NOTICE
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2026 IL App (5th) 241032-U

NO. 5-24-1032

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Champaign County.
	)	
v.	)	No. 08-CF-1424
	)	
GRANVILLE S. JOHNSON,	)	Honorable
	)	Matthew D. Lee,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE BARBERIS delivered the judgment of the court.
Justices Boie and Hackett concurred in the judgment.

ORDER

¶ 1 *Held*: We vacate the order of the circuit court dismissing defendant's amended postconviction petition and remand with directions for the court to conduct a hearing to determine whether postconviction counsel knew of defendant's claim that appellate counsel was ineffective for failing to raise a violation of Rule 431(b) under the plain-error doctrine and refused to include that claim in the initial postconviction petition.

¶ 2 Following a jury trial in the Champaign County circuit court, defendant, Granville S. Johnson, was found guilty of first degree murder and attempted first degree murder. The Fourth District affirmed defendant's convictions on direct appeal. *People v. Johnson*, 2012 IL App (4th) 090893-U. Defendant, through privately retained counsel (postconviction counsel), filed a petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)), which the circuit court dismissed at the first stage of the proceedings.

Defendant filed a *pro se* motion to reconsider, alleging that postconviction counsel provided "ineffective" assistance by failing to include certain claims in the petition. Defendant later supplemented the motion. The circuit court denied defendant's supplemented motion without considering defendant's assertion that postconviction counsel provided "ineffective" assistance.

¶ 3 Defendant appealed, arguing that the circuit court erred by failing to consider whether postconviction counsel provided unreasonable assistance. *People v. Johnson*, 2017 IL App (4th) 160449, ¶ 2. The Fourth District affirmed, holding that a prisoner was not entitled to reasonable assistance at the first stage of postconviction proceedings. *Id.* ¶¶ 35-43. The Illinois Supreme Court reversed the Fourth District, holding that a prisoner who retained private counsel at the first stage of postconviction proceedings was entitled to reasonable assistance and remanding the matter back to the circuit court to consider the substance of defendant's supplemented motion to reconsider. *People v. Johnson*, 2018 IL 122227, ¶¶ 14-24.

¶ 4 On remand, defendant filed a second supplement to his motion to reconsider. The circuit court found that the *pro se* claims defendant raised in the supplemented motion to reconsider were meritless and, thus, denied his motion to reconsider. Defendant appealed, arguing, *inter alia*, that the Fourth District should reverse and remand for second-stage postconviction proceedings because he pleaded the gist of a constitutional claim. *People v. Johnson*, 2020 IL App (4th) 190195-U, ¶ 4. The Fourth District agreed with defendant and reversed, concluding that defendant raised at least one arguably meritorious claim. *Id.* ¶ 54. The Fourth District remanded the matter for "further first-stage postconviction proceedings" and directed the circuit court to determine whether defendant's postconviction counsel was aware of defendant's claim and refused to include it in defendant's petition. *Id.* ¶ 63

¶ 5 On remand, the circuit court initially advanced defendant's postconviction petition to the second stage of proceedings and appointed counsel, who filed an amended postconviction petition on defendant's behalf. The court subsequently reversed its advancement of defendant's petition, finding that it exceeded the limited mandate of the reviewing courts. Based on its review of the pleadings and record, the court concluded that postconviction counsel was not aware of defendant's claim. Defendant appeals,[1] arguing that he established that postconviction counsel was aware of the claim or, alternatively, that postconviction counsel should have been aware of the claim. Defendant additionally argues that the circuit court failed to comply with the Fourth District's mandate, failed to rule on his amended petition within 90 days, and improperly considered input from the State. For the following reasons, we vacate and remand with directions.

¶ 6 I. BACKGROUND

¶ 7 Detailed facts of this case were set forth in *Johnson*, 2012 IL App (4th) 090893-U, *Johnson*, 2017 IL App (4th) 160449, *Johnson*, 2018 IL 122227, and *Johnson*, 2020 IL App (4th) 190195-U. Our recitation of the facts relies heavily upon the prior orders, and we include only those facts necessary to resolve this appeal. We will recite additional facts in the analysis section as needed to address the specific arguments of the parties.

¶ 8 After jury trials were held on three separate occasions between May and August of 2009,[2] defendant was found guilty of the first degree murder of Gregory Moore and the attempted first degree murder of Isaac Moore. During the third trial, the trial court asked the potential jurors during *voir dire* if they understood the principles set forth in Illinois Supreme Court Rule 431(b) (eff. May 1, 2007),[3] but failed to ask the jurors if they accepted those principles. Trial counsel did not

[1]Due to redistricting, petitioner's appeal is now properly before the Fifth District.

[2]During the first two trials, mistrials were declared because the juries were unable to reach a verdict.

[3]Rule 431(b) requires the trial court to ask the potential jurors if they understand and accept the following principles: (1) that the defendant is presumed innocent of the charges against him; (2) that the

object to the procedure followed by the court and did not argue that the court failed to comply with Rule 431(b) in a posttrial motion. The Fourth District affirmed defendant's convictions on direct appeal. *Johnson*, 2012 IL App (4th) 090893-U. Appellate counsel did not raise an issue regarding the court's compliance with Rule 431(b) on direct appeal. Defendant subsequently filed a petition for leave to appeal to the Illinois Supreme Court and a petition for a writ of certiorari with the United States Supreme Court, both of which were denied. *People v. Johnson*, 982 N.E.2d 772 (2013) (table) (denying petition for leave to appeal); *Johnson v. Illinois*, 134 S. Ct. 358 (2013) (denying petition for a writ of certiorari).

¶ 9 In 2014, defendant hired postconviction counsel, who filed a postconviction petition on defendant's behalf. Postconviction counsel raised several claims but did not raise a claim regarding Rule 431(b) in the petition. However, postconviction counsel requested in the petition that the court grant him "sufficient time and leave to amend this petition to add additional claims and supporting affidavits and factual material as his investigation continue[d]." Postconviction counsel did not add any additional claims to the petition. The court dismissed defendant's petition at the first stage of the proceedings, finding that trial counsel was not ineffective and that the other claims were barred by *res judicata*.

¶ 10 After a notice of appeal was filed, defendant filed a timely *pro se* motion to reconsider and requested that the circuit court allow him to file a *pro se* supplement. In the *pro se* motion to reconsider, defendant alleged, *inter alia*, that postconviction counsel provided "ineffective" assistance by failing to add certain meritorious claims to his petition that he had requested counsel to include. Defendant alleged that these claims included, but were not limited to, a claim relating

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State was required to prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence; and (4) that a decision by the defendant not to testify could not be held against him.

to the State's use of a video recorded statement and a claim relating to double jeopardy, along with claims that his counsel on direct appeal was ineffective for failing to raise those issues. Defendant alleged that postconviction counsel was aware of his claims relating to the video recorded statement and double jeopardy. Defendant further alleged that postconviction counsel was ineffective for failing to allege that appellate counsel was ineffective for failing to raise those issues on appeal. The court declined to consider defendant's *pro se* motion because he filed a notice of appeal before filing the motion.

¶ 11 In 2016, the Fourth District granted an agreed motion for summary remand to allow the circuit court to consider defendant's *pro se* motion to reconsider. Shortly thereafter, defendant filed a *pro se* supplement to the motion to reconsider. Defendant raised multiple claims in the supplemented motion but did not raise an issue regarding Rule 431(b). The circuit court ultimately denied defendant's supplemented *pro se* motion to reconsider, concluding that some of the claims were procedurally barred as matters that could have been raised on direct appeal and finding that there was no showing of a reasonable probability of a different outcome. The court also noted that defendant had attempted to allege new postconviction claims not previously raised in his petition without requesting or being granted leave to file a subsequent petition raising new claims.

¶ 12 Defendant appealed, arguing that the circuit court erred by failing to consider whether postconviction counsel provided unreasonable assistance by failing to include the *pro se* claims from his supplemented motion to reconsider because at least one of the claims stated the gist of a meritorious claim. *Johnson*, 2017 IL App (4th) 160449, ¶ 2. The Fourth District affirmed the circuit court's denial of defendant's supplemented motion to reconsider, holding that defendant was not entitled to reasonable assistance at the first stage of postconviction proceedings. *Id.* ¶ 32.

¶ 13 Shortly after the Fourth District issued its decision in 2017, defendant filed a *pro se* motion for leave to file a successive postconviction petition pursuant to the Act (725 ILCS 5/122-1(f) (2016)). Defendant raised multiple claims in the motion but did not raise an issue relating to Rule 431(b). The circuit court subsequently entered an order denying defendant's motion for leave to file a successive postconviction petition, finding that defendant failed to meet the cause and prejudice test. Defendant appealed the court's denial but ultimately dismissed the appeal.

¶ 14 In 2018, the Illinois Supreme Court reversed the Fourth District's 2017 decision, holding that defendant was entitled to reasonable assistance at the first stage of postconviction proceedings. *Johnson*, 2018 IL 122227, ¶¶ 14-18. Our supreme court remanded the matter back to the circuit court to "reach the substance of defendant's supplemented motion to reconsider." *Id.* ¶ 24. Our supreme court provided the following directions on remand:

> "If the circuit court determines the claims raised in defendant's supplemented motion to reconsider are frivolous or patently without merit, then the failure to include those claims would not amount to a denial of reasonable assistance of counsel, and defendant would not be entitled to relief on his motion to reconsider. However, if the circuit court determines that one or more of the claims are not frivolous or patently without merit and if the court determines that defendant's attorney was aware of such claims and refused to include them, then defendant should be permitted to amend his petition with the claims and proceed to the second stage of postconviction proceedings." *Id.*

¶ 15 On remand, defendant filed a second *pro se* supplement to his motion to reconsider. In the second *pro se* supplement, defendant raised, for the first time, a claim that his trial counsel was ineffective for failing to object to the trial court's violation of Rule 431(b) at trial, and that appellate counsel provided ineffective assistance by failing to raise a violation of Rule 431(b) under the

plain-error doctrine on direct appeal. Defendant further alleged that postconviction counsel provided defendant with unreasonable assistance by failing to include this claim in the initial postconviction petition. The circuit court found each of defendant's claims meritless and again denied defendant's *pro se* supplemented motion to reconsider.

¶ 16 Defendant appealed, arguing, *inter alia*, that the Fourth District "should reverse and remand for second-stage postconviction proceedings because he pleaded the gist of a constitutional claim that *** his appellate counsel provided ineffective assistance by failing to raise under the first prong of the plain-error doctrine a violation of Rule 431(b)." *Johnson*, 2020 IL App (4th) 190195-U, ¶ 39. The Fourth District, concluding that the trial court erred by failing to ask the potential jurors if they accepted the Rule 431(b) principles and that the evidence in defendant's case presented "a contest of credibility between the witnesses," found that "appellate counsel arguably provided ineffective assistance by failing to raise under the first prong of the plain-error doctrine a violation of Rule 431(b)." *Id.* ¶¶ 52-54. The Fourth District reversed and remanded, concluding that "defendant's claim, contrary to the finding of the trial court, is neither frivolous nor patently without merit." *Id.* ¶ 54. Despite this, the Fourth District declined to "remand for second-stage postconviction proceedings." *Id.* ¶ 61. The Fourth District noted that defendant did not include the claim in his initial postconviction petition and, instead, included it in his supplemented motion to reconsider in support of his assertion that his postconviction counsel provided unreasonable assistance. *Id.* ¶ 62. The Fourth District noted that, pursuant to the directions from the Illinois Supreme Court, "even if the circuit court determined one of defendant's claims in his supplemented motion to reconsider was neither frivolous nor patently without merit, that determination, by itself, would not warrant advancement to the second-stage of postconviction proceedings." *Id.* (citing *Johnson*, 2018 IL 122227, ¶ 24). The Fourth District went on to note that

"advancement would be warranted only if the circuit court also determined defendant's postconviction counsel was aware of the claim and refused to include it in defendant's postconviction petition." *Id.* (citing *Johnson*, 2018 IL 122227, ¶ 24). The Fourth District added:

> "Because the circuit court found all of defendant's *pro se* claims were meritless, it stopped short of determining whether defendant's postconviction counsel was aware of the claims and refused to include them. We find, consistent with the supreme court's directions, we must remand to the circuit court for further first-stage postconviction proceedings where the circuit court can determine whether defendant's postconviction counsel was aware of defendant's claim that his appellate counsel provided ineffective assistance by failing to raise under the first prong of the plain-error doctrine a violation of Rule 431(b) and refused to include it in defendant's postconviction petition. If the circuit court determines postconviction counsel was aware of defendant's claim and refused to include it in defendant's postconviction petition, then defendant should be permitted to amend his petition with the claim and proceed to the second stage of postconviction proceedings." *Id.* ¶ 63.

¶ 17 On November 6, 2020, the circuit court entered a written order following the remand from the Fourth District. The court "reviewed all of Defendant's pleadings, whether in the form of petitions, successive petitions, motions to reconsider, and supplemental motions." The court noted that following the dismissal of defendant's initial postconviction petition, defendant filed "a number of pleadings[,]" including a July 11, 2014, motion to reconsider, a March 11, 2016, supplement to the motion to reconsider, and an April 4, 2017, petition for successive post-conviction relief. The court noted that defendant did not raise an issue relating to a Rule 431(b) violation in any of those three pleadings. The court noted that the December 17, 2018, supplement

to the motion to reconsider "filed 4 ½ years after the postconviction petition, [was] the first mention made by [defendant] of Rule 431(b)." Accordingly, the court concluded that postconviction counsel was not aware of the claim and, thus, did not refuse to include it in the initial petition. Accordingly, the court denied defendant's supplemented motion to reconsider once more. Defendant filed a timely notice of appeal.

¶ 18 On April 15, 2021, the Fourth District entered an order allowing a motion for summary remand. In doing so, the Fourth District noted that the circuit court was without jurisdiction to issue the November 6, 2020, order because the court entered the order prior to the issuance of the mandate from the Fourth District.

¶ 19 On remand, the circuit court appointed defendant counsel on November 2, 2021, and effectively advanced the matter to the second stage of postconviction proceedings. On April 29, 2022, appointed counsel filed an amended postconviction petition alleging, *inter alia*, that defendant received ineffective assistance from appellate counsel where counsel failed to argue that the trial court plainly erred by violating Rule 431(b). The State subsequently filed a motion to dismiss defendant's amended petition, arguing, *inter alia*, that the court exceeded the Fourth District's mandate by advancing the petition to the second stage without first determining whether postconviction counsel was aware of the Rule 431(b) claim. Defendant filed a response to the State's motion, asserting that an evidentiary hearing was necessary for the court to follow the Fourth District's mandate.

¶ 20 On October 20, 2023, defendant filed a *pro se* motion requesting that the circuit court remove appointed counsel and allow defendant to retain private counsel. In the *pro se* motion, defendant expressed dissatisfaction with the amended petition filed by appointed counsel and

claimed that appointed counsel failed to adequately communicate with him regarding the case. Defendant eventually retained private counsel.

¶ 21 On March 27, 2024, defendant filed a *pro se* response to the State's motion to dismiss his amended postconviction petition, which was adopted by his private counsel. Defendant essentially alleged that the circuit court correctly advanced his postconviction petition to the second stage of the proceedings.

¶ 22 On May 22, 2024, the circuit court entered a written order. The court acknowledged that it effectively advanced the matter to second stage proceedings without making a finding that postconviction counsel was aware of defendant's Rule 431(b) claim. The court noted:

> "To be frank, the court was initially perplexed by the directions it had received from the higher courts to make a finding of fact during the first stage of post-conviction proceedings. This seemed a somewhat puzzling task to complete given that the first stage is limited to a review of the pleadings, which our Supreme Court confirmed in the language of its decision leading up to its instructions to the circuit court in pointing out that '[a]t the first stage of postconviction proceedings there are no hearings, no arguments, and no introduction of evidence.' *People v. Johnson*, 2018 IL 122227, ¶ 21. And yet in order for the court to determine whether post-conviction counsel was aware of the [defendant's] claim—not that counsel *should have* been aware, but that he was *actually* aware—and moreover that he also proactively *refused* to include that claim in the Petition he prepared for his client, it would seem necessary to hear evidence in the form of testimony bearing upon those matters.
>
> Accordingly, it was the court's position at the time that in spite of being instructed that it must first make a determination about what post-conviction counsel knew and either

did or didn't do before advancing this matter to the second stage, an evidentiary hearing would be required to aid the court in making that factual determination—hence the court's decision on November 2, 2021 to appoint counsel for the [defendant] and essentially lay the groundwork for that third stage evidentiary hearing to eventually take place whereupon the court could hear evidence and testimony on the issue of what post-conviction counsel knew and did regarding the [defendant's] [Rule 431(b)] claim at the time the petition was filed." (Emphases in original).

¶ 23 The circuit court concluded, after further reflection, that it was to take the Fourth District's instructions at "face value and make the factual determination regarding what post-conviction counsel knew" by reviewing only the pleadings and not hearing any evidence. The court observed that "the higher courts could have just as easily made this determination themselves rather than remanding back to the circuit court if the only basis for such a finding would be a review of the cold record." Nevertheless, the court noted that the reasoning set forth in the November 6, 2020, order remained "sound." The court found that defendant filed several pleadings after the court dismissed his initial postconviction petition, and that defendant did not raise the Rule 431(b) issue in any of those pleadings. The court found that defendant first raised the issue in his December 17, 2018, motion to supplement, which was filed "almost five years" after the initial postconviction petition was filed. The court found that defendant did not allege that postconviction counsel was aware of the Rule 431(b) issue and failed to include it in the initial petition. Accordingly, the court found that postconviction counsel was not aware of the claim and, thus, postconviction counsel could not have refused to include the claim in the initial postconviction petition. Thus, the court concluded that it should not have given defendant leave to file an amended postconviction petition

and advanced the matter to the second stage of proceedings. Consequently, the court dismissed defendant's amended petition.

¶ 24 On June 17, 2024, defendant filed a *pro se* motion to reconsider with an attached "declaration." Defendant alleged that "directions of the mandate violate[d] his right to due process and den[ied] him equal protection of the law." Defendant alleged that he did make postconviction counsel aware of the Rule 431(b) claim and that counsel failed to include that claim in the initial postconviction petition. Defendant further asserted that his prior pleadings indicated that he did not specifically reference every claim he discussed with postconviction counsel.

¶ 25 On June 20, 2024, defendant filed a notice of appeal from the circuit court's May 22, 2024, order. On July 8, 2024, defendant filed a *pro se* motion to withdraw a declaration that was attached to his June 17, 2024, motion for reconsideration. Privately retained counsel subsequently adopted all of defendant's *pro se* filings.

¶ 26 On July 15, 2024, the circuit court entered a written order denying defendant's motion to withdraw a declaration and denying defendant's motion to reconsider, finding that defendant was attempting to get a "second bite at the apple." On July 22, 2024, defendant filed a motion to strike his previously filed notice of appeal and requested an extension to file a supplement to his motion to reconsider. On the same date, defendant filed a motion for an extension of time to file the supplement.

¶ 27 On August 12, 2024, defendant filed a supplemented motion to reconsider with the circuit court, which the circuit court denied. On August 29, 2024, defendant filed a notice of appeal from the circuit court's orders denying his motion to reconsider, dismissing his postconviction petition, denying his supplemented motion to reconsider, denying his motion for extension, and striking his motion to reconsider. On September 24, 2024, the Office of the State Appellate Defender filed a

notice of appeal from the court's orders denying his amended postconviction petition, denying his motion for reconsideration, and denying his supplemental motion to reconsider.

¶ 28 II. ANALYSIS

¶ 29 On appeal, defendant first contends that the circuit court erred in dismissing his amended petition at the first stage because he sufficiently alleged, under the low first-stage pleading standard, that postconviction counsel provided unreasonable assistance by failing to raise a Rule 431(b) claim, where counsel either knew or should have known of the claim. Defendant alternatively argues that this court should remand because the court did not comply with the mandate of the Fourth District, the court failed to rule on his amended petition within 90 days of filing, and the court improperly considered input from the State. Because the issue is dispositive, we consider only whether the court complied with the mandate of the Fourth District.

¶ 30 We begin by setting forth the legal principles guiding our analysis. "The Act (725 ILCS 5/122-1 *et seq.* (West 2010)) provides a remedy for incarcerated defendants who have suffered a substantial violation of their constitutional rights at trial." *Johnson*, 2018 IL 122227, ¶ 14. There are three stages of proceedings on postconviction petitions. *Id.* "At the first stage, the circuit court must independently review the postconviction petition, without input from the State, and determine whether it is 'frivolous or is patently without merit.' " *Id.* (quoting 725 ILCS 5/122-2.1(a)(2) (West 2010)). If the circuit court determines the petition is frivolous or patently without merit, it must dismiss the petition in a written order. *Id.* If the circuit court does not dismiss the petition, it advances to the second stage of proceedings. *Id.* At the second stage, the circuit court appoints counsel to represent the defendant, if he or she is indigent, and the State may file responsive pleadings. *Id.* ¶ 15. "The circuit court must determine at this stage whether the petition and any accompanying documentation make a substantial showing of a constitutional violation." *Id.* (citing

People v. Edwards, 197 Ill. 2d 239, 245-46 (2001)). "If no such showing is made, the petition is dismissed. If, however, the petition sets forth a substantial showing of a constitutional violation, it is advanced to the third stage, where the circuit court conducts an evidentiary hearing (725 ILCS 5/122-6 (West 2010))." *Id.*

¶ 31 "There is no constitutional right to counsel in postconviction proceedings." *Id.* ¶ 16 (citing *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *People v. Moore*, 189 Ill. 2d 521, 541 (2000)). Consequently, "defendants are guaranteed only the level of assistance provided for by the Act." *Id.* (citing *People v. Flores*, 153 Ill. 2d 264, 276 (1992)). Although not specifically stated in the Act, our supreme court has concluded that defendants are entitled to "reasonable" assistance at the second and third stages of postconviction proceedings. *Id.* (citing *People v. Owens*, 139 Ill. 2d 351, 358-59 (1990)). "[A] defendant who retains a private attorney at the first stage of postconviction proceedings is entitled to a reasonable level of assistance of counsel." *Id.* ¶ 23.

¶ 32 Our supreme court, after determining that defendant was entitled to a reasonable level of assistance at the first stage of proceedings in this case, provided directions to the circuit court on remand. *Id.* ¶ 24. Specifically, our supreme court stated that "[i]f the circuit court determines the claims raised in defendant's supplemented motion to reconsider are frivolous or patently without merit, then the failure to include those claims would not amount to a denial of reasonable assistance of counsel, and defendant would not be entitled to relief on his motion to reconsider." *Id.* Our supreme court went on to state that "if the circuit court determines that one or more of the claims are not frivolous or patently without merit and if the court determines that defendant's attorney was aware of such claims and refused to include them, then defendant should be permitted to amend his petition with the claims and proceed to the second stage of postconviction proceedings." *Id.* The circuit court subsequently determined that the claims defendant raised in his supplemented

motion to reconsider were frivolous and patently without merit and, thus, denied defendant's motion to reconsider.

¶ 33 On appeal, the Fourth District reversed the circuit court, concluding that defendant's claim regarding a Rule 431(b) violation was not frivolous or patently without merit. *Johnson*, 2020 IL App (4th) 190195-U, ¶ 54. However, the Fourth District declined defendant's request "to reverse and remand for second-stage postconviction proceedings." *Id.* ¶ 61. The Fourth District concluded that, pursuant to the directions of our supreme court, advancement to the second stage of proceedings "would be warranted only if the circuit court also determined defendant's postconviction counsel was aware of the claim and refused to include it in defendant's postconviction petition." *Id.* ¶ 62. Accordingly, the Fourth District remanded

> "to the circuit court for further first-stage postconviction proceedings where the circuit court can determine whether defendant's postconviction counsel was aware of defendant's claim that his appellate counsel provided ineffective assistance by failing to raise under the first prong of the plain-error doctrine a violation of Rule 431(b) and refused to include it in defendant's postconviction petition." *Id.* ¶ 63.

¶ 34 "Where directions from a reviewing court are specific, the court to which the cause is remanded has a positive duty to enter an order or decree in accordance with the directions contained in the mandate." *People v. Payne*, 2018 IL App (3d) 160105, ¶ 9 (citing *People ex rel. Daley v. Schreier*, 92 Ill. 2d 271, 276 (1982)). "Whether the trial judge complied with [a reviewing] court's mandate is a question of law subject to *de novo* review." *Id.* ¶ 9 (citing *Emerald Casino, Inc. v. Illinois Gaming Board*, 366 Ill. App. 3d 113, 118 (2006)).

¶ 35 Here, at first glance, it appears that the circuit court complied with the directions provided by both our supreme court and the Fourth District. As noted, our supreme court instructed the

circuit court that if it determined "that defendant's attorney was aware of such claims and refused to include them, then defendant should be permitted to amend his petition with the claims and proceed to the second stage of postconviction proceedings." *Johnson*, 2018 IL 122227, ¶ 24. The Fourth District declined to remand the matter for second stage proceedings and, instead, specifically instructed the circuit court to determine whether postconviction counsel was aware of the claim that appellate counsel was ineffective by failing to raise a Rule 431(b) violation under the plain-error doctrine and refused to include that claim in defendant's postconviction petition. *Johnson*, 2020 IL App (4th) 190195-U, ¶ 63. Accordingly, contrary to defendant's argument, the specific instructions from both our supreme court and the Fourth District clearly indicate that the circuit court was required to determine only whether postconviction counsel was aware of the claim, not whether counsel *should have been aware* of the claim. Although the circuit court initially advanced defendant's petition to the second stage of proceedings without making this determination, it properly reversed that advancement after recognizing that it exceeded the limited mandate. The circuit court then considered the limited question of whether postconviction counsel was aware of defendant's claim that appellate counsel was ineffective for failing to raise a violation of Rule 431(b) under the plain-error doctrine[4] and, based solely on its review of the pleadings and record, determined that postconviction counsel was not aware of the claim. In our view, the court considered the proper question and made the required determination but misinterpreted the directions of our supreme court and the Fourth District as requiring it to make the determination under the legal standards applicable to first stage postconviction proceedings.

[4]The circuit court properly recognized that it was directed to consider only whether postconviction counsel knew of defendant's claim, not whether counsel should have known of the claim as argued by defendant on appeal. Any consideration of whether postconviction counsel should have known about the claim would have conflicted with the specific directions of our supreme court and the Fourth District.

¶ 36 We note that although some of the directions provided by our supreme court and the Fourth District were specific, the procedure the circuit court was to follow in making this determination was not clearly set forth by either court. Our supreme court recognized this in a subsequent decision, noting that it "provide[d] some means of reviewing attorney performance" (*Johnson*, 2018 IL 122227, ¶ 17) without establishing "the *means* necessary to conduct that review once it is mandated." (Emphasis in original.) *People v. Custer*, 2019 IL 123339, ¶ 33. In other words, our supreme court did not provide specific instructions to the circuit court with regard to how the court should determine if postconviction counsel was aware of meritorious claims and refused to include them in the initial postconviction petition (*i.e.*, after holding an evidentiary hearing, after appointing counsel, after allowing defendant to file supporting documents, or based solely on the pleadings).

¶ 37 We find it important to note that the issue before the circuit court on remand was not whether defendant's amended postconviction petition stated the gist of a constitutional claim. Rather, the issue before the court was whether defendant received unreasonable assistance of postconviction counsel at the first stage of proceedings. That is, our supreme court directed the circuit court to consider "the substance" of defendant's *pro se* supplemented motion to reconsider the dismissal of his initial postconviction petition and determine whether defendant demonstrated that he received unreasonable assistance of postconviction counsel.[5] Pursuant to the directions of our supreme court and the Fourth District, the reasonableness of postconviction counsel's representation depended on (1) whether the claims raised in defendant's *pro se* supplemented motion to reconsider had merit and (2) whether counsel knew of those meritorious claims and

[5]We note that, at the time our supreme court issued its decision, defendant had not yet raised an issue relating to Rule 431(b). Defendant first raised an issue relating to Rule 431(b) in a second *pro se* supplement to his motion to reconsider, which defendant filed after our supreme court remanded the cause back to the circuit court.

refused to include them in the initial postconviction petition. If the circuit court determined that the claims raised in the supplemented motion had merit and that postconviction counsel knew of those claims and refused to include them in the postconviction petition, the court was directed to allow defendant to amend his postconviction petition to include those claims and advance the petition to the second stage of proceedings. Given the Fourth District's determination that defendant's claim that appellate counsel was ineffective for failing to raise a Rule 431(b) violation under the plain-error doctrine was arguably meritorious, the only remaining question was whether postconviction counsel knew of that claim and refused to include it in the initial postconviction petition.

¶ 38 While the circuit court did make this determination on remand, it appears that the court mistakenly interpreted the mandate as requiring it to comply with the legal standards applicable to first stage postconviction proceedings when making this determination. We note that the court's ultimate ruling dismissed defendant's amended petition. We reiterate that the court was not tasked with considering whether defendant's postconviction petition stated the gist of a constitutional claim. Instead, the court was directed to consider the substance of defendant's *pro se* supplemented motion to reconsider, which alleged that postconviction counsel provided unreasonable assistance. Accordingly, although the court made the necessary determination, the court incorrectly interpreted the mandate when it ruled on defendant's amended petition rather than defendant's supplemented motion to reconsider and determined that it was limited to considering only the pleadings. *People v. Luna*, 2025 IL App (2d) 240382, ¶ 33 (concluding that, under the scope of the mandate, it would not have made it inconsistent for circuit court to hold a hearing where the trial court incorrectly interpreted the appellate court's mandate as limiting its authority).

¶ 39 Given that the mandate directed the circuit court to consider the claim of unreasonable assistance raised in defendant's supplemented motion to reconsider, the court was not constrained by the legal standards applicable to the first stage of proceedings. The court was required to conduct the proceedings necessary to comply with the directions of our supreme court and the Fourth District, which required the court to determine if postconviction counsel was aware of defendant's claim that appellate counsel was ineffective for failing to raise a violation of Rule 431(b) under the plain-error doctrine. See *id.* ¶ 31 ("[A] mandate does not necessarily preclude the trial court on remand from taking actions not specified in, but still in keeping with, the mandate."). We conclude that, by considering only the pleadings, the court lacked sufficient information to make the determination required by our supreme court and the Fourth District. In our view, the circuit court could only make this determination if postconviction counsel provided, either by way of testimony or an affidavit, the reason for his failure to include the claim in the initial postconviction petition. Defendant should also be afforded the opportunity to respond to postconviction counsel's testimony or affidavit. The procedure followed by the court deprived defendant of that opportunity and required the court to speculate as to postconviction counsel's knowledge of the claim. Accordingly, we vacate the circuit court's determination, which was based solely on the pleadings of record, and remand for a hearing on whether postconviction counsel was aware of defendant's claim that appellate counsel was ineffective for failing to raise a Rule 431(b) violation under the plain-error doctrine but refused to include that claim in the initial petition. The proper course, on remand, would be for the court to ensure the presence of postconviction counsel at the hearing to provide information about counsel's knowledge of defendant's claim. See *People v. Jackson,* 2016 IL App (1st) 133741, ¶¶ 81-82 (vacating the circuit court's ruling at a *Krankel* hearing and remanding the cause to the circuit court to conduct a new preliminary *Krankel* hearing,

where the court conducted the hearing in an improper manner and one of defendant's trial attorneys was not present at the hearing). See *People v. Krankel*, 102 Ill. 2d 181 (1984).

¶ 40 In doing so, we recognize that our supreme court has declined "to extend the posttrial motion procedures [that were] created in *Krankel* to allegations of unreasonable assistance by postconviction counsel." *Custer*, 2019 IL 123339, ¶ 46. Under *Krankel*, the circuit court conducts a preliminary inquiry into the factual basis of a *pro se* claim for ineffective assistance of counsel and determines if a defendant's allegations show possible neglect of the case. *Moore*, 207 Ill. 2d at 77-78. If the defendant's allegations demonstrate possible neglect, new counsel is appointed to fully prosecute the ineffectiveness claim before the court. *Id.* at 78-79. We find *Custer* well-reasoned but distinguishable from the facts of the present case. In the present case, unlike *Custer*, our supreme court and the Fourth District specifically directed the circuit court on remand to make a factual determination on the issue of whether postconviction counsel was aware of a specific claim and refused to include that claim in defendant's postconviction petition. Our determination that remand for a hearing is necessary in this case stems from the specific instructions—provided by both our supreme court and the Fourth District—for the court to determine whether postconviction counsel was aware of defendant's claim and refused to include it in the initial postconviction petition. Under the unique circumstances of the present case, we conclude that the court was required to hold a hearing to make this determination and comply with these specific instructions. We reiterate, however, that this is not a third-stage evidentiary hearing on defendant's postconviction petition. Rather, it is a hearing on the specific issue the court was required to consider in accordance with the instructions provided by our supreme court and the Fourth District.

¶ 41 In light of the foregoing, we vacate the circuit court's order dismissing defendant's amended petition and remand the matter back to the circuit court to conduct a hearing on the

limited issue of whether postconviction counsel knew of defendant's claim that appellate counsel was ineffective for failing to raise a Rule 431(b) violation under the plain-error doctrine on direct appeal. If, following the hearing, the court determines that postconviction counsel was aware of the claim and refused to include it in the initial postconviction petition, the court should allow defendant to add that claim to his postconviction petition and advance his petition to the second stage of proceedings. If, following the hearing, the court determines that counsel was not aware of the claim, the court should deny defendant's *pro se* supplemented motion to reconsider the dismissal of his initial postconviction petition. Because we are remanding the matter back to the circuit court to make a determination following a hearing, we need not address the remaining claims raised by defendant on appeal.

¶ 42 III. CONCLUSION

¶ 43 For the foregoing reasons, we vacate the order of the Champaign County circuit court dismissing defendant's amended petition and remand with directions to conduct a hearing consistent with this order.

¶ 44 Vacated and remanded with directions.