No. 123339

IN THE

SUPREME COURT OF ILLINOIS

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| PEOPLE OF THE STATE OF ILLINOIS,<br><br>Respondent-Appellant,<br><br>-vs-<br><br>JOHN MICHAEL CUSTER<br><br>Petitioner-Appellee. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Appellate Court of Illinois, No. 3-16-0202 consolidated with 3-16-0203.<br><br>There on appeal from the Circuit Court of the Tenth Judicial Circuit, Peoria County, Illinois, Nos. 10-CF-896, 12-CF-410.<br><br>Honorable Albert Purham, Judge Presiding. |

**BRIEF AND ARGUMENT FOR PETITIONER-APPELLEE**

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## POINTS AND AUTHORITIES

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**B. A *Krankel*-like procedure will avoid conflicts of interest.**

## ISSUES PRESENTED FOR REVIEW

**I. Whether a *Krankel*-like procedure should apply to situations where a post-conviction petitioner raises a *pro se* claim of unreasonable assistance of post-conviction counsel at the third stage of the proceedings.**

**II. Whether the State has forfeited review of the first two issues raised in its brief.**

## STATEMENT OF FACTS

Any facts in addition to those described in the State's brief that are necessary for an understanding of the issues presented in this appeal will be included, together with appropriate record references, in the argument portion of this brief.

## ARGUMENT

### I. A *Krankel*-like procedure should apply to situations where a post-conviction petitioner raises a *pro se* claim of unreasonable assistance of post-conviction counsel at the third stage of the proceedings.[1]

In a unanimous opinion, the appellate court held in this case that a *Krankel*-like procedure should apply to situations where a post-conviction petitioner raises a *pro se* claim of unreasonable assistance of post-conviction counsel at the third stage of proceedings. *People v. Custer*, 2018 IL App (3d) 160202, ¶ 25 (citing *People v. Krankel*, 102 Ill. 2d 181 (1984)). The appellate court reasoned that an inquiry into a petitioner's claims of unreasonable assistance of post-conviction counsel serves the same purposes as it does in the post-trial motion context. Specifically, it develops the record regarding the petitioner's claim, allows the circuit court to determine if new counsel needs to be appointed to avoid a conflict of interest, and promotes judicial economy. *Custer*, 2018 IL App (3d) 160202, ¶¶ 29–30. Because the appellate court's reasoning is sound, this Court should affirm the judgment of the appellate court.

#### A. A *Krankel*-like procedure gives effect to the right to reasonable assistance of counsel by allowing the record to be developed in situations where the petitioner would otherwise be without recourse due to an insufficient record.

A *Krankel*-like procedure is necessary to give full effect to the right to reasonable assistance of post-conviction counsel. For that reason it is actually

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[1] In its petition for leave to appeal, the State raised a single issue: whether *Krankel* applies to post-convictions proceedings. The State raises that as Issue III of its opening brief before this Court. Custer will address it as Issue I of his brief, followed by an argument in Issue II of his brief that the State's other issues are both forfeited and without merit.

more important that a *Krankel*-like procedure apply in post-conviction proceedings than it is to have the *Krankel* procedure available in post-trial proceedings.

The Post-Conviction Hearing Act (the Act) provides a remedy for incarcerated defendants whose constitutional rights have been substantially violated at the proceedings resulting in their conviction. 725 ILCS 5/122–1(a)(1) (2014); *People v. Johnson*, 2018 IL 122227, ¶ 17. The Act provides for a three-stage process to adjudicate post-conviction claims. In the first stage, the circuit court examines the claims in the post-conviction petition, without input from the State, and may dismiss the petition if it is frivolous and patently without merit. 725 ILCS 5/122–2.1(a)(2) (2014); *Johnson*, 2018 IL 122227, ¶ 14. If the petition is not dismissed at the first stage, it advances to the second stage, when an indigent petitioner is entitled to have counsel appointed. 725 ILCS 5/122–2.1(b), 122–4 (2014); *People v. Yaworski*, 2014 IL App (2d) 130327, ¶ 5. At the second stage, the State may file responsive pleadings. 725 ILCS 5/122–5 (2014); *Johnson*, 2018 IL 122227, ¶ 15. If the petition makes a substantial showing of a constitutional violation, it proceeds to the third stage, in which an evidentiary hearing is held and the court issues a ruling. 725 ILCS 5/122–6 (2014); *Johnson*, 2018 IL 122227, ¶ 15.

One of the rights protected through the Act is the constitutional right of every defendant to effective assistance of trial counsel. *People v. Domagala*, 2013 IL 113688, ¶¶ 36–37 (citing *Strickland v. Washington*, 466 U.S. 668 (1984); U.S. Const. amends. VI, XIV; Ill. Const. 1970, art. I, § 8). If the record is insufficient to raise a claim of ineffective assistance of trial counsel on direct review, the Act allows the defendant an opportunity to develop the record and raise the claim

in post-conviction proceedings. *People v. Veach*, 2017 IL 120649, ¶¶ 44, 47–48, 50 (citing *People v. Bew*, 228 Ill. 2d 122, 135 (2008)).

In the trial context, the *Krankel* procedure provides an *additional* way for a defendant to develop a record regarding his claims of ineffective assistance of trial counsel. Under that procedure, a defendant's *pro se* allegation of ineffective assistance of trial counsel triggers an inquiry into the defendant's claim. *People v. Ayres*, 2017 IL 120071, ¶ 21. During a preliminary inquiry, the court must examine the factual basis of the defendant's claim. *People v. Patrick*, 2011 IL 111666, ¶ 30; *People v. Moore*, 207 Ill. 2d 68, 77–78 (2003). When that inquiry reveals "possible neglect of the case," the court should appoint new counsel to investigate the claim and present the matter to the court. *People v. Haynes*, 331 Ill. App. 3d 482, 484–85 (3d Dist. 2002) (quoting *People v. Bull*, 185 Ill. 2d 179, 210 (1998)). A *Krankel* inquiry is intended to fully address a defendant's *pro se* claims against trial counsel and to create the necessary record for any claims that are raised on appeal. *People v. Jolly*, 2014 IL 117142, ¶ 38; *see also Ayres*, 2017 IL 120071, ¶ 21 (explaining that the failure to conduct a preliminary *Krankel* inquiry precludes appellate review on direct appeal).

It is in the interest of judicial economy that a record regarding claims of ineffective assistance of trial counsel be fully developed through a *Krankel* inquiry rather than through a post-conviction proceeding. *Ayres*, 2017 IL 120071, ¶ 13, 21. Nevertheless, if a defendant fails to take advantage of the *Krankel* procedure, the defendant still has a way to raise claims of ineffective assistance of trial counsel through the Act.

That is not the case with post-conviction petitioners. If a *Krankel*-like procedure does not apply in the post-conviction context, petitioners would have no recourse in many cases in which their right to reasonable assistance of post-conviction counsel was violated.

The Act creates a statutory right to reasonable assistance of counsel that applies to all stages of post-conviction proceedings in which a petitioner has counsel. *Johnson*, 2018 IL 122227, ¶ 16; 725 ILCS 5/122–4 (2014); *see also* Ill. S. Ct. R. 651(c). However, as the State recognizes (St. br. at 23), because the right to counsel in post-conviction proceedings is a statutory right rather than a constitutional right, and because the Act only provides a remedy for the violation of constitutional rights, a petitioner whose right to reasonable assistance of counsel was violated may not obtain relief under the Act through the filing of a successive post-conviction petition. 725 ILCS 5/122–1(a)(1), (f) (2014); *People v. Flores*, 153 Ill. 2d 264, 276–77 (1992).

Although the State correctly notes that a petitioner may raise a claim of unreasonable assistance of post-conviction counsel on appeal from the dismissal or denial of a post-conviction petition, such a claim can only be raised if the record is sufficient to support the petitioner's claim (St. br. at 23).[2] Unlike a defendant

[2] To the extent the State suggests that a post-conviction petitioner may develop the record by presenting affidavits for the first time on appeal, the State is mistaken (St. br. at 25). It is well-established that the appellate court cannot consider evidence that was not presented to the circuit court. *E.g.*, *People v. Anderson*, 375 Ill. App. 3d 121, 139 (1st Dist. 2007); *People v. Montgomery*, 327 Ill. App. 3d 180, 186 (1st Dist. 2001) (in appeal from dismissal of post-conviction petition, appellate court refused to consider affidavit that was not presented in the circuit court, citing *People v. Friesland*, 109 Ill. 2d 369, 377 (1985)). The State notes that, in the capital case of *People v. Munson*, 206 Ill. 2d 104, 138–40 (2002), this Court considered affidavits presented for the first time on appeal. While this Court possesses supervisory authority, Ill. Const. 1970, art. VI, §

in the trial context, a post-conviction petitioner cannot initiate a new collateral proceeding under the Act to develop the facts relating to a claim of unreasonable assistance. Consequently, a *Krankel*-like inquiry within the same post-conviction proceeding is the only way a post-conviction petitioner can hope to develop a record relating to his or her claims of unreasonable assistance of counsel.

There are many situations in which a petitioner's right to reasonable assistance of counsel could be violated, but where the lack of a record would prevent a petitioner from ever obtaining relief. For example, counsel could file a Rule 651(c) certificate despite having neglected to consult with the petitioner or examine the pertinent part of the record as the rule requires. Ill. S. Ct. R. 651(c). Counsel could proceed on certain claims in the petition but abandon others, and in certain cases, it may not be clear from the record if counsel abandoned claims for a legitimate reason (e.g., because the petitioner did not want to pursue the claims, an investigation revealed the claims to be frivolous) or due to neglect of the case. Counsel could fail to investigate or call a witness, or fail to investigate or introduce physical or documentary evidence, that would corroborate otherwise uncorroborated testimony supporting the petitioner's claim at a third-stage evidentiary hearing. Counsel could, due to a misunderstanding of the law, the facts, or the science with respect to a particular claim, fail to elicit essential details that would have supported or proven the petitioner's claim from either a lay or expert witness through direct

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16—which it may exercise to consider evidence not presented to the circuit court or claims not raised in a post-conviction petition—it is well-established that the appellate court does not have such authority. *People v. Jones*, 213 Ill. 2d 498, 507 (2004). Thus, in the vast majority of cases that are decided by the appellate court without review from this Court, post-conviction petitioners cannot develop the record by presenting new evidence for the first time on appeal.

examination or cross-examination at a third-stage evidentiary hearing. Counsel could fail to investigate or introduce evidence impeaching witnesses for the State at a third-stage evidentiary hearing. Or counsel could fail to rehabilitate a witness that was impeached by the State at a third-stage evidentiary hearing.

A *Krankel*-like inquiry into a petitioner's claims of unreasonable assistance of counsel is therefore necessary in order to effectuate the intent of the Act. As this Court explained in its very recent unanimous opinion in *Johnson*:

> The right to reasonable assistance recognized by this court necessarily follows from the nature and purpose of the Act. As has often been observed, the purpose of the Act is to provide a statutory mechanism for incarcerated defendants to assert they have been unconstitutionally deprived of their liberty. . . . Accordingly, the only way to ensure the purpose of the Act is fulfilled, *i.e.*, to ensure that criminal defendants are not deprived of liberty in violation of their constitutional rights, is to provide some means of reviewing attorney performance. Otherwise, meritorious postconviction claims may be lost. In short, the "statute cannot perform its function" (*People v. Slaughter*, 39 Ill. 2d 278, 285, 235 N.E.2d 566 (1968)) without the right to some level of attorney competence. See also, *e.g.*, *People v. Polansky*, 39 Ill. 2d 84, 87, 233 N.E.2d 374 (1968) (noting the importance of appointed counsel to furthering the "legislative purpose").

*Johnson*, 2018 IL 122227, ¶ 17.

In *Johnson*, this Court found that it would be "absurd" to say that the legislature did not intend privately retained counsel to provide a reasonable level of assistance at the first stage of post-convictions proceedings because that would mean that "a privately retained attorney could submit a wholly deficient petition, and meritorious claims could be lost." *Johnson*, 2018 IL 122227, ¶ 18. This Court made it very clear that: "[O]nce a right to reasonable assistance of counsel is recognized under the Act, there must be a means to assert it. *Johnson*, 2018 IL 122227, ¶ 22.

This Court's reasoning in *Johnson* applies with equal force to the issue before the Court in this case. Without a method to develop the record like a *Krankel* inquiry, attorneys could provide wholly deficient performance in any of the ways described above and a petitioner would have no recourse, no means of having his attorney's performance reviewed. Meritorious claims would be lost and the Act could not perform its function of ensuring that criminal defendants are not deprived of liberty in violation of their constitutional rights.

**B. A *Krankel*-like procedure will avoid conflicts of interest.**

This Court has recognized that, "[a]n attorney cannot be expected to argue his own ineffectiveness" because that creates an "inherent conflict of interest." *People v. Lawton*, 212 Ill. 2d 285, 296 (2004). In the post-trial motion context, a *Krankel* inquiry allows the trial court to determine whether new counsel needs to be appointed in order to avoid that sort of conflict of interest. *People v. Moore*, 207 Ill. 2d 68, 78–79 (2003).

A *Krankel*-like inquiry would serve that same purpose in the post-conviction context. As this Court has explained, "[t]he right to reasonable assistance of postconviction counsel includes the correlative right to conflict-free representation," so "[post-conviction] counsel must be as conflict-free as trial counsel." *People v. Hardin*, 217 Ill. 2d 289, 300 (2005). Accordingly, "[o]nce a *pro se* postconviction petition has cleared the first-stage hurdle, the Act affords the [petitioner] the right to an attorney with undivided loyalty." *People v. Yaworski*, 2014 IL App (2d) 130327, ¶ 14.

Ordinarily, if the circuit court erred in denying a post-conviction petition (or in dismissing it at the second stage) due to a misunderstanding of the applicable

law or the facts of the case, counsel for the petitioner would file a motion to reconsider arguing that the circuit court's ruling was erroneous. This Court held in its unanimous opinion in *Johnson* that a claim of unreasonable assistance of counsel may be raised in a motion to reconsider filed after a circuit court dismisses or denies a post-conviction petition. *People v. Johnson*, 2018 IL 122227, ¶ 22. However, unlike other claims, meritorious claims of unreasonable assistance of counsel could not be argued in a motion to reconsider by post-conviction counsel because of the conflict of interest inherent in counsel arguing his or her own ineffectiveness. Accordingly, a *Krankel*-like inquiry is necessary in order to determine whether new counsel should be appointed to represent a petitioner in proceedings on a motion to reconsider alleging unreasonable assistance of counsel. As in the post-trial context, new counsel need not be appointed unless the preliminary inquiry reveals possible neglect, thus limiting the appointment of new counsel to situations where the petitioner's allegations are potentially meritorious.

The State argues that conflicts of interest will be avoided by the appointment of appellate counsel to argue claims of unreasonable assistance on appeal (St. br. at 25). However, in the post-trial motion context, this Court has rejected the idea that new counsel on appeal solves the problem. *Moore*, 207 Ill. 2d at 78–79. The rationale for rejecting new counsel on appeal as a solution is even more pronounced in the post-conviction context, as violations of the right to unreasonable assistance of counsel based on matters outside the record cannot be raised either on appeal or in any later proceeding without development of the record in the circuit court. For this reason, it is particularly important that a petitioner receive conflict-free counsel in cases where a preliminary inquiry reveals possible neglect,

as a petitioner may need the assistance of counsel in order to investigate, obtain and present evidence, and make legal arguments supporting his or her claim. If a petitioner lacks conflict-free counsel do to so, that would thwart the development of a complete record in cases where a court found that possible neglect occurred. This would result in meritorious post-conviction claims being lost, thereby undermining the purpose of the Act of ensuring that criminal defendants are not deprived of liberty in violation of their constitutional rights.

**C. A *Krankel*-like procedure promotes judicial economy.**

Judicial economy is not the most important concern here. As noted above, because a *Krankel*-like procedure is necessary to develop a record regarding violations of the right to reasonable assistance of counsel for which a petitioner would otherwise have no recourse, the need for the procedure far outweighs any burdens it may impose on the courts or the State.

However, it is worth noting that, as this Court has explained, the *Krankel* procedure generally promotes judicial economy. *People v. Ayres*, 2017 IL 120071, ¶ 21. "[T]he inquiry is not burdensome upon the circuit court." *Ayres*, 2017 IL 120071, ¶ 21. And it can be conducted just after the relevant proceeding when the facts and circumstances surrounding the claim are fresh in the minds of all involved. *Ayres*, 2017 IL 120071, ¶ 21. A *Krankel*-like procedure is therefore the most efficient way to resolve claims of unreasonable assistance of counsel.

This Court has also stated that the *Krankel* procedure has the potential to limit issues on appeal. *Ayres*, 2017 IL 120071, ¶ 21; *People v. Jolly*, 2014 IL 117142, ¶ 38 (citing *People v. Patrick*, 2011 IL 111666, ¶ 41, and *People v. Jocko*, 239 Ill. 2d 87, 91 (2010)). That is true in the post-conviction context as well because,

under such a procedure, a record could be developed that would allow a circuit court to grant relief on meritorious claims. Not only would this better serve the purpose of the Act of ensuring that criminal defendants are not deprived of their liberty in violation their constitutional rights, it would render an appeal unnecessary in some cases.

However, notwithstanding this Court's pronouncement in *Ayres* and other cases, the State complains that the *Krankel* procedure is burdensome and does not limit, but actually multiplies, issues on appeal (St. br. 16–18, 24). The State notes that the *Ayres* majority stated "*Krankel* is limited to post-trial motions" (St. br. at 17, quoting *Ayres*, 2017 IL 120071, ¶ 22). According to the State, through this line in its opinion, the *Ayres* majority limited *Krankel* to post-*trial* motions so as to reduce or limit the burdens the *Krankel* procedure imposes (even though, as noted above, the *Ayres* majority clearly stated that a *Krankel* inquiry is not burdensome and it actually promotes judicial economy). The State argues that extending *Krankel* to post-conviction proceedings would "eradicate the limitation imposed by *Ayres*" (St. br. 17).

The State is incorrect that requiring a *Krankel*-like inquiry in post-conviction proceedings would be contrary to *Ayres*. That issue was not before this Court in *Ayres*. Thus, when the appellate court rendered its decision in Custer's case, it declared that the issue it was addressing was one of first impression. The court (correctly) did not consider this Court's decision in *Ayres* as having disposed of the issue already. *People v. Custer*, 2018 IL App (3d) 160202, ¶ 25.

Instead, the issue in *Ayres* was whether a defendant's bare assertion in a *pro se* post-trial motion that he received "ineffective assistance of counsel," without

any further detail or explanation, was sufficient to warrant a *Krankel* inquiry. The majority held that it was. *Ayres*, 2017 IL 120071, ¶ 21. The dissenting justices would have held otherwise, finding that the specific burdens imposed as a result of holding that a bare, conclusory allegation of ineffective assistance of counsel triggered an inquiry were not justified. Specifically, the dissenting justices noted their concern that a circuit court would have to carefully scrutinize *pro se* filings for the words "ineffective assistance of counsel," and conduct inquiries into bare, conclusory claims, which was of limited benefit because defendants with meritorious claims generally complain about specific actions that counsel took or failed to take. *Ayres*, 2017 IL 120071, ¶ 35 (Thomas, J., dissenting). Significantly, not a single justice in *Ayres* stated that the *Krankel* procedure in general was unduly burdensome. It is evident that the dissenting justices concerns were limited to specific issues created by requiring inquiries into bare, conclusory claims.

In the line that the State quotes, it is apparent that the *Ayres* majority was referencing this Court's prior decision in *Jocko* (a case cited in paragraph 13 of the majority opinion), where this Court held that a circuit court is not obligated to conduct a *Krankel* inquiry when a defendant raises premature *pre*-trial claims of ineffective assistance of counsel. *Jocko*, 239 Ill. 2d at 92–93. This is evident when the line from *Ayres* is placed in context:

> The State argues a claim of ineffective assistance in *any* communication to the court would necessitate an inquiry and, thus, a circuit court would be required to "minutely scrutinize" every *pro se* filing for such a complaint. We disagree. *Krankel* is limited to *post*trial motions.

*Ayres*, 2017 IL 120071, ¶ 22 (emphasis added to "post" in "posttrial").

The State can only reach its conclusion that the *Ayres* Court limited *Krankel* to post-*trial* motions by taking the language of *Ayres* out of context. The State ignores that the circuit court proceeding the *Ayres* Court was addressing was not even a trial. *Ayres*, 2017 IL 120071, ¶¶ 1, 3, 6. Therefore, the Court must have intended to emphasize the stage of the circuit court proceeding (i.e., pre/post) rather than the type of proceeding.

Thus, nothing stated by the majority nor the dissenting justices in *Ayres* was meant to be interpreted as taking a position on whether a *Krankel*-like procedure applies to post-conviction proceedings. And the concerns expressed by the dissenting justices about inquiries into bare, conclusory allegations do not constitute an evaluation of the costs versus the benefits of applying *Krankel* to post-convictions proceedings. Even if this Court were to conclude that the concerns expressed by the dissenting justices regarding bare, conclusory allegations supported reconsideration of the holding in *Ayres*, it would not follow that this would dictate the outcome of the starkly different cost-benefit analysis applicable to the question of whether a *Krankel*-like procedure should apply to post-conviction proceedings.

The State overstates the burdens of applying a *Krankel*-like procedure to post-conviction proceedings. The procedure is simple. Courts must conduct a preliminary inquiry, in which a defendant is allowed the opportunity to explain and support his claims, that develops a record adequate to evaluate the defendant's claims and allows the court to determine if new counsel need be appointed. *Ayres*, 2017 IL 120071, ¶ 24; *People v. Moore*, 207 Ill. 2d 68, 80 (2003); *People v. McLaurin*, 2012 IL App (1st) 102943, ¶¶ 39–41, 52–53. That generally involves brief questioning of the defendant and counsel. *Moore*, 207 Ill. 2d at 78–79. The State may not

participate in an adversarial manner during the preliminary inquiry. *Jolly*, 2014 IL 117142, ¶ 38. If the preliminary inquiry indicates possible neglect, the court must appoint new counsel to investigate the matter. *People v. Haynes*, 331 Ill. App. 3d 482, 484–85 (3d Dist. 2002). New counsel can either (1) present the claim, or (2) move to withdraw and explain why the claim is frivolous. *People v. Greer*, 212 Ill. 2d 192 (2004). Finally, once these simple rules have been followed, a record is made from which a later reviewing court can (if necessary) determine whether the circuit court's treatment of a defendant's claim was proper.

The only time that litigation is unnecessarily "multiplied" is when remands are required because the circuit court denies a defendant new counsel despite a failure to comply with the rules either by the circuit court or the State itself. Here, the State attempts to use the failure of some circuit court judges and some of its own prosecutors (as in the case where the court permits the State to argue against the merits of a defendant's claim) to comply with the *Krankel* procedure as a reason to deny post-conviction petitioners an avenue to develop the record regarding violations of unreasonable assistance of counsel for which petitioners would otherwise have no recourse. This Court should reject the State's attempt to do so.

A *Krankel*-like inquiry is the simplest and most efficient way to develop the record regarding a post-conviction petitioner's claims of unreasonable assistance of counsel. The procedure would therefore serve the interest of judicial economy.

**Conclusion**

A *Krankel*-like inquiry is necessary to develop a record concerning violations of the right to reasonable assistance of counsel that could not otherwise be redressed.

It would also avoid conflicts of interest and promote judicial economy. Accordingly, this Court should hold that a *Krankel*-like procedure applies when a petitioner raises *pro se* allegations of unreasonable assistance of counsel at the third stage of post-conviction proceedings. Since the State's newly asserted alternative issues in this appeal (Issues I and II of the State's brief) do not merit consideration (see Issue II of this brief), this Court should affirm the appellate court's judgment remanding Custer's case for a *Krankel*-like inquiry into his claims of unreasonable assistance of counsel. *People v. Custer*, 2018 IL App (3d) 160202, ¶ 31.

In the alternative, should this Court reverse the judgment of the appellate court, Custer respectfully requests that this Court remand his case to the appellate court so that it may consider the claims made by Custer on appeal that it declined to address in light of its decision to grant a remand for a *Krankel*-like inquiry. *Custer*, 2018 IL App (3d) 160202, ¶ 33 n.2 (declining to consider Custer's argument that the circuit court erred in denying his post-conviction petition).[3]

[3] Undersigned counsel notes that, in addition to the issue that the appellate court expressly declined to consider, the appellate court also declined to consider another issue Custer raised in light of its decision to remand for a *Krankel*-like inquiry: that Custer's post-conviction counsel labored under a conflict of interest when post-conviction counsel represented Custer at a hearing on a motion to reconsider that alleged that he provided unreasonable assistance.

## II. The State has forfeited review of the first two issues raised in its brief. In any event, those issues are without merit.

### A. The State has forfeited review of Issues I and II of its brief because it failed to include those issues in its petition for leave to appeal, and because it failed to raise its Issue I argument in the appellate court.

In its petition for leave to appeal, the State urged this Court to allow review for one reason, and for one reason only: to decide the question of whether *Krankel* applies to post-conviction proceedings. Yet, in Issues I and II of its brief before this Court, the State argues that this Court need not decide that question for two reasons: (1) Custer's request to remand his case for a *Krankel*-like inquiry is "moot" because he already received the relief he is requesting where the circuit court denied his motion to reconsider on the merits after a hearing that "had all the hallmarks of a *Krankel* hearing" (State's Issue I); and (2) Custer's *pro se* allegation that his post-conviction counsel provided unreasonable assistance by failing to call Michelle Colvin at the third-stage evidentiary hearing is "not a cognizable *Krankel* claim" (State's Issue II) (St. br. at 10–15). This Court should find both of these issues forfeited and, particularly because the forfeited arguments might leave the issue upon which leave to appeal was granted unresolved, it should decline to address either of them.

Supreme Court Rule 315 requires a petition for leave to appeal to state the points relied upon in requesting review, as well as any arguments in favor of reversing the appellate court's judgment. Ill. S. Ct. R. 315(c)(3), (c)(5); *People v. Anderson*, 112 Ill. 2d 39, 44 (1986). When a party violates this rule by including in its brief before this Court arguments in favor of reversing the appellate court's judgment that were not raised in its petition for leave to appeal, those arguments

are forfeited and need not be considered by this Court. *Anderson*, 112 Ill. 2d at 44. Consequently, in this case, the State has forfeited review of the arguments raised in Issues I and II of its brief because those arguments were not raised in its petition for leave to appeal. There exists an additional basis for this Court to find the State's Issue I argument forfeited: the State failed to raise that issue in the appellate court.[4] *People v. Cherry*, 2016 IL 118728, ¶ 30 ("it is well settled that arguments raised for the first time in this [C]ourt are forfeited"); *People v. Carter*, 208 Ill. 2d 309, 318 (2003) (State forfeited issue where it did not make the argument in the appellate court or include it in its petition for leave to appeal).

Custer acknowledges that this Court has discretion to reach forfeited issues because forfeiture is a limitation on the parties, not on this Court. *People v. Gawlak*, 2019 IL 123182, ¶ 26. However, here, there are strong policy reasons for this Court to decline to consider the State's forfeited arguments. It is disingenuous for the State to ask this Court to allow it leave to appeal to decide a legal question and then, once this Court allows its request, to contend—based on arguments that were not stated in its petition for leave to appeal—that this Court should not decide that very legal question. If this Court rewards the State for acting in this manner, the State, as well as other litigants, will be encouraged to do that in the future. This will result in a situation where this Court cannot rely on petitions for leave to appeal to limit the issues that a party will present to this Court. This Court will end up wasting judicial resources considering error-correction issues it could not have anticipated would have been presented to this Court, and which take

[4] The State couches its Issue I argument as a "mootness" issue. As explained below (in Issue II.B of this brief), it is not. Therefore, there is no obstacle to this Court applying forfeiture.

this Court away from its mission of providing guidance to lower courts on legal questions of importance.

The policy reasons supporting a decision by this Court to decline to consider the State's Issue I and II arguments here are similar to those involved in *People v. Robinson*, 223 Ill. 2d 165, 174–175 (2006). In that case, this Court declined to consider any of the issues raised in the defendant's brief before this Court and dismissed the defendant's appeal. This Court reasoned that the defendant failed to argue "the issue upon which we granted leave to appeal" in his brief before this Court and instead argued other issues that he raised for the first time in his brief before this Court. *Robinson*, 223 Ill. 2d at 174–175. Similar to the defendant in *Robinson*, the State's Issue I and II arguments here would prevent consideration of the issue upon which this Court granted leave to appeal. Therefore, this Court should decline to consider the State's Issue I and II arguments.

**B. The State's Issue I argument is not a true mootness issue because the State does not argue that it is "impossible" to grant Custer the relief he seeks. In any event, the State's argument is without merit where there has never been a *Krankel*-like inquiry into Custer's claims of unreasonable assistance of counsel and where Custer has never been appointed new conflict-free counsel to argue his claims of unreasonable assistance of counsel.**

In the event this Court is persuaded by the argument in Issue II.A of this brief, it would not be necessary to review the substantive responses Custer makes in this section and the next. The arguments are offered simply to refute the State's suggestion that good reasons exist for this Court not to address the issue of whether a *Krankel*-like procedure should apply to a third-stage post-conviction claim of unreasonable assistance of counsel.

The State couches its Issue I argument as a mootness issue, but it really is not one. An appeal is only moot where it is "impossible for the reviewing court to grant effectual relief to the complaining party." *In re Commitment of Hernandez*, 239 Ill. 2d 195, 201 (2010); *cf. People v. Holt*, 2014 IL 116989, ¶¶ 45, 47–48 (appeal challenging finding of unfitness was moot by the time the case reached this Court, but this Court considered the issue of first impression presented in that case under the public interest exception). Typically, this occurs when "intervening events" occurring *after* the judgment appealed from result in the complaining party no longer needing to obtain relief from the judgment it was challenging on appeal. *Hernandez*, 239 Ill. 2d at 201. For example, in *In re Commitment of Hernandez* the State attempted to appeal from a circuit court order granting the respondent, who had been adjudicated a sexually violent person, conditional release. Thus, the relief sought by the State was to vacate the conditional release order and return the respondent to the custody of the Department of Human Services (DHS). However, while the appeal was pending, the respondent's conditional release was revoked because he violated the conditions of the release plan, and the respondent was returned to DHS custody. Because the conditional release order entered by the circuit court was no longer in effect as a result of intervening events, it was impossible for the State to obtain any relief from the circuit court's order on appeal. *Hernandez*, 239 Ill. 2d at 201.

Likewise, a review of the nature of the defendant's multiple sentences in *People v. Jackson*, 231 Ill. 2d 223, 226–27 (2008) (the second case relied upon by the State in its mootness argument), shows that it would not have been possible

to award that defendant the relief he sought. The same cannot be said of the relief Custer was awarded by the appellate court in this case.

Here, one of the forms of relief that Custer sought on appeal, and that the appellate court granted, was reversal of the circuit court's denial of his motion for reconsideration of the denial of his post-conviction petition and a remand for a *Krankel*-like inquiry into his *pro se* claims of unreasonable assistance of post-conviction counsel to determine if conflict-free counsel needs to be appointed to represent Custer at a new hearing on his claims. *People v. Custer*, 2018 IL App (3d) 160202, ¶ 31. This form of relief was simply one step toward the ultimate relief he seeks of having his sentence reduced in his 10-CF-896 case and his conviction and sentence vacated in his 12-CF-410 case (410C81). Custer's convictions in both cases are still intact, and he remains imprisoned in the penitentiary serving his consecutive sentences for these cases—the State does not argue otherwise. So it cannot be argued (and is not argued) that he has already achieved the ultimate relief that he sought by filing a post-conviction petition. Thus, it is not impossible for the relief the appellate court granted Custer to be effectual.

The State's argument here simply is not a mootness argument. As such, this Court should find the issue forfeited for the reasons discussed in Part A.

In any event, although unnecessary, Custer feels compelled to note two things. First, he has never been appointed new conflict-free counsel to argue his claims of unreasonable assistance of counsel (the State does not argue otherwise). It cannot be disputed that such a result is a possibility when a "true *Krankel* inquiry" is conducted. Second, the hearing on his motion to reconsider was not a *Krankel*

inquiry and did not have "all the hallmarks" of one (St. br. at 12). Importantly, at the time of the hearing on his motion to reconsider, there was no authority requiring the circuit court to conduct a *Krankel*-like inquiry to address *pro se* claims of unreasonable assistance of counsel. It would be absurd to presume that the circuit court conducted an inquiry that it had no reason to believe was required.

And nothing in the record indicates that the circuit court conducted a *Krankel*-like inquiry. Instead, it is evident from the record that the proceeding conducted was a hearing on a motion to reconsider with no particular focus on the *pro se* claim against appointed counsel (896R255–56, copied at Appendix). That is a far cry from the functional equivalent of a *Krankel* inquiry.

At a preliminary *Krankel* inquiry, the circuit court must apply a lower legal standard—possible neglect—to determine if new counsel should be appointed. *People v. Haynes*, 331 Ill. App. 3d 482, 484–85 (3d Dist. 2002) (quoting *People v. Bull*, 185 Ill. 2d 179, 210 (1998)). Unlike a hearing on a motion to reconsider, a court should not reach the merits of the defendant's claims at a preliminary *Krankel* inquiry, since the question before the court is only whether new counsel must be appointed. *People v. Roddis*, 2018 IL App (4th) 170605, ¶ 47. Here, the circuit court held a hearing on the merits of the motion, and there is no indication that the circuit court either applied the possible neglect standard or considered appointing new counsel (896R255–56).

At a *Krankel* inquiry, the defendant is provided an opportunity to explain and support his claims. *People v. Ayres*, 2017 IL 120071, ¶ 24; *People v. Moore*, 207 Ill. 2d 68, 80 (2003); *People v. McLaurin*, 2012 IL App (1st) 102943, ¶¶ 39–41, 52–53. Here, Custer was not even present (896R255).

This Court has stated that it is usually "necessary" for the trial court to ask counsel about the facts and circumstances surrounding the alleged deficient representation. *Moore*, 207 Ill. 2d at 78. Here, the circuit court did not make any such inquiry of counsel (896R255–56).

Because Custer was not present, and because he was represented at the hearing on the motion to reconsider by the very attorney who he alleged had provided unreasonable assistance, no one was there to point out to the judge that Custer's motion alleged unreasonable assistance of counsel. Indeed, no one corrected the prosecutor's incorrect assertion that, "I would advance by way of argument in relation to the Motion to Reconsider that [Custer] didn't assert anything that wasn't already argued at the [third-stage evidentiary hearing],"[5] even though post-conviction counsel did not argue his own ineffectiveness at the third-stage evidentiary hearing (896R255).

In *Moore*, this Court stated: "The trial court conducted no inquiry of any sort into defendant's allegations of ineffective assistance of counsel. Indeed, the record does not show whether the trial court ever read defendant's *pro se* posttrial motion." *Moore*, 207 Ill. 2d at 79. That applies equally to this case.

Additionally, the appellate court in this case certainly found that no *Krankel* inquiry occurred. It even stated that counsel's advocacy of Custer's motion alleging unreasonable assistance was "the very type of conflict of interest that a *Krankel* preliminary inquiry attempts to avoid." *Custer*, 2018 IL App (3d) 160202, ¶ 30.

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[5] The prosecutor said "Second Stage," but it is evident from the prosecutor's reference to the case being "dismissed" after "Second Stage Hearings," that the prosecutor meant third stage (896R255).

What occurred here was definitely not a *Krankel* inquiry. This Court should find State's Issue I to be both forfeited and without merit.

**C. The State's Issue II argument is without merit where Custer's *pro se* claim of unreasonable assistance of counsel was sufficient to trigger a *Krankel*-like inquiry, and where the State's argument that Custer's claim did not entitle him to new counsel is premature since that determination can only be made after a *Krankel*-like inquiry is conducted. Moreover, Custer's claim has the potential to be meritorious, and an inquiry could strengthen it.**

The State argues that no *Krankel* inquiry was required because Custer's claim was "not a cognizable *Krankel* claim" because it pertained to matters of strategy (St. br. at 13). However, in *People v. Ayres*, 2017 IL 120071, ¶¶ 21, 24, this Court explained that, in order to trigger a preliminary *Krankel* inquiry, all a defendant needs to do is bring his claim as to counsel's deficient performance to the attention of the circuit court. Here, Custer certainly did so, and he provided much more detail than the defendant in *Ayres*.

The third-stage evidentiary hearing in this case took place before Judge David A. Brown on July 10, 2015 (896R172). After the hearing in July and August, Custer wrote letters to Judge Brown and filed a *pro se* motion alleging that his post-conviction counsel provided unreasonable assistance by failing to call Michelle Colvin at the evidentiary hearing (410C103, 120–26). These documents also included the allegation that post-conviction counsel failed to call his father as a witness at the evidentiary hearing, as well as more general allegations that his post-conviction counsel had "worked against" him (410C103, 120). Attached to the motion was an affidavit from Colvin dated August 10, 2015, in which she averred, among other things, that after leaving several messages for Custer's plea counsel she was able to get in touch with him about whether he was going to withdraw Custer's

plea, and plea counsel said he was "taking care of it" (410C123–24). Colvin further averred that Custer's post-conviction counsel refused to take her statement (410C123–24). Custer's post-hearing letter to Judge Brown also referenced a letter from Colvin addressed to Judge Brown—Colvin's letter, which appears in the record and was filed-stamped July 8, 2015, included essentially the same claims as Colvin's affidavit (896C102; 410C103). Also attached to Custer's motion was a letter from post-conviction counsel to Custer dated June 30, 2015, in which post-conviction counsel stated, among other things, that (1) he spoke with Colvin until she became so rude that he terminated the phone call, and (2) he did not intend to call Colvin as a witness because "the only testimony she would provide would be that she passed a note to [Custer] through [Custer's plea counsel] urging [Custer] to accept a plea" (410C125). In the order denying Custer's post-conviction petition on September 9, 2015, Judge Brown stated that he would not consider any of those documents because Custer was represented by counsel and counsel had not adopted Custer's *pro se* filings (410C127).

On October 9, 2015, Custer filed a *pro se* motion to reconsider in which he persisted in his claim that his post-conviction counsel "acted against" him by not calling Colvin at the evidentiary hearing, stated that Colvin's affidavit supported his claim, and asked the court to consider her affidavit (896C114). Judge Brown never addressed Custer's October 9 motion to reconsider, so the appellate court remanded for the circuit court to rule on it (St. br. A19).

After the case was remanded but before the April 1, 2016, hearing before Judge Albert L. Purham on the motion to reconsider, Custer wrote a letter to Judge Brown dated January 1, 2016. In that letter, Custer reiterated his prior allegations,

incorporated by reference Colvin's affidavits and post-conviction counsel's June 30 letter to Custer, and suggested that the reason post-conviction counsel refused to call Colvin at the evidentiary hearing was "due to a personal conflict with . . . Colvin" (896C129). Judge Brown responded on January 19, 2016, with a written order stating that he would not read Custer's letter because it was an improper *ex parte* communication (896C128).

Thus, Custer did everything he could to call his claims of unreasonable assistance of counsel to the attention of the circuit court. Indeed, his allegations provided much more detail and support than would be required to trigger an inquiry under *Ayres*.

The State's asserts that (1) no *Krankel* inquiry was required because Custer's claim was "not a cognizable *Krankel* claim" since it pertained to matters of strategy, and (2) any failure to conduct an inquiry was harmless error (St. br. 14). These propositions are not supported by the case law. This Court has explained that, although a circuit court may conclude that there was no possible neglect and therefore no need to appoint new counsel if it determines that the defendant's claims lack merit or pertain only to matters of strategy, a circuit court may only do so *after* conducting a preliminary *Krankel* inquiry. It is premature to reach such a conclusion prior to the inquiry, and for that reason, the failure to conduct the inquiry will not be deemed harmless. *Ayres*, 2017 IL 120071, ¶¶ 11, 19–20; *People v. Jocko*, 239 Ill. 2d 87, 91–92 (2010); *People v. Taylor*, 237 Ill. 2d 68, 75 (2010); *People v. Moore*, 207 Ill. 2d 68, 77–78, 81 (2003); *see also People v. Horman*, 2018 IL App (3d) 160423, ¶ 31; *People v. Lobdell*, 2017 IL App (3d) 150074, ¶ 38; *People v. Peacock*, 359 Ill. App. 3d 326, 340 (2d Dist. 2005).

Here, as discussed in Part B above, there was no preliminary *Krankel* inquiry. For this reason, the cases cited by the State where this Court only held that it was not error for the circuit court to decline to appoint new counsel after a preliminary inquiry are not on point. *People v. Chapman*, 194 Ill. 2d 186, 229–31 (2000); *People v. Kidd*, 175 Ill. 2d 1, 44 (1996); *People v. Ramey*, 152 Ill. 2d 41, 52 (1992); *see also People v. Skillom*, 2017 IL App (2d) 150681, ¶¶ 23–28 (where there was an "extensive" preliminary inquiry, court found the State's participation to be harmless).

The State does cite two cases in which no preliminary *Krankel* inquiry was held, but both of them are readily distinguishable from Custer's case (St. br. at 13–15). In *Taylor*, this Court held that the defendant's claims were insufficient to trigger a preliminary *Krankel* inquiry where the defendant did not mention his attorney and there was nothing to indicate that the defendant was complaining about his attorney's performance. *Taylor*, 237 Ill. 2d at 77.

In *Jocko*, this Court held that the circuit court was not obligated to conduct an inquiry into *pre*-trial claims of ineffective assistance of counsel because it is premature to do so before the outcome of the proceeding is known. *Jocko*, 239 Ill. 2d at 92–93. Though this Court stated that a defendant is not "generally" required to renew pre-trial claims once they are made known to the circuit court, the Court found that the defendant's pre-trial claim that he was not represented by counsel at his arraignment was rebutted by the record. *Jocko*, 239 Ill. 2d at 93.

Here, unlike in *Taylor* and *Jocko*, Custer made the circuit court fully aware of his claims of unreasonable assistance of counsel both before and after Judge Brown's ruling denying his post-conviction petition. Morever, Custer's claims

involved off-the-record communications, so they were not clearly rebutted by the record. *People v. Friend*, 341 Ill. App. 3d 139, 143 (2d Dist. 2003) ("Many of the alleged instances of ineffectiveness occurred outside the trial court's presence. Thus, the court could not have evaluated the defendant's claims solely on the basis of what it had observed during the proceedings."); *see also Peacock*, 359 Ill. App. 3d at 339.

Although it is premature to consider the merits of Custer's claims of unreasonable assistance of counsel at this point, Custer notes that his claims have potential merit. To the extent that the State suggests that the failure to call a particular witness can never support a claim of ineffective assistance of counsel, the State is incorrect (St. br. at 14). "[C]ertain claims that may *generally* be matters of trial strategy could still potentially support an ineffective assistance claim." *People v. Roddis*, 2018 IL App (4th) 170605, ¶ 76. A decision not to call a witness may amount to ineffective assistance if objectively unreasonable. *Peacock*, 359 Ill. App. 3d at 339–40; *People v. Bryant*, 391 Ill. App. 3d 228, 238–39 (5th Dist. 2009). For example, counsel's "tactical" decision may be deemed ineffective where counsel fails to call a witness whose testimony would support an otherwise uncorroborated defense. *E.g.*, *People v. King*, 316 Ill. App. 3d 901, 913, 915–16 (1st Dist. 2000).

Counsel's decision not to call a witness who would corroborate otherwise uncorroborated testimony is even more consequential in the post-conviction context than it is in the trial context. In the trial context, the defendant is not required to present any evidence and may rely on the presumption of innocence and an argument that the State's evidence failed to meet the high burden of proving him

or her guilty beyond a reasonable doubt. *In Re Winship*, 397 U.S. 358, 363 (1970). In the post-conviction context, it is the petitioner's burden to produce evidence that makes a substantial showing that his or her constitutional rights were violated. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008) (citing *People v. Coleman*, 206 Ill. 2d 261, 277 (2002)).

In his order denying Custer's post-conviction petition, Judge Brown noted that the resolution of Custer's claims of ineffective assistance of plea counsel depended on the credibility of "two . . . witnesses" who offered conflicting testimony: Custer and plea counsel (410C132). Judge Brown went on to find that plea counsel, and not Custer, was credible (410C133). However, if Colvin had testified consistent with her affidavit (and her letter file-stamped two days before the third-stage evidentiary hearing which made the same claims as her affidavit), her testimony would have provided corroboration for Custer's otherwise uncorroborated testimony that he had made attempts to communicate to plea counsel his desire to withdraw his plea in his 12-CF-410 case (410C123–24; 896C102; 896R185, 189–90, 201–02; see also 410C91, 95–98). Judge Brown's credibility findings on this key issue may have been different if they were based upon his assessment of the live testimony of three witnesses, and the case became a two-against-one situation.

Moreover, as the appellate court implicitly acknowledged when it declined to consider Custer's argument that the circuit court erred in denying his post-conviction petition with respect to his 10-CF-896 case, an inquiry would have the potential to strengthen Custer's claims. Although the affidavits of Custer's that post-conviction counsel attached to the amended post-conviction petition stated that some of Custer's attempts to follow up with his plea counsel about an appeal

in his 10-CF-896 case were made through Colvin, the affidavit from Colvin that Custer attached with his *pro se* allegations of unreasonable assistance of counsel was silent on that matter (410C83, 87, 123–24). The appellate court's reasoning that it was premature to consider the issue indicates a recognition that an inquiry may have developed a record to show that Colvin would have also provided corroboration of Custer's claims in his 10-CF-896 case. *People v. Custer*, 2018 IL App (3d) 160202, ¶ 33 n.2; *see Lee v. Kink*, No. 18-1005, __ F.3d __, 2019 WL 361813, at *2 (7th Cir. Jan. 25, 2019, slip opinion) (it is unreasonable to assume that witnesses will simply parrot statements made in their affidavits when questioned by attorneys).

And, notably, any corroborating testimony as to Custer's 10-CF-896 case may have been powerful. After all, it is easy to believe that Custer would have wanted plea counsel to challenge his sentence through a motion to reconsider and an appeal in that case. After entering an open plea to the Class 4 offense of simple possession of *0.3 grams* of cocaine in that case, Custer received the *maximum extended-term sentence* of 6 years in prison (896-2SR13, 18). 720 ILCS 570/402(c) (2010); 730 ILCS 5/5–4.5–45(a) (2010). His plea counsel admitted that he had advised Custer that there was a good chance that Custer would be sentenced to only 2 or 3 years because he "could not conceive" of 0.3 grams of cocaine generating a sentence of even 4 years (896R206–208, 214). His plea counsel also admitted that both he and Custer were "very surprised," "flabbergasted," and "very disappointed" when the judge imposed the 6-year sentence (896R206, 208, 214–16, 219). Because Custer received the worst possible outcome in that case, there is every reason to presume he would have wanted to challenge his sentence through

a motion to reconsider and an appeal. If Colvin testified at the evidentiary hearing consistent with what Custer averred in the affidavit that post-conviction counsel attached to Custer's June 4, 2015, amended post-conviction petition, there certainly would be a reasonable probability that the circuit court would have granted his petition as to his 10-CF-896 case.

Thus, Custer's claim of unreasonable assistance of counsel has the potential to be meritorious. It could be strengthened through a *Krankel*-like inquiry. Accordingly, this Court should reject the State's invitation to prematurely reach the merits of Custer's claim.

**Conclusion**

For these reasons, this Court should find the State's Issue I and II arguments to be forfeited. In the alternative, should this Court decide to address the issues, it should find the arguments to be without merit.

## CONCLUSION

For the foregoing reasons, the petitioner-appellee, John Michael Custer, respectfully requests that this Court affirm the appellate court's judgment reversing the circuit court's denial of his motion for reconsideration of the denial of his post-conviction petition and remanding his case for the circuit court to conduct a *Krankel*-like inquiry into his claims of unreasonable assistance of post-conviction counsel to determine if conflict-free counsel needs to be appointed to represent him at the hearing on his motion to reconsider.

In the alternative, should this Court reverse the judgment of the appellate court, Custer respectfully requests that this Court remand his case to the appellate court so that it may consider the claims made by Custer on appeal that it declined to address in light of its decision to grant remand for a *Krankel*-like inquiry.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I, Steven Varel, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) 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 31 pages.

/s/Steven Varel
STEVEN VAREL
Assistant Appellate Defender

## APPENDIX TO THE BRIEF

IN THE TENTH JUDICIAL CIRCUIT OF THE STATE OF ILLINOIS

PEORIA COUNTY, ILLINOIS



| | | |
|---|---|---|
| THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiffs, | ) | Case Nos. 10 CF 896<br>12 CF 410 |
| v. | ) | |
| JOHN CUSTER, Defendant. | ) | |

**MOTION TO RECONSIDER**

REPORT OF PROCEEDINGS of the hearing had before ASSOCIATE JUDGE ALBERT L. PURHAM, JR. on April 1, 2016.

APPEARANCES:

MR. GERALD W. BRADY, JR.
State's Attorney of Peoria County, by
MR. JEREMY BEARD
Assistant State's Attorney
for the People of the State of Illinois

MR. JOEL E. BROWN
Public Defender of Peoria County, by
MR. SAM SNYDER
Assistant Public Defender
for the Defendant

Jill L. David, CSR
CSR# 084-003351
Official Court Reporter
324 Main Street, Room 215
Peoria, IL 61602

R254

THE COURT: This is 10 CF 896 and 12 CF 410, The People v. John Custer. Matter set for review. Mr. Snyder is here on behalf of the defendant who is not present. Mr. Beard is here for the State.

What should come to the Court's attention?

MR. BEARD: Judge, this is the case that we had previously completed Second Stage Hearings on. Judge Brown had dismissed the Post-Conviction Petition. Defendant, apparently, thereafter filed a Motion to Reconsider. He basically just mailed it in. Judge Brown did not rule on that, but the defendant had also at the conclusion of the Second Stage Hearing requested the clerk to file a Notice of Appeal of the judge's decision and also the Appellate Defender's Office be appointed. Third District sent it back because that motion was still pending. They did not have jurisdiction, so we need the Court to rule on that Motion to Reconsider and then his appeal can proceed assuming the Court doesn't grant it.

THE COURT: Okay.

MR. BEARD: I would advance by way of argument in relation to the Motion to Reconsider that he didn't assert anything that wasn't already argued at the Second Stage, so I would stand on the arguments I made there; and I would also stand on the bases that Judge Brown set forth in his ruling.

Additionally, you can file a motion to reconsider under three grounds or bases. One is that there was a change in the law, one that there is newly discovered evidence, or the last being the Court misapplied the law. He doesn't allege any of those things.

THE COURT: Mr. Snyder.

MR. SNYDER: His motion speaks for itself. I would stand on what he already filed.

THE COURT: I respectfully deny his motion. Clerk to file a Notice of Appeal.

(End of proceedings.)

No. 123339

IN THE

SUPREME COURT OF ILLINOIS

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS,<br><br>Respondent-Appellant,<br><br>-vs-<br><br>JOHN MICHAEL CUSTER<br><br>Petitioner-Appellee. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Appellate Court of Illinois, No. 3-16-0202 consolidated with 3-16-0203.<br><br>There on appeal from the Circuit Court of the Tenth Judicial Circuit, Peoria County, Illinois, Nos. 10-CF-896, 12-CF-410.<br><br>Honorable Albert Purham, Judge Presiding. |

**NOTICE AND PROOF OF SERVICE**

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Mr. John Michael Custer, Register No. K58011, Joliet Treatment Center, 2848 West McDonough, Joliet, IL 60436

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On February 28, 2019, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the petitioner-appellee in an envelope deposited in a U.S. mail box in Ottawa, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Nicole Weems
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