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ARGUMENT

As the People's opening brief explained, defendant's statutory right to postconviction counsel ended when his appointed counsel certified compliance with Illinois Supreme Court Rule 651(c) and was granted leave to withdraw on the ground that defendant's claims were frivolous or patently without merit. *See* Peo. Br. 13-26.¹ Accordingly, for the proceedings that followed, defendant had no statutory right to a new attorney, nor a statutory right to reasonable assistance from the attorney he retained to represent him. For that reason, the appellate court erred in reversing the circuit court's second-stage dismissal of defendant's petition based on retained counsel's allegedly unreasonable performance.

In the alternative, even assuming that defendant's right to reasonable assistance of counsel persisted after his appointed counsel was permitted to withdraw, the appellate court erred in remanding for further second-stage proceedings without first determining that defendant was prejudiced by retained counsel's performance. *See* Peo. Br. 26-32. Because defendant has not shown that he was prejudiced by retained counsel's performance, this Court should reverse the appellate court's judgment or, at the very least, remand to the appellate court to make a prejudice assessment in the first instance.

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

I. After the Circuit Court Granted Appointed Counsel's Motion to Withdraw Under *Greer*, Defendant Had No Further Right to Counsel.

In *People v. Greer*, 212 Ill. 2d 192 (2004), this Court recognized that an attorney appointed to represent a postconviction petitioner in second-stage proceedings will sometimes determine, after consulting with the petitioner and reviewing the record in accordance with Rule 651(c), that the petitioner's claims are frivolous or patently without merit and thus cannot be ethically advanced. *Id.* at 204-09. When an attorney so concludes and moves to withdraw on that ground, this Court held, the circuit court should grant the motion if the attorney has "fulfilled his duties as prescribed by Rule 651(c), and the record . . . supports counsel's assessment that the defendant's postconviction claims [are] frivolous and without merit." *Id.* at 212. This Court explained, moreover, that when an appointed attorney is allowed to withdraw under the *Greer* framework, the petitioner is not entitled to "continuing representation" in any proceedings that follow. *Id.* at 209. In other words, when a circuit court allows appointed counsel to withdraw on the ground that a petitioner's claims are frivolous or patently without merit, the petitioner's statutory right to postconviction counsel is extinguished.

Defendant does not appear to challenge this straightforward reading of *Greer*. Instead, he contends that his right to postconviction counsel persisted even after his appointed counsel was granted leave to withdraw because, in his and the appellate court's view, the circuit court "allowed [appointed

counsel] to withdraw because defendant intended to hire a new attorney, not because of [appointed counsel's] determination that defendant's claims lacked merit." A23, ¶ 73; see Def. Br. 16-31. But that view is not supported by the record, as the People's opening brief explained. See Peo. Br. 22-25.

In requesting leave to withdraw, appointed counsel filed a motion and supporting memorandum that invoked *Greer* and explained that defendant's postconviction claims were frivolous or patently without merit. See C263-75. When addressing the motion in open court, the circuit court stated that it was going to "grant [appointed counsel's] motion and allow him to withdraw." R831. And in a written order entered the same day, the circuit court made the basis for its ruling crystal clear: "Pursuant to *People v. Greer*, [appointed counsel's] motion to withdraw is granted." C306. Simply put, appointed counsel's motion to withdraw and the circuit court's order granting the motion rested exclusively on *Greer*.

To be sure, after granting appointed counsel's motion to withdraw, the circuit court allowed defendant time, at his request, to seek private counsel. See R831-32. But this action must be viewed in the context of the prevailing appellate court precedent, which holds that when a circuit court permits an appointed attorney to withdraw under *Greer*, the court may not simultaneously dismiss the defendant's petition but must wait for the People to file a motion to dismiss and allow the defendant an opportunity to respond

to that motion. *See People v. Hayes*, 2016 IL App (3d) 130769, ¶ 19; *People v. Jackson*, 2015 IL App (3d) 130575, ¶ 18.²

The circuit court had this appellate precedent in mind when it stated that “[t]he granting of a motion to withdraw under *Greer* is not dispositive,” C368, and that it had not “jump[ed] as far as the State may believe I jumped” when it granted appointed counsel’s motion to withdraw, R839. In context, these comments do not suggest that the court allowed defendant to retain private counsel *in lieu of* ruling on appointed counsel’s *Greer* motion, as defendant and the appellate court have theorized. Rather, they reflect the circuit court’s understanding that appellate precedent required further proceedings on defendant’s petition after the *Greer* motion was granted, and the circuit court’s view that it would have been “unfair” to prohibit defendant from retaining counsel for those proceedings, if he could afford to do so.

C368.

² In *People v. Pingelton*, No. 127680 (Ill.) (oral argument heard Sept. 13, 2022), the People argued that this appellate precedent should be overruled because a motion to withdraw under *Greer* is a merits-based motion that, if granted, necessarily requires dismissal of the petition as meritless. *See* Brief of Plaintiff-Appellee, *People v. Pingelton*, No. 127680 (Ill.), at 19-21. As one appellate court justice has 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.” *People v. Triplett*, 2022 IL App (3d) 200017, ¶ 24 (Schmidt, J., dissenting); *see also Jackson*, 2015 IL App (3d) 130575, ¶ 36 (Schmidt, J., dissenting) (“It only makes sense that upon granting a *Greer* motion that the trial court simultaneously dismiss the postconviction petition.”). If this Court adopts that view, it would necessarily follow that defendant had no right to assistance of counsel after the *Greer* motion was granted, as the circuit court should have dismissed defendant’s petition on the merits when granting the *Greer* motion.

Indeed, although the circuit court allowed defendant time to retain private counsel, it also recognized that it would have been “inappropriate” for it “to *appoint* new counsel.” R841 (emphasis added). That comment makes sense only if the circuit court had allowed appointed counsel to withdraw under *Greer*, and not for some reason unrelated to the merits of defendant’s claims. And it rebuts defendant’s suggestion, *see* Def. Br. 22, that the court did not realize that its order allowing appointed counsel to withdraw under *Greer* extinguished defendant’s statutory right to postconviction counsel.

Defendant further contends that the circuit court’s order allowing appointed counsel to withdraw could not have extinguished his right to counsel because the court did not expressly adopt appointed counsel’s assessment of defendant’s claims as frivolous or patently without merit. *See* Def. Br. 19-22. It is true that the circuit court — and not just appointed counsel — must find that a defendant’s claims are frivolous or patently without merit before allowing a motion to withdraw under *Greer*. *See People v. Kuehner*, 2015 IL 117695, ¶ 22 (explaining that purpose of requiring appointed counsel to explain why a defendant’s claims are frivolous or patently without merit when seeking leave to withdraw is “so that both the trial court and the reviewing courts have a basis for evaluating counsel’s conclusion”). But there is no requirement that the circuit court explain why it agrees with counsel’s assessment of frivolousness. Indeed, this Court has held in similar circumstances that a circuit court need not explain its reasons

for summarily dismissing a petition as frivolous at the first stage. *See People v. Porter*, 122 Ill. 2d 64, 81 (1988) (statutory requirement that circuit court enter written order with factual findings and legal conclusions when summarily dismissing petition is not mandatory).

Appointed counsel's motion to withdraw invoked *Greer* and provided a reasoned explanation for counsel's conclusion that defendant's claims were frivolous or patently without merit. *See* C263-75. The circuit court granted the motion and expressly stated that it had done so "[p]ursuant to" *Greer*. C306. The court later reiterated that it had granted the motion to withdraw "based upon" *Greer*. R839-40. Contrary to defendant's suggestion that the court used these phrases "inaccurate[ly]," Def. Br. 19, or "unknowingly," Def. Br. 22, this Court generally presumes that a circuit court "knows and follows the law unless the record demonstrates otherwise," *People v. Blair*, 215 Ill. 2d 427, 449 (2005). Here, nothing in the record establishes that the circuit court did not independently determine that defendant's claims were frivolous or patently without merit when it granted appointed counsel's motion to withdraw under *Greer*.

Defendant also contends that the manner in which the circuit court heard the *Greer* motion did not comport with due process. *See* Def. Br. 18-19, 28. Not so. "The fundamental requirements of due process are notice of the proceeding and an opportunity to present any objections." *People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 201 (2009). The record demonstrates that

defendant was on notice that appointed counsel had filed a motion to withdraw on the ground that defendant's claims were meritless, *see* R830 (appointed counsel stating that he discussed the motion with defendant), and that defendant was afforded an opportunity to respond to it, *see* R831 (court asking defendant "what would you like to say regarding" the motion to withdraw). That defendant offered no substantive response to the motion to withdraw — either when asked about it in open court, or at any time during the six-month period between appointed counsel's filing of the motion and the hearing — does not mean that defendant was not afforded a meaningful opportunity to do so.³

Finally, defendant argues that even if the circuit court's order granting appointed counsel's motion to withdraw extinguished his right to postconviction counsel, he still had a right to reasonable assistance from his subsequently retained counsel. *See* Def. Br. 22-23. But the cases defendant cites do not support that proposition. In *People v. Cotto*, 2016 IL 119006, ¶ 41, and *People v. Johnson*, 2018 IL 122227, ¶¶ 17-18, this Court held that postconviction petitioners are entitled to reasonable assistance from retained counsel. But in neither case had the petitioner retained counsel *after* an

³ The circuit court also afforded defendant an opportunity to respond, with the assistance of retained counsel, to the People's later-filed motion to dismiss. As explained, *see supra* p.4 n.2, the circuit court was not required to conduct additional proceedings on defendant's petition after granting appointed counsel's *Greer* motion, let alone allow defendant to retain new counsel to assist him in those proceedings. But in doing so, the circuit court more than satisfied the requirements of procedural due process.

appointed attorney had certified compliance with Rule 651(c) and been granted leave to withdraw under *Greer*. Unlike in those cases, where the retained attorney was the petitioner's only postconviction counsel, the imperative of providing "some means of reviewing attorney performance," *Johnson*, 2018 IL 122227, ¶ 17, is satisfied here because defendant could have argued on appeal that *appointed counsel* performed unreasonably and that the circuit court thus erred in granting the *Greer* motion.

People v. Smith, 2022 IL 126940, also cited by defendant, is likewise inapt. There, this Court held that when one appointed attorney replaces another appointed attorney who has already certified compliance with Rule 651(c), the new attorney need not independently perform Rule 651(c)'s duties but nevertheless owes the petitioner a duty to perform reasonably. *Id.*, ¶ 38. Like *Cotto* and *Johnson*, *Smith* did not address the question presented here: whether a petitioner whose appointed counsel is granted leave to withdraw under *Greer* is entitled to reasonable assistance from retained successor counsel. To extend the right to reasonable assistance recognized in *Smith* to the circumstances here would be inconsistent with *Greer*'s holding that a petitioner has no right to "continuing representation" after his appointed counsel is granted leave to withdraw based on a finding that his claims are frivolous. *Greer*, 212 Ill. 2d at 209.

For all these reasons, this Court should hold that defendant's right to the assistance of postconviction counsel, reasonable or otherwise, ended when

the circuit court granted his appointed counsel's motion to withdraw under *Greer*.

II. In Any Event, the Appellate Court Erred in Remanding for Additional Second-Stage Proceedings Without Determining That Defendant Was Prejudiced by Retained Counsel's Performance.

Even if defendant continued to enjoy a right to reasonable assistance of postconviction counsel after his appointed counsel's withdrawal under *Greer*, the appellate court erred in remanding for further second-stage proceedings without determining that defendant was prejudiced by retained counsel's performance.

As the People acknowledged in their opening brief, *see* Peo. Br. 26 n.2, the People did not advance this alternative argument in the appellate court or their petition for leave to appeal (PLA) in this Court. But contrary to defendant's contention, *see* Def. Br. 35, this omission amounts only to a "forfeiture," not a "waiver." *See People v. Brown*, 2020 IL 125203, ¶ 25 ("Waiver is an intentional relinquishment or abandonment of a known right or privilege, while forfeiture is the failure to make the timely assertion of a right."). And since "[f]orfeiture is a limitation on the parties, not the [C]ourt," this Court may "exercise [its] discretion" to "address even forfeited issues." *People v. Custer*, 2019 IL 123339, ¶ 19.

This Court should do so here for several reasons. First, it "is well settled that, when the appellate court reverses the judgment of the trial court and the appellee in the appellate court then brings the case to this court on

appeal,” as the People have done here, “that party may raise any issues properly presented by the record to sustain the judgment of the trial court, even if those issues were not raised in the appellate court.” *Brown*, 2020 IL 125203, ¶ 29.

Second, as this Court has explained, “review of an issue not specifically mentioned in a [PLA] will be appropriate when that issue is ‘inextricably intertwined’ with other matters properly before the [C]ourt.” *Id.*, ¶ 31. That is the case here. The question presented in the PLA — whether defendant was entitled to reasonable assistance from the attorney he retained after his appointed counsel was granted leave to withdraw — is inextricably intertwined with the question whether, if so, any unreasonable assistance from retained counsel warrants a remand for further second-stage proceedings. *See In re Rolandis G.*, 232 Ill. 2d 13, 37-38 (2008) (explaining that whether “certain evidence was improperly admitted at trial” is “inextricably intertwined” with “whether the admission of evidence, though error, was harmless”).

Finally, the question whether a postconviction petitioner whose counsel files a Rule 651(c) certificate but otherwise performs unreasonably is entitled to automatic reversal without the necessity of showing prejudice is also pending before this Court in *People v. Addison*, No. 127119 (oral argument scheduled for Nov. 15, 2022). The importance of that issue, and the interest in maintaining a uniform body of precedent, provides an

additional reason for this Court to exercise its discretion to consider the issue here.

And if this Court considers the issue, it should hold, for the reasons discussed in the People's opening brief, *see* Peo. Br. 27-30, that requiring an automatic reversal any time a postconviction attorney errs, without regard to whether the petitioner was prejudiced, is inconsistent with this Court's precedent and needlessly wasteful of judicial resources. Defendant contends that this Court's decision in *People v. Suarez*, 224 Ill. 2d 37 (2007), mandates reversal whenever postconviction counsel provides unreasonable assistance, without the need for the petitioner to show that he was prejudiced by the deficient performance. *See* Def. Br. 37-38. But as the People's opening brief explained, *see* Peo. Br. 28-29, *Suarez's* limited exception to the prejudice requirement extends only to circumstances where postconviction counsel fails to file a Rule 651(c) certificate and the record does not otherwise demonstrate compliance with counsel's basic duties under the rule. *See Suarez*, 224 Ill. 2d at 47 (explaining that "remand is required where postconviction counsel failed to fulfill the duties of consultation, examining the record, and amendment of the *pro se* petition, regardless of whether the claims raised in the petition had merit.").

In contrast, where postconviction counsel has certified compliance with Rule 651(c), as retained counsel did here, *see* C360, a petitioner who alleges that counsel performed deficiently must show that he was prejudiced by the

deficient performance to warrant a remand for further proceedings. *See, e.g., People v. Landa*, 2020 IL App (1st) 170851, ¶ 58 (where “a defendant is claiming that postconviction counsel performed [the Rule 651(c)] duties deficiently or otherwise failed to provide reasonable assistance, the defendant must show not only how the attorney’s performance was deficient or unreasonable but also what prejudice resulted from that deficiency”). This rule does not require a petitioner to conclusively establish the merits of his postconviction claims, as defendant suggests. *See* Def. Br. 39-40. It simply requires the petitioner to show a *reasonable probability* that the result of his postconviction proceedings would have been different absent counsel’s deficient performance, just as defendants alleging ineffective assistance at trial or on direct appeal generally must show. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Smith v. Robbins*, 528 U.S. 259, 285 (2000).

Here, the appellate court declined to consider whether defendant was prejudiced by what it deemed to be retained counsel’s unreasonable performance with respect to defendant’s actual innocence claim, mistakenly concluding that defendant was “not required to show prejudice under these circumstances.” A26, ¶ 87; *see also id.*, ¶ 90. Nor did the appellate court consider whether defendant was prejudiced by retained counsel’s performance with respect to defendant’s proportionate penalties clause claim, the other ground on which defendant contends retained counsel performed deficiently. As the People’s opening brief explained, *see* Peo. Br. 30-31, there

is no reasonable probability that defendant would have prevailed on an actual innocence claim had retained counsel made additional efforts to locate and obtain a notarized affidavit from the man who supposedly provided the written statement submitted with defendant's pro se petition implicating Jamaal Garcia as the shooter. In response, defendant makes no attempt to show a reasonable probability of success on this claim. Nor does he attempt to make such a showing with respect to his sentencing claim. *See* Def. Br. 50 (arguing only that, "if this Court were to apply a prejudice analysis, [he] was prejudiced because counsel's unreasonableness is the reason that his actual innocence and proportionate penalties clause claims have never been adjudicated on their merits").

Accordingly, even if this Court holds that defendant had a right to reasonable assistance from retained counsel, it should reverse the appellate court's judgment because defendant has not shown a reasonable probability of success on his postconviction claims. At the very least, if this Court holds that defendant was entitled to reasonable assistance from retained counsel, it should remand for the appellate court to conduct a prejudice analysis in the first instance.

CONCLUSION

This Court should reverse the appellate court's judgment.

November 10, 2022

Respectfully submitted,

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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 14 pages.

/s/ Eric M. Levin
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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 November 10, 2022, 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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