No. 122227

IN THE

SUPREME COURT OF ILLINOIS

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

REPLY BRIEF FOR PETITIONER-APPELLANT

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-vs-	)	Champaign County, Illinois, No. 08- CF-1424.
GRANVILLE S. JOHNSON	)	Honorable John R. Kennedy,
Petitioner-Appellant.	)	Judge Presiding.

REPLY BRIEF FOR PETITIONER-APPELLANT

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.

In his opening brief, Granville S. Johnson urged this Court to hold that petitioners are entitled to a reasonable level of assistance from retained counsel at the first stage of the Post-Conviction Hearing Act ("Act"). (Op. br., 22) Mr. Johnson asserted that to hold otherwise would belie fundamental fairness as petitioners would suffer the loss of meritorious constitutional claims merely because their retained postconviction counsel failed to include the claims in the initial

postconviction petition. (Op. br., 22) In response, the State argues that because this Court has held there is no right to counsel at the first stage of postconviction proceedings, "there is necessarily no right to a particular level of assistance, 'reasonable' or otherwise." (St. br., 10) But the State's logic is flawed, as shown by the analogous situation of petitions for relief from judgment filed under section 2-1401 of the Code of Civil Procedure ("Code"). 735 ILCS 5/2-1401 (2014).

Similar to petitioners at the first stage of postconviction proceedings, a defendant has no constitutional or statutory right to the appointment of counsel to represent him on a petition filed under section 2-1401 of the Code. 725 ILCS 5/122-1 *et seq*. (2014); 735 ILCS 5/2-1401; *Tedder v. Fairman*, 92 Ill. 2d 216, 227 (1982). Nevertheless, the trial court may, in its discretion, appoint counsel to represent an indigent defendant who files a section 2-1401 petition. *Tedder*, 92 Ill. 2d at 227; *People v. Pinkonsly*, 207 Ill. 2d 555, 559, 568 (2003). Although this Court has not specifically delineated the level of assistance required by counsel appointed to a section 2-1401 petitioner, this Court's decisions in *Tedder* and *Pinkonsly* are instructive. *People v. Walker*, 2018 IL App (3d) 150527, ¶ 24.

In *Tedder*, this Court held that even though defendants are not entitled to counsel in civil actions, when counsel is appointed to a section 2-1401 petitioner, the level of assistance required for counsel is to exercise due diligence. *Tedder*, 92 Ill. 2d at 227. Roughly 20 years later, in *Pinkonsly*, the defendant argued that appointed counsel provided ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984), in section 2-1401 proceedings. *Pinkonsly*, 207 Ill. 2d at 560-568. This Court rejected the notion that appointed counsel should be held to the *Strickland* standard, and observed that section 2-1401 does not specify any level

of assistance. *Id*. at 568. But this Court stated, "[a]ssuming that the defendant was entitled to the same level of assistance on his section 2–1401 petition as on a postconviction petition, the defendant did not receive unreasonable assistance." *Id*.

More recently, in *Walker*, the appellate court declined to reach the issue of whether a section 2-1401 petitioner who is appointed counsel is entitled to due diligence or to reasonable assistance by counsel. *Walker*, 2018 IL App (3d) 150527, ¶ 29. The court instead chose to analyze appointed counsel's representation under *both* standards, and found that counsel had failed to provide either due diligence or reasonable assistance. *Id*.

In other words, the fact that section 2-1401 petitioners, who have no statutory right to counsel, are entitled to a required level of assistance by appointed counsel, whether it be due diligence or reasonable assistance, forecloses the State's argument. See *Tedder*, 92 Ill. 2d at 227; *Pinkonsly*, 207 Ill. 2d at 568; *Walker*, 2018 IL App (3d) 150527, ¶ 29. Further, this Court has consistently repudiated the distinction between appointed and retained counsel. *People v. Richmond*, 188 Ill. 2d 376, 381 (1999); *People v. Cotto*, 2016 IL 119006, ¶ 32. Thus, contrary to the State's position, the right to a particular level of assistance by counsel is not inextricably linked to the right to counsel itself. (St. br., 10)

The State subsequently insists that the "long line of precedent" that establishes "there is [] no right to a particular level of assistance" at first-stage postconviction proceedings was not displaced by this Court's decision in *Cotto*. (St. br., 10-11); *Cotto*, 2016 IL 119006, ¶ 32. The State, echoing the appellate court, dismisses this Court's "sentence" 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. (St. br., 11); see *People v. Johnson*, 2017 IL App (4th) 160449, ¶ 40; *Cotto*, 2016 IL 119006, ¶ 32. Just as 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, so does the State. (St. br., 11); *Johnson*, 2017 IL App (4th) 160449, ¶¶ 40-41. But as noted in Mr. Johnson's opening brief, this Court "itself made no such distinction in *Cotto*." (Op. br., 17); *People v. Garcia-Rocha*, 2017 IL App (3d) 140754, ¶ 54 (McDade, J., concurring in part and dissenting in part).

The logic of the State's position centers on the idea that there is a different standard for appointed counsel and counsel who is retained before any automatic statutory right is triggered. The State essentially posits that there is a lower standard for retained counsel. Yet, this Court has repeatedly rejected the distinction between appointed and privately retained counsel. *Richmond*, 188 Ill. 2d at 381 (abandoning the distinction between appointed and retained counsel as to Rule 651(c)); *Cotto*, 2016 IL 119006, ¶ 42 ("We hold that there is no difference between appointed and privately retained counsel in applying the reasonable level of assistance standard to postconviction proceedings.").

The State then, citing to the Illinois Rules of Professional Conduct and *People v. Kegel*, 392 Ill. App. 3d 538 (2d Dist. 2009), claims there is a standard of representation for retained first-stage postconviction counsel because "[e]xisting standards require all attorneys to consult with their clients and provide competent representation." (St. br., 12) However, the State overlooks that the *Kegel* court emphasized the distinction between a "*governmental* obligation[] to ensure proper

representation," created by the Sixth Amendment and section 122-4 of the Act, and a "private obligation" created by the Rules of Professional Conduct. *Kegel*, 392 Ill. App. 3d at 541; see 725 ILCS 5/122-4 (2014). Certainly, retained first-stage postconviction counsel who fails to include meritorious constitutional claims in an initial petition may be subject to disciplinary action and liability for professional malpractice under the Rules of Professional Conduct. See *Kegel*, 392 Ill. App. 3d at 541. But because the appellate court has determined that there is no "*governmental* obligation[] to ensure proper representation" for first-stage postconviction petitioners, the petitioner who retains counsel to file an initial petition on his behalf stills suffer the loss of meritorious constitutional claims when his counsel provides unreasonable representation. See *Johnson*, 2017 IL App (4th) 160449, ¶¶ 36, 41; *Garcia-Rocha*, 2017 IL App (3d) 140754, ¶ 29; *People v. Shipp*, 2015 IL App (2d) 131309, ¶ 16; *Kegel*, 392 Ill. App. 3d at 541.

The State fails to explain how disciplinary action and malpractice liability can cure a petitioner's forfeiture of constitutional claims in an initial petition, especially when considering the procedural hurdles the petitioner will not be able to overcome in successive postconviction petitions. (Op. br., 20-21) In *People v. Flores*, 153 Ill. 2d 264 (1992), this Court adopted the rule in *Coleman v. Thompson*, 501 U.S. 722, 753-754 (1991), that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default. *Flores*, 153 Ill. 2d at 276-277. This rule precludes first-stage postconviction petitioners from obtaining relief based on unreasonable representation. The State's position thus abandons first-stage postconviction petitioners without a direct remedy, as they cannot undo the damage done in their case. It is small consolation that

such petitioners can then file a complaint with the Attorney Registration & Disciplinary Commission.

Moreover, if, as the State alleges, existing standards for attorneys were sufficient to guarantee competent representation, there would be no need for standards such as "effective assistance of counsel," "reasonable assistance of counsel," and "due diligence." See *Strickland*, 466 U.S. at 688; *Cotto*, 2016 IL 119006, ¶ 30; *Tedder*, 92 Ill. 2d at 227. Yet, those standards of representation exist so that courts may ensure that defendants are receiving proper representation at trial and in collateral proceedings. *Id*. As such, barring first-stage postconviction petitioners from receiving reasonable assistance from retained counsel leaves them defenseless against the forfeiture of meritorious constitutional claims. This Court should therefore 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.

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 his opening brief, Mr. Johnson acknowledged that he had argued in the appellate court that it is generally improper for a petitioner to raise new postconviction issues in a motion to reconsider the dismissal of a postconviction petition. (Op. br., 23); *Johnson*, 2017 IL App (4th) 160449, ¶ 31. But because this

Court has yet to reach this issue, he requested that this Court hold that a petitioner may raise new issues in a motion to reconsider the dismissal of a postconviction petition. (Op. br., 23)

The State responds that given Mr. Johnson's waiver of this issue, "this Court need not consider his argument at all." (St. br., 7 n. 4) But waiver "is an admonition to the parties and not a limitation on the jurisdiction of this [C]ourt." *People v. Normand*, 215 Ill. 2d 539, 544 (2005). "[C]ourts of review may sometimes override considerations of waiver or forfeiture in the interests of achieving a just result and maintaining a sound and uniform body of precedent." *Jackson v. Bd. of Election Comm'rs of City of Chicago*, 2012 IL 111928, ¶ 33.

The State cites to numerous civil cases for the proposition that "litigants may not raise new claims via motions for reconsideration." (St. br., 7-8) But civil cases are distinct from criminal cases, and the procedural rules are not always interchangeable. For instance, although the plain error doctrine is greatly utilized in criminal cases, it is only applied in limited circumstances in civil cases. *Baumrucker v. Express Cab Dispatch, Inc.*, 2017 IL App (1st) 161278, ¶ 55. In fact, the appellate court has found that the application of plain error to civil cases should be "exceedingly rare." *Arient v. Shaik*, 2015 IL App (1st) 133969, ¶ 37. In those rare cases, the plain error doctrine may be applied only "where the act complained of was a prejudicial error so egregious that it deprived the complaining party of a fair trial and substantially impaired the integrity of the judicial process itself." *Arient*, 2015 IL App (1st) 133969, ¶ 37.

There is an inherent dissimilarity between civil cases, the object of which is to redress wrongs by seeking compensation or restitution, and criminal cases,

the object of which is to punish offenders. Thus, civil case law should not dictate whether this Court determines if postconviction petitioners in criminal cases should be allowed to raise new issues in a motion to reconsider the dismissal of a postconviction petition. As Mr. Johnson argued in his opening brief, raising new issues in a motion to reconsider would allow 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 unreasonable assistance of counsel. (Op. br., 25)

This is especially important in the context of initial postconviction petitions as they deal with constitutional claims, and any claims not raised in the initial petition are waived. 725 ILCS 5/122-1(f) (2014); see *People v. Allen*, 2015 IL 113135, ¶ 24. Further, this Court's relaxed rules when construing *pro se* petitions favor allowing *pro se* petitioners to file for reconsideration. See *People v. Hodges*, 234 Ill. 2d 1, 21 (2009) (rejecting a strict construction of *pro se* petitions as "inconsistent with the requirement that a *pro se* petition be given a liberal construction," and finding that "[w]here defendants are acting *pro se*, courts should review their petitions with a lenient eye, allowing borderline cases to proceed"). Significantly, here, Mr. Johnson was acting *pro se* in filing his motion to reconsider only after his retained postconviction counsel provided unreasonable assistance by raising issues in the initial petition that were either barred by *res judicata* or "speculative at most." (Vol. IV, C. 842-844)

The State, however, insists that this Court has "held repeatedly that claims not raised in an original (or amended) postconviction petition are waived." (St. br., 8) In the cases the State cites to, however, the petitioners either raised new claims for the first time on review (*People v. McNeal*, 194 Ill. 2d 135, 147 (2000); *People*

v. Patterson, 192 Ill. 2d 93, 146 (2000)), asserted that this Court should treat a successive petition as an initial petition because the proceedings on the initial petition were void, (*People v. Wright*, 189 Ill. 2d 1, 13 (1999)), or just generally stated the law as to postconviction petitions (*Flores*, 153 Ill. 2d at 274). (St. br., 8) Those cases are distinguishable as they did not address waiver where a postconviction petitioner raises new claims in a timely motion to reconsider the dismissal of a petition. Likewise, the Act itself only addresses waiver in the context of successive petitions, not motions to reconsider the dismissal of a petition. (St. br., 9); 725 ILCS 5/122-1(f), 122-3 (2014). Therefore, this Court should determine whether a petitioner may raise new issues in a motion to reconsider the dismissal of a postconviction petition.

The State alternatively argues that Mr. Johnson's "second motion for reconsideration was [] procedurally improper because it was filed more than thirty days after the entry of judgment and because it was the second such motion that [he] filed." (St. br., 9 n. 5) The State is incorrect, and has waived the issue by failing to raise it in the appellate court. See *Meyers v. Kissner*, 149 Ill. 2d 1, 8 (1992) ("Issues not raised and argued before the appellate court are treated as waived.").

Regardless, Mr. Johnson did not file a second motion to reconsider, but rather a supplemental motion for reconsideration. (Vol. IV, C. 934) Because the trial court had not ruled on Mr. Johnson's *timely* motion to reconsider, and the appellate court had remanded the case for the sole purpose that the court consider Mr. Johnson's motion, there was no reason Mr. Johnson could not file a supplemental motion to reconsider. (Vol. IV, C. 932); see *People v. Miraglia*, 323 Ill. App. 3d 199, 205 (2d Dist. 2001) ("We recognize that, as a practical matter and apparently

without express authority in the rules, courts do allow the amendment of a timely filed motion.) Unlike *Miraglia*, where the defendant filed a second reconsideration motion after the trial court had denied the first motion, there was no ruling here. See *Miraglia*, 323 Ill. App. 3d at 201. Further, the mere fact that the trial court considered Mr. Johnson's supplemental motion for reconsideration in conjunction with his initial motion to reconsider when denying the motions suggests that the court implicitly allowed the amendment within its discretion. (Vol. IV, C. 944-945)

In sum, 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.

In his opening brief, Mr. Johnson asserted that where retained counsel files an initial postconviction 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. (Op. br., 26-27) Mr. Johnson argued that in such circumstances, it is incumbent for the trial court to determine if counsel's representation was reasonable by reviewing the additional claims. (Op. br., 26-27) Further, Mr. Johnson contended that 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 of the Act because counsel's failure to include that issue is unreasonable. (Op. br., 27)

Recently, in *People v. Custer*, 2018 IL App (3d) 160202, the appellate court found "that a *Krankel*-like procedure should apply to situations where a defendant makes a claim of unreasonable assistance of postconviction counsel." *Custer*, 2018 IL App (3d) 160202, ¶ 25. In *Custer*, after a third-stage postconviction evidentiary hearing, the petitioner filed a *pro se* motion to reconsider, arguing that his postconviction counsel had "acted against" him by failing to call a witness at the evidentiary hearing. *Id.*, ¶ 21. During the hearing on the motion to reconsider, postconviction counsel appeared on behalf of the petitioner, and stated "[h]is motion speaks for itself. I would stand on what he already filed." *Id.*, ¶ 23. The trial court denied the motion, and the petitioner appealed. *Id.*

On appeal, the *Custer* court examined *People v. Krankel*, 102 Ill. 2d 181 (1984), and its progeny, and noted that unlike the posttrial stage, there is no constitutional right to effective assistance of counsel during postconviction proceedings. *Id.*, ¶¶ 26-28. Nevertheless, the court found that "[t]he differences between [the] defendant's right to the effective assistance of posttrial counsel and the reasonable assistance of postconviction counsel do not prohibit the use of a *Krankel*-like procedure during postconviction proceedings." *Id.*, ¶ 29. Indeed, the court determined that the goals of *Krankel* are as valuable in postconviction proceedings as they are in posttrial proceedings. *Id.* To that end, the court explained that an inquiry into a petitioner's *pro se* claims of unreasonable assistance allows the trial court "to determine if new counsel needs to be appointed to avoid any conflict, develops the record regarding the petitioner's claim, and limits the issues on appeal." *Id.*

Here, after the trial court summarily dismissed Mr. Johnson's initial postconviction petition, Mr. Johnson filed a *pro se* motion to reconsider, raising additional issues and averring that he told counsel he wanted him to include these, and other, issues but counsel declined to do so. (Vol. IV, C. 842-844, 853, 859, 865) 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 appellate court 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)

If this Court finds that Mr. Johnson was entitled to reasonable assistance from counsel at the first stage of postconviction proceedings, then the trial court erred in refusing to review Mr. Johnson's additional claims in his motions to reconsider to determine if counsel's representation was unreasonable. While Mr. Johnson did not expressly propose in his opening brief that a "*Krankel*-like procedure" be conducted akin to the holding in *Custer*, he did suggest that the trial court conduct some type of inquiry into a first-stage postconviction petitioner's claims of unreasonable assistance from retained counsel. (Op. br., 27) This inquiry, at a minimum, should have entailed the trial court allowing Mr. Johnson's initial postconviction petition to advance to second-stage postconviction proceedings if even one of Mr. Johnson's additional claims (that counsel refused to include) in his motions to reconsider had merit. (Op. br., 27) As the *Custer* court noted, the trial court's inquiry into Mr. Johnson's *pro se* claims of unreasonable assistance

would have "develop[ed] the record regarding the petitioner's claim, and limit[ed] the issues on appeal." See *id.*, ¶ 29.

The State, in response, dismisses this argument in a footnote by relying on its stance that first-stage postconviction petitioners are not entitled to any level of assistance. (St. br., 7 n. 3) But as argued in subsection (A), the State's position leaves first-stage postconviction petitioners with no recourse for retained postconviction counsel's unreasonable representation, even where the petitioner can identify issues that satisfy the gist of a meritorious constitutional claim. Because 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, this Court should remand Mr. Johnson's petition 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.

In his opening brief, Mr. Johnson asserted that he presented the gist of a meritorious claim where he argued 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. (Op. br., 29; Vol. IV, C. 934-942) Mr. Johnson contended that he was prejudiced because but for counsel's deficient performance, he may have been acquitted on the charges. (Op. br., 29) Because this argument was in

the record, and thus available on direct appeal, Mr. Johnson insisted that appellate counsel was ineffective for failing to raise the claim and assert trial counsel's ineffectiveness. (Op. br., 29; Vol. IV, C. 940) The State responds that Mr. Johnson's claims are meritless. (St. br., 12) But the State's arguments on the merits are undermined by its failure to employee the gist standard applicable to first-stage postconviction claims. See *Allen*, 2015 IL 113135, ¶ 24.

Yandell's Testimony Regarding Informant Status

First, Mr. Johnson argued that Yandell's testimony, that the alternative suspects with a motive to shoot the victim, Gregory Moore, did not learn of his identity as an informant, was improper. (Op. br., 35; Vol. XXXV, R. 453) As an informant, Gregory provided Yandell with information regarding Brandon Baker, Fidel Garcia, Edmundo Alvarado, and Norberto and Octaviano Sanchez. (Vol. XXXV, R. 443-445) Mr. Johnson noted that defense counsel did not object to Yandell's testimony, and he did not further question Yandell about the matter on recross examination. (Op. br., 35; Vol. XXXV, R. 453, 456-459) Mr. Johnson asserted that 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. (Op. br., 35); see Ill. R. Evid. 602 (eff. Jan.1, 2011).

The State responds that Yandell's testimony was "competent" because he testified only that he was not aware of the alternative suspects learning that Gregory was an informant, not that the drug dealers were in fact unaware of Gregory's informant status. (St. br., 13) The State emphasizes that Yandell's "lack of knowledge [of the dealers' awareness of Gregory's informant status] is precisely what Yandell

testified to." (St. br., 13) The State seemingly concedes the argument because if Yandell lacked personal knowledge of whether the dealers learned the identify of Gregory as an informant, then he could not testify to that matter because he had no personal knowledge. See Ill. R. Evid. 602 ("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."). Consequently, trial counsel provided deficient representation by failing to object to Yandell's testimony, and appellate counsel was deficient for failing to raise the claim and assert trial counsel's ineffectiveness because this argument was in the record, and thus available on direct appeal. (Op. br., 35-36)

Yandell's Testimony Regarding Octaviano

Mr. Johnson next contended that Yandell's testimony that Octaviano fled back to Mexico at the time that Gregory was killed was inadmissible hearsay. (Op. br., 36; Vol. XXXV, R. 454) Mr. Johnson argued that counsel further elicited hearsay on recross examination when he questioned Yandell about the source of knowledge, and Yandell responded that "[i]t was through other confidential sources." (Op. br., 36; Vol. XXXV, R. 458-459) Mr. Johnson maintained that Yandell's inadmissible hearsay testimony was offered to prove the truth of the matter asserted– that Octaviano was in Mexico at the time Gregory was killed. (Op. br., 36; Vol. XXXV, R. 454, 458-459; Vol. IV, C. 936); see *People v. Caffey*, 205 Ill. 2d 52, 88 (2001); *People v. Williams*, 181 Ill. 2d 297, 313 (1998); *People v. Simms*, 143 Ill. 2d 154, 174 (1991).

At the outset, the State argues that Mr. Johnson's claim that trial counsel was ineffective for failing to object to Yandell's direct-examination testimony as hearsay was not raised in his *pro se* supplemental motion for reconsideration. (St. br., 14 n. 8; Vol. IV, C. 934-942) While Mr. Johnson specifically mentioned only trial counsel's ineffectiveness for eliciting inadmissible hearsay from Yandell in his motion, this Court has rejected a strict construction of a *pro se* petition as "inconsistent with the requirement that a *pro se* petition be given a liberal construction." *Hodges*, 234 Ill. 2d at 21. Indeed, this Court has stated that "[w]here defendants are acting *pro se*, courts should review their petitions with a lenient eye, allowing borderline cases to proceed." (Internal citations omitted) *Id*. Thus, under a liberal construction, this Court should find that when Mr. Johnson alleged trial counsel's ineffectiveness as to Yandell's testimony about Octaviano, those allegations included direct-examination testimony.

The State then claims that Yandell's testimony was not hearsay because "he did not testify to what–if anything–th[e] sources told him," he only testified to "what he 'learned' from his 'confidential sources.'" (St. br., 14) This is a distinction without a different in this case. Yandell initially testified 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 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)

In other words, despite the State's contention, Yandell's testimony about "what he 'learned' from his 'confidential sources'" was testimony as to "what–if anything–th[e] sources told him." (St. br., 14) Yandell could have properly testified that he talked to confidential sources and then took steps to determine Octaviano's location during Gregory's death, but he could not testify that he learned Octaviano was in Mexico from his confidential sources. See, *e.g.*, *Williams*, 181 Ill. 2d at 313; *Simms*, 143 Ill. 2d at 174. Further, the State's concession that Yandell testified to an out-of-court statement in a later portion of his recross examination supports Mr. Johnson's argument as there is no difference between his testimony from that portion and the portion that was quoted in Mr. Johnson's opening brief. (St. br., 14 n. 9; Op. br., 36) In both portions of Yandell's testimony, he stated that Octaviano was in Mexico based on a source's information. (St. br., 14 n. 9; Op. br., 36) As such, Yandell's testimony about Octaviano's whereabouts 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)

The State subsequently alleges that Yandell's testimony on recross examination was not hearsay, much less deficient representation or prejudicial, because trial counsel did not elicit it to prove the truth of the matter asserted,

but to prove "the *falsity* of the matter asserted (i.e., that Yandell's information on this point was unreliable and thus that Octaviano was a viable alternative suspect)." (St. br., 15 n. 10) The State speculates that because trial counsel argued in closing that Octaviano had a motive to kill Gregory and was "still out there" at the time of Gregory's murder, counsel's strategy must have been to elicit inadmissible hearsay testimony from Yandell. (St. br., 15; Vol. XXXVIII, R. 791-792)

But the State fails to explain why trial counsel needed to elicit inadmissible hearsay from Yandell on recross examination when Yandell's testimony on direct examination established that Octaviano was "still out there," which was the extent of counsel's suggestion in closing. (Vol. XXXV, R. 454) The State also does not expound upon its theory that counsel was attempting to prove that Yandell's information about Octaviano was unreliable when there was no evidence that counsel cast doubt on Yandell's "confidential sources." (St. br., 15) Therefore, 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.

Yandell's Testimony Regarding Alternative Suspects

Finally, Mr. Johnson asserted that Yandell's testimony, that all of the other individuals Gregory had informed on were in the custody of a law enforcement agency at the time that he was killed, was improper. (Op. br., 37-38; 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)

Mr. Johnson argued that 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. (Op. br., 37-38); see Ill. R. Evid. 602; *Caffey*, 205 Ill. 2d at 88. The State responds that Yandell had personal knowledge of the alternative suspects' location at the time of Gregory's death because of his personal involvement in each of their prosecutions. (St. br., 16-17) But the State's argument is speculative since nothing shows that Yandell knew where the alternative suspects were, and so the State is assuming a favorable fact, which is contrary to the gist of a constitutional claim standard. See *Allen*, 2015 IL 113135, ¶ 24; *People v. Edwards*, 197 Ill. 2d 239,

244 (2001) (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).

As Mr. Johnson argued, trial counsel's representation was still 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. (Vol. XXXV, R. 454) 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) 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.

Prejudice

Mr. Johnson argued in his opening brief that counsel's deficient performance prejudiced him because had counsel objected, the State would not have been able to introduce Yandell's numerous improper and inadmissible statements, which damaged his defense that one of the alternative suspects shot Gregory and Isaac Moore. (Op. br., 38-39) The State, however, undertakes no prejudice analysis for any of the errors as it fails to discuss the impact of the errors on the case. (St. br., 13-18); see *Strickland*, 466 U.S. at 694. Instead, the State summarily declares a lack of prejudice, and thus has forfeited any argument that Mr. Johnson did not satisfy the prejudice prong of his ineffective assistance of counsel claims under the gist of a meritorious claim standard. (St. br., 15 n. 10, 18 n.12); see *People v. Bradley*, 2017 IL App (4th) 150527, ¶ 24 (finding the State forfeits arguments not supported by legal authority and analysis).

CONCLUSION

For the foregoing reasons, Granville S. Johnson, petitioner-appellant, 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 reply brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this reply brief, excluding pages containing the Rule 341(d) cover and the Rule 341(c) certificate of compliance is 5,713 words.

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IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, No. 4-16-0449.
Plaintiff-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,
Defendant-Appellant	)	Judge Presiding.

NOTICE AND PROOF OF SERVICE

Lisa Madigan, Attorney General, 100 W. Randolph St., Chicago, IL 60601, eserve.criminalappeals@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 June 13, 2018, the Reply Brief 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 defendant-appellant 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 Reply Brief to the Clerk of the above Court.

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