No. 127680

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- JOHN PINGELTON, Petitioner-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-18-0751. There on appeal from the Circuit Court of the Seventh Judicial Circuit, Sangamon County, Illinois, No. 05-CF-1295. Honorable John Belz, Judge Presiding.

REPLY BRIEF FOR PETITIONER-APPELLANT

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ARGUMENT

The appellate court reversibly erred when it determined that a violation of John Pingelton's constitutional right to procedural due process during the second stage of the Post-Conviction Hearing Act was subject to harmless-error review.

In his opening brief, John Pingelton ("Pingelton") argued that the circuit court deprived him of his procedural-due-process rights during the second stage of the Post-Conviction Hearing Act ("Act"). (Opening Brief, p. 9–10, 13–18.) More specifically, Pingelton contended that the circuit court denied him of adequate notice and the opportunity to be heard on the State's dispositive motion to dismiss his post-conviction petition. (Opening Brief, p. 9–10, 13–18.) In that process, Pingelton emphasized that the circuit court set a "status" hearing for the following day, disposed of his petition at that next-day "status" hearing, and utilized a procedure where only the State was heard on its own motion to dismiss. (Opening Brief, p. 9–10, 13–18.) See *People v. Pingelton*, 2021 IL App (4th) 180751, ¶¶ 32–34.

As the circuit court denied him his right to due process, Pingelton asserted that the circuit court's constitutional error required a remand for additional proceedings that afford him his right to procedural due process and that the appellate court wrongly concluded that the violation was subject to harmless-error review. (Opening Brief, p. 9–10, 18–27.) See *Pingelton*, 2021 IL App (4th) 180751, ¶ 34. In so doing, Pingelton demonstrated that the appellate court overlooked its own precedent, failed to follow binding precedent from this Court, and ignored significant policy reasons militating against the application of harmless-error review to procedural-due-process violations under the Act. (Opening Brief, p. 9–10, 18–27.) Alternatively, Pingelton explained that, even if the error was subject to harmless-error review, his petition included a potentially meritorious claim that he received ineffective assistance of trial and direct-appeal counsel where his defense counsel failed to exclude improper testimony from two physicians. (Opening Brief, p. 9–10, 27–34.)

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The State does not agree. In its response, the State first contends that the appellate court erroneously found that Pingelton was deprived of adequate notice or an opportunity to be heard during the Act's second stage. (Response Brief, p. 16–23.) To support that belief, the State posits that the dispositive motion before the circuit court was post-conviction counsel's motion to withdraw and not its motion to dismiss. (Response Brief, p. 16–21.) The State further offers that, because post-conviction counsel's motion to withdraw contained similar arguments as its motion to dismiss, Pingelton was afforded a meaningful opportunity to oppose the State's motion. (Response Brief, p. 22–23.) Finally, the State proposes that, even if Pingelton was deprived of his constitutional right to procedural due process, any such deprivation was harmless. (Response Brief, p. 24–38.) The State is wrong on all accounts.

Advocating for the propriety of the circuit court's actions, the State theorizes that Pingelton had adequate notice of and an opportunity to contest his post-conviction counsel's motion to withdraw, which was the dispositive motion in this case as the circuit court's order granting the motion would necessitate the merits-based dismissal of Pingelton's petition. (Response Brief, p. 15, 19.) However, the State's argument is contrary to the Act's plain language and established precedent on this matter.

Under the Act, the resolution of a post-conviction counsel's motion to withdraw at the second stage does not provide a final adjudication on a post-conviction petition. *People v. Jackson*, 2015 IL App (3d) 130575, ¶ 18 ("It is improper for a trial court to dismiss a postconviction petition simply because postconviction counsel has been allowed to withdraw as counsel"); see *People v. Thomas*, 2013 IL App (2d) 120646, ¶ 8 (stating that, during the second stage, a circuit court was not authorized to dispose of a petition until the State had either answered or moved to dismiss). In support of that point, the Act provides that, when a petition is advanced to the second stage, the State shall answer or move to dismiss. 725 ILCS 5/122-5 (2015).

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No other dispositive motion is authorized under the Act's plain language during the second stage, save for the petitioner's voluntary withdrawal of his or her petition with leave of court. See 725 ILCS 5/122-5.

Given the Act's plain language, a circuit court may only dismiss a petition at the second stage either on a State's motion to dismiss or on the petitioner's request to voluntarily withdraw his or her petition. See *People v. Boclair*, 202 Ill. 2d 89, 100 (2002) (explaining that, "[i]f the State does not file a motion to dismiss or if the circuit court denies the State's motion, the circuit court *will proceed to the third stage* and conduct an evidentiary hearing on the merits of the petition") (emphasis added); *People v. Allen*, 2015 IL 113135, ¶ 35 (noting that, at the second stage, the circuit court may dismiss a post-conviction petition upon the State's motion). As such, the Act does not authorize a circuit court to *sua sponte* dismiss a petition during the second stage or to dismiss a petition premised on post-conviction counsel's motion to withdraw. *Jackson*, 2015 IL App (3d) 130575, ¶ 18; *People v. Volkmar*, 363 Ill. App. 3d 668, 673 (5th Dist. 2006) (reasoning that, "once counsel has been appointed, any dismissal of the petition should be by adversary process, based on a motion to dismiss filed by the prosecutor, and not done *sua sponte* and summarily by the circuit court").

Because the Act envisions and permits the State to move to dismiss a post-conviction petition, the resolution of defense counsel's motion to withdraw only determines whether a petitioner will proceed *pro se* or retain appointed counsel's assistance during the post-conviction process. See *People v. Kuehner*, 2015 IL 117695, ¶ 22 (explaining that a post-appointment motion to withdraw is effectively a request to deny the defendant his or her request for the appointment of counsel); cf. *People v. Shortridge*, 2012 IL App (4th) 100663, ¶ 14 (concluding that post-conviction counsel, if he or she believed that the petitioner's claims lacked merit, must move to withdraw as counsel instead of confessing the State's motion to dismiss).

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As post-conviction counsel's motion to withdraw is limited to the matter of post-conviction counsel's representation, it cannot, by itself, necessitate the petition's merits-based dismissal or act as a final dispositive motion. *Jackson*, 2015 IL App (3d) 130575, ¶ 18.

Stated more simply, post-conviction counsel's motion to withdraw is distinct from the State's motion to dismiss, and the notice and opportunity to contest counsel's motion to withdraw does not operate to provide the petitioner with notice and the opportunity to address the State's motion to dismiss, the merits of which dictates the ultimate fate of his or her petition. See, e.g., *People v. Triplett*, 2022 IL App (3d) 200017, ¶ 16 (reasoning that a circuit court errs in simultaneously hearing and ruling on post-conviction counsel's motion to withdraw and the State's motion to dismiss as it effectively deprives the defendant of an opportunity to challenge the State's motion to dismiss).So to ensure that a petitioner receives his or her right to procedural due process under the Act, he or she is entitled to receive adequate notice and a proper opportunity to counter both his post-conviction counsel's motion to withdraw *and* the State's motion to dismiss. See, e.g., *Triplett*, 2022 IL App (3d) 200017, ¶ 18; *People v. Sherman*, 101 Ill. App. 3d 1131, 1134 (3d Dist. 1981) ("[T]he defendant was entitled to adequate notice of counsel's motion to withdraw *and* the prosecution's motion to dismiss in order to allow the defendant to respond *pro se*") (emphasis added).

Due to the Act's plain language and the aforementioned established precedent on this matter, the State's reliance on this Court's decisions in *People v. Greer*, 212 Ill. 2d 192 (2004), and *People v. Kuehner*, 2015 IL 117695, is not particularly helpful. (Response Brief, p. 16–21.) As recognized by the State, this Court in *Greer* did not disturb the appellate court's ultimate determination that it must remand, even though post-conviction counsel's motion to withdraw was properly granted, because the circuit court was not authorized to dismiss the petitioner's post-conviction petition based on counsel's withdrawal motion. (Response Brief, p. 19.) *Greer*, 212 Ill. 2d at 212. More specifically, the appellate court in *Greer* determined that "[t]he

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fact that counsel has been granted leave to withdraw does not mean that the postconviction petition is dismissed" as "[t]he trial court's power to dismiss a postconviction petition *sua sponte* on the basis that the petition is frivolous or patently without merit must be exercised within 90 days after the filing of the petition." *People v. Greer*, 341 Ill. App. 3d 906, 910 (4th Dist. 2003) (referring to 725 ILCS 5/122-2.1(a)(2), (b) (2000)). Looking to this Court's precedent in *People v. Kitchen*, 189 Ill. 2d 424 (1999), the appellate court in *Greer* concluded that it was reversible error for the circuit court to dismiss the petitioner's petition where the parties were litigating post-conviction counsel's representation and there was no motion to dismiss properly before the court. *Greer*, 341 Ill. App. 3d at 910.

By allowing the appellate court's ultimate decision–that is, remanding the cause to the circuit court for additional proceedings–to stand, this Court in *Greer* limited its decision to the matter of whether the Act provides any impediment to appointed post-conviction counsel's efforts to withdraw in order to comply with his or her ethical obligations to the court. *Greer*, 212 Ill. 2d at 211–12. This Court in *Greer* did not otherwise establish that a circuit court had the authority to dismiss a petition on the basis of post-conviction counsel's motion to withdraw when that motion was filed outside the 90-day period expressly outlined by the legislature for dismissing a petition as frivolous or patently without merit, independent of any motion to dismiss. See *id.* Similarly, this Court's decision in *Kuehner* only examined whether the circuit court properly granted post-conviction counsel's motion to withdraw–after the petition was advanced to the second stage within 90 days–when counsel's motion failed to explain why each of the petitioner's claims lacked merit. *Kuehner*, 2015 IL 117695, ¶ 22. Consequently, this Court's judgment in *Kuenher* was constrained to defining the parameters of a properly filed motion to withdraw after the circuit court affirmatively advances a petition to the Act's second stage and the precise standards in adjudicating those motions. See *id.*

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Quite simply, this Court's decisions in *Greer* and *Kuehner* present a narrow analysis into the precise nature of post-conviction counsel's representation and endeavor to strike an appropriate balance between counsel's competing duties of zealously representing his or her clients' interests and to avoid advancing frivolous claims before the court. *Greer*, 212 Ill. 2d at 211–12; *Kuehner*, 2015 IL 117695, ¶ 22. In each case's analysis, this Court supplied that the appropriate balance under the Act is for post-conviction counsel to move to withdraw; this Court did not rule that post-conviction counsel must seek the dismissal of the petitioner's case if he or she found that the claims therein were frivolous or patently without merit. *Greer*, 212 Ill. 2d at 211–12; *Kuehner*, 2015 IL 117695, ¶ 27. Extending *Greer* and *Kuehner* to now require the dismissal of a post-conviction petition if the circuit court grants counsel's motion to withdraw unnecessarily disrupts that delicate balance and interferes with the attorney-client relationship by placing a client and his or her attorney on opposite sides of a dispositive, outcome-determinative motion. In the end, *Greer* and *Kuehner* do not suggest, much less dictate, that a successful motion to withdraw disposes all outstanding post-conviction litigation in a case. See *Greer*, 212 Ill. 2d at 211–12; *Kuehner*, 2015 IL 117695, ¶ 27.

Not only are *Greer* and *Kuehner* inapposite here, the only other authority the State relies on to establish that the circuit court did not err is Justice Schmidt's dissents in *Triplett*, *Hayes*, and *Jackson*. (Response brief, p. 20–21.) See *Triplett*, 2022 IL App (3d) 200017, ¶ 24 (Schmidt, J., dissenting); *People v. Hayes*, 2016 IL App (3d) 130769, ¶¶ 27–28 (Schmidt, J., dissenting); *Jackson*, 2015 IL App (3d) 130575, ¶¶ 35–36 (Schmidt, J., dissenting). As the State explicitly acknowledges, however, this objection has been repeatedly rejected by the appellate courts. (Response Brief, p. 20–21.) More importantly, Justice Schmidt's dissents do not account for the fact that there may be defenses applicable to the State's motion to dismiss that are not available to contest post-conviction counsel's motion to withdraw, such as an objection

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that the motion to dismiss does not comply with Act's requirements. Additionally, the dissents do not consider that, after post-conviction counsel withdraws and no longer controls the litigation on the petition, a petitioner may with leave of court make further amendments to the petition or add additional claims that present a substantial showing of a constitutional claim.

And, to be sure, the State's proposal that the motion to withdraw is the outcome-determinative motion, independent of a motion to dismiss, also ignores a petitioner's right to proceed *pro se* and obtain any agency over the manner in which his or her case is litigated. By its express terms, the Act does not require a petitioner to proceed with appointed or private counsel. See, e.g., 725 ILCS 5/122-4 (2015) ("If appointment of counsel is so requested, and the petition is not dismissed pursuant to Section 122-2.1, the court shall appoint counsel if satisfied that the petitioner has no means to procure counsel"). Especially where, as here, the petitioner asks to appear *pro se* in response to post-conviction counsel's motion to withdraw, a procedure that uses the motion to withdraw to determine the petition's outcome rather than just counsel's withdrawal forecloses the petitioner from dispensing with post-conviction counsel and proceeding *pro se* against the State's motion to dismiss. (Sup. R. 21.) Ultimately, this Court should reject the State's position that the resolution of a successful motion to withdraw necessarily results in the dismissal of a petitioner's post-conviction petition. (Response Brief, p. 16–21.) See *Greer*, 341 Ill. App. 3d at 910.

The State next offers that, even if the circuit court's order granting post-conviction counsel's motion to withdraw did not automatically dispense with Pingelton's petition, Pingelton received notice and a meaningful opportunity to address counsel's motion to withdraw, which was nearly identical to the State's motion to dismiss. (Response Brief, p. 21–23.) Notably, the State does not provide any authority to support its position that a petitioner's response to his or her counsel's motion to withdraw would satisfy his or her procedural-due-process

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rights concerning the State's separate motion to dismiss. See Ill. S. Ct. R. 341(h)(7) (requiring an appellant's brief to contain argument that includes citation to authorities); Ill. S. Ct. R. 341(i) (applying Rule 341(h)(7) to appellee's briefs). By failing to support its contention with the required authority, the State forfeits its argument on this matter. See *Bartlow v. Costigan*, 2014 IL 115152, ¶ 52 (recognizing that a "reviewing court is entitled to have issues clearly defined with pertinent authority cited") (internal quotations omitted).

Forfeiture notwithstanding, the State's argument also disregards that, on May 8, 2018, the circuit court entered a docket entry, scheduling a "status" hearing for the next day, May 9, 2018. (C. 21.) But what actually transpired at the next-day hearing was fundamentally different than a status hearing. (C. 21; Sup. R. 8–25.) See *People v. Bounds*, 182 Ill. 2d 1, 5 (1998) (plainly stating that a circuit court may not convert a status call to a hearing on the merits without notice to the parties). There was no indication that Pingelton was given prior notice that the State's motion to dismiss *or* post-conviction counsel's motion to withdraw would be adjudicated at that "status" hearing. (C. 21.) So even if the respective motion to withdraw and the motion to dismiss contained similar arguments, Pingelton did not receive adequate prior notice that either motion would be resolved at the next-day status hearing. See *Bounds*, 182 Ill. 2d at 5.

The State further complains that Pingelton was able to sufficiently challenge, albeit indirectly, its motion to dismiss in the process of litigating post-conviction counsel's motion to withdraw. (Response Brief, p. 22–23.) To be clear, the State does not advocate that Pingelton, as a represented litigant, could have directly argued against the State's motion to dismiss. (Response Brief, p. 22–23.) Just as importantly, the State's position overlooks that Pingelton could have raised several objections to the State's dispositive motion to dismiss that were unrelated to post-conviction counsel's motion to withdraw. For instance, the State's motion to dismiss was filed on March 11, 2016, well after the 30-day deadline following the court's order on December 17, 2015 that advanced the petition to the second stage under 725 ILCS 5/122-2.1(b). (C. 19.) See 725 ILCS 5/122-5 ("Within 30 days after the making of an order

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pursuant to subsection (b) of Section 122-2.1, or within such further time as the court may set, the State shall answer or move to dismiss. *** No other or further pleadings shall be filed except as the court may order"). As the State never sought leave of court to file its untimely motion, the State's motion to dismiss was not authorized by the Act or properly before the court. See 725 ILCS 5/122-5.

Similarly, at the "status" hearing on May 9, 2018, the State attempted to orally adopt and incorporate all of the arguments that were presented in post-conviction counsel's motion to withdraw and memorandum in support of that motion. (Sup. R. 8–9.) However, the State never sought and obtained leave to amend the motion to dismiss to include the arguments orally presented to the circuit court or reduce the arguments presented to writing. (Sup. R. 8–9.) As a result, Pingelton did not receive any notice that the State's motion to dismiss would incorporate and rely on the arguments made by his counsel in the motion to withdraw. See, e.g., *People v. McMillen*, 2021 IL App (1st) 190442, ¶¶ 20–21 (finding reversible error occurred where the petitioner had no notice of the State's oral motion to dismiss his petition at a "status" hearing and no opportunity to respond to the motion's merits).

In all, contrary to the State's arguments, post-conviction counsel's motion to withdraw did not operate to dismiss Pingelton's petition. See *Greer*, 341 Ill. App. 3d at 910. Further, Pingelton did not receive any notice or the opportunity to respond to the dispositive motion in his case–the State's motion to dismiss–as the circuit court adjudicated the motion at a hastily scheduled "status" hearing and while Pingelton was represented by counsel who was simultaneously attempting to withdraw and not protecting his interests. See *Triplett*, 2022 IL App (3d) 200017, ¶¶ 16–18; *People v. Williams*, 2021 IL App (3d) 190082, ¶¶ 22–23; *Hayes*, 2016 IL App (3d) 130769, ¶ 19; *Jackson*, 2015 IL App (3d) 130575, ¶¶ 18–20. Without proper notice and an adequate opportunity to directly respond to the State's motion to dismiss, the circuit court failed to afford Pingelton the"critical" right to procedural due process under the Act. See *Kitchen*, 189 Ill. 2d at 435.

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Even if the circuit court deprived Pingelton of his right to procedural due process, the State contends that any error was harmless and the circuit court's judgment should be affirmed. (Response Brief, p. 24–38.) Yet the State did not raise that a violation of Pingelton's right to procedural due process was subject to harmless-error review before the appellate court. Because the State did not argue that the circuit court's error could be reviewed for harmless error before the appellate court, the State forfeits its contention that it applied on appeal before this Court. See *People v. Holman*, 2017 IL 120655, ¶ 28.

In support of its new theory, the State asks that this Court extend its decision in *People v. Stoecker*, 2020 IL 124807, which involved a procedural-due-process violation during a Section 2-1401 proceeding (735 ILCS 5/2-1401), to constitutional deprivations under the Act. (Response Brief, p. 24–27.) In so doing, the State emphasizes that are no meaningful differences between Section 2-1401 proceedings and litigation under the Act. (Response Brief, p. 24–27.) However, the State's analysis does not address that *Stoecker* itself limited its analysis to Section 2-1401 proceedings and acknowledged that the procedures used in the Act have "no application whatsoever" to Section 2-1401 proceedings as they are "entirely different form[s] of statutory collateral relief." *Stoecker*, 2020 IL 124807, ¶ 41 (internal quotation omitted). But even more fundamentally, the State does not account for the substantial differences present in Section 2-1401 proceedings that render the effect of any procedural errors quantifiable and determinate, as opposed to post-conviction litigation under the Act.

For instance, Section 2-1401 petitions must be filed within 2 years after the entry of the order or judgment with only a few limited exceptions, such as where the challenge is to a void order or the delay is attributed to a legal disability or fraudulent concealment. 735 ILCS 5/2-1401(c), (f) (2020); *Stoecker*, 2020 IL 124807, ¶ 27. In comparison, post-conviction petitions may be filed outside of the timing limitations if the petitioner can show that the delay was not due to his or her culpable negligence. 725 ILCS 5/122-1(c) (2015); *Boclair*, 202 Ill. 2d at 101 (reasoning that time is not an inherent element of the right to bring a post-conviction petition).

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Given the more stringent timing requirements associated with filing a Section 2-1401 petition, it is easier to determine on review whether such a petition is patently incurable as a matter of law, due to the failure to comply with the statutory timing requirements, than potential, unalleged claims that a petitioner was not culpably negligent so as to excuse a belatedly filed post-conviction petition. Cf. *Stoecker*, 2020 IL 124807, ¶ 27 (explaining that a Section 2-1401 petition filed 16 years after the deadline was patently incurable).

Similarly, Section 2-1401 petitions have a narrower scope that render the proceedings more amenable for review of whether any procedural errors affected the possibility that a potentially meritorious claim was improperly dismissed. As recognized by this Court, a Section 2-1401 petition, as it relates to a criminal case, provides an avenue to correct errors of fact that, unknown to the petitioner and the court when the judgment was entered, would have prevented its rendition. See *People v. Haynes*, 192 Ill. 2d 437, 461 (2000). To that point, a reviewing court can determine whether that alleged mistake of fact, if proven, would be of any consequence to the underlying proceeding and so it is more tenable to determine whether further amendment or procedure could resolve any deficiencies in the purportedly defective claim. In contrast, the Act offers a forum for incarcerated defendants to assert claims that they have been unconstitutionally deprived of their liberty. See *People v. Johnson*, 2018 IL 122227, ¶ 17. Due to its broader focus on adjudicating all constitutional claims, it is more difficult to predict whether, with notice and an opportunity to respond, a petitioner could have sufficiently amended his or her claim with existing facts to potentially warrant relief under the Act. So while both Section 2-1401 proceedings and litigation under the Act can offer petitioners collateral relief from existing judgments, they are sufficiently different in form and substance that this Court should not apply *Stoecker* to procedural-due-process deprivations under the Act.

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Instead, this Court should follow its precedent established in *Bounds* and *Kitchen*; that is, procedural-due-process violations require remand for additional post-conviction proceedings without litigating whether the underlying claims contained merit. *Bounds*, 182 Ill. 2d at 5, *Kitchen*, 189 Ill. 2d at 435. On this matter, the State does not suggest that either *Bounds* or *Kitchen* were wrongly decided. (Response Brief, p. 27–28.) Rather, the State offers that whether harmless-error review applied to procedural-due-process violations was not before this Court in *Bounds* or *Kitchen*. (Response Brief, p. 27–28.) In this process, the State fails to appreciate the plain language used by this Court in its respective decisions.

Taking *Bounds* first, this Court, when addressing the merits of the circuit court's dismissal, determined that the circuit court's conduct in converting a status call into a hearing on the State's motion to dismiss without prior notice or the opportunity to respond violated the petitioner's right to procedural due process. *Bounds*, 182 Ill. 2d at 5. More specifically, this Court ruled that "[t]he procedure followed thus violated defendant's right to procedural due process under the Illinois Constitution. [citation omitted] *Accordingly, we reverse and remand* to the circuit court for further proceedings." *Id.* (emphasis added). In so doing, this Court necessarily established a framework where procedural-due-process deprivations under the Act constituted reversible error without a showing of individualized prejudice. See *id.*

Turning to *Kitchen*, this Court first presumed that the circuit court's dismissal order was premised on the petition's merits. *Kitchen*, 189 Ill. 2d at 433–34. Nevertheless, this Court reasoned that, before it reviewed the merits of the dismissal, it *must address* the petitioner's challenge to the manner in which the circuit court adjudicated his petition. *Kitchen*, 189 Ill. 2d at 433–34. After finding that the petitioner was denied his right to procedural due process, this Court determined that "*Bounds* compels the *vacatur* of the circuit court's order in this case." *Id.* at 434. Consequently, this Court reasoned that, because the circuit court's decision to deny the petition was made without notice to the parties and without the benefit of argument,

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it would "therefore, vacate the circuit court's order[.]" *Id.* at 435. To make it its position very clear, this Court explicitly stated that, in vacating the court's judgment, it intended to send a message to the bench and bar that the protection of the right to procedural due process under the Act is of critical importance. *Id.*

As made clear by this Court's plain language, *Bounds* compels vacating a circuit court's dismissal order where the procedure utilized by the circuit court violates the petitioner's right to procedural due process and that issue must be addressed prior to any review of the petition's merits. *Kitchen*, 189 Ill. 2d at 433–34. As applied in *Kitchen*, this mandate to vacate a circuit court's order based on improper procedure even extends to a circuit court's merits-based dismissal. *Id.* at 434–35. Not only that, this Court expressly stated that this remedy of vacating the circuit court's order was intentional and served to send a message that reinforced the critical importance of the petitioner's procedural rights under the Act. *Id.* Contrary to the State's attempts to distinguish *Bounds* and *Kitchen*, it is difficult to envision a scenario where this Court's precedent in *Bounds* and *Kitchen* remains binding law if this Court finds that harmless-error review applies to procedural-due-process claims.

The State next takes issue with Pingelton analogizing the deprivation of notice and the opportunity to be heard to violations of Illinois Supreme Court Rule 651(c), which governs appointed post-conviction counsel's duties during the second stage. (Response Brief, p. 28–29.) Yet, in *People v. Suarez*, 224 Ill. 2d 37 (2007), this Court determined that the denial of proper representation as statutorily provided by the Act would frustrate its purpose in litigating potentially meritorious constitutional claims and that fulfillment of the rule's requirements would not be encouraged if this Court ignored its nonobservance in appealed cases. 224 Ill. 2d at 51. Just like noncompliance with Rule 651(c), depriving litigants of notice and the opportunity to address a dispositive motion interferes with their ability to present meritorious claims to the court and make adequate amendments to address any of their pleading's deficiencies. See *Suarez*, 224 Ill. 2d at 51.

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Suarez is helpful for another reason as well; it dispels the State's contention that only structural errors are not subject to harmless-error review. (Response Brief, p. 24.) As explained in the opening brief, there are numerous procedural errors under the Act that mandate reversal without regard to the petition's merits. (Opening Brief, p. 24–25.) In contrast, the State posits that an error must be deemed structural before it can be remanded without a harmless-error analysis. (Response Brief, p. 24.) However, this Court's decision in *Suarez* to reject a harmless-error test for Rule 651(c) violations was not predicated on the fact that Rule 651(c) violations are structural error. *Suarez*, 224 Ill. 2d at 51. Instead, this Court determined that noncompliance with Rule 651(c) would frustrate the purpose of the Act and deny the petitioner the statutory right of counsel granted by the Act, and so reversal was required. See *id.* The error presented here–a deprivation of a petitioner's right to procedural due process–would similarly frustrate the Act's purpose of providing an adequate forum to litigate a petitioner's constitutional claims and so requires remand without regard to the petition's merits. See *Bounds*, 182 Ill. 2d at 5, *Kitchen*, 189 Ill. 2d at 435.

The State also offers that there are no sound policy reasons for declining to apply harmless-error review to constitutional errors under the Act, arguing that overburdened circuit courts are presumed to follow the law and will faithfully protect a petitioner's right to procedural due process. (Response Brief, p. 29–30.) The State's position first overlooks that this Court has previously felt compelled to admonish the bench and bar by vacating a judgment obtained in violation of a petitioner's procedural-due-process rights and that, nevertheless, these violations continue unabated. *Kitchen*, 189 Ill. 2d at 435; see, e.g., *Triplett*, 2022 IL App (3d) 200017, ¶¶ 16–18; *Williams*, 2021 IL App (3d) 190082, ¶¶ 22–23; *Pingelton*, 2021 IL App (4th) 180751, ¶¶ 32–34. Finally, the State's conclusion disregards that a hearing with proper notice and an adequate opportunity to respond does little to overburden circuit courts and the fundamental importance of this right in this system's jurisprudence, especially as the right to be heard should

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not be predicating on ultimately succeeding at that hearing. Cf. *Fuentes v. Shevin*, 407 U.S. 67, 87 (1972) ("The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing"); *United States v. Smith*, 30 F.4th 1334, 1338 (11th Cir. 2022) ("[T]he denial of an opportunity to litigate can never be harmless" as a party "*must* have his day in court") (internal quotations omitted).

In response to Pingelton's alternative argument that the circuit court's error was not harmless given that his petition contained a potentially meritorious ineffective-assistance-of-counsel claim, the State offers that the claim was plainly lacking in merit. (Response Brief, p. 30.) More specifically, the State takes issue with Pingelton's conclusion that the two physicians–Dr. Dennis Adams and Dr. Robert Sliwa–were not qualified, or provided an adequate foundation, to opine on whether the absence of physical evidence of trauma was consistent with the occurrence of sexual assault or to testify that most examinations of sexual-assault victims do not reveal any physical evidence of trauma. (Response Brief, p. 32.) According to the State, defense counsel did not provide deficient representation by failing to object to the physicians' improper testimony as there (1) are no precise requirements regarding the expertise needed to qualify a witness to provide an expert opinion, (2) is no obligation for the circuit court to certify or qualify a witness as an expert absent an objection, and (3) was no basis to challenge the foundation of the physicians' expert opinion in the case. (Response Brief, p. 30–36.) The State's points misunderstand Pingelton's contentions on appeal.

While the State does articulate that there are no precise requirements regarding the level of expertise required for a witness to provide expert testimony, it does not follow that there are not any requirements regarding the level of education, scientific study, or training necessary for an expert witness or that the standard necessary to proffer expert testimony was met in this instance. (Response Brief, p. 32.) Nor does the State provide any authority for its position that the physicians were qualified in this case. (Response Brief, p. 31–33.)

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The cases cited by the State–*People v. King*, 2020 IL 123926, *People v. Lovejoy*, 235 Ill. 2d 97 (2009), *People v. Novak*, 163 Ill. 2d 93 (1994), and *People v. Pasch*, 152 Ill. 2d 133 (1992)–do not address the qualifications of a physician to provide expert testimony at trial.

And the State's contention that there was no duty on the circuit court to certify or qualify that a witness could provide expert opinion absent an objection is similarly misplaced. (Response Brief, p. 34.) Indeed, Pingelton asserted that his defense counsel was ineffective for failing to object that the physicians were never certified to testify in this case because they were not qualified to offer the testimony at issue and that their improper opinion lacked an adequate foundation. (Opening Brief, p. 30–31.)

Regarding the physicians' foundation for their belief that most sexual-assault cases do not produce any evidence of physical trauma, the State explains that the physicians' testimony was not speculative and that any deficiencies in their opinions anyway went to the weight given to their testimony rather than its admissibility. (Response Brief, p. 34–36.) Again, while generally weaknesses in an expert's opinion are pertinent to the weight given to that opinion, the proponent of the expert witness must still provide an adequate foundation for that testimony and show that the facts, data, or opinions relied upon by the expert are of a type reasonably relied upon by experts in that particular field in forming opinions or inferences. See *People v. Lind*, 307 Ill. App. 3d 727, 737 (4th Dist. 1999). And that was not met here. To that end, the physicians each testified it was, in essence, uncommon to find evidence of physical trauma in sexual-assault cases and victims. (R. 336, 346, 353.) As such, the physicians did not limit their opinions to only that most examinations of persons alleging that they have been sexually assaulted lack any findings of physical trauma. (R. 336, 346, 353.) But critically, the physicians would have no basis to surmise that most sexual assaults do not actually produce any discernible physical trauma in the victims, without the underlying knowledge of whether the victim was assaulted.

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Nevertheless, the State explains that any failure to prevent the physicians' improper testimony did not prejudice Pingelton. (Response Brief, p. 36–37.) In that assessment, the State does not contest Pingelton's assertions that the evidence was close or that the State did not admit into evidence any corroboration of the complainants' testimony outside of the physicians' testimony. (Opening Brief, p. 32; Response Brief, p. 36–37.) Instead, the State seems to suggest that the physicians' testimony would not have misled the jurors as the jurors would have drawn their own common-sense inferences from the evidence. (Response Brief, p. 37.) But the State ignores that, by placing an expert on the stand, there was a greater likelihood that the jurors would have adopted the physicians' improper and speculative opinion that most sexual-assault victims do not experience discernible physical trauma. (R. 336, 346, 353.) See *King*, 2020 IL 123926, ¶ 40 (finding that the admission of improper expert testimony was not harmless, even where the expert was just permitted to draw common-sense inferences from the crime scene evidence, as he gave "expert" credence to the State's theory of the case).

In the end, this Court should hold that Pingelton was denied his constitutional right to procedural due process under the Act where he was not afforded prior notice and an adequate opportunity to respond to the State's motion to dismiss, requiring a remand for additional second-stage proceedings. See *Bounds*, 182 Ill. 2d at 5; *Kitchen*, 189 Ill. 2d at 435; see, e.g., *Triplett*, 2022 IL App (3d) 200017, ¶¶ 18, 20. But even if this Court concludes that a procedural-due-process deprivation is subject to a harmless-error analysis, then this Court should nonetheless find that Pingelton was harmed by the circuit court's procedure as his petition presented a potentially meritorious claim that he received ineffective assistance of trial and direct-appeal counsels. Pingelton further relies on the arguments presented in his opening brief.

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CONCLUSION

For the foregoing reasons, John Pingelton ("Pingelton") respectfully requests that this Court reverse the appellate court's judgment and remand to the circuit court for additional second-stage proceedings where Pingelton receives adequate notice of, and a proper opportunity to be heard on, the State's motion to dismiss as well as appointed post-conviction counsel to represent Pingelton's interests or leave to proceed *pro se*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is eighteen pages.

/s/Edward J. Wittrig
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No. 127680

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- JOHN PINGELTON, Petitioner-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 4-18-0751. There on appeal from the Circuit Court of the Seventh Judicial Circuit, Sangamon County, Illinois, No. 05-CF-1295. Honorable John Belz, 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 16, 2022, the Reply Brief 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-appellant in an envelope deposited in a U.S. mail box in Springfield, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

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CYNTHIA A. GRANT
SUPREME COURT CLERK

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