No. 128492

IN THE

SUPREME COURT OF ILLINOIS

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

REPLY BRIEF FOR PETITIONER-APPELLANT

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ARGUMENT

Postconviction counsel acted unreasonably and denied Richard Huff due process by "standing" on his facially frivolous *pro se* petition instead of withdrawing, or amending the petition to raise a non-frivolous claim.

The State complicates what is otherwise a simple issue: what must postconviction counsel do when he or she determines that the defendant's *pro se* petition is frivolous as written, and cannot be amended to state a non-frivolous claim. Instead of answering that question directly, the State makes inconsistent arguments that obfuscate the issue, and contradict this Court's recent jurisprudence. This Court should reiterate, as it did last term in *People v. Urzua*, 2023 IL 127789, that "postconviction counsel is ethically obligated to withdraw if he or she believes there are no meritorious issues." *Urzua*, 2023 IL 127789, ¶ 37 (citing *People v. Greer*, 212 Ill. 2d 192, 206 (2004)). Since Huff's attorney did not file a motion to withdraw, or move to amend his facially frivolous petition for postconviction relief, this Court should remand the matter for new second-stage proceedings where a different attorney may provide Huff with the level of assistance he was entitled to receive under the Post-Conviction Hearing Act.

A. The record rebuts the presumption created by postconviction counsel's 651(c) certificate that she provided reasonable assistance as required by the Post-Conviction Hearing Act.

The State argues that Huff "cannot rebut the presumption that postconviction counsel complied with Rule 651(c) because nothing in the record affirmatively shows that counsel did not comply with the rule," which "does not impose a duty to withdraw in any circumstance." (St. br. at 10, 12).

This argument, however, should be rejected because it ignores this Court's repeated recognition that Rule 651(c) does not exist in a vacuum. See *Greer*, 212 Ill. 2d at 206; *People v. Kuehner*, 2015 IL 117695, ¶ 21; *Urzua*, 2023 IL 127789, ¶ 37. It must be considered in conjunction with the other rules of professional conduct which, *read together*, require postconviction counsel to withdraw when the *pro se* petition is frivolous and cannot be amended to state a non-frivolous claim. *Id*.

This recognition began in *Greer*, where this Court found that because postconviction counsel has a 651(c) duty to "present" the defendant's contentions, but is ethically prohibited from "presenting" frivolous contentions, postconviction counsel must withdraw "when counsel *knows* [the defendant's] contentions are frivolous." *Greer*, 212 Ill. 2d at 206 (emphasis in original). In *Kuehner*, this Court held that postconviction counsel is not only obligated to withdraw when counsel "discovers something that ethically would prohibit [him or her] from actually presenting the defendant's claims," but must explain why withdrawal is required when the *pro se* petition advances on a finding that it has arguable merit. *Kuehner*, 2015 IL 117695, ¶ 21. In *Urzua*, this Court settled a split that had developed in the appellate court with respect to whether *Greer* required withdrawal by holding that "Under *Greer*, postconviction counsel *is ethically obligated to withdraw* if he or she believes there are no meritorious issues." *Urzua*, 2023 IL 127789, ¶ 37 (emphasis added).

These cases firmly establish that Rule 651(c) must be considered *in pari materia* with the other rules governing postconviction counsel's

representation. See *Urzua*, 2023 IL 127789, ¶ 37; *Greer*, 212 Ill. 2d at 206; see also Ill. S. Ct. Rules 137, 651(c); Ill. R. Prof. Conduct, Rules 1.16, 3.1, 3.3. Because of this, postconviction counsel has only two options when confronted with a *pro se* petition that is frivolous as written: amend the petition to state a non-frivolous claim, or move to withdraw as appointed counsel. *Id*. There are no other options. See *People v. Shortridge*, 2012 IL App (4th) 100663, ¶ 13 ("If counsel believes that his client's claims are frivolous or without merit his ethical obligation is to seek a withdrawal as counsel"); *People v. Jackson*, 2015 IL App (3d) 130575, ¶ 16 (same); *People v. Elken*, 2014 IL App (3d) 120580, ¶ 36 (same); *People v. Moore*, 2018 IL App (2d) 170120, ¶ 33 (same).

In other words, postconviction counsel cannot "stand" on a facially frivolous *pro se* petition when postconviction counsel *knows* or *should know* the *pro se* claims lack merit. *Id*. Yet, that is precisely what occurred here. Postconviction counsel stood on Huff's *pro se* petition, even though it was: (1) untimely, (2) substantively frivolous as written, and (3) barred by *res judicata*. (C. 85-104; R. 102-04). The latter defects were apparent on the face of the petition, and the former became apparent when the State raised timeliness as an affirmative defense in its motion to dismiss. (C. 85-104; R. 102-04). At that point, postconviction counsel had a duty to either respond to the State's dispositive claims, or move to withdraw.

The State contends that postconviction counsel *did* respond when she "directed the [circuit] court to [Huff's] arguments by standing on the *pro se* petition." (St. br. at 23). But "directing" the circuit court to consider a facially frivolous claim is unethical and, more to the point, no reasonable attorney

could have read the State's motion to dismiss and concluded that Huff's petition was arguably meritorious. (C. 85-104). The record therefore rebuts the presumption created by postconviction counsel's 651(c) certificate that she provided Huff with the standard of representation required by the Post-Conviction Hearing Act.

Pivoting to policy, the State contends that requiring postconviction counsel to file a motion to withdraw is undesirable because "presuming that counsel believed petitioner's argument was frivolous . . . would incentivize appointed counsel in close cases to err on the side of withdrawing rather than risk unethical conduct and possible sanction." (St. br. at 17-18). These concerns are unfounded.

First, this is not a "close case." The State has consistently maintained that Huff's *pro se* petition was frivolous as written, and required dismissal absent an amendment to raise a non-frivolous claim. (C. 85-104; R. 102-04). In this Court, the State has gone one step further, arguing that *because* Huff's petition was frivolous, any error, if one occurred, was harmless beyond a reasonable doubt. (St. br. at 18-24, 27).

Second, Huff does not ask this Court to "presume" anything with respect to postconviction counsel's subjective belief regarding the merits of Huff's petition. Instead, he argues that this Court must look to the reasonableness of postconviction counsel's conduct, and determine whether postconviction counsel's actions were objectively sound. See *e.g.*, *People v. Cotto*, 2016 IL 119006, ¶ 42 ("appointed counsel must provide reasonable assistance to their clients after a petition is advanced from first-stage

proceedings").

In other words, the question is not whether postconviction counsel subjectively believed Huff's petition was frivolous (or even meritorious), it is whether *reasonable counsel* would have objectively believed Huff's *pro se* petition did not need to be amended after the State filed its motion to dismiss. The answer to that question must be no—particularly after the State asserted timeliness in its motion to dismiss. (C. 85-104). Viewed objectively, no reasonable attorney could have believed that Huff's *pro se* petition presented an issue of arguable merit *after* the State filed that motion. See *People v. Perkins*, 229 Ill. 2d 34, 43 (2007) ("Absent allegations of lack of culpable negligence, *the Act directs the trial court to dismiss the petition as untimely* . . . upon the State's motion") (emphasis added).

The State contends that requiring withdrawal under such circumstances would "incentivize counsel to take a position adverse to their client's interests" which, in turn, would be "antithetical to the purpose of appointed counsel in postconviction cases." (St. br. at 18). But this is also wrong for two reasons. First, it relies on the State's improper assumption that defense counsel would file a motion to withdraw in a "close case" to avoid allegations of "unethical conduct and possible sanction." (St. br. at 17-18). The rules of professional conduct are clear: counsel must zealously represent the defendant in *any case* that has arguable merit, including "close cases." Ill. S. Ct. Rule 651(c); Ill. R. Prof. Conduct, R. 1.3 ("a lawyer must [...] act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf"). The only scenario in which postconviction

counsel could ethically move to withdraw is the one presented here, where the *pro se* petition advances to second-stage proceedings, but must be dismissed absent an amendment to state a non-frivolous claim. Even then, postconviction counsel could only file a motion to withdraw if, after investigating the defendant's claims, postconviction counsel concluded that there were no claims of arguable merit to raise on the defendant's behalf. At that point, the responsibility would shift to the circuit court to determine whether postconviction counsel should be permitted to withdraw. See *People v. Bryant*, 2022 IL App (2d) 200279, ¶ 22. ("Once the defendant has had an opportunity to [respond to postconviction counsel's motion to withdraw], the court can then evaluate counsel's motion and decide if it should be granted or denied.").

This procedure is not only required by this Court's rules, but necessary to provide the reviewing court with an adequate record to determine whether the lower court correctly ruled on a motion to withdraw. As this Court explained in *Kuehner*:

> Where appointed counsel concludes after [a 651(c) investigation] that he or she is compelled for ethical reasons to withdraw, it is not asking too much to have counsel simply reduce his or her findings to writing and to include them in the motion to withdraw *so that both the trial court and the reviewing courts have a basis for evaluating counsel's conclusion*.

Kuehner, 2015 IL 117695, ¶ 22 (emphasis added). There is no reason for this Court to depart from this well-established precedent.

Second, no defendant benefits from filing a frivolous petition for postconviction relief. When such a petition is filed, postconviction counsel has the ethical duty to inform the defendant that the *pro se* claims lack merit.

This discussion will necessarily include an explanation as to *why* the defendant's claims (with or without an amendment) cannot proceed under the Post-Conviction Hearing Act, placing the defendant in a position to withdraw his or her petition to avoid the harsh consequences of dismissal on any future claims the defendant may wish to raise. See *People v. Shellstrom*, 216 Ill. 2d 45, 55 (2005) (recognizing that "the obstacles standing in the way of filing a successive postconviction petition are not easy to overcome"). If, however, the defendant disagrees with postconviction counsel's conclusion (or otherwise refuses to withdraw the *pro se* petition), postconviction counsel must file a motion to withdraw. *Greer*, 212 Ill. 2d at 206; *Urzua*, 2023 IL 127789, ¶ 37. But even in that scenario, the defendant is afforded an opportunity to defend the petition, *pro se,* before receiving a ruling on the merits. *Bryant*, 2022 IL App (2d) 200279, ¶ 19 ("the defendant must be given notice of postconviction counsel's motion to withdraw and a meaningful opportunity to respond to the motion").

This procedure is not only fair, but consistent with the analogous situation that arises when appellate counsel determines that further litigation would lack arguable merit. In such cases, when the defendant refuses to dismiss the appeal, appellate counsel files a written motion to withdraw—either an "*Anders* motion" or a "*Finley* motion"—explaining why the defendant's appeal lacks arguable merit. See *Anders v. California*, 386 U.S. 738, 744 (1967); *Pennsylvania v. Finley*, 481 U.S. 551 (1987); Local Rules of the Ill. App. Ct., 3d Dist., R. 105: Motions to Withdraw as Counsel – Finley & Anders ("Where counsel finds that no issue of potential merit can be raised

on appeal and moves to withdraw representation, counsel shall file a motion to withdraw and supporting memorandum establishing review of the record and setting forth any potential issues that counsel ultimately deems meritless"). Once an *Anders* or a *Finley* motion is filed, the defendant is afforded an opportunity to respond. *Id*. Then, the appellate court determines whether the defendant's appeal is actually frivolous. *Id*. If it is, appellate counsel is permitted to withdraw, and the appeal is dismissed. *Id*. If it is not, the motion is denied and the defendant is permitted to proceed on appeal. *Id*. When counsel files such a motion, it must be served on the defendant, who is afforded 35 days to file a response. *Id*.; Ill. S. Ct. R. 13(c).

Nothing about this process is harmful to the appellant, or "incentivizes" appellate counsel to "take a position adverse to their client's interest." (Contrast with St. br. at 18). To the contrary, it is constitutionally mandated on direct appeal to ensure that the defendant's case is properly reviewed during fundamentally fair proceedings. *Anders*, 386 U.S. at 744 (recognizing that due process requires counsel to either actively advocate on the client's behalf, or withdraw); Ill. S. Ct. R. 13(c) (requiring counsel to provide the client with "reasonable notice of the time and place of the presentation of [a] motion for leave to withdraw"). It would make no sense for this Court to find that while this procedure is fair and constitutionally mandated on direct appeal, it would be harmful and "antithetical to the purpose of appointed counsel" if required during postconviction proceedings. (St. br. at 18).

This Court should also reject the State's undeveloped and irrelevant argument that "frivolous" claims are somehow different than "meritless"

claims. (St. br. at 16, 27). The State does not explain the difference between the two, (St. br. at 16), and has therefore forfeited any argument on this point. See *Velocity Invs., LLC v. Alston*, 397 Ill. App. 3d 296, 297 (2d Dist. 2010) ("This court is entitled to have issues clearly defined with pertinent authority cited and cohesive arguments presented [citation], and it is not a repository into which [a litigant] may foist the burden of argument and research") (citing Ill. S. Ct. Rule 341(h)(7)); *Obert v. Saville*, 253 Ill. App. 3d 677, 682 (2d Dist. 1993) ("Bare contentions in the absence of argument or citation of authority do not merit consideration on appeal and are deemed waived."). Furthermore, this Court has never distinguished between a frivolous claim, and a meritless one. See *Urzua*, 2023 IL 127789, ¶ 37 (using the terms "frivolous," "spurious," "without merit," and "unmeritorious" interchangeably); *Greer*, 212 Ill. 2d at 205 (finding no difference between a claim that is "frivolous" or "patently without merit"). But even if there were a difference between the two types of claims, the State agrees that in this case: (1) Huff's claim, as presented in the *pro se* petition, was frivolous, and (2) counsel cannot ethically present a frivolous claim. (St. br. at 16, 27) (citing Ill. R. Prof. Conduct, R. 3.1). It is therefore irrelevant whether there is some theoretical difference between these "types" of claims because, as the State concedes, Huff's claim—as written—could not have been ethically presented to the circuit court. (St. br. at 16, 27).

In sum, Illinois law required postconviction counsel to either amend the *pro se* petition to state a non-frivolous claim, or withdraw as appointed counsel. Ill. S. Ct. Rule 651(c); *Urzua*, 2023 IL 127789, ¶ 37; *Greer*, 212 Ill. 2d at 206. Because postconviction counsel failed to pursue either of these

options, her representation was unreasonable, and the matter must be remanded for new second-stage proceedings under the Post-Conviction Hearing Act.

B. Huff is not required to satisfy *Strickland* to succeed on his claim.

The State contends that because "[this] Court has not explained how a reviewing court should assess the reasonableness of counsel's representation outside the scope of Rule 651(c)," Huff's claim should be subjected to the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). (St. br. at 13-14). The State, relying on *People v. Hotwagner*, 2015 IL App (5th) 130525, and *People v. Zareski*, 2017 IL App (1st) 150836, argues that the "*Strickland* standard" is appropriate "because the statutory right to reasonable counsel is less than the constitutional right prescribed by *Strickland*," and thus "if [Huff's] claim[] cannot surmount the constitutional standard, his statutory claim of unreasonable assistance must fail." (St. br. at 14). It then claims that because Huff "cannot establish either prong" of the *Strickland* test, he cannot succeed. The State is wrong for several reasons.

As a threshold matter, this Court should reject the State's claim that this appeal concerns the "reasonableness of counsel's representation *outside the scope of Rule 651(c)*." (St. br. at 13) (emphasis added). As established in *Greer*, Rule 651(c) must be read *in pari materia* with the other rules governing postconviction counsel's representation, which include Rule 137 and the rules of professional conduct. See *Greer*, 212 Ill. 2d at 206. While no single rule requires postconviction counsel to withdraw when the *pro se* petition is frivolous, all the rules, *read together*, require postconviction

counsel to do just that. See *Urzua*, 2023 IL 127789, ¶ 37; *Kuehner*, 2015 IL 117695, ¶ 21; *Greer*, 212 Ill. 2d at 206. Therefore, contrary to the State's assertion, this issue is not "outside the scope of Rule 651(c)." (St. br. at 13).

But even if postconviction counsel's unreasonable representation was "outside the scope of 651(c)," this Court has been clear: the *Strickland* test cannot be used to evaluate *any* claim of unreasonable assistance of counsel. See *People v. Addison*, 2023 IL 127119; *People v. Pingelton*, 2022 IL 127680; *People v. Suarez*, 224 Ill. 2d 37 (2007); *People v. Turner*, 187 Ill. 2d 406; *People v. Johnson*, 154 Ill. 2d 227, 246 (1993). *Addison* is particularly instructive because, in that case, this Court rejected identical arguments regarding *Strickland*. Specifically, in *Addison*, the State contended—as it does here—that "remanding [the defendant's claim] without a showing of prejudice [would be] illogical because it [would make] it easier to succeed on a claim of unreasonable assistance of postconviction counsel than [. . .] on a claim of ineffective assistance of counsel under *Strickland*." *Addison*, 2023 IL 127119, ¶ 37. But this Court found that argument to be unpersuasive for three reasons.

First, because the scope of postconviction counsel's representation is both limited and well-defined by this Court's rules, counsel *must* follow those rules if the defendant is to receive the level of representation guaranteed by the Post-Conviction Hearing Act:

> The problem with trying to compare an unreasonable assistance claim with a *Strickland* claim is that, at the second stage of postconviction proceedings, counsel's specific duties are prescribed by Illinois Supreme Court rule . . . [W]hen these limited duties are not carried out . . . "remand is required *** regardless of whether the claims raised in the petition have merit" [because] *all* postconviction petitioners are entitled to

> have counsel comply with the limited duties [prescribed by this Court's rules] before the merits of their petitions are determined.

Id. (quoting *Suarez*, 224 Ill. 2d at 47) (emphasis added). Second, because there is a distinct difference between the remedy for *Strickland* claims and the remedy for claims of unreasonable assistance of counsel, the two claims must be treated differently:

> A defendant who succeeds on a claim of ineffective assistance of counsel under *Strickland* is entitled to a new trial. A defendant who successfully argues that his attorney failed to provide reasonable assistance at the second stage of postconviction proceedings is merely entitled to a remand for his attorney to comply with the limited duties required by [this Court].

Addison, 2023 IL 127119, ¶ 37 (emphasis added). Third, because *Hotwagner* and *Pabello* involved third-stage evidentiary hearing—*i.e.*, a stage in the proceedings where Rule 651(c) did not apply—they did not support the State's argument:

> Neither case provides any precedent for requiring a prejudice showing at the second stage, where counsel's limited duties are prescribed by Illinois Supreme Court rule.

Addison, 2023 IL 127119, ¶ 38.

The same reasoning applies here. *Addison* involved a failure to place the defendant's claim in the proper legal form. *Id*. at ¶ 44. In this case, postconviction counsel failed to *either* place Huff's claim in the proper legal form *or* move to withdraw as counsel. It would be illogical and completely inconsistent with *Greer*, *Kuehner*, and *Urzua* for this Court to find that while a violation of Rule 651(c) requires remand, a violation of *either* Rule 651(c) *or* counsel's duty to file a motion to withdraw does not. This Court should reiterate that *any* violation of the well-defined rules governing postconviction

counsel's conduct require remand for new second-stage proceedings.

In addition, the State does not address this Court's recognition, in *Addison*, that while the more consequential remedy of a new trial for a *Strickland* claim justifies the need to show prejudice, the less consequential remedy of new second-stage proceedings does not. (St. br. at 13-24). Nor does the State address, or even recognize that it cited *the same cases* this Court distinguished in *Addison* on grounds that are equally applicable here. (St. br. at 13-24).

The State also cites *People v. Zareski*, 2017 IL App (1st) 150836 as support for its argument. (St. br. at 14). But *Zareski* is inapposite for two reasons. First, the issue in *Zareski* was whether *Strickland* governed claims that *retained* postconviction counsel provided unreasonable assistance during second-stage proceedings. *Id*. at ¶ 46. In that case, *the appellate court* determined that *Strickland* provided the proper framework for reviewing that claim because: (1) Rule 651(c) did not apply to retained counsel, and (2) there were no other allegations that retained counsel violated any other "supreme court rule." *Id*. at ¶ 55 ("The real key of the *Suarez* holding was not that Suarez's counsel had provided unreasonable assistance, but that Suarez's counsel had violated a supreme court rule."). In this case, postconviction counsel was not retained, and she unquestionably violated "a supreme court rule" by standing on a facially frivolous *pro se* petition instead of amending it, or moving to withdraw. More importantly, *Zareski* was decided *before Addison*, and is no longer good law in light of *Addison's* holding that claims of unreasonable assistance cannot be reviewed for prejudice. See *Addison*, 2023 IL 127119, ¶ 37.

Moreover, this Court has been consistent in holding that "it is improper to affirm the dismissal of a post-conviction petition" when the consequences of postconviction counsel's errors "are difficult to ascertain." See *Pingelton*, 2022 IL 127680, ¶ 49 (citing *Suarez*, 224 Ill. 2d at 47-48; *Turner*, 187 Ill. 2d 406, 415-16 (1999); *People v. Johnson*, 154 Ill. 2d 227, 246 (1993)). This is the very predicament presented here. Because postconviction counsel did not amend Huff's petition, or move to withdraw, the record is silent as to whether Huff had any additional claims to raise in an amended petition or, alternatively, could have asserted a meritorious argument in response to the State's motion to dismiss. This is precisely the sort of underdeveloped record that the appointment of counsel is designed to prevent. See *People v. Jackson*, 2021 IL App (1st) 190263, ¶ 45 (remanding for new second-stage proceedings because postconviction counsel's conduct created an "empty record" unsuitable for appellate review). It is also the reason the defendant is not required to prove prejudice when denied reasonable assistance of counsel—because prejudice cannot be shown on the face of an incomplete record. *Id.*; *Suarez*, 224 Ill. 2d 37, 50-51 (2007) (holding that unreasonable assistance of counsel claims cannot be reviewed for harmless error); *Addison*, 2023 IL 127119, ¶¶ 38, 42 (same); *People v. Nitz*, 2011 IL App (2d) 100031, ¶ 18 ("a defendant is not required to make a positive showing that his counsel's failure to comply with Rule 651(c) caused prejudice"); *People v. Yaworski*, 2014 IL App (2d) 130327, ¶ 14 (holding that postconviction counsel's ethical violation of laboring under a conflict of interest required remand without regard to whether counsel complied with Rule 651(c)).

This Court has conclusively rejected *Strickland* as providing the proper

framework for determining second-stage claims of unreasonable assistance of counsel. This is particularly true in cases such as this where the record is incomplete *because* of postconviction counsel's failures. No defendant can satisfy the second prong of the *Strickland* test when the record is devoid of the necessary evidence to prove prejudice *because* postconviction counsel failed to provide it (or failed to file a motion to withdraw so that the defendant could provide it himself). This Court should reaffirm its well-established precedent that when postconviction counsel's "limited duties are not carried out . . . remand is required regardless of whether the claims raised in the petition have merit." *Addison*, 2023 IL 127119, ¶ 37.

C. Postconviction counsel's unreasonable assistance denied Huff his right to procedural due process.

The State argues that Huff was not denied procedural due process because postconviction counsel "had notice of the People's motion to dismiss and an opportunity to respond." (St. br. at 26). It contends that while Huff "does not like the response counsel chose in standing on his petition . . . [t]hat is not a valid argument to show due process was violated." (Resp br. at 27). It then maintains that, even if Huff's right to due process was denied, the denial was harmless because Huff has conceded that his *Apprendi* claim was frivolous. (St. br. at 27). Finally, the State contends that this argument was forfeited because it was not raised in the appellate court, or in Huff's petition for leave to appeal. (St. br. at 24-25). This Court should reject the State's arguments for the following reasons.

First, the State is wrong in arguing that Huff's due process claim is meritless. (St. br. at 25-27). It concedes that Huff had "a procedural due

process right to be 'heard at a meaningful time and in a meaningful manner.'" (St. br. at 25) (citing *Pingelton*, 2022 IL 127680, ¶ 36). However, it argues that because "counsel had notice of the People's motion and an opportunity to respond," Huff cannot challenge postconviction counsel's response on due process grounds. (St. br. at 27). But the State cites no law in support of its position. Moreover, the State completely misses the point. The focus is not on whether *appointed counsel* had a meaningful opportunity to respond to the State's motion to dismiss. The focus is on Huff, and whether *he* had a meaningful opportunity to litigate his claims, either through counsel, or though some other means if counsel was unwilling to do so on his behalf. As the United States Supreme Court explained in *Anders*:

> The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client . . . His role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and *time allowed him to raise any points that he chooses*; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous.

Anders, 386 U.S. 738, 744 (1967) (emphasis added).

Although *Anders* was concerned with the due process rights of an indigent defendant on direct appeal, the same fundamental fairness concerns are at issue here. In this case, postconviction counsel refused to amend Huff's petition; she refused to respond to the State's motion to dismiss; she refused to file a motion to withdraw; and she waived Huff's appearance at a critical juncture in the proceedings. (R. 102-04). Under these circumstances, it cannot

be said that *Huff* was provided a meaningful opportunity to litigate *his* claims or challenge the allegations in the State's motion to dismiss.

Second, this error cannot be reviewed for harmlessness. As discussed above, postconviction counsel's conduct created a black box wherein this Court cannot confidently state that Huff did not wish to raise a different claim in an amended petition, or in response to the State's motion to dismiss. See *Pingelton*, 2022 IL 127680, ¶ 45 (recognizing that some due process errors will not be "amenable" to harmless error review "and that each case must be judged on its own facts"); *Yaworski*, 2014 IL App (2d) 130327, ¶ 14 (recognizing that when an ethical violation, such as a conflict of interest, creates uncertainty in the record regarding the reasonableness of counsel's representation, the matter must be remanded for new second-stage proceedings). Huff made this argument in his opening brief, and the State has offered no response. (Op. br. at 27-28). It has therefore forfeited any opportunity to challenge Huff's position on this point. *People v. Rouse*, 2022 IL App (1st) 210761, ¶ 26 (quoting Ill. S. Ct. Rule 341(h)(7) ("Points not argued are forfeited and shall not be raised . . . in oral argument, or on petition for rehearing").

But assuming, *arguendo*, this error could be reviewed for harmlessness, this Court should find that the State has not proved harmlessness beyond a reasonable doubt. The State's only argument on this point is that because Huff "conceded that his *Apprendi* claim is . . . frivolous, and he has failed at every level of the proceedings to offer any suggestion as to how his petition's deficiencies could be remedied . . . any violation of his right to due process would be harmless." (St. br at 27). But as the State is

well aware, Huff was represented by postconviction counsel when his petition was dismissed, and thus he *could not* have introduced new evidence or raised new claims to remedy the deficiencies in his petition. (See St. br. at 26) (recognizing that once postconviction counsel was appointed, Huff "had no right to personally respond to the People's arguments"). That was postconviction counsel's job, and she failed to do it. Ill. S. Ct. R. 651(c). Huff was similarly barred from introducing new evidence or raising new claims for the first time on appeal. *People v. Jones*, 213 Ill. 2d 498, 505 (2004) ("a claim not raised in a petition cannot be argued for the first time on appeal"). The State is therefore arguing that *because* Huff was prohibited from personally remedying the deficiencies of his petition at every stage following postconviction counsel's appointment, he cannot prove that he was harmed by postconviction counsel's unreasonable representation. This Court should not take such a dim view of the defendant's due process rights.

Furthermore, it is the State's burden—not the defendant's—to prove an error was harmless beyond a reasonable doubt, and the State "has failed at every level of the proceedings" to prove that Huff could not have amended his petition to remedy the deficiencies therein. See *People v. Nelson*, 2020 IL App (1st) 151960, ¶ 134 ("The State bears the burden of proving that a constitutional error was harmless"). It has also failed to respond to Huff's argument that he may have wished to withdraw his petition had postconviction counsel filed a motion to withdraw, as this was his first petition for postconviction relief and its dismissal would subject any future claims to the cause-and-prejudice test for advancement under the Post-Conviction Hearing Act. (Op. br. at 25, 28) (citing *Shellstrom*, 2016 Ill. 2d at

55). The State's silence on this point is telling, and should be construed as a concession that Huff was, in fact, prejudiced by the due process error that occurred here. See *Rouse*, 2022 IL App (1st) 210761, ¶ 26; Ill. S. Ct. Rule 341(h)(7).

Finally, Huff has not forfeited this due process argument (or any other argument) in support of his claim that postconviction counsel acted unreasonably by "standing" on his facially frivolous petition. Since this is the very claim Huff raised in the appellate court, he is entitled to bolster it with additional argument to establish that the appellate court erred in denying him relief. *Brunton v. Kruger*, 2015 IL 117663, ¶ 76 ("We require parties to preserve issues or claims for appeal; we do not require them to limit their arguments here to the same arguments that were made below."). Moreover, Huff gave the State more than sufficient notice that this argument would be made by including it in his petition for leave to appeal. Specifically, he wrote:

> Appointed counsel should not be permitted to represent a petitioner when counsel does not believe the *pro se* claims have merit. Compelling representation under such circumstances is tantamount to silencing the petitioner altogether, because the petitioner cannot address the trial court while represented by counsel, but counsel will not adequately litigate the petitioner's claims when counsel does not believe they have merit.

(PLA at 5).

While Huff did not explicitly use the words "due process" when making this argument, it was clear from the substance of his argument that due process was implicated. Finally, forfeiture is a limitation on the parties and not this Court. *People v. Normand*, 215 Ill. 2d 539, 544 (2005); *Wilson v. Humana Hospital*, 399 Ill. App.3d 751, 757 (2010). Thus, even if Huff somehow failed to preserve a due process argument, this Court should

overlook that deficiency to ensure a just result. *Id*.

D. Summary

Huff was denied his right to the reasonable assistance of counsel. Because his *pro se* petition was frivolous as written, Illinois law required postconviction counsel to either amend it or move to withdraw. Ill. S. Ct. Rule 651(c); *Urzua*, 2023 IL 127789, ¶ 37; *Greer*, 212 Ill. 2d at 206. Counsel's failure to choose from either of these options violated this Court's well-defined rules governing postconviction counsel's conduct and ethical obligations. *Id*. Further, it requires remand "regardless of whether the claims raised in the petition have merit." *Addison*, 2023 IL 127119, ¶ 37 (citing *Suarez*, 224 Ill. 2d at 51-50); *Nitz*, 2011 IL App (2d) 100031, ¶ 18; *Yaworski*, 2014 IL App (2d) 130327, ¶ 14.

Postconviction counsel's conduct also deprived Huff of his right to due process of law because it set the stage for postconviction counsel to waive his appearance during the only hearing on the State's motion to dismiss, during which postconviction counsel provided absolutely no advocacy on Huff's behalf. (R. 102-04). This argument has not been forfeited, and, because the full effect of postconviction counsel's error is not ascertainable, it is not be subject to harmless error review. *Pingelton*, 2022 IL 127680, ¶¶ 49-50; *Jackson*, 2021 IL App (1st) 190263, ¶ 45; *Yaworski*, 2014 IL App (2d) 130327, ¶ 14; *Suarez*, 224 Ill. 2d 37, 51-50. But even if it were amenable to harmless error review, this error was not harmless because Huff was never provided an opportunity to: (a) challenge postconviction counsel's apparent belief that his *pro se* petition was frivolous; (b) respond (in any way) to the State's motion to dismiss, or (c) withdraw his petition to avoid the harsh consequences of

dismissal on any future claims he may wish to raise. *Shellstrom*, 216 Ill. 2d at 55.

This Court should reverse the judgment of the appellate court, and remand the matter for new second-stage proceedings with an attorney who will ensure Huff receives the standard of representation guaranteed by the Post-Conviction Hearing Act.

CONCLUSION

For the foregoing reasons, Richard Huff, petitioner-appellant, respectfully requests that this Court reverse the order dismissing his second-stage petition for postconviction relief, and remand the matter for new second-stage proceedings with new counsel under the Post-Conviction Hearing Act.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 5,869 words.

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IN THE

SUPREME COURT OF ILLINOIS

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

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On August 25, 2023, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the petitioner-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

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