THIRD DIVISION
June 6, 2018

Nos. 1-15-1408 & 1-15-1444 (consolidated)

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the Circuit Court
Respondent-Appellee,	)	of Cook County, Illinois,
	)	County Department, Criminal
v.	)	Division.
	)	
RONALD HARRIS,	)	No. 01 CR 23880
	)	
Petitioner-Appellant.	)	The Honorable
	)	Rickey Jones,
	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Cobbs and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: The petitioner was denied reasonable assistance of postconviction counsel requiring reversal of the second-stage dismissal of his *pro se* postconviction petitions and remand for appointment of new postconviction counsel.

¶ 2 The petitioner, Ronald Harris, was indicted and charged in two separate cases (Nos. 01 CR 23878 and 01 CR 23880) for his involvement in a series of sexual assaults and robberies that occurred at or near bus stops on the south side of Chicago in 2000 and 2001. After unsuccessfully litigating a joint motion to quash arrest and suppress evidence, the petitioner was

tried in two separate jury trials. In case No. 01 CR 23878 the petitioner was found guilty of five counts of aggravated criminal sexual assault against the victim, T.A., and sentenced to four terms of 25 years' imprisonment and one term of 20 years' imprisonment to be served consecutively. In case No. 01 CR 23880, the petitioner was found guilty of four counts of aggravated criminal sexual assault, while carrying a firearm, against the victim K.C., and was sentenced to three terms of 25 years' imprisonment and one term of 20 years' imprisonment to be served consecutively with each other and with the sentences in case No. 01 CR 23878. The petitioner appealed both convictions, and in each instance, this court affirmed the convictions, but vacated the petitioner's sentences and remanded the causes to the trial court for resentencing. See *People v. Harris*, No. 1-06-1382 (2008) (unpublished order pursuant to Illinois Supreme Court Rule 23) (appeal from case No. 01 CR 23878); *People v. Ronald Harris*, No. 1-07-0261 (2008) (unpublished order pursuant to Illinois Supreme court Rule 23) (appeal from case No. 01 CR 23880). While the causes were pending on remand, in each case, the petitioner filed a *pro se* petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2008)). After postconviction counsel was appointed, both petitions advanced to the second stage of postconviction review. More than three years after he was resentenced, and nearly five years after postconviction counsel was appointed, the petitioner filed a motion seeking to proceed *pro se* arguing, *inter alia*, that counsel had failed to advance his petitions in any way. The court granted the motion and terminated appointed counsel's representation, permitting the petitioner to proceed *pro se*. Postconviction counsel never filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). After the *pro se* petitioner amended his petitions, the State filed a motion to dismiss, arguing, *inter alia*, that the petitions were procedurally barred as untimely. The trial court granted the State's motion finding, *inter alia*,

that the petitions were untimely. The petitioner now appeals from the second stage dismissal of both petitions, solely contending that he was denied reasonable assistance of appointed postconviction counsel. For the reasons that follow, we reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 The facts underlying the petitioner's convictions are outlined fully in our prior orders. We therefore set forth only those facts and procedural history that are relevant to the disposition of the issues raised in this appeal.

¶ 5 On January 22, 2009, while both of the petitioner's cases were on remand for resentencing, the petitioner filed his *pro se* postconviction petition in case No. 01 CR 23878, alleging various claims of ineffective assistance of trial and appellate counsels, related to other crimes evidence, prosecutorial misconduct, and police abuse, which resulted in his involuntary confession. On May 4, 2009, the petitioner filed a *pro se* postconviction petition in case No. 01 CR 23880, raising many of the same claims of ineffective assistance of trial and appellate counsels already alleged in his petition in case No. 01 CR 23878. In addition, the second petition also uniquely alleged counsels' ineffectiveness for failing to challenge the validity of the DNA evidence used to obtain the petitioner's conviction in case No. 01 CR 23880. On that same date, the petitioner also filed a *pro se* request for additional DNA testing in case No. 01 CR 23880.

¶ 6 On May 13, 2009, the trial court appointed the Office of the Public Defender to represent the petitioner in matters related to case No. 01 CR 23878.

¶ 7 On August 17, 2009, the petitioner mailed a supplement to his postconviction petition in case No. 01 CR 23880.

¶ 8 On October 6, 2009, a status hearing was held on all pending matters, and Assistant Public

Defender (APD) Gwyndolette Ward Brown (APD Brown) appeared in court as the petitioner's appointed postconviction counsel. At that hearing, she requested that the trial court order the appellate record in the petitioner's cases.

¶ 9 At the next status hearing, on December 16, 2009, the State was represented by two attorneys, one responsible for the postconviction petitions, and the other for the petitioner's motion for DNA testing. The petitioner's appointed postconviction counsel, APD Brown did not appear in court. [1] The trial court stated on the record that the petitioner's cases were on remand for resentencing, and that there were "postconviction petitions pending on both matters." One of the State's attorneys then stated:

> "Actually, no petition has been filed with respect to my matter [the motion for DNA testing] or the P[ost]C[conviction] [U]nit's matter [the petitioner's postconviction petitions]. [APD] Gw[yndolette Ward] Brown from the P[ost]C[onviction] [U]nit that's handling that and on the last date, she indicated that she wasn't prepared to file anything until she obtained the appellate record. So that right now there is nothing pending. It's just been I believe it's just been perhaps *pro se* petitions to review this case."

The State's attorney further explained:

> "I believe it was on October 6th *** [t]hat's the date that the attorney from the P[ost]C[onviction] [U]nit appeared and indicated she needed time to obtain the appellate record. I have not heard from her. We exchanged phone numbers etc. And I have a feeling she is still in the process of obtaining the appellate records as well as deciding whether or not

[1] We note that although two private attorneys appeared on the petitioner's behalf they both stated on the record that they were not there to represent the petitioner on any of his postconviction matters, but were there solely for his resentencing.

she is going to file a postconviction and or a motion for DNA. So with respect to that piece of it since she has [not] appeared yet I would suggest that that piece of it be continued."

¶ 10 At this point in the proceedings, the trial court inquired as to the status of the postconviction petitions, asking: "Am I correct that because you said that it's been docketed are we past the first stage and we are now in the second stage?" After the State's attorney responded in the affirmative, the parties agreed to continue the matter until postconviction counsel could appear in court.

¶ 11 On March 16, 2010, APD Brown informed the court that she represented the petitioner with respect to his postconviction petition and DNA matters, but that she still did not have transcripts, and that she was considering filing a motion for DNA testing. The cause was continued by agreement.

¶ 12 On June 10, 2010, the trial court resentenced the petitioner in both cases. In case No. 01 CR 23878, the petitioner was resentenced to 18 years' imprisonment on each of the five counts, to be served consecutively. In case No. 01 CR 23880, the petitioner was sentenced to 18 years' on three counts and 20 years' on the fourth count. The sentences were to run consecutively to each other and to the sentence in case No. 01 CR 23878.

¶ 13 On June 14, 2010, the trial court noted that attorneys from the Postconviction Units of both the State's Attorney's Office and the Public Defender's Office had been assigned to the cases. The court explained, however, that the cause had been "held in abeyance because it was *** sent back for resentencing." The trial court therefore continued the matter so that everyone could get "caught up."

¶ 14 On June 24, 2010, APD Brown appeared in court on both the postconviction and DNA

matters. The trial court indicated that because "resentencing" was finally "over with" the parties could proceed with the postconviction matters, and the cause was continued.

¶ 15 On December 8, 2010, the State's attorney informed the trial court that she spoke with APD Brown and that APD Brown was not prepared to file anything yet because she had referred the petitioner's DNA issue to the DNA Unit of the Public Defender's Office, to determine whether to file a motion for DNA testing. No mention was made as to the postconviction petitions. The cause was continued by agreement.

¶ 16 On February 16, 2011, APD Brown appeared in court on the "DNA and [postconviction] case," and sated that she had not heard back from her office's DNA Unit regarding whether there was anything that could be DNA tested. The court granted a continuance. At the next status hearing, on April 13, 2011, the parties continued the cause by agreement because the DNA Unit was still reviewing the DNA issue. On June 22, 2011, the parties once more continued all matters by agreement after APD Brown told the court that her office's DNA Unit was still reviewing the DNA issue. On September 14, 2011, APD Brown informed the court that the DNA portion of the petitioner's case had been reviewed by her office's DNA Unit, and that the Unit was preparing a report of its findings.[2] The cause was again continued by agreement.

¶ 17 At the next hearing, on November 2, 2011, for the first time in two years, APD Brown informed the trial court that she was unaware that she was representing the petitioner in case No. 01 CR 23878, and that the Public Defender's Office was under the impression that she was assigned to only one of the petitioner's postconviction petitions, namely the petition with the

[2] The record contains a copy of the letter from the Forensic Science Division of the Public Defender's Office to APD Brown dated September 19, 2011, stating that additional DNA testing would not help the petitioner's cause in case No. 01 CR 23880 because, *inter alia*: (1) the vaginal and rectal swabs from the victim were already consumed in the initial testing; and (2) even if new testing could exclude the petitioner's DNA from the rectal swab, this would have no impact on the direct hit, full profile of the petitioner's DNA found in the victim's vaginal swab.

DNA matter (case No 01 CR 23880), in which the petitioner had also filed a *pro se* motion for DNA testing. APD Brown informed the trial court that based on the findings of her office's DNA Unit she would not be filing an amended motion for DNA testing in that case. She then requested a continuance because she had "just started reviewing the postconviction matters."

¶ 18 On December 7, 2011, APD Brown did not appear in court and the State's attorney stated that APD Brown had asked her for yet another continuance. The trial court, however, indicated that he needed APD Brown to appear in the courtroom because the petitioner had sent a letter to Chief Judge Timothy Evans complaining about various issues in this case, and the Chief Judge had instructed him to address the issues with all the parties. The case was passed until APD Brown could be located, whereupon the trial court gave the petitioner's letter to all of the attorneys, and made the following comments, regarding the petitioner's complaints regard APD Brown:

> "First of all, *** the petitioner indicated that on May 5th, [20]09, he filed a postconviction petition and that counsel was appointed to represent him.
>
> * * *
>
> He further indicated that on January 2[2], [20]09, he filed another petition for postconviction relief and a motion for appointment of counsel ***. He indicates that the Public Defender was appointed to represent him but no lawyer has contacted him."

¶ 19 In her defense, APD Brown claimed that the petitioner's non-DNA postconviction petition (case No. 01 CR 23878) had not yet been docketed until recently.[3] APD Brown claimed that on November 2, 2011, the trial court docketed that second petition, and she was able to obtain a copy, and begin her representation of the petitioner on both postconviction petitions. APD

[3] The record belies this claim by APD Brown.

Brown further explained that since the filing of the petitioner's letter, all of the complaints he raised therein had been resolved, and were therefore moot. Specifically, APD Brown stated that she had already spoken to the petitioner, had written him a letter, and had another telephone call scheduled with him for the following week.[4] The trial court asked APD Brown whether she would "check to make sure [the petitioner] [wa]s satisfied" and would not "be complaining," again, and she indicated that she would.

¶ 20 Over a year and a half later, on August 2, 2013, the petitioner filed a motion seeking termination of postconviction counsel's representation and asking permission to proceed *pro se*. That motion alleged that the petitioner had commenced his postconviction proceeding on May 5, 2009, after which the trial court appointed the Public Defender's Office to represent him in "the second stage of the proceedings." According to the motion, although APD Brown wrote to him in prison and told him that she would amend his petitions, in the past four years she had failed to do anything in that regard. The motion further alleged that in the four years of representation, APD Brown wrote to the petitioner only three times, and that he was unable to reach her by telephone. In his motion, the petitioner argued that APD Brown's "failure to file amended petition(s) in a reasonable timely manner *** deprived [him] of adequate representation." The motion further noted that the petitioner had strongly urged APD Brown by letter to withdraw from representing him in the "postconviction proceedings, which [have been] advanced to the second-stage." The motion therefore sought that the court immediately order the withdrawal and termination of the Public Defender's Office from the proceedings, and that it "appoint private

[4] The record contains a letter from APD Brown to the petitioner dated September 26, 2011, indicating that the DNA Unit of the Public Defender's Office had finished reviewing his case, and that based on that Unit's conclusions, APD Brown would not be pursuing a motion for additional testing on behalf of the petitioner, but would permit the court to rule on the motion as written. APD Brown attached to her letter the DNA Unit's conclusions dated September 19, 2011.

counsel or allow [the petitioner] *pro se* status, with standby counsel, outside of the Public Defender's Office."

¶ 21 In support of his motion, the petitioner attached, *inter alia*: (1) the three letters that he received from APD Brown during her representation; and (2) the letter he wrote to her informing her of his desire that she withdraw.

¶ 22 The first letter from APD Brown was written on September 26, 2011. It primarily addressed the petitioner's motion for DNA testing (in case No. 01 CR 23880). The letter stated that the office's DNA Unit had finished their review and that based on their conclusions APD Brown would not be pursuing additional testing; rather, she would be asking the judge to rule on the petitioner's motion "as it is written." APD Brown enclosed a copy of the DNA Unit's September 19, 2011 findings. The letter addressed the postconviction matters, in one sentence, stating only: "I will review your post-conviction and let you know if I find any issue to pursue there."

¶ 23 The second letter from APD Brown, dated, October 29, 2012, again only addressed the DNA issues. According to the letter, APD Brown had been told "by the crime lab that [the evidence in the petitioner's case] was last checked out by [the petitioner's] arresting officer." In addition, "the clerk's office can't find any record of it," and the "State is doing a separate search." The letter advised the petitioner that "[i]f nothing can be found then you will be out of luck on the DNA." The letter further informed the petitioner that his next court date was January 23, 2013, and that APD Brown had also reordered his transcripts.

¶ 24 The third letter written by APD Brown, dated April 15, 2013, stated in pertinent part:

> "Your [p]ostconviction petition *** was continued to May 17, 2013. This was a status date, meaning no issues were discussed concerning your case. I received a call from the Illinois Lab and they said that they did not have anything to send me as it pertains to testing

materials. I have the State checking for whatever was in their files as to where if anything exists. If I can't find anything I will just have to go forward on the post-conviction alone. I still have not received a transcript for your second post-conviction petition."

¶ 25 On September 25, 2013, APD Brown informed the court that the petitioner had filed a motion requesting that the Public Defender's Office withdraw from representing him and requesting to proceed *pro se*. The trial court instructed APD Brown to discuss the issue with the petitioner and determine whether he would agree to have the Public Defender's Office serve as standby counsel if he were to proceed *pro se*.

¶ 26 On October 30, 2013, APD Brown informed the court that she had contacted the petitioner by mail, and sent him an affidavit. APD Brown stated that although the petitioner did not sign the affidavit, in a reply letter to her, he indicated that he wished to represent himself. At APD Brown's suggestion, the trial court instructed the State to writ the petitioner in. No discussion was had regarding appointment of standby counsel, and APD Brown never filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013)).

¶ 27 On February 19, 2014, APD Brown, and the petitioner both appeared in court, and APD Brown acknowledged that the Officer of the Public Defender had been appointed to represent the petitioner "on two postconviction matters." The trial court then addressed the petitioner's motion to discharge appointed counsel and proceed *pro se*, and the following colloquy took place:

"The Court: *** [A]fter I appointed the the Public Defender to represent you at some point you filed a motion requesting to proceed *pro se* and to discharge your attorney from the Public Defender's Office; is that correct?

[The petitioner]: It is.

The Court: Is that what you want to do?

[The petitioner]: Yes, sir.

The Court: You understand that if you are not able to afford a lawyer, one will be appointed to represent you at no cost to you. Do you understand that?

[The petitioner]: I understand.

The Court: Do you have the money to hire a lawyer?

[The petitioner]: No, I don't.

The Court: I will appoint the Public Defender to represent you at no cost to you, do you understand that?

[The petitioner]: I do.

The Court: And did you confer with the attorney? Have you conferred with the attorney?

[The petitioner]: Briefly, yes.

The Court: Do you want to pass the case to confer with the lawyer again?

[The petitioner]: No.

The Court: You decided what you want to do as far as legal representation?

[The petitioner]: I want to proceed *pro se*.

The Court: You made that decision yourself?

[The petitioner]: Yes, sir.

The Court: Freely and voluntarily?

[The petitioner]: Yes.

The Court: And you are asking that the attorney form the Public Defender's office be discharged?

[The petitioner]: Yes. * * *

* * *

The Court: All right then. The appointment of the Public Defender is vacated. [The petitioner] is allowed to proceed *pro se*, and [the] attorney from the Public Defender's Office is excused."

¶ 28 After electing to proceed *pro se*, the petitioner requested, and the trial court granted him, two weeks to amend his petitions. On March 10, 2014, the petitioner appeared in court *pro se*, and tendered amendments to both postconviction petitions. Both amended petitions explicitly stated that they superseded the original petitions.

¶ 29 In his amended petition in case No. 01 CR 23878, the petitioner alleged, *inter alia*, that: (1) he was arrested without probable cause; (2) the State used perjured testimony during the hearing on his motion to quash arrest and suppress evidence; (3) his confession was involuntary and the product of police abuse and coercion; (4) the State failed to disclose evidence favorable to him; (5) no "true bill" was returned even though he was indicted; and (6) he received ineffective assistance of trial and appellate counsels for, among other things, failures to investigate two named witnesses, suppress his confession and witness identifications, and challenge his indictment as fraudulent. In his amended petition in case No. 01 CR 23880, the petitioner raised the same allegations as in his petition addressing case No. 01 CR 23878. In addition, he alleged that his trial and appellate counsels were ineffective for failing to challenge: (2) his lineup as suggestive; (2) the validity of the DNA evidence and testing used at his trial; and (3) the State's use of perjured testimony.

¶ 30 In support of both amended petitions, the petitioner attached more than 25 exhibits, including, *inter alia*, transcripts from his suppression hearing and trials, the results of the forensic DNA tests used in case No. 01 CR 23880, responses to his FOIA requests to the Illinois

State Police Crime Lab regarding those tests, and a newspaper article related to the credibility of the two detectives, who interrogated him, and who testified against him both at the suppression hearing and at his trials.

¶ 31 On November 10, 2014, the State filed a motion to dismiss the petitions.[5] In its motion, the State argued that: (1) the petitioner's claims were untimely because they were not filed within three years after the date of his resentencing as required under section 122-1(c) of the Act (725 ILCS 5/122-1(c) (West 2014)); (2) the petitioner failed to comply with the Act's pleading requirements, by not including a verified affidavit (725 ILCS 5/122-1 (West 2014), and by not supporting his petitions with other witnesses' affidavits (725 ILCS 5/122-1 (West 2014)); (3) the petitioner's claims were barred by *res judicata* and collateral estoppel; and (4) the petitioner failed to make a substantial showing of any of the claims he alleged.

¶ 32 On January 15, 2015, the *pro se* petitioner filed updated affidavits to his petitions, as well as a response to the State's motion to dismiss.

¶ 33 On April 7, 2015, the trial court held a hearing on the State's motion to dismiss. At the hearing, the State withdrew its argument that the petitions failed to attach a properly notarized verification affidavit because the petitioner had remedied that defect. The State, however, continued to argue, *inter alia*, that the petitions were untimely and therefore procedurally barred.

¶ 34 In response, at the hearing, the petitioner contended that the untimeliness of his petition should be excused because it was not caused by his culpable negligence, but rather by the inadequacies of APD Brown, who was appointed as his postconviction counsel. The petitioner argued that APD Brown failed to comply with Illinois Supreme Court Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013) because she never filed a certificate stating that she had reviewed his

[5] Although the State's motion to dismiss is captioned only for case No. 01 CR 23880, the parties agree that it addresses both petitions.

petitions, or the records in his cases. In addition, the petitioner argued that APD Brown failed to amend his petitions to address the timeliness issue. Instead, according to the petitioner, APD Brown requested and agreed to "lengthy continuances" in order to "disregard the petition[s] as long as possible."

¶ 35 After hearing all the arguments, the trial court granted the State's motion to dismiss both postconviction petitions. In doing so, the court, found, *inter alia*, that the petitions were procedurally barred as untimely because they were "filed beyond the statutory mandated time." In addition, the court found that the petitions failed to make a substantial showing of any constitutional violations. The petitioner now appeals.

¶ 36 II. ANALYSIS

¶ 37 On appeal, the petitioner solely argues that he was denied reasonable assistance of postconviction counsel because postconviction counsel failed to: (1) take the most basic steps to ensure that his postconviction petitions would not be dismissed as untimely; and (2) to fulfill even the most basic duties required under Illinois Supreme Court Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013)). Specifically, the petitioner contends that just as the State argued at the motion to dismiss hearing, because until he was resentenced on June 10, 2010, he was not "convicted" for purposes of the Act (725 ILCS 5/122-1 (West 2010)), his original postconviction petitions had a unique timeliness problem in that they were filed too early. As a result, postconviction counsel[6] had three years from the date of resentencing, until June 10, 2013, to file amendments to his petitions to guarantee that they would not be dismissed as untimely. The petitioner contends that in that three year period, postconviction counsel failed to make any amendments to the two petitions and took no steps whatsoever to ensure the petitions' timeliness

[6] Postconviction counsel was appointed to represent the petitioner on May 13, 2009, a year before the resentencing.

(*i.e.*, attempting to seek wavier of any timeliness problems from the State). In fact, the petitioner contends nothing in the record suggests that postconviction counsel was even aware of the timeliness issues.

¶ 38 In addition, the petitioner argues that the record affirmatively establishes that in the four-and-a-half years that she was appointed to represent him, postconviction counsel failed to read his petitions, much less ascertain the contentions he raised therein. In fact, it took postconviction counsel 31 months to even realize that the petitioner had filed two separate postconviction petitions, and that she had been appointed to represent him on the non-DNA related petition (case No. 01 CR 23878), as early as May 13, 2009. In the absence of a 651(c) certificate (Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013), the petitioner contends, we must find that he was denied reasonable assistance of postconviction counsel, reverse the dismissal of his petitions and remand for appointment of postconviction counsel, other than APD Brown. For the reasons that follow, we agree.

¶ 39 It is well-accepted that the Act provides a method for individuals subject to a criminal sentence to challenge their convictions on the basis of a substantial denial of federal or state constitutional rights. *People v. Cotto*, 2016 IL 119006, ¶ 26. In noncapital cases, the Act provides a three-stage process for the adjudication of postconviction petitions. *Cotto*, 2016 IL 119006, ¶ 26; see also *People v. Johnson*, 2017 IL 120310, ¶ 14. At the first stage, the trial court must independently review the petition and determine whether the allegations therein, if taken as true, demonstrate a constitutional violation or whether they are frivolous or patently without merit. *Cotto*, 2016 IL 119006, ¶ 26; 725 ILCS 5/122–2.1(a)(2) (West 2010); *People v. Tate*, 2012 IL 112214, ¶ 9. If the trial court affirmatively determines that the petition is neither frivolous nor

patently without merit or if it takes no action on the petition within 90 days after the petition is filed and docketed, the petition advances to the second stage. *Cotto*, 2016 IL 119006, ¶ 26.

¶ 40 At the second stage of postconviction proceedings, counsel may be appointed to represent an indigent defendant. 725 ILCS 5/122–2.1(a)(2), (b), 122-4, 122-5 (West 2010); *Cotto*, 2016 IL 119006, ¶ 27; *Tate*, 2012 IL 112214, ¶ 10; *People v. Brooks*, 221 Ill. 2d 381, 389 (2006). The right to counsel in postconviction proceedings is wholly statutory. See *Cotto*, 2016 IL 119006, ¶ 28 (" 'The right to assistance of counsel in postconviction proceedings is a matter of legislative grace' ") (quoting *People v. Hardin*, 217 Ill. 2d 289, 299 (2005)). Therefore, a petitioner is entitled only to the level of assistance required by the Act. *Cotto*, 2016 IL 119006, ¶ 28. Our supreme court has repeatedly held that the Act provides for a "reasonable" level of assistance. *Cotto*, 2016 IL 119006, ¶ 28. To assure reasonable assistance of appointed counsel by the Act, Supreme Court Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013)) imposes specific duties on postconviction counsel. *Cotto*, 2016 IL 119006, ¶ 28. That rule states in pertinent part:

> "The record filed in that court shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has consulted with the 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 trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate representation of petitioner's contentions." Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013).

¶ 41 Compliance with Rule 651(c) is mandatory. *People v. Lander*, 215 Ill. 2d 577, 584 (2005). As our supreme court has explained, "[i]f the court appoints counsel at the second stage, appointed counsel is required to file a certificate showing compliance with Illinois Supreme Court Rule 651(c)." *Cotto*, 2016 IL 119006, ¶ 27 (citing Ill. S. Ct. R. 651(c) (eff. Feb.

6, 2013)). The rule is not merely a formality; rather it ensures that postconviction petitioners receive proper representation when asserting their constitutional claims. *People v. Suarez*, 224 Ill. 2d 37, 47 (2007). A certificate pursuant to Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013)) creates a presumption of compliance with that rule. *People v. Profit*, 2012 IL App (1st) 101397 ¶ 19. In the absence of such a certificate, "a clear and affirmative showing of compliance on the record must be present." *People v. Richardson*, 382 Ill. App. 3d 248, 256 (2008) (citing *Suarez*, 224 Ill. 2d at 46); *People v. Smith*, 2016 IL App (4th) 140085, ¶ 33. We review an attorney's compliance with supreme court rules *de novo*. *Profit*, 2012 IL App (1st) 101307, ¶ 17.

¶ 42 In the present case, the State first attempts to avoid the application of Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013)) entirely, by arguing that the petitioner should not be permitted to raise a claim of unreasonable assistance of postconviction counsel because he voluntarily chose to represent himself during the postconviction proceedings. The State contends that any inadequacies in his petitions after such a choice cannot be attributed to postconviction counsel, who was dismissed before completing her representation. This argument is a red herring.

¶ 43 What the petitioner did or did not do after he chose to represent himself has nothing to do with our evaluation of the representation he was afforded by appointed postconviction counsel four-and-a-half years prior to that choice. A *pro se* petitioner is "responsible for conducting his own defense" only "[f]rom the point when he waives his right to counsel." *People v. Tuczynski*, 62 Ill. App. 3d 644, 650 (1978). The petitioner is not, however, responsible for errors made by his counsel prior to his wavier of that right.

¶ 44 In that respect, our courts have repeatedly held that where appointed postconviction

counsel wishes to withdraw from representing a petitioner, she may do so "only after" she "has complied with Rule 651(c)." See *Smith*, 2016 IL App (4th) 140085, ¶ 31 ("an appointed postconviction counsel may withdraw 'only after counsel complied with Rule 651(c)' " (quoting *People v. Heard*, 2014 IL App (4th) 120833, ¶ 12); see also *People v. Kuehler*, 2015 IL 117695, ¶ 12 (requiring counsel who wishes to withdraw from postconviction representation to, among other things, comply with Rule 651(c)).

¶ 45 In this same vein, we reject the State's argument that any failures by appointed postconviction counsel to comply with the requirements of Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013)) during her representation of the petitioner should be excused because the petitioner suffered no prejudice. Specifically, the State contends that because in addition to finding the petitions untimely, the trial court also concluded that the petitioner's claims lacked merit, the petitioner cannot show that any failures by postconviction counsel prejudiced the outcome of his proceedings. In support, the State relies on *People v. Zareski*, 2017 IL app (1st) 150836. We disagree, and find that case inapposite.

¶ 46 Contrary to the State's assertion, our supreme court has repeatedly held that when a petitioner has been deprived of his right to reasonable assistance of postconviction counsel, he need not establish any further prejudice, and courts of appeal must remand for further proceedings without regard to the merit of the underlying claims. See *Suarez*, 224 Ill. 2d at 47 ("This court has 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*. [Citations]" (Emphasis added.)). As our supreme court has explained its rationale:

> "Our Rule 651(c) analysis has been driven, not by whether a particular defendant's claim is potentially meritorious, but by the conviction that where postconviction counsel does not adequately complete the duties mandated by the rule, the limited right to counsel conferred by the Act cannot be fully realized. See [*People v.*]*Brown*, 52 Ill. 2d [227,] 230 [(1972)], *** ('[T]he purpose underlying Rule 651(c) is not merely formal. It is to ensure that all indigents are provided proper representation when presenting claims of constitutional deprivation under the Post–Conviction Hearing Act. [Citation.] The fulfillment of this design would not be encouraged were we to ignore the rule's nonobservance in those cases appealed to this court'); *** We have [therefore] consistently declined the State's invitation to excuse noncompliance with the rule on the basis of harmless error." *Suarez*, 224 Ill. 2d at 51.

¶ 47 What is more, contrary to the State's assertion, *Zareski* is inapplicable to the facts of this case. In *Zareski*, our appellate court carved out an exception to the long-standing rule barring harmless error analysis in evaluation of postconviction counsel's representation, in situations where a *retained* counsel, rather than the *pro se* petitioner himself, drafts the original postconviction petition. *Zareski*, 2017 IL App (1st) 150836, ¶55. Since the instant cause does not involve *pro se* petitions drafted by a retained counsel, *Zareski* is not implicated and the exception articulated therein does not apply.

¶ 48 Accordingly, we turn to the merits of the petitioner's contention to determine whether, during her representation of the petitioner, postconviction counsel complied with the requirements of Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013)). Since it is undisputed that postconviction counsel did not file a 651(c) certificate we look to the record to determine if there is "a clear and affirmative showing of compliance." *Smith*, 2016 IL App (4th) 140085, ¶ 33. For the reasons that follow, we find that there is not.

¶ 49 In that respect, we reiterate that under Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013)) appointed postconviction counsel was required to: (1) consult with the petitioner to ascertain his contentions of constitutional deprivations; (2) examine the record of the trial proceedings; and (3) make any amendments to the filed *pro se* petitions "necessary to adequately present the petitioners' contentions." See *Cotto*, 2016 IL 119006, ¶ 27. With respect to the last requirement, our courts have repeatedly held that postconviction counsel has a duty to attempt to overcome procedural bars, including forfeiture, *res judicata* and timeliness. *People v. Anguiano*, 2013 IL App (1st) 113458, ¶ 44; see also *People v. Turner*, 187 Ill. 2d 406, 414–15 (1999); *People v. Perkins*, 229 Ill. 2d 34, 44 (2007); *People v. Schlosser*, 2012 IL App (1st) 092523, ¶¶ 22–23. Specifically, with respect to timeliness, our supreme court has held that the "plain language of Rule 651(c) requiring amendments 'necessary for an adequate presentation of petitioner's contentions,' includes alleging any facts that may establish lack of culpable negligence in the late filing" of a petition. *Perkins*, 229 Ill. 2d at 43. The reason for this requirement is to "ensure that postconviction counsel shapes a defendant's allegations into a proper legal form and presents them to the court." *Perkins*, 229 Ill. 2d at 44. "An adequate or proper presentation of a petitioner's substantive claims necessarily includes attempting to overcome procedural bars, including timeliness, that will result in a dismissal of a petition if not rebutted." *Perkins*, 229 Ill. 2d at 44.

¶ 50 In the present case, the record establishes that the two *pro se* petitions were initially prematurely filed, so that the petitioner, represented by postconviction counsel, could not move forward with them until he was resentenced in June 2010. Because he did not appeal from the orders resentencing him, the petitioner had three years from the date of his resentencing to amend his petitions to state his claims and ensure they were not procedurally barred as untimely

(see 725 ILCS 5/122-1(c) (West 2010). The record establishes that in representing the petitioner in that subsequent entire three-year period under which the Act would have permitted for the timely filing of the petitions, postconviction counsel did nothing to amend the petitions or to ensure that they would not be dismissed as untimely. Indeed, nothing in the record suggests that counsel was even aware of any timeliness issues. Twenty days after the due date for filing his petitions had passed, with postconviction counsel making no reference to timeliness or attempting to amend the petitions in any way to address this issue, the petitioner filed a motion to proceed *pro se*, citing postconviction counsel's neglect of his case. Since both petitions were ultimately dismissed, among other reasons, on account of being untimely filed, under the record before us, we are compelled to conclude that counsel's complete inaction with respect to the timeliness issue, during her nearly five year representation of the petitioner, constituted unreasonable assistance. See *Perkins*, 229 Ill. 2d at 49 (failure to amend *pro se* petition to address timeliness issues constitutes unreasonable assistance.)

¶ 51 In coming to this conclusion, we are further troubled by counsel's apparent neglect of the petitioner's cases, reflected in her failure to read the *pro se* postconviction petitions, much less ascertain the petitioner's contentions, three years into her representation. In that respect, the record reveals that although counsel was appointed to represent the petitioner in case No. 01 CR 23878 in May 2009, and appeared in court on that case in October 2009, more than two years later, in November 2011, she stated in open court that she was unaware that she was representing the petitioner in that case. Instead, postconviction counsel claimed that she was under the impression that she was representing the petitioner only on his DNA motion and postconviction petition in case No. 01 CR 23880. Postconviction counsel's September 2011 letter to the petitioner confirms that she did not know she represented the petitioner in case 01 CR 23878,

and that she had not even read the petition in case No. 01 CR 23880, much less the record in either case. Specifically, in that letter, counsel advised the petitioner that she "will review [his] post-conviction and let [him] know if [she] find[s] any issue to purse there." In addition, counsel's two subsequent letters to the petitioner further reveal that by April 2013, well over four years into her representation of the petitioner, counsel still had not obtained, let alone read, the petitioner's record and transcripts in case No. 01 CR 23787. Combined with counsel's failure to address the petitions' timeliness, in the very least, at the time when the petitioner indicated he wished to proceed *pro se*, try as we may, under the record before us, we are unable to find an affirmative showing of counsel's compliance with the requirements of Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013)). *Smith*, 2016 IL App (4th) 140085, ¶ 33

¶ 52 "Without a showing that postconviction counsel fulfilled the requirements [of Rule 651(c)], we cannot conclude that the [petitioner] was provided with adequate representation." *People v. Myers*, 386 Ill. App. 3d 860, 866 (2008); see also *Smith*, 2016 IL App (4th) 140085, ¶ 36. "Counsel's failure to comply with the requirements of Rule 651(c) mandates that this matter be remanded to the circuit court." *Myers*, 386 Ill. App. 3d at 866; see also *Smith*, 2016 IL App (4th) 140085, ¶ 36.

¶ 53 In coming to this conclusion, we note that contrary to the State's assertion, we do not believe that our holding will place too great a burden on postconviction counsel in situations where petitioners ultimately choose to represent themselves. Quite the opposite, we worry that absolving appointed postconviction counsel from the responsibility to provide reasonable assistance to petitioners within the timeframe of their representation, could result in appointed attorneys deliberately delaying their cases in the hope of encouraging petitioners to represent themselves--an outcome that would certainly contravene with the Act's purpose.

¶ 54 Rather, we trust that before a petitioner files a motion to proceed *pro se*, and appointed counsel is permitted to withdraw, postconvcition counsel can quite consistently certify that she has consulted with the petitioner to ascertain his contentions of deprivations, has examined the record of the proceedings, and "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. Feb. 6, 2013). "Such a certificate does not imply that counsel has seen fit to amend the *pro se* petition" to its fullest extent. *Smith*, 2016 IL App (4th) 140085, ¶ 38. Since the operative qualifying words are "any" and "necessary," where amendments to a *pro se* petition would only further a frivolous or patently meritorious claim they are not "necessary" within the meaning of that rule. *Smith*, 2016 IL App (4th) 140085, ¶ 38.

¶ 55 Since appointed postconviction counsel here failed to provide a Rule 651(c) certificate (Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013)), and the record does not affirmatively show her compliance with the requirements of that rule, we must remand to the trial court for further proceedings.

¶ 56 III. CONCLUSION

¶ 57 For all of the aforementioned reasons, we reverse the dismissal of the petitioner's postconviction petitions, and remand for further second-stage proceedings. In doing so, we order the appointment of counsel, other than APD Brown, and urge newly appointed counsel to work on these now eight-year old petitions with utmost haste.

¶ 58 Reversed and remanded with instructions.