2018 IL App (5th) 150167-U

NOS. 5-15-0167, 5-16-0251 cons.

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 07-CF-445
	)	
LEONARD COTTON JR.,	)	Honorable
	)	John Baricevic,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE OVERSTREET delivered the judgment of the court.
Justices Goldenhersh and Cates concurred in the judgment.

ORDER

¶ 1 *Held*: Cause remanded for further proceedings where the record rebutted the presumption that the defendant's appointed postconviction counsel rendered a reasonable level of assistance.

¶ 2 On appeal from the second-stage dismissal of his amended petition for postconviction relief, the defendant maintains that appointed postconviction counsel failed to provide a reasonable level of assistance. The defendant argues that the cause should therefore be remanded for further proceedings. For the reasons that follow, we agree.

¶ 3 BACKGROUND

¶ 4 The protracted history of this case warrants the recitation of numerous facts. See *People v. Johnson*, 2016 IL App (5th) 130554, ¶ 3. On April 24, 2007, the State filed an information charging the defendant, Leonard Cotton Jr., and codefendant, Josha Custer, with one count of first-degree felony murder (720 ILCS 5/9-1(a)(3) (West 2006)). A St. Clair County grand jury later returned a superseding indictment charging them with the same offense. Both charging instruments alleged that on April 12, 2007, Custer shot and killed Kirk Anthony during the commission of an armed robbery (*id.* § 18-2(a)). Custer was 19 years old at the time, and the defendant was 15 (705 ILCS 405/5-130(1)(a)(i) (West 2006)).

¶ 5 The record indicates that when interviewed about the crime on April 16 and 23, 2007, the defendant waived his *Miranda* rights (*Miranda v. Arizona*, 384 U.S. 436 (1966)) and gave video-recorded statements to Detective Ricky Perry of the East St. Louis police department. Perry also elicited statements from Custer and the defendant's father, Leonard Cotton Sr. (Cotton).

¶ 6 In September 2007, on the defendant's motion, clinical psychologist Dr. Daniel Cuneo was appointed to evaluate the defendant with respect to his fitness to stand trial and his ability to understand and waive his *Miranda* rights. In October 2007, Cuneo filed a report with the court opining that the defendant was moderately mentally retarded and that his cognitive abilities were "at best only at the seven to eight-year-old level." Cuneo opined that given the defendant's limited intellectual capacity, the defendant was unfit to stand trial due to his inability to understand the nature and purpose of the proceedings

against him or to assist in his defense. See 725 ILCS 5/104-10 (West 2006). Cuneo further opined that the defendant would not have been able to read or understand the *Miranda*-rights form that he had initialed when interviewed by the police. Cuneo also indicated that the defendant's intellectual limitations would have made him "much more suggestible and much more easily led." Stating that he had reviewed the DVD recordings of the defendant's interviews with the police, Cuneo noted that the defendant had not been asked to explain his *Miranda* rights and that his suggestibility "could be seen repeatedly in his responses." Cuneo also diagnosed the defendant as suffering from adjustment disorder with depressed mood. Cuneo was unable to offer an opinion as to whether there was a substantial probability that the defendant could attain fitness within a year if provided with inpatient rehabilitative treatment. See *id.* § 104-15(b).

¶ 7 In November 2007, the cause proceeded to a fitness hearing, where the defendant appeared with appointed trial counsel, Ms. Karen Craig, and waived his right to have a jury determine his fitness to stand trial. See *id.* §§ 104-12, 104-16. The parties stipulated that if Cuneo were called to testify, his testimony would be consistent with his report. By agreement, the parties further stipulated to Cuneo's opinion that the defendant was presently unfit to stand trial. The State indicated that it did not necessarily agree with Cuneo's reported findings, however, and was not stipulating to his conclusions with respect to anything other than the defendant's fitness. Based on the parties' agreed stipulations, the trial court determined that the defendant was unfit and remanded him to the custody of the Department of Human Services (DHS). See *id.* § 104-16(d) (West

2006). The court ordered DHS to file an assessment report within 30 days and periodic progress reports thereafter. See *id.* §§ 104-17(e), 104-18.

¶ 8 In December 2007, DHS submitted an assessment report noting that the defendant had cognitive impairments and needed to attain a stable mood. The report further noted that the defendant had experienced a moderate-to-severe episode of major depressive disorder with psychosis. The report stated that DHS had the capacity to provide appropriate treatment for the defendant and believed that he could be restored to fitness within a year.

¶ 9 In March 2008, DHS submitted a progress report concluding that the defendant was still unfit to stand trial due to his inability to adequately understand the proceedings against him or to assist in his defense. The report also stated that although the defendant's mental condition was "improving in response to psychotropic medication, he [was] not sufficiently stable to handle the stress of legal proceedings."

¶ 10 In July 2008, DHS submitted a second progress report concluding that the defendant was still unfit. The report indicated that when recently examined, however, the defendant "appeared to render less than his best effort," and the "possibility of malingering [could] not be ruled out." The report noted that the defendant showed significant improvement in his mood and functioning and was taking daily doses of psychotropic medication. The report was authored by Debra Ferguson, Ph.D.

¶ 11 In November 2008, Ferguson submitted a report stating that the defendant had been compliant with his medications, had a stable mood, and had no impairment in functioning. The report noted that although the defendant's level of intellectual

functioning was estimated to be in the borderline range, he was able to provide logical, organized, and coherent responses to questions. The report concluded that although the defendant's recent examination warranted a finding that he was still unfit to stand trial, the possibility of malingering was strongly suggested.

¶ 12 In a subsequently filed report dated November 12, 2008, Ferguson advised that during multiple didactic group sessions in October 2008, the defendant had correctly answered "100% of the questions" pertaining to matters such as "plea bargains, cross-examination, contempt of court, the role of a defense attorney[,] and the rights of a defendant." Referencing the defendant's "inconsistent" performance during his most recent examination, Ferguson's report concluded that the defendant had malingered during the formal examination and was fit to stand trial.

¶ 13 On January 14, 2009, the trial court appointed Cuneo to reevaluate the defendant with respect to his fitness to stand trial. On January 26, 2009, the State's murder charge against Custer was dismissed.

¶ 14 In April 2009, the defendant was remanded back to the custody of the St. Clair County jail, where he remained until his subsequent transfer to the Illinois Department of Juvenile Justice. See 730 ILCS 5/5-8-6(c) (West 2006). On May 6, 2009, Cuneo reexamined the defendant and prepared a report concluding that the defendant was malingering. Cuneo stated that although the defendant "may very well be intellectually limited, he [was] 'faking bad' as to the level of this impairment" and was trying to appear "more intellectually challenged than he is." Cuneo also noted, among other things, that

the defendant had been receiving psychotropic medication and that his prior bouts of depression had been "situational." Cuneo opined that the defendant was fit to stand trial.

¶ 15 On May 27, 2009, the parties appeared before the Honorable Milton Wharton and stipulated that Ferguson and Cuneo were qualified experts in the field of clinical psychology. The parties further stipulated that if Ferguson and Cuneo were called to testify, their testimony would be consistent with their respective reports finding the defendant fit. The parties asked the trial court to make a determination as to the defendant's fitness based on contents of the reports. Trial counsel then advised the court that after she and the defendant had discussed his right to a hearing and his right to cross-examine Ferguson and Cuneo, the defendant had indicated that he was willing to stipulate to their testimony and waive his right to a hearing. The following colloquy then occurred:

> "THE COURT: Thank you. Mr. Cotton, you understand that you have a right to have a hearing where the State would be required to prove by a preponderance of the evidence that you were fit to stand trial. At the hearing, as Miss Craig has recited, you have a right to cross examine any witnesses called by the State in an attempt to prove that you are fit to stand trial. You also would have a right to present any evidence and to testify yourself.
>
> Do you understand that, sir?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Do you wish to have a hearing?
>
> THE DEFENDANT: No, sir.

THE COURT: Based upon the stipulations of all parties as to the qualifications of both Dr. Cuneo and Dr. Ferguson *** and to their findings, the Court at this time would find that Defendant is presently fit to stand trial. The Defendant will be remanded to the Sheriff of St. Clair County. This matter will be set down for further proceedings.

Now, do you understand that the time it took to have you evaluated and examined by the physicians does not apply to the running of your speedy trial demand if you've made one? Do you understand that?

THE DEFENDANT: Yes, sir.

* * *

[THE STATE]: One other thing that I'd ask the Court that I'd like to put on the record, I've discussed with Miss Craig, the co-[d]efendant in this case is a Joshua [*sic*] Custer, which was a case pending before Judge Eckert. That case, Judge, there was a motion filed by the defense attorney requesting records of Detective Ricky Perry from the East St. Louis Police Department, that was a subpoena *duces tecum*, there was an *in camera* review, Judge Eckert in that case allowed the defense certain documentation, but they were under a protective order that they were not to be given out to the other parties, I believe, and they were not ruled to be relevant or admissible, just that they could be looked at by the parties.

I've explained to Miss Craig that I did not want to get into a position with regard to any *Brady* material [(*Brady v. Maryland*, 373 U.S. 83 (1963))] or exculpatory motion, Mr. Cotton was not fit at the time, however[,] those

documents are still under seal. If she wants to file a motion, I would have no objection, as long as I get a court order from this Court releasing those personnel records because East St. Louis filed a motion to quash in that case concerning personnel records. At least it's on the record I have them in my possession. I have not made them available to Miss Craig because they are subject to that order by Judge Eckert.

THE COURT: Miss Craig.

MS. CRAIG: Your Honor, if it requires a motion on our part to secure those, I'll file the appropriate motions. Obviously, I have no way to know at this point what they contain because I haven't seen them, so I don't know whether they contain *Brady* material or not.

THE COURT: If there is *Brady* material in there, I think it has to be disclosed in some way consistent with the Judge's order to protect whatever she thought needed to be secretive.

[THE STATE]: Judge, just as an officer of the Court, I would make an offer of proof, without going into details, I would submit I'm not—I'm not necessarily sure it's *Brady* material *per se* [(see *United States v. Ruiz*, 536 U.S. 622 (2002))] other than there may be some instances of alleged misconduct on the part of that officer which took place after these alleged crimes, however, Judge Eckert felt that they were at least discoverable to the defense lawyer in that case; and again, I don't have any objection to releasing those, but they were not my property, and they were obtained via a subpoena *duces tecum*, so I would have no objection if

Miss Craig files a motion and the Court gives me an order saying they are discoverable, then I will produce everything I have."

¶ 16 The trial court subsequently entered a written order, filed May 27, 2009, stating the following:

"Defendant waives right to fitness hearing. Parties stipulate that Debra Ferguson[,] Ph.D.[,] is a qualified expert as to fitness and would testify consistently with her report dated 11-12-08, which is incorporated by reference. Parties also stipulate Dr. Cuneo is also a qualified expert as to fitness and would testify consistently with his report dated 5-6-09, which is incorporated by reference. Based on those reports, the Court finds defendant is fit to stand trial. Case reset for plea ***. Defendant knows this stops his time for speedy trial purposes if demand has been made."

¶ 17 On July 29, 2009, the parties appeared before Judge Wharton and announced that the defendant intended to enter a negotiated plea of guilty to the State's first-degree murder charge in exchange for a joint recommendation of a 20-year sentence. The defendant was fully admonished pursuant to Illinois Supreme Court Rule 402(a) (eff. July 1, 1997) and was thus advised that the sentencing range for first-degree murder was 20 to 60 years (see 730 ILCS 5/5-8-1(a)(1)(a) (West 2006)). After the defendant acknowledged that he understood the rights that he was giving up by entering a guilty plea, the following exchanges occurred:

"THE COURT: Would there be a factual basis?

[THE STATE]: Yes, Your Honor. If this case would proceed to trial, the People would prove beyond a reasonable doubt that on or about April 12, 2007, this Defendant along with a Josha, J-O-S-H-A, Custer, C-U-S-T-E-R, without lawful justification while attempting to commit a forcible felony of armed robbery, shot Kirk Anthony in the neck with a gun thereby causing the death of Mr. Anthony.

Judge, the evidence would be that this Defendant and Mr. Custer attempted to rob Mr. Anthony, who was a truck driver, the Defendant, this Defendant was taken into custody. He waived his *Miranda* rights and knowingly and voluntarily, he gave a couple of different statements to the police, [Y]our Honor, his original statement to the police was that the co-[d]efendant had the gun, he was part of the —the co-[d]efendant talked him into doing this armed robbery, attempted armed robbery, and that the co-[d]efendant struggled—the victim struggled with the co-[d]efendant who had the gun and the gun went off during the struggle during the course of the robbery and Mr. Anthony was killed during the course of that.

He gave a statement, an additional statement to the East St. Louis Police along with the Illinois State Police where he admitted that he actually had the gun, the victim struggled with him during—when he had the gun in his possession, the gun went off accidentally and Mr. Anthony was killed during the course of the gun —this armed robbery, attempted armed robbery.

There would also be testimony from the Defendant's father, Leonard Cotton, I believe, Sr., who indicated that he gave a statement to the police that his

son talked to him, told him in essence the same version of events that Josha Custer talked him into this robbery, they attempted to do a[n] armed robbery of Mr. Anthony, that Mr. Custer brought the gun to the scene, he actually took possession of the gun while Mr. Custer and the victim were struggling, the gun went off when the victim grabbed it from this [D]efendant, and he was shot one time. There would be testimony from Dr. Nanduri that the victim, Mr. Anthony, died from the shotgun wound that was caused during this attempted armed robbery, and all these events took place in St. Clair County.

THE COURT: Does the defense stipulate to the factual basis?

MS. CRAIG: Yes, [Y]our Honor. The only thing that I would add to that with respect to my client's statement, I have discussed this with him, it was Dr. Cuneo's opinion that based on his mental capacities, that those would not be admissible, in terms they would not be voluntarily—knowingly and voluntarily made in terms of *Miranda,* and I had explained to my client that he could have a motion hearing with respect to that, and I believe that he understands all of that, and that he has chosen this course of action.

THE COURT: Now, Mr. Cotton, do you understand that by entering a plea of guilty, you waive any argument you might have raised by way of a motion, that any statement that you might have given to law enforcement was not knowingly and intelligently made? In other words, you give up your right of going to trial—

THE DEFENDANT: Yes, sir.

THE COURT: —to say you really didn't know what you were doing when you made the statement, do you understand that?

THE DEFENDANT: Did I understand it?

THE COURT: Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: You understand that by pleading guilty, you give up the right you would have had at trial to argue that the statement you made should not have been admitted?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Anyone try to use any force, threats, or intimidation against you or any members of your family to try to force you to plead guilty?

THE DEFENDANT: No, sir.

THE COURT: What is your plea at this time to the charge of first[-]degree murder as set forth in the [c]riminal [i]ndictment, guilty or not guilty?

THE DEFENDANT: Do you think I'm guilty?

THE COURT: How do you plead, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: The Court at this time would find that the Defendant is present in open court, and after being advised of his rights, does enter a plea of guilty, the plea of guilty is accepted by the Court, and the Court would hereby enter a judgment of conviction."

¶ 18 Pursuant to the parties' plea negotiations, the trial court imposed a 20-year sentence on the defendant's conviction, and he was admonished, among other things, that if he wanted to file an appeal, he would first have to move to withdraw his guilty plea within 30 days. See Ill. S. Ct. R. 604(d) (eff. July 1, 2006). The defendant did not subsequently file a motion to withdraw his guilty plea and did not pursue a direct appeal from his conviction.

¶ 19 In February 2011, citing Illinois Supreme Court Rules 471 and 607 (eff. Dec. 13, 2005), the defendant filed a request for free copies of the common law record and the transcripts of "all court dates." In August 2011, the defendant filed a second request for the documents, and citing *People v. Bonn*, 19 Ill. App. 3d 443 (1974), the trial court entered an order granting it.

¶ 20 In May 2012, the defendant wrote the circuit clerk inquiring about "the prices for copies" of the transcripts of several specific court dates, including May 27, 2009. The defendant was subsequently advised that a transcript of the May 27, 2009, hearing could be prepared and that his letter had been forwarded to the court reporter supervisor for an estimate of the cost.

¶ 21 In July 2012, the defendant filed a *pro se* petition for relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). The defendant's *pro se* petition alleged that (1) trial counsel was ineffective for failing to seek a fitness hearing on the basis of the defendant's ingestion of psychotropic drugs, (2) trial counsel was ineffective for failing to file a motion to suppress the defendant's statements to the police, (3) the cumulative impact of trial counsel's errors rendered the defendant's

conviction unreliable, and (4) as newly discovered evidence, Cotton had provided a statement exonerating the defendant. The petition cited several cases in support of its arguments, and the numerous exhibits attached to the petition included affidavits from the defendant and Cotton. The petition referenced the May 27, 2009, hearing, at which the defendant was found fit to stand trial "due to Debra Ferguson[']s and Dr. Cuneo[']s reports." The petition alleged that the trial court had been aware that the defendant had been taking psychotropic medications during the proceedings.

¶ 22 Cotton's affidavit, dated November 10, 2011, stated that in April 2007, Detective Perry had questioned him about the defendant's involvement in the charged murder. Cotton claimed that he had repeatedly told Perry that the defendant had nothing to do with it. Perry accused Cotton of lying and threatened to send him to jail for interfering with the official investigation. Cotton asserted that Perry had turned off the video camera and handcuffed him while continuing to threaten him. Cotton stated that he had eventually said what Perry had told him to say. Perry then allowed Cotton and the defendant to go home.

¶ 23 The defendant's affidavit, dated June 29, 2012, stated, among other things, that prior to entering his guilty plea, he and Craig had discussed filing a motion to suppress his statements to the police, and he told her that he did not understand what that meant. The defendant alleged that Craig had told him not to worry about it, because even if his statements were suppressed, the State would use Cotton's statement at trial, and the defendant would "get 45 years." The defendant indicated that due to his mental retardation, his ingestion of psychotropic medication, and his fear that he would receive a

45-year sentence, he had been "forced" to take the 20-year guilty plea. The defendant further indicated that he had filed his postconviction petition after realizing that it was too late to withdraw his plea. The defendant complained that he had difficulties filing his postconviction petition "without certain documents" that he needed.

¶ 24 In August 2012, finding that the defendant's *pro se* petition set forth the gist of a constitutional claim, the Honorable Michael Cook entered an order appointing counsel to represent him. The record indicates that in January 2013, the defendant met with postconviction counsel following a status hearing.

¶ 25 In April 2013, the defendant wrote the circuit clerk complaining that appointed postconviction counsel had not been responding to his letters. The defendant also complained that he had twice requested reports from the East St. Louis police department, but his requests had gone unanswered. The circuit court advised the defendant that he would have to obtain the reports through his attorney of record.

¶ 26 In May 2013, the defendant wrote a letter to the trial court complaining that postconviction counsel had not responded to the defendant's multiple requests for records and reports and had not provided any "real legal assistance." The defendant suggested that if postconviction counsel did not start responding to his letters, then new counsel should be appointed.

¶ 27 In June 2013, the defendant filed a request for free transcripts and an affidavit indicating that he needed a transcript of the May 27, 2009, hearing, at which he was found fit to stand trial. The defendant further indicated that the transcript was necessary to amend his postconviction petition.

¶ 28 In August 2013, the defendant wrote letters to the trial court advising that postconviction counsel had not yet amended his petition, had not spoken with him since January 2013, and had still not been responding to his letters. Citing these inactions, the defendant also filed a complaint against postconviction counsel with the Attorney Registration and Disciplinary Commission (ARDC). Postconviction counsel subsequently responded to the defendant's complaint in a letter to the ARDC. In the letter, postconviction counsel stated, among other things, that when he met with the defendant in January 2013, the defendant had advised that there were "several issues that he wished raised in addition to those set forth in his original [p]etition." Postconviction counsel further stated that he had communicated with the defendant at least five times. The letter noted that the defendant's case had recently been reassigned to the Honorable John Baricevic and that postconviction counsel had since received a new scheduling order.

¶ 29 In December 2013, the cause proceeded to a status hearing, with the defendant present. At the outset, postconviction counsel advised the trial court that the defendant had withdrawn his ARDC complaint but that the matter had not yet been "closed." When the court inquired, the defendant indicated that such was the case, and he agreed to postconviction counsel's continued representation.

¶ 30 In June 2014, the defendant sent postconviction counsel a letter asking that the defendant's petition be amended to include "newly discovered evidence" regarding Detective Perry. The letter noted that the defendant and postconviction counsel had previously discussed the issue. As attachments to the letter, the defendant provided postconviction counsel with several news articles about Perry, including a January 2009

article that discussed Perry and "murder suspect Josha Custer." The January 2009 article noted that St. Clair County Judge Annette Eckert had "ruled that Perry violated the law by taking an illegal statement from murder suspect Josha Custer" and that the State had subsequently "dropped the charges against Custer" and "blamed Perry's 'misconduct' for blowing up the only evidence against Custer." The article further noted that the State's Attorney had notified the East St. Louis police department "in writing" that the State would no longer use Perry as an " 'essential witness' " in any of its felony cases. Another attached article referencing Custer's case noted that "a murder suspect was freed because a judge didn't believe Perry's version of how an interview was conducted" and that "prosecutors accused Perry of lying about the situation." The defendant suggested that Perry had elicited a false confession from him and had violated his civil rights. The defendant further suggested that it was "on record that Judges and/or [the] State['s] Attorney would not use testimony or witness statements produced by Ricky Perry."

¶ 31 In September 2014, the defendant wrote a letter to the circuit clerk inquiring whether an amended petition had been filed on his behalf. Two weeks later, the defendant filed a motion to dismiss postconviction counsel and appoint different counsel. The motion alleged that postconviction counsel had been "dragging his feet" and had failed to obtain documents that were necessary for the filing of an amended petition. The motion indicated that the defendant had not communicated with postconviction counsel since December 2013.

¶ 32 In December 2014, the cause proceeded to a status hearing, with the defendant present. When the trial court inquired about the defendant's request for new counsel, the

defendant stated that he had spoken with postconviction counsel and counsel had agreed to improve their communication and prepare an amended petition by the end of the year. Postconviction counsel indicated that he had enough information to prepare an amended petition and hoped to have one filed by mid-January. The defendant again agreed to counsel's continued representation. The defendant also asked the court if postconviction counsel would be provided with a transcript of the May 27, 2009, hearing. The defendant explained that the transcript was relevant with respect to his fitness-hearing claim. Postconviction counsel acknowledged that the transcript of the May 27, 2009, hearing was "probably relevant." Counsel indicated that he did not know if the transcript was available but that he could "probably order" one. The trial court directed counsel to prepare an order requesting the transcript, and it was agreed that an amended postconviction petition would be filed by January 15, 2015. The State then indicated that it would prepare an order requesting a transcript of the May 27, 2009, hearing. Postconviction counsel was subsequently provided with the defendant's psychiatric records relating to his fitness to stand trial.

¶ 33 On January 26, 2015, postconviction counsel filed an amended petition on the defendant's behalf and a certificate of compliance in accordance with Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013). Postconviction counsel's Rule 651(c) certificate stated that he had consulted with the defendant to ascertain his contentions of deprivation of constitutional rights, had examined "the entire" record of the trial court proceedings, and had made any amendments to the defendant's *pro se* petition that were necessary for

an adequate presentation of the defendant's claims. See Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013).

¶ 34 The amended postconviction petition alleged that the defendant had been denied due process as a result of the trial court's failure to conduct a full hearing before finding the defendant fit to stand trial and that trial counsel was ineffective for failing to demand such a hearing. The petition additionally stated that trial counsel should have known that the defendant "was of insufficient mental capacity to properly waive his fitness hearing and to stipulate as to the findings of the various medical professionals." The petition alleged that had a full hearing been held, there was a substantial probability that the defendant would have been found unfit to stand trial. The petition quoted the entirety of the trial court's May 27, 2009, written order finding the defendant fit.

¶ 35 The amended petition alleged that trial counsel was ineffective for failing to file a motion to suppress the statements that the defendant had given to the police. Noting that the defendant had been interviewed by Detective Perry, the petition recited information ostensibly obtained from the January 2009 news article that the defendant had previously provided. The petition stated that Perry had been "found by another court in St. Clair County to have violated the law by taking an illegal statement from a murder suspect" but did not mention that Custer was the suspect. The petition further referenced the State's announcement that it would no longer use Perry as an " 'essential witness' " but did not mention that the State had dismissed its case against Custer. The petition noted that these events had occurred six months prior to the entry of the defendant's guilty plea and that the "information was known or should have been known" by trial counsel. The petition

also referenced Cuneo's conclusions that the defendant would not have been able to read or understand his *Miranda* rights and would have been suggestible and easily led during questioning. The petition quoted Cuneo's observations regarding the defendant's video-recorded statements to the police. The petition suggested that had trial counsel filed a motion using all of the information that had been available at the time, there was a reasonable probability that the defendant's statements would have been suppressed. The petition alternatively alleged that if trial counsel had been unaware of Perry's credibility issues, the State's failure to disclose them would have been a *Brady* violation.

¶ 36 The petition also alleged that trial counsel was ineffective for failing to file a motion to suppress Cotton's statement. The petition noted that Cotton had recanted his statement in an affidavit claiming that the statement had been obtained through threats. The petition noted that Cotton had been interviewed by Perry.

¶ 37 Referencing the defendant's affidavit, the amended petition lastly argued that the defendant's plea had been "effectively coerced" given his mental capacity and trial counsel's representation that even if his statements were suppressed, the State would convict him on Cotton's statement, and he would receive a sentence much greater than 20 years. Notably, the amended petition did not allege that but for trial counsel's alleged errors, the defendant would not have pled guilty and would have insisted on going to trial.

¶ 38 The exhibits attached to the amended petition consisted of the defendant's affidavit, Cotton's affidavit, the trial court's May 27, 2009, order, and an April 2009 order in which the court noted that the defendant had been receiving psychotropic

medication. The amended petition did not adopt the defendant's *pro se* petition or incorporate it by reference.

¶ 39 On March 11, 2015, the State filed a request for a transcript of the May 27, 2009, hearing and asked that it be prepared "ASAP." On March 16, 2015, the State filed a motion to dismiss the defendant's amended petition for postconviction relief. With respect to the defendant's fitness-hearing claims, the State noted that the defendant's fitness had not been stipulated at the May 27, 2009, hearing, that the procedures employed comported with due process, that there was not a reasonable probability that the defendant would not have been found fit at a full hearing, and that the defendant's claims regarding his ingestion of psychotropic medications were rebutted by the record. Citing *People v. Mitchell*, 189 Ill. 2d 312 (2000), and *People v. Richardson*, 376 Ill. App. 3d 612 (2007), the State argued that the defendant's fitness claims should therefore be rejected. In support of its contention that the defendant's claims regarding his ingestion of psychotropic medications were rebutted by the record, the State referenced the transcript of the defendant's guilty plea proceedings. The State also noted, "The transcript from [the] May 27, 2009, hearing does not appear in the court record at this time; however, the People have requested the transcript."

¶ 40 With respect to the defendant's allegation that trial counsel should have moved to suppress his statements to the police, the State observed that when the defendant entered his guilty plea, he specifically waived his right to pursue a motion to suppress based on Cuneo's testimony. Further noting that to establish prejudice in the plea context, a defendant must show that there is a reasonable probability that but for counsel's errors,

the defendant would not have pled guilty and would have insisted on going to trial, the State argued that the defendant's ineffective-assistance-of-counsel claim was thus refuted by the record.

¶ 41 In response to the defendant's references to Perry, the State noted that the defendant had failed to "articulate what Officer Perry did or did not do during the course of [the defendant's] interview that was improper" and that "according to the plea transcript, the Illinois State Police were also involved in the interview process." The State further argued that any credibility issues that Perry might have had in 2009 would have gone to the weight of the defendant's statements rather than their admissibility. The State made the same argument with respect to the admissibility of Cotton's statement. The State also emphasized that Cotton had recanted his statement two years after the defendant had entered his guilty plea.

¶ 42 Lastly, in response to the defendant's contention that his plea had been coerced, the State noted that when the trial court asked him if anyone had forced, threatened, or intimidated him into pleading guilty, he had indicated that no one had. The State argued that the allegation was thus refuted by the record. See, *e.g.*, *People v. Ramirez*, 162 Ill. 2d 235, 243 (1994); *People v. Harris*, 50 Ill. 2d 31, 33 (1971); *People v. Cox*, 136 Ill. App. 3d 623, 628-29 (1985).

¶ 43 On April 13, 2015, the cause proceeded to a hearing on the State's motion to dismiss the defendant's amended petition for postconviction relief. At the outset, the State tendered a copy of the transcript of the May 27, 2009, hearing to the trial court and noted that postconviction counsel had been given a copy as well. The State then argued

the points raised in its motion to dismiss and extensively referenced the transcript when addressing the defendant's fitness-hearing claim. The State additionally suggested that the defendant's claim as to Perry's "credibility issues" was "more or less moot" given Cuneo's opinion that the defendant could not have competently waived his *Miranda* rights and the defendant's waiver of his right to have his statements "deemed inadmissible."

¶ 44 In response, postconviction counsel reiterated the allegations set forth in the defendant's amended petition. With respect to the statements Perry elicited from the defendant and Cotton, postconviction counsel additionally argued that the apparent coercion employed during the interviews could have been used to impeach Perry's testimony at a suppression hearing. Without ever mentioning Custer's name, counsel also noted that "in other cases," the State had declined to use Perry as a witness. Postconviction counsel argued that if trial counsel had not been made aware of Perry's problems, then the State's lack of disclosure was a *Brady* violation. Counsel argued that a motion to suppress the defendant's and Cotton's statements would have been successful but did not allege that but for trial counsel's failure to file a motion to suppress, there was a reasonable probability that the defendant would not have pled guilty and would have insisted on going to trial.

¶ 45 With respect to the defendant's fitness-hearing claims, postconviction counsel noted that the May 27, 2009, transcript that the State had tendered had "apparently just [been] created." Counsel nevertheless argued that the transcript supported the defendant's

allegations. The portion of the transcript during which Custer and Perry were discussed was never referenced.

¶ 46 At the conclusion of the parties' arguments, the trial court noted that the defendant would have lacked standing to file a motion to suppress Cotton's statement. The court then asked the State if the defendant's lack of knowledge that Cotton's statement was impeachable might have affected the voluntariness of the defendant's plea. The State argued that it would not have, because trial counsel "had explained to [the defendant] that he was waiving th[e] right to file the motion to suppress his statement and that [he] acknowledged that he understood and wanted to proceed with the plea."

¶ 47 On April 20, 2015, the trial court entered an order granting the State's motion to dismiss the defendant's amended postconviction petition. With respect to the defendant's fitness claims, the court determined that the defendant had failed to demonstrate that had a full fitness hearing been held, the outcome would have been different. The court further noted that nothing suggested that the defendant had ever lost fitness after he had been found fit.

¶ 48 The court rejected the defendant's allegation that trial counsel was ineffective for failing to file a motion to suppress his statements on the basis of the defendant's on-the-record waiver of his opportunity to file such a motion. The court also stated that nothing in the record indicated that the defendant's waiver and plea had not been knowingly and voluntarily made.

¶ 49 The trial court lastly addressed the defendant's allegation that trial counsel was ineffective for failing to file a motion to suppress Cotton's statement. The court noted

that Cotton's affidavit was dated November 10, 2011, and that the defendant had failed to allege that trial counsel "knew or should have known of this issue at the time of the plea." The court further noted that the defendant had failed to allege any grounds for suppression. Stating that "[a]t best[,] the facts alleged would have been factors to challenge the weight to be given the statement, not its admissibility," the court concluded that the defendant had failed "to meet the standard of ineffective assistance."

¶ 50 On April 28, 2015, postconviction counsel filed a notice of appeal on the defendant's behalf. On April 29, 2015, the trial court appointed the Office of the State Appellate Defender to represent him.

¶ 51 On May 5, 2015, the defendant filed a *pro se* motion to reconsider the dismissal of his amended petition for postconviction relief, which the trial court properly disregarded. See *People v. Serio*, 357 Ill. App. 3d 806, 815 (2005); *People v. Handy*, 278 Ill. App. 3d 829, 836 (1996). The motion generally reasserted the claims set forth in the defendant's amended postconviction petition and further alleged that trial counsel had been aware of Perry's "illegal behavior" and was ineffective for failing to investigate it further. The motion included an affidavit in which the defendant asserted that he had advised trial counsel that Perry had threatened to send him to prison if he refused to say what Perry wanted him to say. The defendant's affidavit also asserted that he had advised trial counsel that not all of his interviews with Perry had been recorded. The motion raised no claims regarding postconviction counsel's representation but noted that postconviction counsel had "not been given enough time to go over the May 27, 2009[,] transcript."

¶ 52 On May 11, 2016, the defendant filed a *pro se* motion for leave to file a successive postconviction petition. See 725 ILCS 5/122-1(f) (West 2016). The defendant also requested Perry's personnel records, trial counsel's case file, and a copy of the "sealed" proceedings at which Custer's case had been "dismissed by Judge Eckert." The defendant indicated that he needed the documents to "establish a nexus" between his case and Perry's misconduct.

¶ 53 The defendant's motion for leave alleged that trial counsel had been aware of Perry's misconduct and credibility issues and was ineffective for failing to investigate them further. The motion alleged that the defendant had been unable to previously raise this claim because he did not have the transcript of the May 27, 2009, hearing and had not received it until after the record on appeal had been filed. The defendant noted that he had repeatedly requested the transcript, but the trial court and the State had not "disclosed" it to postconviction counsel prior to the hearing on the State's motion to dismiss the defendant's amended petition. The defendant maintained that had postconviction counsel had access to the transcript, his present claim could have been raised in the amended petition, and the outcome of the dismissal hearing would likely have been different. Quoting the transcribed discussion regarding Perry's personnel records, the defendant further noted that trial counsel had indicated that she would file a motion to inspect Perry's personnel records but never did. The defendant alleged that trial counsel had failed to "uncover readily available evidence" that would have led to the suppression of the "only evidence the [S]tate had." The defendant noted that Custer's case had been dismissed because Perry had lied about taking illegal statements. The

defendant maintained that had he "known that a suppression hearing had the potential to get the only evidence the [S]tate had thrown (dismissed or suppressed) out, he would have insisted on his attorney taking the proper steps to have such a hearing and then insisted on going to trial."

¶ 54 On May 19, 2016, the trial court entered an order denying the defendant's motion for leave to file a successive postconviction petition. The court held that the defendant had not met his burden of showing that he could not have raised "the current claim" in his previously filed petition. On June 6, 2016, the defendant filed a *pro se* notice of appeal, and the Office of the State Appellate Defender was again appointed to represent him. On June 15, 2017, this court entered an order consolidating the defendant's *pro se* appeal with his appeal from the trial court's denial of his amended postconviction petition.

¶ 55 DISCUSSION

¶ 56 The Act sets forth a procedural mechanism through which a defendant can claim that "in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2012). In a postconviction proceeding, the trial court "does not redetermine a defendant's guilt or innocence, but instead examines constitutional issues which escaped earlier review." *People v. Greer*, 212 Ill. 2d 192, 203 (2004).

¶ 57 The Act provides a three-stage process for the adjudication of a postconviction petition. *People v. Cotto*, 2016 IL 119006, ¶ 26. At the first stage, the trial court independently assesses the defendant's petition, and if the court determines that the

petition is "frivolous" or "patently without merit," the court can summarily dismiss it. 725 ILCS 5/122-2.1(a)(2) (West 2012); *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). To survive the first stage, a petition need only show the "gist of a constitutional claim." *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). If a petition is not summarily dismissed at the first stage, it advances to the second stage, where an indigent petitioner can obtain appointed counsel and the State can file responsive pleadings. 725 ILCS 5/122-2.1(b), 122-4, 122-5 (West 2012). At the second stage, the trial court determines whether the petition and any accompanying documents make a substantial showing of a constitutional violation. *Edwards*, 197 Ill. 2d at 246. If a substantial showing of a constitutional violation is made, the petition proceeds to the third stage for an evidentiary hearing; if no substantial showing is made, the petition is dismissed. *Id*.

¶ 58 Because the right to the assistance of counsel during postconviction proceedings is a matter of "legislative grace" (*People v. Hardin*, 217 Ill. 2d 289, 299 (2005)), an indigent defendant who is appointed counsel under the Act is not entitled to the level of assistance required under *Strickland v. Washington*, 466 U.S. 668 (1984) (*People v. McNeal*, 194 Ill. 2d 135, 142 (2000)). He or she is instead entitled to the level of assistance guaranteed under the Act, which our supreme court has determined to be "a 'reasonable' level of assistance." *Greer*, 212 Ill. 2d at 204; *McNeal*, 194 Ill. 2d at 142. With respect to *pro se* defendants, the supreme court has noted:

> "The Act provides for the assistance of counsel because the legislature anticipated that most of the petitions under the Act would be filed *pro se* by prisoners who did not have the aid of counsel in their preparation. To ensure that the complaints of a

> prisoner might be adequately presented, the statute contemplates that the attorney appointed to represent an indigent petitioner would consult with him either by mail or in person, ascertain his alleged grievances, examine the record of the proceedings at the trial and then amend the *pro se* petition so that it would adequately present the prisoner's constitutional contentions. The Act cannot serve its purpose properly unless the attorney appointed to represent an indigent petitioner ascertains the basis of his complaints, shapes those complaints into appropriate legal form and presents them to the court." *People v. Owens*, 139 Ill. 2d 351, 358-59 (1990).

To that end, "[i]f the court appoints counsel at the second stage, appointed counsel is required to file a certificate showing compliance with Illinois Supreme Court Rule 651(c), namely, stating that appointed counsel has consulted with the defendant, examined the record of trial proceedings, and made any necessary amendments." *Cotto*, 2016 IL 119006, ¶ 27. The filing of a Rule 651(c) certificate creates a rebuttable presumption that postconviction counsel rendered reasonable assistance. *People v. Wallace*, 2018 IL App (5th) 140385, ¶ 31. Whether postconviction counsel provided reasonable assistance is a question reviewed *de novo*. *Id*.

¶ 59 Here, as previously stated, postconviction counsel filed a Rule 651(c) certificate in conjunction with the defendant's amended petition for postconviction relief. The certificate averred that postconviction counsel had consulted with the defendant to ascertain his contentions of deprivation of constitutional rights, had examined "the entire" record of the trial court proceedings, and had made any amendments to the defendant's

pro se petition that were necessary for an adequate presentation of the defendant's claims. See Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013).

¶ 60 On appeal, the defendant maintains that the record rebuts the presumption that postconviction counsel provided a reasonable level of assistance, in numerous respects. For instance, referencing the "newly discovered evidence" regarding Perry's professional misconduct, the defendant contends that postconviction counsel failed to shape viable ineffective-assistance-of-counsel claims into proper legal form by framing them in terms of trial counsel's failure to file motions to suppress. The defendant notes that had postconviction counsel used the information regarding Perry to directly attack trial counsel's ineffectiveness with respect to the voluntariness of the defendant's guilty plea, matters such as lack of standing and waiver would not have been issues. See, *e.g.*, *People v. Hall*, 217 Ill. 2d 324, 334-36 (2005); *People v. Correa*, 108 Ill. 2d 541, 549 (1985); *People v. Sharifpour*, 402 Ill. App. 3d 100, 115-16 (2010). Relatedly, the defendant notes that although the January 2009 news article that he provided would have supported his allegation that trial counsel knew or should have known about Perry's problems, postconviction counsel inexplicably failed to attach it to the defendant's amended petition. See *People v. Johnson*, 154 Ill. 2d 227, 240 (1993) ("A post-conviction petition which is not supported by affidavits or other supporting documents is generally dismissed without an evidentiary hearing unless the petitioner's allegations stand uncontradicted and are clearly supported by the record."). The defendant further argues that postconviction counsel's failure to allege the standard for prejudice in the plea context in and of itself rebuts the presumption that the defendant received a reasonable level of

assistance. See *People v. Groszek*, 2016 IL App (3d) 140455, ¶ 14. The defendant asserts, among other things, that postconviction counsel's failure to obtain and review the transcript of the May 27, 2009, hearing before filing the defendant's amended petition was objectively unreasonable. The defendant argues that the transcript was relevant to his fitness-hearing claims and that counsel's failure to review it belies counsel's representation that he had examined "the entire" record of the trial court proceedings. While we tend to view many of the complaints that the defendant lodges on appeal as well-founded, we need not address them all, as we find postconviction's failure to obtain and review the transcript dispositive.

¶ 61 Rule 651(c)'s requirement that postconviction counsel "examine[ ] the record of the proceedings at the trial" (Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013)) does not require counsel to examine "the entirety of a petitioner's trial proceedings" (*People v. Davis*, 156 Ill. 2d 149, 164 (1993)). However, "appointed counsel is required to examine as much of the transcript of proceedings as is necessary to adequately present and support those constitutional claims raised by the petitioner." *Davis*, 156 Ill. 2d at 164. Satisfaction of this requirement would necessarily entail reviewing the transcripts of any hearings ostensibly relevant to the defendant's claims. See *People v. Carrizoza*, 2018 IL App (3d) 160051, ¶ 18. Rule 651(c) envisions that postconviction counsel will work "in collaboration with the defendant and the record." *People v. Garcia*, 405 Ill. App. 3d 608, 625 (2010).

¶ 62 Here, in February 2011, the defendant requested the common law record and the transcripts of "all court dates." Six months later, the trial court entered an order approving

the request. The record indicates that the defendant subsequently received a copy of the common law record, which included the transcript of the July 2009 guilty plea proceedings but contained no other transcripts. In May 2012, when the defendant wrote the circuit clerk inquiring about the cost of obtaining the transcript of the May 27, 2009, hearing, he was advised that it could be prepared for a fee.

¶ 63 In July 2012, the defendant filed his *pro se* petition for postconviction relief. The petition alleged, among other things, that trial counsel was ineffective for failing to seek a fitness hearing and referenced the May 27, 2009, hearing, at which he was found fit. In his accompanying affidavit, the defendant complained that he had had difficulties filing his postconviction petition "without certain documents" that he needed.

¶ 64 From May 2013 through September 2014, the defendant complained numerous times that appointed postconviction counsel had been failing to respond to his letters and requests for documents. In June 2013, the defendant filed an affidavit indicating that he needed a copy of the May 27, 2009, transcript to amend his petition.

¶ 65 At the December 2014 status hearing, the defendant specifically requested that postconviction counsel be provided with the transcript of the May 27, 2009, hearing. Postconviction counsel acknowledged that the transcript was "probably relevant" with respect to the defendant's fitness-hearing allegations but that he did not know if the transcript was available. After the trial court directed postconviction counsel to prepare an order requesting the transcript, the State indicated that it would do so.

¶ 66 In January 2015, postconviction counsel filed the defendant's amended petition and the Rule 651(c) certificate stating that "the entire" record of the trial court

proceedings had been reviewed. In March 2015, the State requested the transcript of the May 27, 2009, hearing and filed its motion to dismiss the defendant's amended petition. The State's motion to dismiss referenced the May 27, 2009, hearing when arguing against the defendant's fitness-hearing claims.

¶ 67 At the April 2015 hearing on the State's motion to dismiss, the State gave postconviction counsel a copy of the transcript of the May 27, 2009, hearing, and postconviction counsel noted that the transcript had "apparently just [been] created." At the same time, counsel argued that the transcript supported the defendant's allegations.

¶ 68 This series of events affirmatively demonstrates that before filing the defendant's amended petition, appointed counsel failed to examine as much of the transcript of the proceedings as was necessary to adequately present and support the defendant's claims. The record therefore rebuts the presumption that postconviction counsel provided a reasonable level of assistance. Postconviction counsel's certification that he had read "the entire" record of the trial court proceedings apparently referred to the entire common law record, which only included the transcript of the July 2009 guilty plea proceeding.

¶ 69 On appeal, the State argues that "postconviction counsel cannot be unreasonable for failing to review a transcript that did not exist." The State further argues that postconviction counsel's review of the trial court's May 27, 2009, written order obviated the need to review the transcript of the hearing. These arguments ignore, however, that the transcript of the May 27, 2009, hearing was readily available and that counsel had a duty to obtain and review it before certifying his compliance with Rule 651(c). See *Bonn*, 19 Ill. App. 3d at 444-45 (noting that postconviction counsel could not certify that he had

examined the record of the proceedings pursuant to Rule 651(c) because no transcript had been made available to him); see also *People v. Little*, 337 Ill. App. 3d 619, 622 (2003) (noting that despite counsel's contrary representation, it was "impossible for defense counsel to have reviewed the report of proceedings prior to filing his Rule 604(d) certificate" as the transcript of the proceedings had not yet been prepared). If, as the State suggests, postconviction counsel is only required to review previously prepared transcripts (whether relevant or not) and written orders resulting from relevant hearings, in many instances, Rule 651(c)'s requirement that counsel examine as much of the transcript of proceedings as is necessary to adequately present and support a defendant's claims would be rendered a nullity. Moreover, in the present case, postconviction counsel's failure to review and obtain the transcript of the May 27, 2009, hearing was particularly unreasonable in light of the defendant's repeated attempts to obtain it, counsel's acknowledgement that it was "probably relevant," and the defendant's insistence that it was necessary to amend his petition. See *People v. Blanchard*, 2015 IL App (1st) 132281, ¶ 18 ("[W]here, as here, the postconviction petition identifies specific exhibits as a basis for the petition, good practice and completeness calls for the Rule 651(c) certification to address the exhibits in order for the presumption of compliance to be invoked and for a proper review of defendant's claims by this court."); see also *People v. Cooper*, 142 Ill. App. 3d 223, 228 (1986) ("The avowed purpose of providing a free transcript to an indigent defendant is to enable the defendant to review the proceedings in order to perfect his petition for post-conviction relief.").

¶ 70 With respect to postconviction counsel's review of the trial court's May 27, 2009, written order, the State additionally maintains that "a full and fair reading of the transcript reveals that the trial court's order accurately reflects what occurred at the hearing." The State thus argues that "reviewing the transcript would not have provided postconviction counsel with any additional information." This is essentially a harmless-error argument, however, and our supreme court has consistently declined to excuse noncompliance with Rule 651(c)'s requirements on the basis of harmless error. *People v. Suarez*, 224 Ill. 2d 37, 51-52 (2007). Once it is established that postconviction counsel failed to comply with Rule 651(c), the proper remedy is to remand the cause for further proceedings, regardless of whether the defendant's claims are "potentially meritorious." *Id*. at 51; see also *People v. Turner*, 187 Ill. 2d 406, 416 (1999) ("This court will not speculate whether the trial court would have dismissed the petition without an evidentiary hearing if counsel had adequately performed his duties under Rule 651(c)."). Furthermore, it is the trial court's duty to ultimately determine whether a defendant's postconviction claims require an evidentiary hearing. *Id*. As an aside, we note that had postconviction counsel obtained and reviewed the transcript of the May 27, 2009, hearing, counsel would have incidentally discovered the discussion regarding Perry's personnel files, which could have been used to support the defendant's claim that trial counsel knew or should have known about Perry's problems.

¶ 71 We also reject the State's suggestion that regardless of whether postconviction counsel complied with Rule 651(c), the defendant has waived consideration of the constitutional claims raised in his postconviction petition by failing to file a motion to

withdraw his guilty plea (see Ill. S. Ct. R. 604(d) (eff. July 1, 2006)) or pursue a direct appeal. This, too, is essentially a harmless-error argument. Moreover, it is well established that a defendant does not waive the right to raise constitutional claims under the Act by failing to withdraw his guilty plea or pursue a direct appeal. See *People v. Flowers*, 208 Ill. 2d 291, 301 (2003); *People v. Rose*, 43 Ill. 2d 273, 279 (1969); *People v. Brooks*, 371 Ill. App. 3d 482, 484-86 (2007); *People v. Miranda*, 329 Ill. App. 3d 837, 841-42 (2002); *People v. Tripp*, 248 Ill. App. 3d 706, 711-12 (1993); *People v. Umfleet*, 190 Ill. App. 3d 804, 809 (1989). The State's reliance on *People v. Hampton*, 165 Ill. 2d 472 (1995), and *People v. Stewart*, 123 Ill. 2d 368 (1988), is misplaced because the defendants in those cases pursued direct appeals before filing their petitions seeking relief under the Act. They therefore waived their postconviction claims that could have been raised on direct appeal but were not. *Hampton*, 165 Ill. 2d at 478-79; *Stewart*, 123 Ill. 2d at 371-75.

¶ 72 We further reject the State's contention that we lack jurisdiction over the defendant's appeal from the dismissal of his amended petition because his *pro se* motion to reconsider the petition's dismissal triggered a mandatory *Krankel* inquiry that the trial court never made. See *People v. Krankel*, 102 Ill. 2d 181 (1984); see also *People v. Ayres*, 2017 IL 120071. Referencing the defendant's complaint that postconviction counsel had "not been given enough time to go over the May 27, 2009[,] transcript," the State argues that the defendant's motion to reconsider revested jurisdiction with the trial court by effectively negating postconviction counsel's notice of appeal pursuant to *Krankel* and Illinois Supreme Court Rule 606(b) (eff. Dec. 11, 2014) ("When a timely

posttrial or postsentencing motion directed against the judgment has been filed ****, any notice of appeal filed before the entry of the order disposing of all pending postjudgment motions shall have no effect and shall be stricken by the trial court.").

¶ 73 Assuming that *Krankel* is even applicable at the second stage of a postconviction proceeding, however (*cf. People v. Custer*, 2018 IL App (3d) 160202, ¶ 25 (holding that "a *Krankel*-like procedure should apply to situations where a defendant makes a claim of unreasonable assistance of postconviction counsel at the third stage of the proceedings")), to trigger a *Krankel* inquiry, a defendant must make "a clear claim asserting ineffective assistance of counsel" (*Ayres*, 2017 IL 120071, ¶ 18). Here, the defendant's statement that postconviction counsel had "not been given enough time to go over the May 27, 2009[,] transcript" falls far short of that standard. See, *e.g.*, *People v. King*, 2017 IL App (1st) 142297, ¶ 20; *People v. Thomas*, 2017 IL App (4th) 150815, ¶¶ 26, 30. Moreover, even assuming that the defendant's motion to reconsider had raised a clear claim asserting that postconviction counsel had provided unreasonable assistance, the trial court had no jurisdiction to consider the motion because its filing would not have negated postconviction counsel's timely filed notice of appeal. See *People v. Patrick*, 2011 IL 111666, ¶ 39 ("We note that once a notice of appeal has been filed, the trial court loses jurisdiction of the case and may not entertain a *Krankel* motion raising a *pro se* claim of ineffective assistance of counsel."); *People v. Bell*, 2018 IL App (4th) 151016, ¶ 32 ("Like *Patrick*, we reject the State's application of Rule 606(b) onto the common-law procedure developed by *Krankel* and its progeny."); *People v. Darr*, 2018 IL App (3d) 150562, ¶ 96 ("To hold that *Krankel* claims should still be ruled upon after the notice of

appeal has been filed is not only contrary to the spirit and letter of *Patrick*, but it would essentially leave no rule governing the timeliness of such claims.").

¶ 74 Lastly, we grant the defendant's request that in light of his "ongoing problems" with postconviction counsel, he be appointed new counsel on remand. Under the circumstances, this request is not unreasonable. See *People v. Kuehner*, 2015 IL 117695, ¶ 25; *People v. Cano*, 220 Ill. App. 3d 725, 730 (1991).

¶ 75 Given our disposition that the cause must be remanded for further proceedings due to postconviction counsel's noncompliance with Rule 651(c), we need not address the merits of the defendant's appeal from the trial court's denial of his motion for leave to file a successive petition for postconviction relief. See *People v. Blaylock*, 202 Ill. 2d 319, 325 (2002) (noting that an appeal is moot where the issues involved have ceased to exist). On remand, appointed counsel can amend the defendant's petition to include the claim set forth in his motion for leave. See *Turner*, 187 Ill. 2d at 417.

¶ 76 CONCLUSION

¶ 77 For the foregoing reasons, the trial court's judgment granting the State's motion to dismiss the defendant's amended petition for postconviction relief is reversed, and the cause is remanded for further second-stage proceedings with new appointed counsel.

¶ 78 Reversed and remanded.