

2025 IL App (1st) 230902-U

No. 1-23-0902

Order filed March 31, 2025

Sixth Division

**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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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 06 CR 23476
	)	
DARIUS BAILEY,	)	Honorable
	)	Carl B. Boyd,
Defendant-Appellant.	)	Judge, presiding.

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PRESIDING JUSTICE TAILOR delivered the judgment of the court.  
Justice Gamrath concurred in the judgment.  
Justice C.A. Walker dissented.

**ORDER**

¶ 1 *Held:* The circuit court's order granting the State's motion to dismiss defendant's postconviction petition is affirmed where postconviction counsel provided reasonable assistance as contemplated by the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2018)).

¶ 2 Defendant Darius Bailey appeals from the second-stage dismissal of his successive petition for relief filed pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2018)). On appeal, Bailey contends that he received unreasonable assistance of postconviction

counsel because counsel's supplemental petition did not attempt to address fatal deficiencies in his *pro se* petition and, when the State highlighted those deficiencies in its motion to dismiss, counsel did not amend the supplemental petition. For the reasons that follow, we affirm.

¶ 3 Bailey's convictions arose from the 2006 murder of 80-year-old Robert Winter. At the time of the offense, Bailey was 20 years old. Following a 2008 jury trial, Bailey was convicted of first degree murder, home invasion, and robbery, and sentenced to concurrent, respective terms of natural life, 30 years, and 15 years in prison. According to the presentencing investigation (PSI) report, which was prepared in conjunction with his sentencing, Bailey told the probation officer that although his parents separated when he was very young, he was raised by both parents while usually living with his mother. Bailey described a "good relationship, always" with both parents and his stepfather, with no abuse or neglect and no alcohol problems or drug use among his family members. At 17, he stopped attending school and was "dropped from the roll." From the age of 17 until his arrest at age 20, Bailey lived with his uncle. In the section of the PSI report titled "Alcohol/Drug Usage," part of which is missing from the record on appeal, the probation officer wrote that Bailey reported smoking marijuana "maybe once every two months when he was 18 to 20 years old." Bailey also stated he never liked alcohol and did not "feel he has ever had a problem with alcohol or drugs."

¶ 4 On direct appeal, this court affirmed the sentence of natural life imprisonment, vacated the conviction and sentence for home invasion, reduced the conviction for robbery from a Class 1 to a Class 2 felony, and resentenced Bailey to seven years in prison on the robbery conviction. See *People v. Bailey*, 2011 IL App (1st) 090074-U, ¶¶ 37, 41, 47. Our supreme court ultimately vacated the trial court's imposition of natural life imprisonment and remanded for resentencing on the

murder conviction. *People v. Bailey*, 2013 IL 113690, ¶ 72. At the resentencing hearing in 2013, the parties indicated there were no additions, deletions, or modifications to be made to the PSI report. The trial court then sentenced Bailey to 60 years in prison for his murder conviction. Bailey filed a motion to reconsider, which the trial court denied. Bailey did not file a timely notice of appeal from that judgment.

¶ 5 In 2013, Bailey filed a *pro se* postconviction petition, alleging ineffective assistance of trial counsel for failing to file a timely notice of appeal following resentencing. The circuit court found Bailey’s petition “sufficient” and appointed counsel. In 2014, the court granted the petition without objection by the State, and Bailey was allowed to file a late notice of appeal.

¶ 6 On appeal, Bailey contended that his sentence was excessive in light of his youth and rehabilitative prospect. He noted that he was 20 when he was arrested, had no prior convictions, had strong family support, and expressed remorse. He further claimed his 60-year sentence was a *de facto* life sentence. He contended that the circuit court did not consider the financial impact of a lengthy sentence nor note his young age in announcing its sentencing determination. In his reply brief, Bailey contended, relying on, *inter alia*, *Miller v. Alabama*, 567 U.S. 460 (2012), that the sentencing considerations surrounding the youthfulness of juveniles should be extended to 20-year-old offenders, as a minor is someone who has not yet attained the age of 21 years. We rejected Bailey’s arguments, affirmed, and ordered the mittimus to be corrected to reflect this court’s and the supreme court’s mandates. *People v. Bailey*, 2015 IL App (1st) 140776-U, ¶¶ 13-20.

¶ 7 In 2016, Bailey filed a *pro se* postconviction petition under the Act, raising claims of ineffective assistance of appellate counsel. The circuit court “denied” the petition, noting that Bailey had not moved for leave to file a successive petition. It does not appear from the record that

Bailey appealed.

¶ 8 In 2017, Bailey filed a *pro se* motion for leave to file a successive postconviction petition. In the petition, he claimed that his sentence was unconstitutional as applied under the eighth amendment of the United States Constitution and the proportionate penalties clause of the Illinois constitution. In making the claim, Bailey relied on *Miller* and related Illinois cases. He also attached his own affidavit, describing his childhood. Bailey averred that, at age 11, he was left in the care of his cousins while his mother worked. The cousins forced him to join a gang and help commit crimes, and he started smoking marijuana and drinking alcohol. By 13, he had seen someone killed and was using cocaine. At 15, he was “kicked out of the house” and introduced to prostitution by an aunt and, shortly thereafter, he was drugged, beaten, and raped at a party. By 18, he “was in better grace” with his parents, who helped him find a job, and had taken an entry examination to join the army. Bailey noted other mitigation in the affidavit, such as earning a general education development, otherwise known as a GED, earning certificates in prison, cutting ties to the gang, being a better father, and having a job offer upon his release. The circuit court “denied” the petition. It does not appear from the record that Bailey appealed.

¶ 9 In 2018, Bailey filed another *pro se* motion for leave to file a successive postconviction petition, arguing that he had been deprived the opportunity to add claims to his 2013 postconviction petition. The circuit court denied leave to file, noting that Bailey had not met the cause and prejudice test for filing a successive petition. Again, it does not appear from the record that Bailey appealed.

¶ 10 On September 3, 2019, Bailey filed the pleadings at issue in the instant appeal, a *pro se* motion for leave to file a successive postconviction petition and an accompanying petition. In the

petition, he claimed that his 60-year sentence was unconstitutional as applied to him, constituted a *de facto* life sentence, and violated the eighth amendment of the United States constitution and the proportionate penalties clause of the Illinois constitution. He argued that he was entitled to a new sentencing hearing because, contrary to “recent Federal and State authority,” the trial court did not consider his youth and its attendant characteristics when imposing sentence. To support his arguments, Bailey relied on *Miller*, *People v. House*, 2019 IL App (1st) 110580-B, other cases, and “emerging” or “advancing” scientific research and “consensus” that brains of young adults continue to develop into their mid-twenties.

¶ 11 Almost one and a half years later, on February 26, 2021, the circuit court docketed the petition and appointed counsel.

¶ 12 On September 7, 2022, counsel filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. July 1, 2017). In the certificate, counsel stated that he had (1) consulted Bailey by mail to ascertain his contentions of deprivations of constitutional rights; (2) reviewed Bailey’s *pro se* postconviction petitions; (3) examined the report of proceedings and common law record from Bailey’s trial and reviewed the appellate court opinions in his appeals; and (4) prepared a supplemental petition which, along with the *pro se* petition, adequately set forth Bailey’s claims of deprivation of his constitutional rights.

¶ 13 In the supplemental petition, counsel asserted that Bailey’s 60-year sentence for a crime committed when he was a 20-year-old emerging adult violated the eighth amendment of the United States constitution and the proportionate penalties clause of the Illinois Constitution. After setting forth relevant cases, counsel argued that, “given the evolving precedent on emerging adults like [Bailey],” an arguable basis existed for a claim that his sentence was unconstitutional. Counsel

further asserted that Bailey's claim that his sentence was unconstitutional had an arguable as-applied factual basis, as the parts of Bailey's brain related to good decision making and impulse control had not fully formed at the time of the offense, and Bailey's "childhood was stressful, disadvantaged and traumatic." Counsel further argued that Bailey had demonstrated his rehabilitative potential since his incarceration, as evidenced by his earning a GED, completing programs in prison, earning a certificate in paralegal studies, and participating in multiple correspondence courses.

¶ 14 Counsel attached an affidavit in which Bailey averred, among other things, that he was raised by a single mother with two jobs and, as a result, he had trouble communicating and interacting with people and felt uncomfortable and "unaccepted" by other family members. When he was 12, he, along with his cousins, started drinking alcohol and smoking marijuana that was provided by his uncle, which led to his being tardy for or absent from school. At 13, he was tricked into smoking marijuana laced with cocaine. He then ingested cocaine for months. When his mother learned he was using drugs and not attending school, she kicked him out, leaving him homeless at age 14. He was also expelled from school. At some point, he moved in with his uncle, but in 2006 was "banned" from his uncle's house. Bailey averred that he attempted to join the army but his drug use prevented him from passing the physical examination.

¶ 15 Counsel also attached a copy of a 2022 appellate court opinion quoting a professor of psychology on the topic of the differences between adults and adolescents, whom he defined as individuals from 10 to 21 years of age (*People v. Wilson*, 2022 IL App (1st) 192048, ¶ 56); the transcript of Bailey's resentencing hearing in 2013; a 2021 paper from Harvard Medical School providing guidance for judges, attorneys, and policy makers regarding the science of late

adolescence; and several certificates from, and information about, educational programming that Bailey completed while incarcerated.

¶ 16 The State filed a motion to dismiss, arguing that because Bailey was over 18 years old at the time of the offense, his challenge under the eighth amendment was foreclosed. With regard to his as-applied challenge under the proportionate penalties clause of the Illinois constitution, the State asserted that the content of Bailey’s 2022 affidavit was directly contradicted by the record of his sentencing hearing, specifically, by the presentencing investigation (PSI) report and letters from Bailey’s family members. The State also argued that the proportionate penalties argument was barred by *res judicata*, as Bailey had “raised the issue of his sentence multiple times and even in 2016, the appellate court stated that it was not excessive and not *de facto* life.” The State asserted that Bailey’s sentencing hearing was “*Miller* compliant” where the court considered the facts of the case, the aggravation and mitigation presented, and Bailey’s background and rehabilitative potential, and that the sentence fashioned by the trial court was not excessive and did not shock the moral sense of the community. The State concluded that there was no showing as to how the sentence violated the proportionate penalties clause “other than he was 20 years old, got a 60-year sentence and there is new neuroscience.”

¶ 17 At the hearing on the motion, the State reiterated its written arguments. In response, postconviction counsel argued that the *pro se* petition and the supplemental petition made a substantial showing that Bailey’s sentence was unconstitutional because the trial court failed to consider *Miller* factors at sentencing. He asserted that *Miller* applied to Bailey because, as shown by the documents attached to the supplemental petition, Bailey would have been more like a juvenile than an adult at the time of the offense.

¶ 18 The circuit court granted the State’s motion. The court explained that Bailey’s eighth amendment challenge was essentially foreclosed because he was 20 years old at the time of the offense and, as such, the as-applied challenge was “the correct basis in which to view this particular case.” The court noted that the factual claims in Bailey’s affidavit, including that he was introduced to drugs and alcohol at the age of 12, was homeless at 14, and was addicted to cocaine for months as a teenager, were not raised in any of his prior sentencing hearings or in the PSI report. The court further explained that the sentencing claim was foreclosed by the doctrine of *res judicata*, as the court “had ruled that the sentence issued was not excessive and not a *de facto* life sentence.” The court further found that the sentencing court considered Bailey’s age and rehabilitative potential and that, where Bailey choked and strangled a man to death, taking his car, checkbook, and money, the sentence imposed was not excessive and did not shock the moral sense of the community.

¶ 19 Bailey filed a timely notice of appeal.

¶ 20 On appeal, Bailey contends that he received unreasonable assistance of postconviction counsel. As relief, Bailey seeks to vacate the dismissal of his petition and remand for new second-stage proceedings with new appointed counsel.

¶ 21 At the second stage of postconviction proceedings, appointment of counsel is a statutory, rather than constitutional, right. 725 ILCS 5/122-4 (West 2018); *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). Under the Act, petitioners are entitled to a “reasonable” level of assistance of counsel. *People v. Addison*, 2023 IL 127119, ¶ 19. To ensure this level of assistance, Rule 651(c) imposes three duties on appointed postconviction counsel. *Id.* ¶ 20. Pursuant to the rule, either the record or a certificate filed by the attorney must show that counsel (1) consulted with the petitioner to ascertain his contentions of constitutional deprivations, (2) examined the record of the trial



proceedings, and (3) made any amendments to the filed *pro se* petition necessary to adequately present the petitioner's contentions. Ill. S. Ct. R. 651(c) (eff. July 1, 2017); *Addison*, 2023 IL 127119, ¶ 20.

¶ 22 The filing of a Rule 651(c) certificate creates a rebuttable presumption that postconviction counsel provided reasonable assistance, and substantial compliance with the rule is sufficient. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19. A defendant bears the burden of overcoming the presumption of reasonable assistance by demonstrating his attorney's failure to substantially comply with the duties mandated by Rule 651(c). *Id.* Our review of an attorney's compliance with Rule 651(c) and of the dismissal of a postconviction petition without an evidentiary hearing is *de novo*. *Id.* ¶ 17.

¶ 23 In this case, postconviction counsel filed a Rule 651(c) certificate. Therefore, the presumption exists that Bailey received the representation required by the rule. *Id.* ¶ 19. That is, a presumption exists that Bailey received reasonable assistance of postconviction counsel. *People v. Hayes*, 2016 IL App (3d) 130769, ¶ 12.

¶ 24 Bailey acknowledges that counsel filed a Rule 651(c) certificate. Nevertheless, he contends that the record rebuts the presumption of reasonable assistance where counsel did nothing to attempt to overcome two plain and fatal defects with his *pro se* petition.

¶ 25 First, he asserts that *res judicata* barred his sentencing challenge, as he had argued that the sentence was excessive in his appeal from resentencing and had argued the sentence was unconstitutional in his 2017 postconviction petition. Bailey maintains that it was unreasonable for counsel to proceed with the sentencing challenge "without attempting to overcome *res judicata* or referencing it at all \*\*\* even after the State identified this problem in its motion to dismiss."

¶ 26 Second, Bailey asserts that counsel committed an “unreasonable oversight” by failing to attempt to reconcile information about his personal background in the record with conflicting information about his personal background in his 2022 affidavit. In particular, he notes that the PSI report and the 2022 affidavit conflicted with regard to his level of drug and alcohol use and his knowledge of family members’ drug and alcohol use. He asserts that, where facts set forth in support of the supplemental petition are positively rebutted by the record, the court could not accept the allegations in the 2022 affidavit as true and could not advance the petition to an evidentiary hearing.

¶ 27 Additionally, in his opening brief, Bailey contended that it was unreasonable for counsel to fail to (1) move to amend the petition to set forth a non-frivolous claim or (2) withdraw as counsel. Relying on *People v. Greer*, 212 Ill. 2d 192 (2004), *People v. Kuehner*, 2015 IL 117695, Illinois Supreme Court Rule 137(a) (eff. Jan. 1, 2018), and several Illinois Rules of Professional Conduct, he asserted that “postconviction counsel could not continue to represent [him] and present his postconviction claim because, in this form, it lacked even arguable merit.” He argued that, in these circumstances, counsel was required to withdraw, and that counsel’s failure to do so deprived him of the opportunity to amend the petition himself or retain other counsel who may have been able to craft a non-frivolous claim.

¶ 28 However, in light of our supreme court’s decision in *People v. Huff*, 2024 IL 128492, which was issued after the filing of the opening brief, Bailey, in his reply brief, abandoned his argument that his postconviction counsel should have withdrawn. In *Huff*, our supreme court held that, when postconviction counsel is appointed without a first-stage ruling by the circuit court, the *pro se* petition posits a weak legal claim but the claim is presented in the best possible legal form, and

there is no indication that counsel knew the claim was frivolous, counsel has no duty to withdraw. *Id.* ¶ 30. Bailey acknowledges that, because the record in his case does not show that postconviction counsel knew or believed his claims were frivolous, the argument that counsel should have withdrawn “is no longer available.”

¶ 29 Nevertheless, Bailey maintains in his reply brief that, “in the end, the success of [his] claim on appeal need not depend on what his postconviction counsel truly believed or whether counsel was obligated to withdraw.” Instead, he asserts, counsel’s performance rebuts the presumption that counsel complied with Rule 651(c) and provided reasonable representation. Specifically, Bailey argues that he received unreasonable assistance because counsel “failed to address *res judicata* and he put necessary facts before the circuit court that were contradicted by the already-existing record.”

¶ 30 Bailey has not identified or suggested any amendment that he believes counsel should or could have made to his petition so that it would survive dismissal based on *res judicata*. Similarly, Bailey’s only proposal as to how counsel should or could have “reconcile[d] information in the record” is a non-specific, generic suggestion of an amendment “with further explanation and clarification by Bailey or his family members about the apparent contradictions.” This court will not find unreasonable assistance of postconviction counsel based on a failure to make unspecified arguments. See *Profit*, 2012 IL App (1st) 101307, ¶¶ 28, 29; *People v. Bernabe*, 2022 IL App (1st) 182475-U, ¶¶ 19, 23 (finding that the defendant had not rebutted the presumption of reasonable assistance where he argued generally that counsel should have amended the petition to address procedural barriers but did not advance any theories as to the specific amendments counsel should have made); Ill. S. Ct. R. 23(e)(1) (eff. Feb. 1, 2023) (nonprecedential orders entered on or after

January 1, 2021, may be cited for persuasive purposes). Where Bailey, with the assistance of appellate counsel in this court, has not even suggested how counsel could have amended his petition to survive the State's motion to dismiss, we cannot find that postconviction counsel acted unreasonably in failing to make these unspecified amendments. See *Profit*, 2012 IL App (1st) 101307, ¶¶ 28, 29.

¶ 31 We are mindful of Bailey's argument, made in his reply brief, that cases such as *Profit* requiring a defendant to posit on appeal what arguments his postconviction counsel could have advanced to overcome barriers such as *res judicata* and contradictory facts only apply where postconviction counsel rested on the *pro se* motion, and are inapplicable where, as here, counsel amended or supplemented the *pro se* petition. In support of this proposition, Bailey cites *People v. Dixon*, 2018 IL App (3d) 150630.

¶ 32 In *Dixon*, postconviction counsel filed an amended petition raising six general claims. *Id.* ¶ 5. The circuit court granted the State's motion to dismiss. *Id.* ¶ 9. On appeal, the defendant contended that he did not receive a reasonable level of assistance from his postconviction counsel because counsel failed to put his claims into proper legal form in the amended petition. *Id.* ¶ 11. This court reversed, finding that the record rebutted the presumption that counsel fulfilled the requirements of Rule 651(c) because the amended petition failed to allege the basic elements of the claims it raised and contained virtually no specific, factual allegations to support the general claims it asserted. *Id.* ¶¶ 15-20.

¶ 33 We find *Dixon* inapposite to Bailey's contention. The takeaway of *Dixon* is that if counsel raises a claim in an amended petition, he must allege the basic elements of that claim and allege specific facts to support it. See *id.* ¶¶ 16, 17, 20. *Dixon* does not hold that the presumption of

compliance with Rule 651(c) is rebutted whenever counsel, rather than resting on the petition, files an amended or supplemental petition that does not allege all the specific facts that are necessary to support the defendant's *pro se* claims. In our view, holding an attorney to that standard would serve as a disincentive to ever amend or supplement a *pro se* petition with weaker, albeit, plausible claims. We see no reason to apply the holding of *Profit*—requiring an appellant alleging unreasonable assistance to articulate what specific amendments he believes his postconviction counsel should have made—only when postconviction counsel rested on the petition, and not when counsel amended or supplemented it.

¶ 34 Bailey has failed to rebut the presumption that counsel provided reasonable assistance. Accordingly, we affirm the circuit court's granting of the State's motion to dismiss the petition.

¶ 35 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 36 Affirmed.

¶ 37 JUSTICE C.A. WALKER dissenting:

¶ 38 I disagree with the majority's finding that Bailey has failed to rebut the presumption that counsel provided reasonable assistance. Our supreme court has clarified that if postconviction counsel finds the petitioner's *pro se* petition is frivolous as written by the *pro se* litigant, counsel shall move to withdraw as counsel or amend the petition to state a non-frivolous claim. *People v. Urzua*, 2023 IL 127789, ¶ 59. In the instant case, during second stage postconviction proceedings, the State filed a motion to dismiss highlighting deficiencies in counsel's supplemental postconviction petition, and despite being aware of those deficiencies, counsel failed to amend or move to withdraw as counsel. Such failure was unreasonable. See *People v. Addison*, 2023 IL 127119, ¶ 21. Therefore, I respectfully dissent.

¶ 39 To ensure that postconviction petitioners receive reasonable assistance of counsel, Illinois Supreme Court 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 petition filed *pro se* that are necessary for an adequate presentation of petitioner’s contentions.” Ill. S. Ct. R. 651(c) (eff. July 1, 2017).

¶ 40 “Once postconviction counsel files a Rule 651(c) certificate, a rebuttable presumption of reasonable assistance arises. The petitioner bears the burden of overcoming that presumption by showing that postconviction counsel did not substantially comply with the strictures of the rule.” *Addison*, 2023 IL 127119, ¶ 21. A petitioner may overcome that presumption by showing postconviction counsel did not make necessary amendments to a *pro se* petition to allow it to survive dismissal, including amendments that address procedural bars, such as *res judicata*. *Id.*

¶ 41 Bailey argues postconviction counsel’s supplemental petition rebuts counsel’s own averment in his Rule 651(c) certification stating he made amendments necessary for the adequate presentation of Bailey’s *pro se* contentions. Counsel’s representation was not reasonable because no amendments were made.

¶ 42 As previously stated, postconviction counsel filed a supplement to the postconviction petition, but counsel included an affidavit from Bailey that was positively rebutted by the evidence from Bailey’s sentencing hearings. Postconviction counsel made no attempt to place Bailey’s postconviction claims in their proper legal form. *People v. Dixon*, 2018 IL App (3d) 150630, ¶ 20, ¶ 24; see also *People v. Aguilar*, 2024 IL App (1st) 221677-U, ¶ 75. Postconviction counsel averred

that he had “examined the record of the proceedings at the trial.” But this is incredulous given that counsel attached Bailey’s affidavit as part of a supplement where the affidavit provides contradictory information. Also, counsel made no effort to explain, reconcile, recant or adequately address the factual inconsistencies between Bailey’s latest affidavit and the record, which raised significant concerns regarding the accuracy of information Bailey submitted in support of his postconviction petition. Postconviction counsel made the petition worse by filing the contradictory affidavit and having failed to “examine the record of the proceedings at the trial” as required by Rule 651(c).

¶ 43 As this court noted in *People v. Orozco*, “we are faced with the unusual situation in which postconviction counsel, in one significant sense, made the *pro se* petition worse . . .”. *People v. Orozco*, 2024 IL App (1st) 221743-U, ¶ 27 (quoting our supreme court in *Addison*, 2023 IL 127119, ¶ 25.) Here, Bailey initially did not attach an affidavit. When postconviction counsel filed the supplement, along with the contradictory affidavit, the petition went from bad to worse as in *Orozco. Id.*

¶ 44 In *People v. Camayo*, 2023 IL App (1st) 200914-UB, ¶26 this court held that postconviction counsel’s duty is not limited to filing a Rule 651(c) certificate or simply ensuring that the petition is in proper legal form. The court made manifest that counsel must make “all necessary amendments” in the petition, including amendments necessary to overcome procedural bars like *res judicata*. *Id.* By failing to amend the petition to overcome the procedural bars the performance of Bailey’s postconviction counsel fell short of compliance with Rule 651(c).

¶ 45 Postconviction counsel failed to recognize the petition would be dismissed because the record positively rebutted facts alleged in Bailey’s new affidavit attached to counsel’s

supplemental petition. Because postconviction counsel's supplemental petition rebuts counsel's own averment in his Rule 651(c) certification, counsel's representation was not reasonable. Again, the State highlighted the issues with the petition in its motion to dismiss, and counsel made no attempt to amend. Counsel's lack of action was unreasonable because it prevented Bailey from making his own amendments or having counsel who could state a non-frivolous claim. Our supreme court set forth the standard in *Addison*, which emphasized that postconviction counsel must actively seek to overcome such barriers, especially where, as here, they are identified by the State. This is an additional reason that I would remand the matter for new second stage proceedings.

¶ 46 Bailey has rebutted the presumption of compliance with Rule 651(c) (though whether counsel was entitled to the initial presumption based on his actions is itself dubious, as his alleged compliance with Rule 651(c) is rebutted by his filing of an affidavit that no reasonable attorney who had "examined the record of the proceedings at the trial" would have filed). Hence, this matter should be remanded for further second stage proceedings where new appointed counsel may submit supporting affidavits and other evidence, including necessary facts that were contradicted by the existing record, along with an amended petition. For the foregoing reasons, I respectfully dissent.