No. 126940

IN THE

SUPREME COURT OF ILLINOIS

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

REPLY BRIEF FOR PETITIONER-APPELLANT

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ARGUMENT

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must demonstrate compliance with Illinois Supreme Court Rule 651(c) and that a certificate filed by an attorney who no longer represents the petitioner does not establish compliance with the Rule.

The State makes several arguments to support its claim that Smith's attorney did not have to comply with 651(c) because a previous attorney filed a certificate. The State notes that petitioners are only entitled to reasonable assistance of counsel and warns of the potential delays in the proceedings by requiring the attorney who ultimately represents the petitioner to comply with the Rule. The State also asks this Court to overturn settled law and hold that a lack of compliance with 651(c) only requires reversal if the petitioner can show prejudice.

Smith does not contest that he was only entitled to representation through legislative grace and no one is happy that post-conviction petitions can languish at the second stage for ten years or more. But it should never be forgotten that post-conviction proceedings are vitally important to ensure that innocent people are freed and that unconstitutional convictions do not stand. Post-conviction counsel's duties are limited and counsel may only have to provide a reasonable level of assistance, which is why it is paramount that these duties are fulfilled. Eliminating delays in post-conviction proceedings is an admirable goal, but these delays are not caused by an attorney fulfilling the limited requirements of 651(c). This Court's bright-line rule that non-compliance with 651(c) will not be tolerated actually streamlines the process because it helps ensure that all valid claims will be heard in the circuit court, which limits the issues on appeal. More important,

expedition of post-conviction petitions should not be achieved by diminishing Rule 651(c). Illinois requires its attorneys to be diligent and zealous advocates for their clients and this Court should require the attorney who represents the petitioner at the dispositive hearing to comply with 651(c).

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

The State does not argue that the record shows that Underwood, the attorney who represented Smith at the dispositive hearing, complied with Rule 651(c). Accordingly, Smith stands on the arguments in the opening brief that the record does not show her compliance with Rule 651(c). (Op Br 14-16)

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

In his opening brief, Smith argued that the plain language of 651(c) showed that Underwood had to comply with the Rule. (Op Br 17-18) The State contends that the plain language of the Rule shows a certificate filed by an attorney who withdraws suffices. (St Br 15-16) But Avant withdrew from representation and she was not Smith's attorney. She did not represent Smith at the dispositive hearing. The plain language is clear: the attorney who represents the petitioner must comply.

The State claims that the Rule refers to only one "showing" by a single attorney, not multiple showings by multiple attorneys. (St Br 16) The relevant language of the Rule is "petitioner's attorney" must demonstrate compliance. Avant withdrew from representation and there is no rule of statutory interpretation that could support a reading that she was Smith's attorney. She filed the certificate nearly two years before the hearing on the State's motion to dismiss. (C. 214; R. 125) The plain language of the Rule shows there was not compliance in this case.

More important, the purpose of the Rule is fulfilled when the attorney who actually represents the petitioner complies with the Rule. In his opening brief, Smith noted that post-conviction petitions often linger at the second stage for many years. Because the law is constantly evolving, the purpose of the Rule would be thwarted if a certificate filed years before the dispositive hearing by an attorney who no longer represents the attorney suffices. (Op Br 19-21) The State acknowledges that petitions often spend many years at the second stage. Smith and the State, however, differ on the relevance of that fact. The State does not address Smith's contention that an attorney who steps in years after the 651(c) certificate was filed might miss a valid claim based on changes in the law. Instead, the State argues that requiring the attorney who ultimately represents the petitioner to comply with the Rule could lead to more delay at the second stage. (St Br 19-20)

As the State notes throughout its brief, the duties proscribed by 651(c) are limited. A competent and diligent attorney can comply with the Rule in a reasonable amount of time. Moreover, avoiding delay should not come at the expense of compliance with the Rule. A post-conviction petitioner should be represented by counsel who has read the petition and the record and who is familiar with the relevant case law. Expediency in post-conviction proceedings should not be achieved by undermining Rule 651(c). Competent representation requires no less. See Ill. R. Prof. Conduct 1.3 com. 1 (a lawyer must "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf") Zealous advocacy requires that the attorney who represents the petitioner demonstrate compliance with the Rule.

The State argues that Smith proposes a rule that would make delay inevitable

and notes that it is not uncommon for post-conviction counsel to be replaced after filing a 651(c) certificate. (St Br 20) The State's warning about potential delays is misguided. There are of course a variety of reasons why a petition might stay at the second stage for years, but the attorney complying with 651(c) is certainly not one of the reasons. Reading the record and the petition and consulting with the client should not take months, let alone years, though unfortunately, that is not always the case. A certificate filed by an attorney who withdraws should not relieve the later attorney from complying with the minimal requirements of 651(c).

It should be noted that there are numerous reasons that attorneys withdraw from representation, such as new jobs, physical and mental health issues, burnout and even disbarment. It should not be assumed that the work of the prior attorney is adequate and that new counsel can parachute in, read the State's motion to dismiss, and adequately represent the petitioner at the hearing on the motion to dismiss.

The attorney who ultimately represents the petitioner should comply with 651(c) to ensure that the attorney has evaluated the claims in light of the current law. As noted in the opening brief, sometimes legal support for a claim arises during the pendency of the proceedings. *People v. Craighead*, 2015 IL App (5th) 140468, ¶¶ 13-20. (Op Br 20) Further, the law is constantly evolving. Recently, this Court decided *People v. Robinson*, 2020 IL 123849, ¶ 55, which noted that the lower courts had been applying the wrong standard when assessing actual innocence claims. Many lower courts had employed a standard that required evidence of total vindication or exoneration to support a claim of actual innocence. *Robinson*, 2020

IL 123849, ¶ 55. This Court reaffirmed that evidence supporting an actual innocence claim need not be entirely dispositive to be likely to alter the result on retrial. *Id*. It is important that the attorney who represents the petitioner evaluate his claims based on the current law. An attorney who relies on a certificate filed by another attorney years before might not incorporate relevant changes in the law into an amended petition.

The attorney who ultimately represents the post-conviction petitioner should also consult with their client because factual investigations can continue during the post-conviction proceedings. A petitioner pursuing an actual-innocence claim might obtain additional evidentiary support after the first attorney files a certificate. If the new attorney does not consult with the client, she might not learn of additional evidence supporting the claim. Moreover, an attorney who has complied with 651(c) will be better prepared at the hearing on the motion to dismiss.

Ironically, adopting the State's position could lead to a waste of judicial resources. Sometimes the legal basis for a claim might arise during the pendency of the proceedings. It is also possible that an attorney who withdraws did not provide reasonable assistance. While the petitioner's claims in cases like this might be vindicated following a lengthy appeal process, it is more efficient to litigate the claims while the petition is at the second stage. The requirements of 651(c) actually streamline the process because they make it more likely that all of the petitioner's valid claims are addressed by the circuit court. This will limit the issues that can be raised on appeal and preserve judicial resources. Adopting the State's position might save some time in the short run, but it will come at the expense of the post-conviction petitioner's rights. Further, any attempt to speed up the process by

diminishing the requirements of 651(c) will be illusory as it will inevitably lead to valid claims being raised on appeal.

In his opening brief, Smith argued that appellate court's reliance on *People v. Marshall*, 375 Ill. App. 3d 670 (1st Dist. 2007), was misplaced because that case concerned whether compliance with 651(c) is required at each stage of the post-conviction proceedings. (Op Br 25-26) In *Marshall*, the appellate court held that counsel at the third stage did not have to comply with 651(c) because the duties outlined in the rule only applied at the second stage. *Marshall*, 375 Ill. App. 3d at 683. Smith argued that even if counsel does not have to comply with 651(c) at the third stage, second-stage counsel must. Thus, *Marshall* did not speak to the issue in this case. Smith also questioned the continued viability of *Marshall* after this Court stated in *People v. Custer*, 2019 IL 123339, ¶ 32, that the "limited duties" required by Rule 651(c) "persist throughout the proceedings under the Act."

The State argues that this Court's straightforward statement in *Custer* that compliance with 651(c) persists throughout post-conviction proceedings is inapplicable because that case addressed whether the trial court was required to hold a *Krankel*-like inquiry into the petitioner's claims that counsel provided unreasonable assistance at the third-stage evidentiary hearing. (St Br 15) According to the State, this factual distinction shows that the holding of *Marshall* is still valid. (St Br 15) This Court's reasoning in *Custer* undermines the State's argument. This Court noted that 651(c) was the "gold standard" for post-conviction duties. One of the reasons a *Krankel*-like hearing after third-stage proceedings was not required was because the petitioner had the remedy of appealing the denial of

post-conviction relief based on the non-compliance with 651(c). *Custer*, 2019 IL 123339, ¶ 38. This could only be true if the requirements of 651(c) applied at the third stage. Thus, *Custer's* holding contradicts the State's argument that the requirements of 651(c) do not persist throughout the proceedings.

Regardless of whether 651(c) applies at the third stage, it does apply at the second stage and Smith's counsel should have complied with the requirements of the Rule.

In his opening brief, Smith cited *People v. Ritchie*, 258 Ill. App. 3d 164, 165 (2nd Dist. 1994), and *People v. Herrera*, 2012 IL App (2d) 110009, where the appellate court held that the 604(d) certificate must be filed by the attorney who represents the defendant at the post-plea hearing and a certificate filed by an attorney who no longer represents the defendant does not comply with the requirements of Illinois Supreme Court Rule 604(d). (Op Br 22-23) The State argues Smith's reliance on those cases is misplaced because the purpose of Rule 604(d) differs sharply from Rule 651(c). (St Br 17) The purpose of each Rule, however, is to ensure that the defendant receives the representation to which he is entitled. *See People v. Love*, 385 Ill. App. 3d 736, 738 (2d Dist. 2008) (purpose of 604(d) certificate is to ensure counsel has reviewed the defendant's claim and considered all relevant bases for the motion to withdraw the guilty plea or to reconsider the sentence); *People v. Wright*, 149 Ill. 2d 36, 66-67 (1992) (purpose of 651(c) certificate is to ensure that petitioners receive adequate representation such that their claims of constitutional deprivation are properly set forth). While 604(d) and 651(c) apply to different proceedings with different standards, the purpose of both is to ensure defendants receive adequate representation.

The State asks this Court to adopt the appellate court's reasoning that the 604(d) cases are not relevant because 604(d) protects a defendant's right to effective assistance of counsel at a post-plea hearing whereas 651(c) protects a petitioner's statutory right to reasonable assistance of counsel during post-conviction proceedings. (St Br 17) While there is a lesser standard applied to post-conviction counsel, the standard must still be met. The State is correct that the requirements of 651(c) are limited in scope. This is not a reason to forgive non-compliance with the Rule. When post-conviction counsel does not complete the few duties imposed by the rule, the limited right to counsel conferred by the Act becomes illusory. *People v. Schlosser*, 2017 IL App (1st) 150355, ¶ 44.

C. *Suarez* mandates a reversal in this case and this Court should reject the State's request to change settled law with regards to the requirement for a remand when the record does not show compliance with Rule 651(c).

This Court's precedent, most recently reaffirmed in *People v. Suarez*, 224 Ill. 2d 37, 47, (2007), holds that when the record does not establish compliance with Rule 651(c), the cause must be remanded, regardless of whether the petitioner can show merit to the claims in the petition. The State argues that this case is distinguishable from *Suarez* because, in *Suarez*, counsel did not file a 651(c) certificate and the record did not demonstrate that counsel consulted with the petitioner. (St Br 25) Smith's attorney, however, did not file a certificate and the record does not show that she otherwise complied with the requirements of 651(c). The certificate filed by an attorney who withdrew from representation and was not present at the dispositive hearing does not show compliance with Rule 651(c).

Thus, this case is directly on point with *Suarez* and requires a remand. The State argues that some lower courts have construed the rule of *Suarez* too

broadly by requiring a remand where counsel filed a 651(c) certificate, but counsel was deemed to have performed one of the duties deficiently. (St Br 26-27) Because the record does not show Smith's attorney complied with 651(c), Smith is entitled to a remand under the narrowest holding of *Suarez*.

The State also argues that even if Underwood did not comply with Rule 651(c), Smith is not entitled to a remand because he did not show prejudice. (St Br 23-25) In his opening brief, Smith noted that this Court has long held that non-compliance with Rule 651(c) will not be excused on the basis of harmless error. *Suarez*, 224 Ill. 2d at 47; *People v. Turner*, 187 Ill. 2d 406, 415-16 (1999); *People v. Johnson*, 154 Ill. 2d 227, 246 (1993)*; People v. Wales*, 46 Ill. 2d 79(1970); *People v. Barnes*, 40 Ill. 2d 383 (1968); *People v. Ford*, 40 Ill. 2d 440 (1968); *People v. Wilson*, 40 Ill. 2d 378 (1968); *People v. Craig*, 40 Ill. 2d 466 (1968); *People v. Tyner*, 40 Ill. 2d 1 (1968). (Op Br 18-19) The lower courts have consistently relied on this principle and have required remand when the record does not show compliance with Rule 651(c). *People v. Schlosser*, 2017 IL App (1st) 150355, ¶ 42; *People v. Jones*, 2016 IL App (3d) 140094, ¶ 28; *People v. Carrizoza*, 2018 IL App (3d) 160051, ¶ 13; *People v. Shortridge*, 2012 IL App (4th) 100663, ¶¶ 13-15.

The State argues that Smith must show prejudice to warrant a remand because in cases where a defendant is constitutionally guaranteed counsel, a defendant is not entitled to relief based on counsel's deficient performance unless he also demonstrates prejudice. (St Br 23-24 citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984).) The State argues, "It would be odd, indeed, if the same were not true when counsel is not constitutionally guaranteed but merely afforded as a 'matter of legislative grace.'" (St Br 24)

This Court should reject the State's attempt to change settled law. A post-conviction petition is not a trial where there is an entire record to determine whether counsel's performance was deficient. In *People v. Slaughter*,39 Ill. 2d 278, 285 (1968), this Court recognized that the post-conviction statute cannot perform its function unless the attorney appointed to represent an indigent petitioner consults with the petitioner, reads the record of the trial proceedings, and makes any necessary amendments to adequately present the petitioner's claims. When post-conviction counsel does not complete the few duties imposed by the rule, the limited right to counsel conferred by the Act becomes illusory. *People v. Shelton*, 2018 IL App (2d) 160303, ¶ 37.

Moreover, this Court rejected a similar argument by the State in *Suarez* stating:

> This court has consistently held that remand is required where postconviction counsel failed to fulfill the duties of consultation, examining the record, and amendment of the *pro se* petition, regardless of whether the claims raised in the petition had merit ..... Our Rule 651(c) analysis has been driven, not by whether a particular defendant's claim is potentially meritorious.... The State presents no new persuasive arguments that would justify departing from our prior case law. Accordingly, we decline to hold that noncompliance with Rule 651(c) may be excused on the basis of harmless error.

Suarez, 224 Ill. 2d at 42, 51 (remanding because of unreasonable assistance, even though no amount of amendment could save petitioner's *Apprendi* claim). This Court had the benefit of *Strickland's* holding when it decided *Suarez* and the State has not presented a compelling reason to change this bright-line rule.

Moreover, there is a great difference between the remedies when a defendant received ineffective assistance of counsel and when a petitioner's counsel does not comply with Rule 651(c). Ineffective assistance requires a new trial whereas

non-compliance with 651(c) results in a remand for counsel to comply with the very limited requirements of 651(c). As noted above, this bright-line rule promotes efficiency because it ensures that all valid claims will be addressed by the circuit court, which further limits the issues that can be raised on appeal. Accordingly, this Court should affirm its long-standing rule that non-compliance with Rule 651(c) requires a remand, regardless of whether the petitioner can show prejudice.

D. Conclusion

The requirements of Rule 651(c) are limited, but vital. There is no support in the language of the Rule that compliance by an attorney who no longer represents the petitioner satisfies the obligations of 651(c). Requiring compliance by the attorney who represents the petitioner at the dispositive hearing ensures that the purpose of the Rule is fulfilled. A petitioner is entitled to have his case argued by an attorney who is familiar with the record, the claims, and the relevant law. A certificate filed years before the hearing should not deprive a petitioner of counsel who has met the limited requirements of 651(c). Contrary to the State's assertion, this Court's bright-line rule that non-compliance with 651(c) will not be tolerated leads to a more efficient post-conviction process because it helps ensure that the circuit court will address all of a petitioner's valid claims. This not only assures that a petitioner's rights are vindicated, it limits the issues to be raised on appeal and preserves judicial resources. This Court should therefore reject the State's request to overturn settled law that non-compliance with Rule 651(c) requires a remand, regardless of whether the petitioner can show prejudice. Accordingly, this Court should remand the cause for further second-stage proceedings.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 12 pages.

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NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On February 18, 2022, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the petitioner-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

/s/Alicia Corona
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