No. 128644

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. RUSSELL A. FREY, Defendant-Appellee.	))))))))))	Appeal from the Appellate Court of Illinois, Second Judicial District, No. 2-21-0044 There on Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Lee County, Illinois, No. 12 CF 44 The Honorable Jacquelyn D. Ackert, Judge Presiding.

REPLY BRIEF OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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ARGUMENT

As the People's opening brief explained, *see* Peo. Br. 14-19,[1] because defendant's postconviction petition advanced to the second stage based on the trial court's failure to review it within 90 days of docketing, appointed counsel's motion to withdraw is governed by *People v. Greer*, 212 Ill. 2d 192 (2004), which permits withdrawal if counsel has fulfilled his Rule 651(c) duties and the record demonstrates that defendant's claims are frivolous or patently without merit. Defendant asks this Court instead to apply the standard adopted in *People v. Kuehner*, 2015 IL 117695, which forbids withdrawal when a petition affirmatively advances to the second stage based on a first-stage finding that it is not frivolous or patently without merit and counsel's motion to withdraw does not address all of the defendant's pro se claims. *See* Def. Br. 23-24. But defendant's argument disregards the critical distinction that this Court drew in *Greer* and *Kuehner* between petitions that advance based on judicial inaction and those that advance due to an affirmative first-stage finding that the petition is not frivolous.

Defendant also incorrectly argues that appointed counsel did not fulfill his Rule 651(c) duty to consult with defendant to ascertain his contentions of error merely because counsel's motion to withdraw did not address certain allegations in defendant's pro se petition. *See* Def. Br. 18-29. As the People's

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

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opening brief explained, *see* Peo. Br. 19-22, this argument misconstrues Rule 651(c)'s duty of consultation and ignores the presumption of compliance with that duty that arises from counsel's filing of a Rule 651(c) certificate.

Finally, defendant's contention that his purportedly overlooked claim is not frivolous or patently without merit, *see* Def. Br. 35-38, cannot be squared with the record evidence refuting his allegations, *see* Peo. Br. 23-25. For all these reasons, this Court should reverse the appellate court's judgment and reinstate the trial court's orders allowing appointed counsel to withdraw and dismissing defendant's postconviction petition.

A. Defendant seeks to upend the *Greer-Kuehner* framework.

As the opening brief explained, *see* Peo. Br. 15-19, *Greer* establishes that when (as here) a postconviction petition advances to the second stage due to judicial inaction, counsel should be allowed to withdraw if he has fulfilled his Rule 651(c) duties and the record demonstrates that the defendant's claims are frivolous or patently without merit, notwithstanding any inadequacy in the motion to withdraw, *see* 212 Ill. 2d at 211-12. In contrast, *Kuehner* holds that when a petition advances to the second stage because the trial court made an affirmative first-stage finding that it is not frivolous or patently without merit, no motion to withdraw may be granted unless the motion explains why all of the defendant's claims are frivolous or patently without merit. 2015 IL 117695, ¶ 22.

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Defendant ignores the critical distinction that *Greer* and *Kuehner* drew between petitions that advance to the second stage due to judicial inaction and those that advance based on an affirmative finding that the petition is not frivolous. *See* Def. Br. 24 (arguing that *Kuehner*'s "reasoning is no less salient in a case where the petition is advanced to the second stage by default"). Whether due to trial courts' heavy dockets or other causes, some petitions do not receive first-stage review within the 90-day period mandated by 725 ILCS 5/122-2.1(a). In *Greer*, this Court recognized that when a petition advances to the second stage through "the fortuity" of judicial inaction, it "may well be frivolous or patently without merit." 212 Ill. 2d at 204. In such circumstances, it will not be unusual for appointed counsel to conclude that there are no nonfrivolous arguments to raise in support of the petition and to move to withdraw on that basis. Indeed, as this Court explained in *Greer*, the requirement of advancing such petitions to the second stage does not stem from a belief that the petitions may be meritorious, but instead from a legislative "desire to jump-start a process that has shown no signs of progress." *Id.* at 209.

In contrast, *Kuehner* stressed that "a request for leave to withdraw as counsel after a first-stage judicial determination that the *pro se* petition is neither frivolous nor patently without merit is an extraordinary request." 2015 IL 117695, ¶ 22. And that "very different procedural posture" led this Court to impose a "decidedly higher" burden on an appointed attorney who

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moves to withdraw after an affirmative first-stage finding of nonfrivolousness than on an attorney who seeks to withdraw after a petition has advanced due solely to judicial inaction. *Id.*, ¶ 18. Defendant's attempt to impose the same burden on all withdrawing counsel, regardless of how the petition advanced to the second stage, thus squarely conflicts with the reasoning of *Greer* and *Kuehner*.

Defendant also attempts to distinguish *Greer*, *see* Def. Br. 34-35, on the ground that appointed counsel there appears to have identified all of the defendant's pro se claims in the motion to withdraw, even though the motion erroneously argued that the claims could not be properly substantiated rather than that they were frivolous or patently without merit, *see Greer*, 212 Ill. 2d at 195, 200. But as discussed below, *see infra* pp. 6-9, defendant's argument wrongly assumes that his appointed counsel overlooked one of his claims instead of having reasonably ascertained that defendant did not intend to raise the claim. Regardless, nothing in *Greer* suggests that counsel having correctly identified all of the defendant's pro se claims in the motion to withdraw was necessary to the Court's decision. Indeed, if that fact had been important, *Kuehner* could have simply distinguished *Greer* on that basis, since counsel in *Kuehner* omitted two of the defendant's pro se claims from her motion to withdraw. *See Kuehner*, 2015 IL 117695, ¶ 9. But, as discussed, *Kuehner* distinguished *Greer* based on the way the petitions had

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advanced to the second stage — and not on the adequacy of the withdrawal motions.

Finally, defendant wrongly suggests that applying *Greer* to cases in which appointed counsel fails to discuss one or more of a defendant's pro se claims in a motion to withdraw creates a risk that a defendant's potentially meritorious claims could go unaddressed. *See* Def. Br. 26-28. But even where (unlike here, *see infra* pp. 6-9) counsel has overlooked a claim when moving to withdraw, an order allowing counsel to withdraw will be subject to reversal if the defendant can show that the overlooked claim is not frivolous or patently without merit. *See Greer*, 212 Ill. 2d at 212. Defendant's concern that potentially meritorious claims could go unaddressed is thus unfounded.

For all these reasons, this Court should reaffirm that when a petition advances to the second stage through judicial inaction, the trial court may allow counsel to withdraw if counsel has fulfilled his Rule 651(c) duties and the record demonstrates that the defendant's claims are frivolous or patently without merit, notwithstanding any error or omission in counsel's motion to withdraw.

B. The record does not rebut the presumption of compliance arising from appointed counsel's Rule 651(c) certificate.

Like the appellate court, *see* A10-11, ¶¶ 28-29, defendant erroneously reasons that appointed counsel could not have fulfilled his Rule 651(c) duty to "consult[ ] with [defendant] . . . to ascertain his . . . contentions of deprivation of constitutional rights," Ill. S. Ct. R. 651(c), because the motion to withdraw

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did not discuss defendant's pro se allegations about a note reporting that the jury was deadlocked and the trial court's alleged response, *see* Def. Br. 20. That conclusion is unsupported both legally and factually.

To start, defendant and the appellate court disregard the presumption of compliance that arose from appointed counsel's filing of a Rule 651(c) certificate. *See People v. Urzua*, 2023 IL 127789, ¶ 62. To be sure, the presumption is rebuttable. *See People v. Addison*, 2023 IL 127119, ¶ 21. But "the burden of overcoming th[e] presumption" rests on defendant, who must affirmatively "show[ ] that postconviction counsel did not substantially comply with the strictures of the rule." *Id.* Here, defendant cannot rebut the presumption of Rule 651(c) compliance.

Defendant contends that the failure to discuss in a motion to withdraw "any . . . claim" that the pro se petition can be liberally construed to present "indicates that counsel failed to ascertain all of the [defendant's] allegations." Def. Br. 10. But this argument misunderstands Rule 651(c)'s ascertainment requirement. The rule directs appointed counsel to ascertain the defendant's contentions not by parsing the pro se petition, but through "consult[ation] with" the defendant. Ill. S. Ct. R. 651(c). Here, when moving to withdraw, appointed counsel certified that he had consulted with defendant to ascertain his contentions. *See* C607. The fact that counsel's accompanying motion to withdraw did not discuss defendant's pro se jury note allegations suggests that after consulting with defendant, counsel reasonably ascertained that

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defendant did not seek to present a standalone claim based on the jury note allegations.

The structure of the pro se petition buttresses that conclusion. As the opening brief explained, *see* Peo. Br. 19-20, defendant devoted most of his petition to his self-described "main claim" of "ineffective assistance of counsel," C522-25, and a secondary claim that his sentence violates the state constitution, C526. In articulating those claims, defendant alleged that the trial court told deadlocked jurors that "they could not leave that night unless they all agreed on something." C525. Then, on the final page of the petition, under the heading "Newly Discovered Evidence," defendant stated that his sister, Roxanne Shaffer, had signed an affidavit (which defendant attached) "claiming a violation of [defendant's] right to due process by forcing the jury to come to a unanimous verdict or they were not allowed to leave that night." C529. Defendant then tied this allegedly "newly discovered evidence" to his ineffective assistance claim, asserting that the failure "to fully depose all witnesses also adds this to the claim for ineffective assistance of trial counsel." *Id.*

That defendant embedded his jury note allegations in his discussion of other claims, explicitly linked the allegations to his ineffective assistance claim, and made only passing reference to a due process claim based on those allegations suggests that he did not intend to present a separate due process claim, but instead viewed the allegations as supporting his other claims. It is

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thus not surprising that after consulting with defendant, appointed counsel concluded that a standalone due process claim was not one of defendant's contentions.

To the extent any doubt remains, it is dispelled by defendant's responses to appointed counsel's motion to withdraw and to the People's motion to dismiss. As the opening briefed noted, *see* Peo. Br. 20-21, defendant confirmed at the hearing on the motion to withdraw that counsel had reviewed the motion with him, *see* R1689-90, which means that defendant was aware that the motion did not discuss a standalone due process claim based on the jury note allegations. Yet while defendant made a general "object[ion]" to the motion, he said nothing about counsel having overlooked one of his claims. R1690.

To be clear, the People are not arguing that defendant's silence "forfeited" the purported due process claim. Def. Br. 21. Rather, the point is that if defendant believed that his pro se petition included a claim that counsel omitted from the motion to withdraw, defendant would have said so at the hearing on the motion. That he did not — and that he also made no mention of any due process claim at the subsequent hearing on the People's motion to dismiss, *see* R1711-12 — is strong evidence that defendant did not intend to present a separate due process claim and that appointed counsel did not fail to correctly ascertain such a claim during his consultation with defendant.

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Defendant deems it "misleading" to state that he "said nothing" about a purportedly overlooked due process claim at the motion to dismiss hearing because he told the trial court that appointed counsel had ignored his request to make phone calls. Def. Br. 21 (emphasis omitted). But defendant does not explain how that comment about phone calls could possibly be construed as a reference to a due process claim or his jury note allegations.

Defendant also contends that, as a legally untrained pro se litigant, he should not be expected "to litigate the merits of his claims." Def. Br. 22. But defendant did not simply fail to argue his purportedly overlooked due process claim, he did not even *mention* it. Even as a pro se litigant, defendant can be expected to know what his claims are — and thus to know if appointed counsel overlooked one of them. *See People v. Johnson*, 191 Ill. 2d 257, 269 (2000) (defendant is fit to participate in postconviction proceedings if he can "communicate his allegations of constitutional deprivations"). Again, the fact that defendant did not mention a due process claim at the hearings on the motion to withdraw and motion to dismiss strongly suggests that he did not intend to raise — and appointed counsel did not overlook — such a claim.

Both defendant, *see* Def. Br. 19-20, and the appellate court, *see* A10-11, ¶¶ 28-29, rely on *People v. Moore*, 2018 IL App (2d) 170120, which held that appointed counsel did not fulfill her Rule 651(c) duty to consult with the defendant to ascertain his contentions because her motion to withdraw "failed to recognize [one] claim among the multiple claims in [the defendant's]

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pro se petition." *Id.*, ¶ 41. This Court, of course, is not bound by a decision of the appellate court. In any event, *Moore* rests on the same basic errors as the decision below: it assessed whether counsel correctly ascertained the defendant's claims by independently reviewing the pro se petition, rather than asking whether counsel had consulted with the defendant to ascertain his claims, as Rule 651(c) requires. And it failed to acknowledge, much less apply, the presumption of compliance arising from counsel's filing of a Rule 651(c) certificate.

Even if *Moore*'s result were correct, moreover, its facts are materially distinguishable. As discussed, *see supra* pp. 7-9, here the pro se petition's structure and defendant's responses to the motion to withdraw and motion to dismiss suggest that counsel reasonably ascertained that defendant did not intend to present his jury note allegations as a standalone due process claim. No similar circumstances are apparent in *Moore*. Indeed, while the appellate court there explained that counsel's "oversight was perhaps understandable, given the length and density of the *pro se* petition," *Moore*, 2018 IL App (2d) 170120, ¶ 42, it appears that the petition plainly presented the overlooked claim, *see id.*, ¶ 24.

Defendant also relies on *People v. Komes*, 2011 IL App (2d) 100014, *see* Def. Br. 25, which is equally inapposite. There, the court found that appointed counsel did not properly certify compliance with Rule 651(c), *see Komes*, 2011 IL App (2d) 100014, ¶¶ 21, 35, so no presumption of compliance

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arose. Here, neither defendant nor the appellate court has ever questioned the validity of counsel's Rule 651(c) certificate, so the only question is whether the record rebuts the resulting presumption of compliance. For all the reasons discussed above, it does not.

Defendant also briefly suggests that appointed counsel failed to comply with the separate Rule 651(c) duty to make "any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of [the defendant's] contentions," Ill. S. Ct. R. 615(c), by not discussing defendant's purported due process claim in the motion to withdraw, *see* Def. Br. 33. This argument rests on the assumption that defendant's contentions included a due process claim. But as explained, *see supra* pp. 6-9, the record does not rebut the presumption that appointed counsel consulted with defendant and reasonably ascertained that defendant did *not* intend to present a standalone due process claim.

Besides wrongly assuming its conclusion, defendant's contention that appointed counsel violated his Rule 651(c) duty to shape defendant's claims into proper legal form by not discussing the purported due process claim in the motion to withdraw confuses counsel's duties under Rule 651(c) with the procedures governing review of motions to withdraw that this Court adopted in *Greer* and *Kuehner*.

Rule 651(c) requires appointed postconviction counsel to "consult[ ] with" the defendant "to ascertain his . . . contentions of deprivation of

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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 [the defendant's] contentions." Ill. S. Ct. R. 651(c). As this Court has explained, Rule 651(c)'s third requirement does not obligate counsel to make amendments that "would only further a frivolous or patently nonmeritorious claim." *Greer*, 212 Ill. 2d at 205. Thus, if counsel determines, after consulting with the defendant to ascertain his contentions and reviewing the trial record, that the defendant's claims are frivolous or patently without merit, counsel may move to withdraw. *Id.* at 204-09.

At that stage, counsel's duties are no longer governed by Rule 651(c). That rule "sharply limits the requisite duties of postconviction counsel," *People v. Custer*, 2019 IL 123339, ¶ 32, and says nothing about the form or content of a motion to withdraw. Indeed, counsel may move to withdraw only *after* he satisfies his Rule 651(c) duties. *See Kuehner*, 2015 IL 117695, ¶ 22. Thus, *Greer* and *Kuehner*, rather than Rule 651(c), define counsel's duties when moving to withdraw. And under *Greer*, when (as here) a petition has advanced to the second stage due to judicial inaction, the decision to allow counsel to withdraw does not turn on the content of the motion to withdraw. *See supra* pp. 2-5.

C. The record demonstrates that defendant's pro se claims are frivolous or patently without merit.

Finally, as the opening brief explained, *see* Peo. Br. 22-25, the record demonstrates that defendant's supposedly overlooked due process claim —

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the only contention he pressed on appeal — is frivolous or patently without merit.

At the outset, defendant incorrectly contends that affirming the trial court's order allowing appointed counsel to withdraw under the standard adopted in *Greer* would amount to improper harmless error review. *See* Def. Br. 22-23, 30 (citing *People v. Addison*, 2023 IL 127119). But *Addison* is inapposite. There, this Court held that courts may not review Rule 651(c) violations for harmless error. *See Addison*, 2023 IL 127119, ¶ 33. Here, in contrast, defendant has not established any Rule 651(c) violation. Rather, counsel validly certified compliance with Rule 651(c), and defendant has not rebutted the resulting presumption of compliance. *See supra* pp. 6-11.

Defendant also suggests that this Court cannot adequately review this claim because appointed counsel did not "investigate and properly substantiate" his jury note allegations. Def. Br. 36. But the *Greer* standard asks a court to determine not whether a defendant has made a substantial showing of a constitutional violation that would survive second-stage review, but only whether the defendant has set forth a claim that is not frivolous or patently without merit. *See Greer*, 212 Ill. 2d at 211-12. That is the standard that courts routinely apply at the first stage of postconviction proceedings, before counsel has been appointed to bolster a defendant's claims. *See People v. Pingelton*, 2022 IL 127680, ¶ 32 ("At the first stage of postconviction proceedings, the circuit court must independently review the postconviction

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petition and shall dismiss it if it is frivolous or is patently without merit.") (internal quotation marks omitted). There is no reason why a reviewing court cannot apply the same standard here.

On the merits, defendant argues that the existence of the unaddressed second jury note reporting that the jurors were deadlocked and asking how to proceed and Shaffer's affidavit alleging that the trial court responded by telling the jurors that they could not continue their deliberations the next day "support a plausible scenario where the trial court told the jury to proceed until they reached a unanimous verdict." Def. Br. 36. But defendant either glosses over or simply ignores the record evidence rebutting both Shaffer's and his own assertions, which the People discussed in the opening brief. *See* Peo. Br. 23-25.

Notably, while Shaffer averred that the jury asked to continue its deliberations the next day, *see* C530, the jury note includes no such request, *see* C375. And Shaffer's assertion that the trial court responded to the note by telling the jury it could not continue deliberating the next day because the court had another trial scheduled, *see* C530, is belied by the record, which reflects that after the court answered an earlier question from the jury, it remained in recess until the jury returned its verdicts, *see* R1561. Moreover, defendant's allegation that the trial court told the jurors that "they could not leave that night unless they all agreed on something," C525, is not even

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supported by Shaffer's affidavit, which makes no mention of such a comment, *see* C530.

Defendant also fails to address the fanciful nature of his and Shaffer's allegations. *See People v. Hodges*, 234 Ill. 2d 1, 16 (2009) (a claim is frivolous or patently without merit if it "is based on an indisputably meritless legal theory or a fanciful factual allegation"). Shortly after excusing the jury to begin deliberations, the trial court acknowledged on the record that deliberations might continue into the next day and said nothing about any scheduling difficulties that would pose. *See* R1547-48. And when the jury sent its first note, "the trial court took great pains to properly address the note" on the record. *People v. Frey*, 2018 IL App (2d) 150868-U, ¶ 63 n.2. Given these facts, it is fanciful to suggest not only that the trial court told the jury it could not continue deliberating the next day and would not be allowed to leave that night until it reached a unanimous verdict, but also that the court did so in an off-the-record exchange that Shaffer somehow witnessed.

* * *

In sum, because appointed counsel fulfilled his Rule 651(c) duties and the record demonstrates that defendant's claims are frivolous or patently without merit, the appellate court should have affirmed the trial court's order allowing appointed counsel to withdraw. This Court should thus reverse the appellate court's judgment.

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CONCLUSION

This Court should reverse the appellate court's judgment and reinstate the judgment of the trial court dismissing defendant's postconviction petition.

October 10, 2023

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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 16 pages.

/s/ Eric M. Levin
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CERTIFICATE OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On October 10, 2023, the **Reply Brief of Plaintiff-Appellant People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which provided service of such filing to the email addresses of the persons named below:

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