No. 2—09—0915
Order filed June 3, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 01—CF—2595
JOVAN D. DANIELS,	)	Honorable T. Jordan Gallagher,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Hutchinson concurred in the judgment.

ORDER

Held: Defendant's postconviction petition did not state a sufficient claim of ineffective assistance of counsel at sentencing: because counsel took an adversarial role at sentencing, we could not presume prejudice; because defendant's claim that he was prejudiced by counsel's failure to present mitigation witnesses was conclusional and unsupported by the witnesses' affidavits, the claim failed, even per the low threshold for a petition at the first stage.

Defendant, Jovan D. Daniels, filed a petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122—1 *et seq*. (West 2008)) in which he asserted that defense counsel was ineffective because, despite defendant's mother's and sister's willingness to testify, defense counsel failed to present mitigation testimony at sentencing. Defendant also asserted that defense counsel failed to

advise him of the right to present mitigation evidence. He did not, however, provide evidence of what the mitigation testimony would have been. The court dismissed the petition summarily.

Defendant now argues that we should construe his claim as one that counsel failed to consult with him regarding mitigation. He casts this as a total denial of counsel per *United States v. Cronic*, 466 U.S. 648, 658-59 (1984). He also argues that under the standard in *People v. Hodges*, 234 Ill. 2d 1, 17 (2009)—that a court should summarily dismiss a petition only if it has "no arguable basis either in law or in fact"—his petition should avoid summary dismissal despite its lack of specificity. Because defense counsel took an active and strategic part in sentencing, we disagree that defendant suffered a complete deprivation of counsel. Further, because nothing in defendant's petition even suggested an arguable basis in fact, we deem it properly subject to summary dismissal. We therefore affirm.

BACKGROUND

Defendant was charged with attempted armed robbery (720 ILCS 5/18—2(a)(2), 8—4(a) (West 2000)) and first degree murder (720 ILCS 5/9—1(a)(3) (West 2000)). The State's theory at trial was that defendant had participated in the planning of, and supplied the gun for, an attempted robbery that resulted in another participant shooting and killing the victim. A jury acquitted defendant of murder, but found him guilty of attempted armed robbery.

At sentencing, the primary matter discussed was defendant's criminal record. Defense counsel presented evidence of the gunman's out-of-state criminal record; counsel used the record to argue that defendant should receive a sentence comparable to the 12 years of the attempted robbery portion of the gunman's sentence. Defense counsel argued vigorously that defendant's

peripheral participation in the criminal enterprise was a mitigating factor. Defendant declined to make a statement in allocution.

The court found no factors in mitigation. In aggravation, the court found that defendant had a serious criminal record and that he committed the crime while on mandatory supervised release. It also found that a "substantial sentence" was necessary to protect the public and that defendant was eligible for an extended-term sentence. It sentenced him to 24 years' imprisonment.

Defendant appealed, contending that his sentence was disproportionate to the sentence that the gunman received for the attempted robbery. We disagreed and thus affirmed defendant's sentence. *People v. Daniels*, No. 2—05—1285 (2007) (unpublished order under Supreme Court Rule 23).

Defendant then filed a postconviction petition containing nine numbered claims. The claim at issue is his claim three. There, he alleged that counsel had "failed to advise [him] that he had the right to present mitigation *** evidence" and had "failed to present any available mitigation." He further alleged that counsel had failed to investigate mitigation witnesses and had "failed to introduce readily available mitigating evidence" despite being "aware that mitigation would and could be easily obtained." Finally, he alleged that his friends and family members, his mother and sister in particular, had been available and willing to testify. He did not specify what their testimony would have been.

As an accompaniment to his petition, defendant filed a memorandum of law. In that document, he acknowledged that, under the rule in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), to meet the standard for a claim of ineffective assistance of counsel, he had to show both that counsel's performance was deficient and that the deficient performance prejudiced him. He asserted

without further explanation that the testimony of his friends and family members would have caused the court to give him a lighter sentence and that, therefore, *Strickland*'s prejudice requirement was satisfied.

Defendant attached his own affidavit as his only evidence in support of his claim three. He averred that defense counsel never told him of the right to present mitigation evidence and that his mother, sister, and friends would have testified on his behalf. Again he did not specify what the substance of these witnesses' testimony would have been.

The court entered an order summarily dismissing the petition. It ruled that defendant could have raised claim three on direct appeal and that it was therefore "waived." Defendant timely appealed.

ANALYSIS

On appeal, defendant argues that the court erred in dismissing his claim three as barred by forfeiture; because no record existed of defense counsel's consultations with defendant, appellate counsel could not have raised the issue on direct appeal. The State concedes that this is so. However, we may affirm on any proper ground. *People v. Quigley*, 365 Ill. App. 3d 617, 619 (2006). Defendant further argues that his allegations of ineffective assistance of counsel were sufficient for his petition to avoid summary dismissal. He contends that counsel's failure to either advise him of the right to put on mitigation evidence or to put on mitigation evidence amounted to a *complete* deprivation of the assistance of counsel at sentencing, a critical stage of the proceedings.

In *Cronic*, the Supreme Court recognized that a complete deprivation of counsel at a critical stage warrants an exception to the rule in *Strickland* that no deprivation of the constitutional right to the assistance of counsel can occur unless a defendant can make a showing of specific prejudice

from counsel's deficient performance. *Cronic*, 466 U.S. at 658-59. Where counsel is physically absent or may as well have been, a court must presume prejudice. That presumption applies when counsel's inaction causes a defendant to forfeit his or her right to participate in a critical stage. In such a case, the adversary process is " 'presumptively unreliable.' " *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000) (quoting *Cronic*, 466 U.S. at 659).

According to defendant, "defense counsel's failure to either consult with the defendant about the right [to] present mitigating evidence or to offer evidence in mitigation resulted in the forfeiture of that right altogether."

Arguing in the alternative, defendant asserts that, although the affidavits of mitigation witnesses might be necessary for him to avoid the dismissal of his claim at a later stage in the proceedings, their absence from defendant's *pro se* petition should not be fatal under the standard in *Hodges*.

We review *de novo* the first-stage (summary) dismissal of a postconviction petition. *People v. Taylor*, 405 Ill. App. 3d 421, 422 (2010). We will discuss standards for summary dismissal in detail when we consider defendant's assertion that, given the statement of those standards in *Hodges*, summary dismissal was inappropriate. However, we start by considering the general standard for an ineffective-assistance-of-counsel claim and the exception to a requirement of a prejudice showing that defendant claims is applicable here.

As a rule, a defendant claiming deprivation of the right to the effective assistance of counsel must show that the deficiency in counsel's assistance caused him or her prejudice.

> "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant

> must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction *** resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687.

In the extreme case where "the process loses its character as a confrontation between adversaries" (*Cronic*, 466 U.S. at 656-57), the court must presume that the defendant was prejudiced. *Cronic*, 466 U.S. at 658-59. Conversely, as long as "the accused ha[s] 'counsel acting in the role of an advocate' " (*Cronic*, 466 U.S. at 656 (quoting *Anders v. California*, 386 U.S. 738, 743 (1967)) providing "meaningful adversarial testing" of the State's case (*Cronic*, 466 U.S. at 656), the conviction is presumed reliable (*Cronic*, 466 U.S. at 658-59). "The presumption that counsel's assistance is essential" requires the conclusion that the "trial is unfair if the accused is denied counsel at a *critical stage*." (Emphasis added.) *Cronic*, 466 U.S. at 659.

In *Mempa v. Rhay*, 389 U.S. 128, 134 (1967), the Supreme Court held that a "critical stage" is any "stage of a criminal proceeding where substantial rights of a criminal accused may be affected." Thus, sentencing is a critical stage. *E.g., People v. Williams*, 358 Ill. App. 3d 1098, 1104 (2005).

Here, defense counsel was an active participant in the sentencing process, arguing actively and presenting documentary evidence. Defendant argues that, by failing to present mitigation

evidence, counsel made a decision that cannot be explained as strategy. No matter whether that is correct here, counsel was taking an active and adversarial part in the proceedings.

We agree with defendant that "defense counsel has a duty to consult with the defendant during all critical stages of the proceedings." *People v. Owens*, 384 Ill. App. 3d 670, 671 (2008). No strategic reason exists for failing to consult with a defendant concerning sentencing, and such a failure to consult is likely to satisfy the first prong of the *Strickland* standard. See *Owens*, 384 Ill. App. 3d at 672-73 (under the circumstances of that case, counsel's failure to consult with the defendant concerning a motion to reconsider the sentence fell "below an objective standard of reasonableness"). Moreover, and despite the existence of the presentencing report as a guide to possible mitigation evidence, consulting with a defendant concerning mitigation evidence is clearly a necessary part of consultation about sentencing. See *People v. Ruiz*, 132 Ill. 2d 1, 26-27 (1989) (holding that defense counsel's failure to consult with the defendant concerning mitigation evidence in a death-penalty case could not be assumed to be a strategic choice).

That said, a failure to consult with a defendant concerning mitigation, uncoupled to other failures, is *not* a total failure of counsel to oppose the State as described in *Cronic*. Nothing in defendant's petition suggests that defense counsel did not consult with defendant *at all* concerning the sentencing process; defendant alleged only a failure to discuss mitigation evidence. Moreover, as we noted, defense counsel took an adversarial role at the sentencing hearing. We therefore will not presume prejudice; defendant had to show it.

Defendant's petition contained only an unsupported claim of prejudice: defendant baldly asserted that the testimony of mitigation witnesses would have resulted in a lower sentence. This is nothing but declaration and in no way even the gist of a showing of prejudice. Further, defendant

failed to attach (or explain the absence of) affidavits from the alleged mitigation witnesses, as necessary to support a claim of prejudice. See 725 ILCS 5/122—2 (West 2008); *People v. Barik*, 365 Ill App. 3d 183, 190-91 (2006). Thus, his ineffectiveness claim was not sufficient.

Defendant suggests that, given the limited detail required in a *pro se* petition, defendant's description of defense counsel's failure to consult with him, supported by his own affidavit, should have been sufficient for his petition to avoid summary dismissal. He points to our supreme court's discussion in *Hodges* of the relevant standard. That decision tells us that, although only limited detail is necessary in a *pro se* petition, *some* detail *is* needed:

> "Section 122—2 of the Act requires that a postconviction petition must, among other things, 'clearly set forth the respects in which petitioner's constitutional rights were violated.' [Citation.] With regard to this requirement, a defendant at the first stage need only present a limited amount of detail in the petition. [Citations.] Because most petitions are drafted at this stage by defendants with little legal knowledge or training, this court views the threshold for survival as low. [Citations.] In fact, we have required only that a *pro se* defendant allege enough facts to make out a claim that is arguably constitutional for purposes of invoking the Act. ***
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> However, our recognition of a low threshold at this stage does not mean that a *pro se* petitioner is excused from providing any factual detail at all surrounding the alleged constitutional violation. Section 122—2 also provides that '[t]he petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached.' [Citation.] The purpose of the 'affidavits, records, or other evidence' requirement is to establish that a petition's allegations are capable of objective or

> independent corroboration. [Citations.] 'Thus, while a *pro se* petition is not expected to set forth a complete and detailed factual recitation, it must set forth some facts which can be corroborated and are objective in nature or contain some explanation as to why those facts are absent.' [Citation.]
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> *** [W]e conclude *** that a *pro se* petition seeking postconviction relief under the Act may be summarily dismissed as 'frivolous or *** patently without merit' pursuant to section 122—2.1(a)(2) only if the petition has no arguable basis either in law or in fact. A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation. An example of an indisputably meritless legal theory is one which is completely contradicted by the record. [Citation.] Fanciful factual allegations include those which are fantastic or delusional." *Hodges*, 234 Ill. 2d at 9-10, 16-17.

This holding provides only limited guidance concerning *how much* detail is necessary. We take to be a central point the *Hodges* court's statement that "[t]he purpose of the 'affidavits, records, or other evidence' requirement is to establish that a petition's allegations are capable of objective or independent corroboration." *Hodges*, 234 Ill. 2d at 10. Thus, it seems clear that the petition and associated evidence must at least imply a factual core to a defendant's claim. In cases such as *Cronic*, the Supreme Court has made clear that there can be no ineffective assistance of counsel claim without an indication that the proceeding's outcome was unreliable. There are no facts here suggesting unreliability.

The flexibility or looseness of the *Hodges* court's standard was premised on its concern that a *pro se* petitioner, lacking in legal knowledge and experience, will not necessarily recognize which details are necessary to his or her petition. Here, two factors greatly lessen that concern. First, defendant's memorandum of law showed that he was specifically aware of *Strickland*'s prejudice prong. (Of course, that he was aware of it does not necessarily mean that he understood it.) Two, a central point of defendant's claim was that the mitigation evidence was *readily available.* That strongly suggests that no barriers existed to defendant's obtaining the same evidence for the petition. Under the circumstances, the petition suggests that defendant's claim is that his friends' and family members' mere willingness to appear and speak for him would have been sufficiently mitigating to produce a lesser sentence. That is not necessarily the case. Half-hearted character testimony could prove to be more damaging than no such testimony at all. This is particularly so given that any witness in mitigation would be subject to cross-examination by the State.

In sum, we agree with defendant that, under the *Hodges* standard, lack of some factual detail necessary to the complete pleading of a claim is not necessarily fatal to a petition at the first stage. However, that standard does not excuse a petitioner from the need to give evidence for (or explain the absence of) a factual core to his or her claim. Defendant failed to meet that requirement here.

CONCLUSION

For the reasons stated, we affirm the first-stage dismissal of defendant's postconviction petition.

Affirmed.