No. 128413

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, No. 2-20-0748.
Respondent-Appellee,	)	
-vs-	)	There on appeal from the Circuit Court of the Seventeenth Judicial Circuit, Winnebago County, Illinois, No. 10 CF 2437.
JAMES AGEE,	)	
Petitioner-Appellant.	)	Honorable Debra D. Schafer, Judge Presiding.

BRIEF AND ARGUMENT FOR PETITIONER-APPELLANT

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NATURE OF THE CASE

James Agee, petitioner-appellant, appeals from a judgment granting the State's motion to dismiss his petition for post-conviction relief at the second stage of proceedings.

An issue is raised concerning the sufficiency of the post-conviction pleadings.

ISSUE PRESENTED FOR REVIEW

Whether post-conviction counsel must provide reasonable assistance under the Post-Conviction Hearing Act and Illinois Supreme Court Rule 651(c) when counsel adds a claim to an amended petition.

STATEMENT OF FACTS

The circuit court granted the State's motion to dismiss James Agee's amended post-conviction petition at the second stage of post-conviction proceedings. (C. 606). The amended petition alleged, *inter alia*, that trial counsel was ineffective for failing to advise Agee that he could rely on the affirmative defense of second degree murder. (C. 277-78). The following is relevant to the claim that post-conviction counsel provided unreasonable assistance that warrants further second stage proceedings and the appointment of new counsel.

Events leading to Agee's guilty plea

On October 18, 2010, Agee strangled his longtime girlfriend Denise Davis during a physical altercation. (C. 491-92). He thereafter went to directly to the police station and voluntarily spoke to the police. (C. 492). The interrogation was recorded on video. (C. 492). Agee did not realize during much of the questioning that Davis was deceased, and, at several points, he expressed the hope that she was okay. (C. 496, 504, 535). According to the statements Agee made during the interrogation, he and Davis dated on and off for 13 to 14 years. (C. 487). They lived together two or three years before the interrogation. (C. 488). Their latest break up occurred three months earlier. (C. 487). They had a 10-year old son, and Davis had two other children. (C. 488, 496). Agee and Davis' sister co-owned a carwash. (C. 500).

Agee and Davis had been bickering for several months. (C. 498). Agee stated, "Then she, she got a tendency to-she used to swing at me all the time, and I think she's always tryin' to provoke me to fight her or hit her or some' in', 'cause she did it so much. But I would never do it." (C. 550). Davis had struck him in the

past couple of months, but he did not hit her back "cause I knew what I would do to her." (C. 498, 560). Agee stated that he boxed 15 to 20 years ago. (C. 490). Their recent disputes involved "money for her daughter's cell phone," and "stuff I'd be doin' and stuff she'd be doin.'" (C. 524). The police were summoned on a prior occasion in which Davis accused Agee of ignoring her telephone calls. (C. 493). Agee stated, "[The police] talked to me and her, and, and they left." (C. 493). Agee denied that he had flattened the tires of Davis' car or that he had caused injuries that she had photographed. (C. 547-48).

On the morning of October 18, 2010, Agee opened the car wash and then drove to Davis' home. (C. 500, 521). Davis met him at the front door, and she let her dog outside. (C. 522). Agee went inside, and they talked in the living room for 10 minutes before they began quarreling. (C. 529). Davis tried to hit Agee, but he blocked her. (C. 489). She kept swinging at him, and she grabbed his head. (C. 490). He pulled away, and she scratched him. (C. 490). He punched her, but she kept swinging at him and grabbed his hair. (C. 491, 530). She ended up on the floor, and Agee got on top of her. (C. 490). She pulled his hair and hit him, and he choked her until she passed out. (C. 526, 530). A detective asked Agee if he lost his temper when he choked Davis, and Agree agreed. (C. 497-98).

Agee left Davis' house. (C. 492). He called Davis' sister and told her he had hurt Davis "bad" and told her to go to the house. (C. 495). He then called his brother and informed him that he was driving to the police station and asked his brother to pick up his car there. (C. 510).

Agee was indicted on two counts of first degree murder. (C. 20-21). Trial counsel's supplemental answer stated the defense would assert the affirmative

defense of self-defense. (C. 32). Trial counsel also filed supplementary discovery motions for evidence pursuant to *People v. Lynch*, 104 Ill.2d 194 (1984). (C. 39, 63, 117). Pursuant to that motion, following the court's *in camera* viewing of the document, the prosecution turned over one police report to the defense. (R. 142-44).

On May 3, 2012, the parties announced they had agreed to a negotiated guilty plea. (R. 272). Agee stated he was 46 years old, he understood the rights he was surrendering by pleading guilty to one count of first degree murder, and he was entering the guilty plea voluntarily. (R 273-76). The prosecutor provided the factual basis for the plea. (R. 277). Agee walked into the police station and said he believed he killed Davis. (R. 277). He later told detectives that he choked her until she passed out. (R. 277). The trial court accepted the guilty plea, imposed a 25-year prison sentence on count 1 and dismissed count 2. (C. 208-10; R. 282).

Proceedings following the guilty plea

On June 28, 2012, trial counsel filed a motion to withdraw the guilty plea, alleging Agee did not knowingly waive his right to a jury trial. (C. 216). The motion further stated its late filing was due to Agee's inability to contact counsel due to his incarceration. (C. 216). On July 2, 2012, Agee filed a *pro se* motion to withdraw his plea and vacate his sentence, alleging that trial counsel told him truth-in-sentencing would be abolished and thereafter he would serve half of his sentence. (C. 225). On the same date, Agee filed a *pro se* motion to reconsider sentence "with the assistance of another inmate" stating the sentence was excessive because Agee did not want to plead guilty to first degree murder "owing to my belief the charge should have been reduced to second degree murder, or

involuntary manslaughter, due to the incident deriveing [*sic*] from a domestic dispute." (C. 218). The circuit court ruled that it lacked jurisdiction to consider the motions because they were filed more than 30 days after the plea. (C. 231).

On April 12, 2013, Agee filed a *pro se* motion to reconsider sentence, again alleging his sentence was excessive because he did not want to plead guilty to first degree murder as the charge should have been reduced to second degree murder or involuntary manslaughter. (C. 234). The circuit court again ruled that it lacked jurisdiction to consider the motion because it was untimely filed. (C. 231).

On October 2, 2013, Agee filed a *pro se* motion to withdraw the plea, alleging trial counsel was ineffective for failing to hire a mental health expert to investigate Agee's mental state at the time of the offense. (C. 242). The motion also noted the circuit court could recharacterize the motion as a post-conviction petition. (C. 244-45). The circuit court ruled it lacked jurisdiction to consider the motion. (C. 255).

Agee filed a motion to reconsider the court's ruling. (C. 258). The motion to reconsider noted Agee's ineffective assistance of counsel claim was cognizable in post-conviction proceedings, and the court could recharacterize the motion to withdraw the plea as a post-conviction petition. (C. 258-59). On April 11, 2014, the circuit court granted the motion to reconsider and recharacterized the motion to withdraw as a post-conviction petition. (C. 264; R. 314).

On May 9, 2014, the circuit court admonished Agee pursuant to *People v. Shellstrom*, 216 Ill.2d 45, 46 (2005), and continued the case to allow him to amend his filing. (C. 266; R. 320-24). Agee ultimately decided to stand on the allegation raised in his motion to withdraw. (R. 347). The circuit court ruled Agee's petition alleged the gist of a constitutional claim and docketed it for second stage post-

conviction proceedings and the appointment of counsel. (R. 364). Post-conviction counsel's investigation of Agee's mental health claim led to counseling he received through the Rockford Park District, but the District had no records related to Agee. (R. 462, 466).

On December 16, 2019, post-conviction counsel filed an amended post-conviction petition raising two claims. (C. 276). The first claim alleged trial counsel failed to advise Agee about a second degree murder defense:

> 10. Defendant's trial counsel failed to meet with Defendant sufficiently to develop a defense to the charge of first-degree murder. Defendant advised his counsel that he and Davis had been in a relationship and the actions leading to the death of Davis occurred during the heat of an argument and that Defendant did not intend to kill or injure Davis. Counsel advised Defendant that he had no alternative but to plead guilty to the charge of first-degree murder. Based on counsel's representations, Defendant believed he had no defense to the charge of first-degree murder or that he had any alternative but to plead guilty. Counsel failed to advise Defendant that if he elected to go to trial, his attorneys could pursue a defense of second-degree murder base[d] on the fact that at the time of Davis' death, Defendant was acting under a sudden and intense passion due to being seriously provoked by Davis and that her death was the result of his own negligence. 720 ILCS 5/[9]-2(a)(1).
>
> 11. Defendant's plea of guilty to the first-degree murder charge was not knowingly and/or voluntarily given due to his counsels' failure to provide him with the information and/or option. Defendant would not have pled guilty had he been aware that he could have gone to trial and been found guilty of second-degree murder. (C. 278).

The amended petition's second claim alleged trial counsel was ineffective for failing to consult a mental health expert. (C. 279). The petition alleged Agee informed trial counsel he "'blacked out'" during the offense. (C. 279). The petition further alleged, "Given the Defendant's relationship with the victim and the fact

that he self reported the offense to the police; stated that he had blacked out during the time he choked Davis; and the fact that he believed that he suffered from mental health issues, it was unreasonable for defense counsel not to ask for a fitness evaluation and/or psychiatric examination." (C. 279).

The amended petition was supported by an affidavit from Agee. (C. 282). The affidavit alleged in pertinent part:

> 4. Prior to the plea of guilty, my attorneys met with me infrequently and did not discuss with me any defenses to the charge of first-degree murder.
>
> 5. I met mostly with my attorney on the day of trial while waiting for my case to be called. I was usually told by my attorney that she was negotiating a plea with the State and that a new court date would be scheduled.
>
> 6. It was never discussed with me by my attorney that I could go to trial and be found guilty of second-degree murder.
>
> 7. More than once I told my attorney that I blacked out during the argument that led to Denise Davis' death and that I believed I had mental health issues.
>
> 8. My attorneys never discussed with me the possibility of having a mental health evaluation and whether it would be beneficial to my defense.
>
> 9. Sometime in March or April, but prior to May 3, 2012 I was told by my attorney that a plea agreement had been negotiated with the [S]tate. I was told that it was the best agreement that could be reached and if I did not accept the offer and went to trial, I would be found guilty of first-degree murder and sentence[d] to more than the 25 year offer.
>
> 10. I was not made aware of any possible defense to the first-degee murder charge if I wanted to go to trial.
>
> 11. I did not believe that I had any alternative but to plead guilty.

> 12. Had I known about the elements of second-degree murder I would not have pled guilty as I did.
>
> 13. I do not believe that I was adequately represented, and I only pled guilty because I was told I had no other options. (C. 282-83).

On April 28, 2020, the State filed a motion to dismiss the petition. (C. 566). The State's motion argued the petition's claims were rebutted by the record, the petition failed to present corroborative evidence supporting the claims, and ". . . defendant has not and cannot demonstrate prejudice as regards either claim, as he has neither made a showing of innocence, nor has he presented a plausible defense." (C. 579-87). Post-conviction counsel did not file a response. (R. 558). Counsel did file an Illinois Supreme Court Rule 651(c) certificate. (C. 600).

The hearing on the State's motion was held on September 30, 2020. (R. 558). As for the prejudice prong of Agee's ineffective assistance of counsel claim, the State argued, "And to satisfy that part of the *Strickland* test it is not enough for the defendant just to assert that he would've gone to trial, he has to either present a claim of innocence or a plausible defense that could've been raised at trial." (R. 561). The State also asserted the amended petition failed to show that second degree murder was a plausible defense. (R. 564).

Post-conviction counsel argued that trial counsel failed to inform Agee about a second degree murder defense, and thus Agee was not fully informed of his options prior to the guilty plea. (R. 570). Counsel also asserted Agee ". . . felt that if his case had gone to trial, that a possible conviction as to Second Degree Murder might've been something that would've been obtained." (R. 570-71). Counsel stated, "[I]t doesn't make much sense that Mr. Agee would've done this without any sort of provocation." (R. 573). Counsel believed a judge or jury would

not have found Agee guilty of first degree murder because, "I think that there would've been certainly other options and other evidence that might've been able to be presented." (R. 573). Counsel also told the court:

> But again, you know, at this stage, Judge, this is the second stage, and again I only have the information that I have available to me to work with. But I would ask the Court to consider advancing this at least to a third stage where the Court could actually hear from Mr. Agee directly as to what his thoughts, his feelings, were when he was represented during the pretrial stages and the time leading up to his plea. (R. 574).

At a later court date, the circuit court granted the State's motion to dismiss the amended petition. (C. 606; R. 592). Agee appealed. (C. 603; SUP C. 4).

Appeal

Agee argued on appeal that post-conviction counsel's failure to plead an essential element of a claim that counsel added to Agee's amended petition was unreasonable and violated Illinois Supreme Court Rule 651(c), warranting further post-conviction proceedings and the appointment of new post-conviction counsel. The State argued the performances of both trial and post-conviction counsel were reasonable. The State did not contend post-conviction counsel had no duty to reasonably represent Agee when counsel added a claim to the amended petition.

In a summary order, the Second District Appellate Court affirmed the petition's dismissal "[b]ecause neither Rule 651(c) nor the [Post-Conviction Hearing] Act provides any basis for deeming that post-conviction counsel has a duty to adequately present a new claim, defendant's argument on appeal fails as a matter of law." *People v. Agee*, 2-20-0748, ¶ 10 (Dec. 23, 2021) (summary order).

Agee filed a petition for rehearing citing *People v. Milam*, 2012 IL App (1st) 100832, ¶ 36, and *People v. Nowlin*, 2021 IL App (4th) 190851-U, ¶ 56, both of

which held that post-conviction counsel must provide reasonable assistance when adding a new claim to a petition. The appellate court ordered the State to answer the rehearing petition. The State filed an answer, and Agee filed a reply. The appellate court denied the rehearing petition on April 11, 2022.

Agee filed a petition for leave to appeal, and this Court granted leave to appeal on September 28, 2022.

ARGUMENT

Post-conviction counsel failed to provide a reasonable level of assistance by failing to plead an essential element of a claim that counsel added to James Agee's amended post-conviction petition.

James Agee's *pro se* post-conviction petition alleged his trial counsel was ineffective for failing to consult with a mental health expert. (C. 242). The circuit court advanced the petition for second stage post-conviction proceedings and appointed counsel. (C. 268; R. 364). Post-conviction counsel's amended petition added a claim that trial counsel was ineffective for failing to inform Agee of the defense of second degree murder prior to the guilty plea, but the amended petition simply alleged, "Defendant would not have pled guilty had he been aware that he could have gone to trial and been found guilty of second-degree murder." (C. 278). Post-conviction counsel's representation was unreasonable because controlling caselaw has long held the bare allegation that Agee would have gone to trial had trial counsel informed him of a second degree murder defense was not enough to support the claim. To prevail, the amended petition was required to show Agee was innocent or had a plausible defense. *People v. Rissley*, 206 Ill.2d 403, 459-60 (2003); *People v. Hall*, 217 Ill.2d 324, 336 (2005); *People v. Hughes*, 2012 IL 112817, ¶ 64; *People v. Brown*, 2017 IL 121681, ¶ 45; *People v. Hatter*, 2021 IL 125981, ¶ 26.

On appeal, Agee argued post-conviction counsel's failure to plead an essential element of the claim that counsel added to the amended petition constituted unreasonable assistance. The appellate court held, though the argument was not advanced by the State, that no standard of representation was applicable when post-conviction counsel adds a claim to a petition, and thus

Agee's counsel's performance could not be unreasonable. *People v. Agee*, 2-20-0748, ¶ 10 (Dec. 23, 2021) (summary order). The appellate court's holding conflicts with this Court's longstanding post-conviction jurisprudence recognizing that post-conviction counsel's reasonable assistance at each stage of the proceedings is essential to assuring that potentially meritorious claims are not lost. This Court should follow this jurisprudence and hold that post-conviction counsel's failure to properly plead a claim that counsel added to a petition constitutes unreasonable assistance under 725 ILCS 5/122-4 (West 2018) and Illinois Supreme Court Rule 651(c) (West 2018). Further, this Court should reverse the petition's dismissal and remand Agee's case for further second stage post-conviction proceedings and the appointment of new post-conviction counsel.

A. This Court should hold in accordance with longstanding post-conviction jurisprudence that the reasonable assistance standard applies when post-conviction counsel adds a claim to a petition.

Interpretation of a statute or Illinois Supreme Court Rule is *de novo*. *People v. Salem*, 2016 IL 118693, ¶ 11.

The Post-Conviction Hearing Act ("Act") allows individuals to challenge their convictions under the United States and Illinois Constitutions. *See* 725 ILCS 5/122-1 *et seq.* (West 2018). Post-conviction proceedings have three stages. *People v. Tate*, 2012 IL 112214, ¶ 9. At the first stage, the petitioner is not appointed counsel and thus bears the responsibility of drafting the petition. *People v. Porter,* 122 Ill.2d 64, 71 (1988). If the circuit court determines the *pro se* petition is not frivolous or patently without merit, the court advances the petition to the second stage and appoints post-conviction counsel to represent the indigent petitioner. *Tate*, 2012 IL 112214, ¶¶ 9-10. At the second stage, post-conviction

counsel can amend the petition, and the State can file a motion to dismiss the petition. *Tate*, 2012 IL 112214, ¶¶ 9-10. If the State's motion is denied, the petition is advanced to the third stage and post-conviction counsel represents the petitioner at an evidentiary hearing. *Tate*, 2012 IL 112214, ¶ 10.

There is no constitutional right to post-conviction counsel. *People v. Smith*, 2022 IL 126940, ¶ 13. The right to post-conviction counsel is provided by the Act and Illinois Supreme Court Rule 651(c). Section 5/122-4 requires the circuit court to appoint counsel for an indigent post-conviction petitioner at the petitioner's request after the *pro se* petition survives summary dismissal. 725 ILCS 5/122-4 (West 2018). Supreme Court Rule 651(c) requires post-conviction counsel to: (1) consult with the petitioner by phone, mail, electronic means or in person to ascertain their contentions of a deprivation of constitutional rights; (2) examine the record of the proceedings at the trial; and (3) make any amendments to the petitions filed *pro se* necessary for an adequate presentation of petitioner's contentions. Illinois Supreme Court Rule 651(c) (West 2018). This Court has interpreted the Act and Rule 651(c) to require post-conviction counsel to provide a reasonable level of assistance to the petitioner: "'[s]ection 122-4 of the Code of Criminal Procedure [citation] and Supreme Court Rule 651 together ensure that post-conviction petitioners in this State receive a reasonable level of assistance by counsel in post-conviction proceedings.'" *Smith*, 2022 IL 126940, ¶ 13 (quoting *People v. Owens*, 139 Ill.2d 351, 359 (1990)).

This Court's precedent shows that post-conviction counsel's reasonable performance is critically important to the functioning of the Act. As this Court noted, ". . . the only way to ensure the purpose of the Act is fulfilled, *i.e.*, to ensure that criminal defendants are not deprived of liberty in violation of their

constitutional rights, is to provide some means of reviewing attorney performance. Otherwise, meritorious postconviction claims may be lost." *People v. Johnson*, 2018 IL 122227, ¶ 17.

This Court has repeatedly held that post-conviction counsel is required to provide reasonable assistance to prevent the loss of potentially viable legal claims. In *Johnson*, 2018 IL 122227, ¶ 17, this Court held that a private attorney at the first stage of post-conviction proceedings is required to provide a reasonable level of assistance. Similarly, in *People v. Cotto*, 2016 IL 119006, ¶ 42, this Court held that both retained and appointed counsel are required to provide reasonable assistance to their clients. In *People v. Perkins*, 229 Ill.2d 34, 49 (2007), this Court held that post-conviction counsel must seek to amend an untimely *pro se* petition to show the delay was not due to the petitioner's culpable negligence. This Court also held that post-conviction counsel's filing of an amended petition did not satisfy Rule 651(c) when nothing in the record showed counsel consulted with the petitioner about his claims. *People v. Suarez*, 224 Ill.2d 37, 43 (2007). This Court also held that post-conviction counsel is required to satisfy Rule 651(c) even though the petitioner's *pro se* petition was untimely. *People v. Lander*, 215 Ill.2d 577, 584 (2005). In *People v. Turner*, 187 Ill.2d 406, 414 (1999), this Court held that post-conviction counsel failed to provide the petitioner with a reasonable level of assistance when counsel ". . . failed to make a routine amendment to the post-conviction petition which would have overcome the procedural bar of waiver and elected to stand on a *pro se* petition, which omitted essential elements of petitioner's constitutional claims and contained virtually no evidentiary support." Finally, in *Smith*, 2022 IL 126940, ¶ 38, this Court held that post-conviction counsel need not demonstrate compliance with Rule 651(c) if a previous attorney

has done so, but it "stress[ed] that if postconviction counsel performs unreasonably–even after a presumption has arisen that there has been compliance with Rule 651(c)–postconviction petitioners are not foreclosed from pursuing a claim that counsel failed to provide a reasonable standard of representation."

These cases reflect this Court's consistent approach toward requiring that post-conviction counsel provide a reasonable level of assistance throughout the entire proceedings to ensure viable legal claims are not lost. Post-conviction counsel is not obligated to raise claims in addition to those alleged in the petitioner's *pro se* petition but counsel may choose to raise additional claims in an amended petition. *People v. Pendleton*, 223 Ill.2d 458, 475-76 (2006). However, the continuing requirement of reasonable assistance of counsel mandates that when post-conviction counsel raises a new claim, counsel should do so reasonably in order to ensure the claim is adequately presented pursuant to the Act and Rule 651(c). 725 ILCS 5/122-4 (West 2018); Illinois Supreme Court Rule 651(c) (West 2018).

In *Johnson*, 2018 IL 122227, ¶ 13, the defendant argued post-conviction counsel performed unreasonably at the first stage of the proceedings by failing to plead several claims in the petition. The State argued that no right to any level of attorney assistance existed at the first stage of post-conviction proceedings, just as the appellate court in Agee's case held that post-conviction counsel has no legal duty to adequately present a claim that counsel adds to a petition. *Johnson*, 2018 IL 122227, ¶ 19; *Agee*, 2-20-0748, ¶ 10. This Court rejected the State's assertion and held that an attorney retained to represent an individual at the first stage of proceedings must provide a reasonable level of assistance. *Johnson*, 2018 IL

122227, ¶ 23. This Court concluded, ". . . it would be absurd to say the legislature did not intend for privately retained counsel to provide a reasonable level of assistance at the first stage of postconviction proceedings." *Johnson*, 2018 IL 122227, ¶ 18. Again, reviewing the performance of post-conviction counsel to ensure potentially meritorious legal claims are not lost ensures that the Act's purpose is fulfilled. *Johnson*, 2018 IL 122227, ¶ 17.

Turning to Agee's case, it similarly would be absurd and undermine the Act's purpose to say the legislature did not intend for post-conviction counsel to provide a reasonable level of care when amending a petition with a new claim. It also would undermine Rule 651(c) to say that post-conviction counsel is not required to exercise reasonable care when amending a petition with a new claim that counsel added after consulting with the petitioner. Illinois Supreme Court Rule 651(c) (West 2018). A petitioner is entitled to reasonable representation when counsel formulates claims anew at the first stage of proceedings. *Johnson*, 2018 IL 122227, ¶ 23. A petitioner similarly should be entitled to reasonable representation when counsel adds a new claim at the second state of post-conviction proceedings. In both instances, counsel is consulting with the petitioner and adding a "new" claim to the petition, one that counsel believes has potential merit and should advance to the next stage of proceedings. *People v. Kuehner*, 2015 IL 117695, ¶ 15 (post-conviction counsel should not advance frivolous claims).

The First and Fourth District Appellate Courts have correctly followed the above cited precedent and held that post-conviction counsel's performance is unreasonable when counsel fails to adequately plead a claim that counsel added to the petition. In *People v. Milam*, 2012 IL App (1st) 100832, ¶ 36, post-conviction counsel raised a new claim in an amended petition that the defendant's confession

was involuntary when he did not have access to his lawyer at the time he signed a written confession. But counsel failed to allege that appellate counsel was ineffective for failing to raise the claim on direct appeal in order to counter the procedural bar of waiver. The appellate court concluded that post-conviction counsel's representation was unreasonable because, "[c]ounsel's failure to allege ineffective assistance of appellate counsel essentially amounted to a failure to present the due process claim in 'appropriate legal form' and placed defendant in the same position he would have found himself in had counsel not raised the claim at all." *Milam*, 2012 IL App (1st) 100832, ¶ 36 (quoting *Turner*, 187 Ill.2d at 406).

Similarly, in *People v. Nowlin*, 2021 IL App (4th) 190851-U, ¶ 56, the appellate court held that post-conviction counsel acted unreasonably in relation to a perjury claim that counsel added to the petition: "While appointed counsel is not obligated to add claims or affidavits to support a *pro se* petition's nonmeritorious claims, appointed counsel *added* this claim. If counsel was aware of his ethical obligations not to file futile or spurious claims, appointed counsel determined this claim had merit, as he signed the second amended petition, but then failed to provide the evidentiary support necessary to support this claim." (Emphasis in the original).[1] The appellate court concluded: "Here, without an affidavit, the circuit court could not ascertain whether a substantial showing of a constitutional violation could be made. Appointed counsel, by not attaching an affidavit from the witness, did not comply with Rule 651(c)'s mandate appointed counsel provide 'necessary' supporting documentation when counsel added a claim but failed to

[1] This unpublished case is cited as persuasive authority pursuant to Illinois Supreme Court Rule 23(e)(1) (West 2022). A copy of the decision is included in the appendix.

support it with evidence." *Nowlin*, 2021 IL App (4th) 190851-U, ¶ 58. Accordingly, the appellate court remanded the case for compliance with Rule 651(c). *Nowlin*, 2021 IL App (4th) 190851-U, ¶ 58.

In Agee's case, he argued on appeal that his post-conviction counsel provided unreasonable assistance in adding a new claim of trial counsel's ineffectiveness without correctly pleading the element of prejudice required for the claim to advance to an evidentiary hearing. Though the appellate court did not dispute that counsel consulted with Agee in presenting the claim or that counsel performed unreasonably in failing to adequately present it, the court held that Agee was not entitled to any level of competence with respect to counsel's advocacy for that new claim. Without citation to authority or any mention of *Milan* and *Nowlin*, the appellate court asserted, "Defendant is incorrect that Rule 651(c)–or the Act, for that matter–requires any level of representation by counsel in the presentation of new claims." *People v. Agee*, 2-20-0748, ¶ 8 (Dec. 23, 2021) (summary order). The appellate court concluded, "[b]ecause neither Rule 651(c) nor the [Post-Conviction Hearing] Act provides any basis for deeming that postconviction counsel has a duty to adequately present a new claim, defendant's argument on appeal fails as a matter of law." *Agee*, 2-20-0748, ¶ 10. The appellate court's holding left Agee with no remedy for counsel's failure to properly plead a potentially meritorious ineffective assistance of counsel claim and conflicts with this Court's longstanding jurisprudence that the Act depends on post-conviction counsel providing reasonable assistance to ensure that potentially viable claims are heard on their merits. *Johnson*, 2018 IL 122227, ¶ 17; *Cotto*, 2016 IL 119006, ¶ 42; *Perkins*, 229 Ill.2d at 49; *Suarez*, 224 Ill.2d at 43; *Lander*, 215 Ill.2d at 584; *Turner*, 187 Ill.2d at 414; *Smith*, 2022 IL 126940, ¶ 13.

Further, the appellate court's holding that petitioners are entitled to a reasonable level of assistance when counsel amends the petitioner's claims but not if counsel adds a new claim is problematic because it can be hard to distinguish between the petitioner's claims and a "new" claim added by counsel. Even in Agee case's, his *pro se* petition alleged trial counsel was ineffective for failing to investigate his mental state at the times of the offense and the plea. (C. 342-43). In the amended petition, counsel raised the claim that trial counsel was ineffective for failing to inform Agee of a second degree murder defense. (C. 277-78). At root, both claims concern trial counsel's failure to properly consider Agee's mental state at the time of the offense. Moreover, post-conviction counsel consulted with Agee about the second degree murder claim, and Agee no doubt agreed to add the claim to the petition. To hold that counsel has no duty whatsoever in presenting the new, but related, claim renders illusory Agee's right to the appointment of counsel who will consult with him as to his claims and make amendments necessary for an adequate presentation of his claims.

Furthermore, the appellate court's holding ignores the reality that *pro se* petitioners often raise incomplete legal claims that post-conviction counsel must shape into appropriate legal form. *Turner*, 187 Ill.2d at 413. Consider the following examples. A *pro se* petitioner alleges that trial counsel was ineffective for failing to call a witness who could offer exculpatory testimony, and post-conviction counsel refashions the allegation into an actual innocence claim. A *pro se* petitioner claims his sentence violates the Eighth Amendment, and post-conviction counsel alleges a proportionate penalties violation under the Illinois Constitution. A *pro se* petitioner claims a prosecution witness lied at trial, and post-conviction counsel alleges a violation of *Brady v. Maryland*, 373 U.S. 83

(1963). In these examples, would the claims added to the petition by counsel be considered to be the petitioner's or new? The appellate court's rule would require reviewing courts to determine whether claims had been raised in the original petition or added by counsel to decide whether the petitioner was entitled to any level of competence in presenting the claims.

Finally, under the appellate court's reasoning, no legal standard of performance is applicable to counsel's representation when a claim is new, rendering counsel's actions unreviewable by appellate courts. Again, the appellate court's holding contradicts this Court's long-standing and well-founded post-conviction jurisprudence that ensures post-conviction counsel provides reasonable assistance at all stages of the proceedings. *Johnson*, 2018 IL 122227, ¶ 17; *Cotto*, 2016 IL 119006, ¶ 42; *Perkins*, 229 Ill.2d at 49; *Suarez*, 224 Ill.2d at 43; *Lander*, 215 Ill.2d at 584; *Turner*, 187 Ill.2d at 414; *Smith*, 2022 IL 126940, ¶ 13. As this Court has stated, the Act depends on post-conviction counsel to present potentially meritorious claims to the courts, and reviewing the performance of counsel is indispensable to ensuring these claims are not squandered. *Johnson*, 2018 IL 122227, ¶ 17. This Court should follow its precedent and hold that post-conviction counsel must provide reasonable assistance when counsel adds a claim to a petition.

B. Agee's post-conviction counsel performed unreasonably by failing to plead all of the legal elements required for a claim counsel added to the amended petition.

Review of post-conviction counsel's performance is *de novo*. *Suarez*, 224 Ill.2d at 42.

As for Agee's case, post-conviction counsel's amended petition added the allegation that trial counsel was ineffective for failing to inform Agee about a second degree murder defense but counsel failed to allege he had a viable defense. (C. 276). A person commits the offense of second degree murder when at the time of the killing he or she is acting under a sudden and intense passion resulting from serious provocation by the individual killed, but he or she negligently or accidentally causes the death of the individual killed. 720 ILCS 5/9-2(a)(1) (West 2010). "Serious provocation is conduct sufficient to excite an intense passion in a reasonable person." 720 ILCS 5/9-2(b) (West 2010). Mutual combat is a form of serious provocation. *People v. Flores*, 282 Ill.App.3d 861, 867 (1st Dist. 1996).

The amended petition alleged the ". . . actions leading to the death of Davis occurred during the heat of an argument and that Defendant did not intend to kill or injure Davis," and ". . . at the time of Davis' death, Defendant was acting under a sudden and intense passion due to being seriously provoked by Davis." (C. 278). The petition also asserted, "Defendant would not have pled guilty had he been aware that he could have gone to trial and been found guilty of second-degree murder." (C. 278). Counsel attached to the amended petition an affidavit from Agee stating, "It was never discussed with me by my attorney that I could go to trial and be found guilty of second-degree murder." (C. 282). According to Agee, trial counsel said, ". . . if I did not accept the offer and went to trial, I would be found guilty of first-degree murder and sentence[d] to more than the 25 year offer." (C. 282). Agee also stated, "I did not believe that I had any alternative but to plead guilty," and "Had I known about the elements of second-degree murder I would not have pled guilty as I did." (C. 282-83).

This claim alleged trial counsel was ineffective for failing to advise Agee about a potential defense to the charges. (C. 276). A defendant is deprived of the right to counsel when: (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Hill v. Lockhart*, 474 U.S. 52, 57 (1985); *People v. Albanese*, 104 Ill.2d 504, 526 (1984).

In the guilty plea context, trial counsel's failure to ensure the defendant voluntarily and intelligently entered the guilty plea is objectively unreasonable. *Hill*, 474 U.S. at 58; *Rissley*, 206 Ill.2d at 457. "The failure of an attorney to inform his client of the relevant law clearly satisfies the first prong of the *Strickland* analysis adopted by the majority, as such an omission cannot be said to fall within 'the wide range of professionally competent assistance' demanded by the Sixth Amendment." *Hill*, 474 U.S. at 62 (White, J., concurring in judgment) (quoting *Strickland*, 466 U.S. at 690). "It is quintessentially the duty of counsel to provide her client with available advice about an issue . . ." prior to a guilty plea. *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). "In order to make an intelligent and informed decision [regarding a lesser included defense], the defendant obviously requires the advice of counsel to aid the defendant in evaluating the evidence and to apprise the defendant of any potential conflicts with the defense strategy pursued to that point in the trial, functions that a trial judge cannot perform for the defendant." *People v. Medina*, 221 Ill.2d 394, 406 (2006).

Trial counsel's failure to properly advise the defendant prior to a guilty plea is prejudicial if the defendant would have insisted on going to trial. *Hill*, 474 U.S. at 60. However, "[a] bare allegation that the defendant would have pleaded not guilty and insisted on a trial if counsel had not been deficient is not enough to

establish prejudice." *Hall*, 217 Ill.2d at 335. "Rather, the defendant's claim must be accompanied by either a claim of innocence or the articulation of a plausible defense that could have been raised at trial." *Hall*, 217 Ill.2d at 335-36.

The Act and Rule 651(c) required post-conviction counsel to adequately present the claim that trial counsel was ineffective for failing to advise Agree about a second degree murder defense. 725 ILCS 5/122-4 (West 2018); Illinois Supreme Court Rule 651(c) (West 2018); *Smith*, 2022 IL 126940, ¶ 13 (stating the Act and Rule 651(c) ". . . together ensure that post-conviction petitioners in this State receive a reasonable level of assistance by counsel in post-conviction proceedings"). As discussed below, the amended petition adequately pled the performance prong that trial counsel was objectively unreasonable for failing to advise Agee about a second degree murder defense, but it failed to present a viable claim of prejudice because post-conviction counsel made a "bare allegation" that Agee would not have pled guilty if trial counsel had informed him about that defense. *Hall*, 217 Ill.2d at 335.

Post-conviction counsel's amended petition adequately pled trial counsel's performance was objectively unreasonable. (C. 282-83). At the second stage of post-conviction proceedings, Agee's affidavit stating trial counsel did not advise him about a second degree murder defense was enough to establish that trial counsel's performance was deficient. *Hill*, 474 U.S. at 62; (C. 282-83). This is so because, at this stage of the proceedings, Agee's factual allegations must be taken as true. *People v. Coleman*, 183 Ill.2d 366, 380-81 (1998). Although trial counsel's supplemental answer asserted the affirmative defense of self-defense, and counsel filed supplementary discovery motions for evidence pursuant to *People v. Lynch*, 104 Ill.2d 194 (1984), nothing in the record shows counsel discussed a second

degree murder defense with Agee. (C. 32, 39, 63, 117). In addition, this claim was corroborated by Agee's *pro se* motion to reconsider sentence, which never received a ruling on its merits and argued the sentence was excessive because Agee did not want to plead guilty to first degree murder ". . . owing to my belief the charge should have been reduced to second degree murder, or involuntary manslaughter, due to the incident deriveing [*sic*] from a domestic dispute." (C. 218). Thus, liberally construing in Agee's favor the factual allegation that counsel did not inform him about a second degree murder defense, the pleadings show trial counsel's performance was objectively unreasonable. *Hill*, 474 U.S. at 58; *Coleman*, 183 Ill.2d at 380-81.

Post-conviction petition counsel added to the amended petition the allegation that trial counsel was ineffective for failing to inform Agee about a second degree murder defense, and thus counsel had a duty to reasonably present the claim. 725 ILCS 5/122-4 (West 2018); Illinois Supreme Court Rule 651(c) (West 2018); (C. 276-77, 282-83). Adequately presenting this claim meant counsel was required to plead that Agee was innocent or had a plausible defense. *Hall*, 217 Ill.2d at 335-36; *Rissley*, 206 Ill.2d at 459-60; *Hughes*, 2012 IL 112817, ¶ 64; *Brown*, 2017 IL 121681, ¶ 45; *Hatter*, 2021 IL 125981, ¶ 26. However, the amended petition did not adequately plead the claim's prejudice prong because it simply alleged the ". . . actions leading to the death of Davis occurred during the heat of an argument and that Defendant did not intend to kill or injure Davis," and ". . . at the time of Davis' death, Defendant was acting under a sudden and intense passion due to being seriously provoked by Davis." (C. 276). Neither the amended petition nor, more importantly, Agee's affidavit describe how Agee was provoked and how that provocation led Agee to strangle Davis. Agee's affidavit simply stated he would not

have pled guilty had trial counsel informed him about a second degree murder defense. (C. 282-93). Reasonable post-conviction counsel could have looked to Agee's statement to the police to support the claim. Agee told the police that he and Davis quarreled until Davis physically attacked him. (C. 529). She tried to hit him, grabbed his head, scratched him, and pulled his hair. (C. 498, 490, 491, 530). She fell to the floor. (C. 490). Agee got on top of her. (C. 490). She hit him and grabbed his hair, and he choked her until she passed out. (C. 490, 526, 530). Such evidence would have provided a starting point for developing a prejudice claim that Agee had a plausible second degree murder defense. Counsel's failure to plead that Agee had a plausible defense constituted unreasonable assistance. 725 ILCS 5/122-4 (West 2018); Illinois Supreme Court Rule 651(c) (West 2018); *Milam*, 2012 IL App (1st) 100832, ¶ 36; *Nowlin*, 2021 IL App (4th) 190851-U, ¶ 58.

Further, at the hearing on the State's motion to dismiss, post-conviction counsel stated the court could hear more about the claims from Agee at an evidentiary hearing. (R. 574). Counsel apparently was operating under the mistaken belief that he was not required to allege in the petition the factual allegations underlying the claim. However, an evidentiary hearing is warranted only when the petitioner's allegations make a substantial showing of a constitutional violation. *People v. Dupree*, 2018 IL 122307, ¶ 28. Post-conviction counsel's pleading of the prejudice element amounted to a ". . . bare allegation that the defendant would have pleaded not guilty and insisted on a trial if counsel had not been deficient [which] is not enough to establish prejudice." *Hall*, 217 Ill.2d at 335. Indeed, the State's moved to dismiss Agee's petition on the very ground that counsel had not adequately pled this claim. (C. 579).

Post-conviction counsel did not adequately present this claim as counsel failed to allege Agee had a viable defense. *Hall*, 217 Ill.2d at 335-36; *Rissley*, 206 Ill.2d at 459-60; *Hughes*, 2012 IL 112817, ¶ 64; *Brown*, 2017 IL 121681, ¶ 45; *Hatter*, 2021 IL 125981, ¶ 26. Thus, post-conviction counsel's representation was unreasonable and rebutted any presumption to the contrary by virtue of the filing of a Rule 651(c) certificate because counsel failed to plead an essential element of the ineffective assistance of counsel claim that counsel added to the amended petition. *Smith*, 2022 IL 126940, ¶ 13; (C. 276).

Post-conviction counsel's unreasonable failure to plead an essential element of the claim is no different from other omissions on the part of post-conviction counsel that led reviewing courts to remand for further post-conviction proceedings. For instance, in *People v. Dixon*, 2018 IL App (3d) 150630, ¶¶ 17-18, as in Agee's case, post-conviction counsel failed to allege the prejudice element of an ineffective assistance of counsel and relied on conclusory factual allegations to support the claim. *See also People v. Jones*, 2016 IL App (3d) 140094, ¶ 29 (post-conviction counsel failed to allege trial counsel was ineffective in order to adequately present the claim); *People v. Thompson,* 2016 IL App (3d) 150644, ¶ 24 (post-conviction counsel failed to supplement the petitioner's claim he was unfit to waive trial counsel with pretrial mental health records); *People v. Schlosser,* 2012 IL App (1st) 092523, ¶ 25 (post-conviction counsel failed to plead the ineffective assistance of appellate counsel in order to save a claim from waiver). In each of these cases, as well as Agee's, post-conviction counsel's unreasonable assistance resulted in the petitioner's claim not being adequately presented in violation of the Act and Rule 651(c).

Finally, post-conviction counsel's failure to comply with the Act and Rule 651(c) cannot be harmless because it is improper to speculate as to whether Agee's petition would have alleged a substantial constitutional violation had post-conviction counsel adequately presented this ineffective assistance of counsel claim. *Turner*, 187 Ill.2d at 416; *Suarez*, 224 Ill.2d at 48; *Milam*, 2012 IL App (1st) 100832, ¶ 36. As this Court has recognized, ". . . it is improper to determine the merit of petitioner's claims where counsel essentially did nothing to shape the petitioner's claims into the appropriate legal form." *Turner*, 187 Ill.2d at 416-17. Thus, this Court should remand the case for further second stage proceedings because the "Petitioner must be given an opportunity to replead his post-conviction petition with the benefit of reasonable assistance of counsel." *Turner*, 187 Ill.2d at 417. Further, Agee's case is unlike those in which the petition contains an otherwise fully-pled claim and post-conviction counsel merely failed to allege facts that would save the claim from procedural default. *See Schlosser,* 2012 IL App (1st) 092523, ¶ 25 (post-conviction counsel failed to amend the petition to avoid waiver of the claim). In those cases, a reviewing court may be in a position to evaluate the merits of the claim. In Agee's case, it remains to be seen whether this ineffective assistance of counsel claim has merit because of counsel's inadequate presentation of the claim. Thus post-conviction counsel's unreasonable assistance cannot be harmless because it is impossible to speculate as to whether his petition would have stated a substantial constitutional violation had counsel adequately presented this claim by alleging that Agee had a viable defense, a required element of the claim. *Turner*, 187 Ill.2d 406; *Hall*, 217 Ill.2d at 335-36; *Rissley*, 206 Ill.2d at 459-60; *Hughes*, 2012 IL 112817, ¶ 64; *Brown*, 2017 IL 121681, ¶ 45; *Hatter*, 2021 IL 125981, ¶ 26.

For these reasons, this Court should hold that post-conviction counsel failed to provide Agee with reasonable assistance, reverse the petition's dismissal, and remand the case to the circuit court for further second stage post-conviction proceedings and the appointment of new post-conviction counsel.

CONCLUSION

For the foregoing reasons, James Agee, petitioner-appellant, respectfully requests that this Court hold that post-conviction counsel failed to provide Agee with reasonable assistance, reverse the petition's dismissal, and remand the case to the circuit court for further second stage post-conviction proceedings and the appointment of new post-conviction counsel.

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 29 pages.

/s/Sean Collins-Stapleton
SEAN COLLINS-STAPLETON
Assistant Appellate Defender

APPENDIX TO THE BRIEF

James Agee No. 128413

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APPEAL TO THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
WINNEBAGO COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS
Plaintiff/Petitioner

Reviewing Court No: 2-20-0748
Circuit Court/Agency No: 2010CF002437
Trial Judge/Hearing Officer: DEBRA D.SCHAFER

v.

JAMES AGEE
Defendant/Respondent

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Second Judicial District Appellate Court No.: 2-20-0748

Report of Proceedings ("R")

No. 2-20-0748
Summary Order filed December 23, 2021

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 10-CF-2437
JAMES AGEE,	)	Honorable Debra D. Schafer,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Schostok and Birkett concurred in the judgment.

SUMMARY ORDER

¶ 1 Defendant, James Agee, appeals from the second-stage dismissal of his amended petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). He contends that, because appointed postconviction counsel neglected to plead an essential element of a claim that counsel added in amending defendant's *pro se* petition, counsel failed to fulfill his duty of reasonable assistance under the Act and Illinois Supreme Court Rule 651(c) (eff. July 1, 2017). Defendant asks us to remand the cause for further proceedings under the Act including the appointment of new postconviction counsel. As we explain, the requirement of reasonable postconviction representation, as created by the Act and implemented by Rule 651(c), extends only

to a petitioner's original claims brought before appointment or retention of counsel. Thus, defendant has no basis to object to postconviction counsel's treatment of a claim not originally raised. We, therefore, affirm the dismissal.

¶ 2 On May 3, 2012, defendant entered a guilty plea to one count of first-degree murder (720 ILCS 5/9-1(a)(1) (West 2010)) for the June 2010 strangulation death of Denise Davis. The court imposed the agreed-to sentence of 25 years' imprisonment.

¶ 3 On June 28, 2012, defendant filed, by counsel, a motion to withdraw the plea. Counsel conceded that the motion was untimely but explained that defendant "was unable to contact *** counsel to file [the] motion within the statutorily prescribed time period due to the circumstances of his incarceration." Defendant filed several *pro se* motions at approximately the same time. The trial court dismissed all the motions for lack of jurisdiction.

¶ 4 On October 2, 2013, defendant filed a *pro se* motion to withdraw his plea. He asserted that he had received the ineffective assistance of counsel in that trial counsel had failed to seek an expert to evaluate his mental state when he killed Davis. Defendant alternatively asked the court to construe his motion as a petition under the Act. After the trial court dismissed this new motion for lack of jurisdiction, defendant moved for reconsideration, asking again to have his motion treated as a petition under the Act. On May 9, 2014, the court granted the motion and advised defendant pursuant to *People v. Shellstrom*, 216 Ill. 2d 45, 46 (2005), of the consequences of recharacterizing his motion as a petition under the Act. Defendant confirmed that he wished to proceed under the Act. Defendant initially sought time to amend the petition but eventually decided to stand on the petition as originally filed. The court docketed the petition for second-stage review and appointed counsel for defendant.

¶ 5 On December 16, 2019, postconviction counsel filed an amended petition stating two claims. The first was an amended version of the claim in the *pro se* petition. The second was a new claim that trial counsel was ineffective for failing to consult with defendant about developing a defense to the charge of first-degree murder. Specifically, trial counsel

> "failed to advise [d]efendant that if he elected to go to trial, his attorneys could pursue a defense of second-degree murder base [*sic*] on the fact that at the time of Davis' death, [d]efendant was acting under a sudden and intense passion due to being seriously provoked by Davis and that her death was the result of his own negligence."

Defendant alleged that he "would not have pled guilty had he been aware that he could have gone to trial and been found guilty of second-degree murder." The petition was supported with defendant's affidavit.

¶ 6 Counsel filed a certificate of compliance with Rule 651(c) stating, among other things, that he had "made any amendments to the petition filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." The State moved to dismiss the petition on its merits, contending that defendant had failed to set out legally sufficient claims of ineffective assistance of counsel. As to the new claim added by counsel, the State asserted that defendant failed to demonstrate that he would have had a plausible defense at trial to the first-degree murder charge. The court granted the State's motion, and defendant timely appealed.

¶ 7 On appeal, defendant contends that postconviction counsel defectively pleaded the claim he added to the amended petition. Defendant asserts that, though postconviction counsel alleged that trial counsel was ineffective for failing to consult with defendant about the possibility of a second-degree murder conviction based on provocation, postconviction counsel failed to "describe how [defendant] was provoked [by Davis] and how that provocation led [defendant] to strangle

Davis." Defendant contends that this defect in pleading amounted to unreasonable representation in violation of the standards set by Rule 651(c). He recognizes that "[p]ost-conviction counsel is not obligated to raise claims in addition to those alleged in the petitioner's *pro se* petition." This principle is well established. See, e.g., *People v. Komes*, 2011 IL App (2d) 100014, ¶ 32. However, defendant claims that, "[w]hen post-conviction counsel does raise a new claim in an amended post-conviction petition, the claim should be adequately presented pursuant to the rule." Defendant cites Rule 651(c) alone for this proposition.

¶ 8 Defendant is incorrect that Rule 651(c)—or the Act, for that matter—requires *any* level of representation by counsel in the presentation of new claims. The interpretation of the duties imposed on postconviction counsel by Rule 651(c) and the Act is a question of law, and we thus address it *de novo*. See, *e.g.*, *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007) (the proper interpretation of a supreme court rule is reviewed *de novo*).

> "There is no constitutional right to the assistance of counsel in postconviction proceedings; the right to counsel is wholly statutory [citation], and petitioners are only entitled to the level of assistance provided for by the [Act] [citation]. [Citation] The Act provides for a reasonable level of assistance. [Citation.] To ensure that postconviction petitioners receive this level of assistance, Rule 651(c) imposes specific duties on postconviction counsel." *Suarez*, 224 Ill. 2d at 42.

Rule 651(c) applies only to counsel appointed or retained after a *pro se* petition has been filed. *People v. Cotto*, 2016 IL 119006, ¶ 41. Rule 651(c) provides in relevant part that the record on appeal from a dismissal or denial of a postconviction petition "shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney *** has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of *petitioner's*

contentions." (Emphasis added.) Ill. S. Ct. R. 651(c) (eff. July 1, 2017). Nothing in the plain language of Rule 651(c) imposes a duty on counsel as to claims that counsel adds to the *pro se* petition, and defendant makes no argument for reading the rule to imply such a duty. He simply cites the rule, as noted.

¶ 9 Our supreme court has interpreted the Act to limit counsel's duties to developing the claims originally raised by the petitioner:

> "Post-conviction counsel is only required to investigate and properly present the *petitioner's* claims. Had the legislature intended otherwise, it would, logically, have provided for the appointment of counsel prior to the filing of the original petition. Counsel's responsibility is to adequately present those claims which the *petitioner* raises. (Emphases in original.) *People v. Davis*, 156 Ill. 2d 149, 164 (1993).

¶ 10 Because neither Rule 651(c) nor the Act provides any basis for deeming that postconviction counsel has a duty to adequately present a new claim, defendant's argument on appeal fails as a matter of law.

¶ 11 For the reasons stated, we affirm the dismissal of defendant's postconviction petition.

¶ 12 Affirmed.

FILED
Date: 12/04/20
Thomas A. Klein
Clerk of the Circuit Court
By EB Deputy
Winnebago County, IL

IN THE CIRCUIT COURT OF THE 17Th JUDICIAL CIRCUIT
Winnebago COUNTY, STATE OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,
-vs-
James Agee,
Defendant/APPELLANT

NO. 2010 CF 2437

NOTICE OF APPEAL

An appeal is taken from the Order or Judgement described below:

1.) Court to which appeal is taken:
Illinois Appellate Court, 55 Symphony Way Elgin, IL 60120

2.) Name of appellant and address to which notices shall be sent:
Name: James Agee B75727
Address: Danville CC 3820 E. Main St Danville IL, 61834

3.) Name and address of appellant's attorney on appeal:
Name: Thomas A Lilien 2nd Dist App Ave
Address: One Douglas Ave Elgin, IL 60120
If appellant is indigent and has no attorney, does he want one appointed?
yes

4.) Date of Judgement or Order: 11-20-20

5.) Offense of which convicted: Murder

6.) Sentence: 25 yrs

7.) If appeal is not from a conviction, nature of Order appealed from:

Signed: James Agee

2021 IL App (4th) 190851

NO. 4-19-0851

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
December 8, 2021
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
MISOOK NOWLIN,	)	No. 11CF800
Defendant-Appellant.	)	
	)	Honorable
	)	J. Casey Costigan,
	)	Judge Presiding.

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices Cavanagh and Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The circuit court did not err in finding defendant failed to make a substantial showing the State knowingly presented the perjured testimony of a witness.

(2) Defendant was denied a reasonable level of representation during proceedings under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2014)).

¶ 2 Defendant, Misook Nowlin, appeals the circuit court's dismissal of her postconviction petition without an evidentiary hearing. On appeal, defendant argues (1) the circuit court erroneously dismissed her petition as she made a substantial showing the State knowingly presented the perjured testimony of a witness, Tonya Bean, during defendant's trial; and (2) she was denied the reasonable assistance of postconviction counsel as counsel failed to properly present her perjury claim and obtain an affidavit from a witness for the claim added by

appointed counsel. We agree with defendant's latter claim of error and reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 In September 2011, defendant was charged with three counts of first degree murder of her mother-in-law, Wenlan Linda Tyda, (720 ILCS 5/9-1(a)(1), (a)(2) (West 2010)) and one count of concealment of homicidal death (720 ILCS 5/9-3.4(a) (West 2010)). The State alleged on or about September 5, 2011, defendant knowingly and without lawful justification killed Wenlan, a person over 60 years of age, by applying pressure to her neck and then knowingly concealed her death with knowledge Wenlan died by homicidal means.

¶ 5 A. Defendant's Trial

¶ 6 At the start of defendant's December 2012 jury trial, defendant pleaded guilty to the concealment charge. The trial continued on the first degree murder charges.

¶ 7 Defendant's jury trial proceeded over multiple days in December 2012. The evidence establishes defendant, in 2011, lived in Bloomington, Illinois, with her husband, Don Wang, and their young son, D.W. Defendant owned a sewing shop, Kim's Sewing, in Bloomington. Wenlan resided in Crest Hill, Illinois, located in Will County. Wenlan was 70 years old and self-employed "in freelance translation."

¶ 8 The State's theory of the case was defendant killed Wenlan for the money. Defendant and Wang had been married approximately 13 years. In 2011, defendant suspected Wang was having an affair with Jenny Chen, who worked for Wenlan and was very close to Wenlan. As part of her business, Wenlan would often travel. On September 4, 2011, Wenlan received a phone call. The individual on the line spoke Mandarin and asked Wenlan to meet her at 5:30 a.m. at the Cub Foods' parking lot, as she needed a ride to Chinatown in Chicago. The woman offered Wenlan $500. That same day, Wenlan drove Wang to the airport, as he was

flying to California to renew his driver's license. Wenlan told Wang about the meeting. After Wenlan did not return home that day, her husband contacted the Crest Hill police. Bloomington police officers began contacting individuals Wenlan knew in Bloomington, including defendant. Testimony establishes defendant went to Hibachi Grill, asking for someone who spoke Mandarin to make a phone call for her. Defendant gave $20 to the woman who made the call for her.

¶ 9 In the investigation of Wenlan's disappearance, police officers learned defendant drove Wenlan's car to Chicago and parked it near Midway Airport. They also learned defendant took a Peoria Charter bus to Normal, Illinois, and a cab to her business. Officers further discovered defendant purchased, around 10 a.m. on September 6, 2011, a 50-gallon tub. After 6 p.m., defendant returned to Lowe's and purchased a shovel and furniture sliders.

¶ 10 When talking to the police, defendant denied the phone call and going to Hibachi Grill. Injuries were observed on defendant's arms, legs, and chest. Defendant said her son scratched her and she had fallen at work.

¶ 11 After being taken into custody, defendant wrote a letter to her adult daughter, Michelle Nowlin. Defendant admitted in that letter luring Wenlan to Bloomington but she did so to try to get Wenlan on her side to repair her marriage. Defendant wrote she knew Wenlan was angry with her and would not talk to her if she made the call herself. Defendant further told Michelle that Wenlan followed her from Cub Foods to the shop, where they fought and struggled outside until defendant grabbed Wenlan by her neck and choked her until she stopped. Defendant said she attempted to resuscitate Wenlan but could not. Then, defendant reported dragging Wenlan into the shop and keeping her there for a day or so.

¶ 12 Wenlan's husband, Larry Tyda, testified to a conversation he overheard between defendant and Wenlan days before Wenlan's disappearance. Defendant and Wenlan were

arguing on the phone. While they were arguing, the doorbell rang. Defendant was standing outside the house. She wanted to talk to Wenlan. Wenlan told her husband she was afraid of defendant. Defendant left after Larry threatened to call the police.

¶ 13 Wenlan's body was found on September 12, 2011, off Interstate 55, exit 241, in a shallow grave. The clothes from Wenlan had been removed, her identification removed, and she was buried in two black garbage bags. The cause of death was strangulation. The coroner testified manual strangulation usually causes a person to lose consciousness within 10 to 15 seconds and causes death in three to six minutes.

¶ 14 During defendant's jury trial, the State called Tonya Bean to testify. At the beginning of her testimony, Bean admitted having been convicted, in 2008, of felony driving while her license was revoked. In December 2011, Bean was incarcerated in McLean County jail on a charge of aggravated battery with a deadly weapon. Another case for aggravated battery was also pending at that time. During her time in jail, Bean interacted with other inmates, including defendant. Bean met defendant during the two and a half months they were incarcerated. Bean had not met defendant before that time. Bean and defendant were in the same pod, a common area for inmates.

¶ 15 Bean testified defendant told her about the events of September 4, 2011. On September 4, defendant talked to an employee at Imperial Buffet. Defendant told Bean she went to "Imperial Garden" because she was very upset with her husband. Defendant wanted to go there to get him fired. When defendant went to the restaurant, she spoke with a woman who worked there and offered her $20 to call her mother-in-law, pretend she needed an interpreter, and tell her to meet her at Cub Foods in Bloomington at 5:30 a.m. the next day. Defendant told Bean she wanted to meet Wenlan at Cub Foods "to pretty much confront her about things, about

what was going on with her and her husband's marriage." Defendant said her husband was cheating and he would be in California on September 5, 2011. Defendant worried they would get divorced.

¶ 16 According to Bean, defendant said she took $10,000 from a joint account she shared with Wang and Wenlan. Defendant did so because she was afraid Wang would leave her and she would have no money. Defendant met Wenlan at Cub Foods at 5:30 a.m. on September 5, 2011. The two argued because "it was kind of like a set up." Defendant told Wenlan she had two checks for her but did not want to argue at Cub Foods. The two went across the street to defendant's business. When the two exited their vehicles, they argued about the marriage again and "the situation of Jenny." Once inside defendant's business, "they got physical." Defendant told Bean the following about the strangulation: "[Defendant] started choking her mother-in-law and her mother-in-law started choking her back and *** her mother-in-law was trying to say something and she kind of let her loose and she said I just wish you and Don would get back together, you know, and be happy. And she just started choking her and killed her."

¶ 17 Defendant told Bean she got a plastic tub with a lid on it, put Wenlan's body in the tub, and placed the tub in the back of her store. While this was occurring, D.W. was sleeping in the back of defendant's car. The tub remained in defendant's store for about a day. It began to smell "like rotten eggs." Defendant called a friend to help move a tub "of dishes" into the back of defendant's car. Defendant then drove to Chicago to Chen's house to see if Wang and Chen were there. Defendant "had a rubber mallet and she said that she was going to knock them out." However, Wang and Chen were not there, and defendant began to panic. Defendant began driving back to Bloomington. She looked for a "dark exit," where she turned off and found a wooded area. Defendant had a shovel she bought from Lowe's and dug a hole. When defendant

removed the tub from her car, she fell and scraped her knees. Defendant buried Wenlan. Defendant confided Wenlan had a $250,000 life insurance policy and defendant believed, whether married or divorced, she would be entitled to some of the money.

¶ 18 Bean testified her conversation with defendant upset her. Bean returned to her cell and began to write down everything she could remember from her conversation with defendant. Bean then asked to speak to the police as soon as possible. On December 22 or 23, Bean met with Detective Barkes from the Bloomington Police Department. Bean told Detective Barkes about her conversation with defendant. Her notes were entered into evidence. The day after Bean's conversation with Detective Barkes, she attended a hearing to lower her bond on the charge of aggravated battery with a deadly weapon. The State did not object to her motion as a favor to her. Bean posted bond. Her case remained pending and was set for trial. On the day trial was to begin, the State dropped the charges due to an uncooperative victim, Bean's fiancé.

¶ 19 Defendant's theory of the case was that she was acting in self-defense and the asphyxiation was unintentional.

¶ 20 Testifying on her own behalf, defendant stated she and Wang married in 2003. D.W. was born in 2006. In May 2011, defendant learned of Wang's relationship with Chen. Defendant learned of phone conversations the two were having. The two talked 300 to 400 minutes every day. This started in 2010, she believed. Defendant was afraid of what would happen to her and D.W. should her marriage fall apart as she had only $200. The day after she learned of the affair, she went to the bank and withdrew all the money from the joint bank account she shared with Wenlan and Wang. The two decided to stay together, but approximately a month later, defendant learned from a hostess at Imperial Buffet, where Wang worked, that Wang and Chen continued to have a relationship.

¶ 21 According to defendant, she met with Wang's boss, Raymond Poon, who was good friends with Wenlan and Wang. Defendant told Poon of her marital problems and Wang's cheating. She also told him she wanted $50,000, child support, and alimony as part of a divorce settlement. Defendant told Poon she did not want defendant working at Imperial Buffet as Wang had been stealing money from the restaurant and receiving an unemployment check from California. Defendant was hoping if Wang lost his job, they would return to California together.

¶ 22 Defendant testified Wenlan called about Wang losing his job. Wenlan was very angry. Defendant denied Wang had been fired. Poon had told him to take care of his marriage and then return to work. Defendant attempted to call Wenlan multiple times but Wenlan refused to talk to her. Defendant attempted to visit her at her home. When Wenlan answered defendant's calls, Wenlan would not listen. She yelled and screamed at defendant.

¶ 23 Defendant explained she went to Hibachi Grill to find someone to call Wenlan because Wenlan, who was "so mad," would not talk to defendant. When Wenlan arrived at Cub Foods, she was surprised to see defendant and upset she had been tricked. Defendant told Wenlan she wanted to go to Chicago with D.W. and Wenlan and they could talk about "things." Defendant wanted Wenlan's help. Wenlan remained angry. Wenlan left Cub Foods first. Defendant returned to her shop so D.W. could sleep on the futon. While there, defendant was happy to see Wenlan pull into the parking lot. Defendant was hopeful Wenlan was there to help her. Defendant went to Wenlan's car and attempted to hug her. Wenlan pushed defendant and pushed her again. When defendant fell, Wenlan picked up defendant's shoes and began striking defendant in the head with them. The two fought in the parking lot. Wenlan was wearing "a big sweater" and had a pocketbook. After Wenlan held onto defendant's leg, defendant held very tightly to Wenlan. She twisted her clothing. Wenlan started to choke defendant. At one point,

defendant was on top of Wenlan. Wenlan stopped fighting. Defendant believed Wenlan passed out. Defendant did not know Wenlan had died.

¶ 24 According to defendant, she attempted to resuscitate Wenlan. Defendant did not call 911 because she could not believe what had happened and she was scared.

¶ 25 The jury found defendant guilty of first degree murder. The trial court sentenced defendant to consecutive prison terms of 50 years for first degree murder and 5 years for concealment. Defendant pursued direct appeals of both convictions. Regarding her first degree murder conviction, defendant argued she was entitled to a new trial as the trial court "allowed the prestige of the State's Attorney's office to artificially enhance Detective Barkes's credibility as a witness" by allowing him to sit at the State's table during trial. *People v. Nowlin*, 2015 IL App (4th) 130387-U, ¶¶ 3, 17. We affirmed defendant's murder conviction. *Id.* ¶ 37. Regarding the concealment conviction, defendant argued her guilty plea must be vacated due to the trial court's failure to admonish her sentences would run consecutively. *People v. Nowlin*, 2017 IL App (4th) 150957-U, ¶ 2. Because defendant did not file a motion to withdraw her guilty plea, we lacked jurisdiction to consider defendant's claim. *Id.* ¶ 15.

¶ 26 B. *Pro Se* Postconviction Petition

¶ 27 In September 2015, defendant filed a *pro se* petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)), asserting multiple claims. Among the claims in her petition were allegations she was denied the effective assistance of counsel as counsel failed to present photographs of her injuries during trial and advised her improperly of the sentencing ranges for her alleged crimes. Defendant further asserted she was denied due process when the trial court denied her request for an interpreter, her husband testified falsely, and "the State knowingly used the perjured testimony during her trial to secure a conviction."

For that last claim, defendant identified Bean as the witness who provided the perjured testimony. In support of the perjury claim, defendant attached an affidavit signed by Tonya Findley. The affidavit states the following, in part:

> "I[,] Tonya Findley, being duly sworn under oath, do hereby depose and state that the following is true and correct to the best of my knowledge:
>
> 1. The information contained herein[ ] is based upon my personal knowledge.
>
> 2. If sworn as a witness, I am competent to testify to the matters herein.
>
> 3. I have not been threatened, forced, or promised anything in exchange for providing this affidavit.
>
> 4. In 2011[,] I met [defendant] in Mc[L]ean County Jail, and she had bruises that were blue and dark purple around her neck[,] as if someone had tried to kill her.
>
> 5. I asked her what happened to her and she stated to me that she got into an argument with her mother-in-law, and that her mother[-]in[-]law started choking her.
>
> 6. I left Mc[L]ean County [on] October 6, 2011[,] and was in Chestnut [T]reatment Center.
>
> 7. In 2013, I returned to Mc[L]lean County Jail for a "dirty drop" and was mandated to do drug treatment.
>
> 8. While in Mc[L]ean County[,] I was living on the same

block with Tonya Bean who testified against [defendant].

9. I had heard rumors that Tonya testified against [defendant], so I asked Tonya what happened.

10. Tonya stated that she never liked [defendant,] so she contacted the [S]tate and asked if she gave them information against [defendant], would they drop her (Tonya's) charges.

11. Tonya Bean stated that she was told by the [S]tate that if she could provide them with any information against [defendant], she could go home.

12. Tonya Bean stated to me that [defendant] never told her that she wanted to kill or have a violent confrontation with her mother-in-law.

13. Tonya Bean stated to me that most of her testimony was information the states attorney [*sic*] told her to say.

14. Tonya Bean also stated that she got information about [defendant's] case from the news and having family/friends look up [defendant's] case via [the] internet.

15. I have specific knowledge and information, personal knowledge that Tonya Bean committed perjury when she testified against [defendant] and that the prosecutor knew she was not being truthful."

¶ 28 On November 30, 2015, the trial court advanced the petition to the second stage of postconviction proceedings and appointed counsel to represent defendant.

¶ 29 C. Amended Postconviction Petition

¶ 30 On September 22, 2017, at a status hearing, counsel, Assistant Public Defender Jeff Brown, informed the circuit court he had just been "reassigned this case last week." In December 2017, Brown filed on defendant's behalf an amended postconviction petition. In this amended petition, counsel presented two claims for postconviction review. In the first claim, defendant argued her due process rights were violated when the State presented false testimony by Bean that "could in any reasonable likelihood have affected the judgment of the jury." The petition alleged, in part, Bean obtained information about defendant's case from the news and family and friends, as well as from prosecutors in the case. Counsel attached to the amended petition the Findley affidavit. In the second claim in the amended petition, a claim not relevant here, defendant argued she was denied due process as she entered a guilty plea in exchange for an agreed-upon sentence but received a more onerous sentence than agreed upon.

¶ 31 On January 24, 2018, Assistant Public Defender Ronald Lewis filed a motion seeking to allow the McLean County Public Defender's Office to withdraw as defendant's counsel. Lewis asserted he had been assigned the case. Lewis asserted the McLean County Public Defendant's Office had a conflict of interest as a member of that office had defended defendant at her trial and claims of ineffective assistance had been raised. The circuit court denied the motion, finding no conflict of interest with the "contract attorneys" for the public defender's office. Later, however, the circuit court allowed the public defender's office to withdraw and appointed "an attorney from McLean County who is in private practice" to represent defendant. On June 8, 2018, the circuit court appointed attorney Joshua Rinker as counsel to represent defendant on her postconviction petition.

¶ 32 D. Second Amended Postconviction Petition

¶ 33 On March 12, 2019, defendant, represented by Rinker, filed a second amended postconviction petition, asserting three arguments: (1) defendant's right to due process was violated when the State presented the false testimony of Bean and the testimony contributed to her conviction; (2) defendant's rights to due process and fundamental fairness were violated because, at the time of her guilty plea to concealment, defendant was not advised of the consecutive nature of her sentences; and (3) defendant was denied the effective assistance of counsel when trial counsel failed to investigate or call her neighbor, Ana L. Glanaras, to testify in support of defendant's claim of self-defense. As to the last claim, defendant argued she informed trial counsel of a witness, her neighbor Glanaras, who saw defendant "just after the alleged incident when the bruising would have been more pronounced." Defendant asserted trial counsel failed to investigate or call Glanaras regarding this bruising. In support of this new claim, defendant attached an affidavit she signed. The second amended postconviction petition included Findley's affidavit.

¶ 34 In May 2019, the State moved to dismiss defendant's postconviction petition. The State argued, in part, defendant failed to allege facts showing the State knew Bean's testimony was false and defendant's ineffective-assistance-of-counsel claim failed as it was contradicted by the record and defendant failed to attach an affidavit from Glanaras.

¶ 35 In a written filing in response to the motion, defendant argued all well-pleaded allegations and the affidavit testimony must be taken as true. Defendant further argued, "[t]he mere fact that Tonya Bean made these statements to Findley is impeachable evidence which could have been used by trial counsel to undermine the credibility of Tonya Bean's testimony" during trial. As to the claim regarding Glanaras, defendant cited *People v. Dupree*, 2018 IL 122307, ¶ 34, 124 N.E.3d 908, as showing there is no bright-line rule requiring an affidavit in all

instances where this type of claim is raised.

¶ 36 A hearing was held on the State's motion to dismiss. At the hearing, defense counsel Rinker stated the following:

> "Your Honor, I think that the—looking first to the issue—I guess I'm calling issue one, about the affidavit or lack thereof from the various Tonyas in the case. I will admit it gets confusing. We have an affidavit from one entity or one party here who says, Hey, somebody else told me they actually lied when they testified during the course of their trial. I guess what we're arguing to the Court is that whether or not that actually is true, that they did lie when they testified during the course of the trial, it is impeachable evidence that the defense attorney during the course of the trial could have used to impeach the credibility of that witness through cross-examination. And I think that that is a distinction that's important here because if we are going to take at this stage of the proceedings Tonya Findley's affidavit as true, then it is impeachable evidence on Tonya Bean's truth and veracity, whether or not Tonya Bean was being truthful when she said that."

The circuit court specifically asked defense counsel about the State's argument there was nothing in the affidavit to establish the State had knowledge of Bean's alleged perjury. To that, defense counsel responded:

> "The [timeline] here would suggest that this affidavit came out after trial counsel could have even known that this affidavit

existed. So how can she raise an ineffective assistance of counsel claim against the trial attorney for not having brought this witness forward when he didn't know that the witness existed. So we uncovered the existence of this affidavit after that consideration would have come about. I think we can all agree that if it's taken as truth, it's certainly impeachable evidence. It would have been something that could have been used by trial counsel during the course of cross-examination to impeach the credibility of that witness and that that would have been important evidence for my client or for her benefit.

***

And I'm circling back to the answer to the Court's question which is, our position here today I think must be that to require my client at this stage to prove that the State knew that that was false testimony is not what we are asking the Court to do. We don't think the Court has to do that. It would be our position that the existence of this affidavit alone taken as truth, knowing that it would have been impeachable evidence is sufficient. That would be our position."

¶ 37 As to the issue regarding Ana Glanaras's purported testimony, defense counsel argued there was a significant time gap between the alleged incident and when defendant was taken into custody. Defense counsel argued Glanaras's testimony would describe defendant's injuries before healing would have occurred. Defense counsel argued if Glanaras could establish

the injuries were more pronounced or egregious, that would have corroborated defendant's claim of self-defense. When asked if this would be waived, defense counsel said the record does not show Ana Glanaras was a potential witness.

¶ 38 The circuit court granted the State's motion. The court emphasized there were no allegations in the postconviction petitions the State knowingly used false or perjured testimony and thus there were no facts to establish defendant's due process rights were violated. As to her ineffectiveness claim, the circuit court found it "refuted by the record." The court found the following:

> "There is no affidavit as to what Ana Glanaras would testify to only allegations by the Petitioner which, for the purposes of this motion, the court takes as true. However, the record shows [defendant] was able and did present evidence of self-defense at trial. The trial judge specifically noted this in 2013 at a *Krankel* hearing. At best, Glanaras['s] testimony would be cumulative to what was already presented. The Court does not find Defendant's right to effective assistance of counsel was violated for failing to present cumulative evidence."

¶ 39 This appeal followed.

¶ 40 II. ANALYSIS

¶ 41 A. Due Process

¶ 42 Defendant first argues the circuit court erred in granting the State's motion to dismiss as she made a substantial showing the State knowingly presented the perjured testimony of Bean.

¶ 43 The Act sets forth procedures by which a criminal defendant may assert, in the proceedings that led to his or her conviction, there was a substantial denial of his or her constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2014). A proceeding under the Act is a collateral attack on the conviction that provides limited review of constitutional claims not raised at trial. *People v. Greer*, 212 Ill. 2d 192, 203, 817 N.E.2d 511, 518 (2004). When a defendant files a petition under the Act, a circuit court reviews that petition and determines whether it is frivolous or patently without merit. *Id.* at 203-04. Petitions that survive this review advance to the second stage of proceedings where counsel is appointed, and an amended petition may be filed. *People v. Andrews*, 403 Ill. App. 3d 654, 659, 936 N.E.2d 648, 653 (2010). In response, the State may answer the petition or move to dismiss it. 725 ILCS 5/122-5 (West 2014). To survive a motion to dismiss and advance to a third-stage evidentiary hearing, the defendant must make a substantial showing a constitutional violation occurred. *People v. Pendleton*, 223 Ill. 2d 458, 473, 861 N.E.2d 999, 1008 (2006). "To accomplish this, the allegations in the petition must be supported by the record in the case or by its accompanying affidavits." *People v. Coleman*, 183 Ill. 2d 366, 381, 701 N.E.2d 1063, 1072 (1998). In ruling on the motion, the circuit court must take all well-pleaded factual allegations not positively rebutted by the record as true. *Id.* at 380-81. We review *de novo* the question of whether the postconviction petition makes a substantial showing of a constitutional violation. *People v. Johnson*, 205 Ill. 2d 381, 389, 793 N.E.2d 591, 597 (2002).

¶ 44 The State's knowing use of perjured testimony to obtain a criminal conviction violates a defendant's constitutional right to due process. *People v. Simpson*, 204 Ill. 2d 536, 552, 792 N.E.2d 265, 278 (2001). "A conviction obtained by the knowing use of perjured testimony must be set aside if there is any reasonable likelihood that the false testimony could

have affected the jury's verdict." *People v. Olinger*, 176 Ill. 2d 326, 345, 680 N.E.2d 321, 331 (1997). To establish a constitutional violation cognizable under the Act, there must be "an allegation of knowing use of false testimony." *People v. Brown*, 169 Ill. 2d 94, 106, 660 N.E.2d 964, 970 (1995). Without an allegation of the knowing use of false testimony or lack of diligence on the State's part, a defendant has not shown involvement by the State to establish a violation of due process. *Id.*

¶ 45 In support of her claim she made a substantial showing the State "knowingly" used perjured testimony, defendant highlights the following language in Findley's affidavit: "Tonya Bean stated to me that most of her testimony was information the states attorney [*sic*] told her to say."

¶ 46 We find defendant has not made a substantial showing the State knowingly used perjured testimony. The highlighted, vague statement does not show the information provided by the State was information that was false or the State knew to be false. According to the evidence at trial, Bean recorded the conversation in writing an hour after it occurred and that documentation was provided to the State. Without factual allegations regarding the content of the information provided by the State, defendant has failed to make a substantial showing the State provided information it knew to be false.

¶ 47 In the alternative, defendant argues the taken-as-true allegations in her postconviction petition and supporting documentation, considered with the facts of the case, "strongly suggest implicit knowledge on the part of the State." Defendant points to the statements that if Bean received knowledge from the news and her family and friends, the State should have realized she had no more information than did the general public. Defendant contends if Bean gathered information from conversations with the prosecutors, the State should

have realized her testimony changed. Defendant maintains the fact Bean benefitted from speaking to the police and the prosecution further suggests the prosecution had knowledge Bean's testimony was false. Defendant also emphasizes that during Bean's testimony, Bean misstated the name of Imperial Buffet as "Imperial Garden," which merged the names of the two restaurants connected to Wang (Imperial Buffet and Lucky Garden). Defendant concludes that such a misstatement occurred randomly seemed implausible "*unless* the reason she confused them was because the prosecution provided her with information involving or documents containing both names."

¶ 48 We are not convinced "strongly suggest" is sufficient to satisfy the substantial-showing-of-a-constitutional-violation threshold of second-stage review. Nor are we convinced by defendant's long list of what-if scenarios. Without factual allegations, this string of speculative statements is insufficient to establish implicit knowledge. The substantial-showing threshold requires more, and defendant's postconviction filings fail to meet that threshold.

¶ 49 B. Reasonable Assistance of Counsel

¶ 50 Defendant next argues she was denied the reasonable assistance of counsel as counsel, despite filing a certificate averring compliance with Illinois Supreme Court Rule 651(c) (eff. July 1, 2017), failed to properly present and support her perjury claim and failed to attach an affidavit from the named witness in her ineffective-assistance-of-counsel claim.

¶ 51 Under the Act, appointed counsel is expected to provide reasonable assistance. *People v. Suarez*, 224 Ill. 2d 37, 42, 862 N.E.2d 977, 979-80 (2007). Rule 651(c) is designed to ensure such reasonable assistance is provided to postconviction petitioners. *People v. Turner*, 187 Ill. 2d 406, 411, 719 N.E.2d 725, 728 (1999). That rule "requires appointed counsel to consult with the petitioner to ascertain his contentions, examine the record of the trial

proceedings, and make any amendments to the *pro se* petition necessary for an adequate presentation of the petitioner's complaints." *People v. Nelson*, 2016 IL App (4th) 140168, ¶ 15, 49 N.E.3d 1007. The mandate counsel make necessary amendments is not limitless, however. *Id.* ¶ 16. For example, there is no obligation for counsel to search for sources outside the record that may support general claims in a postconviction petition. *Id.* In addition, amendments to a *pro se* petition that would simply further a claim that is frivolous or patently without merit are not "necessary." *Greer*, 212 Ill. 2d at 205. Appointed counsel is, however, prohibited by ethical obligations from advancing frivolous or spurious claims. *Id.*

¶ 52 In addition, appointed counsel must file a certificate stating he or she complied with Rule 651(c). Ill. S. Ct. Rule 651(c) (eff. July 1, 2017). This certificate creates a presumption the defendant received reasonable assistance. See *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23, 955 N.E.2d 1200. A defendant may overcome that presumption by showing counsel failed to comply substantially with the requirements of Rule 651(c). *Id.* The failure to comply with Rule 651(c) cannot be remedied or excused by a finding the postconviction petition did not contain a meritorious issue. *Suarez*, 224 Ill. 2d at 51-52. The analysis under Rule 651(c) is "driven, not by whether a particular defendant's claim is potentially meritorious, but by the conviction that where postconviction counsel does not adequately complete the duties mandated by the rule, the limited right to counsel conferred by the Act cannot be fully realized." *Id.* at 51. Noncompliance with the rule will not be excused as harmless error. *Id.*

¶ 53 In this case, defendant acknowledges appointed counsel filed a Rule 651(c) certificate but argues the record rebuts the presumption reasonable assistance was afforded. Defendant argues the record establishes appointed counsel acted unreasonably when he failed to present her perjury claim properly and when he failed to include evidentiary support for

defendant's ineffective-assistance claim.

¶ 54 The record establishes appointed counsel, in the second amended petition, added the ineffective-assistance-of-counsel claim based on trial counsel's failure to present testimony from Ana Glanaras, defendant's neighbor, regarding defendant's injuries as they appeared "just after the alleged incident when the bruising would have been more pronounced." This claim did not appear in either the *pro se* or the amended postconviction petitions. Appointed counsel did not, however, include an affidavit by Glanaras.

¶ 55 The State argues no error occurred as appointed counsel is under no obligation to add claims or affidavits to support nonmeritorious claims. The State further cites *People v. Johnson*, 154 Ill. 2d 227, 241, 609 N.E.2d 304, 311 (1993), as showing a circuit court may reasonably presume postconviction counsel made a concerted effort to obtain affidavits in support of the postconviction claims but was unable to do so. In addition, the State argues this was clearly a nonmeritorious claim as defendant did not mention Glanaras when the trial court conducted a *Krankel* inquiry after her trial and, therefore, forfeited this claim.

¶ 56 The State's argument is misplaced. While appointed counsel is not obligated to add claims or affidavits to support a *pro se* petition's nonmeritorious claims, appointed counsel *added* this claim. If counsel was aware of his ethical obligations not to file futile or spurious claims, appointed counsel determined this claim had merit, as he signed the second amended petition, but then failed to provide the evidentiary support necessary to support this claim.

¶ 57 The record reveals appointed counsel's failure to provide evidentiary support to a claim he added may have resulted from the belief such an affidavit was unnecessary. At the hearing on the State's motion to dismiss defendant's second amended petition, appointed counsel argued he need not attach an affidavit based on the *Dupree* court's refusal to adopt a bright-line

rule requiring an affidavit in all instances where an ineffectiveness claim is raised based on trial counsel's failure to call a witness. *Dupree*, 2018 IL 122307, ¶ 34. Yet *Dupree* plainly establishes "[i]n cases where a postconviction petitioner raises a claim of ineffective assistance based on counsel's failure to call a witness, an affidavit from the proposed witness will be required if it is essential for the postconviction petition to make the necessary 'substantial showing' to support a claim of ineffective assistance." *Id.* The *Dupree* court acknowledged, "It may be true that in most cases where this type of claim is raised, without an affidavit, there can be no way to assess whether the proposed witness could have provided evidence that would have been helpful to the defense." *Id.*

¶ 58 Here, without an affidavit, the circuit court could not ascertain whether a substantial showing of a constitutional violation could be made. Appointed counsel, by not attaching an affidavit from the witness, did not comply with Rule 651(c)'s mandate appointed counsel provide "necessary" supporting documentation when counsel added a claim but failed to support it with evidence. This case must be remanded for compliance with Rule 651(c).

¶ 59 We further find troubling, appointed counsel's handing of defendant's due process claim. In her *pro se* petition, defendant explicitly alleged she was denied due process when the State knowingly presented Bean's perjured testimony at trial. Such a claim requires proof the State had knowledge of the falsity of that testimony when elicited at trial. See *Brown*, 169 Ill. 2d at 106. Appointed counsel, who is discharged by Rule 651(c) to make "any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions," presented the same due process claim in the second amended petition but removed the allegation of "knowing" from defendant's *pro se* petition. Then, in responding to the State's motion to dismiss, appointed counsel abandoned the original due process claim to

argue defendant need not prove the State's malfeasance but somehow should "be allowed the opportunity to cross-examine that witness at a new trial to impeach the credibility of that witness." Although appointed counsel elected to proceed on a claim defendant was denied "due process," counsel proceeded as though the State's conduct was irrelevant to that claim despite the fact a violation of due process does not occur absent an involvement by the State. See *Brown*, 169 Ill. 2d at 106 ("In the absence of an allegation of the knowing use of false testimony, or at least some lack of diligence on the part of the State, there has been no involvement by the State in the false testimony to establish a violation of due process.").

¶ 60 The State argues the decision to remove "knowing" from the original allegations was based on the following: "[c]learly, post-conviction counsel had nothing to support a claim that the State knowingly presented perjured testimony at trial, so [he] did not make that allegation and took 'knowingly' out of the allegation that had been in the *pro se* petition." If that is the case, then appointed counsel knowingly filed a futile due process claim as counsel did not even attempt in the drafting of the second amended petition to satisfy the elements of defendant's claim. Either appointed counsel failed to make necessary amendments to preserve defendant's *pro se* claim or counsel violated his ethical obligations by filing a baseless claim after determining defendant's claim was meritless. See generally *Greer*, 212 Ill. 2d at 205 ("An attorney *** who determines that defendant's claims are meritless cannot in good faith file an amended petition on behalf of defendant.").

¶ 61 While the circuit court commendably considered the allegations in all three of the postconviction petitions filed in this case, despite not needing to do so, we cannot excuse the absence of reasonable representation for defendant. As this court observed in *People v. Shortridge*, 2012 IL App (4th) 100663, ¶ 15, 964 N.E.2d 679, "[o]ur decision here should not be

construed as any indication of whether the allegations set forth in defendant's petition have merit." Our finding "rests solely on the conduct of postconviction counsel during these proceedings." *Id.* We reverse the order dismissing defendant's second amended petition and conclude new counsel should be appointed to represent defendant on remand. See *id.* An amended petition may be filed, and second-stage proceedings should occur.

¶ 62 III. CONCLUSION

¶ 63 We reverse the circuit court's judgment and remand for second-stage proceedings.

¶ 64 Reversed and remanded.

No. 128413

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, No. 2-20-0748.
Respondent-Appellee,	)	There on appeal from the Circuit Court of the Seventeenth Judicial
-vs-	)	Circuit, Winnebago County, Illinois, No. 10 CF 2437.
JAMES AGEE,	)	Honorable Debra D. Schafer,
Petitioner-Appellant.	)	Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Mr. James Agee, Register No. B75727, Danville Correctional Center, 3820 East Main Street, Danville, IL 61834

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 November 18, 2022, 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-appellant in an envelope deposited in a U.S. mail box in Chicago, 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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