No. 128644

IN THE
SUPREME COURT OF ILLINOIS

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

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

KATHERINE M. DOERSCH
Criminal Appeals Division Chief

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

Counsel for Plaintiff-Appellant
People of the State of Illinois

ORAL ARGUMENT REQUESTED

E-FILED
5/23/2023 4:06 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK

TABLE OF CONTENTS

POINTS AND AUTHORITIES

NATURE OF THE CASE

Defendant filed a pro se postconviction petition that advanced to the second stage because the trial court did not conduct a timely initial review. Defendant's appointed counsel certified compliance with Supreme Court Rule 651(c) and moved to withdraw on the ground that defendant's claims were frivolous or patently without merit. The trial court granted counsel's motion to withdraw and later granted the People's motion to dismiss.

The appellate court reversed. It held that the trial court erred in allowing appointed counsel to withdraw because counsel's motion did not address what the appellate court perceived to be one of defendant's pro se claims. In the appellate court's view, that omission established that counsel had not complied with his Rule 651(c) duty to consult with defendant. The appellate court thus remanded for the appointment of new counsel and further second-stage proceedings without assessing whether the supposedly overlooked claim (or any other claim) was nonfrivolous.

The People appeal the appellate court's judgment. No issue is raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

In *People v. Greer*, 212 Ill. 2d 192, 211-12 (2004), this Court held that counsel appointed to represent a defendant whose pro se postconviction petition advanced to the second stage through judicial inaction should be allowed to withdraw if counsel fulfilled his Rule 651(c) duties and the record

demonstrates that the defendant's claims are frivolous or patently without merit. The issues presented here are:

1. Whether the presumption that appointed counsel consulted with defendant to ascertain his contentions — arising from counsel's filing of a Rule 651(c) certificate — may be rebutted solely on the ground that counsel's motion to withdraw did not address a claim that defendant's pro se petition could be liberally construed to present.

2. Whether defendant's supposedly overlooked claim that the trial court violated his right to due process by allegedly denying an off-the-record request from deadlocked jurors to adjourn for the evening and telling them that they could not leave until they reached a verdict is frivolous or patently without merit.

JURISDICTION

This Court allowed leave to appeal on November 30, 2022. Jurisdiction lies under Supreme Court Rules 315(a), 604(a)(2), 612(b)(2), and 651(d).

SUPREME COURT RULE INVOLVED

Supreme Court Rule 651(c), which governs appeals in postconviction proceedings, provides in relevant part:

> The record filed in [the postconviction trial] court shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions.

STATEMENT OF FACTS

I. Trial and Direct Appeal

Defendant was charged with three counts of predatory criminal sexual assault of a child for offenses he committed against his 12-year-old daughter, S.T. C205, 287.[1] The charges alleged that on separate occasions in January and February 2012, defendant committed acts of sexual penetration with S.T. C205.

A. Evidence

As established at trial, S.T. informed her mother in March 2012 that defendant had sexually assaulted her. R1153-58. Two days later, S.T explained to a child advocacy center caseworker that during three weekend custody visits with defendant in January and February 2012, defendant placed his penis in her vagina. R805-09, 1148-52. S.T. also recounted a similar (uncharged) act that occurred several years earlier when she was on a road trip with defendant. R801-04, 1145-46. S.T.'s statements to her mother and the caseworker were admitted as substantive evidence under 725 ILCS 5/115-10 after the trial court found that the statements bore sufficient indicia of reliability. R245-52.

S.T. again described the charged and uncharged sexual assaults in her trial testimony. R856-92, 938-48. In addition, defendant's stepson, C.P.,

[1] "C__," "R__," and "A__" refer to the common law record, the corrected report of proceedings filed as the second supplement to the record, and this brief's appendix.

testified that in 2008 or 2009, when he was 11 years old, defendant touched his penis underneath his clothes. R986-89. The trial court allowed C.P.'s and S.T.'s testimony about defendant's uncharged assaults as propensity evidence under 725 ILCS 5/115-7.3. R282-84.

Defendant denied sexually assaulting S.T. R1397. He claimed that he had never been alone with S.T. on a road trip and was not alone with her during her visits in January and February 2012. R1378-96. He also denied sexually abusing C.P. R1399. On cross-examination, the People introduced a letter that defendant wrote while his case was pending in which he suggested the creation of a "sex offender court" to provide counseling and leniency for first- and second-time sex offenders. R1413-14.

B. Jury deliberations

On the fourth day of trial, the case was submitted to the jury at 4:02 p.m. R1545-46. After the jury retired to deliberate, the trial court addressed the alternate jurors. The court explained that it "expect[ed] the jury to deliberate and come back with a verdict hopefully today but there is no guarantee that's going to happen." R1547. Accordingly, the court allowed the alternate jurors to go home but instructed them to provide the court with contact information in case their services were needed. R1547-48. After further discussion with the attorneys about what evidence to send to the jury room, the trial court recessed at 4:25 p.m. R1557.

At 6 p.m., the trial court and the parties reconvened to address a jury note, which asked whether physical evidence was required to sustain the People's burden of proof. R1557; *see* C376. After discussing the matter, the trial court brought the jurors into the courtroom at 6:05 p.m. and instructed them "to decide this case based on the evidence you have seen and heard together with the instructions I have given you." R1560-61. At 6:06 p.m., the jury was excused to continue deliberating, and the trial court again recessed. R1561.

The common law record contains a second note from the jury, which states: "Please advise — We have 10 guilty (all three counts)[,] 2 not guilty [on] all three counts. The 2 not guilty are firm that the State did not prove guilt on all three counts." C375. A docket sheet in the record states that the jury "submit[ted] [a] question" at 8:10 p.m. C487. But there is no other reference to a second jury note — or any response thereto — in either the common law record or report of proceedings. Rather, the record reflects that after the trial court answered the jury's first question at 6:06 p.m., the court remained in recess until 9:55 p.m., when the jury returned verdicts finding defendant guilty on all counts. R1561-64.

At a subsequent hearing, the trial court sentenced defendant to a total of 50 years in prison. R1663-64.

C. Direct appeal

On appeal, defendant argued that the trial court erred in allowing the People to present C.P.'s testimony as propensity evidence and to introduce defendant's letter about creating a sex offender court. *People v. Frey*, 2018 IL App (2d) 150868-U, ¶ 47. He further argued that the unaddressed second jury note showed that the evidence was closely balanced, so that the alleged errors were not harmless. *Id.*, ¶ 63 & n.2.

The appellate court affirmed. *Id.*, ¶ 66. It concluded that that trial court did not abuse its discretion in admitting C.P.'s testimony as propensity evidence because the circumstances surrounding defendant's uncharged act against C.P. bore sufficient similarity to the circumstances surrounding his charged and uncharged acts against S.T. and because the probative value of C.P.'s testimony was not substantially outweighed by any danger of unfair prejudice. *Id.*, ¶¶ 51-57. The appellate court also held that the trial court did not abuse its discretion in admitting defendant's letter about the creation of a sex offender court because it was relevant to show defendant's consciousness of guilt and its probative value was not substantially outweighed by a danger of unfair prejudice. *Id.*, ¶¶ 58-61.

As for the second jury note, the appellate court observed that there is no mention of the note in the report of proceedings nor any explanation for its presence in the common law record. *Id.*, ¶ 63 n.2. Given that silence, and "the fact that the trial court took great pains to properly address the note it

received about physical evidence," the appellate court "presume[d] that the trial court's failure to address the second note on the record indicates that the jury ultimately chose not to send out the second note." *Id.*

II. Postconviction Proceedings in the Trial Court

A. Defendant's pro se petition

Defendant filed a pro se postconviction petition in December 2019. C522. He described his "main claim" as "ineffective assistance of counsel" and argued that his trial counsel was ineffective for failing to (1) identify inconsistencies between S.T.'s trial testimony and her statement to the child advocacy caseworker; (2) seek the trial judge's recusal based on his involvement as a prosecutor in a prior case against defendant; (3) fully prepare for trial, present mitigating evidence, and object to testimony; (4) introduce evidence that S.T. allegedly falsely accused another person of sexually assaulting her; and (5) conduct DNA testing on S.T.'s clothing. C522-24. He also argued that his appellate counsel was ineffective for not raising these claims on direct appeal. C525.

Defendant explained that, under *Strickland v. Washington*, 466 U.S. 668 (1984), he must demonstrate that counsel's performance was deficient and that it prejudiced him. C522-23 (citing *Strickland*, 466 U.S. at 687). After discussing counsel's perceived shortcomings, defendant asserted that "both prongs of the *Strickland* test have been met" and asked the court to grant him a new trial. C525. He then added: "The initial jury could not

agree on a guilty verdict in this case, yet the [j]udge told them they could not leave that night unless they all agreed on something, being outnumbered and pressured they took the defendant[']s freedom." *Id.*

Next, defendant argued that his 50-year sentence was a de facto life sentence that was imposed without adequate consideration of his rehabilitative potential. C526. Defendant prefaced this argument by stating that the sentence was imposed "despite there being only 10 guilty and 2 [n]ot guilty [votes] after the jury trial," which "caused the jury to have to go back in and deliberate per the residing judge," who "told [them] '[t]hey could not leave until they could agree!'" *Id.*

On the final page of the petition, under the heading "Newly Discovered Evidence," defendant explained that his sister, Roxanne Shaffer, had signed an affidavit "claiming a violation of the 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 despite a 10-2 verdict[.]" C529. Defendant asserted that his trial counsel's failure "to fully depose all witnesses also adds this to the claim for ineffective assistance of trial counsel." *Id.*

In her affidavit, which was attached to the petition, Shaffer attested that:

> On March 23, 2015, the day of my brother Russell Frey's conviction, at approximately 9:00 p.m.[,] the jury sent out a note with a 10 to 2 verdict. The jury asked to continue to the next day. Judge Ron Jacobson denied the request, stating he had a murder trial starting the next day and did not want to postpone it. The murder trial was for Brian Sigler. Within half

> an hour to forty-five minutes[,] the jury came back with a guilty verdict. I believe this took away his right of due process.

C530.

B. Appointed counsel's motion to withdraw

In May 2020, after the trial court recognized that it had not conducted a first-stage review of the petition within 90 days, *see* 725 ILCS 5/122-2.1, it docketed the petition for second-stage proceedings and appointed counsel for defendant, C594.

At a court appearance in July 2020, appointed counsel explained that he had communicated with defendant and requested (and was granted) additional time to continue researching an unspecified legal issue. R1682.

In October 2020, appointed counsel filed a motion to withdraw. C599. Counsel discussed defendant's ineffective assistance claims and explained that each contention "was lacking in legal and factual support." C603. Counsel also explained that defendant's claim that the trial court had not considered his rehabilitative potential at sentencing was "rebutted by the record and . . . without legal or factual merit." C606. Finally, pursuant to Supreme Court Rule 651(c), counsel certified that he (1) "consulted with [defendant] by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights"; (2) "examined the record of the proceedings at the trial"; and (3) "made any amendments to the petition filed *pro se* that are necessary for an adequate presentation of [defendant's] contentions." C607.

At a hearing on the motion, appointed counsel stated that he had reviewed the record, correspondence from defendant, and defendant's filings, and explained that, at defendant's request, he attempted to contact "possible witnesses or additional individuals," with mixed results. R1689. Counsel also stated that he reviewed the motion to withdraw with defendant, which defendant confirmed. R1689-90. Counsel then stood on the motion. *Id.* Defendant stated that he "object[ed]" to the motion but offered no argument in opposition. R1690. The trial court granted the motion to withdraw, stating that it agreed with appointed counsel's assessment of defendant's claims. R1691.

C. People's motion to dismiss

The People then moved to dismiss defendant's petition, "adopt[ing] the reasoning and conclusions" of appointed counsel's motion to withdraw. C609. At a subsequent hearing, the People stood on the motion. R1711. Arguing in support of his petition, defendant asserted that his trial counsel "didn't do everything he could do to get me a not-guilty verdict." R1711-12. Defendant also claimed that appointed postconviction counsel did not make certain phone calls he had requested. R1711. The trial court granted the motion to dismiss, stating that appointed counsel's "very thorough motion to withdraw . . . establishe[d] that there is no merit to [defendant's] arguments. R1712-13.

III. Postconviction Appeal

The appellate court reversed and remanded for further second-stage proceedings with the appointment of new counsel, holding that the trial court erred in granting appointed counsel's motion to withdraw because the motion did not address the pro se petition's references to the trial court's alleged response to the second jury note. A10-13, ¶¶ 28-34.

The appellate court acknowledged that when a postconviction petition advances to the second stage through judicial inaction, an order allowing appointed counsel to withdraw should be affirmed, notwithstanding any deficiency in counsel's motion to withdraw, if counsel complied with his Rule 651(c) duties and the record demonstrates that the defendant's pro se claims are frivolous or patently without merit. A8-10, ¶¶ 24-27. But the appellate court held that appointed counsel's failure to discuss defendant's jury note allegations suggested that counsel had overlooked them and thus not fulfilled his duty to ascertain defendant's contentions. A10, ¶¶ 28-29. The appellate court thus declined to consider whether defendant's pro se petition asserted a nonfrivolous claim based on the trial court's alleged response to the second jury note, A12, ¶ 33, deeming any consideration of the "potential merit" of the claim "premature" because the court could not "assume that the claim[ ]" was in its "final form," A11, ¶ 29.

STANDARDS OF REVIEW

The scope of appointed postconviction counsel's duties when moving to withdraw presents a legal question that this Court reviews de novo. *See People v. Jones*, 2021 IL 126432, ¶ 14 ("pure question of law . . . is subject to *de novo* review"). Likewise, this Court interprets Rule 651(c) de novo. *People v. Smith*, 2022 IL 126940, ¶ 12. Finally, when a trial court dismisses a postconviction petition without an evidentiary hearing, this Court reviews the sufficiency of the petition de novo. *See People v. Cotto*, 2016 IL 119006, ¶ 24.

ARGUMENT

The Trial Court Properly Allowed Appointed Counsel to Withdraw Because Counsel Satisfied His Rule 651(c) Duties and the Record Demonstrates That Defendant's Claims Are Frivolous.

The appellate court erred in reversing the trial court's order allowing appointed counsel to withdraw without determining that any of defendant's pro se claims is nonfrivolous. *People v. Kuehner*, 2015 IL 117695, and *People v. Greer*, 212 Ill. 2d 192 (2004), establish that when a postconviction 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 in counsel's motion to withdraw.

The appellate court skirted this principle by holding that counsel's failure to discuss (what it deemed to be) one of defendant's pro se claims

when moving to withdraw established that counsel did not fulfill his Rule 651(c) duty to consult with defendant to ascertain his contentions. But this holding disregards the presumption of compliance that arises from counsel's filing of a Rule 651(c) certificate and improperly second-guesses counsel's presumptively reasonable ascertainment of the claims defendant sought to raise based on his consultation with defendant.

Properly applied, this Court's precedent supports the trial court's order allowing appointed counsel to withdraw. Counsel certified compliance with Rule 651(c) and the record does not rebut the resulting presumption that counsel consulted with defendant to ascertain his contentions before moving to withdraw. Moreover, defendant made no argument below that the claims counsel addressed in the motion to withdraw are not frivolous or patently without merit, and the record demonstrates that the claim counsel supposedly overlooked — that the trial court violated defendant's right to due process by allegedly denying an off-the-record request from deadlocked jurors to adjourn for the evening and telling them that they could not leave until they reached a verdict — is similarly baseless. The appellate court thus erred in ordering further postconviction proceedings in the trial court, with the appointment of new counsel, where defendant's pro se petition did not present any potentially meritorious claim.

A. Because defendant's petition advanced to the second stage through judicial inaction, whether to allow appointed counsel to withdraw turns solely on counsel's compliance with Rule 651(c) and an assessment of defendant's claims, rather than the content of counsel's motion to withdraw.

The Post-Conviction Hearing Act establishes a three-stage process for adjudicating postconviction petitions. *People v. Addison*, 2023 IL 127119, ¶ 18. At the first stage, the trial court independently reviews the petition within 90 days of its filing to determine whether it should be summarily dismissed as frivolous or patently without merit. *Id.* (citing 725 ILCS 5/122-2.1(a)(2)). If a petition is not summarily dismissed — either because the court finds that it is not frivolous or patently without merit or because the court fails to timely review it — it advances to the second stage, where the court must appoint counsel for an indigent defendant who so requests. *Id.* (citing 725 ILCS 5/122-2.1(b), 725 ILCS 5/122-4). At the second stage, appointed counsel may file an amended petition, the People file a response to the petition, and the court then determines whether the petition "make[s] a substantial showing of a constitutional violation," such that a third-stage evidentiary hearing is warranted. *People v. Pingelton*, 2022 IL 127680, ¶ 34.

Because there is no constitutional right to postconviction counsel, *see Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987), the entitlement to counsel in second-stage postconviction proceedings "is a matter of legislative grace," *Addison*, 2023 IL 127119, ¶ 19 (internal quotation marks omitted). And as this Court has explained, the legislature has entitled postconviction

petitioners to only "a reasonable level of assistance, which is less than that afforded by the federal and state constitutions" to defendants at trial. *Id.* (internal quotation marks and citation omitted).

Given this standard, Rule 651(c) "sharply limits the requisite duties of postconviction counsel." *People v. Custer*, 2019 IL 123339, ¶ 32. Under that rule, counsel must "consult[ ] with" the defendant "to ascertain his or her contentions of deprivation of constitutional rights," "examine[ ] the record of the proceedings at the trial," and "ma[k]e any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of [the defendant's] contentions." Ill. S. Ct. R. 651(c); *see People v. Perkins*, 229 Ill. 2d 34, 42 (2007).

This Court has recognized that an attorney appointed to represent a defendant in postconviction proceedings will sometimes determine, after fulfilling his or her Rule 651(c) duties, that the defendant's claims are frivolous or patently without merit and thus cannot be ethically advanced. *See Greer*, 212 Ill. 2d at 204-09. When that is the case, appointed counsel may ask to withdraw. *Id.* at 207-09. And as *Greer* and *Kuehner* establish, the procedure counsel must follow when doing so depends on the way the petition arrived at the second stage.

In *Greer*, the petition automatically advanced to the second stage because the trial court did not review it within 90 days of filing. *Id.* at 200. Appointed counsel then moved to withdraw, explaining that he could not

"properly substantiate" the defendant's claims. *Id.* (internal quotation marks omitted). The trial court allowed counsel to withdraw, and this Court affirmed. *Id.* at 200, 210-12. This Court emphasized that when a petition advances to the second stage due to "the fortuity" of judicial inaction, "the petition may well be frivolous or patently without merit," *id.* at 204, and appointed counsel "may well find that he or she represents a client attempting to advance arguments that are patently without merit or wholly frivolous, . . . whose petition would have been summarily dismissed had the [trial] court timely considered the merits of the petition," *id.* at 207. The "purpose behind appointment of counsel in [this] instance," the Court observed, "might be, and probably is, nothing more than a desire to jump-start a process that has shown no signs of progress." *Id.* at 209.

In reaching this conclusion, the Court cautioned that appointed counsel's "inability . . . to properly substantiate a defendant's claims is not the standard by which counsel should judge the viability of a defendant's postconviction claims," and the Court advised that "an attorney moving to withdraw should make some effort to explain why [the] defendant's claims are frivolous or patently without merit." *Id.* at 211-12 (internal quotation marks and emphasis omitted). Nonetheless, the Court reasoned, while the procedure in the trial court left "something to be desired," appointed counsel "should be allowed to withdraw" because "counsel fulfilled his duties as prescribed by Rule 651(c), and the record . . . support[ed] counsel's

assessment that the defendant's postconviction claims were frivolous and without merit." *Id.* at 212.

In *Kuehner*, 2015 IL 117695, ¶ 8, by contrast, the petition advanced to the second stage because the trial court expressly found that it was not frivolous or patently without merit. In a subsequent motion to withdraw, appointed counsel explained that two of the defendant's pro se claims were frivolous but failed to address two other claims presented in the petition. *Id.*, ¶ 9. The trial court allowed counsel to withdraw, and the appellate court affirmed, concluding that withdrawal was appropriate under *Greer* because counsel complied with Rule 651(c) and the record demonstrated that the defendant's claims were frivolous or patently without merit. *Id.*, ¶¶ 9-11.

This Court reversed. *Id.*, ¶ 27. The Court did not call *Greer* into question, but instead recognized that the two cases presented "very different procedural posture[s]." *Id.*, ¶ 18. Because "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," *id.*, ¶ 22, the Court explained, "the burdens and obligations of appointed counsel in [those circumstances] are decidedly higher than those that were present in *Greer*," *id.*, ¶ 18. Likening a motion to withdraw filed after a first-stage finding that a petition is not frivolous "to a motion to reconsider," the Court explained that counsel in those circumstances may not just "ask the trial court to conduct its first-stage assessment a second time," but must "bring to

the trial court's attention information that was not apparent on the face of the *pro se* petition" and "demonstrat[e], with respect to each of the defendant's *pro se* claims, why the trial court's initial assessment was incorrect." *Id.*, ¶ 21. And if a motion to withdraw filed after a petition has affirmatively advanced to the second stage does not explain why each of the defendant's claims is frivolous or patently without merit, the Court held, the motion to withdraw "must be denied." *Id.*, ¶ 22.

Together, *Greer* and *Kuehner* establish that appointed counsel's duties when moving to withdraw depend on the way the petition advanced to the second stage. As here and in *Greer*, when a petition advances to the second stage through judicial inaction and appointed counsel subsequently concludes, after fulfilling his Rule 651(c) duties, that the defendant's claims are frivolous or patently without merit, counsel need only certify compliance with Rule 651(c) and alert the trial court to his conclusion in a motion to withdraw. At that point, the purpose of appointing counsel "to jump-start a process that has shown no signs of progress," *Greer*, 212 Ill. 2d at 209, has been accomplished, and the trial court may conduct the first-stage merits review that earlier escaped its attention. And while it may be good practice in these circumstances for counsel to address all of the defendant's claims and explain why he has concluded that they are frivolous or patently without merit, the trial court's decision to allow counsel to withdraw in such circumstances turns not on the content of the motion but on whether counsel

has fulfilled his Rule 651(c) duties and on whether "[t]he record itself demonstrates that defendant's postconviction allegations [are] patently without merit and frivolous." *Greer*, 212 Ill. 2d at 211.

B. Appointed counsel filed a Rule 651(c) certificate and the record does not rebut the resulting presumption that counsel consulted with defendant to ascertain his contentions.

The appellate court erroneously found that appointed counsel did not fulfill his Rule 651(c) duty to consult with defendant to ascertain his contentions of deprivation of constitutional rights solely because counsel's motion to withdraw did not address defendant's pro se allegations concerning the second jury note. A10-11, ¶¶ 28-29. Where, as here, counsel certifies compliance with Rule 651(c), "a rebuttable presumption of reasonable assistance arises," which "[t]he defendant bears the burden of overcoming . . . by showing that postconviction counsel did not substantially comply with the strictures of the rule." *Addison*, 2023 IL 127119, ¶ 21. The appellate court disregarded this presumption and ignored that the record as a whole supports — rather than rebuts — the conclusion that counsel "consulted with [defendant] to ascertain his . . . contentions[.]" Ill. S. Ct. R. 651(c).

To start, it is not clear from the pro se petition that defendant intended to present his allegations about the trial court's response to the second jury note as a standalone claim for relief. Defendant described his "main claim" as "ineffective assistance of counsel" and spent the bulk of his petition discussing his trial and appellate counsels' asserted shortcomings and a

proportionate penalties clause claim. *See* C522-26. In support of those claims, defendant embedded an allegation that the trial court told deadlocked jurors that "they could not leave that night unless they all agreed on something." C525; *see also* C526. While defendant later asserted that Shaffer's affidavit concerning the trial court's supposed comments "claim[ed] a violation of [defendant's] right to due process," C529, his inclusion of that assertion under the heading "Newly Discovered Evidence," along with his explanation that trial counsel's failure "to fully depose all witnesses also adds this to the claim for ineffective assistance of trial counsel," *id.*, suggests that defendant viewed his allegation about the trial court's purported response to the second jury note as evidence in support of his other claims, and not as a claim of its own.

Defendant's comments at the hearings on counsel's motion to withdraw and the People's motion to dismiss further support this view. At the hearing on counsel's motion to withdraw, defendant confirmed that counsel had reviewed the motion to withdraw with him, *see* R1689-90, suggesting that defendant was aware that the motion did not discuss a due process claim based on the jury note allegations. Yet when given an opportunity to respond to the motion, defendant did not contend that counsel had overlooked any of his claims. R1690. And at the hearing on the People's motion to dismiss, defendant likewise made no reference to a due process claim based on the

jury note allegations and did not argue that counsel had overlooked such a claim. *See* R1711-12.

The appellate court believed that defendant's pro se petition, "liberally construed," asserted a standalone claim based on the second jury note and "infer[red]" that counsel had "overlooked" the claim solely because he did not discuss it in the motion to withdraw. A10-12, ¶¶ 29, 32. But the court's focus on the petition itself, rather than appointed counsel's consultation with defendant, misconstrues Rule 651(c), which directs counsel to ascertain the defendant's contentions not by reviewing the pro se petition, but by "consult[ing] with" the defendant. Ill. S. Ct. R. 651(c). And when counsel certifies that he has completed his Rule 651(c) duties — including the duty to consult with the defendant to ascertain his contentions of deprivation of constitutional rights — a reviewing court must presume that counsel rendered "reasonable assistance" unless the record affirmatively reveals that counsel "did not substantially comply with the strictures of the rule." *Addison*, 2023 IL 127119, ¶ 21.

Here, for all the reasons discussed above, the record supports a finding that appointed counsel consulted with defendant to ascertain his contentions and, in doing so, reasonably ascertained that defendant's contentions consisted of the ineffective assistance and proportionate penalties clause claims that counsel addressed in the motion to withdraw and did not include a separate due process claim based on the trial court's alleged response to the

second jury note. At the very least, on this record, the mere fact that counsel's motion to withdraw did not discuss the jury note allegations included in defendant's pro se petition cannot overcome the presumption, arising from counsel's Rule 651(c) certificate, that counsel consulted with defendant and ascertained his contentions.

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

Under a proper application of *Greer*, the appellate court should have affirmed the trial court's order granting appointed counsel's motion to withdraw because counsel fulfilled his Rule 651(c) duties, as explained above, and because the record demonstrates that defendant's claims are frivolous or patently without merit.

To start, defendant did not argue in the appellate court that either his ineffective assistance or his proportionate penalties clause claim was potentially meritorious, *see* A5, ¶ 14 (describing defendant's appellate argument that the trial court erred in allowing postconviction counsel to withdraw because "counsel failed to provide reasonable assistance under Rule 651(c) by neglecting to address his claim concerning the second jury note"), and thus forfeited any such contention, *see* Ill. S. Ct. R. 341(h)(7) ("Points not argued are forfeited.").

The sole issue before the appellate court, therefore, was whether the record demonstrates that the supposedly overlooked claim in the pro se petition concerning the trial court's alleged response to the second jury note

is frivolous or patently without merit. The appellate court declined to consider this question because (as explained above) it wrongly determined that appointed counsel did not comply with Rule 651(c). *See supra* pp. 19-21. The appellate court also deemed any merits consideration of the claim "premature" because it could not assume that the claim was in its "final form." A11, ¶ 29. But courts routinely assess whether a claim is frivolous or patently without merit based solely on its formulation in a pro se petition, without appointing counsel to shape the claim into final form. *See Pingelton*, 2022 IL 127680, ¶ 32 ("At the first stage of postconviction proceedings, the circuit court must independently review the postconviction petition and shall dismiss it if it is frivolous or is patently without merit.") (internal quotation marks omitted).

Here, the record demonstrates that defendant's supposedly overlooked claim concerning the second jury note is frivolous or patently without merit. A claim is frivolous or patently without merit if it "has no arguable basis either in law or in fact," meaning that it "is based on an indisputably meritless legal theory or a fanciful factual allegation." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). "An example of an indisputably meritless legal theory is one which is completely contradicted by the record," and "[f]anciful factual allegations include those which are fantastic or delusional." *Id.* at 16-17. Here, defendant's contention that the trial court coerced the jury to return a guilty verdict by denying an alleged off-the-record request from deadlocked

jurors to continue their deliberations the next day and telling them they could not leave until they reached a verdict is both contradicted by the record and based on fanciful factual allegations.

To start, the record rebuts Shaffer's assertion that "the jury sent out a note with a 10 to 2 verdict" around 9 p.m. and "asked to continue to the next day." C530. While the record contains a jury note revealing a 10 to 2 division, apparently "submit[ted]" at 8:10 p.m., C487, the note makes no request to continue deliberations the next day, C375. Shaffer's further assertion that the trial court denied the jury's alleged request to continue the next day is also contradicted by the record, which reflects that the court was in recess from shortly after 6 p.m., when it responded on the record to a jury note about the need for physical evidence, until shortly before 10 p.m., when the jury returned its verdicts. *See* R1561.

Defendant's own allegations — that the trial court "told [the jury] they could not leave that night unless they all agreed on something," C525, and "forc[ed] the jury to come to a unanimous verdict or they were not allowed to leave that night," C529 — are not even supported by Shaffer's affidavit. Indeed, Shaffer asserts only that the trial court "denied the [jury's] request" "to continue to the next day" — "stating [that] he had a murder trial starting the next day and did not want to postpone it." C530. Shaffer does not allege that the trial court told the jurors they had to agree on a verdict that evening. *See id.*

Beyond contradicting the record, defendant's and Shaffer's contention that the trial court told jurors — in an off-the-record exchange that Shaffer supposedly witnessed — that they could not continue their deliberations the next day because the court had another trial scheduled is fanciful. When the jury retired to deliberate at 4 p.m., the trial court recognized the possibility that deliberations might continue into the next day and said nothing about any scheduling difficulties that would pose. R1547-48. And as the appellate court observed on direct appeal, when the jury sent its first note at 6 p.m., the trial court "took great pains to properly address the note" on the record, with all parties present. *Frey*, 2018 IL App (2d) 150868-U, ¶ 63 n.2. Given these facts, it strains credulity to assume not only that the trial court later told jurors that they would not be able to leave until they agreed on a verdict, but that it did so off the record.

* * *

In sum, the appellate court should have affirmed the trial court's order allowing appointed counsel to withdraw after defendant's postconviction petition advanced to the second stage by default because counsel fulfilled his Rule 651(c) duties and the record demonstrates that the only claim defendant continued to press on appeal is frivolous or patently without merit.

CONCLUSION

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

May 23, 2023

Respectfully submitted,

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

KATHERINE M. DOERSCH
Criminal Appeals Division Chief

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

Counsel for Plaintiff-Appellant
People of the State of Illinois

RULE 341(c) CERTIFICATE OF COMPLIANCE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 26 pages.

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

APPENDIX

TABLE OF CONTENTS TO THE APPENDIX

2022 IL App (2d) 210044-U
No. 2-21-0044
Order filed May 26, 2022

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RUSSELL A. FREY, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lee County. No. 12-CF-44 Honorable Jacquelyn D. Ackert, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: In postconviction proceeding, the trial court erred in granting counsel's motion to withdraw where counsel failed to ascertain one of defendant's *pro se* contentions; therefore, we vacate the orders allowing the withdrawal and dismissing the petition, and we remand for the appointment of new postconviction counsel.

¶ 2 Defendant, Russell A. Frey, was convicted of three counts of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2010)). He appeals from the denial of his *pro se* petition filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). He contends that the trial court erred by granting his appointed counsel's motion to withdraw where counsel failed to consider all of the issues raised in the *pro se* petition. Because

counsel failed to comply with the mandate of Illinois Supreme Court Rule 651(c) (eff. July 1, 2017) that counsel "ascertain [the defendant's] contentions of deprivation of constitutional rights," we (1) vacate the orders allowing counsel to withdraw and dismissing the petition, and (2) remand with directions.

¶ 3 I. BACKGROUND

¶ 4 In March 2012, the State charged defendant with committing three acts of penetration on his 12-year-old daughter, S.T., when he was 35. In March 2015, the court held a jury trial.

¶ 5 The trial transcript reflected that the jury retired to deliberate at about 4 p.m. About two hours later, the jury sent a note inquiring whether the burden of proof required physical evidence. With the consent of both parties, the trial court responded: "[y]ou are [t]o decide this case based on all the evidence you have seen and heard together with the instructions I have given you." Shortly before 10 p.m., the bailiff notified the court that the jury had reached a verdict. The court individually polled the jurors as to whether the verdict represented their own verdict, and each of them confirmed the verdict.

¶ 6 The court denied defendant's motion for a new trial and sentenced him to an aggregate term of 50 years' incarceration. Defendant appealed, and we affirmed. *People v. Frey*, 2018 IL App (2d) 150868-U. Defendant did not raise any jury issues in his appeal, but we remarked in a footnote that the record contained a second note, apparently written by the jury, which read, "Please advise—We have 10 guilty (all 3 counts) 2 not guilty all 3 counts. The 2 not guilty are firm that the State did not prove guilt on all these counts." We commented that the transcript contained no mention of the note and that there was no explanation for its presence in the common -law record. *Id.* ¶ 63 n.2. We noted our difficulty in determining what weight we should place on the second jury note, and we presumed that the trial court's failure to address it on the record meant

that the jury ultimately chose not to send it. We found that presumption reasonable because the trial court took "great pains" to properly address the jury's note about physical evidence. *Id.*

¶ 7 On December 5, 2019, defendant filed a *pro se* postconviction petition alleging that his sentence was unconstitutionally excessive and that his trial and appellate counsels were ineffective in multiple respects. At the end of his ineffective-assistance allegations, he also wrote: "The initial jury could not agree on a guilty verdict in this case, yet the Judge told them they could not leave that night unless they all agreed on something, being outnumbered and pressured they took the defendants freedom!" Defendant followed this allegation with a claim that his sentence was unconstitutional. Defendant's signature does not appear on the final page of argument. The next page of the record is entitled "Motion for Appointment of Counsel." The motion runs onto the next page, where defendant's signature appears. He swears "that the [f]acts stated in this [p]etition are true and correct in substance and in fact." The next page of the record is entitled "Newly Discovered Evidence," the body of which states:

> "On July 25, 2019[,] Roxanne Shaffer made a Sworn Affidavit on behalf of the defendant which is [claiming] a violation of the 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 despite a 10-2 Verdict! Failure of trial counsel to fully depose all witnesses also adds this to the claim for ineffective assistance of trial counsel."

This page also bears defendant's signature; he again swears "that the facts stated in this petition are true and correct in substance and in fact."

¶ 8 The next page in the record is Shaffer's affidavit, in which she averred as follows. She is defendant's sister. At approximately 9:00 p.m. on the day of deliberations, the jury sent the second note. She averred that the jury asked the court to release them for the night and have them continue

their deliberation the next day. The court denied the request, stating that it had a murder trial starting the next day and did not want to postpone it. "Within half an hour to forty-five minutes, the jury came back with a guilty verdict," which "took away [defendant's] right of due process."

¶ 9 On May 13, 2020, the trial court issued an order recognizing that the petition had advanced by default to the second stage because the court had failed to act on it within 90 days. Accordingly, the trial court appointed counsel.

¶ 10 On October 1, 2020, postconviction counsel filed a motion to withdraw under *People v. Kuehner*, 2015 IL 117695. Counsel's motion represented that all of defendant's *pro se* claims concerned either ineffective assistance or sentencing. Counsel then listed defendant's ineffective assistance and sentencing claims, explaining why each lacked merit. However, counsel did not mention defendant's claim concerning the second jury note, and nothing in the motion implied that counsel reviewed or even recognized the claim. Counsel attached a Rule 651(c) certificate to the motion.

¶ 11 At the motion hearing, counsel stated that he (1) reviewed the record and all of defendant's submissions and (2) reached out to potential witnesses. Counsel did not, however, specifically mention the second jury note or Shaffer's affidavit. Counsel concluded, "At the end of the day I would stand on my motion." Defendant objected to counsel's withdrawal. The court granted the motion, stating that it agreed with counsel.

¶ 12 The State moved to dismiss, adopting the reasoning of counsel's motion to withdraw. At the motion hearing, defendant stated that (1) he had asked his counsel to make some phone calls and that counsel never did so, and (2) counsel did not "do everything he could do to get me a not-guilty verdict." The court granted the motion to dismiss based on the reasoning of counsel's motion to withdraw. Defendant appeals.

¶ 13 II. ANALYSIS

¶ 14 Defendant argues that his postconviction counsel failed to provide reasonable assistance under Rule 651(c) by neglecting to address his claim concerning the second jury note. Thus, he claims that the trial court abused its discretion in allowing counsel to withdraw.

¶ 15 First, we note that the State contends that we lack jurisdiction for two reasons: (1) defendant failed to immediately appeal the order allowing postconviction counsel to withdraw and, (2) alternatively, his notice of appeal did not specify the trial court's order granting the motion to withdraw. The State is mistaken.

¶ 16 First, defendant had no option but to wait until the conclusion of the proceedings to pursue an appeal. "The procedure for an appeal in a post-conviction proceeding shall be in accordance with the rules governing criminal appeals." Ill. S. Ct. R. 651(d) (eff. July 1, 2017). Our jurisdiction of criminal appeals is limited to appeals from final judgments, unless otherwise provided by supreme court rule. See, *e.g.,* Ill. S. Ct. Rs. 604(e) through (g) (eff. July 1, 2017). Allowing a motion to withdraw as counsel does not dispose of a defendant's postconviction petition. See *People v. Jackson*, 2015 IL App (3d) 130575, ¶ 17 ("When the trial court grants a motion to withdraw, the court may appoint new counsel or allow the defendant to proceed *pro se*."). Here, there was no final order until the petition was dismissed.

¶ 17 Second, the notice of appeal encompassed the order allowing counsel to withdraw, even though defendant did not specify that order in his notice. "Our supreme court has explained that an appeal from a final judgment includes every previous ruling that represents a 'step in the procedural progression leading to the judgment specified' and every 'preliminary determination necessary to ultimate relief.' " *People v. Garcia*, 2015 IL App (1st) 131180, ¶ 68 (quoting *Burtell v. First Charter Service Corp.*, 76 Ill. 2d 427, 435-36 (1979)). Further, listing only the date of the

final judgment is sufficient as " '[t]here is nothing in the applicable rules of our supreme court suggesting that the notice of appeal must contain further specificity.' " *Id.* (quoting *In re Isaiah D.*, 2015 IL App (1st) 143507, ¶¶ 21-22). Accordingly, having jurisdiction, we proceed to the merits.

¶ 18 "The Act [citation] provides a procedural mechanism by which a criminal defendant can assert that his federal or state constitutional rights were substantially violated in his original trial." *People v. Moore*, 2018 IL App (2d) 170120, ¶ 31. "A postconviction proceeding is not a substitute for a direct appeal, but rather is a collateral attack on a prior conviction and sentence." *Id.* "For this reason, issues that were raised and decided on direct appeal are barred from consideration, by the doctrine of *res judicata*." *Id.* "Moreover, issues that could have been raised on direct appeal, but were not, are considered forfeited." *Id.* However, forfeiture principles are relaxed where the forfeiture stems from the ineffective assistance of appellate counsel. *Id.*

¶ 19 "The Act provides for a three-stage proceeding, and a defendant must satisfy the requirements of each before continuing to the next stage." *People v. Rosalez*, 2021 IL App (2d) 200086, ¶ 90. At the first stage, the trial court is afforded 90 days to review the petition without input from the State. *Id.* (citing 725 ILCS 5/122-2.1(a)(2) (West 2016)). "The petition must present the gist of a constitutional claim, and the petition will survive so long as it is not frivolous or patently without merit." *Id.* "At the first stage, the State is not permitted any input on the sufficiency of the petition." *Moore*, 2018 IL App (2d) 170120, ¶ 32. "If the trial court fails to act on the petition within 90 days, it proceeds to the second stage." *Id.* "Of course, in [this] instance, the petition may well be frivolous or patently without merit, and the defendant is appointed counsel only through the fortuity of the [trial] court's inaction." *People v. Greer*, 212 Ill. 2d 192, 204 (2004).

¶ 20 At the second stage, an indigent petitioner is entitled to the appointment of counsel. 725 ILCS 5/122-4 (West 2018). The Act guarantees a petitioner the reasonable assistance of counsel. *Greer*, 212 Ill. 2d at 204. Rule 651(c) imposes specific duties on postconviction counsel to ensure that counsel provides the requisite level of assistance.` The rule provides:

> "The record filed in [the trial court] shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." Ill. S. Ct. R. 651(c) (eff. July 1, 2017).

¶ 21 "If, after demonstrating compliance with Rule 651(c), appointed counsel determines that the *pro se* petition is frivolous or patently without merit, appointed counsel may—and should—move to withdraw from representation." *Moore*, 2018 IL App (2d) 170120, ¶ 33. The legislature did not intend to require appointed counsel to continue representing a postconviction defendant after determining that the petition is frivolous or patently without merit. *Greer*, 212 Ill. 2d at 209. The Act does not require the attorney to do so, and ethical obligation *prohibits* the attorney from doing so. *Id.*

¶ 22 Also, at the second stage, the State may answer the petition or move to dismiss it. See 725 ILCS 5/122-5 (West 2018). "To survive the second stage, the petition must make a substantial showing of a constitutional violation." *Moore*, 2018 IL App (2d) 170120, ¶ 34. "The court must accept as true all well-pleaded facts that are not positively rebutted by the record." *Id.* We review *de novo* a second-stage dismissal. *Id.* We also review *de novo* counsel's compliance with Rule 651(c). *Id.*

¶ 23 "[O]ur review of an order permitting postconviction counsel to withdraw differs depending on whether the *pro se* petition advanced to the second stage because the trial court deemed it potentially meritorious or instead because the trial court took no action on the petition within 90 days of its filing." *Id.* ¶ 35. "[I]f the petition advanced because the trial court found potential merit, then 'appointed counsel's motion to withdraw must contain at least some explanation as to why *all* of the claims set forth in that petition are so lacking in legal and factual support as to compel his or her withdrawal from the case.' (Emphasis added.)" *Id.* ¶ 35 (quoting *Kuehner*, 2015 IL 117695, ¶ 27). In *Kuehner*, our supreme court explained:

> "[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. The reason for this is that, in making such a determination and advancing the petition to the second stage, the trial court is granting the *pro se* defendant the first form of relief afforded by the Act, namely, the appointment of counsel to represent the defendant's interests going forward (725 ILCS 5/122-4 (West 2008)). A subsequent motion to withdraw is effectively an *ex post* request to deny the defendant that very relief, and it comes not from the State but from defendant's own counsel. Accordingly, we have no reservations about requiring appointed counsel to make the case in the motion to withdraw as to why the relief previously granted his or her client should be undone, and to make that case with respect to each and every *pro se* claim asserted." (Emphasis omitted). *Kuehner*, 2015 IL 117695, ¶ 22.

¶ 24 However, under *Greer*, when a petition advances due to the trial court's inaction, "judicial economy sometimes dictates affirming the grant of leave to withdraw even where the motion to withdraw is deficient." *Moore*, 2018 IL App (2d) 170120, ¶ 38 (citing *People v. Komes*, 2011 IL

App (2d) 100014, ¶ 30). If the original petition's claims were patently without merit, it serves no purpose to reverse a grant of a motion to withdraw merely because of insufficiencies in the motion. *Moore*, 2018 IL App (2d) 170120, ¶ 38; *Komes*, 2011 IL App (2d) 100014, ¶ 30.

¶ 25 In *Kuehner*, the defendant's petition advanced to the second stage after the court found it was not frivolous or patently without merit. However, the trial court later allowed appointed counsel to withdraw. Our supreme court determined that counsel's motion to withdraw was inadequate because it did not address the potential merit of all the claims in the *pro se* petition. *Kuehner*, 2015 IL 117695, ¶ 23. Thus, the court vacated the orders permitting counsel to withdraw and dismissing the petition and remanded for appointment of new postconviction counsel. *Id.* ¶ 27.

¶ 26 In *Moore*, the defendant's postconviction petition advanced to the second stage due to the trial court's inaction. We vacated the orders allowing appointed counsel to withdraw and dismissing the petition. We explained that the record indicated that appointed counsel failed to recognize one of the claims in the defendant's petition. Construing *Kuehner* and *Greer*, we held that, where appointed counsel is allowed to withdraw on a petition that automatically advanced to the second stage because of the trial court's inaction, we will uphold the withdrawal if (1) the record shows that counsel complied with Rule 651(c) and (2) the record demonstrates that the claims in the *pro se* petition were frivolous or patently without merit. *Moore*, 2018 IL App (2d) 170120, ¶ 38.

¶ 27 We construed *Greer* to hold that "even where the petition advances to the second stage through the trial court's inaction, appointed counsel's motion to withdraw must address the potential merit of all claims in the *pro se* petition." *Id.* ¶ 38. We noted that, even under *Greer*, judicial economy might warrant affirming the grant of a motion to withdraw despite counsel's

failure to explain why each of the petitioner's claims lacks potential merit. *Id.* However, "*Greer* was unequivocal that the reviewing court cannot relieve counsel of his or her duty under Rule 651(c) to *ascertain* the petitioner's claims." (Emphasis added.) *Id.* ¶ 43 (quoting *Greer*, 212 Ill. 2d at 212).

¶ 28 In *Moore*, counsel's Rule 651(c) certificate, her motion to withdraw, and her statements at the motion hearing showed that counsel purported to recapitulate the claims of the *pro se* petition as she understood them. Yet, counsel's motion failed to mention one of the *pro se* claims. We inferred that counsel simply overlooked the claim given the length and density of the *pro se* petition. Nonetheless, counsel was not excused from compliance with Rule 651(c)'s mandate that she ascertain the defendant's contentions of deprivation of constitutional rights. Thus, we held that " '[u]nless the record shows that counsel has, in fact, ascertained the petitioner's claims, we cannot assume that the claims are in their final form, and deciding their frivolity is likely to be premature.' " *Moore*, ¶ 42, (quoting *Komes*, 2011 IL App (2d) 100014, ¶ 32). We held that it would likewise be premature to review the claim's potential merit on appeal. We explained that harmless-error analysis does not apply to Rule 651(c) violations, as " 'compliance must be shown regardless of whether the claims made in the *pro se* or amended petition are viable' " *Id.* ¶ 44 (quoting *People v. Suarez*, 224 Ill. 2d 37, 52 (2007).

¶ 29 Here, *Moore* applies, as the record indicates that counsel failed to recognize defendant's due process claim based on the second jury note. While counsel generically stated that he reviewed the record and all that defendant filed, and reached out to potential witnesses, he also expressly stood on his written motion. That motion addressed in depth all of defendant's claims concerning ineffective assistance or sentencing. However, it *did not* mention the claim based on the second jury note or any of the circumstances surrounding the claim. Thus, as in *Moore*, we infer that

counsel overlooked that claim. Because the record does not show that counsel ascertained all of defendant's claims, we cannot assume that the claims are in their final form, making premature a determination of their potential merit. *Moore*, 2018, IL App (2d) 170120, ¶ 42 (citing *Komes*, 2011 IL App (2d) 100014, ¶ 32)

¶ 30 The State contends that, under *Kuehner* and *Greer*, when a petition advances to the second stage due to inaction of the trial court, the filing of a Rule 651(c) certificate is sufficient to raise a presumption that counsel complied with the rule. The State requests that we repudiate *Moore* to the extent that it holds otherwise. But we specifically addressed both *Kuehner* and *Greer* in *Moore*. In *Greer*, it appeared that counsel fulfilled his Rule 651(c) duties, and the record supported counsel's assessment that the postconviction claims were frivolous. *Greer*, 212 Ill. 2d at 212. In *Kuehner*, the petition advanced to the second stage because the trial court determined that it stated the gist of a constitutional claim; appointed counsel subsequently moved to withdraw but failed to address all of the defendant's claims. *Kuehner*, 2015 IL 117695, ¶ 23. We noted in *Moore* that *Kuehner* recognized that language in *Greer* engendered some confusion about whether a motion to withdraw is properly granted when it fails to provide an explanation as to why each claim in the *pro se* petition lacks merit. *Moore*, 2018, IL App (2d) 170120, ¶ 42. But we also noted that *Kuehne*r declined to resolve that tension because the case facts were so different. *Id.* ¶¶ 36-37.

¶ 31 *Moore* is not inconsistent with *Kuehner* and *Greer*. As previously discussed, in *Moore*, the record indicated that counsel did not recognize all of the defendant's *pro se* claims and, therefore, counsel did not comply with Rule 651(c). As *Moore* made clear, we will not presume compliance when the record suggests otherwise. Accordingly, we decline to repudiate *Moore*. For the same reasons, we deny the State's alternate request, made without any citation to authority, to

allow it "to take a petition for leave to appeal as [matter] of right to the Illinois Supreme Court to resolve the potentially inconsistent authority."

¶ 32 The State also suggests that defendant has forfeited the second-jury-note issue because the claim was not in the body of his *pro se* petition and, therefore, it did not rise to the level of a claim. But defendant's *pro se* petition clearly noted the issue under the section on ineffective assistance; moreover, the attached page entitled "Newly Discovered Evidence" expressly asserted a due process claim based on the second jury note. The trial court may dismiss a petition at the second stage of postconviction review if the allegations, when liberally construed in light of the trial court record, fail to make a substantial showing of a constitutional violation. *People v. Barkes*, 399 Ill. App. 3d 980, 985 (2010). Here the petition, liberally construed, asserted the claim, yet neither the parties nor the trial court considered it. Likewise, the State suggests forfeiture because defendant did not specifically raise the issue *pro se* at the hearing on the motion to dismiss. But the State has cited no authority for applying forfeiture in such a manner as to excuse an attorney's lack of compliance with Rule 651(c). Further, at the hearing, defendant noted that his counsel did not make requested phone calls and did not "do everything he could do to get [defendant] a not-guilty verdict." Such a complaint fairly encompassed the due process claim.

¶ 33 The State presents other grounds for finding that defendant forfeited his due-process claim, namely that (1) he failed to raise it on direct appeal, (2) it was barred by *laches*, and (3) it lacked merit. But, as we held in *Moore*, given counsel's apparent failure to discern the claim, we cannot deem it to have been in its final form when the trial court evaluated the potential merits of defendant's petition. Thus, it would be premature to address the claim's merits or whether forfeiture or *laches* applies. See *Moore*, 2018 IL App (2d) 170120, ¶ 44.

¶ 34 As in *Moore*, we vacate the orders permitting counsel to withdraw and dismissing the petition. Given the circumstances, we grant defendant's request for a new court-appointed postconviction counsel. " 'On remand, the [trial] court should not grant any motion to withdraw unless counsel documents Rule 651(c) compliance.' " *Moore*, 2018 IL App (2d) 170120, ¶ 45 (quoting *Komes*, 2011 IL App (2d) 100014, ¶ 36). Any motion by counsel to withdraw should demonstrate the frivolity of all defendant claims. *Id.*

¶ 35 III. CONCLUSION

¶ 36 For the reasons stated, we vacate the orders of the circuit court of Lee County permitting defendant's counsel to withdraw and dismissing defendant's *pro se* postconviction petition. We remand for further proceedings as directed.

¶ 37 Vacated and remanded with directions.

Index to the Record on Appeal

Common Law Record

Corrected Report of Proceedings (Second Supplement to the Record)

Exhibits (Supplement to the Record)

Secured Exhibits

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 May 23, 2023, the **Brief and Appendix 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:

Douglas R. Hoff
Christina Solomon
Office of the State Appellate Defender
203 N. LaSalle Street, 24th Floor
Chicago, Illinois 60601
1stdistrict.eserve@osad.state.il.us
christina.solomon@osad.state.il.us

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