2019 IL App (5th) 150538-U

NO. 5-15-0538

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Massac County.
	)	
v.	)	No. 11-CF-72
	)	
CHARLES W. STEWART,	)	Honorable
	)	Joseph Jackson,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Justices Welch and Barberis concurred in the judgment.

ORDER

¶ 1 *Held*: We reverse the first-stage dismissal of the defendant's *pro se* petition for postconviction relief and remand for appointment of counsel and further proceedings, because the petition states the gist of a constitutional claim and has an arguable basis in fact and law.

¶ 2 The defendant, Charles W. Stewart, appeals the dismissal, at the first stage of proceedings in the circuit court of Massac County, of his *pro se* petition for postconviction relief. For the following reasons, we reverse the dismissal and remand for appointment of counsel and further proceedings.

¶ 3 FACTS

¶ 4 The facts necessary to our disposition of this appeal follow. On June 15, 2011, the defendant was charged, by amended information, with five criminal counts (three counts of

aggravated criminal sexual assault and two counts of home invasion) related to a series of events that occurred in Massac County on May 26, 2011. On June 14, 2011, one day prior to the filing of the amended information, the State notified the circuit court that the amended filing was forthcoming, and the defendant made his first court appearance with his court-appointed defense counsel. At the appearance, defense counsel noted that she planned to file a motion for a fitness examination of the defendant, because she had "a bona fide doubt as to his fitness to stand trial in these cases."

¶ 5 On October 31, 2011, a fitness hearing was held. Therein, psychologist Dr. Michael Althoff testified, *inter alia*, that he conducted a fitness examination of the defendant on September 8, 2011, and also spoke on that day to jail administrator Konemann, who told Dr. Althoff that the defendant had threatened self-harm, but "didn't really demonstrate any behavioral extremes of any note until after he found out about the charges, and then he started talking about hearing voices." Dr. Althoff testified that although Konemann characterized the defendant as generally cooperative and compliant, the defendant at times "talks rather unusual and makes reference to hearing voices, and on one occasion, he slammed his head on the bars and said that the voices made him do that. And he also stated at that time that that's how the voices—how he gets the voices out."

¶ 6 Dr. Althoff testified that the "most noteworthy" aspect of his interview with the defendant was that the defendant "kept returning to reporting information about hearing voices, that he's mentally ill, *** that he's depressed, that he's bipolar, that he's not culpable because he wouldn't have done what he did except for direction by the voices that he heard." Dr. Althoff testified that this was unusual because "someone with a mental illness usually doesn't offer that they hear voices unless they're asked," and when someone volunteers such information, especially early in an interview, "that's striking and suggests *** they have an agenda." Dr.

Althoff testified that he also reviewed "mental health records" of the defendant and conducted a "Fitness Interview Test-Revised" on the defendant, as well as a "Structured Interview of Reported Symptoms." He testified that he administered the latter interview because he "had a very strong impression that the defendant was feigning pathology." He testified that there exists "no gold standard as far as feigning pathology," but that the interview "is probably the most frequently used procedure that's designed to assess whether or not a person is feigning pathology." Based upon his examination, Dr. Althoff diagnosed the defendant "as having feigned psychiatric symptoms, alcohol dependence, cannabis abuse, cocaine abuse, and adjustment disorder with depressed mood." He concluded that the defendant was fit to stand trial, because he believed that if the defendant chose to do so, "he could assist counsel in this defense"; that the defendant "understood the charges against him"; and that there were no "marked deficits concerning his factual and rational understanding, and his reasoning and decision-making abilities seemed adequate."

¶ 7 Following Dr. Althoff's testimony, the trial judge admonished the defendant that "any information gathered in the course" of the defendant's interviews with Dr. Althoff could not be used against the defendant at trial "unless the defendant raises the defenses of insanity or drugged or intoxicated condition." In argument, defense counsel stated, "for the record, my client still believes that he is hearing voices, and that is his perception," and the defendant continued to believe "he cannot be responsible for what he may have done because he was directed to do that by the voices." Nevertheless, defense counsel conceded that Dr. Althoff's report seemed to indicate that the defendant was fit to stand trial. The trial judge found the defendant fit to stand trial.

¶ 8 The defendant's jury trial commenced with *voir dire* on March 12, 2012. The following morning, in her opening statement to the jury, defense counsel began to lay out her theory of the

case. She stated that she believed the evidence in the case would show a deterioration in the defendant's mental health, which included "odd thoughts," depression, multiple suicide attempts, job loss, homelessness, and abandonment by his family. With regard to the events leading to the charges against the defendant in this case, defense counsel posited that the defendant wished to commit suicide, asked the victim (who was an acquaintance of the defendant) to kill him, and became upset when she would not do so. According to defense counsel, "then things went very badly." She described the defendant as someone with "serious problems" and "mental problems," and posited that although what "happened" on the night in question was not "right" or "proper," she could tell the jury that the defendant "had mental problems that evening and that he still does and that that was what caused the situation that happened on May 26, 2011."

¶ 9 Next, the State presented the testimony of the victim, law enforcement officers, evidence lab technicians, forensic scientists, and a nurse. During direct examination, the victim testified, *inter alia*, that the defendant stated that he wanted to die and asked her to kill him. When she told him she was going to call the police, the defendant became enraged, attacked her, and eventually sexually assaulted her. During cross-examination of the victim, defense counsel asked her if the defendant sounded "irrational" after he broke into her home. The victim responded, "No. He didn't sound irrational. He just sounded like somebody pissed off wanting to hurt somebody."

¶ 10 After the State rested its case, and after the trial judge denied defense counsel's motion for a directed verdict, the parties and the judge discussed, outside the presence of the jury, the scheduling for the remainder of the trial. The defendant was admonished as to his right to testify in his own defense, and declined to do so. Thereafter, the State's Attorney noted that after the defense presented the one witness it had indicated it intended to present, the State might "have a rebuttal witness." He added, "And given the issues in this case, the conference on jury

instructions may take longer than usual." Defense counsel agreed with the assessment of the State's Attorney.

¶ 11 Following a recess, the defense presented the testimony of its sole witness, George Rutledge, who was a first cousin of the defendant. Of relevance to this appeal, Rutledge testified that after the defendant moved back to Massac County from Reno, Nevada, approximately eight or nine years prior to the trial, Rutledge sometimes observed "odd behaviors" on the part of the defendant, and knew that the defendant was using illegal drugs such as crack cocaine. Even when the defendant was not using illegal drugs, Rutledge observed "odd behaviors" by the defendant. In particular, Rutleged testified, "I've seen him real irritable when I know he wasn't on drugs, and short-tempered." Rutledge testified that at one point, the defendant lived with Rutledge, during which time the defendant "was talking to himself" and "was answering himself." Rutledge testified that Rutledge kept a knife under his pillow when sleeping, because Rutledge was concerned about his safety, and that of his young sons, while the defendant was staying at the home. When asked if the defendant had "ever acted as if he was hearing voices," Rutledge testified, "If he's talking to himself, he's hearing things." He added that he had seen the defendant "turn and look like things was [*sic*] there," and that in his lay opinion the defendant had "a mental problem" and needed "mental attention." He testified that although the defendant needed help, he did not have family members or other resources available to help him. He testified that he believed the defendant had issues with "[d]epression, drugs, and alcohol," and had tried to commit suicide by overdosing on medication, and testified that the defendant told Rutledge "several times that he wanted somebody to kill him." Rutledge testified that the defendant asked Rutledge to bring a gun to him in jail so that he could commit suicide.

¶ 12 In rebuttal, the State indicated its desire to present the live testimony of Dr. Althoff. In a sidebar, defense counsel asked for a continuing objection, noting that Dr. Althoff's evaluation of

the defendant had been to determine the defendant's fitness to stand trial, not to determine if the defendant was mentally ill. Thereafter, Dr. Althoff testified in front of the jury that his evaluation of the defendant was "focused on a psycho-legal competency related to mental health." He then testified consistently with his pretrial testimony and report, as described in detail above. When asked what his "conclusion" was, Dr. Althoff responded, "And the issue that I reached a conclusion about was?" The State's Attorney answered, "His mental illness, whether he was feigning or not." Dr. Althoff answered, "Whether or not—okay. The data all points to the fact that he was manufacturing symptoms." Dr. Althoff testified, "He does have some issues with his mental health," and subsequently testified that he diagnosed the defendant with "feigned psychiatric symptoms, alcohol dependence, cannabis abuse, cocaine abuse, and adjustment disorder with depressed mood." As "stressors," Dr. Althoff noted "chronic alcoholism, incarceration and pending litigation, homelessness, unemployment, pending divorce," and opined that the defendant "can't get along in society because of his substance abuse and the things that happen when he is intoxicated." In response to a question from the State's Attorney, he noted that the depressed mood was "situation related," and was "not the kind of depression that's severe, like a psychotic depression where you would hear voices or have delusions."

¶ 13 On cross-examination, Dr. Althoff conceded that he did not know who reported to the jail administrator that the defendant only started hearing voices after learning there were criminal charges against him, and did not know if the jail administrator independently had made such an observation himself. Dr. Althoff testified that he did not speak to any members of the defendant's family about the defendant's behavior, or look at any "collateral information in terms of interviewing *** individuals in his family," as part of his information-gathering process. Even as he tried to verify the defendant's claim that the defendant had attempted suicide four times in the past, Dr. Althoff did not attempt to talk to the defendant's family about the

suicide attempts. With regard to the defendant's self-reported 25-year history of chronic alcoholism, Dr. Althoff testified that although he did not know if the defendant had brain damage resulting from it, "long-term chronic *** alcoholism *** can lead to problems with *** cognitive functioning." With regard to the proposition that "after a period of time in an institutionalized setting, an individual who hears auditory hallucinations may have their reserve broken down and actually report them to other people," Dr. Althoff testified that such an individual might "feel more comfortable," and "get more insight," because there can be "less denial" in such situations. When asked if information from the defendant's family, or from previous hospitalizations, might "have made a difference" in Dr. Althoff's opinion that the defendant was feigning mental illness, Dr. Althoff testified, "I would have been happy to review that if that was available to me, and I would be happy to consider that in terms of my opinion. Sure."

¶ 14 After a jury instructions conference, closing argument occurred. In her closing argument, defense counsel reiterated her theory of the case, pointing to evidence that she believed demonstrated that at the time of the alleged offenses, the defendant's mental health was in a state of deterioration, he was homeless and jobless, hearing voices, depressed, and suicidal. With regard to Dr. Althoff's testimony that the defendant "was faking mental illness" and "was not mentally ill," defense counsel pointed out that Dr. Althoff admitted that he did not talk to the defendant's family and "did not do any examination of any prior hospitalization records when my client tried to commit suicide because he didn't get that information." She also argued that Dr. Althoff "didn't look for any other sources of information to try to determine if my client was mentally ill or not." She opined that Dr. Althoff "went with a limited amount of information and made a decision." She argued that "people who are mentally ill, who are crazy, are frequently outcast by our society because we don't know how to handle them or what to do and we're

afraid," which led to many such people ending up homeless and jobless and "in a situation where they feel that there's no reason to keep on living and they just want to die." Her argument thereafter conceded many of the facts surrounding the charges against the defendant, but opined that the defendant's actions, and ineptitude in executing his actions, "would be consistent with somebody who was mentally ill and didn't quite have their act together." She argued that there was "no way to explain rationally" the defendant's actions, because they weren't "rational," as the defendant was "ranting and raving" and "tripping along on one problem after another" in a manner that "wasn't making any sense." She again described the defendant's actions as "not unusual for a mentally ill person to do." Thereafter, she referred to the defendant as "mentally ill" multiple additional times. With regard to the jury instructions, she stated to the jury, "I want you to consider whether a person who is mentally ill can knowingly and intentionally do acts. I want you to think about it." She told the jury members they would "get jury instructions for guilty and not guilty verdicts," and asked the jury members "to consider those not guilty verdicts."

¶ 15 Following deliberations, the jury found the defendant guilty of three counts of aggravated criminal sexual assault and one count of home invasion (the second count of home invasion was not sent to the jury and was subsequently dismissed by the State). The defendant was thereafter sentenced to 15 years in prison on the home invasion conviction and 15 years in prison on each of the three counts of aggravated criminal sexual assault, with a statutory enhancement of 10 years on each conviction for aggravated criminal sexual assault, and with the four sentences to run consecutively. The defendant filed a motion to reconsider sentence, which was denied following a hearing. We affirmed the defendant's convictions and sentences in his direct appeal. *People v. Stewart*, 2014 IL App (5th) 120451-U.

¶ 16 On October 28, 2015, the defendant filed, *pro se*, a petition for postconviction relief pursuant to the Illinois Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). Therein, the defendant alleged, *inter alia*, that he received ineffective assistance of counsel, due to defense counsel's failure to investigate, and to secure an expert witness to testify with regard to, the defendant's "mental problems." Along with his petition, the defendant filed a request for the appointment of counsel and other supporting documents. On November 9, 2015, the trial court dismissed the petition as "frivolous and patently without merit." This timely appeal followed.

¶ 17 ANALYSIS

¶ 18 On appeal, the defendant contends his petition was sufficient to survive a first-stage dismissal.[1] We agree. We review *de novo* the first-stage, or summary, dismissal of a petition for postconviction relief. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). At the first stage of proceedings on such a petition, a defendant "need only present a limited amount of detail in the petition." *Id.* As the *Hodges* court noted, "[b]ecause most petitions are drafted at this stage by defendants with little legal knowledge or training," reviewing courts will view "the threshold for survival as low." *Id.* A defendant need only state the "gist" of a constitutional argument, a requirement that is met if a defendant alleges "enough facts to make out a claim that is arguably constitutional for purposes of invoking the Act," even if the petition as drafted at the first stage "lacks formal legal arguments or citations to legal authority." *Id.* The trial court may dismiss a petition at the first stage as "frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." *Id.* at 11-12. Moreover, "[w]here defendants are acting *pro se*, courts should

[1]In his opening brief on appeal, the defendant also contended that certain "fines imposed by the circuit clerk should be vacated outright" because they were improperly imposed. However, in his reply brief, filed on January 22, 2019, the defendant withdrew this contention, conceding that pursuant to *People v. Vara*, 2018 IL 121823, the appellate court does not have jurisdiction to consider it. Of course, the defendant may raise the issue with the circuit court on remand.

review their [first-stage] petitions 'with a lenient eye, allowing borderline cases to proceed.' " *Id.* at 21 (quoting *Williams v. Kullman*, 722 F.2d 1048, 1050 (2d Cir. 1983)).

¶ 19 We agree with the defendant that his petition meets the very low standard necessary to survive a first-stage dismissal. The crux of the defendant's position on appeal, as made clear in his reply brief on appeal, is that defense counsel was ineffective because although at trial some evidence was adduced that would have supported "an actual, legal insanity defense," defense counsel failed to ask for a jury instruction on a verdict of not guilty by reason of insanity, opting instead to present "a non-legal, jury-nullification version of an insanity defense." The defendant contends it is arguable both that defense counsel's failure to request an instruction was deficient and that the defendant was prejudiced thereby.

¶ 20 As the defendant aptly notes, at the first stage of proceedings under the Act, if a petition alleges ineffective assistance of counsel, that petition "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" by counsel's substandard performance. *Id.* at 17. Moreover, contentions that counsel's actions were the result of some type of strategy are "inappropriate for the first stage" of proceedings, and instead are "more appropriate to the second stage ***, where both parties are represented by counsel, and where the petitioner's burden is to make a substantial showing of a constitutional violation." *People v. Tate*, 2012 IL 112214, ¶ 22.

¶ 21 This court has noted that there exists no "bright line" that establishes whether a defendant is entitled to a jury instruction on a verdict of not guilty by reason of insanity. *People v. Dwight*, 368 Ill. App. 3d 873, 881 (2006). The question "remains a matter for the exercise of judicial discretion." *Id.* In this case, of course, there was no request for such an instruction, so we do not know how the trial judge would have ruled on such a request. We do know, however, that under

Illinois law a defendant is legally insane "if, 'as a result of mental disease or mental defect, [the defendant] lacks substantial capacity to appreciate the criminality of [the defendant's] conduct.' " *Id.* at 879 (quoting 720 ILCS 5/6-2(a) (West 2004)). Although in Illinois, "[t]he law presumes that all persons are sane," such a "presumption serves no useful purpose when the issue of a defendant's sanity is clearly raised." *Id.* The defendant bears the burden of proving " 'by clear and convincing evidence that the defendant is not guilty by reason of insanity.' " *Id.* (quoting 720 ILCS 5/6-2(e) (West 2004)). There is no obligation that the defendant present expert testimony on this point (*id.* at 880), but as is the case with all affirmative defenses, a defendant must present some evidence of the defense. *Id.* at 879. The "some evidence" standard requires a defendant to present enough evidence to allow a reasonable jury to find in the defendant's favor on the question. *Id.* "In a determination of [a] defendant's sanity, a trier of fact may reject all expert testimony and base its determination solely on lay testimony." *Id.* at 880. Moreover, "[w]here there is sufficient evidence based on the testimony and observations of the witnesses to support the defense, the absence of opinion evidence is immaterial," and in fact "[n]either psychiatric testimony nor medical or lay opinion is necessary to give the instructions if the evidence itself reveals serious mental defects or a substantial history of mental illness." *Id.* In determining whether to instruct a jury with regard to an insanity defense, "the trial court must look for the presence of evidence that supports the instructions, avoiding the temptation to make judgments about the weight of it." *Id.* at 881. Of additional significance to the opinions rendered by Dr. Althoff in this case, it must be remembered "that the standards for competency to stand trial and sanity at the time of the offense are different and that a finding as to competency does not necessarily answer the question whether a defendant was sane at an earlier time." *People v. Nichols*, 70 Ill. App. 3d 748, 753-54 (1979); see also *People v. Burnett*, 2016 IL App (1st)

141033, ¶ 48 ("it is a deeply rooted rule that the questions of fitness for trial and sanity concern different time frames and different standards").

¶ 22 In light of these general principles of law, we conclude that in the case at bar defense counsel presented evidence at trial that arguably would have supported a jury instruction on a verdict of not guilty by reason of insanity. That evidence included the testimony of the defense's sole witness, George Rutledge, who was a first cousin of the defendant and who testified that after the defendant moved back to Massac County from Reno, Nevada, approximately eight or nine years prior to the trial, Rutledge sometimes observed "odd behaviors" on the part of the defendant, and knew that the defendant was using illegal drugs such as crack cocaine. Even when the defendant was not using illegal drugs, Rutledge observed "odd behaviors" by the defendant. In particular, Rutleged testified, "I've seen him real irritable when I know he wasn't on drugs, and short-tempered." Rutledge testified that at one point, the defendant lived with Rutledge, during which time the defendant "was talking to himself" and "was answering himself." Rutledge testified that Rutledge kept a knife under his pillow when sleeping, because Rutledge was concerned about his safety, and that of his young sons, while the defendant was staying at the home. When asked if the defendant had "ever acted as if he was hearing voices," Rutledge testified, "If he's talking to himself, he's hearing things." He added that he had seen the defendant "turn and look like things was [*sic*] there," and that in his lay opinion the defendant had "a mental problem" and needed "mental attention." He testified that although the defendant needed help, he did not have family members or other resources available to help him. He testified that he believed the defendant had issues with "[d]epression, drugs, and alcohol," and had tried to commit suicide by overdosing on medication, and testified that the defendant told Rutledge "several times that he wanted somebody to kill him." Rutledge testified that the defendant asked Rutledge to bring a gun to him in jail so that he could commit suicide.

¶ 23 Dr. Althoff's testimony provided some evidence in support of a jury instruction on a verdict of not guilty by reason of insanity as well. On direct examination, Dr. Althoff conceded that the defendant did "have some issues with his mental health." On cross-examination, with regard to the defendant's self-reported 25-year history of chronic alcoholism, Dr. Althoff testified that although he did not know if the defendant had brain damage resulting from it, "long-term chronic *** alcoholism *** can lead to problems with *** cognitive functioning." With regard to the proposition that "after a period of time in an institutionalized setting, an individual who hears auditory hallucinations may have their reserve broken down and actually report them to other people," Dr. Althoff testified that such an individual might "feel more comfortable," and "get more insight," because there can be "less denial" in such situations. When asked if information from the defendant's family, or from previous hospitalizations, might "have made a difference" in Dr. Althoff's opinion that the defendant was feigning mental illness, Dr. Althoff testified, "I would have been happy to review that if that was available to me, and I would be happy to consider that in terms of my opinion. Sure."

¶ 24 Notably, defense counsel began to lay the foundation for a verdict of not guilty by reason of insanity during her opening statement, in which she told the jury that she believed the evidence in the case would show a deterioration in the defendant's mental health, which included "odd thoughts," depression, multiple suicide attempts, job loss, homelessness, and abandonment by his family. She described the defendant as someone with "serious problems" and "mental problems," and posited that although what "happened" on the night in question was not "right" or "proper," she could tell the jury that the defendant "had mental problems that evening and that he still does and that that was what caused the situation that happened on May 26, 2011." She continued in this vein during her closing argument, pointing to evidence that she believed demonstrated that at the time of the alleged offenses, the defendant's mental health was in a state

of deterioration, he was homeless and jobless, hearing voices, depressed, and suicidal. With regard to Dr. Althoff's testimony that the defendant "was faking mental illness" and "was not mentally ill," defense counsel pointed out that Dr. Althoff admitted that he did not talk to the defendant's family and "did not do any examination of any prior hospitalization records when my client tried to commit suicide because he didn't get that information." She also argued that Dr. Althoff "didn't look for any other sources of information to try to determine if my client was mentally ill or not." She opined that Dr. Althoff "went with a limited amount of information and made a decision." She argued that "people who are mentally ill, who are crazy, are frequently outcast by our society because we don't know how to handle them or what to do and we're afraid," which led to many such people ending up homeless and jobless and "in a situation where they feel that there's no reason to keep on living and they just want to die." Her argument thereafter conceded many of the facts surrounding the charges against the defendant, but opined that the defendant's actions, and ineptitude in executing his actions, "would be consistent with somebody who was mentally ill and didn't quite have their act together." She argued that there was "no way to explain rationally" the defendant's actions, because they were not "rational," as the defendant was "ranting and raving" and "tripping along on one problem after another" in a manner that "wasn't making any sense." She again described the defendant's actions as "not unusual for a mentally ill person to do." Thereafter, she referred to the defendant as "mentally ill" multiple additional times. Also of note, the State's Attorney seems to have anticipated a request for a jury instruction on a verdict of not guilty by reason of insanity, stating at one point near the end of the trial, outside the presence of the jury, that "given the issues in this case, the conference on jury instructions may take longer than usual"—an assessment with which defense counsel agreed.

¶ 25 Nevertheless, despite the foregoing evidence developed at trial with regard to the defendant's sanity at the time of the offense—and despite the overwhelming evidence adduced at trial that the defendant committed the acts of which he was accused—defense counsel failed to pursue the possible defense of not guilty by reason of insanity with a request for an appropriate instruction to the jury, and, had the instruction been given, with appropriate closing argument based upon that instruction and the evidence adduced at trial. Instead, defense counsel opted for, as the defendant puts it on appeal, "a non-legal, jury-nullification version of an insanity defense," in which after arguing that the defendant was mentally ill, defense counsel essentially argued, without the support of legal principles regarding an insanity defense in Illinois, that the jury should "consider whether a person who is mentally ill can knowingly and intentionally do acts," and told the jury members they would "get jury instructions for guilty and not guilty verdicts," and should "consider those not guilty verdicts." As the defendant correctly notes, jury nullification defenses are permissible, and do not constitute ineffective assistance of counsel, only if no other plausible defenses exist, which, as explained above, arguably is not true in this case. See, *e.g.*, *People v. Gilbert*, 2013 IL App (1st) 103055, ¶ 28.

¶ 26 As the defendant also notes, the State does not respond to his argument regarding the failure of trial counsel to request a jury instruction on a verdict of not guilty by reason of insanity, and does not respond to his argument regarding how he was prejudiced by this particular failure by trial counsel; moreover, the State does not argue that the defendant has forfeited consideration of his ineffective assistance of counsel arguments.

¶ 27 In light of the foregoing, we conclude that it is at least *arguable* that (1) trial counsel's performance in failing to request a jury instruction on a verdict of not guilty by reason of insanity fell below an objective standard of reasonableness, and (2) the defendant was prejudiced thereby. At this point, of course, the defendant has not fully developed this argument in the trial court. If,

after consultation with appointed counsel at the trial court level on remand, the defendant wishes to persist in this claim, he should have the opportunity to file an amended petition (see, *e.g.*, *People v. Boclair*, 202 Ill. 2d 89, 100 (2002)).

¶ 28 CONCLUSION

¶ 29 For the foregoing reasons, we reverse the first-stage dismissal of the defendant's petition for postconviction relief and remand for appointment of counsel to represent the defendant and for further proceedings. We take no position with regard to whether the defendant ultimately will prevail on his claims.

¶ 30 Reversed; cause remanded.