No. 127789

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. ERNESTO URZUA, Defendant-Appellee.	)	Appeal from the Appellate Court of Illinois, Second Judicial District, No. 2-20-0231 There on Appeal from the Circuit Court of the 16th Judicial Circuit, Kane County, Illinois, No. 06 CF 2221 The Honorable Marmarie J. Kostelny, Judge Presiding.

BRIEF AND APPENDIX FOR PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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POINTS AND AUTHORITIES

NATURE OF THE CASE

Defendant's pro se post-conviction petition was automatically advanced to the second stage after 90 days elapsed without the circuit court's review, and the court appointed counsel. The appointed attorney ultimately filed a certificate pursuant to Illinois Supreme Court Rule 651(c) and a motion to withdraw pursuant to *People v. Greer*, 212 Ill. 2d 192 (2004), following counsel's assessment that he could not ethically proceed with defendant's petition because it lacked merit. The circuit court granted counsel's motion and allowed defendant to retain new counsel. Retained counsel filed a second Rule 651(c) certificate and adopted defendant's pro se petition without amendment. The circuit court dismissed the petition as meritless. The People appeal from the appellate court's judgment holding that retained counsel provided unreasonable assistance. No issue is raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. After appointed post-conviction counsel reviewed the pro se petition, investigated its claims, determined that the claims were meritless, and filed a motion to withdraw, whether counsel's purpose under the Illinois Post-Conviction Hearing Act was satisfied such that the defendant was no longer entitled to reasonable assistance from retained successor counsel to further his meritless claims; and

2. Whether the appellate court erred by reversing and remanding for the appointment of a third attorney where defendant was not prejudiced by the

lack of notarization of a statement by a purported, possibly non-existent witness whose allegations would have failed to state a claim of actual innocence.

JURISDICTION

This Court has jurisdiction pursuant to Supreme Court Rules 315, 604(a)(2), and 612(b)(2). On January 26, 2022, this Court allowed the People's petition for leave to appeal.

STATEMENT OF FACTS

I. Trial and Direct Appeal

Defendant was convicted of the attempted first degree murder of Gerardo Contreras, and the jury found that defendant personally discharged a firearm causing great bodily harm, permanent disfigurement, or disability to Contreras. C10, C99, C120, R665-66.[1] The trial court sentenced defendant to 48 years in prison, which term included a mandatory 25-year firearm enhancement. C138, R711.

As the trial testimony established, on March 1, 2002, Contreras arrived at his home at 729 Colombia Street in Aurora with his two-year-old daughter at around 5:00 p.m. R254, R258-59. He parked his vehicle on the driveway and walked toward the mailbox in front of his home. R259-60. Contreras saw a man approaching from the church parking lot on the east

[1] "C," "R," "Sup R," "Sec C," and "E" refer to the common law record, the report of proceedings, the supplement to the report of proceedings, the secured common law record, and the volume of exhibits, respectively.

side of his house. R261-62, R265. The man wore a "beanie" and a black hoodie. *Id.* Contreras saw the man pull a silver or chrome revolver from his waistband before Contreras turned, picked up his daughter, and ran towards his home. R266-67, R367. The man shot Contreras and then ran south towards Claim Street. R269-70. Contreras described the shooter as a "light-complected male Hispanic, no facial hair," and who was about 5'7" or 5'8" in height, around 145 to 150 pounds, and wearing a black skull cap with the "English style" letter "D" on it. R264, R375. The shots permanently paralyzed Contreras from the mid-chest down. R273-74, R276-77.

On the day of Contreras's shooting, Jamaal Garcia, a Latin Kings member who was described as "darker-complected," was living at the Latin Kings "nation house" at 729 Claim Street. R389, R392, R397, R459. The nation house was directly behind Contreras's home, where members of a rival gang, the Insane Deuces, would sometimes congregate. R256-58, R389, R392, R395-97. Both houses were in a neighborhood that "belong[ed]" to the Latin Kings. R257. And in March 2002, the Latin Kings and the Insane Deuces were not getting along. R257.

Around 4:30 p.m. on the day of the shooting, Garcia was at the nation house drinking and smoking with other gang members, including defendant and a man named Horatio Morales. R401-02, R425-29, R437, R457, R463. Garcia had the nation "house gun" because he was acting as security. R413. Garcia placed the gun on a footstool by the door and left the house after

Andres "Oso" Ramirez, the leader of the Latin Kings street gang, arrived. R404, R406, R408, R414, R419. Ramirez and the victim, Contreras, had problems with each other, which included flashing gang signs at each other in the past. R275. Ramirez told defendant to "get him," referring to Contreras. R435-45. Another gang member gave the house gun, a chrome revolver, to defendant, which prompted defendant to put on a black hoodie and run across the parking lot towards Columbia Street. *Id.*

When Garcia returned, he noticed that the gun was no longer on the footstool where he had placed it earlier. R408. Moments later, Garcia and Morales saw defendant, who was wearing a dark-colored hoodie and pants, running through the parking lot towards Contreras's home. R407-10, R435-45. Garcia lost sight of defendant when defendant reached Contreras's residence. *Id.* Morales saw defendant make a left turn at the end of the parking lot and then heard five or six gunshots. R446-47. Garcia also heard the gunshots, and Garcia and Morales saw defendant running back to the nation house and through the parking lot. R410, R447. Once inside the house, defendant took off the hoodie and gave the gun to Garcia. R447. Garcia and defendant then cleaned and hid the gun. R411.

After the People concluded their case-in-chief, defendant elected not to testify and rested without presenting evidence. R565.

The jury found defendant guilty of attempted first degree murder and concluded that he personally discharged a firearm that proximately caused

great bodily harm, permanent disfigurement, or disability. R665-66, C99, C120. The circuit court sentenced defendant to 48 years in prison. R711, C138.

On direct appeal, the appellate court affirmed defendant's conviction, rejecting his argument that the evidence was insufficient to establish his guilt beyond a reasonable doubt. *People v. Urzua*, 2021 IL App (2d) 200231, ¶ 32 (citing *People v. Urzua*, No. 2-08-0237 (2010) (unpublished order under Illinois Supreme Court Rule 23)).

II. Post-conviction Proceedings in Circuit Court

Defendant filed a pro se post-conviction petition in July 2010, in which he alleged the following: (1) his trial counsel was ineffective for failing to preserve the argument that he was entitled to impeach the victim with prior convictions for aggravated criminal sexual abuse and reckless discharge of a firearm; (2) his trial counsel was ineffective for failing to object to the People's use of the word "cowardly" during its opening statement; (3) his appellate counsel was ineffective; (4) his sentence violated the proportionate penalties clause of the Illinois Constitution; and (5) he had newly discovered evidence of actual innocence. C196-207. In support of his petition, defendant attached a typewritten, unnotarized "affidavit" that was purportedly signed by Markus Spires. C202. The "affidavit" stated that Garcia was holding a chrome revolver on an unspecified date in March 2002, when he flagged Spires down,

got in Spires's vehicle, and told Spires that he had just shot up an "Insane Deuce" on Columbia Street. C202.

The petition was automatically advanced to the second stage because the circuit court failed to review the petition within 90 days of its filing, Sup R7, and the circuit court appointed counsel for defendant in May 2011, R732. After a conflict arose for the originally assigned attorney, assistant public defender Ronald Haskell began representing defendant in 2013. R784. During a status hearing in 2015, Haskell informed the court that there "is an element in the pro se petition that I need to contact an individual," and that he had been unable "to find that individual." R810. In 2016, Haskell told the court that defendant had requested that Haskell meet "unidentified" people "who will present me with potential evidence of actual innocence." R825.

On August 10, 2016, Haskell filed a motion to withdraw pursuant to *People v. Greer*, 212 Ill. 2d 192 (2004), a Rule 651(c) certificate, and a memorandum of law. C263-302. According to his memorandum of law, Haskell was never "able to independently substantiate the existence of an individual by the name of Markus Spires." C273. Further, Haskell noted, no "corroborating information [had] been provided" that "would enable him to confirm Mr. Spires statement." C273. Lastly, the memorandum explained that "the information provided by Spires that would have shifted blame for the shooting from Defendant to Jama[a]l Garcia is contradicted by multiple witnesses' description of a light skinned shooter similar to the defendant's

comple[x]ion where Jama[a]l Garcia, who is now deceased, was a dark skinned individual." C274. Haskell also noted "the problematic nature of a document that appears 8 years after the fact, appears to have been executed on the same typewriter as Defendant's Petition, and is not notarized for authentication, would fail to satisfy the fourth criteria." C274. He concluded by stating that "(1) Defendant's claims of Ineffective Assistance fail to survive a *Strickland* first prong analysis, (2) his claim of excessive sentencing is subject to Res Judicata, and (3) his claim of Actual Innocence is not supported sufficiently to be sustained under the four prong analysis." C274. Accordingly, Haskell reasoned, he was "ethically barred from adopting any of the allegations" of the pro se post-conviction petition. C274.

At a hearing on February 27, 2017, the court had the following colloquy with Haskell and defendant:

The Court: All right. So have you had a chance to speak with [defendant]?

Haskell: Yes, I have, your Honor. I explained it to him in letters and I tried to explain to him the full support of my memorandum of law and my motion to withdraw and the fact that I cannot find any constitutional violations that would warrant proceeding further or adopting his pro se allegations and, therefore, it is incumbent upon me to withdraw from the case.

The Court: Okay. So [defendant], do you understand what your counsel has been explaining?

Defendant: Yes.

The Court: And so he has presented a motion to withdraw as your attorney and what would you like to say regarding that?

Defendant: I want to hire a private attorney.

The Court: Okay.

Defendant: If I can ask for some time to hire a private attorney, my family is wanting to help me apply for an attorney.

The Court: All right. So I am gonna grant Mr. Haskell's motion and allow him to withdraw as your attorney.

***

The Court: Given the situation and the need to hire private counsel, I will give you the six months because I assume your family is going to have to come together to finance that for you.

R830-32. The court's written order following that hearing stated that, "pursuant to People v. Greer, attorney Haskell's motion to withdraw is granted." C306.

About two weeks later, on March 7, 2017, the People filed a motion to reconsider the ruling on defendant's motion for an extension of time to obtain new counsel, C308-12, and, on March 21, 2017, the People filed a motion to dismiss defendant's post-conviction petition, C317-26. At the hearing on the People's motion, the following exchange occurred:

The Court: When you were here before, Mr. Haskell was representing you. He had been a court-appointed counsel. He filed a proper motion pursuant to *People versus Greer* indicating he could not proceed in representing you on your petition for post conviction relief. I granted his motion. And at that time you indicated that you were going to hire new counsel. I did not appoint new counsel nor would I have appointed new counsel at that time. There was no motion or anything on file by the State. Now the State is asking that, one, I reconsider. I'm not sure exactly what they're asking me to reconsider, allowing you to hire new counsel or just vacate the prior order. I'm not sure exactly what the prayer for

> relief is. The second thing is they want to address the motion to dismiss your post conviction petition.
>
> ***
>
> Defendant: Just that after you gave me the opportunity to seek other attorneys, to seek lawyers, I've been seeking lawyers. My family has been seeking counsel. I felt that I was never really properly represented by Mr. Haskell or Dolak. They never seeked witnesses that I was telling them to seek. They never seeked anything that I was telling them to seek. And so my best -- when he told me he was going to withdraw from my case, I told him it would be in his best interest because I'm looking to hire a paid attorney.
>
> The Court: You did indicate that you wanted to hire an attorney. And so -- However, I didn't kind of jump as far as I think the State may believe I jumped. All I did was indicate that I was granting attorney Haskell his motion to withdraw based upon *People v. Greer*. Mr. Urzua asked for time to hire new counsel. At that point I had nothing on file by the State.

R837-40. The court explained that it was "not going to appoint new counsel because that would be inappropriate under the statute and the case law." R841. The court noted that "now the State has taken action" by filing a motion to dismiss the petition. R841. The court stated, "I don't think it's appropriate given the situation to require [defendant] to respond to the motion to dismiss today." R841. The court told defendant that it would schedule a hearing on that motion and that "it may move up your timeline to get an attorney to represent you on this." R841. Defendant stated that he understood. R841-42.

Prior to the next hearing, defendant hired two private attorneys to represent him. R858, R862-63, R867-68. In 2019, following a series of

continuances, defendant's newly retained counsel decided that they could not amend the petition, despite having conducted a "pretty lengthy investigation." R894. Retained counsel adopted defendant's initial pro se post-conviction petition, R894, and filed a Rule 651(c) certificate, R900-02. Defendant's retained attorney also stated that, following a full investigation, he found a "police release" stating that a person with the same name as defendant's alleged witness (Spires) recently had been arrested in Chicago, but he did not know whether it was the same person who provided the "affidavit" offered in support of the pro se petition. R916-19.

At the hearing on the People's motion to dismiss defendant's post-conviction petition, the People noted that they were not conceding that defendant was entitled to obtain subsequent counsel before arguing the motion. R900. In its written order on the motion to dismiss, the circuit court stated that "[o]nce a *Greer* motion to withdraw is properly presented and allowed, the next procedural step is for the State to file either an answer or a motion to dismiss." C368. The court acknowledged that it was "preclude[d] . . . from providing the petitioner with new court appointed counsel" after a *Greer* motion to withdraw is granted. C368. But it believed that it would be "manifestly unfair" to require a defendant to proceed pro se after appointed counsel withdrew pursuant to *Greer* if defendant could afford to retain new counsel. C368. In the end, the court granted the People's motion to dismiss,

concluding that defendant's claims were either forfeited or unsubstantiated. Sup R15, C367-70.

III. Post-conviction Appeal

On appeal from the petition's dismissal, defendant argued solely that he had not received reasonable assistance from his retained post-conviction counsel. *People v. Urzua*, 2021 IL App (2d) 200231, ¶ 1. The People responded that the circuit court's order granting appointed counsel's motion for leave to withdraw under *Greer* extinguished defendant's right to the reasonable assistance of counsel under the Post-Conviction Hearing Act. *Id.*, ¶ 54.

The appellate court disagreed that appointed counsel withdrew under *Greer*. According to the appellate court, "there is no indication the court granted Haskell leave to withdraw on the basis that he determined the claims lacked merit as opposed to defendant's desire, and stated intent, to retain a different attorney." *Id.*, ¶ 72. The appellate court noted that the circuit court did not mention the merits of the pro se petition when it orally granted the motion to withdraw and specifically stated at a later hearing that it had not considered the petition's merits. *Id.*, ¶ 73. The appellate court concluded that Haskell's withdrawal did not extinguish defendant's right to reasonable assistance under the Act because, based on its reading, "the record in this case clearly shows the circuit court's basis for allowing Haskell

to withdraw was not the underlying merits of defendant's claims." *Id.*, ¶¶ 73-74.

After concluding that defendant remained entitled to the assistance of counsel following Haskell's withdrawal, the appellate court held that defendant did not receive reasonable assistance from his retained counsel. *Id.*, ¶¶ 80-87. Although retained counsel filed a Rule 651(c) certificate, the appellate court held that the record rebutted the presumption of reasonable assistance because counsel failed to remedy a procedural defect regarding the unnotarized "affidavit" that was the sole support for defendant's actual innocence claim. *Id.*, ¶¶ 82-87. While the People had argued before the circuit court that this "affidavit" was insufficient to meet the conclusiveness requirement for an actual innocence claim, the appellate court noted that the People had abandoned the argument on appeal. *Id.*, ¶ 87. The appellate court also held that defendant was not required to show that he was prejudiced by retained counsel's error. *Id.*

The appellate court ultimately reversed the judgment of dismissal and remanded "for further second-stage proceedings, at which the circuit court must appoint new counsel who must then comply with Rule 651(c)." *Id.*, ¶ 90.

STANDARD OF REVIEW

This Court reviews de novo the proper interpretation of a supreme court rule, such as Rule 651(c), as well as the circuit court's dismissal of a post-conviction petition without an evidentiary hearing. *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007).

ARGUMENT

I. After the Circuit Court Allows an Appointed Attorney to Withdraw Based on a Pro Se Post-Conviction Petition's Lack of Merit, the Statutory Right to Reasonable Assistance of Counsel Under the Post-Conviction Hearing Act has Been Satisfied.

This Court should reverse the appellate court's judgment holding that retained counsel provided unreasonable assistance and that defendant was entitled to further second-stage proceedings — with the assistance of new counsel — on his meritless post-conviction petition. There is no statutory right to counsel after the circuit court allows an appointed attorney to withdraw based counsel's determination that a post-conviction petition so lacks merit that counsel cannot ethically advance its frivolous claims. On appeal, defendant chose not to challenge the circuit court's order allowing his appointed attorney to withdraw pursuant to *People v. Greer*, 212 Ill. 2d 192 (2004), based on counsel's assessment of the petition's lack of merit. Instead, he argued that the attorneys he later retained provided unreasonable assistance. But once the circuit court allowed appointed counsel's motion to withdraw based on counsel's determination that the petition was without merit, the statutory right to counsel ended. Although the circuit court

permitted defendant to retain new counsel in the interest of fairness, defendant's limited statutory right to counsel had already been satisfied, and defendant was no longer entitled to have his new attorneys provide "reasonable assistance."

The Post-Conviction Hearing Act establishes a three-stage process for adjudicating post-conviction claims of constitutional error. *People v. Cotto*, 2016 IL 119006, ¶ 26. At the first stage, the circuit court has 90 days after the docketing of a pro se petition to determine if it is "frivolous or patently without merit." 725 ILCS 5/122-2.1. "It is only after a defendant's petition has been found to set forth the gist of a meritorious claim, *or* the court fails to take any action on the petition within 90 days of filing, that the process advances to second-stage proceedings and counsel is appointed." *Greer*, 212 Ill. 2d at 204 (citing 725 ILCS 5/122-2.1, 122-4). "At the conclusion of the second stage, the court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation," such that a third-stage evidentiary hearing is warranted. *Cotto*, 2016 IL 119006, ¶ 28.

Because no constitutional right to counsel attaches in a post-conviction proceeding, petitioner's entitlement to counsel "'is a matter of legislative grace.'" *People v. Flores*, 153 Ill. 2d 264, 276 (1992) (quoting *People v. Porter*, 122 Ill. 2d 64, 73 (1988)). Post-conviction counsel is held "to only a 'reasonable' level of assistance, which is less than that afforded by the federal

or state constitutions." *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006) (quoting *People v. Munson*, 206 Ill. 2d 104, 137 (2002)); *see also People v. Johnson*, 2018 IL 122227, ¶¶ 16-17. This standard applies because post-conviction counsel plays a limited role: "[a]t trial, counsel acts as a shield to protect defendants from being 'haled into court' by the State and stripped of their presumption of innocence," but "post-conviction petitioners[ ] . . . have already been stripped of the presumption of innocence, and have generally failed to obtain relief on appellate review of their convictions." *People v. Owens*, 139 Ill. 2d 351, 364-65 (1990) (quoting *Ross v. Moffitt*, 417 U.S. 600, 610-11 (1974)). "Counsel are appointed to represent post-conviction petitioners, not to protect them from the prosecutorial forces of the State, but to shape their complaints into the proper legal form and to present those complaints to the court." *Id.* at 365.

"To assure the reasonable assistance required by the Act," Rule 651(c) requires post-conviction counsel to "consult[ ] with petitioner," identify his "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 petitioner's contentions." *People v. Perkins*, 229 Ill. 2d 34, 42 (2008); Ill. S. Ct. R. 651(c). Counsel should certify that she has discharged these duties. *Perkins*, 229 Ill. 2d at 42; *Pendleton*, 223 Ill. 2d at 472. A filed certificate constitutes proof that post-conviction counsel completed her duties, *People v. McNeal*, 194 Ill.

2d 135, 143 (2000), and creates a presumption that counsel provided reasonable assistance, *People v. Custer*, 2019 IL 123339, ¶ 32.

A. The statutory right to counsel ends once appointed counsel determines that a petition is meritless.

A defendant who files a post-conviction petition that is frivolous or patently without merit is not entitled to counsel. *See Greer*, 212 Ill. 2d at 204, 209. Accordingly, a circuit court may summarily dismiss such a petition within 90 days of its filing without appointing counsel. *Id.* at 204. Likewise, if the petition escapes that initial review through the circuit court's inaction and counsel is appointed, the court may allow counsel to withdraw if the petition is meritless. *Id.* at 209. In both instances, the statutory right to counsel ends with the determination — whether by the circuit court or appointed counsel — that the petition lacks merit.

As this Court explained in *Greer*, a defendant does not retain the right to have counsel advance his claims simply because he was "appointed counsel only through the fortuity of the circuit court's inaction" even though "the petition may well be frivolous or patently without merit[.]" *Id.* at 204. *Greer* recognized that

> An attorney who is appointed to represent a defendant after the 90-day default provision of the Act is applied may well find that he or she represents a client attempting to advance arguments that are patently without merit or wholly frivolous, a client whose petition would have been summarily dismissed had the circuit court timely considered the merits of the petition.

Id. at 207. While counsel must comply with Rule 651(c), fulfillment of those obligations "does not require postconviction counsel to advance frivolous or

spurious claims on defendant's behalf." *Id.* at 205. Amendments to a pro se petition that would only further a frivolous or patently meritless claim "are not 'necessary' within the meaning of the rule." *Id.*

Not only are such amendments unnecessary, but "the mere filing of an amended petition by counsel under such circumstances would appear to violate the proscriptions of Supreme Court Rule 137." *Id.*; *see also* Ill. S. Ct. R. 137 ("The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other document; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law[.]"). This is so because "'[n]either paid nor appointed counsel may deliberately mislead the court with respect to either the facts or the law, or consume the time and the energies of the court or the opposing party by advancing frivolous arguments.'" *Id.* at 207 (quoting *McCoy v. Court of Appeals*, 486 U.S. 429, 435-36 (1988)). In light of these ethical proscriptions, an attorney "who determines that defendant's claims are meritless cannot in good faith file an amended petition on behalf of defendant." *Id.* at 205.

The legislature did not intend for a defendant to have continuing legal representation when appointed counsel determines in good faith that the pro se petition is frivolous or clearly without merit. *Id.* at 209. *Greer* compared two hypothetical defendants, one who files a meritless petition that is

dismissed during the initial 90 days, and another defendant who also files a meritless petition, but has counsel appointed because of the circuit court's initial inaction. *Id.* As *Greer* explained, "[e]ach defendant has filed a frivolous petition. The legislature surely did not intend to accord the latter defendant continuing representation after counsel determines the petition to be frivolous when the former defendant is never given counsel in the first place." *Id.* Instead, "[t]he purpose behind appointment of counsel in the latter instance might be, and probably is, nothing more than a desire to jumpstart a process that has shown no signs of progress." *Id.* But after counsel has fulfilled his duties under Rule 651(c) by consulting with the defendant and examining the record to see if the claims can be amended into an adequate form, the Post-Conviction Hearing Act does not entitle a defendant to continued legal representation after counsel determines that the petition is frivolous and patently without merit. *Id.* On the contrary, "the attorney is clearly *prohibited* from doing so by his or her ethical obligations." *Id.* (emphasis in original).

As subsequent appellate court decisions have held, it therefore follows that the statutory right to counsel ends when an attorney withdraws following counsel's assessment that the petition lacks merit. *See, e.g., People v. Bass*, 2018 IL App (1st) 152650, ¶ 20 ("if the lawyer appointed to represent a postconviction petitioner determines, after fulfilling his or her obligations under Rule 651(c), that the petition cannot be amended, defendant has

received the reasonable assistance of counsel the Act contemplates and his entitlement to the assistance of counsel is at an end"); *People v. Hayes*, 2016 IL App (3d) 130769, ¶ 18 (defendant not entitled to new appointed counsel after initially appointed counsel withdrew pursuant to *Greer* based on petition's lack of merit). As the appellate court observed in *People v. Thomas*, 2013 IL App (2d) 120646, ¶ 7, "the import of the *Greer* court's reasoning is that, once an attorney appointed to represent a defendant in a postconviction proceeding has withdrawn in conformity with the requirements of *Greer*, there will be no further statutory right to counsel, at least in the absence of unusual circumstances."

Thomas is illustrative. In *Thomas*, the circuit court allowed appointed counsel to withdraw pursuant to *Greer* and immediately denied the defendant's post-conviction petition. *Id.*, ¶ 3. The appellate court vacated the denial of the petition due to the court's procedural error (it dismissed the petition despite the fact that the People had not yet filed a motion to dismiss), and on remand, the circuit court appointed another attorney, who also moved to withdraw, arguing that the Act did not authorize the appointment of successive counsel after the original attorney had been permitted to withdraw pursuant to *Greer*. *Id.*, ¶ 4. The circuit court agreed and allowed the successive attorney to withdraw. *Id.* The court also granted the People's later-filed motion to dismiss. *Id.*

On appeal from that judgment of dismissal, the appellate court affirmed, agreeing that the defendant had not been entitled to the appointment of new counsel. In so holding, the court quoted the following language from *Greer*: "'The legislature surely did not intend to accord the [defendant whose petition automatically advanced because of circuit court inaction] *continuing representation* after counsel determines the petition to be frivolous when the [defendant whose petition was reviewed and summarily dismissed] is never given counsel in the first place.'" *Thomas*, 2013 IL App (3d) 120646, ¶ 7 (quoting *Greer*, 212 Ill. 2d at 208-09) (emphasis added by *Thomas*). *Thomas* explained that the words "continuing representation" meant representation by any appointed attorney because "[t]o hold otherwise – i.e., to hold that the statutory right to counsel persists after an attorney has been permitted to withdraw under *Greer* – would lead to precisely the sort of disparate treatment that the *Greer* court denounced." *Id.* Consequently, the *Thomas* defendant "had no right to a reasonable level of assistance" from successor counsel, and counsel's "failure to fulfill the duties specified in Rule 651(c) is not grounds for reversal of the dismissal of defendant's postconviction petition." *Id.*, ¶ 9.

While *Thomas* involved the *appointment* of successor counsel, its reasoning applies equally where a defendant *retains* successor counsel after the initially appointed attorney has withdrawn based on counsel's determination that the petition lacks merit. In either case, representation by

counsel "after granting an attorney's motion to withdraw under *Greer* would ordinarily be an empty gesture, inasmuch as successor counsel would be obliged to withdraw for precisely the same reasons that led his or her predecessor to withdraw." *Thomas*, 2013 IL App (2d) 120646, ¶ 7. *Thomas* correctly recognized that "the import of the *Greer* court's reasoning is that, once an attorney appointed to represent a defendant in a postconviction proceeding has withdrawn in conformity with the requirements of *Greer*, there will be no further statutory right to counsel, at least in the absence of unusual circumstances." *Id.* As in *Thomas*, defendant here did not have a statutory right to counsel after his appointed attorney was allowed to withdraw pursuant to *Greer*, and the appellate court erred when it reversed the dismissal of the petition based on successor counsel's purported lack of reasonable assistance.

And although here retained successor counsel did not formally withdraw from defendant's representation, successor counsel also determined he would not amend the petition after completing his Rule 651(c) duties. In sum, defendant received the assistance to which he was entitled when his appointed counsel withdrew pursuant to *Greer*, and he was entitled to no further assistance, reasonable or otherwise, under the Act.

B. Because appointed counsel withdrew under *Greer* after determining that the petition was meritless, petitioner was not entitled to reasonable assistance from successor counsel.

The appellate court below recognized that the statutory right to counsel ends when counsel withdraws pursuant to *Greer*, *People v. Urzua*, 2021 IL App (2d) 200231, ¶ 74 ("we have no quarrel with *Thomas*'s holding"), but it mistakenly believed that the circuit court had not allowed counsel to withdraw based on counsel's determination that the petition lacked merit, *id.*, ¶ 72 ("there is no indication the court granted Haskell leave to withdraw on the basis that he determined the claims lacked merit as opposed to defendant's desire, and stated intent, to retain a different attorney"). In so finding, the appellate court misread the record.

To start, appointed counsel's motion to withdraw (and accompanying memorandum and Rule 651(c) certificate) was based solely on *Greer* and the lack of merit to defendant's post-conviction claims. C263-302. Counsel explained that he tried to locate the supposed actual innocence witness, whose allegations were contradicted by multiple trial witnesses, in order to cure the "affidavit's" technical defect, but counsel was unable to do so. C274. Nothing in the motion or memorandum even hints that defendant wanted to hire a new attorney. At the hearing on counsel's *Greer* motion, counsel reiterated that it was "incumbent" on him to withdraw based on the lack of any constitutional violations as claimed by defendant. R830. After counsel confirmed that he had explained to defendant why he had to withdraw,

defendant confirmed that he understood why his appointed counsel was withdrawing. R830. It was only later, in response to the court's question about what defendant would like to say regarding counsel's motion to withdraw, that defendant responded, "I want to hire a private attorney." R830-31. The court then ruled that it was going to "grant Mr. Haskell's motion and allow him withdraw as your attorney" and allowed defendant additional time to retain private counsel. R831-32. The court did not dismiss the petition at that time because the People had not yet filed a motion to dismiss. R830; *see also Hayes*, 2016 IL App (3d) 130769, ¶ 19 (affirming counsel's withdrawal due to meritless claims, remanding because circuit court dismissed before People had filed motion to dismiss); *People v. Greer*, 341 Ill App. 3d 906, 910 (4th Dist. 2003) (same), *aff'd*, 212 Ill. 2d at 212. And the court's written order states, "Pursuant to *People v. Greer*, attorney Haskell's motion to withdraw is granted." C306.

Proceedings at the next hearing confirmed that the court had in fact allowed counsel to withdraw based on the lack of meritorious claims and *Greer*. At that hearing, the People stated that they had since filed a motion to dismiss as well as a motion asking the court to reconsider its ruling allowing defendant time to retain counsel. R836-37. The court explained to defendant, who was then representing himself, the posture of the case:

> When you were here before, Mr. Haskell was representing you. He had been court-appointed counsel. *He filed a proper motion pursuant to* People versus Greer *indicating he could not proceed in representing you on your petition for post conviction relief. I*

> *granted his motion.* And at that time you indicated that you were going to hire new counsel. *I did not appoint new counsel nor would have appointed new counsel at that time. There was no motion or anything on file by the State.* Now the State is asking that, one, I reconsider. I'm not sure exactly what they're asking me to reconsider, allowing you to hire new counsel or just vacate the prior order. I'm not sure exactly what the prayer for relief is. The second thing is they want to address the motion to dismiss your post conviction petition.

R837 (emphasis added).

According to the appellate court, "in denying the State's motion, the court specifically stated it had not considered the merits of defendant's petition when it allowed Haskell to withdraw." *Urzua*, 2021 IL App (2d) 200231, ¶ 73. The appellate court did not quote from the record, but it appears that it was referring to the following statement by the circuit court:

> You did indicate that you wanted to hire an attorney. And so – *However, I didn't kind of jump as far as the State may believe I jumped.* All I did was indicate that I was granting attorney Haskell's his motion to withdraw based upon *People v. Greer*. Mr. Urzua asked for time to hire new counsel. *At that point I had nothing on file by the State.*

R839 (emphasis added). The court continued:

> So if you wanted six months or a year, if the State wasn't filing anything, *it wasn't my job to tell the State how to proceed next*. Now the State has filed – I think, Mr. Urzua can still have an attorney represent him. *He can't have another appointed counsel. On that I agree with the State. I cannot appoint another counsel.*

R840 (emphasis added). In other words, the court thought it would be unfair to prevent defendant from retaining his own attorney when the People had not yet filed a motion to dismiss when appointed counsel withdrew. R840. The court elaborated on the situation: "So Mr. Urzua, if you want to continue

to try and hire an attorney, I'm not going to prevent you from doing that. *I am not going to appoint new counsel because that would be inappropriate under the statute and the case law*." R841 (emphasis added).

And finally, in its written order granting the motion to dismiss, the circuit court expressly stated that it had granted appointed counsel's motion to withdraw based on *Greer* and that *Thomas* prevented it from appointing new counsel:

> Certainly, the *Thomas* case precludes this court from providing the petitioner with new court appointed counsel. However, nothing in *Thomas* prohibits a petitioner in post-conviction proceedings from hiring their own counsel at their own expense. Once a *Greer* motion to withdraw is properly presented and allowed, the next procedural step is for the State to file either an answer or a motion to dismiss. The petitioner must then either proceed pro se or retain counsel. The granting of a motion to withdraw under *Greer* is not dispositive. To require a petitioner to proceed without the benefit of counsel if he can afford to retain such counsel is manifestly unfair.

C368. The circuit court reiterated that reasoning in its oral ruling. Sup R8-9.

Thus, the record shows that the circuit court granted appointed counsel's motion to withdraw based on *Greer*. By citing *Thomas*, the circuit court recognized that it could not appoint new counsel after allowing an attorney to withdraw based on the meritlessness of the petition and that it had to wait for a motion from the People before it could dismiss the petition. The appellate court's misreading of the record led to its erroneous conclusion that defendant retained a statutory right to counsel after his appointed counsel withdrew.

In short, the record shows that the circuit court allowed appointed counsel to withdraw pursuant to *Greer*, thus satisfying defendant's statutory right to counsel. Defendant, therefore, was no longer statutorily entitled to legal representation. Accordingly, this Court should reverse the appellate court's judgment and affirm the circuit court's dismissal of the post-conviction petition.

II. Even if Defendant Was Entitled to the Reasonable Assistance of Retained Counsel After his Appointed Attorney's Withdrawal, the Appellate Court Erred in Reversing and Remanding for Further Proceedings Because Defendant was not Prejudiced.

Even if defendant was entitled to the reasonable assistance of retained counsel despite his appointed attorney's withdrawal under *Greer*, the appellate court nevertheless erred in remanding for further proceedings because defendant failed to show that his actual innocence claim had merit and therefore that he was prejudiced.[2] Indeed, appointed counsel's *Greer* motion noted that, despite extensive efforts, counsel was unable to confirm

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[2] This issue was not clearly argued in the People's appellate brief or included in the People's petition for leave to appeal, but this Court may nevertheless consider it. *See People v. Brown*, 2020 IL 125203, ¶ 32 (addressing merits of argument where defendant raised both types of forfeiture). First, "[i]t is well settled that, when the appellate court reverses the judgment of the trial court and the appellee in the appellate court then brings the case to this court on appeal," the appealing party "may raise any issues properly presented by the record to sustain the judgment of the trial court, even if those issues were not raised in the appellate court." *Id.*, ¶ 29 (citing *People v. Artis*, 232 Ill. 2d 156, 164 (2009)). Second, "[t]he failure to raise an issue in a petition for leave to appeal is not a jurisdictional bar to this court's ability to review an issue," and the Court may address a question that "is 'inextricably intertwined' with other matters properly before the court." *Id.*, ¶ 31 (quoting *People v. McKown*, 236 Ill. 2d 278, 310 (2010)).

that the witness even existed, leading counsel to conclude that petitioner's claim was frivolous, especially because that witness's description of the shooter was contradicted by the trial testimony of multiple witnesses. C274. And defendant's retained attorney also stated that, following a full investigation, he found a "police release" stating that a person with the same name as defendant's alleged witness (Spires) recently had been arrested in Chicago, but he did not know whether it was the same person who provided the "affidavit" offered in support of the pro se petition. R916-19. Thus, like appointed counsel, the successor attorney was not able to obtain a notarized affidavit. A remand for yet another to attempt to track down a likely non-existent witness to support defendant's meritless actual innocence claim would be an exercise in futility.

According to the appellate court, "in light of defendant's retained attorneys failure to comply with their duty to shape defendant's pro se claims into appropriate legal form, any argument regarding the merits of the actual-innocence claim is improper, as defendant is not required to show prejudice under these circumstances." *Urzua*, 2021 IL App (2d) 200231, ¶ 87 (citing *People v. Suarez*, 224 Ill. 2d 37, 47-48 (2007)). Contrary to the appellate court's holding, a post-conviction petitioner is not entitled to an automatic remand any time he shows that his post-conviction counsel erred.[3] Instead, where post-conviction counsel has certified compliance with Rule 651(c) (as

[3] The People have raised a similar argument in *People v. Addison*, No. 127119, which is currently pending with this Court.

both appointed and retained counsel did here), a petitioner must show prejudice when he alleges that counsel performed her duties deficiently. *See People v. Landa*, 2020 IL App (1st) 170851, ¶ 58 (if counsel certified compliance and "a defendant is claiming that post-conviction counsel performed [her] duties deficiently or otherwise failed to provide reasonable assistance, the defendant must show not only how the attorney's performance was deficient or unreasonable but also what prejudice resulted from that deficiency"); *People v. Gallano*, 2019 IL App (1st) 160570, ¶ 30 (where post-conviction counsel filed Rule 651(c) certificate, and petitioner claimed only that counsel failed to sufficiently advance particular claim, petitioner was not entitled to remand unless claim was potentially "meritorious"). Even where counsel is constitutionally guaranteed, a defendant is not entitled to relief based on counsel's deficient performance unless he also demonstrates prejudice, *see Strickland v. Washington*, 466 U.S. 668, 694 (1984) (requiring prejudice for deficient performance by trial counsel), and the same should be true when a lesser right to counsel is merely afforded as a "matter of legislative grace," *People v. Porter*, 122 Ill. 2d 64, 73 (1988).

The appellate court here mistakenly relied on *Suarez* to require an automatic remand. *Urzua*, 2021 IL App (2d) 200231, ¶ 87. But *Suarez*'s exception to the prejudice requirement applies only if the record contains no evidence that post-conviction counsel carried out the basic Rule 651(c) duties. In *Suarez*, 224 Ill. 2d 37, appointed post-conviction counsel filed no

certificate, and the record did not otherwise demonstrate that he had conferred with his client, as Rule 651 requires. Based on this failure to comply with Rule 651's consultation requirement, the Court remanded the case, stating that "remand is required where postconviction counsel failed to fulfill the duties of consultation, examining the record, and amendment of the pro se petition, regardless of whether the claims raised in the petition had merit." *Id.* at 47. Under such circumstances, a remand was necessary so that "the limited right to counsel conferred by the Act [was] fully realized." *Id.* at 51. But this exception is no broader than the exception identified by the United States Supreme Court in *Cronic*: if counsel completely abdicates his duty — that is, if counsel is so deficient as to provide no assistance at all — then a defendant need not demonstrate prejudice. *United States v. Cronic*, 466 U.S. 648 (1984); *see also People v. Zareski*, 2017 IL App (1st) 150836, ¶ 54 (explaining that to read *Suarez* as requiring automatic remand in every case involving a Rule 651 violation would mistakenly "equate a postconviction counsel's failure to draft or amend [defendant's] claim" to *Chronic* claim).

Accordingly, where the record demonstrates that post-conviction counsel's failures were so complete as to constitute no assistance at all, then, and only then, is a defendant relieved of the burden of showing prejudice from counsel's alleged unreasonable assistance. Indeed, a rule of automatic remand would waste judicial resources, given that a defendant must receive new appointed counsel who must review the trial record and investigate the

defendant's claims of error under Rule 651(c). *See People v. Schlosser*, 2017 IL App (1st) 150355, ¶¶ 36, 41 (deeming it error to reappoint same assistant public defender following remand for unreasonable assistance and remanding to begin anew with new counsel); *People v. Jones*, 2016 IL App (3d) 140094, ¶¶ 33-34 (same); *People v. Shortridge*, 2012 IL App (4th) 100663, ¶¶ 14-15 (same); *People v. Nitz*, 2011 IL App (2d) 100031, ¶¶ 19, 21 (same). And here, the appellate court ordered the appointment of a *third* attorney to re-investigate defendant's claims and comply with Rule 651, even after defendant's appointed counsel found his claims to be frivolous and withdrew, and his retained counsel was similarly unable to amend his petition despite an investigation. This waste of judicial resources is not compelled by *Suarez*.

Accordingly, this Court should hold that a post-conviction petitioner whose counsel has filed a Rule 651(c) certificate, but whose performance the defendant nevertheless criticizes as unreasonable, must show prejudice to warrant a remand and the appointment of new counsel. And here, defendant failed to show that his actual innocence claim had merit, even if his retained counsel had been to obtain a notarized affidavit from alleged witness Markus Spires.

A claim of actual innocence must be based on evidence that is (1) newly discovered, (2) material, (3) not cumulative, and (4) of such conclusive character that it would probably change the result on retrial. *People v. Edwards*, 2012 IL 111711, ¶ 32. Defendant's appointed counsel investigated

this claim and found it be so lacking in merit that he felt compelled to withdraw pursuant to *Greer*. C274. As appointed counsel explained:

> The Markus Spires affidavit, although it comes forward some 8 years after the shooting of Mr. Contreras, if confirmable would arguabl[y] meet the first three criteria [of an actual innocence claim]. However, the problematic nature of a document that appears 8 years after the fact, appears to have been executed on the same typewriter as Defendant's Petition, and is not notarized for authentication, would fail to satisfy the fourth criteria. . . . Additionally, and critically, the information provided by Spires that would have shifted blame for the shooting from Defendant to Jama[a]l Garcia is contradicted by multiple witnesses' description of a light skinned shooter similar to the defendant's complexion where Jamal Garcia, who is now deceased, was a dark skinned individual. Conflict Counsel cannot find any reasonable basis which would allow him to ethically proceed to adopt Defendant's claim of Actual Innocence.

C274. The People echoed that reasoning in their motion to dismiss. C325-26.

Defendant failed to show that he was prejudiced by retained counsel's failure to track down Spires and obtain a notarized affidavit from him because even if the statement had been notarized, it failed to establish a claim of actual innocence. The circuit court implicitly agreed when it allowed appointed counsel's motion to withdraw pursuant to *Greer*. Significantly, defendant on appeal did not challenge the propriety of his appointed counsel's withdrawal based on this claim's lack of merit. And while the People in turn did not raise an argument on appeal about the merits of that claim (and consequently did not include it in the petition for leave to appeal), the People raised this argument before the circuit court. Again, "[i]t is well settled that, when the appellate court reverses the judgment of the trial court and the

appellee in the appellate court then brings the case to this court on appeal," the appealing party (here, the People) "may raise any issues properly presented by the record to sustain the judgment of the trial court, even if those issues were not raised in the appellate court." *Brown*, 2020 IL 125203, ¶ 29 (citing *Artis*, 232 Ill. 2d at 164).

In short, even if defendant maintained a statutory right to the reasonable assistance of retained counsel after his appointed counsel withdrew pursuant to *Greer*, the appellate court should have considered whether defendant was prejudiced by his retained counsel's performance. Appointed counsel found the actual innocence claim to be meritless, and the circuit court implicitly agreed by allowing counsel's withdrawal motion. The appellate court should have affirmed the dismissal based on the actual innocence claim's substantive lack of merit.

CONCLUSION

This Court should reverse the judgment of the appellate court and affirm the judgment of the circuit court, which dismissed defendant's post-conviction petition.

July 15, 2022

Respectfully submitted,

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APPENDIX

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Appellate Court

People v. Urzua, 2021 IL App (2d) 200231

Appellate Court Caption	THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ERNESTO URZUA, Defendant-Appellant.
District & No.	Second District No. 2-20-0231
Filed	September 29, 2021
Decision Under Review	Appeal from the Circuit Court of Kane County, No. 06-CF-2221; the Hon. Marmarie J. Kostelny, Judge, presiding.
Judgment	Reversed and remanded.
Counsel on Appeal	James E. Chadd, Douglas R. Hoff, and David Holland, of State Appellate Defender's Office, of Chicago, for appellant. Jamie L. Mosser, State's Attorney, of St. Charles (Patrick Delfino, Edward R. Psenicka, and Adam Trejo, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.
Panel	JUSTICE JORGENSEN delivered the judgment of the court, with opinion. Presiding Justice Bridges and Justice Brennan concurred in the judgment and opinion.

OPINION

¶ 1 Defendant appeals from the second-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). His sole contention on appeal is that he did not receive reasonable assistance from postconviction counsel, whom he retained after his appointed attorney withdrew after purporting to comply with *People v. Greer*, 212 Ill. 2d 192 (2004), and Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013). We reverse and remand for further second-stage proceedings with the appointment of new counsel and compliance with Rule 651(c).

¶ 2 I. BACKGROUND

¶ 3 A. The Charges, Pretrial Proceedings, and Trial Evidence

¶ 4 Around 5 p.m. on March 1, 2002, the victim, Gerardo Contreras, was shot four times in his back and arm as he retrieved the mail from his mailbox in the front yard of his house, which was next to the parking lot of a church, on Columbia Street in Aurora. At the time, he was with his two-year-old daughter, whom Contreras shielded from injury. The injuries Contreras sustained were life threatening and left him paralyzed "from the mid-chest area down." Contreras spent approximately two months under daily care, first at Loyola University Medical Center in Maywood and then at the Rehabilitation Institute of Chicago. The case went unsolved for more than four years, and ultimately, Horatio "H" Morales and Jamaal "Ike" Garcia told investigators that defendant shot Contreras, which led to defendant being charged by indictment with attempted murder (720 ILCS 5/8-4(a), 9-1(a) (West 2002)) in relation to the shooting. The indictment also alleged defendant personally discharged a firearm that proximately caused great bodily harm, permanent disability, or permanent disfigurement to Contreras, which meant defendant was subject to a 25-year sentence enhancement if found guilty of attempted murder. See *id.* § 8-4(c)(1)(D).

¶ 5 Trial commenced on January 7, 2008. That day, the State moved *in limine* to bar defendant from eliciting evidence of Contreras's prior adjudication as a delinquent minor and conviction of felony offenses. The trial court granted the motion.

¶ 6 The State's theory of the case was that defendant, a member of the Latin Kings street gang, shot Conteras under an order from Andres "Oso" Ramirez, who was the leader of the Latin Kings in Aurora, and that the shooting was motivated by (1) a rivalry between the Latin Kings street gang and the Ambrose and Insane Deuces street gangs, with which Contreras was affiliated, and (2) Contreras's purported disrespect toward the Latin Kings. During opening statements, the State told the jury it expected the evidence to establish defendant "committed [this] horrendous, cowardly crime."

¶ 7 Other than Contreras's daughter, whose testimony the State did not present at trial, and Contreras himself, there were no eyewitnesses to the shooting, and no physical evidence directly connected defendant to the crime. However, the State presented the testimony of three of Contreras's neighbors, all of whom heard five or six gunshots. Two of those neighbors, Jose Acevedo Jr. and Jose Caballero, looked out their windows and saw a man, who was wearing dark clothing, including a black hooded sweatshirt, running south through the parking lot of the church, toward Claim Street. The third neighbor, JoAnn Howard, heard the gunshots but

did not look out her window. Rather, she called the police and, while on the phone, heard a man yelling, "help me, I've been shot."

¶ 8 At the time, Contreras's house was located in a neighborhood "belong[ing] to" the Latin Kings. The Latin Kings were known to enforce with violence the boundaries of their neighborhood. At the time of the shooting, Contreras "affiliate[d] with" members of the Ambrose and Insane Deuces street gangs, which were friendly with each other but rivals of the Latin Kings. The Latin Kings congregated at a "nation house" on Claim Street, which was the next street south of Columbia Street. On some date before the shooting, Contreras and Ramirez flashed gang signs at each other.

¶ 9 Shortly after he was shot, Contreras told a responding police officer a man shot him and then ran toward Claim Street through the church parking lot. Though asked, Contreras could not provide a description. On March 13, 2002, while in the hospital, Contreras spoke to investigator Robert Wallers and described the shooter as an 18- to 21-year-old Hispanic man, who had a light complexion, was five feet and seven or eight inches tall, and weighed 145 to 150 pounds. Contreras also told Wallers the man was wearing a black crewneck sweatshirt, black pants, and a black beanie with an "English style" letter "D" on it. Contreras told Wallers the man used a silver or chrome handgun. Wallers had Contreras look through a "gang affiliate book," which contained photographs of known gang affiliates, in hopes of identifying the shooter. Contreras could not do so.

¶ 10 Using the description Contreras gave him, Wallers compiled a photographic array, which included defendant's photograph, and, on April 5, 2002, showed it to Contreras. Contreras did not identify anyone in the photographs as his shooter. The investigation stalled and, on May 6, 2002, was administratively closed pending further leads or developments.

¶ 11 Approximately four years later, in February 2006, after receiving information about the shooting from a special agent with the Federal Bureau of Investigation (FBI), Detectives Michael Nilles and Jeff Sherwood of the Aurora Police Department spoke to Morales, who was in the custody of the Illinois Department of Corrections, about the shooting. In May 2007, Garcia also came forward and spoke to police about the shooting.

¶ 12 At trial, Morales testified that he was currently serving 10- and 3-year sentences for his 2005 armed robbery and unlawful use of a weapon by a felon convictions, respectively. He also acknowledged he had illegally reentered the country after having been previously deported, which he knew was a federal crime. He also knew that, at the conclusion of his state sentence, he could be prosecuted for that crime, the penalty for which was "possibly" 10 years in federal prison. However, at the time of trial, Morales had not been told, nor had anyone even indicated, he would not be prosecuted or deported as a result of his testimony against defendant.

¶ 13 On March 1, 2002, Morales, an associate of the Latin Kings, had recently been released from prison. He lived at the "nation house" with defendant, whom he knew only by his nickname "Limon," and Garcia, both of whom were members of the Latin Kings. According to Morales, Garcia had a "darker" complexion than him. In the short time Morales lived with defendant and Garcia, Morales twice heard them talking about the fact Contreras, a rival gang member, lived in the Latin Kings' neighborhood.

¶ 14 On the day of the shooting, Morales was drinking alcohol and smoking marijuana. He did not know whether someone was "pulling security" at the time. At some point, Ramirez, Michael Reyes, and Paul Benevides, all members of the Latin Kings, came to the nation house.

Five or six minutes later, Morales heard Ramirez tell defendant to "go get" Contreras and saw Benevides give defendant what looked like a chrome revolver. Defendant then put on a black hooded sweatshirt, left the nation house, and ran through the church parking lot toward Columbia Street. Morales watched through the front window of the nation house and lost sight of defendant as he made a left turn. Morales then heard five or six gunshots and saw defendant running back toward the nation house. When defendant got back inside, he took off his sweatshirt and gave the gun to Garcia, who then ran downstairs and put the gun away. Everyone then left the house.

¶ 15 The next day, Morales saw defendant, who was with self-admitted Latin King Orlando Delgado, carrying from the basement of the nation house a gun-shaped object wrapped in a newspaper. Defendant left with Delgado and then went to Mexico for two or three months.

¶ 16 Morales did not report what he saw to the police in 2002, 2003, or 2004, but while in the Kane County jail in 2005, Morales decided to "turn [his] life around." Accordingly, on February 16, 2006, Morales spoke with Detectives Nilles and Sherwood. At the time, the detectives told Morales they believed defendant was the shooter. Morales identified defendant in a photographic array as the person who shot Contreras. At that time, he requested that his brother, who was also in custody, be transferred to the same prison he was in, because he was concerned for his brother's safety, as the Latin Kings had already made threats against him and his family. At the time of trial, Morales's brother was housed in the same facility as Morales. Thereafter, Morales began writing letters to Nilles, whom he considered a friend.

¶ 17 Morales also testified that Garcia was inside the nation house when the shooting occurred. He did not recall if Garcia was "pulling security" that day and did not recall him leaving the house with Damon "Malo" Jones to buy cigarettes before the shooting. After the shooting, Garcia took the gun into the basement to hide it and then left the house. On February 16, 2006, the detectives showed Morales "a number of newspapers" and then showed him two photographic arrays. Morales identified defendant as the man who shot Contreras and Ramirez as the person who gave defendant an order to shoot Contreras.

¶ 18 Detective Nilles testified that, after he spoke with Morales, Morales began writing him personally and, on some occasions, asked for favors, such as having his brother transferred to the same correctional facility in which he was housed and having the Aurora Police Department or the FBI protect his family. Nilles could not recall, however, having any conversation with Morales regarding his immigration status or possible prosecution for illegally reentering the country.

¶ 19 Garcia testified he had prior juvenile adjudications of delinquency for the offenses of armed violence and mob action in 2000 and felony convictions of unlawful possession of a controlled substance in 2000, unlawful use of weapon by a felon in 2003, and burglary in 2005. At the time of trial, he was in prison as a result of one of his prior convictions.

¶ 20 Garcia was released from prison a month or two before the shooting and lived in the nation house. He lived with Morales, who had been released from prison at most two weeks before the shooting, and defendant. In the months Garcia lived at the house, "a topic of conversation" was that Contreras, an apparent member of the Insane Deuces, was living in Latin Kings territory.

¶ 21 Around 4:30 p.m. on March 1, 2002, Garcia, Morales, Jones, defendant, and a "couple other people" were at the nation house. At some point in the day, Garcia took possession of

the "nation gun," which was a revolver any Latin King could use, because he was acting as "security."

¶ 22 Around 4:30 p.m., Garcia left the nation house with Jones to purchase cigarettes. He left the gun on a foot stool near the front door. When he returned home a couple minutes later, the gun was not where he had left it. Garcia assumed another Latin King grabbed it when he left for the store, which was not unusual. Garcia stayed on the front porch and, a couple minutes later, saw Contreras arrive at his home. Defendant, who was wearing a dark-colored hooded sweatshirt, "took off" alone toward Contreras's house, running through the church parking lot. Garcia lost sight of defendant as he reached the front of Contreras's house.

¶ 23 Garcia heard gunshots and saw defendant run back through the parking lot to the "nation house." He did not actually see the shooting. Garcia and defendant went into the basement, "cleaned" the gun, and stashed it "in the wall." After stashing the gun, everyone who was at the nation house fled. Garcia never returned to the house because, that night, he was arrested on an outstanding warrant in a different case.

¶ 24 B. The Verdict and Defendant's Posttrial Motion

¶ 25 The jury found defendant guilty of attempted murder and also found the State proved the allegation that, in committing the offense, defendant personally discharged a firearm that proximately caused great bodily harm, permanent disability, or permanent disfigurement to another person. Defendant moved for a new trial. He raised no argument concerning the court's order *in limine* barring him from introducing evidence of Contreras's prior convictions or the State's use of the term "cowardly" in its opening statement. The court denied the motion.

¶ 26 C. Sentencing

¶ 27 The presentence investigation report (PSI) showed defendant was born August 30, 1982, making him 19 years old at the time of the offense. The PSI also showed that, between 1999 and 2007, defendant had accrued a lengthy criminal history, including 4 felony convictions (2 of which involved the possession of a firearm), 4 misdemeanor convictions, and 12 traffic and ordinance violations. Defendant was on mandatory supervised release (MSR) when Contreras was shot.

¶ 28 At sentencing, the State argued none of the statutory mitigating factors applied to defendant. In regard to the evidence showing defendant acted at the behest of Ramirez, the leader of his gang, the State argued that was "not the type of facilitation or inducement that was contemplated by the statute." See 730 ILCS 5/5-5-3.1 (West 2002). The State asked the court to sentence defendant to "no less than 20 years" on top of the 25-year firearm enhancement. Defendant's attorney made no mention of defendant's relative youth at the time of the offense, offered no response to the State's argument regarding the fact defendant apparently acted at the behest of Ramirez, and made no mention of any of the statutory mitigating factors. Instead, he argued, primarily, that the 25-year firearm enhancement was unconstitutional. Defendant did not make a statement in allocution.

¶ 29 The court sentenced defendant to 23 years, plus the 25-year firearm enhancement, for an aggregate sentence of 48 years. In reaching its sentence, the court noted no statutory mitigating factors applied, defendant's "serious criminal history" was an aggravating factor, and the sentence was necessary to deter others from committing serious crimes. Additionally, it noted

defendant was on MSR at the time of the offense and the offense was related to the activities of an organized gang. Finally, the court emphasized the nature and circumstances and seriousness of the crime, noting Contreras was shot in his back while carrying his daughter in the front yard of his own home and while unarmed. The court did not mention defendant's age or rehabilitative potential.

¶ 30 Defendant moved to reconsider his sentence, contending, in part, "the [c]ourt failed to follow Article I, Section 2 of the Illinois Constitution, which states as follows: 'All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship.' " At the hearing on the motion, defendant made no argument as to his claim the court did not adequately balance the seriousness of the offense and the objective of restoring him to useful citizenship. The court denied the motion.

¶ 31 D. Direct Appeal

¶ 32 On direct appeal, defendant challenged only the sufficiency of the State's evidence. We rejected his contention and affirmed. *People v. Urzua*, No. 2-08-0237 (2010) (unpublished order under Illinois Supreme Court Rule 23).

¶ 33 E. Postconviction Proceedings

¶ 34 In July 2010, defendant *pro se* petitioned for relief under the Act, asserting claims of ineffective assistance of counsel, a challenge to his sentence under the proportionate-penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11), and a claim of actual innocence based on newly discovered evidence. Specifically, his ineffective-assistance claims alleged his trial attorney was constitutionally deficient because the attorney failed to "object [to] and preserve for the record" (1) the circuit court's refusal to allow Contreras's prior convictions into evidence for impeachment purposes and (2) the prosecutor's characterization of defendant as a "coward" in its opening statement, which inflamed the passions of the jury and prejudiced him from the outset. The petition generally asserted appellate counsel was also ineffective, without explaining why or how.

¶ 35 As to his proportionate-penalties claim, defendant asserted his aggregate 48-year sentence was " 'cruel and degrading' " and did not comply with the proportionate-penalties clause because it failed to take into account his rehabilitative potential. His sole support for the claim was that he was "25 years old when charged and convicted."

¶ 36 As to his actual-innocence claim, defendant attached the "affidavit" of Markus Spires, who averred that, in March 2002 (though he did not remember the actual date), he was driving on Claim Street when he "came upon" his friend, Garcia, who was wearing a black hooded sweatshirt and was "running really fast as if he were trying to get away from someone/something/or somewhere, from the direction of Columbia [Street]." Spires further averred that he pulled over and Garcia entered his car. As Garcia entered his car, he saw Garcia was carrying a chrome revolver. Spires asked Garcia "what was *** going on," and Garcia told him he had just shot an " 'Insane Deuce' over on Columbia [S]treet." Further, Spires averred, "I for some reason didn't think to have [Garcia] get out while he still brandished the gun or to know anything further for I truly did not want any part of the trouble that was sure to follow." Spires drove Garcia a few blocks, at which time Garcia threw the revolver from the window and then asked to be let out of Spires's car. Spires averred that he was giving the statement of his own free will, free from influence from threats or promises, and because it

was "the right thing to do after learning [defendant] was charged" for the shooting. The "affidavit" was not notarized; rather, it was signed by Spires, on April 4, 2010, "under the penalty of perjury" pursuant to section 1-109 of the Code of Civil Procedure (Code) (735 ILCS 5/1-109 (West 2010)). Defendant asserted he was entitled to a new trial because the "affidavit" was new, material, noncumulative, and of such conclusive character it would likely change the result on retrial.

¶ 37 The circuit court did not rule on the petition within 90 days. On December 22, 2010, the court advanced the petition to second-stage proceedings under the Act and, on May 6, 2011, appointed the public defender to represent defendant. Due to a conflict of interest within the public defender's office, private attorney Ronald Haskell was appointed to represent defendant. After several delays in receiving the transcripts, on August 12, 2015, Haskell told the court he had reviewed the transcripts and was now in the position to file an amended petition within the next 30 days. At subsequent status hearings, Haskell told the court he still "need[ed] to contact an individual" he had been unable to find and needed his investigator "to check a couple things out."

¶ 38 Haskell did not file an amended petition; rather, on August 10, 2016, he moved to withdraw under the procedures set forth in *Greer* and *People v. Kuehner*, 2015 IL 117695. Haskell also filed a supporting memorandum, asserting he could not ethically proceed with defendant's petition. In relevant part, as to defendant's actual-innocence claim, Haskell noted the lack of notarization on Spires's affidavit was "at best problematic" but argued it arguably satisfied the requirements that the evidence was new, material, and noncumulative. Haskell asserted, however, the affidavit was not of such conclusive character as to probably change the result on retrial, because it appeared to have been executed on the same typewriter as defendant's *pro se* petition and was not notarized for authentication. Further, he argued he had not been provided any information that would allow him to confirm the existence of Spires, such as his current location, the nature of his relationship with defendant, and his criminal history or gang affiliation, if any. Finally, he contended, "the information provided by Spires that would have shifted the blame *** to Jamal [*sic*] Garcia [wa]s contradicted by multiple witnesses' description of a light skinned shooter *** where[as] *** Garcia, who is now deceased, was a dark skinned individual."

¶ 39 Haskell also certified under Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) that he had (1) reviewed the common-law record and report of proceedings submitted to this court in defendant's direct appeal, the PSI, defendant's briefs, and our disposition in his direct appeal; (2) consulted with defendant, both in writing and in person, in a manner "sufficient to fully understand [defendant's] issues and intent"; (3) read defendant's *pro se* petition; and (4) determined the *pro se* petition raised no issues of merit.

¶ 40 On February 27, 2017, Haskell told the court he intended to proceed on his motion. The court confirmed the State had not yet moved to dismiss the petition and asked defendant if he would like to respond to Haskell's motion. Defendant told the court his family was going to help him hire a private attorney and needed an additional six or seven months to do so. The court allowed Haskell to withdraw and also granted defendant leave to seek new representation. Though the State objected to the length of time defendant requested to find a new attorney, it did not object to the court granting defendant leave to do so.

¶ 41 On March 7, 2017, however, the State moved to reconsider the court's ruling granting defendant an extension of time to obtain new counsel. In its motion, the State cited *People v.*

Thomas, 2013 IL App (2d) 120646, in support of the proposition that, as long as a proper *Greer* motion and Rule 651(c) certificate had been filed, a defendant is not entitled to receive the services of another attorney, either appointed or retained, to second-guess the professional judgment of the attorney who withdrew. On March 21, 2017, the State moved to dismiss defendant's petition.

¶ 42 At the hearing on the State's motion to reconsider, the court asked defendant for his position. He told the court his family had been seeking an attorney to take over his representation and he felt Haskell had not properly represented him, because Haskell "never [sought] witnesses [or anything else] that [defendant] was telling [him] to seek." According to defendant, when Haskell told defendant of his plan to withdraw, defendant told Haskell "it would be in his best interest [to do so] because [he was] looking to hire a paid attorney."

¶ 43 The court denied the State's motion to reconsider, reasoning that it had not "jump[ed] as far" as the State believed it had. The court noted that, at the time it granted Haskell leave to withdraw, the State had not yet filed a responsive pleading. Accordingly, the court concluded, while it could not *appoint* another attorney to represent defendant, defendant was entitled to hire his own counsel to respond to the State's motion to dismiss or seek leave to file an amended petition, at which point the State could object. However, the court noted that, because the State had now filed a motion to dismiss, it had to move the proceedings forward, and therefore, it continued the motion to June 8, 2017, for a hearing on the motion. The court told defendant that, if he did not retain an attorney by that date, he would have to argue the motion himself.

¶ 44 On June 8, 2017, the law firm of McNamee & Mahoney, Ltd., entered its appearance on behalf of defendant. On January 23, 2018, after several continuances granted without objection from the State, attorney Timothy Mahoney told the court attorney Matthew Haiduk was also going to represent defendant, and he requested 60 days in which to amend defendant's *pro se* petition. The court granted the request without objection from the State.

¶ 45 At a status hearing on April 3, 2018, Mahoney told the court he and Haiduk had "discovered some new issues that caused [them] a little bit of concern." At subsequent status hearings, Mahoney told the court that, while "it doesn't look like there's much going on[,] there really is a lot going on" and that Mahoney had been making "some efforts *** to work this out through the authorities as [defendant had] provided some information several years ago."

¶ 46 At the final status date, on October 8, 2019, Haiduk told the court he had "done a pretty lengthy investigation" but would not be able to amend the petition. Accordingly, Haiduk and Mahoney elected to adopt defendant's *pro se* petition. The court set the State's motion to dismiss for a hearing.

¶ 47 Before the hearing on the State's motion, Haiduk certified under Rule 651(c) that he had "consulted with [defendant] by phone on November 15, 2019[,] to ascertaine [*sic*] his or her contentions of deprivations of constitutional rights, ha[d] examined the record of proceedings at the trial, and ha[d] made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions."

¶ 48 At the hearing on the State's motion to dismiss, the State reiterated the position set forth in its March 2017 motion to reconsider, *i.e.*, that, under *Thomas*, defendant was not entitled to new counsel once his original appointed attorney was granted leave to withdraw under *Greer*. With respect to defendant's actual-innocence claim, the State argued the claim could be dismissed for the sole reason that Spires's affidavit was not notarized. The State also noted

Spires's affidavit contained no information from which the court could determine the evidence was new and could not have been obtained before trial. Finally, the State argued Spires's affidavit contained inadmissible hearsay and that Garcia, who allegedly confessed to Spires, was now dead. The State also specifically adopted the contentions made by Haskell in his motion to withdraw.

¶ 49 With respect to the actual-innocence claim, Haiduk argued Garcia's statements to Spires were admissible as a statement against Garcia's penal interest. See Ill. R. Evid. 804(b)(3) (eff. Jan. 1, 2011). As to the existence of Spires, Haiduk stated he had "put 30 seconds in looking for [him]" and tendered to the court a computer printout (which the court did not admit into evidence) showing a man named "Markus Spires," who was about the same age as defendant and the witnesses in this case, was arrested and charged in Cook County in 2016 for an unidentified offense. As to the lack of notarization on Spires's "affidavit," Haiduk argued defendant was not required under the Act to have the "affidavit" notarized, as it was signed under penalty of perjury. According to Haiduk, whether Spires existed and whether he would testify consistently with his "affidavit" were factual questions to be resolved at a stage-three evidentiary hearing.

¶ 50 On February 28, 2020, the court entered a written order granting the State's motion to dismiss defendant's *pro se* petition. In relevant part, the court found the lack of notarization on Spires's "affidavit" was fatal to defendant's actual-innocence claim and, despite the fact the State had placed defendant on notice of the defect, defendant never attempted or was unable to correct it.

¶ 51 This appeal followed.

¶ 52 II. ANALYSIS

¶ 53 On appeal, defendant contends Haiduk and Mahoney, his retained attorneys, did not provide reasonable assistance as guaranteed by the Act and Rule 651(c). Specifically, he argues that, despite Haiduk's certification that he complied with Rule 651(c), his retained attorneys failed to (1) make certain routine amendments to his petition to avoid procedural obstacles, (2) properly present his actual-innocence claim, and (3) review pertinent transcripts, such as that of the sentencing hearing. He maintains his attorneys' unreasonable assistance requires remand without regard to the underlying merits of his petition and asks that we remand the matter for further second-stage proceedings with new appointed counsel.

¶ 54 The State does not specifically respond to the merits of defendant's contentions or raise any argument as to defendant's suggested remedy. Rather, the State argues the circuit court's order granting defendant's original appointed postconviction attorney leave to withdraw under *People v. Greer*, 212 Ill. 2d 92 (2004), extinguished defendant's right to counsel under the Act. As a result, the State asserts, defendant's free-standing claim of unreasonable assistance is not legally cognizable and must be rejected. In other words, once defendant's appointed attorney was granted leave to withdraw, defendant had no right to the assistance of *any* counsel and, therefore, no right to reasonable assistance of counsel. In support of its argument, the State relies primarily on *Greer* and *Thomas*. Thus, the State raises a threshold issue: whether a defendant is entitled to reasonable assistance of counsel if he or she retains an attorney to further press postconviction contentions after his or her original appointed postconviction attorney is allowed to withdraw after complying with *Greer* and Rule 651(c).

¶ 55 Because this appeal arises from a second-stage dismissal under the Act, our review is *de novo*. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). To the extent the case requires us to interpret the Act and Rule 651(c) and determine whether defendant's retained attorneys complied with Rule 651(c), our review is also *de novo*. *People v. Tousignant*, 2014 IL 115329, ¶ 8; *People v. Profit*, 2012 IL App (1st) 101307, ¶ 17.

¶ 56 A. Was Defendant Entitled to Reasonable Assistance?

¶ 57 1. *The Act*

¶ 58 The Act sets forth a procedure under which an incarcerated defendant can assert his or her conviction was the result of a substantial denial of his or her rights under the United States Constitution, the Illinois Constitution, or both. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). The Act contemplates a three-stage proceeding, which is initiated by the filing of a petition. *Id.* The defendant must verify the petition by affidavit (725 ILCS 5/122-1(b) (West 2010)); the petition must "clearly set forth the respects in which [his or her] constitutional rights were violated" (*id.* § 122-2); and the petition must have attached thereto affidavits, records, or other evidence supporting its allegations or state why the same are not attached (*id.*).

¶ 59 At the first stage of proceedings, the circuit court must, within 90 days of the petition's filing, independently evaluate the petition, and if the court determines it is frivolous and patently without merit, it must dismiss the petition in a written order. *Id.* § 122-2.1(a)(2). Accordingly, the petition advances to the second stage if (1) the court fails to rule on the petition within the 90-day period, regardless of the petition's merit (*People v. Harris*, 224 Ill. 2d 115, 129 (2007)), or (2) the facts alleged in the petition state an arguable claim of constitutional deprivation (*Hodges*, 234 Ill. 2d at 9, 17).

¶ 60 At the second stage, the court shall appoint counsel for an indigent defendant upon his or her request. 725 ILCS 5/122-4 (West 2010). The State may answer the petition or move to dismiss it. *Id.* § 122-5. The Act gives the court broad discretion, at any time before final judgment, to allow amendments to the pleadings and extensions of time "as shall be appropriate, just[,] and reasonable and as is generally provided in civil cases." *Id.* The question at the second stage of proceedings is whether the allegations of the petition, taken as true unless positively rebutted by the record, and the attached supporting materials make a substantial showing of a constitutional violation. *People v. Domagala*, 2013 IL 113688, ¶¶ 33, 35. In deciding this question, the court does not make credibility determinations. *People v. Coleman*, 183 Ill. 2d 366, 385 (1998). If the petition makes such a showing, it advances to a third-stage evidentiary hearing. *Id.*

¶ 61 2. *The Statutory Right to Assistance of Counsel*

¶ 62 It is well established there is no *constitutional* right to counsel in proceedings under the Act. *People v. Owens*, 139 Ill. 2d 351, 364-65 (1990). Rather, the right to counsel is derived solely from the Act, and, therefore, "defendants are guaranteed only the level of assistance provided for by the Act." *People v. Johnson*, 2018 IL 122227, ¶ 16 (*Granville Johnson*). A defendant who is represented by counsel in proceedings under the Act is entitled to "a 'reasonable' level of attorney assistance." *Id.* This is true whether the attorney is appointed or retained and whether the matter is at the first, second, or third stage of the proceedings. *Id.* ¶¶ 16, 18.

¶ 63 Rule 651(c) limits the duties an attorney must undertake at the second stage of proceedings. It requires counsel "only to certify that they have 'consulted with the petitioner by phone, mail, electronic means[,] or in person,' 'examined the record' as needed to shape the defendant's *pro se* claims, and 'made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation' of those claims.' " *People v. Custer*, 2019 IL 123339, ¶ 32 (quoting Ill. S. Ct. R. 651(c) (eff. July 1, 2017)). Counsel's certification that he or she complied with those duties creates a rebuttable presumption that counsel provided the defendant a reasonable level of assistance, absent an affirmative showing in the record otherwise. *Id.* ¶¶ 32, 38. The requirements of Rule 651 "do not include bolstering every claim presented in a petitioner's *pro se* postconviction petition, regardless of its legal merit, or presenting each and every witness or shred of evidence the petitioner believes could potentially support his position." *Id.* ¶ 38.

¶ 64 3. *Greer* and *Thomas*

¶ 65 As noted, the State relies primarily on *Thomas* in support of its argument that defendant was not entitled to any assistance, let alone reasonable assistance, from his retained attorneys. However, because it informs much of the basis for the *Thomas* court's holding, we first examine *Greer*.

¶ 66 In *Greer*, the circuit court advanced the defendant's *pro se* petition to the second stage and appointed him counsel after it failed to rule on the petition within 90 days. *Greer*, 212 Ill. 2d at 200. The appointed attorney ultimately moved to withdraw, stating he had reviewed the record, transcripts of the proceedings, and the state's attorney's files and had interviewed "all relevant parties," including the defendant, and determined "he could find no basis on which to present any meritorious issue for review." (Internal quotation marks omitted.) *Id.* With his motion, the appointed attorney submitted a brief purporting to comply with *Anders v. California*, 386 U.S. 738 (1967), in which the attorney concluded he could not " 'properly substantiate' " the defendant's claims and had considered other potential claims and determined they lacked merit. *Greer*, 212 Ill. 2d at 200. Before the State had answered the petition or moved to dismiss it, the circuit court granted the appointed attorney's motion and dismissed the petition, finding it presented no constitutional claims of merit. The defendant appealed, arguing the court should not have permitted his appointed attorney to withdraw and should not have dismissed his petition *sua sponte* after granting his attorney's motion. The appellate court affirmed the portion of the circuit court's order granting the attorney leave to withdraw but reversed the portion dismissing the petition, finding the dismissal was premature. *Id.* at 195.

¶ 67 The supreme court affirmed the appellate court, holding an attorney appointed to represent a defendant in proceedings under the Act has an *ethical obligation* to withdraw when the attorney determines the defendant's claims are meritless. *Id.* at 209. In doing so, the court observed that an attorney cannot advance frivolous or spurious claims on behalf of a client, because doing so violates his or her duties under Illinois Supreme Court Rule 137 (eff. Jan. 1, 2018). *Greer*, 212 Ill. 2d at 205. With respect to postconviction counsel's duty to make any necessary amendments to adequately present a defendant's claims, the court found amendments that would only further frivolous or patently unmeritorious claims are not " 'necessary' " within the meaning of the rule. *Id.* The court also rejected the defendant's

argument that his appointed attorney could not withdraw because the Act did not specifically authorize it, reasoning, in part, as follows:

> "[T]he legislature has seen fit to confer upon the circuit court the power, without the necessity of appointing counsel, to dismiss, outright, petitions at first stage when they are deemed frivolous or patently without merit. The fact that the legislature has required appointment of counsel for indigent defendants when the circuit court has not considered a postconviction petition in a timely manner does *not*, in our opinion, indicate that the legislature intended that such a defendant have *continuing representation* throughout the remainder of postconviction proceedings, where counsel later determines that the petition is frivolous or clearly without merit. The purpose behind appointment of counsel in the latter instance might be, and probably is, nothing more than a desire to jump-start a process that has shown no signs of progress. There appears to be no other rationale for treating similarly situated defendants differently. Each defendant has filed a frivolous petition. The legislature surely did not intend to accord the latter defendant continuing representation after counsel determines the petition to be frivolous when the former defendant is never given counsel in the first place." (Emphases in original and added.) *Id.* at 208-09.

¶ 68 In *Thomas*, the defendant's *pro se* petition was advanced to the second stage, and the defendant was appointed counsel by reason of the circuit court's failure to take action within the initial 90-day period. *Thomas*, 2013 IL App (2d) 120646, ¶ 2. More than four years later, the appointed attorney certified she had consulted with the defendant and reviewed the record of proceedings, and she subsequently moved to withdraw under *Greer*. *Id.* ¶¶ 2-3. The circuit court granted the attorney's motion and denied the defendant's *pro se* petition before the State had answered or moved to dismiss it. *Id.* ¶ 3. The defendant appealed, and we reversed on the basis that the circuit court erred by denying the petition before the State answered or moved to dismiss it. *Id.* We did not consider whether the circuit court had erred in permitting the defendant's attorney to withdraw. *Id.* ¶ 4. On remand, the circuit court reappointed the attorney who had withdrawn and then later appointed a different attorney to replace her. *Id.* The new attorney did not comply with Rule 651(c) and instead moved to withdraw on the basis that the previous attorney had been permitted to withdraw under *Greer*, arguing the defendant had no right to " 'successive court-appointed counsel.' " *Id.* The circuit court allowed the attorney to withdraw and dismissed the defendant's petition. *Id.*

¶ 69 On appeal, the defendant argued the second-stage dismissal of his postconviction petition should be reversed because he did not receive reasonable assistance from the attorney appointed on remand, as the record did not show the attorney complied with Rule 651(c). *Id.* ¶¶ 6-7. We rejected defendant's contention, concluding defendant's right to reasonable assistance had been extinguished when his original postconviction attorney withdrew in conformity with *Greer*. *Id.* ¶ 9. We interpreted the words "continuing representation," used by the *Greer* court, to mean "representation by *any* appointed attorney (as opposed to representation by the particular attorney seeking to withdraw)." (Emphasis in original.) *Id.* ¶ 7. We explained that to conclude otherwise would lead to the disparate treatment the *Greer* court denounced and, further, to appoint counsel in such a situation "would ordinarily be an empty gesture, inasmuch as successor counsel would be obliged to withdraw for precisely the same reasons that led his or her predecessor to withdraw." *Id.* Accordingly, we concluded, "once an attorney appointed to represent a defendant in a postconviction proceeding has withdrawn in

conformity with the requirements of *Greer*, there will be no further *statutory* right to counsel, at least in the absence of unusual circumstances." (Emphasis added.) *Id.* We further found that, because the defendant had no right to an attorney, the circuit court's appointment of counsel on remand "was [not] truly under the auspices of the Act" and, therefore, the defendant "was not entitled to the level of assistance guaranteed when the Act actually provides a right to counsel." *Id.* ¶ 9.

¶ 70 4. *This Case*

¶ 71 As noted, the State argues, under *Thomas*, once Haskell certified under Rule 651(c) that he had complied with the rule and was allowed to withdraw, defendant no longer had a statutory right to counsel and, therefore, no right to reasonable assistance from *any* attorney, let alone his retained attorneys. We are not persuaded, and under the circumstances present here, we conclude defendant was entitled to reasonable assistance from his retained attorneys.

¶ 72 *Thomas* is inapposite. It involved a scenario in which the circuit court *appointed* new counsel to the defendant, on remand, after his original postconviction attorney withdrew, thus granting the defendant his statutory right to counsel twice, an action not contemplated by the Act. We note neither the Act nor *Thomas* considers the effect of withdrawal by original appointed postconviction counsel on a defendant's right to reasonable assistance from, as is the case here, a subsequently retained private attorney. More importantly, the circuit court in *Thomas* granted the defendant's original postconviction attorney leave to withdraw based on the attorney's conclusion that, under *Greer*, the defendant's claims were unmeritorious. In fact, the circuit court in *Thomas* went even further, dismissing the petition before the State had answered or moved to dismiss it. But in this case, there is no indication the court granted Haskell leave to withdraw on the basis that he determined the claims lacked merit as opposed to defendant's desire, and stated intent, to retain a different attorney. Indeed, the record compels the opposite conclusion.

¶ 73 At the hearing on Haskell's motion to withdraw, defendant told the circuit court his family intended to hire an attorney to press his postconviction claims. In granting Haskell's motion, the court made no mention of the merits of defendant's *pro se* petition. At the hearing on the State's motion to reconsider the order allowing defendant time to hire a new attorney, defendant told the court his family had been seeking an attorney; he felt Haskell had not properly represented him because Haskell "never [sought] witnesses [or anything else] that [defendant] was telling [Haskell] to seek"; and, when Haskell told defendant he intended to withdraw, defendant told Haskell "it would be in [Haskell's] best interest [to do so] because [defendant was] looking to hire a paid attorney." And in denying the State's motion, the court specifically stated it had not considered the merits of defendant's petition when it allowed Haskell to withdraw. Under these circumstances, it is clear the court allowed Haskell to withdraw because defendant intended to hire a new attorney, not because of Haskell's determination that defendant's claims lacked merit. Accordingly, we conclude Haskell's withdrawal did not, as in *Thomas*, extinguish defendant's right to reasonable assistance under the Act.

¶ 74 In reaching this conclusion, we note we have no quarrel with *Thomas*'s holding. Nothing in the Act contemplates the appointment of successive postconviction counsel once a defendant's original appointed counsel is granted leave to withdraw on the basis that the defendant's claims are unmeritorious. But the record in this case clearly shows the circuit

court's basis for allowing Haskell to withdraw was not the underlying merits of defendant's claims.

¶ 75 We find support for our conclusion in *Granville Johnson*, 2018 IL 122227. In *Granville Johnson*, the supreme court held a defendant who retains an attorney at the first stage of proceedings under the Act is entitled to reasonable assistance—though not necessarily to the protections of Rule 651(c) (which are germane to second-stage proceedings)—from his retained attorney. *Id.* ¶ 18. But, as noted, at the first stage, a defendant has no statutory right to appointed counsel; the right to appointed counsel attaches at the second stage. Accordingly, *Granville Johnson* supports the conclusion that a defendant is entitled to reasonable assistance even when he lacks the statutory right to appointed counsel, and we see no reason not to extend that reasoning to the case at bar.

¶ 76 B. Did Defendant's Attorneys Provide Reasonable Assistance?

¶ 77 1. *The Failure to Attempt to Obtain a Properly Notarized Affidavit From Spires to Support Defendant's Actual-Innocence Claim*

¶ 78 Defendant argues his retained attorneys provided unreasonable assistance when they failed to fulfill their duty to make amendments to the *pro se* petition that were necessary to adequately present his actual-innocence claim. Specifically, defendant asserts the record shows his retained attorneys made no effort to obtain a notarized affidavit from Spires to support defendant's actual-innocence claim. Defendant maintains his retained attorneys' failure to obtain a properly notarized affidavit from Spires was fatal to his actual-innocence claim, thus demonstrating they did not provide him reasonable assistance. We agree.

¶ 79 To succeed on a claim of actual innocence, a defendant must present new, material, noncumulative evidence that is of such conclusive character that it would probably change the result on retrial. *People v. Coleman*, 2013 IL 113307, ¶ 96. Evidence is new when it is discovered after trial and could not have been discovered sooner through the exercise of due diligence. *Id.* Evidence is material when it is relevant and probative of the defendant's innocence. *Id.* Evidence is noncumulative when it adds to what the jury heard. *Id.*

¶ 80 The failure to submit a properly notarized affidavit in support of a postconviction claim is a nonjurisdictional procedural defect. *People v. Allen*, 2015 IL 113135, ¶ 35. When, as here, the defendant submits an unnotarized statement, the State may challenge the defect at the second stage of the proceedings. *Id.* And when "a defendant's postconviction counsel is unable to obtain a properly notarized affidavit, the court may dismiss the petition upon the State's motion." *Id.*

¶ 81 Here, defendant submitted with his *pro se* petition the unnotarized statement of Spires, who was the sole support for his actual-innocence claim. Though the document was styled as an "affidavit," it was not an affidavit, which is a "statement sworn to before a person who has authority under the law to administer oaths." (Internal quotation marks omitted.) *Id.* ¶ 31. For purposes of the Act, a statement that is made under penalty of perjury as set forth in section 1-109 of the Code (735 ILCS 5/1-109 (West 2020)) but is not notarized is not sufficient to survive second-stage dismissal. *People v. Nitz*, 2011 IL App (2d) 100031, ¶¶ 16-17; see also *Allen*, 2015 IL 113135, ¶¶ 34-36 (unnotarized statement, signed by witness under penalty of perjury, was not a true affidavit but nevertheless constituted "other evidence" sufficient to survive summary dismissal); *People v. Velasco*, 2018 IL App (1st) 161683, ¶ 104 (unnotarized

statements were not true affidavits for purposes of the Act and were not sufficient to provide evidentiary support for the defendant's claims at second stage of proceedings; the State correctly challenged the defect at the second stage and the appellate court would not consider them on appeal). Accordingly, defendant's *pro se* actual-innocence claim suffered from a procedural defect that was fatal at the second stage of the proceedings. But the record shows that, even after the State challenged this fatal defect in its motion to dismiss, neither of his retained attorneys attempted to cure it.

¶ 82 Under Rule 651(c), postconviction counsel has an obligation to present a defendant's postconviction claims to the court in appropriate legal form, which at a minimum requires counsel "to attempt to obtain evidentiary support for claims raised in the *pro se* petition." *People v. Waldrop*, 353 Ill. App. 3d 244, 251 (2004). Further, postconviction counsel must at least attempt to overcome procedural defects, if possible. See *People v. Turner*, 187 Ill. 2d 406, 413-15 (1999). Ordinarily, we would presume defendant's retained attorneys made a concerted effort to obtain affidavits in support of his claim but were unable to do so. *People v. Johnson*, 154 Ill. 2d 227, 241 (1993) (*Milton Johnson*). But the record in this case flatly contradicts such a presumption. See *id.*

¶ 83 *Waldrop* is instructive. In that case, we held the defendant's postconviction attorney provided unreasonable assistance. *Waldrop*, 353 Ill. App. 3d at 250. We noted that, while courts will ordinarily presume postconviction counsel made a concerted effort to obtain affidavits in support of a defendant's claims, the record before us flatly contradicted such a conclusion because the attorney "mistakenly believed that he did not have a duty to seek an affidavit from the witness specifically identified in defendant's *pro se* petition." *Id.* (citing *Milton Johnson*, 154 Ill. 2d at 241).

¶ 84 Here, like in *Waldrop*, the record clearly shows Haiduk was operating under the misconception that Spires's signature "under penalty of perjury" was sufficient to advance the petition to the third stage. Indeed, he argued defendant was not required to have the "affidavit" notarized because it was signed under penalty of perjury and whether Spires existed and would testify consistently with his "affidavit" were factual questions to be resolved at a third-stage evidentiary hearing. This was incorrect; the failure to submit a notarized affidavit is fatal to a petition at the second stage. *Allen*, 2015 IL 113135, ¶ 35.

¶ 85 Admittedly, the record shows Haiduk made some effort *to confirm the existence of Spires*, as he apparently searched for Spires for 30 seconds and found a document from the Chicago Police Department that showed a person named Markus Spires, who was about the same age as defendant, Morales, and Garcia, had been arrested and charged in Cook County in 2016 with an unspecified offense. However, the record does not indicate defendant's retained attorneys made any effort, other than the cursory search described above, to locate Spires *and have him execute a proper affidavit*. Indeed, neither attorney ever indicated they tried without success to obtain a proper affidavit from Spires. And we cannot infer otherwise from their statements to the court that "there really [wa]s a lot going on" and they had "done a pretty lengthy investigation." Under these circumstances, we conclude that, notwithstanding Haiduk's Rule 651(c) certificate, defendant's retained attorneys failed to comply with their duty under that rule to present defendant's *pro se* actual-innocence claim in the appropriate form. At a minimum, the attorneys had a duty "to attempt to obtain" a proper affidavit (*Waldrop*, 353 Ill. App. 3d at 251), and the record rebuts the presumption they did so.

¶ 86 In the circuit court, the State took the position that Spires's affidavit was not sufficient to meet the conclusiveness requirement of an actual-innocence claim because the trial evidence showed the shooter was a "light-skinned" Hispanic man while Garcia was described at trial as "dark skinned." (Haskell also asserted this position in his motion to withdraw.) As noted, the State has abandoned this argument on appeal and not raised any other argument regarding the merits of defendant's actual-innocence claim. It has therefore forfeited any such argument. See, *e.g.*, *People v. Murphy*, 2017 IL App (1st) 142092, ¶ 16.

¶ 87 Moreover, in light of defendant's retained attorneys failure to comply with their duty to shape defendant's *pro se* claims into appropriate legal form, any argument regarding the merits of the actual-innocence claim is improper, as defendant is not required to show prejudice under these circumstances. See *People v. Suarez*, 224 Ill. 2d 37, 47-48 (2007). In any event, we note the circuit court dismissed defendant's actual-innocence claim without regard to the State's argument concerning the relative skin complexions of Garcia and defendant and instead relied solely on the lack of a proper affidavit. In other words, defendant's retained attorneys failure to attempt to obtain proper evidentiary support for defendant's actual-innocence claim prevented the circuit court from considering the merits of defendant's claim and directly contributed to its dismissal without an evidentiary hearing. See *Turner*, 187 Ill. 2d at 413. We conclude defendant did not receive reasonable assistance from his retained attorneys, and therefore, we reverse the circuit court's second-stage dismissal of his petition.

¶ 88 2. *Remedy*

¶ 89 We must next consider the appropriate remedy. Defendant asks that we remand the case for further second-stage proceedings, "this time with the reasonable assistance of post-conviction counsel to appropriately present [defendant's] contentions." The State offers no argument on the issue of remedy.

¶ 90 It is well settled that, when a reviewing court determines postconviction counsel has failed to comply with Rule 651(c), the appropriate remedy is to remand the cause to the circuit court for further second-stage proceedings, regardless of whether the claims raised in the petition had merit. *Suarez*, 224 Ill. 2d at 47-48 (collecting cases). Reviewing courts should "not speculate whether the [circuit] court would have dismissed the petition without an evidentiary hearing if counsel had adequately performed his [(or her)] duties under Rule 651(c)." *Turner*, 187 Ill. 2d at 416 (citing *Milton Johnson*, 154 Ill. 2d at 246). "It is the duty of the [circuit] court, and not [a] court [of review], to determine on the basis of a complete record whether the post-conviction claims require an evidentiary hearing." *Milton Johnson*, 154 Ill. 2d at 246. Under the facts of this case, we conclude the appropriate remedy is to remand this matter for further second-stage proceedings, at which the circuit court must appoint new counsel who must then comply with Rule 651(c). *Id.* at 249; *Turner*, 187 Ill. 2d at 417; *People v. Addison*, 2021 IL App (2d) 180545, ¶ 35; *Nitz*, 2011 IL App (2d) 100031, ¶ 21. In doing so, we emphasize nothing in this decision should be construed as an opinion on the merits of the claims in defendant's *pro se* petition.

¶ 91 III. CONCLUSION

¶ 92 For the reasons stated, we reverse the judgment of the circuit court of Kane County and remand this matter for second-stage postconviction proceedings with new counsel and

compliance with Rule 651(c).

¶ 93 Reversed and remanded.

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(a), is 33 pages.

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PROOF 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 July 15, 2022, the **Brief and Appendix for Plaintiff-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 provided service to the following:

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