

No. 126940

IN THE

## SUPREME COURT OF ILLINOIS

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PEOPLE OF THE STATE OF	)	Appeal from the Appellate Court of
ILLINOIS,	)	Illinois, No. 1-18-1220.
	)	
Respondent-Appellee,	)	There on appeal from the Circuit
	)	Court of Cook County, Illinois , No.
-vs-	)	08 CR 2655.
	)	
	)	Honorable
KARL SMITH,	)	Thomas Joseph Hennelly,
	)	Judge Presiding.
Petitioner-Appellant.	)	

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## BRIEF AND ARGUMENT FOR PETITIONER-APPELLANT

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**NATURE OF THE CASE**

Karl Smith, petitioner-appellant, appeals from a judgment granting the State's motion to dismiss his petition for post-conviction relief at the second stage.

**ISSUE PRESENTED FOR REVIEW**

Whether the attorney who represents a post-conviction petitioner at the dispositive hearing at the second stage of proceedings must demonstrate compliance with Rule 651(c), or whether a certificate filed by an attorney who no longer represents the petitioner suffices under the Rule.



**RULE INVOLVED****Illinois Supreme Court Rule 651. Appeals in Post-Conviction Proceedings**

Relevant Section:

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

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



## STATEMENT OF FACTS

### Overview

After a jury trial, Karl Smith was found guilty of two counts each of attempted murder and aggravated battery with a firearm, and one count each of aggravated battery of a child, home invasion, and armed robbery. The trial court sentenced Smith to an aggregate term of 99 years' imprisonment. On direct appeal, the appellate court vacated one of the convictions for aggravated battery with a firearm and the aggravated battery of a child conviction, but affirmed the judgment in all other respects. *People v. Smith*, 2013 IL App (1st) 120311-U. Smith filed a *pro se* post-conviction petition and counsel was appointed to represent him at the second stage of proceedings. On April 22, 2016, Assistant Public Defender Denise Avant filed a 651(c) certificate stating that she had complied with the requirements of the Rule. On August 4, 2017, Avant filed a response to the State's motion to dismiss. Avant left the office and Christine Underwood was appointed to represent Smith. She represented Smith at the hearing on the State's motion to dismiss, which was held on March 26, 2018. The State's motion to dismiss was granted.

On appeal, Smith argued that the case should be remanded because the record did not show that the attorney who represented him at the hearing on the State's motion to dismiss complied with Illinois Supreme Court Rule 651(c). The appellate court affirmed the dismissal in a published opinion. *People v. Smith*, 2020 IL App (1st) 181220.

### Jury Trial

Karl Smith was charged with numerous counts stemming from the home invasion and armed robbery of Gabriel Curiel, his son David Curiel, and his brother,



Jonathan Collazo. (CI.38-68)<sup>1</sup>

Prior to trial, defense counsel requested a competency hearing of the State's minor witness, David Curiel. (R.II.T-3) David, who was six years old at the time of the offense, had been shot in the head during the incident. (R.II.S-4, U-4) Counsel believed that the nature of the injuries, as well as his age, may have impacted his memory and ability to testify competently. (R.II.U-4) The court refused to order a hearing, stating that it would "take that up when he testifies." (R.II.U-5)

Gabriel Curiel testified and acknowledged that he was a convicted felon who made a living as a drug dealer in January 2008. (R.IV.PP-23) At that time, he lived with his brother, Jonathan Collazo, and his cousin, Luis. (R.IV.24). He has three children: Isaiah, David, and Javion, who stayed with him on the weekends. (R.IV.PP-23-24) The door to Curiel's apartment opened outward into the hallway and had a peephole. (R.IV.PP-26-27) Curiel had known Karl Smith for over 15 years, and his nickname was "Twin," because he had a twin brother named Kevin. (R.IV.PP-26)

Around 9:00 a.m., on January 18, 2008, Curiel heard a knock at the door. (R.IV.PP-27) Curiel looked out of the peephole and saw Karl Smith. (R.IV.PP-27) He unlocked the door, and the door was flung open from the outside. (R.IV.PP-28). Smith and two masked men entered the apartment. (R.IV.PP-29) One of the masked men pointed a chrome revolver at Curiel and told him to get down on the ground. (R.IV.PP-29) Curiel backed up to the kitchen, and Smith locked the door behind

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<sup>1</sup> The post-conviction record is an e-record. The direct appeal record is a paper record. The direct appeal common law record will be referred to as CI. The direct appeal report of proceedings will be referred to as R and the corresponding Volume and letter.



himself. (R.IV.PP-29, 30) Smith tackled Curiel and taped Curiel's legs with duct tape. (R.IV.PP-30) Smith said all he wanted was the money, and to be quiet or they would shoot. (R.IV.PP-31) Smith stabbed Curiel twice on each side of his lungs, and on his neck and arms. (R.IV.PP-34) Curiel blacked out after being kicked in the face by one of the masked men. (R.IV.PP-36)

When Curiel woke up, money and cannabis were gone from his safe. (R.IV.PP-37) He saw David holding his head and sobbing. (R.IV.PP-37) Curiel had been stabbed seven or eight times and had been shot in the shoulder. (R.IV.PP-39) He also had a graze wound on his head. (R.IV.PP-39) Curiel did not immediately identify Smith as one of the offenders. (R.IV.PP-40) When an officer told Curiel that his son had been shot in the head, he began to answer their questions and told them that Smith was one of the offenders. (R.IV.PP-42)

Jonathan Collazo acknowledged that he was a convicted felon and drug dealer. (R.IV.PP-95, 121) On the morning of the offense, he was asleep in his room when his cell phone rang. (R.IV.PP-99-100) Before he could answer, he heard Curiel screaming. (R.IV.PP-100) Collazo opened the door and looked down the hall. (R.IV.PP-101) He saw his nephew sitting on the couch crying. (R.IV.PP-101) He saw a masked man with a gun in his hand. (R.IV.PP-101) Collazo went to the kitchen where he saw Smith tying up Curiel. (R.IV.PP-101)

Collazo was able to run into his bedroom and lock the door. (R.IV.PP-106) He climbed out of a window and onto the roof next door. (R.IV.PP-106) He made his way to a liquor store near Division and Pulaski and asked an employee there to call the police. (R.IV.PP-106) After the phone call, Collazo ran back to the building. (R.IV.PP-107) On his way, he saw a squad car, and he pointed officers to the



building. (R.IV.PP-107) When Collazo learned that David had been shot, he identified Smith as one of the intruders. (R.IV.PP-111) Collazo said he lied when he initially told the police that there had been three black men in masks. (R.IV.PP-135)

Thomas Surma, a Chicago Police officer, was on patrol on Division Avenue around 10:00 a.m., on January 18, 2008, when he saw Collazo across the street in his boxer shorts acting “very frantic, all beat up, had blood on him.” (R.IV.PP-153-154) Collazo said he had been pistol whipped and that the offenders were still in the house. (R.IV.PP-154) Moments later there was a 911 call about a person calling for help at Division and Pulaski. (R.IV.PP-155) Surma and his partner entered the apartment. (R.IV.PP-156) In the apartment, he saw a large amount of blood on the floor and two people huddled in bathroom: an adult and a young child. (R.IV.PP-157-158) The child’s eyes started rolling in the back of his head and he looked like he might pass out or die. (R.IV.PP-158) Surma noticed a wound on the child’s forehead. (R.IV.PP-159) According to Surma’s report, Collazo told him there were three offenders, unknown to him, and each one was wearing a black mask. (R.IV.PP-169-172) Collazo never mentioned Smith’s name. (R.IV.PP-174)

David Curiel testified that he was nine years old, and lived in the suburbs with his mother. (R.IV.PP-176) After answering a few preliminary questions, David testified that in January 2008, he was staying with his dad. (R.IV.PP-178) When asked why he was staying with his dad, David responded, “I need a hug.” (R.IV.PP-178) After defense counsel asked for a sidebar, David said “I want my mom.” (R.IV.PP-178) The jury was excused, and David was allowed to use the restroom. (R.IV.PP-178)

Defense counsel moved for a mistrial, arguing that Smith was prejudiced



by the jury seeing David's emotional breakdown. (R.IV.PP-179) The court found that the outburst was not sufficient grounds for a mistrial, but said it would conduct a competency hearing should the State call him to the witness stand again. (R.IV.PP-181-182) The State did not recall David.

Chicago Police officer Lenny Pierri and his partner, Officer Stinar, responded to the scene and then went to 4609 North Harding. (R.IV.PP-188-192) Pierri noticed what looked like blood on the screen door and heard someone running around inside. (R.IV.PP-192-193) After a few minutes, Smith came to the back door. (R.IV.PP-193) Smith had some cuts, some of which were still bleeding. (R.IV.PP-194) Police searched Smith's home that night and discovered a bundle of money, stained with blood, underneath a mattress. (R.IV.PP-198-99) No black clothing, guns, or knives were recovered. (R.IV.PP-206)

DNA analysis was performed on two bills recovered from under Smith's mattress. The DNA from a stain on a \$20 dollar bill matched Curiel. (R.VI.QQ-54, 72) Three stains from a \$50 dollar bill were analyzed. (R.VI.QQ-47) The first was a mixture of at least three people, and Curiel could not be excluded, but Smith, David, and Collazo could be excluded. (R.VI.QQ-48) Analysis of the second showed DNA from which Smith and Curiel could not be excluded, and David and Collazo could be excluded. (R.VI.QQ-48) The third was a mixture of at least three people. (R.VI.QQ-48) Smith and Curiel could not be excluded; David and Collazo could be excluded. (R.VI.QQ-48-49)

Officer Carlos Delgado testified for the defense that Curiel told him that the offenders were three unknown males who were all wearing masks and black clothing. (R.VI.QQ-146) He also wrote in his report that Collazo said he was sleeping



on the living room floor when he was awakened by an unknown offender. (R.VI.QQ-154) Collazo also told the officer that one of the men was unmasked, and that he recognized the scar on that man's head as belonging to Smith. (R.VI.QQ-161-162)

The jury found Smith guilty of the attempt first degree murder of Gabriel Curiel, aggravated battery with a firearm of Gabriel Curiel, attempt first degree murder of David Curiel, aggravated battery with a firearm of David Curiel, aggravated battery to a child, home invasion, and armed robbery. (R.VI.RR-101-102)

### Direct Appeal

On direct appeal, Smith contended that the one-act, one-crime rule required the court to vacate his aggravated battery convictions because they were based upon the same physical acts underlying his attempted murder convictions, namely shooting the victims. The appellate court vacated one of the convictions for aggravated battery with a firearm and the aggravated battery of a child conviction, but affirmed the judgment in all other respects. *People v. Smith*, 2013 IL App (1st) 120311-U.

### Post-conviction Proceedings

On March 10, 2014, Smith mailed a *pro se* post-conviction petition to the circuit court alleging several constitutional violations. (C. 38) Smith alleged that the trial court erred by not holding a pre-trial competency hearing for David Curiel. (C. 42-43) Smith claimed the failure to hold the competency hearing prejudiced him because the jury was influenced by David's emotional breakdown. (C. 46-47, 92-93) He alleged that the State committed a *Brady* violation by not disclosing David's statement of identification in discovery. (C. 42-43, 94-95) Smith alleged that the trial court erred by imposing consecutive sentences for charges that arose



out of the same course of conduct. (C. 42) He also contended that the trial court erred by not informing him that he would be receiving consecutive sentences until the sentencing hearing. Smith claimed this knowledge might have caused him to reconsider his options regarding a possible guilty plea. (C. 42, 78) Smith alleged that he was not proven guilty beyond a reasonable doubt because the State relied on witnesses whose trial testimony was contradicted by their prior statements. (C. 43) Smith attached transcripts from the hearings on the defense motion for a competency hearing and motion to produce David's school and medical records. (C. 48-66,) He also attached the transcript of David's trial testimony and the defense motion for a mistrial. (C. 67-74) Smith claimed appellate counsel was ineffective for not raising these trial errors on direct appeal. (C. 96-98)

Assistant Public Defender Denise Avant was appointed to represent Smith in January of 2015. (R. 56) On April 22, 2016, Avant filed a 651(c) certificate stating that she had consulted with Smith about the claims in his petition, had read the direct appeal record and briefs, spoken with Smith's trial attorney, and researched the issues raised in the petition. (C. 214) Avant determined a supplemental petition was not necessary for the presentation of Smith's claims.

On April 6, 2017, the State filed a motion to dismiss Smith's post-conviction petition. (C. 230-246) The State said the petition was untimely. (C. 233) Timeliness aside, the State argued the claims were without merit. It did not violate *Brady* or discovery rules because it filed three supplemental answers to discovery detailing David's statements of identification. (C. 234-235, 238) There was no error in not holding a competency hearing because the defense did not establish that one was necessary. Also, there was no prejudice because David did not offer substantive



testimony and the jury was instructed to disregard what he said and his demeanor. (C. 237) The State argued it proved its case beyond a reasonable doubt. (C. 238-245) Because Smith's allegations of trial error were without merit, appellate counsel was not ineffective for not raising the issues on direct appeal. (C. 234)

On August 4, 2017, Avant filed a response to the State's motion to dismiss. (C. 262-266) Avant did not address the merits, but argued Smith's late filing could be excused because he was not culpably negligent in the late filing. (C. 263) The petition was only a few weeks late and Smith, who only completed the 10th grade in high school, was unaware of the deadlines for filing a post-conviction petition. (C. 263-65) Avant attached Smith's affidavit that stated he thought his petition was timely. (C. 266)

On October 27, 2017, the trial court stated that a new attorney had been assigned to Smith's petition because Avant left the Public Defender's Office. (R. 116)<sup>2</sup> On February 2, 2018, Assistant Public Defender Christine Underwood appeared on behalf of Smith. (R. 122-23) On March 26, 2018, a hearing on the State's motion to dismiss was held.<sup>3</sup> (R. 125) Underwood argued Smith's late filing should be excused because he thought he had 90 days from the judgment date before the post-conviction clock started running when he only had 35 days. (R. 128) Underwood argued that this mistake did not constitute culpable negligence. (R. 128) Underwood also argued that Smith's petition should advance to an evidentiary hearing because the claim the trial court erred in not holding the

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<sup>2</sup> The transcript does not list the date for this hearing, but the docketing statement indicates it was held on October 27, 2017. (C. 35)

<sup>3</sup> The transcript mistakenly lists this date as March 26, 2017, but the hearing was held on March 26, 2018.



competency hearing was meritorious. (R. 129-131) The trial court granted the State's motion to dismiss finding that Smith's post-conviction petition was untimely and without merit. (R. 132-133)

*Instant Appeal*

On appeal from the dismissal of his post-conviction petition, Smith argued that the cause should be remanded because the attorney who represented him at the hearing on the motion to dismiss did not file a 651(c) certificate and the record did not show she otherwise complied with the Rule. Smith argued that the certificate filed by the attorney who no longer represented him did not show his attorney complied with Illinois Supreme Court Rule 651(c). The appellate court, relying on *People v. Marshall*, 375 Ill. App. 3d 670 (1st Dist. 2007), held that the attorney who ultimately represented Smith did not have to comply with the Rule because the attorney who left the office had filed the 651(c) certificate. *People v. Smith*, 2020 IL App (1st) 181220, ¶¶ 17-20.

The appellate court acknowledged that cases addressing Illinois Supreme Court Rule 604(d), which sets forth the requirements for an attorney representing a defendant who has moved to withdraw his guilty plea, have held that the attorney who represents a defendant at the hearing cannot rely on a certificate filed by an attorney who no longer represents the defendant. *Smith*, 2020 IL App (1st) 181220, ¶ 21. But the court held the reasoning of those cases did not apply because a post-conviction petitioner is only entitled to reasonable assistance of counsel while a defendant withdrawing his guilty plea is entitled to the higher standard of effective assistance of counsel. *Id.* at ¶ 22. This Court granted leave to appeal on May 26, 2021.



## ARGUMENT

**This Court should hold that the attorney who represents a post-conviction petitioner during the dispositive hearing at second-stage proceedings must demonstrate compliance with Illinois Supreme Court Rule 651(c) and that a certificate filed by an attorney who no longer represents the petitioner does not establish compliance with the Rule.**

Karl Smith filed a *pro se* post-conviction petition and the trial court appointed counsel for second-stage proceedings. An assistant public defender represented Smith and filed a 651(c) certificate and a response to the State's motion to dismiss the petition. This attorney then left the Public Defender's Office and a new attorney from the office was appointed to represent Smith. Smith's new attorney did not file a 651(c) certificate even though she represented Smith at the hearing on the motion to dismiss. The record does not establish that this attorney otherwise complied with the requirements of Rule 651(c). On appeal from the second-stage dismissal, Smith argued that the case should be remanded for further proceedings because the attorney who represented him at the hearing on the State's motion to dismiss did not file a 651(c) certificate and the record did not establish that she complied with the Rule.

The appellate court held that the second attorney did not need to independently demonstrate compliance with Rule 651(c), in part, because post-conviction petitioners are only entitled to reasonable assistance of counsel, which is a lesser standard than effective assistance, which applies to trial counsel. *People v. Smith*, 2020 IL App (1st) 181220, ¶ 22. The appellate court also relied on *People v. Marshall*, 375 Ill. App. 3d 670, 679 (1st Dist. 2007), which addressed a different issue: whether counsel who represents a petitioner at the third stage of proceedings is required to comply with Rule 651(c) even though second-stage counsel had already



met the rule's requirements. *Smith*, 2020 IL App (1st) 181220, ¶¶ 17-20.

The appellate court's opinion is contrary to the plain language and purpose of Rule 651(c). The Rule requires that the petitioner's attorney comply with the requirements of the Rule. The attorney who filed the certificate withdrew from representation and it cannot be said that she was Smith's attorney after she withdrew. Moreover, the purpose of Rule 651(c) is to ensure that petitioners receive adequate representation such that their claims of constitutional deprivation are properly set forth. This purpose will be impeded if the attorney who ultimately represents the petitioner does not have to independently demonstrate compliance with the Rule. Second-stage proceedings often last for years and sometimes over a decade. The only way to ensure representation that complies with the requirements of Rule 651(c) is to require that the attorney who ultimately represents the petitioner demonstrate compliance with the Rule. Accordingly, Smith asks this Court to reverse the decision of the appellate court and remand for further second-stage proceedings.

Pursuant to the Post-Conviction Hearing Act (the Act), an indigent post-conviction petitioner whose petition is not summarily dismissed is entitled to appointed counsel. 725 ILCS 5/122-4 (2017); *People v. Turner*, 187 Ill. 2d 406, 411 (1999). Because such representation is a statutory right rather than a constitutional one, the petitioner is entitled only to the level of representation required by the Act, which this Court has defined as a "reasonable" level of assistance. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). To ensure such reasonable assistance, Illinois Supreme Court Rule 651(c) requires that post-conviction counsel: (1) consult with the petitioner either by mail or in person to ascertain his



constitutional claims; (2) examine the record of the trial court proceedings; and (3) make any amendments to the *pro se* petition necessary to adequately present the petitioner's claims. Ill. S. Ct. Rule 651(c) (2017). Remand is required if counsel fails to fulfill any one of these requirements, "regardless of whether the claims raised in the petition had merit." *People v. Suarez*, 224 Ill. 2d 37, 47 (2007); *see also People v. Schlosser II*, 2017 IL App (1st) 150355, ¶ 42; *People v. Jones*, 2016 IL App (3d) 140094, ¶ 33.

Compliance with Rule 651(c) is reviewed *de novo*. *People v. Mason*, 2016 IL App (4th) 140517, ¶ 19, *citing People v. Bell*, 2014 IL App (3d) 120637, ¶ 9.

**A. The record does not show Smith's attorney complied with Rule 651(c).**

In this case, Assistant Public Defender Denise Avant was appointed to represent Smith on his post-conviction petition in January of 2015. (R. 56) On April 22, 2016, Avant filed a 651(c) certificate stating she had complied with the Rule and that a supplemental petition was not necessary for the presentation of Smith's claims. (C. 214) On August 4, 2017, Avant filed a response to the State's motion to dismiss arguing that Smith's late filing should be excused because his petition was only a few weeks late and he was unfamiliar with the filing requirements of the Post-Conviction Hearing Act. (C. 262-266) Before the hearing on the motion to dismiss, Avant left the Public Defender's Office and Assistant Public Defender Christine Underwood was appointed to represent Smith. (R. 116, 122-23) Underwood represented Smith at the hearing on the State's motion to dismiss on March 26, 2018. (R. 125-133)

A review of the record confirms that Underwood did not file a 651(c) certificate as the common law record does not contain one and there is no mention in the



report of proceedings that Underwood filed a certificate. Without a filed certificate, it cannot be presumed that counsel complied with Rule 651(c). *See People v. Jones*, 2011 IL App (1st) 092529, ¶ 23 (the filing of a Rule 651(c) certificate gives rise to a rebuttable presumption that post-conviction counsel provided reasonable assistance). Furthermore, the failure to file a Rule 651(c) certificate will be forgiven only where the record shows that counsel substantially fulfilled the required duties. *People v. Lander*, 215 Ill. 2d 577, 584 (2005); *People v. Rodriguez*, 2015 IL App (2d) 130994, ¶ 23. This requires “a clear and affirmative showing of compliance on the record.” *People v. Richardson*, 382 Ill. App. 3d 248, 256 (1st Dist. 2008). Although strict compliance is not necessary, post-conviction counsel must substantially comply with the three duties imposed by Rule 651(c): reviewing the trial record, consulting with the client, and making any necessary amendments to the client’s petition. *People v. Mason*, 2016 IL App (4th) 140517, ¶ 19-20.

The record here does not provide a “clear and affirmative” showing that counsel substantially complied. Counsel did not say she communicated with Smith. Nor did she say that she read the trial record. It is true that Underwood argued Smith’s late filing should be excused. (R. 128) She also argued that Smith’s claim of error regarding the failure to hold a competency hearing had merit. (R. 129-31) But this does not establish that she read the trial record or communicated with Smith. All of her arguments could have been gleaned from reading Smith’s *pro se* post-conviction petition and prior counsel’s response to the State’s motion to dismiss.

In *People v. Richmond*, 188 Ill. 2d 376, 379 (1999), counsel who represented the petitioner at the second stage did not file a 651(c) certificate. The State argued



that the record showed counsel substantially complied with the Rule because counsel's statements at two court appearances showed he was aware of the facts of the case and of the contents of the defendant's *pro se* petition. *Id.* at 383. The State also argued that the court could infer that counsel consulted with the defendant because counsel mentioned to the circuit judge certain matters involving the defendant, such as his transfer to a different prison, his plans to take the GED, his scores on other tests, and his conduct in prison. *Id.* This Court rejected the State's arguments because the information cited by the State could have been obtained from any number of sources, including the defendant's family or the Department of Corrections. *Id.* Thus, there was no showing in the record that counsel fulfilled his duties to consult with the defendant, examine the trial record, and make any necessary amendments to the defendant's *pro se* post-conviction petition. *Id.*

This case warrants the same result. Underwood's arguments do not establish that she read the trial record or consulted with Smith about his claims. While she did argue at the hearing on the motion to dismiss, all of her arguments could have been based on reading the response to the motion to dismiss and the *pro se* petition. There is nothing in the record to show that she consulted with Smith or read the trial record. As a result, there is no clear and affirmative showing that Underwood substantially complied with Rule 651(c).

**B. The certificate filed by prior counsel did not establish compliance, as the plain language and purpose of Rule 651(c) require the attorney who represents the petitioner at the dispositive hearing to comply with the duties imposed by the Rule.**

Without a sufficient showing of compliance by Underwood, the question becomes whether the 651(c) certificate filed by Smith's prior attorney, nearly two



years before the hearing on the State's motion to dismiss, satisfies the duties imposed by Rule 651(c). This Court should hold that prior counsel's certificate does not satisfy Rule 651(c), as both the plain language and purpose of the Rule require compliance by the attorney who ultimately represents the petitioner at the dispositive second-stage hearing.

The plain language of Rule 651(c) shows that the certificate filed by an attorney who no longer represented Smith did not satisfy the requirements of the Rule. When interpreting supreme court rules, this Court applies the same principles of construction applicable to statutes. *People v. Roberts*, 214 Ill. 2d 106, 116 (2005). The primary goal is to ascertain and give effect to the intent of the drafters, and the most reliable indicator of the drafters' intent is the language used, given its plain and ordinary meaning. *People v. Perkins*, 229 Ill. 2d 34, 41 (2007). This Court's review of the proper interpretation of supreme court rules is *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007).

Rule 651(c) states:

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. Ill. S. Ct. Rule 651(emphasis added).

It is not disputed that the attorney who filed the 651(c) certificate withdrew from the case and did not represent Smith at the hearing on the State's motion to dismiss. This hearing was the dispositive hearing and the only hearing that is required at the second stage. The attorney who withdrew was not Smith's attorney and her certificate did not constitute compliance for the attorney who ended up



representing Smith. The plain language of 651(c) requires that the attorney who ultimately represents the petitioner to comply with Rule, as it provides that “petitioner’s attorney” – not petitioner’s prior attorney – must fulfill the three duties imposed by the Rule.

Requiring the attorney who ultimately represents the petitioner to comply with 651(c) also fulfills the purpose of the Rule. The last sentence of Rule 651(c), which imposes three core duties on post-conviction counsel, was added by this Court in 1969 to implement its decisions in *People v. Garrison* 43 Ill. 2d 121 (1969); *People v. Jones*, 43 Ill. 2d 160 (1969); and *People v. Slaughter*, 39 Ill. 2d 278, 285 (1968), with respect to the responsibilities of an attorney representing an indigent prisoner in a post-conviction proceeding. See Ill. S. Ct. Rule 651, Committee Comments. In *Slaughter*, this Court recognized that the post-conviction statute can not perform its function unless the attorney appointed to represent an indigent petitioner consults with the petitioner, reads the record of the trial proceedings, and makes any necessary amendments to adequately present the petitioner’s claims. *Slaughter*, 39 Ill. 2d at 285.

When post-conviction counsel does not complete the few duties imposed by the rule, the limited right to counsel conferred by the Act becomes illusory. *People v. Shelton*, 2018 IL App (2d) 160303, ¶ 37, citing *People v. Schlosser*, 2017 IL App (1st) 150355, ¶ 44. Accordingly, this Court has consistently held that remand is required where post-conviction counsel failed to fulfill the duties of consultation, examining the record, and amendment of the *pro se* petition, regardless of whether the claims raised in the petition had merit. *People v. Suarez*, 224 Ill. 2d 37, 47, (2007); *People v. Wales*, 46 Ill. 2d 79(1970); *People v. Barnes*, 40 Ill. 2d 383 (1968);



*People v. Ford*, 40 Ill. 2d 440 (1968); *People v. Wilson*, 40 Ill. 2d 378 (1968); *People v. Craig*, 40 Ill. 2d 466 (1968); *People v. Tyner*, 40 Ill. 2d 1 (1968). Thorough knowledge of both the record and the nature of a defendant's claims are essential to providing competent representation at a hearing on the State's motion to dismiss. Thus, the requirements of 651(c) should apply to the attorney who represents the defendant at that dispositive hearing, and a certificate filed by a prior attorney who withdraws from representation before that hearing does not establish compliance.

Without compliance by the attorney who represents the petitioner at the hearing on the motion to dismiss, there will be no guarantee that his claims were adequately presented. Consulting with the petitioner might reveal facts that could justify a late filing. *See People v. Robinson*, 324 Ill. App. 3d 553, 556-57 (2d Dist. 2001) (counsel's performance was unreasonable for not arguing a lack of culpable negligence for late filing because of petitioner's mental health issues that might have manifested after petitioner was incarcerated). If counsel has not read the record, they might not make the necessary amendments to avoid forfeiture or waiver. *See People v. Turner*, 187 Ill. 2d 406, 412-13 (1999) (post-conviction counsel did not comply with 651(c) where he failed to amend petition to include a claim of ineffective assistance of appellate counsel where the factual basis for the claim was in the direct appeal record). More generally, a post-conviction petitioner has a right to have an attorney who has consulted with the petitioner and who is familiar with the record and the claims, when this attorney argues at the dispositive hearing.

The realities of post-conviction proceedings also dictate that the attorney who ends up representing the petitioner must comply with 651(c). Post-conviction



petitions often linger at the second stage for many years. *See People v. Kelly*, 2012 IL App (1st) 101521, ¶¶ 33-40 (discussing delays in proceedings that led to a 12-year second-stage); *People v. Cleveland*, 2012 IL App (1st) 101631, ¶ 1 (petition spent ten years at the second stage); *People v. Woidtke*, 313 Ill. App. 3d 399, 401, 413 (5th Dist. 2000) (petition was at second stage for six years); *People v. Willingham*, 2020 IL App (1st) 162250, ¶¶ 15-16 (petition that was filed in 1999 was dismissed at the second stage in 2015). In this case, the 651(c) certificate was filed about two years before the hearing on the State's motion to dismiss. (C. 214; R. 125)

The only way to ensure that the right to counsel conferred by the Act is honored is to require that the attorney who ultimately represents the petitioner comply with the Rule. The law continuously evolves. A later-appointed attorney should thus be required to meet the minimal requirements of reading the petition and the record and consulting with the petitioner so that they can adequately present the petitioner's claims under the law as it exists at the time of the second-stage hearing. For instance, in *People v. Craighead*, 2015 IL App (5th) 140468, ¶¶ 13-20, the case law supporting the petitioner's claim developed during the pendency of the petition. Under the holding of the appellate court, meritorious claims could get lost in the shuffle if the attorney who represents the petitioner at the dispositive hearing is not required to review the record and consult with the petitioner, and is instead permitted to rely on work performed years earlier by an attorney who no longer represents the petitioner.

The court here held that all there was left for new counsel to do was argue the State's motion to dismiss. *Smith*, 2020 IL App (1st) 181220, ¶ 20. But if the motion to dismiss focuses on timeliness, and new counsel does not comply with



651(c), counsel might not realize that there is new law supporting one of the petitioner's claims that should be brought to court's attention either through an amended petition or at the argument on the motion to dismiss. And regardless of whether there are any intervening changes in the law, it is imperative the attorney who is tasked with arguing against the State's motion to dismiss review the record and consult with the client. By fulfilling those basic tasks, counsel will be able to ensure that the petitioner's claims are argued fully and competently at the dispositive hearing.

Further, not requiring the attorney who ultimately represents the defendant to comply with 651(c) deprives the petitioner of the ability to rebut the presumption created by the certificate filed by the previous attorney. This Court has made clear that an attorney's Rule 651(c) certificate does not conclusively prove compliance with the Rule and can be rebutted by the record. *Perkins*, 229 Ill. 2d at 52. The record that could rebut Rule 651(c) compliance can include two elements: (1) any supplemental or amended petitions, and (2) counsel's argument at the second-stage hearing. *People v. Landa*, 2020 IL App (1st) 170851, ¶ 60 (finding that counsel's insufficient argument at the hearing helped rebut the presumption of compliance created by the 651(c) certificate).

Because post-conviction counsel is not required to file an amended or supplemental petition, the only aspect of counsel's performance that is mandatory is the argument at the hearing on the motion to dismiss. Since the Rule makes clear that counsel's claim of compliance can be rebutted by the record, the only part of the record that a petitioner is guaranteed to be able to use to rebut such a claim is the argument at the hearing. Here, though, the attorney who filed the



certificate did not argue at the hearing. This deprived Smith of the record that he could use to potentially rebut the presumption that the earlier attorney complied with the Rule. Moreover, as is usually the case, Smith was not present at the hearing on the State's motion to dismiss.

The appellate court's holding would severely restrict a petitioner's ability to rebut the presumption of compliance. The second attorney would have no obligation to consult with the defendant, read the petition or the record, or file an amended petition. Neither the original attorney nor the petitioner will necessarily be at the hearing on the motion to dismiss. It will be difficult for the petitioner to show whether the prior attorney who filed the certificate actually complied with the Rule. The defendant will not even be able to tell his second attorney that the prior attorney did not consult with him because there would be no requirement that the second attorney ever consult with the petitioner.

Caselaw addressing compliance with Illinois Supreme Court Rule 604(d) supports the conclusion that the purpose of Rule 651(c) would be undermined if newly appointed counsel cannot rely on a certificate filed by the previous attorney to show compliance. In *People v. Ritchie*, 258 Ill. App. 3d 164, 165 (2nd Dist. 1994), a public defender filed an affidavit after the defendant filed a motion to withdraw his guilty plea. However, a different attorney represented the defendant at the hearing on the motion to withdraw his guilty plea. The court stated, "The purpose of the rule is frustrated if an affidavit by an attorney who no longer represents defendant is deemed adequate compliance with the rule." *Id.* at 167. Similarly, in *People v. Herrera*, 2012 IL App (2d) 110009, the appellate court held that a 604(d) certificate filed by a public defender who later left the office could not be



imputed to the attorney who represented the defendant at the hearing stating, “Without a compliant certificate filed by the attorney who represents the defendant at his or her postplea hearing, the court has no assurance that the attorney *presenting* the motion has a grasp of the record and the defendant’s contentions of error.” *Id.* at ¶ 11 (emphasis in original).

The purpose of certificates under each Rule is to ensure the defendant receives adequate representation. *See People v. Love*, 385 Ill. App. 3d 736, 738 (2d Dist. 2008) (purpose of 604(d) certificate is to ensure counsel has reviewed the defendant’s claim and considered all relevant bases for the motion to withdraw the guilty plea or to reconsider the sentence); *People v. Wright*, 149 Ill. 2d 36, 66-67 (1992) (purpose of 651(c) certificate is to ensure that petitioners receive adequate representation such that their claims of constitutional deprivation are properly set forth). Smith argues that, similar to *Herrera*, without compliance by the attorney who argues at the dispositive hearing, there is no assurance that the attorney arguing the petition has a grasp of the record and petitioner’s contentions of error.

The appellate court below held that the case law addressing 604(d) was not relevant because a post-conviction petitioner is only entitled to reasonable assistance of counsel whereas a defendant in post-plea proceedings is entitled to the higher standard of effective assistance of counsel. *Smith*, 2020 IL App (1st) 181220, ¶¶ 21-22. While that is true, it does not diminish the duties of appointed counsel under Rule 651(c). These requirements are “limited” but mandatory. *Custer*, 2019 IL 123339, ¶ 32. The different standards of representation cannot justify the erosion of post-conviction counsel’s limited duties under Rule 651(c). Whether the standard is effective assistance or reasonable assistance, a basic prerequisite



of competent representation at a dispositive hearing is, as *Herrera* recognized, a familiarity with the record and the petitioner's claims.

Further, the difference between effective and reasonable assistance is the scope of representation, not its competence. *People v. Owens*, 139 Ill. 2d 351, 364 (1990), explained this distinction: “trial counsel plays a different role than counsel in post-conviction proceedings.” At trial, “counsel acts as a shield to protect defendants from being ‘haled into court’ by the State...”. 139 Ill. 2d at 364-65. In contrast, “It is the petitioner, rather than the state, who initiates the post-conviction proceeding...”. *Id.* at 365. Therefore, post-conviction counsel is appointed “not to protect them from the prosecutorial forces of the State, but to shape their complaints into the proper legal form and present those complaints to the court.” *Id.* Counsel's scope of representation, in short, is narrower in post-conviction proceedings than at trial, but it still must be competent. *See Wildey v. Paulsen*, 385 Ill. App. 3d 305, 313 (1st Dist. 2008) (“even if Paulsen represented Wildey in the limited capacity that she now claims, Paulsen still had a duty to provide competent representation and advice within the parameters of that limited capacity”).

Another way of looking at the lesser standard of representation afforded a post-conviction petitioner is that he has fewer rights. A petitioner has no right to even be present at the dispositive hearing. *See People v. Moore*, 216 Ill. App. 3d 657, 659-60 (3rd Dist. 1991) (while a defendant in a criminal case has a constitutional right to be present at his trial, that right does not carry over to post-conviction proceedings). The fact that counsel's duties under the Rule are limited makes it vital that these few requirements are met. In order to ensure that the right to counsel conferred under the Act is not illusory, the attorney who



represents the petitioner at the dispositive hearing must demonstrate compliance with Rule 651(c).

Compliance with 651(c) should not end when an attorney withdraws from representing the petitioner. The appellate court here relied on *People v. Marshall*, 375 Ill. App. 3d 670 (1st Dist. 2007), to hold that the certificate filed by the attorney who withdrew constituted compliance with the Rule. *Smith*, 2020 IL App (1st) 181220, ¶¶ 17-20. In *Marshall*, the defendant argued the appellate court should reverse the dismissal of her petition because the attorneys who were appointed to represent her at the evidentiary hearing did not comply with Rule 651(c), even though second-stage counsel already had met the Rule's requirements. *Marshall*, 375 Ill. App. 3d at 679.

The appellate court in *Marshall* rejected the defendant's contention that post-conviction counsel must file a 651(c) certificate at each stage of the proceedings. The court noted that the tasks set out in Rule 651(c)—consulting with the defendant, examining the record and, if necessary, amending the petition to present the defendant's claims—are performed by counsel at the second stage of post-conviction review so that the State can fully review the defendant's claims and determine if it will move to dismiss them. *Id.* at 683. The duties of counsel at the third stage do not include consulting with the defendant or amending the petition to present his claims because counsel at the third stage argues the merits of the petition as set forth at the second stage. *Id.* Accordingly, the *Marshall* court held that compliance with Rule 651(c) is not required at third-stage proceedings. *Id.*

This case presents a different question from *Marshall*. Regardless of whether the requirements of Rule 651(c) apply at the third stage of proceedings, they



unquestionably do apply at the second stage, as it is only at the second stage that the attorney shapes the petitioner's issues and it is only at the second stage that the petitioner can rebut counsel's claims of compliance. *See Perkins*, 229 Ill. 2d at 42, 52. The court in this case acknowledged that *Marshall* concerned compliance at the third stage, but held the reasoning should apply because all there was left for counsel to do was argue against the State's motion to dismiss. *Smith*, 2020 IL App (1st) 181220, ¶ 20.

The appellate court's reasoning in this case is flawed for two reasons. First, it is questionable whether the holding of *Marshall* with regards to compliance with Rule 651(c) is still good law. Citing *Marshall*, the appellate court here stated, "Rule 651(c)'s requirements must be met only once and not, as defendant suggests, by attorneys representing a defendant at each stage of post-conviction proceedings." *Smith*, 2020 IL App (1st) 181220, ¶ 17, *citing Marshall*, 375 Ill. App. 3d at 682. In *People v. Custer*, 2019 IL 123339, ¶ 32, this Court stated, that the "limited duties" required by Rule 651(c) "persist throughout the proceedings under the Act." *Marshall* was decided long before this Court's decision in *Custer*. Thus, *Marshall*'s holding that the requirements of Rule 651(c) do not persist throughout the proceedings is questionable.

Second, even if Rule 651(c) does not apply at the third stage, it must apply to the attorney who represents the petitioner at the dispositive hearing at the second stage. The appellate court here held that there was nothing left for counsel to do but argue the response to the motion to dismiss. *Smith*, 2020 IL App (1st) 181220, ¶ 20. Thus, there was no reason for counsel to consult with the defendant, read the record, or make amendments. *Id.* But *Smith* was entitled to have the



attorney who ultimately represented him comply with 651(c). A certificate filed by counsel years before the dispositive hearing is not proof that later counsel complied with 651(c).

The requirements of 651(c) are not onerous and there is no compelling reason to not require petitioner's ultimate counsel to comply. The attorney who argues at the dispositive hearing should be familiar with the petitioner's claims and the record. The plain language of the Rule mandates that a petitioner's attorney—not their prior attorney—perform these limited duties. Moreover, the only way to ensure that a petitioner's claims are adequately presented is to require the attorney who ultimately represents the petitioner to comply with 651(c). There is little downside to requiring petitioner's attorney to comply with the Rule, as the requirements of the Rule are limited. At most, the attorney might duplicate some work by an attorney who no longer represents the defendant. But the potential benefit is that a petitioner's claims will be adequately presented. The only way to ensure that the purpose of 651(c) is honored is to require the attorney who ultimately represents the petitioner to comply with the Rule.

### **Conclusion**

The rules of this Court are not mere suggestions. They have the force of law, and they should be followed. *People v. Glasper*, 234 Ill. 2d 173, 189 (2009). The plain language of Rule 651(c) requires that the petitioner's attorney demonstrate compliance with the Rule. An attorney who withdraws from representation is no longer the petitioner's attorney and a certificate filed by this attorney does not demonstrate compliance by the attorney who ultimately represents the petitioner. The appellate court's holding in this case is contrary to the plain language



of the Rule.

If allowed to stand, the appellate court's decision would also undermine the purpose of the Rule. A petitioner's ability to rebut the presumption that the certificate demonstrates compliance would be significantly limited. More important, a petitioner is entitled to have the attorney who actually represents him comply with the Rule. Petitions can linger for years at the second stage and the only way to ensure petitioner's claims are adequately presented is for the attorney who represents him at the dispositive hearing to comply with the Rule. The requirements of the Rule are limited and the reasonable assistance standard does not mean the attorney should skirt the requirements of Rule 651(c). Because the requirements of Rule 651(c) are so limited, it is vital that they are followed. There is little cost to requiring petitioner's attorney to comply and there is a risk that meritorious claims will be missed if counsel does not comply. Accordingly, Karl Smith asks this Court to reverse the decision of the appellate court and remand the cause to the circuit court for further second-stage proceedings.



**CONCLUSION**

For the foregoing reasons, Karl Smith, petitioner-appellant, respectfully requests that this Court reverse the decision of the appellate court and remand for further second-stage proceedings.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 29 pages.

/s/Peter Sgro  
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	Victor Kubica	PP210	PP242		
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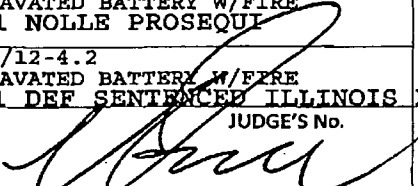
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Sheet # 0004	Defendant Sheet # 0001 OF 0003	CRIMINAL DISPOSITION SHEET				Branch/Room/Location 1727 205 100 CHICAGO POLICE DEPT		CLERK USE ONLY 0003
CASE NUMBER 08CR0265501		DEFENDANT NAME SMITH, KARL		ATTORNEY PUBLIC DEFENDER		COURT DATE 09-26-2014	COURT CALL/TIME 2-0930 AM	
CB/DCN # 017142163	IR # 1125342	EM	BOND #	I	C	D	BOND AMOUNT	
CHARGES		* IN CUSTODY 12/14/11*					COURT ORDER ENTERED	CODES
C001 720-5/33A-2(A) ARMED VIOLENCE/CATEGORY I 05/02/11 NOLLE PROSEQUI		<i>Post Convict Petition</i> <i>P. 1 appointment</i> <i>BAH / 05/24/14</i>						
C002 720-5/12-11(A)(1) HOME INVASION/ARMED/FORCE 05/02/11 NOLLE PROSEQUI								
C003 720-5/12-11(A)(1) HOME INVASION/ARMED/FORCE 05/02/11 NOLLE PROSEQUI								
C004 720-5/12-11(A)(3) HOME INVASION/ARMED W/FIR 05/02/11 NOLLE PROSEQUI								
C005 720-5/12-11(A)(3) HOME INVASION/ARMED W/FIR 05/02/11 NOLLE PROSEQUI								
C006 720-5/9-1(A)(1) (ATT) MURDER/INTENT TO KILL/INJ 10/11/11 DEF SENTENCED ILLINOIS								DOC
C007 720-5/9-1(A)(1) (ATT) MURDER/INTENT TO KILL/INJ 05/02/11 NOLLE PROSEQUI								
C008 720-5/9-1(A)(1) (ATT) MURDER/INTENT TO KILL/INJ 10/11/11 DEF SENTENCED ILLINOIS								DOC
C009 720-5/12-4.2 AGGRAVATED BATTERY W/FIRE 10/11/11 DEF SENTENCED ILLINOIS								DOC
C010 720-5/12-4.2 AGGRAVATED BATTERY W/FIRE 05/02/11 NOLLE PROSEQUI								
C011 720-5/12-4.2 AGGRAVATED BATTERY W/FIRE 10/11/11 DEF SENTENCED ILLINOIS								DOC
JUDGE:	JUDGE'S No.		RESPONSIBLE FOR CODING AND COMPLETION BY DEPUTY CLERK:			VERIFIED BY:		

THOMAS J. HENNELLY



Sheet # 0001	Defendant Sheet # 0001 OF 0003	CRIMINAL DISPOSITION SHEET		Branch/Room/Location 1727 205 100 CHICAGO POLICE DEPT		CLERK USE ONLY 0001		
CASE NUMBER 08CR0265501		DEFENDANT NAME SMITH, KARL		ATTORNEY PUBLIC DEFENDER		COURT DATE 03-26-2018	COURT CALL/TIME 2-0930 AM	
CB/DCN # 017142163	IR # 1125342	EM	BOND #	I	C	D	BOND AMOUNT	
CHARGES		* IN CUSTODY 12/14/11*		COURT ORDER ENTERED			CODES	
C001 720-5/33A-2(A) ARMED VIOLENCE/CATEGORY I 05/02/11 NOLLE PROSEQUI		<i>People's rights to Hennelly allowed</i>						
C002 720-5/12-11(A) (1) HOME INVASION/ARMED/FORCE 05/02/11 NOLLE PROSEQUI								
C003 720-5/12-11(A) (1) HOME INVASION/ARMED/FORCE 05/02/11 NOLLE PROSEQUI								
C004 720-5/12-11(A) (3) HOME INVASION/ARMED W/FIR 05/02/11 NOLLE PROSEQUI								
C005 720-5/12-11(A) (3) HOME INVASION/ARMED W/FIR 05/02/11 NOLLE PROSEQUI								
C006 720-5/9-1(A) (1) (ATT) MURDER/INTENT TO KILL/INJ 10/11/11 DEF SENTENCED ILLINOIS								DOC
C007 720-5/9-1(A) (1) (ATT) MURDER/INTENT TO KILL/INJ 05/02/11 NOLLE PROSEQUI								
C008 720-5/9-1(A) (1) (ATT) MURDER/INTENT TO KILL/INJ 10/11/11 DEF SENTENCED ILLINOIS								DOC
C009 720-5/12-4.2 AGGRAVATED BATTERY W/FIRE 10/11/11 DEF SENTENCED ILLINOIS								DOC
C010 720-5/12-4.2 AGGRAVATED BATTERY W/FIRE 05/02/11 NOLLE PROSEQUI								
C011 720-5/12-4.2 AGGRAVATED BATTERY W/FIRE 10/11/11 DEF SENTENCED ILLINOIS		DOC						
JUDGE: 	JUDGE'S No.	RESPONSIBLE FOR CODING AND COMPLETION BY DEPUTY CLERK:			VERIFIED BY:			

THOMAS J. HENNELLY



2020 IL App (1st) 181220  
 No. 1-18-1220  
 Opinion filed December 31, 2020

Fourth Division

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IN THE  
 APPELLATE COURT OF ILLINOIS  
 FIRST DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit
	)	Court of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 08 CR 2655
	)	
KARL SMITH,	)	Honorable
	)	Thomas Joseph Hennelly,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE LAMPKIN delivered the judgment of the court, with opinion.  
 Presiding Justice Gordon and Justice Reyes concurred in the judgment and opinion.

**OPINION**

¶ 1 Defendant Karl Smith appeals the second-stage dismissal of his postconviction petition. He argues that he is entitled to a remand for further second-stage proceedings because the attorney who represented him at the hearing on the State's motion to dismiss his petition did not comply with the requirements of Illinois Supreme Court Rule 651(c). The State counters that the attorney was not required to independently satisfy the duties prescribed by Rule 651(c) because her

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predecessor counsel had already filed a valid Rule 651(c) certificate. For the following reasons, we agree with the State and affirm the circuit court's judgment.<sup>1</sup>

¶ 2

## I. BACKGROUND

¶ 3 In January 2008, defendant and two other men forced their way into an apartment that Gabriel Curiel shared with his brother, Jonathon Collazo. Gabriel's three children, including six-year-old David, were also present at the time. The intruders stole money and cannabis from a safe in the apartment. During the incident, David was shot in the head, and Gabriel was beaten, stabbed in the chest, and shot in the shoulder. Both were seriously injured but survived.

¶ 4 At a jury trial in 2011, Gabriel and Collazo identified defendant as one of the offenders. The State also called David, then nine years old, to testify. Before trial, defendant requested a hearing on David's competency, but the trial court stated that it would address that issue at trial. After taking the stand, David answered several preliminary questions, but when asked about the day of the attack, he responded "I need a hug" and "I want my mom." The jury was then excused, and defense counsel moved for a mistrial, arguing that David's emotional reaction in front of the jury had prejudiced defendant. The trial court denied that request, but stated that it would conduct a competency hearing if the State recalled David to the stand. The State did not recall David and the trial court later instructed the jury to disregard his testimony and what had occurred while he was on the stand.

¶ 5 The jury found defendant guilty of two counts of attempted first degree murder, two counts of aggravated battery with a firearm, and one count each of home invasion, armed robbery, and

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<sup>1</sup> In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.



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aggravated battery of a child. The trial court sentenced defendant to consecutive prison terms of 30 years and 25 years on the attempted first degree murder convictions and consecutive terms of 22 years for the home invasion and armed robbery convictions, for an aggregate sentence of 99 years. The court imposed concurrent sentences of 30 years and 15 years on the aggravated battery with a firearm convictions and no sentence on the aggravated battery of a child conviction, which merged with one of the aggravated battery with a firearm convictions.

¶ 6 On direct appeal, defendant argued that his aggravated battery convictions should be vacated under the one-act, one-crime rule because they were based on the same physical acts as his attempted first degree murder convictions, namely, the shootings of Gabriel and David. We vacated one of defendant's aggravated battery with a firearm convictions and his aggravated battery of a child conviction because those convictions were based on defendant's act of shooting David, which was the same act underlying his conviction for attempted first degree murder of David. *People v. Smith*, 2013 IL App (1st) 120311-U, ¶ 8. But we affirmed defendant's other aggravated battery with a firearm conviction because that conviction was based on defendant's act of shooting Gabriel, while his conviction for attempted first degree murder of Gabriel was based on his distinct act of stabbing Gabriel. *Id.* ¶ 9.

¶ 7 In March 2014, defendant filed a *pro se* postconviction petition, alleging that (1) he was not proven guilty beyond a reasonable doubt, (2) the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose David's pretrial statement identifying him, (3) the trial court erred in rejecting his request for a pretrial hearing on David's competency to testify, which caused him prejudice when David had an emotional breakdown in front of the jury, (4) the trial court erred in imposing consecutive sentences for convictions arising from the same course of conduct and not



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informing him before trial that he could receive consecutive sentences, and (5) his appellate counsel was ineffective for failing to raise the preceding claims on direct appeal.

¶ 8 When the trial court failed to rule on the petition in 90 days, it automatically advanced to second-stage proceedings and the court appointed the Office of the Public Defender to represent defendant. On January 23, 2015, Assistant Public Defender (APD) Denise Avant appeared on defendant's behalf. On April 22, 2016, after several continuances, APD Avant filed a certificate under Illinois Supreme Court Rule 651(c) attesting that she had consulted with defendant by phone to ascertain his contentions of deprivations of constitutional rights, had reviewed the transcript of defendant's trial and the briefs from his direct appeal, had spoken with defendant's trial counsel, had researched the issues in defendant's *pro se* petition, and had determined that no supplemental petition was necessary to adequately present defendant's contentions.

¶ 9 On April 6, 2017, the State filed a motion to dismiss defendant's petition, arguing that it was untimely and that defendant's claims were meritless. On August 4, 2017, APD Avant filed a response to the State's motion, conceding that defendant filed his petition 38 days late but arguing that the delay should be excused because defendant was not culpably negligent. In support, APD Avant submitted an affidavit from defendant explaining that he had only a tenth grade education and was unfamiliar with the legal rules for calculating the deadline for filing a postconviction petition.

¶ 10 Sometime after filing the response to the State's motion to dismiss, APD Avant left the Public Defender's office and the case was reassigned to APD Kristine Underwood. On March 26, 2018, APD Underwood represented defendant at the hearing on the State's motion to dismiss. APD Underwood argued that the untimeliness of defendant's petition should be excused because his

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mistake in calculating the deadline for filing the petition did not constitute culpable negligence. On the merits, APD Underwood focused on defendant's claim that the trial court erred in denying his request for a pretrial hearing on David's competency to testify. APD Underwood argued that, in light of David's age and the head injuries he suffered in the shooting, a pretrial hearing on his competency was warranted. And though David ultimately did not testify at trial, APD Underwood argued that defendant was prejudiced by the lack of a pretrial competency hearing when David became emotional in front of the jury while attempting to testify.

¶ 11 In an oral ruling, the trial court granted the State's motion to dismiss. The court found that defendant's petition was untimely, but it did not address the argument that the lateness should be excused due to defendant's lack of culpable negligence. The trial court also found that defendant's claims were meritless. As for the claim that the court erred in denying defendant's request for a pretrial hearing on David's competency, the court noted that David ultimately did not testify and that the jury was instructed to disregard what occurred when he was briefly called to the stand. After the court announced its ruling, defendant filed a timely notice of appeal.

¶ 12 II. ANALYSIS

¶ 13 Defendant's sole argument on appeal is that he is entitled to a remand for further second-stage proceedings because APD Underwood did not file a Rule 651(c) certificate and the record does not otherwise establish that she independently complied with the duties specified by the rule. Defendant does not dispute that APD Avant complied with the requirements of Rule 651(c). But he argues that, regardless of APD Avant's compliance, APD Underwood, as the attorney who represented him at the hearing on the State's motion to dismiss, was independently required to comply with Rule 651(c). We review an attorney's compliance with Rule 651(c) *de novo*.

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*People v. Profit*, 2012 IL App (1st) 101307, ¶ 17. We likewise review the scope of an attorney's duties under Rule 651(c) *de novo*. See *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007) (questions concerning the proper interpretation of a supreme court rule are reviewed *de novo*).

¶ 14 Under the Post-Conviction Hearing Act, when a postconviction petition is not dismissed as frivolous or patently without merit within 90 days after it is filed, the petition advances to second-stage proceedings, including the appointment of counsel. 725 ILCS 5/122-2.1(b) (West 2018); 725 ILCS 5/122-4 (West 2018); *People v. Bailey*, 2017 IL 121450, ¶ 18. There is “no constitutional right to counsel, effective or otherwise,” in postconviction proceedings. *People v. Custer*, 2019 IL 123339, ¶ 30; see *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). Rather, the right to counsel recognized by the Post-Conviction Hearing Act exists as a matter of legislative grace. *Custer*, 2019 IL 123339, ¶ 30. A postconviction petitioner is thus “entitled to only the level of assistance guaranteed by the Act.” (Internal quotation marks omitted.) *Id.* That “required quantum of assistance has been judicially deemed to be a ‘reasonable level,’ a standard that is significantly lower than the one mandated at trial by our state and federal constitutions.” *Id.* (quoting *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006)).

¶ 15 To ensure that postconviction petitioners receive the reasonable level of assistance guaranteed under the Post-Conviction Hearing Act, Rule 651(c) requires postconviction counsel to perform three specific tasks. *Suarez*, 224 Ill. 2d at 42. In particular, Rule 651(c) requires postconviction counsel to “consult[ ] with [the] petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights, \*\*\* examine[ ] the record of the proceedings at the trial, and [make] any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of [the] petitioner's contentions.” Ill. S. Ct.

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R. 651(c) (eff. July 1, 2017); see *People v. Kirk*, 2012 IL App (1st) 101606, ¶ 18. These duties serve “to ensure that counsel shapes the petitioner’s claims into proper legal form and presents those claims to the court.” *People v. Perkins*, 229 Ill. 2d 34, 44 (2007). When a postconviction attorney files a certificate attesting that she has performed the duties mandated by Rule 651(c), the certificate gives rise to a rebuttable presumption that counsel provided the reasonable level of assistance guaranteed by the Post-Conviction Hearing Act. *Profit*, 2012 IL App (1st) 101307, ¶ 19.

¶ 16 As noted, defendant does not dispute that APD Avant filed a Rule 651(c) certificate, and he makes no attempt to overcome the presumption that APD Avant provided him the reasonable assistance guaranteed by the Post-Conviction Hearing Act. Instead, defendant contends that APD Underwood, who replaced APD Avant as his counsel prior to the hearing on the State’s motion to dismiss, was herself required to comply with Rule 651(c)’s requirements. But we find no support for this contention in either the Post-Conviction Hearing Act or Rule 651(c).

¶ 17 This court’s decision in *People v. Marshall*, 375 Ill. App. 3d 670 (2007), is instructive. There, a defendant who was denied postconviction relief after a third-stage evidentiary hearing argued that the attorneys who represented her at the evidentiary hearing were required to comply with the requirements of Rule 651(c) even though the attorney who previously represented her at the second-stage proceedings on her petition had already certified compliance with the rule’s requirements. *Id.* at 672, 679. In rejecting this contention, we held that “Rule 651(c)’s requirements must be met only once and not, as defendant suggests, by attorneys representing a defendant at each stage of postconviction proceedings.” *Id.* at 682.

¶ 18 We explained that counsel at the various stages of the postconviction process have distinct roles. In particular, counsel at second-stage proceedings must satisfy Rule 651(c)’s requirements

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of consulting with the petitioner, reviewing the record, and making any necessary amendments to the petitioner's *pro se* petition "so that the State can fully review the defendant's claims and determine if it will move to dismiss them." *Id.* at 683. "An attorney at the evidentiary hearing stage," by contrast, "must argue the merits of the postconviction petitioner's claims as presented in the petition following review by counsel at the second stage." *Id.* In light of these distinctive roles, we concluded that "Rule 651(c) does not require third-stage counsel to duplicate the efforts of second-stage counsel." *Id.*

¶ 19 Although *Marshall* did not address the precise question presented here, we think its reasoning applies with full force. Defendant does not dispute that APD Avant consulted with him to ascertain his contentions of constitutional error, reviewed the record of his trial proceedings, and reasonably determined that no amendments to his *pro se* petition were necessary to adequately present his claims. By certifying her compliance with these duties, APD Avant created a rebuttable presumption, which defendant does not attempt to overcome, that APD Avant provided the level of reasonable assistance mandated by the Post-Conviction Hearing Act. *Profit*, 2012 IL App (1st) 101307, ¶ 19. In addition to complying with the duties specified in Rule 651(c), APD Avant filed a written response to the State's motion to dismiss, urging the trial court to excuse the tardy filing of defendant's *pro se* petition due to a lack of culpable negligence on defendant's part. Defendant likewise makes no argument that APD Avant rendered unreasonable assistance in responding to the State's motion.

¶ 20 When APD Underwood replaced APD Avant as defendant's counsel, all that was left to do was orally argue defendant's position at the hearing on the State's motion to dismiss. Much like the attorneys at the third-stage evidentiary hearing in *Marshall*, APD Underwood's role was



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different than that of the attorney she replaced. Her task was to urge that the untimely filing of defendant's *pro se* petition be excused (as APD Avant had previously done in writing) and "argue the merits of [defendant's] claims as presented in the petition following review by [APD Avant]." *Marshall*, 375 Ill. App. 3d at 683. To perform that limited role, it was not necessary for APD Underwood to independently consult with defendant to ascertain his contentions of constitutional error, review the trial record, or determine whether any amendments to defendant's *pro se* petition were necessary to adequately present his claims. APD Underwood was entitled to rely on APD Avant's certificate of compliance with respect to those duties and was not required "to duplicate [APD Avant's] efforts." *Id.*

¶ 21 Resisting this conclusion, defendant cites two decisions of the Second District applying Illinois Supreme Court Rule 604(d). That rule provides that, when a defendant moves to withdraw his guilty plea or reconsider the sentence imposed following his plea, the defendant's attorney must certify that he "has consulted with the defendant \*\*\* to ascertain defendant's contentions of error \*\*\*, has examined the [relevant records], and has made any amendments to the motion necessary for adequate presentation of any defects in those proceedings." Ill. S. Ct. R. 604(d) (eff. July 1, 2017). In *People v. Ritchie*, 258 Ill. App. 3d 164, 166-67 (1994), and *People v. Herrera*, 2012 IL App (2d) 110009, ¶ 11, the Second District held that the attorney who represents a defendant at the hearing on his motion must independently certify compliance with Rule 604(d), even if an earlier attorney who has since withdrawn previously certified his own compliance. *Ritchie* explained that "one purpose of [Rule 604(d)] is to assure that all of [a] defendant's viable contentions of error are presented to the court," and that that purpose would be "frustrated if an affidavit by an attorney who no longer represents [the] defendant is deemed adequate compliance

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with the rule.” *Ritchie*, 258 Ill. App. 3d at 166-67. *Herrera* further reasoned that, due to “the strict forfeiture provision of Rule 604(d) \*\*\*”, fundamental fairness requires that the defendant have the assistance of counsel in preparing and *presenting* his motion, and Rule 604(d) ensures that those duties are performed and that the defendant’s due process rights are protected.” (Emphasis in original.) *Herrera*, 2012 IL App (2d) 110009, ¶ 11.

¶ 22 Assuming *arguendo* that *Ritchie* and *Herrera* correctly interpreted the requirements of Rule 604(d), we reject defendant’s call to extend that interpretation to Rule 651(c). Although superficially similar, Rule 604(d) and Rule 651(c) serve fundamentally distinct purposes. Rule 604(d) protects a defendant’s constitutional right to effective assistance of counsel at a critical stage of the proceedings on his guilty plea. *People v. Young*, 355 Ill. App. 3d 317, 324 (2005). In contrast, Rule 651(c) protects only the statutory right to reasonable assistance of counsel that applies in postconviction proceedings. *Custer*, 2019 IL 123339, ¶ 30. Thus, even if the attorney who represents a defendant at the hearing on his motion to withdraw his guilty plea or reconsider the sentence imposed following his guilty plea must certify compliance with Rule 604(d) despite a predecessor attorney’s earlier certificate, there is no logical reason why the same rule should apply to a postconviction attorney’s compliance with the requirements of Rule 651(c), since the standards of attorney performance that those rules protect differ so drastically. See *Custer*, 2019 IL 123339, ¶ 30 (standard of reasonable assistance guaranteed in postconviction proceedings “is significantly lower than the [standard] mandated at trial by our state and federal constitutions”).

¶ 23 The duties imposed on postconviction counsel under Rule 651(c) exist to ensure that postconviction petitioners receive the reasonable assistance of counsel guaranteed by the Post-Conviction Hearing Act. *Suarez*, 224 Ill. 2d at 42. Here, APD Avant certified that she complied

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with the duties specified in Rule 651(c), including consulting with defendant to ascertain his contentions of constitutional error, reviewing the trial record, and determining that no amendments to his *pro se* petition were necessary to adequately present his claims. APD Avant's certificate created a rebuttable presumption that defendant received reasonable assistance of postconviction counsel. *Profit*, 2012 IL App (1st) 101307, ¶ 19. APD Underwood, who replaced APD Avant prior to the hearing on the State's motion to dismiss, was not required to duplicate APD Avant's efforts and independently perform the duties specified in Rule 651(c) in order to provide reasonable assistance at the motion hearing.

¶ 24 Because defendant has not rebutted the presumption of reasonable assistance created by APD Avant's Rule 651(c) certificate, nor identified any specific deficiency in APD Underwood's performance other than her failure to independently comply with Rule 651(c), there is no basis to remand this matter for further second-stage proceedings.

¶ 25 III. CONCLUSION

¶ 26 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 27 Affirmed.

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**No. 1-18-1220**

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**Cite as:** *People v. Smith*, 2020 IL App (1st) 181220

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**Decision Under Review:** Appeal from the Circuit Court of Cook County, No. 08-CR-2655; the Hon. Thomas Joseph Hennelly, Judge, presiding.

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**Attorneys  
for  
Appellant:** James E. Chadd, Patricia Mysza, and Peter Sgro, of State Appellate Defender's Office, of Chicago, for appellant.

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**Attorneys  
for  
Appellee:** Kimberly M. Foxx, State's Attorney, of Chicago (Alan J. Spellberg, and Tyler J. Cox, Assistant State's Attorneys, of counsel), for the People.

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TO THE APPELLATE COURT OF ILLINOIS  
IN THE CIRCUIT COURT OF COOK COUNTY  
CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS )

Case No.: 08 CR 0265501  
Post-Conviction

-vs.- )

Judge: Thomas Hennelly

KARL SMITH )

**NOTICE OF APPEAL**

An appeal is taken from the order or judgment described below:

**APPELLANT'S NAME:** Karl Smith - B-73217  
**APPELLANT'S ADDRESS:** Menard Correctional Center, P.O. Box 1000, Menard, IL 62259  
**APPELLANT'S ATTORNEY:** State Appellate Defender  
**ADDRESS:** 203 N. LaSalle St., 24<sup>th</sup> Fl., Chicago, IL 60601  
**OFFENSE:** Attempt Murder, Armed Robbery, Aggravated Battery and Home Invasion.  
**JUDGMENT:** People's Motion To Dismiss Pro Se Petition For Post Conviction Relief granted

**DATE OF JUDGMENT OR SENTENCE:** March 26, 2018

**SENTENCE:**

*Christine Underwood*  
APPELLANT (OR ATTORNEY)

VERIFIED PETITION FOR REPORT OF PROCEEDINGS, COMMON LAW RECORD, AND FOR  
APPOINTMENT OF COUNSEL ON APPEAL FOR INDIGENT DEFENDANT

Under Supreme Court Rules 605-608, Appellant asks the Court to order the Official Court Reporter to transcribe an original and copy of the proceedings, file the original with the Clerk and deliver a copy to the Appellant; order the Clerk to prepare the record on appeal and to appoint counsel on appeal.

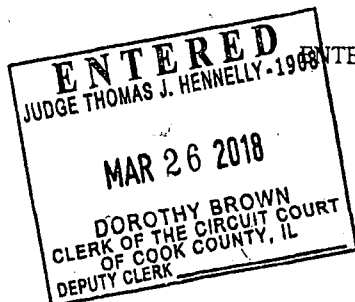
Appellant, being duly sworn (or appellant's attorney, who certifies), says that at the time of his conviction he was and is unable to pay for the record or to retain counsel for appeal.

*Christine Underwood*  
APPELLANT (OR ATTORNEY)

ORDER

IT IS ORDERED THAT the State Appellate Defender is appointed as counsel on appeal and that the common law record and report of proceedings be furnished to Appellant without cost within 45 days of receipt of this order. Date(s) to be transcribed (List pre-trial motion, jury waiver, trial, sentencing, and post-judgment dates):

Order date(s): 3/26/18



ENTER: JUDGE



No. 126940

IN THE

## SUPREME COURT OF ILLINOIS

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PEOPLE OF THE STATE OF	)	Appeal from the Appellate Court of
ILLINOIS,	)	Illinois, No. 1-18-1220.
	)	
Respondent-Appellee,	)	There on appeal from the Circuit
	)	Court of Cook County, Illinois , No.
-vs-	)	08 CR 2655.
	)	
	)	Honorable
KARL SMITH,	)	Thomas Joseph Hennelly,
	)	Judge Presiding.
Petitioner-Appellant.	)	

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**NOTICE AND PROOF OF SERVICE**

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, aagKatherineDoersch@gmail.com;

Ms. Kimberly M. Foxx, State's Attorney, Cook County State's Attorney Office, 300 Daley Center, Chicago, IL 60602, eserve.criminalappeals@cookcountyil.gov;

Mr. Karl Smith, Register No. B73217, Menard Correctional Center, P.O. Box 1000, Menard, IL 62259

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On August 25, 2021, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the petitioner-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

E-FILED  
8/25/2021 9:02 AM  
Carolyn Taft Grosboll  
SUPREME COURT CLERK

/s/Alicia Corona  
LEGAL SECRETARY  
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