No. 128644

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellant, -vs- RUSSELL A. FREY, Petitioner-Appellee.	))))))))))	Appeal from the Appellate Court of Illinois, No. 2-21-0044. There on appeal from the Circuit Court of the Fifteenth Judicial Circuit, Lee County, Illinois, No. 12 CF 44. Honorable Jacquelyn D. Ackert, Judge Presiding.

BRIEF AND ARGUMENT FOR PETITIONER-APPELLEE

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ISSUE PRESENTED FOR REVIEW

Whether Russell Frey's postconviction counsel violated Rule 651(c) and provided unreasonable assistance when he failed to address in his motion to withdraw as counsel a due process claim that was raised in Frey's *pro se* postconviction petition.

STATUTES AND RULES INVOLVED

Illinois Supreme Court Rule 651. Appeals in Postconviction Proceedings

Relevant Section:

Paragraph (c) Record for Indigents; Appointment of Counsel, provides in relevant part, that:

> The record filed in that court shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions.

STATEMENT OF FACTS

Overview

Following a jury trial, Russell Frey was convicted of three counts of predatory criminal sexual assault of a child. (C. 205). Frey was sentenced to an aggregate term of 50 years in prison. (C. 420; R. 1663).[1] The appellate court affirmed Frey's conviction in 2018. (C. 494-520); *People v. Frey*, 2020 IL App (2d) 150868-U. In 2019, Frey filed a *pro se* postconviction petition, which was not ruled upon within 90 days and so advanced to the second stage. (C. 522-30, 594). In October of the following year, appointed postconviction counsel filed a motion to withdraw, which the circuit court granted. (C. 599-607; R. 1691). In January of 2021, the court granted the State's motion to dismiss. (R. 1712-13). On appeal, the appellate court reversed the dismissal of Frey's petition and found that postconviction counsel violated Rule 651(c) by failing to address a substantive issue raised by Frey in his *pro se* petition, and the court declined to review the merits of the issue. *People v. Frey*, 2021 210044-U, ¶¶ 2, 29.

Trial Proceedings

Frey's jury trial on three counts of predatory criminal sexual assault began in March 2015. At trial, Frey's daughter, S.T., testified to three incidents that occurred in January and February of 2012 , when she was 12 years old. (R. 843, 845, 862-63, 868-72, 891).

In January of 2012, Frey lived in a basement apartment of S.T.'s stepfather's

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[1] A corrected record of proceedings was filed with the appellate court titled "Record - Supplement to the Record 2." Appellee's citations to the record ("R.") refer to this supplement.

house. (R. 861). S.T. testified that on the last Saturday of that month, she was alone with Frey in the apartment and Frey took off her clothes and started touching her. (R. 863-64, 957). Frey then took off his clothes and put his "bad spot" inside her "bad spot." (R. 864-65).

In February of 2012, Frey was at his parents' home in Dixon, Illinois. (R. 868-69). S.T. was with Frey in an attic bedroom of the house when Frey grabbed her, began kissing her and taking her clothes off. (R. 871). Frey put his "bad spot" inside of her several times and held her down so that she was unable to push him off. (R. 872).

On the last Sunday of that February, S.T. testified that she was doing her laundry in her grandparents' home in the bathroom when Frey picked her up and put her on top of the washing machine. (R. 891). Frey took both of their pants off and then "started assaulting [her] again." (R. 891).

S.T's mother testified that, in March 2012, S.T. told her that Frey had "raped" her. (R. 1154). S.T.'s mother took her to the hospital and the hospital contacted DCFS, after which S.T. had a scheduled interview with Traci Mueller from Shining Star Child Advocacy Center. (R. 790, 1156, 1160). A recording of the interview was presented at trial. (R. 813; St. Ex. 2). Mueller testified that, during the interview, S.T. used the words "bad spot" to describe both a penis and vagina. (R. 803-04). Mueller also recounted that S.T. had shared the above incidents with her during the interview. (R. 805-08).

The jury was excused to deliberate at 4:02 p.m. (R. 1545). At 6:00 p.m. the jury sent out a note asking, "Does the burden of proof have to have physical

evidence?" (C. 376; R. 1557). In agreement with the parties, the court told the jury, "You are to decide this case based on the evidence you have seen and heard together with the instructions I have given you." (R. 1560-61).

The common law record contains another note from jury reading, "Please advise – we have 10-guilty 2-not guilty all 3 counts[.] The 2-not guilty are firm that the State did not prove guilt on all these counts." (C. 375). The memorandum of orders records this note as having been submitted at 8:10 p.m and then filed. (C. 487). The note is not addressed in the report of proceedings.

At 9:55 p.m., the jury reached a verdict. (R. 1561). The jury found Frey guilty on all three counts. (C. 377-79; R. 1563-64). After denying Frey's motion for a new trial, the trial court sentenced Frey to an aggregate term of 50 years. (C. 420; R. 1605-06, 1663).

Direct Appeal

On direct appeal, the Second District affirmed Frey's convictions. (C. 494-520); *People v. Frey*, 2018 IL App (2d) 150868-U. In its order, the appellate court pointed to the second, unaddressed jury note in a footnote. *Id.* at ¶ 63 n.2. The appellate court acknowledged the note and remarked upon its unexplained presence in the common law record where there was no discussion of it in the record of proceedings. *Id.* The court presumed that the jury ultimately chose not to send it to the court. *Id.*

Postconviction Proceedings

On December 5, 2019, Frey filed a *pro se* postconviction petition alleging that his trial counsel was ineffective for 1) failing to properly investigate and

impeach S.T.; 2) failing to request a recusal of the trial judge; 3) failing to fully investigate and present mitigating evidence due to counsel's illness; 4) failing to investigate and introduce other allegations of sexual assault made by S.T. against another person; 5) failing to order DNA testing; and, 6) appellate counsel was ineffective for failing to raise these issues. (C. 523-25). Frey further argued that his sentence violated the Proportionate Penalties Clause because Frey would not complete his sentence until his early seventies. (C. 526). Finally, Frey alleged that his due process rights were violated where the jury was deadlocked and the judge told the jury that they could not leave until they agreed. (C. 525-26). Attached to his petition was an affidavit written by Roxanne Shaffer stating:

> On March 23, 2015, the day of my brother, Russell Frey's conviction, at approximately 9:00 p.m. the jury sent out a note with a 10-2 verdict. The jury asked to continue to the next day. Judge Ron Jacobson denied the request, stating he had a murder trial starting the next day and did not want to postpone it. The murder trial was for Brian Sigler. Within half an hour to forty-five minutes, the jury came back with a guilty verdict. (C. 530).

On May 13, 2020, Frey's petition was advanced to the second stage after 90 days had passed without review by the circuit court. (C. 594). On October 1, 2020, appointed counsel filed a motion to withdraw, citing *Kuehner* and *Greer*, explaining why Frey's ineffective assistance of trial and appellate counsel claims lacked merit and also why his excessive sentence claim lacked merit. (C. 599-607). Counsel did not address the due process claim regarding the deadlocked jury nor Shaffer's affidavit. Attached to the motion was counsel's 651(c) certificate. (C. 607).

At the hearing on counsel's motion, counsel informed the circuit court that

he had reviewed the record and the petition. (R. 1689-90). He said that Frey had asked him to reach out to other possible witnesses and he had done so but was not able to make contact with everyone. (R. 1689). The court asked Frey if he had reviewed the motion to withdraw with counsel, to which Frey responded in the affirmative, and stated that he objected to counsel's withdrawal. (R. 1690). The circuit court granted counsel's motion to withdraw. (R. 1691). The State filed its motion to dismiss on the same day, and the court continued the case to give Frey time to review that motion. (R. 1691-92).

On January 13, 2021, Frey represented himself at the hearing on the State's motion to dismiss. (R. 1711). The State adopted the reasoning from Frey's former counsel's motion to withdraw and made no further argument. (R. 1711-12; C. 609-10). Frey responded that he had asked his appointed, now withdrawn, counsel to make some phone calls and he never did. (R. 1711). Frey told that court that he did not know the law and so he would not lead the court on by pretending that he did. (R. 1711). The circuit court granted the State's motion to dismiss, finding that former counsel's motion to withdraw thoroughly laid out the petition's claims and that the ineffective assistance of counsel claim had already been raised on direct appeal. (R. 1712-13). Frey appealed. (C. 616, 624).

Appeal of the Dismissal of Frey's Petition

On the appeal of the dismissal of Frey's petition, Frey argued that appointed counsel failed to perform his duties under 651(c) and provided unreasonable assistance by not addressing the due process claim regarding the deadlocked jury that Frey included in his petition. *People v. Frey*, 2022 IL App 210044-U, ¶ 2. The

Second District agreed, finding that *People v. Moore*, 2018 IL App (2d) 170120, controlled the outcome. *Id.* at ¶ 29.

Specifically, the Second District held that appointed counsel was unreasonable for failing to include the due process issue because the omission indicated that counsel did not in fact "ascertain [Frey's] contentions of deprivation of constitutional rights," as was required under 651(c). *Id.* at ¶¶ 28-29. Further, the court ruled that it would be premature to assess the merits of the underlying issue at this stage because the court could not presume that the claim was in its final form. *Id.* The violation was not subject to a harmless error analysis because compliance with 651(c) is required regardless of whether the petition's claims are viable. *Id.* (citing *Moore,* 2018 IL App (2d) 170120, ¶ 44). As such, the violation itself was reason enough to remand the petition for further second-stage proceedings, with the appointment of new counsel. *Id.* at ¶¶ 28-29, 34.

ARGUMENT

Russell Frey's postconviction counsel violated Rule 651(c) and provided unreasonable assistance when he failed to include in his motion to withdraw as counsel a due process claim raised by Frey in his *pro se* postconviction petition.

In its order reversing the dismissal of Russell Frey's postconviction petition, the Second District held that appointed postconviction counsel was unreasonable for failing to address one of the claims contained in Frey's *pro se* petition in his motion to withdraw. *People v. Frey*, 2022 IL App 210044-U, ¶ 29. In its brief, the State never explains how a motion to withdraw that completely fails to address one of the *pro se* postconviction petitioner's claims of constitutional deprivation can amount to reasonable assistance. Instead, the State essentially proposes a new standard that would only require attorneys to "alert" the circuit court that they believed the petition was frivolous. (St. Br. 16-18). This proposal not only disregards well-settled law, it also undermines the reasonable assistance standard set forth in Rule 651(c) requiring appointed counsel to ascertain petitioner's claims and to shape them into their proper legal form for presentation to the circuit court. Ill. S. Ct. Rule 651(c); *see People v. Greer*, 212 Ill. 2d 192, 209 (2004)(allowing attorneys to withdraw as postconviction counsel, but should report their findings in a motion). Further, the State ignores this Court's recent opinion in *People v. Addison*, 2023 IL 127119, and attempts to apply a harmless error analysis to 651(c) violations. This Court should decline the State's attempts to lower the reasonable assistance standard and to apply harmless error when that standard is not met.

At the second stage of postconviction proceedings, appointed counsel has a duty to reasonably assist a petitioner in accordance with Illinois Supreme Court

Rule 651(c), but is not required to raise frivolous claims. *Greer*, 212 Ill. 2d at 209. To that end, this Court has held that counsel should file a motion to withdraw, assessing the merits, or lack thereof, of the petition. *Id.* at 211-12; *People v. Kuehner*, 2015 IL 117695, ¶ 21. This Court must decide whether counsel, when filing a motion to withdraw under such circumstances, shows compliance with Rule 651(c) and provides reasonable assistance where counsel fails to address each of petitioner's *pro se* claims in the motion. Frey argues that such circumstances do not show compliance with the rule. This is because the omission of any *pro se* claim indicates that counsel failed to ascertain all of the petitioner's allegations of constitutional deprivations and thus also failed to properly present those allegations to the circuit court, even to show why those claims have no legal merit. As a result, a *pro se* petitioner could have an unaddressed claim (or claims) dismissed without ever being substantively evaluated by the circuit court. Therefore, when counsel omits one of petitioner's *pro se* claims in the motion to withdraw, Rule 651(c) is violated and the petition must be sent back for further second-stage proceedings, with the appointment of counsel. *Frey*, 2022 IL App 210044-U, ¶¶ 28-29, 34.

In his *pro se* petition, Russell Frey raised several claims of ineffective assistance of trial counsel, a proportionate penalties claim, and a due process claim relating to a second jury note that he supported with an affidavit from Roxanne Shaffer, his sister. (C. 522-26, 530). Postconviction counsel filed a motion to withdraw, pursuant to *Greer* and *Kuehner*, that addressed only Frey's ineffective assistance of trial counsel claims and the proportionate penalties claim, stating that the issues had no merit. (C. 599-607). On appeal from the circuit court's second-

stage dismissal, Frey argued that the presumption that was created by the filing of counsel's 651(c) certificate was rebutted where counsel failed to address one of the issues, specifically the due process claim, in Frey's petition. *People v. Frey*, 2022 IL App 210044-U, ¶ 2. Following its decision in *People v. Moore*, 2018 IL App (2d) 170120, the Second District agreed that counsel was unreasonable for failing to address the due process issue in his motion to withdraw, and held that, in order to provide reasonable assistance, counsel must address each issue raised in the petition in their motion to withdraw. *Frey*, 2022 IL App 210044-U, ¶¶ 28-29. This Court should affirm the appellate court's decision.

The State contends that this Court should reverse the appellate court's judgment because it "disregard[ed] the presumption of compliance" rising from the filing of a 651(c) certificate and because the record indicates that the underlying issue is frivolous. (St. Br. 12-13). The State is incorrect on both points. First, as will be shown below, the presumption of compliance with 651(c) is rebuttable, and the fact that counsel overlooked an issue raised by Frey is sufficient to rebut the presumption created by the filing of the certificate. Second, this Court need not ascertain the merits of the underlying issue because a harmless error analysis does not apply when counsel has violated their 651(c) duties. *People v. Suarez*, 224 Ill. 2d 37, 51-52 (2007)("[W]e decline to hold that non-compliance with Rule 651(c) may be excused on the basis of harmless error."); *Addison*, 2023 IL 127119, ¶ 35 (same). Further, even if this Court were to attempt to ascertain the merits of the due process claim here, it cannot do so based on the record in this case alone because counsel failed to comply with 651(c) by either amending the petition with

the requisite factual allegations or otherwise explaining why he could not do so.

This Court should affirm the appellate court and hold that counsel's failure to include Frey's due process claim in his motion to withdraw was a 651(c) violation. At the second-stage, a *pro se* petitioner is appointed counsel "to ensure that the complaints of a prisoner are adequately presented." *Suarez*, 224 Ill. 2d at 46. This duty should not be relaxed on the basis of whether the petition was advanced after review by a circuit court or by default after 90 days. If counsel moves to withdraw from performing their mandated duties, then they must explain why the *pro se* petition is entirely without merit, in a way that properly presents all of the issues so as to allow the circuit court to make the ultimate decision as to the merits of the motion to withdraw, and later, the State's motion to dismiss. Otherwise, a petition could be dismissed, as it was here, without a determination on the merits of every issue. Because counsel failed to present Frey's claims to the court, counsel failed in his 651(c) duties toward Frey. Accordingly, this Court should affirm the appellate court's ruling reversing the dismissal of Frey's petition and remanding for further second stage proceedings with the appointment of new counsel.

Relevant Facts

In his *pro se* petition, Frey made three overarching allegations: 1) he received ineffective assistance of trial and appellate counsel; 2) his due process rights were violated when the trial court coerced a deadlocked jury into a verdict; and, 3) his sentence was excessive in violation of the proportionate penalties clause of the Illinois Constitution. (C. 523-26). With respect to the due process claim, Frey attached an affidavit to his petition from Roxanne Shaffer, his sister, averring

that she was present when the jury sent a note to the trial court that stated that the jury was deadlocked with two jurors finding Frey was not guilty, and requesting to continue deliberations to the next day. (C. 375, 529-30). Shaffer stated in her affidavit that the trial court denied the jury's request, stating that it would not continue deliberations to the next day because of another scheduled trial. (C. 530). Frey alleged in his petition that the trial court coerced the jury into a guilty verdict by not allowing them to leave that night after their inquiry. (C. 529). Notably, the direct appeal record does not contain any transcripts regarding the second jury note, and neither the report of proceedings nor the common law record contain an explanation as to the origins of the second jury note and its presence in the record. (*See* C. 518-519); *see also People v. Frey*, 2018 IL App (2d) 150868-U, ¶ 63, fn. 2.

After the expiration of the 90 days allotted to the trial court to review the petition, Frey's petition advanced to the second stage by default and counsel was appointed. (C. 594). A few months later, counsel moved to withdraw citing *Greer* and *Kuehner*. (C. 599-607). In the motion, counsel asserted that all of Frey's postconviction claims fell into two categories, namely, ineffective assistance of trial and appellate counsel and a challenge to the finding of guilt and sentencing. (C. 600). Counsel addressed Frey's five distinct claims of ineffective assistance of trial counsel (C. 603-06), his ineffective assistance of appellate counsel claim (C. 606), and his excessive sentencing claim (C. 606), citing to legal principles and authorities to explain why he found each claim frivolous. Counsel made no mention at all of the deadlocked jury and its note, Frey's due process rights, nor

of Shaffer's affidavit. In addition to his motion, counsel filed a 651(c) certificate averring that he consulted with petitioner in order to ascertain his contentions of deprivation of constitutional rights, examined the record, and made any amendments to the petition that were necessary for an adequate presentation of the petitioner's contentions. (C. 607).

At the hearing on the motion to withdraw, counsel informed the circuit court that he had reviewed the motion to withdraw with Frey, reviewed the record, and, at Frey's request, had reached out to other possible witnesses but had not made contact with everyone. (R. 1689). Frey objected to counsel's withdrawal. (R. 1690). The circuit court granted counsel's motion. (R. 1692). The State filed its motion to dismiss on the same day as the hearing on counsel's motion to withdraw, but the court continued the case to give Frey the opportunity to review the motion or hire counsel. (R. 1692-93).

In its brief motion to dismiss, the State did not address a single substantive claim from Frey's petition. (C. 609-10). The State merely asserted that it "adopt[ed] the reasoning and conclusions in the Counsel for Petitioner's Motion to Withdraw as the basis for this Motion to Dismiss." (C. 609). At the hearing on the State's motion, the State's only argument was that its motion should be granted "based on procedurally, how we got there, as well [sic] the in-depth reasoning and statutory citations adopted by [postconviction counsel]." (R. 1711). Frey's response was that he asked his counsel to make some phone calls, which he never did, and that he lacked the legal knowledge to further argue his claims. (R. 1711). He also stated that his trial lawyer did not do "everything that he could do to get [him] a not-guilty

verdict." (R. 1711-12).

The circuit court granted the State's motion to dismiss. (R. 1712). In its findings, the court stated that it had reviewed counsel's motion to withdraw that was incorporated by the State in its motion to dismiss. (R. 1712). The court went on to say:

> [Postconviction counsel] did a very thorough examination of the record, the case law, the statutory citations, and he put together a very thorough motion to withdraw, and he applied the facts that were presented at trial with respect to the arguments that Mr. Frey now tries to make, the ineffective assistance of counsel claim, which was dealt with on direct appeal and was denied. The Court finds that all – all of the information provided by [counsel] establishes that there is no merit to these arguments, and [counsel] further stated in his research he found no other meritorious claims that could be made at this time. On that basis, the Court grants the motion to dismiss that was filed by the State. (R. 1712-13).

Frey appealed his petition's dismissal and, on appeal, argued that his appointed counsel failed to adhere to his 651(c) duties and provided unreasonable assistance when he omitted Frey's due process claim regarding the deadlocked jury. *People v. Frey*, 2022 IL App 210044-U, ¶ 2. The appellate court agreed with Frey's argument, finding that counsel provided unreasonable assistance because his failure to address Frey's due process claim regarding the deadlocked jury and second jury note in his motion to withdraw indicated that he failed to ascertain Frey's claims of constitutional deprivation in violation of Rule 651(c). *Id.* at ¶¶ 28-29. The court also declined to assess the merit of the due process claim because remand was required after a finding of a 651(c) violation, regardless of the viability of a petitioner's claims. *Id.* The appellate court remanded the petition for new second-stage proceedings and the appointment of new counsel. *Id.* at ¶ 34.

Relevant Postconviction Law

The Post Conviction Hearing Act ("the Act") provides a remedy for incarcerated petitioners who have suffered a substantial violation of their constitutional rights at trial. 725 ILCS 5/122-1 *et seq.*(2020). Proceedings under the Act consist of three possible stages. At the first stage, the trial court must review the defendant's petition within 90 days, without input from the State, to determine whether it states an arguable claim, or the "gist," of a constitutional violation. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). If the petition is not dismissed as being frivolous or patently without merit, or if the court fails to act within 90 days of the petition's filing, the petition is advanced to the second stage where an indigent petitioner is appointed counsel and then given the opportunity, through counsel, to file an amended petition, shaping the *pro se* claims into the proper legal form. *People v. Cotto*, 2016 IL 119006, ¶ 27. The State is given the opportunity to file a motion to dismiss the petition. *Id*. At the second stage, a petition should be dismissed "when the petition's allegations of fact – liberally construed in favor of the petitioner and in light of the original trial record – fail to make a substantial showing" of a constitutional violation. *People v. Coleman*, 183 Ill. 2d 366, 382 (1998). If the petition makes the required substantial showing, it is then advanced to the third stage of proceedings for the circuit court to hold an evidentiary hearing. *People v. Tate*, 2012 IL 112214, ¶ 10.

The Act provides for the assistance of counsel at the second stage because the legislature anticipated that most of the petitions under the Act would be filed by *pro se* prisoners who did not have the aid of counsel in their preparation. *People*

v. Owens, 139 Ill. 2d 351, 358 (1990). Because this right to postconviction counsel is wholly statutory, petitioners are entitled to only a "reasonable level of assistance" from postconviction counsel. *People v. Turner*, 187 Ill.2d 406, 410 (1999); *People v. Guest*, 166 Ill.2d 381, 412 (1995). To ensure that level of assistance, an attorney who is appointed to represent a defendant in a postconviction proceeding must file a certificate in accordance with Supreme Court Rule 651(c), certifying that he or she has 1) consulted with the defendant to ascertain his contentions of violations of his constitutional rights; 2) examined the record of the trial proceedings; and, 3) made any amendments to the defendant's *pro se* petition necessary to adequately present the defendant's contentions. Ill. S. Ct. Rule 651(c); *People v. Perkins*, 229 Ill.2d 34, 42 (2007). These duties are mandatory and ensure "that a petitioner's complaints would be adequately presented." *People v. Schlosser*, 2012 IL App (1st) 092523, ¶ 18. If counsel files a Rule 651 (c) certificate, they may create a rebuttable presumption that reasonable assistance was provided. *Perkins*, 229 Ill. 2d at 42, 44. The petitioner may overcome that presumption by demonstrating counsel's failure to substantially comply with the duties mandated by Rule 651(c). *Addison*, 2023 IL 127119, ¶ 21; *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19.

While postconviction counsel is obligated to provide a reasonable level of assistance, the Illinois Supreme Court has also held that appointed postconviction counsel has an ethical obligation not to present frivolous claims to the court, and counsel is allowed to move to withdraw when no non-frivolous claims are available. *Greer*, 212 Ill.2d at 205-09. Counsel's motion to withdraw should make some effort

to explain why each of defendant's claims are frivolous or patently without merit. *Kuehner*, 2015 IL 117695, ¶ 21. It is solely appointed counsel's burden to establish that the *pro se* petition, upon counsel's review, lacked merit such that counsel could no longer proceed in their representation. *Id.* at ¶ 22.

The question of whether the trial court properly dismissed the defendant's postconviction petition at the second stage, and the question of whether postconviction counsel afforded the defendant reasonable assistance, are both reviewed *de novo*. *Cotto*, 2016 IL 1190006, ¶ 24; *Suarez*, 224 Ill.2d at 42.

A. The record rebuts the presumption of reasonable assistance created by counsel's filing of a 651(c) certificate, where counsel failed to address a substantive issue that was raised in Frey's *pro se* petition in his motion to withdraw.

Counsel was unreasonable for failing to include an analysis of Frey's due process claim regarding the second jury note in his motion to withdraw as postconviction counsel. In *People v. Greer*, 212 Ill. 2d 192, 205-09 (2004), this Court held that postconviction counsel appointed at the second stage is allowed to withdraw if they believe that there is no legal issue with merit that can be ethically raised. There, counsel filed an *Anders*-like motion, detailing his activities after his appointment, and went through each of petitioner's claims, stating that he could not "properly substantiate" the petitioner's contentions. *Id.* at 200. This Court considered the legislative intentions of the Act and the ethical obligations of counsel and concluded that appointed counsel should be allowed to withdraw where the petition was in fact frivolous based on the record. *Id.* at 205-09. This Court then went on to assess the merits of the claims in the petition and, upon finding that each claim was rebutted by the record, affirmed the circuit court's decision to allow

the motion to withdraw. *Id.* at 210-12. In doing so, this Court explicitly stated that counsel's motion was faulty and counsel's averment that he could not "properly substantiate" the petitioner's claims was not the appropriate standard to determine whether the claims had merit, but the record rebutted petitioner's claims and so, this Court concluded, counsel adhered to his 651(c) duties and was allowed to withdraw. *Id.*

Then, in *People v. Kuehner*, 2015 IL 117695, ¶ 21, this Court ruled that, where appointed counsel seeks to withdraw during second-stage proceedings, they must give some explanation as to why they believed each claim in the *pro se* petition was frivolous. In *Kuehner*, unlike *Greer*, the petition was advanced to the second stage because the circuit court ruled at the first stage that the petition was not frivolous. *Id.* at ¶ 8. In counsel's motion to withdraw, counsel explained why she believed some of petitioner's claims were frivolous, but omitted one claim; that petitioner's trial counsel lied to him, inducing him into a guilty plea. *Id.* at ¶ 23. The omitted claim was supported by affidavits from the petitioner's family. *Id.* This Court explained that the omitted issue rendered counsel's motion to withdraw unsatisfactory, and remanded the cause for new second-stage proceedings with new appointed counsel. *Id.* at ¶¶ 23-25. Further, this Court declined to review the merits of the omitted claim, in part, because it "decline[d] to do a job that properly belong[ed] to appointed counsel." *Id.* at ¶ 24.

Following *Greer* and *Kuehner*, the Second District in *People v. Moore*, 2018 IL App (2d) 170120, ¶ 42, reasoned that counsel's incomplete motion to withdraw (which was missing only one of the claims from the petitioner's lengthy *pro se*

petition) rebutted the presumption created by the filing of her 651(c) certificate because she seemingly did not "'ascertain [defendant's] contentions of deprivation of constitutional rights.'" (quoting Ill. S. Ct. R. 651(c)). Because this resulted in a 651(c) violation, the court did not review the merits of the petition, finding that there should be no harmless error analysis when a 651(c) violation has occurred. *Moore*, 2018 IL App (2d) 170120, ¶ 44, citing *Suarez*, 224 Ill. 2d at 52. This was so even in a case where the petition was advanced by default after the 90-day review period had passed. *Moore*, 2018 IL App (2d) 170120, ¶¶ 39-40.

The appellate court in this case found that the *Moore* court had properly analyzed *Greer*, and it came to the same conclusion that it had in *Moore* – postconviction counsel's failure to address Frey's due process claim was a violation of his 651(c) duties and it would be premature to assess the merits of the omitted issue. *Frey*, 2022 IL App 210044-U, ¶¶ 28-29. Notably, the State never cites to *Moore* in its brief before this court, or argues that its reasoning does not apply to the case at hand, despite the appellate court's reliance upon it in its order. As a result, the State has inadequately addressed crucial jurisprudence relevant to the issue at hand. Frey now argues, however, that the reasoning of the Second District in *Moore* is sound and this Court should come to the same conclusion here.

Counsel's omission of the due process claim from his motion to withdraw shows that he did not fully consult with Frey and ascertain his contentions of constitutional deprivation. *See Moore*, 2018 IL App (2d) 170120, ¶ 42 (a *pro se* claim that was omitted from counsel's motion to withdraw rebutted the presumption created by the filing of a 651(c) certificate because it shows that counsel did not

ascertain the petitioner's claims). The motion in question addressed several distinct aspects of Frey's ineffective assistance of counsel claims, as well as his proportionate penalties claim. (C. 603-06). However, there is nothing in the motion relating to Frey's due process claim that the jury was improperly coerced into coming to a verdict, which was also supported by an affidavit from Roxanne Shaffer. (C. 526, 529-30). Counsel represented to the court in-person and via the filing of his 651(c) certificate that he went through each claim in the petition, yet the fact that his motion did not include the due process claim rebuts those representations. The omission of this issue in particular is concerning where the allegation would require investigation of matters that are outside the record, at the very least requiring counsel to speak with Shaffer to ascertain whether there was a factual basis for Frey's legal claim, and where the second jury note is not referenced anywhere in the record of proceedings. *See Frey*, 2018 IL App (2d) 150868-U, ¶ 63, n.2.

The State asserts that Frey did not raise the due process issue during either the hearing on the motion to withdraw nor the hearing on the motion to dismiss, and so the issue was forfeited regardless of what counsel included or omitted from his motion. (St. Br. 20). However, at the hearing on the State's motion to dismiss, Frey told the circuit court that he had asked counsel to make some phone calls but that counsel had not done so. (R. 1711). The State's assertion that Frey said *nothing* regarding his omitted claim is misleading and, worse, attempts to place the burden of composing a proper motion to withdraw on the petitioner instead of appointed counsel. *See Kuehner*, 2015 IL 117695, ¶ 22 (When appointed counsel's examination of the record reveals that a petition is frivolous and counsel seeks

to withdraw, "the burden for establishing that rests squarely on appointed counsel." If counsel fails to meet that burden, the motion to withdraw must be denied.). The State does not cite to any authority that would suggest that, after counsel has met their burden and is allowed to withdraw, the burden shifts to the *pro se* petitioner to orally argue what they have already written out in their initial *pro se* petition.

Moreover, Frey was a *pro se* litigant who openly admitted to the court that he did not know the law. (R. 1711). Particularly in a case where the State did not include any substance in its motion to dismiss except to adopt defense counsel's reasoning, it might not even have been clear to Frey that he was supposed to litigate the merits of his claims at the hearing, as opposed to object to counsel's motion to withdraw. Given such circumstances, it would be an unbelievably high burden on petitioners to preserve their claims or risk forfeiture. As such, and contrary to the State's assertion, it is counsel's duty to compose a proper motion to withdraw, not petitioner's, and counsel's failure to do so in this case was a violation of his 651(c) duties. Regardless of what Frey said at either hearing, the claim was written out in his petition, that was still before the court at the hearing on the motion to dismiss. And the State provides no support for its claim that a petitioner's failure to develop an argument at a hearing on a motion to dismiss their petition overcomes appointed counsel's unreasonable assistance.

The State maintains that when the petition advances by default after 90 days, any errors in counsel's motion to withdraw should be ignored where the record rebuts petitioner's claims. (St. Br. 12, 15-19). The State incorrectly attempts

to apply a harmless error analysis to a 651(c) violation (*infra*, Arg. B), and also wrongly analyzes this Court's decisions in *Greer* and *Kuehner*. If the purpose of the motion to withdraw is to explain to the circuit court why counsel believes the petition is frivolous, as *Greer* instructs, then it makes no sense to relax that reasoning simply because the petition was advanced due to a violation of the 90-day rule. *See Moore*, 2018 IL App (2d) 170120, ¶ 43 (finding that it is imperative that counsel be able to ascertain the claims in the petition before asserting to the circuit court that the petition lacks merit, even where the petition was advanced by default of a 90-day rule violation). Counsel's withdrawal would be improper if even *one* of petitioner's claims presented a substantial showing of a constitutional violation. *People v. Komes*, 2011 IL App (2d) 100014, ¶ 29 ("*[A]ny* claim that will potentially allow counsel to produce a nonfrivolous amended petition is sufficient to give counsel an ethical basis to continue representation.")(emphasis in original). So, if even one claim is overlooked, a petitioner is at risk of suffering a significant miscarriage of justice due to counsel's negligence in representation. This Court has already determined that counsel is unreasonable if they fail to address forfeiture issues when they file an amended petition. *Addison*, 2023 IL 127119, ¶ 25. Similarly, counsel should be found unreasonable for failing to present a claim to the circuit court *at all*, even if it is just to explain why the claim is frivolous, because there will be no other opportunity for the court to review the merits of the claim.

If a petition is advanced after the circuit court's review at the first stage, but counsel nonetheless believes they are required to withdraw, it follows that counsel must thoroughly address each issue in the petition in order to explain

why they have come to a different conclusion than the circuit court. *Kuehner*, 2015 IL 117695, ¶ 21. However, that reasoning is no less salient in a case where the petition is advanced to the second stage by default of a 90-day rule violation. If anything, it is even more important that counsel explain why *each* issue from the petition is frivolous or without merit, because no legally-trained eye has reviewed the issues in the petition. *See Anders v. California*, 386 U.S. 738, 745 (1967)(writing a motion to withdraw as counsel from direct appeal "induces the court to pursue all the more vigorously its own review" of the merits of defendant's claims because of the references to the record and the legal authorities cited by counsel in their motion). Also, where counsel has presumably already discussed the petition's contentions with the petitioner, it is not too much to ask counsel to write their findings in a motion and present those findings to the circuit court as a basis for its decision on whether counsel should be allowed to withdraw. *See id.* at ¶ 22. Requiring counsel to do as much for *each* of the petitioner's *pro se* claims is not an arduous task, especially in circumstances such as this case where counsel had already done the work to address most of Frey's claims in his motion.

The State contends that the purpose of appointment in the case of a 90-day rule violation could be to simply "jumpstart a process that has shown no signs of progression" and that appointed counsel need only certify compliance with 651(c) and "alert" the circuit court as to their conclusion in a motion to withdraw. (St. Br. 16-18). Essentially, the State argues that this Court should decline to review counsel's performance once a 651(c) certificate is filed, and rely solely on the presumption created by its filing. This Court has already rejected the State's

argument, finding that when the record shows that counsel has violated one of their 651(c) duties, it necessarily follows that the presumption created by the filing of a certificate has been rebutted. *Addison*, 2023 IL 127119, ¶ 28. The State's argument contradicts the very definition of a *rebuttable* presumption. If a reviewing court does not review counsel's performance and relies solely on counsel's contentions in the filed certificate, the presumption is effectively a noncontestable conclusion, rendering Rule 651(c) ineffective with no mechanism to enforce it.

The State's recommended course of action has already been rejected by the appellate court in *People v. Komes*, 2011 IL App (2d) 100014. There, the Second District found that appointed counsel's motion to withdraw that merely alerted the circuit court of her belief that the petition was frivolous was inadequate under *Greer*. *Id.* at ¶ 20. The court specifically found that the motion was "plainly less than what the *Greer* court described as sufficient," reasoning:

> Counsel must make an effort to explain why the petitioner's "claims" are frivolous—we draw attention to the use of the plural noun. Given the ethical concerns underlying the [*Greer*] court's reasoning [citation], "claims" logically must mean all of the petitioner's claims. This is because any claim that will potentially allow counsel to produce a nonfrivolous amended petition is sufficient to give counsel an ethical basis to continue representation. *Id.* at ¶¶ 28, 29.

The State's suggestion that this Court allow so much deference to appointed counsel flies in the face of the very ethical concerns that the *Greer* court based its decision upon. To put it another way, counsel can withdraw from representation to avoid filing a frivolous petition with the court because they ethically are required to do so. *Greer*, 212 Ill. 2d at 205-09. The flipside of that responsibility to the courts, however, is that counsel is ethically and legally obligated to provide reasonable

assistance to the petitioner where there is *even one* nonfrivolous claim that can be raised. *Komes*, 2011 IL App (2d) 100014, ¶¶ 28-29; *see People v. Urzua,* 2023 IL 127789, ¶ 33 (In cases where counsel finds that a petition lacks merit, following *Greer*, "appointed counsel must explain why each of the petitioner's *pro se* claims lacks merit."). Thus, the level of deference that the State is suggesting be given to postconviction counsel is unethical and contradicts the underlying reasoning behind the *Greer* decision.

Another inescapable inference from the State's suggested standard is the potential harm that could result from granting such a high level of deference to appointed counsel. Just because a petition was not reviewed within 90 days of its filing, it does not mean that the petition is necessarily frivolous. It is vital that counsel appointed at the second stage be thorough in their investigation of the petitioner's claims and then present those claims in the appropriate legal form to the circuit court. *Addison*, 2023 IL 127119, ¶ 25. Consistent with *Addison*, reasonable assistance of counsel should also include presenting the reasons why claims do not have merit, particularly in a setting where counsel is the only person who can freely investigate off-the-record claims, and the circuit court will rely on counsel's representations before making a decision on whether to grant the motion to withdraw, and later, the State's motion to dismiss. The State's approach to counsel's 651(c) duties is improperly deferential, given that Frey's request is simple (counsel must explain why he was unable to address the due process claim involving information that was not in the trial record) and the potential harm caused would be significant (forfeiture of a potentially meritorious constitutional

deprivation).

The State further argues that a deferential standard should be applied to counsel's motion to withdraw because the circuit court is still capable of assessing the merits of the petition in the manner that it would have at the first stage. (St. Br. 18). Certainly, the circuit court did not do so here where the State's motion to dismiss merely adopted defense counsel's motion, and the circuit court explicitly stated that it found defense counsel's motion to be thorough and so it granted the State's motion to dismiss. (R. 26-27). Moreover, the law holds that once the circuit court has failed to review a petition within 90 days, advancement to the second-stage is mandatory and the court can no longer review the petition under first-stage standards. *People v. Porter*, 122 Ill. 2d 64, 85 (1988)(the statutorily allotted time frame for summary dismissal of a postconviction petition is mandatory and noncompliance renders any summary dismissal order void).

A petitioner is at a significantly greater disadvantage at the second stage than they were at the first stage. First, a petitioner must now meet the stricter standard, and make a substantial showing of a constitutional deprivation as opposed to the gist of a constitutional violation. *Coleman*, 183 Ill. 2d at 382. Second, at the second stage, a petitioner must be able to respond to the State's motion to dismiss because the adversarial nature of proceedings has started once the petition passes the first stage. *Cotto*, 2016 IL 119006, ¶ 27. If counsel withdraws at the second stage, petitioner must overcome both of those barriers on their own, likely with no formal legal training, in order to satisfy this higher standard. The State, in its proposal for a deferential definition of reasonable assistance, is dismissive

of the burden that would be placed on petitioners because of both the higher legal standard and the adversarial nature present in second-stage proceedings.

This case exemplifies the potential negative consequences of appointed counsel filing an incomplete motion to withdraw in the proceedings that occurred after counsel's withdrawal. Here, after counsel filed his incomplete motion to withdraw, the State explicitly stated in its motion to dismiss that it adopted *defense counsel's* argument from his motion to withdraw. (R. 25; C. 609). The State did not present any substantive oral or written argument, and it certainly did not address the due process issue that counsel had missed. Then, when the circuit court dismissed Frey's petition, it simply agreed with the State's assessment and stated that defense counsel's motion was thorough and, based upon defense counsel's representations, dismissed the petition. (R. 26-27). Thus, it appears from the record that neither appointed counsel, nor the prosecutor, nor the circuit court performed even a bare analysis of Frey's due process claim. This Court has found that where appointed counsel provides unreasonable representation by failing to ascertain or properly present petitioner's claims, the circuit court is unable to make a full assessment of the merits of the petition, which is why remand is required after a 651(c) violation. *Addison,* 2023 IL 127119, ¶¶ 41-42; *Kuehner,* 2015 IL 117695, ¶¶ 21-22. In this case, the circumstances exemplify how detrimental the State's proposed standard could be for a petitioner at the second stage of proceedings, representing themselves after counsel failed to adequately ascertain all of their claims and present them to the court.

The remedy that Frey requests is reasonable in comparison to the potential

harm. As this Court recently discussed in *Addison*, 2023 IL 127119, ¶ 37, it is undisputed that a reasonable level of assistance is a lower bar than the one prescribed by *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Accordingly, the remedy for a violation of these respective standards is reflective of that variance. The remedy for a decision that counsel failed under the *Strickland* standard is a new trial, whereas the remedy for a finding that second-stage counsel was unreasonable is only a remand for further postconviction proceedings. *Addison*, 2023 IL 127119, ¶ 37. Lowering the standard of reasonable representation to below what is considered "good practice" by even the State (St. Br. 18) is not only unnecessary because of the simple request being made (including each of petitioner's claims in a motion to withdraw), but also disproportionately prejudicial to a *pro se* petitioner who only has one opportunity to raise their allegations of constitutional deprivation.

There is no reason for this Court to expose petitioners to the risk of forfeiture by agreeing with the State's overly lenient reasonable assistance standard. To leave an avenue open where, through counsel's negligence, a petitioner's potentially meritorious issue could be forfeited is unnecessary and unduly risky. More importantly, counsel's omission is a violation of Rule 651(c) because it is a clear indication that a petitioner's allegation was overlooked, or at the very least, not properly presented to the circuit court for a final consideration of the merits or lack thereof. This Court should therefore find that, in failing to include Frey's due process claim in his motion to withdraw, postconviction counsel did not adhere to his 651(c) duties and remand the case for further second-stage proceedings.

B. Because postconviction counsel violated Rule 651(c), Frey does not need to show prejudice. Regardless, the record is ambiguous as to whether the issue has merit and so it must be remanded for further investigation.

The State questions whether Frey even raised the due process claim and further argues that the claim is frivolous and without merit. (St. Br. 20-21, 22-25). The State asserts that the record rebuts the claim because the second jury note did not contain a request to continue deliberations until the next day, Shaffer's affidavit did not sufficiently allege facts to support a claim of jury coercion, and the claim was fanciful. (St. Br. 23-24). The State's prejudice argument need not be addressed if this Court determines that counsel violated Rule 651(c) by omitting Frey's due process claim from his motion to withdraw. Noncompliance with Rule 651(c) does not require a harmless error assessment, and so this Court need not evaluate the merits of Frey's due process claim. *Suarez*, 224 Ill. 2d at 51-52; *Addison*, 2023 IL 127119, ¶ 35 (applying the *Suarez* rule even in cases where a 651(c) certificate was filed).

Initially, the State claims that "it is not clear" from Frey's *pro se* petition that the due process issue was intended to be a "standalone claim for relief." (St. Br. 19). The Second District correctly rejected this argument. *People v. Frey*, 2022 IL App (2d) 2110044-U, ¶ 32. Here, Frey concluded the main body of his petition with the due process issue, stating that the jury was deadlocked, but the "Judge told them they could not leave that night unless they all agreed...being outnumbered and pressured they took the defendants [sic] freedom[.]" (C. 525). He further elaborated on the claim on a page labeled "newly discovered evidence," and in the attached affidavit from Shaffer, where he more fully pled the factual details

of his claim. (C. 529-30). Liberally construing the petition, as the court must at second-stage proceedings, these factual allegations are more than sufficient to establish that Frey has in fact raised a discrete due process claim regarding the coercion of the jury during their deliberations. The State criticizes the viability of Frey's argument by arguing that it was not raised as a "standalone claim" (St. Br. 19-20), but fails to provide a definition or authority that describes what such a claim would look like. The Second District found that, under the actual standard for reviewing a petition at the second stage – i.e. whether, when construing the allegations liberally in light of the trial record, the petition makes a substantial showing of a constitutional violation – that Frey asserted a due process claim that was not reviewed by appointed counsel, the State, or the circuit court. *Frey*, 2022 IL App (2d) 2110044-U, ¶ 32. Accordingly, this Court should not accept the State's fabricated standard for factual allegations made in a *pro se* petition.

The State further argues that Frey's silence regarding this due process issue at the hearing on counsel's motion to withdraw or the hearing on the State's motion to dismiss implies that Frey never intended to make a discrete due process claim in the first place. (St. Br. 20-21). The Second District already rejected this argument, because the State did not cite to any authority that would suggest that Frey forfeited his claim by failing to bring it up at either hearing, and that has not changed here. *Frey*, 2022 IL App (2d) 2110044-U, ¶ 32. Moreover, Frey asserted to the court that he objected to counsel's withdrawal and that counsel did not make the calls that Frey requested of him (R. 1690, 1711), contrary to the State's assertion that Frey said nothing at the hearing on the motion to withdraw and the motion

to dismiss. (St. Br. 20-21). Frey's statements at both hearings suggest that counsel failed to adhere to his 651(c) duties to consult with Frey regarding his petition and ascertain his contentions. *See supra*, Arg. A, p. 21-22. These statements certainly do not support a finding that the claim did not exist in the first place, and do nothing to controvert the fact that counsel failed to address the claim.

Having established that Frey indeed raised the due process claim in regard to the jury's second note to the court, this Court need not review the merits of that claim. In *Addison*, 2023 IL 127119, ¶ 35, this Court held that where there is a violation of Rule 651(c), a petitioner need not show that his claims have merit for the case to be remanded. This Court found that "*all* postconviction petitioners are entitled to have counsel comply with the limited duties of Rule 651(c) before the merits of their petitions are determined."*Addison*, 2023 IL 127119, ¶ 37 (emphasis in original). Moreover, it is counsel's duty, not this Court's, to establish why the claims in a petition are frivolous. *Kuehner*, 2015 IL 117695, ¶ 22. Thus, if this Court finds that counsel failed to comply with 651(c), Frey need not show that the omitted issue has merit.

In *Addison*, postconviction counsel failed to put petitioner's claims in the proper legal form to avoid forfeiture. *Addison*, 2023 IL 127119, ¶ 26. While counsel in the case at hand filed an inadequate motion to withdraw, and counsel in *Addison* filed an inadequate amended petition, the reasoning and analysis of *Addison* is instructive because both attorneys failed to present their respective petitioner's claims to the circuit court in the appropriate legal form. Here, both the State, in its motion to dismiss, and the circuit court, in granting the State's motion, relied

upon counsel's incomplete motion to withdraw. Because counsel failed to address the due process issue, the circuit court did not review it within the appropriate legal framework. Even if that legal framework required the conclusion that the claim was ultimately frivolous, appointed counsel should still be required to present that issue and allow the circuit court to come to its own conclusion.

This Court has long upheld the 651(c) principle that a reviewing court cannot affirm the dismissal of a postconviction petition when counsel has failed to shape the claims into the proper legal form. *See Addison*, 2023 IL 127119, ¶ 41 (citing *People v. Turner*, 187 Ill. 2d 406, 416 (1999), *People v. Johnson*, 154 Ill. 2d 227, 246 (1993), and *Suarez*, 224 Ill. 2d at 48)(all holding that remand is required when appointed counsel does not adequately adhere to their duties under Rule 651(c), regardless of the merit of the claims raised in the petition). The State fails to explain how counsel's motion that completely omits one of the petitioner's claims could constitute reasonable assistance of counsel under Rule 651(c), and is this is because its position is contrary to case law. It follows, from *Addison*, *Kuehner*, and *Moore*, that counsel violates 651(c) and cannot withdraw without addressing all of the petitioner's claims. *Addison*, 2023 IL 127119, ¶ 41 (counsel must shape *pro se* petitioner's claims into the proper legal form by addressing procedural forfeiture of any issues in the amended petition); *Kuehner*, 2015 IL 117695, ¶¶ 21-22 (counsel withdrawing must explain why each *pro se* claim lacks merit, and that duty rests solely with counsel); *Moore*, 2018 IL App (2d) 1701230, ¶ 42 (omission of a *pro se* claim from counsel's motion to withdraw indicates that counsel failed to ascertain petitioner's contentions of constitutional deprivation and resulted in a 651(c)

violation).

The State ignores the above precedent and instead argues that this Court should assess the merits of Frey's claim, pursuant to *Greer*. (St. Br. 22). Though this Court assessed the merits of the petition in *Greer*, it need not do so here because the circumstances are different. In *Greer*, counsel filed a motion to withdraw detailing his actions after his appointment and explaining why "*each* of defendant's contentions" were frivolous. *Greer*, 212 Ill. 2d at 200 (emphasis added). This Court held that it was appropriate to allow postconviction counsel to withdraw where the claims lacked merit and it was clear from the record that counsel fulfilled his 651(c) duties. *Id.* at 211-12.

In the instant case, counsel failed to include a claim from Frey's petition, indicating that he did not fulfill his 651(c) duties. *Supra*, Arg. A. Moreover, even though this Court did not directly address what a sufficient motion to withdraw looked like, it implied that counsel should at least make some effort to explain each issue. *Greer,* 212 Ill. 2d at 211-12 ("[A]n attorney moving to withdraw should make some effort to explain why defendant's *claims* are frivolous...")(emphasis added). This Court has already held that, in the case of counsel filing a motion to withdraw as appointed counsel for a petition advanced to the second stage by a circuit court's finding on the merits, counsel's motion must include every issue raised in the *pro se* petition and an explanation as to why it is frivolous. *Kuehner*, 2015 IL 117695, ¶ 21. Further, before this Court's decision in *Kuehner*, the appellate court also interpreted *Greer* to require an assessment of the merits of every issue in a motion to withdraw, even where the petition was advanced by default. *Komes*,

2011 IL App (2d) 100014. The Second District found that the *Greer* court's use of the plural in describing counsel's duties to address petitioner's "claims" logically meant *all* of a petitioner's claims, because even one nonfrivolous claim would grant counsel an ethical basis to continue their representation. *Id.* at ¶ 29.

This interpretation by the appellate court aligns with this Court's decisions in *Turner*, *Johnson*, *Suarez*, *Kuehner*, and *Addison*, which all address what appointed counsel's duties look like under 651(c), and how to best remedy counsel's error when they fail to adhere to those duties. *See Addison*, 2023 IL 127119; *Turner*, 187 Ill. 2d 406; *Johnson*, 154 Ill. 2d 227; *Suarez*, 224 Ill. 2d 37; and *Kuehner*, 2015 IL 117695. These cases provide that a reviewing court should not review the merits of a petition after a finding of a 651(c) violation and, as described above, a violation occurred when counsel failed to include Frey's due process claim. Even though this Court engaged in a review of the merits of petitioner's underlying claims in *Greer*, counsel assessed the merits of each claim in his motion to withdraw and this Court ultimately found that counsel adhered to his 651(c) duties. *Greer*, 212 Ill. 2d at 200, 211-12. Here, Frey is arguing that counsel's failure to include one of Frey's *pro se* claims was a violation of 651(c), and renders counsel's assistance unreasonable. Thus, *Greer* is inapposite as to this point, and this Court should decline to address the merits of the omitted issue upon review.

Even if this Court were to attempt to review the merits of the omitted claim, the State's contention that the record rebuts Frey's claim is incorrect. (St. Br. 24-25). The direct appeal record contains a copy of a second jury note which reads, "[p]lease advise – we have 10-guilty, 2-not guilty[.] The 2-not guilty are firm that the state

did not prove guilt on all three counts." (C. 375). The second jury note is addressed in the memorandum of orders as having been submitted at 8:10 p.m. and then filed. (C. 487), but the record of proceedings is silent as to how the trial court responded, as noted by the Second District on direct appeal. *Frey*, 2018 IL App (2d) 150868-U, ¶ 63, n.2. However, Frey supported his due process claim with an affidavit describing what occurred during deliberations. (C. 530). At the second stage, a petitioner's factual allegations are taken as true. *People v. Coleman*, 183 Ill. 2d 366, 385 (1998) ("The inquiry into whether a postconviction petition contains sufficient allegations of constitutional deprivations does not require the circuit court to engage in any fact-finding or credibility determinations."). The State points to the fact that there was not a request in the second jury note that they be allowed to continue deliberations until the next day. (St. Br. 24). The note does, however, state that the jury was deadlocked, and asked for advice on how to proceed. (C. 375). This, in combination with Shaffer's affidavit and Frey's allegations, both of which must be taken as true, support a plausible scenario where the trial court told the jury to proceed until they reached a unanimous verdict after receiving such a note. Thus, where the report of proceedings is silent as to any discussion of, or response to, the second jury note, and a court reviewing the petition at the second stage must take Frey's factual allegations as true, the record does not rebut Frey's due process claim.

More importantly, whatever ambiguities might exist between the record and Frey's factual pleadings are why counsel is appointed at the second stage – it is counsel's duty under Rule 651(c) to investigate and properly substantiate

a legal claim for presentation to the circuit court. If counsel is unable to do so, they should record their investigation and lack of findings in a motion to withdraw. Contrary to the State's argument, the fact that the report of proceedings does not contain a transcript regarding the second jury note is not an indication that the claim is rebutted by the record. Rather, it is an indication that an off-the-record investigation is necessary to determine how the jury note was handled. Incidentally, this is exactly the type of investigation that appointed counsel is required to perform under 651(c) mandates.

Finally, the State argues that Shaffer's affidavit does not allege sufficient facts to support Frey's contention that the trial court coerced the jury into a guilty verdict. (St. Br. 23-24). Notably, the State did not make this argument in the circuit court either in its written motion to dismiss or at the hearing on its motion. (R. 25; C. 609-10). The reason it did not do so is because the State relied wholly on postconviction counsel's motion to withdraw. (C. 609). The State's argument now only highlights the extent of counsel's error in either possibly failing to investigate the claim or submit a proper affidavit or clearly failing to include the due process claim in his motion to withdraw, explaining why he was unable to raise the claim. Because counsel failed to even mention the claim in his motion to withdraw, much less describe his investigation into the claim and his reason for then concluding that it was meritless, it would be premature for a reviewing court to determine the merits of the claim based on the State's allegations of factual ambiguities. It is postconviction counsel's duty to take the claims raised by the petitioner and formulate them into proper legal claims. *Addison*, 2023 IL 127119, ¶ 26. Here,

where counsel failed to ascertain and perhaps investigate Frey's due process claim and then failed to present it to the circuit court, or otherwise explain why counsel would be unable to do so, it would be premature to review the merits of the issue because it is not in its "final form." *See Moore,* 2018 IL App (2d) 1701230, ¶ 42.

In sum, counsel's failure to include Frey's due process claim in his motion to withdraw was a violation of his duties under Rule 651(c), regardless of the procedure by which the case advanced to the second stage. Because a 651(c) violation is prejudicial on its face, no harmless error analysis need be performed before this Court decides to remand for further proceedings. Even if this Court were to attempt to analyze the merits of Frey's due process claim, it could not do so based on the record alone. Accordingly, this Court should affirm the appellate court, reversing the dismissal of Frey's petition, and remanding for new second-stage proceedings with the appointment of new counsel.

CONCLUSION

For the foregoing reasons, Russell Frey, petitioner-appellee, respectfully requests that this Court affirm the appellate court's decision reversing the dismissal of Frey's post-conviction petition, and remanding for further second-stage proceedings with the appointment of new counsel.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 38 pages.

/s/ Christina Solomon
CHRISTINA SOLOMON
Assistant Appellate Defender

No. 128644

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellant, -vs- RUSSELL A. FREY, Petitioner-Appellee.	))))))))))	Appeal from the Appellate Court of Illinois, No. 2-21-0044. There on appeal from the Circuit Court of the Fifteenth Judicial Circuit, Lee County, Illinois, No. 12 CF 44. Honorable Jacquelyn D. Ackert, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On August 25, 2023, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the petitioner-appellee in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

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