No. 126464

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- ROBERT J. GORSS, Defendant-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 2-18-0646. There on appeal from the Circuit Court of the Eighteenth Judicial Circuit, DuPage County, Illinois, No. 16 CF 2007. Honorable Liam Brennan, Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

JAMES E. CHADD
State Appellate Defender

THOMAS A. LILIEN
Deputy Defender

AMARIS DANAK
Assistant Appellate Defender
Office of the State Appellate Defender
Second Judicial District
One Douglas Avenue, Second Floor
Elgin, IL 60120
(847) 695-8822
2nddistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLANT

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Carolyn Taft Grosboll
SUPREME COURT CLERK

ARGUMENT

Defense counsel failed to strictly comply with the requirements of Supreme Court Rule 604(d) where the certificate filed did not state that the necessary consultation took place, only that the defendant did not wish to withdraw his guilty plea.

Defense counsel filed a 604(d) certificate which failed to state that he had consulted with Mr. Gorss about any contentions of error to his guilty plea. (C. 181). Instead of complying with this requirement, counsel stated that "[t]he defendant does not desire to withdraw the guilty plea." (C. 182). This addressed only Mr. Gorss' conclusion, not whether counsel had fulfilled his requirement to consult with Mr. Gorss. Because counsel was required to certify that he had consulted with his client as to contentions of error in both the sentence and the guilty plea, Mr. Gorss' case should be remanded for new post-plea proceedings in compliance with Rule 604(d). *People v. Easton*, 2018 IL 122187, ¶ 35.

The State argues that (1) the certificate complied with Rule 604(d)'s substantive requirements (St. Br. p. 6); (2) the fact that counsel certified that Mr. Gorss did not wish to withdraw his plea necessarily meant that counsel both consulted with his client and that his client had no contentions of error as to his plea (St. Br. p. 7); and (3) counsel had no obligation to "generate" contentions of error on behalf of his client. (St. Br. p. 8).

First, the State argues that the certificate substantially complied with Rule 604(d)'s requirements and satisfied the purpose of the rule. (St. Br. p. 6). In support, the State points to counsel's language stating that the defendant "does not desire to withdraw his guilty plea," which, the State argues, can imply only that a consultation took place.

This argument is simply not convincing. It is clear that the substantive

focus of the rule is on what counsel did, not the ultimate decision by the client. The rule requires counsel to certify that he consulted with his client regarding any contentions of error. It does not require counsel to list the contentions discussed or the conclusion reached by the client after the consultation. It requires certification *that there was a consultation.* In this case, there was no such certification.

The First District appellate court noted that "the rule focuses on the attorney's duty to consult with his or her client, and that consultation has value even if it does not ultimately affect the content of the motion." *People v. Gillespie*, 2017 IL App (1st) 152351, ¶12. Correspondingly, even if the consultation does not ultimately affect a defendant's decision not to withdraw his guilty plea, the underlying goal of the rule is to ensure that a consultation and discussion of concerns took place, not to recite the resulting decision.

The certificate in this case states only that the defendant did not wish to withdraw his plea. It leaves open the possibility that the defendant may have had contentions of error that counsel never discussed with him, or any number of possibilities with regard to how he reached his decision—that it may have been made out of ignorance, or a chat with his family, or a Google search, rather than consultation.

This Court explained that when examining a certificate, a court's task is to determine whether *counsel* has satisfied the 604(d) directive for a consultation. "The certificate relates the details of counsel's consultation with the defendant. Its objective is to describe past conduct—*i.e.*, the factual circumstances of an interaction with defendant that has already taken place. …The focus is to ascertain what counsel actually did to achieve compliance with the rule." *Easton*, 2018 IL

122187, ¶ 34. There is nothing in the certificate in the case at hand that describes an interaction or discussion with the client about his guilty plea.

The State cites to *People v. Tousignant*, 2014 IL 115329, for the proposition that the words and phrases of a statute should not be considered separately, but in relation to other relevant provisions and the statute as a whole. (St. Br. p. 4-5). This basic tenet of statutory interpretation supports Appellant's argument that the focus of Rule 604(d) is on *counsel's* actions and *counsel's* certification of his actions. After all, for each element of the certification, counsel is confirming what they have done:

> (1) *I* have consulted . . .
>
> (2) *I* have examined . . .
>
> (3) *I* have made any amendments . . .
>
> Ill. S. Ct. Rule 604(d) Art. VI Forms Appendix (emphasis added).

The rule never refers to the defendant's decision or the contentions discussed. The plain language of the rule requires counsel to certify his own actions—that he has consulted with his client. Ill. S. Ct. R. 604(d).

The State correctly points out that the certificate complied with Rule 604(d)'s requirements with regard to sentencing. (St. Br. p. 7). In fact, the certificate's compliance as to sentencing highlights its inadequacy as it relates to the guilty plea. As to sentencing, the certificate states as follows:

> (1) The below-signed attorney has consulted with the defendant in person to ascertain the Defendant's claim of error in the entry of the sentence.
>
> ***
>
> (5) The Defendant does desire to reconsider the sentence. (C. 182).

The certificate's first statement addresses the fact that the attorney consulted with the defendant regarding his claim of error as to sentencing, and the second gives the conclusion the defendant reached regarding his sentence.

As to the guilty plea, the first statement regarding consultation is missing. The certificate contains only a corollary to the second paragraph stating the defendant's conclusion:

> (4) The Defendant does not desire to withdraw the guilty plea. (C. 182).

The State argues that this conclusion "necessarily" means both that counsel consulted with his client and that his client either had no contentions of error, or that he chose to forgo them. (St. Br. p. 7). However, as Justice McLaren noted in his dissent in *Peltz*, this statement actually leaves only speculation "as to what occurred between counsel's examination of the report of proceedings of the plea of guilty and defendant's stated desire not to withdraw the plea." *Peltz*, 2019 IL App (2d) 170465, at ¶ 49; see also *Tousignant*, 2014 IL 115329 at ¶ 18 (Noting that an insufficient certificate raises serious concerns about the "possibility that defendant actually had concerns about the guilty plea which were not discussed with counsel, and were omitted from the motion."). We do not know whether the defendant waived the issue or forfeited it. It certainly does not follow that because the defendant reached a decision, he had no contentions of error about the plea or that his decision must have been based on consultation with counsel. (St. Br. p. 7).

Many different inferences may be drawn from the lack of certification regarding consultation. The inference the State suggests is only one of many. For example, a different inference may be drawn solely from the discrepancy with

which counsel handled each requirement. Counsel has a duty of candor to the tribunal. Counsel included a certification of consultation as to sentencing as well as the defendant's conclusion, but remained silent as to the consultation regarding the guilty plea and only included the defendant's conclusion. Thus, the certificate could be read as a careful distinction between the two, born out the duty of candor if the guilty plea consultation never took place.

Besides the internal inconsistency with the certificate's handling of the sentencing versus the guilty plea, it should be noted that these second statements as to the defendant's conclusions are superfluous and not required by the rule or included in the form certificate. Ill. S. Ct. Rule 604(d) Art. VI Forms Appendix. The defendant's conclusions are not the reason for the rule and for purposes of the certificate they do not matter. It is the first certification—the certification that counsel has consulted with his client—that is required.

Finally, the State argues that counsel has no obligation to "generate contentions of error" on behalf of a defendant. (St. Br. p. 6-7). This argument is irrelevant. Appellant never suggested that counsel has some duty to create contentions of error. Counsel has the duty that is imposed by the rule—that he certify whether *he has consulted* with the defendant as to any contentions of error as to the guilty plea. There is clearly no requirement that the certificate either enumerate or "generate" contentions of error.

The State also makes a slippery slope argument and compares the deficiency in the certificate in this case to a hypothetical situation in which there may be an inadvertent omission of "a word or phrase" from the certificate. (St. Br. p. 13). The State argues that the Appellant suggests an "inflexible approach, whereby

certificates are deemed deficient whenever counsel does not parrot the precise language of the rule or form . . .” (St. Br. p. 13). This is not a legitimate concern. For example, in this particular case, there are several discrepancies between the suggested form and the certificate filed. None of these are substantial departures requiring correction. For example, the form certificate uses the term “contentions of error,” and the filed certificate uses the term “claims of error.” Additionally, the form certificate uses the first-person phrasing that “I have examined the trial court file,” and “I have made any amendments.” The certificate at hand reads, “The below-signed attorney has examined the guilty plea transcript and sentencing transcript and the trial court file herein.” (C. 182; Ill. S. Ct. Rule 604(d) Art. VI Forms Appendix). These are not “rote recitations” of the rule, but they substantially adopt its content. Appellant does not suggest that these departures are in any way problematic.

However, when an entire substantive requirement of the rule is omitted, the certificate is insufficient. In *Easton*, this Court stated that, “[t]he clarity of our statement that ‘counsel *is required* to certify’ that he or she has consulted with the defendant as to both types of error cannot be challenged.” *Easton*, 2018 IL 122187, at ¶ 35 (emphasis in original). Following this Court’s directive in *Tousignant*, the First District noted in *Gillespie*, that “[t]hough strict enforcement of the rule under *Tousignant* might seem ‘hypertechnical,’ we believe that the law properly requires it.” *Gillespie*, 2017 IL App (1st) 152351 at ¶ 13. In the case at hand, counsel never certified that he consulted with the defendant as to contentions of error in his guilty plea. (C. 182). This is not merely the inadvertent omission of a word of phrase, as the State suggests. (St. Br. p. 13). It is the omission

of an entire requirement of Rule 604(d).

Furthermore, the State's contention that its construction of the rule would reduce litigation contemplates only a reduction in remands for deficient 604(d) certificates. (St. Br. p. 13). This is a short-sighted approach. By virtue of enacting Rule 604(d), this Court created a specific right for defendants, and it follows that there should be a remedy with regard to that right. *Easton*, 2018 IL 122187 at ¶ 32 ("The point of the rule is to protect the defendant's interests through adequate consultation."). The remedy for a deficient certificate is a remand. If deficiencies are simply overlooked in order to reduce remands, then there would be no need to have enacted Rule 604(d) in the first place. In his dissent, Justice McLaren calls this approach "penny wise and pound foolish." *Peltz*, 2019 IL App (2d) 170465, at ¶ 54. It is clarification by this Court that will reduce deficient certificates and thus the need for the remedy of a remand.

Justice McLaren directly addresses this point in his dissent:

> Finding this particular certification in compliance with the Rule means that this one case need not be remanded for filing a new motion and holding a new hearing. However, it does not preclude further proceedings raising allegations of ineffective representation based upon these ambiguities. The deviation approved by the majority does not enhance finality but jeopardizes it. Why sacrifice clarity for ambiguity? Why require this court to determine whether some "second deviation substitutes for the first deviation" the next time a certificate fails to address a requirement and includes other nonrequired information? Why jeopardize finality in order to affirm in this instance? A truly compliant certification nips in the bud potential claims that counsel failed to provide the representation required by Rule 604(d).
> *Peltz*, 2019 IL App (2d) 170465, at ¶ 54 (McLaren, J., dissenting).

Ambiguous and noncompliant certificates jeopardize the finality of these cases and leave the door open for post-conviction allegations of ineffective assistance of counsel. Clarification by this Court and a reduction in ambiguous certificates

will not only reduce the need for remands, it will reduce the need for collateral appeals as well.

For these reasons, and for the reasons set forth in his opening brief, Mr. Gorss requests that this Court remand his case for new post-plea proceedings including: (1) the filing of a new Rule 604(d) certificate; (2) the opportunity to file a new post-plea motion should he so choose; and (3) a new motion hearing.

CONCLUSION

For the foregoing reasons, Robert Gorss, defendant-appellant, respectfully requests that this Court remand his case for new post-plea proceedings including: (1) the filing of a new Rule 604(d) certificate; (2) the opportunity to file a new post-plea motion should he so choose; and (3) a new motion hearing.

Respectfully submitted,

THOMAS A. LILIEN
Deputy Defender

AMARIS DANAK
Assistant Appellate Defender
Office of the State Appellate Defender
Second Judicial District
One Douglas Avenue, Second Floor
Elgin, IL 60120
(847) 695-8822
2nddistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLANT

CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages contained in the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and the certificate of service, is 9 pages.

/s/Amaris Danak
AMARIS DANAK
Assistant Appellate Defender

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NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, aagKatherineDoersch@gmail.com;

Ms. Lisa Ann Hoffman, Supervisor of Appeals, DuPage County State's Attorney Office, 503 North County Farm Road, Wheaton, IL 60187, SAO.Appeals@dupageco.org;

Mr. Robert Berlin, DuPage County State's Attorney, 503 N. County Farm Rd., Wheaton, IL 60187, SAO.Appeals@dupageco.org;

Mr. Robert Gorss, Register No. B19947, East Moline Correctional Center, 100 Hillcrest Road, East Moline, IL 61244

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 June 30, 2021, the Reply Brief 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 defendant-appellant in an envelope deposited in a U.S. mail box in Elgin, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

/s/Vinette Mistretta
LEGAL SECRETARY
Office of the State Appellate Defender
One Douglas Avenue, Second Floor
Elgin, IL 60120
(847) 695-8822
Service via email will be accepted at
2nddistrict.eserve@osad.state.il.us