No. 123339

IN THE
SUPREME COURT OF ILLINOIS

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

BRIEF AND APPENDIX OF RESPONDENT-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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POINTS AND AUTHORITIES

NATURE OF THE CASE

In 2014, petitioner filed a *pro se* postconviction petition alleging that his trial attorney erred by failing to seek to withdraw and appeal guilty pleas that petitioner had entered in two cases. The circuit court appointed counsel, and the case proceeded to a third-stage evidentiary hearing. Before the hearing, counsel told petitioner that he would not call petitioner's girlfriend to testify because she could not provide useful testimony.

After the hearing, which included testimony from petitioner and his former attorney, the court denied the petition. Petitioner then filed several *pro se* motions to reconsider, alleging that his postconviction counsel erred by not calling his girlfriend to testify. The court did not rule on those motions, and petitioner appealed. The appellate court dismissed the appeal at the request of petitioner's appellate counsel and remanded for a ruling on the *pro se* motions. After a hearing on remand, the circuit court denied the motions.

Petitioner appealed again, arguing among other things that the circuit court's actions violated *People v. Krankel*, 102 Ill. 2d 181 (1984), which requires trial courts in criminal cases to investigate *pro se* post-trial allegations of ineffective assistance of counsel. The appellate court held, as a matter of first impression, that *Krankel* should be extended to postconviction proceedings, and remanded for a preliminary *Krankel* inquiry. *People v. Custer*, 2018 IL App (3d) 160202. A question is raised on the pleadings: whether petitioner alleged a cognizable *Krankel* claim.

ISSUES PRESENTED FOR REVIEW

1. Whether the appellate court's opinion is merely advisory because petitioner's appeal was moot given that he had already received his requested relief.

2. Whether this case should be remanded for a *Krankel* inquiry where it is settled that petitioner's allegation that counsel erred by not calling his girlfriend to testify is not cognizable in *Krankel* proceedings.

3. Whether *Krankel* should be extended to postconviction proceedings.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315 and 612. This Court allowed the People's petition for leave to appeal on September 26, 2018.

STATEMENT OF FACTS

A. Petitioner's Guilty Pleas

In 2010, the People charged petitioner with unlawful possession of a controlled substance in Peoria County case No. 10-CF-896 ("case 896"). 896-C5.[1] After initially being represented by the public defender, petitioner retained private lawyer Clyde Hendricks, and in 2011 he entered an open guilty plea. 896-SR*12-19. At the plea hearing, petitioner stated that he was

[1] The record on appeal for case No. 10-CF-896 is cited using the prefix 896-, followed by "C_" (for the common law record), "R_" (for the report of proceedings), "SR_" (for the first volume of the supplemental record), and "SR*_" (for the second volume of the supplemental record), followed by the page number (*e.g.*, 896-C51 refers to page 51 of the common law record in the 896 case). The record for case No. 12-CF-410 is cited with the prefix 410-.

entering the plea voluntarily and understood that he could be sentenced to up to six years in prison. *Id.* at 15-19. The court accepted the plea and continued the case for sentencing while petitioner remained free on bond. *Id.* at 19.

While the drug case was pending, petitioner was arrested for two separate incidents: (1) attacking a police officer who was responding to a report that petitioner was beating a woman in her home; and (2) swinging a knife at a man and woman in a bar. 896-R120-23. For the first incident, the People charged petitioner with unlawful possession of a weapon by a felon, aggravated assault, and unlawful use of a weapon in case No. 12-CF-410 ("case 410"); in the second incident, petitioner was charged with aggravated battery in case No. 12-CF-246 ("case 246"). *See Custer*, 2018 IL App (3d) 160202, ¶ 4.

In May 2012, petitioner skipped his sentencing hearing in case 896, and the court issued a warrant for his arrest. 896-R53-57. He was arrested several months later and appeared for sentencing in October 2012. *Id.* at 67. At the hearing, the People argued for the maximum six-year prison sentence, noting that petitioner had five prior felony convictions and twenty-six misdemeanor convictions — most of which involved "crimes of violence" — and was subject to a "multitude" of protective orders filed by a number of women. *Id.* at 67-70. Petitioner's counsel, Hendricks, asked for a lesser sentence because he believed that petitioner had possessed a relatively small

amount of cocaine. *Id.* at 71. Petitioner asked to speak to the court and said that several of his prior convictions involved abuse of his girlfriend, Michelle Colvin, and that she was "nuts," unreliable, and had lied in prior legal proceedings. *Id.* at 74-75. The court sentenced petitioner to six years of imprisonment. *Id.* at 80.

Nine months later, in July 2013, petitioner (again represented by Hendricks) entered fully negotiated guilty pleas in cases 410 and 246. *Id.* at 112-126. In exchange for petitioner's guilty plea to aggravated battery of a police officer and unlawful possession of a weapon, the People recommended a total sentence of nine and a half years in prison and dismissed the remaining charges. *Id.* at 113-14. The trial court accepted the pleas and imposed the agreed sentence. *Id.* at 124.

B. Petitioner's Postconviction Petition

In May 2014, petitioner filed a *pro se* postconviction petition, alleging that Hendricks erred by failing to pursue an appeal in case 896 or move to withdraw petitioner's guilty plea in case 410. 410-C31-35. The circuit court advanced the petition to the second stage and appointed counsel to represent petitioner. *Id.* at 45.

In June 2015, petitioner's appointed counsel, Sam Snyder, filed a supplemental petition that incorporated the allegations in the *pro se* petition and added four supporting affidavits from petitioner, *id.* at 81-99, claiming that he and his girlfriend (Colvin) had asked Hendricks about appealing case

896 and Hendricks said that he would "take care of what needed to be done and for [petitioner] not to worry," *id.* at 83, 87. Defendant also attested that he asked Hendricks to file a motion to withdraw his plea in case 410, but Hendricks failed to do so. *Id.* at 91. The People filed a general denial and the case proceeded to a third-stage evidentiary hearing. 896-R245-47.

Before the hearing, Colvin — whom petitioner had described during a colloquy in the case 896 sentencing hearing as "nuts," unreliable, and someone who lied in prior legal proceedings — sent the court a letter stating that (1) she knew petitioner was not an innocent man; (2) she had helped him decide to plead guilty in case 410; (3) she had spoken to Hendricks several months later and he said that he was appealing; and (4) postconviction counsel Snyder "refused to take [her] statement." 896-C102. Around that same time, Snyder sent petitioner a letter stating that (1) he had spoken with Colvin; (2) she was very "rude and disrespectful" to Snyder and his staff; and (3) he would not be calling her to testify because he did not believe that her testimony would be helpful. 410-C125.

At the hearing, petitioner testified that Hendricks advised him that the court probably would impose a sentence ranging from probation to three years in prison if he pleaded guilty in case 896. 896-R191. When the court imposed a six-year sentence, petitioner asked Hendricks to appeal. *Id.* at 180-81. More than a month later, Hendricks told petitioner that he had not appealed because petitioner had no viable claim. *Id.* at 197. Petitioner

further testified that one week after he pleaded guilty in case 410, he wrote to Hendricks asking him to withdraw his plea. *Id.* at 190. According to petitioner, Colvin also contacted Hendricks about appealing. *Id.*

Hendricks testified that he advised petitioner that if he pleaded guilty in case 896 he had a "good chance" of receiving four years or fewer in prison due to the small amount of cocaine in his possession. *Id.* at 214. At some point, Hendricks told petitioner that the risk of an open plea was that any sentence within the statutory range would be very difficult to challenge on appeal. *Id.* at 217. Immediately after sentencing, Hendricks told petitioner that the six-year sentence, while surprising, was within the judge's discretion. *Id.* at 215-16. Hendricks never received any indication that petitioner wanted to withdraw his pleas or appeal. *Id.* at 209-210, 212-13. If petitioner had wanted to withdraw his pleas or appeal, Hendricks would have done so. *Id.* at 218-19.

Before the court issued its ruling, petitioner sent the court a letter alleging, among other things, that Snyder had erred by failing to call Colvin to testify at the evidentiary hearing. 410-C103. Petitioner then filed a *pro se* motion asking the court to preemptively "reconsider" its yet-to-be-issued ruling on the petition because Snyder had erred by failing to call Colvin. *Id.* at 120. The motion included an affidavit from Colvin claiming that Hendricks had told her that he was moving to withdraw the guilty plea in case 410; Colvin also claimed that Snyder had refused to take her statement

because he said that he did not take statements from his clients' girlfriends. *Id.* at 123-24. The motion also included the letter from Snyder, sent before the evidentiary hearing, informing petitioner that he had spoken with Colvin and decided not to call her to testify. *Id.* at 125.

In a September 2015 written order, the circuit court (1) declined to rule on petitioner's *pro se* motion to reconsider because he was represented by counsel; and (2) denied the amended petition on the merits. *Id.* at 127-34. In denying petitioner's claims, the court held:

> The court finds [petitioner's] testimony to be totally unbelievable. In addition to his manner while testifying the court finds [petitioner's] testimony and claims are clearly contradicted by the facts and circumstances set forth in the record.

Id. at 132. For example, petitioner's claim that he did not understand the plea hearings was contradicted by the hearing transcripts, which showed that petitioner "made appropriate responses" and asked "pointed and intelligent questions." *Id.* Furthermore, the court noted that if petitioner were unhappy with Hendricks as he claimed, he would not have hired him for several subsequent criminal and civil matters. *Id.* at 132-33. And, while petitioner claimed that Hendricks failed to convey a plea offer from the People, the record showed that petitioner rejected the offer before Hendricks was hired. *Id.* at 133.

Conversely, the court found Hendricks "to be very believable." *Id.* Hendricks provided "very matter of fact" and "honest" responses to questions by both counsel. *Id.* In sum, "the court believe[d] Mr. Hendricks and not

[petitioner]" and thus concluded that Hendricks was "never instructed or asked" to withdraw petitioner's guilty pleas or appeal. *Id.*

Petitioner then filed another *pro se* motion to reconsider alleging that Snyder erred by not calling Colvin to testify. 896-C114. The court did not address that motion. *Id.* at 116.

C. Petitioner's First Postconviction Appeal and Remand

On appeal, while represented by the Office of the State Appellate Defender, petitioner moved to dismiss his appeal "and order the circuit court to rule on [his] motion for reconsideration" alleging that Snyder erred by failing to call Colvin to testify. Appx. A-15. The People did not oppose the request, and the appellate court remanded for a ruling on the *pro se* motion. *Id.* at A-19. Following that order, petitioner wrote yet another letter to the circuit court, again alleging that Snyder erred by failing to call Colvin to testify. 896-C129.

On remand, the circuit court held a hearing on the *pro se* motion. 896-R255-56. Petitioner was not present. *Id.* The prosecutor noted that the motion was not really a motion to reconsider because it did not argue that the denial of his postconviction petition was error. *Id.* Snyder stated that petitioner's motion "speaks for itself" and that he would "stand on what he already filed." *Id.* at 256. The court denied the motion. *Id.*

D. Petitioner's Second Postconviction Appeal

In his second postconviction appeal, petitioner argued, among other things, that the circuit court "erred in denying his motion to reconsider . . . without conducting a *Krankel* inquiry." *Custer*, 2018 IL App (3d) 160202, ¶ 25. The appellate court acknowledged that there was no authority for extending *Krankel* to postconviction proceedings, but nevertheless remanded for the circuit court "to conduct a *Krankel*-like inquiry into [petitioner's] *pro se* claim of unreasonable assistance of postconviction counsel." *Id.* ¶¶ 25, 31. Because the appellate court remanded for a preliminary *Krankel* inquiry, it did not address petitioner's primary claim that the circuit court erred by denying his postconviction petition. *Id.* ¶ 33, n.2.

STANDARD OF REVIEW

Whether the appellate court's opinion must be vacated as moot is a question of law that this Court reviews *de novo*. *In re Alfred H.H.*, 233 Ill. 2d 345, 350 (2009). Whether a trial court is obligated to conduct a *Krankel* inquiry is likewise a legal question that is reviewed *de novo*. *People v. Taylor,* 237 Ill. 2d 68, 75 (2010). A reviewing court will reverse a trial court's denial of a *Krankel* motion only if the ruling was manifestly erroneous, *i.e.*, it is an error that is clearly plain, evident, and indisputable. *See*, *e.g.*, *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25 (collecting cases).

ARGUMENT

This Court established the *Krankel* rule to permit a defendant in a criminal case to submit a *pro se* post-trial motion alleging that his trial counsel provided ineffective assistance. *People v. Krankel*, 102 Ill. 2d 181, 189 (1984); *see also, e.g.*, *People v. Jocko*, 239 Ill. 2d 87, 91-92 (2010). If the trial court determines that the defendant's allegations relate to trial strategy or are refuted by the record, the court must deny the motion; if, however, the allegations "show possible neglect of the case," the court must appoint new counsel to investigate defendant's ineffective assistance claim and represent defendant in the remaining proceedings. *See, e.g., Jocko*, 239 Ill. 2d at 91-92.

The appellate court's order remanding this case for a preliminary *Krankel* inquiry should be reversed for three independent reasons. First, petitioner's claim is moot because the circuit court has already conducted an inquiry and denied petitioner's claim. Second, a claim that counsel erred by failing to call a particular witness to testify is not cognizable in *Krankel* proceedings. Third, *Krankel* does not apply to postconviction proceedings.

I. Because Petitioner's Appeal Is Moot, the Appellate Court's Opinion Is Merely Advisory and Should Be Vacated.

The appellate court's opinion is an impermissible advisory opinion that should be vacated because petitioner's appeal is moot. It is a "'basic tenet of justiciability'" that reviewing courts should not issue advisory opinions that decide moot questions. *People v. Jackson*, 231 Ill. 2d 223, 227 (2008). An appeal is moot where a party received the relief he is requesting either prior

to, or in the midst of, the appeal. *See*, *e.g., id.* (appeal challenging term of mandatory supervised release was moot where other convictions obviated obligation to serve term). In such circumstances, the proper course of action is to vacate the appellate court's judgment, because it is advisory, and dismiss the appeal as moot. *See, e.g., id*. at 228 (dismissing appeal as moot and vacating appellate court's opinion); *In re Commitment of Hernandez*, 239 Ill. 2d 195, 201 (2010) (dismissing appeal as moot and vacating appellate court's opinion where party "has already received the relief it sought").

Petitioner is requesting, and in the decision under review the appellate court ordered, the circuit court to conduct a preliminary *Krankel* inquiry into petitioner's *pro se* allegation that his postconviction counsel erred by not calling Colvin to testify. But the circuit court already considered that allegation and rejected it following petitioner's *first* appeal. In that appeal, the appellate court ordered the circuit court to rule on petitioner's *pro se* "motion to reconsider," which incorporated Colvin's affidavit and alleged that counsel erred by not calling her to testify. 896-C114. On remand, the circuit court held a hearing, considered the *pro se* motion, and then denied it. 896-R255-56. Notably, there has been no suggestion that that ruling was manifestly erroneous (nor could there be, for the reasons explained below). Thus, petitioner already has obtained the relief he is requesting, his appeal was and is moot, and the appellate court's opinion should be vacated. *See, e.g.*, *Jackson*, 231 Ill. 2d at 227; *In re Hernandez*, 239 Ill. 2d at 201.

Any argument by petitioner that additional relief is possible (and, thus, that this appeal is not moot) because the circuit court's first inquiry was somehow deficient would be meritless. The circuit court acted appropriately on remand and its inquiry had all the hallmarks of a *Krankel* hearing. As discussed below, because petitioner's claim concerns a strategic decision — whether to call a certain witness to testify — the circuit court was required to deny petitioner's *Krankel* motion. *Infra* pp. 13-14; *see also People v. Skillom*, 2017 IL App (2d) 150681, ¶¶ 28-30 (collecting cases; procedural errors in *Krankel* hearing are harmless if claim is meritless).

Moreover, lack of cognizability aside, any suggestion that the court failed to conduct a proper hearing on remand would be incorrect. Although petitioner was not present at the hearing, it is settled that the circuit court may base its evaluation of a *Krankel* claim on "the insufficiency of the defendant's allegations on their face." *People v. Moore*, 207 Ill. 2d 68, 79 (2003); *see also People v. Ayres*, 2017 IL 120071, ¶ 12 (same). Similarly, no conflict of interest prohibited counsel from addressing the motion during the hearing. *Moore*, 207 Ill. 2d at 78 (court may discuss allegations with counsel who purportedly erred). And any suggestion that a more searching inquiry was necessary would also fail, not only because petitioner's claim is non-cognizable, but also because the record is fully developed, including (1) the circuit court's determination — after hearing live testimony — that petitioner is not a credible witness (including with respect to his claim that he told

Colvin to ask Hendricks to appeal) and that Hendricks is credible (including his testimony that no one asked him to appeal); (2) numerous filings from petitioner explaining the precise nature of his claim that postconviction counsel erred; (3) undisputed evidence showing that Snyder spoke to Colvin before the third-stage hearing, was aware of the testimony she allegedly could provide, and told petitioner that he was not going to call her to testify; (4) an affidavit from Colvin outlining her proposed testimony; and (5) petitioner's own in-court representation that Colvin is "nuts," unreliable, and has lied in prior legal proceedings. Thus, any attempt to argue that this case presents a live controversy would be meritless; petitioner already received the relief he is requesting and no further relief can be provided.

In sum, because the circuit court already conducted a hearing on petitioner's *pro se* motion, petitioner's appeal was and is moot, and the appellate court's advisory opinion should be vacated.

II. Petitioner's Claim Is Not Cognizable in *Krankel* Proceedings.

There is a second, independent reason to reverse the appellate court's judgment: petitioner's allegation that his attorney erred by not calling Colvin to testify is not a cognizable *Krankel* claim.

This Court has emphasized that appointment of "new counsel is not automatically required" when a defendant files a *Krankel* motion. *See, e.g., People v. Taylor*, 237 Ill. 2d 68, 75 (2010). In particular, an allegation that "pertains only to matters of trial strategy" is not a cognizable *Krankel* claim.

See, *e.g.*, *id.*; *see also People v. Ramey*, 152 Ill. 2d 41, 52 (1992) (no *Krankel* relief permitted because allegations "related to trial tactics").

It is settled that "whether to call particular witnesses is a matter of trial strategy." *See, e.g., People v. Patterson*, 217 Ill. 2d 407, 442 (2005). For that reason, this Court has consistently held that an allegation that counsel erred by failing to call a particular witness to testify is not a colorable *Krankel* claim. *See, e.g., People v. Chapman*, 194 Ill. 2d 186, 230-31 (2000); *People v. Kidd*, 175 Ill. 2d 1, 44-45 (1996).

Here, petitioner alleges that Snyder erred by failing to call Colvin to testify at his postconviction evidentiary hearing. It is undisputed that, before that hearing, Snyder (1) spoke with Colvin; (2) was aware of the testimony she supposedly could provide (as described in the affidavits Snyder filed before the hearing); and (3) told petitioner that he had decided not to call Colvin to testify. Because there has been no allegation that Snyder failed to investigate Colvin (nor could there be), and because petitioner's complaint is based solely on counsel's decision not to call her to testify at the hearing, petitioner's claim is not cognizable in *Krankel* proceedings.

Thus, even if the circuit court had not already conducted a hearing on petitioner's motion, this Court should reverse the appellate court's judgment for the independent reasons that (1) the allegation of a non-cognizable claim is insufficient to trigger a *Krankel* inquiry; or (2) any failure to conduct that inquiry in this particular case is harmless because petitioner's claim is non-

cognizable. *See, e.g.*, *Jocko*, 239 Ill. 2d at 93 (failure to conduct *Krankel* inquiry was harmless where claim was meritless).

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

Even if the circuit court had not already held a hearing on petitioner's *pro se* allegations of attorney error, and even if petitioner had alleged a cognizable claim, this Court should reverse the appellate court's judgment because *Krankel* does not apply to postconviction proceedings.

A. This Court Has Correctly Held That *Krankel* Is Limited To Post-Trial Motions in Criminal Cases.

Krankel imposes a number of obligations on trial courts confronted with a *pro se* allegation of ineffective assistance of trial counsel. For example, the preliminary *Krankel* inquiry often requires the court to question the defendant and his counsel, and review the record. *See, e.g., Moore*, 207 Ill. 2d at 78. And if the court determines that the defendant's allegations "show possible neglect of the case," the court then must appoint new counsel and provide that counsel time to investigate and potentially pursue the defendant's ineffective assistance claim. *Id.*

Over the years, this Court has acknowledged the potential problems, inefficiencies, and burdens imposed by *Krankel*, and has limited its application accordingly. For example, in part because a preliminary *Krankel* inquiry often requires a trial court to invade the attorney-client relationship and risks imposing undue "influence or control," this Court has held that *Krankel* does not apply to privately retained counsel. *People v. Pecoraro*, 144

Ill. 2d 1, 15 (1991). This Court has also held that defendants may not file pre-trial *Krankel* motions — even though the representation counsel provides before trial is constitutionally guaranteed — because there is no effective and efficient means for a trial court to address an ineffective assistance claim before a trial is completed. *Jocko*, 239 Ill. 2d at 93.

Most notably, this Court has recently re-emphasized that *Krankel* is limited to post-trial allegations of ineffective assistance in criminal cases. *See Ayres*, 2017 IL 120071, ¶ 22. In *Ayres*, a four-justice majority held that a bare-bones allegation of "ineffective assistance of counsel" raised in a post-trial pleading that contains no further explanation of the claim is sufficient to require a preliminary *Krankel* inquiry. *Id.* ¶ 1. The People argued that such a rule would have many negative consequences, in part because it would impose a significant burden on a justice system that already is flooded with often lengthy and inscrutable *pro se* submissions. The three dissenting justices agreed with the People that the rule would have "negative consequences" and was against the "great weight of authority," and echoed the People's concerns about the burden imposed by the new rule, stating:

> The majority's new rule will require the trial court to carefully scrutinize the many *pro se* submissions it receives, looking for a bare allegation of ineffective assistance of counsel. If it finds one, it would then be required to schedule a hearing, writ the defendant to court, and personally question both the defendant and his attorney about the claim. In addition, if the court misses that bare allegation, the appellate court would in all cases be required to remand the case for a hearing even though the claim is meritless.

Id. ¶¶ 30, 35 (Thomas, J. dissenting; joined by Karmeier, J. and Garman, J). Moreover, as the People noted, such a remand often multiplies litigation because defendants later appeal on the basis that the *Krankel* hearing conducted on remand was flawed or that *Krankel* counsel somehow erred. *See*, *e.g.*, *People v. Downs*, 2015 IL 117934, ¶ 34 (remanding for consideration of claim that *Krankel* counsel provided ineffective assistance at *Krankel* hearing held on a prior remand several years earlier); *People v. McLaurin*, 2012 IL App (1st) 102943, ¶¶ 52-53 (finding trial court's lengthy inquiry of defendant and counsel inadequate and remanding for additional questioning).

Importantly, the *Ayres* majority acknowledged these concerns but stressed that any burden on the lower courts would be minimized because "*Krankel* is limited to post-trial motions." *Ayres*, 2017 IL 120071, ¶ 22. The appellate court's decision here — extending *Krankel* to postconviction proceedings — directly contradicts that assurance.

Indeed, to extend *Krankel* to postconviction proceedings would eradicate the limitation imposed by *Ayres* and significantly increase the burden on the lower courts for the reasons identified by the People and the dissent in that case. And if *Krankel* were extended to postconviction proceedings, petitioners in other collateral actions would no doubt likewise demand *Krankel's* application, including in section 2-1401 petitions for relief from judgment, civil commitment proceedings under the Sexually Violent

Persons Commitment Act, and original actions. Thus, the problems with this approach highlighted by the People and the *Ayres* dissent, and, significantly, acknowledged by the majority, would be multiplied.

This case presents a telling example of the unnecessary drain on judicial resources that would occur if *Krankel* were extended in the manner proposed by the appellate court. Petitioner pleaded guilty to several serious felonies. He later filed a postconviction petition alleging that his trial counsel should have moved to withdraw his pleas and appeal, though petitioner had no valid basis for doing so. His postconviction counsel spoke with Colvin and decided not to call her to testify, and he informed petitioner of that decision before the hearing. After the hearing, the circuit court ruled that petitioner's testimony was not credible (including his allegation that he told Colvin to ask counsel to appeal) and that his trial counsel was credible (including his testimony that he was never asked to appeal). This case already has been remanded once for a hearing on petitioner's *pro se* claim that postconviction counsel erred, and the circuit court denied petitioner relief. Yet the litigation continues: the appellate court has remanded the case a second time, without even suggesting that the circuit court's decision to deny relief was error.

To avoid further unnecessary drains on judicial resources in this and future cases, this Court should hold firm to its reasoning in *Ayres* and reiterate that *Krankel* is limited to post-trial allegations in criminal cases and does not apply to postconviction proceedings.

B. Postconviction Proceedings Are Fundamentally Different than Criminal Trials and Postconviction Counsel's Duties Are Strictly Limited.

Apart from this Court's reasoning in *Ayres*, there are fundamental differences between a criminal trial and postconviction proceedings that demonstrate that *Krankel* should not be extended to postconviction litigation.

The Post-Conviction Hearing Act provides a means by which a petitioner may challenge his conviction for violations of the state or federal constitutions. *See* 725 ILCS 5/122-1, *et seq.* At the first stage of proceedings, the circuit court reviews the postconviction petition and may summarily dismiss it if it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2). If the petition presents the gist of a constitutional claim, it proceeds to the second stage, where counsel is appointed to represent the petitioner and the People must either answer or move to dismiss the petition. 725 ILCS 5/122-4, 5. If the petition is not dismissed or denied, the case proceeds to a third-stage evidentiary hearing, after which the court rules on the petitioner's claims. 725 ILCS 5/122-6. Given the Act's structure, and the intrinsic differences between postconviction proceedings and criminal trials, it is both inappropriate and unnecessary to extend *Krankel* to postconviction litigation for two reasons.

1. There is no constitutional right to counsel in postconviction proceedings and appointed counsel's responsibilities are sharply limited.

To begin, the justification for applying *Krankel* in criminal cases — the desire to protect the defendant's Sixth Amendment right to the effective

assistance of counsel, despite the burdens *Krankel* imposes on the lower courts — is absent from postconviction proceedings.

Criminal defendants have a constitutional right to "the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *see also* U.S. Const. amend. VI. And the purpose of *Krankel* is to protect that constitutional right by requiring trial courts to investigate *pro se* post-trial claims of ineffective assistance so that ultimately a determination can be made as to whether the defendant's Sixth Amendment rights were violated. *See*, *e.g.*, *Moore*, 207 Ill. 2d at 78.

By contrast, there is no constitutional right to counsel in postconviction proceedings. *See*, *e.g.*, *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). Rather, the right to counsel is a matter of legislative grace and, thus, postconviction counsel need provide only "the level of assistance guaranteed by the Act." *Perkins*, 229 Ill. 2d at 42. In turn, this Court has consistently held that the Act requires only a "reasonable level" of assistance, "which is less than that afforded by the federal or state constitutions." *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006); *see also People v. McNeal*, 194 Ill. 2d 135, 142 (2000) ("[T]he degree of skill and care that a lawyer must exercise in representing a postconviction petitioner is not controlled by the sixth amendment standard announced by the Supreme Court in *Strickland v. Washington*").

It follows that the structure of the Act necessarily limits the scope of postconviction counsel's duties. Indeed, this Court has emphasized that postconviction counsel plays a much "different role" than trial counsel. *See*, *e.g.*, *People v. Greer*, 212 Ill. 2d 192, 204 (2004). Trial counsel "acts as a shield to protect" defendants — all of whom are presumptively innocent — from being 'haled into court'" and convicted; thus, trial attorneys have a wide range of responsibilities in carrying out their duties. *Id.*

By contrast, postconviction petitioners "have already been stripped of the presumption of innocence, and have generally failed to obtain relief on appellate review." *Id.* Thus, postconviction counsel's role is very limited: counsel is expected only to "shape[] the petitioner's claims into proper legal form and present[] those claims to the court." *Perkins*, 229 Ill. 2d at 44. Notably, this requires postconviction counsel only to shape the claims already raised in the *pro se* petition — counsel has "no obligation" to raise or investigate new claims. *Pendleton*, 223 Ill. 2d at 472, 476. Indeed, this Court has repeatedly held that postconviction counsel is not even required to review the entire record, only the portion of the record that relates to the petitioner's *pro se* claims. *See*, *e.g.*, *id.* at 475. And petitioners themselves are generally limited to raising only those claims that could not have been raised at trial or on direct appeal. *See*, *e.g.*, *People v. Miller*, 203 Ill. 2d 433, 437 (2003).

In sum, the justification for the *Krankel* rule — the desire to protect a constitutional right, despite the burdens imposed on the lower courts — is

absent from postconviction proceedings. Postconviction petitioners have no constitutional right to counsel, postconviction proceedings involve only a very narrow universe of potential claims, and postconviction counsel necessarily plays a much more limited role than counsel in a criminal trial. Given the significant burdens *Krankel* imposes on lower courts, *Krankel* therefore should not be extended to postconviction proceedings.

2. This Court has already created a mechanism to ensure that petitioners receive reasonable assistance.

There is another, independent reason not to extend *Krankel* to postconviction proceedings: this Court has already created an effective mechanism for ensuring that petitioners receive the "reasonable assistance" required by the Act.

As this Court has frequently explained, "to assure the reasonable assistance required by the Act, Supreme Court Rule 651(c) imposes specific duties on postconviction counsel." *Perkins*, 229 Ill. 2d at 42; *see also People v. Suarez*, 224 Ill. 2d 37, 42 (2007) (same). Rule 651(c) requires postconviction counsel to certify that he or she (1) "consulted with petitioner by phone, mail, electronic means or in person"; (2) "examined the record" as necessary to shape petitioner's *pro se* claims; and (3) "made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation" of the petitioner's claims. Ill. S. Ct. R. 651(c). And Rule 651(c) governs counsel's actions not just before the circuit court, but through appeal. *Perkins*, 229 Ill. 2d at 44 (collecting cases).

Where postconviction counsel files a Rule 651(c) certification, the presumption arises that he or she provided reasonable assistance. *See*, *e.g.*, *People v. Moore*, 189 Ill. 2d 521, 543 (2000) (where counsel filed certification, "we hold that postconviction counsel complied with the requirements of Rule 651(c) and thus rendered reasonable assistance"); *Perkins*, 229 Ill. 2d at 42 (compliance with Rule 651(c) "assure[s] the reasonable assistance required by the Act"); *People v. Bass*, 2018 IL App (1st) 152650, ¶ 12 (Rule 651(c) certificate creates presumption "that postconviction counsel rendered reasonable assistance"). However, that presumption may be challenged on appeal, and if the appellate court finds that counsel failed to comply with Rule 651(c), "remand is required . . . regardless of whether the claims raised in the petition had merit." *Suarez*, 224 Ill. 2d at 47. Thus, this Court's rules already ensure reasonable assistance of counsel under the Act.

Further, this Court has long held that a petitioner may not raise the ineffectiveness of postconviction counsel as a basis for relief under the Act. *People v. Flores*, 153 Ill. 2d 264, 276 (1992). This limitation protects the finality of judgments and conforms to the legislature's express intent that postconviction claims be limited to errors that occurred "'*in the proceeding which resulted in [the petitioner's] conviction*.'" *Id.* at 277 (emphasis in original; quoting 725 ILCS 5/122-1). To extend *Krankel* to postconviction proceedings — along with the attendant need for investigation and resolution by the circuit court — would undermine the legislature's intent and allow

petitioners to circumvent the longstanding rule that the alleged ineffectiveness of postconviction counsel "does not present a basis upon which relief can be granted under the Act." *Id.* at 276.

For nearly fifty years Rule 651(c) has proven effective in ensuring that petitioners receive the "reasonable assistance" required by the Act. Notably, neither petitioner nor the appellate court has suggested otherwise. Thus, it is unnecessary to extend *Krankel* to postconviction proceedings.

C. The Issues Identified by the Appellate Court are Meritless.

In its opinion below, the appellate court neither identified any cases applying *Krankel* in postconviction proceedings nor opined that Rule 651(c) fails to protect the interests of postconviction petitioners. Instead, the appellate court held, in conclusory fashion, that it was necessary to extend *Krankel* to postconviction proceedings to "limit[] the issues on appeal," "develop[] the record," and "avoid any conflict [of interest]." *Custer*, 2018 IL App (3d) 160202, ¶¶ 29-30. All three bases are meritless.

First, the court did not identify what issues needed to be "limited" on appeal or how extending *Krankel* would accomplish that. Indeed, as noted, *Krankel* often *multiplies* issues on appeal. *Supra* pp. 16-17. Further, the appellate court's opinion fails to consider that issues on postconviction appeal are already greatly limited by (1) the narrow scope of postconviction proceedings and (2) the sharply circumscribed duties of postconviction counsel. *See supra* pp. 19-21. And nothing in the case law suggests that Rule 651(c) fails to sufficiently limit issues on postconviction appeal.

Second, while the appellate court asserted that it was necessary to impose *Krankel* to "develop the record regarding defendant's claim," the court did not explain how the present postconviction framework fails to do so. Again, due to the limited scope of postconviction proceedings and counsel's duties in those proceedings, there is far less need to "develop a record" than after a criminal trial. Moreover, the present framework already creates a record by requiring postconviction counsel to certify that he or she complied with the duties imposed by Rule 651(c). And this Court has allowed petitioners to supplement the record on appeal with evidence that postconviction counsel failed to comply with those duties. *See*, *e.g.*, *People v. Munson*, 206 Ill. 2d 104, 138-40 (2002) (petitioner permitted "to supplement the record on appeal" with multiple affidavits concerning postconviction counsel's alleged errors).

Third, the appellate court's concern about avoiding a "conflict of interest" between postconviction counsel and petitioners likewise fails to consider Rule 651(c), which, as discussed, already requires postconviction counsel to evaluate their own performance and expressly represent that the petitioner received the "reasonable assistance" afforded by the Act. And to the extent that the petitioner disagrees with counsel's assertion in that regard, no conflict exists under the present system because the petitioner is entitled to new counsel to press his claim on appeal.

D. *People v. Johnson* Is Inapplicable.

This Court's recent decision *People v. Johnson*, 2018 IL 122227, is inapposite and does not resolve the issue here. In *Johnson*, the circuit court dismissed Johnson's petition (filed by retained counsel) at the first stage of postconviction proceedings; Johnson thereafter filed two *pro se* motions to reconsider, asserting new claims that he alleged counsel had refused to include in the petition. *Id.* ¶¶ 5-8. The circuit court held that the new claims were waived because they were not included in the petition, and Johnson appealed, arguing that the court erred by refusing to consider them. *Id.* ¶¶ 8-9. This Court held that private counsel retained at the first stage of postconviction proceedings (not just counsel appointed after the first stage) must provide a "reasonable level of assistance," which requires the attorney to raise all of the non-frivolous claims that the petitioner asks him to raise. *Id.* ¶¶ 1, 21, 23. This Court remanded for the circuit court to consider the new claims raised in Johnson's *pro se* supplemental motion to reconsider, instructing that if those claims "are not frivolous or patently without merit," and Johnson's retained postconviction counsel "was aware of such claims and refused to include them," then the circuit court should allow Johnson to amend his petition to include the claims and proceed to the second stage of postconviction proceedings. *Id.* ¶ 24.

Although *Johnson* remanded for consideration of a *pro se* motion, that decision does not control this appeal for several reasons. To begin, the

question raised in this appeal — whether *Krankel* should be extended to postconviction proceedings — was not before the Court in *Johnson*. Indeed, *Krankel* is neither cited nor discussed in the Court's opinion. Rather, the issue in *Johnson* was whether the Act's "reasonable assistance" standard applies to retained counsel at the first stage of proceedings and what duties that standard imposes in that scenario. *Id.* ¶ 1. The Court had no opportunity to consider the reasoned arguments raised in this brief.

Further, had *Johnson* intended to apply *Krankel* to retained counsel at the first-stage of proceedings, it would have had to overrule not only *Ayres*, but also *Pecoraro*, which held that *Krankel* does not apply to privately retained counsel. *Pecoraro*, 144 Ill. 2d at 15. But the opinion does not mention those cases either. 2018 IL 122227; *see also People v. Williams*, 235 Ill. 2d 286, 294 (2009) (departure from stare decisis "must be specifically justified" by showing the prior decision is "unworkable or badly reasoned" and "likely to result in serious detriment prejudicial to public interests").

Perhaps most importantly, although *Johnson* remanded for consideration of a *pro se* motion, the Court's remand order was not in the form of *Krankel* relief. That is, rather than ordering the circuit court to consider whether the claims of attorney error had sufficient potential merit to require new counsel, this Court instead held that if Johnson's new claims (alleging errors in his original criminal case) were non-frivolous, and his privately retained counsel ignored his instructions to raise them, then

Johnson could amend his postconviction petition to add those claims. Thus, the decision is best understood as a product of agency law, rather than *Krankel*, and is limited to correcting retained counsel's failure at the first-stage to follow a petitioner's pleading preferences. *See Johnson*, 2018 IL 122227, ¶ 21 (noting agency relationship between counsel and petitioner and stating that attorney error at the first stage "will almost certainly" be limited to counsel's "fail[ure] to include one or more claims in the petition the [petitioner] wanted to have raised").

* * *

In sum, this Court should not extend *Krankel* to postconviction proceedings. To do so would be contrary to this Court's reasoning in *Ayres* and is unnecessary because (1) there is no constitutional right to counsel in postconviction proceedings; (2) postconviction counsel's duties are sharply limited and fundamentally different than trial counsel's; and (3) Rule 651(c) already ensures that petitioners receive "reasonable assistance."

CONCLUSION

For the foregoing reasons, this Court should reverse the appellate court's judgment.

January 7, 2019

Respectfully submitted,

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RULE 341(c) CERTIFICATE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(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 twenty-nine pages.

/s/ Michael L. Cebula
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Appeal Allowed by People v. Custer, Ill., September 26, 2018

2018 IL App (3d) 160202
Appellate Court of Illinois, Third District.

The PEOPLE of the State of Illinois, Plaintiff–Appellee,

v.

John Michael CUSTER, Defendant–Appellant.

Appeal Nos. 3–16–0202 and 3–16–0203

Opinion filed February 6, 2018

Synopsis

Background: Petition was filed for post-conviction relief based on ineffective assistance of counsel in prosecution for possession of controlled substance, possession of weapon by felon, and aggravated battery. Petitioner also alleged ineffective assistance of post-conviction counsel. The Circuit Court, Peoria County, Nos. 10–CF–896 and 12–CF–410, Albert L. Purham, Jr., J., denied petition. Petitioner appealed.

[Holding:] The Appellate Court, McDade, J., as a matter of first impression, held that petitioner was entitled to preliminary inquiry into the underlying facts and circumstances of his pro se claim of unreasonable assistance of postconviction counsel.

Reversed and remanded with directions.

West Headnotes (4)

[1] Criminal Law
Duty of court to inquire as to effectiveness in general

Post-conviction petitioner was entitled to preliminary inquiry into the underlying facts and circumstances of his pro se claim of unreasonable assistance of postconviction counsel at the third stage of proceedings, although assignment of counsel in postconviction proceedings was provided by statute and at the court's discretion; inquiry into assistance of counsel claims arising from postconviction, rather than posttrial stage, would permit circuit court to determine if new counsel needed to be appointed to avoid any conflict, develop the record regarding defendant's claim, and limit the issues on appeal. 725 Ill. Comp. Stat. Ann. 5/122-4.

1 Cases that cite this headnote

[2] Criminal Law
Right to counsel

Unlike the posttrial stage, defendant does not have a constitutional right to the effective assistance of counsel during third-stage postconviction hearing. U.S. Const. Amend. 6.

1 Cases that cite this headnote

[3] Criminal Law
Right to counsel

The right to the assistance of postconviction counsel is a matter of legislative grace, and a defendant is guaranteed only the level of assistance provided by the act providing for post–conviction hearings. 725 Ill. Comp. Stat. Ann. 5/122-4.

Cases that cite this headnote

[4] Criminal Law
Right to counsel

Appointed counsel in a postconviction proceeding is required to be as conflict-free as trial counsel.

1 Cases that cite this headnote

Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois, Circuit Nos. 10–CF–896 and 12–CF–410, Honorable Albert L. Purham, Jr., Judge, Presiding.

Attorneys and Law Firms

Michael J. Pelletier, Peter A. Carusona, and Steven Varel, of State Appellate Defender's Office, of Ottawa, for appellant.

Jerry Brady, State's Attorney, of Peoria (Patrick Delfino, Lawrence M. Bauer, and Dawn Duffy, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.

OPINION

JUSTICE McDADE delivered the judgment of the court, with opinion.

****593 *167** ¶ 1 Defendant, John Michael Custer, appeals from the Peoria County circuit court's third-stage denial of his postconviction petition. Defendant argues that he received unreasonable assistance of postconviction counsel. We reverse and remand with directions.

¶ 2 FACTS

¶ 3 In case No. 10–CF–896, the State charged defendant with unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2010)). During the pretrial proceedings, defendant retained private counsel, Clyde Hendricks. On November 14, 2011, defendant entered an open guilty plea to the unlawful possession of a controlled substance charge. Defendant told the court that he had discussed the plea with Hendricks and Hendricks had answered all his questions. The court admonished defendant that he could receive a sentence of 1 to 6 years' imprisonment or up to 30 months' probation. Defendant said he understood the possible penalties. Defendant also indicated he was entering the plea voluntarily. The court accepted defendant's plea and continued the case for a sentencing hearing. At the time, defendant remained free on bond.

¶ 4 In April 2012, while defendant was awaiting sentencing, the State charged defendant in case No. 12–CF–410 with unlawful possession of a weapon by a felon (720 ILCS 5/24–1.1(a) (West 2012)), aggravated assault (720 ILCS 5/12–2(a) (West 2012)), and unlawful use of a weapon (720 ILCS 5/24–1(a)(2) (West 2012)). Around the same time, in case No. 12–CF–246, the State also charged defendant with aggravated battery.[1]

¶ 5 On May 3, 2012, case Nos. 10–CF–896 and 12–CF–410 were called for a combined hearing. Defendant failed to appear at the hearing, and the court issued a warrant for defendant's arrest. Defendant was arrested on September 6, 2012.

¶ 6 On October 25, 2012, the court called case No. 10–CF–896 for a sentencing hearing. The State asked that the court impose a maximum six-year prison sentence. The State argued that defendant had failed to appear for the first sentencing hearing and his criminal history included 5 felony convictions, 26 misdemeanor convictions, and 2 pending felony charges. Hendricks argued for a lesser sentence and emphasized that the charge was based on possession of 0.3 grams of cocaine, a very small amount. Defendant explained in allocution that almost all of his prior felony cases were derived from his 13–year relationship with Michelle Colvin.

¶ 7 The court sentenced defendant to six years' imprisonment. The court admonished defendant that, to challenge the sentence, he must first file within 30 days either a motion to withdraw the guilty plea or a motion to reconsider sentence before he could file a notice of appeal. Defendant indicated that he did not have any questions about the appeal process. The court remanded defendant to the custody of the Illinois Department of Corrections.

****594 *168** ¶ 8 On July 23, 2013, defendant entered fully negotiated guilty pleas in case Nos. 12–CF–410 and 12–CF–246. In exchange for defendant's guilty pleas, the court imposed the agreed sentence of 4½ years' imprisonment on the aggravated battery charge in case No. 12–CF–246 and a judgment of conviction on the unlawful possession of a weapon by a felon charge in case No. 12CF–410. The court dismissed the remaining charges and admonished defendant of his right to appeal and the prerequisite that defendant file a motion to withdraw his guilty plea within 30 days of the sentence before filing a notice of appeal.

¶ 9 On May 27, 2014, defendant filed, in case Nos. 10–CF–896 and 12–CF–410, a *pro se* petition for postconviction relief. In his petition, defendant alleged that his right to the effective assistance of counsel had been violated because Hendricks said he would appeal the court's decision in

case No. 10–CF–896 but he never effectuated an appeal. Defendant also alleged that Hendricks failed to file a motion to withdraw defendant's guilty plea in case No. 12–CF–410 after defendant had asked him to. The court appointed counsel and advanced the petition to the second stage of proceedings.

¶ 10 On June 4, 2015, appointed counsel, Sam Snyder, filed a supplemental petition. The supplemental petition incorporated by reference all the allegations in defendant's *pro se* petition and attached four supporting affidavits from defendant. In the affidavits, defendant averred that Hendricks had initially told defendant that he would appeal the sentence in case No. 10–CF–896. Defendant attempted to contact Hendricks several times by telephone regarding the status of his appeal. Eventually, Hendricks told defendant that he needed to file a motion to reconsider sentence before he filed the notice of appeal. Defendant received no further information from Hendricks on the status of his appeal. Defendant directed his father and girlfriend, Colvin, to also contact Hendricks. Defendant averred that Colvin argued over the telephone with Hendricks and Hendricks told Colvin that he would "take care of what needed to be done and for [defendant] not to worry." Based on Hendricks's statement to Colvin, defendant thought that Hendricks was appealing case No. 10–CF–896. When defendant next saw Hendricks at a hearing on case No. 12CF–410, Hendricks told defendant that an appeal in case No. 10–CF–896 was "a waste of time." Defendant also averred that Hendricks did not file a motion to withdraw his guilty plea or a notice of appeal in case No. 12–CF–410 despite defendant's request.

¶ 11 The State answered defendant's petition with a general denial of the claims. The court advanced the petition to the third stage.

¶ 12 At the evidentiary hearing, defendant testified that, in case No. 10–CF–896, he wanted to take the case to trial but Hendricks advised defendant to plead guilty. Hendricks advised defendant that the court would impose a sentence of probation or up to three years' imprisonment. Hendricks emphasized that the court would likely sentence defendant to a term of probation. Without this advice, defendant would have insisted on going to trial.

¶ 13 At the time of the plea, defendant did not comprehend the court's sentence range admonishment because he had been drinking alcoholic beverages and taking drugs. When the court imposed a six-year prison sentence, defendant was devastated. Hendricks told defendant not to worry, as he intended to appeal the sentence. Immediately after defendant was taken into custody, defendant asked Hendricks to appeal his sentence. Sometime during the week after the sentencing hearing, Hendricks told defendant that he had to file a motion ****595 *169** to reconsider sentence before he could file the notice of appeal. Thereafter, defendant tried, without success, to contact Hendricks regarding the status of his appeal. More than one month after the court imposed the six-year sentence, defendant learned that Hendricks had not appealed the sentence. At that time, Hendricks explained that he did not pursue an appeal because defendant had entered a blind plea and the court had the "right to be able to sentence [defendant] to whatever [the court] wanted."

¶ 14 In case No. 12–CF–410, one week after defendant's plea, defendant asked Hendricks, via letter, to file a motion to withdraw his guilty plea. Defendant received no response from Hendricks and sent a second letter one week later. Defendant was also unsuccessful in his attempts to contact Hendricks by telephone. Defendant also directed his father and Colvin to contact Hendricks; however, they too received no information on the status of defendant's appeal.

¶ 15 The State called Hendricks to testify. When Hendricks began representing defendant in case No. 10–CF–896, the State had offered a plea agreement where defendant would plead guilty to unlawful possession of a controlled substance in exchange for the State's recommendation of a four-year prison sentence. Hendricks told defendant that the charge carried a sentencing range of probation to six years' imprisonment and advised defendant that he had a "good chance" of getting less than four years' imprisonment because of the small amount of cocaine that led to the charge. Hendricks told defendant that a sentence of probation was unlikely and denied promising defendant that he would receive a sentence of probation. After discussing the sentencing consequences, defendant rejected the State's offer and entered an open guilty plea. When the court imposed the six-year sentence, Hendricks was "very surprised." Hendricks did not, at that time, advise defendant of his right to appeal because he had previously discussed the

appeal process with defendant. Hendricks thought that his prior conversation plus the court's admonishment rendered any further explanation unnecessary. Hendricks said that defendant never indicated that he wanted to file a motion to reconsider sentence or appeal his conviction.

¶ 16 Hendricks also represented defendant in case No. 12–CF–410. When defendant entered his fully negotiated guilty plea, Hendricks had no concerns about defendant's ability to understand the proceedings or the consequences of his plea. Hendricks denied threatening or coercing defendant into entering the plea. Hendricks said that after defendant entered the plea, defendant did not ask him to move to withdraw the plea or appeal the conviction. Hendricks also did not tell defendant that he would appeal the case.

¶ 17 On cross-examination, Hendricks said, regarding case No. 10–CF–896, that he was "sure [he] indicated to [defendant] that *** he had a right to an appeal." Hendricks also advised defendant that the abuse of discretion standard of review on appeal made defendant's chance of success on appeal low. Hendricks was not sure if he gave this advice on the day of sentencing or during an earlier conversation with defendant. Hendricks did not intend to discourage defendant from appealing the circuit court's decision. Hendricks maintained that defendant did not indicate a desire to appeal and Hendricks would have filed a motion to reconsider sentence or a notice of appeal if requested by defendant. At the time of the sentencing hearing, Hendricks and defendant had had many discussions over the course of a year, and defendant was well versed in the criminal **596 *170 justice system, and therefore, Hendricks felt that he did not need to ask defendant if he wanted to appeal the court's decision.

¶ 18 After hearing the arguments of the parties, the court took the matter under advisement. Before the court issued its ruling, defendant sent an *ex parte* letter to the court that alleged Snyder had provided unreasonable assistance of postconviction counsel. Defendant contended that Snyder refused to call Colvin to testify in support of defendant's postconviction claims.

¶ 19 On August 19, 2015, before the court issued its ruling, defendant filed a *pro se* motion to reconsider. In the motion, defendant asked the court to preemptively reconsider its analysis of the case. Defendant argued that Snyder had prevented Colvin from testifying on his behalf during the evidentiary hearing. In a supporting affidavit, Colvin averred that she had contacted Hendricks after defendant's convictions and Hendricks told her that he was "taking care of" defendant's motion to withdraw the guilty plea. Colvin also averred that Snyder refused to take her statement. Defendant included a letter from Snyder with his motion. In the letter, Snyder said that he would not call Colvin to testify because her testimony pertained only to passing a note to defendant that urged him to accept a plea agreement. Snyder said that defendant's best argument was that Hendricks had failed to perfect his right to an appeal.

¶ 20 On September 9, 2015, the court issued a written order denying defendant's postconviction petition. In the order, the court refused to consider defendant's *pro se* filings, as defendant was represented by counsel. The court further found defendant's testimony was incredible and Hendricks's testimony was credible. The court concluded that defendant had failed to demonstrate that he instructed Hendricks to pursue an appeal in both cases by first filing a motion to reconsider sentence or withdraw the guilty plea.

¶ 21 On October 9, 2015, defendant filed a *pro se* notice of appeal and a motion to reconsider the court's denial of his petition. In his motion to reconsider, defendant said that Snyder had "acted against" him by not calling Colvin to testify at the third-stage hearing. Defendant urged the court to consider the affidavits from Colvin that defendant had sent on September 9, 2015. The court did not rule on the motion because of the contemporaneously filed notice of appeal.

¶ 22 We granted the parties' agreed motion to dismiss the appeal with directions for the circuit court to first rule on defendant's motion to reconsider. *People v. Custer*, No. 3–15–0718 (2016) (unpublished minute order).

¶ 23 On remand, the court called the case for a hearing on defendant's motion to reconsider. Snyder appeared on behalf of defendant, who was not present at the hearing. The State argued that the court should deny the motion, as defendant did not allege a valid basis for the court to reconsider its denial of defendant's postconviction petition. When asked for his response, Snyder said "[h]is motion speaks for itself. I would stand on what he already filed." The court denied the motion. Defendant appeals.

¶ 24 ANALYSIS

[1] ¶ 25 Defendant argues that the court erred in denying his motion to reconsider sentence without conducting a *Krankel* inquiry into his *pro se* allegation of unreasonable assistance of postconviction counsel. The State argues that there is no authority to extend *Krankel* to the representation of postconviction counsel. In response, defendant acknowledges that this case presents an issue of first impression. After considering the rationale behind *Krankel*, we find that a *Krankel*-like ****597 *171** procedure should apply to situations where a defendant makes a claim of unreasonable assistance of postconviction counsel at the third stage of the proceedings.

¶ 26 *People v. Krankel*, 102 Ill. 2d 181, 187, 80 Ill.Dec. 62, 464 N.E.2d 1045 (1984), prescribes the following procedure to address a defendant's *pro se* posttrial claim of ineffective assistance of counsel. First, after a defendant makes a *pro se* claim of ineffective assistance, the circuit court should examine the factual basis of defendant's claim and determine if it lacks merit or pertains to matters of trial strategy. *People v. Moore*, 207 Ill. 2d 68, 77–78, 278 Ill.Dec. 36, 797 N.E.2d 631 (2003). This proceeding is commonly described as a "preliminary inquiry." *People v. Jolly*, 2014 IL 117142, ¶ 27, 389 Ill.Dec. 101, 25 N.E.3d 1127. The preliminary inquiry consists of some exchange between the court and trial counsel regarding the facts and circumstances of defendant's allegations. *Moore*, 207 Ill. 2d at 78, 278 Ill.Dec. 36, 797 N.E.2d 631. The court may also briefly discuss the allegations with defendant. *Id.* The court can base its preliminary evaluation of defendant's claim on its knowledge of counsel's performance and the insufficiency of defendant's allegations. *Id.* at 79, 278 Ill.Dec. 36, 797 N.E.2d 631. Second, where the court finds that defendant's *pro se* allegations show possible neglect, the court should appoint new counsel. *Id.* at 78, 278 Ill.Dec. 36, 797 N.E.2d 631. This appointment avoids the conflict of interest that trial counsel would experience if he had to justify his actions contrary to defendant's position. *Id.* Third, the matter proceeds to a hearing on defendant's claim where defendant is represented by the newly appointed conflict-free counsel. *Id.*

¶ 27 The supreme court has explained that *Krankel* "serves the narrow purpose of allowing the trial court to decide whether to appoint independent counsel to argue a defendant's *pro se* posttrial ineffective assistance claims." *People v. Patrick*, 2011 IL 111666, ¶ 39, 355 Ill.Dec. 943, 960 N.E.2d 1114. "[T]he goal of any *Krankel* proceeding is to facilitate the trial court's full consideration of a defendant's *pro se* claim and thereby potentially limit issues on appeal." *People v. Ayres*, 2017 IL 120071, ¶ 13, 417 Ill.Dec. 580, 88 N.E.3d 732. Additionally, the preliminary inquiry creates the necessary record for any claims raised on appeal. *Id.*

[2] [3] [4] ¶ 28 The instant proceeding differs from the above-described *Krankel* scenario in that defendant's *pro se* claim arose after a third-stage postconviction hearing. Unlike the posttrial stage, defendant does not have a constitutional right to the effective assistance of counsel during this collateral proceeding. *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987); *People v. Guest*, 166 Ill. 2d 381, 412, 211 Ill.Dec. 490, 655 N.E.2d 873 (1995). Instead, the Post–Conviction Hearing Act (Act) allows the circuit court to appoint counsel, where requested by defendant, at the second stage of postconviction proceedings. 725 ILCS 5/122–4 (West 2014). The right to the assistance of postconviction counsel "is a matter of legislative grace, and a defendant is guaranteed only the level of assistance provided by the [Act]." *People v. Hardin*, 217 Ill. 2d 289, 299, 298 Ill.Dec. 770, 840 N.E.2d 1205 (2005). The Act provides a defendant with the "reasonable" assistance of appointed counsel. *Id.* Appointed counsel "must be as conflict-free as trial counsel." *Id.* at 300, 298 Ill.Dec. 770, 840 N.E.2d 1205.

¶ 29 The differences between defendant's right to the effective assistance of posttrial counsel and the reasonable assistance of postconviction counsel do not prohibit the use of a *Krankel*-like procedure during postconviction proceedings. The goals of the *Krankel* procedure hold as much value in this context as they do in the posttrial context. Namely, an inquiry ****598 *172** into defendant's *pro se* claim of unreasonable assistance permits the circuit court to determine if new counsel needs to be appointed to avoid any conflict, develops the record regarding defendant's claim, and limits the issues on appeal. For these reasons, we find that a *Krankel*-like procedure applies to the instant case.

¶ 30 We further find defendant's argument that Snyder's advocacy of defendant's motion that alleged unreasonable

assistance of counsel is the very type of conflict of interest that a *Krankel* preliminary inquiry attempts to avoid. Simply stated, "[a]n attorney cannot be expected to argue his own ineffectiveness." *People v. Lawton*, 212 Ill. 2d 285, 296, 288 Ill.Dec. 638, 818 N.E.2d 326 (2004). This rationale reasonably extends to the postconviction context, where appointed counsel is required to "be as conflict-free as trial counsel." *Hardin*, 217 Ill. 2d at 300, 298 Ill.Dec. 770, 840 N.E.2d 1205. Because defendant's unreasonable assistance claim arose during the postconviction proceedings, we hold that the circuit court must conduct a preliminary inquiry on defendant's claim. The supreme court has recently reaffirmed that

> "the primary purpose of the preliminary inquiry is to give the defendant an opportunity to flesh out his claim of ineffective assistance so the court can determine whether appointment of new counsel is necessary.
>
> We also agree that judicial economy is served by holding an express claim of ineffective assistance of counsel is all that is necessary to trigger a *Krankel* inquiry. The goal of *Krankel* is to 'facilitate the trial court's full consideration of a defendant's *pro se* claims of ineffective assistance of trial counsel and thereby potentially limit issues on appeal.' *Jolly*, 2014 IL 117142, ¶ 29, 389 Ill.Dec. 101, 25 N.E.3d 1127. Moreover, '[b]y initially evaluating the defendant's claims in a preliminary *Krankel* inquiry, the circuit court will create the necessary record for any claims raised on appeal.' *Id.* ¶ 38. Absent such a record, as in the case at bar, appellate review is precluded. Moreover, the inquiry is not burdensome upon the circuit court, and the facts and circumstances surrounding the claim will be much clearer in the minds of all involved when the inquiry is made just subsequent to trial or plea, as opposed to years later on appeal." *Ayres*, 2017 IL 120071, ¶¶ 20–21, 417 Ill.Dec. 580, 88 N.E.3d 732.

¶ 31 Accordingly, we reverse the circuit court's denial of defendant's motion to reconsider and remand with directions for the court to conduct a *Krankel*-like inquiry into defendant's *pro se* claim of unreasonable assistance of postconviction counsel to determine if conflict-free counsel needs to be appointed to represent defendant in a hearing on this claim.

¶ 32 CONCLUSION

¶ 33 The judgment of the circuit court of Peoria County is reversed and remanded with directions. [2]

¶ 34 Reversed and remanded with directions.

Justices Holdridge and O'Brien concurred in the judgment and opinion.

All Citations

2018 IL App (3d) 160202, 97 N.E.3d 166, 420 Ill.Dec. 592

Footnotes

1 Case No. 12–CF–246 is not the subject of this appeal, but it proceeded to a combined plea and sentencing hearing with case No. 12–CF–410. As a result, the charging instrument and statutory offense citation are not a part of the record in this appeal.

2 Defendant also raises an issue regarding the circuit court's third-stage denial of his postconviction petition. Our resolution of the unreasonable assistance of postconviction counsel issue has rendered analysis of the denial unnecessary at this juncture. Therefore, we decline to address this issue at this time.

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IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ILLINOIS PEORIA COUNTY

People of the State of Illinois		
Plaintiff,		
	Case No.:	**10-CF-896**
vs.		**12-CF-410**
JOHN CUSTER,		
Defendant.		

ORDER re DEFENDANT'S PETITION FOR POST CONVICTION RELIEF

This matter comes before the Court for ruling on the Defendant's Petition for Post Conviction Relief following a Third Stage evidentiary hearing. Defendant filed his *pro se* "Petition for Post Conviction Relief" on May 27, 2014 (the "Petition"). In his Petition, Defendant raised various claims of ineffective assistance of trial counsel and a claim of improper 402(a) admonitions regarding consecutive sentences. On July 14, 2014, the Petition was docketed for further proceedings under the Post-Conviction Hearing Act, and counsel was appointed to represent Defendant. On June 4, 2015, defense counsel filed his 651(c) certificate and a Supplemental Petition for Post-Conviction Relief with attached affidavits. At that time, the State simply answered with a general denial of the claims, and the case was set for a Third Stage hearing. The matter proceeded to a Third Stage hearing on July 10, 2015, and the matter was taken under advisement so the court could review the transcripts of the plea proceedings and the court files.

Subsequent to the matter being taken under advisement, Defendant has submitted numerous *pro se* filings to the Circuit Clerk. Because defendant continues to be represented by counsel in these proceedings, and defense counsel has not adopted the filings, the court will not consider the late *pro se* filings.

Having reviewed the Petition, the State's Motion(s), the arguments of the parties, as well the court file from the original proceedings, the court hereby makes the following **FINDINGS** and **ORDERS**.

Claim (a): **In effective assistance of trial counsel -- various allegations.**

In the first portion of Defendant's Petition, he sets forth a number of allegations against his attorney in support of a generalized claim of ineffective assistance of counsel. Included among the allegations are such things as lying to the court and to the defendant, forcing defendant to take a plea deal, ill-advising the client throughout the proceedings, ill-advising the client to take a plea deal, coercing the defendant to plead guilty by having the defendant's girlfriend write a letter, preventing Defendant from having a speedy trial, and that Defendant was severely sedated, being held in a psych ward, and under the influence of large amounts of medications. The allegations are general in nature and fail to adequately demonstrate either prong of the Strickland analysis for ineffective assistance of counsel. Furthermore, none of these allegations are supported by the materials submitted by Defendant in support of his Petition or by the record to a sufficient degree to merit an evidentiary hearing. Therefore, the court hereby **DENIES** the foregoing allegations of ineffective assistance of counsel.

Claim (b): **In effective assistance of trial counsel -- failure to file motion to withdraw plea and vacate judgment.**

Defendant's Petition alleges his constitutional rights to effective assistance of counsel were violated in both of his cases because his trial attorney failed to file motions to withdraw his pleas and vacate the judgment in the two (2) cases addressed by his Petition. The court notes the Petition does not relate to case 12-CF-246 in which a guilty plea was entered pursuant to a fully negotiated package plea deal which involved 12-CF-410.

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In case 10-CF-896, Defendant pled guilty pursuant to an open plea to one (1) count of unlawful possession of a controlled substance on November 14, 2011. Initially in this case, the Peoria County Public Defender's office was appointed to represent Defendant. According to the court file, Defendant's case was continued once to have Defendant brought back from the IDOC. The case was set for a 402 conference and/or plea on December 16, 2010. On that date, an order was entered on which it was noted that "all previous offers by the People are withdrawn." In May of 2011, private defense counsel entered his appearance on behalf of Defendant, and the Public Defender's office was allowed to withdraw. The case was again continued for new trial settings. As mentioned above, Defendant entered an open plea on November 14, 2011. The case was set for a sentencing hearing. Defendant failed to appear for his sentencing hearing, and a bench warrant was issued on May 3, 2012, for his arrest. The case remained on warrant status until September 6, 2012, after he was picked up on that warrant. The case was then set for a new sentencing hearing.

The Presentence Investigation Report that was prepared for the sentencing hearing and which is located in the court file shows Defendant had some nine (9) prior felony convictions, ten (10) criminal misdemeanor convictions, ten (10) Class A traffic convictions, plus seven (7) orders of protection entered against him. It also revealed that while this case was pending he was charged with felony domestic battery, returned to IDOC on a parole violation, was charged with misdemeanor domestic battery, arrested again for domestic battery, arrested for violation of an order of protection and possession of cannabis, ticketed for reckless driving and driving on a suspended license. At that the conclusion of the sentencing hearing on October 25, 2012, the judge imposed a sentence of six (6) years in IDOC -- the maximum extended term sentence on the Class 4 felony. No motion to withdraw the plea or reconsider the sentence was filed.

While out on bond on the 10-CF-896 case, Defendant was charged in 12-CF-410 with unlawful possession of a weapon by a felon (Class 3) and aggravated assault and unlawful use of weapons (both Class A), and in case 12-CF-246 with aggravated battery (to a police officer) (Class 2), domestic battery (Class 4), and unlawful possession of drug paraphernalia (Class A). In both 2012 felony cases, Defendant was represented by the same private defense counsel who represented him in the 10-CF-896.

On July 23, 2013, nine (9) months after being sentenced in 10-CF-896, and while still represented by the same private defense counsel, Defendant pled guilty in both 12-CF-246 and 12-CF-410. The pleas on those two (2) cases were pursuant to a fully negotiated agreement between Defendant and the State whereby Defendant was sentenced to five (5) years on the Unlawful Possession of a Weapon by a Felon in 12-CF-410, and four and one half (4.5) years on the Aggravated Battery in 12-CF-246. The State agreed to dismiss the other pending charges in both cases. Both of the sentences were to run consecutive to each other and also consecutive to the six (6) year sentence in 10-CF-896. Once again, no timely motion to withdraw a guilty plea was filed in either of the 2012 felony cases.

Defendant now claims he instructed his private attorney numerous times in the thirty (30) days following his sentencing in 2011 on the 10-CF-896 case that he wanted to appeal. He also claims that he likewise told the same private attorney numerous times that he wanted to withdraw his plea in the 12-CF-410 case. However, despite agreeing to do so, counsel never took action on either case.

With regard to a claim of ineffective assistance of counsel, Defendant must make a substantial showing to satisfy both prongs of the Strickland test -- (1) the attorney's performance fell below an objective standard of reasonableness, and (2) the substandard performance caused prejudice to defendant. Under the second prong, defendant must make a showing that there is a reasonable probability that, but for counsel's unprofessional error (i.e., the failure to investigate and/or call witnesses), the result of the proceeding would have been different. There is a strong presumption that counsel's performance falls within the wide range of reasonable professional assistance. Failure to satisfy either the deficiency prong or the prejudice prong precludes a finding of ineffective assistance of counsel.

At the Third Stage hearing, Defendant testified that he entered a blind plea of guilty on the advice of counsel. He claims his attorney predicted he would receive less than three (3) years on the class 4 felony. After he was sentenced to six (6) years, he testified his attorney then told him that the State had previously offered four (4) years. He claims he then told his attorney multiple times he wanted to appeal, but his attorney never filed a motion to reconsider the sentence and/or to withdraw his guilty plea. When

questioned by his post-conviction counsel, Defendant stated he probably would have taken the four (4) years offered by the State. On cross-examination Defendant claimed his attorney guaranteed he would get probation, acknowledged the State had been negotiating for between 5 and 5.5 years, also acknowledged he understand he was extendable on the Class 4, but claimed he wasn't aware he could get six (6) years.

At the evidentiary hearing, the State presented the testimony of Clyde Hendricks, the private counsel who represented Defendant in all of his legal matters back in 2010 through 2012, and into 2013, including the Defendant on case 10-CF-896. Mr. Hendricks testified he advised Defendant of the possible range of sentences between 1 and 6 years, and he was certain Defendant understood the sentencing range. At the time he took over the file from an assistant public defender, there was a note that indicated the State had offered four (4) years, but Defendant thought that was excessive, and counsel agreed. In fact, as noted above, before Mr. Hendricks had taken over the representation of Defendant, the State had withdrawn all offers, suggesting the defense had rejected any offer made to the assistant public defender. Mr. Hendricks states he advised Defendant that he thought that because it was a relatively small amount of a controlled substance involved the court would impose a sentence of less than 4 years, but he made no guarantees. He termed it a "calculated risk" by the Defendant. After the sentencing hearing, Mr. Hendricks was surprised by the maximum sentence, and when he spoke with Defendant, the Defendant was surprised as well. When Mr. Hendricks spoke with Defendant immediately after the sentencing, he advised Defendant that it would be a tough standard of review on appeal of the sentence and it would be a low chance of success on appeal to challenge the sentence. He gave that advice not to discourage an appeal. There were no further discussions between Defendant and Mr. Hendricks about an appeal or withdrawing the plea. Despite the fact that he and Defendant were in continuing communication on a regular basis regarding Defendant's other legal matters, Mr. Hendricks testified Defendant never told him he wanted to withdraw the plea or ask the court to reconsider the sentence. He testified that if Defendant had requested a motion or an appeal, he would have taken the necessary steps. He also testified he never told Defendant he would file an appeal.

With regard to case 12-CF-410, Defendant testified at the third stage hearing he was pretty medicated at the time of the plea and he simply did what his attorney said. He claims he told the court he didn't understand what was going on. He also testified he wanted to go to trial on the weapons charge because he believes he could carry a 3" pocket knife as a convicted felon. He claimed he tried to contact his attorney after the guilty plea but his attorney never got back to him.

Mr. Hendricks testified the plea in 12-CF-410 was pursuant to a fully negotiated plea as part of a package deal with the plea in 12-CF-246. Mr. Hendricks advised Defendant to take the package deal because Mr. Hendricks believed Defendant was likely to be convicted on both cases. Both cases would have required Defendant to testify in order to mount any kind of defense, and counsel didn't think it was advisable to have Defendant testify in light of his extensive criminal history which could be used for impeachment. Mr. Hendricks never threatened Defendant or told him he didn't have a choice, and was confident Defendant understood what was going on. Defendant never told Mr. Hendricks that he wanted to appeal or withdraw the plea in any fashion. Mr. Hendricks also testified that he continued to represent Defendant on other matters even after the guilty pleas in the 2012 cases.

To determine whether Defendant is entitled to relief on his claim of ineffective assistance of counsel, the court must resolve the dispute between Defendant's version of events and defense counsel's version of events. To do so requires a determination of credibility of the two (2) witnesses. As an initial matter, the court finds Defendant's testimony to be totally unbelievable. In addition to his manner while testifying, the court finds Defendant's testimony and claims are clearly contradicted by the facts and circumstances set forth in the record. He claims he didn't understand the proceedings and what was going on, but it is clear he was well versed in the criminal courts and procedures in light of his extensive criminal history. There is no doubt he knew full well what was going on throughout the proceedings. The transcripts of the plea hearings suggest he fully understood what was going on. He asked pointed and intelligent questions, and he made appropriate responses to questions. Furthermore, the court finds that if Defendant was truly so disenchanted with Mr. Hendricks' performance in 10-CF-896, Defendant wouldn't have continued to retain Mr. Hendricks as his privately retained

attorney for the subsequent criminal cases, as well as for some civil matter. Additionally, it appears to the court that the State, at some point during the time Defendant was represented by an assistant public defender, offered four (4) years on the 10-CF-896 case. That offer was withdrawn by the State after the setting for a plea or a 402 conference, suggesting the defense rejected the State's offer. As such, the record contradicts Defendant's testimony that he "probably" would have accepted the 4 year offer if Mr. Hendricks had relayed it to him. It not only appears he did reject the offer before Mr. Hendricks was hired, but that the offer was withdrawn before he was even hired.

Conversely, the court finds Mr. Hendricks to be very believable. While testifying he answered all of the questions, on both counsel, very matter of fact and appeared to provide honest responses under cross-examination. For instance, when questioned about the prediction he made to his client about getting something less than 4 years on the Class 4 possession charge, Mr. Hendricks testified he did advise his client that he thought they could get better than the five (5) years the State was offering at the time.

Stated simply the court believes Mr. Hendricks and not the Defendant. As such, when determining whether Defendant asked Mr. Hendricks to file the motion to reconsider the sentence and/or withdraw the pleas the court believes Mr. Hendricks testimony that the Defendant never instructed or asked him to do so. Based upon the foregoing, the court finds Defendant has failed to demonstrate that in case 10-CF-896 he instructed his attorney to file a motion to reconsider the sentence and/or to withdraw his plea, and in case 12-CF-410 he instructed his attorney to file a motion to withdraw his plea. Defendant has failed to demonstrate counsel's performance was deficient and/or that he was prejudiced by counsel's deficient performance. Therefore, the court hereby **DENIES** this claim in Defendant's Petition.

Claim (c): **Improper 402(a) admonishment by the court regarding consecutive sentences.**

In this claim, Defendant asserts he was not properly admonished regarding the possibility of consecutive sentences. Presumably this claim relates only to the 12-CF-410. The court has reviewed the transcripts of the plea hearing, and has determined that

this claim has no merit from a factual basis. Defendant was admonished regarding the possibility of consecutive sentences, and in fact there was an extensive discussion on the record between the court, the attorneys, and the defendant about consecutive sentences. It is clear Defendant fully understood the agreed upon sentences were to be consecutive to each other as well as consecutive to the previously imposed sentence in 10-CF-896. As a result, the court hereby **DENIES** this claim in Defendant's Petition.

In light of the foregoing, the court hereby **DENIES** the Defendant's Petition for Post-Conviction Relief in its entirety. The Clerk shall provide a copy of this Order to ASA Beard, APD Snyder and to Defendant at his last known address. This is a final appealable order and there is no just reason to delay enforcement hereof.

IT IS SO ORDERED.

Entered September 9, 2015.

David A. Brown, Associate Judge

No. 3-15-0718

IN THE

APPELLATE COURT OF ILLINOIS

THIRD JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of
	)	the Tenth Judicial Circuit,
Respondent-Appellee,	)	Peoria County, Illinois
	)	
-vs-	)	No. 10-CF-896
	)	
JOHN MICHAEL CUSTER,	)	Honorable
	)	David Brown,
Petitioner-Appellant.	)	Judge Presiding.

AGREED MOTION TO DISMISS APPEAL AND TO ORDER CIRCUIT COURT TO RULE ON DEFENDANT'S MOTION FOR RECONSIDERATION OF THE DENIAL OF HIS POST-CONVICTION PETITION

Petitioner-Appellant, John Michael Custer, by Peter A. Carusona, Deputy Defender, and Thomas A. Karalis, Assistant Appellate Defender, Office of the State Appellate Defender, respectfully requests that this Honorable Court dismiss his appeal in the above-entitled cause and order that the circuit court decide the defendant's timely-filed motion for reconsideration of the denial of his petition for post-conviction relief.

In support of this motion counsel states:

1. Following proceedings in November, 2011, defendant entered a plea of guilty to a charge of unlawful possession of a controlled substance and he was later sentenced to a 6-year term of imprisonment.

2. Without having pursued a direct appeal from his conviction and/or sentence, on May 27, 2014, defendant filed a *pro se* petition for post-conviction relief.

(C51-55). (Defendant listed two Peoria County case numbers within the caption of his *pro se* petition, neither of which matched the case number of the case at bar. However, in later orders, pleadings, and a certificate of compliance with Supreme Court Rule 651(c), the court and defendant listed the instant case and Peoria County Case No. 12-CF-410 as the two cases with which the claims in defendant's petition were concerned.)

3. On July 14, 2014, an order was entered by Judge David Brown docketing defendant's petition for further proceedings and appointing post-conviction counsel (C60).

4. On June 4, 2015, appointed counsel filed a supplemental petition for post-conviction relief in which defendant alleged that his counsel during the former guilty-plea proceedings rendered ineffective assistance of counsel in that former counsel failed to file any post-plea motions in this case (or in Case No. 12-CF-410) (C99).

5. An evidentiary hearing was held on July 10, 2015 (R172-243), at the conclusion of which Judge Brown took defendant's post-conviction claims under advisement for a decision (C103).

6. In an order entered on September 9, 2015, pertaining to both the instant case and Peoria County Case No. 10-CF-896, Judge Brown denied defendant's post-conviction petition (C104-11).

7. On October 9, 2015, defendant filed: 1) a *pro se* notice of appeal listing the case number in this case as well as Peoria County Case No. 12-CF-410 and referring to the order of September 9, 2015, as the judgment being appealed from (C116-17; see Appendix); and 2) a motion to reconsider the order of September 9th denying his petition for post-conviction relief (C114-15; see Appendix). According to the record on

appeal in this case as well as the one filed in Case No. 3-15-0719, to date no ruling has been entered on defendant's timely-filed motion.

8. A new notice of appeal was prepared by the clerk of the court and was filed on October 14, 2015 (C121; see Appendix). The Office of the State Appellate Defender was appointed to represent defendant on October 13, 2015 (C120).

9. The instant appeal should now be dismissed. Illinois Supreme Court Rule 606(b) provides that when a timely motion directed against the judgment has been filed by counsel or the defendant, any notice of appeal filed before the entry of the order disposing of all post-judgment motions shall have no effect and shall be stricken by the trial court. This rule applies to appeals involving post-conviction petitions. *People v. Dominguez*, 356 Ill. App. 3d 872, 875-76 (2d Dist. 2005); *People v. Powers*, 376 Ill. App. 3d 63, 65 (2d Dist. 2007). In this case the trial court never ruled upon the motion for reconsideration and instead appointed the Office of the State Appellate Defender to represent the defendant. The trial court, however, pursuant to Rule 606(b), should have ruled on the motion. This Court therefore should dismiss this appeal and order the circuit court to rule on defendant's motion for reconsideration.

10. Undersigned counsel notes, pursuant to Supreme Court Rule 361(a), that he has conferred with counsel for the State and that counsel for the State does not oppose the present motion.

WHEREFORE, appellant, John Michael Custer, respectfully requests that this Honorable Court dismiss the defendant's appeal in this cause and order the circuit court to rule on the defendant's motion for reconsideration.

Respectfully submitted,

Thomas A Karalis

THOMAS A. KARALIS
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COUNSEL FOR PETITIONER-APPELLANT

STATE OF ILLINOIS)
) SS
COUNTY OF LASALLE)

AFFIDAVIT

Thomas A. Karalis, being first duly sworn on oath, deposes and says that he has read the foregoing Motion and the facts stated therein are true and correct to the best of his knowledge and belief.

Thomas A Karalis

THOMAS A. KARALIS
Assistant Appellate Defender

SUBSCRIBED AND SWORN
to before me on December 29, 2015.

Roberta J Eisert

NOTARY PUBLIC

Official Seal
Roberta J Eisert
Notary Public State of Illinois
My Commission Expires 02/19/2018

STATE OF ILLINOIS

THIRD DISTRICT APPELLATE COURT

BARBARA TRUMBO
Clerk of the Court
815-434-5050

1004 Columbus Street
Ottawa, Illinois 61350
TDD 815-434-5068

01/12/16

Mr. Peter A. Carusona, Deputy Defender
Office of the State Appellate Defender
770 E. Etna Road
Ottawa, IL 61350-1014

RE: General No. 3-15-0718
Circuit Court No. 10CF896
County of Peoria
People v. Custer, John Michael

The Court has this day entered in the above entitled cause the following order:

Agreed Motion to Dismiss Appeal and to Order Circuit Court to Rule on Defendant's Motion for Reconsideration of the Denial of His Post-Conviction Petition is ALLOWED. APPEAL DISMISSED. CIRCUIT COURT DIRECTED TO RULE ON MOTION.

Barbara A. Trumbo
BARBARA A. TRUMBO, Clerk
Appellate Court
Third District

cc: Mr. Terry A. Mertel, Deputy Director
Mr. Jerry Brady, State's Attorney
Hon. David A. Brown, Trial Judge
Mr. Robert Spears, Circuit Clerk

Index to Record on Appeal[1]

Common Law Record in Case No. 10 CF 896

[1] This index is ordered by the page numbers provided by the circuit court clerk, rather than by chronological order. This appeal involves multiple consolidated cases and the record commingles documents and transcripts from several cases.

Report of Proceedings in Case No. 10 CF 896

Common Law Record in Case No. 12 CF 410

Report of Proceedings in Case No. 12 CF 410

PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On January 7, 2019, the foregoing **Brief and Appendix of Respondent-Appellant People of the State of Illinois** was (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy from my email address to the email addresses below:

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

/s/ Michael L. Cebula

MICHAEL L. CEBULA
Assistant Attorney General

E-FILED
1/7/2019 7:43 AM
Carolyn Taft Grosboll
SUPREME COURT CLERK