No. 125981

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- ANTHONY HATTER, Petitioner-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-17-0389. There on appeal from the Circuit Court of Cook County, Illinois, No. 13 CR 18258. Honorable James Michael Obbish, Judge Presiding.

REPLY BRIEF FOR PETITIONER-APPELLANT

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ARGUMENT

Anthony Hatter's *pro* se post-conviction petition set out an arguable claim that plea counsel was ineffective for not investigating a plausible defense to the charges. The appellate court's decision to the contrary clashes with this Court's precedent and should be reversed.

Anthony Hatter's *pro se* post-conviction petition outlined a viable defense to the charges he pled guilty to, a defense that plea counsel neglected to raise. The trial court's summary dismissal of the petition was thus error. In its response, the State refuses to apply basic principles of post-conviction review, that first-stage petitions must be viewed liberally and need not present full claims. See *People v. Brown*, 236 Ill. 2d 175, 188 (2010); *People v. Hodges*, 234 Ill. 2d 1, 21 (2009). Under this settled law, Hatter's case should be remanded for second-stage proceedings.

A. Since Hatter's *pro se* petition makes an arguable showing of ineffective assistance of plea counsel, summary dismissal was inappropriate.

The State's brief does not acknowledge, much less apply, the "forgiving," "low" standard used by courts to evaluate first-stage petitions. See *People v. Allen*, 2015 IL 113135, ¶ 43; *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). Such petitions must be given a liberal construction, since most are drafted by petitioners "with little legal knowledge or training." *Hodges*, 234 Ill. 2d at 9, 16 n.7, 21. The State is silent on this principle; its Argument does not even recognize that Hatter's petition is a *pro se* document. Applying these principles, Hatter's ineffective-assistance claim should advance.

Hatter's showing of arguably deficient representation is undisputed. It is arguable that reasonable trial counsel would have discovered and raised

the fact that Hatter had only lived with the alleged victim, F.T., for two months, well short of the six-month period of continuous co-residency needed to prove the family-member element of the criminal sexual assault charges. (SC. 4); see 720 ILCS 5/11-1.20(a)(3) (West 2012); 720 ILCS 5/11-0.1. Hatter's showing on this prong had a basis in law and fact and was not rebutted by the record. Op. Br. 11–13. The State does not address these points.

Instead, the State focuses on prejudice. To fully prove prejudice, a defendant must show counsel's poor performance led the defendant to forgo trial, a showing "accompanied by either a claim of innocence or the articulation of a plausible defense that could have been raised at trial." *People v. Hall*, 217 Ill. 2d 324, 335–36 (2005). At this stage, though, Hatter must only show "it is arguable that [he] was prejudiced," which means his claim is not "based on an indisputably meritless legal theory or a fanciful factual allegation." *Hodges,* 234 Ill. 2d at 16–17. Hatter has shown arguable prejudice. His allegation that he was forced by counsel to plead guilty despite having a valid defense to the family-member element has a basis in law and fact. Op. Br. 14–16. The State does not dispute that proof of the family-member defense would mean acquittals on the offenses of conviction.

The State, though, argues that Hatter has not shown arguable prejudice because he did not explicitly aver that (a) counsel's poor performance led him to plead guilty, and (b) that the family-member defense would defeat all charges, even those dropped by prosecutors. St. Br. 11–12.

The State's response overlooks a basic rule for reviewing summary dismissals: a first-stage petition "is not required to set forth a constitutional

claim in its entirety." *People v. Brown*, 236 Ill. 2d 175, 188 (2010). As explained in the opening brief, this Court has found first-stage claims to be arguable even though some allegations necessary for a full claim were missing. See *id.* at 188 (petitioner did not aver that he informed counsel of problems with medication or that fitness motion would be successful); *Hodges*, 234 Ill. 2d at 21 (petition framed prejudice in terms of different defense than was raised on appeal); see also Op. Br. 20 (also citing appellate court cases applying same principle). The State's response? Nothing. And these principles rebut the State's arguments on prejudice.

Rather than follow these principles, the State turns to an appellate court case. St. Br. 11. In *People v. McCoy,* the court found a failure-to-investigate claim lacked merit since the petitioner did not present exculpatory evidence. 2014 IL App (2d) 100424-B, ¶ 18. The State's brief relies on an additional one-sentence holding: "Further, in terms of prejudice, defendant failed to allege that he would have pled not guilty and insisted on going to trial." *Id*. *McCoy* fails to acknowledge that first-stage claims need not be fully formed, or that such claims must be given a liberal construction. And the court's analysis is phrased in terms of full merit, not arguable merit. 2014 IL App (2d) 100424-B, ¶¶ 18–19. It thus a poor guide.

The State confuses matters by claiming Hatter must show that rejecting the plea offer would have been "rational under the circumstances." See St. Br. 10, 11–13. This is the standard for when a claim of ineffective assistance involves the consequences of a guilty plea, like deportation. See *Lee v. United States*, ___ U.S. ___, 137 S. Ct. 1958, 1968–69 (2017); *People v.*

Brown, 2017 IL 121681, ¶¶ 39–41, 48. By contrast, for ineffective-assistance claims involving "a defendant's defense strategy or chance of acquittal, . . . this court requires a claim of innocence or a plausible defense to establish prejudice." *Brown*, 2017 IL 121681, ¶ 45. This is a "different approach" than the one in cases of ineffective assistance concerning plea consequences. *Id.* Hatter's argument is that counsel failed to raise a viable defense, so the plausible-defense type of prejudice applies.

Even under the State's inapt standard, though, Hatter's claim has arguable merit. The State contends, based on the factual basis at the guilty plea, that it could prove another theory of the crime, and that the resulting sentencing exposure would make going to trial irrational. St. Br. 11–14. But the State proceeds from a mistaken premise. Its alternative theory substitutes the element that the defendant "knows that the victim . . . is unable to give knowing consent." 720 ILCS 5/11-1.20(a)(2); (see C. 15, 17, 19). The State claims this element was proven since, per the factual basis, F.T. feigned sleep during the alleged assault. (R. 9–10.) As support, the State offers a misreading of *People v. Lloyd*, 2013 IL 113510. It claims *Lloyd* found culpability if the defendant "believed the victim to be asleep during the sexual assault." St. Br. 12. In truth, *Lloyd* requires knowledge, not belief, and that the victim was *in fact* asleep. 2013 IL 113510, ¶¶ 39–40 (following caselaw finding culpability when victims "were typically severely mentally disabled, highly intoxicated, unconscious, or asleep"). F.T. was not asleep, so she was not incapable of giving knowing consent. Since Hatter's family-member defense would offer a complete defense to the charges, it would have

arguably been rational to reject the guilty plea offer.

The State's other main response is that Hatter's claim of living with F.T. for only two months lacks corroboration. St. Br. 15–19. A petition must include as attachments "affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2016.) Hatter verified his allegations with a notarized affidavit. (SC. 9.) His allegations can be tested at an evidentiary hearing, the proper place for credibility determinations. See *People v. Sanders*, 2016 IL 118123, ¶ 40. The State makes no claim that Hatter's allegations are "fantastic or delusional"—they are plainly not—the only sort of factual allegations that could support summary dismissal. See *People v. Knapp*, 2020 IL 124992, ¶ 45.

The State, though, suggests that Hatter needed to present "evidence of his residency" or an explanation for the lack of such evidence. St. Br. 16–17, *citing People v. Delton*, 227 Ill. 2d 247 (2008). The State does not specify what evidence is missing. Brief living arrangements, like the one alleged by Hatter, are often not reflected in official documentation. In *People v. Delton*, by contrast, there were several obvious pieces of evidence not presented and not excused: an affidavit from the defendant's spouse and disciplinary complaints against the police officers who were allegedly harassing the defendant. 227 Ill. 2d 247, 257–58 (2008). *Delton* is distinguishable.

On appeal Hatter also cited a Department of Corrections record, subject to judicial notice, showing he was in custody for five weeks of the six months preceding the alleged offense. Op. Br. 13–14 & A-27. The State

claims, inaccurately, that Hatter faults the trial court for not addressing this record, which was not before it. St. Br. 16. Hatter in fact argued that the court's summary dismissal was error based on the pleadings alone. Op. Br. 11–13, 14–15. The prison record just confirms what the pleadings showed, that Hatter's ineffective-assistance claim is "capable of objective or independent corroboration." See *Allen*, 2015 IL 113135, ¶ 43.

As an aside, though, the State's other challenge to the DOC record is misplaced. The State contends that the record would not preclude some earlier six-month period of co-residency, distant from the offense date. St. Br. 18. But the record supports Hatter's claim that he only lived with F.T. for two months, since it shows a period of separate residency. And the family-member determination is, contrary to the State's assertion, limited to the six months before the crime. The statute requires that the defendant "has resided in the household with the child [victim] continuously for at least 6 months." 720 ILCS 5/11-0.1 (West 2012). "Has resided" is in the present perfect tense, a tense that "denote[s] action beginning in the past and continuing to the present." See *In re Gwynne P.*, 215 Ill. 2d 340, 358 (2005). Here "the present" is the time of the crime. The DOC record, though not essential to Hatter's claim, corroborates that claim.

Since Hatter's petition sets out an arguable claim of ineffective assistance of counsel, the trial court's summary dismissal order was error.

B. The appellate court's decision, affirming the summary dismissal of Hatter's petition, veered from established principles for reviewing post-conviction petitions.

The opening brief showed how the appellate court's decision below did

not faithfully apply this Court's post-conviction precedent. See Op. Br. 16–21; *People v. Hatter*, 2020 IL App (1st) 170389-U, ¶¶ 17–20. The State again offers no response. Instead, it repeats the appellate court's missteps, treating Hatter's petition as something other than a *pro se*, first-stage petition. See Op. Br. 17–21; *supra* pp. 1–5. The appellate court decision, divorced as it is from basic post-conviction law, should be reversed.

C. The appellate court's novel holdings on prejudice should be rejected as contrary to *People v. Hall*.

Finally, Hatter has shown how the appellate court's novel prejudice requirement is foreclosed by *People v. Hall*, 217 Ill. 2d 324 (2005). The appellate court required Hatter to show a plausible defense to all charges, though *Hall* found a sufficient second-stage showing based on a plausible defense to only one of the charges. *Hall*, 217 Ill. 2d at 327, 334–41; Op. Br. 21–22; *People v. Hatter*, 2020 IL App (1st) 170389-U, ¶ 19. The State's brief summarizes *Hall* but then misapplies it, claiming (sans any authority) that Hatter needed to show a defense to all charges. St. Br. 14–15. The State has not asked this Court to reconsider *Hall*. And *Hall* decisively undercuts the defense-to-all-counts theory of prejudice. (The State also fails to address other problems Hatter noted with the appellate court's novel theory. See Op. Br. 22–23.)

This Court should reaffirm *Hall* and reverse the appellate court's supererogatory prejudice requirement. And, since Hatter's petition presents an arguable constitutional claim, the case should be remanded for second-stage proceedings.

CONCLUSION

In sum, the State's brief does nothing to rebut Hatter's arguable showing of ineffective assistance of counsel. Hatter respectfully requests that this Court reverse the judgments of the circuit and appellate courts and remand for second-stage post-conviction proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 8 pages.

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NOTICE AND PROOF OF SERVICE

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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 February 26, 2021, 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 petitioner-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

/s/Danielle Lockett
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