No. 128398

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Appellate Court of
	) Illinois, Second Judicial District,
Respondent- Appellee,	) No. 2-21-0197
	)
vs.	) There heard on Appeal from the
	) Circuit Court of Winnebago
JESSICA R. LIGHTHART,	) County, Illinois, No. 02-CF-3683
	)
Petitioner-Appellant.	) Hon. Robert Randall Wilt,
	) Judge Presiding

BRIEF AND ARGUMENT FOR PETITIONER-APPELLANT

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TABLE OF CONTENTS

NATURE OF THE CASE

Jessica R. Lighthart, Petitioner-Appellant, appeals from the dismissal of her post-conviction petition on timeliness grounds upon the grant of the State's motion to dismiss, which dismissal was affirmed by the appellate court.

No issue is raised concerning the charging instrument. An issue, however, is raised concerning the timeliness of the post-conviction pleadings.

ISSUE PRESENTED FOR REVIEW

Whether a defendant who enters into a negotiated plea, but where the proper post-plea motion to withdraw guilty plea and vacate judgment is not filed in a timely manner, must, pursuant to 725 ILCS 5/122-1(c), file a post-conviction petition within 6 months from the date for filing a *certiorari* petition or within 3 years from the date of conviction.

JURISDICTION

Jessica R. Lighthart, Petitioner-Appellant, appeals from the Second District's affirmance of the trial court's grant of the State's motion to dismiss her post-conviction petition based on timeliness. *People v. Lighthart*, 2022 IL App (2d) 210197 (March 15, 2022). Ms. Lighthart filed a timely petition for leave to appeal on April 19, 2022.

On September 28, 2022, this Court allowed Ms. Lighthart's petition for leave to appeal pursuant to Illinois Supreme Court Rule 315(h). (A. 2)

STATUTES INVOLVED

725 ILCS 5/122-1(c) (West 2007) provides, in pertinent part:

> When a defendant has a sentence other than death, no proceedings under this Article shall be commenced more than 6 months after the conclusion of proceedings in the United States Supreme Court, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence. If a petition for certiorari is not filed, no proceedings under this Article shall be commenced more than 6 months from the date for filing a certiorari petition, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence. If a defendant does not file a direct appeal, the post-conviction petition shall be filed no later than 3 years from the date of conviction, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence.

Illinois Supreme Court Rule 604(d) (West 2007) provides, in pertinent part:

> No appeal shall be taken upon a negotiated plea of guilty challenging the sentence as excessive unless the defendant, within 30 days of the imposition of sentence, files a motion to withdraw the plea of guilty and vacate the judgment. For purposes of this rule, a negotiated plea of guilty is one in which the prosecution has bound itself to recommend a specific sentence, or a specific range of sentence, or where the prosecution has made concessions relating to the sentence to be imposed and not merely to the charge or charges then pending.

STATEMENT OF FACTS

Jessica Lighthart was charged, along with Markus Buchanan, with, *inter alia*, first degree murder in a fifteen-count indictment. (C. 19-21)

On June 15, 2004, Ms. Lighthart pled guilty to Count 1 (first degree murder), with the understanding of a sentencing cap of 35 years and that the remaining counts would be dismissed pursuant to the agreement. (R. 463-478) On August 13, 2004, Ms. Lighthart was sentenced to 35 years' imprisonment. (C. 138)

On August 17, 2004, Ms. Lighthart's public defender filed a motion to reconsider sentence. (C. 139) On October 1, 2004, the motion to reconsider sentence was heard and

denied. (R. 610-617) On October 14, 2004, Ms. Lighthart filed a *pro se* motion to withdraw plea and vacate sentence. (C. 153-155) On February 14, 2006, the court-appointed conflict counsel filed an amended motion to withdraw plea and vacate sentence. (C. 177-179) On February 14, 2006, the court heard and denied the motion. (C. 183)

On February 21, 2006, a notice of appeal was filed. (C. 185) On September 19, 2006, the appeal was dismissed for lack of jurisdiction because the notice of appeal was untimely. (C. 194-199)

On August 10, 2007, Ms. Lighthart filed a *pro se* petition for post-conviction relief, which raised the following issues: (1) trial counsel was ineffective for failing to adequately investigate the abusive relationship with Markus Buchanan for purposes of establishing a defense or mitigation at sentencing; and (2) trial counsel was ineffective for failing to advise her how to file an appeal on her guilty plea. (C. 207-214) On October 3, 2007, the trial court dismissed the petition as frivolous and patently without merit. (C. 215)

On August 24, 2009, the appellate court reversed the trial judge's order and remanded the case for second-stage proceedings. (C. 231-240) The court found that Ms. Lighthart stated the gist of a constitutional claim that her trial counsel was ineffective for failing to timely file a motion to withdraw plea and vacate judgment, thereby failing to perfect a direct appeal on Ms. Lighthart's behalf. (C. 236-240)

On August 24, 2018, private counsel filed an amended petition for post-conviction relief, which raised, *inter alia*, the following issues: (1) trial counsel was

ineffective for failing to adequately present evidence of domestic violence in mitigation at sentencing; (2) trial counsel was ineffective for advising Ms. Lighthart to turn down the State's offer of 27 years' imprisonment; and (3) trial counsel was ineffective for failing to file a timely motion to withdraw plea and vacate judgment, which led to Ms. Lighthart being barred from perfecting a direct appeal. (C. 296-336)

On January 3, 2020, new private counsel filed a supplemental petition for post-conviction relief, incorporating the previous post-conviction petitions and raising the following claims: (1) trial counsel was ineffective for failing to interview and investigate available witnesses whose testimony could have supported a compulsion defense, thereby rendering Ms. Lighthart's plea involuntary; and (2) trial counsel was ineffective for failing to file the proper post-plea motion, which deprived Ms. Lighthart of the right to appeal. (C. 340-363)

On December 7, 2020, the State filed a motion to dismiss. (C. 384-395) In its motion, the State argued that Ms. Lighthart's petition for post-conviction relief was untimely because it was not filed within 6 months from the date for filing a *certiorari* petition: "The deadline for filing a certiorari petition would have been 35 days from the date of final judgment. The date of final judgment in this matter appears to be September 19, 2006. 35 days from that would be October 23, 2006. That would make the deadline for filing a Petition April 23, 2007. The defendant did not file a Post-Conviction Petition by that deadline." (C. 387)

On January 28, 2021, Ms. Lighthart filed a response to the State's motion to dismiss (C. 410-423), in which she contended, *inter alia*, that the three-year limitations period applied because she could not file a direct appeal due to her trial counsel's

ineffectiveness in failing to file the proper post-plea motion and that because she filed her post-conviction petition within three years of the date of conviction, her petition was timely. (C. 412-413)

On the day before the hearing scheduled on the State's motion to dismiss, the trial judge communicated to the parties and requested that they be prepared to discuss the case of *People v. Byrd*, 2018 IL App (4th) 160526, at the hearing. (R. 722; C. 428)

On February 22, 2021, a lengthy hearing was held on the State's motion to dismiss. (R. 720-803) With respect to timeliness, Ms. Lighthart argued, *inter alia*, that the State forfeited the timeliness argument articulated in *Byrd* by failing to specify it in its motion, that the Third District's decision in *People v. Ross*, 352 Ill. App. 3d 617 (3d Dist. 2004), constituted a correct statement of the law, that *Ross* and *Byrd* were in direct conflict, that *Byrd* was wrongly decided, and that, in any event, the petition was timely because it was filed in accord with *Ross*, which was the only case authority on the issue at the time. (R. 725-750) During the hearing, the trial judge agreed with Ms. Lighthart that the State should have confessed error on her post-conviction claim that her trial counsel was ineffective for failing to file the proper post-plea motion. (R. 790-791)

On March 3, 2021, per the trial court's request (R. 802), Ms. Lighthart filed a Memorandum of Law on Conflicting Appellate Decisions on Timeliness. (C. 427-432)

On March 17, 2021, the trial court issued a written order granting the State's motion to dismiss and dismissing Ms. Lighthart's post-conviction petition on the ground that it was untimely. (C. 434-436) In particular, the court ruled that the State did not forfeit the argument as to *Byrd*, that there was no conflict between *Ross* and *Byrd*, that

Byrd controlled, and that there was no evidence that Ms. Lighthart relied upon *Ross* when she filed her initial petition. (C. 435-436)

On April 15, 2021, Ms. Lighthart filed a timely Notice of Appeal. (C. 438)

On March 15, 2022, after previously hearing oral argument, the Second District issued its opinion in *People v. Lighthart*, 2022 IL App (2d) 210197, in which it affirmed the trial court's ruling and held that "[w]e agree with *Byrd*'s conclusion that the relevant filing for purposes of filing a direct appeal under section 122-1(c) is the filing of a notice of appeal." (A. 18)

On September 28, 2022, this Court granted Ms. Lighthart's petition for leave to appeal. (A. 2)

ARGUMENT

The Trial Court Erred in Granting the State's Motion to Dismiss Ms. Lighthart's Petition for Post-Conviction Relief on Timeliness Grounds Where Ms. Lighthart, Who Could Not Perfect a Direct Appeal Because of Her Trial Counsel's Ineffectiveness in Filing the Wrong Post-Plea Motion, Filed Her Petition in a Timely Manner Within Three Years of the Date of Conviction.

Introduction

This case presents an issue of first impression before this Court, viz., where a defendant enters into a negotiated plea but the proper post-plea motion to withdraw guilty plea and vacate judgment is not filed in a timely manner (in this case, due to ineffective assistance of counsel) – thereby, as a matter of law, precluding the defendant from perfecting a direct appeal – must a post-conviction petition be filed, pursuant to 725 ILCS 5/122-1(c), within 3 years from the date of conviction or within 6 months from the date for filing a *certioriari* petition?

Herein, after entering into a negotiated plea (R. 463-478), Ms. Lighthart was sentenced to 35 years' imprisonment on August 13, 2004. (C. 138) Due to her public defender's ineffectiveness in filing the wrong post-plea motion (C. 139), Ms. Lighthart was not able to perfect a direct appeal. (C. 194-199) On August 10, 2007, Ms. Lighthart filed a *pro se* post-conviction petition (C. 207-210), which was filed within 3 years of the date of her conviction pursuant to 725 ILCS 5/122-1(c) (West 2007). At the time Ms. Lighthart filed her post-conviction petition, there was only one appellate decision addressing this issue, i.e., *People v. Ross*, 352 Ill. App. 3d 617 (3d Dist. 2004), which held that where a defendant who pled guilty pursuant to a negotiated plea is unable to perfect a direct appeal because of the lack of a timely filed post-plea motion to withdraw plea and vacate judgment, which precludes a direct appeal on the merits, "the six-month

limitation period was not triggered, and defendant had three years from the date of his conviction to file a timely petition for postconviction relief." *Id.* at 620.

Despite this, and after almost 14 years of litigation on Ms. Lighthart's post-conviction petition, including a previous reversal by the Second District to remand the case for further post-conviction proceedings on account of trial counsel's arguable ineffectiveness for failing to file the correct post-plea motion (C. 231-240), the trial court, relying on a 2018 decision from the Fourth District, *People v. Byrd*, 2018 IL App (4th) 160526, still dismissed Ms. Lighthart's petition on the grounds of timeliness. (C. 434-436) In affirming the trial court, the Second District, without offering any meaningful additional analysis, followed *Byrd* in lockstep. (A. 18)

Ms. Lighthart contends that her post-conviction petition was timely filed within 3 years of the date of her conviction, as she was not able to perfect a direct appeal on the merits due to her trial counsel's ineffectiveness. Moreover, Ms. Lighthart argues that *People v. Byrd*, 2018 IL App (4th) 160526, as well as the Second District's opinion under review herein, was wrongly decided, as it relied upon Illinois Supreme Court Rule 606(a), which, when read in conjunction with subsection (b), actually includes an explicit textual exemption to appeals in negotiated guilty plea cases arising under Illinois Supreme Court Rule 604(d). Furthermore, by focusing exclusively on the mere ministerial act of filing the notice of appeal itself, both *Byrd* and *Lighthart* ignored entirely – and made no reference to – the critical Committee Comments to Rule 604(d), which instruct that "before a defendant *may file a notice of appeal* from a judgment entered on his plea of guilty, he must move in the trial court to vacate the judgment and withdraw his plea." ILL. SUP. CT. R. 604(d), Committee Comments (Revised July 1,

1975) (emphasis added). Finally, because Ms. Lighthart's petition was filed in accord with the holding of *Ross*, which was the only appellate holding on the timeliness issue at the time, Ms. Lighthart cannot, according to this Court's precedent, be penalized for adhering to such decisional law.

Accordingly, because the trial court erred in granting the State's motion to dismiss on timeliness grounds, this Court should reverse the trial court's judgment, as well as the Second District's affirmance, and remand the case for further proceedings on the merits of Ms. Lighthart's post-conviction petition.

Standard of Review

Where, as here, the issue is one of statutory construction, the Court's review is *de novo*. *In re M.M.*, 2016 IL 119932 ¶ 15; *People v. Campa*, 217 Ill. 2d 243, 252 (2005), *overruled, in part, on other grounds by People v Clark*, 119 IL 122891.

The fundamental rule of statutory interpretation is to give effect to the intent of the legislature. *People v. Smith*, 236 Ill. 2d 162, 166-67 (2010). The best indicator of legislative intent is the language of the statute itself, which must be given its plain and ordinary meaning. *Id.* at 167; *Campa*, 217 Ill. 2d at 252. If the language in the statute is clear and unambiguous it must be applied as written without resorting to extrinsic aids of construction. *People v. Dabbs*, 239 Ill. 2d 277, 287 (2010). A statute is to be viewed as a whole. *In re M.M.*, 2016 IL 119932 ¶ 16. Therefore, words and phrases must be construed in light of other relevant statutory provisions and not in isolation. *Id.* Each word, clause, and sentence of a statute must be given a reasonable meaning, if possible, and should not be rendered superfluous. *Id.* Also, the court may consider the reason for

the law, the problems sought to be remedied, the purposes to be achieved, and the consequences of construing the statute one way or the other. *Id.*

Statutes and Rules

725 ILCS 5/122-1(c) (West 2007) provides, in pertinent part:

> When a defendant has a sentence other than death, no proceedings under this Article shall be commenced more than 6 months after the conclusion of proceedings in the United States Supreme Court, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence. If a petition for certiorari is not filed, no proceedings under this Article shall be commenced more than 6 months from the date for filing a certiorari petition, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence. *If a defendant does not file a direct appeal, the post-conviction petition shall be filed no later than 3 years from the date of conviction,* unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence.

725 ILCS 5/122-1(c) (West 2007) (emphasis added).

In addition, Illinois Supreme Court Rule 604(d) provides, in pertinent part:

> *No appeal shall be taken upon a negotiated plea of guilty challenging the sentence as excessive unless the defendant, within 30 days of the imposition of sentence, files a motion to withdraw the plea of guilty and vacate the judgment.* For purposes of this rule, a negotiated plea of guilty is one in which the prosecution has bound itself to recommend a specific sentence, or a specific range of sentence, or where the prosecution has made concessions relating to the sentence to be imposed and not merely to the charge or charges then pending.

ILL. SUP. CT. R. 604(d) (West 2007) (emphasis added).

Moreover, the Committee Comments to Rule 604(d) explain that "Paragraph (d) . . . provides that *before a defendant may file a notice of appeal* from a judgment entered on his plea of guilty, he must move in the trial court to vacate the judgment and withdraw his plea." ILL. SUP. CT. R. 604(d), Committee Comments (Revised July 1, 1975) (emphasis added).

Caselaw

In *People v. Ross*, 352 Ill. App. 3d 617 (3d Dist. 2004), the Third District addressed the question of which limitations period in 725 ILCS 5/122-1(c) was applicable to the defendant's post-conviction petition: three years after the date of conviction, as contended by the defendant, or six months after the due date for the petition for leave to appeal, as asserted by the State. *Id.* at 619.

In *Ross*, the defendant pled guilty to first degree murder pursuant to a negotiated plea in which the State agreed to recommend a 60-year sentencing cap. *Id.* at 617-18. On January 6, 1997, the defendant was sentenced to 60 years' imprisonment. *Id.* at 618. Neither the defendant nor counsel filed a timely post-plea motion. *Id.* Instead, on April 4, 1997, the defendant filed a *pro se* "Petition to Withdraw Guilty Plea and Vacate Sentence," which was denied by the trial court. *Id.* After defendant filed a notice of appeal, appointed appellate counsel's motion to dismiss the appeal based on the defendant's failure to comply with Rule 604(d) was granted. *Id.*

On November 19, 1999, the defendant filed a *pro se* post-conviction petition. *Id.* The State filed a motion to dismiss alleging that the petition was untimely. *Id.* at 619. After the trial court ruled that the post-conviction petition was untimely and dismissed it on that basis, the defendant timely appealed. *Id.*

On appeal, the appellate court was asked to construe 725 ILCS 5/122-1(c), which, at the time, provided:

> No proceedings under this article shall be commenced more than 6 months after the denial of a petition for leave to appeal or the date for filing such a petition if none is filed . . . or three years from the date of conviction, whichever is sooner, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence.

725 ILCS 5/122-1(c) (West 2002).

The Third District stated that "[a] defendant who takes no direct appeal from his conviction has three years to file a timely post-conviction petition." *Id.* The court further ruled that "[t]he six-month limitation period applies only after an appeal from the judgment of conviction is taken and the appellate court renders judgment." *Id.* The reviewing panel also pointed out that where the defendant's conviction was entered upon a plea of guilty, "no appeal shall be taken" without complying with the post-plea requirements of Rule 604(d). *Id.* The court then remarked that "[a] notice of appeal filed in the trial court without complying with the rule vests the appellate court with authority to consider only the trial court's jurisdiction – not the merits of the cause" and that, in such a case, the appellate court's only recourse is to dismiss the appeal. *Id.* at 619-20. The Third District then held that "[f]or post-conviction purposes, a direct appeal dismissed for failure to file a timely postplea motion pursuant to Rule 604(d) is tantamount to no appeal at all." *Id.* at 620.

With respect to the defendant's case, the appellate court noted that the defense's non-compliance with Rule 604(d) precluded appellate review of the defendant's conviction and sentence; "[t]herefore, for purposes of the Act, no direct appeal was taken." *Id.* Thus, "[t]he Act's six-month limitation period was not triggered, and defendant had three years from the date of his conviction to file a timely petition for post-conviction relief." *Id.* Accordingly, the Third District concluded that because the defendant's *pro se* petition of November 19, 1999, was filed within three years of the defendant's January 6, 1997, conviction, the petition was not barred by the three-year limitation period. *Id.*

On the other hand, in *People v. Byrd*, 2018 IL App (4th) 160526, the Fourth District addressed the identical question of whether the six-month or three-year limitations period of section 122-1(c) applied; however, in so doing, the court attempted to answer the question of what constitutes the "filing" of a direct appeal.

In *Byrd*, on January 7, 2011, the defendant pled guilty pursuant to a fully negotiated plea to an agreed sentence of 34 years' imprisonment. *Id.* ¶ 7. On April 5, 2011, the defendant submitted a letter, which the trial court construed as a *pro se* motion to withdraw his plea. *Id.* ¶¶ 13, 15. The trial court then struck the motion as being untimely. *Id.* ¶ 15.

On May 11, 2011, the defendant mailed a "Late Notice of Appeal." *Id.* ¶ 17. The appellate court granted defendant leave to file his notice of appeal and appointed the Office of the State Appellate Defender (OSAD) on appeal. *Id.* OSAD moved to dismiss the appeal, *inter alia*, on the ground that the defendant failed to comply with Rule 604(d), which the appellate court ultimately granted on October 26, 2011. *Id.* ¶¶ 19-25.

On December 5, 2012, the defendant mailed a *pro se* post-conviction petition, which, after being advanced to the second stage and being amended, was dismissed by the trial court as being untimely after a hearing on the State's motion to dismiss. *Id.* ¶¶ 39-40.

For the first time on appeal, the defendant asserted that "his postconviction petition was filed within three years from the date of his conviction and his postconviction counsel provided unreasonable assistance for failing to argue so before the trial court." *Id.* ¶ 46. In contrast, the State argued that the three-year limitations period did not apply because the defendant "file[d] a direct appeal," specifically contending that

the filing of a notice of appeal itself constitutes the filing of a direct appeal and, therefore, the defendant's failure to comply with Rule 604(d) does not negate the fact that a direct appeal was filed. *Id.* ¶ 47.

The Fourth District concluded that, pursuant to the language of section 122-1(c), "it is the act of filing a direct appeal that precludes the three-year limitations period from applying. Contrary to defendant's argument, the three-year limitations period is not conditioned on the 'pursuit' of an appeal or the manner in which it is resolved." *Id.* ¶ 49.

In so holding, the panel addressed the question of what constitutes the "filing" of a direct appeal. The reviewing court relied heavily upon Illinois Supreme Court Rule 606(a), which provides that "[a]ppeals shall be perfected by filing a notice of appeal." *Id.* ¶ 52 (quoting ILL. SUP. CT. R. 606(a)). The Fourth District opined that "[i]f the filing of a notice of appeal commences a direct appeal, it follows the filing of a notice of appeal constitutes the 'filing [of] a direct appeal' for purposes of section 122-1(c), thereby precluding the three-year limitations period from applying." *Id.* The court also cited to a passage from *People v. Johnson*, 2017 IL 120310, ¶ 23, as being persuasive, although it noted that "the issue of what constitutes the filing of a direct appeal was not directly before the court . . . ." *Id.*

In addition, the *Byrd* panel distinguished *Ross* on the ground that the statutory language of section 122-1(c) was amended to include the phrase, "[i]f the defendant does not *file* a direct appeal." *Id.* ¶ 50 (emphasis in original).

Thus, the appellate court concluded that because defendant elected to seek appellate review by filing a *pro se* late notice of appeal, "the filing of that notice of appeal commenced his direct appeal [under the six-month limitations period] and

precluded the three-year limitations period from applying." *Id.* ¶ 52. Accordingly, the court found that "the post-conviction petition defendant placed in the institutional mail on December 5, 2012, was clearly beyond the six-month limitations period," which occurred 35 days after the grant of OSAD's initial motion to dismiss the first appeal on October 26, 2011. *Id.* ¶ 55.

In the instant case, the Second District adopted *Byrd's* reasoning *in toto*, stating that "[w]e agree with *Byrd*'s conclusion that the relevant filing for purposes of filing a direct appeal under section 122-1(c) is the filing of a notice of appeal." *Lighthart*, 2022 IL App (2d) 210197, ¶ 44. (A. 18) The Second District further remarked that "*Byrd* astutely recognized that our supreme court [in *Johnson*], in reading section 122-1(c), has used 'notice of appeal' interchangeably with 'direct appeal.'" *Id.* ¶ 45. (A. 18) Next, the Second District rejected Ms. Lighthart's argument based upon legislative history because "the pertinent language in section 122-1(c) is unambiguous . . . ." *Id.* ¶ 47. (A. 20) The Second District also rejected Ms. Lighthart's contention that her petition should be deemed timely because *Ross* was the only precedent available at the time of the filing of her petition and supported her submission within 3 years of the date of conviction. *Id.* ¶ 48. (A. 20-21)

In sum, relying on the reasoning of *Byrd*, the Second District held that, "for purposes of section 122-1(c), defendant's filing of her notice of appeal on February 21, 2006, constituted the filing of a direct appeal," and, "[a]s such, defendant did not have three years from the date of the judgment of conviction to file a postconviction petition, but instead she had six months from the date she had to file a petition for leave to appeal [*sic*] [this should have read "to file a *certioriari* petition]." *Id.* ¶¶ 43, 49. (A. 17, 21)

Trial Court's Ruling

After a lengthy argument in the trial court on the timeliness issue, in which Ms. Lighthart argued that *Ross* should control and that *Byrd* was wrongly decided because of its misplaced reliance on Illinois Supreme Court Rule 606(a) (R. 725-753), the trial court issued an order ruling that Ms. Lighthart's post-conviction petition was untimely and granting the State's motion to dismiss.

In pertinent part, the trial court's holding is as follows:

> The defendant urges the Court to follow the reasoning in *Ross* arguing that it served as the law at the time she filed her Post-Conviction Petition. The problem with this reasoning is twofold: (1) *Ross*, which was decided in September 2004 was based upon the language of 122-1 as it existed prior to the amendment in August 2004 and *Byrd* was decided based upon the language of the statute as amended, and (2) this argument if valid would have been recognized by the court in *Byrd*.
>
> The Court disagrees with the Defendant's assertion that there are conflicting decisions amongst the Appellate Circuits. Of the two opinions only *Byrd* addresses the issue in the context of the statutory language as it now exists, as it existed in August 2004 when Defendant was sentenced, as it existed in September 2006 when her appeal was dismissed and as it existed in August 2007 when she filed her Post-Conviction Petition. Absent a 2nd District decision or Supreme Court opinion to the contrary the reasoning by the appellate court in *Byrd* is binding upon this Court and dispositive of the issue now before it.

(C. 435)

The trial court then concluded:

> This Court finds that the Post-Conviction Petition filed by Defendant on August 10 2007 was filed outside of the statutory limitations period. Further that despite counsel's current argument, there is no reason to believe that the petition as filed was done in reliance on the *Ross* decision. The Petition, the Amended Petition, and the Supplemental Petition as filed do not mention *Ross* nor acknowledge or attempt to factually justify the late filing.

(C. 436)

Application to Ms. Lighthart's Case

As noted above, the Second District followed the reasoning of *Byrd in toto*: "We agree with *Byrd*'s conclusion that the relevant filing for purposes of filing a direct appeal under section 122-1(c) is the filing of a notice of appeal." *Lighthart*, 2022 IL App (2d) 210197, ¶ 44. (A. 18) The Third District in *Ross*, however, properly interpreted section 122-1(c) in light of Illinois Supreme Court Rule 604(d)'s explicit language, i.e., "No appeal shall be taken upon a negotiated plea of guilty . . .," which categorically prohibits the filing of a direct appeal unless the proper post-plea motion is first timely filed. Although *Byrd* and *Lighthart* equated the mere act of filing of a notice appeal with the filing of a direct appeal for purposes of section 122-1(c), both courts ignored entirely the critical Committee Comments for Rule 604(d), which provide that "*before a defendant may file a notice of appeal* from a judgment entered on his plea of guilty, he must move in the trial court to vacate the judgment and withdraw his plea." ILL. SUP. CT. R. 604(d), Committee Comments (Revised July 1, 1975) (emphasis added). Thus, even if the filing of a notice of appeal were the operative event in commencing a direct appeal in most criminal cases, it clearly is not the operative event in the case of defendant who enters a negotiated guilty plea, as such a defendant may not even file a notice of appeal unless she first files a timely post-plea motion to withdraw her guilty plea and vacate the judgment. *Id.*

As outlined below, the trial court's ruling dismissing Ms. Lighthart's petition on timeliness grounds was in error on at least six separate grounds: (1) *Ross*, which is in direct conflict with *Byrd*, is well reasoned and is consistent with the plain language of both section 122-1(c) and Illinois Supreme Court Rule 604(d); (2) *Byrd* was wrongly

decided; (3) *Byrd's* reliance on this Court's previous decision in *People v. Johnson*, 2017 IL 120310, was misplaced because *Johnson* neither addressed the question of what constitutes the filing of a direct appeal nor did it involve a negotiated guilty plea; (4) the Committee Comments to Illinois Supreme Court Rule 604(d) are persuasive authority that the holding of *Byrd* is demonstrably erroneous in the context of a negotiated guilty plea case; (5) *Ross* is not distinguishable based on the *de minimus* clarifying amendment to the language of section 122-1(c); and (6) Ms. Lighthart cannot be penalized for alleged untimeliness for following the caselaw in effect at the time of the filing of her post-conviction petition.

First of all, the reasoning in *Ross* is sound, logical, and straightforward, viz., where a defendant is unable to perfect an appeal under Rule 604(d) because a timely motion to withdraw guilty plea and vacate judgment is not filed – which automatically results in the appeal being mandatorily dismissed on jurisdictional grounds – the defendant does not have a direct appeal, as the underlying claims are never adjudicated on the merits. *See Ross*, 352 Ill. App. 3d at 619-620. Thus, the three-year limitations period applies. *Id.* at 620.

In this regard, the holding in *Ross* encapsulates and enforces the plain language of Rule 604(d), which, in mandatory language, provides that "*No appeal shall be taken upon a negotiated plea of guilty* challenging the sentence as excessive unless the defendant, within 30 days of the imposition of sentence, files a motion to withdraw the plea of guilty and vacate the judgment." ILL. SUP. CT. R. 604(d) (emphasis added). Because Rule 604(d) specifically states that "no appeal shall be taken" on a negotiated plea unless a timely motion is filed, *Ross* is correct in concluding that no direct appeal is filed where a

post-plea motion to withdraw guilty plea and vacate judgment is not timely submitted. In short, a direct appeal cannot be considered to have been filed for purposes of the Post-Conviction Hearing Act in a situation where Rule 604(d) explicitly prohibits a direct appeal from being taken.

Secondly, *Byrd* was wrongly decided, and the sources it cited in no way support its conclusions. For example, in determining what constitutes the filing of a direct appeal, which is the gravamen of *Byrd's* holding, the Fourth District relied almost exclusively upon the language of Illinois Supreme Court Rule 606(a), which provides that "[a]ppeals shall be perfected by filing a notice of appeal." *Id.* ¶ 52 (quoting ILL. SUP. CT. R. 606(a)). Based on this language, the Fourth District concluded that "[i]f the filing of a notice of appeal commences a direct appeal, it follows the filing of a notice of appeal constitutes the 'filing [of] a direct appeal' for purposes of section 122-1(c), thereby precluding the three-year limitations period from applying." *Id.*

Byrd's reliance on Rule 606(a), however, is fatal in the present context. This is because the plain language of Rule 606(b) states: "*Except as provided in Rule 604(d)*, the notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment . . . ." ILL. SUP. CT. R. 606(b) (West 2020). Statutes, of course, must be viewed as a whole. *In re M.M.*, 2016 IL 119932 ¶ 16. Therefore, Rule 606(a) must be read in conjunction with Rule 606(b).

This means that, in context, Rule 606(a) actually reads: Except as provided in Rule 604(d), "[a]ppeals shall be perfected by filing a notice of appeal." ILL. SUP. CT. R. 606(a). Thus, in cases arising under Rule 604(d), an appeal is not perfected by filing a notice of appeal; rather, an appeal cannot be perfected without first timely filing a motion

to withdraw guilty plea and vacate judgment in the trial court. This is made explicit in Rule 604(d), which must be read *in pari materia* with Rule 606, to wit: "No appeal shall be taken upon a negotiated plea of guilty challenging the sentence as excessive unless the defendant, within 30 days of the imposition of sentence, files a motion to withdraw the plea of guilty and vacate the judgment." ILL. SUP. CT. R. 604(d).

This interpretation is consistent with cases construing Rule 604(d). For example, in *People v. Schmidt*, 59 Ill. App. 3d 762 (5th Dist. 1978), the Fifth District held that "[a] defendant does not have the option to substitute a notice of appeal for the required motion in the trial court to vacate his guilty plea." *Id.* at 764. Similarly, in *People v. Belton*, 184 Ill. App. 3d 1001 (1st Dist. 1989), the First District described the failure to file a motion to withdraw guilty plea and vacate judgment as "a jurisdictional defect" that prevents a reviewing court from even entertaining an appeal. *Id.* at 1006.

Thus, rather than supporting the proposition that the act of filing a notice of appeal constitutes the filing of a direct appeal, Rule 606(a), read as a whole with Rule 606(b) and Rule 604(d), actually thoroughly undermines the principal holding of *Byrd* in the context of a negotiated guilty plea case.

Thirdly, the *Byrd* court also cited to a brief passage from *People v. Johnson*, 2017 IL 120310, ¶ 23, which it said it found persuasive, but it admitted that "the issue of what constitutes the filing of a direct appeal was not directly before the court . . . ." *See Byrd*, 2018 IL App (4th) 160526, ¶ 52. Yet, *Johnson* did not involve a negotiated guilty plea at all and had absolutely nothing to do with the issue at hand; instead, it addressed the distinct question of the applicable limitations period where no petition for leave to appeal was filed. *See Johnson*, 2017 IL 120310, ¶ 17. Instead, *Byrd* plucked one innocent

phrase of unintentional *dicta* from the entire opinion, viz., "when no notice of appeal is filed," and then used it to create a brand-new legal construct for negotiated guilty plea cases. *See Byrd*, 2018 IL App (4th) 160526, ¶ 52.

Fourth, although *Byrd* – and, by extension, *Lighthart* – relied exclusively on the act of filing a notice of appeal to define the filing of a direct appeal under section 122-1(c), neither court made any reference to the outcome-determinative language contained in the Committee Comments to Illinois Supreme Court Rule 604(d). In particular, the Committee Comments to Rule 604(d) instruct that "Paragraph (d) . . . provides that *before a defendant may file a notice of appeal* from a judgment entered on his plea of guilty, he must move in the trial court to vacate the judgment and withdraw his plea." ILL. SUP. CT. R. 604(d), Committee Comments (Revised July 1, 1975) (emphasis added). Thus, the Committee Comments clarify that, in the context of a negotiated guilty plea, a defendant may not even "file a notice of appeal" unless she first files a timely motion to withdraw the guilty plea and vacate the judgment. This is thoroughly consistent with the plain language of Illinois Supreme Court Rule 604(d), which, in mandatory text, declares that *"[n]o appeal shall be taken* upon a negotiated plea of guilty challenging the sentence as excessive unless the defendant, within 30 days of the imposition of sentence, files a motion to withdraw the plea of guilty and vacate the judgment." ILL. SUP. CT. R. 604(d) (emphasis added). The above language from the Committee Comments utterly eviscerates *Byrd's* holding that the mere act of filing a notice of appeal constitutes the filing of a direct appeal in a situation, such as Ms. Lighthart's, where the defendant entered into a negotiated guilty plea.

Although Committee Comments are not binding authority, they are persuasive and may be adopted by the Court. *See People v. Ross*, 168 Ill. 2d 347, 352 (1995) ("When a statute is ambiguous, it is appropriate to look to other sources to ascertain legislative intent. [Citation] One such source is the committee comments to the statute, which, although not binding upon this court, are persuasive authority."); *Cascade Builders Corp. v. Rugar*, 2021 IL App (1st) 192410, ¶ 14; *Allstate Ins. Co. v. Avelares*, 295 Ill. App. 3d 950, 955 (1st Dist. 1998).

Thus, if the Court determines that there is any ambiguity in the language of either section 122-1(c), Illinois Supreme Court Rules 606(a) and (b), or Illinois Supreme Court Rule 604(d) – all which must be construed *in pari materia* in the instant case, then the Court should adopt the Committee Comments to Rule 604(d), which "support the defendant's position and undermine that of the State." *Ross*, 168 Ill. 2d at 552. *See Allstate Ins. Co.*, 295 Ill. App. 3d at 955 ("While the comments of the Supreme Court Rules Committee are not binding, we do take note of the comments, and, in instances where, in our view, the Committee comments have merit, we are inclined to adopt them. In our view, the committee comments to the Illinois Supreme Court rules applicable to this appeal have merit and should receive deference in this case. Accordingly, we adopt them.")

Fifth, contrary to *Byrd*, *Ross* is not distinguishable based on the *de minimus* clarifying amendment to the text of section 122-1(c). As detailed below, both the pre-August 2004 language (construed in *Ross*) and post-August 2004 language (construed in *Byrd*) of section 122-1(c) contain a six-month limitations period and a three-year

limitations period. None of this changed as a result of the 2004 amendment. *See* Public Act 93-972, § 10 (eff. Aug. 20, 2004).

In particular, the earlier version (analyzed in *Ross*), provides, in pertinent part:

> No proceedings under this article shall be commenced more than 6 months after the denial of a petition for leave to appeal or the date for filing such a petition if none is filed . . . or three years from the date of conviction, whichever is sooner, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence.

725 ILCS 5/122-1(c) (West 2002).

The amended version (applicable in the present case) provides, in pertinent part:

> When a defendant has a sentence other than death, no proceedings under this Article shall be commenced more than 6 months after the conclusion of proceedings in the United States Supreme Court, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence. If a petition for certiorari is not filed, no proceedings under this Article shall be commenced more than 6 months from the date for filing a certiorari petition, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence. If a defendant does not file a direct appeal, the post-conviction petition shall be filed no later than 3 years from the date of conviction, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence.

725 ILCS 5/122-1(c) (West 2007).

Significantly, in *People v. Johnson*, 2017 IL 120310, this Court, in construing the pre- and post-2004 versions of section 122-1(c), declared that "the legislative debates prior to the latest statutory amendment indicated that the amendment did not change the time frame for filing a postconviction petition; it only clarified the time frame." *Id.* ¶ 22. Specifically, the legislature removed the "petition for leave to appeal" language and added the "petition for *certiorari*" language. *Id.* ¶ 23.

In addition, with respect to the three-year limitations period, the legislature included clarifying language that "[i]f a defendant does not file a direct appeal, the post-

conviction petition shall be filed no later than 3 years from the date of conviction . . . ." 725 ILCS 5/122-1(c) (West 2007).

Yet, in *Byrd*, the Fourth District, in a single sentence and without any legal or legislative analysis whatsoever, pronounced that the aforementioned language indicating that the three-year limitations period applies only "[i]f a defendant does not file a direct appeal" renders "*Ross* distinguishable." *Byrd*, 2018 IL App (4th) 160526. ¶ 50. Such a conclusion, however, is directly contradicted by the legislative history.

Rather, the debates on the 2004 amendment to section 122-1(c), which were entirely ignored by the panel in *Byrd*, unequivocally indicate that there was no substantive change between the three-year limitations period as construed by *Ross* under the previous language of section 122-1(c) and the subsequent amendatory language. In fact, the new language was solely for purposes of clarification:

> Turner: "What happens is, once a verdict has been issued the person can either file a direct appeal or he can..."
>
> Davis, M.: "But who is… who is… the 3-year deadline is for him to appeal to whom or what organization or what authority?"
>
> Turner: "It's… it's the period of time that he has to file the petition. So, he has 3 years to file to ask for a post-conviction hearing on that particular case, to go back into his case. . . ."
>
> Davis, M.: "Currently, what's the time frame?"
>
> Turner: "Currently, it's 3 years."
>
> Davis, M.: "It's… it's 3 years now?"
>
> Turner: "Right. It's 3 years currently."

Davis, M.: "So, we're… we're…"

Turner: "It doesn't change that… it doesn't expand that length of time. But it's when the three years start."

Davis, M.: "We're not lengthening it and we're not shortening it, is that correct?"

Turner: "No. We're just clarifying it, that's correct."

93d ILL. GEN. ASSEM., HOUSE PROCEEDINGS, May 27, 2004, at 21-22.

Finally, the trial court, as well as the Second District, erred in concluding that Ms. Lighthart's post-conviction petition was untimely where it was filed in accordance with the caselaw in effect at the time. *See Lighthart*, 2022 IL App (2d) 210197, ¶ 48. (A. 20-21)

In *Central City Educ. Ass'n v. Illinois Educ. Labor Relations Board,* 199 Ill. App. 3d 559 (1st Dist. 1990), *aff'd,* 149 Ill. 2d 496 (1992), the appellate court explicitly rejected a timeliness challenge to a petition for review as being demonstrably "unfair" in that it "would penalize a litigant for complying with the accepted practice and caselaw in effect at the time it filed its petition for review." *Id.* at 563. Because the petition for review was filed in accordance with current caselaw, the court held that it was timely and addressed the merits. *Id.* Significantly, this specific ruling was affirmed by this Court on review. *See Central City*, 149 Ill. 2d at 533 (holding that "we cannot penalize the petitioner for untimely filing of his petition when the law governing the applicable appeal period was not settled").

Ms. Lighthart's petition for post-conviction relief was filed in a timely fashion pursuant *Ross* – the only appellate decision addressing this issue at the time of her

submission – and thus in express compliance with the "caselaw in effect at the time." *Central City*, 199 Ill. App. 3d at 563. Accordingly, the trial court should not have dismissed her petition on timeliness grounds.

Lastly, the trial court remarked in its ruling that "[t]he Petition, the Amended Petition, and the Supplemental Petition as filed do not mention *Ross* nor acknowledge or attempt to factually justify the late filing." (C. 436) Timeliness, however, is an affirmative defense that can be waived or forfeited by the opposing party. *People v. Boclair*, 202 Ill. 2d 89, 101 (2002). Therefore, Ms. Lighthart would have had no reason to raise *Ross* until the State made a decision to file a motion to dismiss and to raise a timeliness argument on this specific ground.

CONCLUSION

For the foregoing reasons, Jessica Lighthart, Petitioner-Appellant, respectfully requests that this Court reverse the trial court's judgment granting the State's motion to dismiss on timeliness grounds, as well as the appellate court's affirmance, and remand the case for further proceedings on the merits of Ms. Lighthart's post-conviction petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 26 pages.

/s/ Steven W. Becker
Steven W. Becker
Attorney for Jessica R. Lighthart

APPENDIX

INDEX TO APPENDIX

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September 28, 2022

In re: People State of Illinois, Appellee, v. Jessica R. Lighthart, Appellant. Appeal, Appellate Court, Second District. 128398

The Supreme Court today ALLOWED the Petition for Leave to Appeal in the above entitled cause. We call your attention to Supreme Court Rule 315(h) concerning certain notices which must be filed with the Clerk's office.

With respect to oral argument, a case is made ready upon the filing of the appellant's reply brief or, if cross-relief is requested, upon the filing of the appellee's cross-reply brief. Any motion to reschedule oral argument shall be filed within five days after the case has been set for oral argument. Motions to reschedule oral argument are not favored and will be allowed only in compelling circumstances. The Supreme Court hears arguments beginning the second Monday in September, November, January, March, and May. Please see Supreme Court Rule 352 regarding oral argument.

Very truly yours,

Cynthia A. Grant

Clerk of the Supreme Court

2022 IL App (2d) 210197
No. 2-21-0197
Opinion filed March 15, 2022

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 02-CF-3683
JESSICA R. LIGHTHART,	)	Honorable Robert Randall Wilt,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE BRIDGES delivered the judgment of the court, with opinion.
Justices Hutchinson and Zenoff concurred in the judgment and opinion.

OPINION

¶ 1 Defendant, Jessica R. Lighthart, appeals the trial court's dismissal of her postconviction petition as untimely at the second stage of postconviction proceedings. Defendant entered a negotiated guilty plea for first-degree murder, and, after her sentencing, she moved to withdraw her plea and vacate her sentence. At issue in this appeal is whether defendant's filing of a notice of appeal from the trial court's denial of her motion to withdraw her plea and vacate her sentence constituted the filing of a direct appeal for purposes of section 122-1(c) of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1(c) (West 2006)). Because we determine that defendant did file a direct appeal for purposes of section 122-1(c), the relevant filing period for her postconviction petition was six months from the date she had to file a petition for leave to appeal.

She filed her petition beyond the six-month period, and therefore we affirm the dismissal of her postconviction petition as untimely.

¶ 2 I. BACKGROUND

¶ 3 On January 10, 2003, defendant was charged in a 15-count indictment with first-degree murder, among other offenses. On June 15, 2004, defendant pled guilty to count I, which alleged that she and a codefendant committed first-degree murder in that they, while attempting to commit the forcible felony of armed robbery, fatally shot a man. As part of her plea deal, the other 14 counts were dismissed. Her plea deal did not specify her sentence beyond setting a cap of 35 years. Per trial counsel, defendant was entering the plea deal to avoid the possibility that she be found guilty at trial and sentenced to natural life. The trial court asked defendant if she understood that, after she pled guilty, she could be sentenced to a term from 20 to 35 years' imprisonment, and she responded yes. She also said that she understood that she would not be allowed to withdraw her plea of guilty simply because she did not like the sentence imposed. On August 13, 2004, she was sentenced to 35 years.

¶ 4 Through trial counsel, defendant moved to reconsider her sentence, and the motion was heard and denied on October 1, 2004. On October 14, 2004, defendant moved *pro se* to withdraw her plea and vacate her sentence, asserting that she received inadequate representation by counsel. Through appointed counsel, defendant filed on February 14, 2006, an amended motion to withdraw her guilty plea and vacate her sentence. That same day, the trial court heard and denied her amended motion.

¶ 5 On February 21, 2006, defendant, through appointed counsel, filed a notice of appeal from the denial of her motion to withdraw her guilty plea and vacate her sentence. We dismissed her appeal on September 19, 2006, finding that we lacked jurisdiction because the notice of appeal

was untimely. *People v. Lighthart*, No. 2-06-0201 (2006) (unpublished order under Illinois Supreme Court Rule 23). We explained that the only appealable order was the August 13, 2004, judgment of conviction, entered following her sentencing, and the only timely motion filed against that judgment was her August 17, 2004, motion to reconsider her sentence. *Id.* at 4. The time to appeal began to run on October 1, 2004, when the trial court denied her motion to reconsider her sentence, and defendant's October 14, 2004, motion to withdraw her guilty plea and vacate the judgment was not timely and did not extend the time available to appeal. *Id.*

¶ 6 Defendant filed a *pro se* postconviction petition on August 10, 2007. On the form petition, she circled that she appealed her conviction to the Illinois Appellate Court and separately circled that she did not petition to the Illinois Supreme Court. Her claim for relief was that her trial counsel was ineffective in failing to advise her that she could appeal her guilty plea, resulting in her untimely direct appeal. She also claimed ineffective assistance in advising her to take an open plea and not a guaranteed plea of 27 years, in failing to go through records and discovery with her, and in failing to pursue records of a codefendant's abuse against her.

¶ 7 On October 3, 2007, the trial court summarily dismissed defendant's petition at the first stage of postconviction proceedings as frivolous and patently without merit. Defendant appealed, and we reversed. *People v. Lighthart*, No. 2-07-1079 (2009) (unpublished order under Illinois Supreme Court Rule 23). The issue on appeal was whether defendant's postconviction petition stated the gist of a constitutional claim that her trial counsel was ineffective in failing to perfect her direct appeal. *Id.* at 6. We explained that, by filing a postjudgment motion, trial counsel exhibited awareness of defendant's interest in challenging the judgment and that therefore counsel was required to move to withdraw the plea and, upon denial of that motion, file a notice of appeal. *Id.* at 9. We remanded for further proceedings under the Act. *Id.* at 10.

¶ 8 Defendant, through appointed counsel, filed an amended petition for postconviction relief on August 24, 2018. Therein, she raised three grounds under which she was denied effective assistance of counsel: (1) trial counsel's failure to present evidence of domestic violence against defendant in mitigation at the sentencing hearing, (2) trial counsel convincing defendant to reject a plea agreement for a 27-year sentence, and (3) trial counsel's failure to discuss with defendant the possibility of filing a motion to withdraw her guilty plea and ultimate failure to timely file such a motion, causing defendant's direct appeal to be untimely.

¶ 9 Through private counsel, defendant filed a supplemental petition for postconviction relief on January 3, 2020. The supplemental petition incorporated the amended petition for postconviction relief and provided affidavits to support two arguments that trial counsel was ineffective: two affidavits supporting that trial counsel failed to interview witnesses who knew of the domestic abuse against defendant by her codefendant and one affidavit supporting that trial counsel failed to move to withdraw defendant's guilty plea.

¶ 10 The State moved on December 7, 2020, to dismiss defendant's supplemental and amended postconviction petitions. The State argued, *inter alia*, that defendant's original postconviction petition was untimely under section 122-1(c) of the Act (725 ILCS 5/122-1(c) (West 2006)), asserting that she had until April 23, 2007, which was six months from the date to file a *certiorari* petition, to file a postconviction petition.

¶ 11 Defendant responded that her original postconviction petition was timely, arguing that she did not file a direct appeal, due to trial counsel's ineffectiveness, and therefore the State's six-month filing period was inapplicable. She continued that, under section 122-1(c) of the Act, she had three years from the date of her conviction to file her petition, and thus her August 10, 2007, postconviction petition was timely.

¶ 12 The trial court heard the State's motion to dismiss on February 22, 2021, and it asked the parties to address *People v. Byrd*, 2018 IL App (4th) 160526. The State argued that the statutory six-month period applied to defendant's original postconviction petition, that it was filed several months beyond the six-month period, and that it was therefore untimely. It argued that *Byrd* was on point and supported a six-month period. Defendant argued that *People v. Ross*, 352 Ill. App. 3d 617 (2004), directly contradicted *Byrd* and that *Byrd* was wrongly decided. She contended that she did not file a direct appeal, because she was jurisdictionally barred from filing the appeal due to trial counsel's failure to move to withdraw her guilty plea and vacate the judgment.

¶ 13 Defendant also argued that the State forfeited its timeliness argument. She argued that timeliness was an affirmative defense that had to be pled with specificity and that the State's timeliness argument in its motion to dismiss was "very generic" and did not incorporate the *Byrd* case. She further argued that the State's motion failed to reference the three-year period applicable when a defendant does not file a direct appeal. Defendant later clarified that she was not arguing that the State forfeited its entire timeliness argument; she was arguing that it forfeited only the argument based on *Byrd* that the filing of a notice of appeal constituted the filing of a direct appeal.

¶ 14 The trial court was "totally confused" by defendant's claim that the State forfeited its argument, given that the State could not raise a timeliness argument before the second stage of postconviction proceedings. The State had argued that the six-month period applied, which put her on notice as to what the State thought the applicable timeframe was under the governing statute. At the end of the hearing, the trial court asked the parties to address whether it was bound by *Byrd* or *Ross*. In response, defendant filed a "Memorandum of Law on Conflicting Appellate Decisions on Timeliness," arguing that the trial court should follow the *Ross* decision.

¶ 15 On March 17, 2021, the trial court dismissed defendant's postconviction petition. In its order, the trial court rejected defendant's argument that the State forfeited its timeliness argument. Further, it rejected her argument that she did not file a direct appeal. It found *Byrd* to be on point, explaining that *Byrd*, unlike *Ross*, interpreted the relevant statutory language as it existed when defendant's direct appeal was dismissed and when she filed her original postconviction petition. Accordingly, it found that defendant's August 10, 2007, postconviction petition was filed outside the applicable statutory period, and it granted the State's motion to dismiss.

¶ 16 Defendant timely appealed.

¶ 17 II. ANALYSIS

¶ 18 At issue in this appeal is whether the trial court erred in granting the State's motion to dismiss defendant's postconviction petition. Defendant advances two arguments: (1) the trial court erred in dismissing her postconviction petition on timeliness grounds, because she had three years from the date of her conviction to file her petition, and (2) the trial court improperly acted as an advocate in raising the timeliness issue when the State had forfeited such argument. We address defendant's latter argument first.

¶ 19 A. Forfeiture and the Trial Court's Role

¶ 20 Defendant argues that the State was required to raise its timeliness affirmative defense to her postconviction petition with specificity and that it failed to do so, thus forfeiting that argument. She contends that the State did not reference *Byrd* in its motion to dismiss her postconviction petition nor did it address whether she filed a direct appeal on the merits, which was relevant to whether the Act's three-year filing period applied. Therefore, she concludes, the trial court was acting as an advocate for the State when it *sua sponte* asked the parties to address *Byrd*. She argues that, "[u]nlike Europe, ours is an adversarial system" and it was up to the parties, not the judge, to

frame claims and raise issues. She asserts that, when a judicial officer exceeds his or her role by assuming the role of the prosecutor or advocate, as she concludes occurred here, we should reverse and remand for a hearing before a different judge.

¶ 21 The State responds that the trial court properly considered *Byrd* and did not act as an advocate for the State. The State directs us to its December 7, 2020, motion to dismiss defendant's supplemental and amended postconviction petitions, in which it raised the issue that defendant's petition was untimely. It argues that it provided the deadline for defendant to file her postconviction petition based on the specific facts in this case, including the entry of judgment and the time to file a *certiorari* petition. The State further argues that, in defendant's response to its motion to dismiss, she argued that she had three years from the date of her conviction to file her postconviction petition, because she did not file a direct appeal. It continues that the trial court invited both parties to provide input on the applicability of *Ross* and *Byrd* and the court held a lengthy hearing before determining that the three-year filing period under section 122-1(c) of the Act did not apply to defendant's postconviction petition.

¶ 22 We reject defendant's arguments that the State forfeited its timeliness argument and that the trial court acted as an advocate for the State in considering the timeliness of her postconviction petition. Here, the State raised the timeliness issue in its motion to dismiss at the second stage of postconviction proceedings. It specifically argued that the six-month period provided by section 122-1(c) applied to defendant's petition. Section 122-1(c) provided, in relevant part:

> "*If a petition for certiorari is not filed, no proceedings under this Article shall be commenced more than 6 months from the date for filing a certiorari petition*, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence. *If a defendant does not file a direct appeal, the post-conviction petition shall be filed no*

later than 3 years from the date of conviction, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence." (Emphases added.) 725 ILCS 5/122-1(c) (West 2006).

¶ 23 Although defendant is correct that the State's motion did not explicitly address whether the three-year period under section 122-1(c) of the Act applied, we note that the two time periods at issue are found in consecutive sentences under the same subsection of the Act and that the State's argument that one period applied reasonably implied that the other did not. What is more, defendant herself argued in her response that the three-year filing period applied. Thus, even if we were to accept defendant's argument that the State failed to develop sufficiently the timeliness issue in its motion to dismiss, defendant invited the trial court's consideration of the three-year filing period. See *People v. Harvey*, 211 Ill. 2d 368, 385 (2004) ("[U]nder the doctrine of invited error, an accused may not request to proceed in one manner and then later contend on appeal that the course of action was in error." (Internal quotation marks omitted.)).

¶ 24 Having determined that the timeliness issue, including whether the three-year filing period applied, was raised by the parties ahead of the hearing, we have absolutely no basis to say that the trial court was acting as an advocate for the State in asking the parties to address *Byrd*. Far from transgressing its role as a judge and acting as an advocate, the trial court researched case law applicable to the question the parties put before it. It found *Byrd*, and it asked the parties to address *Byrd* at the hearing on the State's motion to dismiss. Following the hearing, it invited the parties to brief it on whether to follow *Byrd* or *Ross*, and defendant filed a memorandum of law in response. We note that, in *Byrd*, the court addressed the same question on which the State's timeliness argument hinged: whether the defendant filed a direct appeal for purposes of section

122-1(c), thus precluding the statute's three-year filing period. *Byrd*, 2018 IL App (4th) 160526, ¶ 47. As such, the trial court's request that the parties address *Byrd* was both proper and prudent.

¶ 25 B. Timeliness of the Postconviction Petition

¶ 26 We now turn to the merits of defendant's argument that her postconviction petition was timely. Defendant argues that the timeliness issue is one of first impression before the Second District. She frames the issue as whether a defendant has three years to file a postconviction petition under section 122-1(c) of the Act when she has entered a negotiated guilty plea but failed to perfect a direct appeal due to ineffective assistance of counsel in failing to move timely to withdraw a guilty plea and vacate judgment. She contends that the three-year period applied to her postconviction petition.

¶ 27 Defendant asserts five reasons why the trial court erred in determining that section 122-1(c)'s three-year period did not apply to her petition: (1) *Ross* and *Byrd* are in direct conflict, and *Ross* was well reasoned; (2) *Byrd* was wrongly decided; (3) *Ross* was not distinguishable based on the amended language of section 122-1(c); (4) the trial court was not bound by *Byrd*; and (5) defendant cannot be penalized for following *Ross*, because it was the case law in effect at the time she filed her postconviction petition.

¶ 28 First, defendant characterizes *Byrd* and *Ross* as considering the same legal question but reaching "diametrically opposed" conclusions. She argues that *Ross* was in harmony with not only the plain language of section 122-1(c) but also Illinois Supreme Court Rule 604(d) (eff. Aug. 1, 1992), which provided that "*[n]o appeal shall be taken upon a negotiated plea of guilty* challenging the sentence as excessive unless the defendant, within 30 days of the imposition of sentence, files a motion to withdraw the plea of guilty and vacate the judgment." (Emphasis added.) She stresses that the language of Rule 604(d) providing that "no appeal shall be taken" demonstrates that *Ross*

was correct to conclude that no direct appeal is filed when counsel fails to timely move to withdraw the plea of guilty and vacate the judgment.

¶ 29 Second, defendant argues that *Byrd* was wrongly decided, emphasizing the case's "fatal" reliance on the language of Illinois Supreme Court Rule 606(a) (eff. Mar. 20, 2009). She contends that Rule 606(a) had to be read in conjunction with Rule 606(b), which begins: "Except as provided in Rule 604(d), ***." Ill. S. Ct. R. 606(b) (eff. Mar. 20, 2009). She argues that Rule 606(b) directly limits Rule 606(a), asserting that Rule 606(a) should be read as: "Except as provided for in Rule 604(d), appeals shall be perfected by filing a notice of appeal."

¶ 30 Third, defendant contends that, while *Ross* interpreted an earlier version of section 122-1(c), both the pre- and post-amended version provided a three-year filing period as one of the possible periods to file a postconviction petition. Defendant also directs us to legislative hearings in which a representative states that the three-year period was not being lengthened or shortened and that the revisions were only clarifying the three-year deadline.

¶ 31 Fourth, defendant argues that the trial court was not bound to follow *Byrd*. She contends that there was no supreme court or Second District opinion on point and therefore, because *Byrd* and *Ross* were in conflict, the trial court should have exercised its discretion to decide which to follow.

¶ 32 Fifth and last, defendant argues that *Ross* was the only relevant authority at the time she filed her postconviction petition, that *Ross* supported that her petition was timely, and that therefore the trial court should not have dismissed her petition on timeliness grounds.

¶ 33 The State responds that defendant's argument is without merit because she filed a direct appeal. It argues that, under the plain language of section 122-1(c), the three-year period applies

when a petitioner *does not file* a direct appeal; it is not contingent on whether an appeal is heard on the merits. It contends that *Byrd* is directly on point.

¶ 34 We review *de novo* the dismissal of a postconviction petition at the second stage. *People v. Johnson*, 2017 IL 120310, ¶ 14. Here, defendant's argument boils down to an issue of statutory construction, which we also review *de novo*. *Williams v. Bruscato*, 2019 IL App (2d) 170779, ¶ 17. The primary goal of statutory construction is to ascertain and give effect to the intent of the legislature, and the most reliable indicator of the legislature's intent is the language of the statute itself, given its plain and ordinary meaning. *Id.* ¶ 18. We construe a statute as a whole, so that no part is rendered meaningless or superfluous. *People v. Diggins*, 235 Ill. 2d 48, 54 (2009). Where the language of the statute is clear and unambiguous, we will apply the statute as written, without resort to aids of statutory construction. *Id.* at 54-55. Only where the statute is ambiguous may we rely on extrinsic aids such as legislative history. *Barrall v. Board of Trustees of John A. Logan Community College*, 2019 IL App (5th) 180284, ¶ 10. The language of a statute is ambiguous if it is susceptible to more than one reasonable interpretation. *People v. Boyce*, 2015 IL 117108, ¶ 22.

¶ 35 Defendant was not sentenced to death, and therefore section 122-1(c) provided three possible time periods to file a postconviction petition, absent showing that delay was not due to culpable negligence: (1) six months from the conclusion of proceedings in the United States Supreme Court; (2) if she did not file a petition for leave to appeal or a petition for *certiorari*, six

months from the date for filing that petition;[1] and (3) if she did not "file a direct appeal," three years from the date of her conviction. 725 ILCS 5/122-1(c) (West 2006). The first period is not at issue here, and defendant and the State disagree on whether the second or third period applies.

¶ 36 Simply put, we must interpret whether defendant filed a direct appeal for purposes of section 122-1(c). If she did file a direct appeal, then she had six months from October 23, 2006,[2] to file a postconviction petition. If she did not file a direct appeal, then she had three years from August 13, 2004, the date of the judgment of conviction, to file a petition. To answer this question, we begin with a discussion of the two cases on which defendant predicates her argument: *Byrd* and *Ross*.

¶ 37 In *Ross*, the appellate court addressed whether the defendant had three years or six months to file his postconviction petition under section 122-1(c) (725 ILCS 5/122-1(c) (West 2002)). *Ross*, 352 Ill. App. 3d at 619. The defendant had pled guilty to felony murder and was sentenced to 60 years' imprisonment, which was the sentencing cap the State had agreed to recommend. *Ross*, 352 Ill. App. 3d at 617-18. Neither the defendant nor his counsel filed a timely postplea motion. The defendant did file a *pro se* petition to withdraw his guilty plea and vacate his sentence, but the trial court denied it as untimely and for lack of subject matter jurisdiction. *Id.* at 618. The defendant

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[1] Although the language of the statute explicitly mentions only a petition for *certiorari* and not a petition for leave to appeal, our supreme court has explained that the six-month period for filing a postconviction petition begins at the date to have filed a petition for *certiorari* or a petition for leave to appeal. *Johnson*, 2017 IL 120310, ¶ 24.

[2] Following the September 19, 2006, dismissal of defendant's direct appeal, she had 35 days to petition for leave to appeal to the Illinois Supreme Court. See Ill. S. Ct. R. 315(b) (eff. Aug. 15, 2006).

directly appealed the denial, and his appointed appellate counsel moved to dismiss the appeal based on his failure to comply with Rule 604(d). *Id.* The appellate court granted the motion and dismissed the appeal. *Id.* Thereafter, the defendant filed a *pro se* postconviction petition alleging, *inter alia*, ineffective assistance of trial and appellate counsel. *Id.* Ultimately, the trial court dismissed the petition as untimely. *Id.* at 619.

¶ 38 On appeal, the defendant argued that, because he failed to perfect a direct appeal, he had three years from the date of his sentencing, not six months after the due date for his petition for leave to appeal, to timely file a postconviction petition. *Id.* The court began its analysis by providing the applicable version of section 122-1(c):

> " 'No proceedings under this Article shall be commenced more than 6 months after the denial of a petition for leave to appeal or the date for filing such a petition if none is filed *** or 3 years from the date of conviction, whichever is sooner, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence.' " *Id.* (quoting 725 ILCS 5/122-1(c) (West 2002)).

The court continued that, when a defendant fails to comply with the postplea requirements of Rule 604(d), "[a] notice of appeal filed in the trial court *** vests the appellate court with authority to consider only the trial court's jurisdiction—not the merits of the cause." *Id.* (citing *People v. Flowers*, 208 Ill. 2d 291 (2003)). It reasoned that, for postconviction purposes, a direct appeal dismissed for failure to comply with Rule 604(d) was "tantamount to no appeal at all." *Id.* at 620. Applying this reasoning, the court concluded that the defendant's noncompliance with Rule 604(d) precluded appellate review and that, for purposes of the Act, no direct appeal was taken. *Id.* As no appeal was taken, "[t]he Act's six-month limitation period was not triggered, and defendant had three years from the date of his conviction to file a timely petition for postconviction relief." *Id.*

¶ 39 In *Byrd*, the appellate court directly examined the question of what the phrase "file a direct appeal" meant under section 122-1(c). *Byrd*, 2018 IL App (4th) 160526 ¶¶ 48-53. There, the defendant pled guilty to five counts of armed robbery and one count of attempted armed robbery and agreed to serve 34 years' imprisonment in exchange for the dismissal of other cases pending against him. *Id.* ¶ 7. The defendant filed an untimely *pro se* motion to withdraw his guilty plea. *Id.* ¶ 15. The defendant then filed a *pro se* notice of appeal, which was ultimately dismissed upon motion by the Office of the State Appellate Defender. *Id.* ¶¶ 17, 25. Thereafter, the defendant filed a postconviction petition alleging ineffective assistance of counsel, and his petition advanced to the second stage. *Id.* ¶¶ 27, 29. The State moved to dismiss his petition, arguing in part that the petition was untimely. *Id.* ¶ 31. Following a hearing, the trial court dismissed the petition on several grounds, including that the petition was untimely. *Id.* ¶ 40.

¶ 40 On appeal from the dismissal of the defendant's postconviction petition, he argued that his petition was timely because he " 'could not pursue a direct appeal,' due to his failure to comply with Illinois Supreme Court Rule 604(d) (eff. Sept. 1, 2006)" and therefore, under section 122-1(c) of the Act, he should have been allowed three years from the time of his conviction to file his petition. *Id.* ¶ 46. He argued that, under the reasoning of *Ross*, no direct appeal was taken in his case. *Id.*

¶ 41 In interpreting section 122-1(c), the *Byrd* court found the language to be clear and unambiguous, and it determined that the three-year filing period was conditioned on the "act of filing a direct appeal," not the " 'pursuit' of an appeal or the manner in which it is resolved." *Id.* ¶ 49. It found *Ross* distinguishable, explaining that *Ross* interpreted an earlier version of section 122-1(c), which did not contain the limiting language "[i]f a defendant does not file a direct appeal." (Emphasis and internal quotation marks omitted.) *Id.* ¶ 50.

¶ 42 As to what constituted the filing of a direct appeal, the court found persuasive the supreme court's comments in *Johnson*, 2017 IL 120310. *Byrd*, 2018 IL App (4th) 160526, ¶ 52. In interpreting whether section 122-1(c) imposed a time limit when no petition for leave to appeal was filed, the *Johnson* court stated that "[t]he statute even provides a three-year deadline for filing a petition *when no notice of appeal is filed*. We see no reason for the legislature to provide a deadline when no notice of appeal has been filed but not to include one when no petition for leave to appeal has been filed." (Emphasis added.) *Johnson*, 2017 IL 120310, ¶ 23. The *Byrd* court explicitly found the supreme court's reference to the filing of the notice of appeal persuasive. *Byrd*, 2018 IL App (4th) 160526, ¶ 52. It bolstered its analysis by citing Illinois Supreme Court Rule 606(a) (eff. Mar. 20, 2009), which provided that appeals are perfected by the filing of the notice of appeal, and it reasoned that, if the filing of a notice of appeal commences a direct appeal under Rule 606(a), it followed that the filing of a notice of appeal constituted the filing of a direct appeal for purposes of section 122-1(c). *Byrd*, 2018 IL App (4th) 160526, ¶ 52. Therefore, the *Byrd* court concluded, the defendant's filing of his notice of appeal commenced his direct appeal and precluded section 122-1(c)'s three-year filing period. *Id.* ¶ 53.

¶ 43 We hold that, for purposes of section 122-1(c), defendant's filing of her notice of appeal on February 21, 2006, constituted the filing of a direct appeal. The word "file" in section 122-1(c) is unambiguous. "File" is defined in relevant part as "to initiate (something, such as a legal action) through proper formal procedure" and "to return to the office of the clerk of a court *without action on the merits*." (Emphasis added.) Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/file (last visited Mar. 2, 2022) [https://perma.cc/Q9FQ-B5MR]. The plain language of section 122-1(c) required that defendant "file" a direct appeal, and to require more than the act of filing—to require a resolution of the appeal on the merits—would be to read

language into the statute that is not present. See *People v. Clark*, 2019 IL 122891, ¶ 47 (" 'No rule of statutory construction authorizes this court to declare that the legislature did not mean what the plain language of the statute imports, nor may we rewrite a statute to add provisions or limitations the legislature did not include.' " (quoting *People v. Smith*, 2016 IL 119659, ¶ 28)).

¶ 44 We agree with *Byrd*'s conclusion that the relevant filing for purposes of filing a direct appeal under section 122-1(c) is the filing of a notice of appeal. *Byrd*'s conclusion is strongly supported by Illinois Supreme Court Rule 606(a) (eff. Mar. 12, 2021), which provides that "[a]ppeals shall be perfected by filing a notice of appeal with the clerk of the trial court." Although defendant argues that Rule 606(a) must be read in conjunction with Rule 606(b), Rule 606(b) addresses the time in which a notice of appeal must be filed, not how an appeal is perfected. Rule 606(b)'s opening clause, "[e]xcept as provided in Rule 604(d)" (Ill. S. Ct. R. 606(b) (eff. Mar. 12, 2021)), modifies the first sentence of Rule 606(b), and defendant's argument that it also modifies the first sentence in Rule 606(a) is unpersuasive.

¶ 45 Furthermore, *Byrd* astutely recognized that our supreme court, in reading section 122-1(c), has used "notice of appeal" interchangeably with "direct appeal." See *Johnson*, 2017 IL 120310, ¶ 23 (section 122-1(c) "even provides a three-year deadline for filing a petition when no notice of appeal is filed"). In *Johnson*, the supreme court read into section 122-1(c) language that the legislature omitted by oversight, therefore providing that a postconviction petition must be filed within six months of the date for filing a petition for *certiorari* or a petition for leave to appeal. *Id.* ¶ 24. In construing the statute to avoid an absurd and unjust result, it could see no reason why the legislature would "provide a deadline when *no notice of appeal has been filed* but not include one when no petition for leave to appeal has been filed." (Emphasis added.) *Id.* ¶¶ 21, 23. The supreme

court's language equating the filing of a direct appeal with the filing of a notice of appeal strongly supported *Byrd*'s holding, and it likewise supports ours.

¶ 46 Contrary to defendant's argument, *Ross* was not well reasoned. *Ross* addressed the version of section 122-1(c) that was effective from July 1, 1997, to November 18, 2003, and that version provided in relevant part:

> "No proceedings under this Article shall be commenced more than 6 months after the denial of a petition for leave to appeal or the date for filing such a petition if none is filed *** or 3 years from the date of conviction, *whichever is sooner* ***." (Emphasis added.) 725 ILCS 5/122-1(c) (West 2002).

See Pub. Act 90-14 (eff. July 1, 1997) (amending 725 ILCS 5/122-1). At the outset, we note that *Ross* was not directly interpreting a conditional clause determining when the three-year filing period applied. The court instead arrived at the three-year period by ruling out the six-month period as a possibility. The flaw in *Ross*'s analysis was its conclusion that, because noncompliance with Rule 604(d) precluded the appellate court from reaching the merits of the defendant's direct appeal, the Act's six-month filing period was not triggered. This conclusion assumed, and in fact required, that, when the defendant's appeal was dismissed, he could not petition for leave to appeal to the Illinois Supreme Court. This simply was not true—a defendant whose appeal is dismissed, whether for noncompliance with Rule 604(d) or for lack of appellate jurisdiction, may file a petition for leave to appeal to the Illinois Supreme Court. See *People v. Bailey*, 2014 IL 115459, ¶¶ 1-4 (granting the defendant's petition for leave to appeal where the appellate court dismissed the direct appeal for lack of jurisdiction); *People v. Foster*, 171 Ill. 2d 469, 470-71 (1996) (granting the defendant's petition for leave to appeal where the appellate court dismissed the direct appeal for failure to comply with Rule 604(d)). Under the plain language of section 122-1(c) at the time, the

relevant filing period for the *Ross* defendant should have been either six months from the date he had to file a petition for leave to appeal or three years from the date of conviction, whichever was sooner. Thus, *Ross* is not persuasive, even if it were not distinguishable on the basis of interpreting an outdated version of the statute.

¶ 47 We also reject defendant's argument based on legislative history. First of all, the pertinent language in section 122-1(c) is unambiguous such that we would not look beyond its plain language, but even if we were to find the language ambiguous, the legislative history cited by defendant does not aid her position. Defendant cites the House of Representatives proceedings on this statute, where, in the context of a proposed amendment to the Capital Litigation Trust Fund, Representative Turner stated that the time to file a postconviction petition was not being changed but rather was being "clarifie[d]." 93d Ill. Gen. Assem., House Proceedings, May 27, 2004, at 21 (statements of Representative Turner). That is, the length of time to petition remained at three years, but what was changing was "when the 3 years start." *Id.* at 22. The representative's statements would not have reasonably supported that the language eventually added to section 122-1(c), "[i]f a defendant does not file a direct appeal," required more than the filing of a notice of appeal; the statements would have reasonably supported simply that the statutory filing period remained three years and that the period was now applicable when a defendant does not file a direct appeal.

¶ 48 Last, we reject defendant's argument that she cannot be penalized for relying on *Ross*. The case defendant relies upon, *Central City Education Ass'n, IEA-NEA v. Illinois Educational Labor Relations Board*, 199 Ill. App. 3d 559 (1990), is readily distinguishable. There, the petitioner argued that its appeal had been filed two months before a separate case was decided, which held that such appeals had to be filed within 30 days instead of 35 days. *Id.* at 563. The court held that

the 30-day period did not apply retroactively to the petitioner's appeal. *Id.* at 563-64. The court noted that the respondent's order had directed the petitioner to the law providing for the 35-day filing period for an appeal. *Id.* at 562. Here, defendant raises no issue of retroactivity. Rather, at the time that defendant's direct appeal was dismissed, the version of the statute that *Ross* interpreted had been amended over two years prior, and there is no indication in the record that defendant was relying on *Ross* in the first place.

¶ 49 In sum, defendant's February 21, 2006, notice of appeal constituted the filing of a direct appeal under the plain language of section 122-1(c). As such, defendant did not have three years from the date of the judgment of conviction to file a postconviction petition, but instead she had six months from the date she had to file a petition for leave to appeal. She did not file within those six months, and she does not argue that such delay was not due to her culpable negligence. Therefore, the trial court properly dismissed her petition as untimely at the second stage of postconviction proceedings.

¶ 50 III. CONCLUSION

¶ 51 For the reasons stated, we affirm the judgment of the circuit court of Winnebago County.

¶ 52 Affirmed.

No. 2-21-0197

Cite as:	*People v. Lighthart*, 2022 IL App (2d) 210197
Decision Under Review:	Appeal from the Circuit Court of Winnebago County, No. 02-CF-3683; the Hon. Robert Randall Wilt, Judge, presiding.
Attorneys for Appellant:	Steven W. Becker, of Law Office of Steven W. Becker LLC, of Chicago, for appellant.
Attorneys for Appellee:	J. Hanley, State's Attorney, of Rockford (Patrick Delfino, Edward R. Psenicka, and Stephanie Hoit Lee, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.

STATE OF ILINOIS
IN THE CIRCUIT COURT OF THE 17th JUDICIAL CIRCUIT
COUNTY OF WINNEBAGO

THE PEOPLE OF THE STATE OF ILLINOIS,)
Plaintiff)
)
) No. 02 CF 3683
v.)
)
JESSICA LIGHTHART)
Defendant)

ORDER DISMISSING POST-CONVICTION PETITION

Background:

On January 15 2004 Defendant pled guilty to a single count of 1st Degree murder. As a part of the plea the parties agreed to a sentencing cap of 35 years in the Illinois Department of Corrections. In so doing Defendant's sentencing range was reduced from 20-60 years to 20-35 years. Thereafter, on August 13 2004 defendant was sentenced to 35 years in the Department of Corrections, a sentence within the negotiated range.

Thereafter, following the filing and litigation of Motions to Reconsider Sentence and a Motion to Withdraw Guilty Plea Defendant did on February 21, 2006 filed a direct appeal. By a Rule 23 opinion the 2d District Appellate Court did on September 16 2006 dismiss the appeal citing a lack of jurisdiction. The ultimate reasoning was that due to the nature of the plea agreement the appeal was not properly perfected as the Motion to Withdraw Guilty Plea was filed too late. Citing Rule 604(d) the Appellate Court noted the Motion was to be filed no later than 30 days after the sentencing. *People v Lighthart* No. 2-06-0201 No Leave to Appeal was filed.

Approximately 11 months later, August 10 2007, Defendant filed her *pro se* Petition for Post-Conviction Relief. This Petition was dismissed at Stage 1 by the trial judge. On appeal that decision was reversed and the case remanded for Stage 2 proceedings. *People v Lighthart* No. 02-07-1079.

On August 24 2018 appointed counsel filed the Amended Petition for Post-Conviction Relief and on January 3 2020 current counsel filed the Supplemental Petition for Post-Conviction Relief.

On December 7 2020 the State filed its Motion to Dismiss Defendant's Supplemental and Amended Post-Conviction Petition. In that Motion, along with its various other arguments, the State raised the issue of the late filing of the initial Post-Conviction Petition.

Inasmuch as the Court has determined that the State is correct in its assertion that the Post-Conviction Petition as filed was untimely the other issues raised by the pleadings will not be addressed.

Analysis:

First, the Court rejects Petitioner's argument that the State has somehow forfeited this argument. The statutory limitations period imposed by 725 ILCS 5/122-(c) is an affirmative defense to be raised as a part of Stage 2 proceedings. *People v Boclair* 202 Ill2d 89, 102 (2002). Thus, the State properly raised it in their initial pleading.

There are actually two limitations periods under the statute, the fact that is key to the argument of counsel. If an appeal is filed the Post-Conviction Petition must be filed within 6 months of the date "for filing a petition for *certiorari* or a petition for leave to appeal." *People v Johnson* 2017 IL 120310 ¶ 24. If there is not direct appeal then the limitations period is 3 years from the date of conviction. As to each limitations period there is built in a possible extension if the petition "...alleges facts showing that the delay was not due to his or her culpable negligence."

In short, the State argues given that a direct appeal was filed and dismissed the Post-Conviction Petition had to be filed no later than April 23 2007. The Defendant counters that since her appeal was dismissed and never substantively addressed there was not a real appeal and the 3 year limitations period applies. She asserts, therefore, that her Petition, filed August 10 2007, was timely filed.

There are only 2 cases that the Court and counsel have discovered that are relevant to the issue of which limitations period applies, *People v Ross* 352 IllApp3d 617 (3rd Dist. 2004) and *People v Byrd,* 2018 IL App (4th) 160526. *Ross,* which was based upon the language of 725 ILCS 5/122-1 as it existed prior to August 2004 found that where an appeal is dismissed for lack of jurisdiction no real appeal has been filed and the applicable limitations period is the 3 year period. *Byrd,* decided based upon the statutory language as it existed after amendment in August 2004, dealing with the same fact pattern held that it is the act of filing a direct appeal that triggers the applicable limitations period and that where an appeal is filed but later dismissed it is the 6 month time period and not the 3 year time period that applies. In so ruling the Court in *Byrd* specifically distinguished *Ross.*

The Defendant urges the Court to follow the reasoning in *Ross* arguing that it served as the law at the time she filed her Post-Conviction Petition. The problem with this reasoning is twofold: (1) *Ross,* which was decided in September of 2004 was based upon the language of 122-1 as it existed prior to the amendment in August 2004 and *Byrd* was decided based upon the language of the statue as amended, and (2) this argument if valid would have been recognized by the Court in *Byrd.*

The Court disagrees with the Defendant's assertion that there are conflicting decisions among the Appellate Circuits. Of the two opinions only *Byrd* addresses the issue in the context of the statutory language as it now exists, as it existed in August 2004 when Defendant was sentenced, as it existed in September 2006 when her appeal was dismissed and as it existed in August 2007 when she filed her Post-Conviction Petition. Absent a 2nd District or Supreme Court opinion to the contrary the reasoning by the Appellate Court in *Byrd* is binding upon this Court and dispositive of the issue now before it.

Conclusion:

This Court finds that the Post-Conviction Petition filed by Defendant on August 10 2007 was filed outside of the statutory limitations period. Further that despite counsel's current argument, there is no reason to believe that the Petition as filed was done in reliance upon the *Ross* decision. The Petition, the Amended Petition and the Supplemental Petition as filed do not mention *Ross* nor acknowledge or attempt to factually justify the late filing.

THEREFORE IT IS ORDERED,

(1) The State's Motion to Dismiss the various forms of the Post-Conviction Petition is granted.
(2) The Clerk shall deliver a copy of this Order to counsel either via email or regular mail.
(3) The Clerk shall mail a copy of this Order to Defendant at her current place of confinement.
(4) The court date of May 7 2021 is hereby canceled.

Enter: 3/17/21

Judge Randy Wilt

TABLE OF CONTENTS OF REPORT OF PROCEEDINGS

Sentencing Hearing, August 13, 2004

Witnesses

Table of Contents

APPEAL TO THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
WINNEBAGO COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS
Plaintiff/Petitioner

Reviewing Court No: 2-21-0197
Circuit Court/Agency No: 2002CF003683
Trial Judge/Hearing Officer: RANDY WILT

v.

JESSICA LIGHTHART
Defendant/Respondent

COMMON LAW RECORD - TABLE OF CONTENTS

Page 1 of 8

Table of Contents

COMMON LAW RECORD - TABLE OF CONTENTS

Table of Contents

COMMON LAW RECORD - TABLE OF CONTENTS

Page 3 of 8

Table of Contents

COMMON LAW RECORD - TABLE OF CONTENTS

Table of Contents

COMMON LAW RECORD - TABLE OF CONTENTS

Page 5 of 8

Table of Contents

COMMON LAW RECORD - TABLE OF CONTENTS

Page 6 of 8

Table of Contents

COMMON LAW RECORD - TABLE OF CONTENTS

Page 7 of 8

Table of Contents

COMMON LAW RECORD - TABLE OF CONTENTS

No. 128398

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Appellate Court of
	) Illinois, Second Judicial District,
Respondent- Appellee,	) No. 2-21-0197
	)
vs.	) There heard on Appeal from the
	) Circuit Court of Winnebago
JESSICA R. LIGHTHART,	) County, Illinois, No. 02-CF-3683
	)
Petitioner-Appellant.	) Hon. Robert Randall Wilt,
	) Judge Presiding

NOTICE OF FILING

TO: Kwame Raoul, Illinois Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601;

Edward R. Psenicka, Deputy Director, State's Attorneys Appellate Prosecutor, 2032 Larkin Ave., Elgin, IL 60123;

Hon. J. Hanley, Winnebago County State's Attorney, 400 West State Street, 7th Floor, Rockford, IL 61101.

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. I hereby certify that a copy of the Brief and Argument and accompanying papers in the above-entitled cause were filed electronically with the Clerk of the above Court on October 31, 2022.

/s/ Steven W. Becker
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No. 128398

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Appellate Court of
	) Illinois, Second Judicial District,
Respondent- Appellee,	) No. 2-21-0197
	)
vs.	) There heard on Appeal from the
	) Circuit Court of Winnebago
JESSICA R. LIGHTHART,	) County, Illinois, No. 02-CF-3683
	)
Petitioner-Appellant.	) Hon. Robert Randall Wilt,
	) Judge Presiding

PROOF OF 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. I hereby certify that I will send 13 copies of the Brief and Argument and accompanying papers to the Clerk of the above Court upon acceptance of filing. Additionally, on October 31, 2022, the date the brief was submitted for filing with the Clerk's Office, I will serve one copy via email to the below-mentioned individuals:

Kwame Raoul, Illinois Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601 (eserve.criminalappeals@atg.state.il.us);

Edward R. Psenicka, Deputy Director, State's Attorneys Appellate Prosecutor, 2032 Larkin Ave., Elgin, IL 60123 (2nddistrict.eserve@ilsaap.org);

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