Illinois Official Reports

Supreme Court

***People v. Agee*, 2023 IL 128413**

Caption in Supreme Court:	THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. JAMES AGEE, Appellant.
Docket No.	128413
Filed	November 30, 2023
Decision Under Review	Appeal from the Appellate Court for the Second District; heard in that court on appeal from the Circuit Court of Winnebago County, the Hon. Debra D. Schafer, Judge, presiding.
Judgment	Judgments affirmed.
Counsel on Appeal	James E. Chadd, State Appellate Defender, Douglas R. Hoff, Deputy Defender, and Sean Collins-Stapleton, Assistant Appellate Defender, of the Office of the State Appellate Defender, of Chicago, for appellant. Kwame Raoul, Attorney General, of Springfield (Jane Elinor Notz, Solicitor General, and Katherine M. Doersch and Erin M. O'Connell, Assistant Attorneys General, of Chicago, of counsel), for the People.

Justices

JUSTICE NEVILLE delivered the judgment of the court, with opinion.

Chief Justice Theis and Justices Overstreet, Holder White, Cunningham, Rochford, and O'Brien concurred in the judgment and opinion.

OPINION

¶ 1 Petitioner, James Agee, pled guilty in the circuit court of Winnebago County to a charge of first degree murder. The circuit court sentenced petitioner to 25 years' imprisonment. Petitioner thereafter filed a *pro se* petition for postconviction relief alleging ineffective assistance of trial counsel for failing to seek an expert to testify as to his mental health at the time of the offense. After the court docketed the petition for second-stage proceedings, postconviction counsel was appointed. Postconviction counsel filed an amended petition adding a second claim, alleging that trial counsel was ineffective for failing to advise petitioner he could pursue a defense of second degree murder at trial. The State moved to dismiss the amended petition, arguing petitioner failed to show he was unaware of a defense to first degree murder, failed to show he had a viable defense, and failed to provide evidence of a mental health issue. The circuit court granted the motion. Petitioner appealed, arguing that postconviction counsel erroneously pled the second claim by failing to allege all the elements of a second degree murder claim. The appellate court affirmed in a summary order dated December 23, 2021. No. 2-20-0748 (2021) (unpublished summary order under Illinois Supreme Court Rule 23(c)). The court explained that the rule requiring reasonable assistance of postconviction counsel, Illinois Supreme Court Rule 651(c) (eff. July 1, 2017), does not require "any level of representation in the presentation of new claims." (Emphasis omitted.) No. 2-20-0748, ¶ 8. The court concluded that nothing in the language of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)) imposes a duty on postconviction counsel, as to claims that counsel adds to the *pro se* petition, because "neither Rule 651(c) nor the Act provides any basis for deeming that postconviction counsel has a duty to adequately present a new claim, defendant's argument on appeal fails as a matter of law." No. 2-20-0748, ¶ 10. For the following reasons, although different from the appellate court's reasoning, we affirm the judgments of the lower courts.

¶ 2 I. BACKGROUND

¶ 3 On October 18, 2010, petitioner strangled his longtime girlfriend Denise Davis during a physical altercation. He thereafter went directly to the police station and voluntarily made a statement to the police, which was recorded on video. Petitioner did not realize during much of the questioning that Davis was deceased, and several times he expressed a concern that she would be okay.

¶ 4 A. Petitioner's Statement to Police

¶ 5 According to the statements petitioner made during the interrogation, he and Davis had been in a long-term relationship and had dated on and off for 13 to 14 years. They lived together

two or three years before the altercation, and their latest breakup occurred three months earlier. They had a 10-year-old son. Petitioner arrived at Davis's house that morning, noticed that she was home, and parked in front of the house. Davis told petitioner that she was about to leave, but petitioner just went in, and they started arguing. He stated that "it was just normal for [him and Denise] to argue" and that "[f]or the last couple months [they had] been arguing a lot."

¶ 6 Petitioner claimed that Davis swung at him but he "blocked it," because years before he used to be a boxer. She "came at [him] again" and scratched his forehead, and petitioner "grabbed her" and "hit her a couple of times *** in her face." "She hit the ground. That's when I got on her, I guess, and was chokin' her," and "[a]s soon as she passed out, I left." Petitioner stated that he had "both hands around her neck" and left them there "for only a couple minutes."

¶ 7 Petitioner claimed that they had never had a physical fight before, because he knew that he could injure her, given the difference in their size. Petitioner stated that on that day, "I just, I just lost my temper. Maybe I went a little too far, yeah." Within 15 minutes of leaving Davis's house, petitioner had arrived at the police station. He stated that he did not call for an ambulance because his "mind was so jacked up" and he "thought [he] hurt her bad."

¶ 8 Petitioner stated that he told Davis that he had hired a private investigator to follow her. He told the police that was a lie.

¶ 9 Petitioner was asked several times what the argument was about and how it escalated into a physical confrontation. He responded, "I don't even remember what the argument was about," "I even forgot what we was arguin about," "[w]e argued so much, man. I don't remember," and "I think it was so much built up. I think we was just arguin. We was always arguin, and I don't know."

¶ 10 B. Preplea Proceedings

¶ 11 On November 22, 2010, the State filed a motion for disclosure before trial. On December 6, 2010, petitioner filed a supplemental answer to discovery indicating that he would be asserting the affirmative defense of use of force in defense of person (720 ILCS 5/7-1 (West 2010)).

¶ 12 Thereafter, defense counsel filed and litigated numerous motions *in limine* intended to keep out testimony and information at trial that defendant deemed prejudicial. Based on the defense motions, the parties litigated whether the State could introduce (1) Davis's out-of-court statements to witnesses asserting that petitioner had been stalking her after she ended their romantic relationship, (2) petitioner's prior charges and convictions, including several prior incidents of domestic violence, and (3) petitioner's unredacted, inculpatory statement to police.

¶ 13 At a hearing on May 1, 2012, the State clarified that it intended to focus on petitioner's history of stalking the victim, as indicated by Davis's statements and petitioner's admissions to police that he had hired a private investigator to follow Davis after they ended their relationship. The circuit court allowed the State to introduce testimony that petitioner had been stalking the victim and petitioner's statement.

¶ 14 C. Guilty Plea Proceedings and Postplea Motions

¶ 15 On May 3, 2012, just two days after the court's rulings, petitioner entered a negotiated plea of guilty to one count of first degree murder (*id.* § 9-1(a)(1)) for the October 2010 strangulation death of Davis. Prior to accepting the plea, the circuit court admonished petitioner pursuant to

Illinois Supreme Court Rule 402 (eff. July 1, 1997) to ensure his plea was knowingly and voluntarily entered. In response to those admonishments, petitioner assured the court that (1) he had fully discussed the terms and consequences of the agreement with his attorney, (2) he was aware of the rights he was relinquishing by entering the plea, (3) he was voluntarily entering the plea, (4) he understood the proceedings and the specific terms of the agreement, (5) he understood he had a right to plead not guilty and go to trial, (6) he was not under the influence of drugs or alcohol at the time of entering the plea, (7) he was not promised or threatened into pleading, and (8) he was doing so because he believed it was the best thing for him to do. The court accepted the plea and imposed the agreed-upon, 25-year sentence.

¶ 16 On June 28, 2012, trial counsel filed a motion to withdraw the guilty plea, alleging petitioner did not knowingly waive his right to a jury trial and that its late filing was due to petitioner's inability to contact counsel due to petitioner's incarceration. On July 2, 2012, petitioner filed a *pro se* motion to reconsider his sentence stating the sentence was excessive because he did not want to plead guilty to first degree murder "owing to my belief the charge should have been reduced to 2nd degree murder, or involuntary manslaughter, due to the incident deriveing [*sic*] from a domestic dispute." Attached was an affidavit titled "Affidavit in Support of Motion to Reconsider Sentence," signed by petitioner and dated June 27, 2012, stating that he was misled when trial counsel informed him his "charges could not be reduced to a lesser degree" and truth in sentencing would be abolished, thus, he would only serve half of his sentence. On the same date, petitioner filed a *pro se* motion to withdraw his guilty plea and vacate his sentence, alleging that he received ineffective assistance of counsel when he entered his guilty plea. He alleged that he was misinformed that truth in sentencing would be abolished. Again, his affidavit dated June 27, 2012, was attached but retitled "Affidavit in Support of Motion to Withdraw Guilty Plea and Vacate Sentence."

¶ 17 D. Postplea Circuit Court Proceedings

¶ 18 On July 25, 2012, the circuit court ruled that it lacked jurisdiction to consider the motions because they were filed more than 30 days after the plea. On April 12, 2013, petitioner filed a *pro se* motion to reconsider sentence, again alleging his sentence was excessive. The circuit court again ruled that it lacked jurisdiction to consider the motion because it was untimely filed. On October 2, 2013, petitioner filed a *pro se* motion to withdraw the plea, alleging trial counsel was ineffective for failing to "advise this defendant that the mental state he described having, although not vividly—at the time the alleged 1st degree murder occurred to trial counsel in private conferences constituted an affirmative defense to the 1st degree murder charge when considering his emotional attachment and relationship status to the victim." It also alleged that trial counsel failed to hire a mental health expert to investigate petitioner's mental state at the time of the offense. The motion requested that the circuit court recharacterize the motion as a postconviction petition.

¶ 19 On January 10, 2014, the circuit court ruled it lacked jurisdiction to consider the motion. On February 24, 2014, petitioner moved for reconsideration of that order, noting that his ineffective assistance of counsel claim was cognizable in postconviction proceedings and the court could recharacterize the motion to withdraw the plea as a postconviction petition.

¶ 20 E. Postconviction Proceedings

¶ 21 On April 11, 2014, the circuit court granted the motion to reconsider and recharacterized the October 2, 2013, motion to withdraw as a postconviction petition. On June 9, 2014, the circuit court admonished petitioner and continued the case to allow him to amend his filing. Ultimately, he decided to stand on the allegations raised in his motion. On January 9, 2015, the circuit court ruled petitioner's petition alleged the gist of a constitutional claim and docketed it for second-stage postconviction proceedings and the appointment of counsel.

¶ 22 After numerous continuances, on December 16, 2019, postconviction counsel filed an amended postconviction petition raising two claims. The first claim alleged trial counsel failed to advise petitioner regarding a second degree murder defense:

> "9. Defendant and Davis at one point had been involved in a romantic relationship. Davis and Defendant had a child together. On October 18, 2010, Defendant came to the Winnebago County Justice Center and advised Sheriff's deputies that he thought he had killed Davis. Davis was later located at her home and subsequently pronounced dead. Defendant gave a statement to detectives. Defendant admitted that he and Davis argued and that he choked Davis until she passed out. It was later determined that Davis died of asphyxiation.
>
> 10. Defendant's trial counsel failed to meet with Defendant sufficiently to develop a defense to the charge of first degree murder. Defendant advised his counsel that he and Davis had been in a relationship and the actions leading to the death of Davis occurred during the heat of an argument and that Defendant did not intend to kill or injure Davis. Counsel advised Defendant that he had no alternative but to plead guilty to the charge of first degree murder. Based on counsel's representations, Defendant believed he had no defense to the charge of first degree murder or that he had any alternative but to plead guilty. Counsel failed to advise Defendant that if he elected to go to trial, his attorneys could pursue a defense of second-degree murder base[d] on the fact that at the time of Davis' death, Defendant was acting under a sudden and intense passion due to being seriously provoked by Davis and that her death was the result of his own negligence.
>
> 11. Defendant's plea of guilty to the first degree murder charge was not knowingly and/or voluntarily given due to his counsel's failure to provide him with the information and/or option. Defendant would not have pled guilty had he been aware that he could have gone to trial and been found guilty of second-degree murder."

¶ 23 The amended petition's second claim alleged trial counsel was ineffective for failing to consult a mental health expert. This claim is not in issue on this appeal.

> "Given the Defendant's relationship with the victim and the fact that he self-reported the offense to the police; stated that he had blacked out during the time he choked Davis; and the fact that he believed that he suffered from mental health issues, it was unreasonable for defense counsel not to ask for a fitness evaluation and/or psychiatric examination."

¶ 24 The amended petition was supported by an affidavit from petitioner, which alleged in pertinent part:

> "4. Prior to the plea of guilty, my attorneys met with me infrequently and did not discuss with me any defenses to the charge of first degree murder.

5. I met mostly with my attorney on the day of trial while waiting for my case to be called. I was usually told by my attorney that she was negotiating a plea with the State and that a new court date would be scheduled.

6. It was never discussed with me by my attorney that I could go to trial and be found guilty of second-degree murder.

7. More than once I told my attorney that I blacked out during the argument that led to Denise Davis' death and that I believed I had mental health issues.

8. My attorneys never discussed with me the possibility of having a mental health evaluation and whether it would be beneficial to my defense.

9. Sometime in March or April, but prior to May 3, 2012 I was told by my attorney that a plea agreement had been negotiated with the [S]tate. I was told that it was the best agreement that could be reached and if I did not accept the offer and went to trial, I would be found guilty of first degree murder and sentence[d] to more than the 25 year offer.

10. I was not made aware of any possible defense to the first degree murder charge if I wanted to go to trial.

11. I did not believe that I had any alternative but to plead guilty.

12. Had I known about the elements of second-degree murder I would not have pled guilty as I did.

13. I do not believe that I was adequately represented, and I only pled guilty because I was told I had no other options."

Also attached was petitioner's 87-page transcript of his videotaped statement to the police and postconviction counsel's Rule 651(c) certificate. Ill. S. Ct. R. 651(c) (eff. July 1, 2017).

¶ 25 On April 28, 2020, the State filed a motion to dismiss the petition, arguing that the petition's claims were rebutted by the record, the petition failed to present corroborative evidence supporting the claims, and petitioner could not demonstrate prejudice as regards either claim, as he had neither made a showing of innocence nor presented a plausible defense. It also pointed out that in defendant's answer to discovery, before the plea, he asserted the affirmative defense of self-defense. On September 30, 2020, postconviction counsel filed an amended Rule 651(c) certificate, and on the same date, the hearing on the State's motion was held.

¶ 26 On December 9, 2020, the circuit court issued its order granting the State's motion to dismiss. The court specifically found:

"Mr. Agee indicated at the time of his plea that no one had forced him to plead guilty to this, and in looking, one of the most persuasive things that I found in reviewing the record were the words of Mr. Agee himself. In the motion—the pro se motion to reconsider sentence that was filed on July 2 of 2012, which is a handwritten motion, Mr. Agee indicated, 'I did not want to ple[a]d guilty to first degree murder owing to my belief the charge should have been reduced to second degree murder or involuntary manslaughter due to the incident deriving from a domestic dispute.' He didn't indicate in this motion, which was just a couple months after his guilty plea, that he had no idea that second degree was an issue or an option, that involuntary manslaughter was something that could have possibly been pursued. He indicated that at the time he pled

guilty he didn't really want to do it because in his mind he believed that second degree or involuntary was something more appropriate. That—to my mind that disputes and refutes the fact that he is just now finding out at some later date that second degree or involuntary may have possibly been an issue."

¶ 27 Petitioner appealed from the second-stage dismissal of his amended petition, arguing that postconviction counsel defectively pled the added claim by not sufficiently alleging all elements of the claim.

¶ 28 F. Appellate Court Decision

¶ 29 In a summary order dated December 23, 2021 (No. 2-20-0748, ¶ 11), the appellate court affirmed. The court explained that the rule requiring reasonable assistance of postconviction counsel under Rule 651(c) does not require any level of representation in the presentation of new claims. *Id.* ¶ 8. The court found that this court has interpreted the Act to limit counsel's duties to developing the claims originally raised by the petitioner. *Id.* ¶ 9. The court concluded that nothing in the language imposes a duty on counsel as to claims that counsel adds to the *pro se* petition and, because "neither Rule 651(c) nor the Act provides any basis for deeming that postconviction counsel has a duty to adequately present a new claim, defendant's argument on appeal fails as a matter of law." *Id.* ¶ 10. Petitioner's petition for leave to appeal was granted. Ill. S. Ct. R. 315 (eff. Oct. 1, 2021).

¶ 30 II. ANALYSIS

¶ 31 Petitioner contends that the appellate court erred in finding that Rule 651(c) does not require any level of representation from postconviction counsel in the presentation of added claims in a petitioner's amended *pro se* postconviction petition. Petitioner maintains that he rebutted the presumption of reasonable assistance implied by the filing of postconviction counsel's Rule 651(c) certificate of compliance. Petitioner also argues that he made a substantial showing of a constitutional violation where trial counsel was ineffective when he failed to inform petitioner regarding any defense to first degree murder. Lastly, petitioner contends that he made a substantial showing of a constitutional violation because trial counsel was ineffective in not pursuing a viable defense based on the provocation provision of second degree murder.

¶ 32 The State agrees that petitioner is required to receive reasonable assistance and that the appellate court erred. However, the State contends that petitioner did receive reasonable assistance from postconviction counsel. The State also maintains that petitioner failed to make a substantial showing of a constitutional violation because the record rebuts his contentions regarding a second degree murder defense.

¶ 33 A. Standard of Review

¶ 34 We review *de novo* both the circuit court's dismissal of a postconviction petition at the second stage and the interpretation of the appointment of counsel provision in the Act. *People v. Dupree*, 2018 IL 122307, ¶ 29; *People v. Suarez*, 224 Ill. 2d 37, 42 (2007).

¶ 35 B. The Post-Conviction Hearing Act

¶ 36 Under the Act, criminal defendants may assert that their convictions were the result of a substantial denial of their federal or state constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2018); *People v. Tate*, 2012 IL 112214, ¶ 8. The Act provides a three-stage mechanism for a defendant to advance such a claim. *People v. Custer*, 2019 IL 123339, ¶ 29. At the first stage of postconviction proceedings, the circuit court must independently review the postconviction petition and shall dismiss it if it is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2018). Accordingly, the petition advances to the second stage if (1) the court does not rule on the petition within the 90-day period, notwithstanding the petition's merit (*People v. Harris*, 224 Ill. 2d 115, 129 (2007)), or (2) the facts alleged in the petition state an arguable claim of constitutional deprivation (*People v. Hodges*, 234 Ill. 2d 1, 11 (2009)).

¶ 37 At the second stage, counsel may be appointed to assist an indigent defendant. 725 ILCS 5/122-4 (West 2018); *Tate*, 2012 IL 112214, ¶ 10. In a postconviction proceeding, there is no constitutional right to the assistance of counsel. *Custer*, 2019 IL 123339, ¶ 30. Instead, the right to counsel is a matter of legislative grace. *Id.* At the second stage, the State may file a motion to dismiss or an answer to the petition. *People v. Domagala*, 2013 IL 113688, ¶ 33. In deciding a motion to dismiss, the circuit court must determine whether the petition and accompanying documents make a substantial showing of a constitutional violation. *People v. Pingelton*, 2022 IL 127680, ¶ 34; *People v. Johnson*, 2018 IL 122227, ¶ 15. If the petition makes the requisite showing, it is advanced for a third-stage evidentiary hearing. *Id.* If not, dismissal is proper. *Id.*

¶ 38 C. Postconviction Counsel Is Required to Provide Reasonable Assistance When Amending and Adding a Claim to a *Pro Se* Petition

¶ 39 Petitioner contends that the appellate court erred in finding that Rule 651(c) requiring reasonable assistance of postconviction counsel does not require any level of representation in the presentation of added claims in an amended *pro se* postconviction petition. The State agrees with petitioner. We also agree with the parties.

¶ 40 The appellate court reasoned that the rule requiring reasonable assistance of postconviction counsel under Rule 651(c) does not require "any level of representation by counsel in the presentation of new claims." (Emphasis omitted.) No. 2-20-0748, ¶ 8. The appellate court concluded that nothing in the language of the Act imposes a duty on counsel as to claims that counsel adds to the *pro se* petition and, because "neither Rule 651(c) nor the Act provides any basis for deeming that postconviction counsel has a duty to adequately present a new claim, defendant's argument on appeal fails as a matter of law." *Id.* ¶ 10.

¶ 41 This court has determined that the Act, which applies to all postconviction petitions, requires postconviction counsel to provide a reasonable level of assistance to a petitioner. *People v. Turner*, 187 Ill. 2d 406, 410, (1999) (without qualification determining that the Act and Rule 651 together ensure that postconviction petitioners in this state receive a reasonable level of assistance by counsel in postconviction proceedings); *People v. Cotto*, 2016 IL 119006, ¶ 41 (determining that this court has treated the reasonable level of assistance standard as generally applying to all postconviction petitioners without reference to Rule 651(c) and without distinguishing between retained or appointed counsel); *Johnson*, 2018 IL 122227,

¶¶ 16-19 (finding that, at the first, second, and third stages of postconviction proceedings, defendants are entitled to a reasonable level of assistance); *People v. Addison*, 2023 IL 127119, ¶ 19 (holding that a postconviction petitioner is entitled only to the level of assistance granted by the Act, which we have labeled a reasonable level of assistance); *Custer*, 2019 IL 123339, ¶ 30 (same).

¶ 42 To ensure that postconviction petitioners receive reasonable assistance of counsel, Illinois Supreme Court Rule 651(c) (eff. July 1, 2017) provides:

> "The record filed in that court shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights, has examined the record of the proceedings at trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions."

¶ 43 Although compliance with the rule is mandatory, Rule 651(c) sharply limits the requisite duties of postconviction counsel at the second stage of proceedings. *Custer*, 2019 IL 123339, ¶ 32. Counsel's certification that he or she complied with those duties creates a rebuttable presumption that counsel provided the petitioner with a reasonable level of assistance, absent an affirmative showing otherwise in the record. *Id.*

¶ 44 In addition, it would nullify Rule 651(c) if we found that postconviction counsel was not required to exercise reasonable care when amending a petition with a claim that counsel added after consulting with petitioner. See Ill. S. Ct. R. 651(c) (eff. July 1, 2017); *Johnson*, 2018 IL 122227, ¶¶ 21-23 (finding that petitioner is entitled to reasonable representation when counsel formulates claims at the first stage of proceedings under the Act). As this court has stated, the Act depends on postconviction counsel to present potentially meritorious claims to the courts, and reviewing the performance of counsel is indispensable to ensuring these claims are not squandered. *Johnson*, 2018 IL 122227, ¶ 17; *People v. Kuehner*, 2015 IL 117695, ¶ 20 (determining that Rule 651(c) requires that counsel consult with the prisoner, ascertain his alleged grievances, examine the record of proceedings at the trial, and amend the *pro se* petition, if necessary); *Suarez*, 224 Ill. 2d at 46 (same). Also, as *pro se* petitioners often raise incomplete legal claims, postconviction counsel must shape them into appropriate legal form and present them to the court. *Suarez*, 224 Ill. 2d at 46; *Turner*, 187 Ill. 2d at 412; see *People v. Slaughter*, 39 Ill. 2d 278, 285 (1968) (finding that the statute cannot 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). In short, the statute cannot perform its function without the petitioner having a right to a reasonable level of attorney assistance. *Johnson*, 2018 IL 122227, ¶ 17; see also *People v. Polansky*, 39 Ill. 2d 84, 87 (1968) (noting the importance of appointed counsel to furthering the legislative purpose).

¶ 45 Further, as claims included in the amended petition constitute petitioner's *pro se* claims after consultation pursuant to Rule 651(c), counsel's duty to provide reasonable assistance in pursuing those claims necessarily attaches. To hold that postconviction counsel has no duty whatsoever, in presenting the added and related claim based on petitioner's *pro se* allegations regarding his mental state at the time of the murder, renders illusory petitioner's right to the

appointment of counsel who will consult with him as to his claims and make amendments necessary for an adequate presentation of his claims.

¶ 46 Finally, the parties agree, the duty of reasonable assistance should extend to all claims postconviction counsel identified and included in the amended petition, pointing out the possible difficulty in distinguishing between amended versions of a petitioner's claims and claims added by postconviction counsel. See Ill. S. Ct. R. 651(c) (eff. July 1, 2017). Consequently, petitioner had a right to reasonable assistance when counsel amended his petition and added a second claim. Accordingly, we hold that postconviction counsel must provide reasonable assistance when counsel amends or when counsel adds claims to a *pro se* postconviction petition.

¶ 47 D. Petitioner Failed to Rebut
Postconviction Counsel's Presumption
of Compliance With Rule 651(c) Created
by the Filing of Counsel's Certificate

¶ 48 We next turn to petitioner's contention that he rebutted the presumption of compliance with Rule 651(c) created by postconviction counsel's filing of his certificate. Petitioner claims that postconviction counsel's amended petition added the allegation that trial counsel was ineffective for failing to inform petitioner of a possible second degree murder defense and for failing to allege all of the elements necessary for such a claim.

¶ 49 The State responds that postconviction counsel reasonably amended the petition to ensure that petitioner's claim of ineffective assistance of trial counsel was sufficiently raised. The State asserts that petitioner failed to demonstrate that postconviction counsel failed to make any amendments to the petition that were necessary for an adequate presentation of his defense and, thus, has not rebutted the presumption that postconviction counsel complied with Rule 651(c).

¶ 50 A challenge to a guilty plea alleging ineffective assistance of counsel is subject to the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Hatter*, 2021 IL 125981, ¶ 25; *People v. Rissley*, 206 Ill. 2d 403, 457 (2003). Under *Strickland*, a defendant must establish that counsel's performance fell below an objective standard of reasonableness and the defendant was prejudiced by counsel's substandard performance. *Strickland*, 466 U.S. at 687; *People v. Lawton*, 212 Ill. 2d 285, 302 (2004). An attorney's conduct is deficient if the attorney failed to ensure that the defendant's guilty plea was entered voluntarily and intelligently. *Rissley*, 206 Ill. 2d at 457.

¶ 51 To establish the prejudice prong of an ineffective assistance of trial counsel claim in the guilty plea context, the defendant must show there is a reasonable probability that, absent counsel's alleged errors, the defendant would have pled not guilty and insisted on going to trial. *People v. Valdez*, 2016 IL 119860, ¶ 29 (citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985), and *People v. Hughes*, 2012 IL 112817, ¶ 63); *Rissley*, 206 Ill. 2d at 457. A conclusory allegation that a defendant would not have pled guilty and would have demanded a trial is insufficient to establish prejudice. *Hughes*, 2012 IL 112817, ¶ 64; *People v. Hall*, 217 Ill. 2d 324, 335 (2005). Rather, a guilty plea defendant's claim of counsel's incompetence concerning a matter of defense strategy must be accompanied by either a claim of innocence or the articulation of a plausible defense that could have been raised at trial. *Rissley*, 206 Ill. 2d at

459-60. Under *Hill*, the question of whether counsel's deficient representation caused the defendant to plead guilty depends in large part on predicting whether the defendant likely would have been successful at trial. *People v. Pugh*, 157 Ill. 2d 1, 15 (1993) (citing *Hill*, 474 U.S. at 59).

¶ 52 Initially, we note that, in petitioner's brief to this court, he admits that the "amended petition adequately pled the performance prong that trial counsel was objectively unreasonable for failing to advise petitioner about a second degree murder defense." Petitioner contends that this factual allegation showed that trial counsel's performance was objectively unreasonable but contends that the amended petition did not adequately plead the claim's prejudice prong. We disagree.

¶ 53 In the case at bar, postconviction counsel's amended petition shaped petitioner's vague and inarticulate *pro se* contentions into a claim of ineffective assistance of trial counsel that alleged deficient performance and prejudice. The petition stated that trial counsel failed to advise petitioner regarding a second degree murder defense. It explicitly stated:

> "Defendant and Davis at one point had been involved in a romantic relationship. Davis and Defendant had a child together. *** Defendant admitted that he and Davis argued and that he choked Davis until she passed out. It was later determined that Davis died of asphyxiation.
>
> *** Defendant advised his counsel that he and Davis had been in a relationship and the actions leading to the death of Davis occurred during the heat of an argument and that Defendant did not intend to kill or injure Davis. Counsel advised Defendant that he had no alternative but to plead guilty to the charge of first-degree murder. *** Counsel failed to advise Defendant that if he elected to go to trial, his attorneys could pursue a defense of second-degree murder base[d] on the fact that at the time of Davis' death, Defendant was acting under a sudden and intense passion due to being seriously provoked by Davis and that her death was the result of his own negligence. [Citation.]
>
> *** Defendant's plea of guilty to the first-degree murder charge was not knowingly and/or voluntarily given due to his counsels' failure to provide him with the information and/or option. Defendant would not have pled guilty had he been aware that he could have gone to trial and been found guilty of second-degree murder."

¶ 54 Further, this claim was supported by the entire transcript of petitioner's statement to the police as an exhibit to the petition. See *People v. Jones*, 2016 IL App (3d) 140094, ¶ 31 (finding that appointed counsel either had to allege facts regarding statements omitted from a redacted videotape or attach evidentiary support to the petition, preferably the entire videotaped statement). The claim was also supported by petitioner's affidavit, which asserted that he "blacked out during the argument that led to Denise Davis' death." It further stated, "Had I known about the elements of second-degree murder I would not have pled guilty as I did." See 725 ILCS 5/122-2 (West 2018) ("the petition shall have attached thereto affidavits, records, or other evidence supporting its allegations").

¶ 55 We find this court's decision in *People v. Spreitzer*, 143 Ill. 2d 210 (1991), instructive. In *Spreitzer*, the defendant was convicted of aggravated kidnapping and murder. *Id.* at 213. He was sentenced to death on the murder charge and to a 60-year sentence for aggravated kidnapping. *Id.* He filed a *pro se* petition for postconviction relief and was appointed postconviction counsel who filed an amended petition. *Id.* at 214. The amended petition

contained allegations of constitutional error by his trial counsel. *Id.* The court granted the State's motion to dismiss the petition. *Id.* On appeal, the defendant maintained that he was deprived of the effective assistance of postconviction counsel, claiming that his attorney should have provided evidentiary support to his petition so that it could withstand a motion to dismiss. *Id.* at 215. The defendant argued that postconviction counsel failed to give substance to his allegations with specific evidentiary facts sufficient to grant relief. *Id.* This court, in affirming the trial court's dismissal of defendant's postconviction petition, quoted *People v. Stovall*, 47 Ill. 2d 42, 46 (1970), which held: "Where there is not a showing that sufficient facts or evidence exists, inadequate representation certainly will not be found because of an attorney's failure to amend a petition or, when amended, failing to make the petition's allegations factually sufficient to require the granting of relief." See *Spreitzer*, 143 Ill. 2d at 221.

¶ 56 Similarly, in the case at bar, postconviction counsel added evidentiary support by including petitioner's statement to police and petitioner's affidavit; thus, to the extent possible, postconviction counsel affirmatively pled petitioner's claim regarding a second degree murder defense. Further, petitioner has failed to show that any other evidence exists to support his claim. See *Stovall*, 47 Ill. 2d at 46 (finding that we cannot charge counsel with incompetency for failure to introduce evidence not shown to be existing and available).

¶ 57 Petitioner maintains that postconviction counsel provided unreasonable assistance because he failed to allege the prejudice prong of ineffective assistance of trial counsel. Petitioner relies on *People v. Dixon*, 2018 IL App (3d) 150630, for the proposition that, when counsel fails to allege prejudice, he has not adequately represented petitioner's claims. We find petitioner's reliance misplaced because *Dixon* is distinguishable.

¶ 58 In *Dixon*, the appellate court stated that, to prevail on a claim of ineffective assistance of counsel, a defendant must show both that his counsel was deficient and that this deficiency prejudiced the defendant. *Id.* ¶ 16. The appellate court found that postconviction counsel failed to shape the defendant's *pro se* claims into proper legal form. *Id.* ¶ 15.

¶ 59 The court observed that the amended petition stated that trial counsel was ineffective for failing to file pretrial motions but did not allege what motions counsel could have filed or that such motions would have been successful. *Id.* ¶ 18. Additionally, the petition stated that trial counsel was ineffective for failing to investigate and call defense witnesses, but the petition did not specify whom trial counsel should have called as witnesses and what the content of their testimony would have been. *Id.*

¶ 60 The appellate court also noted that the amended petition alleged that the defendant's constitutional rights were violated because he was arrested without a warrant and without probable cause. *Id.* ¶ 19. However, the court observed that the petition gave no factual detail surrounding the arrest that would show the defendant was arrested without probable cause and that the arrest warrant appeared in the record, which the amended petition did not address. *Id.*

¶ 61 In addition, the court found that counsel's submission of the defendant's handwritten, unnotarized, 70-page, *pro se* memorandum in lieu of a proper affidavit was improper because the handwritten memorandum was not a sworn statement. *Id.* ¶ 23. Thus, counsel did not comply with Rule 651(c) and section 122-2 of the Act (725 ILCS 5/122-2 (West 2014)). *Dixon*, 2018 IL App (3d) 150630, ¶ 23. The court remanded the case because counsel failed to shape the defendant's claims into proper legal form. *Id.* ¶ 24.

¶ 62 The court in *Dixon* continuously noted the availability of evidence that was lacking in the amended petition. It also pointed out that counsel failed to comply with Rule 651(c) when adding the unnotarized handwritten statement, thus, distinguishing it from the case at bar. Here, counsel attached not only petitioner's statement but also petitioner's affidavit, thus complying with Rule 651(c) and the Act. Further, this was the only evidence available to support the amended petition's contentions, further distinguishing *Dixon* from the case at bar.

¶ 63 Here, as previously noted, the amended petition alleged that "[c]ounsel failed to advise Defendant that if he elected to go to trial, his attorneys could pursue a second degree murder defense," thus indicating that such a defense was plausible and available at trial. In addition, petitioner stated in his affidavit that "[h]ad I known about the elements of second-degree murder I would not have pled guilty." He also attested to the fact that he and Davis had been in a romantic relationship and that the death occurred during the heat of an argument, but that counsel advised petitioner that he had no alternative but to plead guilty to the charge of first degree murder. See *Rissley*, 206 Ill. 2d at 459-60 (finding that, to establish prejudice, the defendant's claim must be accompanied by the articulation of a plausible defense that could have been raised at trial).

¶ 64 Lastly, petitioner alleges that, at the hearing on the State's motion to dismiss, postconviction counsel was operating under the mistaken belief that he was not required to allege in the petition the factual allegations underlying the claim. Petitioner points to counsel's suggestion that the court could hear more about the claims from petitioner at an evidentiary hearing. We disagree.

¶ 65 During the hearing, counsel stated that "[t]he Court is not making any findings of fact as to what might have been presented at trial. The Court has to consider what the allegations are in our petition and whether they do meet certain standards." Counsel also stated that the *Strickland* decision does set forth two prongs, thus acknowledging the standard that is required in challenges to guilty pleas which allege ineffective assistance of trial counsel. See *Hatter*, 2021 IL 125981, ¶ 25. Counsel further stated:

> "Sometimes I think it's best that the Court actually hear from a defendant in a hearing to adequately get a picture of what their position is and what their feelings were. We can attach affidavits to a petition and of course the Court can look at other exhibits, but it's a much different animal to actually hear from someone."

Thus, counsel correctly stated the Act's standard for presentation of amended postconviction petitions. See 725 ILCS 5/122-2 (West 2018). Additionally, counsel's statements did not indicate that he was aware of relevant evidence that he failed to provide.

¶ 66 Petitioner has failed to demonstrate that postconviction counsel failed to make any amendments to the *pro se* petition that were necessary for an adequate presentation of petitioner's legal claims. See Ill. S. Ct. R. 651(c) (eff. July 1, 2017). Accordingly, petitioner cannot show deficient performance by postconviction counsel. Consequently, petitioner has not rebutted postconviction counsel's Rule 651(c) certificate's presumption of reasonable assistance.

¶ 67 E. The Record Rebuts Petitioner's Claims Regarding a Second Degree Murder Defense

¶ 68 Petitioner contends that he made a substantial showing of a constitutional violation because trial counsel did not advise him regarding a second degree murder defense. His contention is without merit.

¶ 69 The dismissal of a postconviction petition is warranted at the second stage of the proceedings only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *Pingelton*, 2022 IL 127680, ¶ 34; *Johnson*, 2018 122227, ¶ 15. At that stage, all factual allegations that are not positively rebutted by the record are accepted as true. *People v. Childress*, 191 Ill. 2d 168, 174 (2000). But the allegations in a postconviction petition and its supporting affidavits must be taken as true only to the extent they are not rebutted by the trial record. See *People v. Robinson*, 2020 IL 123849, ¶ 45 (at the pleading stage of postconviction proceedings, all well-pled allegations in the petition and supporting affidavits that are not positively rebutted by the trial record are to be taken as true); *People v. Sanders*, 2016 IL 118123, ¶ 42 (finding all well-pled factual allegations not positively rebutted by the trial record must be taken as true for purposes of the State's motion to dismiss); *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006).

¶ 70 The Illinois Criminal Code provides that the crime of first degree murder may be mitigated to second degree murder if "at the time of the killing he or she is acting under a sudden and intense passion resulting from serious provocation by the individual killed ***, but he or she negligently or accidentally causes the death of the individual killed." 720 ILCS 5/9-2(a)(1) (West 2010). "Serious provocation" is defined by the statute as "conduct sufficient to excite an intense passion in a reasonable person." *Id.* § 9-2(b).

¶ 71 1. The Record Rebuts Petitioner's Claim That He Was Unaware of a Second Degree Murder Defense at Trial

¶ 72 Petitioner specifically contends he made a substantial showing of a constitutional violation that trial counsel was ineffective when petitioner "was not made aware of any possible defense to first degree murder charge if he wanted to go to trial" and he "did not believe he had any alternative but to plead guilty." However, the record affirmatively rebuts petitioner's contention.

¶ 73 First, petitioner's initial supplemental answer to discovery filed on December 6, 2010, just two months after his arrest, asserted the affirmative defense of self-defense. It specifically stated that

> "Defendant intends to assert the affirmative defense: Use of force in defense of person. 'A person is justified in the use of force against another when to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force.' "

See *id.*

¶ 74 Second, the record reveals that petitioner and trial counsel disagreed as to the viability of a second degree murder defense. Petitioner attested in his affidavit dated June 27, 2012, that his defense counsel "informed me my charges could not be reduced to a lesser degree." Because there are only two degrees of murder in Illinois, petitioner's affidavit clearly establishes that a second degree murder defense had been discussed. See *id.* § 7-1.

¶ 75 Third, the circuit court noted in its order of December 9, 2020, that petitioner's *pro se* motion to reconsider sentence, filed shortly after his guilty plea, claimed that he had not wanted to plead guilty because he believed that his actions constituted second degree murder or involuntary manslaughter. The court specifically stated:

> "Mr. Agee indicated at the time of his plea that no one had forced him to plead guilty to this, and in looking, one of the most persuasive things that I found in reviewing the record were the words of Mr. Agee himself. In the motion—the pro se motion to reconsider sentence that was filed on July 2 of 2012, which is a handwritten motion, Mr. Agee indicated, 'I did not want to ple[a]d guilty to first degree murder owing to my belief the charge should have been reduced to second degree murder or involuntary manslaughter due to the incident deriving from a domestic dispute.' *** He indicated that at the time he pled guilty he didn't really want to do it because in his mind he believed that second degree or involuntary was something more appropriate. That—to my mind that disputes and refutes the fact that he is just now finding out at some later date that second degree or involuntary may have possibly been an issue."

We agree.

¶ 76 Fourth, petitioner pled guilty just two days after the circuit court ruled on May 1, 2012, that defendant's confession would not be redacted and that the State could introduce extensive evidence of his stalking. This evidence would have contradicted any claim that petitioner acted in self-defense or that their argument was sudden and that he had been provoked. Further, in the face of this evidence, petitioner could not possibly establish that he committed a lesser mitigated form of murder. In addition, because this evidence had been ruled admissible, petitioner would not have been better off going to trial, with a possible sentence of up to 60 years' imprisonment. See *Hughes*, 2012 IL 112817, ¶ 64.

¶ 77 Finally, petitioner's plea dated May 3, 2012, also rebuts his contention that he believed he had no alternative but to plead guilty. Prior to accepting petitioner's plea, the circuit court admonished him that the decision of whether to plead guilty or go to trial was his and his alone, that he could persist in his plea of not guilty and go to trial, that he had a right to trial before a judge or jury, that he was pleading guilty because he thought it was the best thing for him to do, that he was doing so voluntarily and of his own free will, that he understood the range of penalties, and that he had discussed his case thoroughly with his attorneys. Petitioner stated "Yes" to all of the above.

¶ 78 The record affirmatively rebuts petitioner's contention that trial counsel was ineffective because petitioner was not made aware of a second degree murder defense at the time of trial. Accordingly, petitioner has failed to make a substantial showing of a constitutional violation. See *Pingelton*, 2022 IL 127680, ¶ 34.

¶ 79 2. The Record Rebuts Petitioner's Claim Regarding a Viable Defense Based on Second Degree Murder Under the Provocation Provision

¶ 80 Petitioner contends that he made a substantial showing of a constitutional violation where trial counsel was ineffective in not pursuing a viable defense of second degree murder based on serious provocation. We disagree.

¶ 81 This court has established that the categories of serious provocation that have been recognized for second degree murder are (1) substantial physical injury or assault, (2) mutual quarrel or combat, (3) illegal arrest, and (4) adultery with the offender's spouse. *People v. Chevalier*, 131 Ill. 2d 66, 71 (1989).

¶ 82 This case did not involve an illegal arrest or adultery with petitioner's spouse. Also, petitioner did not suffer a substantial physical injury at the hands of Davis. The only injury that petitioner experienced was a scratch on his forehead. A victim's slapping of a defendant does not amount to substantial physical injury or assault where the defendant sustained no injury from the victim's response. See *People v. Strader*, 278 Ill. App. 3d 876, 884 (1996).

¶ 83 Thus, we address mutual combat, which is a fight or struggle that both parties enter willingly or where two persons, upon a sudden quarrel and in hot blood, mutually fight upon equal terms and where death results from the combat. *People v. Austin*, 133 Ill. 2d 118, 125 (1989). The record reveals that Davis was not on equal physical terms with petitioner. The pretrial service report indicates that, at the time of his arrest, petitioner was six feet tall and weighed 200 pounds. The autopsy report for Davis shows she was 5 feet, 7½ inches tall and weighed 162 pounds at the time of her death. Further, in petitioner's statement, he acknowledged his awareness of their different physical makeup and what would happen if he engaged in a physical fight with Davis.

¶ 84 This was not a sudden quarrel, as petitioner told the detectives just after the murder "it was just normal for [him and Denise] to argue" and that "[f]or the last couple months [they had] been arguing a lot." In *Chevalier*, this court explained that long-term conflict in a relationship undercuts a second degree murder defense under the provocation provision when it stated:

> "Parenthetically, we fail to understand why a history of marital discord should be a factor favoring a voluntary manslaughter instruction. *** Since voluntary manslaughter requires evidence of a sudden passion, a history of marital discord, particularly suspicions of adultery, if relevant at all, would undermine, not support, a defendant's claim that the evidence supports a voluntary manslaughter instruction."[1] (Emphasis omitted.) *Chevalier*, 131 Ill. 2d at 75.

¶ 85 Furthermore, petitioner has never indicated what the altercation was about. The detectives asked petitioner to explain what provoked the fight that ended with Davis's murder, numerous times throughout the interrogation, but petitioner never provided them with a reason. It has been determined that passion on the part of the slayer, no matter how violent, will not relieve him from liability for murder unless it is engendered by a provocation that the law recognizes as being reasonable and adequate, and if the provocation is insufficient, the crime is murder. *Austin*, 133 Ill. 2d at 125. Here, because the provocation is unknown, there can be no determination that it was sufficient to warrant Davis's murder.

¶ 86 Additionally, the record reveals that Davis did not willingly enter into a fight with petitioner. In the weeks before her murder, Davis had complained that petitioner was stalking

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[1]Effective July 1, 1987, the Illinois General Assembly amended the Criminal Code and abolished the offense of voluntary manslaughter, replacing it with the offense of second degree murder. See Pub. Act 84-1450, § 2 (eff. July 1, 1987) (amending Ill. Rev. Stat. 1985, ch. 38, ¶ 9-2). The elements of the new offense are essentially the same as the old, except the General Assembly added a section clearly explaining both the State's and defendant's burdens of proof at a murder trial. See *id.*

her and following her around town. In petitioner's statement to the detectives, he admitted that he often drove by Davis's house and that on the day of the murder he stopped there unannounced and uninvited after seeing her work vehicle parked outside. Petitioner told the detectives that Davis was by the front door as he reached it, he then entered the home, and after entering, an argument quickly ensued and escalated into the physical attack that ended with Davis's death. This court has established that the one who instigates combat cannot rely on the victim's response as evidence of mutual combat sufficient to mitigate the killing of that victim from murder to manslaughter. *Id.* at 126; see *Strader*, 278 Ill. App. 3d at 885 (finding no mutual combat despite victim's slapping and shoving of defendant where there would not have been an altercation if defendant had not come to the victim's home).

¶ 87 Thus, the record rebuts petitioner's contention that trial counsel was ineffective in not pursuing a viable defense of second degree murder based on the provocation provision. Consequently, petitioner has failed to make a substantial showing of a constitutional violation. See *Pingelton*, 2022 IL 127680, ¶ 34.

¶ 88 III. CONCLUSION

¶ 89 In sum, we hold that postconviction counsel is required to provide reasonable assistance when adding a claim to a *pro se* postconviction petition. We find that defendant failed to rebut the presumption of reasonable assistance raised by postconviction counsel's Rule 651(c) certificate. In addition, we find that the record rebutted petitioner's claim that trial counsel was ineffective because petitioner was not made aware of a second degree murder defense at trial. We also find that the record rebutted petitioner's claim that trial counsel was ineffective in not pursuing a viable defense based on second degree murder under the provocation provision. Thus, we find that petitioner has failed to make a substantial showing of a constitutional violation. Therefore, we hold, for different reasons from those relied on by the appellate court, that petitioner's amended postconviction petition was properly dismissed at the second stage of the proceedings. See *People v. Durr*, 215 Ill. 2d 283, 296 (2005) (finding that this court, in determining the correctness of the result reached by the appellate court, is in no way constrained by the appellate court's reasoning and may affirm on any basis supported by the record). We therefore affirm the judgments of the appellate and circuit courts.

¶ 90 Judgments affirmed.