No. 128492

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, v. RICHARD HUFF, Petitioner-Appellant.	) Appeal from the Appellate Court of) Illinois, First Judicial District) No. 1-20-1278.)) There on Appeal from the Circuit) Court of Cook County, Illinois,) No. 97 CR 26081.))) The Honorable) Carol M. Howard,) Judge Presiding.

BRIEF OF RESPONDENT-APPELLEE PEOPLE OF THE STATE OF ILLINOIS

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POINTS AND AUTHORITIES

NATURE OF THE CASE

A jury found petitioner guilty of the murder of his five-year-old daughter, R781, and after finding petitioner eligible for the death penalty, the trial court declined to impose it and sentenced him to life in prison, R850-51.[1] After unsuccessfully pursuing a direct appeal and a petition for relief from judgment, in 2016, petitioner filed a *pro se* postconviction petition that advanced to second stage proceedings. C40-49. Counsel was appointed and filed a certificate pursuant to Illinois Supreme Court Rule 651(c); counsel did not amend the *pro se* petition. C73. The trial court dismissed the petition on the People's motion. C115. On appeal, petitioner argued that postconviction counsel provided unreasonable assistance by not withdrawing from the case because the petition was frivolous. *People v. Huff*, 2022 IL App (1st) 201278-U, *see also* A11. The Illinois Appellate Court affirmed, and petitioner has appealed that judgment. A18. No question is raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether appointed postconviction counsel provided reasonable assistance when she filed a compliant Rule 651(c) certificate and stood on petitioner's *pro se* petition, even if, as petitioner now argues, his petition was frivolous.

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[1] Citations to the common law record, report of proceedings, supplemental common law record, petitioner's brief, and the appendix to petitioner's brief appear as "C__," "R__," "Sup. C __," "Pet. Br. __," and "A__," respectively.

2. Whether petitioner forfeited his procedural due process claim by raising it for the first time in this Court.

3. Alternatively, whether petitioner's procedural due process claim is meritless.

JURISDICTION

Jurisdiction lies under Illinois Supreme Court Rules 315 and 612(b)(2). On September 28, 2022, this Court granted the petitioner's petition for leave to appeal.

STATEMENT OF FACTS

Trial

In 1997, petitioner was charged with the first degree murder of his five-year-old daughter. C4. At trial, the evidence established that petitioner returned home after midnight and found his daughter attempting to finish her kindergarten homework. R397. He told her that she had 15 minutes to finish it, or he would "whip her ass." R398. After 15 minutes, he beat her with a belt. R629. When he noticed that the girl had placed playing cards in her underwear to protect against the belt, he made her strip naked and gave her another 15-minute deadline. R629-30. Over the next three hours, petitioner beat the naked child with a leather belt and an electrical wire every 15 to 20 minutes. R630-37. He also "slap[ped] her upside her head." R635. The child tried to escape from petitioner several times, falling and hitting her head. R630-37. Petitioner eventually put the child to bed but

kept her awake because he was worried about her head injuries. R640. He found her unresponsive a few hours later. R643. She was taken to the hospital where she was pronounced dead. R495. The jury found petitioner guilty. R781.

At petitioner's sentencing hearing, the People sought the death penalty because the victim was under the age of 12 and the offense was exceptionally brutal and heinous. R819. Petitioner waived his right to a jury for the death penalty sentencing phase. R116. The trial court found defendant eligible for the death penalty but declined to impose it due to petitioner's lack of a criminal record. R826-27; R848-49. Finding petitioner's conduct to be exceptionally brutal or heinous, the court sentenced him to natural life imprisonment. R850-51.

Direct Appeal and Section 2-1401 Petition

On direct appeal, petitioner argued, *inter alia*, that his natural life sentence violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because a jury did not find the "exceptionally brutal and heinous" aggravator that permitted his life sentence. A8. The appellate court affirmed, holding that where a defendant is first found eligible for the death penalty, the trial court is permitted to impose a sentence of natural life without implicating *Apprendi*. *Id.*

In 2005, petitioner repeated his *Apprendi* claim in a *pro se* petition for relief from judgment pursuant to 735 ILCS 5/2-1401. A8. The trial court

dismissed the petition as untimely and further held that its claim was barred by *res judicata*. *Id.* The appellate court affirmed. *Id.*

Postconviction Proceedings at Issue in This Appeal

On July 19, 2016, petitioner filed a *pro se* postconviction petition repeating his *Apprendi* argument as the petition's sole claim. *See* C40-49. Petitioner acknowledged that his petition was untimely, but argued that he could raise it at any time under the void-sentence rule. C41. Petitioner further acknowledged that his claim was barred by *res judicata*, but argued that this procedural bar could be overcome due to subsequent changes in the law. C45-48. Because the trial court failed to rule on the petition within 90 days, it automatically advanced to the second stage, and the court appointed counsel. R7; C54.

Over the next year, counsel obtained and reviewed petitioner's trial records. *See* R17, 23, 27-28, 38. After reviewing the records, she obtained a continuance to reach out to a colleague who had experience with *Apprendi* claims. R41. On June 13, 2018, counsel filed a certificate pursuant to Illinois Supreme Court Rule 651(c) stating that she (1) consulted with petitioner[2] to ascertain his contentions, (2) reviewed the record of petitioner's trial and sentencing proceedings, and (3) researched the issue in the *pro se* petition. C73. Counsel further certified that she had not prepared an amended

[2] Counsel's certificate mistakenly identifies petitioner as "Richard Hayes" in its first paragraph, but correctly identifies him as "Richard Huff" in the certificate's caption. *See* C73.

petition because the *pro se* petition "adequately sets forth the petitioner's claim of deprivation of his constitutional rights." *Id.*

In December 2019, the People filed a motion to dismiss the petition because (1) it was untimely, (2) the *Apprendi* claim was barred by *res judicata*, and (3) alternatively, any error was harmless. C85-104. Postconviction counsel informed the court that she would not file a response to the motion and rested on her Rule 651(c) certificate. R98-99. At a hearing on the People's motion, counsel waived petitioner's appearance, informed the court that she would not amend his *pro se* petition, and reiterated that she was resting on her Rule 651(c) certificate and the *pro se* petition. R102-04.

The trial court granted the People's motion and dismissed the petition. C113.

On appeal, petitioner acknowledged that his petition was deficient on its face but argued that postconviction counsel was unreasonable for failing to either amend the petition with a new, non-frivolous claim or withdraw as counsel pursuant to *People v. Greer*, 212 Ill. 2d 192, 206 (2004). A7, 15. The appellate court affirmed, holding that petitioner failed to rebut the presumption of reasonableness established by counsel's valid Rule 651(c) certificate. A14-15. The court further explained that when confronted with a meritless *pro se* petition, appointed counsel may reasonably either stand on the petition or withdraw from representation. A15-16.

STANDARDS OF REVIEW

This Court reviews *de novo* whether postconviction counsel provided reasonable assistance. *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007).

This Court also reviews *de novo* whether petitioner's due process claim is forfeited, *People v. Custer*, 2019 IL 123339, ¶ 17, and meritless, *People v. Pingelton*, 2022 IL 127680, ¶ 28.

ARGUMENT

Petitioner cannot rebut the presumption that postconviction counsel provided reasonable assistance. This Court has repeatedly explained that Rule 651(c) strictly limits second stage postconviction counsel's duties to three tasks: to consult with the petitioner, to examine the record, and to make any necessary amendments to the *pro se* petition. Petitioner does not contest that counsel filed a valid Rule 651(c) certificate, and that certificate established a rebuttable presumption that counsel completed those tasks and thus provided reasonable assistance. Petitioner cannot rebut this presumption because he has identified nothing in the record that affirmatively shows counsel did not complete the tasks. Thus, the presumption stands, counsel complied with her Rule 651(c) duties, and this Court should conclude that counsel provided reasonable assistance.

Should this Court accept petitioner's request to expand second stage counsel's duties beyond those identified by Rule 651(c), petitioner still cannot show he received unreasonable assistance. Because reasonable assistance is

a lower guarantee than that of constitutionally effective assistance guaranteed by the Sixth Amendment, if petitioner cannot establish that his counsel provided constitutionally ineffective assistance, he necessarily cannot show unreasonable assistance. Here petitioner cannot show that counsel's representation was constitutionally ineffective — let alone unreasonable — because he cannot show she performed unreasonably by not withdrawing. Moreover, petitioner cannot show that counsel was ineffective — let alone unreasonable — because he was not harmed by counsel's representation on his concededly frivolous claim.

Consequently, to remand for further proceedings on petitioner's concededly frivolous petition, after appointed counsel complied with her Rule 651(c)'s duties, would merely elevate form above function.

Finally, petitioner has forfeited his procedural due process claim by raising it for the first time in this Court. Forfeiture aside, the claim is meritless because postconviction counsel had notice of the People's motion to dismiss, was given the opportunity to respond, and ultimately did respond. In any event, any error would have been harmless, given that petitioner's petition is admittedly meritless.

I. Petitioner Failed to Rebut the Presumption that Postconviction Counsel Provided Reasonable Assistance.

This Court should affirm the appellate court's judgment because petitioner failed to rebut the presumption that postconviction counsel provided reasonable assistance.

The Post-Conviction Hearing Act (Act) establishes a three-stage process for adjudicating postconviction claims of constitutional error. *People v. Cotto*, 2016 IL 119006, ¶ 26. At the first stage, the trial court reviews a *pro se* petition to determine if it is "frivolous or patently without merit." 725 ILCS 5/122-2.1. If the court finds the claims are not frivolous or — as in this case — fails to make a first stage determination within 90 days, the petition is docketed for second stage proceedings, and the court may appoint counsel if petitioner is indigent. 725 ILCS 5/122-4; *see also People v. Pendleton*, 223 Ill. 2d 458, 472 (2006). If appointed, "counsel is required to file a certificate showing compliance with Illinois Supreme Court Rule 651(c), namely, stating that appointed counsel has consulted with the defendant, examined the record of trial proceedings, and made any necessary amendments." *Cotto*, 2016 IL 119006, ¶ 28. "At the conclusion of the second stage, the court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation," such that a third stage evidentiary hearing is warranted. *Id.*

Petitioner has no federal or state constitutional right to counsel in postconviction proceedings. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *see also People v. Flores*, 153 Ill. 2d 264, 276 (1992). Instead, the appointment of counsel at the second stage "'is a matter of legislative grace.'" *Flores*, 153 Ill. 2d at 276 (quoting *People v. Porter*, 122 Ill. 2d 64, 73 (1988)). Consequently, postconviction counsel is held "to only a 'reasonable' level of

assistance, which is less than that afforded by the federal or state constitutions." *Pendleton*, 223 Ill. 2d at 472 (quoting *People v. Munson*, 206 Ill. 2d 104, 137 (2002)); *see also People v. Johnson*, 2018 IL 122227, ¶¶ 16-17.

This lower standard applies because postconviction counsel plays a far more limited role than that of constitutionally mandated counsel at trial: "[a]t trial, counsel acts as a shield to protect defendants from being 'haled into court' by the State and stripped of their presumption of innocence," but "post-conviction petitioners[ ] . . . have already been stripped of the presumption of innocence, and have generally failed to obtain relief on appellate review of their convictions." *People v. Owens*, 139 Ill. 2d 351, 364-65 (1990) (quoting *Ross v. Moffitt*, 417 U.S. 600, 610-11 (1974)). The sole purpose of appointed postconviction counsel in second stage proceedings is to review the *pro se* petition, identify petitioner's claims, "shape their complaints into the proper legal form and to present those complaints to the court." *People v. Addison*, 2023 IL 127119, ¶ 19.

Thus, Illinois Supreme Court Rule 651(c), which effectuates the statutory right to reasonable assistance, "'sharply limits the requisite duties of postconviction counsel," who "are required only to certify that they have 'consulted with the petitioner by phone, mail, electronic means or in person,' 'examined the record' as needed to shape the defendant's pro se claims, and 'made any amendments to the petitions filed pro se that are necessary for an adequate presentation' of those claims.'" *Id.* ¶ 37 (quoting *Custer*, 2019 IL

123339, ¶ 32). The filing of a Rule 651(c) certificate creates a presumption that postconviction counsel carried out her Rule 651(c) duties and provided reasonable assistance. *Custer*, 2019 IL 123339, ¶ 32; *see also People v. McNeal*, 194 Ill. 2d 135, 143 (2000). Petitioner bears the burden of affirmatively rebutting the presumption that counsel complied with the rule and provided reasonable representation. *Addison*, 2023 IL 127119, ¶ 21.

A. Petitioner failed to rebut the presumption that postconviction counsel complied with Rule 651(c).

Petitioner cannot rebut the presumption that postconviction counsel complied with Rule 651(c) because nothing in the record affirmatively shows that counsel did not comply with the rule, as she certified.

As an initial matter, petitioner does not contest that counsel filed a compliant Rule 651(c) certificate. *See* Pet. Br. 22-23. Consequently, as petitioner acknowledges, *see id.*, this Court should presume counsel complied with her Rule 651(c) duties and provided reasonable assistance, *Addison*, 2023 IL 127119, ¶ 21.

Indeed, petitioner does not contest that postconviction counsel consulted with him to ascertain his contentions of error and reviewed the trial record, just as counsel certified. See Pet. Br. 22-24. Instead, petitioner now concedes that the sole claim in his petition was frivolous and argues counsel failed to amend the petition to state a new, nonfrivolous claim. *See id.* at 22-24, 29. But counsel has no duty to raise a new claim not presented

in the *pro se* petition, and petitioner has not rebutted the presumption that counsel made all necessary and available amendments to his *Apprendi* claim.

Rule 651(c) requires appointed counsel to make all amendments to petitioner's *pro se* petition that are necessary to shape the *pro se* claims into the proper legal form. *Addison*, 2023 IL 127119, ¶ 26. This duty includes amendments to overcome procedural bars. *Id.* ¶ 21. But counsel is not required to make frivolous amendments in an attempt to overcome the petition's deficiencies. *Greer*, 212 Ill. 2d at 205. Nor is counsel required to find and add new claims beyond those identified in the *pro se* petition. *People v. Davis*, 156 Ill. 2d 149, 164 (1993) ("Post-conviction counsel is only required to investigate and properly present the *petitioner's* claims.") (emphasis in original); *see also* Ill. S. Ct. R. 651(c) (requiring a showing that counsel "has made any amendments to the petitions filed pro se that are necessary for an adequate presentation of petitioner's contentions"). Where counsel files a Rule 651(c) certificate and makes no amendments to the *pro se* petition, courts presume that no further amendment was available. *See People v. Perkins*, 229 Ill. 2d 34, 50-52 (2007).

Petitioner has identified nothing in the record that shows counsel failed to make a necessary amendment to overcome the procedural bars to his claim. Indeed, petitioner has not even suggested an amendment that counsel could have made. *See* Pet. Br. 22-24. Consequently, he cannot rebut the presumption that counsel made any necessary amendments and provided

reasonable representation. *See Cotto*, 2016 IL 119006, ¶ 50 ("Notably, defendant fails to explain what additional information should have been included by counsel in regard to the timeliness issue."); *see also Perkins*, 229 Ill. 2d at 50-52 ("There is nothing in the record to indicate that petitioner had any other excuse showing the delay in filing was not due to his culpable negligence. We cannot assume there was some other excuse counsel failed to raise for the delay in filing."). Accordingly, the presumption stands, counsel complied with Rule 651(c), and petitioner received reasonable assistance.

B. Petitioner cannot establish that counsel was unreasonable for failing to withdraw, despite her compliance with Rule 651(c).

Petitioner's argument that postconviction counsel violated a duty beyond those delineated in Rule 651(c) is equally unavailing. *See* Pet. Br. 8-11. Because Rule 651(c) does not impose a duty to withdraw in any circumstance, any duty to withdraw must arise under some other principle governing reasonable assistance.

This Court recently reiterated that "Rule 651(c) delineates the duties attorneys must perform to establish reasonable assistance" at the second stage of postconviction proceedings. *People v. Urzua*, 2023 IL 127789, ¶ 52. The Court further explained that second stage counsel's duties are "limit[ed]" to the three tasks contained within Rule 651(c). *Id.* ¶ 54; *see also Addison*, 2023 IL 127119, ¶ 37 ("A defendant who successfully argues that his attorney failed to provide reasonable assistance at the second stage of postconviction proceedings is merely entitled to a remand for his attorney to comply with the

limited duties required by Rule 651(c)."); *Custer*, 2019 IL 123339 ¶ 38 ("The flaw in petitioner's argument is that it presupposes a higher standard of professional conduct for postconviction counsel than is imposed by Rule 651(c), the gold standard for postconviction duties."). Accordingly, because counsel performed the three duties described in Rule 651(c), she provided reasonable assistance in consulting with petitioner, reviewing the record, and shaping petitioner's *pro se* claim as necessary.

To be sure, this Court has suggested that a petitioner may be able to raise a claim that postconviction counsel's representation at the second stage was unreasonable even where counsel complied with Rule 651(c). *See, e.g.*, *People v. Smith*, 2022 IL 126940, ¶ 38 ("We stress that if postconviction counsel performs unreasonably—even after a presumption has arisen that there has been compliance with Rule 651(c)—postconviction petitioners are not foreclosed from pursuing a claim that counsel failed to provide a reasonable standard of representation.").

Despite this suggestion, the Court has not explained how a reviewing court should assess the reasonableness of counsel's representation outside the scope of Rule 651(c). Yet the appellate court has approached the issue by analogizing the claim to a constitutional ineffectiveness claim, *see, e.g.*, *People v. Hotwagner*, 2015 IL App (5th) 130525, ¶ 37, reasoning that if counsel's performance cannot be deemed deficient under *Strickland v. Washington*, 466

U.S. 668 (1984), then "it cannot be said that counsel failed to provide the reasonable assistance required under the Act," *id.* ¶ 38.

Under *Strickland*, to succeed on an ineffective assistance claim, a defendant must establish that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance resulted in prejudice. 466 U.S. at 687. And, because the statutory right to reasonable counsel is less than the constitutional right prescribed by *Strickland*, *Pendleton*, 223 Ill. 2d at 472, if petitioner's claims cannot surmount the constitutional standard, his statutory claim of unreasonable assistance must fail, *see People v. Watson*, 2022 IL App (5th) 190427, ¶ 48*; People v. Pabello*, 2019 IL App (2d) 170867, ¶ 36; *People v. Zareski*, 2017 IL App (1st) 150836, ¶ 59; *Hotwagner*, 2015 IL App (5th) 130525, ¶ 37. Applying *Strickland* to petitioner's claim, he cannot establish either prong.

1. Counsel's performance was not rendered unreasonable by her decision to continue to advocate for petitioner rather than entirely withdraw from the representation.

The record does not establish that counsel's decision to stand on the *pro se* petition rather than withdraw was objectively unreasonable. In judging the reasonableness of postconviction counsel's actions, one must remember the limited nature of counsel's representation; counsel is not provided as a shield against the State, but only to shape petitioner's *pro se* claims into the proper legal form and present them to the court. *Addison*, 2023 IL 127119, ¶ 19. And that is exactly what counsel did here.

Petitioner filed a *pro se* petition raising a single claim. C40-49. In that petition, he anticipated the People's affirmative defenses of timeliness and *res judicata* and offered reasons why those defenses did not bar his claim. C41, 45-48. Once appointed, counsel reviewed the record, conferred with petitioner, and investigated his claims. C73; *see also* R38-41. Counsel ultimately concluded that no amendments were necessary to adequately present petitioner's *Apprendi* claim. C73. Petitioner has not identified any possible amendment that counsel failed to make, *see* Pet. Br. 22-24, and consequently this Court presumes that counsel fully investigated any available responses, but found no arguments better than those already raised by petitioner, *Perkins*, 229 Ill. 2d at 50-52. Accordingly, counsel reasonably stood on the arguments already before the court. R102-04. The fact that those arguments were not "particularly compelling" or that they were ultimately "legally without merit" does not render counsel's performance unreasonable, particularly where no better options were available. *Perkins*, 229 Ill. 2d at 51. In short, counsel was tasked with shaping petitioner's meritless claim into the best available legal form, and she did just that.

Contrary to petitioner's argument, Pet. Br. 12-21, *Greer* does not hold that counsel provides unreasonable assistance when she declines to withdraw when faced with a frivolous petition. *See* 212 Ill. 2d at 212. Instead, *Greer* holds that appointed counsel may withdraw under the Act when she feels ethically compelled to do so. *Id.* at 209. In so holding, *Greer's* analysis did

not rely upon appointed counsel's obligations to provide reasonable assistance, but upon counsel's ethical obligations. *Id.* at 209. And whether counsel provided reasonable representation and whether counsel satisfied her ethical obligations are not the same question. Some of counsel's ethical obligations involve duties to her client, such as the duties of loyalty or competence, *see* Ill. R. Prof. Conduct, R. 1.1 and 1.7, and are relevant to whether counsel's representation was adequate. But other ethical obligations involve duties to the court, like the duty of candor or the obligation not to bring frivolous claims, *see* Ill. R. Prof. Conduct, R. 3.1 and 3.3. These obligations to the court do not necessarily protect the client — in fact they may harm a client's case — and have no bearing on whether counsel adequately represented her client's interests.

Regardless, neither *Greer* nor the rules that govern professional conduct bar an attorney from bringing a claim she views as meritless. Instead, attorneys are barred from bringing "frivolous" claims. Ill. R. Prof. Conduct, R. 3.1; *see also Greer*, 212 Ill. 2d at 209 (counsel is not required to continue representing petitioner where petition is "frivolous and patently without merit"); *Urzua*, 2023 IL 127789, ¶ 78 (Theis, C.J., dissenting) ("*Greer* does not, however, compel counsel to withdraw from the proceedings whenever a defendant's claim seems weak."). The distinction is not merely semantic; if counsel were barred from bringing a claim that was merely

meritless, then every attorney who loses a case would violate her ethical duties.

Here, nothing in the record suggests that postconviction counsel believed the petition was frivolous, as opposed to merely potentially meritless. Indeed, because counsel stood on petitioner's *pro se* petition, the reasonable inference is that counsel believed those claims were arguably meritorious. *People v. Holman*, 164 Ill. 2d 356, 369 (1995) (recognizing, in Sixth Amendment context, "a strong presumption . . . that counsel exercised sound professional judgment"). Petitioner asks this Court to turn that presumption on its head and presume instead that counsel knowingly brought a frivolous claim and violated her ethical duties.

But such a presumption would create a difficult line for appointed counsel charged with aiding a postconviction petitioner and would be contrary to the purpose of the Act. As the comments to the Rules of Professional Conduct make clear, there is a sometimes murky line between the duty to avoid raising frivolous claims and the duty to advocate zealously for a client. *See* Ill. R. Prof. Conduct 3.1, Comment 1 ("[T]he law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change."). This balance is particularly important in proceedings of a criminal nature, where a party's incarceration is at stake. *Id.* Comment 3.

By presuming that counsel believed petitioner's argument was frivolous, and that she thus violated her ethical duties, the Court would incentivize appointed counsel in close cases to err on the side of withdrawing rather than risk unethical conduct and possible sanction. And, because *Greer* has made clear that withdrawing counsel must not only withdraw but "should make some effort to explain why defendant's claims are frivolous or patently without merit," *Greer*, 212 Ill. 2d at 211-12, such a presumption would incentivize counsel to take a position adverse to their client's interests. Such a result is antithetical to the purpose of appointed counsel in postconviction cases and harms rather than helps petitioners. *See infra* section I.B.2.

In sum, counsel was appointed to adequately present petitioner's *pro se* claim to the court, and she did so. There is nothing in the record to suggest that counsel believed that the petition was frivolous, such that counsel was ethically bound to withdraw. Accordingly, petitioner cannot show that counsel's performance was objectively unreasonable.

2. Petitioner was not prejudiced.

Even if petitioner's claim were so obviously frivolous that this Court would infer that counsel violated her ethical duties by presenting it to the trial court, counsel's performance cannot have prejudiced petitioner.

Under the *Strickland* prejudice standard, a defendant cannot succeed on a claim of ineffective assistance of counsel unless he can show a

"'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *People v. Cherry*, 2016 IL 118728, ¶ 24 (quoting *Strickland* 466 U.S. at 694). It follows that if petitioner cannot show a reasonable probability that his *Apprendi* claim would have succeeded had counsel withdrawn, then counsel's performance cleared the effectiveness bar as well as the lower bar of reasonableness.

To be sure, this Court has held that a petitioner is not required to show prejudice where he claims that second stage counsel did not complete the three duties delineated in Rule 651(c). *Addison*, 2023 IL 127119, ¶ 37 ("Our case law thus clearly establishes that all postconviction petitioners are entitled to have counsel comply with the limited duties of Rule 651(c) before the merits of their petitions are determined."). Prejudice is not required because counsel's obligations at the second stage are limited to Rule 651(c)'s three specified duties, and a petitioner is entitled to have counsel perform those three duties. *Id.* ¶¶ 36-38; *see also Suarez*, 224 Ill. 2d at 41-42. But here, counsel performed the three duties identified in Rule 651(c), *see supra* section I, so petitioner is left to argue that counsel otherwise performed unreasonably at the second stage by failing to withdraw from representation, a duty not found in the rule or this Court's caselaw.

If this Court recognizes such a claim, the reasoning that permits petitioner to succeed without establishing prejudice no longer applies because counsel's duties would be expanded beyond the three specific tasks that

petitioner is entitled to. *See Addison*, 2023 IL 127119, ¶¶ 36-38. Moreover, such a broad expansion of counsel's duties, without an accompanying requirement that petitioner show prejudice, would render the statutory right to reasonable assistance more potent than the constitutional right to counsel. Such a result is inconsistent with this Court's consistent precedent holding that reasonable assistance is a less rigorous standard than effective assistance. *See, e.g.*, *Pendleton*, 223 Ill. 2d at 472; *see also Cotto*, 2016 IL 119006, ¶ 45. Consequently, because petitioner claims that counsel failed to perform a duty beyond the three specified in Rule 651(c), he must establish how that failure prejudiced him.

Here, even if he could show that counsel's decision not to withdraw was unreasonable, petitioner cannot show that he was prejudiced, for he has conceded that his petition is meritless. Pet. Br. 29. Moreover, he has failed to identify any amendment or argument that he would have made had counsel withdrawn that would have salvaged his meritless petition. Accordingly, he has forfeited any such argument. Ill. S. Ct. R. 341(h)(7).

Forfeiture aside, even applying the *Strickland* prejudice standard, there is no reasonable probability of a different result had counsel withdrawn. Petitioner's petition was denied because it was untimely and his claim was barred by *res judicata*. *See* C113. An untimely postconviction petition must be dismissed unless petitioner shows that his failure to file the petition earlier was not the result of his culpable negligence. 725 ILCS 5/122-

1(c). Here, petitioner cannot possibly make such a showing. Petitioner's limitations period began to run in 2001, 35 days after the appellate court issued its opinion in his direct appeal. *See Johnson*, 2017 IL 120310, ¶ 24 (period begins to run once the 35-day to file a petition for leave to appeal has ended); *see also* A5. Petitioner then had six months, until May 2, 2002, to file a timely postconviction petition. *See* 725 ILCS 5/122-1(c). Petitioner has not offered any excuse, and indeed he has no excuse, for failing to file his postconviction petition within that time period, given that he had previously raised the same *Apprendi* claim in his direct appeal. A5. Nor could petitioner show that he was not at fault for filing his 2016 postconviction petition over 14 years late, because he was able to raise the exact same claim in his section 2-1401 petition filed in 2005. *See* A8.

Nor is there a reasonable probability that petitioner could have overcome the *res judicata* bar. Courts will enforce the *res judicata* bar unless it would be "fundamentally unfair" to apply it. *Nowak v. St. Rita High Sch.*, 197 Ill. 2d 381, 390 (2001). But petitioner was able to fully litigate the *Apprendi* issue — with the aid of constitutionally effective appellate counsel — in his direct appeal. And petitioner has identified no deficiency in his direct appeal proceedings in these postconviction proceedings, or when he initially failed to overcome the *res judicata* bar in his section 2-1401 petition. Consequently, even if postconviction counsel had determined that petitioner's

claim was frivolous and withdrawn, there is no reasonable probability that the result of these proceedings would have been any different.

Moreover, even if petitioner could have somehow overcome the procedural bars to his petition, he still could not establish prejudice because his underlying *Apprendi* claim is meritless. In *Apprendi*, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. When a defendant is found eligible for the death penalty by proof beyond a reasonable doubt, the imposition of a sentence less than death, *i.e.*, a mandatory life sentence, complies with *Apprendi*. *People v. Ford*, 198 Ill. 2d 68, 75 (2001). Here, petitioner waived his right to a jury for the death penalty sentencing phase, R116, and the trial court found him eligible for the death penalty, R826-27. Petitioner has not raised any challenge to the court's eligibility finding. Consequently, his life sentence does not violate *Apprendi*, and his claim is meritless. *See Ford*, 198 Ill. 2d at 75.

Petitioner's pure speculation that, had counsel withdrawn and had he been able to respond to the People's motion to dismiss *pro se*, he might have somehow saved his petition does not meet his burden of establishing prejudice. *See* Pet. Br. 28. Nor, contrary to petitioner's argument, *id.*, is it the case that postconviction counsel failed to respond to the People's

affirmative defenses. Petitioner anticipated both defenses in his *pro se* petition and argued that the procedural bars did not apply, C41, 45-48, although he now argues that his arguments were frivolous, Pet. Br. 29. Counsel directed the court to petitioner's arguments by standing on the *pro se* petition. R102-04. Petitioner's present speculation assumes that he would have discovered, *pro se*, a legal argument that had escaped him at the time of filing, as well as his postconviction counsel and his postconviction appellate counsel. If petitioner could have developed a successful argument at the time, one wonders why he has not done so during the pendency of this appeal.

The importance of requiring petitioner to prove prejudice where counsel has already fulfilled her duties under Rule 651(c) is particularly clear here, where petitioner not only cannot show that he was harmed by counsel's performance, but the actions he suggests counsel should have taken could have harmed him. Petitioner argues not only that counsel should have withdrawn, but also that she should have filed a brief thoroughly explaining to the court why petitioner's claims were frivolous, as is required[3] of counsel withdrawing from postconviction proceedings after the court has made a first stage determination that the petition is *not* frivolous, *see People v. Kuehner*, 2015 IL 117695, ¶ 21, or counsel withdrawing on direct appeal, *see Anders v.*

[3] Contrary to petitioner's assertion, Pet. Br. 21, *Greer* does not explicitly require counsel to file such a detailed motion in proceedings where a petition automatically advanced to the second stage, *see Greer*, 212 Ill. 2d at 211-12. The question whether such a motion is required in these circumstances is currently before the Court in *People v. Frey*, No. 128664 (Ill.).

California, 386 U.S. 738, 87 (1967). Thus, instead of presenting petitioner's claim to the trial court, petitioner argues that counsel should have explained to the court that the claim was frivolous and acted as adversary, rather than advocate. *See* Pet. Br. 17-18. Yet the only potential benefit petitioner would purchase by having his appointed attorney inform the court that his petition is frivolous is the opportunity to argue, *pro se*, the very claim that he concedes on appeal is frivolous.

To remand for further proceedings where petitioner received the assistance of counsel who complied with the three duties outlined in Rule 651(c), where petitioner concedes that his petition is frivolous, and where he offers only unsupported speculation as to what might be different on remand, is to elevate form over function. Petitioner cannot show he was prejudiced by counsel's performance and thus cannot establish that counsel's representation was unreasonable.

II. Petitioner's Procedural Due Process Claim Fails.

A. Petitioner forfeited his due process claim.

Petitioner has forfeited his procedural due process claim because he raised it for the first time in his opening brief to this Court. *See* Pet. Br. 24-29. Forfeiture bars an appellant from raising claims in this Court that he did not raise before the appellate court. *People v. Robinson*, 223 Ill. 2d 165, 174 (2006). Similarly, an appellant forfeits any issue not raised in his petition for leave to appeal. *People v. Whitfield*, 228 Ill. 2d 502, 509 (2007). Petitioner did not include a due process claim in his briefs to the appellate court, *see*

Petitioner's Opening Brief,[4] *People v. Huff,* No. 1-20-1278 (Ill. App. Ct); *see also* Petitioner's Reply Brief, *People v. Huff,* No. 1-20-1278 (Ill. App. Ct), and did not include such a claim in his petition for leave to appeal to this Court, *see* Petition for Leave to Appeal, *People v. Huff*, No. 128492 (Ill.). Accordingly, he has forfeited the claim.

B. Alternatively, petitioner's due process claim is meritless, and at the very least any error was harmless.

Forfeiture aside, petitioner's due process claim is meritless, or at the very least any error was harmless.

A postconviction petitioner has a procedural due process right to be "heard at a meaningful time and in a meaningful manner." *Pingelton*, 2022 IL 127680, ¶ 36. In effect, this means that a petitioner is entitled to notice of, and a meaningful opportunity to respond to, any motion or responsive pleading filed by the People. *Id.* Where a party's counsel receives notice and an opportunity to respond on the party's behalf, procedural due process is satisfied. *See People v. Stoecker*, 2020 IL 124807, ¶ 22 (party's due process right would not have been violated had his counsel been given notice of, and an opportunity to respond to, motion to dismiss). Even where a postconviction petitioner's right to due process has been violated, the error is harmless where the petition is ultimately meritless. *Pingelton*, 2022 IL 127680, ¶ 43.

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[4] Pursuant to Illinois Supreme Court Rule 318(c), the People have requested the Clerk of the Illinois Appellate Court, First District, certify and transmit copies of the appellate court briefs to this Court.

There is no dispute that petitioner's appointed counsel had notice of the People's motion to dismiss and an opportunity to respond. *See* R102-04. And once petitioner chose to accept the appointment of counsel, he had no right to personally respond to the People's arguments. *Pingelton*, 2022 IL 127680, ¶ 40 ("Because he was still represented by counsel, petitioner had no right to counter the State's argument directly."). Thus, petitioner's right to procedural due process was satisfied because his counsel had an opportunity to respond. *See Stoecker*, 2020 IL 124807, ¶ 22.

Petitioner's case is distinguishable from *Pingleton*. *Cf.* Pet. Br. 26-28. There, appointed counsel filed a motion to withdraw, explaining that the petitioner's claims were frivolous, and the People filed a motion to dismiss. *Pingelton*, 2022 IL 127680, ¶¶ 11-12. The trial court had docketed the case for a "status" hearing, but when the case was called, the court proceeded to address both postconviction counsel's motion to withdraw and the People's motion to dismiss. *Id.* ¶ 39. The petitioner was permitted to respond to appointed counsel's motion to withdraw, but not to the People's motion to dismiss. *Id.* ¶ 40. Counsel did not respond to the motion to dismiss and reiterated that the petition was meritless. *Id.* ¶¶ 17-19.

On appeal, this Court held that petitioner's right to due process had been violated because he was not given notice that the court would address the motion to dismiss and he was not given an opportunity to respond to that motion. *Id.* ¶ 40. And the petitioner's right to respond was not effectuated

through appointed counsel because counsel's motion to withdraw conceded that the People's motion was correct. *Id.*

Unlike appointed counsel in *Pingleton*, postconviction counsel here did not file a motion to withdraw and did not concede that the motion to dismiss was correct, for standing on the petition is not the same as actively conceding the People's argument and relinquishing counsel's role as petitioner's advocate. By standing on the petition, counsel implicitly directed the court's attention to the arguments against the People's motion contained therein. Ultimately, petitioner's claim is not that counsel did not have the opportunity to respond for petitioner, or even that counsel failed to respond at all. Rather, petitioner does not like the response counsel chose in standing on his petition. That is not a valid argument to show due process was violated; it is just a reiteration of petitioner's unsuccessful argument that counsel was unreasonable. *See supra* section I.

Regardless, even if petitioner's case were analogous to *Pingleton*, his due process claim must fail because any error would be harmless. *See Pingelton*, 2022 IL 127680, ¶ 66 (petitioner was not entitled to remand because due process error was harmless). Petitioner has conceded that his *Apprendi* claim is not merely meritless but frivolous, and he has failed at every level of these proceedings to offer any suggestion as to how his petition's deficiencies could be remedied. *See supra* section I.B.2. Thus, any violation of his right to due process would be harmless.

CONCLUSION

This Court should affirm the appellate court's judgment.

July 18, 2023

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages 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, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 28 pages.

/s/ Nicholas Moeller
Nicholas Moeller
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CERTIFICATE OF FILING AND SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On July 18, 2023, 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 provided notice to the following registered e-mail addresses:

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