No. 123339

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court
	)	of Illinois, Third District
Respondent-Appellant,	)	Nos. 3-16-0202 & 3-16-0203 (cons.)
	)	
	)	There on appeal from the Circuit Court
v.	)	of the Tenth Judicial Circuit,
	)	Peoria County, Illinois
	)	Nos. 10-CF-896 & 12-CF-410
	)	
JOHN MICHAEL CUSTER,	)	The Honorable
	)	Albert Purham,
Petitioner-Appellee.	)	Judge Presiding.

REPLY BRIEF OF RESPONDENT-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

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ARGUMENT

I. The Appellate Court's Advisory Opinion Should Be Vacated.

The People's opening brief demonstrated that petitioner's claim is moot — and, thus, the appellate court's opinion is advisory and must be vacated — because the circuit court already held a hearing, considered his motion, and denied it. Peo. Br. 10-13.[1]

A. Petitioner's Forfeiture Argument Contradicts Settled Law.

Petitioner incorrectly argues that the People forfeited the mootness argument by not raising it in the appellate court or in their petition for leave to appeal (PLA). Pet. Br. 17-18. Because the People were appellee in the appellate court, they may raise any argument here that is supported by the record. *See, e.g.*, *People v. Donoho*, 204 Ill. 2d 159, 169 (2003) (considering argument not raised in People's PLA or appellate court). Moreover, it is settled that mootness arguments "may be raised at any time" and cannot be forfeited because they relate to a court's authority to hear a case. *See, e.g.*, *In re J.B.*, 204 Ill. 2d 386, 388 (2003) (assertion that the People could forfeit mootness argument ignored "basic principles" of law).

Petitioner appears to be aware of this rule, because he states in a footnote that this case is not really moot and, thus, "there is no obstacle" to "applying forfeiture." Pet. Br. 17 n.4. But whether an argument is forfeited

[1] The People's and petitioner's briefs are cited as "Peo. Br. _" and "Pet. Br. _."

and whether it is meritorious are separate questions; in any event, petitioner's own cases demonstrate that this case is moot. *Infra* p. 3.

Petitioner's suggestion that mootness arguments "wast[e] judicial resources" and are unworthy of review is also incorrect. Pet. Br. 17. Indeed, it is a "'basic tenet of justiciability'" that courts should not decide moot questions and upholding that rule by vacating advisory opinions conserves, rather than wastes, judicial resources. *People v. Jackson*, 231 Ill. 2d 223, 227 (2008). Given a party's incentive to raise meritorious arguments at the first opportunity, there is no basis for petitioner's theory that allowing parties to raise mootness arguments at any time encourages gamesmanship. Pet. Br. 17.

Lastly, there is no merit to petitioner's unsupported claim that the People have acted in a "disingenuous" manner. *Id.* The Attorney General's Office did not represent the People below, and undersigned counsel was assigned to this case only after this Court allowed leave to appeal; at that time, he obtained the record and discovered that the decision below was advisory. Moreover, the present mootness argument is merely an alternative argument in support of the PLA's contention that the appellate court's opinion should be vacated. Petitioner does not contend that he has been prejudiced, nor could he, given that he has had a full opportunity to brief the mootness argument.

B. Petitioner's Theory that This Case Is Not Moot Because He Remains Imprisoned Is Incorrect.

Petitioner's own authority demonstrates that he is wrong to assert that the fact he has already received the relief he is requesting is "simply is not a

mootness argument." Pet. Br. 19-20 (citing *In re Hernandez*, 239 Ill. 2d 195 (2010)). In *Hernandez*, the People appealed a circuit court order granting conditional release to a sexually violent person; while the appeal was pending, the committed person violated the terms of his release and was returned to custody. This Court vacated the appellate court's subsequent opinion as moot because "the State has already received the relief it sought — return of respondent to [custody]." *Hernandez*, 239 Ill. 2d at 201, 205.

Indeed, this Court has consistently held that the appellate court's ruling must be vacated as moot when the petitioner already received the relief he was requesting. *See, e.g.*, *Madison Park Bank v. Zagel*, 91 Ill. 2d 231, 235-36 (1982) (plaintiff's claim moot where defendant "has paid all the money" allegedly owed); *Wheatley v. Bd. of Ed. of Dist. 205*, 99 Ill. 2d 481, 485 (1984) (vacating opinion where petitioners had received "the essential relief demanded"); *In re Walgreen*, 186 Ill. 2d 362, 364 (1999) (similar).

Petitioner is also incorrect to argue that this case is not moot because he "remains imprisoned" and, thus, has not "achieved the ultimate relief that he sought by filing a postconviction petition." Pet. Br. 20. Petitioner cites no authority for this novel "ultimate relief" theory of mootness, nor is respondent aware of any. The question is not whether petitioner should be released from prison, but whether *Krankel* applies to postconviction proceedings — and that question is moot because the circuit court already reviewed and denied petitioner's *Krankel* motion. Indeed, petitioner's "ultimate relief" theory

would mean that defendants' claims could never be moot as long as they remained imprisoned, which would lead to absurd results.

C. Petitioner's Theory that the Hearing Was Not Really a *Krankel* Inquiry Is Incorrect.

Petitioner further argues that the circuit court did not conduct a preliminary *Krankel* inquiry to determine whether his allegations met the "possible neglect" standard for appointing new counsel, but instead "held a hearing on the merits of the motion"; this was error, according to petitioner, because "a court should not reach the merits of the defendant's claims at a preliminary *Krankel* inquiry." Pet. Br. 21. But this Court has repeatedly held that trial courts *should* consider the merits of a petitioner's claims at the preliminary inquiry stage. *See, e.g.*, *People v. Ayres*, 2017 IL 120071, ¶ 11 (at preliminary stage, court should consider whether "the claim lacks merit"); *People v. Taylor*, 237 Ill. 2d 68, 75 (2010) (same); *People v. Jocko*, 239 Ill. 2d 87, 92 (2010) (same). For example, this Court has consistently affirmed trial court decisions not to appoint new counsel because the defendant's claims of attorney error "lack merit and involve a question of trial strategy." *People v. Chapman*, 194 Ill. 2d 186, 230-31 (2000); *see also People v. Kidd*, 175 Ill. 2d 1, 45 (1996) (same).

Petitioner ignores this controlling authority in favor of a single appellate case, *People v. Roddis*, 2018 IL App 4th 170605 (cited in Pet. Br. 21). *Roddis* holds that *some* merits issues should not be considered during the preliminary *Krankel* inquiry, *id*. ¶ 47, and this Court has allowed the People's

PLA challenging that restriction, *see People v. Roddis*, No. 124352. But even *Roddis* holds that courts may consider the merits, and decline to appoint counsel, in a certain circumstances, including, as relevant here, when the allegations relate to counsel's decision not to "introduce a particular piece of evidence or testimony." 2018 IL App 4th 170605, ¶¶ 65, 100. Thus, even under petitioner's authority, he was not entitled to new counsel based on his complaint about postconviction counsel's decision not to present Michelle Colvin's testimony.

Petitioner's remaining arguments likewise fail. Petitioner's assertion that it "would be absurd to presume the circuit court conducted an inquiry that it had no reason to believe was required" cites no authority and ignores the record. Pet. Br. 21. Petitioner, while represented by the appellate defender, moved to dismiss his first appeal and asked the court to remand for consideration of his pro se motion alleging that his postconviction counsel erred by not calling Colvin to testify. Peo. App. 15. The appellate court in turn remanded for consideration of that claim. Peo. App. 19. It was established at the time of remand that a party represented by counsel may not file a pro se motion unless it is a *Krankel* motion. *People v. Bell*, 2018 IL App (4th) 151016, ¶ 28 (collecting cases). The circuit court "is presumed to know the law and apply it properly, absent an affirmative showing to the contrary in the record," *In re N.B.*, 191 Ill. 2d 338, 345 (2000), and petitioner points to nothing in the record to demonstrate that the circuit court was unaware of

Krankel, see id. (holding that, despite reference to incorrect standard, record did not demonstrate judge applied incorrect burden of proof).

Moreover, even if petitioner were correct that the court "had no reason to believe" that a *Krankel* inquiry was required, the fault lies with petitioner and his appellate counsel. Petitioner cannot file a counseled motion asking the appellate court to remand for a ruling on a pro se motion — without mentioning *Krankel* — and then later complain that the circuit court "had no reason to believe" that a *Krankel* inquiry was required. *See, e.g.*, *In re Det. of Swope*, 213 Ill. 2d 210, 217 (2004) ("a party cannot complain of error which that party induced the court to make or to which that party consented").

Petitioner's alternative suggestion that the hearing was improper because he was not present is incorrect, as his own authority shows. *People v. Moore*, 207 Ill. 2d 68, 79 (2003) (court may base its evaluation of *Krankel* claims on "the insufficiency of the defendant's allegations on their face") (cited in Pet. Br. 21). And contrary to petitioner's assertion, the judge did ask his counsel to address the motion, Pet. App. 3; in any event, as petitioner concedes, courts are not required to do so, Pet. Br. 22. There also is no basis to believe that the prosecutor's sparse comments affected the inquiry. *Id*.

Perhaps most importantly, although petitioner contends that the circuit court should have inquired further, he fails to identify what information the court lacked. Indeed, the record establishes that any additional inquiry was wholly unnecessary. As discussed, because petitioner's claim concerns a

strategic decision — whether to call a particular witness to testify — the court was required by settled law to deny petitioner's *Krankel* motion. Peo. Br. 13-15 (collecting cases). And, in any event, the fully developed record included (1) petitioner's multiple filings explaining the precise nature of his claim, i.e., that counsel erred by declining to call Colvin to testify; (2) Colvin's affidavit describing her proposed testimony; (3) petitioner's statement that Colvin is "nuts," unreliable, and had lied in prior proceedings; (4) undisputed proof that postconviction counsel spoke with Colvin before the third-stage hearing, was aware of her potential testimony, and told petitioner that he would not be calling her to testify; and (5) the court's determination (after hearing live testimony) that petitioner was not credible and trial counsel was.

In sum, the circuit court has already considered petitioner's allegations, his claim is thus moot, and the appellate court's opinion should be vacated.

II. Petitioner's Claim Is Not Cognizable.

The People's opening brief also established a second basis to reverse the appellate court's judgment: any failure to conduct a *Krankel* inquiry was harmless because petitioner's allegation that counsel erred by not calling Colvin to testify is not a cognizable *Krankel* claim. Peo. Br. 13-15.

A. Petitioner's Forfeiture Argument Is Forfeited and Meritless.

Petitioner's response brief incorrectly asserts that the People forfeited this argument by omitting it from their PLA. Pet. Br. 16-18. To begin, petitioner has forfeited his forfeiture argument. This Court has "established a clear framework" for deciding whether to review arguments omitted from a

PLA: when an argument is not mentioned in the PLA but is "inextricably intertwined with other matters properly before the court, review is appropriate." *People v. McKown*, 236 Ill. 2d 278, 310 (2010). Petitioner does not acknowledge this standard, let alone develop an argument that the People failed to meet it. Pet. Br. 16-18. Thus, he has forfeited his forfeiture argument. Ill. S. Ct. R. 341(h)(7).

Moreover, any forfeiture argument is meritless. In *In re Rolandis G.*, this Court rejected a claim that the People forfeited a harmless error argument by failing to raise it in their PLA. 232 Ill. 2d 13, 37-38 (2008). As this Court held, whether an error is harmless is "inextricably intertwined with the determination of whether the error that occurred requires reversal." *Id.* at 38; *see also People v. Becker*, 239 Ill. 2d 215, 239 (2010) (same). For the same reason, the People's argument here that petitioner's claim is not cognizable (and, thus, no remand is needed because the failure to conduct an inquiry was harmless and/or no inquiry was triggered) is inextricably intertwined with the argument raised in their PLA that there was no error in any alleged failure to hold a preliminary inquiry.

B. Petitioner's Substantive Arguments Contradict Settled Law.

On the merits, petitioner primarily responds that his allegations were full of "detail" and "made the circuit court fully aware of his claims of unreasonable assistance." Pet. Br. 25-26. And he is correct — his pro se filings specifically identified (1) who allegedly erred (postconviction counsel);

(2) how he allegedly erred (by declining to present testimony from Colvin); and (3) what testimony Colvin would have provided (trial counsel indicated he would appeal). *Id.* at 23-25. And petitioner's motion included an affidavit from Colvin describing her putative testimony, as well as the letter postconviction counsel sent before the hearing stating that he had spoken with Colvin and decided not to call her to testify. *Id.*

But that comprehensive detail is precisely why harmless error principles apply here: the record is clear that petitioner is challenging counsel's decision not to call a particular witness to testify and the law is equally clear that petitioner's allegation is not a cognizable *Krankel* claim. *See, e.g.*, *Chapman*, 194 Ill. 2d at 230-31 (claim that counsel failed to call witness is not colorable); *Kidd*, 175 Ill. 2d at 45 (same).

Petitioner incorrectly asserts that this Court has held that harmless error analysis may be conducted only *after* a preliminary *Krankel* inquiry. Pet. Br. 25 (citing *Ayres*, *Taylor*, *Moore*, *Jocko*). *Ayres's* holding that a bare bones allegation of "ineffective assistance" (that fails to identify who erred or how) triggers a *Krankel* inquiry does not mean that a case must be remanded for inquiry when the defendant raises in detail a claim that is meritless as a matter law. *Ayres*, 2017 IL 120071, ¶ 1. *Taylor* contradicts petitioner's theory because it holds that no remand was required despite the court's failure to conduct a preliminary inquiry because the defendant's statements were insufficient to trigger one. *Taylor*, 237 Ill. 2d at 76-77. Similarly, *Moore* holds

that *Krankel* errors "can be harmless," though it remanded for inquiry where "no record at all was made" that would allow it to assess the merits of the defendant's claims. *Moore*, 207 Ill. 2d at 80-81.

And *Jocko*, 239 Ill. 2d 87, completely undermines petitioner's theory that harmless error analysis is inappropriate at this stage. Jocko filed a pro se motion alleging that counsel did not attend his arraignment; the circuit court did not address his motion and the appellate court remanded for a preliminary *Krankel* inquiry. *Id.* at 89-90. This Court reversed, holding that the circuit court's failure to conduct a preliminary inquiry was harmless because Jocko's claim "is refuted by the record" which showed that counsel had appeared at arraignment. *Id.* at 93.

Further, petitioner's theory is not only contrary to this Court's precedent, it would also lead to absurd results. For example, under petitioner's theory, if a defendant alleged that his counsel erred by failing to raise arguments that are per se irrelevant and improper — for example, that the victim in a statutory rape case was dressed provocatively — the appellate court would still be required to remand for a preliminary *Krankel* inquiry if one had not been held. Similarly, under petitioner's theory, if a defendant alleged that his counsel erred by refusing to offer an alibi defense — while the record demonstrated counsel had called multiple alibi witnesses — the appellate court would still be required to remand though the claim was objectively baseless. The law does not require such absurd results.

The rest of petitioner's response contends that his claim that postconviction counsel erred by failing to call Colvin to testify has "potential merit" because she could have "corroborated" his testimony. Pet. Br. 27-30. That theory is contrary to settled law in two respects.

First, it is settled that "which witnesses to call at trial and what evidence to present on defendant's behalf ultimately rest with trial counsel." *See, e.g.*, *People v. West*, 187 Ill. 2d 418, 432 (1999). Thus, allegations that counsel erred by deciding not to call a particular witness do not state a cognizable ineffective assistance claim. *See, e.g.*, *id; Chapman*, 194 Ill. 2d at 230-31; *Kidd*, 175 Ill. 2d at 45. The "only exception" is when counsel "'entirely fails to conduct any meaningful adversarial testing.'" *West*, 187 Ill. 2d at 432-33; *see also People v. Reid*, 179 Ill. 2d 297, 310 (1997) (same). Petitioner does not acknowledge this standard, let alone argue that his postconviction counsel failed to meet it. Pet. Br. 27-30.[2]

[2] Petitioner cites four appellate cases for the proposition that not calling a certain witness "may amount to ineffective assistance if objectively unreasonable." Pet. Br. 27. But those decisions cannot overrule this Court's precedent; moreover, none of them support his argument. The first, *Roddis*, 2018 IL App 4th 170605, ¶ 100, undermines petitioner's theory because it holds that counsel should not be appointed if a defendant complains that his attorney failed to introduce certain testimony. The second shows the absence of adversarial testing: counsel announced he would present testimony from the defendants and other witnesses, then "failed to present any evidence whatsoever." *People v. Bryant*, 391 Ill. App. 3d 228, 239-40 (5th Dist. 2009). Similarly, the third involved counsel who failed to present the sole exculpatory eyewitness or "any evidence" to rebut the State. *People v. King*, 316 Ill. App. 3d 901, 916 (1st Dist. 2000). And the fourth, *People v. Peacock*, 359 Ill. App. 3d 326, 340 (4th Dist. 2005), was referring to errors in cross-examination.

Additionally, any claim that counsel did not conduct any meaningful adversarial testing would fail as a matter of law, because counsel (1) filed an amended postconviction petition with four supporting affidavits that was sufficient to advance the case to the third stage; (2) examined petitioner at that hearing to elicit that both he and Colvin asked trial counsel to appeal; and (3) cross-examined trial counsel at length regarding his assertion that nobody asked him to appeal. *See* 410-C81; 896-R176-91, 213-227. Indeed, counsel performed so well that petitioner's primary argument on appeal was that the court erred in denying his postconviction petition because the third-stage hearing proved his claim. *See* Pet. Appellate Brief, at 18-30. Thus, petitioner cannot now argue that counsel's decision not to call Colvin means he failed to test the People's case, especially where (1) petitioner said on the record that Colvin is "nuts," unreliable, and lied in prior cases; and (2) on cross-examination of Colvin, the People could have elicited testimony about the long-term abuse she had suffered at petitioner's hands. *See* 896-R67-75.

Second, and independently, it is settled that "counsel's performance cannot be considered deficient because of a failure to present cumulative evidence." *People v. Dupree*, 2018 IL 122307, ¶ 51. This Court has consistently rejected claims that counsel erred by failing to investigate or call witnesses who would have provided cumulative or corroborative testimony. *People v. Johnson*, 183 Ill. 2d 176, 192 (1998) (failure to investigate alibi witness who would have provided testimony cumulative to another witness

"cannot" be considered deficient); *People v. Hickey*, 204 Ill. 2d 585, 619 (2001) (same rule); *Dupree*, 2018 IL 122307, ¶ 51 (failure to call corroborating witness "cannot be considered deficient"). Thus, petitioner's assertion that his claim that counsel erred by not calling Colvin had "potential merit" because she could "corroborate" his testimony fails for this additional reason.

In sum, this case should not be remanded because petitioner's claim that postconviction counsel erred is meritless as a matter of law.

III. *Krankel* Does Not Apply to Postconviction Proceedings.

The People's opening brief established a third basis to reverse: *Krankel* does not apply to postconviction proceedings. Peo. Br. 15-26. Petitioner's response misreads this Court's precedent and fails to consider the stark differences between trial and postconviction proceedings.

A. *Ayres* Holds that *Krankel* Is Limited to Post-Trial Motions.

As the People's opening brief noted, *Ayres* held that "*Krankel* is limited to post-trial motions." 2017 IL 120071, ¶ 22. That holding was in response to concerns raised by the dissent and the People that requiring a *Krankel* inquiry into bare bones claims of "ineffective assistance" would drain judicial resources and unnecessarily multiply litigation by requiring trial courts to carefully scrutinize the numerous pro se filings they receive and causing fruitless remands. *Id*. ¶ 35 (Thomas, J., dissenting; joined by Karmeier, J. and Garman, J.). Petitioner's request to expand *Krankel* to postconviction cases would eradicate that protection.

Petitioner misses the point when he argues that it "is evident that the dissenting justices' concerns were limited to specific issues created by requiring inquiries into bare, conclusory claims." Pet. Br. 12. By demanding the application of *Krankel* to postconviction proceedings, petitioner is multiplying the dissenters' concerns by bringing them to a vast, new arena: collateral actions. The only way to avoid this exponential increase in the problems identified by the dissent, and acknowledged by the majority, is to hold that *Krankel* does not apply to postconviction proceedings.

Petitioner misreads *Ayres* when he argues that the majority merely was "referencing this Court's prior decision in *Jocko*," which held that trial courts need not rule on *Krankel* motions before trial. Pet. Br. 12-13. *Jocko* is cited only once in *Ayres*, deep in an unrelated string cite, nine paragraphs before the majority declared (without citing *Jocko*) that *Krankel* is limited to posttrial motions. *Ayres*, 2017 IL 120071, ¶¶ 13, 22. Moreover, in the two sentences preceding the Court's declaration that *Krankel* is so limited, the majority referred to the concerns about the drain on judicial resources, and those same concerns plainly exist (and, indeed, would be multiplied) if *Krankel* were applied to postconviction proceedings. *Id.* ¶ 22.

Petitioner's argument that the burden imposed by *Krankel* is overstated because it is relatively simple to conduct a preliminary inquiry fails to consider the actual burdens identified by the *Ayres* dissent, including that (1) trial courts must carefully scrutinize the many pro se filing they receive, searching

for suggestions of a complaint about counsel; and (2) if no preliminary inquiry is held, the appellate court must automatically remand for inquiry, even though such unexplained claims are likely to be meritless. *Id.* ¶ 35.

Petitioner is likewise wrong to argue that litigation is multiplied only when the circuit court or prosecution errs, Pet. Br. 14, because the case law is filled with examples of defendants consuming significant resources pursuing baseless *Krankel* claims. For example, defendants have pursued *Krankel* appeals all the way to this Court even though their claims were "spurious"; "clearly lacked merit"; were "refuted by the record"; did not even mention counsel; or were non-cognizable. *See, e.g.*, *Jocko*, 239 Ill. 2d at 93 (claim refuted by record); *Kidd*, 175 Ill. 2d at 45 (claim "clearly lacked merit"); *Taylor*, 237 Ill. 2d at 77 (defendant "does not mention his attorney"); *People v. Ramey*, 152 Ill. 2d 41, 52 (1992) (claims were "spurious"); *People v. Johnson*, 159 Ill. 2d 97, 126 (1994) (claims were "conclusory, misleading, or legally immaterial"); *Chapman*, 194 Ill. 2d at 231 (claim "simply has no merit"); *People v. Munson*, 171 Ill. 2d 158, 203 (1996) (similar); *People v. Crane*, 145 Ill. 2d 520, 533 (1991) (similar). And that does not even account for the meritless *Krankel* appeals that conclude in the appellate court.

Petitioner also fails to consider that *Krankel* multiplies litigation in another way: it creates myriad procedural issues for courts to consider that would not exist absent *Krankel*. For example, this last year alone — thirty-five years after *Krankel* was issued — this Court has granted PLAs to consider not

only whether *Krankel* applies to postconviction litigation, but also when a court may rule on the merits of a *Krankel* claim, and whether defense counsel can trigger an inquiry. *See People v. Roddis*, No. 124352; *People v. Bates*, No. 124143. And the lower courts continue to grapple with other unsettled procedural issues. *See, e.g.*, *People v. Horman*, 2018 IL App (3d) 160423, ¶ 26 (propriety of serial *Krankel* inquiries "is a question of first impression").

Applying *Krankel* to postconviction proceedings would not only import (and, thus, multiply) such procedural questions, but it also would create new questions. For example, while *Jocko* held that courts need not rule on *Krankel* motions before trial, would postconviction courts be free to ignore *Krankel* motions filed in the first or second stages of postconviction litigation? Would counsel's Rule 651(c) certificate be sufficient on its own to rebut a petitioner's claims without further inquiry? Would *Krankel* apply to other collateral actions, proceedings under the Sexually Violent Persons Commitment Act, or original actions?

For these reasons, the concerns expressed by the dissent and the People in *Ayres* are real and well-supported. Thus, this Court should decline to apply *Krankel* to postconviction proceedings.

B. Petitioner Does Not Address the Fundamental Differences Between Postconviction Proceedings and Criminal Trials.

Notably, petitioner does not dispute that two fundamental differences between trials and postconviction proceedings demonstrate that *Krankel* should not be extended to postconviction litigation: (1) the justification for

applying *Krankel* in criminal cases — protecting the defendant's Sixth Amendment right to counsel — is absent because there is no constitutional right to postconviction counsel; and (2) postconviction counsel plays a very limited role, with limited responsibilities. Peo. Br. 19-24. Thus, there is less need for *Krankel* (and the burdens it imposes) in postconviction matters.

Also, as the People noted, it is settled that a petitioner may not raise the ineffectiveness of postconviction counsel as a basis for relief under the Post-Conviction Hearing Act because it contravenes the legislature's express intent that postconviction claims be limited to errors that occurred "'*in the proceeding which resulted in [the petitioner's] conviction*.'" *People v. Flores*, 153 Ill. 2d 264, 277 (1992) (emphasis in original). Notably, petitioner's response does not dispute the People's corresponding observation that to extend *Krankel* to postconviction proceedings — along with the need for investigation and resolution by the circuit court — would similarly undermine the legislature's intent.

C. This Court Has Already Created an Effective Mechanism to Ensure Reasonable Assistance of Postconviction Counsel.

Petitioner's assertion that without *Krankel*, petitioners "have no recourse" to ensure they receive reasonable assistance of counsel is objectively incorrect. Pet. Br. 5. As discussed in the People's opening brief, through Rule 651(c) this Court already has created an effective mechanism to ensure that petitioners receive reasonable assistance. Peo. Br. 22-24; *People v. Perkins*, 229 Ill. 2d 34, 42 (2007) (Rule 651(c) "assure[s] the reasonable assistance

required by the Act"). When counsel files a Rule 651(c) certification, the presumption arises that she provided reasonable assistance; that presumption may be challenged on appeal, and if the appellate court finds that counsel failed to do so, remand is required even if the petitioner's postconviction claims are meritless. Peo. Br. 23 (collecting cases).

Tellingly, petitioner does not cite any case suggesting that this long-standing framework fails to protect petitioners' interests. Instead, he raises a series of vague hypotheticals that he contends show that there "are many situations in which a petitioner's right to reasonable assistance of counsel could be violated, but where the lack of a record would prevent a petitioner from ever obtaining relief." Pet. Br. 6. However, those hypotheticals demonstrate a misunderstanding of postconviction proceedings.

The primary scenarios petitioner hypothesizes involve postconviction counsel's failure to call certain witnesses, introduce certain evidence, or ask certain questions at the third-stage hearing. Pet. Br. 6-7. But, as discussed, it is settled that those actions or inactions are matters of legal strategy immune from claims of attorney error, absent a showing that counsel "entirely failed to conduct any meaningful adversarial testing" — a determination that can be made on the record. *Supra* p. 11; *see also, e.g.*, *West*, 187 Ill. 2d at 432 (selection of witnesses and evidence); *People v. Franklin*, 167 Ill. 2d 1, 22 (1995) (witness examination); *People v. Clendenin*, 238 Ill. 2d 302, 319 (2010) (discussing decisions that belong to counsel).

Other scenarios involve postconviction counsel's alleged failure to investigate or otherwise support petitioner's pro se claims. Pet. Br. 6-7. But, under settled law, such allegations are non-cognizable and/or can be resolved based on the record. That is because postconviction counsel is required to review only the portion of the record that relates to the petitioner's pro se claims. *See*, *e.g.*, *People v. Pendleton*, 223 Ill. 2d 458, 475 (2006). Counsel "'is under no obligation to actively search for sources outside the record that might support general claims raised in the postconviction petition.'" *People v. Williams*, 186 Ill. 2d 55, 61 (1999); *see also People v. Moore*, 189 Ill. 2d 521, 542 (2000) (same). And when the pro se petition specifically identifies potential witnesses or evidence, and counsel abandons or otherwise fails to support those claims, courts "'may reasonably presume that postconviction counsel made a concerted effort'" to obtain supporting evidence but "'was unable to do so.'" *People v. Guest*, 166 Ill. 2d 381, 413 (1995); *see also Williams*, 186 Ill. 2d at 62 (failure to support claims did not fall below reasonable assistance).

The last scenario petitioner imagines is where, in her Rule 651(c) certification, counsel falsely claims that she spoke with her client about his petition and examined the relevant portions of the record. In other words, petitioner asks this Court to assume that (1) rather than simply speaking with her client or looking at the record, a lawyer would instead choose to file a false certification; and (2) evidence existed outside the record to prove a negative, i.e., that counsel never communicated with petitioner or looked at the record.

This incredibly unlikely scenario, and the unfair assumptions about attorneys that it depends upon, are insufficient to justify abandoning Rule 651(c) and extending *Krankel* to postconviction proceedings. *See, e.g.*, *Moore*, 189 Ill. 2d at 543 (certification evidenced "that postconviction counsel complied with the requirements of Rule 651(c) and thus rendered reasonable assistance").

But even if petitioner had hypothesized a cognizable claim of attorney error that lacked record support, his argument — that, absent *Krankel*, there is no way to develop a record — would still fail. First, unlike at trial, Rule 651(c) creates a record by requiring counsel to certify that they provided reasonable assistance and how they did so. Ill. Sup. Ct. R. 651(c). Second, parties are permitted in some circumstances to supplement the record in the appellate court. *See* Ill. Sup. Ct. R. 329 (party may supplement where "the record is insufficient to present fully and fairly the questions involved"); *People v. Waldrop*, 353 Ill. App. 3d 244, 247-48 (2d Dist. 2004) (collecting cases; party may supplement record with new certifications from postconviction counsel addressing petitioner's claim that he erred); *People v. Deloney*, 341 Ill. App. 3d 621, 624 (1st Dist. 2003) (petitioner supplemented postconviction record on appeal with new witness affidavit).[3] Third, petitioner could file a

[3] Petitioner suggests in a footnote that the record can never be supplemented on appeal but the cases he cites are inapposite, either because they (1) do not concern attempts to supplement the record; or (2) involve petitioners attempting to amend their postconviction petition (while on appeal) with entirely new claims or evidence to argue that the circuit court erred by summarily dismissing their petition, and thus they depend on the pleading

successive postconviction petition, asserting as his basis to do so that postconviction counsel erred in his original postconviction proceedings. *See* 725 ILCS 5/122-1(f).

Petitioner's reliance on *People v. Johnson*, 2018 IL 122227, ¶¶ 1, 23, Pet. Br. 7, is mistaken. *Johnson* holds that retained counsel at the first stage of postconviction proceedings (not just counsel appointed after the first stage) must provide reasonable assistance. *Johnson* does not mention *Krankel*, let alone control any issues in this appeal. *See id.*; Peo. Br. 26-28.

Lastly, petitioner is incorrect when he contends that applying *Krankel* to postconviction proceedings is necessary because counsels' self-interests discourage them from raising the adequacy of their performance with the circuit court. Pet. Br. 8-9. To begin, the People note that even in the trial context, defense counsel are not necessarily reluctant to alert the court to their own deficient performance. *See, e.g.*, *People v. Bates*, 2018 IL App (4th) 160255, ¶¶ 91-98 (collecting cases where counsel moved for new trial alleging own ineffectiveness). But more importantly, the postconviction system accounts for any such reluctance by *requiring* counsel to file a certification attesting that they provided reasonable assistance, i.e., that they consulted with their client, reviewed the relevant record, and took the steps necessary to adequately present petitioner's claims. Ill. S. Ct. R. 651(c); *see also Perkins*,

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rule that claims not pleaded in the petition cannot be raised for the first time on appeal. Pet. Br. 5 n.5 (citing *Anderson*, *Montgomery*, *Friesland*, *Jones*).

229 Ill. 2d at 42. Petitioner cites no authority suggesting that this has been inadequate to protect petitioners' rights, nor are the People aware of any.

In sum, for the last fifty years, Rule 651(c) has proven to be an effective mechanism to ensure that petitioners receive the "reasonable assistance" required by the Postconviction Act. Thus, no reason exists to extend *Krankel* to postconviction proceedings.

CONCLUSION

This Court should reverse the appellate court's judgment.

May 6, 2019

Respectfully submitted,

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RULE 341(c) CERTIFICATE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and the certificate of service is 5,826 words.

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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On May 6, 2019, the foregoing **Reply Brief of Plaintiff-Appellant People of the State of Illinois** was (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy from my email address to the email addresses below:

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Additionally, upon its acceptance by the Court's electronic filing system, the undersigned will mail thirteen duplicate paper copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

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