No. 126940

IN THE
SUPREME COURT OF ILLINOIS

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

BRIEF OF RESPONDENT-APPELLEE
PEOPLE OF THE STATE OF ILLINOIS

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ORAL ARGUMENT REQUESTED

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NATURE OF THE CASE

The circuit court dismissed petitioner's postconviction petition at the second stage, holding that petitioner failed to make a substantial showing of a denial of a constitutional right. Petitioner appeals, claiming that he received unreasonable assistance of postconviction counsel. No issue is raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether petitioner has failed to show that postconviction counsel provided unreasonable assistance, where (1) petitioner's first attorney complied with Illinois Supreme Court Rule 651(c) and ensured that petitioner's claims were in the correct legal form, and (2) petitioner's second attorney reasonably represented petitioner at the second-stage hearing.

2. Whether petitioner has failed to demonstrate the prejudice necessary to obtain a remand for new second-stage proceedings.

JURISDICTION

Appellate jurisdiction lies under Supreme Court Rules 315 and 612(b). This Court granted leave to appeal on May 26, 2021.

STATEMENT OF FACTS

Petitioner was charged with home invasion and armed robbery after he and two accomplices robbed an apartment where Gabriel Curiel was home with his children, including six-year-old David Curiel, as well as his brother,

Jonathan Collazo. *See* Tr.C40-42, Tr.C60-61, Tr.C64-68.[1] The men stabbed Gabriel in both lungs and shot David in the head, but they survived their injuries, so petitioner was also charged with multiple counts of attempted murder and aggravated battery. *See* Tr.C43-51, Tr.C53, Tr.C62.

I. Trial and Direct Appeal

Before trial, petitioner moved for a hearing to test David's competency to testify, citing David's youth and his brain injury. Tr.C99-101. David was expected to identify petitioner as a perpetrator, based on his oral statements to his mother and the prosecutors. Tr.C142, Tr.C144-45. The trial court declined to hold a pretrial hearing, stating that it would address David's competency if it became an issue at trial. C50-51.

When the prosecutor called David at trial, he testified that he was nine years old, in the fourth grade, and lived with his mother. Tr.R.PP176-77. But on further questioning, David replied, "I need a hug," "I need my mom," and "I need to use the bathroom real bad." Tr.R.PP178. The jury was excused, and defense counsel moved for a mistrial, noting that David "broke down" on the stand, and arguing that it was "highly prejudicial that the jury saw all of that." Tr.R.PP178-79. The court denied a mistrial. Tr.R.PP180-

[1] "C" and "R" refer to the common law record and reports of proceedings in petitioner's postconviction appeal (No. 1-18-1220); "Tr.C." and "Tr.R." refer to the common-law record and reports of proceedings from petitioner's direct appeal (No. 1-12-0311); and "Pet. Br." and "A" refer to petitioner's opening brief and appendix.

82. The People declined to present further testimony from David, Tr.R.PP208-09, and did not present evidence of David's out-of-court statements identifying petitioner, *see* Tr.R.QQ108-22 (testimony of David Curiel's mother).

Gabriel Curiel testified that he had known petitioner for 17 years when petitioner knocked on his apartment door on the morning of January 18, 2008. Tr. R.PP24-28. When Gabriel opened the door, petitioner entered with two masked men, one of whom carried a gun. Tr.R.PP28-29. The masked men demanded money, Tr.R.PP30-31, while petitioner tackled Gabriel, duct-taped his legs together, and stabbed Gabriel on both sides of his chest, his neck, and his arms, Tr.R.PP33-34. Gabriel blacked out when a masked man stomped on his face. Tr.R.PP35-36. When he regained consciousness, he discovered that he had been shot in the shoulder; his child, David, was holding his head and sobbing. R.PP37-39.

Gabriel's brother, Jonathan Collazo, was in the apartment at the time, and he testified that he awoke to hear Gabriel screaming. Tr.R.PP99-100. Collazo opened his bedroom door and looked down the hall, where a masked man was holding a gun, and David was sitting on the couch crying. Tr.R.PP101. Collazo found Gabriel on the kitchen floor, where petitioner was tying him up. Tr.R.PP101-02. Collazo had known petitioner for as "long as [he could] remember" and considered him one of Gabriel's "best friends." Tr.R.PP98. A masked man ordered Collazo to the floor and hit

him in the back of the head with a gun. Tr.R.PP103-04. When the man went to assist petitioner, Collazo fled, climbing through his bedroom window onto a roof. Tr.R.PP105-06. From a liquor store, Collazo called police, who arrived at the apartment within minutes. Tr.R.PP107. When officers arrived, David had lost a large amount of blood and his eyes were rolling back into his head. Tr.R.PP157-58.

Later on the day of the attack, police visited petitioner's home, where they found petitioner bleeding from a fresh wound on his face and with cuts on his hands. Tr.R.PP191-96. Under a mattress in a bedroom, they found more than $2,000 in cash; one of the bills was stained with Gabriel's blood. TR.R.PP199-200, PP223-24, Tr.R.QQ53-54.

At the end of the case, at petitioner's request, the trial court instructed jurors to disregard David's brief appearance in the courtroom, stating:

> David Curiel was walked into the courtroom and was unable to testify. I'm going to instruct you to disregard the fact that he appeared, his demeanor and what was said during the brief conversation he had with the State. You're not to consider that in arriving in your decision in this case.

Tr.R.RR7-8.

The jury convicted petitioner of two counts of attempted murder, home invasion, armed robbery, aggravated battery of a child, and two counts of aggravated battery with a firearm. Tr.C154-60. The trial court sentenced petitioner to an aggregate 99 years in prison. Tr.R.YY6-8.

On direct appeal, the appellate court vacated two of petitioner's aggravated battery convictions (on which judgment had been entered and concurrent sentences imposed) because they violated the one-act, one-crime doctrine, but otherwise affirmed petitioner's convictions and his aggregate 99-year sentence. *People v. Smith*, 2013 IL App (1st) 120311-U, ¶¶ 8-10.

II. Postconviction Proceedings in Circuit Court

In March 2014, petitioner filed a *pro se* postconviction petition, arguing, in part, that the trial court erred by denying a pretrial hearing to evaluate David's competency and that petitioner was denied a fair trial due to David's emotional reaction on the stand. C43-47. Petitioner argued that the competency issue was "the core of this case," and that appellate counsel's failure to raise this critical issue was objectively unreasonable. C96-97.

Because the trial court failed to conduct a first-stage review of the petition within the requisite 90 days, *see* 725 ILCS 5/122-2.1(a), it docketed the petition for second-stage proceedings and appointed counsel, R49-50.

Assistant Public Defender (APD) Denise Avant appeared on January 23, 2015, and requested the trial transcripts. R56-58. On the next court date in April, Avant reported that she had begun reviewing the transcripts and intended to "interview Mr. Smith to see what his claims actually are." R61. In August, Avant reported that she had "read the record and interviewed Mr. Smith," but "[t]here are some things I still need to check out." R70. In January 2016, Avant reported that she was waiting to talk to

petitioner's trial counsel, R73.

On April 22, 2016, Avant filed a certificate pursuant to Supreme Court Rule 651(c), which stated:

> 1. I have consulted with petitioner, Karl Smith by telephone on October 14, 2015, to ascertain his contentions of deprivations of constitutional rights[.]
>
> 2. I have reviewed a copy of petitioner's trial transcript totaling 15 volumes, presided over by the Honorable Thomas [J.] Hennelly.
>
> 3. I have reviewed the briefs in petitioner's direct appeal, No. 12-0311.
>
> 4. I have researched the issues in petitioner's pro se Petition for Postconviction Relief.
>
> 5. I have spoken to petitioner's trial attorney, Jennifer Gill[,] on April 21, 2016.
>
> 6. I have determined that no supplemental petition is necessary for an adequate presentation of petitioner's contention of deprivation of his constitutional rights.

C214.

The People requested time to review the petition. R79. On April 7, 2017, the People filed a motion to dismiss, asserting that (1) the petition was time-barred, and (2) petitioner failed to make a substantial showing of the denial of a constitutional right. C230-46. The People noted that petitioner's claims of trial error were forfeited and argued that petitioner had no meritorious claim that his direct appeal counsel was ineffective. *Id.*

Avant reviewed the motion to dismiss, R97, and discussed it with petitioner, R101. On August 4, 2017, Avant filed a response, arguing that

although the petition was one month late, petitioner had not been culpably negligent. C262-66. She supported the filing with petitioner's affidavit explaining his failure to comply with the deadline. C266.

The matter was set for a hearing on the People's motion to dismiss. R112. However, before that hearing was held, Avant resigned her employment with the public defender's office. R115-16. On February 2, 2018, APD Kristine Underwood appeared on petitioner's behalf, and argument was scheduled for the following month. R122-23.

At the March 26, 2018 hearing, the People argued that petitioner's "main contentions are that his appellate attorney was ineffective for failing to raise various claims in the Appellate Court," but he failed to make a substantial showing of ineffective assistance. R126. Underwood argued that (1) the petition made the requisite substantial showing, and (2) the court should find that the lateness of the petition was not due to petitioner's culpable negligence. R128-31. On the first issue, Underwood emphasized that the trial court erred by failing to evaluate David Curiel's competency before trial, and that petitioner was denied a fair trial by David's emotional reaction on the stand, R129-31, such that he had meritorious claims for appeal. The People responded that "appellate counsel has the discretion in choosing which issue to raise" and that petitioner could not show that he was prejudiced by counsel's failure to raise the issues pertaining to David. R131-32.

The circuit court dismissed the petition. R132-33. It noted that the petition was untimely but did not address culpable negligence. R132. Instead, the court held that petitioner was not entitled to a third-stage hearing because he failed to make a substantial showing that appellate counsel was ineffective because "there was no trial court error" to raise. R133. The court addressed the claims relating to David, noting that no error occurred because David ultimately "never testified," and the jury was instructed to disregard David's appearance in the courtroom. *Id.*

III. Postconviction Appeal

On appeal, petitioner argued only that he was entitled to a remand for further proceedings because Underwood did not file an additional Rule 651(c) certificate. A12, ¶ 1. As the appellate court emphasized, petitioner "does not dispute that APD Avant complied with the requirements of Rule 651(c)," but "argue[d] that, regardless of APD Avant's compliance, APD Underwood, as the attorney who represented him at the hearing on the State's motion to dismiss, was independently required to comply with Rule 651(c)." A16, ¶ 13.

The appellate court rejected this argument, reasoning that "counsel at the various stages of the postconviction process have distinct roles." A18, ¶ 18. Avant consulted with petitioner, ascertained his claims of error, reviewed the full trial record, and ensured that his allegations were in the correct legal form. A19, ¶ 19. "When APD Underwood replaced APD Avant as [petitioner's] counsel, all that was left to do was orally argue [petitioner's]

position at the hearing on the State's motion to dismiss." A19, ¶ 20. "To perform that limited role, it was not necessary for APD Underwood to independently consult with [petitioner] to ascertain his contentions of constitutional error, review the trial record, or determine whether any amendments to [petitioner's] *pro se* petition were necessary to adequately present his claims." A20, ¶ 20.

Finding that petitioner had failed to demonstrate that he received unreasonable assistance of postconviction counsel based on Underwood's failure to independently comply with Rule 651(c), the appellate court affirmed the judgment dismissing petitioner's postconviction petition. A21, ¶¶ 24, 26.

STANDARD OF REVIEW

Whether postconviction counsel provided reasonable assistance presents a legal question that this Court reviews *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007).

ARGUMENT

I. The Trial Court Correctly Dismissed the Postconviction Petition at the Second Stage Because Petitioner Failed to Make a Substantial Showing of a Constitutional Violation.

The trial court dismissed petitioner's petition at the second stage, and petitioner does not dispute that it correctly concluded that he failed to make a substantial showing of a constitutional violation.

The Post-Conviction Hearing Act establishes a three-stage process for adjudicating claims that constitutional errors occurred at trial. *People v. Cotto*, 2016 IL 119006, ¶ 26. At the first stage, a trial court must review a petition within 90 days to determine whether it should be dismissed as "frivolous or . . . patently without merit." 725 ILCS 5/122-2.1. If the petition is not frivolous — or if the trial court fails to perform its review within the requisite 90 days — the petition is docketed for further proceedings, and the court may appoint counsel. 725 ILCS 5/122-4; *see People v. Swamynathan*, 236 Ill. 2d 103, 114 (2010) ("failure to summarily dismiss a petition within 90 days requires appointment of counsel and second-stage review of the petition").

At the second stage, the People may move to dismiss. *Cotto*, 2016 IL 119006, ¶ 27. The People may assert that the petition is time barred, and petitioner may respond that the lateness was not due to his culpable negligence. *See People v. Perkins*, 229 Ill. 2d 34, 43 (2008). Alternatively, the People may seek dismissal on the merits, and "[a]t 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. The purpose of a third-stage hearing, where appropriate, is to "determine whether the evidence introduced demonstrates

that the petitioner is, in fact, entitled to relief." *People v. Domagala*, 2013 IL 113688, ¶ 34.

Here, the trial court dismissed the petition at the second stage because petitioner failed to make a substantial showing that he received the ineffective assistance of appellate counsel. Petitioner does not argue that the trial court erred in deeming the petition meritless and has forfeited that claim. *Cotto*, 2016 IL 119006, ¶ 49 (postconviction petitioner who claims only unreasonable assistance on appeal forfeits challenge to merits of dismissal). Accordingly, on finding that petitioner received the reasonable assistance of postconviction counsel, this Court should affirm the judgment of dismissal.

II. Petitioner Is Not Entitled to New Second-Stage Proceedings Because He Has Failed to Demonstrate That Postconviction Counsel Performed Unreasonably or That He Was Prejudiced by Any Deficiency.

Petitioner claims that, notwithstanding that his petition lacked merit, he is entitled to new second-stage proceedings because he received unreasonable assistance of postconviction counsel. This Court should reject his argument, for petitioner has failed to demonstrate either that (1) postconviction counsel performed unreasonably, or (2) he was prejudiced.

A. Petitioner has not shown that postconviction counsel performed unreasonably.

First, petitioner has failed to show that counsel performed unreasonably.

Because no constitutional right to counsel attaches, a petitioner's entitlement to the assistance of postconviction 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)). Postconviction 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. Generally, postconviction counsel's role is "to shape [the petitioner's] complaints into the proper legal form and to present those complaints to the court." *People v. Owens*, 139 Ill. 2d 351, 365 (1990).

"To assure the reasonable assistance required by the Act," this Court adopted Illinois Supreme Court Rule 651(c). *Perkins*, 229 Ill. 2d at 42. The rule requires that the record in postconviction cases "shall contain a showing, which may be made by the certificate of petitioner's attorney," that counsel (1) "has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights"; (2) "has examined the record of the proceedings at the trial"; and (3) "has made any amendments to the petitions filed pro se that are necessary for an adequate presentation of petitioner's contentions." Ill. S. Ct. R. 651(c). The filing of a certificate creates a presumption that postconviction counsel carried out her Rule 651(c) duties. *People v. Custer*, 2019 IL 123339, ¶ 32.

Here, petitioner does not dispute that Avant carried out the duties mandated by Rule 651(c). *See* A16 (noting that petitioner "does not dispute that APD Avant complied with the requirements of Rule 651(c)"). Avant certified that she spoke with petitioner by phone to ascertain his claims, reviewed the 15-volume trial record and the briefs filed on direct appeal, researched the issues raised in the *pro se* petition, conferred with petitioner's trial counsel, and determined that no amendments to the petition were necessary. C214. And the record confirms that Avant diligently completed those tasks: starting in January 2015, Avant periodically updated the trial court on the status of her work before ultimately filing her certificate in April 2016. *See* R61 (requesting continuance to review transcripts and consult with petitioner); R64 (requesting continuance to finish reviewing transcripts); R70 (requesting continuance to further investigate); R73 (requesting continuance to interview trial counsel). When the People filed a motion to dismiss asserting that the petition was time-barred, Avant again conferred with petitioner, obtained his affidavit, and filed a response asserting a lack of culpable negligence. R97, R101, C262-66.

Petitioner therefore had counsel's assistance "to shape [his] complaints into the proper legal form and to present those complaints to the court." *Owens*, 139 Ill. 2d at 365. All that remained when Avant withdrew from the case was for the parties to present oral arguments at a hearing on the motion to dismiss. The pleadings fully briefed the two issues before the court at

that hearing: (1) whether the time bar should apply; and (2) "whether the petition and any accompanying documentation make a substantial showing of a constitutional violation," *Cotto*, 2016 IL 119006, ¶ 28. As a result, Underwood's role at that stage was limited: providing oral argument in support of her former colleague Avant's briefing. Underwood was not required to duplicate the Rule 651(c) tasks to carry out that limited role, but was instead governed by a general standard of reasonableness, which she plainly satisfied.

1. Petitioner was entitled to have a single attorney comply with Rule 651(c), and Underwood was not required to duplicate Avant's efforts.

For starters, the appellate court correctly held that Underwood was not required to independently comply with Rule 651(c) to provide reasonable assistance of postconviction counsel.

The appellate court's decision in *People v. Marshall*, 375 Ill. App. 3d 670 (1st Dist. 2007), is instructive. There, like here, the postconviction petitioner received the assistance of postconviction counsel in shaping his contentions. *Id.* at 673. With the help of that counsel, Marshall secured a third-stage hearing before a new attorney took over his representation. *Id.* The appellate court held that this new attorney was not required to file another Rule 651(c) certificate. *Id.* at 682-83. Because "[c]ounsel at the third stage of postconviction review argues the merits of the petition as it is presented by second-stage counsel," the appellate court reasoned, "Rule

651(c) does not require third-stage counsel to duplicate the efforts of second-stage counsel." *Id.* at 683. Rather, "Rule 651(c)'s requirements must be met only once." *Id.* at 682. The same rationale applies here, because Underwood merely assumed responsibility for arguing the merits of a fully briefed postconviction petition at the second-stage motion hearing.

Petitioner is incorrect that "the holding of *Marshall* with regards to compliance with Rule 651(c)" is undermined by this Court's decision in *People v. Custer*, 2019 IL 123339. *See* Pet. Br. 26 (petitioner's argument); *People v. Pabello*, 2019 IL App (2d) 170867, ¶ 34 (*Custer* did not overrule *Marshall*). Rather, *Custer* is inapposite to the issue addressed in *Marshall*. In *Custer*, which declined to adopt a *Krankel* procedure to evaluate claims of unreasonable assistance of postconviction counsel, 2019 IL 123339, ¶ 42, this Court reiterated that Rule 651(c) "sharply limits the requisite duties of postconviction counsel" and noted only that "[t]hose limited duties persist throughout the proceedings under the Act," *id.* ¶ 32. The Court did not consider, much less hold, that new counsel arguing in support of a fully briefed postconviction petition must duplicate the efforts of the counsel that assisted in the presentation of that petition.

Nor does the plain language of Rule 651(c) or its purpose support petitioner's contention that Underwood was required to duplicate Avant's efforts simply because Avant withdrew before presenting oral argument. In construing a court rule, this Court applies the principles of statutory

construction and "must give effect to the drafters' intent." *People v. Gorss*, 2022 IL 126464, ¶ 10. The best indicator of that intent is the rule's plain language. *Id.* To the extent that the language is ambiguous, this Court may consider the purpose of the rule and the policies it serves. *See McCarthy v. Taylor*, 2019 IL 123622, ¶¶ 19, 31 (adopting construction of Rule 137 that furthered its purpose); *Kunkel v. Walton*, 179 Ill. 2d 519, 533-34 (1997) ("Where the meaning of an enactment is unclear from the statutory language itself, the court may look beyond the language employed and consider the purpose behind the law and the evils the law was designed to remedy.").

Here, the rule's language is unambiguous. Rule 651(c) provides that the record on appeal "shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney" has completed a series of tasks. Ill. S. Ct. R. 651(c). The rule does not state that once this is done, every new attorney who subsequently appears in the case must redo the same tasks and also file a certificate. Instead, the rule refers to only one "showing" by a single "attorney" — not multiple showings by multiple attorneys. So, Avant satisfied the plain language of the rule when she filed her certificate, a point that petitioner does not dispute. Had petitioner demonstrated that *neither* Avant nor Underwood complied with Rule 651(c), he would have a valid claim that he had not received the reasonable assistance to which he was entitled.

Moreover, even if the language were ambiguous, its purpose would not be served by requiring a new attorney to duplicate the efforts of prior counsel who had complied with Rule 651(c). Rule 651(c) guarantees counsel who will "shape [a petitioner's] complaints into the proper legal form and . . . present those complaints to the court." *Owens*, 139 Ill. 2d at 365. Once the requisite pleadings have been filed to "shape" those allegations, Rule 651(c)'s purpose has been satisfied. The scope of postconviction counsel's duties at subsequent hearings turns not on Rule 651(c)'s mandates, but on the requirement to provide reasonable representation at those proceedings.

Petitioner's reliance on cases discussing Supreme Court Rule 604(d) is misplaced because the purpose of Rule 651(c) differs sharply from the purpose of Rule 604(d). *See* Pet. Br. 22 (citing *People v. Ritchie*, 258 Ill. App. 3d 164 (2d Dist. 1994), and *People v. Herrera*, 2012 IL App (2d) 110009). The purpose of Rule 604(d) "is to ensure that any errors that may have resulted in a guilty plea and subsequent sentence are brought to the attention of the circuit court before appeal, while memories are fresh and witnesses are available." *Gorss*, 2022 IL 126464, ¶ 15. As the appellate court noted, that rule "protects a defendant's constitutional right to effective assistance at a critical stage of the proceedings on his guilty plea," whereas the statutory right to reasonable assistance of postconviction counsel "differ[s] . . . drastically" and is more limited in scope. A21, ¶ 22. Thus, even "[a]ssuming *arguendo* that *Ritchie* and *Herrera* correctly interpreted the

requirements of Rule 604(d)" to require a new attorney who argues at a plea withdrawal hearing to file his own certificate, the same logic does not apply to postconviction counsel who assumes petitioner's representation before arguing at a second-stage hearing. *Id.* In sum, these cases interpreting Rule 604(d) are inapposite to the question in this case.

Petitioner is also incorrect that "[w]ithout compliance by the attorney who represents the petitioner at the hearing on the motion to dismiss, there will be no guarantee that his claims were adequately presented," because this contention conflates the requirements of Rule 651(c) with the general standard of assistance guaranteed to postconviction petitioners. That is, recognizing that a second attorney need not duplicate a first attorney's compliance with Rule 651(c) would not prevent petitioners from pursuing valid claims that later counsel failed to provide a reasonable standard of representation at subsequent proceedings.

"Rule 651(c) 'is merely a vehicle for ensuring a reasonable level of assistance' and should not be viewed as the only guarantee of reasonable assistance in postconviction proceedings." *Cotto*, 2016 IL 119006, ¶ 41 (quoting *People v. Anguiano*, 2013 IL App (1st) 113458, ¶ 37); *see also Pabello*, 2019 IL App (2d) 170867, ¶ 23 ("One aspect of reasonable assistance is compliance with Rule 651(c)."). Where Rule 651(c) does not govern, "performance is measured by the overarching reasonableness standard generally applicable to a postconviction proceeding." *Pabello*, 2019 IL App

(2d) 170867, ¶ 35. For example, where private counsel is retained, postconviction counsel need not comply with Rule 651(c), *see People v. Mitchell*, 189 Ill. 2d 312, 358 (2000), but is still required to perform reasonably, *Anguiano*, 2013 IL App (1st) 113458, ¶¶ 25-31; *see also Pabello*, 2019 IL App (2d) 170867, ¶¶ 27-28 (general reasonableness standard governs postconviction counsel's performance at third-stage evidentiary hearing); *Marshall*, 375 Ill. App. 3d at 683 (same).

Moreover, it is inaccurate that "[t]here is little cost to requiring petitioner's [second] attorney to comply" with Rule 651(c). Pet. Br. 28. Such a requirement unquestionably would delay resolution of postconviction cases, often by years. For example, it took nearly 16 months for Avant to carry out her Rule 651(c) duties in this case. Requiring a new attorney to duplicate those efforts would inject months or years of delay. Petitioner accurately notes that "[p]ost-conviction petitions often linger at the second stage for many years." Pet. Br. 19-20. Courts have criticized such delay as evidence that a petitioner has been failed by his attorneys; they have not praised delay as a means of securing *better* assistance by postconviction counsel. *See People v. Kelly*, 2012 IL App (1st) 101521, ¶ 40 ("The nearly 12-year period that elapsed from petitioner's filing of his *pro se* petition in July 1998 to the circuit court's dismissal of the amended petition in May 2010 illustrates the unreasonable representation provided by both appointed and privately retained counsel."); *People v. Woidtke*, 313 Ill. App. 3d 399, 413 (5th

Dist. 2000) (Maag, J., concurring) ("I write separately solely to state my strong personal belief that the actions of the trial court and counsel in allowing the defendant's postconviction petition to languish for *years* without even a hearing are unconscionable.") (emphasis in original). This Court should not adopt a construction of its rule that exacerbate such delay.

To be sure, sometimes delay is unavoidable. Such would be the case if Avant had been replaced *before* she was able to complete her Rule 651(c) duties and therefore had not ensured that petitioner's contentions were in the proper legal form. Petitioner proposes a rule that would make delay inevitable. After Avant completed her Rule 651(c) duties and readied the case for a second-stage hearing, petitioner was entitled to a ruling on his petition, and he received one less than two months after Underwood first appeared in his case. Under petitioner's proposed rule, that disposition would have had been delayed by months or longer. And, although the result in petitioner's case was a dismissal, petitioner's proposed rule of automatic delay would also deny prompt resolution of meritorious postconviction petitions. Notably, it is not uncommon for postconviction counsel to be replaced after completing the Rule 651(c) duties, before disposition of the case. The First District has confronted the issue twice since its decision in this case. *See People v. Battle*, 2021 IL App (1st) 182727-U, ¶¶ 38-46; *People v. Hemphill*, 2021 IL App (1st) 192008-U, ¶¶ 33-40.

Moreover, there is no corresponding benefit of petitioner's proposed rule that would justify such delay. Petitioner speculates that "meritorious claims may be missed" without this requirement, Pet. Br. 28, but this argument overlooks that appointed postconviction counsel need not search for claims not included in a *pro se* petition. Counsel may investigate additional issues, *Pendleton*, 223 Ill. 2d at 476, but "is only required to investigate and properly present the *petitioner's* claims," *People v. Davis*, 156 Ill. 2d 149, 164 (1993) (emphasis in original). The filing of a single Rule 651(c) certificate serves to ensure that was done. Petitioner was not entitled to have new counsel reinvestigate the same issues and conclude, again, that petitioner's claims were in the correct legal form, nor is there any benefit to petitioner to having a second counsel duplicate first counsel's efforts.

Thus, as the appellate court correctly held, that Underwood did not re-do the Rule 651(c) tasks that were properly completed by Avant provides no basis to conclude that Underwood did not provide reasonable assistance.

2. Underwood provided reasonable assistance at the second-stage hearing under the general reasonableness standard that governs after Rule 651(c)'s requirements have been met.

Applying the general reasonableness standard that governs once petitioner has received the assistance dictated by Rule 651(c), Underwood plainly provided the required level of assistance at petitioner's second-stage hearing.

Petitioner maintains only that Underwood should have duplicated the Rule 651(c) tasks before arguing at the hearing; he makes no argument that Underwood performed inadequately under the pertinent standard of general reasonableness. Because this point was not raised in his opening brief, his petition for leave to appeal, or his briefs in the appellate court, it has been forfeited. *See* Ill. S. Ct. R. 341(h)(7) ("Points not argued [in the opening brief] are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."); *WISAM 1, Inc. v. Ill. Liquor Control Comm'n*, 2014 IL 116173, ¶ 23 (issues not raised in petition for leave to appeal or in appellate court are forfeited).

Forfeiture aside, Underwood performed reasonably at the hearing. She emphasized the issue that the *pro se* petition described as "the core of this case," C97 — David Curiel's competency, the trial court's alleged errors in addressing this issue, and appellate counsel's failure to raise those errors on appeal, *see* R129-31. She also argued that petitioner was not culpably negligent in filing his petition one month late. R128. Underwood's arguments at the hearing demonstrated familiarity with the record, the issues in the *pro se* petition, and with the motion to dismiss, and Underwood satisfied the general standard of reasonable assistance. No remand is warranted due to her performance.

B. Petitioner has failed to show sufficient prejudice to warrant a remand.

Alternatively, this Court should affirm the appellate court's judgment because petitioner has failed to show prejudice from Underwood's performance. Although the appellate court did not address prejudice, "this court is not bound by the appellate court's reasoning and may affirm for any basis presented in the record." *People v. McDonough*, 239 Ill. 2d 260, 275 (2010).

Even if Underwood's performance were deficient (and it was not), petitioner was not prejudiced by that deficiency. The issues at the second-stage hearing were (1) whether the petition should be dismissed as time-barred, and (2) whether the allegations of petitioner's postconviction petition warranted an evidentiary hearing. Both issues were fully addressed in the filed pleadings. The circuit court noted that petitioner failed to comply with the filing deadline, but it did not address culpable negligence and ultimately held that the petition failed to make a substantial showing that appellate counsel was ineffective under *Strickland*. R132-33. This holding did not turn on any purported failing by Underwood.

Indeed, petitioner does not even claim that he was prejudiced; rather, petitioner contends that he is entitled to a remand without showing prejudice. Pet. Br. 18 ("remand is required . . . regardless of whether the claims raised in the petition had merit"). But in cases where counsel is

constitutionally guaranteed, a defendant generally 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); *Smith v. Robbins*, 528 U.S. 259, 285 (2000) (requiring prejudice for deficient performance by direct appeal counsel). 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." *Porter*, 122 Ill. 2d at 73.

Thus, the appellate court has extended the *Strickland* prejudice requirement to postconviction proceedings. It has uniformly held that a showing of prejudice is required where counsel's performance at a third-stage hearing is challenged. *See Pabello*, 2019 IL App (2d) 170867, ¶¶ 36, 44 (petitioner failed to show unreasonable assistance based on postconviction counsel's failure to present evidence at third-stage hearing where petitioner was not prejudiced); *People v. Hotwagner*, 2015 IL App (5th) 130525, ¶¶ 37, 51 (same).

The appellate court has also explained that a showing of prejudice should be required where counsel has filed a Rule 651(c) certificate and petitioner contends that she nevertheless performed deficiently. "[I]f a defendant is claiming that postconviction counsel performed [his] 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." *Landa*, 2020 IL App (1st) 170851, ¶ 58; *see also People v. Gallano*, 2019 IL App (1st) 160570, ¶ 30, *appeal denied*, 144 N.E.3d 1183 (Ill. 2020) (Table) (where postconviction 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 that claim was potentially "meritorious").

An exception to this prejudice requirement applies only if the record contains no Rule 651(c) certificate and otherwise fails to demonstrate that postconviction counsel carried out her basic Rule 651(c) duties. In *Suarez*, 224 Ill. 2d 37, appointed postconviction counsel filed no Rule 651(c) certificate, and the record did not demonstrate that he had conferred with his client. 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.

Although petitioner relies on this statement to suggest that a postconviction petitioner is never required to show prejudice, Pet. Br. 18, *Suarez* did not adopt such a rule. In effect, *Suarez* applied the *Cronic* standard — if counsel is so deficient as to provide no assistance at all, a defendant relieved from demonstrating prejudice, *United States v. Cronic*, 466 U.S. 648 (1984) — to a case where postconviction counsel's failures were

so complete as to constitute no assistance at all. Reading *Suarez* to require an automatic remand in every case, and not merely cases involving counsel's failure to fulfill fundamental duties under Rule 651(c), "equate[s] a postconviction counsel's failure to draft or amend [petitioner's] claim" in every instance into an ineffective assistance claim under *Cronic*, and is inconsistent with the principle that reasonable assistance "is supposed to be even lower than the *Strickland* standard." *People v. Zareski*, 2017 IL App (1st) 150836, ¶ 54.

Petitioner cites two appellate court cases that relied on *Suarez* to hold that a postconviction petitioner was not required to show prejudice based on counsel's failures at the second stage. *See* Pet. Br. 18. But these cases are easily distinguishable. In both cases, as in *Suarez*, counsel had failed to file a proper certificate, and the record did not otherwise demonstrate compliance with Rule 651(c)'s consultation or record review requirements. *See People v. Shelton*, 2018 IL App (2d) 160303, ¶ 37 (no certificate was filed and court declined to infer from record that counsel had complied with all components of Rule 651(c)); *People v. Schlosser*, 2017 IL App (1st) 150355, ¶ 44 (counsel's certificate did not comply with Rule 651(c) and record did not otherwise confirm that counsel had consulted with petitioner). Here, in contrast, Avant did file a proper 651(c) certificate, so these cases are of no moment.

To be sure, the appellate court has, on occasion, mistakenly applied a rule of automatic remand even where counsel did certify compliance with

Rule 651(c) but was deemed to have performed one of her duties deficiently. *See, e.g., People v. Jones*, 2016 IL App (3d) 140094, ¶¶ 26-33 (concluding that, notwithstanding certificate, postconviction counsel performed unreasonably by failing to advance claim in amended petition and attach affidavit, and declining to consider whether claims were meritorious); *People v. Thompson*, 2016 IL App (3d) 150644, ¶¶ 23-27 (holding that, notwithstanding certificate, postconviction counsel performed unreasonably by failing to review mental health records, and remanding without considering whether petitioner was prejudiced). Those cases rest on a misreading of *Suarez* and are incorrect. *See Landa*, 2020 IL App (1st) 170851, ¶ 58; *Gallano*, 2019 IL App (1st) 160570, ¶¶ 29-30. However, this Court need not decide whether to overrule them because they are distinguishable, given that they arose out of counsel's noncompliance with the specific duties of Rule 651(c). Here, there is no dispute that Avant fully complied with Rule 651(c), providing petitioner the assistance to which he was entitled under that rule.

Because Avant provided the assistance mandated by Rule 651(c), a showing of prejudice should be required. Unlike in *Suarez*, there is no concern "that where postconviction counsel does not adequately complete the duties mandated by the rule, the limited right to counsel conferred by the Act cannot be fully realized." 224 Ill. 2d at 51. Avant consulted with petitioner, researched his claims, reviewed the trial record, interviewed trial counsel, determined that no amendment to the petition was necessary, and filed a

response to the People's motion to dismiss asserting that petitioner's failure to comply with the filing deadline was not the result of culpable negligence. C214, C262-66.

And because Rule 651(c) was complied with, Underwood is held to a general standard of reasonableness, as discussed. Where that standard applies, this Court should require a showing of prejudice. And petitioner cannot demonstrate prejudice based on Underwood's performance at the second-stage hearing — indeed, he has forfeited any argument that his petition set forth a meritorious claim. *See Cotto*, 2016 IL 119006, ¶ 49 (petitioner who argued only that postconviction counsel was unreasonable for failing to rebut time-bar argument forfeited review of merits of his postconviction claims); *see also* Ill. S. Ct. R. 341(h)(7) (points not raised in opening brief may not be raised in reply brief). Accordingly, petitioner is not entitled to a remand.

CONCLUSION

This Court should affirm the appellate court's judgment.

February 1, 2022

Respectfully submitted,

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RULE 341(c) CERTIFICATE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 29 pages.

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CERTIFICATE OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On February 1, 2022, the foregoing **Brief of Respondent-Appellee People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which automatically served notice on counsel at the following e-mail address:

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