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**CERTIFICATE OF FILING AND SERVICE**

## ARGUMENT

As demonstrated in the People's opening brief, only meritless claims are at issue in petitioner's postconviction petition. *See* Peo. Br. 26-28. Indeed, petitioner does not dispute this point; rather, he insists that this Court cannot consider the merits. *See* Pet. Br. 16, 25-30, 45-46. He is incorrect.

First, the merits must be considered to decide whether, contrary to postconviction counsel's Rule 651(c) certificate, counsel failed to make a necessary amendment. *See infra* Section I. Second, a postconviction petitioner who has received the assistance of postconviction counsel must show that a potentially meritorious claim is at issue, such that he was prejudiced by counsel's defective performance of her duties, to obtain a remand. *See infra* Section II. Finally, if the People prevail on petitioner's claim that counsel was deficient for failing to make a necessary amendment, petitioner requests that this Court remand for consideration of petitioner's claim that counsel violated Rule 651(c) by failing to attach an affidavit; but this claim fails for the same reason: petitioner cannot show a potentially meritorious claim. *See infra* Section III.

In sum, because petitioner has received the assistance of postconviction counsel and has no claim of potential merit, this Court should reverse the appellate court's judgment and affirm the circuit court's judgment dismissing the amended postconviction petition.

**I. Petitioner Failed to Rebut the Presumption that Postconviction Counsel Made “Necessary” Amendments to the Petition.**

Petitioner’s contention that postconviction counsel failed to “ma[ke] . . . amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner’s contentions,” Ill. S. Ct. R. 651(c), fails. He cannot rebut the presumption that counsel complied with this duty, as she certified, because he has not shown that counsel omitted any meritorious argument. *See People v. Gallano*, 2019 IL App (1st) 160570, ¶ 30 (“where, as here, the presumption of reasonable assistance is present, ‘the question of whether the *pro se* allegations had merit is crucial to determining whether counsel acted unreasonably’”) (quoting *People v. Profit*, 2012 IL App (1st) 101307, ¶ 23). Counsel necessarily determined that an allegation of ineffective assistance of appellate counsel lacked merit when she filed an amended petition omitting that allegation and certified that she had complied with Rule 651(c), and petitioner does not demonstrate that counsel’s assessment was wrong. Moreover, even if adding an ineffective assistance of counsel claim to avert potential forfeiture of petitioner’s underlying claim is “routine” as a general matter, petitioner still must demonstrate that it would have been meritorious on the facts of his case, and he has not done so.

**A. Petitioner must demonstrate that counsel omitted a claim or argument that had potential merit to overcome the presumption of compliance.**

Where counsel has certified that she made all necessary amendments, reviewing courts presume that counsel determined that any omitted claims or arguments were meritless. To rebut the presumption that postconviction counsel complied with Rule 651(c), petitioner must show that counsel failed to include a “necessary” amendment — in other words, that counsel omitted or failed to amend a meritorious argument.

As this Court has made clear, “[i]f amendments to a *pro se* postconviction petition would only further a frivolous or patently nonmeritorious claim, they are not ‘necessary’ within the meaning of” Rule 651(c). *People v. Greer*, 212 Ill. 2d 192, 205 (2004) (quoting Ill. S. Ct. R. 651(c)). To be sure, *Greer* considered whether postconviction counsel could withdraw from a case that presented *only* nonmeritorious claims, *see* Pet. Br. 19, but the same logic should govern counsel’s selection of claims to include in an amended petition when counsel does not withdraw. Postconviction counsel’s only duty is to pursue meritorious issues. If a claim — or a procedural argument in support of a claim — is not meritorious, then counsel’s failure to include it in an amended petition cannot be considered a failure to make a “necessary” amendment under *Greer*.

Counsel need not explain her decision to omit a particular claim or argument to comply with Rule 651(c). Contrary to petitioner’s argument, *see*



Pet. Br. 19, *People v. Kuehner*, 2015 IL 117695, imposed no such requirement. In *Kuehner*, postconviction counsel sought to withdraw after the circuit court advanced the petition to the second stage upon finding that the petition was not frivolous or patently without merit. Because the circuit court had already found that the petition contained at least one non-frivolous claim, *see People v. Rivera*, 198 Ill. 2d 364, 370-71 (2001) (if at least one claim is not frivolous, entire petition must be docketed for second stage proceedings), postconviction counsel's motion to withdraw sought reconsideration of that order, and counsel could not withdraw without explaining why *every* claim was frivolous, *Kuehner*, 2015 IL 117695, ¶¶ 21-22.

In contrast, appointed counsel's determination that *some* claims in a petition lack merit is consistent with a circuit court's first stage order and does not require that it be reconsidered. By filing an amended petition, counsel has agreed with the circuit court's first stage finding. The first stage holding means only that one claim in the petition is non-frivolous; it does not imply that every pro se claim has potential merit. *See Rivera*, 198 Ill. 2d at 370-71 (circuit court may not partially dismiss petition at first stage). And by omitting a claim or argument from an amended petition, postconviction counsel has communicated that, in counsel's estimation, that argument is meritless.

Counsel's assessment of the merits is entitled to deference. Petitioner emphasizes that postconviction counsel's duties are "very basic" and

“minimal,” Pet. Br. 34-35, but petitioner in fact advocates for a standard that accords no deference to counsel’s judgments and faults counsel for failing to raise arguments that petitioner does not even contend are meritorious. However, postconviction counsel’s duties are less stringent than those of constitutionally guaranteed counsel, *People v. Smith*, 2022 IL 126940, ¶ 35, whose performance can only be deemed deficient for failing to make meritorious arguments, *see, e.g., People v. Rogers*, 2021 IL 126163, ¶ 32 (“Counsel’s performance[ ] . . . could not have been deficient for failing to make an objection where binding precedent would have made such an objection meritless and any motion . . . would have been otherwise futile.”); *People v. English*, 2013 IL 112890, ¶ 34 (“Appellate counsel is not required to raise issues that he reasonably determines are not meritorious.”). At a minimum, this means that a petitioner cannot show that counsel has failed to make a necessary amendment, contrary to counsel’s certification, unless petitioner demonstrates that the amendment would have been meritorious.

In sum, petitioner’s claim fails because this Court must presume that counsel made any necessary amendments to the petition, including removing any claims or arguments that lacked merit, and petitioner has failed to demonstrate that an omitted argument was, contrary to counsel’s considered judgment, meritorious.

- B. Even if it is generally “routine” to amend a petition to include an ineffective assistance of appellate counsel claim where necessary to avert forfeiture, petitioner must show that the omitted claim is meritorious to overcome the presumption of compliance.**

Petitioner argues that he has overcome the presumption of reasonable assistance because counsel failed to raise a “routine” claim of ineffective assistance of appellate counsel to overcome forfeiture, *see* Def. Br. 12, but characterizing an amendment as routine does not absolve petitioner of his obligation to demonstrate that it was meritorious. *See People v. Perkins*, 229 Ill. 2d 34, 50-51 (2008) (counsel’s failure to allege excuse for untimeliness did not overcome presumption of compliance because petitioner had no apparent meritorious argument to raise).

Petitioner is incorrect that this Court, in *People v. Turner*, 187 Ill. 2d 406 (1999), adopted a rule that counsel must always allege ineffective assistance of appellate counsel, and that the rule of *Turner* governs even if a Rule 651(c) certificate is filed. *See* Pet. Br. 21-24. *Turner* did not adopt a blanket rule that postconviction counsel must *always* include a pro forma claim of ineffective assistance of appellate counsel to comply with Rule 651(c). *See* Peo. Br. 12-14. It did not even find counsel’s assistance in that case deficient solely on that basis; rather, it relied on “the totality of the circumstances,” which amounted to “a total failure of representation.” *Turner*, 187 Ill. 2d at 414-15.

And, more importantly, *Turner* did not hold that the failure to make this allegedly “routine” amendment rebuts the presumption created by the filing of a certificate. In *Turner*, because counsel filed no certificate, the record needed to demonstrate compliance with Rule 651(c). *See id.* at 410-12. This Court cited counsel’s omission of a claim of ineffective assistance of appellate counsel as one piece of evidence tending to show that counsel did not comply with Rule 651(c). *Id.* at 413-14. But here counsel did file a certificate.

A certificate provides prima facie evidence that counsel complied with the rule, *People v. McNeal*, 194 Ill. 2d 135, 143 (2000), and creates a presumption that petitioner must rebut, *People v. Custer*, 2019 IL 123339, ¶ 32. In such circumstances, a bare allegation that counsel failed to raise a “routine” claim of ineffective assistance of appellate counsel does not suffice: petitioner must demonstrate that the procedural argument that counsel failed to raise was meritorious. *See Perkins*, 229 Ill. 2d at 50-51.

This Court’s reasoning in *Perkins* should control here. There, postconviction counsel certified compliance with Rule 651(c) without amending the postconviction petition to allege that its untimeliness was not due to petitioner’s culpable negligence. *Id.* at 38-40. This Court held, as a general rule, that one of postconviction counsel’s fundamental duties is to rebut a time-bar claim, reasoning that “the plain language of Rule 651(c), requiring amendments ‘necessary for an adequate presentation of petitioner’s

contentions,’ includes alleging any facts that may establish a lack of culpable negligence in the late filing.” *Id.* at 43-44. Nevertheless, the Court held, counsel complied with Rule 651(c). Counsel’s certificate created a presumption that counsel had made any “necessary” amendments, and “[t]here [was] nothing in the record to indicate that petitioner had any other excuse showing the delay in filing was not due to his culpable negligence.” *Id.* at 50-51. In other words, absent evidence that counsel had failed to raise a *meritorious* excuse for the untimely filing, Perkins could not overcome the presumption that counsel had complied with his Rule 651(c) duties. *Id.*

The same reasoning applies here. Even if *Turner* set forth a general rule that postconviction counsel should raise a claim of ineffective assistance of appellate counsel to overcome forfeiture, the mere failure to do so does not rebut the presumption created by a filed Rule 651(c) certificate that counsel made any “necessary” amendments. As in *Perkins*, where counsel had no apparent meritorious argument that the untimeliness of the petition should be excused, counsel here had no meritorious argument that appellate counsel was ineffective. Accordingly, just as in *Perkins*, the failure to raise a meritless counterargument to a procedural defect does not rebut the presumption that counsel performed reasonably.

Moreover, as in *Perkins*, counsel made the most of the weak arguments available. In *Perkins*, postconviction counsel argued at the second stage hearing that the untimeliness of the petition should be excused. *Id.* at 51.

Though counsel's argument was not "particularly compelling," this Court emphasized that it "was apparently the best option available based on the facts." *Id.* at 51. Here, postconviction counsel similarly made what argument she could to try to avert forfeiture, A43, though it was clear that such an argument lacked merit. It must be presumed, as in *Perkins*, that counsel offered the best argument available. And, indeed, the circuit court did not rely on forfeiture, but instead rejected petitioner's claims for failure to make a substantial showing of a constitutional violation.

In sum, petitioner does not argue that a claim of ineffective assistance of appellate counsel was actually meritorious, and accordingly, he cannot overcome the presumption that counsel complied with Rule 651(c) by making any "necessary" amendments warranted on the facts of petitioner's case. And because petitioner has not overcome the presumption, the appellate court erred in remanding for new second stage proceedings.

**II. No Rule of Automatic Remand Applies Here, and Petitioner Has Failed to Show That He Was Prejudiced by Postconviction Counsel's Omissions.**

Even assuming that petitioner could show that counsel failed to make a "necessary" amendment, he would not be entitled to a remand because he cannot demonstrate prejudice.

**A. If counsel has filed a Rule 651(c) certificate, then petitioner must show prejudice.**

The First District has correctly held that where postconviction counsel has certified compliance with Rule 651(c), and the petitioner nevertheless alleges that counsel performed her duties deficiently, he must show prejudice to warrant a remand. *See People v. Landa*, 2020 IL App (1st) 170851, ¶ 58; *Gallano*, 2019 IL App (1st) 160570, ¶ 30.<sup>1</sup> It has further explained that the rule of automatic remand that the Second District applied here is premised on a misreading of *People v. Suarez*, 224 Ill. 2d 37 (2007). *See Landa*, 2020 IL App (1st) 170851, ¶ 58; *Gallano*, 2019 IL App (1st) 160570, ¶ 30. Petitioner’s proposed rule that a court can *never* require a showing of prejudice, even if counsel has filed a certificate, should be rejected.

Even where counsel is constitutionally guaranteed, prejudice is usually required to show ineffective assistance, *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (requiring prejudice for deficient performance by trial counsel); *see also Smith v. Robbins*, 528 U.S. 259, 285 (2000) (requiring prejudice for deficient performance by direct appeal counsel), so requiring prejudice where counsel has filed a Rule 651(c) certificate places a claim of unreasonable assistance at the second stage within the existing framework

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<sup>1</sup> Contrary to petitioner’s suggestion, the People do not argue that any defect in counsel’s representation “was harmless *because* she filed a [Rule] 651(c) certificate.” Pet. Br. 30 (emphasis added). Rather, given the certificate, petitioner must make a showing of prejudice, which he has not attempted to do.

for evaluating claims of constitutionally ineffective assistance of counsel. A petitioner's burden should not be *lower* on postconviction review, where counsel has been afforded merely as a matter of legislative grace. *People v. Zareski*, 2017 IL App (1st) 150836, ¶ 54. Indeed, this Court imposes a lesser “reasonable assistance” standard on postconviction counsel's representation, *People v. Smith*, 2022 IL 126940, ¶ 35, and similarly this Court should adopt the First District's rule requiring a showing of prejudice where counsel has certified her compliance with Rule 651(c), so the standard applied to postconviction counsel is not elevated above that required of constitutionally guaranteed counsel.

*People v. Profit* first rejected the theory that “Rule 651(c) violations require reversal regardless of whether the claims in the petition have merit, and that such violations are not subject to harmless error analysis.” 2012 IL App (1st) 101307, ¶ 21. Though *Profit* ultimately held that the petitioner could not demonstrate that counsel failed to comply with Rule 651(c) because the pro se claims had no merit, *id.* ¶ 23, in doing so, the court rejected the petitioner's argument that a reviewing court may never consider the merits before deciding whether to remand a case based on counsel's failure to advance particular claims, *id.* As in *Profit*, counsel's failure to advance non-meritorious claims here does not rebut the presumption that postconviction counsel adequately performed her duties, *see supra* Section I, and it also means that petitioner was not prejudiced.



Moreover, contrary to petitioner's assertion, Pet. Br. 38, *Landa's* and *Gallano's* reliance on *Profit* was not misplaced. Both *Landa* and *Gallano* correctly recognized that *Suarez* does not compel a remand if counsel has certified compliance with Rule 651(c). See *Landa*, 2020 IL App (1st) 170851, ¶ 58; *Gallano*, 2019 IL App (1st) 160570, ¶ 30. In *Suarez*, no certificate was filed, and the record did not otherwise demonstrate compliance with Rule 651(c). 224 Ill. 2d at 41-43. Postconviction counsel's complete failure to comply with Rule 651(c)'s duties was akin to a total failure of representation, in which circumstance the United States Supreme Court presumes prejudice. See *United States v. Cronin*, 466 U.S. 648 (1984).

But absent a total failure of representation, a showing of prejudice should be required to avoid "equat[ing] a postconviction counsel's failure to draft or amend [petitioner's] claim" in every instance to a claim under *Cronic*. *Zareski*, 2017 IL App (1st) 150836, ¶ 54. Based on this principle, *Zareski* required a showing of prejudice when evaluating the assistance of postconviction counsel who had been retained to file an initial petition. See *id.* ¶¶ 51, 54-55. Those circumstances are not governed by Rule 651(c), and the *Zareski* court found *Suarez* distinguishable and declined to extend it, reasoning that "[t]he real key of the *Suarez* holding was not that Suarez's counsel had provided unreasonable assistance, but that Suarez's counsel violated a supreme court rule." *Id.* ¶¶ 51, 55.

But the *Zareski* court's explanation does not really explain *Suarez* because this Court routinely applies harmless error principles to violations of supreme court rules. *See People v. Thompson*, 238 Ill. 2d 598, 609 (2010) ("A violation of a supreme court rule does not require reversal in every instance and this court has applied harmless-error review to violations of our rules."). The better explanation for *Suarez* is that it dealt with a complete failure to comply with counsel's duties under Rule 651(c).

Indeed, in this light, *Zareski*'s insistence that *Suarez* should not be extended is even more persuasive. It should be harder for a postconviction petitioner to show that his statutory right was violated than it is for a criminal defendant to show that his constitutional right was violated. Accordingly, the Court should require a showing of prejudice where counsel has certified compliance with Rule 651(c) and the petitioner claims only that she committed some error in performing her duties.

Here, counsel's assistance, confirmed by certificate, brings the case outside of the *Suarez* and *Cronic* framework, and the type of error at issue is akin to *Strickland*, where prejudice must be shown. *See Bell v. Cone*, 535 U.S. 685, 697 (2002) ("For purposes of distinguishing between the rule of *Strickland* and that of *Cronic*, th[e] difference is not of degree but of kind.").

**B. Petitioner cannot demonstrate a reasonable probability that, but for counsel’s alleged errors, he would have met his second stage burden, such that he was prejudiced.**

Under *Strickland*, a defendant must demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” 466 U.S. at 694; *see also Smith*, 528 U.S. at 285 (in appellate counsel context, defendant “must show a reasonable probability that[ ] . . . he would have prevailed on his appeal”). The same standard should apply here.

The purpose of second stage proceedings is to evaluate whether a petition and its supporting documentation make a substantial showing of a constitutional violation. *People v. Cotto*, 2016 IL 119006, ¶ 28. Thus, to show prejudice here, petitioner must demonstrate a reasonable probability that, had postconviction counsel included a claim of ineffective assistance of appellate counsel in the amended petition, he would have met his second stage burden. He cannot, because (1) the claim of ineffective assistance lacks merit; and (2) the circuit court did not rely on forfeiture to deny relief on petitioner’s claims of trial error.

Contrary to petitioner’s claim that a prejudice rule is unworkable, *see* Pet. Br. 32, courts routinely consider whether hypothetical arguments would have altered the result of a proceeding. Indeed, the First District cases requiring a showing of prejudice in this context demonstrate that such a rule can be applied. *See Gallano*, 2019 IL App (1st) 160570, ¶¶ 30-34 (finding

claims that were supported by unnotarized affidavits lacked merit, such that notarized affidavits would not have altered result); *Landa*, 2020 IL App (1st) 170851, ¶¶ 66-70 (finding claim of ineffective assistance of trial counsel that postconviction counsel failed to properly argue was potentially meritorious); *see also Profit*, 2012 IL App (1st) 101307, ¶¶ 23-28 (holding that postconviction counsel did not err by failing to raise “indisputably meritless” pro se claim based on false premise that codefendant received concurrent sentences).

Nor is this burden insurmountable. In *Landa*, the court found that petitioner had shown prejudice, which demonstrates that there is no merit to the suggestion that a showing of prejudice is impossible because petitioners “have no right to an evidentiary hearing at which they could introduce evidence to establish ‘prejudice.’” Pet. Br. 36. A petitioner does not need to prove by a preponderance of the evidence that he would have been entitled to postconviction relief if postconviction counsel had not erred. He needs to show only a *reasonable probability* that he would have met his second stage burden if counsel had performed differently. Indeed, petitioners are *always* required to meet their second stage burden without the benefit of an evidentiary hearing.

Petitioner’s hypothetical scenario in which postconviction counsel provided no affidavit to support a claim that trial counsel was ineffective for failing to investigate an alibi witness, *see* Pet. Br. 36, actually illustrates how

the People's proposed rule would work. The omission of an essential affidavit might constitute a failure to make a "necessary" amendment. *See, e.g., People v. Dupree*, 2018 IL 122307, ¶ 34 ("where a postconviction petitioner raises a claim of ineffective assistance based on counsel's failure to call a witness, an affidavit from the proposed witness will be required if it is essential for the postconviction petitioner to make the necessary 'substantial showing' to support a claim of ineffective assistance."). If counsel filed a certificate and omitted an affidavit, the court would "presume that post-conviction counsel made a concerted effort to obtain affidavits in support of the post-conviction claim, but was unable to do so," *People v. Johnson*, 154 Ill. 2d 227, 241 (1993), but such a presumption could be overcome, *see People v. Waldrop*, 353 Ill. App. 3d 244, 251 (2d Dist. 2004) (record showed postconviction counsel was unaware he needed affidavit). To show prejudice, petitioner would not need to obtain the affidavit and supplement the record on appeal, as petitioner posits. *See* Pet. Br. 36. Instead, he would need to demonstrate a reasonable probability that the circuit court would have found that petitioner made a substantial showing of a constitutional violation if he had supported his claim of ineffective assistance with the required affidavit. If he could meet this burden, then he would be entitled to remand to support his petition with the necessary affidavit, and then to second stage review to determine whether the claim (as substantiated) made a substantial showing of a constitutional violation.

Here, however, petitioner's claims are based on the trial record. Based on that record, the circuit court found petitioner's claims lacked merit.

Whether appellate counsel provided ineffective assistance turns largely on whether those claims had a reasonable chance of success on appeal. Thus, the trial record makes clear that petitioner has no meritorious allegation of ineffective assistance of appellate counsel.

Nor is this Court precluded from reviewing the merits because the ineffective assistance of appellate counsel claim was not in the petition. Contrary to petitioner's claim, *see* Pet. Br. 45-46, *People v. Jones*, 213 Ill. 2d 498 (2004), does not preclude this Court from considering whether there is a reasonable probability that such a claim would have altered the result at the second stage. A reviewing court may not reverse a judgment dismissing a postconviction petition by considering new claims on appeal. *Jones*, 213 Ill. 2d at 505-08. But here the question is whether the circuit court's judgment should be affirmed. It is not "premature" to hold that the circuit court's judgment should stand where petitioner has failed to identify a prejudicial defect in the proceedings.

**C. This court should require a showing of prejudice because automatically remanding for new second stage proceedings, without any showing that a meritorious claim is at issue, needlessly taxes judicial resources.**

This Court should clarify the scope of *Suarez* and hold that prejudice is required to secure remand where a Rule 651(c) certificate has been filed,

demonstrating that counsel has conferred with petitioner, investigated the record, and made what counsel determined to be the necessary amendments. This rule avoids pointless remands and ensures that judicial resources are focused on postconviction petitions that raise potentially meritorious claims.<sup>2</sup>

Petitioner claims that the rule of automatic remand employed by the Second District in this case has not “opened the floodgate to unnecessary remands.” Pet. Br. 43. He is wrong. The appellate court has remanded many cases, even where postconviction counsel certified compliance with Rule 651(c), based on an express refusal to consider whether any potentially meritorious claim was at issue.

Published cases reflect that the appellate court often remands postconviction cases, despite the filing of a Rule 651(c) certificate, for perceived failings of postconviction counsel without consideration of the merits of the underlying claims. *See, e.g., People v. Urzua*, 2021 IL App (2d) 200231, ¶¶ 87, 90, *PLA granted*, 184 N.E.3d 526 (Ill. 2021) (remanding based on counsel’s failure to provide notarized affidavit and finding that court was precluded from considering whether affidavit would support meritorious

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<sup>2</sup> Petitioner argues that the People have failed to provide a compelling reason to overrule *Suarez*, Pet. Br. 41-42, but the People do not seek to overturn *Suarez*’s fundamental holding that a postconviction petitioner is entitled to have at least one attorney complete her basic Rule 651(c) duties without showing prejudice. Consistent with *Suarez*, his Court should clarify that this remedy applies only to complete failures of representation, and not to alleged errors by postconviction counsel who has certified compliance.

claim of actual innocence); *People v. Russell*, 2016 IL App (3d) 140386, ¶¶ 11-12 (remanding because postconviction counsel’s failure to allege ineffective assistance of appellate counsel required automatic reversal without consideration of merits of claims); *People v. Thompson*, 2016 IL App (3d) 150644, ¶¶ 20-27 (remanding because record did not confirm that postconviction counsel reviewed certain mental health records, without considering merits of underlying claim that trial counsel was ineffective for failing to raise fitness).

And because this rule of automatic remand is applied routinely, the vast majority of such remands are unpublished. *See* Ill. Sup. Ct. R. 23(a)(1) (appellate court court’s decision warrants publication only if it modifies or explains the law); *see, e.g., People v. Barmore*, 2022 IL App (2d) 200449-U, ¶¶ 18, 24, 49 (remanding for new second stage proceedings, even after third stage hearing was held, for alleged failures in amending petition, and holding court was precluded from considering merits of underlying claims); *People v. Miller*, 2022 IL App (5th) 200151-U, ¶¶ 42-45 (deeming counsel’s amended postconviction petition too “conclusory” and remanding because “[w]hen postconviction counsel fails to comply with the duties of Rule 651(c), remand is required regardless of whether the defendant’s postconviction claims have merit”); *People v. Smith*, 2022 IL App (4th) 210582-U, ¶ 23 (automatically remanding due to counsel’s failure to allege claim of ineffective assistance of appellate counsel, despite counsel’s Rule 651(c) certificate and without



considering merits of that claim, because shortcoming of postconviction counsel was “threshold” issue that rendered “the merits of the appeal . . . not reachable”); *People v. Vantlin*, 2021 IL App (5th) 170477-U, ¶¶ 51-57 (automatically remanding due to postconviction counsel’s alleged failures because “where postconviction counsel failed to fulfill the duties of Rule 651(c), remand is required, regardless of whether the claims raised in the petition had merit”).

Contrary to petitioner’s claim that these remands are not burdensome, Rule 651(c) requires each attorney to thoroughly investigate by reviewing the trial records and researching the claims raised in the pro se filings. In complex cases, complying with these duties can take months. If one attorney has already certified that she has completed these tasks and made any necessary amendments to the petition, courts should require some showing that a meritorious claim is at issue before requiring new counsel to duplicate these efforts. This will ensure that both courts’ and public defenders’ resources are directed toward cases of potential merit.

### **III. This Court Should Reverse the Appellate Court’s Judgment and Affirm the Circuit Court’s Judgment Dismissing the Amended Postconviction Petition.**

In the appellate court, petitioner claimed that postconviction counsel violated Rule 651(c) by failing to (1) allege a claim of ineffective assistance of appellate counsel and (2) provide petitioner’s affidavit to support a claim that his statement was involuntary. Def. Br. 46. The appellate court, having

found that postconviction counsel erred on the first ground, declined to consider whether the failure to provide an affidavit also violated Rule 651(c).

Petitioner does not defend the appellate court's judgment on the basis that counsel violated Rule 651(c) by failing to provide an affidavit, as he could have, *see In re Veronica C.*, 239 Ill. 2d 134, 151 (2010) ("this court, in determining the correctness of the result reached by the appellate court, is in no way constrained by the appellate court's reasoning and may affirm on any basis supported by the record"). Instead, petitioner argues that if this Court were to rule in the People's favor by finding that postconviction counsel did not violate Rule 651(c) by failing to include a meritless claim of ineffective assistance of appellate counsel and/or that petitioner cannot demonstrate prejudice, then the Court should remand to the appellate court to consider whether petitioner is instead entitled to relief based on the omission of the affidavit. Pet. Br. 46-47.

In the absence of prejudice, this would be a futile exercise. Because petitioner has failed to demonstrate that any meritorious claim is at stake, this Court should reverse the appellate court's judgment and affirm the circuit court's judgment dismissing petitioner's amended postconviction petition at the second stage.

**CONCLUSION**

This Court should reverse the appellate court's judgment and affirm the circuit court's judgment dismissing his amended postconviction petition.

October 7, 2022

Respectfully submitted,

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**RULE 341(c) CERTIFICATE**

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing 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, and the certificate of service, is 5,003 words.

/s Erin M. O'Connell

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**CERTIFICATE OF FILING AND SERVICE**

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 October 7, 2022, the foregoing **Reply Brief of Respondent-Appellant People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which automatically served notice on counsel at the email address below:

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