No. 128413

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, v. JAMES AGEE, Petitioner-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, Second District, No. 2-20-0748 There on Appeal from the Circuit Court of the 17th Judicial Circuit, Winnebago County, Illinois, No. 10 CF 2437 The Honorable Debra D. Schafer, Judge Presiding.

BRIEF OF RESPONDENT-APPELLEE
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NATURE OF THE CASE

The circuit court dismissed petitioner's amended postconviction petition at the second stage, holding that petitioner failed to make a substantial showing of the denial of a constitutional right. On appeal, petitioner claimed that he received unreasonable assistance of postconviction counsel. The appellate court rejected petitioner's argument and affirmed the judgment, and this Court granted leave to appeal. No question is raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether petitioner was entitled to the reasonable assistance of postconviction counsel when counsel amended his postconviction petition to shape his vague pro se allegations into a claim of ineffective assistance of trial counsel.

2. Whether petitioner has failed to rebut the presumption that postconviction counsel complied with his Rule 651(c) duties and provided reasonable assistance when amending his petition.

JURISDICTION

Appellate jurisdiction lies under Supreme Court Rules 315 and 612(b). This Court granted leave to appeal on September 28, 2022.

STATEMENT OF FACTS

Charges and Guilty Plea

On October 18, 2010, petitioner walked into the police station and informed police that he had just choked Denise Davis, a former domestic partner, until she passed out and that he believed that she was dead. *See* C486-500 (transcript of petitioner's recorded statement).[1] Petitioner was later charged with first degree murder, based on allegations that he strangled Davis to death. C20-22.

Before trial, petitioner disclosed that he intended to claim self-defense. C32. Based on defense motions in limine, the parties litigated whether the People could introduce: (1) Davis's out-of-court statements to other witnesses asserting that petitioner had been stalking her after she ended their romantic relationship, C52-54 (defense motion), 174-75 (People's response, describing statements from Davis to her mother, sister, coworker, boyfriend, and friend); (2) petitioner's prior charges and convictions, C59-60 (listing 14 criminal case numbers), including several that related to prior incidents of domestic violence, C183-85; and (3) petitioner's unredacted, inculpatory statement to police, C186-87, 199-200.

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[1] "C" and "R" refer to the common law record and report of proceedings. "Pet. Br." and "A" refer to petitioner's opening brief and appendix. "Pet. App. Ct. Br." and "Peo. App. Ct. Br." refers to the parties' briefs in the appellate court. Certified copies of the appellate briefs will be submitted to this Court pursuant to Supreme Court Rule 318(c).

At a hearing on May 1, 2012, the People clarified that they intended to focus on petitioner's history of stalking the victim, as evidenced by Davis's out-of-court statements and petitioner's admissions to police that he had hired a private investigator to keep tabs on Davis even after they had broken up. R182-84. The prosecution would not introduce petitioner's prior convictions as part of its case-in-chief. R183. The circuit court agreed that the People could introduce testimony that petitioner had been stalking the victim and petitioner's largely unredacted statement. *See* C211-12; R193-245. On May 3, 2012, petitioner entered a negotiated plea of guilty to first degree murder, C209; R271-84, and he was sentenced to 25 years in prison, C210.

Post-Plea Motions and Postconviction Petition

Nearly two months later, on June 28, 2012, petitioner moved to withdraw his guilty plea, claiming that it was not knowingly and voluntarily entered. C216. He later moved to reconsider his sentence, asserting that he "did not want to plead guilty to [first] degree murder, owing to [his] belief the charge should have been reduced to [second] degree murder, or involuntary manslaughter, due to the incident arising from a domestic dispute." C218. He further claimed that his attorney had promised him that truth-in-sentencing would be "abolished," such that he would need to serve only 50% of his 25-year sentence. C222. The circuit court found that it lacked

jurisdiction over the motions because they were filed more than 30 days after judgment was entered. C231, 239.

On October 2, 2013, petitioner filed a new motion to withdraw his plea, asserting that he had described to trial counsel a "mental state" that "constituted an affirmative defense to the [first] degree murder charge when considering his emotional attachment and relationship status to the victim." C242-43. He claimed that trial counsel was ineffective for failing to retain "an expert or professional psychologist" to evaluate his mental state at the time of the offense. C243. Petitioner requested that the court excuse the untimeliness of the motion or, alternatively, recharacterize it as a postconviction petition. C244-45.

Ultimately, the court construed the motion as a postconviction petition, docketed the petition for second stage proceedings, and appointed counsel. R49-50. Counsel filed an amended postconviction petition, C276-80, and a certificate of compliance with Supreme Court Rule 651(c), C600. The amended petition raised two claims: (1) trial counsel was ineffective during plea negotiations for failing to advise petitioner that he could pursue a second degree murder defense, C277-78; and (2) trial counsel was ineffective for failing to seek an evaluation of petitioner's mental state, C278-79. Only the first claim is at issue in this appeal.

In support of that claim, petitioner alleged that he "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." C278. Counsel did not inform him that he "could pursue a second-degree murder [defense] base[d] on the fact that at the time of Davis' death, [d]efendant was acting under a sudden and intense passion due to being seriously provoked by Davis and that her death was the result of her own negligence." C278 (citing 720 ILCS 5/9-2(a)(1)). In an affidavit, petitioner stated, "More than once I told my attorney that I blacked out during the argument that led to Denise Davis' death." C282.

Postconviction counsel attached to the amended petition a transcript of petitioner's videotaped statement to police, given on the day he killed Davis. C486-563. In the statement, petitioner admitted that he and Davis "officially broke up" three months earlier. C487. For at least a month, she had been seeing someone else, and they had "argued about that." C494. He had gone to Davis's house that day, noticed that she was home, and parked in front of the house. C519-20. Davis was about to let the dog out the front door and told petitioner that she was about to leave, but petitioner "just went in." C522-23. They started arguing; "it was just normal for [them] to argue." C488-89.

Petitioner claimed that Davis swung at him, but he "blocked it," because he used to be a boxer. C489. She "came at [him] again" and scratched his forehead, and petitioner "grabbed her" and "hit her a couple of times . . . in her face." C490. In petitioner's words, Davis "kept swingin'. 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." R491. Petitioner had "both hands around her neck" and left them there "for only a couple minutes." C526.

Petitioner claimed that they had never had a physical fight before, C492, because he knew that he could injure her, given their size disparity, C498-99. However, on that day, "I just, I just lost my temper. Maybe I went a little too far, yeah." C498. Within fifteen minutes of leaving Davis's house, he had arrived at the police station; he did not call for an ambulance because his "mind was so jacked up," and he "thought [he] hurt her bad." R495.

The People moved to dismiss the petition for failing to make a substantial showing of a constitutional violation. C566-96. The circuit court granted the motion and dismissed the petition. C132-33; R587-92. It found, as relevant here, that the record refuted petitioner's assertion that he had been unaware of the availability of a second degree murder defense, noting that a motion petitioner filed shortly after the guilty plea asserted that he had not wanted to plead guilty "'owing to [his] belief the charge should have been reduced to second degree murder or involuntary manslaughter,'" and thus demonstrated that he had been aware of potential defenses. R590-92.

Postconviction Appeal

On appeal, petitioner argued that postconviction counsel provided unreasonable assistance. Throughout his brief, he maintained that postconviction counsel had "added" a claim of ineffective assistance to the

petition, based on trial counsel's failure to inform him of a second degree murder defense, and that postconviction counsel had provided unreasonable assistance with respect to that new claim. *See* Pet. App. Ct. Br. at 12-19. Petitioner noted that, to show prejudice, he needed to demonstrate that a second degree murder defense was viable. *See id.* at 17-18. The amended petition failed to make such a showing, and petitioner claimed that this deficiency was the fault of his attorney. *See id.*

The appellate court concluded that petitioner's claim failed at the threshold because a petitioner has no right to the reasonable assistance of postconviction counsel when counsel adds a new claim to a petition. A10-11, ¶¶ 8-10.

STANDARD OF REVIEW

Whether postconviction counsel has a duty to provide reasonable assistance, and whether counsel satisfied that standard, are legal questions that this Court reviews de novo. *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007).

ARGUMENT

I. Petitioner Was Entitled to Reasonable Assistance When Postconviction Counsel Shaped the Vague Allegations of His Pro Se Petition Into a Legal Claim.

The People agree — as they did below — that petitioner had a right to reasonable assistance from postconviction counsel when counsel amended his

postconviction petition to include a claim that trial counsel was ineffective for failing to advise him of a second degree murder defense.

As this Court has stressed, postconviction counsel's duties are limited. *People v. Custer*, 2019 IL 123339, ¶¶ 30-32. A petitioner is entitled to the assistance of counsel only as "'a matter of legislative grace.'" *People v. Flores*, 153 Ill. 2d 264, 276 (1992) (quoting *People v. Porter*, 122 Ill. 2d 64, 73 (1988)); *see* 725 ILCS 5/122-4 (allowing for the appointment of counsel). Postconviction counsel must provide "only a 'reasonable' level of assistance, which is less than that afforded by the federal or state constitutions." *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006) (quoting *People v. Munson*, 206 Ill. 2d 104, 137 (2002)); *see also People v. Johnson*, 2018 IL 122227, ¶¶ 16-17. Counsel's role is "to shape [the petitioner's] complaints into the proper legal form and to present those complaints to the court." *People v. Owens*, 139 Ill. 2d 351, 365 (1990).

"To assure the reasonable assistance required by the [Illinois Post-Conviction Hearing] Act," Rule 651(c) requires postconviction counsel to "consult[ ] with petitioner . . . to ascertain his or her contentions of deprivation of constitutional rights," "examine[ ] the record of the proceedings at the trial," and "make any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." *People v. Perkins*, 229 Ill. 2d 34, 42 (2008); Ill. S. Ct. R. 651(c). Counsel may investigate additional issues, *Pendleton*, 223 Ill. 2d at 476, but "is only

required to investigate and properly present the *petitioner's* claims," *People v. Davis*, 156 Ill. 2d 149, 164 (1993) (emphasis in original). This means that postconviction counsel cannot be faulted for failing to develop and pursue claims not suggested by the pro se filing. *Id.*

However, in carrying out his Rule 651(c) duties, postconviction counsel may determine that a petitioner intends to raise claims that are suggested by, but not clearly articulated in, the pro se petition. Indeed, counsel's role is premised on the assumption that the pro se petitioner may lack the skill to shape his complaints into the proper legal form. *See Suarez*, 224 Ill. 2d at 46. Therefore, counsel must "consult" with the petitioner to "ascertain" his contentions. Ill. S. Ct. R. 651(c); *see also Suarez*, 224 Ill. 2d at 46 (counsel's duty of consultation is critical to ensuring "that the complaints of a prisoner are adequately presented"). Following such consultation, counsel may include a claim in an amended petition that was not clearly articulated in the pro se petition. And where counsel has included a claim in an amended petition, counsel has necessarily determined that it constitutes one of the "petitioner's claims" for purposes of Rule 651(c).

Under this framework, counsel's duty to provide reasonable assistance should extend to all of the claims counsel has identified as the petitioner's claims and included in the amended petition. To hold otherwise would require courts to second-guess counsel's identification of the petitioner's claims. And a rule requiring courts to reevaluate counsel's identification of

the petitioner's claims, determine whether any of those claims are "new," and exclude any "new" claims from the scope of counsel's obligation to provide reasonable assistance, would be difficult to apply. Here, for example, petitioner's pro se postconviction petition at least suggested a claim that trial counsel was ineffective for failing to adequately advise petitioner of the possibility of a second degree murder defense. C242-43 (claiming that petitioner's "emotional attachment and relationship status to the victim," which he described to trial counsel during their pre-plea discussions, provided him with an "affirmative defense" to first degree murder). Thus, as petitioner observes, "it can be hard to distinguish between the petitioner's claims a 'new' claim added by counsel." Pet. Br. 19.

For these reasons, this Court should decline to adopt the appellate court's rule, which would require an assessment of whether claims included in an amended petition are "new." Instead, courts should defer to postconviction counsel's judgment identifying a petitioner's claims. And, because the claims included in counsel's amended petition constitute the "petitioner's claims" for purposes of Rule 651(c), counsel's duty to provide reasonable assistance in pursuing those claims necessarily attaches. Thus, petitioner had a right to reasonable assistance when counsel amended his petition to articulate a claim that trial counsel was ineffective for allegedly failing to advise him of a second degree murder defense.

II. Petitioner Has Failed to Rebut the Presumption That Postconviction Counsel Complied with His Rule 651(c) Duties and Performed Reasonably, And His Claim Fails Through No Fault of Counsel.

Though the appellate court was wrong to find that no right to reasonable assistance of postconviction counsel attached, this Court should nevertheless affirm its judgment, because petitioner's right to reasonable assistance was satisfied. *See In re Veronica C.*, 239 Ill. 2d 134, 151 (2010) ("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").

Here, postconviction counsel reasonably amended the petition to ensure that petitioner's claim of ineffective assistance of trial counsel was adequately presented. Notwithstanding counsel's efforts, the claim plainly lacks merit (through no fault of counsel), and this Court should affirm the judgment of dismissal.

A. Postconviction counsel amended the petition to ensure an "adequate presentation" of petitioner's claim of ineffective assistance of trial counsel.

As discussed, postconviction counsel must provide only "a reasonable level of assistance." *People v. Addison*, 2023 IL 127119, ¶ 19 (internal quotation marks omitted). This reasonableness standard "is significantly lower than the one mandated at trial by our state and federal constitutions." *Custer*, 2019 IL 123339, ¶ 30. The filing of a Rule 651(c) certificate, *see* C600,

creates a presumption that counsel performed the duties prescribed by the rule and provided reasonable assistance, *Addison*, 2023 IL 127119, ¶ 21. Petitioner "bears the burden of overcoming that presumption by showing that postconviction counsel did not substantially comply with the strictures of the rule." *Id.*

Petitioner has failed to rebut the presumption that postconviction counsel reasonably amended his postconviction petition and "ma[d]e 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). Under the clear terms of this rule, the question is whether counsel's efforts sufficed for "an adequate presentation," and complying with this requirement does not "include bolstering every claim presented in a petitioner's *pro se* postconviction petition, regardless of its legal merit, or presenting each and every witness or shred of evidence the petitioner believes could potentially support his position." *Custer*, 2019 IL 123339, ¶ 38. Generally, counsel should ensure that the claims are in the proper legal form by ensuring that all elements of the claim are alleged, *People v. Dixon*, 2018 IL App (3d) 150630, ¶ 16; that required affidavits or other substantiation are included, if available, *People v. Johnson*, 154 Ill. 2d 227, 248-49 (1993); and that arguments are presented to overcome procedural bars, *see Addison*, 2023 IL 127119, ¶ 21.

Counsel complied with these requirements in presenting petitioner's ineffective assistance claim. To prevail on an ineffective assistance of trial counsel claim, a petitioner must demonstrate both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985). Relevant here, trial counsel must provide reasonable advice in the context of plea negotiations, and may perform deficiently if, for example, he fails to reasonably inform the petitioner of his chances of success at trial or the consequences of pleading guilty. *Hill*, 474 U.S. at 58-59. To demonstrate that he was prejudiced by erroneous advice that led him to plead guilty, the petitioner "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59. This analysis "depends in large part on predicting whether the defendant likely would have been successful at trial." *People v. Hall*, 217 Ill. 2d 324, 336 (2005). To demonstrate prejudice, a petitioner "must show that he would have been better off going to trial because he would have been acquitted or had a viable defense." *People v. Hatter*, 2021 IL 125981, ¶ 26; *see also Hall*, 217 Ill. 2d at 336; *People v. Rissley*, 206 Ill. 2d 403, 459-60 (2003).

Applying these standards here shows that petitioner's postconviction counsel provided reasonable assistance. Counsel shaped petitioner's vague pro se allegations, C242-43, into a claim of ineffective assistance that alleged both deficient performance and prejudice, C277-78. The amended petition

claimed that trial counsel was ineffective for failing to advise petitioner that he "could pursue a second-degree murder [defense] base[d] on the fact that at the time of Davis' death, [d]efendant was acting under a sudden and intense passion due to being seriously provoked by Davis and that her death was the result of her own negligence." C278 (citing 720 ILCS 5/9-2(a)(1)).

Petitioner concedes that counsel adequately alleged deficient performance, Pet. Br. 23, but claims that counsel did not adequately plead or substantiate his claim of prejudice because "counsel failed to allege [petitioner] had a viable defense," *id.* at 26. Although the amended petition did not use the words "viable defense," in asserting that petitioner "could pursue" a second degree murder defense, C278, the petition plainly implied that such a defense was viable. Therefore, contrary to petitioner's assertion, this case is not similar to those in which postconviction counsel failed to allege the essential elements of a claim. *See* Pet. Br. 26 (citing *Dixon*, 2018 IL App (3d) 150630, ¶ 16 (holding counsel performed unreasonably where "the amended petition alleged several claims of ineffective assistance of counsel but failed to allege that the defendant was prejudiced by trial counsel's deficiencies"); *People v. Jones*, 2016 IL App (3d) 140094, ¶¶ 27-30 (holding counsel performed unreasonably by failing to allege elements of claim of ineffective assistance of counsel suggested by pro se petition)).

And postconviction counsel substantiated that claim to the extent possible. Petitioner contends that "[r]easonable post-conviction counsel could

have looked to Agee's statement to police to support the claim," Pet. Br. 25, but counsel attached the entire transcript of petitioner's statement as an exhibit to the petition, C486-563. Counsel also attached petitioner's affidavit, which asserted (contrary to petitioner's detailed statement to police) that he "blacked out during the argument that led to Denise Davis' death." C282.

Moreover, contrary to petitioner's claim, postconviction counsel did not suggest at the hearing on the People's motion to dismiss that he "was operating under the mistaken belief that he was not required to allege in the petition the factual allegations underlying the claim," or that he had additional substantiation to offer. Pet. Br. 25. At the hearing, counsel asserted that petitioner's live testimony could better elucidate to the circuit court why petitioner believed that trial counsel had been ineffective. Counsel stressed that petitioner "felt that if his case had gone to trial, that a possible conviction as to Second Degree Murder might've been something that would have been obtained," R570-71, and urged the circuit court to hold a hearing "to adequately get a picture of what [petitioner's] position is and what [his] feelings are," R572. But although petitioner may have wished to express his feelings to the court, those are not dispositive of his *Strickland* claim, which instead turns on whether he had a viable defense on the facts. Thus, counsel's statements do not reflect that counsel was aware of relevant evidence that he failed to provide. And the record demonstrates that

petitioner does *not* have a viable defense, so petitioner's claim fails — through no fault of postconviction counsel. *See infra* pp. 18-20.

Finally, petitioner does not (and cannot) claim that postconviction counsel unreasonably failed to amend the petition to overcome a procedural bar to addressing his claim. Consequently, petitioner has failed to demonstrate the counsel failed to make any amendments to the petition "that are necessary for an adequate presentation of petitioner's contentions," Ill. S. Ct. R. 651(c), and thus has not rebutted the presumption that counsel complied with Rule 651(c), as counsel certified.

B. Despite counsel's reasonable assistance, petitioner's claim fails because the record demonstrates that he had no viable second degree murder defense.

Petitioner's claim of ineffective assistance of trial counsel failed because it lacks merit, and not because postconviction counsel failed to provide adequate assistance. At the second stage of postconviction proceedings, a petitioner must "make a substantial showing of a constitutional violation," such that an evidentiary hearing is warranted. *People v. Pingelton*, 2022 IL 127680, ¶ 34. Some claims, though adequately pleaded and substantiated to the best of counsel's ability, will nevertheless fail to make the necessary substantial showing. That is the case here.

Indeed, the circuit court found that petitioner had failed to demonstrate deficient performance, R590-92, even though petitioner concedes that postconviction counsel reasonably amended the postconviction petition

with respect to this prong of *Strickland*, Pet. Br. 23. Petitioner contends that he made a substantial showing of deficient performance because his affidavit, which claimed that "trial counsel did not advise him about a second degree defense," was required to "be taken as true." *Id.* 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-pleaded allegations in the petition and supporting affidavits *that are not positively rebutted by the trial record* are to be taken as true." (emphasis added)).

Here, the record affirmatively rebuts petitioner's claim that he was unaware of a second degree murder defense before trial. The circuit court noted petitioner's motion filed shortly after the guilty plea, which claimed that he had not wanted to plead guilty because he believed that his actions constituted second degree murder or involuntary manslaughter. R590-92. It stands to reason that petitioner "did not want to plead guilty to [first] degree murder, owing to [his] belief the charge should have been reduced to [second] degree murder, or involuntary manslaughter, due to the incident arising from a domestic dispute," C218, because petitioner had discussed these theories with his attorney before pleading guilty, and they had simply disagreed about the viability of such a defense.

Trial counsel's opinion that petitioner had no viable second degree murder defense was eminently reasonable, and any competent attorney would have told him the same. The lack of a viable defense defeats petitioner's claim on the prejudice prong as well. *See Hatter*, 2021 IL 125981, ¶ 26 (to demonstrate prejudice, petitioner must "show that he would have been better off going to trial because he would have been acquitted or had a viable defense").

Although petitioner's pro se filings reflect an entrenched belief that his strong feelings for Davis reduce his culpability for murdering her and render it a lesser mitigated offense, that belief is unsupported by the law. First degree murder may be mitigated if a defendant demonstrates that he was acting under a "sudden and intense passion resulting from serious provocation by the individual killed or another whom the offender endeavors to kill, but he or she negligently or accidentally causes the death of the individual killed." 720 ILCS 5/9-2(a)(1). However, "'[p]assion 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 which the law recognizes as being reasonable and adequate.'" *People v. Tenner*, 157 Ill. 2d 341, 372 (1993) (quoting *People v. Austin,* 133 Ill.2d 118, 125 (1989)). To mitigate first degree murder, "the only categories of serious provocation which have been recognized are: substantial physical injury or assault, mutual quarrel or

combat, illegal arrest, and adultery with the offender's spouse." *Id.* (internal quotation marks omitted).

Petitioner can cite no such provocation. He was not Davis's spouse, and there was no "illegal arrest." Nor do the two remaining categories — substantial physical injury or assault, and mutual quarrel or combat — fit the facts. The evidence that the circuit court had deemed admissible at petitioner's trial, including his own statement to police and statements made by Davis before her death, would show that he had been stalking Davis after she ended their relationship. On the day of the murder, petitioner went to Davis's house uninvited, entered the house even though she told him that she was leaving, and strangled her to death. *See* C519-23.

Even if petitioner could show that Davis had tried to protect herself, any struggle would not have been mutual combat, because Davis was not a willing participant in the altercation that led to her death. *People v. McDonald*, 2016 IL 118882, ¶ 59 ("Mutual combat 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."); *see also People v. Flores*, 282 Ill. App. 3d 861, 868 (1st Dist. 1996) ("one who instigates combat cannot rely on his victim's response as evidence of mutual combat sufficient to mitigate the killing from first-degree murder to second-degree murder"). Nor does petitioner have any viable argument that Davis's efforts at fending him off resulted in "substantial

physical injury." He did not claim any such injury when he went to the police station to turn himself in shortly after strangling Davis: he mentioned a scratch to his forehead but admitted that he blocked her from striking him. C489-90. Responding to this minor injury by choking the victim with both hands around her neck for several minutes was "violence all out of proportion to the provocation," and therefore a second degree murder argument would have been unavailing. *Austin*, 133 Ill. 2d at 127.

Notably, petitioner pleaded guilty just two days after the circuit court ruled that petitioner's confession would not be redacted and the People could introduce extensive evidence of his stalking, which would have contradicted any claim that Davis had attacked him without provocation or that their argument was sudden. In the face of this evidence, petitioner could not possibly establish that he committed a lesser mitigated form of murder. Because this evidence had been ruled admissible, petitioner would not have been better off going to trial, and thus he cannot show a reasonable probability that he would not have pleaded guilty. *Hatter*, 2021 IL 125981, ¶ 26. To the contrary, had he proceeded to trial, petitioner faced the same first degree murder conviction and the risk of a much higher sentence of up to 60 years in prison.

For his part, petitioner does not attempt to demonstrate that he had a viable defense. Instead, he asserts that "it is improper to speculate as to whether [his] petition would have alleged a substantial constitutional

violation had post-conviction counsel adequately presented this ineffective assistance of counsel claim." Pet. Br. 27. But it is not speculation to conclude that the record precludes any argument that petitioner had a viable second degree murder defense. And this means that, despite postconviction counsel's able efforts to shape his pro se allegations into the proper legal form, the claim must fail.

Accordingly, because petitioner received the reasonable assistance of counsel in shaping his ineffective assistance claim, but nevertheless failed to make a substantial showing of a constitutional violation, this Court should affirm the judgment of dismissal.

CONCLUSION

This Court should affirm the appellate court's judgment.

May 24, 2023

Respectfully submitted,

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RULE 341(c) CERTIFICATE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 22 pages.

/s/ Erin M. O'Connell
ERIN M. O'CONNELL
Assistant Attorney General

CERTIFICATE OF FILING AND SERVICE

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 May 24, 2023, the foregoing **Brief of Respondent-Appellee People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which automatically served notice on counsel at the following e-mail address:

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