineffective assistance of counsel," Pet. Br. 23, rests on a misconstruction of the record and conflates legal insufficiency with factual insufficiency. First and foremost, the record belies petitioner's argument that counsel performed unreasonably, as counsel pleaded both prongs of *Strickland v. Washington*, 466 U.S. 668 (1984), asserted that petitioner would have not taken a plea deal had he known of C.J. Baricevic's attendance at the pre-trial meeting, supported that assertion

[1] For this reason, petitioner's assertion that "[h]ad counsel been subject to Rule 651(c), this case would certainly have been remanded," Pet. Br. 17, is incorrect. Because counsel performed reasonably, counsel would have complied with Rule 651(c), and the result would have been the dismissal of the petition.

with petitioner's affidavit averring that he would not have proceeded to trial had he known of C.J. Baricevic's relationship to the judge, and responded to the trial court's questions at the hearing by informing the court that petitioner had stated he would not have proceeded to trial. Peo. Br. 14-15. Counsel thus correctly identified the legal standard and attempted, albeit unsuccessfully, to convince the court that petitioner's factual assertion that he would not have proceeded to trial due to C.J. Baricevic's presence at the meeting and relationship to the judge satisfied *Strickland's* prejudice prong.

Given this record, petitioner is incorrect that counsel did not support petitioner's claim. That counsel was unable to garner sufficient evidentiary support to make a substantial showing of prejudice does not mean that counsel provided *no* factual support for the claim. Moreover, contrary to petitioner's argument, *see* Pet. Br. 21, 24, 25, counsel did not perform unreasonably merely because counsel had no better answer to the trial court's questions regarding prejudice than to emphasize petitioner's averment that he would not have proceeded to trial had he known about C.J. Baricevic's relationship to the judge. As this Court has repeatedly emphasized, counsel's inability "to make the petition's allegations factually sufficient to require the granting of relief" does not make counsel's performance unreasonable. *People v. Spreitzer,* 143 Ill. 2d 210, 221 (1991); *see also People v. Perkins*, 229 Ill. 2d 34, 51 (2007) (counsel not unreasonable even though "[c]ounsel's argument may not have been particularly compelling

and . . . may have been legally without merit" because it was "the best option available based on the facts").

Indeed, petitioner's argument turns the presumption of reasonable assistance on its head. Under this presumption, the Court presumes that counsel's inability to provide further factual support means that no further support is available. *See*, *e.g., People v. Huff,* 2024 IL 128492, ¶ 24 ("It is presumed from the lack of an amendment that there were none to be made."); *People v. Johnson,* 154 Ill. 2d 227, 241 (1993) ("In the ordinary case, a trial 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."). Thus, counsel performs reasonably when counsel, for instance, "shape[s] petitioner's . . . contentions into a claim of ineffective assistance of trial counsel that alleged deficient performance and prejudice," *People v. Agee*, 2023 IL 128413, ¶ 53; provides available affidavits to support the claims, *Johnson,* 154 Ill. 2d at 248-49; provides argument to overcome procedural bars, *People v. Addison,* 2023 IL 127119, ¶ 21; and "to the extent possible, . . . affirmatively [pleads] petitioner's claim," *Agee,* 2023 IL 128413, ¶ 56. In short, counsel must adequately shape the legal presentation of a claim and, where possible, provide factual support for the claim. That is precisely what counsel did here, *see* Peo. Br. 13-16, and counsel accordingly performed reasonably.

Petitioner's attempt to distinguish cases applying the presumption of reasonableness and the corresponding presumption that counsel made available amendments and argument, *see* Pet. Br. 44-45, are unavailing. To start, the factual distinctions petitioner identifies do not change the legal rule that this Court uniformly applied in each of petitioner's cited cases: that postconviction counsel's performance is presumed to be reasonable. *See Huff*, 2024 IL 128492, ¶ 24; *Agee,* 2023 IL 128413, ¶ 65; *Johnson,* 154 Ill. 2d at 241. This is particularly true, as *Huff* noted, where, as here, a petitioner does nothing to rebut that presumption. 2024 IL 128492, ¶ 24 ("Notably, petitioner does not identify any necessary amendments to his *pro se* petition that could have been made by counsel to allow the petition to survive dismissal."); *see also Spreitzer,* 143 Ill. 2d at 221 ("Where there is not a showing that sufficient facts or evidence exists, inadequate representation certainly will not be found because of an attorney's failure to amend a petition or, when amended, failure to make the petition's allegations factually sufficient to require the granting of relief."). Thus, that each case has slightly different facts is irrelevant to whether the legal principle that counsel is presumed to have made available amendments and argument applies with equal force.

Moreover, the cited cases are, in fact, instructive precisely for their factual similarities. As here, *Agee* concerned a postconviction claim of ineffective assistance of counsel in the context of a plea deal, 2023 IL 128413,

¶ 51, and the petitioner contended on appeal that the prejudice prong was insufficiently pleaded by counsel's petition, *id.* ¶ 52. But, this Court explained, counsel's actions, including correctly pleading both *Strickland* prongs and filing an affidavit with the petitioner's bare assertion that he would not have pleaded guilty, sufficed for reasonable assistance even though the claim proved to be non-meritorious. *Id.* ¶ 56. In contrast, in *Johnson*, the Court found the presumption that postconviction counsel performed reasonably to be rebutted by a new affidavit that postconviction appellate counsel submitted to support the ineffectiveness claim. 154 Ill. 2d at 241. The Court explained that because counsel "filed an affidavit as a supplemental record in this appeal," it was clear that in the trial court "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.* The opposite is true here because postconviction trial counsel did file an affidavit supporting the ineffectiveness claim, and, as in *Agee*, petitioner points to nothing that counsel should have done differently.

For similar reasons, petitioner's unsupported assumption that more factual support for his ineffectiveness claim must have existed because counsel included it in the petition, Pet. Br. 26-27, 44-47; *see also* A13, ¶¶ 26-27, fails to recognize the distinction between frivolousness and lack of merit, *see* Peo. Br. 17-18. Counsel had a duty to raise non-frivolous claims and thus

must have believed the claim to be non-frivolous. *Compare People v. Johnson,* 2018 IL 122227, ¶ 24 (retained counsel who is "aware of" non-frivolous claims but refuses to include them in a postconviction petition provides unreasonable assistance). But counsel's apparent belief that the claim was non-frivolous does not, as petitioner assumes, suggest that counsel also believed that the claim had sufficient factual and legal support to survive second-stage dismissal.

On the contrary, second-stage proceedings are not governed by the frivolousness standard, which asks whether the petitioner has alleged an "arguable" constitutional claim, *e.g.*, in the *Strickland* context, an arguable claim of deficient performance and prejudice. *People v. Tate*, 2012 IL 112214, ¶¶ 19-20; *see also Huff*, 2024 IL 128492, ¶ 29 (claim is frivolous when it "[l]ack[s] a legal basis or legal merit," or is "manifestly insufficient as a matter of law," and these conclusions are "[o]bvious" and "apparent"). This pleading standard is "lower" than the standard that governs at the second stage*, Tate*, 2012 IL 112214, ¶ 20, where the petitioner must make "a substantial showing of a constitutional violation," *Agee*, 2023 IL 128416, ¶ 37. Thus, a claim may fall somewhere between the two standards, such that a claim can be both non-frivolous and non-meritorious. *See Huff*, 2024 IL 128492, ¶ 30 (recognizing that claim may be both non-frivolous and "weak"); *Tate*, 2012 IL 112214, ¶¶ 24-26 (holding that petition raised non-frivolous

Strickland claim but recognizing that it may not survive second-stage dismissal).

Accordingly, contrary to petitioner's argument, *see* Pet. Br. 26-27, only when counsel "*knows* that the [petition's] contentions are patently without merit or wholly frivolous" does counsel have an ethical duty to withdraw. *Huff*, 2024 IL 128492, ¶ 28 (emphasis in original). When the claims are "weak" but "presented in the best possible legal form," and counsel has not suggested that he believes the claims to be frivolous, counsel is not required to withdraw. *Id*. ¶ 30. Thus, that counsel here moved forward with the ineffectiveness claim suggests only that counsel believed the claim was "arguable" — *i.e.*, that it was not "manifestly insufficient as a matter of law," *id.* ¶ 28; *Tate*, 2012 IL 112214, ¶¶ 19-20 — not that counsel further believed the claim had "substantial" merit such that it would survive second-stage review.

In sum, petitioner fails to overcome the presumption that counsel performed reasonably.

II. Petitioner Was Required, But Failed, to Show Prejudice from Counsel's Allegedly Unreasonable Performance.

Alternately, as the People's opening brief demonstrated, Peo. Br. 19-26, this Court should reverse the appellate court's decision because it failed to apply the principle that petitioners with retained counsel must show prejudice resulting from counsel's allegedly unreasonable assistance. Requiring a showing of prejudice is consistent with how courts evaluate Sixth

Amendment claims of ineffective assistance of counsel, and therefore provides "a familiar and manageable framework for evaluating claims of unreasonable assistance where retained counsel filed the defendant's initial postconviction petition." *People v. Perez,* 2023 IL App (4th) 220280, ¶ 54.

Petitioner does not argue that *he* was prejudiced by his counsel's allegedly unreasonable assistance; in fact, he concedes that he has not shown prejudice. Pet. Br. 14-15. Rather, petitioner argues that he should not be required to show prejudice because no showing of prejudice is required when appointed postconviction counsel fails to comply with Rule 651(c), Pet. Br. 30-36, and that "equity" requires a similar holding here, *id.* at 35. But prejudice is not required when counsel fails to comply with Rule 651(c) because petitioners are entitled to attorneys who strictly comply with that rule. *See Addison*, 2023 IL 127119, ¶ 37 ("Our case law thus clearly establishes that all postconviction petitioners are entitled to have counsel comply with the limited duties of Rule 651(c) before the merits of their petitions are determined."); *see also People v. Zareski,* 2017 IL App (1st) 150836, ¶ 55 (prejudice not required in Rule 651(c) cases because "counsel had violated a supreme court rule"); *People v. Boone,* 2023 IL App (1st) 220433-U, ¶ 57 (noting that *Addison* implicates only those situations where "counsel's performance is governed by Rule 651(c)"). As petitioner recognizes, Pet. Br. 48, indigent petitioners are appointed counsel and cannot choose who is appointed to represent them. *See People v. Rouse*, 2020 IL App (1st) 170491,

¶ 55 ("[A]n indigent [petitioner] is not entitled to representation by the counsel of his choice."). Appointed counsel is therefore subject to the requirements of Rule 651(c), which was enacted as an added safeguard "to ensure that all indigents are provided proper representation when presenting claims of constitutional deprivation." *People v. Suarez*, 224 Ill. 2d 37, 51 (2007). But Rule 651(c) does not apply when retained counsel has filed the petition, *see People v. Cotto*, 2016 IL 119006, ¶ 41, so retained counsel here was subject not to Rule 651(c) but instead to petitioner's choice of counsel and the Post-Conviction Hearing Act's general requirement of reasonable performance. *Huff,* 2024 IL 128492, ¶ 21("The standard under the Act is that a petitioner is entitled to reasonable assistance of counsel.").

Petitioner's cited cases do not demonstrate otherwise. All of the decisions petitioner cites to support his assertion that "this Court has long since recognized a specific carve-out allowing petitioners to receive remands without a review on the merits," Pet. Br. 35-36, involve violations of Rule 651(c). *See Suarez*, 224 Ill. 2d at 52 ("[W]e decline to hold that noncompliance with Rule 651(c) may be excused on the basis of harmless error."); *People v. Jones*, 43 Ill. 2d 160, 162 (1969) (prejudice not required where petitioner filed pro se petition and counsel failed to consult with petitioner); *Johnson*, 154 Ill. 2d at 313 (no showing of prejudice required where counsel did not "adequately perform[] his duties under Rule 651(c)"); *People v. Turner*, 187 Ill. 2d 40, 416 (1999) (same). These decisions rest on the requirement that

appointed counsel must "substantially comply with the strictures of the rule." *Addison*, 2023 IL 127119, ¶ 21. When that has not occurred, there is no assurance that appointed counsel has "'adequately performed his duties under Rule 651(c),'" *id.* ¶ 41 (citation omitted), and "a remand is required regardless of whether the petition's claims have merit," *id.* ¶ 42. But where, as here, the general reasonableness standard applies, a showing of prejudice is required. *See id.* ¶ 38 (discussing appellate court precedent, and distinguishing circumstances "where counsel's limited duties are prescribed by Illinois Supreme Court rule" from circumstances where "this court has not prescribed by rule specific duties that counsel must perform"). Thus, only where Rule 651(c) applies has this Court excused a petitioner from demonstrating prejudice. *See id*.

This Court should decline petitioner's invitation to apply a presumption of prejudice outside of the Rule 651(c) context. Indeed, were the Court to extend *Addison* and presume prejudice in circumstances where, as here, counsel is subject only to the general standard of reasonableness, the logic would equally require a presumption of prejudice where counsel is alleged to have provided unreasonable assistance at the third stage. *See id.* But such a result would lead to unnecessary remands and make the statutory right to postconviction counsel more robust than the Sixth Amendment right to the effective assistance of counsel. *See Addison*, 2023 IL 127119, ¶ 19 (explaining that the Act's lesser standard of reasonableness "is rational

because trial counsel plays a different role than counsel in post-conviction proceedings.") (internal quotation omitted). Accordingly, the Court should limit *Addison* to its circumstances — where "appointed counsel does not adequately fulfill his or her duties under Rule 651(c)," 2023 IL 127119, ¶ 42 — and hold that where the general reasonableness standard applies, the petitioner must show prejudice consistent with the framework found sufficient to govern the higher standard of assistance afforded by the Constitution. *See* Peo. Br. 19-20.

The Court should also reject petitioner's alternative argument that he should not be required to show prejudice because counsel performed so unreasonably that "petitioner cannot show prejudice on the face of the record." Pet. Br. 29-30 (citing *People v. Johnson*, 2022 IL App (1st) 190258-U). Even if prejudice may be presumed in some circumstances, as it is under the Sixth Amendment, *see id.* at 40-41, this "narrow" and "rarely applied" exception to *Strickland's* prejudice requirement — where counsel's representation fell "to such a low level as to amount not merely to incompetence, but to no representation at all," *People v. Cherry,* 2016 IL 118728, ¶ 26 (internal quotations omitted) — does not apply here because petitioner's counsel provided some representation, *see id.* ("only non-representation, not poor representation, triggers a presumption of prejudice" under the Sixth Amendment (internal quotations omitted)).

Moreover, as the People's opening brief demonstrated, the record here is sufficient to evaluate prejudice. *See* Peo. Br. 22-26. First, petitioner's improper admonishment claim was rebutted by the record because his plea deal specifically contemplated consecutive sentences. R231. Second, his claim that the trial court erred in failing to make certain factual findings before imposing consecutive sentences was both barred by his negotiated guilty plea waiver and meritless because the trial court was not required to make the findings. *See* Peo. Br. 23-24. Finally, petitioner's ineffectiveness claim was meritless because even had he known of C.J. Baricevic's relationship to the trial judge, there is no reasonable probability that petitioner would have rejected the extremely favorable plea deal he received, which called for the dismissal of two armed robbery charges were dismissed and enabled petitioner to avoid a mandatory prison sentence of 31 years and a longer discretionary sentence up to natural life. *See id*. at 24-25.

Accordingly, even if retained counsel performed unreasonably, the Court should reverse the appellate court's judgment because, as petitioner concedes, he cannot show that he was prejudiced by that performance.

III. The Parties Agree That the Appellate Court's Order Requiring New Counsel Was Erroneous.

The People's brief demonstrated that the appellate court exceeded its authority when it directed the trial court to appoint petitioner new counsel on remand. *See* Peo. Br. 26. Petitioner agrees that the appellate court had no authority to order the trial court to appoint petitioner new counsel because

petitioner has not yet sought the appointment of counsel. Pet. Br. 49. Petitioner also appears to agree, albeit for different reasons than the People argued, that the appellate court could not disqualify petitioner's hired counsel and require petitioner to seek new counsel if this case is remanded. *Id.* at 53. In short, the parties agree that the appellate court was without authority to order new counsel, as such a decision rests with petitioner and the trial court, not the appellate court. Therefore, even if this Court were to affirm the appellate court's judgment remanding for further second-stage proceedings, it should vacate that portion of the appellate court's judgment requiring new counsel on remand.

CONCLUSION

This Court should reverse the appellate court's judgment.

October 16, 2024

Respectfully submitted,

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RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) 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(a), is 13 pages.

s/Mitchell J. Ness
Mitchell J. Ness

CERTIFICATE OF FILING AND SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On October 16, 2024, the **Reply Brief of Respondent-Appellant People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which provided notice to the following registered email address:

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