NOTICE
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2026 IL App (5th) 240418-U

NO. 5-24-0418

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Macon County. |
| | ) | |
| v. | ) | No. 14-CF-1529 |
| | ) | |
| UNDRA L. INGRAM, | ) | Honorable |
| | ) | Phoebe S. Bowers, |
| Defendant-Appellant. | ) | Judge, presiding. |

JUSTICE BOIE delivered the judgment of the court.
Justices Barberis and Vaughan concurred in the judgment.

**ORDER**

¶ 1 *Held*: We affirm the second-stage dismissal of the defendant's postconviction petition where the defendant's claim of ineffective assistance of appellate counsel was brought before the circuit court, the State's motion to dismiss sufficiently addressed the entirety of the amended postconviction petition, and postconviction counsel did not render unreasonable assistance of counsel.

¶ 2 On April 16, 2021, the defendant, Undra L. Ingram, filed a *pro se* petition in the circuit court of Macon County seeking relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2020)). The petition advanced to the second stage, where postconviction counsel filed an amended petition and the State moved to dismiss the amended petition. On March 20, 2024, the circuit court granted the State's motion to dismiss. The defendant now appeals, arguing that postconviction counsel provided unreasonable assistance under Illinois Supreme Court Rule 651(c) (eff. July 1, 2017) by failing to amend the petition to allege ineffective assistance

of appellate counsel. The defendant also argues that the circuit court erred in dismissing the defendant's right-to-counsel claim where the State did not specifically move to dismiss that claim and postconviction counsel was ineffective for failing to orally argue that claim. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The State charged the defendant with four counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2010)), two counts of criminal sexual assault (*id.* § 11-1.20(a)(3)), and three counts of aggravated criminal sexual abuse (*id.* § 12-16(c)(1)(i)), all involving his daughter, D.I. In April 2018, the case proceeded to a jury trial. Among other evidence, Officer Robert Murray testified about D.I.'s initial report stating that on December 4, 2014, D.I. told a school counselor that the defendant had been sexually abusing her since approximately 2009. An Illinois Department of Children and Family Services worker then interviewed D.I. at the school, with Officer Murray present. Officer Murray testified that D.I. was visibly shaking and crying during the interview and said that her father was going to be mad at her. Afterward, D.I. and her sister, U.I., were both taken to the Child Advocacy Center for interviews. U.I. testified at trial that D.I. had told her about the abuse months before D.I. reported it to the school counselor. The State also played portions of U.I.'s recorded interview at the trial.

¶ 5 The defendant testified in his own defense. During his testimony, the circuit court took a brief recess. After the circuit court suggested 10 minutes for the break, defense counsel asked the court to admonish the defendant, and the circuit court instructed the defendant to stay in the courtroom with his attorney, but not to talk to anyone. When the circuit court instructed the defendant not to talk to anyone, defense counsel stated, "Including me. Okay?" The defendant responded, "Okay."

¶ 6 The jury found the defendant guilty on all counts, and he was sentenced to an aggregate term of 105 years' imprisonment in the Illinois Department of Corrections. The Fourth District affirmed the defendant's convictions on direct appeal. *People v. Ingram*, 2020 IL App (4th) 180664-U, ¶ 54.

¶ 7 On April 16, 2021, the defendant filed a *pro se* postconviction petition. He alleged that trial counsel was ineffective for failing to object to Officer Murray's testimony regarding D.I.'s statements; failing to request a limiting jury instruction regarding that testimony; failing to request a hearing as required by section 115-10(b)(1) of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10(b)(1) (West 2020)) regarding U.I.'s testimony and recorded interview setting forth statements made by D.I. to U.I.; and, failing to object to the hearsay testimony of the Child Advocacy Center interviewer. The defendant also alleged that the circuit court violated his right to counsel by barring him from speaking with his attorney during the recess. In his conclusion, the defendant further claimed that any forfeiture of the issues set forth in the petition stemmed from ineffective assistance of appellate counsel.

¶ 8 The circuit court advanced the petition to the second stage and appointed counsel. Postconviction counsel filed an amended petition on June 20, 2023, that incorporated the defendant's *pro se* petition, developed the hearsay claims, and added an additional claim of ineffective assistance of trial counsel for failing to call certain witnesses, with a memorandum in support of the amended petition styled as an actual innocence claim. Postconviction counsel filed a Rule 651(c) certificate at the same time that the amended petition was filed. The State moved to dismiss the petition on February 22, 2024. It argued that the petition's claims were forfeited because they could have been raised on direct appeal but were not, and that the amended petition did not allege ineffective assistance of appellate counsel.

¶ 9 The circuit court conducted a hearing on the State's motion on March 20, 2024. At the hearing, postconviction counsel first noted that the issues raised in the petition could and should have been raised on direct appeal, and that part of the defendant's argument was that "appellate counsel should have raised these particular issues on direct appeal as to the hearsay, so some of those instances would be as raised in our petition." In her discussion of the hearsay issues, postconviction counsel further stated, "[I]t was also then ineffective assistance for appellate counsel not to challenge these things on direct appeal." She later reiterated for a third time that the defendant was not given effective assistance of counsel at the appellate level. The parties primarily argued the petition on its merits and the circuit court found that the defendant had not made a substantial showing of a constitutional violation. It addressed the claims of ineffective assistance of counsel regarding the hearsay and uncalled-witnesses issues on their merits, but it did not specifically address the right-to-counsel claim when announcing its decision. The circuit court granted the State's motion and dismissed the amended petition at the second stage. This timely appeal followed.

¶ 10 II. ANALYSIS

¶ 11 The defendant appeals the circuit court's second-stage dismissal of his postconviction petition arguing that postconviction counsel provided unreasonable assistance under Illinois Supreme Court Rule 651(c) (eff. July 1, 2017). He first contends that postconviction counsel should have amended the *pro se* petition to allege ineffective assistance of appellate counsel for failing to argue on direct appeal that trial counsel was ineffective. Postconviction counsel's failure to include this allegation, he claims, subjected the claims set forth in the petition to forfeiture. The defendant also argues that the circuit court erred by dismissing the amended petition in its entirety, because the State's motion to dismiss did not address his claim that he had been denied access to

counsel during a recess in his trial testimony. He contends that postconviction counsel should have raised this omission with the circuit court, and failure to do so was unreasonable assistance. He asks that this court remand this matter for new second-stage proceedings, with new postconviction counsel.

¶ 12 A. Rule of Law

¶ 13 The Act provides a statutory remedy to criminal defendants who claim substantial violations of their constitutional rights occurred in the proceedings which resulted in their convictions. *People v. Taliani*, 2021 IL 125891, ¶ 53; *People v. Edwards*, 2012 IL 111711, ¶ 21. A postconviction proceeding "is not a substitute for, or an addendum to, direct appeal." *People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994). "The purpose of a post-conviction proceeding is to permit inquiry into constitutional issues involved in the original conviction and sentence that were not, nor could have been, adjudicated previously upon direct appeal." *People v. Peeples*, 205 Ill. 2d 480, 510 (2002). A postconviction petition must "clearly set forth the respects in which [the defendant's] constitutional rights were violated" and shall "have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2020).

¶ 14 "The Act provides a three-stage mechanism for a defendant to advance such a claim." *People v. Addison*, 2023 IL 127119, ¶ 18. "At the first stage, the [circuit] court must independently review the petition within 90 days of its filing and determine whether it is frivolous or patently without merit." *Id.* If the circuit court does not dismiss the petition, it must be further considered at the second stage. 725 ILCS 5/122-2.1(b) (West 2020); *Addison*, 2023 IL 127119, ¶ 18.

¶ 15 The second stage of postconviction review tests the petition's legal sufficiency. *People v. Dixon*, 2018 IL App (3d) 150630, ¶ 12. At this stage, it is the defendant's burden to make a

substantial showing of a constitutional violation. *Id.* It is at this stage, also, that the State may move to dismiss the petition. 725 ILCS 5/122-5 (West 2020). "If the State moves to dismiss, the [circuit] court may hold a dismissal hearing, which is still part of the second stage." *People v. Wheeler*, 392 Ill. App. 3d 303, 308 (2009). At this stage, the circuit court may dismiss a postconviction petition if its allegations, taken as true and liberally construed in favor of the defendant, fail to warrant relief under the Act. *People v. Sanders*, 2016 IL 118123, ¶ 31. "We review a [circuit] court's dismissal of a postconviction petition at the second stage *de novo*." *Addison*, 2023 IL 127119, ¶ 17.

¶ 16 There exists no constitutional right to the assistance of counsel in a postconviction proceeding. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). Rather, the right to counsel under the Act is a matter of "legislative grace." *People v. Porter*, 122 Ill. 2d 64, 72 (1988). Accordingly, a postconviction defendant is entitled only to a "reasonable" level of assistance. *People v. Flores*, 153 Ill. 2d 264, 276 (1992). To ensure that a postconviction defendant receives that level of assistance, Rule 651(c) 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 the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." Ill. S. Ct. R. 651(c) (eff. July 1, 2017).

¶ 17 The purpose of this rule is to "ensure that counsel shapes the [defendant's] claims into proper legal form and presents those claims to the court." *People v. Perkins*, 229 Ill. 2d 34, 44 (2007). Proper presentation of claims includes making efforts to overcome procedural bars that will result in dismissal of the petition if not rebutted. *Id.* When postconviction counsel files a Rule 651(c) certificate, a rebuttable presumption arises that counsel provided reasonable assistance. *Addison*, 2023 IL 127119, ¶ 21; *People v. Custer*, 2019 IL 123339, ¶ 32.

¶ 18 B. Unreasonable Assistance

¶ 19 The defendant's first argument is that he received unreasonable assistance of postconviction counsel because she failed to amend the postconviction petition to include a claim of ineffective assistance of appellate counsel, exposing the defendant's claims to forfeiture. This failure runs afoul of Rule 651(c), the defendant argues, and states that remand is required regardless of whether the circuit court considered these claims on their merits.

¶ 20 In support of this position, the defendant relies on *Addison*, 2023 IL 127119. In that case, our supreme court held that a postconviction attorney's failure to allege ineffective assistance of appellate counsel was a failure to shape the defendant's claims into their proper form in violation of Rule 651(c). *Id.* ¶ 27. The *Addison* court further held that, because of this, remand was necessary regardless of whether the underlying claims had merit. *Id.* ¶ 33. The State in this case counters that the present case is distinguishable from *Addison*, because the circuit court dismissed the defendant's petition on its merits. In support of its position, the State relies on this court's decision in *People v. Warnsley*, 2025 IL App (5th) 230445-U.

¶ 21 Postconviction counsel filed a Rule 651(c) certificate in this case. It is therefore the defendant's burden to show that postconviction counsel failed to do what was necessary to adequately present his claims. *Addison*, 2023 IL 127119, ¶ 21. In his attempt to carry this burden, the defendant points to postconviction counsel's supposed failure to amend the defendant's *pro se* petition to include a claim of ineffective assistance of appellate counsel, and the consequent exposure of his claims to forfeiture.

¶ 22 The defendant's argument overlooks the conclusion of his own *pro se* petition. There, the defendant stated, "Furthermore, any potential forfeiture, waiver, or procedural default stem from the ineffectiveness of trial or appellate counsel." In support, the defendant cited *People v. Mauro*,

362 Ill. App. 3d 440, 444 (2005), in which the Second District advised postconviction defendants to include such a statement in their petitions. Postconviction counsel later filed an amended petition that incorporated the defendant's *pro se* petition in its entirety. The amended petition therefore included the defendant's statement that any forfeiture of his claims stemmed from the ineffectiveness of appellate counsel. Thus, the amendment the defendant faults postconviction counsel for excluding was unnecessary, because the claim was already part of the petition before the circuit court.

¶ 23 We acknowledge that, in *Addison*, our supreme court found that a similar statement was not an "adequate presentation" of the defendant's claim. *Addison*, 2023 IL 127119, ¶ 24 n.1. In that case, the amended petition's conclusion stated that the defendant " 'received ineffective assistance of counsel during pre-trial proceedings, during post-trial proceedings, and at the appellate level.' " *Id.* The *Addison* court explained that this was not a substantive claim of ineffective assistance of appellate counsel, because the petition nowhere explained *how* appellate counsel was ineffective. Thus, even if the statement were to be treated as a claim, the court reasoned, it was not an adequate presentation of that claim under Rule 651(c). *Id.* In reaching this conclusion, the court examined five circumstances: (1) the claim was raised in such an obscure way that no one recognized it as being in the petition, (2) the petition failed to set forth any way in which appellate counsel was ineffective, (3) the State moved to dismiss the petition on the basis that it contained no ineffective assistance of appellate counsel claim, (4) postconviction counsel never challenged the State's claim that the allegation was not included, and (5) the circuit court ruled on the petition with the understanding that it contained no claims of ineffective assistance of counsel.

¶ 24 Of these five circumstances, only the third is fully present here. As to the first, we acknowledge that the statement in the defendant's *pro se* petition was easy to miss, and neither party has mentioned it on appeal. However, the record shows that postconviction counsel was aware of it in the circuit court. In responding to the State's motion to dismiss, she stated three separate times that appellate counsel was ineffective for failing to raise various claims, and on the first mention told the court:

> "In addressing the State's Motion to Dismiss, part of the argument, walking through this would, be *res judicata* and waiver, indicating that these are issues that could and should have been raised on direct appeal. Absolutely. That's part of our argument is that appellate counsel should have raised these particular issues on direct appeal as to the hearsay, so some of those instances would be as raised in our petition."

¶ 25 Postconviction counsel thus recognized that the defendant's claims faced forfeiture, and she understood the petition to answer that problem with an allegation that appellate counsel should have raised the issues on direct appeal. She stated three times at the hearing on the motion to dismiss that appellate counsel was ineffective for failing to include the claims.

¶ 26 As to the second circumstance, the statement in the defendant's *pro se* petition attributes any forfeiture of the petition's claims to appellate counsel's ineffectiveness. This is precisely the type of allegation that the *Addison* court noted was absent in the petition before it. See *id.* (noting that the petition nowhere alleged that "appellate counsel was ineffective for failing to raise the claims asserted in the petition").

¶ 27 The third circumstance is present here, as it was in *Addison*. The State moved to dismiss on the basis that the petition did not allege ineffective assistance of appellate counsel. The fourth and fifth circumstances, however, are absent. Counsel in *Addison* never countered the State's forfeiture argument, while postconviction counsel here met that argument directly. *Id.* ¶ 25. Likewise, the trial court in *Addison* ruled with the understanding that the petition contained no

claim of ineffective assistance of appellate counsel. *Id.* ¶¶ 24 n.1, 40. The circuit court here, by contrast, decided the defendant's claims on their merits alone.

¶ 28 Accordingly, we find that the circumstances that led the *Addison* court to find an inadequate presentation of the defendant's claims are largely absent here. The allegation of ineffective assistance of appellate counsel in the defendant's *pro se* petition was incorporated by reference into the amended petition, and postconviction counsel addressed the relevant argument at the hearing. Further, unlike *Addison*, the circuit court did not dismiss the petition based on a procedural default, but rather dismissed the petition because it determined that the defendant's claims lacked merit, and the petition therefore failed to allege a constitutional violation. Where ineffective assistance of appellate counsel was alleged and argued, and the circuit court did not dismiss the petition based on a procedural default, but rather considered the petition on its merits, we cannot conclude that postconviction counsel made an inadequate presentation of the defendant's claims in violation of Rule 651(c) as alleged in this appeal.

¶ 29 C. Dismissal of Right-to-Counsel Claim

¶ 30 The defendant next argues that the circuit court erred by dismissing his petition in its entirety. His *pro se* petition alleged that the circuit court violated his right to counsel by barring him from speaking with his attorney during a recess in his testimony. Postconviction counsel incorporated that claim into the amended petition, but did not argue that claim at the hearing on the motion to dismiss. The State's motion to dismiss also did not address that specific claim. Without a motion specifically directed at this claim, the defendant's argument runs, the circuit court could have only dismissed it *sua sponte*, which the Act does not permit at the second stage. Additionally, the defendant contends that postconviction counsel was unreasonable for failing to

bring this omission to the circuit court's attention and for failing to present the right-to-counsel claim at the hearing on the motion to dismiss.

¶ 31 The defendant is correct about the governing law. At the second stage, the State may either answer the petition or move to dismiss it. 725 ILCS 5/122-5 (West 2020). Once a petition has advanced to the second stage, the circuit court may no longer dismiss it on its own motion. *People v. Starks*, 2012 IL App (2d) 110324, ¶ 23; *People v. Greer*, 341 Ill. App. 3d 906, 910 (2003). However, the State is free to seek dismissal of some claims, all claims, or none. See, *e.g.*, *People v. Miller*, 2017 IL App (3d) 140977, ¶ 30 (the State conceded one claim but challenged the remainder). The first question, therefore, is whether the State's motion sought to dismiss the right-to-counsel claim. We find that it did.

¶ 32 While the State's motion addressed most of the defendant's claims individually, it did not limit itself to those claims. Indeed, the motion closes by requesting the circuit court to dismiss the petition in its entirety. By requesting the circuit court to dismiss the defendant's petition in its entirety, the State necessarily requested the circuit court to dismiss every claim within it, including the right-to-counsel claim.

¶ 33 The defendant's reliance on *People v. Ressa*, 2024 IL App (3d) 220259-U, does not change our analysis. In that case, the State's motion to dismiss discussed only three specified claims. *Id.* ¶ 18. The petition itself was so poorly organized in that case that the parties disputed, both in the circuit court and on appeal, which claims it raised. *Id.* ¶ 44. Under those circumstances, the Third District remanded to allow the State to respond to the claims its motion had not addressed. *Id.* ¶ 52. Here, the right-to-counsel claim was set out plainly in the *pro se* petition and adopted by the amended petition. The State's motion sought to dismiss the amended petition as a whole, and neither party disputes that the right-to-counsel claim forms part of the petition.

¶ 34 The defendant argues that allowing general language of this kind would deprive defendants of notice of the arguments they must answer. We are not persuaded that the defendant lacked notice here. The State's motion asked the circuit court to dismiss the amended petition, in its entirety, without an evidentiary hearing. It did so on the grounds that the petition, the affidavits, and the trial record, taken together, did not demonstrate the need for such a hearing. The defendant was therefore on notice that the State sought the dismissal of every claim in the petition, including the right-to-counsel claim.

¶ 35 The defendant points to two rules that, in his view, show that a motion to dismiss must argue each claim with specificity; namely, that the State may amend its motion to dismiss at the second stage, and that it may waive a timeliness defense. *People v. Boclair*, 202 Ill. 2d 89, 102 (2002); *People v. Perkins*, 229 Ill. 2d 34, 49 (2007). There would be no need to clarify or supplement a motion to dismiss, the defendant argues, if a general request for dismissal were sufficient. We disagree. At the second stage, the question is whether the defendant has made a substantial showing of a constitutional violation. *Dixon*, 2018 IL App (3d) 150630, ¶ 12. It is the defendant's burden to convince the court that the answer to that question is "yes." *Id.* A motion that asks the court to dismiss the entire petition is, in effect, stating that the defendant has not met that burden. To be sure, the State may choose to strengthen its position with arguments directed at particular claims, and it forgoes the right to do so at its own risk. Foregoing that right, however, affects merely the strength of the State's motion on a particular claim. It does not convert the court's ruling on that claim into a *sua sponte* dismissal. Where the law does not mandate that each claim in the petition be specifically addressed in the State's motion to dismiss the petition, we will not add such a requirement. 725 ILCS 5/122-5 (West 2020); but see *People v. Cowart*, 2015 IL App (1st) 131073, ¶ 11 (the State forfeits *nonjurisdictional procedural* challenges to

postconviction petitions when it fails to raise any such challenge in a motion to dismiss). Accordingly, by granting the State's request to dismiss the amended petition in its entirety in this case, the circuit court did not engage in an improper *sua sponte* dismissal of the defendant's claim.

¶ 36 Couched within his argument that the circuit court erred in dismissing the right-to-counsel claim without a proper motion from the State, the defendant sets forth two additional claims that postconviction counsel provided unreasonable assistance. He asserts that he received unreasonable assistance where postconviction counsel failed to highlight the lack of specificity in the State's motion regarding the right-to-counsel claim, and failed to present argument on that issue at the hearing.

¶ 37 The defendant asks us not to engage in a prejudice analysis of these claims, arguing that postconviction counsel's failure to comply with her duty to present the claim at the hearing is a Rule 651(c) violation requiring remand for new second-stage proceedings. This request misapprehends the rule; once counsel has shaped the claims "into the proper legal form" and presented them, "Rule 651(c)'s purpose has been satisfied," and the duties at later hearings "turn[ ] on the requirement to provide reasonable representation—not on Rule 651(c)'s mandates." *People v. Smith*, 2022 IL 126940, ¶¶ 28-29. Because the *pro se* petition, incorporated into the amended petition, adequately presented the right-to-counsel claim, we review postconviction counsel's assistance at the motion to dismiss hearing under the reasonable representation standard.

¶ 38 Courts have recognized that we may apply the *Strickland* test[1] for ineffective assistance of counsel to measure "reasonable" performance under the Act, as "it stands to reason that, if postconviction counsel's assistance cannot be deemed ineffective under *Strickland*, it cannot be

[1]The United States Supreme Court set forth the two-prong test to evaluate claims of ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668, 691 (1984), adopted by the Illinois Supreme Court in *People v. Albanese*, 104 Ill. 2d 504, 526 (1984).

deemed unreasonable under the Act." *People v. Pabello*, 2019 IL App (2d) 170867, ¶ 36. Under the *Strickland* test, the defendant must prove both that: (1) his attorney's errors were so serious as to fall below an objective standard of reasonableness; and (2) that these errors prejudiced the defendant to the point that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A "reasonable probability" of a different result is a probability sufficient to undermine confidence in the proceeding's outcome. *Id.* To be successful on a claim for ineffective assistance of counsel, the defendant must satisfy both prongs. *Id.* at 697. While the failure to establish either prong precludes the finding of ineffective assistance of counsel, we may dispose of a claim by examining either the performance or the prejudice prong alone. See *People v. Graham*, 206 Ill. 2d 465, 476 (2003). For the following reasons, we find that both of the defendant's claims of unreasonable assistance regarding the right-to-counsel issue fail the *Strickland* test.

¶ 39 We first note that while the circuit court did not specifically address the right-to-counsel claim when it granted the State's motion to dismiss, it was only required to determine whether the defendant had made a substantial showing of a constitutional violation, and a claim-by-claim evaluation was not required to be set forth when it announced its decision. See *People v. Maclin*, 2014 IL App (1st) 110342, ¶ 27; see also *People v. Harris*, 224 Ill. 2d 115, 139 (2007) (when a petition is summarily dismissed, the trial court impliedly denies all requests in the defendant's prayer for relief). Further, our review of the ultimate issue as to whether the circuit court erred in dismissing the claim is de novo; under de novo review, we evaluate the circuit court's judgment, not its reasoning, and we may affirm on any basis in the record. *People v. Munz*, 2021 IL App (2d) 180873, ¶ 27.

¶ 40 The defendant claimed in his petition that he was denied his right to counsel when he was directed not to speak to his trial attorney during a brief, approximately 10-minute recess that occurred in the middle of his testimony. Postconviction counsel's failure to discuss the issue at the hearing does not limit our review. Failure to argue a claim that is included in the petition does not result in its waiver. See 725 ILCS 5/122-3 (West 2020) (waiver occurs when a claim is not included in the original or amended petition). The record makes clear that when the recess was taken, the defendant did not ask to be permitted to speak to his attorney at that time, and his attorney did not make any such request. Under these facts, where the mid-testimony recess was brief and the defendant never indicated a desire to confer with trial counsel, we cannot say that a defendant was denied their right to counsel. See *People v. Brooks*, 115 Ill. 2d 510, 521 (1987) (defendant was not denied right to counsel where recess was brief and no desire to confer with attorney was expressed) (abrogated on other grounds). We therefore find that the defendant's petition failed to demonstrate a constitutional violation as to this issue.

¶ 41 As such, even if postconviction counsel had argued the right-to-counsel issue at the hearing, and even if the circuit court had stated a basis for its dismissal of the claim, neither would have impacted our decision. Illinois law does not support a constitutional violation under these facts. Any contrary argument by postconviction counsel would have been futile, and postconviction counsel cannot be deemed unreasonable for failing to make a futile argument. See *People v. Patterson*, 217 Ill. 2d 407, 438 (2005). Thus, postconviction counsel's performance did not fall below an objective standard of reasonableness, and the defendant has failed to establish the first prong of *Strickland*. Accordingly, we find that postconviction counsel did not render unreasonable assistant of counsel with regard to the defendant's right-to-counsel claim.

¶ 42 Based on the foregoing, we find that an allegation of ineffective assistance of appellate counsel was brought before the circuit court, that the State's motion to dismiss sufficiently challenged whether the petition made a substantial showing of a claim of a constitutional violation, and that postconviction counsel did not render unreasonable assistance of counsel. Accordingly, we find no error in the circuit court's dismissal of the defendant's amended postconviction petition at the second stage.

¶ 43 III. CONCLUSION

¶ 44 For the foregoing reasons, we affirm the judgment of the circuit court of Macon County.

¶ 45 Affirmed.