IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- JAMES CHERRY, Defendant-Appellee and Cross-Appellant.	)	Appeal from the Appellate Court of Illinois, No. 5-13-0085. There on appeal from the Circuit Court of the Twentieth Judicial Circuit, St. Clair County, Illinois, No. 10-CF-1007. Honorable Michael N. Cook, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE CROSS RELIEF REQUESTED

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

I.

James Cherry's Conviction for Armed Violence Is Void Because Armed Violence Cannot Be Predicated upon the Felony of Aggravated Battery.

CROSS-APPEAL

II.

James Cherry's Counsel Failed to Advance His Claims at the *Krankel* Evidentiary Hearing, Such that Cherry's Claims Were Not Subjected to Meaningful Adversarial Testing; this Cause Must Be Remanded for Further Proceedings on Cherry's Claims.

A.

James Cherry's post-trial counsel failed to advance his claims at the *Krankel* evidentiary hearing, such that Cherry's claims were not subjected to meaningful adversarial testing; this cause must be remanded for further proceedings on Cherry's claims.

B.

James Cherry's post-trial counsel was ineffective when his inaction essentially deprived Cherry of a hearing on his claims at the *Krankel* evidentiary hearing and precluded a finding of prejudice.

ISSUES PRESENTED FOR REVIEW

I.

Whether James Cherry's conviction for armed violence is void because armed violence cannot be predicated upon the felony of aggravated battery.

CROSS-APPEAL

II.

Whether James Cherry's counsel failed to advance his claims at the *Krankel* evidentiary hearing, such that Cherry's claims were not subjected to meaningful adversarial testing; this cause must be remanded for further proceedings on Cherry's claims.

STATEMENT OF FACTS NECESSARY FOR CROSS-APPEAL

After his conviction, James Cherry filed a letter with the trial court asserting that his attorney was ineffective and had Cherry's bond assigned to his fee without Cherry's knowledge. (C. 172) The letter also claimed that trial counsel operated under a conflict of interest when he was "an associate of Miller Bey, the father of Larry Miller." (C. 172) Cherry asserted that his counsel did not conduct an investigation, failed to interview witnesses, and did not investigate other crimes near the parking lot. (C. 172-73) Further, his counsel did not hire a ballistics expert, test the bullet removed from Cherry's vehicle, or challenge the admission of the magazine found in Cherry's car. (C. 173) Cherry asserted that his counsel did not maintain adequate communication with him prior to trial, and failed to prepare him to testify. (C.174)

At his sentencing, during his statement in allocution, Cherry began to read from a letter, "During my trial I did not have adequate representation. I was prejudiced by the poor performance of my attorney and a conflict of interest that violated my..." (C. 233) The State asked for a sidebar, and Cherry's attorney admitted that he "was probably going to be withdrawing anyway for purposes of appeal." (C. 234) The trial court informed Cherry that his complaints of ineffective assistance of counsel were "matters that should be left up to appeal and not relevant at sentencing." (C. 236)

After sentencing, Cherry was given his appellate admonitions; he then asked how he could obtain a different lawyer. (C. 240) The trial court acknowledged, "you believe that there's been a breakdown in your lawyer/client relationship with [defense counsel] among other things and would request that the Court appoint

a lawyer, is that correct, sir?" (C. 241) The court appointed a public defender for Cherry. (C. 242) Cherry's new counsel, Thomas Philo, filed a motion to reconsider sentence, asserting that the sentence was extreme in light of the circumstances, which were unlikely to recur. (C. 243) On December 7, 2012, a hearing was held on the motion to reconsider sentence. Philo argued that Cherry was under "extreme intoxication" at the time of the shooting. (C. 44) The motion was denied. (C. 50)

On January 5, 2012, the trial court entered an order noting that Cherry "had filed a letter with the court alleging ineffective assistance of counsel and requesting a new trial," and set the matter for hearing on February 23, 2012. (C. 247) The hearing was continued several times, until January 16, 2013. (C. 248, 250, 254) Cherry was present at the hearing, but was not asked to explain or elaborate on the issues raised in his *pro se* letter. (C. 258) Cherry's counsel noted that Cherry had previously filed a four-page letter asserting his former counsel's ineffective assistance, had requested a ruling on the issues in the motion, and had alleged that his trial counsel "failed to investigate some medical records that may have shown that Defendant was not under the influence of alcohol." (C. 259) The trial court allowed attorneys for both sides to argue the issues presented in the letter, and Cherry's counsel repeated the allegations in the letter. (C. 260) The trial court found that the letter did not meet the standard of *Strickland v. Washington*, and denied the motion. (C. 260-63)

On appeal, Cherry alleged that aggravated battery was not a proper predicate offense for armed violence, and also that the counsel appointed for his *Krankel* evidentiary hearing was ineffective. The Appellate Court agreed that armed violence could not be predicated on aggravated battery, and vacated that conviction. *People*

v. Cherry, 2014 IL App (5th) 130085, ¶ 20. However, the Court found that Cherry's counsel at his *Krankel* evidentiary hearing did not provide ineffective assistance of counsel in violation of the *Strickland* standard, when he did not show prejudice from counsel's performance. *Cherry*, 2014 IL App (5th) 130085, ¶ ¶ 28-31.

ARGUMENT

I.

James Cherry's Conviction for Armed Violence Is Void Because Armed Violence Cannot Be Predicated upon the Felony of Aggravated Battery.

James Cherry was convicted of armed violence predicated on aggravated battery. On appeal, Cherry argued that armed violence can not be predicated on aggravated battery, because the statute specifically excludes as a possible predicate felony certain listed offenses or "any offense that makes the possession or use of a dangerous weapon either an element of the base offense, an aggravated or enhanced version of the offense, or a mandatory sentencing factor that increases the sentencing range," and the use of a firearm elevates aggravated battery to aggravated battery with a firearm, thus creating a firearm-enhanced version of the offense. 720 ILCS 5/33A-2 (2010); 720 ILCS 5/12-4.2 (2010). The Appellate Court agreed with Cherry, finding that aggravated battery with a firearm is a firearm-enhanced version of the base offense of aggravated battery, "so the logical conclusion is that it is specifically excluded by the statute's most recent iteration, despite the fact that the prosecution chose a subsection of the predicate offense that does not reference a weapon." *People v. Cherry*, 2014 IL App (5th) 130085, ¶ 19.

In this appeal, the main thrust of the State's argument is that the Appellate Court "failed to identify the correct 'offense'" when its ruling defined the base offense as "generic aggravated battery" and not aggravated battery causing great bodily harm. (State's Brief at 9) The State's brief cites *People v. Guevara*, 216 Ill.2d 533, 546 (2005), for its assertion that the "myriad forms of aggravated battery set forth in the aggravated battery statute are properly viewed as distinct offenses." This

Court's opinion in *Guevara* does include the phrase "distinct offenses," but within that same paragraph this Court also referred to the various ways in which home invasion could be charged as "distinct types of home invasions." *Guevara*, 216 Ill. 2d at 546. Earlier in its opinion, when reviewing the evolution of the home invasion statute, this Court described the statute: "[b]efore January 1, 2000, section 12 11(a) of the Criminal Code of 1961 split home invasion into two categories." *Guevara*, 216 Ill.2d at 536. And later, when explaining the impact of the 15-20-25-Life enhancements on home invasion, this Court noted that they "added three new categories related to firearm use." *Guevara*, 216 Ill.2d at 537. The isolated reference to "distinct offenses" cited by the State is therefore not dispositive to the issue of how characterize the twenty-four forms of aggravated battery.

Even if each of the twenty-four distinct forms of aggravated battery is a distinct offense, as the State asserts (State's Brief at 10), the State's argument still fails. Under the State's interpretation, each possible arrangement of elements charged is not just an offense, but is a "base offense" under 720 ILCS 5/33A-2(b) (2010). Under the State's analogy, aggravated battery would not only be twenty-four separate offenses, each of those twenty-four versions would be the base offense. When applying the basic rules of statutory construction. "Each word, clause and sentence of the statute, if possible, must be given reasonable meaning and not rendered superfluous." *People v. Botruff*, 212 Ill.2d 166, 175 (2004). The armed violence statute specifically excludes as a possible predicate felony certain listed offenses or "any offense that makes the possession or use of a dangerous weapon either an element of the base offense, an aggravated or enhanced version of the offense, or a mandatory sentencing factor that increases the sentencing range."

720 ILCS 5/33A-2 (2010). If, as the State claims, the legislature intended to exclude only those distinct offenses containing firearm language, why would it then include the phrase "an aggravated or enhanced version of the offense" in this statute? The inclusion of this phrase, which must be given a reasonable interpretation, means that an "offense" is broader than the specific set of elements charged, and includes all offenses under the broader category of a base offense. The Appellate Court's conclusion that "the plain language of the current statute prohibits predicating armed violence on any part of the aggravated battery statute, including section 12-4(2)" is correct because it gives proper effect to the entire amendment made by the legislature in 2007. *Cherry*, 2014 IL App (5th) 130085, ¶ 19.

Indeed, the State contradicts its own position in its argument when it argues that "[a]ggravated battery causing great bodily harm would be an improper predicate for armed violence only if ...(2) there existed 'an aggravated or enhanced version' of aggravated battery causing great bodily harm that included 'the possession or use of a dangerous weapon' as an element...". (State's Brief at 11) Under the State's argument, there are currently "twenty-four distinct forms of aggravated battery, each with unique elements." (State's Brief at 10) If every form is its own offense, there can never be an aggravated or enhanced version of the offense. A version of aggravated battery causing great bodily harm with the additional element of "the possession or use of a dangerous weapon" would be distinct from the current version of aggravated battery causing great bodily harm, and would create a twenty-fifth distinct form of aggravated battery--aggravated battery causing great bodily harm with the possession or use of a dangerous weapon. If each of these twenty-five versions is a distinct offense, consistent with the State's overall

argument, then aggravated battery causing great bodily harm could still serve as a predicate for armed violence. Obviously, this argument is absurd, but it is an interpretation consistent with the State's argument that an additional distinct element creates a distinct offense.

The State's position that every type of aggravated battery is a distinct offense is not consistent with the legislature's actions when it amended the armed violence statute in 2007. The primary function of a court in construing a statute is to give effect to the intent of the legislature, and it is proper to consider both the history and course of the legislation, as well as subsequent amendments to the statute. *In re Pronger*, 118 Ill.2d 512, 520 (1987). When the Illinois legislature enacted Public Act 91-404 and created the 15-20-25-Life sentencing scheme, the predicate offenses for armed violence were changed to avoid violations of the Proportionate Penalties Clause, with the legislature specifically excluding the ten offenses now enhanced under the 15-20-25-Life sentencing scheme:

> "Armed Violence Elements of the offense....
>
> (b) A person commits armed violence when he or she personally discharges a firearm that is a Category I or II weapon while committing any felony defined by Illinois Law, except first degree murder, attempt first degree murder, intentional homicide of an unborn child, predatory criminal sexual assault of a child, aggravated criminal sexual assault, aggravated kidnaping, aggravated battery of a child, home invasion, armed robbery, or aggravated vehicular hijacking." 720 ILCS 5/33A-2(b) (2000).

However, after violations of the Proportionate Penalties Clause were discovered, the legislature again amended this statute, adding in the bolded language:

> "Armed Violence Elements of the offense...
>
> "(b) A person commits armed violence when he or she personally discharges a firearm that is a Category I or Category II weapon while committing any felony defined by Illinois law, except first degree murder, attempted first degree murder, intentional homicide of an unborn child, second degree murder, involuntary manslaughter, reckless homicide, predatory criminal sexual assault of a child, aggravated battery of a child, home invasion, **or any offense that makes the possession or use of a dangerous weapon either an element of the base offense, an aggravated or enhanced version of the offense, or a mandatory sentencing factor that increases the sentencing range**." 720 ILCS 5/33A-2(b) (2010).

With this amendment, the legislature not only added the bolded language, it changed the list of specifically-excluded predicate offenses. Second degree murder, involuntary manslaughter, and reckless homicide were added to the list. 720 ILCS 5/33A-2(b) (2010). And four of the offenses enhanced under the 15-20-25-Life sentencing scheme--aggravated criminal sexual assault, aggravated kidnaping, armed robbery, and aggravated vehicular hijacking-- were removed.

The State's interpretation would effectively undo the 2007 amendment. Again, the State's argument, simply put, is that every form of an offense is its own distinct base offense. (State's Brief at 10) Under this argument, there can never be an aggravated or enhanced version of any offense, as each is its own offense. It would be absurd to imagine that the legislature, which made the 2007 amendment specifically to clarify that armed violence could not be predicated on robbery (See, *People v. Clemons*, 2012 IL 107821, ¶ 15), would then remove armed robbery from the list of specifically excluded offenses if it did not intend that both armed robbery and robbery were included by the "catch-all" language at the end of their amendment. If the offense of armed robbery is distinct from robbery, and not "an aggravated or enhanced version of the offense," and every form of an offense is its own distinct offense, such that there can never be an aggravated or enhanced version of the offense, the legislature would have added the offense of robbery to the list and left armed robbery on the list (as well as aggravated criminal sexual assault, aggravated kidnaping, and aggravated vehicular hijacking).

A closer look at those four offenses that the legislature removed from the armed violence statute in 2007 provides insight into how the legislature intended the word 'offense' to be interpreted. Logically the legislature fully intended these four offenses to be covered by the catch-all phrase of "any offense that makes the possession or use of a dangerous weapon...an aggravated or enhanced version of the offense..". With the 2007 amendment, the legislature intended to *prevent* further identical elements challenges similar to those brought in *People v. Hauschild*, 226 Ill.2d 63 (2007), *People v. Andrews*, 364 Ill.App.3d 253 (2nd Dist. 2006), *People v. Baker*, 341 Ill.App.3d 1083 (4th Dist. 2003), and *People v. Hampton*, 363 Ill.App.3d

293 (1st Dist. 2005), overruled by *People v. Hampton*, 225 Ill.2d 238 (2007). But, if State is correct and every form of an offense is its own distinct offense, such that there can never be an aggravated or enhanced version of each offense; aggravated criminal sexual assault is distinct from criminal sexual assault, aggravated kidnaping is distinct from kidnaping, armed robbery is distinct from robbery, and aggravated vehicular hijacking is distinct from vehicular hijacking. Therefore, under the State's interpretation, the amendment specifically *allows* armed violence to be again predicated on criminal sexual assault, kidnaping, robbery, and vehicular hijacking, making this amendment a nullity and frustrating the legislature's clear intent. When interpreting statutory language, "we do always presume that the legislature did not intend an absurd, inconvenient, or unjust result." *People ex rel. Birkett v. Jorgensen*, 216 Ill.2d 358, 363 (2005). The State's interpretation of this amendatory language would produce an absurd result.

The recognized that the legislature had struggled to correct past infirmities in the armed violence statute, and to prevent further violations of the identical elements prong of the Proportionate Penalties Clause:

> "In reaching our conclusion, we note that the defendant was also convicted of aggravated battery with a firearm based on the same event. As such, we find it would be patently unreasonable to conclude that the prosecution may both charge the defendant with an enhanced version of an offense and then also predicate an armed violence charge on a subsection of the same basic offense that does not specifically address weapons

> in order to sidestep the statutory exclusions. This would clearly frustrate the legislative intent of the General Assembly's multiple, and increasingly thorough, revisions to the statute. *Cherry*, 2014 IL App (5th) 130085, ¶ 20.

The legislature has provided clear guidance on allowable predicate offenses for armed violence. But, to the extent that this Court might feel that this statute is still ambiguous, the statute should be interpreted to afford lenity to the accused. *People v. Roberts*, 214 Ill.2d 106, 118 (2005).

The State, without any citation to authority other than general definitions, also conflates "aggravated or enhanced version of the offense" with requiring a showing of included elements, similar to tests used to determine if one offense is a lesser-included offense of the other. (State's Brief at 11-13) This Court has held that, when a party cites no authority for an argument, "[s]uch bare contentions do not merit consideration on appeal." *People ex rel. Aldworth v. Dutkanych*, 112 Ill.2d 505, 511 (1986). And this amendatory language was simple, and must be "given its plain and ordinary meaning." *People v. Ramirez*, 214 Ill.2d 176, 179 (2005). Nothing in the language chosen by the legislature requires parity of elements, and this Court should reject the State's attempt to add new requirements to the plain language of the armed violence statute.

James Cherry was convicted of armed violence predicated upon aggravated battery, an excluded predicate felony, and therefore his armed violence conviction is void. He requests that this Court uphold the decision of the Appellate Court, which vacated this conviction, and remand his cause to the trial court for resentencing on the merged count of aggravated battery with a firearm.

CROSS-APPEAL

II.

James Cherry's Counsel Failed to Advance His Claims at the *Krankel* Evidentiary Hearing, Such that Cherry's Claims Were Not Subjected to Meaningful Adversarial Testing; this Cause Must Be Remanded for Further Proceedings on Cherry's Claims.

In *People v. Krankel*, 102 Ill.2d 181 (1984), this Court created a process for the trial court "to fully address a defendant's claims of ineffective assistance." *People v. Jocko*, 239 Ill.2d 87, 91 (2010). Cases interpreting *Krankel* established a two-step procedure for inquiry into the defendant's claims. Once the defendant brings his *pro se* claim to the trial court's attention, the court should examine the factual basis of the claim and appoint counsel when it finds possible neglect of the case. *People v. Moore*, 207 Ill.2d 63, 77-78 (2003); *Krankel*, 102 Ill.2d at 189. New counsel should "undertake an independent evaluation of the defendant's claim and present the matter to the court from a detached, yet adversarial position." *People v. Jackson*, 131 Ill.App.3d 128, 139 (4th Dist. 1985). After a full evidentiary hearing, the trial court rules on whether the defendant proved that his attorney was constitutionally ineffective. *Moore*, 207 Ill.2d at 77-788; *Krankel*, 102 Ill.2d at 189.

After his conviction, James Cherry filed a letter with the trial court asserting that his attorney was ineffective and had a conflict of interest with a State's witness. (C. 173) When Cherry brought these claims to the trial court's attention after sentencing, the court acknowledged that Cherry had "a breakdown" in his relationship with his counsel and appointed a public defender to represent Cherry. (C. 241-42) This new counsel filed a motion to reconsider sentence and, after its denial, the trial court set Cherry's *pro se* complaints for an evidentiary hearing under *Krankel*. (C. 247) After being continued for over a year, this hearing was

held on January 16, 2013. At the hearing, Cherry's counsel noted that Cherry had previously filed a four-page letter asserting his former counsel's ineffective assistance, requested a ruling on the issues in the motion, and additionally alleged that Cherry's trial counsel "failed to investigate some medical records that may have shown that Defendant was not under the influence of alcohol." (C. 259) The trial court allowed attorneys for both sides to argue the issues presented in the letter, and Cherry's counsel merely repeated the allegations in the letter. (C. 260) The trial court found that the allegations in the letter did not show a violation of *Strickland v. Washington*, and that Cherry's counsel had "not demonstrated a reasonable probability that any errors...would have substantially changed the outcome of this case." (C. 262-63) *People v. Cherry*, 2014 IL App (5th) 130085, ¶ 20. And, on appeal, the Appellate Court, applying the *Strickland* standard, found that Cherry's *Krankel* counsel did not provide ineffective assistance of counsel at the evidentiary hearing, when Cherry did not show prejudice from counsel's performance. *Cherry*, 2014 IL App (5th) 130085, ¶ ¶ 28-31.

James Cherry's *Krankel* claims were advanced to the second stage, a post-trial evidentiary hearing, and he was entitled to effective representation of counsel at the adversarial evidentiary hearing on his *pro se* claims of ineffective assistance of counsel at trial. However, his new defense counsel did nothing to advance his claims and to counter the State's arguments that Cherry received the adequate assistance of trial counsel. Where post-trial counsel entirely failed to subject the State's arguments at the *Krankel* hearing to meaningful adversarial testing, the adversary process was rendered presumptively unreliable, and the *Strickland* test may be set aside for application of the *Cronic* test, where a showing of prejudice is not required. *United States v. Cronic*, 466 U.S. 648, 654 (1984).

If this Court upholds the Appellate Court's ruling and declines to apply the *Cronic* test, this Court should find that James Cherry did not receive the effective assistance of counsel under *Strickland*, and the requirement to show prejudice should be relaxed where post-trial counsel's deficient performance deprived James Cherry of a hearing on his disputed ineffectiveness claims.

Under either standard, this Court should find that James Cherry's *Krankel* evidentiary hearing was inadequate, due to his post-trial counsel's inaction, and remand this cause for appointment of new post-trial counsel and for a fair and adversarial hearing on his claims of ineffective assistance of trial counsel.

Standard of Review

A claim that counsel was ineffective is reviewed *de novo*. *People v. Chapman*, 194 Ill.2d 186, 217 (2000).

A.

James Cherry's post-trial counsel failed to advance his claims at the *Krankel* evidentiary hearing, such that Cherry's claims were not subjected to meaningful adversarial testing; this cause must be remanded for further proceedings on Cherry's claims.

James Cherry's post-trial letter to the trial court triggered a *Krankel* inquiry into his claims of ineffective assistance of trial counsel, with the appointment of new counsel to advance his *pro se* claims at an evidentiary hearing. (C. 241-42) However, his post-trial counsel failed to develop Cherry's complaints, did not call witnesses to substantiate these claims, and merely restated the bare assertions in Cherry's *pro se* motion (C. 259-60), and thus deprived Cherry of an adversarial evidentiary hearing on his complaints of ineffective assistance.

The United States Constitution guarantees criminal defendants the right to assistance of counsel at every stage of a criminal proceeding where substantial

rights of a criminal accused may be affected. *People v. Baker*, 92 Ill.2d 85, 90 (1982); U.S. Const. amends. VI, XIV; Ill. Const. art. 1, §8. This right applies at a defendant's sentencing hearing and to hearings on other post-trial motions. *Mempa v. Ray*, 389 U.S. 128, 137 (1967). A hearing on a motion for a new trial is one such critical stage. *People v. Abdullah*, 336 Ill.App.2d 940, 950 (4th Dist. 2002).

A defendant is denied his right to effective assistance of counsel when counsel's performance was objectively unreasonable and counsel's unreasonable performance substantially prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Patterson*, 217 Ill.2d 407, 438 (2005). But when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *United States v. Cronic*, 466 U.S. 648, 659 (1984). The *Strickland* test may be set aside when counsel entirely fails to subject the State's case to meaningful adversarial testing. *People v. Hattery*, 109 Ill.2d 449, 461-62 (1985).

The Appellate Court found that Cherry's counsel at his *Krankel* evidentiary hearing did not provide ineffective assistance of counsel assistance of counsel in violation of the *Strickland* standard, because he did not show prejudice from counsel's performance. *People v. Cherry*, 2014 IL App (5th) 130085, ¶ ¶ 28-31. But *Cronic* is the proper test here because counsel completely failed to act as an advocate on Cherry's behalf, so completely denying Cherry of his right to counsel that no further showing of prejudice is needed. *Cronic*, 466 U.S. at 654.

Here, Cherry's *Krankel* counsel did nothing to advance Cherry's claims and to counter the State's arguments that Cherry received the adequate assistance of trial counsel, or that counsel's actions were a matter of "trial strategy." (C. 261-62)

Although Cherry asserted claims that could best be advanced by Cherry's own testimony, such as whether he gave the names of potential witnesses to his counsel, Cherry was not called as a witness. (C. 259) Cherry's trial counsel was also not called, and therefore there was no testimony about his investigation of this case to rebut the State's predictable assertion of "trial strategy." (C. 259)

Without an evidentiary hearing with testimony naming these proposed witnesses, the scope of their testimony, and any action taken by defense counsel prior to trial to ascertain their possible role in the defense strategy, the trial court did not know whether such witnesses were even contacted. A trial attorney who fails to make a full investigation is in no position to make strategic decisions about calling witnesses. *People v. Truly*, 230 Ill.App.3d 948, 954 (1st Dist. 1992). Where counsel fails to investigate and interview promising witnesses, and therefore "has no reason to believe they would not be valuable in securing [defendant's] release," counsel's inaction constitutes negligence, not trial strategy. *Workman v. Tate*, 957 F.2d 1339, 1345 (6th Cir. 1992), citing, *United States ex rel. Cosey v. Wolff*, 727 F.2d 580, 584 (7th Cir. 1984). And when Cherry's counsel for the *Krankel* evidentiary hearing simply asked the court "to consider the allegations in the pleading," he did not provide the trial court with any information or evidence with which to evaluate Cherry's claims and, by failing to advance these claims, he assured their failure. (C. 259)

Although the State might argue that counsel's inaction was a result of the lack of meritorious issues raised in Cherry's *pro se* letter, *Krankel* counsel specifically adopted the issues raised by Cherry. (C. 259) By choosing to adopt these issues, he implicitly affirmed that they had legal merit. Indeed, had *Krankel* counsel refused to advance Cherry's *pro se* claims, the court could have allowed Cherry to argue

his own claims, which would have elicited some facts and given this Court a basis to evaluate Cherry's claims. *Krankel* counsel's action in adopting these issues, without advancing the issues, prevented the development of any facts necessary to evaluate the merits of Cherry's claims and created a situation worse than if Cherry was unrepresented.

The only claim that *Krankel* counsel added to the claims from Cherry's *pro se* letter was that trial counsel "failed to investigate some medical records that may have shown that Defendant was not under the influence of alcohol." (C. 259) Despite making this claim before the court, *Krankel* counsel did noting to support the bare statement. Although this hearing was continued for over a year, *Krankel* counsel did not obtain these purported medical records and submit them to the court, guaranteeing that this unsupported claim would fail. And this claim itself is confusing, since there was no testimony at trial that Cherry was under the influence of alcohol. The first mention of Cherry's possible intoxication was at the hearing on the motion to reconsider sentence, when Cherry's *Krankel* counsel argued that Cherry was under "extreme intoxication" at the time of the shooting. (C. 44) That he later advanced a claim that Cherry was not intoxicated, contradicting his earlier argument, is inexplicable. Had *Krankel* counsel properly investigated Cherry's claims before raising them in the trial court, there would be support of one of his contradictory positions. But instead, he made bare allegations, without any attempt to support them with documentation, and all such allegations were destined to fail.

Once counsel was appointed to represent James Cherry and present his claims of ineffective assistance of counsel at an adversarial, evidentiary hearing, Cherry was entitled to the effective assistance of counsel to advance his claims. His *Krankel* counsel did nothing to substantiate his claims, not even calling Cherry

himself as a witness to his claims. *Krankel* counsel provided the trial court with no argument or evidence and completely failed to challenge the State's assertion that Cherry had received a fair trial with the effective assistance of counsel. This complete denial of representation at a critical stage denied James Cherry his Sixth Amendment right to the effective assistance of counsel at the evidentiary hearing stage of his *Krankel* process. Under *Cronic*, prejudice can be assumed. *Cronic*, 466 U.S. at 662. James Cherry respectfully requests that this Court remand his cause to the trial court for the appointment of new *Krankel* counsel and an adversarial evidentiary hearing on his claims of ineffective assistance of trial counsel.

B.

James Cherry's post-trial counsel was ineffective when his inaction essentially deprived Cherry of a hearing on his claims at the *Krankel* evidentiary hearing and precluded a finding of prejudice.

Claims of ineffective assistance of counsel generally are judged under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and *People v. Albanese*, 104 Ill.2d 504 (1984). The defendant must show his counsel's representation fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, a reasonable probability exists that the results of the proceeding would have been different. *Strickland*, 466 U.S. at 687. A reasonable probability that the outcome would have been different is "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The Appellate Court found that Cherry's counsel at his *Krankel* evidentiary hearing did not provide ineffective assistance of counsel assistance of counsel in violation of the *Strickland* standard, when Cherry could not show prejudice from counsel's performance. *Cherry*, 2014 IL App (5th) 130085, ¶ ¶ 28-31.

However, it is precisely because of *Krankel* counsel's deficient performance that Cherry cannot possibly show prejudice. Counsel failed to make any record in adversarial proceedings such that Cherry can argue or this Court can conclude that the trial court would have ruled in favor of Cherry. Because *Krankel* counsel failed to competently present the defendant's claims, the record contains only Cherry's *pro se* motion, and the inadequate *Krankel* hearing on which to assess the defendant's claim. For this reason, this Court should relax the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984).

Because there was no hearing on Cherry's claims in which evidence was presented and the trial court made factual findings, there is an insufficient factual basis for this Court to fairly assess whether there is a reasonable probability that the results of the proceeding would have been different. This situation is analogous to those cases in which counsel fails to file a notice of appeal, thereby depriving a defendant of a stage of proceedings. In *Flores-Ortega*, 528 U.S. 470 (2000), the Supreme Court explained that where counsel's deficient performance leads to the "forfeiture of a proceeding itself," there can be no "presumption of reliability" for that proceeding, as it does not exist. Thus, there is no need for a defendant to show he was likely to have succeeded on the appeal, and prejudice is presumed. *Flores-Otega*, 528 U.S. at 483. Likewise, in this case, then, if this Court finds *Krankel* counsel's performance to be deficient, this Court should find that Cherry was deprived of a hearing on his potentially meritorious claims of ineffectiveness, and remand this cause for new proceedings on his claims, including a full and fair adversarial hearing in which the defendant is represented by new counsel. See *People v. Usher*, 397 Ill.App.3d 276, 280-81 (2nd Dist. 2009) (recognizing prejudice standard of *Flores-Ortega*).

In holding that Cherry's claims can be dismissed because his counsel's mere repetition of his *pro se* claims "fail to demonstrate how he was prejudiced by the alleged failures," *Cherry*, 2014 IL App (5th) 130085, ¶ 30, the has placed Cherry in an impossible situation. Once counsel was appointed for him, Cherry had no ability to advance his *pro se* claims, and was completely reliant on his *Krankel* counsel to develop and present his claims. His counsel's complete inaction on his behalf precluded any inquiry into his claims, and thus precluded any possibility of showing prejudice.

This situation is particularly damaging to Cherry's ability to obtain further relief through a post-conviction petition on his uninvestigated claims of ineffective assistance of trial counsel, because the doctrine of *res judicata* now applies to these claims. The doctrine of *res judicata* bars consideration of issues that were previously raised and decided on direct appeal. *People v. West*, 187 Ill.2d 418, 425 (1999); accord Black's Law Dictionary 1336 37 (8th ed.2004) ("*res judicata* is an issue that has been definitively settled by judicial decision"). Here, Cherry's numerous claims of failure to investigate evidence and interview witnesses have all been found meritless. *People v. Cherry*, 2014 IL App (5th) 130085, ¶ 30. If he attempts to raise these issues in a post-conviction petition, they are subject to summary dismissal. *People v. Blair*, 215 Ill.2d 427, 445 (2005).

It is incongruous that, if he pursues post-conviction relief, Cherry's collateral counsel will be held to a higher standard than the Appellate Court expected of his *Krankel* counsel. A defendant has the constitutional right to effective assistance of counsel at all proceedings where "substantial rights" are at issue. *People v. Baker*, 92 Ill.2d 85, 90 (1982) As a defendant at the post-trial stage, Cherry was entitled to the effective assistance of counsel at his *Krankel* evidentiary hearing. *Mempa*

v. Ray, 389 U.S. 128, 137 (1967). However, if the ruling of the Appellate Court is allowed to stand, Cherry will have received a lower standard of representation than that afforded to post-conviction petitioners, who only have a statutory right to the reasonable assistance of counsel. *People v. Greer*, 212 Ill.2d 192, 204 (2004). This Court has discussed this policy underlying this distinction in representation at the pre- and post-trial level:

> "This distinction is rational, because trial counsel plays a different role than counsel in post-conviction proceedings. At trial, counsel acts as a shield to protect defendants from being "haled into court" by the State and stripped of their presumption of innocence. Post-conviction petitioners, however, have already been stripped of the presumption of innocence, and have generally failed to obtain relief on appellate review of their convictions. It is the petitioner, rather than the State, who initiates the post-conviction proceeding, by claiming that constitutional violations occurred at his trial. Counsel are appointed to represent post-conviction petitioners, not to protect them from the prosecutorial forces of the State, but to shape their complaints into the proper legal form and to present those complaints to the court." *People v. Owens*, 139 Ill.2d 351, 364-65 (1990) internal citations and quotes omitted.

But here, Cherry received less than the right to representation held by post-conviction petitioners, because his *Krankel* counsel was not required to shape his complaint into the proper legal form and to present those complaints to the court. Supreme Court Rule 651(c) requires post-conviction counsel to add value to the petition through their representation. But this decision of the Appellate Court does not require any affirmative action from Cherry's *Krankel's* counsel, and allows for prejudice to not be proven, because there was no presentation of evidence. Counsel's inaction can doom the allegations of ineffectiveness, with no protection to the defendant.

Indeed, under the post-conviction framework, Cherry would have the protections set out in *People v. Greer*, 212 Ill.2d 192 (2004). If his counsel determined not to present his claims, then he would have to provide the court with some explanation as to why the claims were meritless. *People v. Kuehner*, 2015 IL 117695, ¶ 21. If counsel may not simply abandon a defendant's claims without explanation in the post-conviction setting, where the defendant has only a statutory right to counsel, then surely at least as much should be expected in the post-trial setting, where the defendant still enjoys a constitutional right to the effective assistance of counsel.

This Court should find that James Cherry's post-trial counsel was ineffective at the *Krankel* evidentiary hearing when he did nothing to develop Cherry's bare complaints and therefore made no attempt to show prejudice as required under *Strickland*. Because Cherry's *Krankel* evidentiary hearing was inadequate, due to his post-trial counsel's inaction, this proceeding can be presumed unreliable. James Cherry respectfully requests that this Court remand his cause to the trial court for the appointment of new *Krankel* counsel and an adversarial evidentiary hearing on his *pro se* claims of ineffective assistance of trial counsel.

CONCLUSION

For the foregoing reasons, James Cherry, defendant-appellee, respectfully requests that this Court uphold the decision of the Appellate Court, which vacated his conviction for armed violence predicated on aggravated battery, and remand his cause to the trial court for resentencing on the merged count of aggravated battery with a firearm.

He further requests that this Court remand his cause to the trial court for the appointment of new *Krankel* counsel and an adversarial evidentiary hearing on his *pro se* claims of ineffective assistance of trial counsel.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Susan M. Wilham, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 24 pages.

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IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, No. 5-13-0085.
Plaintiff-Appellant,	)	There on appeal from the Circuit Court of the Twentieth Judicial Circuit, St. Clair County, Illinois,
-vs-	)	No. 10-CF-1007.
JAMES CHERRY,	)	Honorable Michael N. Cook,
Defendant-Appellee and Cross-Appellant.	)	Judge Presiding.

NOTICE AND PROOF OF SERVICE

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The undersigned certifies that an electronic copy of the Brief and Argument in the above-entitled cause was submitted to the Clerk of the above Court for filing on September 9, 2015. On that same date, we caused to be delivered three copies to the Attorney General of Illinois, and mailed three copies to the State's Attorneys Appellate Prosecutor and one copy to appellee in envelopes deposited in a U.S. mail box in Springfield, Illinois, with proper postage prepaid. The original and eleven copies of the Brief and Argument will be sent to the Clerk upon receipt of the electronically submitted filed stamped Brief and Argument.

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