

No. 127119

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF	)	Appeal from the Appellate Court of
ILLINOIS,	)	Illinois, No. 2-18-0545.
)	
Respondent-Appellant,	)	There on appeal from the Circuit
	)	Court of the Sixteenth Judicial
-vs-	)	Circuit, Kane County, Illinois, No.
	)	11 CF 1606.
)	
DION ADDISON,	)	Honorable
	)	Clint Hull,
Petitioner-Appellee.)	Judge Presiding.

BRIEF AND ARGUMENT FOR PETITIONER-APPELLEE

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ISSUES PRESENTED FOR REVIEW

- I. Whether Dion Addison rebutted the presumption that post-conviction counsel complied with her Rule 651(c) duties, despite her filing a certificate of compliance, where the record shows that she failed to amend the petition to add a claim of ineffective assistance of appellate counsel to overcome the forfeiture of his *pro se* claims.
- II. Whether harmless error should excuse Addison's post-conviction counsel's non-compliance with Rule 651(c) merely because counsel filed a Rule 651(c) certificate.

STATUTES AND RULES INVOLVED

Illinois Supreme Court Rule 651. Appeals in Post-Conviction 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 *in absentia*, Dion Addison was convicted of unlawful possession of a stolen motor vehicle, unlawful possession of a converted motor vehicle, forgery, and theft by deception. (C. 94, 96-97; R. 475) Addison was also sentenced *in absentia* to a mandatory Class X sentence of 15 years in prison for possession of a stolen motor vehicle and five years for forgery, to be served concurrently. (C. 132-33, 146; R. 598-99) In 2015, Addison filed his *pro se* post-conviction petition, which was advanced to second stage. (C. 209-53, 261) Post-conviction counsel filed an amended petition, which contained claims that were based on the record and should have been filed on direct appeal, and her Supreme Court Rule 651(c) certificate on July 17, 2017. (C. 383-93) The circuit court granted the State's motion to dismiss the amended petition. (C. 474-75) The appellate court reversed the dismissal of Addison's petition and found that post-conviction counsel rendered an unreasonable level of assistance by failing to amend the petition to include a claim of ineffective assistance of appellate counsel to overcome the forfeiture of Addison's claims. *People v. Addison*, 2021 IL App (2d) 180545, ¶¶ 1, 32-35.

TRIAL PROCEEDINGS

Motion to Suppress Statements

Addison filed a *motion in limine* in which he alleged that his statements were involuntary because they were given in exchange for a promise of his release from custody. (C. 71-72, 329-30) The suppression hearing proceeded without Addison

because he did not appear in court. (R. 84)

United States Secret Service Special Agent Shannon McDowell testified that he spoke to Kerry Drake and Addison on the morning of June 26, 2011 at the Geneva Police Department station. (R. 87-90) Addison was given his *Miranda* warnings and said he understood them. (R. 93-94) Addison signed a waiver form and agreed to speak with McDowell. (R. 94-95) After Addison made his statement, McDowell talked to him about the possibility of working with the Secret Service. (R. 96) The Geneva police asked McDowell for his recommendation regarding Addison's custody status. (R. 97-98) He told the police that Addison could be charged or released from custody if he was going to provide further information or assist the Secret Service. (R. 98-99) To his knowledge, Addison had been released from custody. (R. 99)

Trial counsel did not call any witnesses or present any evidence on Addison's behalf. (R. 99-100) Counsel told the trial court that he had anticipated calling Addison to testify, but he was not present in court. (R. 100) After hearing the evidence and the parties' arguments, the trial court denied Addison's motion. (R.101)

Jury Trial

The trial evidence established that at around midnight on June 20,2011, Addison and Drake responded to Kevin Ziegler's Craigslist ad listing his motorcycle for sale for \$3,000. (R. 254-55, 257-58, 260, 287) After Addison, who had identified himself as Eric, showed Ziegler some of the money, Ziegler let Drake test drive the motorcycle. (R. 259-60) Ziegler approved the sale and Addison gave Ziegler the money in exchange for the motorcycle's title and keys. (R. 261)

At his apartment, Ziegler noticed that some of the bills had the same serial numbers and called the police. (R. 262-63) Geneva Police Department Officer Robert Bailey examined the bills and determined they were fake. (R. 264) Bailey noticed that some of the bills had the same serial numbers, the color looked slightly different than that of authentic currency, and they were missing magnetic strips. (R. 280-82) He identified eight different serial numbers shared by the 160 bills. (R. 282)

After Bailey went to Ziegler's apartment, Drake was pulled over for driving the motorcycle without a license plate. (R. 256-66, 270, 287, 318-19, 344-45) Bailey took Ziegler to the location of the traffic stop where he identified the motorcycle as his and the driver as Drake. (R. 270, 287) Drake called Addison on behalf of the officers and asked him bring proof of ownership due to the traffic stop. (R. 289-90) Addison agreed to meet Drake and the police, but did not show up. (R. 290-91) Drake called Addison two more times and Addison said he was on his way, but never showed up. (R. 291-93) After waiting 40 minutes, Bailey returned the motorcycle to Ziegler and instructed him to take it to the police station so that the officers could take pictures of it. (R. 294, 347)

At around 2:14 a.m., Addison was arrested for driving on a suspended driver's license. (R. 295-96, 322-23) The police found two separate printouts with Mapquest directions one to Ziegler's address and one to an Indiana address and a handwritten list of motorcycles for sale in Addison's car. (R. 296-97, 328) Addison was released to Bailey's custody. (R. 296, 328) Agent McDowell responded to Bailey's call for assistance and determined that every single bill lacked security features and that eight different serial numbers appeared on the set of 160 bills. (R. 297,

357, 360)

Addison waived his *Miranda* rights and agreed to talk to McDowell. (R. 362-64, 367-68) Addison made two statements. In his first statement, he said that the motorcycle was for Drake and that they drove to Geneva to buy it from a man named Kevin or Calvin, who had listed it for sale on Craigslist. (R. 369) Addison later told the officers that he had been untruthful. (R. 371) In his second statement, he said he wanted to buy the motorcycle for himself and asked Drake, who had a valid motorcycle license, to go with him to Geneva to test drive the bike. (R. 371-72) After Drake test drove the bike and gave his okay, Addison paid the buyer with counterfeit money. (R. 372) Addison further stated that Drake knew that counterfeit money would be used for the purchase the bike and that he had obtained the bills from a man named Roy. (R. 373) Addison had paid \$600 for \$3000 in counterfeit bills. (R. 375) After the purchase of the bike, Addison and Drake went to purchase gas and then drove off separately. (R. 375) Shortly thereafter, Drake called Addison to tell him that the police stopped him for driving the bike without a license plate and that the police suspected that Addison used counterfeit money for the bike. (R. 376)

Addison was released on his own recognizance after he confessed. (R. 383) McDowell acknowledged that he had asked Addison's assistance in getting more counterfeit bills from Roy. (R. 383-84) McDowell, however, denied discussing the possibility of Addison not being charged with a crime in exchange for his cooperation with the Secret Service before Addison made his statement. (R. 399) He did concede that Addison was ultimately charged with the instant offenses because he had

failed to provide any information regarding the counterfeit bill manufacturer. (R. 403)

Bailey took the bills to the evidence storage room, but at trial could not recognize the evidence bag. (R. 283-84) Neither his signature nor initials were on the bag and the bills were now clipped and organized by serial numbers. (R. 283-34, 306) The property room technician testified that after an investigator examined the bills, she placed them in a new and smaller evidence bag. (R. 340) When two other officers examined the bills, she opened and released the new evidence bag. (C. 45; R. 340)

Defense counsel presented no evidence or any witnesses on Addison's behalf. (R. 433) The jury found Addison guilty of all the charges. (C. 94, 96-97; R. 475)

Post-Trial and Sentencing

After denying Addison's motion for new trial, the trial court sentenced him *in absentia* to concurrent terms of 15 years in prison for unlawful possession of a stolen motor vehicle and five years in prison for forgery and merged the remaining counts. (C. 132-33; R. 597-99) On June 1, 2013, Addison was arrested and he filed a motion to reconsider sentence, which was denied. (C. 161-62, 165-66, 173; R. 604-05, 620)

Direct Appeal

On direct appeal, the appellate court granted an agreed motion to correct Addison's *mittimus* to reflect two additional days of sentence credit. (C. 208)

Post-Conviction Proceedings

Post-Conviction Petition

On March 25, 2015, Addison filed a timely *pro se* post-conviction petition. (C. 210-53) The petition raised 16 issues, including claims of ineffective assistance of trial counsel for failing to file a timely motion to suppress statements and for failing to properly investigate evidence in order to successfully argue Addison's motion to suppress statements, and a claim that the trial court erred in denying the motion to suppress statements. (C. 211, 218, 220-21) The petition also alleged that appellate counsel was ineffective for failing to raise these issues on direct appeal. (C. 210-13, 232) In support of his petition, Addison attached his affidavit in which he asserted, *inter alia*, that he confessed because McDowell said he would be released without any charges if he provided the name of the person who gave him the counterfeit money. (C. 237)

The circuit court advanced Addison's petition to second stage and appointed counsel on April 15, 2015. (C. 261) On July 17, 2017, post-conviction counsel filed an amended petition in which she raised four ineffective assistance of trial counsel claims: (1) failure to file a motion to suppress statements based on a *Miranda* violation, (C. 386-88), (2) failure to file a motion to suppress involuntary statements, (C. 388-89), (3) failure to object to improper expert testimony regarding the counterfeit currency, (C. 389-90), and (4) failure to raise a sufficiency of evidence challenge based on a discrepancy in the number of counterfeit bills inventoried and introduced as evidence at trial. (C. 390-92) The petition also alleged that the trial court erred in giving the accountability jury instruction. (C. 392-93) In support

of the ineffectiveness claim regarding trial counsel's failure to file a motion to suppress the involuntary statements, post-conviction counsel attached the motion and amended *motion in limine* challenging Addison's statement to McDowell, McDowell's investigation report, which described Addison's cooperation with the Secret Service, Addison's signed *Miranda* waiver form, and proof that he refused to make a written statement to McDowell. (C. 327-30, 362-76) Counsel did not submit an affidavit from Addison.

On the same day, post-conviction counsel filed her certificate pursuant to Illinois Supreme Court Rule 651(c). (C. 324) In the certificate, she averred that she consulted with Addison to ascertain his contentions, examined the trial court file and record of proceedings, and made any amendments to the petition as necessary for an adequate presentation of Addison's contentions. (C. 324)

On January 30, 2018, the State moved to dismiss Addison's petition. (C. 401-53) In the motion, the State argued that Addison's claims could have been raised on direct appeal. (C. 411-13) As to the ineffectiveness claim pertaining to the failure to file a motion to suppress the involuntary statement, the State asserted that Addison's claim failed because it was not supported with any affidavits or evidence *de hors* the record. (C. 420-21)

At the hearing, the circuit court remarked that "[o]ne of the arguments that hasn't been addressed in great detail but is addressed in the State's motion to dismiss is the concept of waiver." (R. 773) The court asked post-conviction counsel to address if the claims were forfeited. (R. 773-74) The court asked:

I am just - - I am just asking on the waiver argument.

Everything that has been presented by way of the amended PCP are arguments that I believe could have been made on direct appeal. Arguments that you have brought forth are all matters that were in the record. So you don't have to have an answer. I just wondered if you wished to address it.

(R. 774-75) Counsel replied, "Other than that perhaps there was the same oversight on the appellate level as the trial counsel had." (R. 775)

On July 10, 2018, the circuit court dismissed Addison's petition in a written order, in which the court found that Addison failed to make a substantial showing of a violation of a constitutional right. (C. 474-75)

Post-Conviction Appeal

On appeal, Addison argued that post-conviction counsel failed to comply with Illinois Supreme Court Rule 651(c) and rendered an unreasonable level of assistance because she (1) failed to obtain an affidavit from Addison as evidentiary support for his claim that trial counsel was ineffective for failing to properly challenge the voluntariness of his statement; and (2) failed to amend the petition to include an allegation of ineffective assistance of appellate counsel necessary to avoid procedural default of Addison's other claims.

In a published decision, the appellate court agreed with Addison that post-conviction counsel violated Rule 651(c) by failing to amend the petition to include a claim of ineffective assistance of appellate counsel to avoid the forfeiture of Addison's claims. *People v. Addison*, 2021 IL App (2d) 180545, ¶¶ 1, 29. The appellate court found that, when necessary to prevent forfeiture, post-conviction counsel's failure to include a claim of ineffective assistance of appellate counsel, especially where it was alleged in the *pro se* petition, is "patently unreasonable." *Id.*, ¶ 28.

The Court rejected the State's argument that Addison needed to show prejudice demonstrating that his claims had merit and held that counsel must show compliance with Rule 651(c) regardless of whether petitioner's claims are viable. *Id.*, ¶ 30. The Court did not address Addison's claim that post-conviction counsel failed to comply with Rule 651(c) by failing to submit his affidavit in support of his claim since it was remanding the case and directing the appointment of counsel based on post-conviction counsel's failure to allege appellate counsel's ineffectiveness. *Id.*, ¶ 33.

On September 29, 2021, this Court granted the State's petition for leave to appeal.

ARGUMENT

- I. Dion Addison rebutted the presumption that post-conviction counsel complied with her Rule 651(c) duties, despite her filing a certificate of compliance, where the record shows that she failed to amend the petition to add a claim of ineffective assistance of appellate counsel to overcome the forfeiture of Addison's claims.**

Filing an Illinois Supreme Court Rule 651(c) certificate creates a rebuttable presumption that post-conviction counsel provided reasonable assistance, not a conclusive finding that counsel did in fact properly shape and present a *pro se* petitioner's claims. *People v. Perkins*, 229 Ill. 2d 34, 42, 44 (2008). In his *pro se* post-conviction petition, Dion Addison raised multiple claims of ineffective assistance of trial counsel. Recognizing that these claims should have been raised on direct appeal, Addison alleged that his appellate counsel was ineffective for failing to do so. Post-conviction counsel adopted five the ineffectiveness claims in an amended petition, but did not address appellate counsel's performance. On appeal from the circuit court's second-stage dismissal, Addison argued that post-conviction counsel failed to comply with Rule 651(c), despite filing a certificate. Following decades of this Court's precedent, the appellate court unanimously concluded that Addison rebutted the presumption of reasonable assistance because the record established that counsel failed to make a routine amendment a claim of ineffective assistance of appellate counsel in order to avoid the forfeiture of five of Addison's *pro se* claims. *People v. Addison*, 2021 IL App (2d) 180545, ¶¶ 1, 29.

The State counters that while the failure to make this routine amendment demonstrates a lack of compliance in the absence of a Rule 651(c) certificate, it does not rebut the presumption of compliance when a certificate is filed. Rather,

a petitioner may only rebut the presumption of compliance if he shows that the underlying claims have merit.(St. Br. 11-15) This Court should reject the State’s illogical proposition because failure to make a routine amendment is noncompliance with Rule 651(c) regardless of filing of a certificate. If counsel’s failure is insufficient to establish compliance in the absence of a certificate, that same failure necessarily rebuts a presumption of compliance. The State’s position is also contrary to this Court’s precedent and the State has failed to provide a compelling argument as to why a different standard should apply to make a showing of unreasonable assistance of counsel merely because she filed a Rule 651(c) certificate. For the reasons stated below, this Court should uphold the appellate court’s decision and remand Addison’s case for further proceedings with the appointment of new post-conviction counsel.

A. General Post-Conviction Principles

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.* Post-conviction proceedings have three possible stages. *People v. Tate*, 2012 IL 112214, ¶ 9. At the first stage, a petition may only be dismissed if the claims are found to be frivolous or patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 10, (2009). If, as here, the petition is advanced to the second stage of proceedings, counsel is appointed to represent the indigent petitioner, and the State may file a motion to dismiss or an answer to the petition. *People v. Cotto*, 2016 IL 119006, ¶ 27. 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. *Tate*, 2012 IL 112214, ¶ 10.

There is no constitutional right to counsel in post-conviction proceedings. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *People v. Moore*, 189 Ill. 2d 521, 541, (2000). Because such representation is a statutory right rather than a constitutional one, the petitioner is entitled to the standard of representation required by the Act, which this Court has defined as a “reasonable” level of assistance. *People v. Perkins*, 229 Ill. 2d 34, 42 (2008). The Act provides for the assistance of counsel because the legislature anticipated that most of the petitions under the Act would be filed *pro se* by prisoners who did not have the aid of counsel in their preparation. *People v. Owens*, 139 Ill. 2d 351, 358 (1990). To ensure that the complaints of a prisoner might be adequately presented, the statute contemplates that the attorney appointed to represent an indigent petitioner will ascertain the basis of the petitioner’s complaints, shape those complaints into appropriate legal form and present the prisoner’s constitutional contentions to the court. *People v. Johnson*, 154 Ill. 2d 227, 237–38 (1993). The Act cannot serve its purpose properly unless the attorney appointed to represent an indigent petitioner performs these duties. *Owens*, 139 Ill. 2d at 359.

To ensure that petitioners receive this level of assistance, Illinois Supreme Court Rule 651(c) imposes specific duties on post-conviction counsel and requires

that the record disclose that counsel has fulfilled these mandatory duties. Ill. S. Ct. R. 651(c) (eff. Jul. 1, 2017). Pursuant to this rule, counsel's duties include (1) consulting with the defendant to ascertain his contentions of deprivation of constitutional rights, (2) examining the record of the proceedings at trial, and (3) making any amendments that are necessary for an adequate presentation of the defendant's contentions. Ill. S. Ct. R. 651(c).

Substantial compliance with Rule 651(c) is sufficient. *People v. Wright*, 149 Ill.2d 36, 63 (1992). Substantial compliance with Rule 651(c) may be shown by post-conviction counsel's certificate of compliance or by the record itself. *People v. Lander*, 215 Ill. 2d 577, 584 (2008). If counsel files a Rule 651 (c) certificate, she 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). *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19. The question of whether counsel provided reasonable assistance in compliance with Rule 651(c) is reviewed *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007).

Rule 651(C) requires counsel to amend a *pro se* petition to allege ineffective assistance of appellate counsel to avoid the procedural bar of forfeiture. *People v. Turner*, 187 Ill. 2d 406, 413-14 (1999). Counsel's failure to raise a routine amendment of ineffective assistance of counsel to overcome the forfeiture of the *pro se* claims cannot be excused on the basis of harmless error. *Suarez*, 224 Ill. 2d at 52.

B. Because the record rebuts the presumption that Addison's counsel provided reasonable assistance, the consideration of the merits of the claims is premature.

The State's position that the underlying merits of the *pro se* claims must be considered in determining whether Addison rebutted the presumption that his post-conviction counsel rendered a reasonable level of assistance is unavailing for four reasons. (St. Br. 9-17) First, it is premised upon a misapprehension of this Court's holding in *People v. Greer*, 212 Ill. 2d 192 (2004), which does not permit post-conviction counsel to merely stand on claims that she has determined were viable, but not adequately raised by the *pro se* petitioner for second-stage purposes. (St. Br. 12) Second, the State has failed to show that reviewing courts cannot look to the record to determine if a petitioner rebutted the presumption that counsel shaped the *pro se* claims into proper legal form, despite the filing of a 651(c) certificate. (St. Br. 12-15) Third, the State's reliance on this Court's decision in *People v. English*, 2013 IL 112890, does not support its position that counsel does not have to make a routine amendment to a *pro se* petition to include a claim of ineffective assistance of appellate counsel to overcome the forfeiture of the *pro se* claims, if those claims are without underlying merit. (St. Br. 14-15) Finally, it is premature to evaluate the merits of the underlying claims at second-stage post-conviction proceedings where post-conviction counsel's incompetence has been shown.

In his *pro se* petition, Addison raised, *inter alia*, several claims of ineffective assistance of trial counsel for failure to challenge the chain of custody of the counterfeit bills and for failure to suppress his statements. (C. 211, 218, 221)

Recognizing that these claims were based on the trial record, Addison, who is not even an attorney, attempted to overcome the procedural bar of waiver by arguing that appellate counsel was ineffective for failing to raise them on direct appeal. (C. 211-13, 228, 232) When the circuit court advanced the petition to the second-stage on its merits, appointed post-conviction counsel adopted four of Addison's ineffective assistance of trial counsel claims and included them in her amended petition. (C. 383-92) Although all of these claims were based on the trial court record, counsel inexplicably did not include a claim of ineffective assistance of appellate counsel to overcome the procedural default of the claims. Had she reviewed Addison's *pro se* petition and the record, as she certified that she had done in her Rule 651(c) certificate, she should have realized that she had to allege the ineffectiveness of appellate counsel in her amended petition. (C. 324) Indeed, Addison alleged ineffective assistance of appellate counsel times 14 different time throughout his *pro se* petition. (C. 210-13, 232)

Addison's post-conviction counsel had a further opportunity to amend the petition to include a claim of ineffective assistance of appellate counsel when the State moved to dismiss the petition. In its motion to dismiss and orally at the motion's hearing, the State argued that each of the claims in the amended petition had been forfeited because they were "present on the face of the original appellate record," "available to appellate counsel," and could have been raised on direct appeal. (C. 411) Notably, post-conviction counsel failed to allege appellate counsel's ineffectiveness during her argument at the hearing. (R. 755-68) Counsel's omission prompted the circuit court to ask her why she had not addressed waiver. (R. 773)

The following colloquy ensued:

THE COURT: [...] One of the arguments that hasn't been addressed in great detail but is addressed in the State's motion to dismiss is the concept of waiver.

And so could you address why you don't believe that these issues that you have addressed would not and could not have been raised on direct appeal?

[COUNSEL]: Your Honor, on information and belief, having spoken to my client, his appellate counsel represented to him that if it wasn't specifically argued at trial that he could not use that information. [. . .]

THE COURT: I am just - - I am just asking on the waiver argument.

Everything that has been presented by way of the amended PCP are arguments that I believe could have been made on direct appeal. Arguments that you have brought forth are all matters that were in the record.

So you don't have to have an answer. I just wondered if you wished to address it. [. . .]

[COUNSEL]: Other than perhaps there was the same oversight on the appellate level as the trial counsel had.

(R. 774-75) This exchange is further evidence that counsel acted unreasonably because she ignored *Turner's* directive to avoid the forfeiture of the claims by raising a claim of ineffective assistance of appellate counsel. Accordingly, counsel's inaction demonstrated non-compliance, in spite of the filing of a Rule 651(c) certificate.

1. ***People v. Greer*, 212 Ill. 2d 192 (2004), does not excuse Addison's post-conviction counsel's failure to overcome the forfeiture of his *pro se* claims.**

Citing to *Greer*, the State argues that Addison's post-conviction counsel was not required to "pursue a claim of ineffective assistance of appellate counsel

if that claim lacked merit.” (St. Br. 12) This is an inaccurate and incomplete reading of *Greer*. Notably, *Greer* does not stand for this proposition. *Greer* held that post-conviction counsel is ethically obligated to withdraw if she believes there are no meritorious issues. *Greer*, 212 Ill. 2d at 209. In *People v. Kuehner*, 2015 IL 117695, this Court found that where post-conviction counsel’s investigation reveals that a claim is in fact meritless, counsel has a duty to demonstrate as much to the circuit court when she moves to withdraw. *Id.*, ¶ 21. Therefore, neither *Greer* nor *Kuehner* support the State’s proposition that Addison’s counsel was not required to properly shape and present the claims in proper legal form where she adopted and included the claims in an amended petition. Rather, under *Greer* and *Kuehner*, if counsel believed the claims lacked merit, she was required to withdraw them.

Further, the State’s position that post-conviction counsel, who determines that a *pro se* claim is frivolous, may merely file a 651(c) certificate and stand on the claim conflicts with counsel’s ethical obligations. (St. Br. 12) Illinois Rule of Professional Conduct 3.1 provides in relevant part:

A lawyer shall not bring or defend a proceedings, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good-faith argument for an extension, modification or reversal of existing law. Ill. R. Prof.’l Conduct R. 3.1 (eff. Jan. I. 2010)

When a post-conviction counsel stands on the claims in a petition and files a 651(c) certificate, counsel is certifying that all necessary amendments to the petition have been made. Ill. S. Ct. R. 651(c). Necessary amendments would include the removal of those claims that an attorney cannot “assert” due to their frivolity.

If this were not the case, then this Court would not have specifically recognized in both *Greer* and *Kuehner* that there are cases where post-conviction counsel will be ethically prohibited from presenting the defendant's claims, making withdrawal necessary. *Kuehner*, 2015 IL 117695, ¶ 21; *Greer*, 212 Ill. 2d at 206. It is inconceivable that the State's implication that post-conviction counsel either knew or believed Addison's claims were frivolous but, rather than moving to withdraw the claims, she intentionally failed to shape the claims into proper legal form, amounts to a claim that counsel acted unethically.

More importantly, where post-conviction counsel adopted some of Addison's *pro se* claims, but abandoned others in her amended petition, the record establishes that she determined several of Addison's *pro se* ineffective assistance of trial counsel claims had sufficient merit for second-stage purposes. In his *pro se* petition, Addison raised 16 allegations of constitutional violations. (C. 210-31) The circuit court advanced the petition to second stage and appointed counsel. (C. 261) Her 651(c) certificate indicates she reviewed the claims and examined the record to determine if she would file an amended petition and which claims to include. (C. 324) The record shows that counsel withdrew 11 of Addison's *pro se* claims and adopted four of his ineffective assistance of trial counsel claims in her amended petition. (C. 386-88) This demonstrates that counsel recognized that pursuant to *Greer* and *Kuehner* she was ethically obligated to withdraw any claims that were in fact frivolous and patently without merit. *Greer*, 212 Ill. 2d at 206; *Kuehner*, 2015 IL 117695, ¶ 2. On the other hand, by adopting Addison's four ineffective assistance of trial counsel claims, she averred that these claims were not frivolous. As the

State correctly notes, “Counsel’s determination of whether to include the *pro se* allegations in the amended petition should be afforded deference.” (St. Br. 16) Because counsel affirmatively believed that four of Addison’s ineffective assistance of trial counsel claims had merit, she was required to make a routine amendment to overcome the forfeiture of those claims. *People v. Turner*, 187 Ill.2d 406, 412-13 (1999).

2. The proposition of law set forth in *People v. Turner*, 187 Ill. 2d 406 (1999), that if the record shows that post-conviction counsel failed to avoid the procedural default of the claims, counsel acted unreasonably, applies whether or not counsel filed a Rule 651(c) certificate.

The failure to amend a petition to include a claim of ineffective assistance of appellate counsel is one of the few specific amendments that this Court has instructed that post-conviction attorneys *must* make when necessary. *People v. Turner*, 187 Ill.2d 406, 414 (1999). In this case, the appellate court relied on *Turner* and found that the record established that Addison’s post-conviction counsel failed to make this routine amendment and counsel’s inaction directly contributed to the dismissal of Addison’s petition at the second stage. *People v. Addison*, 2021 IL App (2d) 180545, ¶ 19. The State, however, contends that *Turner*’s analysis of whether the record was sufficient to demonstrate compliance with Rule 651(c) does not similarly rebut the presumption of compliance here because Addison’s counsel filed a 651(c) certificate. (St. Br. 12-14) According to the State, in order to rebut the presumption of compliance, courts must look at the underlying merits of the claims because post-conviction counsel is required to only amend meritorious claims to allege ineffective assistance of counsel. (St. Br. 14-15) For the reasons

stated below, the State's position is unavailing.

The filing of a 651(c) certificate creates only a *rebuttable* presumption of compliance with the rule. Compliance with Rule 651(c) duties, such as the duty to make all the necessary amendments for an adequate presentation of a petitioner's *pro se* claims, does not hinge solely on whether post-conviction counsel filed a *pro forma* certificate of compliance or not. Indeed, *Turner* does not include such limiting language. *Turner* held that post-conviction counsel has an affirmative obligation to amend a petition to avoid procedural default of the claims by alleging ineffective assistance of appellate counsel. *Turner*, 187 Ill. 2d at 414. Nowhere in the decision did this Court specify that the duty to cure procedural defects is relieved merely by the filing of a *pro forma* 651(c) certificate. Because all post-conviction attorneys must cure routine procedural defects, the failure to do so establishes non-compliance with 651(c).

It necessarily follows that where an appellant claims that his post-conviction counsel failed to cure routine procedural defects, notwithstanding counsel's filing of a 651(c) certificate, courts must look at the record to determine if counsel, made a claim of ineffective assistance of appellate counsel to avoid the forfeiture of the *pro se* claims. In *Turner*, this Court looked at the record to determine, in the absence of a 651(c) certificate, whether counsel consulted with the petition to ascertain his constitutional claims, examined the record of the proceedings at trial and sentencing, and made the necessary amendments for the adequate presentation of the *pro se* claims. *Id.* at 410. Just as a court looks to the record to show compliance with Rule 651(c) in absence of a certificate, a court must look to the record to see

if the petitioner rebutted the presumption of compliance in spite of the filing of a 651(c) certificate. *See People v. Perkins*, 229 Ill. 2d 34, 50-52 (2007) (this Court looked to the record when it determined that post-conviction, who filed a 651(c) certificate, provided reasonable assistance where he did not amend the petition to address untimeliness). Regardless of whether counsel filed a 651(c) certificate, court must look to the record to determine whether counsel fully complied with her duties, which is required regardless of the merits of the underlying claim.

The State further attempts to distinguish *Turner* by contending that Addison's post-conviction counsel's performance was less deficient than that in *Turner* and not a "total failure." (St. Br. 13) At the outset, the State incorrectly contends that Addison solely complained that counsel failed to allege ineffective assistance of appellate counsel to overcome the forfeiture of his claims. (St. Br. 11-12) Addison, however, also contended that counsel rendered an unreasonable level of assistance because she failed to file an affidavit supporting the allegations in the amended post-conviction petition. *Addison*, 2021 IL App (2d) 180545, ¶ 16. The appellate court did not address Addison's unreasonable assistance claim regarding the affidavit because the court had already found that counsel unreasonably failed to allege ineffective assistance of appellate counsel to overcome the procedural bar of waiver. *Id.*, ¶ 33. Even if post-conviction counsel's representation did not amount to "total failure," the result for Addison was the same as that for petitioner in *Turner*: the merits of his petition were never reached by the circuit court.

Here, the record shows that counsel essentially did nothing to shape the petitioner's claims into appropriate legal form. *Turner*, 187 Ill. 2d at 416-17. Under

Turner this constitutes unreasonable assistance. She could have easily made a routine amendment to the petition, but she failed to do so. Indeed, Addison would have been in a better position if counsel had stood on his *pro se* petition which included a claim of ineffective assistance of appellate counsel to avoid the procedural default of his claims. Counsel's inaction prevented the circuit court from properly considering Addison's underlying claims. Although the circuit court did not specify that it found the claims forfeited in its dismissal order, (C. 474-75), the court's comments regarding forfeiture at the motion to dismiss hearing suggest that the court considered whether the claims were forfeited due to post-conviction counsel's inaction when the court made its ruling. *Cf. People v. Wardell*, 230 Ill. App. 3d 1093, 1103 (1st Dist. 1992) ("If it is on [the judge's] tongue, it most assuredly must be on his mind.")). To tolerate such inadequate representation would render the appointment of counsel in post-conviction proceedings nothing but "an empty formality." *Turner*, 187 Ill. 2d at 417 (citing *People v. Garrison*, 43 Ill. 2d 121, 123 (1969)). This Court cannot allow post-conviction counsel to be shielded from review where she fails to comply with Rule 651(c) merely because the underlying claims were not shaped properly.

3. **This Court's decisions in *People v. English*, 2013 IL 112890, and *People v. Flores*, 153 Ill. 2d 264 (1992), do not support the State's argument that post-conviction counsel's failure to cure the procedural defects in a petition does not rebut the presumption of compliance where the underlying *pro se* claims may not be meritorious.**

In further support of its claim that the presumption of compliance is only

rebutted if the underlying claims have merit, the State relies on the holding in *People v. English*, 2013 IL 112890, ¶34, to argue that appellate counsel is required to raise only meritorious issues. (St. Br. 14-15) *English* is distinguishable from this case for three reasons. First, *English* involved a third-stage post-conviction appeal. *Id.*, 24, 32. At the evidentiary hearing, the petitioner presented evidence and the circuit court engaged in fact-finding and made credibility determinations. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). Therefore, the court could look at the merits of the underlying claim based on evidence to determine whether the petitioner made a showing a constitutional violation by a preponderance of the evidence. *People v. Coleman*, 2013 IL 113307, ¶ 92. Addison's petition was dismissed at the second stage where the circuit court cannot engage in fact finding. *People v. Domagala*, 2013 IL 113688, ¶ 35. Second, *English* raised a substantive constitutional claim of ineffective assistance of appellate counsel, whereas Addison is raising a claim centered around whether post-conviction forfeited his *pro se* claims by failing to raise a claim of ineffective assistance of appellate counsel. Third, unlike in *English*, a claim of ineffective assistance of appellate counsel is not in Addison's amended petition because counsel failed to include the claim. Consequently, because the amended petition never alleged that appellate counsel was ineffective for failing to raise Addison's *pro se* trial counsel ineffectiveness claims, the merits of such a claim cannot be addressed on appeal. *People v. Jones*, 213 Ill. 2d 498, 505 (2004)(holding that claims not raised in a petition cannot be argued for the first time on appeal).

The State's argument that raising ineffective assistance of appellate counsel

claims is a *pro forma* exercise is based on the assumption that the underlying claims are non-meritorious. (St. Br. 15-16) However, at the second stage, credibility determinations are premature. *People v. Sanders*, 2016 IL 118123, ¶ 33. More importantly, post-conviction counsel's determination that Addison's *pro se* ineffective assistance of trial counsel claims had sufficient merit for second-stage purposes undermines the State's contention that requiring counsel to make a routine amendment to Addison *pro se* petition of ineffective assistance of appellate counsel to overcome procedural default would have been a *pro forma* exercise. The State's reliance on *People v. Flores*, 153 Ill. 2d 264, 277 (1992), is misplaced because it concerns successive post-conviction petitions and claims that have been previously raised and addressed by a reviewing court. (St. Br. 31-32) Since this is Addison's initial petition, his claims were never previously addressed because appellate counsel did not brief any issues on direct appeal. Accordingly, post-conviction counsel should have been trying to evade waiver where Addison's claims had never been previously addressed. *Flores*, 153 Ill. 2d at 277 (recognizing the ease with which a petitioner may evade the operation of waiver and *res judicata* simply by couching his claims in the context of ineffective assistance). Because neither *English* nor *Flores* address the concerns in Addison's case, they provide no support for the State's claim that the appellate court's ruling would require post-conviction counsel to engage in a *pro forma* exercise compelled by Rule 651(c).

Pursuant to this Court's holdings, reviewing courts have consistently remanded cases for further post-conviction proceedings where post-conviction counsel filed a Rule 651(c) certificate and the record rebutted the presumption

of compliance because counsel failed to amend the petition to include a claim of ineffective assistance of appellate counsel.

For instance, in *People v. Schlosser*, (*Schlosser I*), 2012 IL App (1st) 092523, ¶ 19, post-conviction counsel failed to amend the petitioner’s *pro se* petition to include a claim of ineffective assistance of appellate counsel to avoid a claim of forfeiture, but argued the claim on the petitioner’s behalf at the hearing on the State’s motion to dismiss. The appellate court found that, under *Turner*, the failure to make this necessary amendment to the written petition was unreasonable representation which rebutted the presumption of Rule 651(c) compliance created by counsel’s filing of a Rule 651(c) certificate and the court held that to orally argue an issue at a hearing was not an adequate substitute for the necessary filing of an amended written petition. *Id.*, ¶¶19-28; Ill. Sup. Ct. R. 651(c). Finally, *Schlosser* recognized that, under *People v. Suarez*, 224 Ill. 2d 37 (2007), a petitioner need not show prejudice to be due remand for a violation of Rule 651(c). *Id.*, ¶¶19-28. See *People v. Kirk*, 2012 IL App (1st) 101606, ¶ 31, (presumption arising from counsel’s filing of a Rule 651(c) certificate, was rebutted by the record where it established that “counsel did not comply with the duties imposed by Rule 651(c)” where counsel “effectively admitted to the court that the petitioner’s ‘main claim’ included ineffective assistance of appellate counsel, but failed to include that claim in the petition”); *People v. Kluppelberg*, 327 Ill. App. 3d 939, 947 (1st Dist. 2002) (post-conviction counsel, who filed a Rule 651(c) certificate, rendered unreasonable assistance by not amending petition to include claim that appellate counsel was ineffective in failing to argue trial counsel’s ineffectiveness); *People v. Schlosser*

II, 2017 (1st) 150355, ¶ 37 (finding no presumption of compliance from filing of a 651(c) certificate where the certificate filed years after the initial certificate was not updated to reflect actions counsel took in the years since).

Here too, Addison's post-conviction counsel failed to fulfill her duty to make the required routine amendment of ineffective assistance of appellate counsel to the petition, so as to avoid the forfeiture of the *pro se* claims. Additionally, counsel's belated acknowledgment that the forfeiture may have been due to oversight of appellate counsel did not cure her failure to amend the written petition. In fact, counsel's remark was akin to an admission that she failed to include a routine amendment to overcome the procedural bar of Addison's claims and thus did not comply with the duties imposed by Rule 651(c).

Furthermore, a consideration of the merits of the underlying claims in the amended petition would be premature. Due to counsel's failure to properly include a claim of ineffective assistance of appellate counsel, it is not in the amended petition, and therefore was never before the circuit court. It is impermissible for this Court to speculate whether the circuit court would have dismissed the amended petition if counsel had cured the procedural defect by amending the petition to include a claim of ineffective assistance of appellate counsel. *See People v. Johnson*, 154 Ill. 2d 227, 245-46 (1993) (refusing to speculate on what action the circuit court would have taken in the event that post-conviction counsel had performed reasonably); *Turner*, 187 Ill.2d at 416 (refusing to speculate as to whether the circuit court would have dismissed the petition if counsel had complied with Rule 651(c)).

More importantly, as this Court has held where counsel has failed to render reasonable assistance, we do not look to the underlying merits of a case whose issues may not have been fully developed at the circuit court. *People v. Suarez*, 224 Ill. 2d 37, 47 (2007). Finally, the State engages in the precise analysis that is precluded at this stage of the proceedings and asks this Court to make a premature credibility determination. *People v. Coleman*, 183 Ill. 2d 366, 382 (1998) (finding that credibility determinations at the second-stage of proceedings is impermissible). As a result, this Court should reject the State's invitation to impermissibly and prematurely consider the merits of the underlying claims in Addison's amended petition. See *People v. Robinson*, 2020 IL 123849, ¶ 81 (holding that it is well-established "that credibility determinations are made at a third-stage evidentiary hearing," not at the second stage) (internal citations omitted).

Since the State has failed to provide this Court with any reason to limit its analysis in *Turner* to instances where post-conviction counsel does not file a 651(c) certificate, this Court should hold that reviewing courts look to the record to determine if a petitioner rebuts the presumption that counsel, who filed a Rule 651(c) certificate, provided reasonable assistance. By proposing that the underlying merits of claims must be considered, the State is asking this Court to condone an analysis that is premature and inconsistent with this Court's prior Rule 651(c) analysis. Because counsel failed to comply with her Rule 651(c) duties, the ineffective assistance of appellate counsel claim is not in the amended petition. Therefore, this Court cannot speculate whether Addison would have been entitled to an evidentiary hearing if counsel had complied with her Rule 651(c) duties. Rather,

this Court should affirm the appellate court's decision and find that Dion Addison's post-conviction counsel rendered an unreasonable level of assistance because she did not allege a claim of ineffective assistance of appellate counsel to overcome the *pro se* claims' forfeiture in the amended petition or at the hearing on the State's motion to dismiss.

II. Harmless error should not excuse Addison's post-conviction counsel's noncompliance with Rule 651(c) merely because she filed a 651(c) certificate.

The State further contends that even if the record shows post-conviction counsel failed to comply with Rule 651(c), any non-compliance was harmless because she filed a 651(c) certificate. (St. Br. 17-25) Counsel provides an unreasonable level of assistance because she fails to comply with her duties, such as where she fails to raise a claim of ineffective assistance of appellate counsel to overcome forfeiture of the claims, regardless of whether she filed a 651(c) certificate. *People v. Suarez*, 224 Ill. 2d 27, 51 (2007). Consequently, this Court should reject the State's proposal that Addison, whose post-conviction counsel filed a 651(c) certificate, must show that he was prejudiced by counsel's non-compliance. (St. Br. 18-24)

A. Post-conviction counsel's failure to cure a procedural defect in a post-conviction petition at the second stage should be evaluated using the *Suarez* non-harmless error rule, not a *Strickland*-like prejudice standard.

The State is asking this Court to adopt a harmless error analysis to unreasonable assistance claims when post-conviction counsel files a Rule 651(c) certificate. (St. Br. 18-22) This Court should reject the State's position for three reasons. First, this Court has consistently declined to hold that noncompliance with Rule 651(c) may be excused on the basis of harmless error and makes no

exception for cases where non-compliance occurs despite the filing of a 651(c) certificate. *People v. Suarez*, 224 Ill. 2d 37, 51-52 (2007). Second, a *Strickland*-like prejudice standard is unworkable and incompatible with post-conviction counsel's limited duties at the second stage. Third, the State has failed to provide compelling reasons to support its alternative argument that *Suarez* should be overruled if its non-harmless error standard applies to claims of unreasonable assistance against counsel who filed a 651(c) certificate. Accordingly, this Court should decline the State's invitation to excuse non-compliance with Rule 651(c) on the basis of harmless error.

1. *Suarez's non-harmless error analysis.*

In *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007), this Court held that remand is required if post-conviction counsel provides unreasonable assistance and no harmless error applies. The rationale for this rule is that “[o]ur Rule 651(c) analysis has been driven, not by whether a particular defendant’s claim is potentially meritorious, but by the conviction that where postconviction counsel does not adequately complete the duties mandated by the rule, the limited right to counsel conferred by the Act cannot be fully realized.” *Id.* at 51. This Court further determined that where post-conviction counsel has not fulfilled her duties it is impossible to know whether the petition would have made a substantial showing of a constitutional violation had counsel properly performed her duties. *Id.* at 47-49. Accordingly, the appellate court correctly found in this case that Addison was not required to show prejudice to be entitled to a remand because the record rebutted the presumption of counsel’s compliance with Rule 651(c). *People v. Addison*, 2021

IL App (2d) 180545, ¶ 31.

The State first argues that the rule in *Suarez* applies only where no 651(c) certificate was filed. (St. Br. 19-21) However, *Suarez* never made a distinction between counsel who files a 651(c) certificate and one who does not. *Suarez* held that harmless error analysis is inappropriate where counsel failed to fulfill his 651(c) duties. *Suarez*, 224 Ill. 2d at 44-47. This holding applies even where, as in this case, counsel filed a 651(c) certificate, but the record rebuts the presumption of her compliance. *Id.* at 51. Once it is shown that counsel did not comply with Rule 651(c) despite the filing of a certificate, a reviewing court is in the exact same position as if counsel did not file a certificate—that is, because counsel did not comply with Rule 651(c), it is impossible to know whether the petition would have had merit had counsel complied with Rule 651(c). Consequently, the rule in *Suarez* applies where there is a failure to comply with Rule 651(c), despite the filing of a certificate. Once failure to comply is established, the assurance provided by the filing of the certificate is erased. Here, although post-conviction counsel filed a 651(c) certificate, in which she certified that she “[made] any amendments to the petitions filed *pro se* that” she deemed “necessary for an adequate presentation of petitioner’s contentions,” the record rebutted the presumption of compliance because she did not make a routine amendment—a claim of ineffective assistance of appellate counsel—to avoid the forfeiture of the underlying *pro se* claims. See Argument I, *supra*.

The State also tries to distinguish *Suarez* on the basis that *Suarez*’s post-conviction counsel’s performance was “so deficient as to constitute no assistance

at all.” (St. Br. 19-20) However, nowhere in the decision did this Court specify that the holding in *Suarez* is based on the extent of counsel’s noncompliance. Notably, in *Suarez*, this Court found that post-conviction counsel’s failure to consult with the petitioner was in and of itself sufficient to establish noncompliance with Rule 651(c). *Suarez*, 224 Ill. 2d at 42-44. Furthermore, the straightforward dictates of Rule 651(c) must be met regardless of whether counsel’s representation was a “total failure” or a failure in part. Here, Addison’s counsel’s flagrant inaction in failing to take even the most routine step of amending the claims so as to present cognizable constitutional claims rendered post-conviction counsel’s appointment “an empty formality.” *People v. Turner*, 187 Ill. 2d 406, 417 (1999). Counsel’s inactions were the functional equivalent of no assistance at all because counsel’s failures allowed the circuit court to dismiss Addison’s petition. [W]hen postconviction counsel does not complete the few duties imposed by the Rule, the limited right to counsel conferred by the Act becomes illusory.” *People v. Schlosser (Schlosser II)*, 2017 IL App (1st) 150355, ¶ 44. Despite counsel’s filing of a 651(c) certificate, Addison, just as the *Suarez* petitioner, was denied reasonable assistance of post-conviction counsel. As such, counsel’s noncompliance cannot be excused by harmless error, despite her filing of a 651(c) certificate.

2. The State’s proposed modified *Strickland* prejudice standard is incompatible with post-conviction counsel’s scope of representation at the second stage.

The State tries to evade *Suarez*’s holding by attempting to pigeonhole a review of post-conviction counsel’s performance within a framework applied to trial counsel. (St. Br. 18-22) First, the State contends that requiring a remand

every time post-conviction counsel, who files a 651(c) certificate, fails to cure a procedural defect in the petition would place the reasonable assistance standard on an equal footing with *Cronic*-type errors, which do not require a showing of prejudice. (St. Br. 20-21, citing *United States v. Cronic*, 466 U.S. 648 (1984)). The State is suggesting that post-conviction appellants, like Addison, should not be entitled to *Cronic*-like relief absent counsel's total failure or abdication of duties. Because *Cronic* relief is exceptional, the State contends that Addison must show that post-conviction counsel failed to comply with Rule 651(c) and in addition must demonstrate modified prejudice simply because counsel filed a Rule 651(c) certificate. (St. Br. 18-19, citing *Strickland*, 466 U.S. at 694) The State reasons that it should not be easier for post-conviction petitioners to raise and win reasonable assistance claims than defendants who raise ineffective assistance of trial counsel claims on direct appeal. (St. Br. 21-22) This Court should reject the State's proposal to adopt an modified *Strickland* prejudice because it would be illogical to measure post-conviction counsel's performance at the second stage at which she was bound by Rule 651(c) by the standard applicable to trial counsel's constitutional obligations.

The State's proposal that post-conviction counsel's performance be evaluated by the same standards as trial counsel highlights the State's misapprehension of the differences between the statutory duties and tasks of a post-conviction attorney and the constitutional obligations of a trial attorney. At the second stage, post-conviction counsel has a limited role. Unlike trial counsel, whose performance is measured by the *Strickland* standard, post-conviction counsel "is only required

to investigate and properly present the *petitioner's* claims.” *People v. Pendleton*, 223 Ill. 2d 458, 475 (2006). While post-conviction counsel “may conduct a broader examination of the record, and may raise additional issues if he or she chooses, there is no obligation to do so.” *Pendleton*, 223 Ill. 2d at 476 (citing *People v. Davis*, 156 Ill. 2d 149, 164 (1993)). Consequently, post-conviction counsel is not obligated to conduct an independent investigation to track down witnesses or evidence that are not listed in the petition or the record as is expected of trial counsel. Post-conviction counsel’s limited duties—consultation with the petitioner, review of the petition and relevant parts of the trial and sentencing transcripts, and shaping a petitioner’s claims into proper legal form—are commensurate with the limited statutory right to counsel. Because the duties and rights of post-conviction counsel are so minimal, failure to comply with these limited duties is unreasonable, it is illogical to require post-conviction petitioners to meet a heightened *Strickland*-like standard before requiring counsel to comply with these very basic duties.

There is also a great difference between the remedies when a defendant received ineffective assistance of trial counsel and when a petitioner’s counsel does not comply with Rule 651(c). Ineffective assistance of trial counsel requires a new trial whereas non-compliance with 651(c) results in a remand for counsel to comply with the very limited requirements of 651(c). To apply a *Strickland*-like prejudice standard to determine whether post-conviction counsel rendered an unreasonable level of assistance or to limit the *Suarez* non-harmless error standard by requiring post-conviction appellants to establish a complete breakdown of post-conviction counsel’s performance similar to *Cronic*-type errors would be inconsistent

with Supreme Rule 651(c) and post-conviction law.

The State's proposal of requiring petitioners to make a showing of *Strickland*-like prejudice when raising unreasonable assistance claims is also unworkable because in Illinois post-conviction appellants have no right to an evidentiary hearing at which they could introduce evidence to establish "prejudice." For example, the only way to "prove" for *Strickland* purposes that the post-conviction appellant was actually prejudiced by counsel's failure to investigate and obtain an affidavit from an alibi witness is to either add an affidavit or supporting documentation to the record, or add facts explaining why counsel could not get that supporting evidence to the record. But there is no mechanism in Illinois for a post-conviction appellant to add these sorts of facts to the record. This fact is what sets Illinois apart from the other states noted in the footnote in the State's brief. (St. Br. 23, fn. 2) For example, the first case the State cites is *Rippo v. State*, 423 P.3d 1084, 1097-99 (Nev. 2018), from Nevada, a state where post-conviction litigants are allowed to file successive post-conviction petitions alleging ineffective assistance of post-conviction counsel as "cause." In Illinois, deficient representation by incompetent post-conviction counsel is not "cause." *People v. Ramey*, 393 Ill. App. 3d 661, 668 (1st Dist. 2009). So, while a *Strickland* prejudice standard might be workable under Nevada's procedures, it is not workable under Illinois' procedures.

More importantly, this Court rejected the State's proposal that post-conviction petitioners must show prejudice to warrant a remand in *Suarez*. In *Suarez*, 224 Ill. 2d at 51, this Court reiterated that Rule 651(c) analysis "has been driven, not by whether a particular defendant's claim is potentially meritorious, but by the

conviction that where postconviction counsel does not adequately complete the duties mandated by the rule, the limited right to counsel conferred by the Act cannot be fully realized.” This Court further found that if counsel fails to comply with her duties, the petition requires a remand, regardless of the strength of the underlying claim. *Id.* at 49-51. Because the State had not presented a compelling reason to depart from this Court’s prior case law, this Court declined to hold that noncompliance with Rule 651(c) may be excused on the basis of harmless error. *Id.* at 52. Notably, this Court had the benefit of *Strickland*’s holding when it decided *Suarez*, but declined to adopt it.

Furthermore, the cases cited by the State to suggest that it should not be easier for a post-conviction petitioner to get relief than an appellant who raises an ineffectiveness claim after trial or direct appeal are inapplicable or wrongly decided. In *People v. Zareski*, 2017 IL App (1st) 150836, ¶ 53-55, the appellate court considered whether Rule 651(c) applies to post-conviction counsel who drafts and files the *initial* post-conviction petition at the first stage. (St. Br. 21-22) Because the appellate court found that 651(c) did not apply when the initial petition was drafted and filed by counsel, it held that post-conviction appellants must show a *Strickland*-like prejudice when raising a claim of unreasonable assistance. *Id.*, ¶¶ 58-61. Since *Zareski* does not address post-conviction counsel’s noncompliance with Rule 651(c) at the second stage, it is inapplicable to this case.

Zareski, moreover, held that post-conviction counsel’s failure to comply with Rule 651(c) at second-stage post-conviction proceedings is still subject to the *Suarez* rule. *Id.*, ¶ 55. The appellate court found, “The real key of the *Suarez*

holding was not that *Suarez*'s counsel had provided unreasonable assistance, but that *Suarez*'s counsel had violated a supreme court rule. That failure justified remanding 'regardless of merit.'" *Id.* The *Zareski* court reasoned that because *Suarez* only applied to attorneys whose representation is governed by Rule 651(c), it did not apply to Zareski's counsel, who was retained to file the petition at first stage. *Id.* Therefore, the *Strickland*-like prejudice adopted in *Zareski* does not apply in cases like Addison's. Instead Rule 651(c) and *Suarez* are controlling authority.

Neither do *People v. Landa*, 2020 IL App (1st) 170851, nor *People v. Gallano*, 2019 IL App (1st) 160570, support the State's contention that *Suarez* applies only when counsel fails to file a Rule 651(c) certificate. (St. Br. 18-19, 21-22) *Landa* and *Gallano* were both wrongly decided because they were premised on *People v. Profit*, 2012 IL App (1st) 101307, an appellate decision that does not address the proper remedy for a Rule 651(c) violation. In *Gallano*, post-conviction counsel filed a 651(c) certificate, but failed to obtain notarization of two affidavits attached to the petition. 2019 IL App (1st) 160570, ¶¶ 18, 27, 30. In finding that no Rule 651(c) violation occurred, the appellate court held that post-conviction counsel was not required to properly notarize the pleadings because the *pro se* allegations ultimately lacked merit. *Id.*, ¶ 30. In *Landa*, the petitioner filed a *pro se* post-conviction petition, raising constitutional claims. 2020 IL App (1st) 170851, ¶¶ 17-22. Petitioner alleged that counsel, who filed a Rule 651(c) certificate rendered unreasonable assistance because he made no amendments to petitioner's *pro se* claims; post-conviction counsel stood on the *pro se* claims and filed a supplemental petition, adding an actual innocence claim. *Id.*, ¶¶ 28-31, 36, 59. Relying on *Gallano*,

the appellate court stated that the rule in *Suarez* that petitioner need not show prejudice “applies when counsel fails to file a Rule 651(c) certificate,” *id.*, ¶¶ 56-58, and ultimately concluded that post-conviction counsel’s failure to amend and support petitioner’s *pro se* claims did constitute unreasonable assistance that prejudiced the petitioner. *Id.*, ¶ 70.

Gallano and *Landa*, however, erroneously rely on *People v. Profit*, 2012 IL App (1st) 101307, in which the issue was whether Rule 651(c) requires post-conviction counsel to raise *pro se* claims that had been stricken by the circuit court. *Profit* concerned a successive post-conviction petition where the defendant attempted to file two additional *pro se* claims after he had already been appointed counsel. *Id.*, ¶¶ 10, 12, 24-26. The State objected to the defendant filing *pro se* claims while represented by counsel and the circuit court struck the additional *pro se* claims. *Id.*, ¶¶ 11, 13. Thereafter, Profit’s counsel filed a Rule 651(c) certificate, and the circuit court granted the State’s motion to dismiss the defendant’s successive petition. *Id.*, ¶¶ 13-14. On review, the appellate court found that post-conviction counsel did not provide unreasonable assistance by declining to amend the successive post-conviction petition to include the *pro se* claims that had been stricken by the court. *Id.*, ¶¶ 1, 15, 25-28.

Profit is factually distinguishable from Addison’s case. First, *Profit* does not address the precise question at issue here: whether post-conviction counsel provides unreasonable assistance where she affirmatively chooses to include several of the petitioner’s *pro se* claims in an amended petition, but she fails to amend a petition to include a routine claim of ineffective assistance of appellate counsel

to overcome the forfeiture of the *pro se* claims. Second, in *Profit*, post-conviction counsel abandoned petitioner's additional *pro se claims* that had been stricken by the circuit court. Here, counsel adopted the claims, but failed to shape them into proper legal form. Third, the *Profit* court addressed the merits of the claims raised in the petitioner's stricken pleadings because the record was silent as to whether post-conviction counsel believed those claims had merit. Here, because post-conviction counsel adopted Addison's *pro se* claims in an amended petition, counsel did not believe these issues to be frivolous or patently non-meritorious. Accordingly, nothing in *Profit* suggests that the *Strickland*-like analysis applies merely because counsel failed to make a routine amendment, despite the filing of a 651(c) certificate.

The State also cites to several appellate court cases where the *Strickland*-like standard was applied to third-stage proceedings. (St. Br. 19, citing *People v. Pabello*, 2019 IL App (2d) 170867, ¶¶ 36, 44; *People v. Hotwagner*, 2015 IL App (5th) 130525, ¶¶ 37, 51) This Court has not addressed the performance standard required of post-conviction counsel at the third-stage post-conviction proceedings. Although the appellate court has applied a *Strickland*-like prejudice standard to the third stage, that analysis is neither helpful nor relevant at the second stage where counsel plays a more limited role and is clearly governed by Rule 651(c). Notably, post-conviction counsel at the third stage is seeking to secure substantive relief: a new trial. On the other hand, counsel at the second stage is limited to shaping a petitioner's *pro se* claims into proper legal form.

In sum, this Court should reject the State's invitation to adopt essentially

a harmless error analysis to excuse non-compliance with Rule 651(c) because the State has failed to provide any new persuasive arguments in support of its proposal that post-conviction appellants, like Addison, should have to establish non-compliance with the rule and a *Strickland*-like prejudice for unreasonable assistance claims against counsel who filed a certificate.

3. There are no compelling reasons to overrule *Suarez*.

Alternatively, the State argues that if *Suarez* stands for the proposition that lack of 651(c) compliance requires a remand regardless of the filing of a certificate, this Court should overrule *Suarez*. (St. Br. 22-35) However, the State has failed to provide any compelling reasons why the *Suarez* standard is no longer workable or in conflict with legal precedent.

The *stare decisis* doctrine expresses the policy of the courts to stand by precedents and not to disturb settled points. *Karbin v. Karbin ex rel. Hibler*, 2012 IL 112815, ¶ 28. One of the tenets of *stare decisis* is that the law will not change erratically but will develop in a principled, intelligent manner. *Id.* Thus, a question once deliberately examined and decided should be closed to further argument, ensuring that the law will develop in a principled, intelligent fashion, immune from erratic changes. *People v. Clemons*, 2012 IL 107821, ¶ 9. *Stare decisis* enables the people and the bar “to rely upon our decisions with assurance that they will not be lightly overruled.” *Moehle v. Chrysler Motors Corp.*, 93 Ill. 2d 299, 304 (1982). Any departure from *stare decisis* “demands special justification.” *Chicago Bar Ass’n v. Illinois State Board of Elections*, 161 Ill. 2d 502, 510 (1994) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)). “[P]rior decisions should not be overruled

absent good cause or compelling reasons.” *People v. Colon*, 225 Ill. 2d 125, 146 (2007)(internal citations omitted). “In general, a settled rule of law that does not contravene a statute or constitutional principle should be followed unless doing so is likely to result in serious detriment prejudicial to public interests.” *Colon*, 225 Ill. 2d at 146.

Here, the State has given no “good cause” or “compelling reasons” to overrule *Suarez*. (St. Br. 23-24) Neither of the cases cited by the State support its argument that the *Suarez* rule conflicts with “this Court’s precedent that a postconviction petitioner is entitled to lesser assistance than a defendant whose attorney is constitutionally guaranteed.” (St. Br. 23, citing *People v. Custer*, 2019 IL 123339, ¶¶ 30-32; *People v. Johnson*, 2018 IL 122227, ¶¶ 16-17) For instance, in *Custer*, 2019 IL 123339, ¶ 42, this Court only held that post-conviction petitioners are not entitled to a *Krankel*-like inquiry of post-conviction counsel’s performance. In making such a finding, this Court noted the extremely limited role of post-conviction counsel in comparison to trial counsel. *Id.*, ¶ 32. As discussed above, a post-conviction attorney’s statutory duties are much more limited than the constitutional duties of a trial attorney. *Custer* therefore actually supports Addison’s argument that applying a *Strickland*-like prejudice to second-stage claims of non-compliance with Rule 651(c) would be incompatible with the limited statutory right to counsel.

Nor do the six out-of-state cases cited in a footnote supports the State’s argument that *Suarez* should be overruled because it is badly reasoned. (See St. Br. 23, fn. 2, citing *Rippo v. State*, 423 P.3d 1084, 1097-99 (Nev. 2018); *Moore v. State*, 839 N.W.2d 834, 837, 839-40 (N.D. 2013); *Carter v. State*, 289 P.3d 542,

549-51 (Utah 2012); *Robertson v. State*, 201 P.3d 691, 701-02 (Kan. 2009); *Silva v. People*, 156 P.3d 1164, 1169 (Colo. 2007); *Dunbar v. State*, 515 N.W.2d 12, 14-16 (Iowa 1994)). These cases are irrelevant because they do not interpret Rule 651(c), a similar rule, or a statute like Illinois's Post-Conviction Hearing Act.

Finally, the State asserts that applying a blanket rule of automatic remand for every unreasonable assistance claim involving a Rule 651(c) violation would tax the resources of both public defenders' offices and courts and add to lengthy delays in the resolution of post-conviction cases, many of which contain meritless claims. (St.Br. 23-25) The State's argument is unavailing for multiple reasons. *Schlosser I* has been the law in at least one district of the appellate court since June 15, 2012. and the State has failed to show that it has opened the floodgate to unnecessary remands. That is because the Act already provides a very simple mechanism to prevent frivolous petitions from making it to second stage. All that has to happen is the circuit court has to dismiss it within 90 days. 725 ILCS 5/122-2.1(a)(b)(2018). For petitions that advance to second stage because the court failed to rule on them within 90 days, post-conviction counsel has the option to withdraw if he believes that the underlying claims have no merit. *People v. Greer*, 212 Ill. 2d 192, 205 (2004). However, once counsel determines that the claims are cognizable and plead sufficient facts to make a substantial showing of a constitutional violation, she must fulfill the duties imposed by the Rule 651(c) to properly present the *pro se* claims to the court. *See People v. Perkins*, 229 Ill. 3d 34, 44 (2007).

More importantly, a *pro se* petitioner should not be penalized because he

has been randomly assigned to a post-conviction attorney who does not understand the Act or her Rule 651(c) duties. *See People v. Schlosser (Schlosser II)*, 2017 IL App (1st) 150355, ¶¶ 35-39, 44 (where the adjudication of the petition was delayed due to the multiple remands and reappointment of the same counsel, who was found to have provided unreasonable assistance, remand was necessary because counsel did not complete the few duties imposed by Rule 651(c)). As noted by this Court in *Suarez*, “ [I]n granting a right to counsel for *pro se* petitioners whose petitions are not dismissed at the first stage of postconviction proceedings, the legislature recognized that most postconviction petitions would be filed by *pro se* prisoners who lacked the assistance of counsel in framing their petitions.” 224 Ill. 2d at 46. When post-conviction counsel does not comply with the few duties imposed by Rule 651(c), *pro se* petitioners are not provided proper representation in accordance with the Act. *Suarez*, 224 Ill. 2d at 47. Adopting a *Strickland*-like prejudice standard for second-stage claims of unreasonable assistance because some post-conviction attorneys have been grossly incompetent would unfairly penalize *pro se* litigants who have a right for their post-conviction claims to be heard.

Addison acknowledges the import of judicial finality, but this Court “has consistently held that remand is required where postconviction counsel failed to fulfill the duties of consultation, examining the record, and amendment of the *pro se* petition, regardless of whether the claims raised in the petition had merit.” *Suarez*, 224 Ill. 2d at 47. Based on the unequivocal words of this Court, a remand is necessary because counsel’s non-compliance with rule 651(c), the limited right

to counsel conferred by the Act becomes illusory. *Schlosser II*, 2017 IL App (1st) 150355, ¶ 44.

Because *Suarez* is well-reasoned and the State has failed to provide a compelling reason for requiring petitioners, like Dion Addison, from showing a *Strickland*-like prejudice when raising a claim of unreasonable assistance of post-conviction counsel, who filed a Rule 651(c) certificate, this Court should affirm the appellate court's order remanding Addison's petition for further second-stage proceedings.

B. It would be premature for this Court to determine whether alleging ineffective assistance of appellate counsel would have altered the result for Addison.

Because Rule 651(c) analysis is driven by whether post-conviction counsel complied with the rule, the State's claim that there is no reasonably probability that if counsel had made the routine amendment of adding a claim of ineffective assistance of appellate counsel to the *pro se* petition would have altered the result is premature. (St. Br. 25-28)

Inexplicably, the State insists that *People v. Easley*, 192 Ill. 2d 307, 328-29 (2000), supports its claim that Addison is required to prove that he was prejudiced by post-conviction counsel's failure to raise a claim of ineffective assistance of appellate counsel. (St. Br. 26-27) However, while *Easley* did involve claims of ineffective assistance of appellate counsel, post-conviction counsel properly presented those claims to the court, and there was no issue at all about 651(c) or unreasonable assistance of counsel. Furthermore, Addison's ineffective assistance of appellate counsel claims, unlike those in *Easley*, are not properly before this Court since

postconviction counsel did not raise them in the amended petition. *People v. Jones*, 213 Ill. 2d 498, 506–07 (2004) (determining that “claims not raised in a petition cannot be argued for the first time on appeal”). Accordingly, the State’s reliance on *Easley* should be ignored.

C. Conclusion

Non-compliance with Rule 651(c) should not be excused merely because post-conviction counsel files a certificate. Regardless of whether counsel filed a 651(c) certificate, the limited right to reasonable assistance of counsel is not fulfilled where the record establishes counsel’s noncompliance. A *Strickland*-like prejudice to excuse counsel’s noncompliance with the rule when she files a 651(c) certificate would render the limited right to counsel under the Act to an “empty formality.” *People v. Turner*, 187 Ill. 2d 406, 417 (1999). Because the State has failed to provide a compelling reason why the *Suarez*’s rule should be overruled, this Court should reject the State’s invitation to excuse counsel’s noncompliance with Rule 651(c) as harmless error. Therefore, this Court should affirm the appellate court’s decision that found that Dion Addison’s post-conviction counsel rendered unreasonable assistance by failing to overcome the forfeiture of the *pro se* claims and remand for further proceedings with the appointment of new counsel. Alternatively, should this Court find that counsel did not perform unreasonably by failing to include an allegation of ineffective assistance of appellate counsel to avoid the waiver of Addison’s claims, it should remand this case to the appellate court for consideration of Addison’s unaddressed claim that post-conviction counsel did not comply with Rule 651(c) where she failed to obtain supporting affidavits.

CONCLUSION

For the foregoing reasons, Dion Addison, petitioner-appellee, respectfully requests that this Court affirm the decision of the appellate court and remand for further second-stage proceedings if this Court should find that post-conviction counsel failed to comply with Rule 651(c) because she did include a routine amendment to the *pro se* petition of ineffective assistance of appellate counsel to overcome the forfeiture of the *pro se* claims.

Alternatively, should this Court find that counsel did not perform unreasonably by failing to include an allegation of ineffective assistance of appellate counsel to avoid the waiver of Addison's claims, it should remand this case to the appellate court for consideration of Addison's unaddressed claim that post-conviction counsel did not comply with Rule 651(c) where she failed to obtain supporting affidavits.

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 47 pages.

/s/Stephanie T. Puente
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No. 127119

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF)	Appeal from the Appellate Court of
ILLINOIS,	)	Illinois, No. 2-18-0545.
)	
Respondent-Appellant,	)	There on appeal from the Circuit
	)	Court of the Sixteenth Judicial
-vs-	)	Circuit, Kane County, Illinois, No.
	)	11 CF 1606.
)	
DION ADDISON,	)	Honorable
)	Clint Hull,
Petitioner-Appellee.)	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 15, 2022, 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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