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.

BRIEF AND ARGUMENT FOR PETITIONER-APPELLANT

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NATURE OF THE CASE

Following a jury trial, John Pingelton ("Pingelton")was convicted on two counts of criminal sexual assault. (R. 416.) The circuit court sentenced Pingelton to two consecutive terms of ten years in prison, for a total of twenty years. (C. 119.) Pingelton then appealed his convictions and sentences, which were affirmed by the appellate court. (C. 117, 129, appeal no. 4-07-0133.)

While imprisoned, Pingelton filed for post-conviction relief. (C. 209–10.) After the circuit court advanced the petition to the second-stage of the Post-Conviction Hearing Act and appointed counsel, it granted the State's motion to dismiss the petition. (C.19, 400.) The circuit court also denied Pingelton's subsequent motion to reconsider. (C. 412, 468.) Pingelton appealed, and the appellate court affirmed. *People v. Pingelton*, 2021 IL App (4th) 180751, ¶ 6. Pingelton then petitioned for rehearing, which the appellate court denied. This Court granted Pingelton's petition for leave to appeal. An issue is raised concerning the sufficiency of the post-conviction pleadings.

ISSUE PRESENTED FOR REVIEW

Whether a violation of a petitioner's constitutional right to procedural due process during the second stage of the Post-Conviction Hearing Act is subject to harmless-error review?

STATUTES AND RULES INVOLVED

Ill. S. Ct. R. 651 (eff. July 1, 2017)

(a) Right of Appeal. An appeal from a final judgment of the circuit court in any postconviction proceeding shall lie to the Appellate Court in the district in which the circuit court is located.

(b) Notice to Petitioner of Adverse Judgment. Upon the entry of a judgment adverse to a petitioner in a postconviction proceeding, the clerk of the trial court shall at once mail or deliver to the petitioner a notice in substantially the following form:

> "You are hereby notified that on _____ the court entered an order, a copy of which is enclosed herewith. You have a right to appeal to the Illinois Appellate Court in the district in which the circuit court is located. If you are indigent, you have a right to a transcript of the record of the postconviction proceedings and to the appointment of counsel on appeal, both without cost to you. To preserve your right to appeal you must file a notice of appeal in the trial court within 30 days from the date the order was entered."

(c) Record for Indigents; Appointment of Counsel. Upon the timely filing of a notice of appeal in a postconviction proceeding, if the trial court determines that the petitioner is indigent, the procedures for appointment of counsel and provision of the report on proceedings shall be governed by Rule 607. In a postconviction proceeding, the appellant or appellant's counsel shall, upon written request, be provided the postconviction report of proceedings and any relevant report of proceedings not previously provided to the appellant or appellant's counsel.

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.

(d) Procedure. The procedure for an appeal in a post-conviction proceeding shall be in accordance with the rules governing criminal appeals.

STATEMENT OF FACTS

On July 7, 2005, K.S. and A.H. decided to run away from their foster home. (R. 271–72, 295.) To effectuate that plan, K.S. and A.H. went to Anthony Gilbert's residence, looking for John Pingelton ("Pingelton") and his wife, Cheryl ("Cheryl"). (R. 272–73, 284, 319.) K.S. and A.H. had previously babysat Cheryl and Pingelton's four young children. (R. 258, 273, 276.) While at the residence, K.S. and A.H. met with Pingelton, Cheryl, the four children, and Anthony Gilbert ("Gilbert"). (R. 258, 274.) At some point, Cheryl left with two of the children. (R. 259.) Gilbert, Pingelton, K.S., and A.H. drank beer and hung out while in "a good mood." (R. 274, 285, 296, 306.) Pingelton offered K.S. and A.H. a place to stay. (R. 274–75.)

Later, Pingelton and Gilbert had a disagreement. (R. 274.) So, Pingelton called Cheryl to give him a ride. (R. 260.) Cheryl arrived and drove Pingelton, K.S., A.H., and the remaining two children to a house that Pingelton and Cheryl owned. (R. 260–61.) After making sure the children were content, Cheryl returned home. (R. 261.)

Returning the next morning to transport the group, Cheryl did not notice anything that caused her any concern, K.S. and A.H. did not appear to be upset, and there was nothing alarming about their demeanor. (R. 267, 269.) K.S. and A.H. did not tell Cheryl about anything that happened to them the previous night. (R. 268, 280, 313.) Cheryl dropped off K.S. and A.H. at a park. (R. 261.)

K.S. and A.H. returned to their foster mother's residence, but did not allege that a sexual assault occurred the previous night. (R. 280, 290, 314.) K.S. and A.H. ran away again the next day; however, a police officer stopped them several blocks later. (R. 280, 290, 302, 315.) K.S. and A.H. did not notify the officer that a sexual assault happened. (R. 291, 302, 315.) Around ten days later, A.H. informed her foster mother that Pingelton assaulted her while she was at his house. (R. 302–03.) A counselor from the foster care agency then interviewed K.S., who initially denied that there was an assault. (R. 281.) K.S. eventually relayed to the counselor that Pingelton assaulted her. (R. 281.)

The State charged Pingelton with two counts of criminal sexual assault in violation of 720 ILCS 5/12-13(a)(1). (C. 36–37.) The case proceeded to a jury trial. (C. 12.) However, the first jury trial resulted in a mistrial, as neither the fact that K.S. and A.H. eventually sought medical attention, nor the results of those examinations, were provided to the defense. (C. 12; R. 129–31.) After a continuance, a second jury trial commenced. (C. 12–13.)

At the second jury trial, K.S. testified that, at Pingelton's house, she was drinking on the back porch with him and A.H. (R. 276.) According to K.S., after A.H. went to an upstairs bedroom, Pingelton sexually assaulted K.S. on the back porch. (R. 276–77.) Specifically, while K.S. yelled, Pingelton pushed her down and placed his penis in her vagina. (R. 276–77.) K.S. explained that the attack caused so much trauma that she bled vaginally. (R. 288.) When Pingelton finished assaulting her, K.S. indicated that he went upstairs where A.H. slept. (R. 278.) A.H. testified that she was upstairs when Pingelton put his hand in her vagina, and she started screaming. (R. 299.) As relayed by A.H., Pingelton stopped after K.S. came upstairs and discovered them. (R. 299.) K.S. and A.H. stated that they made an agreement not to tell anyone about the matter. (R. 280, 302.)

At that trial, the State also provided, *inter alia*, the following medical evidence from Doctor Dennis Adams ("Dr. Adams") and Doctor Robert Sliwa ("Dr. Sliwa"). (R. 333, 343.) Dr. Adams, a board-certified emergency physician for 25 years, examined A.H. on July 17, 2005. (R. 333–34.) Dr. Adams performed a pelvic exam on A.H., which he found "unremarkable." (R. 335.) According to Dr. Adams, there was no evidence of vaginal trauma. (R. 335.) As he had examined over twenty victims of sexual assault and was familiar with literature "in the field," Dr. Adams opined that most sexual-assault cases do not have objective evidence of trauma. (R. 335–36, 341.) Dr. Adams, on cross-examination, admitted that he was not a gynecologist and was not trained in the use of a colposcope, an instrument used to magnify findings in a gynecological examination. (R. 338–39.)

Dr. Sliwa, a board-certified emergency physician for around 5 years, examined K.S. on July 27, 2005. (R. 344–45.) In that examination, Dr. Sliwa reported that he found no signs of vaginal trauma. (R. 345, 351.) Based on his consideration of literature "in the field" and examination of approximately 100 sexual-assault victims, Dr. Sliwa opined that a majority of sexual-assault cases for post-puberty girls would not reveal any evidence of sexual trauma. (R. 344–46, 353.) On cross-examination, Dr. Sliwa admitted that he was not a gynecologist and he had never used a colposcope. (R. 346–47.) And Dr. Sliwa further offered that he could provide no opinion on whether K.S. was sexually assaulted. (R. 351–52.)

Afer deliberating, the jurors found Pingelton guilty on both counts. (R. 416.) The circuit court sentenced Pingelton to ten-year prison sentences on each count, to be served consecutively. (C. 119.) Pingelton appealed. (C. 117.) The appellate court affirmed. (C. 129, appeal no. 4-07-0133.) Thereafter, Pingelton filed multiple motions and letters seeking the transcripts and common-law record pertaining to his case. (C. 146–47, 151, 154, 162, 166.) The circuit court eventually ordered that Pingelton receive copies of the record. (C. 18.) After obtaining the record, Pingelton sought leave to file a late post-conviction petition and an extension in which to file for relief, which the circuit court granted. (C. 18–19, 178, 200.)

On December 2, 2015, Pingelton filed a post-conviction petition alleging that he was deprived of his constitutional rights. (C. 209–10.) First, Pingelton argued that he received ineffective assistance of trial and appellate counsel when they permitted the physicians to testify as experts on matters unrelated to their treatment of K.S. and A.H. and to explain the State's lack of physical evidence without being submitted or designated as experts. (C. 210–19.) Second, Pingelton claimed that his due-process rights were violated when he was convicted on a defective charging instrument. (C. 220–25.) The circuit court, on December 17, 2015, appointed post-conviction counsel to represent Pingelton on his petition. (C. 19.)

On March 11, 2016, the State filed a motion to dismiss. (C. 275–76.) In that motion, the State argued that Pingelton's petition contained claims that were waived, conclusory, lacking in merit, and refuted by the record. (C. 275–76.) The State certified service to post-conviction counsel. (C. 277.) Pingelton, acting *pro se*, sought leave to amend his post-conviction petition, culminating in a status hearing where the circuit court continued the matter. (C. 20.) Finally, in February 2018, post-conviction counsel filed a motion to withdraw and included a memorandum addressing Pingelton's two claims as well as a certificate pursuant to Illinois Supreme Court Rule 651(c). (C. 296, 300, 303, 306–07.) Pingelton filed responses raising *Brady* violations concerning a missing police report and his medical records. (C. 311, 331.) Post-conviction counsel filed a reply addressing Pingelton's responses. (C. 374.)

On May 8, 2018, the circuit court or clerk made a docket entry stating that the case was set for a status hearing the next day. (C. 21.) There was no indication in the docket entries that any notice was provided to Pingelton. (C. 21.) That next day, the circuit court held a hearing with the State, post-conviction counsel, and Pingelton appearing via a conference call. (Sup. R. 8–9.) The circuit court commented that it received all the briefing on the motion to withdraw and was ready to receive arguments. (Sup. R. 9.) Then, the circuit court permitted the State to argue its motion to dismiss. (Sup. R. 9.) The State orally adopted post-conviction counsel's motion to withdraw and argued that Pingelton's claims lacked merit. (Sup. R. 9–11.) Thereafter, the circuit court directed Pingelton to make his arguments. (Sup. R. 11.) Consistent with his filings, Pingelton attacked post-conviction counsel's representation and arguments in the motion to withdraw. (Sup. R. 11–20.) In that process, Pingelton asked the circuit court to remove post-conviction counsel and allow him to proceed *pro se*. (Sup. R. 20.) Post-conviction counsel simply sought leave to withdraw from the case. (Sup. R. 24.) The circuit court took the matter under advisement. (Sup. R. 24.)

Later, in a written ruling, the circuit court granted post-conviction counsel's motion to withdraw. (C. 400.) In that same filing, the circuit court also stated that it heard arguments on the State's motion to dismiss and allowed the motion, as Pingelton failed to make a substantial showing of any constitutional violation. (C. 400.) Pingelton filed a motion to reconsider, arguing that, *inter alia*, the circuit court "considered and granted the State[']s motion to dismiss, where [he] has never received nor has [he] seen any such motion from the State, [and] was fundamentally unfair and improper in that [he] was not given an opportunity to address this State[']s motion." (C. 416.) After a hearing, the circuit court found that the motion to reconsider was "not persuasive" and stood "by all previous findings and rulings[.]" (C. 23.)

Pingelton appealed. (C. 488–89.) In so doing, Pingelton argued that the circuit court violated his right to procedural due process under the Post-Conviction Hearing Act when it granted the State's motion to dismiss his petition without notice or the opportunity to be heard. *People v. Pingelton*, 2021 IL App (4th) 180751, ¶ 6. Additionally, Pingelton contended that the circuit court erred by allowing his post-conviction counsel to withdraw where Pingelton's *pro se* petition presented a potentially meritorious allegation of ineffective assistance of counsel regarding the admission of the doctors' testimony. *Pingelton*, 2021 IL App (4th) 180751, ¶ 36.

Ultimately, the appellate court affirmed. *Id.* at ¶ 6. In that process, the appellate court agreed that the circuit court improperly denied Pingelton his right to have notice and the opportunity to be heard on the State's motion to dismiss. *Id.* at ¶¶ 32–34. To that end, the appellate court found that, due to the manner in which the circuit court conducted the hearing on the State's dispositive motion, the circuit court ordered the dismissal of Pingelton's petition without providing him with any avenue to argue against that motion. *Id.* Nevertheless, the appellate court concluded that the error was harmless, as it believed that Pingelton's *pro se* petition lacked merit. *Id.* at ¶¶ 34, 36. More specifically, the appellate court held that post-conviction counsel

was correctly allowed to withdraw because ultimately trial counsel's decision regarding the admission of the doctors' testimony was trial strategy. *Id.* at ¶ 68. The concurring opinion agreed with the appellate court's decision, but did not join in a part of the majority's discussion addressing the certification of expert witnesses. *Id.* at ¶ 78 (Harris. J., concurring).

Thereafter, Pingelton petitioned for rehearing, pointing out that, based on the appellate court's prior precedent in *People v. Al Momani*, 2016 IL App (4th) 150192, and this Court's prior decisions in *People v. Bounds*, 182 Ill. 2d 1 (1998) and *People v. Kitchen*, 189 Ill. 2d 424 (1999), harmless-error review was not appropriate for a procedural-due-process violation during the second stage of the Post-Conviction Hearing Act. Pingelton also advocated that the appellate court wrongly rejected his argument that the circuit court improperly allowed post-conviction counsel to withdraw without developing a potentially meritorious ineffective-assistance-of-counsel claim, where it was improper for the appellate court to dismiss his ineffective-assistance-of-counsel allegations based on trial strategy at this stage of the proceedings. More specifically, Pingelton posited that the motion-to-withdraw proceeding was tantamount to first-stage review of his petition, where a claim of ineffective assistance of counsel could not be dismissed as trial strategy. The appellate court denied Pingelton's petition for rehearing without comment. Subsequently, Pingelton petitioned this Court for leave to appeal, which this Court granted. This appeal follows.

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.

More than two years after the State's untimely motion to dismiss and in the midst of litigating post-conviction counsel's motion to withdraw, the circuit court set up a "status" hearing without notice to the parties for the following day. That very next day, the circuit court allowed the State to argue its motion to dismiss uncontested at the "status" hearing, before John Pingelton ("Pingelton") and his post-conviction counsel litigated counsel's motion to withdraw. The circuit court subsequently granted both the State's motion to dismiss and post-conviction counsel's motion to withdraw in the same ruling.

Consequently, the circuit court dismissed Pingelton's post-conviction petition and resolved the State's dispositive motion as the result of a hearing of which he was not provided any notice. Just as problematically, Pingelton was represented by post-conviction counsel at the hearing and so he could not respond *pro se* to the State's motion. And, because post-conviction counsel sought to withdraw at the same hearing, he realistically could not be expected to protect Pingelton's interests. Simply, the circuit court's procedure effectively deprived Pingelton of any notice and meaningful opportunity to address the State's untimely and long-forgotten motion to dismiss, violating his constitutional right to procedural due process.

In its subsequent review of the procedural framework employed by the circuit court, the appellate court correctly determined that Pingelton lacked sufficient notice and the opportunity to be heard–the established hallmarks of procedural due process– on the State's motion to dismiss. Specifically, the appellate court held that Pingelton "had no reason to suspect the motion [to dismiss] would be argued at this hearing[,]" there was "no indication [Pingelton] personally received the motion[,]" and "[b]ecause of the way that the trial court conducted the hearing, the only party who ever discussed the State's motion to dismiss was the State itself." *People v. Pingelton*, 2021 IL App (4th) 180751, ¶¶ 33–34.

Nevertheless and contrary to its own precedent as well as opinions from this Court, the appellate court found that the deprivation of notice and a meaningful opportunity to respond to the State's motion was harmless error. *Id.* at ¶ 34. But this Court has previously warned that it would vacate and remand for additional proceedings where the circuit court violates the petitioner's right to procedural due process in contesting the State's motion to dismiss his post-conviction petition, in order both to underscore the critical nature of the petitioner's due-process rights and to ensure that such violations would not be repeated. In disregarding that message, the appellate court erred and this Court should reverse the appellate court's decision. After reversing the appellate court's judgment, this Court should remand for additional second-stage proceedings. More precisely, this Court should order the circuit court first to resolve post-conviction counsel's motion to withdraw and issue its ruling. After that and with proper notice, the circuit court should then proceed on the State's motion to dismiss either with post-conviction counsel representing Pingelton's interests or allow him the opportunity to proceed *pro se*.

1. Standard of Review

The circuit court's dismissal of a post-conviction petition at the second stage of proceedings under the Post-Conviction Hearing Act ("the Act") is reviewed *de novo*. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). Similarly, a procedural-due-process claim presents a legal question reviewed *de novo*. *People v. Cardona*, 2013 IL 114076, ¶ 15. And, whether a constitutional violation may be analyzed for harmless error is a purely legal question reviewed *de novo*. Cf. *People v. Wrice*, 2012 IL 111860, ¶ 50.

2. The Act and the Constitutional Right to Procedural Due Process

The Act provides a statutory remedy for criminal defendants who have suffered a substantial denial of their constitutional rights during the proceedings that resulted in their convictions. 725 ILCS 5/122-1(a)(1) (2015); *People v. Johnson*, 2018 IL 122227, ¶ 14. Under the Act, the post-conviction process contains three distinct stages. *Johnson*, 2018 IL 122227, ¶ 14. This three-stage process is initiated when the defendant files his petition with the circuit court. *People v. Tate*, 2012 IL 112214, ¶ 8.

At the initial stage, a defendant's petition may be dismissed only if the circuit court finds that the filed petition is frivolous or patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 11 (2009). If the circuit court does not dismiss the petition as frivolous or patently without merit within 90 days, then the petition advances to the second stage where counsel is appointed for indigent petitioners. 725 ILCS 5/122-2.1(a)(2) (2015); 725 ILCS 5/122-4 (2015); 725 ILCS 5/122-5 (2015); *People v. Niffen*, 2018 IL App (4th) 150881, ¶ 13. If the circuit court advances the petition to the second stage within 90 days, it is presumed that the circuit court examined the petition and found that it was not frivolous or patently without merit. See *People v. Fathauer*, 2019 IL App (4th) 180241, ¶ 44.

After counsel is appointed or retained at the second stage, the State is permitted to file responsive pleadings. *People v. Cortez*, 338 Ill. App. 3d 122, 124–25 (1st Dist. 2003). Specifically, within 30 days, the State shall answer or move to dismiss; in the event that a motion to dismiss is filed and denied, the State must file an answer within 20 days after such a denial. 725 ILCS 5/122-5; *People v. Jackson*, 2015 IL App (3d) 130575, ¶ 14. After such responsive filings, the circuit court may dismiss the petition when its allegations fail to make a substantial showing of a constitutional violation. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). A substantial showing of a constitutional violation is a measure of the legal sufficiency of a defendant's well-pled allegations of a constitutional violation which, if proved at an evidentiary hearing, would entitle him to relief. *People v. Domagala*, 2013 IL 113688, ¶ 35. As a result, during the second stage of the Act, all supported factual allegations that are not positively rebutted by the record are accepted as true. *Hall*, 217 Ill. 2d at 334.

If a defendant makes a substantial showing that his constitutional rights were violated, the matter proceeds to a third-stage evidentiary hearing where the circuit court serves as a fact finder, resolves evidentiary conflicts, evaluates the witnesses' credibility, and determines the

weight to be given to the proffered testimony and evidence. *Domagala*, 2013 IL 113688, ¶¶ 34, 46. For the third-stage evidentiary hearing, the circuit court determines whether the evidence introduced demonstrates that the defendant is, in fact, entitled to relief. *Id.* at ¶ 34.

The Act is a creature of statute, and a defendant is entitled to the procedure, process, and rights outlined by the Act itself. See *People v. McDonald*, 2018 IL App (3d) 150507, ¶ 15. Even so, a criminal defendant is still entitled to procedural due process. U.S. Const., amend. XIV; Ill. Const. 1970, art. I, § 2; see *People v. Williams*, 2021 IL App (3d) 190082, ¶ 21 ("A defendant has a right to procedural due process in postconviction proceedings"). While post-conviction petitioners are not entitled "to the full panoply of constitutional rights that accompany an initial criminal prosecution, this does not mean that a defendant in a post-conviction proceeding is not entitled to due process at all." *People v. Wright*, 189 Ill. 2d 1, 17 (1999) (overruled on other grounds by *People v. Boclair*, 202 Ill. 2d 89, 99 (2002)). Indeed, the protection of a defendant's right to procedural due process under the Act "is of critical importance." *People v. Kitchen*, 189 Ill. 2d 424, 435 (1999).

"The hallmarks of procedural due process are notice and the opportunity to be heard." *In re E.W.*, 2015 IL App (5th) 140341, ¶ 32; see *In re D.W.*, 214 Ill. 2d 289, 316 (2005) (due process requires "the opportunity to be heard at a meaningful time and in a meaningful manner"). To satisfy the petitioner's right to due process, the Act requires post-conviction petitioners to be provided notice and an opportunity to be heard prior to the circuit court's ruling on a second-stage motion to dismiss. *People v. Al Momani*, 2016 IL App (4th) 150192, ¶ 12; see *Williams*, 2021 IL App (3d) 190082, ¶ 22 (holding that the circuit court's post-conviction procedure deprived the petitioner of his right to procedural due process because it failed to provide him with a meaningful opportunity to be heard in response to the State's second-stage motion to dismiss). To be sure, Illinois courts have long recognized that basic notions of fairness

demand that a defendant be afforded notice of, and a meaningful opportunity to rebut, any motion or responsive pleading by the State. *People v. Stoecker*, 2020 IL 124807, ¶ 20; see *English v. Cowell*, 10 F.3d 434, 437 (7th Cir. 1993) (notice and an opportunity to respond to a dispositive motion are "deeply imbedded in our concept of fair play and substantial justice").

3. The Procedure Employed by the Circuit Court Violated Pingelton's Constitutional Right to Procedural Due Process.

On appeal, the appellate court correctly recognized that the circuit court failed to provide Pingelton with sufficient notice and opportunity to be heard on the State's motion to dismiss his post-conviction petition. *Pingelton*, 2021 IL App (4th) 180751, ¶¶ 32–34. As explained further below, Pingelton had no reason to suspect that the motion to dismiss–a motion filed two years earlier–would be argued at the unnoticed status hearing and there was no indication that Pingelton had ever even received that motion. *Id.* Not only that, due to the manner in which the circuit court conducted the hearing, the State was the only party permitted to address its motion to dismiss and the circuit court ultimately granted that dispositive motion without hearing contrary argument from the defense. *Id.*

To that end, Pingelton filed his post-conviction petition on December 2, 2015, and the circuit court appointed post-conviction counsel to represent him on the matter around15 days later. (C. 19, 209–10.) By appointing counsel to represent Pingelton, the circuit court advanced his post-conviction petition to the second stage. See *People v. Johnson*, 2018 IL App (5th) 140486, ¶ 45 (stating that, by appointing counsel, the circuit court takes affirmative action that effectuates the petition's advancement to the second stage).

On March 11, 2016, the State moved to dismiss Pingelton's petition. (C. 275–76.) Because the dismissal motion was more than 30 days after the circuit court advanced the petition to the second stage and no other docketing deadlines were outlined by the circuit court, the State's motion was untimely. See 725 ILCS 5/122-5; *Cortez*, 338 Ill. App. 3d at 124–25 (stating that a motion to dismiss filed more than 30 days after counsel's appointment was clearly beyond

the time limits established under the Act). As such, the State's motion to dismiss was beyond the expected filing deadlines delineated by the Act. See *Cortez*, 338 Ill. App. 3d at 128–29 (criticizing the State's failure to abide by the Act's filing guidelines as it may jeopardize the integrity of the post-conviction process). The certificate of service for the State's untimely motion to dismiss indicated that it delivered a copy to post-conviction counsel. (C. 277.) The record does not establish if Pingelton received a copy of the State's dispositive motion. (C. 277.) No action was taken on the State's motion to dismiss in the remainder of 2016 or, besides a single status hearing, in 2017. (C. 19–20.)

In February 2018, post-conviction counsel indicated that he would seek leave to withdraw, and both he and Pingelton filed numerous motions addressing that issue. (C. 296, 309, 323, 374.) Then, on May 8, 2018, the circuit court or circuit clerk issued a docket entry scheduling a status hearing for the next day. (C. 21.) There is no indication in the record that notice was given to Pingelton or to post-conviction counsel. (C. 21.) That next day, the circuit court conducted a hearing by conference call with Pingelton, who was incarcerated, not on a status hearing, but on both post-conviction counsel's motion to withdraw and the State's dispositive motion to dismiss his petition. (C. 21; Sup. R. 9.) As there was no notice given to Pingelton or post-conviction counsel that the State's motion to dismiss–a motion filed more than two years prior–would be argued, it was improper for the circuit court to proceed on the motion at the hearing. See *Al Momani*, 2016 IL App (4th) 150192, ¶¶ 12, 13; see, e.g., *People v. Bounds*, 182 Ill. 2d 1, 5 (1998) (reversing for further proceedings where the defense was prepared for a status call, only to be surprised when the circuit court, without any prior notice, granted the State's motion to dismiss the petition). By doing so, the circuit court violated Pingelton's right to procedural due process. See *Kitchen*, 189 Ill. 2d at 435.

The circuit court's procedure also denied Pingelton of any meaningful opportunity to be heard on the State's motion. After the circuit court introduced the parties at the telephone conference call, it informed Pingelton that it had "received your response to [the] *Finley* brief.

So, we are prepared to argue today." (Sup. R. 9.) However, the circuit court then asked the State to present its motion to dismiss first. (Sup. R. 9.) In its argument, the State adopted post-conviction counsel's motion to withdraw and requested that the circuit court dismiss Pingelton's petition. (Sup. R. 9–11.)

Thereafter, the circuit court stated to Pingelton that it would "hear [his] argument." (Sup. R. 11.) But, to that point, the only allowed, substantive filings that Pingelton had made were in response to post-conviction counsel's motion to withdraw. (C. 293, 309, 323.) Indeed, at the time of the hearing, post-conviction counsel still represented Pingelton. (C. 19, 400.) As a result, Pingelton was prohibited from addressing or responding to the State's untimely and unnoticed motion to dismiss from over two years prior. See *In re Sean N.*, 391 Ill. App. 3d 1104, 1106 (4th Dist. 2009) (ruling that a represented defendant's *pro se* motions and arguments are not properly before the court and must be disregarded); *People v. Neal*, 286 Ill. App. 3d 353, 355 (4th Dist. 1997) (explaining that represented parties cannot proceed *pro se*). The only permissible arguments that the represented Pingelton could make to the circuit court were limited to complaints surrounding post-conviction counsel's representation. See, e.g., *People v. Bell*, 2014 IL App (3d) 120637, ¶ 15 (concluding that the circuit court properly struck the post-conviction petitioner's *pro se* supplemental pleadings as he was represented by counsel); cf. *People v. Rhodes*, 2019 IL App (4th) 160917, ¶ 18 (generally describing that the only exception to the rule precluding a represented party from filing *pro se* motions is when the *pro se* motion is directed against his or her counsel's performance). Thus, before the circuit court, the represented Pingelton could only challenge his counsel's motion to withdraw and could not dispute the State's motion to dismiss directly. Cf. *Bell*, 2014 IL App (3d) 120637, ¶ 15.

In that context, Pingelton, at the hearing, proceeded in the only manner available to him; he contested his counsel's findings and contentions in the motion-to-withdraw briefing before requesting to proceed *pro se*. (Sup. R. 11–21.) Regarding the State's motion to dismiss,

as a layperson, Pingelton could not "be expected to jump up at a hearing and voice his objections while his attorney [was] actively arguing his interests." See *Jackson*, 2015 IL App (3d) 130575, ¶ 23 (quoting *People v. Elken*, 2014 IL App (3d) 120580, ¶ 35). Indeed, not only was it unreasonable to expect Pingelton to voice his objections to the State's motion, he was actually prohibited from doing so as he was represented by counsel. See *Bell*, 2014 IL App (3d) 120637, ¶ 15.

But critically, post-conviction counsel also could not be expected to represent Pingelton's interests at the hearing. To be sure, post-conviction counsel actively argued to the circuit court and promoted his motion seeking to withdraw from the case. (Sup. R. 21–24.) See *Jackson*, 2015 IL App (3d) 130575, ¶ 23 ("a motion to withdraw separates defense counsel's interests from those of the defendant"). This separation of interests was further demonstrated when the State incorporated post-conviction counsel's briefing into its motion to dismiss. (Sup. R. 9.) Because post-conviction counsel's and Pingelton's needs were divorced, no one was able to protect Pingelton's interests at the telephone hearing on the State's untimely, dispositive motion. (Sup. R. 9–24.)

Simply, the entire time from the filing of the State's motion to dismiss through the circuit court's order dismissing his petition, Pingelton could not reply to the State's motion due to the fact that post-conviction counsel represented him. (C. 19, 400.) See *Bell*, 2014 IL App (3d) 120637, ¶ 15. And, in a subsequent "status" hearing set up the day before and without notice to Pingelton or his counsel, the circuit court permitted the State to argue an untimely motion from years earlier effectively uncontested. (C. 21, 275–76; Sup. R. 9–11.) This haphazard procedure does not satisfy the Act's requirement that Pingelton receive the "critical" right to due process. See *Kitchen*, 189 Ill. 2d at 435.

Just as troubling, it is not as though the circuit court was unaware of the procedural deficiencies in Pingelton's case. Once the circuit court permitted post-conviction counsel to withdraw, Pingelton raised that he lacked notice and a meaningful opportunity to respond to the State's motion to dismiss. Specifically, Pingelton asked the circuit court to reconsider its dismissal order, arguing that it "considered and granted the State[']s motion to dismiss, where [he] has never received nor has [he] seen any such motion from the State, [and] was fundamentally unfair and improper in that [he] was not given an opportunity to address this State[']s motion." (C. 416.) Because Pingelton was finally proceeding *pro se*, the motion to reconsider was his first opportunity to raise the issue. (C. 416.) Even though Pingelton promptly alerted the circuit court of its "fundamentally unfair and improper" procedure, the circuit court erroneously denied him relief. (C. 23, 423.)

This conclusion that the circuit court deprived Pingelton of notice and an opportunity to respond to the State's motion to dismiss is further supported by the appellate court decision in *Williams*, 2021 IL App (3d) 190082, ¶¶ 22–24. In *Williams*, while the post-conviction petitioner and his counsel were litigating counsel's motion to withdraw during the second stage, the State filed its motion to dismiss. 2021 IL App (3d) 190082, ¶ 22. Ten days thereafter and despite the defendant's response that he had not been able to adequately review the motion, the circuit court simultaneously held a hearing on counsel's motion to withdraw and the State's motion to dismiss, ultimately granting the State's motion to dismiss. *Id.*

In finding that the circuit court deprived the defendant of his right to procedural due process, the appellate court noted that he was in "the precarious position of not knowing at the outset of the hearing whether he would be required to represent himself in response to the State's motion to dismiss" and that it would have been procedurally improper for him to respond to the State's motion as a litigant before his counsel was permitted to withdraw. *Id.*

To protect the defendant's right to procedural due process, the appellate court explained that "proper procedure would have been to first rule on postconviction counsel's motion to withdraw. If the court granted the motion to withdraw, it should have then allowed defendant to respond to the State's motion to dismiss as a self-represented litigant after giving defendant adequate notice and time to prepare." *Id.* at ¶ 23.

Just like in *Williams*, Pingelton was procedurally barred from addressing the State's motion to dismiss because he was represented by counsel. (Sup. R. 21–24.) And similar to *Williams*, post-conviction counsel could not protect Pingelton's interests as he was actively trying to withdraw from the case. (Sup. R. 21–24.) As such, in both cases, the circuit court essentially conducted an *ex parte* hearing on the State's motion to dismiss and, after hearing the State's argument on the matter, granted its motion without any opportunity for the defense to object. (Sup. R. 9–24.)

In the end, this Court should find that the circuit court's procedure was substantively deficient and operated to deprive Pingelton of his right to procedural due process under the Act. See *Williams*, 2021 IL App (3d) 190082, ¶¶ 22–24; *Al Momani*, 2016 IL App (4th) 150192, ¶ 13. As explained previously, the circuit court must first resolve post-conviction counsel's motion to withdraw. See *Williams*, 2021 IL App (3d) 190082, ¶ 23. Only after that and with proper notice may the circuit court proceed on the State's motion to dismiss either with post-conviction counsel representing Pingelton's interests or Pingelton opposing the motion *pro se*. See *id.*

4. The Appellate Court Reversibly Erred in Reviewing the Violation of Pingelton's Constitutional Right to Procedural Due Process for Harmless Error.

After finding that the circuit court deprived Pingelton of proper notice and an adequate opportunity to defend his own interests, however, the appellate court determined that any procedural error was harmless due to the purported meritless nature of his *pro se* petition. *Pingelton*, 2021 IL App (4th) 180751, ¶¶ 32, 34. In so doing, the appellate court ignored its

own precedent that required reversal for procedural-due-process violations during the second stage of the Act as well as binding precedent from this Court on the matter. As a result, the appellate court reversibly erred in applying a harmless-error review to the denial of Pingelton's fundamental constitutional rights under the Act. See *Kitchen*, 189 Ill. 2d at 435 (expounding that the right to procedural due process under the Act is "of critical importance").

More specifically, the appellate court has already established that denying a post-conviction petitioner notice and the opportunity to be heard at the second-stage required reversal rather than for it to engage in a harmless-error analysis. See *Al Momani*, 2016 IL App (4th) 150192, ¶ 13. In *Al Momani*, the circuit court dismissed the petitioner's petition at the second stage a few days after the State filed its motion to dismiss, without providing the petitioner notice or an opportunity to contest the State's motion. *Id.* at ¶¶ 5, 12. The appellate court determined that the circuit court's conduct violated the petitioner's right to procedural due process, warranting remand for additional proceedings that afforded the petitioner the opportunity to respond to the State's motion. *Id.* at ¶¶ 12–15. Specifically, the appellate court held that, "[b]ecause the trial court erred in granting the State's motion to dismiss when defendant did not have notice or an opportunity to be heard, *we must reverse* the court's dismissal of defendant's postconviction petition and remand this case for defendant to have the opportunity to respond to the State's motion." *Id.* at ¶ 13 (emphasis added). Immediately thereafter, the appellate court further explained that, as it must reverse the circuit court's dismissal, it would not address the merits of the State's motion to dismiss or the defendant's post-conviction petition. *Id.*

Just like in *Al Momani*, the circuit court's disregard for Pingelton's procedural rights under the Act warrants reversal regardless of the petition's merits. *Id.* To that end, the appellate "*must reverse*" to ensure that Pingelton receives his right to defend and respond against the State's dispositive motion with proper notice. See *id.* And, as such, the appellate court reversibly

erred in affirming the circuit court's judgment that granted the State's motion to dismiss Pingelton's *pro se* post-conviction petition. *Id.*; see *People v. Netter*, 2022 IL App (4th) 200549-U, ¶¶ 29, 32 (applying *Al Momani* and remanding for the defendant to have the opportunity to respond to the State's motion to dismiss where the circuit court denied the defendant his procedural-due-process rights by granting the State's amended motion to dismiss two days after it was filed); cf. *People v. McMillen*, 2021 IL App (1st) 190442, ¶¶ 21, 23 (remanding for additional third-stage proceedings without regard to the petition's merits "where the matter was scheduled for a 'final status' hearing and defendant had no notice that his attorney intended to withdraw or his petition was going to be ruled upon").

Not only did the appellate court contravene its own precedent, it also failed to follow binding precedent from this Court. For example, in *Bounds*, this Court determined that the circuit court's conversion of a status hearing to a hearing on the post-conviction petition's merits without notice violated the defendant's right to procedural due process under the Illinois Constitution. *Bounds*, 182 Ill. 2d at 5. The *Bounds* Court found that, as the defendant's right to procedural due process was denied, it must "[a]ccordingly" reverse and remand the matter to the circuit court for additional proceedings. *Id.* Critically, the *Bounds* Court remanded for additional proceedings without reviewing the petition's merits to determine whether the circuit court's due-process violation was harmless error. See *id.*

Similarly, this Court in *Kitchen*, when confronted with the circuit court's dismissal of the defendant's post-conviction petition without notice and an opportunity to be heard on the matter and while the parties were embroiled in a discovery dispute, held that *Bounds* compelled the vacating of the dismissal order and a remand for additional proceedings. *Kitchen*, 189 Ill. 2d at 434–35. In its analysis, the *Kitchen* Court remanded without examining whether the defendant's petition or the State' s motion to dismiss contained any merit and instead indicated that it was reversing to reinforce the seriousness of the continued deprivations of a defendant's right to

due process under the Act. See *Kitchen*, 189 Ill. 2d at 434–35. In particular, the *Kitchen* Court explained that, by vacating the circuit court's judgment, it intended to send a clear message that the protection of a defendant's right to procedural due process under the Act "is of critical importance" and so that continued violations of that right would not reoccur. *Id.* at 435. As a result, just like in *Bounds* and *Kitchen*, this Court should reverse the circuit court's judgment in *Pingelton*'s case and remand without consideration of whether his petition or the State's motion to dismiss ultimately were meritorious. *Id.*; *Bounds*, 182 Ill. 2d at 5.

In making this argument, Pingelton recognizes this Court's recent decision in *People v. Stoecker*, 2020 IL 124807. In *Stoecker*, the defendant filed a petition for relief from judgment under Section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (2021)) over 16 years after his convictions and sentences were affirmed on direct appeal and after numerous petitions for collateral relief were denied. *Stoecker*, 2020 IL 124807, ¶ 1. Four days after the State filed its motion to dismiss and without giving the defendant a reasonable opportunity to respond or notice, the circuit court granted that dismissal motion, thereby depriving the defendant of his right to procedural due process. *Id.* at ¶ 22.

Nevertheless, this Court determined that the error was subject to harmless-error review. *Id.* at ¶ 25. In that process, this Court explained that there is a strong presumption that most errors of constitutional dimensions may yet be reviewed for harmless error; however, automatic reversal is required where an error is deemed "structural." *Id.* at ¶ 23. According to this Court, a structural error is "a systemic error which serves to 'erode the integrity of the judicial process and undermine the fairness of the proceedings.'" *Id.* (quoting *People v. Glasper*, 234 Ill. 2d 173, 197–98 (2009)). Following precedent from the United States Supreme Court, this Court further espoused that an error qualifies as structural when the error has "consequences that are necessarily unquantifiable and indeterminate." *Id.* at ¶ 24 (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006)).

Applying that standard to the circuit court's dismissal of the petitioner's petition for relief from judgment under Section 2-1401, this Court explained that the error at issue could not be equated with structural error. *Id.* at ¶ 25. While remarking that the error was "serious," this Court found that it did not necessarily render the proceedings unfair or that the error's impact was not indeterminate. *Id.* To that end, this Court ultimately reviewed the circuit court's dismissal of the petitioner's petition for relief from judgment, found that the error was harmless, and affirmed the circuit court's judgment. *Id.* at ¶¶ 26, 47.

That being said, while there are some similarities between proceedings on petitions for relief from judgment and post-conviction petitions, this Court should not extend *Stoecker*'s holding on the applicability of harmless-error review to the Act, which would, in essence, overrule its prior decisions in *Bounds* and, in particular, *Kitchen*. While both proceedings can involve collateral challenges to a final judgment rendered in a criminal case, the Act and Section 2-1401 are different statutory proceedings designed to accomplish different ends. See *Stoecker*, 2020 IL 124807, ¶¶ 40–41 (noting that the Act has no application whatsoever to Section 2-1401 and is an entirely different form of statutory collateral relief). As relayed above, the purpose of the Act is to provide a statutory mechanism for incarcerated defendants to assert they have been unconstitutionally deprived of their liberty and, as such, safeguards a critical avenue to ensure the constitutional integrity of the proceedings in which their conviction was entered. See *Johnson*, 2018 IL 122227, ¶ 17. Consequently, the Act serves an essential and distinguishable role in ensuring that petitioners are not wrongfully incarcerated in deprivation of their constitutional rights. See *id.*

Given that important objective, the legislature included additional protections to safeguard a petitioner's interests under the Act that differentiate it from cases involving a petition for relief from judgment under 735 ILCS 5/2-1401 and indicate a heightened need to ensure that

a defendant's constitutional claims are properly heard and addressed. To that end, the legislature, unlike claims filed under 735 ILCS 5/2-1401, provided an express statutory right to the assistance of counsel for claims that reach the second stage. *Stoecker*, 2020 IL 124807, ¶ 36. Not only that, this Court established Illinois Supreme Court Rule 651(c), which requires post-conviction counsel to discharge specific obligations that ensure a defendant's claims are analyzed by counsel, developed by the record, and shaped into adequate legal form. See Ill. S. Ct. R. 651(c) (2017). Under the circumstances, this Court envisioned, and the legislature clearly designed, Section 2-1401 petitions and post-conviction petitions to be treated differently and so this Court should not overrule *Bounds* and *Kitchen* by applying *Stoecker* to procedural error under the Act.

This Court also should not extend *Stoecker* to proceedings under the Act due to the limited nature of Section 2-1401 litigation. As recognized by this Court, Section 2-1401 generally provides a forum to determine whether facts exist that were unknown to the court at the time of trial and would have prevented entry of the judgment; in that way, Section 2-1401 proceedings are narrower in scope than litigation under the Act. See *People v. Pinkonsly*, 207 Ill. 2d 555, 567 (2003) (determining that this Court has long held that Section 2-1401 proceedings are not an appropriate vehicle for ineffective-assistance claims because such claims do not challenge the judgment's factual basis); *People v. Hayden*, 288 Ill. App. 3d 1076, 1078 (5th Dist. 1997) (stating that "the primary difference between the two proceedings is the scope of review"). In contrast, the legislature specifically created a broad forum through the Act for criminal defendants to litigate all of their claims of constitutional deprivations, which are not limited to factual mistakes. See *Hayden*, 288 Ill. App. 3d at1078. Given the limited purpose fulfilled by Section 2-1401 petitions and the stringent requirements to warrant relief under those provisions in comparison to the Act, it is more easily determinable on review if possible procedural error affects the ultimate outcome in any particular Section 2-1401 case. See, e.g., *Stoecker*, 2020 IL 124807, ¶¶ 25–27 (determining that the effect of the procedural-due-process violation in

a Section 2-1401 proceeding could be quantified; the petition was patently incurable as a matter of law as it was filed 16 years after the expiration of the statute's two-year limitation period); see generally *In re Parentage of G.E.M.*, 382 Ill. App. 3d 1102, 1118 (3d Dist. 2008) (offering that Section 2-1401's requirements "are stringent"); *Bank of Ravenswood v. Domino's Pizza, Inc.*, 269 Ill. App. 3d 714, 725 (1st Dist. 1995) (noting Section 2-1401's strict limitations period).

Just as importantly, there are other contexts in the Act's second stage where procedural error results in reversal without regard to the petition's merits, further reinforcing that reviewing courts treat errors in the post-conviction proceedings differently than procedural errors under Section 2-1401. Cf. *People v. Dixon*, 2019 IL App (1st) 160443, ¶ 57 (commenting that it was "unaware of cases in the postconviction context where a court has excused procedural error because it believes the petition did not have merit. Actually, the cases suggest the opposite"). For instance, when post-conviction counsel fails to abide by Rule 651(c) at the second stage, the proper remedy is to remand for additional proceedings regardless of the underlying merits of the petition. *People v. Suarez*, 224 Ill. 2d 37, 47 (2007) (rejecting that harmless-error review applied where post-conviction counsel failed to fulfill the duties prescribed in that rule).

Similarly, where the circuit court dismisses a petition without the State properly filing a written motion to dismiss, the reviewing court remands for second-stage proceedings without regard to the petition's merits. See, e.g., *People v. Hayes*, 2016 IL App (3d) 130769, ¶ 19 (after affirming post-conviction's counsel proper withdrawal from the case, remanding back to the circuit court where the circuit court dismissed the post-conviction petition based on post-conviction counsel's motion to withdraw even in the absence of a motion by the State to dismiss, and remanding "so that the proper procedure announced in the Act can be followed" including allowing the defendant *pro se* to respond to the State's motion); *People v. Volkmar*, 363 Ill. App. 3d 668, 673–74 (5th Dist. 2006) (holding that where the petition had advanced to the second stage and counsel was appointed, the circuit court reversibly erred when it *sua sponte*

dismissed the petition). And where post-conviction counsel improperly attempts to withdraw by moving to dismiss the defendant's petition, the cause is still remanded so that the defendant is provided proper notice and an opportunity to respond *pro se*. See *Jackson*, 2015 IL App (3d) 130575, ¶¶ 22–23. Consequently, the Act contains numerous examples where the reviewing courts remand due to second-stage errors even though there is no indication that the petition's claims contain any merit. Cf. *Dixon*, 2019 IL App (1st) 160443, ¶ 57.

To be sure, there are also policy reasons to refrain from applying harmless-error review to due-process errors during the Act's second stage. At the forefront is the critical nature of the error itself. See *Kitchen*, 189 Ill. 2d at 435 (reiterating that "the protection of a defendant's right to procedural due process in post-conviction proceedings is of critical importance"); cf. *Pettigrew v. Nat'l Accts. Sys., Inc.*, 67 Ill. App. 2d 344, 351 (2d Dist. 1966) (stating that the intrinsic fairness of the procedure utilized by the court in rendering any judgment, order, or decree "is essential to the untainted administration of justice–the most cherished aspect of our judicial system"). Indeed, the right to due process protects the fairness of the process and the appearance of impartiality in the justice system. See *People v. Deleon*, 2020 IL 124744, ¶ 7. Allowing the *ex parte* presentation of a dispositive motion without notice, which is in essence what occurred here, threatens the fundamental concepts underlying the constitutional guarantee that ensures the justice system's integrity and erodes any confidence that petitioners will have a fair and full opportunity to present their post-conviction claims. See *People v. Keller*, 353 Ill. App. 3d 830, 836–37 (2d Dist. 2004) (explaining that, "[t]o deem an error harmless when it eviscerates the right to be heard is to allow it to annul the most basic procedural safeguards").

So if the purpose of due process is to ensure fundamental fairness in the process of adjudicating a petitioner's constitutional claims, then the deprivation of that right undoubtedly would serve to undermine the proceeding's fairness, which would constitute structural error. See *Williams*, 2021 IL App (3d) 190082, ¶ 37 (McDade, J., concurring). And without the

procedural protections safeguarded by the right to due process, there is a heightened risk that post-conviction rulings appear arbitrary, further endangering the justice system's integrity. Cf. *McIntyre v. Sec. Comm'r of S.C.*, 425 S.C. 439, 452 (Ct. App. 2018) (noting that the lack of formal procedural architecture may fate the process as arbitrary and so affect fundamental fairness that to deem it harmless "would only add insult to the injury to the rule of law").

Just as significantly, the deprivation of a petitioner's right to procedural due process under the Act is an ongoing concern. As noted previously, this Court admonished in *Kitchen* that its purpose in vacating a circuit court's judgment that deprived the petitioner of his right to procedural due process and remanding for additional proceedings was "to send a clear message to both bench and bar that the protection of a defendant's right to procedural due process in post-conviction proceedings is of critical importance" and that it trusted "such violations will not soon be repeated in our courtrooms." *Kitchen*, 189 Ill. 2d at 435. Without the penalty for violating the petitioner's right to due process being a remand for additional proceedings that afford the petitioner that right, there is an increased danger that due-process violations will continue unmitigated and unremedied. See *id.*; *Williams*, 2021 IL App (3d) 190082, ¶ 38 (McDade, J., concurring) (voicing concern that harmless-error review during the post-conviction process may authorize continued violations of a petitioner's right to due process); cf. *People v. Brown*, 52 Ill. 2d 227, 230 (1972) (in the post-conviction context, reasoning that compliance with Rule 651(c) "would not be encouraged were we to ignore the rule's nonobservance in those cases appealed to this court"). In that way, remanding for additional second-stage proceedings would thus reinforce the importance of a defendant's right to due process, emphasize the seriousness of the depriving a defendant of that right, and repeat this Court's warning that it will not tolerate continued violations of this nature. See *Kitchen*, 189 Ill. 2d at 435; *Williams*, 2021 IL App (3d) 190082, ¶ 38 (McDade, J., concurring) (warning that continuing procedural-due-process violations "unquestionably erodes the integrity of the judicial process").

It is also important to note that remanding for additional second-stage proceedings would not impose a high burden on trial courts. See *Keller*, 353 Ill. App. 3d at 836 (articulating that harmless-error analysis is a creature of necessity–not a fundamental principle of justice–and that remands for additional post-conviction proceedings place "little burden on the trial court"). An additional post-conviction hearing with notice and the opportunity to respond before the circuit court simply does not exact the same challenges to society's interest in the finality of judgments and the efficient administration of justice as errors that would necessarily require a new trial with its corresponding high economic and social costs. See *id.* And the minimal burden in remanding for additional post-conviction proceedings must be balanced against the cost of litigation on appeal concerning whether a due-process violation was harmless. In fact, a strict, easy-to-apply rule prohibiting harmless-error review for constitutional deprivations during second-stage proceedings may decrease appellate litigation between the State and petitioners on whether an error was harmless in each and every case. Cf. *People v. Janes*, 158 Ill. 2d 27, 35 (1994) (explaining that a bright-line rule will generally eliminate unnecessary litigation on appeals).

Ultimately, this Court should follow its previous decisions in *Bounds* and *Kitchen* and decline to extend *Stoecker* to second-stage proceedings under the Act. Quite simply, this Court should hold that deprivations of a petitioner's constitutional right to procedural due process during the Act are not subject to harmless-error review. As a result, this Court should reverse the circuit and appellate court's judgments and remand for additional second-stage proceedings.

5. Alternatively, the Appellate Court Reversibly Erred in Finding that the Circuit Court's Error was Harmless.

Alternatively, even if harmless-error review applied to the aforementioned deprivations of Pingelton's constitutional rights, the appellate court reversibly erred in holding that his petition failed to present even the gist of a constitutional claim and in rejecting Pingelton's appellate

argument that the circuit court erroneously allowed post-conviction counsel to withdraw as there was a potentially meritorious allegation that trial and direct-appeal counsel provided ineffective assistance of counsel. *Pingelton*, 2021 IL App (4th) 180751, ¶¶ 6, 68. More specifically, Pingelton, in his post-conviction petition, asserted the potentially meritorious claim that he received ineffective assistance from his trial counsel for permitting the unqualified and improper expert testimony of physicians Dennis Adams ("Dr. Adams") and Robert Sliwa ("Dr. Sliwa") regarding the frequency of vaginal trauma in sexual-assault victims and from his appellate counsel for failing to raise trial counsel's ineffectiveness during his direct appeal. (C. 209–19.) *Id.* at ¶¶ 6, 36, 69. As a result, Pingelton contended that the circuit court erred in permitting post-conviction counsel to withdraw instead of shaping this particular argument as required by Rule 651(c). *Id.*

However, as previously mentioned, the appellate court held that Pingelton's petition failed to present even the gist of a constitutional claim. *Id.* at ¶ 73. According to the appellate court, trial counsel's decision not to object to the expert testimony from the physicians was trial strategy and that there was no need for counsel to object to the "non-certification of experts" before the jurors. *Id.* at ¶¶ 44, 68. The appellate court was incorrect.

The Act requires that post-conviction counsel provide reasonable assistance to help the petitioner properly present his claims to the court. *Suarez*, 224 Ill. 2d at 42. To ensure that a petitioner receives a reasonable level of assistance, Rule 651(c) demands that post-conviction counsel: (1) consult with the petitioner to ascertain his contentions of deprivations of constitutional rights; (2) examine the record of the proceedings at trial; and (3) make any amendments to the *pro se* petition necessary for an adequate presentation of the petitioner's claims. Ill. S. Ct. R. 651(c); *People v. Patterson*, 2012 IL App (4th) 090656, ¶ 23.

While filing a certificate of compliance with Rule 651(c) creates a rebuttable presumption that the certifying attorney complied with the above requirements and that the petitioner received reasonable assistance, that presumption can be rebutted by the record. *People v. Perkins*, 229 Ill. 2d 34, 52 (2007). The core feature of the defendants' right to counsel under the Act is the entitlement to have competent counsel make the necessary amendments to their claims to adequately present any constitutional deprivations to the court. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 18. To that end, post-conviction counsel must shape the defendant's claims into proper legal form consistent with the substantive law. See *People v. Jones*, 2016 IL App (3d) 140094, ¶¶ 28, 30.

Applicable here, under the constitutions of the United States and Illinois, a defendant is guaranteed the right to effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. In asserting an ineffective-assistance claim, the defendant generally must meet the well-established *Strickland* standard. *People v. Beasley*, 2017 IL App (4th) 150291, ¶ 26 (referencing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To satisfy that standard, the defendant must show that his counsel provided deficient representation and that counsel's deficient representation prejudiced him. See *Beasley*, 2017 IL App (4th) 150291, ¶ 26. In showing prejudice, the defendant need not establish that the error was outcome determinative, but rather must demonstrate that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *People v. Manning*, 241 Ill. 2d 319, 327 (2011).

Concerning expert testimony, generally an individual will be permitted to testify as an expert if his or her experience and qualifications afford that person with knowledge which is not common to lay persons and where such testimony will assist the trier of fact in rendering its verdict. *People v. King*, 2020 IL 123926, ¶ 35. Before allowing such testimony, a witness must be qualified as an expert by the court. *O'Brien v. Meyer*, 196 Ill. App. 3d 457, 461 (1st Dist. 1989); see *Pingelton*, 2021 IL App (4th) 180751, ¶¶ 55–56. And, in that process, the circuit court

must carefully consider the necessity and relevance of the expert testimony in light of the particular facts of the case. *King*, 2020 IL 123926, ¶ 35. Expert testimony is necessary only when the matter is both particularly within the witness's experience and qualifications and beyond that of the average juror's. *People v. Cloutier*, 156 Ill. 2d 483, 501 (1993).

In the present case, as treating physicians, both Dr. Adams and Dr. Sliwa properly testified that they examined A.H. and K.S. respectively and that they did not find any indication of sexual trauma. (R. 334–35, 345.) But, then defense counsel allowed improper expert testimony that was not related to the physicians' treatment of K.S. and A.H. Specifically, both physicians opined that the majority of sexual-assault victims do not have any indication of sexual trauma and that the victims' lack of injuries is consistent with being sexually assaulted. (R. 336, 346, 353.) This was improper opinion testimony, from physicians who were not certified by the circuit court as experts in the field of sexual-assault injuries or gynecology, that was largely speculative and likely to mislead the jurors.

Even though both Dr. Adams and Dr. Sliwa were treating physicians for the purposes of discovery, they still offered expert testimony unrelated to the factual matter of their treatment of K.S. and A.H. (R. 336, 346, 353.) To that end, the physicians opined, based on literature in the field and other cases, that a victim's lack of injuries is not inconsistent with a sexual assault occurring and that most of their examinations of sexual-assault victims do not reveal any indication of trauma. (R. 336, 341, 344, 346, 353.) This testimony was opinion based on the physicians' purported expertise in the field and, as such, required their qualification as experts before it was admissible. See *Meyer*, 196 Ill. App. 3d at 461.

But there was a possible basis for defense counsel to challenge their qualifications before the circuit court. Neither physician practiced gynecology or was board certified in that field. (R. 338–39, 346–47.) See *N. Tr. Co. v. Upjohn Co.*, 213 Ill. App. 3d 390, 406–07 (1st Dist. 1991) (noting that a physician with a speciality in emergency medicine failed to establish his familiarity

and competency to render an opinion on a gynecological issue in a medical malpractice action). The physicians were also not familiar with using a colposcope, which was a gynecological tool used in examinations to magnify any abnormalities or signs of trauma. (R. 338–39, 347–48.) And Dr. Adams admitted that he only conducted twenty examinations of purported sexual-assault victims in his 25 years of practice. (R. 333–35.)

Not only should defense counsel have challenged the physicians' qualifications, defense counsel needed to challenge the foundation for the physicians' opinion on the matter. Significantly, part of the physicians' opinion on whether the lack of injuries was consistent with sexual assault, was based on their examination of other alleged sexual-assault victims. See *Cloutier*, 156 Ill. 2d at 502 (finding that the circuit court properly excluded questions concerning the expert's experience with other sexual-assault victims). But the physicians' opinion that most sexual-assault victims that they had examined did not have any trauma or injuries required the underlying knowledge of whether the alleged victims were actually sexually assaulted. (R. 335, 342, 346, 351–52.) However, it would be impossible for the physicians to know that critical underlying fact. (R. 338, 342, 351–53.) So the physicians' belief that most assault victims do not exhibit injuries was pure speculation. See *id.* (determining that expert opinion based on a speculative foundation must be excluded).

The physicians' improper opinion testimony mattered in Pingelton's case. The State did not provide any objective corroboration that Pingelton assaulted K.S. or A.H at the residence. Instead, the State entirely relied on the testimony of K.S. and A.H. that Pingelton assaulted K.S. on the back porch in a residential neighborhood, before assaulting A.H. upstairs. (R. 276–77, 299.) Yet the credibility of both K.S. and A.H. was challenged at trial. Cheryl Pingelton explained that the morning after the encounter neither K.S. or A.H. appeared to be upset, there was nothing alarming about their demeanor, and they did not alert her to any allegations of assault. (R. 267–69.)

Thereafter, K.S. and A.H. had opportunities to relay the assault allegations to their foster mother and even to a police officer who escorted them home after an attempt to run away, but they did not do so. (R. 280, 291, 302, 314–15.) K.S. even denied that a sexual assault occurred when confronted by a counselor who knew about A.H.'s allegations. (R. 281.)

In this close case, the State offered the speculative opinions of two physicians, who were not qualified by the circuit court in that field, that the lack of injuries was consistent with being sexually assaulted. As there was no other objective corroboration of K.S.'s and A.H.'s testimony, the physicians' opinion on the matter risked misleading the jurors to believe that the lack of injuries experienced by K.S. and A.H. evidenced that they were actually assaulted.

Nevertheless, in ruling that Pingelton's *pro se* petition failed to present a gist of a constitutional claim–and thus post-conviction counsel need not amend the petition under Rule 651(c) and could withdraw–the appellate court stated that the petition was frivolous and patently without merit as defense counsel's decision not to object to the expert testimony of the two physicians was trial strategy. *Pingelton*, 2021 IL App (4th) 180751, ¶¶ 68–73. However, this position ignores that it was improper to dismiss Pingelton's ineffective-assistance allegations as trial strategy at this point in the proceedings where the appellate court reviewed whether post-conviction counsel was properly allowed to withdraw. To be sure, the standard in reviewing a motion to withdraw after the petition was advanced to the second-stage by the circuit court *is tantamount to the standard of review at the first stage*; that is, whether the defendant's petition was frivolous or patently without merit. See *People v. Kuehner*, 2015 IL 117695, ¶ 21; *Fathauer*, 2019 IL App (4th) 180241, ¶ 44.

Yet in determining whether an ineffective-assistance-of-counsel claim is frivolous or patently without merit, this Court, in *People v. Tate*, rejected that it was appropriate at the first stage to argue that the defense counsel employed reasonable trial strategy. *Tate*, 2012 IL 112214, ¶ 22. Specifically, the *Tate* Court found that the reasonable-trial-strategy argument

was not applicable when the defendant was merely required to present a gist of a claim, but rather should be considered in determining whether the defendant made a substantial showing of a constitutional violation. *Id.* at ¶¶ 21–22. Given the guidance provided by this Court in *Tate,* the appellate court should not have rejected Pingelton's ineffective-assistance claims as reasonable trial strategy when determining if Pingelton's *pro se* petition presented the gist of a constitutional claim. See *id.* And, contrary to the appellate court's conclusions, there was no indication that it was defense counsel's actual strategy to offer the speculative opinions of two unqualified physicians that the lack of injuries is consistent with being sexually assaulted. See *Pingelton*, 2021 IL App (4th) 180751, ¶¶ 68–73.

While the appellate court ultimately rejected Pingelton's ineffective-assistance claims due to defense counsel's purported trial strategy, it also commented that Pingelton's assertions that defense counsel was ineffective because the doctors provided expert opinion without being certified or recognized as experts were meritless. *Id.* at ¶ 44. More specifically, the appellate court's majority opinion suggested that it would not be proper for the circuit court to recognize a particular witness as an expert in front of the jurors. *Id.* at ¶ 49. To be clear, Pingelton does not argue that defense counsel was ineffective for failing to object to the circuit court's lack of certification of the doctors as experts before the jurors. Instead, Pingelton contends that testifying experts must be certified as such by the circuit court before they provide expert opinion and, more importantly, the doctors lacked the necessary expertise to opine about evidence of trauma in sexual-assault cases and their opinions were without an adequate foundation.

And finally, in considering Pingelton's *pro se* petition and amendments as a whole, it is important that his ineffective-assistance claims were not incurable as a matter of law. For example, Pingelton's ineffective-assistance arguments were not dismissed on the grounds that they were procedurally barred, untimely, or frivolous due to some other insurmountable barrier that further amendment could not rectify. See, e.g., *Stoecker*, 2020 IL 124807, ¶¶ 27–29

(finding that the circuit court's errors were harmless as the petitioner's Section 2-1401 claims were incurable as a matter of law when they were filed 16 years after the deadline and were barred by the doctrine of *res judicata*). As such, it is not inevitable that a remand "would serve no purpose and would merely delay the dismissal of the meritless petition." See *id.* at ¶ 33.

Under the circumstances, Pingelton's assertions that he received ineffective assistance regarding the physicians' opinions about the frequency of vaginal trauma in sexual-assault victims was not meritless. Consequently, post-conviction counsel was required to shape it into appropriate legal form before it was subject to the State's motion to dismiss. So even if the deprivation of Pingelton's constitutional right to procedural due process during the second stage of the Act is subject to harmless-error review, this Court should nonetheless hold that the error prejudiced Pingelton as his petition alleged a potentially meritorious claim that post-conviction counsel was required to amend and shape pursuant to Rule 651(c).

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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COUNSEL FOR PETITIONER-APPELLANT

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 thirty-five pages.

/s/Edward J. Wittrig
EDWARD J. WITTRIG
Assistant Appellate Defender

APPENDIX TO THE BRIEF

John Pingelton No. 127680

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FOURTH JUDICIAL DISTRICT

FROM THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT

SANGAMON COUNTY, ILLINOIS

STATE OF IL

Plaintiff/Petitioner

Reviewing Court No: 4-18-0645
Circuit Court No: 2005CF001295
Trial Judge: JOHN BELZ

v.

JOHN PINGLETON

Defendant/Respondent

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v.

JOHN PINGLETON

Defendant/Respondent

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Defendant	A	EXHIBIT A REPORT OF COURT PROCEEDINGS ON OCTOBER 2ND 2006	E 2-E 6

IN THE CIRCUIT COURT FOR THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS

FILED
MAY 22 2018
38
Clerk of the Circuit Court

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Respondent,	)	
	)	
v.	)	**No. 05-CF-1295**
	)	
JOHN PINGLETON,	)	
	)	
Defendant-Petitioner.	)	

ORDER

Defendant-Petitioner, John Pingleton, filed a pro se pleading entitled Post-Conviction Petition, and Defendant's counsel William Davis had filed Motion for Leave to Withdraw pursuant to Pennsylvania v. Finley. Defendant filed a response to the Finley Brief and Attorney Davis filed a Reply brief. The court hears arguments of the parties, Attorney Davis Motion to withdraw is granted. Court hears arguments on State's Motion to Dismiss and finds as follows:

Defendant was found guilty of two counts of criminal sexual assault in a jury trial. The Court sentenced him to 10 years in Department of Correction with a 2 Mandatory Supervised Release. Defendant-Petitioner claims that trial counsel was ineffective for failing to object to the two treating physicians testifying as experts, and that the state suppressed the physician's reports in violation of People v Brady and that he was convicted on a defective charging instrument. As to the claim of ineffective assistance of trial counsel, after reviewing the standard enunciated in Strickland v. Washington, 466 U.S. 668 (1984), the Court cannot find that any of the allegations made by the Defendant-Petitioner show unreasonable assistance by his trial counsel, nor can the Court find that he was prejudiced by these purported failures. The Court also finds that Defendant-Petitioner claim of a Brady violation is also unfounded. Additionally, the Defendant's claim that he was convicted of a defective charging instrument is also not supported by the record.

As Defendant has failed to make a substantial showing of any constitutional violation in his Petition, the Court allows the State's Motion to Dismiss Post-Conviction Petition. Defendant's pleadings are hereby DISMISSED.

Defendant has a right to appeal this decision to the Illinois Appellate Court, Fourth District. If Defendant is indigent, he has a right to a transcript of the record of post-conviction proceedings and to the appointment of counsel on appeal, both without cost to him. To preserve the right to appeal, a notice of appeal must be filed in the trial court within 30 days from the date the order was entered.

* Clerk to send copy of order to all parties of record

ENTERED: 5/22/18

John W. Belz
Circuit Judge

E-FILED
Transaction ID: 4-18-0751
File Date: 11/21/2018 12:15 PM
Carla Bender, Clerk of the Court
APPELLATE COURT 4TH DISTRICT

No. 4-18-0751

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH JUDICIAL DISTRICT

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

LATE NOTICE OF APPEAL

An appeal is taken to the Appellate Court, Fourth Judicial District:

Appellant(s) Name:	Mr. John Pingelton
Appellant's Address:	Taylorville Correctional Center 1144 Illinois Route 29 Taylorville, IL 62568
Appellant(s) Attorney:	Office of the State Appellate Defender
Address:	400 West Monroe Street, Suite 303 P.O. Box 5240Springfield, IL 62705-5240
Offenses of which convicted:	Two Counts of Criminal Sexual Assault
Date of Judgment or Order:	May 22, 2018 and October 2, 2018
Sentences:	10 years in the Illinois Department of Correction on both counts
Nature of Order Appealed:	Denial of Post-Conviction Petition and Motion to Reconsider

/s/ John M. McCarthy
JOHN M. MCCARTHY
ARDC No. 6216508
Deputy Defender

FILED
August 3, 2021
Carla Bender
4th District Appellate
Court, IL

2021 IL App (4th) 180751

NO. 4-18-0751

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOHN PINGELTON, Defendant-Appellant.	)	Appeal from the Circuit Court of Sangamon County No. 05CF1295 Honorable John W. Belz, Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court, with opinion.
Presiding Justice Knecht concurred in the judgment and opinion.
Justice Harris specially concurred, with opinion.

OPINION

¶ 1 Following a November 2006 jury trial, defendant, John Pingelton, was convicted of two counts of criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2004)). The trial court later sentenced him to 10 years in prison on each count, to be served consecutively.

¶ 2 In December 2015, defendant pro se filed a postconviction petition alleging, in pertinent part, that he received ineffective assistance of both trial and appellate counsel because his counsel allowed physicians to provide improper expert opinions. Later that month, the trial court advanced the petition to the second stage and appointed counsel to represent defendant.

¶ 3 In March 2016, the State filed a motion to dismiss defendant's petition.

¶ 4 In January 2018, postconviction counsel filed a motion to withdraw as counsel that included (1) a memorandum addressing defendant's claims and (2) a certificate pursuant to Illinois

Supreme Court Rule 651(c) (eff. July 1, 2017).

¶ 5 On May 8, 2018, the trial court made a docket entry indicating that the case was set for a status hearing the following day. At that hearing, the State and postconviction counsel appeared personally, and defendant appeared via telephone. The court heard arguments from the State, postconviction counsel, and defendant and then took the matter under advisement. The court later wrote an order in which it granted (1) postconviction counsel's motion to withdraw and (2) the State's motion to dismiss.

¶ 6 Defendant appeals, arguing that (1) the trial court erred by dismissing his petition without providing him sufficient notice and opportunity to be heard and (2) postconviction counsel provided unreasonable assistance because he failed to advance the potentially meritorious claim that defendant received ineffective assistance of trial and appellate counsel when trial counsel failed to object to unqualified doctors providing improper expert opinions and appellate counsel failed to raise that argument on direct appeal. We affirm.

¶ 7 I. BACKGROUND

¶ 8 A. The Charges

¶ 9 In October 2005, the State charged defendant with two counts of criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2004)), alleging that defendant used force to commit acts of sexual penetration, namely, placing his penis in the vagina of K.S. and placing his finger in the vagina of A.H.

¶ 10 B. The Trial

¶ 11 Because the majority of the evidence presented at trial is not relevant to this appeal, we focus primarily on the expert testimony at issue. We previously set forth a thorough recitation of the trial testimony in our order affirming defendant's conviction on direct appeal. People v.

Pingelton, 377 Ill. App. 3d 1163 (2007) (table) (unpublished order under Illinois Supreme Court Rule 23).

¶ 12 Cheryl Dowell, defendant's former spouse, testified that on July 7, 2005, she, defendant, and their children were at defendant's friend's residence. K.S. and A.H., two teenaged girls, were also present. K.S. and A.H. lived in a foster home and had previously babysat for defendant and Dowell.

¶ 13 K.S. testified that she and A.H. decided on July 7, 2005, to run away from their foster home. They met with defendant and Dowell at defendant's friend's house before going to defendant's house. At defendant's house, defendant sexually assaulted K.S. and A.H. After the assault, defendant kept trying to tell K.S. and A.H. that nothing happened.

¶ 14 Initially, K.S. and A.H. did not tell anyone about the attack. K.S. testified that defendant's attack caused her to bleed vaginally and she got a medical examination about two weeks after the attack. A.H. testified she received a medical examination about 10 days after defendant digitally penetrated her.

¶ 15 Dr. Dennis Adams testified that he was an emergency medicine physician and had examined approximately 20 victims of sexual assault. Adams stated he conducted a physical examination of A.H. and the pelvic exam portion was "unremarkable." However, Adams explained that the lack of trauma was not inconsistent with A.H.'s allegations because "in most cases [he had handled,] there was not objective evidence of trauma."

¶ 16 On cross-examination, Adams acknowledged that in his experience, some cases of sexual assault show physical trauma. Adams also acknowledged he was not a gynecologist and did not use a colposcope (essentially, a specialized magnifying device) to look for trauma. He testified that he had not been trained in the use of a colposcope and had never used one before.

¶ 17 Dr. Robert Silwa testified that he was an emergency medicine physician and had conducted approximately 100 sexual assault examinations. Silwa examined K.S., did not find evidence of trauma, and stated that, even if K.S. had told him she experienced bleeding at the time of the assault, Silwa would not have expected to find evidence of trauma because of the length of time between the attack and examination.

¶ 18 On cross-examination, Silwa acknowledged he was not a gynecologist and did not use a colposcope. Silwa explained that a colposcope (1) is a magnifying tool used to examine the cervical area in great detail for signs of subtle trauma not visible to the naked eye and (2) is more commonly used to examine children. Silwa testified that he had never used a colposcope. Silwa agreed that he could not say one way or another whether K.S. was sexually assaulted.

¶ 19 The jury convicted defendant of both counts of criminal sexual assault. The trial court later sentenced him to 10 years in prison on each count, to be served consecutively.

¶ 20 C. Defendant's Postconviction Petition

¶ 21 In December 2015, defendant pro se filed a postconviction petition alleging, in pertinent part, that he received ineffective assistance of both trial and appellate counsel because (1) his trial counsel failed to prevent two State's witnesses—the physicians—from providing improper expert opinions and (2) his appellate counsel failed to raise that issue on direct appeal. Later that month, the trial court advanced the petition to the second stage and appointed counsel to represent defendant.

¶ 22 In March 2016, the State filed a motion to dismiss defendant's petition, arguing that it contained claims that were waived, conclusory, lacking in merit, and refuted by the record.

¶ 23 In January 2018, postconviction counsel filed a motion to withdraw as counsel that included (1) a memorandum addressing defendant's claims and (2) a certificate pursuant to Illinois

Supreme Court Rule 651(c) (eff. July 1, 2017).

¶ 24 On May 8, 2018, the trial court made a docket entry indicating that the case was set for a status hearing the following day.

¶ 25 At that hearing, the State and postconviction counsel appeared personally, and defendant appeared via telephone. The trial court first heard argument from the State on its motion to dismiss, during which the State said it would "adopt and incorporate all of the arguments that are contained within [counsel's motion to withdraw]." The State argued further, in pertinent part, that (1) trial counsel was not ineffective because he was able to elicit favorable testimony from the State's experts and (2) the charging instrument was not defective.

¶ 26 Defendant then personally stated to the trial court that his postconviction counsel should be allowed to withdraw and that defendant should be allowed to proceed pro se. In response to defendant's remarks, postconviction counsel said that he examined defendant's claims, concluded they were meritless, and requested that he be allowed to withdraw. The court took the matter under advisement.

¶ 27 The trial court later entered a written order in which it granted (1) postconviction counsel's motion to withdraw and (2) the State's motion to dismiss. In doing so, the trial court referred to the motion to withdraw very briefly but wrote at length about why it granted the State's motion to dismiss. The court noted that (1) none "of the allegations made by the Defendant-Petitioner show unreasonable assistance by his trial counsel, nor can the Court find that he was prejudiced by these purported failures" and (2) "the Defendant's claim that he was convicted of [sic] a defective charging instrument is also not supported by the record." The court then concluded by writing, "As Defendant has failed to make a substantial showing of any constitutional violation in his Petition, the Court allows the State's Motion to Dismiss Post-Conviction Petition."

¶ 28 This appeal followed.

¶ 29 II. ANALYSIS

¶ 30 Defendant appeals, arguing that (1) the trial court erred by dismissing his petition without providing him sufficient notice and opportunity to be heard and (2) postconviction counsel provided unreasonable assistance because he failed to advance the potentially meritorious claim that defendant received ineffective assistance of trial and appellate counsel when trial counsel failed to object to unqualified doctors providing improper expert opinions and appellate counsel failed to raise that argument on direct appeal. We affirm.

¶ 31 A. Defendant's Lack of Notice and Opportunity To Be Heard Was Harmless Error

¶ 32 Defendant first argues that the trial court erred because it failed to provide him sufficient (1) notice of the hearing and (2) opportunity to be heard at the hearing. We agree that the trial court erred by not providing defendant sufficient notice and opportunity to be heard. However, this error was harmless because, for the reasons we explain later, defendant failed to state the gist of a constitutional claim. See infra ¶¶ 67-71.

¶ 33 Because of the way that the trial court conducted the hearing at issue, the only party who ever discussed the State's motion to dismiss was the State itself. The trial court (1) heard argument from the State on the State's motion to dismiss, (2) heard argument from defendant and postconviction counsel on the motion to withdraw, and (3) ordered dismissal based upon the motion to dismiss alone without ever hearing argument from defendant on that motion.

¶ 34 Because nearly two years had passed since the State's motion to dismiss was originally filed in March 2016, defendant had no reason to suspect the motion would be argued at this hearing. Further, defendant was then represented by postconviction counsel, thereby limiting his ability to argue pro se until his counsel was later allowed to withdraw. See People v. Bell, 2018

IL App (4th) 151016, ¶ 28, 100 N.E.3d 177. In addition, the State's motion was served on postconviction counsel, not defendant, and the record contains no indication defendant personally received the motion. Under these circumstances, defendant could not reasonably be expected to argue against the motion to dismiss, when, at the time the State made its argument, (1) defendant was still represented by counsel and (2) counsel would not be allowed to withdraw until later. Accordingly, it was error, albeit harmless under the circumstances of this case, for the trial court to grant the motion without hearing argument from defendant.

¶ 35 B. Trial Counsel Provided Effective Assistance

¶ 36 Defendant argues that his postconviction counsel should not have been allowed to withdraw because defendant made the potentially meritorious claim that he received ineffective assistance from both his trial and appellate counsel regarding trial counsel's permitting improper expert testimony. We disagree because trial counsel did not err when he did not object to the expert testimony the two doctors provided.

¶ 37 To explain our conclusion concerning defendant's ineffective assistance of counsel claim, we will discuss in some detail the procedure regarding the proffer of expert testimony. But first we will discuss the law that applies when a defendant claims that he received ineffective assistance of counsel.

¶ 38 1. The Law Regarding Ineffective Assistance of Counsel

¶ 39 All defendants enjoy the constitutional right to effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. "To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defendant." People v. Pope, 2020 IL App (4th) 180773, ¶ 61, 157 N.E.3d 1055.

¶ 40 To demonstrate deficient performance, a defendant must show his counsel's performance fell below an objective standard of reasonableness. Id. ¶ 62. Because the constitution guarantees only reasonably competent counsel, it is not sufficient for a defendant to show that counsel's representation was imperfect. Harrington v. Richter, 562 U.S. 86, 110 (2011) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). Instead, a defendant must show his counsel's representation undermined the proper functioning of the adversarial process to such an extent that the defendant was denied a fair trial. Id. (citing Strickland, 466 U.S. at 686).

¶ 41 To demonstrate prejudice, a defendant must show "that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " (Internal quotation marks omitted.) People v. Moore, 2020 IL 124538, ¶ 29, 161 N.E.3d 125 (quoting People v. Domagala, 2013 IL 113688, ¶ 36, 987 N.E.2d 767). " 'The likelihood of a different result must be substantial, not just conceivable.' " Pope, 2020 IL App (4th) 180773, ¶ 63 (quoting Harrington, 562 U.S. at 112). " 'A defendant must satisfy both prongs of the Strickland test and a failure to satisfy any one of the prongs precludes a finding of ineffectiveness.' " Id. (quoting People v. Simpson, 2015 IL 116512, ¶ 35, 25 N.E.3d 601).

¶ 42 A defendant must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy. People v. Manning, 241 Ill. 2d 319, 327, 948 N.E.2d 542, 547 (2011). Strategic choices are virtually unchallengeable. Id. at 333.

¶ 43 2. Expert "Certification" by the Trial Court

¶ 44 As we discuss later, we conclude that trial counsel's actions in this case constituted trial strategy. However, because defendant also complains that trial counsel failed to object to the testimony of the doctors who, defendant asserts on appeal, (1) "were not certified by the circuit court as experts in the field of sexual assault injuries or gynecology" and (2) "were never submitted or recognized as experts," we will also address these complaints. As we explain, we conclude that, even if trial counsel's actions were not a matter of trial strategy, defendant's argument that a defendant's trial counsel must object to "non-certification of experts" is meritless, and we reject it in its entirety.

¶ 45 a. The Difference Between an Expert Witness and a Lay Witness

¶ 46 The Illinois Rules of Evidence regarding expert witnesses contain no requirement that the trial court "certify" a witness before that witness may provide opinion testimony. Instead, the question is whether the foundational requirements for that testimony have been laid. Ill. R. Evid. 702 to 705 (eff. Jan. 1, 2011). And, in any event, "certification" is the wrong term because trial courts never "certify" expert witnesses. Instead, they determine, in the sound exercise of their discretion, whether a sufficient foundation has been laid regarding a particular witness to permit that witness to render an opinion.

¶ 47 We note that this is the fundamental difference between witnesses who testify as experts and those who do not. Expert witnesses are permitted to render opinions within their area of expertise, while lay witnesses (that is, nonexperts), with very few exceptions, may not render opinions. The testimony of lay witnesses is typically limited to matters within their personal knowledge—that is, what they did, saw, heard, smelled, tasted, or touched. We agree with what the First District wrote on this subject in People v. Kimbel, 2020 IL App (1st) 162182, ¶ 33, 150

N.E.3d 148:

> "Illinois law is clear that '[a]dmissible testimony is limited to matters of which the witness has personal knowledge through his own senses' [citation] and that 'a witness may only testify to facts within his own personal knowledge and recollection, and may not draw inferences and conclusions.' " (Emphasis in original.) (quoting People v. French, 2017 IL App (1st) 141815, ¶ 68, 72 N.E.3d 1214).

¶ 48 b. The Trial Court's Use of the Term "Expert" in Front of the Jury Is Questioned

¶ 49 Concerning the proffer of expert testimony, attorneys and trial courts frequently proceed as defendant on appeal suggests should have happened in this case. First, the attorney seeking to present expert testimony typically lays the foundation by asking a witness questions about the witness's background, education, training, and experience. Second, the attorney turns to the judge and says, "Your Honor, the State tenders Dr. Smith as an expert in toxicology." Third, the opposing party is given the opportunity to state that party's objection, if any, or alternatively to conduct a voir dire examination of the witness regarding the witness's qualifications. Last, the judge says, "The court finds a sufficient foundation has been laid and accepts Dr. Smith as an expert in toxicology." And all of this takes place in open court in front of the jury. While this course of action is common practice in courtrooms in Illinois and throughout the country, we recommend against it.

¶ 50 We suggest that, when a trial court makes the determination that a witness is qualified to give opinion testimony, it is never necessary or appropriate for the court to use the term "expert" in front of the jury. In support of this view, we cite the advisory committee's notes (Advisory Committee Notes) to Federal Rule of Evidence 702, in which the committee wrote the

following:

> "The use of the term 'expert' in the Rule does not, however, mean that a jury should actually be informed that a qualified witness is testifying as an 'expert.' Indeed, there is much to be said for a practice that prohibits the use of the term 'expert' by both the parties and the court at trial. Such a practice 'ensures that trial courts do not inadvertently put their stamp of authority' on a witness's opinion, and protects against the jury's being 'overwhelmed by the so-called "experts." ' [Citation.]" Fed. R. Evid. 702, Advisory Committee Notes (amended 2000).

We note that for reasons we discuss later, we do not agree that the parties should be prohibited from using the term "expert;" that prohibition should apply only to the trial court.

¶ 51 When a trial court uses the term "expert" in front of a jury, it creates a danger that the court's authority is being associated with the expert's authority. See Charles R. Richey, Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules Evidence in Civil and Criminal Jury Trials, 154 F.R.D. 537, 541 (1994); see also Evan Bruno, Better Practice—Let a Witness' Record Speak For Itself Without The Expert Label, Chicago Daily Law Bulletin (August 19, 2014) ("The judge's determination is based upon the same evidence the jury has just heard, and his open declaration of that determination does nothing but give the jury exactly what they should not have: outside commentary upon the witness's credibility."). Even the American Bar Association has advised, "The court should not, in the presence of the jury, declare that a witness is qualified as an expert or to render an expert opinion, and counsel should not ask the court to do so." Am. Bar Ass'n, Civil Trial Practice Standards, 1, 29 (updated Aug. 2007), https://www.americanbar.org/content/dam/aba/administrative/litigation/leadership-portal/ctps.pdf (last visited July 29, 2021) [https://perma.cc/JG24-TSR2].

¶ 52 Juries may give more weight to testimony from "experts" merely because the common meaning of the word—when used by the judge—may cause the jury to presume the witness demands more attention and credence than other witnesses. Richey, 154 F.R.D. at 544. In short, when a court declares that a witness is an "expert" in his or her field, it confers the judicial imprimatur of authority and credibility, which thereby inappropriately augments the witness's stature while simultaneously detracting from the court's position of neutrality.

¶ 53 Famed trial lawyer Irving Younger explained the advantage to be gained from a trial lawyer's perspective by seeking to have the court declare a witness to be an expert, as follows:

> "[Y]ou say to the judge something like, 'Your Honor, I ask the court to declare Dr. Elko an expert in the field of physiology.'
>
> Now, you see, all you're doing is saying to the judge, 'Your Honor, with respect to *** whether the expert can give his opinion, have I done it, Judge? Have I done it?' And, of course you've done it, so the judge says, 'Yes.' How does the jury hear it? The jury hears it as the judge certifying that your expert is an expert. The judge's authority begins to be associated with your expert's authority. And since the judge is the ultimate figure in the courtroom, it's a very nice phenomenon to have working for you." (Emphasis in original.) Irving Younger, A Practical Approach to the Use of Expert Testimony, 31 Clev. St. L. Rev. 1, 16 (1982).

¶ 54 Commenting on this very statement from Irving Younger, Professor Paul F. Kirgis noted, "[T]he kind of express expert certifications advocated by Judge Younger and appearing so frequently in trial transcripts are not required. They are, in fact, fundamentally at odds with basic principles regarding the role of the judge in the courtroom." Paul F. Kirgis, Curtailing the Judicial Certification of Expert Witnesses, 24 Am. J. Trial Advoc. 347, 348 (2000). Kirgis explains that

this odd practice never occurs regarding other preliminary questions; for example, no attorney of any merit would ever ask the judge to declare that the witness has personal knowledge. Id. at 351.

¶ 55 Instead of calling witnesses "experts" or having the judge "certify" a witness as an expert in front of the jury, counsel should either (1) address the matter with the trial court pretrial or (2) simply lay the proper foundation in open court before the jury and then ask to approach the bench for a sidebar at which counsel could ask the trial court if the court agrees that a sufficient foundation has been established so that counsel could then ask the witness questions calling for opinions.

¶ 56 Obviously, the jury should be permitted to hear all foundational evidence regarding a witness whom a party seeks to have testify as an expert, as well as any voir dire by opposing counsel, but the jury need not be privy either to argument about the witness's expert qualifications or the court's ultimate determination.

¶ 57 As we mentioned earlier, our suggested limitation on the use of the term "expert" applies only to the trial court, not the parties. The problem to be avoided is the court's putting its judicial imprimatur upon the background or testimony of any purported expert. That problem simply does not exist when the parties are arguing their cases to the jury. In fact, closing argument is precisely the proper time for counsel to argue to the jury why certain witnesses or evidence should be believed or not. See People v. Neal, 2020 IL App (4th) 170869, ¶ 170, 150 N.E.3d 984.

¶ 58 c. Select State and Federal Courts Agree with the Suggestion That Trial Courts Should Not Use the Term "Expert" in Front of the Jury

¶ 59 Courts have long recognized the problem with judicial commentary on trial evidence. In 1933, the United States Supreme Court, reflecting on a particularly improper comment from a trial judge, noted,

> "His definite and concrete assertion of fact, which he had made with all the persuasiveness of judicial utterance, as to the basis of his opinion, was not withdrawn. His characterization of the manner and testimony of the accused was of a sort most likely to remain firmly lodged in the memory of the jury and to excite a prejudice which would preclude a fair and dispassionate consideration of the evidence." Quercia v. United States, 289 U.S. 466, 472 (1933).

¶ 60 Other courts of review have explained that trial courts should not designate certain witnesses as "experts" in front of the jury. The Sixth Circuit has noted that, "although the practice is different in some state courts, the Federal Rules of Evidence do not call for the proffer of an expert after he has stated his general qualifications." (Emphasis omitted.) Berry v. City of Detroit, 25 F.3d 1342, 1351 (6th Cir. 1994).

¶ 61 The only role a trial court should play is to determine whether a witness is qualified to render an opinion. State v. McKinney, 917 P.2d 1214, 1233 (Ariz. 1996), overruled on other grounds by State v. Martinez, 999 P.2d 795 (Ariz. 2000). In McKinney, the Arizona Supreme Court wrote the following:

> "We do not recommend, however, the process of submitting a witness as an expert. The trial judge does not decide whether the witness is actually an expert but only whether the witness is 'qualified as an expert by knowledge, skill, experience, training, or education .. [to] testify .. in the form of an opinion or otherwise.' Ariz. R. Evid. 702. By submitting the witness as an expert in the presence of the jury, counsel may make it appear that he or she is seeking the judge's endorsement that the witness is to be considered an expert. The trial judge, of course, does not endorse the witness's status but only determines whether a

sufficient foundation has been laid in terms of qualification for the witness to give opinion or technical testimony." Id. at 1232-33.

¶ 62 As the Eighth Circuit has pointed out,

"there is no requirement that the court specifically make that finding in open court upon proffer of the offering party. Such an offer and finding by the Court might influence the jury in its evaluation of the expert[,] and the better procedure is to avoid an acknowledgement of the witnesses' expertise by the Court." United States v. Bartley, 855 F.2d 547, 552 (8th Cir. 1988).

¶ 63 A court's referring to a witness as an expert provides no additional probative value regarding the witness's qualifications; instead, it merely adds an additional prejudicial effect upon the jury regarding the witness's credibility. Richey, 154 F.R.D. at 553; see also United States v. Johnson, 488 F.3d 690, 697 (6th Cir. 2007) (noting that, when a court declares that a witness is an expert, "it lends a note of approval to the witness that inordinately enhances the witness's stature and detracts from the court's neutrality and detachment").

¶ 64 d. Conspiracy—an Analogous Situation

¶ 65 An analogous situation is provided by Illinois Rule of Evidence 801(d)(2)(E) (eff. Oct. 15, 2015), which allows for the admission of statements of a coconspirator that would otherwise be inadmissible hearsay. For a statement to be admitted under this rule, the trial court must first make a preliminary determination that enough evidence has been presented to show the existence of a conspiracy. However, when deciding whether to admit evidence of a coconspirator's statement, a trial court would not—and should not—state to the jury, "Ladies and gentlemen, I am going to allow this statement because I find that Mr. Jones and Mr. Smith were engaged in a conspiracy." Instead, the judge would make that determination outside the presence of the

jury. The Sixth Circuit has explained why, as follows:

> "[The trial judge] should refrain from advising the jury of his findings that the government has satisfactorily proved the conspiracy. The judge should not describe to the jury the government's burden of proof on the preliminary question. Such an instruction can serve only to alert the jury that the judge has determined that conspiracy involving the defendant has been proven by a preponderance of the evidence. This may adversely affect the defendant's right to a trial by jury. The Judge's opinion is likely to influence strongly the opinion of the individual jurors when they come to consider their verdict and judge the credibility of witnesses." United States v. Vinson, 606 F.2d 149, 153 (6th Cir. 1979).

¶ 66 The only difference between a court's declaring that (1) a witness may testify as an expert and (2) the evidence shows that a conspiracy existed is the extent of the prejudice involved. The result is the same—namely, a judge should avoid making statements in front of the jury that may be viewed by the jury as judicial commentary on the evidence or on what weight the jury should give it.

¶ 67 3. This Case

¶ 68 We conclude that postconviction counsel was correctly allowed to withdraw because trial counsel's decision not to object to the expert testimony of the two doctors was trial strategy.

¶ 69 The testimony at issue occurred when Dr. Adams and Dr. Silwa, both emergency room physicians, testified "regarding the frequency of vaginal trauma in sexual-assault victims."

¶ 70 Here, trial counsel presumably made the decision that objecting to the experts' opinion testimony would prove fruitless because of their experience dealing in emergency rooms

with victims of sexual violence. In addition, trial counsel's clearly preferred trial strategy was to use the testimony of the physicians to attempt to undermine the testimony of both A.H. and K.S. because neither physician found evidence of physical trauma that would have corroborated the complainants' testimony.

¶ 71 A serious defect in defendant's argument about the testimony of the physicians can be found in a single statement in defendant's brief: "But, then both the State and defense counsel elicited improper expert testimony that was not related to the physicians' treatment of K.S. and A.H." Clearly, if defense counsel was using the doctors in a similar manner as the State, defense counsel made a decision that was trial strategy to allow both physicians to give those opinions.

¶ 72 C. Postconviction Counsel Provided Reasonable Assistance

¶ 73 Last, we note that defendant also claims that postconviction counsel failed to provide reasonable assistance because counsel failed to object in a timely manner to the State's motion to dismiss. For the reasons we explained earlier, defendant failed to state the gist of a constitutional claim, and any error related to the motion to dismiss was harmless.

¶ 74 III. CONCLUSION

¶ 75 For the reasons stated, we affirm the trial court's judgment.

¶ 76 Affirmed.

¶ 77 JUSTICE HARRIS, specially concurring:

¶ 78 I agree with the decision to affirm. However, I do not join in paragraphs 48-66 (supra ¶¶ 48-66) and do not endorse the majority's critique of a trial judge finding, in front of a jury, that a witness is qualified to testify as an expert.

No. 4-18-0751

Cite as:	People v. Pingelton, 2021 IL App (4th) 180751
Decision Under Review:	Appeal from the Circuit Court of Sangamon County, No. 05-CF-1295; the Hon. John W. Belz, Judge, presiding.
Attorneys for Appellant:	James E. Chadd, Catherine K. Hart, and Edward J. Wittrig, of State Appellate Defender's Office, of Springfield, for appellant.
Attorneys for Appellee:	Daniel K. Wright, State's Attorney, of Springfield (Patrick Delfino, David J. Robinson, and Benjamin M. Sardinas, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.

2022 IL App (4th) 200549-U

NO. 4-20-0549

FILED
January 4, 2022
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
DONTRELL L. NETTER,	)	No. 16CF1063
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Knecht and Justice Turner concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred by granting the State's motion to dismiss defendant's amended postconviction petition at the second stage of postconviction proceedings without providing defendant with notice and an opportunity to be heard on the motion.

¶ 2 Defendant, Dontrell L. Netter, appeals the trial court's second-stage dismissal of his postconviction petition. He argues the court erred by dismissing his petition when (1) he was not provided with notice and an opportunity to be heard, (2) allegations in his petition were supported by the record, and (3) his petition demonstrated a substantial showing of a violation of his constitutional right to the effective assistance of counsel. We reverse and remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 Following a December 2017 jury trial, defendant was convicted of aggravated

criminal sexual assault of a person over 60 years of age (720 ILCS 5/11-1.30(a)(5) (West 2014)) and sentenced to 30 years in prison. He challenged his conviction on direct appeal, and this court affirmed. *People v. Netter*, 2019 IL App (4th) 180290-U.

¶ 5 Defendant's previous appeal details the underlying facts of his case and we do not repeat them here. However, briefly stated, the State's evidence showed Channing Butler, an employee of Bickford Assisted Living Center (Bickford), communicated with various individuals online for the purpose of having them engage in sexual activity with either Butler or a resident of the facility. According to the State's evidence, defendant communicated with Butler online and met him at Bickford in July 2015. At trial, Butler denied that defendant engaged in sexual activity with anyone at Bickford; however, the State presented as substantive evidence Butler's prior inconsistent statement to the police that defendant engaged in oral sex with H.C., an elderly resident of the facility's "memory care unit." The State's evidence also included a photograph found on Butler's cell phone taken in July 2015, depicting H.C.'s face and the penis of an African American male. Butler admitted taking the photograph but initially testified he was not 100% certain if defendant, who was African American, was the individual depicted in the photo. Butler's testimony did indicate that only three people were in the room when the photograph was taken, himself, H.C., and defendant. Additionally, on further direct examination, Butler ultimately stated his belief that the penis depicted in the photograph belonged to defendant.

¶ 6 At trial, defendant testified on his own behalf and denied the allegations against him. He acknowledged communicating with Butler online and visiting Bickford. However, defendant maintained that when he corresponded with Butler online and agreed to meet in person, he believed Butler was a woman. He testified that when he visited Bickford at night, he did not recognize it as an assisted living facility. Further, defendant stated that he immediately left the

facility when he saw that Butler was offering for him to engage in sexual activity with H.C.

¶ 7 In December 2019, defendant, with the assistance of legal counsel, filed a petition for postconviction relief. He raised four claims based on the alleged ineffectiveness of his trial counsel. Specifically, defendant asserted his trial counsel (1) was unreasonably focused on counsel's relationships with prosecution witnesses; (2) was unable to hear, which hindered his ability to question witnesses and argue on defendant's behalf; (3) was unable to make cogent and timely objections and introduce evidence to support defendant's explanation of events; and (4) failed to introduce certain digital forensic evidence.

¶ 8 Relative to defendant's last contention, he noted that part of the State's case included the photograph taken by Butler of H.C. and the penis of an African American male. He asserted that Butler had invited many other individuals to the assisted living facility, and, at trial, exhibited confusion regarding who was depicted in the photograph. Defendant maintained that discovery in the case revealed the existence of two additional digital images from Butler's phone "of another African American male attempting to place his penis in [the victim's] mouth," which were not presented by defense counsel at trial and could have been used "to explain why Butler was confused ***." Defendant argued that a reasonable probability existed that the introduction of the digital images found in discovery would have supported his defense and resulted in his acquittal.

¶ 9 In his petition, defendant claimed the discovery in his case did not "reveal any metadata for the two photographs." Further, he stated he had not attached the discovery photographs as exhibits to his petition due to their nature and out of respect for the victim. He maintained that he had the intention of introducing the photographs as evidence in support of his petition but requested "that he be allowed to do so under seal."

¶ 10 On April 16, 2020, the trial court entered an order, noting the circuit clerk did not forward defendant's postconviction petition to the court until April 9, 2020, and stating as follows: "Due to the gross incompetence of the Circuit Clerk, this court now forwards *** Defendant's petition to the State for a response by May 1, 2020."

¶ 11 On April 28, 2020, the State filed a motion to dismiss defendant's petition, arguing the issues he raised were barred by *res judicata* because they had been previously addressed on direct appeal. Alternatively, the State asserted defendant failed to make a substantial showing of a constitutional violation. Regarding defendant's claim that his counsel was ineffective for failing to introduce the additional digital images from Butler's phone, the State argued defendant's claim was "conclusory, speculative, and unsupported." It noted defendant had not introduced the images "under seal" or otherwise, and argued his petition improperly lacked affidavits pertaining to the relevance of or foundation for the digital images.

¶ 12 On April 30, 2020, the trial court made a docket entry, which gave defendant 30 days to respond to the State's motion to dismiss. A letter from the court to the parties, advising them of its docket entry, was filed the same day. The record indicates the court's letter was mailed to defendant's counsel at an address in Urbana, Illinois, but returned to the court as "Not Deliverable As Addressed." On May 18, 2020, the correspondence was resent to defendant's counsel at an address in Champaign, Illinois.

¶ 13 On June 1, 2020, defendant filed a motion for an extension of time to respond to the State's motion to dismiss. He asserted his counsel did not receive notice of the trial court's April 30 docket entry until May 25, 2020, and was "preparing for a jury trial in another county." Defendant requested an additional 30 days to respond to the State's motion. On June 30, 2020, defendant filed a second motion for an extension of time to respond to the State's motion to

dismiss. He noted the court had not ruled on his previous request and asked for an additional 30 days to prepare a response. On July 8, 2020, the court granted defendant's second motion for an extension of time.

¶ 14 On August 3, 2020, defendant filed a motion for discovery and leave to file an amended postconviction petition. He asserted his request for discovery was "limited to a complete copy of the original and subsequent discovery the State turned over to trial defense counsel, including digital images that contain the metadata." Defendant maintained that following his review of the complete discovery in the case he would amend his petition to include more detailed information on the digital images he was alleging should have been admitted at his trial, as well as the images themselves.

¶ 15 On August 19, 2020, the trial court made a docket entry, giving the State 21 days to respond to defendant's motion. Fourteen days later, on September 2, 2020, the court entered a written order, dismissing defendant's postconviction petition as "frivolous" and "patently without merit." The court stated defendant's petition had advanced to the second stage of postconviction proceedings by default and that had the petition been forwarded in a timely manner, it would have been dismissed. Although the court noted defendant's recent filing of a motion for discovery and to amend his petition, it ultimately concluded the State's motion to dismiss was "well-taken" and that defendant's claimed errors had been decided on direct appeal.

¶ 16 On September 3, 2020, defendant filed a motion to reconsider the trial court's dismissal of his postconviction petition. He alleged that following his motion for discovery and leave to amend his postconviction petition, the State and defendant's counsel "resolved the discovery issues" that were raised in defendant's motion. Defendant asserted his counsel forwarded an amended petition to the State and the parties signed an agreed order, stating

defendant would be given leave to file his amended petition with certain exhibits under seal and the State would be given leave to amend its motion to dismiss within 21 days. Defendant maintained his counsel was preparing to forward the parties' agreed order to the court when counsel became aware of the court's dismissal of defendant's petition. Defendant asked the court to reconsider its dismissal and allow the parties to "proceed under the previously agreed order, giving [defendant] the opportunity to file his Amended Petition, the [State] an opportunity to respond[,] and for th[e] court to rule after a hearing on the State's Motion to Dismiss."

¶ 17 The same day, the State filed a response, in which it raised no objection to defendant's motion to reconsider or his filing of an amended postconviction petition. On September 15, 2020, the trial court entered an order that gave defendant 15 days to file any amendments to his petition. On September 29, 2020, defendant filed his amended petition. It contained similar claims to those defendant presented in his original petition and included additional allegations with respect to when the digital images found in discovery were taken. To his amended petition, he attached copies of the digital images and an "Extraction Report," which he alleged trial testimony showed pertained to those images.

¶ 18 Also on September 29, 2020, the State filed a motion to dismiss defendant's amended filing. Its motion contained similar allegations to its previous motion to dismiss. Regarding the digital images, the State continued to maintain that defendant's claims were "conclusory, speculative, and unsupported." On September 30, 2020, the State filed an affidavit of mailing, showing its motion to dismiss defendant's amended petition was mailed that day to defendant's counsel at the Urbana, Illinois, address, which was previously utilized by the trial court and noted to be invalid.

¶ 19 Two days later, on October 2, 2020, the trial court entered an order, dismissing

defendant's amended petition as "frivolous" and "patently without merit." The court stated it had considered defendant's motion to reconsider and his amended postconviction petition, and "reaffirm[ed]" its previous September 2020 dismissal order.

¶ 20 This appeal followed.

¶ 21 II. ANALYSIS

¶ 22 As stated, on appeal, defendant argues the trial court erred by dismissing his amended postconviction petition at the second stage of postconviction proceedings. Initially, he contends the court improperly failed to provide him with notice and an opportunity to be heard following the State's motion to dismiss his amended petition. Additionally, defendant asserts his petition was properly supported by the record and demonstrated a substantial showing of a constitutional violation. For the reasons that follow, we agree with defendant's first contention of error and find reversal of the court's dismissal and remand for further proceedings is required.

¶ 23 "The Post-Conviction Hearing Act [(Act)] provides a procedural mechanism through which criminal defendants can assert that their federal or state constitutional rights were substantially violated in their original trials or sentencing hearings." *People v. Buffer*, 2019 IL 122327, ¶ 12, 137 N.E.3d 763. "The Act provides a three-stage process for the adjudication of postconviction petitions." *Id.* ¶ 45. "At the first stage, the circuit court has 90 days to review a petition and may summarily dismiss it if the court finds it is frivolous and patently without merit." *People v. Pendleton*, 223 Ill. 2d 458, 472, 861 N.E.2d 999, 1007 (2006). "If the petition is not dismissed within that 90-day period, the circuit court must docket it for further consideration." *Id.* (citing 725 ILCS 5/122–2.1(b) (West 2000)).

¶ 24 During the second stage of postconviction proceedings, the circuit court may appoint counsel for an indigent defendant and the State may file a responsive pleading. *People v.*

Cotto, 2016 IL 119006, ¶ 27, 51 N.E.3d 802. The Act also provides for amendments of both the petition and any other pleading. 725 ILCS 5/122-5 (West 2018) ("The court may in its discretion make such order as to amendment of the petition or any other pleading, or as to pleading over, or filing further pleadings *** as shall be appropriate, just and reasonable and as is generally provided in civil cases."). Further, at the second stage, "the circuit court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation." (Internal quotation marks omitted.) *People v. Domagala*, 2013 IL 113688, ¶ 33, 987 N.E.2d 767. If such a showing is made, the defendant is entitled to a third-stage evidentiary hearing. *Id.* ¶ 34. The second-stage dismissal of a postconviction petition is subject to *de novo* review. *People v. Johnson*, 2017 IL 120310, ¶ 14, 77 N.E.3d 615.

¶ 25 " 'The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." ' " *People v. Al Momani*, 2016 IL App (4th) 150192, ¶ 10, 55 N.E.3d 725 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965))). "[T]he protection of a defendant's right to procedural due process in post-conviction proceedings is of critical importance." *People v. Kitchen*, 189 Ill. 2d 424, 435, 727 N.E.2d 189, 194 (1999).

¶ 26 Here, in arguing that he did not receive notice and an opportunity to be heard on the State's motion to dismiss his amended postconviction petition, defendant relies on this court's decision in *Al Momani*, 2016 IL App (4th) 150192, a case also involving second-stage postconviction proceedings and the same trial judge. There, the defendant filed a *pro se* postconviction petition in February 2014 and, with the aid of counsel, an amended petition in May 2014. *Id.* ¶ 3. Because the trial court did not dismiss the amended petition within 90 days, the matter advanced to the second stage of postconviction proceedings. *Id.* ¶ 9. On February 10, 2015,

the State filed a motion to dismiss the defendant's petition. *Id.* The State's affidavit of service showed it mailed the motion to dismiss to the defendant's attorney on the same day. *Id.* ¶ 10. Two days later, on February 12, 2015, the court granted the State's motion. *Id.* ¶ 9. The defendant appealed, arguing "the trial court violated his due-process rights by granting the State's motion to dismiss before he had notice or the opportunity to be heard on the State's motion." *Id.*

¶ 27 On review, this court concluded the trial court's dismissal "clearly violated the fundamental requirement of due process" as the "[d]efendant was given neither notice nor an opportunity to be heard." *Id.* ¶ 10. We noted the State's affidavit of service showed that it mailed the motion to dismiss to the defendant's attorney the same day the motion was filed. *Id.* However, the record did not reflect when the defendant's attorney received the motion to dismiss and, ultimately, it was "unlikely counsel received the motion before the trial court granted it two days later[.]" *Id.* We further stated as follows:

> "Once postconviction proceedings reach the second stage, the Act does not provide for a trial court to rule on a motion to dismiss *ex parte* without giving a defendant notice and an opportunity to be heard. Because the Act does not specifically allow courts to do so, we find the Act requires postconviction petitioners to be provided notice and an opportunity to be heard prior to the trial court ruling on a motion to dismiss filed by the State during the second stage of postconviction proceedings. The opportunity to be heard can be satisfied by allowing a hearing on the motion or by allowing [the] defendant to file a written response to the motion.
>
> Because the trial court erred in granting the State's motion to dismiss when [the] defendant did not have notice or an opportunity to be heard, we must reverse

> the court's dismissal of [the] defendant's postconviction petition and remand this case for [the] defendant to have the opportunity to respond to the State's motion." *Id.* ¶¶ 12-13.

See also *People v. Bradley*, 2017 IL App (4th) 150527, ¶ 16, 85 N.E.3d 591 ("It is well established that due process does not allow a trial court to grant a motion to dismiss a complaint without allowing the opposing party notice and a meaningful opportunity to be heard.").

¶ 28 Defendant argues this case is similar to *Al Momani*, and we agree. The record reflects the trial court took no action regarding defendant's original postconviction petition within 90 days after it was filed, and the petition advanced to the second stage of postconviction proceedings. At the second stage, the court allowed defendant to amend his petition, and, on September 29, 2020, the State moved to dismiss that amended petition. The following day, the State mailed its motion to defendant's counsel at what the record shows—and the State does not dispute—was an incorrect address. Three days after the motion to dismiss was filed and only two days after the motion was mailed to defense counsel, the court granted the State's motion and dismissed defendant's amended petition.

¶ 29 Like in *Al Momani*, the record in this case does not reflect when defense counsel received the State's motion to dismiss the amended petition. However, we find it unlikely the motion was received before the court's dismissal. Not only was the motion mailed to the wrong address, it was also mailed only two days before the court's dismissal. Ultimately, the record indicates there was no notice to defendant of the State's filing of its motion to dismiss and no meaningful opportunity for defendant to be heard on the motion through either a hearing or the filing of a written response.

¶ 30 On appeal, the State suggests due process requirements were satisfied because

defendant had notice of, and an opportunity to be heard on, the State's motion to dismiss his *original* postconviction petition. Specifically, it contends "defendant clearly was given meaningful notice and opportunity to be heard on the State's motion to dismiss, [with] defendant thereafter filing a motion for discovery and leave to amend the petition, a motion to reconsider the dismissal, and an amended post-conviction petition." We disagree.

¶ 31 Initially, the State has failed to cite any legal authority to support its contention that providing notice and an opportunity to be heard in connection with an earlier motion to dismiss would also satisfy due process requirements following the filing of an amended postconviction petition and a subsequent responsive pleading directed at that *amended* petition. We note that although defendant was given notice of, and an opportunity to respond to, the State's motion to dismiss his original postconviction petition, those initial proceedings ultimately led to defendant's filing of the amended postconviction petition and the State filing a motion to dismiss that amended petition. The State's second motion to dismiss addressed only defendant's amended petition and both defendant's amended postconviction petition and the State's second motion to dismiss contained additional allegations or contentions not contained in the parties' previous pleadings.

¶ 32 Here, we find the critical inquiry is whether defendant received notice and an opportunity to be heard on the State's motion to dismiss his *amended* petition, not the motion to dismiss the *original*, which was superseded by amendment. See *Freymark v. Handke*, 415 Ill. 360, 364, 114 N.E.2d 349, 351 (1953) ("It is fundamental that the filing of an amended pleading operates as an abandonment of the original pleading it supersedes."). As stated in *Al Momani*, 2016 IL App (4th) 150192, ¶ 12, "the Act requires postconviction petitioners to be provided notice and an opportunity to be heard prior to the trial court ruling on *a* motion to dismiss filed by the State during the second stage of postconviction proceedings." (Emphasis added.) In this instance,

defendant did not receive notice and an opportunity to be heard before the court ruled on the State's motion to dismiss his amended petition. Accordingly, we reverse the trial court's dismissal of defendant's amended postconviction petition and remand for defendant to have the opportunity to respond to the State's motion.

¶ 33 III. CONCLUSION

¶ 34 For the reasons stated, we reverse the trial court's judgment and remand for further proceedings.

¶ 35 Reversed and remanded.

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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Mr. John Pingelton, Register No. S01562, Taylorville Correctional Center, 1144 Illinois Route 29, Taylorville, IL 62568

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 February 28, 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 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 Brief and Argument to the Clerk of the above Court.

/s/Rachel A. Davis
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