2015 IL App (1st) 130369-U
No. 1-13-0369

THIRD DIVISION
February 11, 2015

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	No. 10 CR 15041
v.	)	
	)	The Honorable
RUBEN SANCHEZ,	)	Thomas M. Davy,
	)	Judge Presiding.
Petitioner-Appellant.	)	

PRESIDING JUSTICE PUCINSKI delivered the judgment of the court.
Justice Mason concurred in the judgment.
Justice Lavin specially concurred.

ORDER

¶ 1 *Held*: Circuit court's dismissal of petitioner's *pro se* petition for post-conviction relief affirmed where: (1) petitioner had standing to seek post-conviction relief; but (2) the petition failed to set forth the gist of a meritorious constitutional claim.

¶ 2 Petitioner Ruben Sanchez appeals the circuit court's summary dismissal of his petition for post-conviction relief filed pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2006)). On appeal, petitioner argues that the circuit court erred in concluding that he lost standing to seek post-conviction relief and in dismissing his petition as

frivolous and patently without merit. For the reasons set forth herein, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 On August 10, 2010, petitioner was arrested following a traffic stop. At the time of the stop, petitioner was driving on a suspended license. He was subsequently charged with numerous offenses in connection with the stop including aggravated driving under the influence of alcohol, possession of cannabis, aggravated assault of a peace officer and resisting/obstructing a peace officer. Petitioner elected to proceed by way of a jury trial.

¶ 5 Trial

¶ 6 At trial, Chicago Police Officer Garcia testified that on August 10, 2010, at approximately 11:45, he and his partner were on routine patrol in an unmarked police car when they observed petitioner fail to stop at a stop sign at the intersection of 93rd Street and Baltimore Avenue. Petitioner then proceeded through a blinking red light, which at the time, was operating as a stop sign, without stopping. After observing petitioner commit those traffic violations, Officer Garcia activated his emergency lights. Petitioner, however, continued driving, and failed to stop at another stop sign and swerved over the center line. Because petitioner did not stop his vehicle after Officer Garcia activated his emergency lights, Officer Garcia maneuvered his patrol car alongside petitioner's van and motioned to petitioner to pull over. Petitioner did not comply; rather, he responded by sticking his middle finger up at the officers.

¶ 7 Petitioner then made a left turn onto 93rd Street followed by a right turn onto a gravel road before coming to a stop near a parked trailer. Officer Garcia instructed petitioner to remain seated in his van and approached the vehicle. As he did so, he observed that petitioner was bracing himself against the frame of his vehicle to prevent himself from falling forward.

Petitioner's eyes were red and bloodshot and his speech was slurred. The scent of alcohol was present on his breath.

¶ 8 After Officer Garcia requested petitioner to get onto the ground, petitioner clenched his fists, got into a combative stance, and tried to punch him. As a result, Officer Garcia testified that he was forced to utilize an emergency takedown procedure to get petitioner onto the ground. Once on the ground, it took multiple efforts to get petitioner's hands into handcuffs before he could be taken into custody. As Officer Garcia worked to subdue petitioner, his partner recovered a 12 ounce can of Budweiser from petitioner's van.

¶ 9 Although Officer Garcia completed a police report regarding the incident, he did not include the fact that petitioner made an obscene gesture with his middle finger in response to requests to stop the vehicle. In addition, he could not recall whether petitioner was wearing a shirt at the time of his arrest, but acknowledged that petitioner was shirtless in his arrest photograph. He did recall seeing a scar on petitioner's stomach, but denied that petitioner reported that he had undergone stomach surgery. Officer Garcia also acknowledged that petitioner's lip was bleeding after he was forced to the ground.

¶ 10 Chicago Police Officer Etti, a certified breathalyzer test administrator, testified that she was called to assist in the administration of a breathalyzer test sometime in the early morning hours of August 11, 2010. She encountered petitioner lying on the floor of the processing room at the 4th District Police Station. He smelled strongly of alcohol, had bloodshot eyes, and his speech was slurred. When asked, petitioner indicated that he was not injured and did not need medical attention, but he refused to perform field sobriety tests. Petitioner also refused to submit to a breathalyzer test. Officer Etti described petitioner as "very abusive" and indicated that he "used a lot of profanity." Because petitioner seemed to be "very intoxicated" and refused to get

off the ground, Officer Etti instructed other officers to call an ambulance to "make sure that he wasn't overly intoxicated." Officer Etti subsequently prepared an Alcohol Drug Influence Report (A.D.I.R.) of the incident.

¶ 11 After presenting the aforementioned testimony, the State rested its case and petitioner moved for a directed verdict, which the circuit court denied. Petitioner elected not to testify and rested without calling any witnesses. Following deliberations, the jury returned with a verdict finding petitioner guilty of the offense of aggravated driving under the influence of alcohol. At the sentencing hearing that followed, the court sentenced petitioner to 18 months' imprisonment followed by a one-year period of mandatory supervised release (MSR).

¶ 12 Direct Appeal

¶ 13 Petitioner appealed his conviction and the sentence imposed thereon, arguing: he was improperly denied his constitutional right to proceed *pro se* during the lower court proceedings; the representation provided by his court-appointed counsel was ineffective; he was denied his right to conflict-free counsel during post-trial proceedings; and the State's rebuttal argument deprived him of his constitutional right to a fair and impartial trial. In an unpublished Rule 23 order, this court rejected petitioner's claims of error and affirmed his conviction and sentence. *People v. Sanchez*, 2013 IL App (1st) 110900-U.

¶ 14 Post-Conviction Proceedings

¶ 15 On May 4, 2012, while his direct appeal was pending,[1] petitioner filed a *pro se* petition for post-conviction relief. In his *pro se* filing, petitioner argued: he was denied his right to a speedy trial when he was not tried within 120 days after being taken into custody; the circuit

[1] Although petitioner's direct appeal and post-conviction petition were proceeding simultaneously, our supreme court has held that "there is no basis in either the Act's language or in this court's jurisprudence for the proposition that a post[-]conviction proceeding may not proceed at the same time as a direct appeal." *People v. Harris*, 224 Ill. 2d 115, 128 (2007).

court erred in failing to order petitioner's attorney to provide him with "a copy of all paper [*sic*] and discovery;" the State's trial witnesses provided "conflicting statements," which were indicative of "perjery [*sic*];" and defense counsel was ineffective for failing to call any witnesses and not allowing petitioner to testify or review "copys [*sic*] of [his] files."

¶ 16 On June 29, 2012, the circuit court entered a written order dismissing petitioner's *pro se* petition for post-conviction relief, finding that he lacked standing to seek relief in light of this court's recent opinion in *People v. Henderson*, 2011 IL App (1st) 090923, which held that a criminal petitioner who completes his MSR term while his post-conviction petition is pending loses standing under the Act to obtain relief. Relying on *Henderson*, the circuit court held:

> "At the time of the filing of the petition the petitioner was no longer in IDOC custody. He filed a petition three days before he was released from MSR, and motioned the case up three days after his MSR release date on May 7, 2012.
>
> Section 122-1 of the Act provides that a post-conviction petition may be instituted by, '[a]ny person imprisoned in the penitentiary.' Illinois cases have held that petitions may be filed in certain cases by persons not physically in the penitentiary. * * * At issue in this case is whether petitioner's flurry of activity in the seven day window around his release from MSR on May 7, 2012 qualify him to benefit from a post-conviction petition.
>
> Following the recent case of *People v. Henderson*, 2011 IL App (1st) 090923, the petitioner no longer qualifies as a person entitled to the assistance of the Post-Conviction Act. * * *
>
> [Because] petitioner is no longer subject to MSR now nor at the time he motioned his case up on May 10th, after his release from MSR on May 7th, 2012, the

petitioner has no standing under the Act and this petition is frivolous and patently without merit and is hereby dismissed."

¶ 17 Thereafter, on July 2, 2012, petitioner filed a "Motion for leave to file a late post-conviction petition," asking the circuit court to withdraw its prior order and to "rule on the post-conviction petition filed May 4, 2012 after viewing all Evadins [*sic*] in the petition." Based upon the relief sought, the circuit court treated petitioner's second *pro se* filing as a motion to reconsider, which the circuit court then denied. In doing so, the court explained: "The petitioner's post-conviction petition was dismissed based on the case of *People v. Henderson*, 2011 IL App (1st) 090923 which held that when a person is no longer on MSR, even if he may have been at the time the petition was filed, he has lost standing under the Act. That is the exact position the petitioner here is in."

¶ 18 This appeal followed.

¶ 19 ANALYSIS

¶ 20 On appeal, petitioner argues that the circuit court erred in summarily dismissing his petition for post-conviction relief for lack of standing. He contends that "the court's ruling that [petitioner] lost standing on his pending post-conviction petition when he was discharged from mandatory supervised release (MSR) was based on *People v. Henderson*, 2011 IL App (1st) 090923, an erroneous decision that has generated an internal split in the divisions of this [c]ourt." Because the court summarily dismissed his petition for lack of standing and did not review the substantive merit of his claims to determine whether the petition was frivolous and patently without merit, petitioner contends that his petition must proceed automatically to second-stage post-conviction review.

¶ 21 The State, in turn, "agree[s] that the trial court erred when it relied on *Henderson* and concluded that petitioner did not have standing at the time he filed his *pro se* post-conviction petition." Specifically, the State "maintain[s] that the *Henderson* discussion of standing to seek post-conviction relief is incorrect and th[e] [appellate] [c]ourt should not follow it." The State nonetheless argues that petitioner's post-conviction petition should not be remanded for second-stage proceedings because the claims advanced in his petition are frivolous and patently without merit.

¶ 22 The Act provides a means by which a petitioner may advance a collateral challenge to his criminal conviction and assert that the conviction resulted from the substantial denial of his constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2006); *People v. Petrenko*, 237 Ill. 2d 490, 495-96 (2010). Courts have consistently recognized that the Act should be liberally construed to afford petitioners who have standing under the Act the opportunity to raise claims pertaining to constitutional violations. *People v. Pack*, 224 Ill. 2d 144, 150 (2007); *People v. Rajagopal*, 381 Ill. App. 3d 326, 329-30 (2008). With respect to the issue of standing, section 122-1(a) of the Act provides that "[a]ny person *imprisoned in the penitentiary* may institute a proceeding under this Article." (Emphasis added.) 725 ILCS 5/122-1(a) (West 2010). Based on the plain language of this provision, courts have held that individuals who have completed their sentences are precluded "from using the Act's remedial machinery solely to purge their criminal records." *People v. Carrera*, 239 Ill. 2d 241, 245 (2010); see also *People v. Dent*, 408 Ill. App. 3d 650, 654 (2011) ("[T]he Act and its remedies are not available to defendants whose sentences have been completed and whose liberty interests are no longer restrained").

¶ 23 The Act's standing provision, however, has not been so narrowly construed as to require actual incarceration as a necessary prerequisite to initiate post-conviction proceedings. See

People v. Davis 54 Ill 2d. 494, 496 (1973) (holding that the Act's standing provision "would not be construed so narrowly as to preclude the remedy in every case in which the petition is not filed and the hearing completed before imprisonment ends" and that the Act does "not require that the person seeking relief actually be imprisoned at the time the relief is sought"). Rather, courts have held that post-conviction relief is available not only to incarcerated petitioners but to any petitioner whose liberty is constrained in any meaningful way. *Carrera*, 239 Ill. 2d at 236; *People v. Martin-Trigona*, 111 Ill. 2d 295, 300 (1986); *Rajagopal*, 381 Ill. App. 3d at 330. By focusing on a petitioner's liberty interests, rather than actual incarceration, courts have construed the phrase "imprisoned in the penitentiary" to include petitioners who have been released from prison after filing their post-conviction petitions (*Davis*, 39 Ill. 2d 325, 328-29 (1968)), petitioners who are sentenced to probation or who are released on parole (*Martin-Trigona*, 111 Ill. 2d at 299-300, citing *People v. Montes*, 90 Ill. App. 3d 355 (1980), and *People v. Placek*, 43 Ill. App. 3d 818 (1976)), petitioners who are on mandatory supervised release at the time that their petitions were filed (*Correa*, 108 Ill. 2d at 546-47), and petitioners who are released on an appeal bond (*Martin-Trigona*, 111 Ill. 2d at 300). In finding that individuals subject to such constraints have standing to seek post-conviction relief under the Act, courts have reasoned: "as with actual incarceration, restraints on liberty accompanying probation, parole and release on appeal bond are unacceptable when they are imposed in violation of an individual's State or Federal Constitutional rights." *Martin-Trigona*, 111 Ill. 2d at 300.

¶ 24 Here, there is no dispute that petitioner filed his *pro se* petition for post-conviction relief on May 4, 2012, while he was serving the MSR portion of his sentence. Accordingly, he had standing to seek post-conviction relief under the Act. See *Correa*, 108 Ill. 2d at 546-47 (recognizing that an MSR term is a statutorily mandated component of a sentence and that a

defendant who was serving an MSR term has standing to seek post-conviction relief). There is similarly no dispute that petitioner completed his MSR term on May 7, 2012, three days after his post-conviction petition was filed. He was thus no longer serving any portion of his sentence on June 29, 2012, the date that the circuit court dismissed his petition, finding it frivolous and patently without merit because petitioner lacked standing to seek relief under the Act.

¶ 25 In *People v. Henderson*, this court addressed the question of whether an individual who files a petition for post-conviction relief while serving the MSR portion of his sentence, but completes his MSR period while his petition is pending review, loses standing under the Act. To answer that question, we reviewed our supreme court's decision in *People v. Correa*, 108 Ill. 2d 541 (1985), where the court concluded that a petitioner who files a petition while serving the MSR portion of his sentence has standing to seek post-conviction relief under the Act. *Id*. at ¶ 12, *citing Correa*, 108 Ill. 2d at 546-47. However, we noted that in its disposition, "the supreme court did not state whether the defendant had already successfully completed his MSR term by the time the supreme court rendered its opinion or consider whether a defendant loses standing under the Act where he is released from MSR following the filing of his petition." *Id*. Ultimately, after reviewing the purpose of the Act and the plain language of its standing provision, we concluded that there was "no meaningful distinction to be drawn between instances where the defendant's liberty is not encumbered when he files the petition and those instances in which a defendant regains his liberty after the petition is filed. The purpose of the Act would not be fulfilled by giving either defendant relief. He is no longer on that string and the State cannot affect his liberty at present." *Id*. at ¶ 14. Thus, we reasoned that because the petitioner had completed his MSR term after filing his petition for post-conviction relief, he "no

longer need[ed] the Act's assistance to secure his liberty" and concluded that he had "lost standing under the Act, a defect that cannot be cured." *Id*. at ¶ 15.

¶ 26 Following our decision, the second division authored its own opinion, in which it rejected our conclusion in *Henderson* and held that a petitioner's completion of his MSR term after timely filing his petition for post-conviction relief did not eliminate the petitioner's standing to seek post-conviction relief under the Act or render his petition moot. *People v. Jones*, 2012 IL App (1st) 093180. In doing so, the second division initially noted that proceedings under the Act "have been deemed civil in nature" and that "[a] statutory civil cause of action that is timely filed cannot be declared moot by subsequent events." *Id*. at ¶ 6. The court further observed that

> "[a]pplication of the *Henderson* decision which allowed for appellate court dismissal of a petition merely because the petitioner has served his sentence is troubling for another important reason. Many of these petitions frequently experience delays not found in other categories of cases before they receive final review." *Id*. at ¶ 8. The court noted that the petitioner had initially commenced post-conviction proceedings in 2001, which was approximately 11 years before the court was called upon to make its ruling, and concluded that "[i]t would frustrate justice to shut the door on the one avenue for Illinois prisoners to obtain relief from a criminal conviction on constitutional grounds because the State and Appellate Defender's office, delayed through no fault of their own, a petitioner's case for so long that he eventually serves his entire sentence and is released. The just thing to do would be to address the merits of the petition on appeal * * *." *Id*. at ¶ 12.

¶ 27 The *Jones* court further bolstered its conclusion that a timely filed post-conviction petition is not rendered moot by the petitioner's subsequent completion of his MSR term by

citing to a "foundation of prior Illinois Supreme Court cases where the court has made clear that all that is required is that a petitioner must still be serving any sentence imposed, including any period of mandatory supervised release, at the time of the initial timely filing of his petition." *Id*. at ¶ 10. In particular, the *Jones* court found that the Illinois supreme court had addressed that issue in *People v. Davis*, 39 Ill. 2d 325 (1968), where it had stated as follows:

> " 'From the outset of the post-conviction hearing the State has asserted that the petition should be dismissed because Davis was not incarcerated at the time that the cause was heard. The State relies on the wording of the Post-Conviction Hearing Act which gives 'any person imprisoned in the penitentiary' the right to allege a substantial denial of constitutional rights [citation] and this court's comment that the legislative intent behind this provision was 'to make the remedy available only to persons actually being deprived their liberty and not to persons who had served their sentences and who might wish to purge their records of past convictions.' [Citation.] In some jurisdictions, post-conviction remedies may be utilized to attack unconstitutional convictions regardless of the fact that petitioner has fully served his sentence. [Citations.] Others restrict use of this remedy, usually because of statutory language, to those persons actually imprisoned at the time of the hearing. [Citations.] As there are obvious advantages in purging oneself of the stigma and disabilities which attend a criminal conviction, we see no reason to so narrowly construe this remedial statute as to preclude the remedy in every case in which the petition is not filed and the hearing completed before imprisonment ends.' " *Id*. at ¶ 11, *quoting Davis*, 39 Ill. 2d at 328-29.

¶ 28 After reviewing the arguments of the parties as well as relevant case law, we are persuaded that the conclusion reached by our colleagues in *Jones* is correct. That is, a petitioner

who timely files a post-conviction petition does not lose standing under the Act merely because he completes his MSR term by the time that his petition comes before the court for review. *Jones*, 2012 IL App (1st) 093180, ¶¶ 10-12. Applying that ruling to this case, we conclude that because petitioner filed his petition for post-conviction relief before his MSR period expired, he had, and retained, standing under the Act and that his petition should not have been dismissed for lack of standing.

¶ 29 Having found that the circuit court erred in dismissing petitioner's post-conviction petition for lack of standing, we must now determine whether his petition must be sent back to the circuit court for second-stage post-conviction proceedings. Petitioner argues that when the circuit court dismissed his petition solely on the issue of standing, the court did not conduct a review of the merits of the petition within 90 days as required by the Act during first-stage post-conviction adjudications. Accordingly, he contends that the circuit court's summary dismissal of his post-conviction petition for lack of standing cannot be affirmed on any alternative basis and that his petition must automatically advance to second-stage post-conviction review.

¶ 30 The State responds that petitioner is not entitled to second-stage post-conviction review. Although the State agrees that the circuit court erred in dismissing petitioner's petition for lack of standing, it observes that the court nonetheless conducted its requisite review of his petition within 90 days as required by the Act. Because the court complied with the time requirement set forth in the Act, the State argues that this court can affirm the dismissal order based on any reason present in the record and maintains that the dismissal order should be affirmed because the claims advanced therein are frivolous and patently without merit.

¶ 31 The Act contemplates a three-stage process for cases that do not involve the death penalty. *People v. Jones*, 213 Ill. 2d 498, 503 (2004). Proceedings under the Act are

commenced by the filing of a petition in the circuit court that contains the allegations pertaining to the substantial denial of the petitioner's constitutional rights. *Jones*, 213 Ill. 2d at 503; *People v. Steward*, 406 Ill. App. 3d 82, 88 (2010). At the first stage, the trial court must, "[w]ithin 90 days," review the petition and determine whether the allegations, if taken as true, demonstrate a constitutional violation or whether they are "frivolous" or "patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2008); *People v. Perez*, 2014 IL 115927, ¶ 11; *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). Because the Act's 90-day time requirement is "mandatory, not directory, * * * a trial court's noncompliance with the time requirement renders any summary dismissal void." *People v. Brooks*, 221 Ill. 3d 381, 389 (2006). Accordingly, if an order dismissing a petition as frivolous and patently without merit is not entered within 90 days, the petition must automatically proceed directly to second-stage post-conviction review. *People v. Lentz*, 2014 IL App (2d) 130332, ¶ 7; *People v. Longbrake*, 2013 IL App (4th) 120665, ¶ 15. The summary dismissal of a petition for post-conviction relief is subject to *de novo* review. *Carrera*, 239 Ill. 2d at 245.

¶ 32 Here, petitioner concedes that the circuit court entered its order summarily dismissing his *pro se* post-conviction petition on June 29, 2012, which was well within the 90-day time requirement set forth in the Act. He argues, however, that because the reason for the dismissal was lack of standing, the court did not consider whether his petition was frivolous and patently without merit as required by the Act. We disagree. Petitioner's argument is unavailing and fails to accord with established case law. See *People v. Boclair*, 202 Ill. 2d 89, 101 (2002) (recognizing that the term "merit" as used in the Act encompasses concepts of "legal significance, *standing*, or importance") (Emphasis added.); *Steward*, 406 Ill. App. 3d at 90 (holding that "the legislature intended that the phrase 'frivolous or * * * patently without merit'

encompasses the issue of standing" and that "[a] petition filed pursuant to the Act has no merit if filed by an individual who is not imprisoned" and has no standing). Accordingly, because the circuit court summarily dismissed petitioner's *pro se* post-conviction petition within 90 days, finding it frivolous and patently without merit, it complied with requirements of the Act and the petition is not subject to automatic second-stage review. This is true even though we have concluded that the basis for the court's ruling was incorrect because a reviewing court reviews the judgment itself and not the reasons for the judgment. See *People v. Lee*, 344 Ill. App. 3d 851, 853 (2003) (recognizing that although the circuit court's reasons for summarily dismissing a post-conviction petition may provide assistance to a reviewing court, it is the judgment itself that is reviewed, and not the reasons given for the judgment). Given that this court is not limited to reviewing the basis upon which the circuit court summarily disposed of the petition, we will review *de novo* petitioner's *pro se* post-conviction petition to determine whether it contains the gist of a meritorious constitutional claim. *Id*. When employing *de novo* review, this court accepts as true the facts alleged in the petition unless they are expressly contradicted by the record. *People v. Coleman*, 183 Ill. 2d 366, 381-82 (1998).

¶ 33 On appeal, petitioner argues that only one of the claims contained in his petition meets that standard. Specifically, he argues that his "petition stated the gist of an arguable claim that he was denied his right to the effective assistance of counsel and his constitutional right to testify."

¶ 34 The State responds that petitioner's ineffective assistance of counsel claim is frivolous and patently without merit because "the record clearly demonstrates that not only was [petitioner] advised of his right to testify on his own behalf, but he made the ultimate decision to voluntarily waive that right." Moreover, the State observes that "petitioner does not explain what evidence his testimony would have yielded and how this evidence would have contradicted the

People's witnesses. Instead, petitioner merely alleges that his trial counsel informed him that he did not have to testify while petitioner 'wanted to,' a claim that does not remotely support a claim of ineffective assistance of counsel."

¶ 35 At the first stage of post-conviction review, the focus is on whether the petition sets forth a "gist" of a constitutional claim. *People v. Boclair*, 202 Ill. 2d 89, 99-100 (2002). The gist standard is a "low threshold" to meet. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). To satisfy this standard, the petition need only contain a limited amount of detail; it need not set forth claims in their entirety. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009); *Gaultney*, 174 Ill. 2d at 418. Even though the pleading standard is low, section 122-2 of the Act requires that the petition "have attached thereto, affidavits, records or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2010). The purpose of this requirement is to ensure that the factual allegations that are contained in the petition are capable of independent objective verification. *Hodges*, 234 Ill. 2d at 10.

¶ 36 In the instant appeal, the relevant inquiry is whether the petition contains the gist of a meritorious claim that petitioner was denied his constitutional right to effective assistance of counsel. To prevail on a claim of ineffective assistance of trial counsel, a petitioner must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984) and show that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced defendant. *People v. Albanese*, 104 Ill. 2d 504, 525 (1984); *People v. Baines*, 399 Ill. App. 3d 881, 887 (2010). The right to testify is considered a fundamental constitutional right that belongs exclusively to a criminal defendant. *People v. Madej*, 177 Ill. 2d 116, 145-46 (1997). Although counsel may advise her client whether or not to testify, the ultimate decision whether to testify is not

considered to be a matter of trial strategy that is left up to counsel. *Madej*, 177 Ill. 2d at 146; *People v. Hernandez*, 351 Ill. App. 3d 28, 36 (2004). Accordingly, counsel will not be deemed ineffective merely for advising her client not to testify; rather, ineffectiveness will only be found if there is evidence that counsel refused to permit her client to testify. *People v. Youngblood*, 389 Ill. App. 3d 209, 217 (2009).

¶ 37 Here, the record reveals that once the State rested its case, defense counsel requested a brief recess to "confer with [her] client." Following the recess, the circuit court asked defense counsel if petitioner would be testifying and defense counsel replied, "no." In support of his contention that defense counsel infringed on his constitutional right to testify, petitioner made the following allegations in his *pro se* petition for post-conviction relief:

> "At Recess PD Ms Barrido said I do not have to testifi [*sic*] because she was shore [*sic*] they did not prove there [*sic*] case and you could see the oficers [*sic*] where [*sic*] not telling the truth because of there [*sic*] changing stores [*sic*] I told her I wanted to testifi [*sic*] and I was wright [*sic*] I should have testified [*sic*] she was wrong."

The petition was not accompanied by any affidavits or other supporting evidence and did not provide any details concerning the subject matter of petitioner's potential trial testimony.

¶ 38 After reviewing the petition and the record, we conclude that petitioner has failed to raise a colorable claim of ineffective assistance of counsel as there is no indication that counsel refused to permit petitioner to testify. Instead of revealing that defense counsel infringed on petitioner's right to testify, the record merely demonstrates that counsel advised him that he did not have to testify, that he acquiesced to his attorney's advice not to testify and took no steps to invoke his right to testify at trial. Although the circuit court never addressed petitioner directly to advise him of his right to testify or obtain a waiver, it has long been the rule that "the trial

court is not required to advise a defendant of his right to testify, to inquire whether he knowingly and intelligently waived that right, or to set of record defendant's decision on this matter." *People v. Smith*, 176 Ill. 2d 217, 235 (1997). Absent a contemporaneous objection at trial asserting his desire to testify, a petitioner fails to present the gist of a constitutional claim that counsel infringed on his right to testify. See *People v. Enis*, 194 Ill. 2d 361, 399-40 (2000); *People v. Thompkins*, 161 Ill. 2d 148, 177-78 (1994). Moreover, petitioner has failed to provide any allegations to satisfy the prejudice prong of the *Strickland* test. He provides no detail as to the alleged substance of his testimony and there is thus no evidence that petitioner's testimony would have made any difference in light of the substantial evidence against him. See, *e.g.*, *People v. Coleman*, 2011 IL App (1st) 091005, ¶ 34. Ultimately, we find that petitioner's allegation that he was denied his right to testify is conclusory, and is thus insufficient to warrant further proceedings under the Act. Because petitioner does not argue that any of the other claims in his petition have merit, we need not consider them on appeal. See Ill. S. Ct. R. 341(h) (eff. Feb. 6, 2013) ("Points not argued are waived"). In light of the foregoing, we affirm the circuit court's order summarily dismissing petitioner's *pro se* post-conviction petition.

¶ 39 CONCLUSION

¶ 40 The judgment of the circuit court is affirmed.

¶ 41 Affirmed.

¶ 42 JUSTICE LAVIN, specially concurring.

¶ 43 I concur with the result reached by the majority; however, I am not persuaded that *Henderson's* discussion of standing was properly rejected in *Jones*. In *Jones*, my esteemed colleagues acknowledged that legal proceedings under the Act are civil in nature. *Jones*, 2012 IL App (1st) 093180, ¶ 6. With that said, the *Jones* decision also stated, without citation to legal

authority, that a timely filed cause of action cannot be rendered moot by subsequent events. *Id*. ¶ 6. Contrary to Jones' suggestion, it is well settled that an appeal may become moot based on events that occur after an appeal was filed. *In re Christopher P.*, 2012 IL App (4th) 100902, ¶ 19; see also *Shifris v. Rosenthal*, 192 Ill. App. 3d 256, 258-59, 261 (1989) (events occurring after the complaint was filed render the action moot). Also implicit in *Jones*' determination is that standing can never be lost after an action has been filed. A review of Illinois case law, however, suggests otherwise.

¶ 44 In *Lower v. Lanark Mutual Fire Insurance Co.*, 151 Ill. App. 3d 471, 472, 474 (1986), the plaintiff filed a derivative action as a shareholder but subsequently lost her status as a shareholder. The reviewing court found that the plaintiff was required to have maintained her "status as a shareholder *throughout* the entire pendency of the action." (Emphasis added.) *Id*. at 473. Accordingly, the reviewing court upheld the trial court's determination that the plaintiff lost standing after filing the action. *Id*. at 474; see also *In re Estate of Hayden*, 105 Ill. App. 3d 60, 63-64 (1982) (although the appellant had standing to file a revocation of conservatorship petition, the appellant lost standing to represent his grandmother's interests once the conservatorship was revoked). Absent legal authority specifying that standing can never be lost after filing an action, I am not persuaded by *Jones*' dubious determination (*Jones*, 2012 IL App (1st) 093180, ¶¶ 6, 10).

¶ 45 Without repeating *Henderson's* more detailed discussion of prior supreme court case law (see *Henderson*, 2011 IL App (1st) 090923, ¶¶ 11-14), I maintain that our supreme court has never expressly considered and addressed this precise procedural issue, regardless of the court's language in addressing very similar, albeit not identical, procedural issues. In addition, although individuals involved with the legal system should strive to improve its efficiency so that litigants,

including criminal defendants, will not suffer from long delays, prejudicial inefficiency will not be cured by meaningless legal distinctions. There is no meaningful distinction between a defendant who completes MSR one day before filing his petition and a defendant who completes MSR one day after. In both instances, the only possible relief is purging the defendant's conviction. Unless the supreme court or the legislature chooses to modify the Act's purpose of restoring liberty, I see no basis to grant post-conviction relief to a defendant whose liberty has already been restored. Although there may be an argument that a lack of standing is better addressed at the second stage of proceedings, I cannot agree with a categorical determination that standing cannot be lost after filing a petition.