

17-7498  
No. \_\_\_\_\_

**ORIGINAL**

Supreme Court, U.S.  
FILED

NOV 20 2017

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

James Phillips — PETITIONER  
(Your Name)

People of the state of <sup>vs.</sup> Illinois  
~~People State of Illinois~~ J.P. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Illinois Supreme Court  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JAMES PHILLIPS  
(Your Name)

P.O. Box 1000  
(Address)

Taylorville, IL 62568  
(City, State, Zip Code)

\_\_\_\_\_  
(Phone Number)

**RECEIVED**

**JAN 17 2018**

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

## QUESTION(S) PRESENTED

In his pro se post-conviction petition, James Phillips alleged that he wanted to testify at his trial, but counsel refused to call him as a witness. Did James state an arguable claim of ineffective assistance of counsel where:

(1) the trial record does not contradict James's sworn allegations; and

(2) James's intended testimony that his custodial statements were false and coerced arguably would have changed the outcome of his trial, since James's statements were the only evidence that purported to corroborate the victim's self-contradictory testimony?

Accordingly, although we intimate no view whatever

on the merits of petitioner's allegations, we conclude that he is entitled to an opportunity to offer proof. *Haines v. Kerner* 925 S.Ct. 594 (1972) 404 U.S. 519, 36 L.Ed 2d 652.

Trial counsel was ineffective for withholding medical evidences and the state also withheld evidences. This ruling is an extension of *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S. Ct. 340, 342, 79 L.Ed.

791, where the court ruled on what nondisclosure by a prosecutor violates due process.

The Maryland Court of Appeals declared, "The suppression or withholding by the state of material evidence exculpatory to an accused is a violation of due process" without citing the United States Constitution or the Maryland Constitution which also has a due process clause. *Brady v. Maryland* 83 S.Ct. 1194 (1963)

The state attorney said that the defendant's statements were untrue. But he was still charged with them.

## QUESTION 6) PRESENTED

D.H.'s testimony was impeached but the trial court took her side which her testimony was to be dismissed because her testimony is false.

## LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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## JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was \_\_\_\_\_.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_ A \_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was 4/10/2017.  
A copy of that decision appears at Appendix C.

☒ A timely petition for rehearing was thereafter denied on the following date: May 15, 2017, and a copy of the order denying rehearing appears at Appendix D.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_ A \_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following provisions of the United States Constitution are involved; US. Const. Amends. V, VI, ~~XIV~~. The text of said provisions are attached hereto as Appendix

The Fifth Amendment to the United States Constitution J.P. ~~provisions~~ provides.

No person... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the United States Constitution J.P. ~~provisions~~ provides.

In all criminal prosecutions, the accused shall enjoy the right... to have the assistance of counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law.

IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

The opinion of the United States district court appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
J.P. M/A ☒ is unpublished.

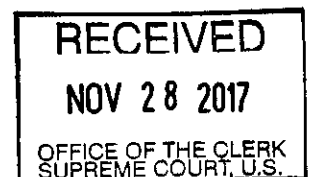
☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix ~~Ad~~ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ is unpublished.

The opinion of the ~~Illinois SUPREME~~ ~~State Trial~~ court appears at Appendix ~~B~~ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ is unpublished.



### STATEMENT OF THE CASE

James Phillips was convicted in a bench trial of two counts of Peredatory criminal sexual assault of a child and one counts of Aggravated criminal sexual abuse and was sentenced to 19 years in prison. He appeals from the summary dismissal of his pro-se petition for post-conviction relief in which he alleged inter alia, that trial counsel was ineffective for refusing to allow him to testify.

Bench trial: James' bench trial commenced on October 31, 2011 [C. 57: R. H3]. After accepting his jury waiver the trial judge admonished James of his right to testify, saying when the time came if he wanted to testify James should not just sit there like a bump on a log or the judge would assume that he decided not to testify. [R. H9-11]. James did not then indicate any decision and the state rested that day with trial continued until December 9<sup>th</sup> as scheduling was discussed defense counsel indicated that he was not sure if James would testify. (R. H 139-146). When the trial continued ~~both~~ defense counsel presented five witnesses and rested (R. 13-49). James did not testify, nor was there any discussion on the record of whether it was his choice not to testify. The charges in this case arise from D. H.'s allegations that James sexually assaulted and abused her between July 2008 and October 2009. When she was eleven to twelve years old. (C. 22-C. 39). D. H. alleged that these incidents took place in a bedroom at her aunt Sheila's house, where she and her siblings often slept because their mother had to work, and where James, Sheila's ex-boyfriend, also lived. (R. H21-25). Although D. H. claimed that her brother and two sisters were frequently in the bedroom when James touched her neither her siblings nor anyone else witnessed any of the alleged incidents. (R. H. 26-34, I 20-48). The trial court accordingly based its verdicts on D. H.'s testimony and James's written statement, which he made after spending over a day in police custody with minimal food and little or no sleep. (R. I 66-67.

D.H.'s initial allegations: D.H. allegedly told her cousin T.T. that at various times between July 16, 2010 and September 2009, James put his hand on her Vagina and tried to have sex with her. (R.H.63-65). Later that day, D.H. told Monica Almeida, an ER nurse, that someone forced her to touch his penis and tried to penetrate her with his penis. (R.H.66-67). Shortly thereafter, D.H. repeated her allegations to a sex-abuse investigator Pettis (he touch her Vagina with his hand, and tried to have sex with her but stopped when she told him to). (R.H.45, 50, 55-6). D.H. also told Detective Ronald Schmuck that James touched her around her Vagina and forced her to grab his penis. (R.H.87-88). D.H. told Pettis and Schmuck that there were approximately twenty such incidents. (R.H.87-88, 19). In October 2010, Pettis informed James that after investigating, DCFS concluded the allegations were "unfounded." (R.H.13-14, 30).

James's Custodial Statements: James was arrested at 9:40 p.m. on January 17, 2011 and eventually transported to the Area 5 detective division. (R.H.74, 79, 103-04). At 5:30 p.m. on January 18, James denied D.H. allegations to Schmuck. (R.H.85-86, 88). At 7:50 pm Schmuck left to interview D.H. and her mother, and confronted James with D.H.'s new allegations after reading him his Miranda rights. (R.H.88-90, 96). Initially James denied these new allegations (R.H.90); later in Schmuck's interrogation, however, James described four incidents of sexual contact with D.H. but denied ever penetrating her Vagina. (R.H.90-93). When James made these statements, he had been

in custody for at over a day, during which he had two water bottles, two bags of chips, and no sleeping accommodations. (R. H 78, 131).

After Schmuck interviewed D.H. again with Assistant State's Attorney Morrison (R. H 106) on January 19 they questioned James again after ASA Morrison read him his Miranda rights. (R. H 97, 106) James then described three incidents of sexual contact with D.H. which were memorialized in a statement written out by Morrison and signed by James at 5:23 a.m. nearly thirty-two hours after he was taken into custody. (R. H 78-79, 116, 118-11, 121-28). Defense Counsel did not move to suppress James's oral or written statements, which was admitted into evidence at trial without objection. (R. H 121).

D.H.'s trial testimony: D.H. testified that when she was eleven years old, she would sleep over at her aunt's apartment [a] most every night for two and a half years when her mother worked, along with her brother and sisters. (R. H 21-25, 48-49). Sheila's son Eric, Eric's infant daughter, and James also lived with Sheila. (R. H 23-24). D.H. would see James at her aunt's apartment nearly every day. (R. H 25). When they stayed over, D.H. and her siblings all slept in the back bedroom, usually on one full-size mattress on the floor. (R. H 27, 226-27). D.H. testified that James came into the children's bedroom about every other night and touched her inappropriately (R. H 49); her estimates varied from more than 20 and less than 40, to about 60, and perhaps as many as several hundred such incidents. (R. H 47, 49, 54-55). D.H. described four incidents in detail. First, D.H. testified that James

Came into the bedroom one night while she was in bed, touched her breasts, and put his hand on her vagina, without penetrating her. (R.H.28-29). D.H. "Struggled" to fend off James's advances, and the two "wiggled" all over the bed" without waking any of her siblings, all sleeping in the same bed. (R.H.29-30, 46-48). Second, D.H. testified that James came into the bedroom, laid her on the floor, undressed her, and "tried to put his penis inside [her] vagina." (R.31-32). D.H. testified that either James's penis touched her vagina but did not go inside, or that the tip of his penis went inside her (R.H.33). This incident did not wake her brother or sisters, who were asleep there at the time. (R.H.34). Third, D.H. testified that James came into the bedroom, put her on the floor, and licked her vagina, while her brother and sister were in the room sleeping. (R.H.35-36). Fourth, D.H. testified that James forced her to hold his penis for ten seconds, again in the back bedroom while her brother and sisters were there. (R.H.36-37).

Testimony of D.H.'s relatives: D.H.'s aunt Sheila, Cousin Eric, and two sisters never witnessed any of the incidents D.H. alleged. Sheila testified that she never saw James do anything inappropriate with D.H. and that when D.H. and her siblings slept over, James always slept in Sheila's room. (R.I.28, 35). Eric, whose bedroom was right next to the room where D.H. and her siblings slept, testified that he never saw James in the children's room while they were sleeping. (R.I.40-41). One of D.H.'s sisters never saw or heard James in their bedroom, and she never saw James do any "bad things" to D.H. (R.I.20-21). D.H.'s other sister testified that James never came to their room at night. (R.I.48). D.H.'s relatives also

disputed D.H. as to how much time She Spent at Sheila's apartment. Sheila said that Starting in 2006, the Children stayed over "Maybe once every weekend or every other weekend" and perhaps occasionally during Spring break or Summer vacation, with the frequency decreasing over time. (R.124-25). One of D.H.'s Sisters Stressed that they did not Stay at the apartment very often, and both Sisters testified that they stayed on weekends and only occasionally when their mother went out of town on business. (R.118, 48). Verdicts and Sentencing: The trial Court found that D.H. testified "fairly credibly," although there were certain "problem[s] with her testimony," such as her "lack of immediate outcry." (R.166). The trial Court also found that James's oral and written statements were "highly corroborative of D.H. testimony." (R.166). Thus, on the basis of D.H.'s testimony and James's Custodial Statements, the trial Court found James guilty and entered Judgment on two counts of predatory Criminal Sexual assault of a Child, and one count of aggravated Criminal Sexual abuse. (R.166-67). The trial Court sentenced James ~~of aggravated Criminal Sexual abuse~~ <sup>J.P.</sup> to a total 19 years in prison. (R.165). On direct appeal, James argued that trial Counsel was ineffective for failing to file a motion to suppress James's Custodial statement. The Appellate Court affirmed James's convictions and sentences in an unpublished Order. People v. Phillips, 2014 IL App (1st) 12-0662 U (March 31, 2014). James did not file a petition for leave to appeal to the Court.

Post-conviction petition: James filed a pro se petition for post-conviction relief on May 14, 2014 (PC. 42-44).

There are no affidavits or other accompanying exhibits, but the petition was signed under oath. (PC. 44). James alleged, inter alia, that trial counsel was ineffective because James "told his Counsel's [sic] to call him as a witness," but "trial Counsel's (sic) refused to call defendant to testify." (PC. 43.)

The Circuit Court summarily dismissed it in a written order dated June 27, 2014. (PC. 42, 81-C, 86). The Court held that James's ineffective assistance claim was "barred through the doctrine of waiver" because it was a "matter [ ] of trial record that Petitioner could have raised on appeal." (PC. 84). The Court further held that James's did not state an arguable claim of ineffective assistance of counsel, and that he failed to provide adequate evidentiary support for his claim. (PC. 85).

The Appellate Court affirmed, largely based upon its holding that the failure to explicitly recite that he communicated his demand to testify to counsel at trial rendered the pleading facially inadequate despite its pro se nature. *People v Phillips*, 2017 IL App (1st) 142553-U 34. Mr. Phillips now seek this Court's review.

## ARGUMENT

IN Cases in which there is a claim of denial of rights Under the Fed. Const. this Court is not bound by the Concussion of the Lower Court, But will reexamine the Evidentiary basis on which those Concussion are based:

This Court Should Grant Review In This Case, AS The Appellate Court's and the Illinois Supreme Court's Decision Misapprehended The Pleading Requirements Applicable To The Case And Therefore Improperly Applied A Standard Binding on Counsel To This Pro Se Litigant, Depriving Him Of A Hearing On His Claims Of Constitutional Deprivation Guaranteed Him By Statute, All In Conflict With This Court's Precedents.

James Phillips, a pro se litigant, filed a post-conviction petition claiming that trial counsel deprived him of his right to testify on his own behalf (alleging that "trial counsel failed to call Defendant as a witness at trial which defendant told his counsel's to call him as a witness trial counsel refused to call defendant to testify [sic]" (P.C. 43)). The Appellate Court rejected the trial judge's holding that the claim was forfeited because it was not raised on direct appeal (People v. Phillips, 2017 IL App (1st) 142553-U 32), but affirmed nonetheless, reasoning (a) that because the pro se pleading did not explicitly recite the point in time at which he communicated his demand to trial counsel, it was inadequate (Phillips, 2017 IL App (1st) 142553-U 34, 40), (b) assuming arguendo an invocation of that right, Mr. Phillips could not show he was prejudiced by the denial of his right to testify (Phillips, 2017 IL App (1st) 142553-U 35-39), and (c)

found that the trial record somehow refuted his claim in any event. Phillips, 2017 IL App (1st) 142553-U 43. None of these analyses squares with existing law or the factual record, warranting your Honors' review and guidance. The Appellate Court erroneously presumed that, as a matter of stage-one pleading, it is incumbent on petitioner to explicitly recite that he voiced a demand to testify to their trial counsel "contemporaneously" with something (a something that was not specified) at trial:

"The decision to testify ultimately rests with the defendant alone and is not considered to be a matter of trial strategy left to trial counsel. People v. Brown, 336 Ill. App. 3d 711, 719 (2002). Although this decision is made with the advice of counsel, only the defendant can determine whether or not to testify. Id. Trial counsel's undue interference with defendant's right to testify can constitute ineffective assistance of counsel if counsel refused to allow defendant to testify. See People v. Youngblood, 389 Ill. App. 3d 209, 217 [2009]. The dismissal of a postconviction claim that trial counsel was ineffective for not allowing the defendant to testify

"The Appellate Court stated that "the court fully explained his right to testify and he told the court he would let it know if he wished to testify." Phillips, 2017 IL App (1st) 142553-U 34. This reading misconstrued the record: While Mr. Phillips was indeed instructed regarding his right to testify by the judge as trial commenced, he did not promise an express invocation of that right if he so opted in the future, but instead simply indicated that he understood the trial judge. [PR. H1D, 11].

must be affirmed unless the defendant made a "contemporaneous assertion... of his right to testify" during trial. *Id.* (citing *People v. Brown*, 54 Ill.2d 21, 24 [1973])<sup>66</sup> Phillips, 2017 IL App (1st) 142553-U 31.<sup>2</sup>

Respectfully, this misreads both applicable statutes and case law, as well as the pleading requirements imposed on pro se litigants in Stage One proceedings. As regards the invocation of one's individual right to testify, the seminal case is *People v. Brown*, 54 Ill.2d 21 [1973], a case that simply does not - and legally cannot - address stage-one pleading concerns as that stage did not even exist at the time. In *Brown* this court stated the petition was "dismissed upon motion" (*Brown*, 54 Ill.2d 21, 22), and in fact, at that time, all dismissals had to be on motion, as the summary dismissal provision (now 725 ILCS 5/122-2.1, previously Ill. Rev. Stat. Ch. 38 122-2.1) was not enacted until a decade later. P.A. 83-942 § 1A (effective November 23, 1983). Under the 1973 version of the statute, petitions were immediately docketed upon filing [Ill. Rev. Stat. 1973, Ch. 38, 122-1], the appointment of counsel upon application was then allowed [Ill. Rev. Stat. 1973, Ch. 38 122-4], and the law required the state to either answer or move to dismiss within 30 days [Ill. Rev. Stat. 1973, Ch. 38 122-5 - there was, in other words, quite literally no first stage at all, and thus the pro se pleading

<sup>2</sup>In that same vein, elsewhere the Appellate Court wrote:  
<sup>66</sup>defendant argues that *People v. Brown*, 336 Ill. App. 3d 711 (2002), and *People v. Dredge*, 144 Ill. App. 3d 911 (1986), control the case at bar. We disagree... in those cases, the postconviction petitions were remanded for further proceedings on the defendants' mere

Claims that trial counsel violated their right to testify at trial, without supporting affidavits attesting must state the defendant contemporaneously raised his right to testify during trial. See *Youngblood*, 389 Ill. App. 3d at 217.<sup>3</sup> Phillips, 2017 IL App (1st) 142553-U 41. Rules that have evolved over time in case law, which address the applicable tests to be used at stage-one, simply do not apply. And this is an important point: it is one thing to hold a pleading to the exacting standards applicable to attorneys, and quite another to apply that rigor to pro se litigants. Such litigants, unschooled in the law, need only plead the gist of their claims. As your Honors explained, "[t]he 'gist' standard is a low threshold. ... To set forth the 'gist' of a constitutional claim, the post-conviction petition need only present a limited amount of detail ... and hence need not set forth the claim in its entirety. Further, the petition need not include legal arguments or [citations] to legal authority." *People v. Edwards*, 197 Ill. 2d 239, 244 (2001) (internal punctuation and citations omitted).<sup>3</sup> This Court's analysis in *Brown*, predating section 2-1, would of course not analyze the gist standard. The gist standard appeared in reaction to the legislature's creation of stage-one proceedings, which by definition occurs before counsel is appointed and before the state has any input into the sufficiency of the petition. This is why *Brown* was able to focus on the factual allegations of the petition and the state's motion to dismiss in assessing whether there was a fully-formed legal

<sup>3</sup>Even more insightful is this passage from Edwards:

<sup>6</sup>While in a given case the prose defendant may be aware of all the facts pertaining to his claim, he will, in all likelihood, be unaware of the precise legal basis for his claim or all the legal elements of that claim. In many cases, the prose defendant will be unaware that certain facts, which in his mind are tangential or secondary, are in fact, critical parts of a complete and valid constitutional claim. Under the 'sufficient facts' test, however, the prose defendant must recognize the facts that need to be pled to support a 'valid claim.' This is an unrealistic requirement. Accordingly, we decline to adopt the 'sufficient facts' test.<sup>9</sup> Edwards, 197 Ill. 2d 239, 245.

Claim pleaded. Mr. Brown alleged that before trial he was visited by counsel, discussed strategy, and he indicated to counsel that he "insisted and desired to testify in his own defense..." Brown, 54 Ill. 2d 21, 23. At trial, counsel told Mr. Brown's relatives that he would not call him because "the prosecuting attorney would murder him..." (Brown, 54 Ill. 2d 21, 23); but there was no allegation that Mr. Brown insisted on testifying at that juncture, that is, during trial. Thus, your honors reasoned:  
<sup>6</sup>Neither in the post-conviction petition in this case, with its reference to conversations which took place between the defendant and his attorney well in advance of the beginning of the trial, nor in the supporting affidavit, is there any statement that the defendant, <sup>J.P.</sup> when the time came for him to testify, told his lawyer that he wanted to do so ~~and his attorney well in advance of the beginning of the trial~~, despite advice to the contrary. In the absence of a contemporaneous assertion by the defendant

of his right to testify, the trial judge properly denied an evidentiary hearing." Brown, 54 Ill.2d 21, 24; emphasis added.

Brown, in other words, analyzed whether a petitioner has made a substantial showing of constitutional deprivation such that an evidentiary hearing was required (a stage-two analysis), at a time when he had the right to counsel and thus could have pleaded a demand made at trial, and failed to do so; it is not whether a petitioner has stated the gist of a claim under the applicable Hodges standard. People v. Hodges, 234 Ill.2d 1 (2009). The Appellate Court thus erred as Brown has no relevance to a mere pleading requirement on a pro se litigant such as James Phillips.

The Appellate Court's citation to People v. Enis 194 Ill.2d 361 (2000) (to the effect that "[a] postconviction petition must allege that defendant contemporaneously asserted his right to testify" (Phillips, 2017 IL App (1st) 142553-U 33)), in no way alters this result. Procedurally, Enis involved stage-two proceedings and a State dismissal motion, at which time the accused had the assistance of counsel, unlike the stage-one pro se proceeding at issue here. Moreover, in marked contrast to the counseled failure to even mention a demand in Enis, the Appellate Court acknowledged that Mr. Phillips "[s]pecifically... alleged 'trial counsel failed to call Defendant as a witness at trial which defendant told his counsel's [sic] to call him as a witness trial counsel's [sic] refused to call defendant to testify'" (Phillips, 2017 IL App (1st) 142553-U 26) - that is, the Enis case.

differs both factually and procedurally to the case at bar. This colors how the Appellate Court should have viewed *People v. Youngblood*, 389 Ill. App. 3d 209 (2nd Dist. 2009), another case cited and relied upon. *Phillips*, 2017 IL App (1st) 142553-U20, 41. It is true that *Youngblood* referenced Brown's contemporaneous assertion requirement "[w]hen a defendant's postconviction claim that his trial counsel was ineffective for refusing to allow the defendant to testify is dismissed, the reviewing court must affirm the dismissal unless, during the defendant's trial, the defendant made a 'contemporaneous assertion... of his right to testify.'" *Youngblood*, 389 Ill. App. 3d 209, 217, citing *Brown*, 54 Ill. 2d 21, 24), but this in no way alters the fact that the *Youngblood* court was also aware of the limits dictated by the procedures applicable in *Brown*, as the *Youngblood* court also stated:

"We note that, in *People v. Davis*, 373 Ill. App. 3d 351, 361 (2007), the First District held that '[t]he record [must contain]... evidence that [the] defendant alerted the trial court that he wanted to testify.' In *Brown*, the Supreme Court required only that the defendant inform his attorney, rather than the trial court, of his desire to testify... These cases are reconcilable. The difference between them is that *Davis* was a direct appeal involving a claim that the defendant's right to testify was violated, while *Brown* concerned an appeal from the dismissal of a postconviction petition alleging that trial counsel's representation was deficient in that

Counsel did not permit the defendant to testify. This difference is significant because a defendant can introduce evidence in a postconviction proceeding, the absence of a record of the purported assertion of the right could be cured during an evidentiary hearing." Youngblood, 389 Ill. App. 3d 209, 217-18 (emphases added).

Although the petition in Youngblood was dismissed at stage one, then, it is clear that the Youngblood Court was aware that its authority, Brown, was not predicated on the adequacy or inadequacy of pleading requirements. Respectfully, that nuance is lost in the decision at bar.

This understanding, in turn, must be realized in assessing the balance of the Appellate Court's decision. It is axiomatic, and YOUR Honors have directed, that in the first two stages (that is, at the pro se and counseled pleading stages), the Circuit Court does not engage in any credibility determinations or weighing of the facts, instead accepts as true all well-pleaded facts not contradicted by the underlying trial record.

People v. Coleman, 183 Ill. 2d 366, 380-81 (1998). In the context of a first-stage post-conviction petition, a pro se petitioner need not demonstrate that he will ultimately meet the two-prong Strickland v. Washington, 466 U.S. 668, 687-88 (1984) standard for ineffectiveness. Edwards, 197 Ill. 2d 239, 244-45. Instead, a first-stage petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that Counsel's performance fell below an objective standard of reasonableness; and (ii) it is arguable that the defendant was

prejudiced," *Hodges*, 234 Ill.2d 1, 17 (italics supplied);  
See also *People v. Tate*, 2012 IL 12214 ¶ 19 (At stage-two, "is  
appropriate to require the petitioner to 'demonstrate' or  
'prove' ineffective assistance by 'showing' that Counsel's  
performance was deficient and that it prejudiced the defense.  
However... [this] is from a first-stage summary dismissal [and]  
different, more lenient formulation applies..." ¶ 20 (t) his  
'arguable' Strickland test demonstrates that first-stage  
post conviction petitions alleging ineffective assistance of counsel  
are judged by a lower pleading standard than are such petitions at  
the second stage of the proceeding"). The question, in other  
words, is one of pleading and not whether the accused will  
prevail after an evidentiary hearing.

Here, at a bare minimum, there was an arguable claim that  
trial counsel's performance was objectively unreasonable.

Illinois Courts specifically recognize that an accused's allegation  
that trial counsel's actions deprived him of his right to testify  
is a claim cognizable under the Post-Conviction Hearing Act.  
See *People v. Madel*, 177 Ill.2d 116, 145 (1997) (Overruled in part  
on other grounds in *Coleman*, 183 Ill.2d 366); *People v. Lester*, 261  
Ill. App.3d 1075, 1079 (2d Dist. 1994); *People v. Dredge*, 148 Ill.  
App.3d 911, 912-13 (4th Dist. 1986).<sup>4</sup> Indeed, deciding whether  
to testify is one of the handful of decisions Illinois courts  
recognize as belonging solely to the defendant because of its  
fundamental nature. *People v. Medina*, 221 Ill.2d 394, 403-04  
(2006). The Appellate Court's decision recognized that legal  
reality. *Phillips*, 2017 IL App (1st) 142553-U 31. When trial counsel

usurps a defendant's fundamental right to testify, "the question of the exercise of that right is not a matter of a strategic or tactical decision best left to trial Counsel."

People v. Piper, 272 Ill. App. 3d 843, 846 (5th Dist. 1995).

"The Appellate Court cited *Madel* to the effect that the "Supreme Court has decided such cases on the prejudice prong alone."

Phillips, 2017 IL App (1st) 142553-U 35. That must be balanced against this Court's decision in *Tate*, 2012 IL 112214 19-20, applying a lenient test to the pleading of prejudice.

Instead, the denial of a defendant's fundamental right "can be a Constitutional violation in and of itself" because only the defendant may waive such rights. *Piper*, 272 Ill. App. 3d 843, 846. Moreover, where trial Counsel's ineffectiveness denied a defendant's substantial rights, Courts may presume prejudice. See *People v. Swanson*, 276 Ill. App. 3d 130, 132 (2d Dist. 1995) (prejudice presumed where trial Counsel usurped defendant's right to appeal); *People v. Golden* 369 Ill. App. 3d 639, 646 (2d Dist. 2006) (same).<sup>5</sup> Here, Mr. Phillips pleaded that he wanted to testify and that intent was frustrated by trial Counsel - and that is all that is required as a matter of pleading. Giving voice to that desire at a specific juncture of the trial is a detail not required to state an arguable claim at stage-one. These principles also upend the Appellate Court's reliance on the colloquy between the Circuit Court and Mr. Phillips at the outset of trial, quoted at the outset of the decision. Phillips, 2017 IL App (1st) 142553-U 4. Near the close of that exchange, the Circuit Court cautioned Mr. Phillips

"Don't sit over there like a bump on a log and not say anything. I might figure [you] talked to your lawyer and decided not to testify." (P.R. H.10). In the analysis portion of the decision, the Appellate Court placed some weight on that exchange—a legal irrelevancy, in that (as was recognized in Youngblood itself), "[i]n Brown, the Supreme Court required only that the defendant inform his attorney, rather than the trial

<sup>5</sup> The Golden Court relied on People v. Moore, 133 Ill. 2d 331, 339 (1990), which held that "no showing of prejudice is required where counsel failed to perfect defendant's appeal. Prejudice is presumed." Golden, 369 Ill. App. 3d 639, 649. The Second District's decision was vacated in People v. Golden, 229 Ill. 2d 277 (2008), because the accused actually had an appeal, albeit an imperfect one.

Court, of his desire to testify..." Youngblood, 389 Ill. App. 3d 209, 217-218.<sup>6</sup> Thus, the entire colloquy was irrelevant here, as it was not incumbent on Mr. Phillips to inform the Circuit Court, but to inform his attorney, and he alleged that he did so—that is, he pleaded an arguable claim that his attorney fell below the standard required. The Youngblood Court's reading of Brown, in other words, did not add an additional element to be pleaded to state a claim, and in fact did the exact opposite, eliminating the notion that pleading rules require that an accused inform both his trial attorney and the

Court of his decision.

Even if the Circuit Court's knowledge of that invocation was at issue here, under the facts disclosed in the record it could not presume from Mr. Phillips' alleged silence that the decision had been made for him not to testify. Before trial was continued the day of the trial judge's directive to Mr. Phillips, Judge Porter asked how much more time was needed to complete the trial, and defense counsel informed him that he had "[f]ew witnesses probably be quick. Sheila Hall, there is the DCFs. So, four people. Just the two sisters.... Then maybe the defendant." (PR. H 139, 140; italics supplied). In other words, the Circuit Court was expressly told not to assume that Mr. Phillips would not testify, as no decision had been made. Again, this meets the requirement that an arguable claim be advanced - as a matter of pleading, particularly as to a pro se pleading,

<sup>66</sup>The Appellate Court <sup>66</sup>The petition does not allege that, during trial, defendant made an assertion of his right to testify despite defendant's pretrial colloquy with the trial court, wherein the court fully explained his right to testify and he told the court he would let it know if he wished to testify. Defendant having failed to allege that he made a contemporaneous assertion of his proper<sup>67</sup> Phillips, 2017 IL App (1st) 142553-U 34.

This more than meets the legal requirement here.

The Appellate Court's final rationale for upholding the dismissal was an alleged inadequacy in the pleading of the prejudice prong of the Strickland test.

Phillips, 2017 IL App (1st) 142553-U 36-40. To meet the prejudice prong, a petitioner need not show that he would have been acquitted, only that a different outcome would be reasonable, as "prejudice may be found even when the chance that minimally competent counsel would have won an acquittal is significantly less than 50 percent." People v. McCarter, 385 Ill. App. 3d 919, 935 (1st Dist. 2008). See also Strickland, 466 U.S. 668, 693-94. Indeed, the prejudice analysis the Court employed here, simply reviewing the evidence found sufficient to sustain the conviction on direct appeal, effectively eliminates any possibility of prejudice, even after an evidentiary hearing. The essence of an ineffectiveness claim is that the fact-finder (here, the trial judge in this bench trial), could not reach a fair decision because trial counsel's errors deprived him of the proper tool needed to reach a decision. There is no need to prove either prong of the claim in the first stage - a petitioner is only required to plead such a claim.

For example, the Appellate Court reasoned that:

"Even taking the other allegations in defendant's postconviction petition as true and construing them liberally, it is unclear what defendant would have testified to at trial.

In his postconviction petition, he merely alleges, among other things, that Detective Schmuck did threaten

And Promises [sic] defendant something' and that 'Detective Schmuck force [sic] defendant into making a false statement during [sic] interrogation.'

Even liberally construing defendant's post conviction petition to infer he would testify to this, these allegations are directly rebutted by the record.

Schmuck testified that he did not mistreat defendant during the interview?" Phillips, 2017 IL App (1st) 142553-U 37-38

This passage serves only to highlight the error in the court's analysis.

It is the very fact that Mr. Phillips would testify that his statements were coerced and untrue, which is relevant here as it would lend the lie to Detective Schmuck's testimony and undermine his credibility.

And to reiterate, credibility determinations are alien to stage one dismissals - courts are required under Coleman to presume the truth of Mr. Phillips' allegations. The question is not whether to believe either Mr. Phillips or Detective Schmuck, but whether Mr. Phillips was arguably prejudiced, evidenced by this factual dispute, and thus warranting further proceedings, such as an evidentiary hearing where the truth between the two of them could be assessed. Were the rule otherwise, not even a fully corroborated confession from the real offender could warrant relief, as the initial factfinders' verdict would trump any new evidence, and that surely cannot be true.

This is even more applicable vis-a-vis the Appellate Court's analysis as to the sufficiency of the trial evidence. The court reasoned:

"Defendant contends that, without his custodial statements, there is nothing to corroborate D.H.'s [the complainant's] testimony. He then proceeds to argue the sufficiency of the evidence by noting D.H.'s testimony is fraught with inconsistencies and 'hard to believe,' and recounts D.H.'s conflicting testimony at trial. However, this is the same argument the trial court heard and rejected at trial. Additionally, we held the following in defendant's direct appeal [quotation from direct appeal omitted]. We therefore have already addressed defendant's contentions and determined that D.H.'s testimony, standing alone, was sufficient to convict defendant." Phillips, 2017 IL App (1st) 142553-U 39-40.

This misconstrues the issue. The issue in the petition was not the adequacy of the state's evidence, but that the evidence was not so overwhelming that Mr. Phillips' testimony was rendered irrelevant. Instead, the points made about the problems in D.H.'s testimony served to show that refusing Mr. Phillips his right to testify robbed him of a chance to undermine D.H.'s credibility by providing the fact-finder with evidence that showed D.H. to be unbelievable. Moreover, legally it was not incumbent on Mr. Phillips to establish D.H. to be incredible as a matter of pleading; all that was required is that he present an arguable claim that she was incredible, as pleading and proving it are different things.

## REASONS FOR GRANTING THE PETITION

IN Cases in which there is a claim of denial of rights Under the Fed. Const. this Court is not bound by the Concussion of the Lower Courts, BUT will reexamine the Evidentiary Basis On which those concussions are Based. *Nemotko v. Maryland* 340 U.S. 268. Following the 1983 Creation of Stage one proceedings in the post-conviction process [P.A. 83-942 § 1A (effective November 23, 1983)], this Court has repeatedly grappled with how to assess the sufficiency of pro se filings. Your Honors required the gist of a claim in *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996), emphasizing that it was a "low threshold" that need not include legal arguments or authorities. Given the chance to require pro se litigants to file a "factually complete" petition in *People v. Edwards*, 197 Ill. 2d 239 (2001), YOUR Honors abjured as being "contrary to this Court's holding that the pro se defendant 'need only present a limited amount of detail.'" 197 Ill. 2d 239, 245. The unifying feature of this Court's decision-making in this area is that pro se litigants need only plead enough to inform the trial judge of the nature of his claim; if this is done then appointed counsel then can investigate and dot the legal i's and t's.

Here, the Appellate Court abandoned that procedure, upholding the summary dismissal of a claim because James Phillips, a pro se litigant, did not know (and therefore did not plead) the precise timing of his demand to his trial attorney that he be allowed to testify on his own behalf. Indeed, the Appellate Court did not dispute that such a demand was made; its decision turned on the absence of a factual assertion that the demand was made "contemporaneously" with some other, undefined, event. Making matters worse, the Appellate Court's basis was this Court's decision in *People v. Brown* 54 Ill. 2d 21, 24 (1973), a case that offers no insight because it preceded the creation of stage one proceedings. It is clear that YOUR Honors must review this case and again provide guidance.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

James Phillips

Date: 11-17-2017