No. 127680

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOHN PINGELTON, Defendant-Appellant.	Appeal from the Appellate Court of Illinois, Fourth Judicial District, No. 4-18-0751 There on Appeal from the Circuit Court for the Seventh Judicial Circuit, Sangamon County, Illinois, No. 05 CF 1295 The Honorable John W. Belz, Judge Presiding.

BRIEF OF PLAINTIFF-APPELLEE PEOPLE OF THE STATE OF ILLINOIS

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

KATHERINE M. DOERSCH
Criminal Appeals Division Chief

ERIC M. LEVIN
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(773) 590-7065
eserve.criminalappeals@ilag.gov

Counsel for Plaintiff-Appellee
People of the State of Illinois

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

POINTS AND AUTHORITIES

NATURE OF THE CASE

Defendant filed a pro se postconviction petition attacking his criminal sexual assault convictions and arguing, among other things, that his trial counsel was ineffective for not objecting to expert testimony from the victims' treating physicians. The circuit court advanced the petition to the second stage and appointed counsel for defendant. The People then filed a motion to dismiss, and defendant's appointed counsel filed a motion to withdraw on the ground that there were no meritorious issues to present. After allowing defendant to respond to the motion to withdraw, the circuit court granted both motions and dismissed defendant's petition. Defendant now appeals the appellate court's judgment finding that the circuit court erred by dismissing the petition without affording defendant an opportunity to respond to the motion to dismiss, but that the error was harmless because the petition is meritless.

ISSUES PRESENTED FOR REVIEW

1. Whether defendant was afforded procedural due process when he was given an opportunity to respond to appointed counsel's dispositive, merits-based motion to withdraw before the circuit court dismissed his postconviction petition.

2. Whether, in the alternative, a procedural due process violation in second-stage postconviction proceedings is subject to harmless error review.

3. If so, whether any procedural due process violation in the dismissal of defendant's postconviction petition was harmless because his postconviction claims are plainly meritless.

JURISDICTION

This Court allowed leave to appeal on November 24, 2021. Jurisdiction lies under Supreme Court Rules 315(a), 612(b), and 651(d).

STATEMENT OF FACTS

I. Trial and Direct Appeal

Defendant was charged with two counts of criminal sexual assault for forcibly placing his penis in the vagina of K.S. and his fingers in the vagina of A.H. C36-37.[1]

The evidence at trial showed that on July 7, 2005, K.S. and A.H., both 16 years old, decided to run away from their foster home in Pawnee, Illinois. R271-72, 294-95. They went to the nearby home of Tony Gilbert, looking for defendant and his wife, Cheryl. R272-73, 296, 318-19. Defendant and Cheryl lived with defendant's mother across the street from K.S. and A.H.'s foster home, and K.S. and A.H. had previously babysat for their children. R258, 273.

At Gilbert's house, K.S. and A.H. drank several beers with defendant and Gilbert. R273-74, 284-85, 296. At some point, Cheryl left to put their

[1] "C," "R," "SR," "Def. Br.," and "A" refer, respectively, to the common law record, report of proceedings, supplemental report of proceedings, defendant's opening brief, and appendix to defendant's opening brief.

two sons to bed at defendant's mother's house. R259-60. Later that evening, Cheryl returned and drove K.S., A.H., defendant, and her and defendant's two daughters to a house in Springfield that she and defendant owned. R260-61. Cheryl then returned to defendant's mother's house. R261, 263-64.

At the Springfield house, defendant, K.S., and A.H. sat on the back deck and drank while defendant's daughters slept inside. R275-76, 298-99, 309-10. At some point, A.H. went upstairs to sleep. R276, 299. Defendant then tried to give K.S. a massage, and K.S. repeatedly told him to stop, which angered defendant. R276. Defendant then pushed K.S. down, removed her and his own pants, and put his penis in her vagina. R276-77. When defendant stopped, K.S. went to the bathroom and discovered that she was bleeding from her vagina. R277, 288. Meanwhile, defendant went upstairs, put his hand inside A.H.'s pants, and inserted his fingers into her vagina. R299. Hearing noises, K.S. went upstairs and found defendant on top of A.H. R278. Defendant got up when K.S. yelled, and K.S. and A.H. went downstairs. R278, 299-300. K.S. and A.H. stayed in the house until morning because they were scared and had nowhere to go. R278, 300. During that time, defendant repeatedly told K.S. and A.H. that "nothing happened" and threatened to cut off A.H.'s hair if they told anyone. R278-79.

When Cheryl returned to the house in the morning, K.S. and A.H. did not appear upset and did not tell Cheryl that defendant had assaulted them. R261, 267-68. With defendant in the car, Cheryl drove her daughters to

daycare and took K.S. and A.H. to a park in Pawnee. R261. K.S. and A.H. walked back to their foster home but did not tell their foster mother what had happened because they did not think she would believe them. R279-80, 301-02. The next day, K.S. and A.H. tried to run away again but were picked up by a police officer and returned to their foster home. R280. They did not tell the officer that defendant had assaulted them. R290-91, 302.

About ten days after the assault, A.H. told her foster mother about defendant's assault. R302-03. When a foster care counselor subsequently asked K.S. about the incident, she initially denied that anything had happened because she was still scared but eventually reported that defendant had assaulted her. R281-82.

Detective Scott Kinkaid of the Springfield Police Department then interviewed defendant about the accusations. Defendant initially denied knowing K.S. or A.H. and denied having been at the Springfield house with them. R322-23. Later, defendant admitted that he knew the girls and had spent the night with them at the Springfield house but denied having had any sexual contact with them. R323.

In addition to testimony from K.S., A.H., Cheryl, Gilbert, and Kinkaid describing the facts recounted above, the People called two physicians who had examined K.S. and A.H. after they reported the assaults.

Dr. Dennis Adams examined A.H. on July 17, 2005. R334. He testified that he was board-certified in emergency medicine and had practiced as an

emergency physician for 25 years. R333-34. He also testified that he was familiar with the literature on sexual assault examinations and had examined approximately 20 victims of sexual assault in the course of his career. R335, 341-42. Dr. Adams performed a pelvic examination of A.H. that revealed no evidence of vaginal trauma. R335. However, based on his experience and the relevant literature, Dr. Adams opined that the absence of trauma was not inconsistent with A.H.'s allegation that defendant inserted his fingers into her vagina. R335-36, 341-42. Dr. Adams explained that in most of the sexual assault examinations he had performed, he did not find physical evidence of trauma. R336.

On cross-examination, Dr. Adams testified that he had no opinion as to whether A.H. was sexually assaulted. R342. He acknowledged that in some of the other sexual assault examinations he had performed, he did find evidence of trauma, and agreed that "sometimes you find it, sometimes you don't." R336-37. He also acknowledged that he did not know the underlying facts of the prior cases in which he performed sexual assault examinations. R338. Finally, Dr. Adams acknowledged that he is not a gynecologist and had never used (or been trained to use) a colposcope, which he described as an instrument used to magnify findings during a pelvic exam. R338-39.

Dr. Robert Sliwa examined K.S. on July 27, 2005. R344. He testified that he was board-certified in emergency medicine and had examined more than 100 sexual assault victims in the course of his practice. R344. He also

testified that he was familiar with the literature concerning sexual assault examinations. R344. Dr. Sliwa testified that he found no evidence of vaginal trauma in his examination of K.S. R345. Based on his experience and the relevant literature, however, Dr. Sliwa opined that the absence of such trauma was not inconsistent with an allegation of sexual assault. R345-46. He noted that in the majority of cases in which an adult woman or post-pubescent girl is sexually assaulted, no evidence of trauma is found. R353. And here, he explained, K.S. "reported that her assault had happened several weeks before [his examination], so by that time if there was any trauma, it would have been cleared up." R346. He testified that K.S.'s report of vaginal bleeding at the time of the assault did not affect his opinion. R346.

On cross-examination, Dr. Sliwa testified that he had no opinion as to whether K.S. was sexually assaulted. R351-52. He acknowledged that he is not a gynecologist, but explained that, as a physician, he had received some training in the field, although not in the use of a colposcope. R347. Dr. Sliwa agreed that examining K.S. with a colposcope "might have picked up evidence of trauma that [he was] unable to detect with the naked eye." R348. He also agreed that it is possible for evidence of trauma to be detected weeks after an assault. R349-50.

The jury found defendant guilty of both counts, R416, and the trial court sentenced him to consecutive ten-year prison terms, R429. The appellate court affirmed on direct appeal, *see People v. Pingelton*, No. 4-07-

0133 (Ill. App. Ct. Dec. 28, 2007) (unpublished order) (C129-144), and defendant did not petition for leave to appeal in this Court.

II. Postconviction Proceedings in the Circuit Court

In December 2015, defendant filed a pro se postconviction petition asserting two claims. C209-225. First, he argued that his trial and appellate counsel were ineffective for not objecting to Dr. Adams's and Dr. Sliwa's opinion testimony because the People did not properly submit the physicians as expert witnesses and disclose the victims' medical records, and because their opinions about the frequency with which physical evidence of trauma is found during sexual assault examinations were unrelated to their treatment of the victims and outside their personal knowledge. C211-19. Second, defendant argued that the information charging him with criminal sexual assault of A.H. was defective because it did not define the elements of the offense or sufficiently describe the manner in which he allegedly committed the offense. C220-24. Two weeks later, the circuit court appointed counsel for defendant. C269.

In March 2016, the People filed a motion to dismiss the postconviction petition arguing that defendant's claims were conclusory, meritless, waived, and barred by res judicata. C275-76. The motion was served on defendant's appointed counsel. C277.

In February 2018, defendant's appointed counsel filed a motion to withdraw and a certificate of compliance with Illinois Supreme Court Rule

651(c). C296-308. In support of the motion to withdraw, counsel argued that the claims in defendant's pro se petition were "unsupportable as a matter of law," C300, and that "a careful examination of the record" revealed "no meritorious issues to be argued in a Post-Conviction Petition," C305. With respect to defendant's contention that trial and appellate counsel were ineffective for failing to object to Dr. Adams's and Dr. Sliwa's opinion testimony, counsel noted that contrary to defendant's assertion, the record established that the People had disclosed the victims' medical records before trial. C302. Counsel also argued that the doctors "were correctly identified as treating physicians [rather than expert witnesses] during trial since their consultation was conducted well before litigation and was for treatment purposes only," and explained that "Illinois courts have consistently allowed treating physicians to offer opinions during their testimony at trial, reasoning that the opinions rendered by treating physicians are a product of their observations rather than a contemplation of litigation." C301-02. As for the sufficiency of the charging instrument, counsel explained that by alleging that defendant committed an act of sexual penetration by placing his fingers in A.H.'s vagina by force the information "adequately provided [defendant] with notice of the offense[ ] charged against him." C304.

Appointed counsel's Rule 651(c) certificate attested that counsel had (1) "consulted with [defendant] in[ ]person and by mail to ascertain his contentions of deprivation of constitutional rights for the purposes of

presenting said alleged wrongs within these post-conviction proceedings," (2) "examined the record of the proceedings of the trial and all appellate proceedings and post-conviction pleadings of record," and (3) "made all amendments to the *pro se* post-conviction petition that were necessary for an adequate presentation of [defendant's] contentions of deprivation of constitutional rights or . . . determined that there are no meritorious constitutional issues to be presented in post-conviction proceedings." C306-07.

Defendant filed two responses to counsel's motion to withdraw. In the first response, defendant argued that counsel did not review his pro se claims or the record and failed to raise additional claims that defendant proposed. C309. Defendant argued that if the People disclosed the victims' medical records before trial, then trial counsel was ineffective for failing to impeach the victims and treating physicians with purported discrepancies between the records and the witnesses' testimony. C310-11. Defendant also reiterated his contention that trial counsel was ineffective for not objecting to presentation of the treating physicians as expert witnesses and argued for the first time that the People failed to disclose police reports documenting a police visit to Gilbert's home. C311-12. Defendant asked the court to allow appointed counsel to withdraw, permit defendant to amend his pro se petition, and advance the petition to the third stage. C313.

In his second response, defendant asserted that his petition presented "errors of constitutional proportion" that warranted an evidentiary hearing. C323. He again argued that trial counsel was ineffective for failing to object to Dr. Sliwa testifying as an expert witness, C324-28, and that the People failed to disclose a police report related to Gilbert, C328-331, and argued for the first time that the People failed to disclose defendant's own medical records, C331-32. He also argued that appointed postconviction counsel was ineffective and asked the court to advance his petition to the third stage. C332-34.

Appointed counsel filed a reply, C374-78, reiterating his conclusion that defendant "has no meritorious issues to be argued in a Post-Conviction Petition," C378.

At a hearing on May 9, 2018, with defendant appearing by phone, SR9, the court heard argument on both the People's motion to dismiss and appointed counsel's motion to withdraw. With respect to the motion to dismiss, the Assistant State's Attorney "adopt[ed] and incorporate[d]" the arguments in appointed counsel's motion to withdraw and argued that defendant's claims were meritless. SR9-11. Next, defendant and appointed counsel addressed the motion to withdraw. Defendant argued that appointed counsel did not adequately review the record and present his claims, and defendant also argued the merits of those claims. SR12-20. As relevant here, defendant argued that trial counsel was ineffective for failing to object to the

treating physicians' testimony because the People did not include the physicians on its witness list. SR12-13. He also argued that Dr. Sliwa should not have been permitted to offer expert testimony "beyond what he . . . treated [K.S.] for." SR16. He asked the court to "remove" appointed counsel and allow him to proceed pro se. SR21. Appointed counsel then addressed defendant's contentions. SR21-24. With respect to defendant's challenge to the treating physicians' qualifications to offer expert testimony, counsel explained that the physicians were "experts purely due to their knowledge and experience." SR22. Counsel noted that he had filed a Rule 651(c) certificate and asked the court to allow him to withdraw. SR24.

On May 22, 2018, the court entered a written order granting appointed counsel's motion to withdraw and the People's motion to dismiss. C400. The court did not articulate its reasons for granting appointed counsel's motion to withdraw. *See id.* Addressing the motion to dismiss, the court found that defendant had "failed to make a substantial showing of any constitutional violation." *Id.* As relevant here, the court explained that trial counsel's failure to object to the treating physicians' expert testimony was not unreasonable and that defendant was not prejudiced by the omission in any event. *Id.* The court deemed defendant's other claims "unfounded" and "not supported by the record." *Id.*

In a pro se motion to reconsider, defendant argued that the court failed to address all his claims, that appointed counsel falsely certified compliance

with Rule 651(c), and that it was unfair to grant the People's motion to dismiss without providing him notice of the motion and an opportunity to respond. C412-16. The court heard argument, SR27-35, and denied the motion, C468.

III. Postconviction Appeal

Defendant made two arguments on appeal. First, he argued that the circuit court violated his right to procedural due process by granting the People's motion to dismiss without giving him notice of the motion and an opportunity to respond. A19, ¶ 30. Second, he argued that the circuit court erred in granting appointed counsel's motion to withdraw because his pro se petition raised a potentially meritorious claim, namely that trial counsel was ineffective for failing to object to the treating physicians' expert testimony. A20, ¶ 36.

The appellate court affirmed. First, the appellate court found that defendant had not been provided sufficient notice of the People's motion to dismiss or given an opportunity to respond before the circuit court granted the motion. A19, ¶ 32. The court noted that the motion "was served on postconviction counsel, not defendant, and the record contains no indication defendant personally received the motion." A20, ¶ 34. The court reasoned that because the People filed the motion to dismiss two years before the May 9 hearing, "defendant had no reason to suspect the motion would be argued

at this hearing," and could not have personally responded to the motion, in any event, because he was still represented by appointed counsel. A19, ¶ 34.

Nonetheless, the court concluded that the error was harmless because defendant's petition "failed to state the gist of a constitutional claim." A19, ¶ 32. The court first rejected defendant's contention that trial counsel could be faulted for not objecting to the trial court's failure to "certif[y]" the treating physicians "as experts in the field of sexual assault injuries or gynecology." A22, ¶ 44 (internal quotation marks omitted). The court noted that "[t]he Illinois Rules of Evidence regarding expert witnesses contain no requirement that the trial court 'certify' a witness before that witness may provide opinion testimony." *Id.*, ¶ 46. Instead, the court explained, the rules of evidence require trial courts to "determine, in the sound exercise of their discretion, whether a sufficient foundation has been laid regarding a particular witness to permit that witness to render an opinion." *Id.*[2]

Next, the court rejected defendant's contention that trial counsel was ineffective for not objecting to the treating physicians' testimony "regarding the frequency of vaginal trauma in sexual-assault victims." A29, ¶ 69. The court explained that "trial counsel presumably made the decision that objecting to the experts' opinion testimony would prove fruitless because of

---

[2] The majority opinion also includes an extended discussion advising trial courts to avoid deeming a witness an expert in front of the jury, A23-29, so as not to "confer[ ] the judicial imprimatur of authority and credibility" on the witness, A25, ¶ 52. Justice Harris, who specially concurred, did not join that portion of the majority opinion. A30, ¶ 78.

their experience dealing in emergency rooms with victims of sexual violence." A29-30, ¶ 70. Thus, because "defendant failed to state the gist of a constitutional claim," the court held that "any error related to the motion to dismiss was harmless." A30, ¶ 73.

Finally, for the same reasons, the appellate court held that the circuit court did not err in granting appointed counsel's motion to withdraw. A29, ¶ 68.

STANDARDS OF REVIEW

Whether a procedure satisfies due process is a legal question that this Court reviews de novo. *People v. Hall*, 198 Ill. 2d 173, 177 (2001). Whether a procedural error is subject to harmless error review also presents a question of law that this Court reviews de novo. *People v. Jolly*, 2014 IL 117142, ¶ 28. Finally, because this Court reviews de novo the dismissal of a postconviction petition without an evidentiary hearing, *see People v. Cotto*, 2016 IL 119006, ¶ 24, whether a procedural error at second-stage postconviction proceedings was harmless should likewise be reviewed de novo.

ARGUMENT

I. The Circuit Court Afforded Defendant Procedural Due Process Before Dismissing His Postconviction Petition.

The federal and state constitutions guarantee individuals procedural due process before being deprived of life, liberty, or property. U.S. Const., amend. XIV; Ill. Const. 1970, art. I, § 2. Procedural due process "is a flexible concept which calls for procedural safeguards tailored to the demands of a

particular legal context." *Hall*, 198 Ill. 2d at 177. At its core, due process "entails an orderly proceeding wherein a person is served with notice, and has an opportunity to be heard and to present his or her objections, at a meaningful time and in a meaningful manner, in a hearing appropriate to the nature of the case." *Village of Vernon Hills v. Heelan*, 2015 IL 118170, ¶ 31; *see People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 201 (2009) ("The fundamental requirements of due process are notice of the proceeding and an opportunity to present any objections."). "The purpose of these requirements is to protect persons from mistaken or unjustified deprivations of life, liberty, or property." *Heelan*, 2015 IL 118170, ¶ 31.

The procedures that the circuit court employed before dismissing defendant's postconviction petition comported with the flexible requirements of procedural due process. Defendant does not dispute that he received notice of, and was given several opportunities to respond to, his appointed counsel's motion to withdraw, which argued that his postconviction claims were meritless. Because an order granting the motion to withdraw would also require the dismissal of defendant's petition on the merits, defendant's opportunity to respond to the motion to withdraw afforded him a meaningful opportunity to object to his petition's dismissal. And even if the motion to withdraw was not itself a dispositive motion, the arguments in the motion to withdraw overlapped with the arguments in the People's motion to dismiss to

such a degree that defendant was meaningfully able to respond to the motion to dismiss in his responses to the motion to withdraw.

A. Defendant had several opportunities to respond to appointed counsel's merits-based motion to withdraw, which was the dispositive motion in his case.

Defendant's insistence that he was entitled to a separate opportunity to address the People's motion to dismiss after the circuit court granted his appointed counsel's motion to withdraw, *see* Def. Br. 18, misunderstands the nature and effect of an appointed attorney's merits-based motion to withdraw in a postconviction proceeding.[3]

At the first stage of a postconviction proceeding, a circuit court must independently review a postconviction petition within 90 days of filing and determine whether the petition is "frivolous" or "patently without merit." 725 ILCS 5/122-2.1(a)(2); *see People v. Edwards*, 197 Ill. 2d 239, 244 (2001). If the court finds that the petition is frivolous or patently without merit, it must summarily dismiss the petition. 725 ILCS 5/122-2.1(a)(2); *see Edwards*, 197 Ill. 2d at 244. If the court does not summarily dismiss a petition at the first stage, it must advance the petition to second-stage proceedings and appoint counsel for an indigent petitioner who so requests. 725 ILCS 5/122-2.1(b); 725 ILCS 5/122-4; *People v. Hodges*, 234 Ill. 2d 1, 10 (2009).

---

[3] This brief uses the phrase "merits-based motion to withdraw" to refer to a motion in which counsel seeks to withdraw based on his or her conclusion that the petitioner has no arguably meritorious claims, as opposed to a motion to withdraw on another ground, such as a conflict of interest.

At the second stage of proceedings, appointed counsel must "consult[ ] with petitioner . . . to ascertain his or her contentions of deprivation of constitutional rights, . . . examine[ ] the record of the proceedings at the trial, and . . . ma[k]e 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); *see People v. Turner*, 187 Ill. 2d 406, 410 (1999). Also at this stage, the People may move to dismiss or answer the petition. 725 ILCS 5/122-5; *Hodges*, 234 Ill. 2d at 10-11. The circuit court then "determine[s] whether the petition and any accompanying documentation make a substantial showing of a constitutional violation." *People v. Domagala*, 2013 IL 113688, ¶ 33 (internal quotation marks omitted). If the circuit court finds that the petitioner has made the requisite showing, the petition advances to the third stage for an evidentiary hearing. *Id.*, ¶ 34. Otherwise, the court must dismiss the petition without an evidentiary hearing. *Edwards*, 197 Ill. 2d at 246.

This Court has recognized that an attorney appointed to represent a postconviction petitioner will sometimes determine, after fulfilling his or her duties under Rule 651(c), that the petitioner's claims are frivolous or patently without merit, despite the petition having been advanced to the second stage. In *People v. Greer*, 212 Ill. 2d 192, 195 (2004), the petition advanced to the second stage not because the court determined that it was not frivolous or patently without merit, but because the circuit court did not review it within

90 days of filing. Appointed counsel eventually filed a motion to withdraw, explaining that "he could find no basis on which to present any meritorious issue for review." *Id.* at 200 (internal quotation marks omitted). This Court affirmed the circuit court's order granting counsel's motion to withdraw, holding that the postconviction statute "present[ed] no impediment to withdrawal of counsel" where "counsel fulfilled his duties as prescribed by Rule 651(c), and the record . . . support[ed] counsel's assessment that the defendant's postconviction claims were frivolous and without merit." *Id.* at 211-12. An attorney "who determines that [the] defendant's claims are meritless," the Court reasoned, "cannot in good faith file an amended petition on behalf of [the] defendant," *id.* at 205, and "is clearly *prohibited* from [continuing to represent the defendant] by his or her ethical obligations," *id.* at 209 (emphasis in original).

In *People v. Kuehner*, 2015 IL 117695, ¶ 21, this Court recognized that similar ethical considerations may require an appointed attorney to withdraw even when the circuit court had expressly made a first-stage finding that the petition was not frivolous or patently without merit. But the Court explained that, in those circumstances, "the burdens and obligations of appointed counsel . . . are decidedly higher than those that were present in *Greer*." *Id.*, ¶ 18. Thus, this Court held, where a circuit court has found that a petition is not frivolous or patently without merit, appointed counsel's motion to withdraw must "demonstrat[e], with respect to each of the defendant's *pro se*

claims, why the trial court's initial assessment was incorrect." *Id.*, ¶ 21. As the Court explained, a motion to withdraw under these circumstances is "tantamount to a motion to reconsider" the circuit court's first-stage finding. *Id.*

This Court has not addressed whether allowing appointed counsel to withdraw because a defendant's postconviction claims are frivolous or patently without merit necessitates dismissal of the defendant's petition.[4] But the reasoning in *Kuehner* and *Greer* compels the conclusion that it does. As noted, *Kuehner* analogized a merits-based motion to withdraw filed after a circuit court affirmatively advances a petition to the second stage to a motion to reconsider the court's first-stage finding that the petition was not frivolous or patently without merit. *See* 2015 IL 117695, ¶ 21. In other words, an order granting a merits-based motion to withdraw requires a finding by the circuit court that the defendant's claims are frivolous or patently without merit. And a necessary consequence of such a determination is the dismissal of the petition, because a petition that cannot satisfy the first-stage standard of non-frivolousness necessarily fails to satisfy the more stringent second-stage substantial-showing standard. *See Edwards*, 197 Ill. 2d at 246 (petition

[4] The appellate court in *Greer* affirmed the circuit court's order allowing appointed counsel to withdraw, but reversed the circuit court's simultaneous sua sponte dismissal of the defendant's petition, holding that the grant of a motion to withdraw "does not mean that the postconviction petition is dismissed." *People v. Greer*, 341 Ill. App. 3d 906, 910 (4th Dist. 2003). This Court, however, "express[ed] no opinion" on the appellate court's resolution of the latter issue. *Greer*, 212 Ill. 2d at 212.

that fails to make "substantial showing of a constitutional violation" must be dismissed at second stage).

Moreover, *Greer* explained that requiring an appointed attorney to continue to represent a defendant whose claims are determined to be frivolous or patently without merit would "needlessly consum[e] the time and energies of the court and the State." 212 Ill. 2d at 207. Allowing a defendant to continue to litigate his petition pro se under those circumstances would be equally wasteful and inconsistent with the determination that the frivolity of his claims justified counsel's withdrawal.

To be sure, several panels of the appellate court have held that after a circuit court grants appointed counsel's motion to withdraw, it must afford the defendant an opportunity to respond to any motion to dismiss filed by the People before dismissing the petition. *See People v. Triplett*, 2022 IL App (3d) 200017, ¶¶ 16-18; *People v. Williams*, 2021 IL App (3d) 190082, ¶¶ 22-23; *People v. Hayes*, 2016 IL App (3d) 130769, ¶ 19; *People v. Jackson*, 2015 IL App (3d) 130575, ¶¶ 17-18. But as Justice Schmidt repeatedly explained, "[o]nce counsel is allowed to withdraw on the basis that the case has no merit, the only logical next step is to dismiss the matter." *Triplett*, 2022 IL App (3d) 200017, ¶ 24 (Schmidt, J., dissenting); *see also Hayes*, 2016 IL App (3d) 130769, ¶¶ 27-28 (Schmidt, J., dissenting) (questioning "just exactly what does the majority expect will happen" when the People move to dismiss after the circuit court grants appointed counsel's motion to withdraw based

on a finding that "the postconviction petition is frivolous and patently without merit").

Indeed, as Justice Schmidt also explained, "it would be oxymoronic to allow [appointed counsel] to withdraw based on the court's finding that defendant's claims are meritless, but allow defendant to proceed *pro se* on the same meritless claims." *Jackson*, 2015 IL App (3d) 130575, ¶ 35 (Schmidt, J., dissenting). Rather, "[i]t only makes sense that upon granting a [merits-based motion to withdraw] that the trial court simultaneously dismiss the postconviction petition." *Id.*, ¶ 36 (Schmidt, J., dissenting). In other words, an order granting a merits-based motion to withdraw by appointed postconviction counsel necessarily resolves the merits of the defendant's postconviction claims and disposes of the postconviction proceeding.

Here, defendant does not dispute that he received notice of appointed counsel's motion to withdraw and was given several opportunities to respond to it before the circuit court granted the motion and dismissed his petition. Because the motion to withdraw was a dispositive motion that (once granted) necessitated dismissal of defendant's postconviction petition, defendant's opportunity to respond to that motion satisfied his right to procedural due process. *See Hall*, 198 Ill. 2d at 177 (procedural due process "is a flexible concept which calls for procedural safeguards tailored to the demands of a particular legal context").

B. Defendant also had a meaningfully opportunity to respond to the People's motion to dismiss because the motion to dismiss and the motion to withdraw made the same arguments.

Even if an order granting appointed counsel's motion to withdraw did not automatically require dismissal of a defendant's postconviction petition, defendant's multiple opportunities here to respond to counsel's motion to withdraw meaningfully enabled him to respond to the People's motion to dismiss because the two motions were substantively identical. Indeed, at the hearing on both motions, the People "adopt[ed]" the arguments from appointed counsel's motion to withdraw and addressed only the merits of defendant's claims, without advancing the procedural arguments for dismissal, such as waiver and res judicata, that it had asserted in its written motion to dismiss. SR9-11. And nothing in the record suggests that the circuit court relied on any argument outside the motion to withdraw when dismissing defendant's petition. *See* C400 (finding petitioner's claims meritless, "unfounded," or "not supported by the record").

Moreover, in two written responses to counsel's motion to withdraw, defendant both attacked appointed counsel's performance *and* argued in support of his postconviction claims. *See* C309-313, 323-34. In particular, he argued that he had presented "errors of constitutional proportion" that "warrant[ed] a 3rd stage post-conviction evidentiary hearing." C323; *see also* C313 (asking court to "advanc[e] this petition to the 3rd stage"), C332 (arguing that his "petition must advance to the 3rd stage"). Likewise, at the

hearing on both motions, defendant not only challenged the adequacy of appointed counsel's representation but also argued in support of his postconviction claims. SR12-20.

Nevertheless, defendant argues that he was unprepared and unable to respond to the People's motion to dismiss. *See* Def. Br. 14-16. But he does not contest that he filed two responses to counsel's motion to withdraw, nor that the People adopted the motion to withdraw when arguing in support of the motion to dismiss. And he does not explain what additional arguments he would have made had he been able to respond separately to the motion to dismiss.

In sum, the circuit court's procedures allowed defendant an opportunity to present objections to the dismissal of his petition "at a meaningful time and in a meaningful manner." *Heelan*, 2015 IL 118170, ¶ 31. The procedures thus served to "protect" against a "mistaken or unjustified" dismissal of defendant's petition, *id.*, and comported with the "flexible concept" of procedural due process, *Hall*, 198 Ill. 2d at 177.

II. Any Procedural Due Process Violation Was Harmless.

Alternatively, if this Court holds that the circuit court violated defendant's right to procedural due process by not giving him an opportunity to respond to the People's motion to dismiss after granting appointed counsel's motion to withdraw, it should find that the error was harmless because defendant's postconviction claims are plainly meritless.

A. A procedural due process violation in postconviction proceedings is subject to harmless error review.

This Court "adhere[s] to a strong presumption that most errors of constitutional dimension are subject to harmless error analysis." *People v. Stoecker*, 2020 IL 124807, ¶ 23; *see also People v. Davis*, 233 Ill. 2d 244, 273 (2009). "Harmless error analysis is based on the notion that a defendant's interest in an error-free proceeding must be balanced against societal interests in finality and judicial economy." *Stoecker*, 2020 IL 124807, ¶ 23 (internal quotation marks and brackets omitted). Thus, as this Court has explained, "automatic reversal is only required where an error is deemed 'structural,' that is, a systemic error which serves to erode the integrity of the judicial process and undermine the fairness of the proceedings." *Id.* (cleaned up); *see also People v. Moon*, 2022 IL 125959, ¶ 28 ("An error is typically designated as structural only if it necessarily renders a criminal trial fundamentally unfair or is an unreliable means of determining guilt or innocence."). Structural errors are not amenable to harmless error review because such errors have "consequences that are necessarily unquantifiable and indeterminate." *Stoecker*, 2020 IL 124807, ¶ 24 (internal quotation marks omitted); *see Moon*, 2022 IL 125959, ¶ 65 (noting that one factor in assessing whether an error is structural "is the difficulty of measuring" its impact on the proceedings).

There is no sound reason for departing from the strong presumption in favor of harmless error review here. This Court rejected a similar request in

Stoecker, where it held that the violation of a defendant's procedural due process right to "a reasonable opportunity to respond to a dispositive motion in a collateral civil proceeding . . . cannot be equated with the narrow class of automatically reversible errors." 2020 IL 124807, ¶ 25. While the Court recognized that a procedural due process violation "is serious," it explained that the error "does not necessarily render the proceedings automatically unfair or unreliable," and that its impact "is not . . . necessarily unquantifiable and indeterminate." *Id.* To the contrary, the Court "determine[d] the error to be harmless because petitioner's claims were procedurally defaulted and patently incurable as a matter of law and because no additional proceedings would have enabled him to prevail on his claim for relief." *Id.*, ¶ 26.

Defendant tries to distinguish *Stoecker* on the ground that it involved proceedings on a petition for relief from judgment under 735 ILCS 5/2-1401 rather than a postconviction petition. *See* Def. Br. 22-23. But that is a distinction without a difference. While petitions for relief from judgment and postconviction petitions offer "different form[s] of statutory collateral relief," *Stoecker*, 2020 IL 124807, ¶ 41 (internal quotation marks omitted), both allow defendants to "collaterally attack[ ] an invalid judgment in a criminal case," *In re N.G.*, 2018 IL 121939, ¶ 53; *see People v. Johnson*, 2018 IL 122227, ¶ 14 (postconviction statute "provides a remedy for incarcerated defendants who have suffered a substantial violation of their constitutional rights at trial");

People v. Haynes, 192 Ill. 2d 437, 461 (2000) ("A section 2-1401 petition for relief from a final judgment is the forum in a criminal case in which to correct all errors of fact occurring in the prosecution of a cause, unknown to the petitioner and court at the time judgment was entered, which, if then known, would have prevented its rendition.").

Moreover, the primary difference between the two proceedings — that "[a] postconviction petition requires the court to decide whether the defendant's constitutional rights were violated at trial," whereas "a section 2-1401 petition . . . requires the court to determine whether facts exist that were unknown to the court at the time of trial and would have prevented entry of the judgment," *People v. Pinkonsly*, 207 Ill. 2d 555, 566 (2003) — does not suggest that errors in a postconviction proceeding are somehow less amenable to harmless error review than errors in a section 2-1401 proceeding. That postconviction proceedings involve "constitutional claims," Def. Br. 23, is immaterial. As noted, this Court strongly presumes that even "errors of constitutional dimension are subject to harmless error analysis." *Stoecker*, 2020 IL 124807, ¶ 23.

Instead, the question is whether a procedural error in a postconviction proceeding is "necessarily unquantifiable and indeterminate" and "render[s] the proceedings automatically unfair or unreliable." *Id.*, ¶ 25. In *Stoecker*, the Court was able to determine that the defendant was not harmed by the lack of opportunity to respond to the People's motion to dismiss his section

2-1401 petition "because [his] claims were procedurally defaulted and patently incurable as a matter of law and because no additional proceedings would have enabled him to prevail on his claim for relief." *Id.*, ¶ 26. It is just as easy here for the Court to assess whether defendant's postconviction claims are insufficient as a matter of law and thus whether further proceedings would be futile. *See Williams*, 2021 IL App (3d) 190082, ¶ 32 (McDade, J., specially concurring) (arguing that *Stoecker* was wrongly decided, but acknowledging that, under that precedent, the defendant was not entitled to reversal based on a procedural due process violation in his postconviction proceedings because "the allegations contained in defendant's postconviction petition were without merit").

Defendant asserts that conducting harmless error review of procedural due process violations in postconviction proceedings would require the Court to "overrule" its prior decisions in *People v. Bounds*, 182 Ill. 2d 1 (1998), and *People v. Kitchen*, 189 Ill. 2d 424 (1999). Def. Br. 22. Not so. Neither case expressly addressed whether a procedural due process violation in a postconviction proceeding may be reviewed for harmless error. *See Williams*, 2021 IL App (3d) 190082, ¶ 27 (noting that "it is unclear whether harmless error arguments were made in [*Kitchen*], as the [C]ourt[ ] did not conduct harmless error analysis or discuss its potential applicability"). As this Court has explained, "a judicial opinion, like a judgment, is authority only for what is actually decided in the case." *N.G.*, 2018 IL 121939, ¶ 67. Because *Bounds*

and *Kitchen* did not address the question of whether harmless error review applies to procedural due process violations in postconviction proceedings, those decisions "cannot be read as expressing any view by this [C]ourt" on the question. *Id.*[5]

Defendant's reliance on *People v. Suarez*, 224 Ill. 2d 37 (2007), *see* Def. Br. 24, which declined to conduct harmless error review of appointed postconviction counsel's failure to comply with the requirements of Rule 651(c), is similarly misplaced. *Suarez* rested on the dictates of Rule 651(c) and the statutory right to counsel in postconviction proceedings, not the general right to procedural due process that is at issue here. *See* 224 Ill. 2d at 51 ("Our Rule 651(c) analysis has been driven, not by whether a particular defendant's claim is potentially meritorious, but by the conviction 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."). There, this Court explained that it could not "presume . . . that the trial court would have dismissed the petition without an evidentiary hearing if counsel had adequately performed his duties under Rule 651(c)."

---

[5] Defendant also argues that conducting harmless error review of the alleged procedural due process violation here would be inconsistent with the appellate court's decision in *People v. Al Momani*, 2016 IL App (4th) 150192. *See* Def. Br. 19-20. But *Al Momani* was decided before *Stoecker* and, like *Bounds* and *Kitchen*, did not expressly address the question of whether a procedural due process violation in postconviction proceedings is amenable to harmless error review. In any event, this Court is not bound by a decision of the appellate court. *See People v. Anderson*, 188 Ill. 2d 384, 390 (1999).

Id. at 48 (internal quotation marks omitted). Unlike the procedural due process violation alleged here, attorney performance that fails to comply with Rule 615(c) — and is thus "so deficient that it amounts to virtually no representation at all," *id.* at 48 (internal quotation marks omitted) — undermines the fairness and reliability of the proceedings, and has "consequences that are necessarily unquantifiable and indeterminate." *Stoecker*, 2020 IL 124807, ¶ 24 (internal quotation marks omitted). In contrast, the procedural error alleged here and in *Stoecker* is not "necessarily unquantifiable and indeterminate" and "does not necessarily render the proceedings automatically unfair or unreliable." *Id*., ¶ 25.

Finally, defendant's asserted "policy reasons" against conducting harmless error review of procedural due process violations in postconviction proceedings, Def. Br. 25, are unpersuasive. As defendant notes, this Court has held that "the protection of a defendant's right to procedural due process in post-conviction proceedings is of critical importance." *Kitchen*, 189 Ill. 2d at 435. But the same is true of the right to procedural due process in section 2-1401 proceedings, which *Stoecker* described as a matter "of utmost importance." 2020 IL 124807, ¶ 22. Nor is a rule of automatic reversal required to prevent circuit courts from violating postconviction petitioners' procedural due process rights. *See* Def. Br. 26. This Court "presume[s] that trial courts know and follow the law unless the record demonstrates otherwise." *In re Commitment of Snapp*, 2021 IL 126176, ¶ 22. If this Court

were to announce that the procedures employed by the circuit court here violated defendant's right to procedural due process, there is no reason to think that lower courts would not faithfully heed that directive in the future. Remanding for further proceedings as a "penalty" for the violation, Def. Br. 26, despite the error's harmlessness, would merely serve to waste the scarce judicial resources of already overburdened trial courts. *See Stoecker*, 2020 IL 124807, ¶ 33 ("Reversal and remand would serve no purpose and would merely delay the dismissal of the meritless petition.").

B. Defendant's postconviction claims are plainly meritless.

To the extent this Court concludes that defendant's right to procedural due process was violated, that error was harmless. Because defendant's postconviction claims have "no arguable basis either in law or in fact," the circuit court properly allowed appointed counsel to withdraw on the ground that defendant's claims were frivolous or patently without merit. *Hodges*, 234 Ill. 2d at 12. And because defendant cannot surmount even that minimal threshold, there is no possibility that he would have been able to "make [the] substantial showing of a constitutional violation" needed to survive a second-stage dismissal, *Edwards*, 197 Ill. 2d at 246, even if he had been afforded a separate opportunity to respond directly to the motion to dismiss.

The only postconviction claims that defendant continues to press on appeal are his contentions that trial counsel was ineffective for failing to object to the victims' treating physicians' expert testimony concerning the

likelihood of discovering physical evidence of trauma when performing a pelvic exam of a sexual assault victim, and that appellate counsel was ineffective for failing to raise trial counsel's alleged ineffectiveness on direct appeal. *See* Def. Br. 28. To prevail on either claim, defendant must show that (1) counsel's performance was deficient, meaning that it "fell below an objective standard of reasonableness," and (2) he was prejudiced by the deficiency, such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984); *see People v. Moore*, 2020 IL 124538, ¶ 29. Defendant does not even arguably satisfy either prong with respect to either claim.

First, trial counsel's performance was not deficient because an objection to the admissibility of the treating physicians' expert testimony would have been meritless. *See People v. Rogers*, 2021 IL 126163, ¶ 32 ("Counsel cannot be considered ineffective for failing to make or pursue what would have been a meritless motion or objection."). A witness is "permitted to testify as an expert if his experience and qualifications afford him knowledge which is not common to lay persons and where such testimony will aid the trier of fact in reaching its conclusion." *People v. King*, 2020 IL 123926, ¶ 35; *see also* Ill. R. Evid. 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge,

skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.").

Under this standard, the treating physicians were qualified to offer expert testimony on the likelihood of discovering physical evidence of trauma when examining a sexual assault victim. Both doctors were board-certified in emergency medicine and had examined numerous sexual assault victims in the course of their practices. R334-35, 344. Both doctors testified, moreover, that they were familiar with the literature on sexual assault examinations. R341, 344. And Dr. Sliwa testified that as a physician, he received training in gynecology. R347.

Defendant concedes that the doctors "properly testified that they examined A.H. and K.S. respectively and that they did not find any indication of sexual trauma." Def. Br. 30. But he contends that because the doctors were not practicing or board-certified gynecologists, they were not qualified to opine on whether the absence of physical evidence of trauma was inconsistent with the victims' allegations of sexual assault, or to testify that most examinations of sexual assault victims do not reveal physical evidence of trauma. *See id.* But "[t]here are no precise requirements regarding [the] experience, education, scientific study, or training" necessary to qualify a witness to offer expert testimony on a subject. *People v. Lovejoy*, 235 Ill. 2d 97, 125 (2009). And the relevant "question is not whether [a] witness is more qualified than other experts in the field; rather, the issue is whether the

witness is more competent to draw the inference than the lay jurors and judge." Kenneth S. Broun, *McCormick on Evidence, Practitioner Treatise Series*, Vol. 1, p. 71 (6th ed. 2006); *see People v. Novak*, 163 Ill. 2d 93, 104 (1994) ("The indicia of expertise is not an assigned level of academic qualifications. Rather, the test is whether the expert has knowledge and experience beyond the average citizen that would assist the jury in evaluating the evidence.").

Based on their medical education, clinical experience, and familiarity with the scientific literature in the field, Dr. Adams and Dr. Sliwa possessed knowledge about the extent to which acts of sexual assault are expected to cause lasting physical evidence of trauma that may not have been "common to the average layperson and provided assistance to the jury in evaluating the evidence before it." *Lovejoy*, 235 Ill. 2d at 125. That the doctors were not gynecologists or trained to use a colposcope, *see* Def. Br. 30-31, may have affected the weight a jury would accord their testimony, but it did not affect its admissibility, *see People v. Pasch*, 152 Ill. 2d 133, 179 (1992) ("On cross-examination, counsel may probe the witness's qualifications, experience and sincerity, weaknesses in his basis, the sufficiency of his assumptions, and the soundness of his opinion.").

Further, there is no support for defendant's contention that the circuit court's failure to "certif[y]" the physicians as experts rendered their expert testimony inadmissible. Def. Br. 33. As the appellate court explained,

nothing in the Illinois Rules of Evidence or this Court's precedent requires the "certification" of an expert. *See* A22, ¶ 46. Instead, Rule 702 permits a witness to testify as an expert if he or she is "qualified" to do so "by knowledge, skill, experience, training, or education." Ill. R. Evid. 702. The single appellate decision that defendant cites in support of his argument, *see* Def. Br. 29, does not support his position. There, the appellate court noted that "[b]efore rendering an expert opinion, a witness must be qualified as an expert by the court." *O'Brien v. Meyer*, 196 Ill. App. 3d 457, 461 (1st Dist. 1989). But nothing in *O'Brien* suggests that a court must qualify (or certify) a witness as an expert in the absence of an objection to the witness's qualifications by the opposing party.

Nor was there any basis for defendant's trial counsel to challenge the foundation for the physicians' expert testimony. As noted, the doctors opined that finding no physical evidence of trauma when examining K.S. and A.H. was not inconsistent with the girls' allegations that they had been sexually assaulted. R335-36, 345-46. The doctors testified that this conclusion was consistent with the literature on sexual assault examinations and their clinical experience examining victims of sexual assault. R336, 341-42, 345-46. In particular, Dr. Adams testified that in most of the 20 sexual assault examinations he had performed, he did not find evidence of trauma. R336. And Dr. Sliwa testified that in the majority of cases in which an adult woman

or post-pubescent girl is sexually assaulted, no evidence of trauma is found. R353.

Defendant contends that the doctors' testimony about the likelihood of finding physical evidence of trauma when examining a sexual assault victim was "pure speculation" because they could not know whether other patients they examined had in fact been sexually assaulted. Def. Br. 31. But he ignores that the doctors' opinions were based not only on their clinical experience, but also on the scientific literature on the subject. *See* R341-42, 345-46. Regardless, "the basis for a witness' opinion generally does not affect his standing as an expert; such matters go only to the weight of the evidence, not its sufficiency." *Snelson v. Kamm*, 204 Ill. 2d 1, 26 (2003). Here, defendant was able to cross-examine the doctors about possible "weaknesses in [the] basis" for their opinions and the "sufficiency of [their] assumptions." *Pasch*, 152 Ill. 2d at 179; *see* R338 (eliciting that Dr. Adams had "no way of knowing personally what the underlying facts" were in the other cases on which he relied). While this line of inquiry may have affected the weight a jury would give to the physicians' opinions, it did not offer trial counsel any grounds to object to the opinions' admissibility.

Nothing in *People v. Cloutier*, 156 Ill. 2d 483 (1993), the sole decision on which defendant relies, *see* Def. Br. 31, is to the contrary. There, a trial court allowed defense counsel in a rape and murder prosecution to cross-examine a medical examiner about whether the autopsy finding that there

was no trauma to the victim's genitals was consistent with the defendant and victim having had consensual sex, but refused to allow further cross-examination "on the existence of injury to the genitalia of other bodies on which the witness had performed autopsies," and "whether the expert had found injury to the genitalia more consistently in instances of forced sex." *Cloutier*, 156 Ill. 2d at 501. This Court affirmed, explaining that because "the expert witness specifically disclaimed any recall of the number of forced sex victims who had not suffered injury to their genitalia as a result of such conduct . . . any opinion rendered on the consistency or lack thereof of injury in instances of forced sex would have been speculative and uncertain." *Id.* at 502. In other words, the opinion that the defendant sought to elicit in *Cloutier* was speculative not because the medical examiner did not know whether any prior victim he autopsied had in fact been sexually assaulted, but because he could not recall the underlying data on which he would have based his opinion. In contrast, the physicians here testified that they did not discover physical evidence of trauma in a "majority" or "most" of their sexual assault examinations. R336, 353. The factor that rendered a potential opinion in *Cloutier* too speculative to admit was simply not present here.

In addition, defendant suffered no prejudice from trial counsel's failure to object to the treating physicians' opinion testimony. Defendant contends that the testimony "risked misleading the jurors to believe that the lack of injuries experienced by K.S. and A.H. evidenced that they were actually

assaulted." Def. Br. 32. But the doctors' opinions were far more modest. Each doctor made clear that he had no opinion as to whether the girl he examined had been assaulted. R342, 351-52. Instead, the doctors opined only that the absence of physical evidence of trauma when examining the girls was not "inconsistent" with the allegations of sexual assault. R335-36, 345-46. Given that A.H. and K.S. were examined, respectively, 10 and 20 days after the alleged assaults, jurors likely would have inferred that any physical injury from the assaults could have healed by that time, even without expert testimony on the matter. *See People v. Mertz*, 218 Ill. 2d 1, 74 (2005) (finding any error in admission of expert testimony harmless where, among other things, "any inferences drawn by [the witness] were commonsense ones that the jurors no doubt had already drawn for themselves"). For that reason, even if the treating physicians had not been permitted to offer expert opinions on the matter, there is no reasonable probability that the result of defendant's trial would have been different. Defendant has thus failed to make even an arguable showing that trial counsel's performance was deficient or that he suffered any resulting prejudice.

Nor can defendant establish deficient performance or prejudice with respect to appellate counsel's decision not to argue trial counsel's alleged ineffectiveness on direct appeal. "Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to

refrain from raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong." *Haynes*, 192 Ill. 2d at 476 (internal quotation marks omitted). As discussed, defendant's ineffective assistance of trial counsel claim is wholly meritless, so appellate counsel's decision not to advance that claim on direct appeal cannot be deemed deficient performance. Nor was defendant prejudiced by appellate counsel's failure to raise a meritless issue. *See id.* ("[U]nless the underlying issues are meritorious, defendant has suffered no prejudice from counsel's failure to raise them on appeal.").

In sum, because defendant's postconviction claims were frivolous and patently without merit, the circuit court properly granted appointed counsel's motion to withdraw. For the same reason, defendant certainly could not have met the higher standard necessary to survive a second-stage motion to dismiss. Accordingly, any procedural error in the circuit court's second-stage dismissal of defendant's petition was harmless.

CONCLUSION

This Court should affirm the appellate court's judgment.

August 1, 2022

Respectfully submitted,

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

KATHERINE M. DOERSCH
Criminal Appeals Division Chief

ERIC M. LEVIN
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(773) 590-7065
eserve.criminalappeals@ilag.gov

Counsel for Plaintiff-Appellee
People of the State of Illinois

RULE 341(c) CERTIFICATE OF COMPLIANCE

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. 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 39 pages.

/s/ Eric M. Levin
ERIC M. LEVIN
Assistant Attorney General

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 August 1, 2022, the **Brief of Plaintiff-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 provided service of such filing to the email addresses of the persons named below:

Catherine K. Hart
Edward J. Wittrig
Office of the State Appellate Defender
Fourth Judicial District
400 W. Monroe St., Suite 303
Springfield, Illinois 62704
4thdistrict.eserve@osad.state.il.us

David J. Robinson
State's Attorneys Appellate Prosecutor
725 S. Second Street
Springfield, Illinois 62704
4thdistrict@ilsaap.org

Hon. Daniel Wright
Sangamon County State's Attorney
200 S. Ninth St., Suite 402
Springfield, Illinois 62701
chandler.chapman@co.sangamon.il.us

Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail thirteen copies of the **Brief of Petitioner-Appellee People of the State of Illinois** to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois 62701.

/s/ Eric M. Levin
ERIC M. LEVIN
Assistant Attorney General