

We reverse and remand with directions.

¶ 4

I. BACKGROUND

¶ 5

After a November 2007 trial, a jury found defendant guilty of the charges against him, but two of the charges were later nol-prossed due to the merger doctrine. That same month, defense counsel filed a motion for a new trial, asserting (1) the State failed to prove him guilty beyond a reasonable doubt and (2) the trial court erred by admitting the evidence stipulation regarding two of the State's exhibits after the State had rested its case. Defendant also filed a *pro se* posttrial motion, asserting, *inter alia*, he had no minority on his jury panel and his counsel did not represent him to the best of counsel's ability as counsel's trial strategy was poor. Defense counsel later adopted defendant's minority argument. At a January 2008 hearing, the trial court first addressed the aforementioned arguments in the posttrial motions and denied all of the claims. The court then sentenced defendant to concurrent prison terms of 11 years for delivery of a controlled substance within 1,000 feet of a church (720 ILCS 570/407(b)(2) (West 2006)) and five years for unlawful delivery of a controlled substance (720 ILCS 570/401(d)(i) (West 2006)). Defendant filed a motion to reduce his sentence, which the court denied.

¶ 6

In June 2008, defendant appealed his convictions and sentences, arguing only that the trial court committed plain error by imposing a street-value fine without considering any evidence regarding the value of the drugs in question. This court affirmed the trial court's judgment. *People v. Rogers*, No. 4-08-0400 (Dec. 29, 2009) (unpublished order under Supreme Court Rule 23).

¶ 7

In May 2010, defendant filed his *pro se* postconviction petition, asserting his constitutional rights were violated because (1) McLean County systematically excludes "Afro-

Americans and Latino Americans" from the jury-selection process, (2) the "State's witness made mention of several reports and notes taken during the investigation" that were not tendered to defendant, (3) he was denied effective assistance of trial counsel on 10 different bases, (4) he was denied effective assistance of appellate counsel, and (5) the trial court did not fully comply with Illinois Supreme Court Rule 431 (eff. May 1, 2007). Defendant did not attach any supporting material to his petition. In August 2010, the trial court moved the petition to the second stage of the postconviction proceedings and appointed counsel for defendant.

¶ 8 The trial court held several status hearings on defendant's *pro se* postconviction petition. At the March 2011 hearing, postconviction counsel stated he had read the record and given defendant a detailed 12-page memorandum outlining his thoughts on the case and asking defendant to respond to those thoughts. Defendant acknowledged receiving the letter, which is not part of the record. At the May 2011 hearing, postconviction counsel asked to file a declaration to stand on the *pro se* pleadings because defendant had not specifically responded to his memorandum. The court addressed defendant, and defendant indicated he did not have any other issues he wanted counsel to raise. The declaration was then filed.

¶ 9 In July 2011, the State filed a motion to dismiss defendant's *pro se* postconviction petition, asserting, *inter alia*, defendant had failed to attach material in support of each of his claims and some of his claims lacked specificity.

¶ 10 On August 1, 2011, the trial court held a hearing on the State's motion to dismiss. Postconviction counsel began his argument in opposition to the dismissal motion by stating the following:

"Judge, I believe that the purpose of the pleading at this point is to

put the State on notice of what's going to be litigated at a trial or hearing. I submit that while [the State's] arguments may well be demonstrated at a trial hearing, I don't believe it's appropriate at this point for the Court to rule on the pleadings concerning the allegations in the State's motion. Accordingly, we would oppose the motion to dismiss."

Postconviction counsel specifically argued he believed the counts were properly pleaded. As to the two ineffective-assistance claims, he acknowledged trial strategy was not the basis for a postconviction petition. Regarding the Rule 431 claim, he indicated the issue was a matter of record that could have been raised on direct appeal. After hearing the parties' arguments, the court granted the motion to dismiss, finding defendant's claims did not make a substantial showing of a constitutional violation. Regarding defendant's first two arguments, the court found, *inter alia*, the petition failed to include materials in support of those claims.

¶ 11 On August 16, 2011, defendant filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606(d) (eff. Mar. 20, 2009). See Ill. S. Ct. R. 651(d) (eff. Dec. 1, 1984) (providing the supreme court rules governing criminal appeals apply to appeals in postconviction proceedings). Thus, this court has jurisdiction of the cause pursuant to Illinois Supreme Court Rule 651(a) (eff. Dec. 1, 1984).

¶ 12 II. ANALYSIS

¶ 13 In this appeal, defendant does not challenge the merits of his postconviction petition's dismissal but rather, asserts his postconviction counsel rendered unreasonable assistance due to counsel's lack of knowledge of postconviction proceedings. Due to the lack of

reasonable assistance, defendant asserts he is entitled to have his petition remanded for further proceedings. Conversely, the State argues defendant did receive a reasonable level of assistance because postconviction counsel was not required to advance frivolous claims on defendant's behalf. We review *de novo* a trial court's dismissal of a postconviction petition without an evidentiary hearing. *People v. Coleman*, 183 Ill. 2d 366, 389, 701 N.E.2d 1063, 1075 (1998).

¶ 14 In postconviction proceedings, defendants are not entitled to effective assistance of counsel. *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987). Instead, state law dictates the sufficient level of assistance, and our supreme court has held the Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/art. 122 (West 2010)) entitles a defendant to reasonable representation. *People v. Guest*, 166 Ill. 2d 381, 412, 655 N.E.2d 873, 887 (1995). To ensure counsel provides that reasonable level of assistance, Rule 651(c) imposes specific duties on postconviction counsel. *People v. Suarez*, 224 Ill. 2d 37, 42, 862 N.E.2d 977, 979 (2007). The rule requires postconviction counsel to (1) consult with the defendant to ascertain his contentions of the deprivation of constitutional rights, (2) examine the record of the proceedings at trial, and (3) make any amendments to the defendant's *pro se* petition that are necessary for an adequate presentation of his contentions. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). Compliance with Rule 651(c) is mandatory and may be shown by the filing of a certificate representing that counsel has fulfilled the duties. *People v. Perkins*, 229 Ill. 2d 34, 50, 890 N.E.2d 398, 407 (2007). When, as in this case, counsel fails to file a Rule 651(c) certificate of compliance, the error is harmless if the record establishes counsel met the requirements of the rule. See *People v. Lander*, 215 Ill. 2d 577, 584, 831 N.E.2d 596, 600 (2005).

¶ 15 Here, defendant argues his postconviction counsel failed to fulfill the third

obligation of Rule 651(c) because the claims in his *pro se* petition were not adequately presented due to counsel's lack of knowledge about the burden of proof at the second stage of the proceedings. Citing *People v. Profit*, 2012 IL App (1st) 101307, ¶ 23, 974 N.E.2d 813, 818, the State asserts the matter of whether the defendant's *pro se* claims had merit is crucial to the determination of whether counsel acted reasonably by not filing an amended petition. Consequently, defendant received reasonable representation because the claims in his *pro se* petition were "nonspecific assertions and legal conclusions contradicted by the record." We disagree with the State. Unlike in this case, the counsel in *Profit* had filed a Rule 651(c) certificate, which gives rise to a rebuttable presumption that counsel performed the duties required by that rule. *Profit*, 2012 IL App (1st) 101307, ¶ 23, 974 N.E.2d at 818. In *Suarez*, 224 Ill. 2d at 47, 862 N.E.2d at 982, where counsel failed to file a Rule 651(c) certificate, our supreme court declared it had "consistently held that remand is required where postconviction counsel failed to fulfill the duties of consultation, examining the record, and amendment of the *pro se* petition, regardless of whether the claims raised in the petition had merit." Thus, our analysis focuses only on whether the record shows postconviction counsel complied with Rule 651(c)'s third requirement. We find the record does not.

¶ 16 First, the trial court made findings that defendant's *pro se* petition was insufficient on a few of defendant's claims. As to defendant's first claim regarding jurors, the court found defendant had the burden to establish a systematic exclusion of minorities and "the petition and any accompanying documentation" failed to make a substantial showing of a constitutional violation. On the second claim related to discovery, the trial court found defendant's assertions were nonspecific and noted the petition failed to comply with section 122-2 of the Postconviction

Act (725 ILCS 5/122-2 (West 2010)), which requires the petition to "have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." Such an omission was fatal to defendant's claim. See *People v. Johnson*, 154 Ill. 2d 227, 240, 609 N.E.2d 304, 310 (1993) (absence of affidavits or other evidence in support of the postconviction petition renders the petition insufficient to require an evidentiary hearing).

Second, the statements postconviction counsel made in the trial court do not show counsel addressed whether defendant's claims could be shaped into the appropriate legal form for an adequate presentation of defendant's contentions. Since this case lacks a Rule 651(c) certificate, we cannot presume counsel did so. In *People v. Turner*, 187 Ill. 2d 406, 414, 719 N.E.2d 725, 729-30 (1999), the supreme court found the defendant was denied reasonable assistance of postconviction counsel when counsel rested on a *pro se* petition that omitted essential elements of the defendant's constitutional claims and failed to comply with section 122-2 of the Postconviction Act.

¶ 17 Accordingly, we find postconviction counsel failed to comply with the third requirement of Rule 651(c), resulting in defendant not receiving reasonable assistance of postconviction counsel. Thus, the circuit court's order dismissing defendant's petition should be reversed and new counsel appointed to represent defendant at the second stage of the proceedings. See *People v. Shortridge*, 2012 IL App (4th) 100663, ¶ 15, 964 N.E.2d 679, 682. We note our decision should not be construed as any indication of whether the allegations set forth in defendant's *pro se* petition have merit. Moreover, if all of defendant's claims are not meritorious and no amendments can make the claims adequate, new counsel should move to withdraw from representation. *Shortridge*, 2012 IL App (4th) 100663, ¶ 15, 964 N.E.2d at 682.

¶ 18

III. CONCLUSION

¶ 19 For the reasons stated, we reverse the McLean County circuit court's judgment and remand for further proceedings consistent with this order.

¶ 20 Reversed and remanded with directions.