No. 122227

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, No. 4-16-0449.
Respondent-Appellee,	)	There on appeal from the Circuit Court of the Sixth Judicial Circuit,
-vs-	)	Champaign County, Illinois, No. 08- CF-1424.
GRANVILLE S. JOHNSON	)	Honorable John R. Kennedy,
Petitioner-Appellant.	)	Judge Presiding.

BRIEF AND ARGUMENT FOR PETITIONER-APPELLANT

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ORAL ARGUMENT REQUESTED

POINT AND AUTHORITIES

The trial court erred in summarily dismissing Granville S. Johnson's postconviction petition where retained counsel provided unreasonable assistance by refusing to include meritorious issues in the initial petition, and where Mr. Johnson raised those meritorious issues in his motions to reconsider the dismissal of his petition, thereby presenting the gist of a meritorious claim.

A.

The appellate court erred in holding that a petitioner who retains counsel is not entitled to a reasonable level of assistance when filing an initial postconviction petition.

B.

Mr. Johnson properly raised, and the trial court erroneously refused to consider, meritorious issues in his motions to reconsider the dismissal of his postconviction petition.

1.

The appellate court erred in finding that a petitioner waives issues newly raised in a motion to reconsider the dismissal of a postconviction petition.

NATURE OF THE CASE

Granville S. Johnson, petitioner-appellant, appeals from a judgment dismissing his petition for postconviction relief.

An issue is raised concerning the sufficiency of the postconviction pleadings.

ISSUE PRESENTED FOR REVIEW

Whether the trial court erred in summarily dismissing Granville S. Johnson's postconviction petition where retained counsel provided unreasonable assistance by refusing to include meritorious issues in the initial petition, and where Mr. Johnson raised those meritorious issues in his motions to reconsider the dismissal of his petition, thereby presenting the gist of a meritorious claim.

STATUTES AND RULES INVOLVED

725 ILCS 5/122-4 (West 2014). Pauper Petitions.

"If the petition is not dismissed pursuant to Section 122-2.1, and alleges that the petitioner is unable to pay the costs of the proceeding, the court may order that the petitioner be permitted to proceed as a poor person and order a transcript of the proceedings delivered to petitioner in accordance with Rule of the Supreme Court. If the petitioner is without counsel and alleges that he is without means to procure counsel, he shall state whether or not he wishes counsel to be appointed to represent him. If appointment of counsel is so requested, and the petition is not dismissed pursuant to Section 122-2.1, the court shall appoint counsel if satisfied that the petitioner has no means to procure counsel. A petitioner who is a prisoner in an Illinois Department of Corrections facility who files a pleading, motion, or other filing that purports to be a legal document seeking post-conviction relief under this Article against the State, the Illinois Department of Corrections, the Prisoner Review Board, or any of their officers or employees in which the court makes a specific finding that the pleading, motion, or other filing that purports to be a legal document is frivolous shall not proceed as a poor person and shall be liable for the full payment of filing fees and actual court costs as provided in Article XXII of the Code of Civil Procedure." 725 ILCS 5/122-4 (West 2014).

STATEMENT OF FACTS

Granville S. Johnson was charged with the murder of Gregory Moore, and the attempted murder of Isaac Moore. (Vol. I, C. 1-10) His first two trials were declared mistrials as the juries were unable to reach a verdict. (Vol. XXI, R. 99; Vol. XXVII, R. 110)

During the third trial, Isaac testified that on July 30, 2008, his cousin Gregory and their friend Amandrae McGill picked him up after work. (Vol. XXXIV, R. 327-330) The three of them then stopped by McGill's house to pick up cigars because it was Isaac's "intention that [they] were going to go pick up weed, and [they] needed more cigars." (Vol. XXXIV, R. 330) By the time they reached their next stop, Roper Street, they had "started to smoke part of a blunt," and Isaac admitted that he was "high." (Vol. XXXIV, R. 331, 369)

Shortly after they arrived at Roper Street, Isaac observed Gregory talking to Mr. Johnson through the driver's side window. (Vol. XXXIV, R. 334-335) Gregory had previously introduced Mr. Johnson as a longtime friend, and had explained "that they grew up together, and [that] they were friends when they grew up." (Vol. XXXIV, R. 333) In fact, Gregory and Isaac had met up with Mr. Johnson on multiple occasions to "sit and talk" and "sometimes [they] would smoke" cannabis. (Vol. XXXIV, R. 333-334)

According to Isaac, Gregory and Mr. Johnson then entered a residence on Roper Street, and Anthony Jamerson approached the passenger's side of the vehicle to converse with him and McGill. (Vol. XXXIV, R. 335-337) However, McGill insisted that no one approached the vehicle while Gregory was inside the residence. (Vol. XX, R. 6) Isaac testified that minutes after Gregory returned to the vehicle, Mr. Johnson

approached the driver's side window and shot at him and Gregory. (Vol. XXXIV, R. 337-343, 373) They suffered gunshot wounds, and Gregory was later pronounced dead. (Vol. XXXIV, R. 343-345, 400-401)

Nine to ten days after the incident, Jamerson was arrested on a parole violation warrant, and interrogated by the police as a suspect in the investigation. (Vol. XXXV, R. 471-473) Because Jamerson maintained at trial that he could not recall anything from the night of the incident or from his interrogation due to his "drinking," the State was allowed to play a portion of the interrogation to the jury. (Vol. XXXVI, R. 606-620, 622, 630)

During the interrogation, Jamerson initially insisted that he was not present during the shooting, but rather that he was in the vicinity, heard the shots, and was told that "the Mexicans did it." (Vol. III, C. 557) Then Jamerson stated that he heard "on the streets" that Mr. Johnson "did it." (Vol. III, C. 558) It was only after the officer suggested that Jamerson might be involved, and that there was evidence that he was standing near the vehicle, that he claimed Mr. Johnson fired the shots. (Vol. III, C. 563-566) Jamerson expounded that Mr. Johnson "chased" after the two individuals who exited the vehicle, and that during a later conversation Mr. Johnson told Jamerson, "you ought to be happy." (Vol. III, C. 584-585)

McGill voluntarily spoke to officers, and when he was shown a photo lineup that included a picture of Mr. Johnson and "a couple of other people [that] [he] kn[e]w," he indicated that he did not recognize anyone in the photos as being the suspect that shot Gregory. (Vol. XXXV, R. 522, 528; Vol. XX, R. 19) While McGill testified at the first two trials, he was declared unavailable prior to the third trial, and defense counsel was allowed to present McGill's recorded testimony from the first trial. (Vol. II, C. 486-94; Vol. XXXII, R. 20-22; Vol. XXXVII, R. 666)

In the first trial, McGill testified that he was friends with Isaac, and he was sitting in the back seat behind Gregory on the day of the incident. (Vol. XX, R. 3, 5) He stated that he saw the face of the shooter, but he did not recognize the person. (Vol. XX, R. 8, 10) McGill observed that the shooter was either "black or Hispanic." (Vol. XX, R. 8, 10)

The State was allowed to present portions of McGill's testimony from the second trial as rebuttal evidence. (Vol. XXXVIII, R. 748) When the State questioned McGill's ability to see the shooter's face with Gregory's head and a pillar obstructing his line of sight, McGill responded, "I don't know; whatever it was, it wasn't blocking my view." (Vol. XXXVIII, R. 755-756) The State also queried why McGill could not identify the shooter's race considering the detailed description he provided of the shooter's clothing and gun, and McGill explained that his focus was on the gun and the clothing more so than the shooter's face. (Vol. XXXVIII, R. 757-758) McGill unequivocally stated that Mr. Johnson was not the shooter. (Vol. XX, R. 18)

A cell phone recovered from Gregory's vehicle showed that the last calls dialed and received were associated with the name Bub, which was Mr. Johnson's nickname. (Vol. XXXVI, R. 592) Officers seized tan Timberline boots and a shirt worn by Mr. Johnson a few days after the incident. (Vol. XXXV, R. 517; Vol. XXXVI, R. 554-556) The sample from the boots did not contain enough information to either exclude or imply any positive deoxyribonucleic acid (DNA) associations with Gregory, Isaac, or Mr. Johnson. (Vol. XXXVI, R. 600-601) The sample from Mr. Johnson's shirt matched his DNA profile. (Vol. XXXVI, R. 602) The gun was never recovered. (Vol. XXXV, R. 418; Vol. XXXV, R. 499, 524)

Isaac agreed that he did not observe Gregory engage in "any sort of argument" with Mr. Johnson that night, and he did not feel there was any animosity between

Gregory and Mr. Johnson. (Vol. XXXIV, R. 369) Isaac affirmed that he called Mr. Johnson's attorneys, on his own initiative, and informed them that he did not know with certainty who shot Gregory. (Vol. XXXIV, R. 354, 381-384) At trial, Isaac claimed that he lied to Mr. Johnson's attorneys to protect his family. (Vol. XXXIV, R. 357)

Isaac admitted that he and Gregory were informants for the Champaign Police Department. (Vol. XXXIV, R. 387-388; Vol. XXXV, R. 426, 436-437) In 2007, because "the community knew [that] Greg[ory] was a snitch," the Champaign Police Department gave Isaac and Gregory $500 to relocate to Indianapolis, Indiana. (Vol. XXXV, R. 447) According to Isaac, upon returning to Champaign, Illinois, in 2008, he and Gregory were caught selling crack cocaine, and he was charged with unlawful delivery of a controlled substance. (Vol. XXXIV, R. 352-353, 390-391; Vol. XXXV, R. 447) Isaac eventually pleaded guilty to delivering cocaine, and was sentenced to 30 months of probation. (Vol. XXXIV, R. 353, 392) Isaac confirmed that in July 2009, he was arrested for theft and the State filed a petition to revoke probation that was pending in August 2009, at the time of the third trial. (Vol. XXXIV, R. 353-354)

While working as an informant in 2007, Gregory provided Officer Jaceson Yandell with information that led to a search of Brandon Baker's home, and the seizure of a gun and "substantial amounts of crack and cocaine." (Vol. XXXV, R. 443-444) After his arrest, Baker disclosed that his source was Fidel Garcia. (Vol. XXXV, R. 444) Gregory also provided information about Edmundo Alvarado, from whom he had bought varying amounts of cannabis several times. (Vol. XXXV, R. 444-445) That same year, Gregory informed on Norberto and Octaviano Sanchez in a case where approximately 1200 grams of cocaine and $37,000 in cash were seized. (Vol. XXXV, R. 445)

In one case, after Gregory participated in a controlled buy, he entered a vehicle with officers. (Vol. XXXV, R. 450-451) As they were driving away, Yandell noticed that Otis Powell, a known drug dealer, and Stanley Roundtree, an associate, were following behind. (Vol. XXXV, R. 451, 454) Shortly thereafter, Powell shot Gregory and Isaac. (Vol. XXXIV, R. 390-391; Vol. XXXV, R. 451-452) No one was arrested for that incident. (Vol. XXXIV, R. 391)

Yandell testified that he was "extremely concerned" about Gregory's safety in the summer of 2008 because "his name had gotten out on the street in the drug community as working for the police." (Vol. XXXV, R. 428) Yandell believed Gregory might be killed, "be[] involved in a shooting, or [be] beat up" because they "were dealing with quite a few people at the time." (Vol. XXXV, R. 429)

In the first two trials, Yandell did not testify that the individuals that Gregory had informed upon were either in the custody of a law enforcement agency, or in Mexico, at the time Gregory was killed. (Vol. XVII, R. 72-116; Vol. XXIV, R. 94-136) In regards to Octaviano, Yandell said that he fled, but did not specify where he fled to. (Vol. XVII, R. 79, 105; Vol. XXIV, R. 103) As for Alvarado, Yandell said that to his knowledge, Alvarado was never arrested and that he had requested the investigation be closed because his confidential source, Gregory, was deceased. (Vol. XVII, R. 105-106)

In the third trial, however, Yandell testified that Baker, Garcia, Alvarado, and the two Sanchezes did not learn of Gregory's identity. (Vol. XXXV, R. 453) Yandell further stated that with the exception of Octaviano, who fled back to Mexico, all of the other individuals were in the custody of a law enforcement agency at the time that Gregory was killed. (Vol. XXXV, R. 454) Yandell attributed his knowledge of everyone's whereabouts to Champaign Police Department records and a confidential source who was familiar with Octaviano. (Vol. XXXV, R. 457-459)

At the conclusion of the third trial, the jury found Mr. Johnson guilty of murder and attempted murder, and he was sentenced to consecutive prison terms of 53 years and 32 years. (Vol. XXXVIII, R. 852; Vol. XLI, R. 73-74)

Direct Appeal

On direct appeal, counsel argued that the State failed to exercise due diligence in obtaining DNA test results and therefore was not entitled to an extension of the speedy-trial deadline. (Appendix, *People v. Johnson*, 2012 IL App (4th) 090893-U.) Counsel alternatively contended that even if the State properly received an extension of the deadline, the State should have received only a 29-day extension and the State failed to bring Mr. Johnson to trial within the authorized time. (Appendix, *People v. Johnson*, 2012 IL App (4th) 090893-U.) The appellate court affirmed Mr. Johnson's convictions on September 14, 2012. (Appendix, *People v. Johnson*, 2012 IL App (4th) 090893-U.)

Postconviction Petition

In April 2014, Mr. Johnson's privately retained counsel, Timothy J. Witczak, filed a postconviction petition on behalf of Mr. Johnson. (Vol. IV, C. 827-839) In the petition, Witczak argued that: 1) Mr. Johnson's right to a speedy trial was violated; (2) the State presented incomplete evidence to the trial court regarding the necessity for a continuance of the speedy trial clock; and (3) trial counsel was ineffective for failing to present this evidence to the trial court. (Vol. IV, C. 827)

The trial court dismissed Mr. Johnson's postconviction petition in June 2014. (Vol. IV, C. 842-844) The court found that trial counsel's failure to file a motion to reconsider the trial court's finding of diligence and the alleged violation of Mr. Johnson's speedy trial rights "were all matters of record that were or could have been raised on direct appeal," and thus Mr. Johnson was procedurally barred from asserting the issues. (Vol. IV, C. 843) The court also found that the claim

of ineffective assistance of counsel did not satisfy *Strickland v. Washington*, 466 U.S. 668 (1984), because "[t]he claim that the [c]ourt would or should have reconsidered its ruling *** [wa]s speculative at most." (Vol. IV, C. 843-844) Indeed, the court concluded that "[t]here [wa]s no probability that such a motion would or should have changed the result." (Vol. IV, C. 844) On June 23, 2014, Witczak filed a notice of appeal on behalf of Mr. Johnson. (Vol. IV, C. 848)

In July 2014, Mr. Johnson filed a *pro se* motion to reconsider. (Vol. IV, C. 853) Mr. Johnson asserted that his postconviction counsel was ineffective for failing to claim: 1) ineffective assistance of direct appeal counsel on the issues raised in the postconviction petition; 2) ineffective assistance of trial and direct appeal counsel for failing to raise the issue of presenting Jamerson's recorded statement to the police as substantive evidence; and 3) ineffective assistance of direct appeal and postconviction counsel for failing to raise a double jeopardy issue raised by trial counsel. (Vol. IV, C. 853-66) Mr. Johnson averred that he told counsel he wanted him to include these, and other, issues but counsel declined to do so. (Vol. IV, C. 859, 865)

Mr. Johnson noted that when he questioned postconviction counsel about amending the petition to include other issues,

> "counsel respond[ed] in [a] way that confused [him] and then beg[a]n questioning [him] about payment. [Mr. Johnson] mailed counsel['s] letter to [his] family, to show [his] family [that] counsel was complaining about money and that they needed to make payments. Th[at] [wa]s the reason said letter [wa]s not attached to th[e] motion. [Mr. Johnson] d[id] not believe that he c[ould] attach said letter in [the] future. After receiving [the] last letter from counsel about money and why he didn't raise ineffective [assistance] of direct appeal counsel[,] [Mr. Johnson] never heard [f]rom counsel again, until [the] court dismiss[ed] the petition. [Mr. Johnson] wanted and had every intention of adding other meritorious issues to his [p]etition[,] including but not limited to the ones discussed in th[e] motion." (Vol. IV, C. 861)

Because Mr. Johnson filed the motion to reconsider after his counsel filed a notice of appeal, the trial court did not consider the motion. (Vol. IV, C. 873) The Fourth District on appeal remanded the case to the trial court for compliance with Illinois Supreme Court Rule 606(b) to allow the court to consider Mr. Johnson's timely *pro se* motion to reconsider. (Vol. IV, C. 932)

On remand, Mr. Johnson filed a *pro se* supplemental motion for reconsideration. (Vol. IV, C. 934) Mr. Johnson asserted: 1) ineffective assistance of trial and direct appeal counsel where unreliable hearsay was allowed into evidence that alternate suspects had left town or were in jail at the time of the shooting based on information gathered from a confidential informant and Champaign Police records; 2) ineffective assistance of trial counsel for asking the question that led to the inadmissible hearsay that Yandell received information that Octaviano fled to Mexico from a confidential source; 3) ineffective assistance of counsel for failing to object to Yandell's answer because "no foundation was laid as to how Yandell gain[ed] the knowledge that none of the Mexican men learned the identity of Gregory [] being a snitch[;]" 4) ineffective assistance of trial counsel for failing to object to Yandell's answer as to the foundation and the source of his knowledge that Mr. Johnson was associates with Powell and Roundtree; 5) ineffective assistance of counsel for failing to raise a valid double jeopardy claim after his first and second trial; and 6) ineffective assistance of counsel for failing to subpoena or ask for a continuance to get McGill, a key witness, to testify. (Vol. IV, C. 934-942)

The trial court, in denying Mr. Johnson's motions to reconsider, did not consider the merits of the issues raised in the motions because they were "attempts to allege new postconviction issues not previously raised in the prior petition." (Vol. IV, C. 944-945) Thus, the court found that the claims were forfeited. (Vol. IV, C. 944-945)

Postconviction Appeal

In June 2016, Mr. Johnson appealed. (Vol. IV, C. 947) Counsel on appeal argued that where private counsel filed Mr. Johnson's initial postconviction petition and counsel refused to include additional issues that Mr. Johnson wanted to raise, the trial court should have considered whether counsel's representation was unreasonable. *People v. Johnson*, 2017 IL App (4th) 160449, ¶ 3. Counsel additionally asserted that because at least one of the issues Mr. Johnson wanted to raise stated the gist of a meritorious claim, the case should be remanded for second-stage postconviction proceedings. *Johnson*, 2017 IL App (4th) 160449, ¶ 3.

In March 2017, the appellate court affirmed the dismissal of Mr. Johnson's postconviction petition, and found that:

> "(1) neither the Act nor case law indicates a prisoner sentenced to a term of imprisonment is entitled to reasonable assistance at the first stage of postconviction proceedings, (2) to find such an entitlement would require us to judicially disengage the guarantee of reasonable assistance from the underlying right to counsel at second-stage proceedings so that the former can exist independently of the latter, and (3) awarding such an entitlement would lead to disparate treatment among prisoners similarly situated except with regard to the means to obtain counsel." *Johnson*, 2017 IL App (4th) 160449, ¶ 41.

This Court granted leave to appeal on September 27, 2017.

ARGUMENT

The trial court erred in summarily dismissing Granville S. Johnson's postconviction petition where retained counsel provided unreasonable assistance by refusing to include meritorious issues in the initial petition, and where Mr. Johnson raised those meritorious issues in his motions to reconsider the dismissal of his petition, thereby presenting the gist of a meritorious claim.

Granville S. Johnson's privately retained postconviction counsel provided unreasonable assistance by raising issues in the initial postconviction petition that were either barred by *res judicata* or "speculative at most." (Vol. IV, C. 842-844) Even more egregious is that counsel failed to include additional issues identified by Mr. Johnson. (Vol. IV, C. 859, 865) At least one of those issues, all of which involve the improper testimony of Officer Jaceson Yandell, contained the gist of a meritorious constitutional claim sufficient to advance Mr. Johnson's petition to the second stage under the Post-Conviction Hearing Act. (Vol. IV, C. 934-942)

Although these issues were brought to the attention of the trial court in motions to reconsider, the court found these issues were forfeited because they were not previously raised in the petition. (Vol. IV, C. 944-945) On appeal, after finding that Mr. Johnson was not entitled to reasonable assistance at the first stage of postconviction proceedings, the Fourth District did not address the merits of Mr. Johnson's claims. *People v. Johnson*, 2017 IL App (4th) 160449, ¶ 36. Because the loss of viable constitutional violations is a severe penalty to endure for retaining counsel, Mr. Johnson respectfully requests that this Court remand for second-stage consideration under the Post-Conviction Hearing Act and the appointment of counsel.

A.

The appellate court erred in holding that a petitioner who retains counsel is not entitled to a reasonable level of assistance when filing an initial postconviction petition.

The Sixth Amendment right to counsel does not extend to collateral appeals, such as postconviction proceedings. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). Instead, the right to assistance of counsel in postconviction proceedings is wholly statutory. *People v. Turner*, 187 Ill. 2d 406, 410 (1999). A postconviction petitioner is guaranteed the level of assistance provided by the Post-Conviction Hearing Act. *People v. Hardin*, 217 Ill. 2d 289, 299 (2005).

Standard of Review

Whether a postconviction petitioner is entitled to a reasonable level of assistance at first-stage proceedings under the Post-Conviction Hearing Act presents a question of law that this Court reviews *de novo*. *People v. Cotto*, 2016 IL 119006, ¶ 24.

Authorities

The Post-Conviction Hearing Act (Act) provides a process by which an incarcerated individual may challenge a conviction by asserting that it was the result of a substantial denial of rights under the United States or Illinois Constitutions, or both. 725 ILCS 5/122-1 *et seq.* (2014). Since the Act was enacted in 1949, the standard by which this Court has reviewed postconviction counsel's representation has evolved. Albert E. Jenner, Jr., *The Illinois Post-Conviction Hearing Act*, 9 F.R.D. 347 (1950). Originally "it was anticipated that most of the petitions under the Act would be filed *pro se* by prisoners who had not had the aid of counsel in their preparation." *People v. Slaughter*, 39 Ill. 2d 278, 285 (1968);

725 ILCS 5/122-4 (2014) (counsel may be appointed if the petition advances to the second stage). The Act, however, does not bar petitioners from retaining postconviction counsel to file their initial petition. *People v. Anguiano*, 2013 IL App (1st) 113458, ¶ 16. Indeed, since 1969, this Court has reviewed initial postconviction petitions filed by retained counsel. *People v. Mayfield*, 42 Ill. 2d 318, 319 (1969). But "[r]eviewing counseled petitions under a *pro se* centered statute has led to some difficulties." *Anguiano*, 2013 IL App (1st) 113458, ¶ 17.

With regard to appointed counsel's standard of representation, in 1966, this Court held that a petitioner's claims must be "adequately present[ed]." *People v. Ashley*, 34 Ill. 2d 402, 412 (1966). No more than two years later, this Court in *Slaughter* determined that "[t]he statute can not perform its function unless the attorney appointed to represent an indigent petitioner ascertains the basis of his complaints, shapes those complaints into appropriate legal form and presents them to the court." *Slaughter*, 39 Ill. 2d at 285. Illinois Supreme Court Rule 651(c) codified the *Slaughter* directive by listing the specific duties required of counsel in postconviction proceedings. Ill. S. Ct. R. 651(c) (eff. July 1, 2017). Pursuant to Rule 651(c), counsel must consult with the petitioner by phone, mail, electronic means or in person to ascertain his contentions of deprivation of constitutional rights, examine the record of the trial proceedings, and make any amendments to the *pro se* petition that are necessary for an adequate presentation of the petitioner's contentions. Ill. S. Ct. R. 651(c) (eff. July 1, 2017).

Roughly thirty years after *Slaughter*, this Court addressed the standard required of postconviction counsel where the petitioner initially files the petition *pro se*, and then retains counsel during second-stage proceedings under the Act.

People v. Richmond, 188 Ill. 2d 376, 378 (1999). In *Richmond*, this Court abandoned the distinction between appointed and retained counsel as to Rule 651(c) because there was "no apparent reason not to impose on retained counsel *** the same requirements *** impose[d] on appointed counsel representing a defendant who originally files a *pro se* post[]conviction petition." *Richmond*, 188 Ill. 2d at 381; *Cotto*, 2016 IL 119006, ¶ 31.

As this Court developed the Rule 651(c) standard of representation, it also advanced a "reasonable level of assistance" standard. *People v. Mitchell*, 189 Ill. 2d 312, 358 (2000). For more than two decades, this Court has held that the Act mandates a postconviction petitioner be provided a "reasonable level of assistance by counsel." *People v. Owens*, 139 Ill. 2d 351, 359 (1990); *Cotto*, 2016 IL 119006, ¶ 30. While Rule 651(c) only applies to petitions that are initially filed *pro se*, the reasonable level of assistance standard is not subject to that limitation. *Cotto*, 2016 IL 119006, ¶ 41. This Court "has treated the reasonable assistance standard as generally applying to all postconviction defendants without reference to Rule 651(c) or between retained or appointed counsel." *Cotto*, 2016 IL 119006, ¶ 41. In *Cotto*, this Court stated:

> "This court has also required reasonable assistance from privately retained postconviction counsel *at the first* and second stage of postconviction proceedings. See *People v. Mitchell*, 189 Ill. 2d 312, 358 [] (2000) (reviewing retained counsel's performance under the reasonable assistance standard). Notably, this court has never held that the reasonable assistance standard is inapplicable to a postconviction defendant who retained private counsel or otherwise distinguished between appointed and retained counsel for purposes of that standard." (Emphasis added.) *Cotto*, 2016 IL 119006, ¶ 32.

Analysis

Cotto therefore implies, but did not hold, that petitioners who retain counsel at the first stage are entitled to a reasonable level of assistance from retained

counsel. *Cotto*, 2016 IL 119006, ¶ 32. Nevertheless, the appellate courts have concluded that because the Act does not expressly provide the right to counsel at the first stage of postconviction proceedings, petitioners represented by retained counsel are not entitled to reasonable assistance at the first stage. *People v. Johnson*, 2017 IL App (4th) 160449, ¶¶ 36, 41; *People v. Garcia-Rocha*, 2017 IL App (3d) 140754, ¶ 29; *People v. Shipp*, 2015 IL App (2d) 131309, ¶ 16; *People v. Kegel*, 392 Ill. App. 3d 538, 541 (2d Dist. 2009).

In so concluding, the appellate court dismissed this Court's "comment" in *Cotto* that retained postconviction counsel must provide reasonable assistance at the first stage by distinguishing *People v. Mitchell*, 189 Ill. 2d 312 (2000), the authority this Court relied on. *Johnson*, 2017 IL App (4th) 160449, ¶ 40; *Cotto*, 2016 IL 119006, ¶ 32. The appellate court speculated that reasonable assistance was required in *Mitchell* solely because it was a death penalty case where the petitioner was statutorily entitled to counsel at the first stage of postconviction proceedings. *Johnson*, 2017 IL App (4th) 160449, ¶¶ 40-41. But this Court "itself made no such distinction in *Cotto*." *Garcia-Rocha*, 2017 IL App (3d) 140754, ¶ 54 (McDade, J., concurring in part and dissenting in part).

In *Cotto*, the petitioner appealed from the second-stage dismissal of his postconviction petition, and argued that his retained postconviction counsel failed to provide him with a reasonable level of assistance. *Cotto*, 2016 IL 119006, ¶ 15. The question before this Court was whether a postconviction petitioner was entitled to a reasonable level of assistance from retained counsel *after* first-stage postconviction proceedings. *Cotto*, 2016 IL 119006, ¶ 25. To that end, this Court held that "[b]oth retained and appointed counsel must provide reasonable assistance to their clients after a petition is advanced from first-stage proceedings." *Cotto*,

2016 IL 119006, ¶ 42. But merely because this Court's holding was based upon the posture of the case under its consideration does not negate this Court's statement as to the reasonable level of assistance standard applicable to retained first-stage postconviction counsel. *Garcia-Rocha*, 2017 IL App (3d) 140754, ¶ 56 (McDade, J., concurring in part and dissenting in part).

The appellate court, however, narrowly interpreted *Cotto*, reasoned that it was distinct from this case, and found:

> "(1) neither the Act nor case law indicates a prisoner sentenced to a term of imprisonment is entitled to reasonable assistance at the first stage of postconviction proceedings, (2) to find such an entitlement would require us to judicially disengage the guarantee of reasonable assistance from the underlying right to counsel at second-stage proceedings so that the former can exist independently of the latter, and (3) awarding such an entitlement would lead to disparate treatment among prisoners similarly situated except with regard to the means to obtain counsel." *Johnson*, 2017 IL App (4th) 160449, ¶ 41.

The appellate court's three-pronged rationale is unpersuasive. First, while the Act does not explicitly guarantee petitioners a reasonable level of assistance at the first stage of postconviction proceedings, it also does not prohibit petitioners from obtaining reasonable assistance at the first stage. In fact, the Act does not include a guarantee of a reasonable level of assistance at any stage. 725 ILCS 5/122-4 (2014) ("If appointment of counsel is so requested, and the petition is not dismissed pursuant to Section 122-2.1, the court shall appoint counsel if satisfied that the petitioner has no means to procure counsel.").

The reasonable level of assistance standard was instead first introduced in *Owens* by this Court. *Owens*, 139 Ill. 2d at 359. While this Court has not specifically addressed whether petitioners are entitled to a reasonable level of assistance at the first stage of postconviction proceedings, this Court has repeatedly rejected applying different standards to appointed and retained counsel. *Richmond*,

188 Ill. 2d at 381; *Cotto*, 2016 IL 119006, ¶ 41. Moreover, in *Cotto*, this Court strongly implied that the reasonable level of assistance standard applies throughout postconviction proceedings. *Cotto*, 2016 IL 119006, ¶ 41. Nothing in the Act nor Illinois Supreme Court case law remotely suggests, as the appellate court apparently would hold, that no standard of representation apply to retained first-stage postconviction counsel.

Second, the appellate court's concern that it would be required to judicially "disengage" the guarantee of a reasonable level of assistance from the underlying right to counsel is misplaced. *Johnson*, 2017 IL App (4th) 160449, ¶ 41. This disengagement can only occur if one assumes that the reasonable level of assistance standard cannot possibly apply to retained first-stage postconviction counsel. But this Court has never held as much, and *Cotto* strongly indicates that this Court would not agree with such an assumption. *Cotto*, 2016 IL 119006, ¶ 41. Also, as mentioned above, the Act itself does not guarantee a reasonable level of assistance, much less attach that level of representation only to counsel's efforts at second-stage proceedings. See 725 ILCS 5/122-4 (2014).

Third, the appellate court's reasoning that holding retained first-stage postconviction counsel to a reasonable level of assistance standard "would lead to disparate treatment among prisoners similarly situated except with regard to the means to obtain counsel" is unconvincing. *Johnson*, 2017 IL App (4th) 160449, ¶ 41. Because the Act does not restrict petitioners from retaining postconviction counsel to file their initial petition, it already contemplates a disparate system where some petitioners file their petitions *pro se* while others retain counsel. See *Anguiano*, 2013 IL App (1st) 113458, ¶ 16; *Garcia-Rocha*, 2017 IL App (3d) 140754, ¶ 59 (McDade, J., concurring in part and dissenting in part) (The General Assembly

"could easily have required, in all cases, that the initial postconviction petition be prepared and submitted *pro se*. It did not do that[.]"). As Justice McDade noted, there is "the very real possibility that in postconviction proceedings, as in numerous other situations throughout our criminal and civil courts, financially advantaged parties may (or may not) receive qualitatively higher levels of representation." *Garcia-Rocha*, 2017 IL App (3d) 140754, ¶ 59 (McDade, J., concurring in part and dissenting in part).

Further, accepting the appellate court's rationale in this case would lead to absurd results. If first-stage retained postconviction counsel is held to no standard of representation, then counsel can submit a wholly deficient petition because counsel has no minimum standards for representation and does not have to comply with Rule 651(c) by consulting with the petitioner or adequately presenting the petitioner's claims. For instance, counsel can file a petition raising only issues that are barred by *res judicata*, such as counsel did in this case. (Vol. IV, C. 842-844) Hypothetically, counsel can even file a copy of the petitioner's notes and submit them as a petition. In such a situation, counsel wastes the petitioner's one chance to file a postconviction petition without needing to obtain leave of court to file a successive postconviction petition.

While the appellate court here noted the theoretical possibility that Mr. Johnson could file a successive postconviction petition, a petitioner must obtain leave of court to file such a petition. *Johnson*, 2017 IL App (4th) 160449, ¶ 42; 725 ILCS 5/122-1(f) (2014); *People v. LaPointe*, 227 Ill. 2d 39, 44 (2007). In order for a court to grant leave, a petitioner must establish "cause" for failing to raise the claim in the initial postconviction petition, and "prejudice" as a result of that failure. *People v. Smith*, 2014 IL 115946, ¶ 33; *People v. Edwards*, 2012 IL 111711,

¶ 22. Typically, a petitioner cannot raise the issue of postconviction counsel's performance in a subsequent petition. *People v. Flores*, 153 Ill. 2d 264, 276 (1992), *holding modified, People v. Pitsonbarger*, 205 Ill. 2d 444 (2002). A petitioner "faces immense procedural default hurdles when bringing a successive postconviction petition," which are "lowered in very limited circumstances" as successive petitions "plague the finality of criminal litigation." *People v. Tenner*, 206 Ill. 2d 381, 392 (2002).

The appellate courts that have refused to hold retained first-stage postconviction counsel to a reasonable level of assistance standard have also declined to address whether petitioners may satisfy the cause-and-prejudice test in a motion for leave to file a successive postconviction petition. *Johnson*, 2017 IL App (4th) 160449, ¶ 42; *Kegel*, 392 Ill. App. 3d at 542. Their evasion of the issue, however, is at odds with their conclusion that the Act does not entitle petitioners who have retained counsel at the first stage to a reasonable level of assistance by counsel. *Johnson*, 2017 IL App (4th) 160449, ¶¶ 36, 41; *Kegel*, 392 Ill. App. 3d at 541. If counsel is not required to provide a reasonable level of assistance at the first stage, then petitioners cannot possibly argue in a successive petition that "cause" is satisfied by counsel's failure to provide reasonable assistance at the first stage.[1] Without establishing "cause," a petitioner cannot obtain leave of court to file a successive postconviction petition. *Smith*, 2014 IL 115946, ¶ 33.

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[1] Significantly, this concern came to fruition when Mr. Johnson subsequently filed a motion for leave to file a successive postconviction petition, and the trial court relied upon *Johnson* to find that the unreasonable assistance of postconviction counsel could not serve as "cause" for failing to raise the claims in an earlier proceeding. (Appendix, Trial Court's Order); *People v. Davis*, 65 Ill. 2d 157, 164-165 (1976) (reviewing courts may take judicial notice of public records and other judicial proceedings).

The position taken by the appellate courts in the guise of not disadvantaging *pro se* petitioners in fact disadvantages petitioners who scrape together the means necessary to retain counsel. *Pro se* petitioners can ensure that their petitions contain all the claims they want to raise. By contrast, based on the appellate courts holdings, those who retain counsel are stuck with whatever incomplete and deficient petition their retained counsel filed, with their only recourse being to file a successive petition that is doomed because they cannot show "cause" when the problem was their own counsel.

In sum, petitioners should be entitled to a reasonable level of assistance from retained counsel at the first stage of postconviction proceedings. Petitioners should not suffer the loss of meritorious constitutional claims simply because their retained postconviction counsel has failed to include such claims in the initial petition. The alternative, which is to hold retained counsel to no standard of representation, belies fundamental fairness. Accordingly, this Court should hold that the reasonable level of assistance standard applies to retained postconviction counsel at the first stage of the Act.

B.

Mr. Johnson properly raised, and the trial court erroneously refused to consider, meritorious issues in his motions to reconsider the dismissal of his postconviction petition.

Although Mr. Johnson informed his retained postconviction counsel about additional issues he wanted to raise in his initial postconviction petition, counsel refused to include the issues. (Vol. IV, C. 859, 865) Instead, counsel raised an issue that was either barred by *res judicata* or "speculative at most." (Vol. IV, C. 842-844) Mr. Johnson subsequently and timely apprised the trial court about counsel's "ineffectiveness" and the additional issues in motions to reconsider, but the court

found the issues were forfeited because they were not previously raised in the initial petition. (Vol. IV, C. 944-945) Because Mr. Johnson diligently informed the trial court about counsel's improper refusal to include meritorious issues in his motions to reconsider, the court should have considered whether retained postconviction counsel's representation was unreasonable by reviewing the additional claims.

1.

The appellate court erred in finding that a petitioner waives issues newly raised in a motion to reconsider the dismissal of a postconviction petition.

In the appellate court, Mr. Johnson argued that, based on appellate court precedent, it is generally improper for a petitioner to raise new postconviction issues in a motion to reconsider the dismissal of a postconviction petition. *People v. Johnson*, 2017 IL App (4th) 160449, ¶ 31. This Court, however, has yet to reach this issue. Because that concession is incorrect, Mr. Johnson requests this Court to hold that a petitioner may raise new issues in a motion to reconsider the dismissal of a postconviction petition.

Standard of Review

Whether a petitioner may raise new issues in a motion to reconsider the dismissal of a postconviction petition is purely a legal issue, which this Court reviews *de novo*. See *Hobbs v. Hartford Insurance Co. of the Midwest*, 214 Ill. 2d 11, 17 (2005) (*de novo* standard applies when facts are undisputed and appeal involves only a legal issue).

Authorities and Analysis

The summary dismissal of a postconviction petition is a final judgment. 725 ILCS 5/122-2.1(a)(2) (2014). But a petitioner may move the court to reconsider

its judgment within 30 days of the entry of the judgment. *People v. Dominguez*, 366 Ill. App. 3d 468, 472 (2d Dist. 2006); 735 ILCS 5/2-1203(a) (2014). "The purpose of a motion to reconsider is to bring to the court's attention changes in the law, errors in the court's previous application of existing law, and newly discovered evidence that was not available at the time of the hearing." *In re Ashley F.*, 265 Ill. App. 3d 419, 426 (1st Dist. 1994).

Here, the appellate court relied on *People v. Vilces*, 321 Ill. App. 3d 937 (2d Dist. 2001), and the Post-Conviction Hearing Act (Act) to find that a petitioner forfeits an issue raised for the first time in a motion to reconsider because "[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is [forfeited]." *Johnson*, 2017 IL App (4th) 160449, ¶ 31; 725 ILCS 5/122-3 (2014). *Vilces*, in turn, had cited to *People v. Wright*, 189 Ill. 2d 1 (1999), and *People v. Patterson*, 192 Ill. 2d 93 (2000), as support for the proposition that petitioners cannot raise new issues in a motion to reconsider the court's dismissal of a postconviction petition. *Vilces*, 321 Ill. App. 3d at 939.

Neither *Wright* nor *Patterson*, however, stood for such a proposition or dealt with motions to reconsider. Since the facts in *Wright* were entirely inapplicable to *Vilces*, the appellate court seemingly cited to it for the general legal principle that any claim of substantial denial of constitutional rights not raised in the original or the amended petition is waived. *Wright*, 189 Ill. 2d at 12. In *Patterson*, this Court noted that a petitioner cannot raise a new issue *on appeal* from the dismissal of his postconviction petition where the petitioner did not raise the claim in his original or amended postconviction petition. *Patterson*, 192 Ill. 2d at 146.

But raising new issues on appeal from the dismissal of a postconviction petition is entirely distinct from raising new issues in a motion to reconsider the

dismissal of a postconviction petition. Under the Act, postconviction claims are supposed to be raised in the trial court. 725 ILCS 5/122-1 (2014). Thus, postconviction claims raised for the first time in the appellate court are not only raised in the wrong court, but are also raised in a court that is supposed to review the decision of the lower court, and not decide claims that were not presented to the lower court. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Consequently, *Wright* and *Patterson*, the cases the appellate courts relied on to find that a petitioner forfeits an issue raised for the first time in a motion to reconsider, are not analogous to this case.

While this Court has not yet expressly addressed the issue here, this Court noted in *People v. Blair*, 215 Ill. 2d 427 (2005), that petitioners have "an opportunity to respond to the court's summary dismissal based on *res judicata* and forfeiture. A defendant may file a motion to reconsider which may claim exceptions to *res judicata* and forfeiture." *Blair*, 215 Ill. 2d at 451. *Blair* therefore suggests that petitioners may raise new issues in a motion to reconsider the court's dismissal of an initial postconviction petition, at least in regards to overcoming the procedural bars of *res judicata* and forfeiture.

Raising new issues in a motion to reconsider the dismissal of a postconviction petition allows the proper court, the trial court, to consider the petitioner's claims and the reasons the petitioner did not include the claims in the initial petition, such as if the petitioner received unreasonable assistance of counsel. Accordingly, this Court should hold that the trial court erred, and that a petitioner may raise new issues in a timely motion to reconsider the dismissal of a postconviction petition in the trial court.

2.

Alternatively, the trial court erred in failing to consider the new issues Mr. Johnson raised in his motions to reconsider the dismissal of his postconviction petition where counsel refused to include the issues in his initial petition.

Standard of Review

"[W]here the denial of a motion to reconsider is based on new matters, such as additional facts or new arguments or legal theories that were not presented during the course of the proceedings leading to the issuance of the order being challenged, the abuse of discretion standard applies." *Compton v. Country Mut. Ins. Co.*, 382 Ill. App. 3d 323, 330 (1st Dist. 2008).

Authorities and Analysis

The Act provides the trial court with broad discretion with regards to postconviction petitions. 725 ILCS 5/122-5 (2014). The court may "make such order as to amendment of the petition or any other pleading, or as to pleading over, or filing further pleadings, or extending the time of filing any pleading other than the original petition." 725 ILCS 5/122-5. The Act instructs the court to exercise its discretion "as shall be appropriate, just and reasonable and as is generally provided in civil cases." 725 ILCS 5/122-5.

In *Cotto*, this Court stated: "This court has also required reasonable assistance from privately retained postconviction counsel *at the first* and second stage of postconviction proceedings." (Emphasis added.) *People v. Cotto*, 2016 IL 119006, ¶ 32. Pursuant to *Cotto*, where retained counsel files an initial petition that is deemed frivolous and patently without merit, and the petitioner files a timely motion to reconsider claiming that counsel failed to include numerous issues in the petition, the forfeiture rule should be relaxed because it is incumbent for the

trial court to determine if counsel's representation was reasonable by reviewing the additional claims. If one of the additional claims has merit, the trial court necessarily abuses its discretion by not allowing the petition to proceed to the second stage because counsel's failure to include that issue is unreasonable.

Here, the trial court summarily dismissed Mr. Johnson's initial postconviction petition, filed by retained counsel, in June 2014. (Vol. IV, C. 842-844) The court found that the issues raised "were all matters of record that were or could have been raised on direct appeal," or "speculative at most." (Vol. IV, C. 843-844) In July 2014, Mr. Johnson filed a *pro se* motion to reconsider, raising additional issues. (Vol. IV, C. 853) Mr. Johnson averred that he told counsel he wanted him to include these, and other, issues but counsel declined to do so. (Vol. IV, C. 859, 865)

Mr. Johnson noted that when he questioned postconviction counsel about amending the petition to include other issues,

> "counsel respond[ed] in [a] way that confused [him] and then beg[a]n questioning [him] about payment. [Mr. Johnson] mailed counsel['s] letter to [his] family, to show [his] family [that] counsel was complaining about money and that they needed to make payments. Th[at] [wa]s the reason said letter [wa]s not attached to th[e] motion. [Mr. Johnson] d[id] not believe that he c[ould] attach said letter in [the] future. After receiving [the] last letter from counsel about money and why he didn't raise ineffective [assistance] of direct appeal counsel[,] [Mr. Johnson] never heard [f]rom counsel again, until [the] court dismiss[ed] the petition. [Mr. Johnson] wanted and had every intention of adding other meritorious issues to his [p]etition[,] including but not limited to the ones discussed in th[e] motion." (Vol. IV, C. 861)

Because Mr. Johnson filed the motion to reconsider after his counsel filed a notice of appeal, the trial court did not consider the motion. (Vol. IV, C. 873) After the Fourth District remanded the case to the trial court to consider Mr. Johnson's timely *pro se* motion to reconsider, Mr. Johnson filed a *pro se* supplemental motion for reconsideration. (Vol. IV, C. 934-942) The trial court,

in denying Mr. Johnson's motions to reconsider, did not consider the merits of the issues raised in the motions. (Vol. IV, C. 944-45)

The trial court erred in refusing to relax the forfeiture rule because the court needed to determine if counsel's representation was reasonable by reviewing the additional claims. If the appellate courts are correct that a petitioner who privately retains counsel is not entitled to any level of assistance by counsel, then filing a timely reconsideration motion, such as Mr. Johnson did, is the petitioner's only recourse to avoid perpetually losing claims that were not raised or properly pleaded by retained counsel. As previously noted in subsection (A) of this brief, Mr. Johnson cannot show cause and prejudice under current Illinois case law where his own counsel was the source of the failure to raise some claims and properly plead other claims. See *People v. Flores*, 153 Ill. 2d 264, 276 (1992), *holding modified*, *People v. Pitsonbarger*, 205 Ill. 2d 444 (2002). It is also a more efficient use of judicial resources to allow a petitioner, such as Mr. Johnson, to file a timely motion to reconsider with the claims that retained counsel failed to allege or properly plead than to require the petitioner to raise the new issues in yet another postconviction petition.

Since at least one of the additional claims raised by Mr. Johnson has merit, as discussed in subsection (C) of this brief, the trial court necessarily abused its discretion by not allowing the petition to proceed to the second stage because counsel's failure to include that issue was unreasonable. Therefore, Mr. Johnson's petition should be remanded for second-stage postconviction proceedings and the appointment of counsel.

C.

The trial court erred in summarily dismissing Mr. Johnson's postconviction petition because it stated the gist of a meritorious constitutional claim.

Mr. Johnson presented the gist of a meritorious claim when he asserted in his *pro se* supplemental motion for reconsideration that trial counsel provided ineffective assistance by allowing Officer Jaceson Yandell's numerous improper statements to negate the feasability of alternative suspects. (Vol. IV, C. 934-942) Mr. Johnson was prejudiced because but for counsel's deficient performance, he may have been acquitted on the charges. Because this argument was in the record, and thus available on direct appeal, appellate counsel was ineffective for failing to raise the claim and assert trial counsel's ineffectiveness. (Vol. IV, C. 940) Consequently, the trial court erred in dismissing Mr. Johnson's postconviction petition as frivolous and patently without merit, and this Court should reverse and remand for second-stage postconviction proceedings.

Standard of Review

This Court reviews the trial court's first-stage dismissal of a postconviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-389 (1998).

Authorities

At the first stage of the Post-Conviction Hearing Act (Act), the trial court must independently review the postconviction petition and determine whether "the petition is frivolous or is patently without merit." *People v. Edwards*, 197 Ill. 2d 239, 244 (2001); 725 ILCS 5/122-2.1(a)(2) (2014). A petition is frivolous or patently without merit only if it has "no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). A petition lacks an arguable legal basis when it is based on an indisputably meritless legal theory, such as one

completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16. A petition lacks an arguable factual basis when it is based on a fanciful factual allegation or is fantastic or delusional. *Hodges*, 234 Ill. 2d at 16-17.

First-stage dismissal is improper when the petition alleges sufficient facts to state the "gist of a constitutional claim." *People v. Allen*, 2015 IL 113135, ¶ 24. The petition does not need to set forth the claim in its entirety, nor does the petition need to include legal arguments or citations to legal authority. *Edwards*, 197 Ill. 2d at 244. In fact, the petition only needs to contain "a limited amount of detail," and the facts alleged should be taken as true and liberally construed in favor of the petitioner. *Edwards*, 197 Ill. 2d at 244. Because most petitions are drafted at this stage by defendants with little legal knowledge or training, this Court has set a low threshold to survive the first stage of review. *Hodges*, 234 Ill. 2d at 9. Courts are encouraged to use "a lenient eye, allowing borderline cases to proceed." *Hodges*, 234 Ill. 2d at 16, fn. 7, quoting *Cuadra v. Sullivan*, 837 F.2d 56, 58-59 (2nd Cir. 1988).

Claims of ineffective assistance of counsel in a postconviction petition are evaluated under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Cathey*, 2012 IL 111746, ¶ 23. A petition alleging ineffective assistance of counsel may not be summarily dismissed if "(i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Cathey*, 2012 IL 111746, ¶ 23. To show prejudice, a petitioner must demonstrate that there was a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694.

In determining whether the petitioner was prejudiced, the reviewing court examines the totality of the circumstances. *Strickland*, 466 U.S. at 695.

"Claims of ineffective assistance of appellate counsel are measured against the same standard as those dealing with ineffective assistance of trial counsel." *People v. Childress*, 191 Ill. 2d 168, 175 (2000). Accordingly, a petitioner must show that the failure to raise an issue on direct appeal was objectively unreasonable, and that the decision prejudiced the petitioner. *Childress*, 191 Ill. 2d at 175.

Relevant Facts & Procedural History

The key issue in this case was whether Mr. Johnson shot Gregory and Isaac Moore, or whether one of the numerous drug dealers with ample motive to do so pulled the trigger. There was no physical evidence linking Mr. Johnson to the shooting. The tan Timberline boots that officers seized from Mr. Johnson did not contain enough information to either exclude or imply any positive DNA associations with Gregory, Isaac, or Mr. Johnson. (Vol. XXXVI, R. 600-601) The sample from Mr. Johnson's shirt that officers seized matched his own DNA profile. (Vol. XXXVI, R. 602) The gun was never recovered. (Vol. XXXV, R. 418, 499, 524)

The only evidence of Mr. Johnson's involvement was the testimony of Isaac and Anthony Jamerson, two individuals whose credibility was thoroughly impeached. Isaac acknowledged that he was "high" on the night in question. (Vol. XXXIV, R. 331, 369) He also admitted, though at trial he retracted, that he called Mr. Johnson's attorneys, on his own initiative, and informed them that he did not know with certainty who shot Gregory. (Vol. XXXIV, R. 354, 357, 381-384) Moreover, at the time of trial, Isaac had a pending petition to revoke probation for the underlying offense of unlawful delivery of a controlled substance, and thus he had a motive to curry favor with the State. (Vol. XXXIV, R. 352-354, 390-391; Vol. XXXV, R. 447)

Jamerson, who only spoke to officers after he was arrested on a parole violation warrant, was initially interrogated as a suspect in the investigation. (Vol. XXXV, R. 471-473) Jamerson's version of the events changed repeatedly, and it was only after the officer suggested that Jamerson might be involved, and that there was evidence that he was standing near the vehicle, that he claimed Mr. Johnson fired the shots. (Vol. III, C. 563-566)

A witness present during the incident, however, directly contradicted Isaac's and Jamerson's identification of Mr. Johnson as the shooter. Amandrae McGill, who was friends with Isaac, and was sitting in the back seat behind Gregory on the day of the incident, unequivocally stated that Mr. Johnson was not the shooter. (Vol. XX, R. 3, 5, 18) McGill testified that he saw the face of the shooter and he did not recognize the person, but he identified the person as either "black or Hispanic." (Vol. XX, R. 8, 10)

Mr. Johnson had no motive to shoot Gregory or Isaac. Gregory had previously introduced Mr. Johnson as a longtime friend, and had explained "that they grew up together, and [that] they were friends when they grew up." (Vol. XXXIV, R. 333) In fact, Gregory and Isaac had met up with Mr. Johnson on multiple occasions to "sit and talk" and "sometimes [they] would smoke" cannabis. (Vol. XXXIV, R. 333-334) Isaac even admitted that on the night of the incident, he did not observe Gregory engage in "any sort of argument" with Mr. Johnson, and he did not feel there was any animosity between Gregory and Mr. Johnson. (Vol. XXXIV, R. 369)

But there were many alternative suspects that Gregory had informed on to the police that did have motive to shoot him and Isaac. As an informant, Gregory provided Officer Jaceson Yandell with information regarding Brandon Baker, Fidel Garcia, Edmundo Alvarado, and Norberto and Octaviano Sanchez. (Vol. XXXV, R. 443-445) Gregory's information led to the seizure of a firearm, "substantial

amounts of crack and cocaine," and $37,000 in cash. (Vol. XXXV, R. 443-445) In one case, Otis Powell, a known drug dealer, and Stanley Roundtree, an associate observed Gregory participate in a controlled buy with officers. (Vol. XXXV, R. 450-454) Shortly thereafter, Powell shot Gregory and Isaac. (Vol. XXXIV, R. 390-391; Vol. XXXV, R. 451-452) By the time of the incident, Gregory's "name had gotten out on the street in the drug community as working for the police." (Vol. XXXV, R. 428)

Because the State's case against Mr. Johnson was weak and riddled with inconsistencies, the first two trials were declared mistrials as the juries were unable to reach a verdict. (Vol. XXI, R. 99; Vol. XXVII, R. 110) By the time of the third trial, however, Yandell testified for the first time that the alternative suspects, Baker, Garcia, Alvarado, and the two Sanchezes, did not learn of Gregory's identity as an informant. (Vol. XXXV, R. 453) Defense counsel did not object. (Vol. XXXV, R. 453) Counsel also did not ask any further questions about the matter on recross examination. (Vol. XXXV, R. 456-459)

Yandell further testified, for the first time at the third trial, that with the exception of Octaviano, who fled back to Mexico, all of the other individuals were in the custody of a law enforcement agency at the time that Gregory was killed. (Vol. XXXV, R. 454) Defense counsel objected on the "basis of knowledge," and the court sustained the objection. (Vol. XXXV, R. 454) The State promptly asked Yandell: "Okay. At the time that Gregory [] was killed, were you aware of whether several of those individuals, [] Baker, [] Garcia, and [] Alvarado and the Sanchezes were actually in the custody of a law enforcement agency?" (Vol. XXXV, R. 454) Yandell responded, "Yes, they were, other than Octaviano Sanchez, who we learned fled back to Mexico." (Vol. XXXV, R. 454) Defense counsel did not renew his objection. (Vol. XXXV, R. 454)

On recross examination, counsel asked Yandell if he had any reports indicating that all of the alternative suspects, except for Octaviano, were in custody on the date of the incident. (Vol. XXXV, R. 457) Yandell answered, "They're individual cases that I've done on these individuals. It's in Champaign Police Department records." (Vol. XXXV, R. 457-458) When Yandell admitted that he did not have the records with him and had not provided the records to the State, counsel ceased questioning him on that matter. (Vol. XXXV, R. 458) Counsel also questioned Yandell about his source of knowledge that Octaviano fled to Mexico. (Vol. XXXV, R. 458) Yandell stated that "[i]t was through other confidential sources," and acknowledged that he had not "checked on whether or not [Octaviano] ever returned." (Vol. XXXV, R. 459)

At the conclusion of the third trial, the jury found Mr. Johnson guilty of murder and attempted murder. (Vol. XXXVIII, R. 852; Vol. XLI, R. 73-74) Despite the fact that Mr. Johnson was convicted only after the third trial, where Yandell testified to new information regarding the knowledge and whereabouts of the alternative suspects who had motive to shoot Gregory and Isaac, direct appeal counsel and retained postconviction counsel did not raise the issues of Yandell's numerous improper statements. (Vol. IV, C. 827-839; Appendix, *People v. Johnson*, 2012 IL App (4th) 090893-U.)

Mr. Johnson, however, challenged Yandell's improper testimony in his motions to reconsider the dismissal of his postconviction petition. Mr. Johnson asserted: (1) trial counsel was ineffective because there was no foundation for Yandell's testimony that the numerous suspects whom Gregory had informed on to the police did not learn that Gregory was an informant; (2) trial counsel was ineffective for eliciting inadmissible hearsay from Yandell that a confidential source informed him Octaviano fled to Mexico; and (3) trial counsel was ineffective because there

was no foundation for Yandell's hearsay testimony that the alternative suspects were in law enforcement custody at the time of Gregory's death. (Vol. IV, C. 936-938) Mr. Johnson further contended that his direct appeal and retained postconviction counsel were ineffective, presumably for failing to raise the issues he identified in his motions to reconsider. (Vol. IV, C. 940)

Deficient Representation

The first statement at issue is Yandell's testimony that the alternative suspects with a motive to shoot Gregory, Baker, Garcia, Alvarado, and the two Sanchezes, did not learn of Gregory's identity as an informant. (Vol. XXXV, R. 453) At trial, defense counsel did not object to Yandell's testimony, and he did not further question Yandell about the matter on recross examination. (Vol. XXXV, R. 453, 456-459)

Yandell's testimony was improper because there was no evidence introduced to suggest that he had personal knowledge that the alternative suspects that Gregory had informed on regarding drug-related crimes were unaware that Gregory was an informant. Generally, "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony." Ill. R. Evid. 602 (eff. Jan.1, 2011).

The evidence in fact indicated the opposite. Indeed, Yandell testified that he was "extremely concerned" about Gregory's safety because "his name had gotten out on the street in the drug community as working for the police." (Vol. XXXV, R. 428) Because Yandell admitted that Gregory's identity had been thoroughly compromised, defense counsel's representation was deficient where he did not object to Yandell testifying that the alternative suspects were oblivious to the fact that Gregory was an informant without evidence to substantiate Yandell's

knowledge of the matter. Because this argument was in the record, and thus available on direct appeal, appellate counsel was deficient for failing to raise the claim and assert trial counsel's ineffectiveness.

The second statement at issue is Yandell's testimony that Octaviano fled back to Mexico at the time that Gregory was killed. (Vol. XXXV, R. 454) On recross examination, counsel questioned Yandell about the source of knowledge, and Yandell responded that "[i]t was through other confidential sources." (Vol. XXXV, R. 458-459)

Yandell's testimony was improper because it was inadmissible hearsay. Hearsay evidence, an out-of-court statement offered to prove the truth of the matter asserted, is generally inadmissible due to its lack of reliability unless it falls within an exception to the hearsay rule. *People v. Caffey*, 205 Ill. 2d 52, 88 (2001). A police officer may testify regarding the existence, but not the substance, of an out-of-court statement for the limited purpose of explaining the steps taken in the course of an investigation, provided that such an explanation is both necessary and important. See, *e.g.*, *People v. Williams*, 181 Ill. 2d 297, 313 (1998); *People v. Simms*, 143 Ill. 2d 154, 174 (1991). "Even then, the evidence must satisfy some relevant nonhearsay purpose. That is, the words of the communication must not be considered or used for their truth, only to show that the words were spoken when that somehow matters in the case." *People v. Warlick*, 302 Ill. App. 3d 595, 599 (1st Dist. 1998). As such, Yandell's testimony that he learned Octaviano's whereabouts from a confidential source was inadmissible hearsay because it was offered to prove the truth of the matter asserted. (Vol. XXXV, R. 454, 458-459; Vol. IV, C. 936).

Defense counsel's representation was deficient because he did not challenge Yandell's initial hearsay statement about Octaviano's flight to Mexico, and then elicited further hearsay from Yandell on recross examination. Because this argument was in the record, and thus available on direct appeal, appellate counsel was deficient for failing to raise the claim and assert trial counsel's ineffectiveness.

The third statement at issue is Yandell's testimony that with the exception of Octaviano, all of the other individuals Gregory had informed on were in the custody of a law enforcement agency at the time that Gregory was killed. (Vol. XXXV, R. 454) At trial, defense counsel objected on the "basis of knowledge," and the court sustained the objection. (Vol. XXXV, R. 454) The State promptly asked Yandell: "Okay. At the time that Gregory [] was killed, were you aware of whether several of those individuals, [] Baker, [] Garcia, and [] Alvarado and the Sanchezes were actually in the custody of a law enforcement agency?" (Vol. XXXV, R. 454) Yandell responded, "Yes, they were, other than Octaviano [], who we learned fled back to Mexico." (Vol. XXXV, R. 454) Defense counsel did not renew his objection. (Vol. XXXV, R. 454)

On recross examination, counsel asked Yandell if he had any reports indicating that all of the alternative suspects, except for Octaviano, were in custody on the date of the incident. (Vol. XXXV, R. 457) Yandell answered, "They're individual cases that I've done on these individuals. It's in Champaign Police Department records." (Vol. XXXV, R. 457-458) When Yandell admitted that he did not have the records with him and had not provided the records to the State, counsel ceased questioning him on that matter. (Vol. XXXV, R. 458)

Yandell's testimony was improper because the Champaign Police Department records were not introduced into evidence to authenticate that he had personal knowledge that the alternative suspects were in custody on the date of the incident, and thus his testimony was hearsay. See Ill. R. Evid. 602 (eff. Jan. 1, 2011); *Caffey*, 205 Ill. 2d at 88. Defense counsel's representation was deficient because although he initially objected to Yandell's testimony on the basis of knowledge, he did not renew the objection when Yandell provided identical testimony after the initial

objection was sustained. Counsel's representation was further deficient because he later exacerbated his error when he elicited on recross examination that Yandell learned this information from Champaign Police Department records. (Vol. XXXV, R. 457; Vol. IV, C. 938) Because Yandell had no personal knowledge beyond those records that the alternative suspects were in custody, and the records were never produced, counsel's representation was deficient when he allowed Yandell to testify to as much. Since this argument was in the record, and thus available on direct appeal, appellate counsel was also deficient for failing to raise the claim and assert trial counsel's ineffectiveness.

In short, Mr. Johnson established the gist of a meritorious constitutional claim where he asserted that his trial and appellate counsel were deficient for allowing Yandell to testify to matters outside the purview of his personal knowledge. (Vol. IV, C. 938) Mr. Johnson further established the gist of a meritorious constitutional claim because he contended that his trial and appellate counsel were deficient for eliciting inadmissible hearsay from Yandell. (Vol. IV, C. 936)

Prejudice

Defense counsel's deficient performance prejudiced Mr. Johnson because had counsel objected, the State would not have been able to introduce Yandell's numerous improper and inadmissible statements, which damaged Mr. Johnson's defense that one of the alternative suspects shot Gregory and Isaac. Without Yandell's improper and inadmissible testimony, the State's case was weak because it rested on Isaac's and Jamerson's claims, which were uncorroborated by forensic evidence, impeached by prior inconsistencies and criminal convictions, and contradicted by McGill's testimony. (Vol. III, C. 563-566; Vol. XXXIV, R. 352-357, 381-384, 390-391; Vol. XXXV, R. 418, 447, 471-473, 499, 524; Vol. XXXVI,

R. 600-602) Indeed, the State's weak evidence resulted in the first two trials being declared mistrials because the juries were unable to reach a verdict. (Vol. XXI, R. 99; Vol. XXVII, R. 110)

Yandell's improper and inadmissible testimony therefore made the difference in changing the verdict in Mr. Johnson's third trial, where he was found guilty, because it was conspicuously absent in the first two trials. (Vol. XXI, R. 99; Vol. XXVII, R. 110) In the third trial, Yandell testified that Baker, Garcia, Alvarado, and the two Sanchezes did not learn of Gregory's identity, and that with the exception of Octaviano, who fled back to Mexico, all of the other individuals who Gregory had informed on were in the custody of a law enforcement agency at the time that Gregory was killed. (Vol. XXXV, R. 454) Yandell's improper and inadmissible testimony therefore tended to nullify the possibility that one of the many alternative suspects may have shot Gregory and Isaac. Accordingly, Mr. Johnson established the gist of a meritorious constitutional claim that, had either trial counsel objected or had appellate counsel raised trial counsel's failure to object, there was a reasonable probability that the result would have been different. *Strickland*, 466 U.S. at 690. Therefore, Mr. Johnson's postconviction petition should be remanded for second-stage postconviction proceedings and the appointment of counsel.

Conclusion

In short, the appellate court erred in holding that a petitioner is not entitled to a reasonable level of assistance from retained counsel at the first stage of postconviction proceedings because holding counsel to no standard of representation is unfeasible. Although Mr. Johnson apprised the trial court of retained counsel's unreasonable representation in his motions to reconsider the dismissal of his

postconviction petition, the trial court refused to address the merits of his claims. The trial court therefore erred in concluding that a petitioner forfeits new issues raised in a timely motion to reconsider the dismissal of a postconviction petition. Alternatively, the trial court erred in finding that the new issues raised in Mr. Johnson's motions to reconsider were forfeited because his retained counsel did not provide a reasonable level of assistance. Notably, the claims Mr. Johnson raised *pro se* in his motions to reconsider presented the gist of at least one meritorious constitutional claim that trial and appellate counsel provided ineffective assistance for failing to object to inadmissible testimony that allowed the State to finally get a conviction in the third trial. Accordingly, this Court should remand for second-stage consideration under the Act and the appointment of counsel.

CONCLUSION

For the foregoing reasons, Granville S. Johnson respectfully requests that this Court remand for second-stage consideration under the Post-Conviction Hearing Act and the appointment of counsel.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Sheril J. Varughese, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 41 pages.

/s/Sheril J. Varughese
SHERIL J. VARUGHESE
ARDC No. 6321662
Assistant Appellate Defender

No. 122227

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, No. 4-16-0449.
Respondent-Appellee,	)	There on appeal from the Circuit Court of the Sixth Judicial Circuit,
-vs-	)	Champaign County, Illinois, No. 08- CF-1424.
GRANVILLE S. JOHNSON	)	Honorable John R. Kennedy, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Lisa Madigan, Attorney General, 100 W. Randolph St., Chicago, IL 60601, mglick@atg.state.il.us, cc: twhatley-conner@atg.state.il.us, jescobar@atg.state.il.us, lbendik@atg.state.il.us;

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On January 12, 2018, 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 in an envelope deposited in a U.S. mail box in Springfield, 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.

/s/Linsey Carter
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APPENDIX TO THE BRIEF

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Report of Proceedings

	Direct	Cross	Redir.	Recr.

Exhibits - (Vol. XLII)
- People's Exhibit 1 (photo)
- People's Exhibit 2 (transcript)
- People's Exhibit 5A-C (photos)
- People's Exhibit 12A-C (photos)
- People's Exhibit 14 (line up)
- People's Exhibit 17A-M (photos)
- People's Exhibit 23 A-H (photos)

Manilla Envelope Containing:
- People's Exhibit 8 (DVD-R) - Anthony Johnson
- People's Exhibit 9 (DVD-R) - Isaac Moore
- People's Exhibit 15 (CD-R) - Amdandrae McGill
- Court's Exhibit 1 (CD-R)
- Court's Exhibit 2 (CD-R) - Amandrae McGill

Two Manilla Envelopes Containing:
- Subpoenas

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL DISTRICT
CHAMPAIGN COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Respondent,	)	
vs	)	08-CF-1424
GRANVILLE JOHNSON, Defendant-Petitioner	)	

ORDER DENYING PETITIONER'S MOTION FOR LEAVE TO FILE A SUCCESSIVE POST-CONVICTION PETITION

The Petitioner, Granville Johnson, has filed on April 4, 2017 a Motion for Leave to File a Successive Post-Conviction Petition The Court has reviewed the Motion, the attached Petition and documents and the record in this cause

Procedural History

In August 2009, the defendant was found guilty by a jury of First Degree Murder and Attempt (First Degree Murder) Defendant's conviction and sentence were affirmed on direct appeal Petitions for leave to appeal and a writ of certiorari were denied in the Illinois Supreme Court and United States Supreme Court respectively

In April 2014, the Petitioner, through private counsel, filed a post-conviction petition alleging ineffective assistance of counsel The Petition was summarily dismissed The Petitioner filed a Motion to Reconsider, which was denied The Petitioner appealed The judgment was affirmed

Analysis

725 ILCS 5/122-1(f) governs the filing of successive post-conviction petitions Leave of Court to file a successive petition may be granted only if Petitioner demonstrates 1) cause for failure to bring the claim in the initial Petition, i e an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings and 2) resulting prejudice, i e the claim not raised in the initial Petition so infected the trial that the resulting conviction or sentence violates due process

The Petitioner's Motion for Leave fails in his both respects The Motion's essential premise is that his conviction resulted from perjured testimony by a police officer in his August 2009 trial The Petitioner claims the Officer's testimony given about whether certain Hispanic males were incarcerated on the date of the shooting at issue was perjurious In support, Petitioner offers detention records showing that a person identified as Edmundo Alvarado and others were not in custody on the date of the shooting at issue The records relied upon by the Petitioner are incarceration records from July 2008 There is no assertion that these documents were unavailable prior to his initial Petition in 2014 Clearly, given Petitioner's assertion that a "Hispanic" was the shooter in question, he was aware of the significance of this information long before 2014 As a result, the Petition shows no objective factor that impeded his ability to b ring this claim in his initial Petition

In addition, the Petitioner claims that he is entitled to bring claims not previously brought due to unreasonable assistance of his prior post-conviction counsel However, the Appellate Court has ruled in this cause People v Johnson No 4-16-449 (Fourth District) that the Petitioner is not entitled to reasonable assistance of counsel at the first stage of post-conviction

proceedings Therefore, the alleged unreasonable assistance of prior post-conviction counsel cannot serve as cause for failure to bring the current claim in the prior proceedings

In addition, the Motion for Leave fails to satisfy the prejudice element of the statute The alleged prejudice is that a police officer falsely testified that Edmundo Alvarado, whom Petitioner identifies as a suspect in the murder, was in custody at the time of the murder Prejudice is claimed because a witness testified that the shooter "could have been Hispanic " Nowhere in the record is Edmundo Alvarado identified as the shooter An assumption has to be made that Edmundo Alvarado meets the description of "could have been Hispanic " The evidentiary link to show prejudice is missing As a result, the Motion fails to satisfy the prejudice element of the statute

Similarly, the Petitioner's other claims in his Motion of ineffective assistance of trial counsel for failing to object to hearsay, for failure to subpoena a witness whose prior testimony was admitted at trial by audio recording, and of ineffective assistance of direct appeal counsel all fail the cause element of the statute All of these claims arose before the Petitioner's April 2014 Post-Conviction Petition There is no showing of any objective factor impeding the ability to bring the claims in the first Petition

Consequently, the Motion for Leave fails to meet the cause and prejudice test required by statute The Motion for Leave filed April 4, 2017 is denied The Clerk of the Circuit Court shall provide Notice of this Order as provided in Supreme Court Rule 651(b)

Dated 4/06/17

John R Kennedy
Associate Judge

2012 IL App (4th) 090893-U

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

Appellate Court of Illinois,
Fourth District.

The PEOPLE of the State of Illinois, Plaintiff–Appellee,
v.
Granville S. JOHNSON, Defendant–Appellant.

No. 4–09–0893.
|
Sept. 14, 2012.

Appeal from Circuit Court of Champaign County, No. 08CF1424, John R. Kennedy, Judge Presiding.

ORDER

Justice KNECHT delivered the judgment of the court:

*1 ¶ 1 *Held:* (1) The trial court did not abuse its discretion, when ruling on a motion to extend the speedy-trial deadline to permit DNA testing pursuant to section 103–5(c) of the Code of Criminal Procedure of 1963 (725 ILCS 5/103–5(c) (West 2008)), in finding the State had exercised without success due diligence to obtain DNA testing results material to the case.

(2) The record establishes, when the trial court granted the State's request, the court extended the speedy-trial deadline up to the section 103–5(c)'s maximum of 120 days.

¶ 2 After an August 2009 jury trial, defendant, Granville S. Johnson, was convicted of first degree murder (720 ILCS 5/9–1(a)(1) (West 2008)) and attempt (first degree murder) (720 ILCS 5/8–4(a), 9–1(a)(1) (West 2008)). In November 2009, the trial court sentenced defendant to consecutive prison terms of 53 years for first degree murder and 32 years for attempt (first degree murder). Defendant appeals, arguing (1) the State failed to exercise due diligence in obtaining deoxyribonucleic acid (DNA) test results and was not entitled to an extension of the speedy-trial deadline under section 103–5(c) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/103–5(c) (West 2008)); and (2) in the alternative, even if the State properly received an extension of the deadline, the State should have received only a 29–day extension and the State failed to bring him to trial within the authorized time. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On June 30, 2008, victims and cousins Greg Moore and Isaac Moore drove a van to a duplex in Champaign for the purpose of meeting someone nicknamed "Bubba" to purchase marijuana. At the duplex, Isaac saw Greg speak to defendant through the driver's side window. Greg exited the van and entered the duplex with defendant, while Isaac stayed in the van. Greg returned and sat in the driver's seat. Defendant then allegedly reached into the driver's side window and began shooting, striking Greg twice in the head at short range and killing him. Defendant shot Isaac twice as Isaac was fleeing. A police officer arrived to aid Isaac, and Isaac identified "Bubba" as the shooter. Later, Isaac told the officer in the ambulance he did not know who shot him. At the hospital, Isaac identified the shooter by a nickname. The police linked the name to defendant. Another individual at the scene, one who knew what defendant looked like and who witnessed the shooting, could not identify the shooter.

¶ 5 On August 1, 2008, defendant was arrested for the first degree murder of Greg and attempt (first degree murder) of Isaac. Defendant did not post bond and remained incarcerated through his trials and sentencing.

¶ 6 On August 13, 2008, the State sent a number of items to the Illinois State Police crime lab for testing. These items included boots taken from an apartment of a woman connected to defendant, swabbings from the inside of those boots, swabbings of a projectile, the T-shirt defendant was wearing when arrested, and standards from Greg and Isaac.

*2 ¶ 7 On October 7, 2008, the State filed a motion under section 103–5(c), which set forth the following:

"NOW COME the People of the State of Illinois * * * [which] move[s] that the above-styled cause which is now set for pretrial hearing on October 7, 2008 be continued to the November 4, 2008 pretrial date, and as grounds therefore state that:

"1. Forensic Scientist Aaron Small of the [crime lab] has not yet completed DNA testing of the numerous items of evidence relating to this case submitted to said laboratory, and the People would be prejudiced by the absence of Forensic Scientist Small's testimony as to the results of such testing.

2. Said items of evidence were submitted to the [crime lab] by the Champaign Police Department on August 13, 2008, twelve days after the Defendant's arrest. Based on Movant's telephone conversations with Forensic Scientist Small, there are reasonable grounds to believe that some or all of said testing can be completed prior to November 4, 2008. Thus, pursuant to 725 ILCS 5/103–5(c), the People have thus far exercised without success due diligence to obtain DNA testing of said items of evidence, and there are reasonable grounds to believe that the results of said testing may be obtained at a later date."

¶ 8 That same day, a hearing was held on the State's motion. Defense counsel objected, on the ground he did not know what evidence had been taken or its relevance:

"Judge, I would note an objection for the record. I would also note that I really can't make any argument against the continuance at this moment, because it simply says 'numerous items of evidence were taken.' The State wants you to find due diligence, which perhaps you can. I got the discovery this morning, so I don't know what evidence was taken or what the relevance is. So, my client is in custody so I am objecting for the record only."

The prosecutor at this hearing was not the lead prosecutor on the case and could not specify what items had been sent to the crime lab. The trial court continued the hearing on the motion until October 16.

¶ 9 On October 15, 2008, the State moved to allow the destruction of evidence necessary for forensic testing. The State also requested an order mandating defendant submit biological and hair samples. In the motion, the State averred the crime lab reported the items tested had biological material suitable for DNA testing. The State also stated hairs had been found in a boot and on the shirt.

¶ 10 On October 20, 2008, the continued hearing was held on the State's October 7 motion. Defense counsel objected to the State's motion, stating his client remained in custody and wanted to maintain the speedy-trial clock. Defense counsel stated, "I understand the need or the necessity by the State perhaps for these things, but we would just object for the record." The court concluded the following in regard to the State's motion to continue:

"The court finds that the State has exercised due diligence, and pursuant to 725, 5/103–5, subsection C, I'm going to grant, over the defendant's objection, the motion to continue. This motion to continue can extend the speedy trial for an additional 120 days, so that would put us at a—at a trial date somewhat outside of the normal 120–day time frame. But I am going to grant that motion. There will come a point in time when we're actually going to have to see to it that we have some dates certain. But that motion will be granted. I'm going to set this matter over."

*3 ¶ 11 The trial court immediately continued: "Counsel, do you want it on the 4th of November? I'm not sure we're going to have much to do on the 4th of November other than set it over. I have a pretrial on December 30th at nine o'clock." Defense counsel replied, "We maintain our objection, but, yes, Judge, since the court has already ruled over our objection, I think there's no reason to have it set, and we could just-." At that point, the trial court interrupted and set the pretrial for December 30. The trial court warned counsel it would "stay on top of this, and as soon as the information is provided to the State, this case will be set for trial."

¶ 12 At the hearing, the trial court ordered defendant to provide the requested samples to the State and authorized the destruction of evidence for DNA testing. A crime-lab report, dated November 25, 2008, appears in the record. According to the report, the crime lab tested the physical

evidence for DNA and compared the DNA to Greg's and Isaac's DNA samples.

¶ 13 A crime-lab report, dated February 3, 2009, indicated the crime lab received defendant's DNA sample on January 8, 2009. The crime lab determined the biological material on the shirt defendant was wearing at the time of his arrest belonged to defendant. Defendant's DNA was not found on the projectile. The DNA testing could not exclude defendant from having contributed to the DNA in the boots.

¶ 14 On May 11, 2009, defendant's first trial began. Defendant moved to dismiss the case against him, arguing the trial court had not granted a continuance pursuant to section 103–5(c). The court disagreed and denied the motion. The first trial ended in a hung jury; a mistrial was declared. A second jury trial in June 2009 had the same result. After defendant's third jury trial in August 2009, he was found guilty. The court sentenced him as stated.

¶ 15 This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 A. Due Diligence

¶ 18 Defendant contends the State should not have been granted a continuance because it failed to exercise due diligence in obtaining DNA test results. Defendant provides three bases for his argument: (1) the State, despite sending other evidence for testing on August 13, 2008, failed to request defendant provide a DNA standard for comparison until October 15, 2008; (2) despite obtaining defendant's sample, the State did not send the sample to the crime lab until early January 2009; and (3) the State could have avoided any delay had it checked the Illinois State Police DNA database, which contained defendant's "DNA since at least 2005." Defendant contends because the continuance was improperly given, the 120–day speedy-trial deadline expired on November 28, 2008.

¶ 19 Under section 103–5 of the Code (speedy-trial statute), the State must bring a defendant who remains in custody to trial within 120 days of his arrest. *People v. Colson,* 339 Ill.App.3d 1039, 1041, 791 N.E.2d 650, 651 (2003) (citing 725 ILCS 5/103–5(a) (West 2008)). The speedy-trial statute also provides exceptions to allow the State additional time in starting a defendant's trial. See, *e.g.,* 725 ILCS 5/103–5(c), (f) (West 2008). The exception applicable to this case is the one provided in section 103–5(c), which permits additional time for DNA testing. 725 ILCS 5/103–5(c) (West 2008).

*4 ¶ 20 According to section 103–5(c), a trial court may grant an extension if certain prerequisites are met, including a finding the State acted with due diligence: "If the court determines that the State has exercised without success due diligence to obtain results of DNA testing that is material to the case and that there are reasonable grounds to believe that such results may be obtained at a later day, the court may continue the cause on application of the State for not more than an additional 120 days." 725 ILCS 5/103–5(c) (West 2008). Because the speedy-trial statute enforces a constitutional right, we liberally construe the statute in defendant's favor. *People v. Reimolds,* 92 Ill.2d 101, 106, 440 N.E.2d 872, 874 (1982). "The provision for DNA testing was not meant to provide an automatic continuance in every trial that involved DNA testing because the statute requires that the State must exercise 'without success due diligence to obtain results of DNA testing.' " *Colson,* 339 Ill.App.3d at 1048, 791 N.E.2d at 656 (quoting 725 ILCS 5/103–5(c) (West 2000)). On the question of whether the State exercised due diligence, the State carries the burden of proof and the trial court must make a determination "on a case-by-case basis after careful review of the particular circumstances presented." *People v. Swanson,* 322 Ill.App.3d 339, 342, 751 N.E.2d 1182, 1184 (2001).

¶ 21 This court will not reverse a trial court's decision on due diligence unless the decision is a clear abuse of discretion. *Swanson,* 322 Ill.App.3d at 342, 751 N.E.2d at 1184. The question of whether the trial court abused its discretion is one to be reviewed by examining the information the court had before it *when* ruling on the motion for a continuance. *People v. Bonds,* 401 Ill.App.3d 668, 674, 930 N.E.2d 437, 444 (2010). In reviewing the trial court's decision, this court "will examine the record as it existed at the time of the motion." *Bonds,* 401 Ill.App.3d at 674, 930 N.E.2d at 444.

¶ 22 The record, as it existed at the time of the hearing, does not show the trial court abused its discretion in granting a continuance. By October 20, 2008, the record indicated the State sent evidence for DNA testing just 12 days after defendant's arrest. The record also established,

as of October 15, 2008, the crime lab had found DNA suitable for testing. By that date, the State was seeking an order through which it would obtain defendant's DNA sample, so the State had not yet obtained and sent defendant's DNA. The reason for any delay in seeking defendant's DNA is not clear from the record. Defense counsel did not object on due-diligence grounds or any specific grounds. The State was not asked to explain the reason for the delay. The delay may have been the result of any number of reasons. Perhaps the State chose to wait until the crime lab determined suitable DNA existed for testing.

¶ 23 We find the fact the State did not seek defendant's DNA sample until the crime lab found suitable DNA for testing does not render the finding of due diligence an abuse of discretion. Case law reveals it is not routine or automatic for the crime lab to perform tests looking for suitable DNA and then comparing DNA at the same time. In *Swanson,* 322 Ill.App.3d at 341–42, 751 N.E.2d at 1184, although the defendant's DNA sample had been sent at the same time as other evidence, the State did not ask the laboratory to perform DNA testing until *after* the crime lab informed the State it found DNA evidence suitable for testing. Here physical evidence was sent within 12 days of defendant's arrest. The State followed up by requesting defendant's sample by October 15 after learning suitable DNA existed for testing. While not prompt, it was not excessive delay. We find no abuse of discretion in the finding of due diligence.

*5 ¶ 24 Defendant argues the fact the crime lab did not receive defendant's DNA sample until January 9, 2009, over 2 1/2 months after the trial court ordered defendant provide such sample, proves a lack of the requisite diligence for a section 103–5(c) continuance. This argument is unconvincing. The statute explicitly requires a due-diligence finding *before* the granting of the continuance (725 ILCS 5/103–5(c) (West 2008)). In addition, the case law shows courts, when examining diligence, should look to the evidence before the trial court at the time the decision was made and not to facts arising later. *Bonds,* 401 Ill.App.3d at 674, 930 N.E.2d at 444. The failure to send the sample promptly does not retroactively violate section 103–5(c) or render the trial court's decision retroactively improper. Defendant's cases do not hold otherwise. See *Swanson,* 322 Ill.App.3d at 344, 751 N.E.2d at 1186; *People v. Spears,* 395 Ill.App.3d 889, 896, 920 N.E.2d 488, 494 (2009).

¶ 25 In his reply brief, defendant concedes such a finding "may be legally correct." Defendant argues, however, a ruling that later failures should not be considered is problematic because the trial court's order will remedy the State's "subsequent failure ." Defendant maintains the trial court would have denied the State's motion had it known the State already possessed defendant's DNA sample and failed to submit it for testing until more than 5 months after his arrest, which was 86 days *after* the State obtained permission to collect his sample. Defendant, citing the Illinois and federal constitutions, maintains the underlying issue in this case is his constitutional right to a speedy trial and the State has identified no case that permits it to violate his right to a speedy trial as long as it did not intend to do so.

¶ 26 We return to the language of section 103–5(c): "If the court determines that the State has exercised without success due diligence to obtain results of DNA testing that is material to the case and that there are reasonable grounds to believe that such results may be obtained at a later day, the court may continue the cause on application of the State for not more than an additional 120 days." 725 ILCS 5/103–5(c) (West 2008). According to the plain language of this statute, the General Assembly determined a trial court, upon finding due diligence, may extend the statutory speedy-trial guarantee to 240 days. No language in this subsection or in the remaining text of the speedy-trial statute mandates the trial court, after granting such a motion, continue to monitor the State's conduct to ascertain whether the continuance should be shortened or revoked.

¶ 27 While defendant contends the underlying issue of this case is his *constitutional* right to a speedy trial, defendant's argument on appeal for a reversal is based only on the speedy-trial statute's guarantees. The two are not the same. See *People v. Crane,* 195 Ill.2d 42, 48–49, 743 N.E.2d 555, 560 (2001). The statutory language that serves to guarantee defendant a speedy trial provides defendant no relief from the State's alleged failures that occur within the time of the continuance. Whether the constitutional guarantee is violated by the State's conduct postcontinuance is not at issue in this case. Defendant did not raise the issue in his opening brief and only referenced it in his reply brief. It is forfeited. See Ill. S.Ct. Rule 341(h)(7) (eff.Jul.1, 2008) ("Points not argued are waived and shall not be raised in the reply brief.").

*6 ¶ 28 Similarly, we find the State's failure to check the DNA database is irrelevant in this case to the question of due diligence and whether defendant's statutory speedy-trial right was violated. The record, at the time of the continuance motion, did not contain evidence of the State's failure.

¶ 29 B. The Length of the Continuance

¶ 30 Defendant next argues, in the alternative, if we find the trial court properly granted the State a continuance, the State should have received only 29 days and he was not brought to trial before the speedy-trial clock expired on December 26, 2008. Defendant contends the State, in its motion, asked for a continuance of the case until November 4, 2008. Defendant maintains, under this court's decision in *People v. Johnson,* 323 Ill.App.3d 284, 289, 751 N.E.2d 621, 625 (2001), the trial court could only extend the speedy-trial deadline the length of time requested by the State. Defendant further contends such conclusion is further supported by the fact the speedy-trial statute must be liberally construed in the defendant's favor.

¶ 31 Defendant bases this argument on half of a sentence in *Johnson:* "[T]he length of any extension up to the maximum necessarily depends upon the State's request." *Johnson,* 323 Ill.App.3d at 289, 751 N.E.2d at 625. We turn to the case.

¶ 32 In *Johnson,* the defendant was found guilty of armed robbery and attempt (aggravated criminal sexual assault). *Johnson,* 323 Ill.App.3d at 285, 751 N.E.2d at 622. Approximately 2 months after his arrest, the State moved for a continuance pursuant to section 103–5(c) and argued it could not obtain certain DNA evidence within the initial 120 days provided by the speedy-trial statute. *Johnson,* 323 Ill.App.3d at 286, 751 N.E.2d at 623. The State asked for an additional 120 days to take the defendant to trial. *Johnson,* 323 Ill.App.3d at 286, 751 N .E.2d at 623. The trial court granted the motion over the defendant's objection. *Johnson,* 323 Ill.App.3d at 286, 751 N.E.2d at 623. The issue on appeal was whether section 103–5(c) authorizes the grant of "an additional 120–day period only from the day" the motion is granted or whether it permits the days to be added to the 120–day speedy-trial limit, giving the State up to 240 days to bring a defendant to trial. *Johnson,* 323 Ill.App.3d at 289, 751 N.E.2d at 625. We held section 103–5(c) authorizes the continuance of cases beyond the initial 120–day period to a maximum of 240 days without violating a defendant's speedy-trial rights. *Johnson,* 323 Ill.App.3d at 289, 751 N.E.2d at 625. After our holding, the sentence relied upon by the State appears. It states the following, in its entirety: "We note, however, that section 103–5(c) makes it incumbent upon the State to apply for such a continuance, and the length of any extension up to the maximum necessarily depends upon the State's request." *Johnson,* 323 Ill.App.3d at 289, 751 N.E.2d at 625.

*7 ¶ 33 Defendant's argument is unconvincing. The language relied upon by defendant is *dicta.* The issue in *Johnson* is not the same as before this court here: whether the trial court's authority to decide the length of an extension is limited by the State's request in a written motion. *Johnson* did not answer the same question. The language can be fairly interpreted as not limiting the court's authority to what the State requests but indicating any extension depends upon the substance, merits, and needs found in the State's request. The plain language of section 103–5(c) does not limit the trial court in the manner defendant contends it does. The court is given the authority to grant an extension up to 120 days if certain requirements are met. One of those prerequisites is not a motion by the State dictating the maximum amount of time to be granted. See 725 ILCS 5/103–5(c) (West 2008).

¶ 34 We find unconvincing defendant's argument the fact the statute must be liberally construed results in the interpretation defendant espouses. Liberal construction does not confer the "authority to engage in judicial legislation." *In re M.M.,* 156 Ill.2d 53, 67, 619 N.E.2d 702, 710 (1993). In the absence of any language so limiting trial courts' authority in deciding section 103–5(c) motions, we will not find trial courts so limited.

¶ 35 We turn to the record to determine whether the trial court ordered the continuance until November 4 or longer. The State's October 7, 2008, motion asked the trial court to continue the cause "to the November 4, 2008 pretrial date." The State maintained "there [were] reasonable grounds to believe that some or all of said testing can be completed prior to November 4, 2008," indicating all DNA testing would not be completed by such date, particularly in light of its request, filed 8 days later and 5 days before the hearing, for defendant's DNA.

At the October 20, 2008, hearing, defense counsel objected "for the record," stating he understood "the need or the necessity by the State perhaps for these things." The trial court then determined it would grant the motion to continue. The court next stated the motion could "extend the speedy trial for an additional 120 days * * * at a trial date somewhat outside the normal 120–day time frame." The court did not set a definite time for the trial but stated it would do so "as soon as the information is provided to the State."

¶ 36 The record is clear. The trial court granted a continuance up to the 120–day maximum. See *Colson,* 339 Ill.App.3d at 1041, 791 N.E.2d at 651 ("The grant of a section 103–5(c) continuance extends the 120–day speedy-trial term to a maximum of 240 days."). The court did not find the trial would be set after 29 days, but after the DNA-testing information was provided to the State. Defendant's argument fails.

¶ 37 III. CONCLUSION

¶ 38 For the reasons stated, we affirm the trial court's judgment. We grant the State its statutory assessment of $75 as costs of this appeal.

***8** ¶ 39 Affirmed.

Justices APPLETON and COOK concurred in the judgment.

All Citations

Not Reported in N.E.2d, 2012 IL App (4th) 090893-U, 2012 WL 7007584

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March 31, 2017
Carla Bender
4th District Appellate
Court, IL

2017 IL App (4th) 160449

NO. 4-16-0449

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. GRANVILLE S. JOHNSON, Defendant-Appellant.	))))))))	Appeal from Circuit Court of Champaign County No. 08CF1424 Honorable John R. Kennedy, Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court, with opinion.
Presiding Justice Turner and Justice Appleton concurred in the judgment and opinion.

OPINION

¶ 1 In April 2014, defendant, Granville S. Johnson, filed a petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2014)) with the assistance of private counsel. In June 2014, the trial court dismissed defendant's petition at the first stage of postconviction proceedings.

¶ 2 In July 2014, defendant's counsel withdrew his representation, and defendant filed a timely *pro se* motion to reconsider, which he later supplemented. Defendant's motion to reconsider and its supplement alleged postconviction counsel provided "ineffective" assistance by failing to raise certain previously requested claims in his postconviction petition.

¶ 3 In May 2016, the trial court denied defendant's motion to reconsider and found

any new claims raised in his motion to reconsider and its supplement were forfeited as they were not raised in the original petition. Defendant appeals, arguing the trial court erred by (1) not considering whether postconviction counsel's representation was "unreasonable" for failing to include the additional claims in his postconviction petition and (2) summarily dismissing his petition because at least one of the claims he would have raised states the gist of a meritorious claim. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In August 2009, a jury found defendant guilty of first degree murder (720 ILCS 5/9-1(a)(1) (West 2008)) and attempt (first degree murder) (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2008)), and, in November 2009, the trial court sentenced him to consecutive terms of 53 years' and 32 years' imprisonment. Defendant's convictions and sentence were later affirmed on appeal, and both his petition for leave to appeal to the Illinois Supreme Court and his writ of *certiorari* with the United States Supreme Court were denied. *People v. Johnson*, 2012 IL App (4th) 090893-U (affirming on direct review), *appeal denied*, No. 115225 (Ill. Jan. 30, 2013); *Johnson v. Illinois*, 134 S. Ct. 358 (2013) (denying petition for a writ of *certiorari*).

¶ 6 A. Direct Review

¶ 7 On appeal from his convictions and sentence, defendant argued, in relevant part, the trial court erroneously concluded the State exercised due diligence in obtaining deoxyribonucleic acid (DNA) test results and thus was entitled to an extension of the speedy-trial deadline under section 103-5(c) of the Code of Criminal Procedure of 1963 (725 ILCS 5/103-5(c) (West 2008)). *Johnson*, 2012 IL App (4th) 090893-U, ¶¶ 2, 18. In support of his argument, defendant highlighted three examples of a lack of due diligence: (1) the State, despite sending

other evidence for testing on August 13, 2008, failed to request a DNA standard for comparison until October 15, 2008; (2) despite obtaining defendant's sample, the State did not send the sample to the crime lab until early January 2009; and (3) the State could have avoided any delay had it checked the Illinois State Police DNA database, which had contained defendant's DNA since at least 2005. *Id.* ¶ 18. After reviewing the record "as it existed at the time of the [October 20, 2008,] hearing" on the State's motion for a continuance, we concluded the trial court's decision to grant the State a continuance was not an abuse of its discretion. *Id.* ¶¶ 22-28.

¶ 8 B. Postconviction Petition

¶ 9 In April 2014, defendant, through private counsel, filed a postconviction petition, alleging ineffective assistance of trial counsel for counsel's failure to file a motion to reconsider the trial court's October 20, 2008, order based on newly tendered evidence. Specifically, defendant alleged, on October 21, 2008, the State tendered supplemental discovery to trial counsel, which included a September 11, 2008, Illinois State Police lab report. According to the petition, the lab report stated the lab "was ready to proceed with DNA testing as soon as it received (1) permission to consume some of the samples in the testing process[,] and (2) a sample of [defendant's] DNA." The State did not file its motion to permit destruction of evidence necessary to complete forensic testing and motion for an order requiring the submission of defendant's biological and hair samples until October 15, 2008. Defendant asserted the State's failure to take the steps necessary to complete testing for approximately one month demonstrated, contrary to the court's previous decision, it did not act diligently in obtaining the DNA test results. Defendant argued, had (1) trial counsel filed a motion for the court to reconsider its prior ruling based on the newly tendered evidence, the trial court may have

reversed its decision to grant the State a continuance; and (2) the court reversed its prior decision, the State would have been required to try defendant by November 2008, which might well have led to the dismissal of the charges for a violation of the speedy-trial statute.

¶ 10 C. First-Stage Dismissal

¶ 11 On June 11, 2014, the trial court summarily dismissed defendant's postconviction petition. The court characterized defendant's petition as raising a claim his trial counsel was ineffective for failing to file a motion to reconsider the trial court's ruling granting the State a continuance to obtain DNA evidence, which, in turn, resulted in a violation of his right to a speedy trial. The court found defendant was "procedurally barred from asserting [his claim] under the doctrine of *res judicata*" as it was an issue "that [was] or could have been raised on direct appeal" and defendant "allege[d] no new evidence or information that was not or could not have been a subject of [his] direct appeal." In addition, the court found defendant's claim did not meet the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). On June 23, 2014, defendant, through counsel, filed a notice of appeal.

¶ 12 D. Retained Counsel's Motion to Withdraw Representation

¶ 13 On July 7, 2014, defendant's counsel filed with this court a motion to withdraw as counsel and appoint the office of the State Appellate Defender (OSAD) to represent defendant.

¶ 14 E. *Pro Se* Motion to Reconsider

¶ 15 On July 8, 2014, defendant directed a copy of a *pro se* motion to reconsider the dismissal of his postconviction petition be sent to the trial court and the State. Defendant's motion was file stamped by the circuit clerk on July 11, 2014.

¶ 16 In his motion to reconsider, defendant alleged, after receiving a copy of his

postconviction petition, he wrote postconviction counsel to address counsel's decision to not raise a claim of ineffective assistance of appellate counsel. Postconviction counsel allegedly wrote defendant and explained he did not need to do so because counsel on direct appeal argued about the lab report. Defendant, unsatisfied with postconviction counsel's response, requested counsel to supplement the petition with an ineffective assistance of appellate counsel claim. Defendant did not hear back from counsel until his petition was denied. Defendant asserted postconviction counsel was "ineffective" for failing to raise an ineffective assistance of appellate counsel claim.

¶ 17 In addition to the failure to raise an ineffective assistance of appellate counsel claim relating to the September 11, 2008, lab report, defendant alleged postconviction counsel was "ineffective" for failing to add other meritorious claims to his petition that he and counsel agreed would be added. Specifically, defendant wanted counsel to add claims of ineffective assistance of appellate and trial counsel for failing to address (1) the use of a recorded statement by Anthony Jamerson as substantive evidence at his trial and (2) double jeopardy. Defendant alleged, after he requested the additional claims be added to his petition,

> "[c]ounsel respond[ed] in [a] way that confused [him] and then beg[a]n questioning [him] about payment. [Defendant] mailed counsel['s] letter to family, to show family [that] counsel was complaining about money and that they needed to make payments. This is the reason said letter is not attach[ed] to this motion. [Defendant] do[es] believe that he can attach said letter in [the] future. After receiving [the] last letter from counsel about money

> and why he didn't raise ineffective [assistance] of direct appeal counsel[,] [defendant] never heard [f]rom counsel again, until [the] court dismiss[ed] [his] petition. [Defendant] wanted and had every intention of adding other meritorious issues to his [p]etition[,] including but not limited to the ones discussed in this motion."

¶ 18 F. Withdrawal of Representation by Retained Counsel

¶ 19 On July 11, 2014, this court granted private counsel's motion to withdraw as counsel and appointed OSAD to represent defendant on appeal.

¶ 20 G. Trial Court's Order Declining to Address Defendant's *Pro Se* Motion to Reconsider

¶ 21 On July 16, 2014, the trial court entered an order indicating it would not consider defendant's *pro se* motion to reconsider because defendant's counsel had previously filed a notice of appeal.

¶ 22 H. Agreed Motion for Summary Remand

¶ 23 In February 2016, defendant filed an agreed motion for summary remand for compliance with Illinois Supreme Court Rule 606(b) (eff. Dec. 11, 2014) to allow the trial court to consider his timely *pro se* motion to reconsider, which this court granted.

¶ 24 I. *Pro Se* Supplemental Motion to Reconsider

¶ 25 In March 2016, defendant filed a *pro se* supplemental motion to reconsider. Defendant alleged, in addition to the claims raised in his prior *pro se* motion to reconsider, his postconviction counsel provided "ineffective" assistance by failing to allege claims of ineffective assistance of appellate and trial counsel for failing to address (1) various evidentiary faults with

the trial testimony from a police officer, and (2) the failure to subpoena a key defense witness, Amandrea McGill, or ask for a continuance.

¶ 26 J. Denial of Motion to Reconsider

¶ 27 In May 2016, the trial court entered an order denying defendant's motion to reconsider and its supplement. The trial court maintained the claim raised in defendant's postconviction petition was both (1) "procedurally barred as [it related to] matters of record that could have been raised on direct appeal" and (2) meritless, as there was not a reasonable probability of a different outcome had trial counsel filed a motion to reconsider after being tendered the September 11, 2008, lab report. As to the additional claims raised in defendant's *pro se* motion to reconsider and its supplement, the court found the claims were forfeited as they were not raised in the original petition, and defendant had not requested leave to file a successive postconviction petition.

¶ 28 This appeal followed.

¶ 29 II. ANALYSIS

¶ 30 On appeal, defendant argues the trial court erred in not considering the additional claims contained in his *pro se* motion to reconsider and its supplement where the omission of those claims from his original petition was the fault of postconviction counsel, he exercised due diligence in bringing the new claims to the court's attention, at least one of his claims raised in his motion to reconsider states the gist of a meritorious claim, and he will be deprived of the opportunity to raise those claims in a future proceeding. Defendant requests we remand the matter and advance his petition to the second stage of postconviction proceedings.

¶ 31 From the outset, defendant acknowledges the trial court correctly noted it is

generally improper for a prisoner to raise new postconviction issues in a motion to reconsider. See 725 ILCS 5/122-3 (West 2014) ("Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is [forfeited]."); *People v. Vilces*, 321 Ill. App. 3d 937, 939-40, 748 N.E.2d 1219, 1221-22 (2001) (finding the defendant forfeited an issue raised for the first time in a motion to reconsider). However, defendant distinguishes the present matter and suggests the trial court should have relaxed the forfeiture rule because (1) retained counsel filed his initial postconviction petition, and (2) his motion to reconsider and its supplement alleged he received "ineffective" assistance of postconviction counsel. Defendant maintains this court should address his claim of "ineffective" assistance, which he now characterizes as "unreasonable" assistance, based on counsel's (1) failure to amend his petition with the claims he requested and (2) presentation of a claim the trial court found to be barred by *res judicata* and speculative. Defendant asserts, because at least one of his claims raised in his motion to reconsider states the gist of a meritorious claim, summary dismissal was in error and this court should remand for stage-two proceedings. Defendant specifically presents argument on appeal as to why the additional claim relating to the officer's testimony at trial—a claim first raised in the motion to reconsider—states the gist of a meritorious claim. In summary, defendant proposes the following rule:

> "[W]here private counsel files an initial petition that is deemed frivolous and patently without merit, and the petitioner files a timely motion to reconsider claiming that counsel failed to include numerous issues in the petition, the [forfeiture] rule should be relaxed because it is incumbent for the trial court to determine if

> counsel's representation was reasonable by reviewing the additional claims. If one of the additional claims has merit, the trial court necessarily abuses its discretion by not allowing the petition to proceed to stage two because counsel's failure to include that issue is unreasonable."

¶ 32 In response, the State maintains the trial court properly concluded, following section 122-3 of the Act (725 ILCS 5/122-3 (West 2014)) and the general rule highlighted in *Vilces*, any claim not raised in defendant's original postconviction petition is forfeited. The State contends to allow defendant to distance himself from the general rule because his petition was filed with the assistance of counsel would improperly grant more leverage to those prisoners who have the ability to retain counsel, contradict the plain language of section 122-3, and usurp the Act's contemplation of only one postconviction petition unless leave to file a successive petition is granted. The State maintains, if defendant wants to raise additional claims, he must do so in a successive postconviction petition. The State further asserts, even if this court (1) elects to address defendant's claim of unreasonable assistance on appeal, it would be improper to analyze a claim of unreasonable assistance based on new claims unrelated to the initial petition; and (2) addresses defendant's claim of unreasonable assistance based on the failure to raise a claim relating to the officer's testimony, it would fail as the underlying claim is meritless.

¶ 33 Defendant's entire argument is premised on the presumption prisoners are entitled to reasonable assistance at the first stage of postconviction proceedings. In his initial brief, defendant asserted, citing *People v. Cotto*, 2016 IL 119006, ¶ 32, 51 N.E.3d 802, the supreme court "recently reiterated that private counsel must render reasonable assistance at the first stage

of post[ ]conviction proceedings." The State's brief did address defendant's position and, in fact, presents argument under the presumption a prisoner is entitled to reasonable assistance at the first stage of postconviction proceedings.

¶ 34 Following the briefing in this case but before oral arguments, defendant's counsel, much to his credit, brought recent adverse authority, *People v. Garcia-Rocha*, 2017 IL App (3d) 140754, to the attention of the State and this court on the issue of whether prisoners are entitled to reasonable assistance at the first stage of postconviction proceedings. Both parties have now had the opportunity to thoroughly address this issue during oral arguments. The State now contends a prisoner is not entitled to reasonable assistance at the first stage of postconviction proceedings. As the issue presents a question of law, our review is *de novo*. *Cotto*, 2016 IL 119006, ¶ 24, 51 N.E.3d 802.

¶ 35 We begin with the statutory language. Section 122-4 of the Act (725 ILCS 5/122-4 (West 2014)) provides, where a postconviction petition is advanced to the second stage, a prisoner is without means to procure counsel, and the prisoner requests counsel be appointed, the trial court shall appoint counsel. This right of counsel arises only if the petition survives the first stage of postconviction proceedings. The Act does not otherwise grant prisoners the right to counsel at first-stage proceedings. See *People v. Ligon*, 239 Ill. 2d 94, 118, 940 N.E.2d 1067, 1081 (2010) (finding a defendant has no right to the appointment of counsel at the summary dismissal stage of his postconviction proceeding).

¶ 36 Our supreme court has noted the right to counsel in postconviction proceedings is "wholly statutory" (*People v. Lander*, 215 Ill. 2d 577, 583, 831 N.E.2d 596, 600 (2005)) and "a matter of legislative grace and favor which may be altered by the legislature at will" (internal

quotation marks omitted) (*People v. Owens*, 139 Ill. 2d 351, 364, 564 N.E.2d 1184, 1189 (1990)). "Because the right to counsel in post-conviction proceedings is derived from a statute rather than the Constitution, post-conviction petitioners are guaranteed only the level of assistance which that statute provides." *Id.* In placing its gloss over the statutory language, our supreme court has found, once a petition advances to second-stage proceedings, prisoners are entitled to a reasonable level of assistance, regardless of whether counsel is retained or appointed. *Cotto*, 2016 IL 119006, ¶ 42, 51 N.E.3d 802; 725 ILCS 5/122-4 (West 2014). Because the Act does not provide prisoners the right to counsel at the first stage of postconviction proceedings, we find no statutory basis to grant prisoners who have the ability to retain counsel the right to reasonable assistance at first-stage proceedings.

¶ 37 In 2009, the Second District was presented with the same issue. In *People v. Kegel*, 392 Ill. App. 3d 538, 539, 913 N.E.2d 30, 31 (2009), the defendant appealed from the summary dismissal of his postconviction petition, arguing he did not receive reasonable assistance from the attorney he hired to prepare his petition. While the right to counsel, and thus the right to reasonable assistance, never arose because his petition was summarily dismissed, the defendant argued an attorney retained to prepare a postconviction petition should be held to the same standard as an attorney appointed to assist a defendant whose *pro se* petition has passed muster under section 122-2.1. *Id.* at 541, 913 N.E.2d at 32. The court rejected defendant's argument, finding it to be an attempt "to disengage the guarantee of reasonable assistance from the underlying right to counsel such that the former can exist independently of the latter." *Id.* It found:

"[T]he rule that defendant champions would lead to disparate

> treatment among prisoners who are similarly situated except with regard to the means to obtain counsel. A prisoner whose retained attorney filed a fatally defective petition would be entitled to reversal of the summary dismissal of the petition if the attorney did not provide 'reasonable assistance.' In contrast, an indigent defendant with no assistance of counsel who filed a petition suffering the same defect would have no basis for reversal. The General Assembly could not have intended such a result." (Emphasis omitted.) *Id.*

The court further rejected defendant's suggestion counsel was obligated to provide reasonable assistance as a matter of professional ethics, finding any private ethical obligation did not expand the scope of the government's obligation under section 122-4 to guarantee a defendant is properly assisted by counsel in postconviction proceedings. *Id.* at 541, 913 N.E.2d 32-33. In closing, the court noted its holding did not foreclose the defendant from raising his underlying claim in a successive petition and declined to express any view on whether the quality of postconviction counsel's performance could establish cause or whether it resulted in any prejudice. *Id.* at 542, 913 N.E.2d at 33. See also *People v. Shipp*, 2015 IL App (2d) 131309, ¶ 24, 53 N.E.3d 23 (finding "[n]either statute nor case law provide for a freestanding right to reasonable assistance of counsel at first-stage postconviction proceedings").

¶ 38 More recently, the Third District has followed suit in concluding a prisoner is not entitled to reasonable assistance at the first stage of postconviction proceedings. In *Garcia-Rocha*, 2017 IL App (3d) 140754, ¶ 1, the defendant appealed from the second-stage dismissal of

his postconviction petition, arguing he received unreasonable assistance by his privately retained postconviction counsel. The court initially noted it was unclear whether the defendant was arguing counsel was unreasonable for failing to raise an issue in his initial petition, failing to amend the petition at the second stage of proceedings, or both. *Id.* ¶ 26. To the extent the defendant was raising a claim of unreasonable assistance based on counsel's failure to include an issue in his initial petition, the court rejected such an argument. *Id.* ¶¶ 27-34. The court found "neither the legislature nor Illinois courts [have] recognized any right to counsel at the first stage of postconviction proceedings," and, citing *Kegel*, it echoed concerns that accepting the defendant's argument would lead to disparate treatment among prisoners similarly situated except with regard to the means to obtain counsel. *Id.* ¶¶ 27-28. Justice McDade, in her partial concurrence/dissent, disagreed with the majority finding. *Id.* ¶¶ 52-61 (McDade, J., concurring in part and dissenting in part). She suggested a prisoner is entitled to reasonable assistance because, "in essence, when [the] prisoner retains counsel to prepare the initial postconviction petition, the first and second stages effectively merge and it is the job of retained counsel to both identify and raise those issues that could rise to the level of constitutional claims *and* to put them in proper form for the court's consideration." (Emphasis in original.) *Id.* ¶ 57.

¶ 39 Defendant asserts we should decline to follow our sister districts' decisions in *Kegel* and *Garcia-Rocha* as the supreme court in *Cotto* has provided express, binding authority for the proposition a prisoner is entitled to reasonable assistance at the first stage of postconviction proceedings. In *Cotto*, 2016 IL 119006, ¶ 22, 51 N.E.3d 802, the defendant appealed from the second-stage dismissal of his postconviction petition, arguing his privately retained postconviction counsel failed to provide him with a reasonable level of assistance. The

supreme court was tasked with deciding "if every postconviction petitioner represented by counsel is entitled to a reasonable level of assistance from counsel *after first-stage proceedings*, regardless of whether counsel was appointed or privately retained." (Emphasis added.) *Id.* ¶ 1. The court ultimately found:

> "[T]he appellate court in this case erred when it concluded that defendant was not entitled to reasonable assistance from his retained counsel *at second-stage proceedings*. *** We hold that there is no difference between appointed and privately retained counsel in applying the reasonable level of assistance standard to postconviction proceedings. Both retained and appointed counsel must provide reasonable assistance to their clients *after a petition is advanced from first-stage proceedings*." (Emphases added.)
>
> *Id.* ¶ 42.

Based on its characterization of the issue presented and ultimate holding, the supreme court was not tasked with determining whether a prisoner is entitled to reasonable assistance at the first stage of postconviction proceedings. However, in reaching its holding the court did make the following comment: "This court has also required reasonable assistance from privately retained postconviction counsel at the first and second stage of postconviction proceedings." *Id.* ¶ 32. In support of this comment, the court cited its prior decision in *People v. Mitchell*, 189 Ill. 2d 312, 358, 727 N.E.2d 254, 280 (2000), with a parenthetical indicating the court in that case reviewed "retained counsel's performance under the reasonable assistance standard." *Cotto*, 2016 IL 119006, ¶ 32, 51 N.E.3d 802.

¶ 40 Defendant maintains the supreme court's comment in *Cotto* demonstrates he is entitled to reasonable assistance at the first stage of postconviction proceedings. The Third District addressed the supreme court's comment in *Garcia-Rocha*. The *Garcia-Rocha* majority distinguished *Mitchell*—the authority the supreme court relied upon in making such a comment—as in that case the defendant was sentenced to death (*Mitchell*, 189 Ill. 2d at 320, 727 N.E.2d at 261), and prisoners sentenced to death had a statutory right to the assistance of appointed counsel at the first stage of postconviction proceedings (725 ILCS 5/122-2.1(a)(1) (West 1992); *People v. Brisbon*, 164 Ill. 2d 236, 243, 647 N.E.2d 935, 938 (1995)). *Garcia-Rocha*, 2017 IL App (3d) 140754, ¶ 29. The majority found any right to reasonable assistance the prisoner in *Mitchell* may have had at the first stage of proceedings did not apply to the defendant, who was sentenced to a term of imprisonment and had no statutory right to counsel at the first stage of proceedings. *Id.* The *Garcia-Rocha* dissent disagreed, finding the majority improperly narrowed the supreme court's comment where the supreme court itself did not make such a distinction in its opinion. *Id.* ¶¶ 54-56 (McDade, J., concurring in part and dissenting in part).

¶ 41 We find the decisions of our sister districts to be well-reasoned: (1) neither the Act nor case law indicates a prisoner sentenced to a term of imprisonment is entitled to reasonable assistance at the first stage of postconviction proceedings, (2) to find such an entitlement would require us to judicially disengage the guarantee of reasonable assistance from the underlying right to counsel at second-stage proceedings so that the former can exist independently of the latter, and (3) awarding such an entitlement would lead to disparate treatment among prisoners similarly situated except with regard to the means to obtain counsel. See *Kegel*, 392 Ill. App. 3d at 539-41, 913 N.E.2d at 31-32; *Garcia-Rocha*, 2017 IL App (3d)

140754, ¶¶ 27-34. We further decline to find such an entitlement based on an unclear comment by the supreme court in a case where (1) the court was not tasked with considering the issue; (2) the comment relied on distinguishable precedent; and (3) the court cited, but did not reject, the Second District's holding in *Kegel*.

¶ 42 Defendant asserts requiring him to seek relief through a successive postconviction petition, as the trial court suggested, is a severe penalty for counsel's inadequate representation. Defendant maintains the penalty is severe because he would be unable to satisfy the cause-and-prejudice test. See generally *People v. Smith*, 2014 IL 115946, 21 N.E.3d 1172; 725 ILCS 5/122-1(f) (West 2014). Given the posture of this case, we decline to express any view on whether defendant, who purportedly has letters between himself and counsel wherein he requests counsel to raise certain meritorious claims in his postconviction petition prior to the trial court's ruling on the petition, may satisfy the cause-and-prejudice test if those letters and any supporting documentation are filed as part of his motion for leave to file a successive postconviction petition. See *Kegel*, 392 Ill. App. 3d at 542, 913 N.E.2d at 34 (declining to express any view on whether the quality of postconviction counsel's performance could establish cause or whether it resulted in any prejudice).

¶ 43 Based on the statutory language, the persuasive authority from our sister districts, and the absence of a clear ruling on this issue by the supreme court, we hold a prisoner is not entitled to reasonable assistance at the first stage of postconviction proceedings. Defendant was not entitled to reasonable assistance, and we reject defendant's arguments grounded in such an entitlement.

¶ 44 III. CONCLUSION

¶ 45 We affirm the trial court's judgment. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2014).

¶ 46 Affirmed.

State of Illinois

In the Circuit Court of the Sixth Judicial Circuit

Champaign County

People of the State of Illinois	Case No. 08 CF 1424
v	
	Honorable John R. Kennedy
Granville Johnson	

Notice of Appeal

An Appeal is taken from the order of judgement described below:

1. Court to which appeal is taken: Fourth Appellate District

2. Name of Appellant and address to which notices shall be sent
   Granville Johnson - K79226
   Menard Correctional Center
   P.O. Box 1000
   Menard, Illinois 62259

3. Date of judgement or order: June 11, 2014 & May 9, 2016.

4. Offense: First Degree murder and attempted murder.

5. Sentence: 53 years; Consecutive 32 years.

C000947

7. Issue on Appeal: Appellant appeals from the denial of a petition for post-conviction relief entered June 11, 2014; Appellant also appeals from the denial of a 'Motion for Reconsideration' entered on May 9, 2016.

Verified Petition for Report of Proceedings, Common law Record and for Appointment of Counsel on Appeal

Under Supreme Court Rules 605-608, Appellant asks Court to order the Official Court Reporter to transcribe an original and copy of all proceedings, file the original with the Clerk and deliver a copy to the appellant; order the Clerk to prepare the Record on Appeal and the Appointed Counsel on Appeal.

Appellant, being duly sworn, says at the time of the aforementioned judgement(s) he is unable to pay for the Record or retain counsel for appeal

Subscribed and sworn to before me on the 31st day of May, 2016

Shane W. G
Notary Public

Respectfully Submitted,
Granville Johnson
Granville Johnson

OFFICIAL SEAL
SHANE W. GREGSON
Notary Public - State of Illinois
My Commission Expires 2/25/2019

C000948

APPEAL TO THE ILLINOIS FOURTH APPELLATE COURT

FROM THE CIRCUIT COURT OF CHAMPAIGN COUNTY, SIXTH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS)
) Trial Court No. 2008-CF-001424
VS)
)
Granville S. Johnson) Trial Judge John R. Kennedy

FILED
SIXTH JUDICIAL CIRCUIT
36 JUN 13 2016
CLERK OF THE CIRCUIT COURT
CHAMPAIGN COUNTY ILLINOIS

Notice of Appeal

An appeal is taken from the order or judgment described below:

(1) Court to which appeal is taken: Appellate Court of Illinois, Fourth Judicial Circuit

(2) Name of Appellant and address to which notices shall be sent. Use additional sheet of paper if necessary:

Name: Granville S. Johnson K79226

Address: Menard CC
711 Kaskaskia St.
PO Box 1000
Menard, IL 62259 Email Address:

(3) Name and address of Appellant's Attorney on appeal.

Name: Michael J. Pelletier

Address: Office of the State Appellate Defender
400 West Monroe Street, Suite 303
P.O. Box 5240
Springfield, IL 62705-5240 Email Address:

(4) Date of judgment or order: November 20, 2009 and May 9, 2016

(5) Offense of which convicted: Murder/Intent To Kill/Injure
Attempt First Degree Murder

(6) Sentence: 53 years Illinois Department of Corrections, 32 years Illinois Department of Corrections
The sentence for each count are to run consecutively.

(7) If appeal is not from a criminal conviction, nature of order appealed from: Conviction, Sentence and Denial of Motion to Reconsider

(8) If appeal is from a judgment of a circuit court holding unconstitutional a statute of the United States or of this state, a copy of the court's findings made in compliance with Rule 18 shall be appended to this Notice of Appeal.

Granville S. Johnson
Defendant-Appellant

Signed: Kevin M. Blakeman

Clerk of the Circuit Court
Champaign County, Illinois

C000949