NOTICE
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2026 IL App (5th) 240494-U

NO. 5-24-0494

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Champaign County.
	)	
v.	)	No. 18-CF-1304
	)	
GERMEL A. BUTLER,	)	Honorable
	)	Roger B. Webber,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE SHOLAR delivered the judgment of the court.
Presiding Justice Cates concurred in the judgment.
Justice Vaughan specially concurred.

ORDER

¶ 1 *Held*: Because defendant did not receive reasonable assistance of postconviction counsel where counsel failed to provide an affidavit of a witness verifying the claims made therein as required by section 122-1(b) of the Post-Conviction Hearing Act (725 ILCS 5/122-1(b) (West 2022)), this cause is remanded for second-stage proceedings with the appointment of new counsel.

¶ 2 Defendant, Germel A. Butler, appeals the dismissal of a portion of his amended postconviction petition after the second stage and the denial of his amended postconviction petition following a third-stage evidentiary hearing. Regarding the denial of his petition following the third-stage hearing, defendant contends that the trial court's ruling was against the manifest weight of the evidence and was improperly based on evidence outside the record. Regarding the dismissal of portions of his amended postconviction petition at the second stage, defendant argues that postconviction counsel failed to comply with Illinois Supreme Court Rule 651(c) (eff. July 1,

2017), and that this failure requires that we reverse and remand for additional second-stage proceedings with new counsel. We agree that postconviction counsel did not provide reasonable assistance at the second stage. Accordingly, we reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 The facts of this case were thoroughly discussed in defendant's direct appeal. See 2021 IL App (4th) 190439-U. For this reason, we only supplement the facts as necessary for the context of this appeal.

¶ 5 On September 19, 2018, defendant was charged, by information, with four offenses stemming from allegedly brutal assaults of his then-girlfriend, D.S., that had occurred on the evening of September 17, 2018, and morning of September 18, 2018. Counts I and II charged aggravated criminal sexual assault in violation of section 11-1.30(a)(2) and (a)(3) of the Criminal Code of 2012 (720 ILCS 5/11-1.30(a)(2), (a)(3) (West 2018)) respectively. Both were Class X felonies. Count III charged aggravated domestic battery (*id.* § 12-3.3(a)(5)), a Class 2 felony, and count IV charged domestic battery, a Class 4 felony (*id.* § 12-3.2(a)(1)). The public defender was appointed, and defendant was represented by an assistant public defender throughout defendant's trial and sentencing.

¶ 6 Prior to jury selection, the trial court asked the parties whether any plea offers were made. The parties confirmed that the State had offered a sentencing cap of 20 years, and defendant had rejected the offer. The trial court admonished defendant on the minimum and maximum sentences he faced on the individual counts. After conferring with trial counsel, defendant acknowledged that he understood the minimum and maximum sentences and confirmed his continued rejection of the offer. The record does not demonstrate that defendant was ever told that, if convicted of both counts I and II, the sentences would be served consecutively to each other and would be credited at 85%.

¶ 7 The jury trial took place in April 2019. The primary evidence against defendant was the testimony of D.S., the alleged victim. D.S. testified that she was in a dating relationship with defendant and had known defendant for several years. D.S. described her relationship with defendant as volatile and abusive, and detailed numerous incidents of domestic violence in the past. She testified as to the events that led to the charges against defendant. Her testimony described what occurred on the evening of September 17, 2018, and the morning of September 18, 2018, when the defendant became angry with her, beat her, and allegedly choked her until she passed out. D.S. also testified to violent nonconsensual intercourse. D.S. indicated that on September 18, 2018, defendant "raped me again that morning," and she was screaming for help. A neighbor showed up at the door, and she was finally able to escape. D.S. ran to another neighbor's door, screaming, "Call 911. He's going to kill me." The police arrived and defendant was taken into custody.

¶ 8 D.S. further testified that beginning on September 19, 2018, defendant called her several times a day from the jail where he was being held on the charges. She answered some, but not all, of the calls. During these calls, defendant would apologize, say he loved D.S., and they would get married and run away. D.S. testified that, during this time frame, some of defendant's friends and family were also discussing the facts of the case with her and she was "constantly supervised."

¶ 9 On cross-examination, D.S. acknowledged submitting two handwritten statements that recanted her allegations against defendant. The first statement was titled, "State's Attorney's Information Request," which was a signed document D.S. took to the state's attorney's office on September 20, 2018. Her statement indicated the charges against defendant were false; she lied because she was angry that he drank too much; she was intoxicated; and the police coerced her into giving a statement against defendant. The second statement was titled, "Affidavit," which was a notarized statement made by D.S. under the penalties for perjury as provided by section 1-109

of the Code of Civil Procedure. 735 ILCS 5/1-109 (West 2016). It was dated September 27, 2018. Within this "Affidavit," D.S. recanted her September 18, 2018, statement to police, noting she and defendant were arguing due to his drinking problems and that he had "cheated on me in my home." The affidavit stated that D.S. was angry and extremely intoxicated. It further stated she accused defendant of the charges in order to hurt him, but that the truth was that defendant had never put his hands on her out of anger, and her prior bruises were from her job. She indicated she cut down trees for a living. The statement requested all charges and the no-contact order be dismissed.

¶ 10 Regarding the "State's Attorney's Information Request," D.S. testified that Vanessa Wilkinson worked for the apartment management company where defendant was staying. D.S. referred to her at times as her "landlord," and Wilkinson was involved in determining whether D.S. could stay in the apartment following defendant's arrest. D.S. testified that Wilkinson brought D.S. to the state's attorney's office and told her what to write. With regard to the "Affidavit," D.S. testified that it was in her handwriting, but she copied what had been pre-written for her by someone else. D.S. claimed that the person who wrote the affidavit, then notarized it and took it to the state's attorney's office, was Wilkinson. D.S. testified that both recantations were false.

¶ 11 The jail house phone calls were admitted into evidence and played for the jury. The calls corroborated D.S.'s testimony that defendant stated he cared for her. In calls made between September 19 and September 21, 2018, defendant indicated that D.S. did this to him and twice defendant asked D.S. to complete an affidavit. On September 21, 2018, defendant called his daughter, Jemika Butler, who was with D.S. During that call, defendant directed Jemika to read an unidentified statement to him and to not use any names. Defendant suggested revisions and getting the statement notarized.

¶ 12 On the fourth and final day of trial, the State rested. Before the defense presented its case, the State informed the trial court that it had just received, from defense counsel, a printout of a text

message conversation between D.S. and a defense witness, Vanessa Wilkinson. The State orally moved to exclude the text messages, arguing that the defense would not be able to provide a foundation through one witness and that the messages did not impeach D.S.'s testimony.

¶ 13 Defense counsel told the trial court that she did not know of the text messages until the prior evening. Counsel further stated, "My investigator had spoken with Ms. Wilkinson on an earlier date. [Previous counsel], I believe, had spoken with her. I spoke with her. I was not told that there were text messages until last night." Defense counsel argued that she could lay a foundation through Wilkinson alone and that the messages impeached D.S. because they directly contradicted any implication that Wilkinson was coercive in getting D.S. to prepare and sign the "State's Attorney's Information Request."

¶ 14 The trial court asked if impeachment was the primary purpose of the messages. Defense counsel answered affirmatively. The trial court granted the State's oral motion *in limine*, finding it would be improper to impeach D.S. with the messages because D.S. was not confronted with the statements and given an opportunity to admit, deny, or explain them. The trial court stated counsel could make an offer of proof at some point. The defense then presented its case.

¶ 15 Vanessa Wilkinson testified that she was defendant's supervisor at the leasing company at which they worked. The same leasing company owned the apartment where defendant and D.S. lived. After initially indicating she was only acquaintances with defendant, Wilkinson eventually admitted she was friends with defendant. Wilkinson stated that once she learned of defendant's arrest in this matter, she checked on his apartment and discovered D.S. was living there despite not being on the lease. At D.S.'s request, Wilkinson drove D.S. to the state's attorney's office, where she observed D.S. write a statement. Wilkinson denied writing the statement or telling D.S. what to write. D.S. told Wilkinson that the police coerced her and this happened because defendant cheated on her.

¶ 16 Jemika Butler, defendant's daughter, testified that she helped D.S. prepare an "affidavit" at D.S.'s request. She stated that she never threatened or coerced D.S. in any way. D.S. was the one who contacted Jemika first. On cross-examination, Jemika admitted that she wrote out the statement for D.S., but stated it reflected D.S.'s words. When asked if defendant had input, Jemika stated, "what he said on the phone, but she—these were her words I was writing out for her as she spoke them to me." Jemika also testified that she changed D.S.'s words to sound more professional. Jemika acknowledged defendant requested that she help D.S. write the affidavit and that she spoke with defendant multiple times about getting the affidavit completed.

¶ 17 After the jury found defendant guilty of all charges, but prior to sentencing, defense counsel filed a motion for a *Krankel* hearing (see *People v. Krankel*, 102 Ill. 2d 181 (1984)) on defendant's behalf. The motion set forth various claims alleging that defense counsel was ineffective. These allegations included the failure to inform the defendant that counsel would not be able to introduce evidence regarding other DNA found on D.S.'s vaginal swabs or lack of testing regarding condom usage and byproducts left behind and other swabs taken. Defense counsel also failed to call the neighbor, Joe, as a witness. Further, the motion asserted, *inter alia*, that trial counsel failed to properly interview Vanessa Wilkinson regarding the text message conversation she had with D.S.

¶ 18 At the hearing on the motion, defendant initially declined the opportunity to expand on the allegations raised in the written motion. The trial court then asked defense counsel about the allegations. As to the Wilkinson text messages, defense counsel asserted that an investigator had conducted an extensive interview with Wilkinson prior to trial and authored a report tendered to defendant's first public defender, who then tendered the report with the case file to defendant's current defense counsel. Defense counsel stated that nowhere in the report did Wilkinson mention text messages. Defense counsel stated that she spoke with Wilkinson and that she believed prior counsel also spoke with Wilkinson. Defense counsel further stated that she was not informed of

the text messages until the night before Wilkinson's testimony. As to the other claims, defense counsel thoroughly explained the reasoning behind each allegation. Defendant then offered his comments in support of the *Krankel* motion. In response to the allegations related to the DNA evidence, defendant claimed he was not told about the DNA evidence and the lack of testing for condom-related material in the swabs taken from the rape kit until after he asked for a trial. Defendant claimed this testing for condom usage would have supported his defense at trial. The trial court denied the appointment of new counsel, finding all of defendant's claims were related to trial strategy or immaterial. Defense counsel requested, and the trial court allowed, amending the *Krankel* motion to attach the text messages as exhibits, so that the appellate court could consider the messages in any ineffective assistance claim on appeal.

¶ 19 The defendant was sentenced to consecutive 20-year terms in the Illinois Department of Corrections (IDOC) on both counts I and II. Defendant was also sentenced to four years' incarceration for aggravated domestic battery and two years' incarceration for domestic battery.

¶ 20 On direct appeal, defendant contended he was denied his right to a fair trial by the trial court overruling an objection to hearsay and the effective assistance of counsel where counsel failed to seek the admission of D.S.'s second statement recanting her statement to the police. *People v. Butler*, 2021 IL App (4th) 190439-U, ¶¶ 73, 88. The Fourth District affirmed the trial court's judgment. *Id.* ¶ 96.

¶ 21 On March 21, 2022, defendant filed a *pro se* postconviction petition. The petition asserted several constitutional errors, including that counsel was ineffective for failing to properly advise defendant of the possibility of consecutive sentencing that he faced if convicted of the most serious charges at trial. He explained that defense counsel misled him to believe that he could not receive consecutive sentences and that the criminal sexual assaults were the product of the one-act, one-crime rule, and thus he could not be sentenced to more than 20 years' imprisonment if convicted

at trial. He contended that based on such erroneous advice, he rejected the State's plea offer of 20 years in IDOC. Defendant further contended that had counsel properly advised him that he could receive consecutive sentences on the aggravated criminal sexual assault charges and they were not violative of the one-act, one-crime rule, he would have accepted the State's fully negotiated plea offer instead of facing a higher sentence at trial.

¶ 22 The petition was docketed for second-stage proceedings and defendant was appointed postconviction counsel. On October 12, 2023, postconviction counsel filed a supplemental postconviction petition, incorporating all the allegations from the *pro se* petition. The supplemental petition also added another ineffective assistance of counsel claim based on defense counsel's failure to properly investigate and interview Vanessa Wilkinson before trial and for not impeaching D.S. with text messages sent to Wilkinson. Postconviction counsel asserted defense counsel's failure to properly investigate and interview Wilkinson before trial prevented the timely discovery of the text messages and counsel was ineffective for not questioning D.S. regarding the facts contained in the text messages in order to impeach D.S. Postconviction counsel further contended that directly confronting D.S. with the text messages would have directly contradicted the implication that Wilkinson coached or threatened D.S. into making the statements.

¶ 23 Attached to the supplemental petition was the same alleged text message conversation between D.S. and Wilkinson that was discussed and supplemented during the *Krankel* hearing. The text messages showed that D.S. initiated the conversation and asked Wilkinson to give her a ride to the courthouse for a meeting with the state's attorney. In the messages, D.S. further explained that she planned on creating an affidavit that recanted her prior statements to police.

¶ 24 An affidavit of Vanessa Wilkinson—that was verified but not notarized—was also attached to the supplemental petition. The affidavit stated that Wilkinson had in-person and text conversations with D.S. in 2018, and that the conversation attached to the supplemental petition

was a copy of the text message conversation she had with D.S. Wilkinson's affidavit further stated D.S. contacted Wilkinson first and asked for a ride to the courthouse. According to the Wilkinson affidavit, D.S. told Wilkinson that she wanted to fill out an affidavit to recant her statement, and Wilkinson did not help D.S. write her affidavit. Wilkinson further attested that she spoke with an investigator at the Champaign public defenders' office in 2018 and was not asked if there were any text message conversations between herself and D.S. Wilkinson averred that she spoke to defense counsel once and it was the day she was supposed to testify. On that date, she gave counsel a copy of the text messages.

¶ 25 On October 12, 2023, postconviction counsel filed an Illinois Supreme Court Rule 651(c) certificate (Ill. S. Ct. R. 651(c) (eff. July 1, 2017)), stating that he consulted with defendant to ascertain his contentions of deprivation of constitutional rights, examined the record of the proceedings at trial, and made any amendments to the *pro se* petition that were necessary for adequate presentation of defendant's contentions.

¶ 26 On December 22, 2023, the State filed a motion to dismiss defendant's *pro se* and supplemental postconviction petitions. It argued that defendant forfeited his claims where he did not allege the ineffectiveness of appellate counsel for failing to raise them on direct appeal. The State further argued that defendant's claim regarding the alleged plea offer was purely speculative where the record showed that the 20-year cap offer was no longer pending at the time of trial. It further argued that regardless of whether the plea offer was available, defendant continuously maintained his innocence throughout the proceedings. Regarding the text messages, the State argued that D.S., Jamika Butler, and Vanessa Wilkinson all testified about coordinating statements and none of the text messages contradicted such evidence.

¶ 27 On February 22, 2024, the trial court held a nonevidentiary hearing on the State's motion to dismiss. After hearing arguments from the parties, the court advanced defendant's

ineffectiveness claim based on defense counsel's failure to advise of the possibility of consecutive sentencing to a third-stage evidentiary hearing. The remaining claims were dismissed. Regarding the claim involving Wilkinson's text messages, the circuit court noted that because D.S. was thoroughly cross-examined about her inconsistent statements and Wilkinson also testified about D.S.'s desire to help defendant, the introduction of the text messages would not have changed the outcome of the trial.

¶ 28 The third-stage evidentiary hearing was held on April 3, 2024. Defendant testified that prior to trial, he received a plea offer from the State, which would have capped his potential sentence to 20 years in IDOC. Defendant stated that trial counsel informed him that the State offered a cap of 20 years, but he would face only 30 years if he went to trial. According to defendant, defense counsel never advised him that the sentences for the aggravated criminal sexual assault charges could be served consecutively. Defendant testified that counsel further advised that if defendant lost at trial, the State would likely still ask for a sentencing cap of 20 years' imprisonment.

¶ 29 Defendant claimed that he rejected the plea offer based on this advice. He stated that if he had been advised that the aggravated criminal sexual assault counts were mandatory consecutive and that he would potentially face 60 years in prison on those two counts, he would have accepted the plea offer. Defendant further stated that he was not aware of the mandatory consecutive sentencing on the two aggravated criminal sexual assault convictions until the day of his sentencing. Defendant testified that defense counsel advised him of the maximum potential penalties only once, because he told her, "I wasn't taking any plea at that point." When asked why the change to wanting to plead guilty now, defendant stated that facing 60 years' imprisonment was a big difference from potentially facing 30 years.

¶ 30 On cross-examination, defendant agreed that he never asked defense counsel to negotiate a counteroffer. He further agreed that he maintained his innocence and wanted to go to trial at all times throughout the case. Defendant reiterated that prior to the date of his sentencing, he believed he would be sentenced between 6 and 20 years' imprisonment to be served at 50%. Defendant stated that once the trial court sentenced him to 40 years' imprisonment, he brought up defense counsel's misinformation to defense counsel. Defendant agreed he did not inform the trial court of defense counsel's misrepresentation at the sentencing hearing, stating defense counsel filed a *Krankel* motion "but she didn't include that in there." He also agreed that he did not raise the issue at his *Krankel* hearing but explained that he did not know he could raise the issue at that time and thought it was something he had to raise on appeal. Defendant also agreed, however, that he did not raise the issue on appeal. The State presented defendant with an excerpt from the report of proceedings at the sentencing hearing and asked if, during his statement in allocution, he stated, " 'with this being said, I would ask you, Your Honor, sentence me to the minimum of 12 years while I file my appeal.' " Defendant denied making such statement.

¶ 31 Defense counsel testified at this third-stage evidentiary hearing that she informed defendant that the State made an offer which would require him to plead guilty to one of the sex counts in exchange for a 20-year sentencing cap. Defense counsel testified that defendant was not interested in that offer, and the offer was revoked before trial but she could not remember how many days before trial. When asked if defendant ever expressed a desire to plead guilty, defense counsel stated, "He may have at one point indicated that if he could get a time served probation offer to a domestic battery count, but he was never willing to plead to either of the sex counts." Defense counsel stated that defendant never asked her to make a counteroffer and "[h]e was very focused on trial strategy and preparation." She further stated that defendant maintained his innocence throughout the entire proceedings.

¶ 32 On cross-examination, defense counsel testified she told defendant that if he went to trial and was unsuccessful, he would face more time than the State offered, but he would walk out a free man if he went to trial and won. When asked if defense counsel had one or multiple conversations regarding the plea offer, defense counsel stated she did not recall but that it was her "practice" in preparing for trial to talk to the client regularly and that her discussions would include confirming whether the plea offer was still on the table and if defendant had any thoughts, questions, or desire to provide a counteroffer. Postconviction counsel asked if defense counsel advised defendant that the sexual assault counts were mandatory consecutive sentencing, and defense counsel replied, "I believe so." Defense counsel continued,

> "I would have to review my notes in the file. It would be my normal practice prior to trial to go over specifically what the person was charged with and *** if there were specific things with a count. *** I can't say I specifically remember doing so in this case because it was some time ago. There may be notes in the file to that effect."

¶ 33 The State argued that defendant's statement that he learned of the mandatory consecutive sentencing only after the trial court sentenced him was contradicted by the record where defendant indicated his knowledge of the mandatory consecutive sentencing by requesting the minimum of 12 years' imprisonment. The State further argued that based on this contradiction, defendant was not credible. Moreover, because defendant was the only witness in support of his petition, and he could not be deemed credible, he failed to meet his burden that he had suffered a constitutional violation. The State also contended that it defied logic for defendant to raise numerous grievances after he was sentenced but never once mentioned that defense counsel misinformed him about consecutive sentencing until three years later.

¶ 34 Postconviction counsel argued that defendant requested a 12-year sentence at the sentencing hearing after he heard both the State and defense counsel speak about counts I and II

requiring consecutive sentences. Postconviction counsel also argued that innocent people regularly plead guilty because of the risk of going to trial. He further argued that while defense counsel testified as to her general practice to advise clients of mandatory consecutive sentencing, she did not specifically recall whether she advised defendant regarding the possibility of consecutive sentences. Postconviction counsel argued that nothing in the record disputed defendant's claim.

¶ 35 The circuit court stated it considered the evidence and the parties' arguments. The circuit court first addressed prejudice and noted that the evidence supporting defendant's claim was his own testimony. The circuit court stated,

> "And evaluating his credibility in the light of not just what he said today and in the light of reality. But recalling his testimony during the trial and his attitude at trial, his statement in allocution where after having been convicted and facing sentencing, when he listed a multitude of problems, he continued to maintain his innocence. In fact, he alleged or claimed that the victim suffered from mental health issues and that's why she would make up these horrible lies about him."

In light of his statements throughout the proceedings and his uncorroborated assertion that he would have taken 20 years' imprisonment, the trial court did not find it likely that defendant would have taken the plea offer.

¶ 36 With regard to whether counsel's representation fell below an objective standard of reasonableness, the trial court found it "patently incredulous" that the two sex offenses described would be considered under the one-act, one-crime doctrine, and that even a marginally competent attorney would have advised their client of this fact. The court stated that trial counsel "is anything but less than marginally competent. She conducted many trials in this courtroom. I can't believe she would have told her client that." The court further stated it believed that defense counsel told defendant that he could get more time if they lost at trial. The court also believed defendant's focus

was always on going to trial and proving his innocence, which was consistent with defendant's demeanor and testimony throughout trial and at his sentencing hearing and in the pleadings that he had filed since his sentencing. The trial court found defendant was not credible, that he had failed to make a substantial showing of a constitutional violation, and denied his postconviction petition. Defendant filed this timely appeal.

¶ 37 II. ANALYSIS

¶ 38 On appeal, defendant argues (1) postconviction counsel failed to comply with Rule 651(c), (2) the circuit court's denial of his postconviction petition after a third-stage evidentiary hearing was manifestly erroneous, and (3) the trial court committed reversible error by considering evidence that was not in the record, specifically its personal knowledge of defense counsel's previous representation of other clients in the trial court. For the reasons that follow, we find that postconviction counsel failed to comply with Rule 651(c) for failing to make the amendments necessary for adequate presentation of defendant's claims and that this issue is dispositive of this appeal.

¶ 39 A. The Post-Conviction Hearing Act

¶ 40 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2018)) provides a statutory remedy to criminal defendants who claim that substantial violations of their constitutional rights occurred at trial. *People v. Taliani*, 2021 IL 125891, ¶ 53; *People v. Edwards*, 2012 IL 111711, ¶ 21. A postconviction proceeding "is not a substitute for, or an addendum to, direct appeal." *People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994). "The purpose of a post-conviction proceeding is to permit inquiry into constitutional issues involved in the original conviction and sentence that were not, nor could have been, adjudicated previously on direct appeal." *People v. Peeples*, 205 Ill. 2d 480, 510 (2002). The postconviction petition must "clearly set forth the respects in which petitioner's constitutional rights were violated" and shall 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 2018).

¶ 41 "The Act provides a three-stage mechanism for a defendant to advance such a claim." *People v. Addison*, 2023 IL 127119, ¶ 18. "At the first stage, the trial court must independently review the petition within 90 days of its filing and determine whether it is frivolous or patently without merit." *Id.*; 725 ILCS 5/122-2.1(a)(2) (West 2018). Thereafter, if the petition is not summarily dismissed, the court advances the petition to second-stage proceedings and may appoint counsel for an indigent defendant. *People v. Cotto*, 2016 IL 119006, ¶¶ 26-27. At this time, appointed counsel may amend the postconviction petition, and the State may file a motion to dismiss. *Id.* ¶ 27. "The second stage of postconviction review tests the legal sufficiency of the petition." (Internal quotation marks omitted.) *People v. Dixon*, 2018 IL App (3d) 150630, ¶ 12. The petitioner bears the burden at the second stage of making a substantial showing of a constitutional violation. *Id.* The circuit court may only dismiss a postconviction petition at this stage if the allegations, liberally construed in favor of the defendant and taken as true, do not make a substantial showing of a constitutional violation. *People v. James*, 2023 IL App (1st) 192232, ¶ 33. "The purpose of the first two stages is to determine whether an evidentiary hearing is even necessary." *People v. Fields*, 2020 IL App (1st) 151735, ¶ 42. A reviewing court applies a *de novo* standard of review to a trial court's dismissal of a postconviction petition at the second stage. *Addison*, 2023 IL 127119, ¶ 17. If the court finds the petition and any accompanying documents make a substantial showing of a constitutional violation, it will advance the petition to a third-stage evidentiary hearing. *Cotto*, 2016 IL 119006, ¶ 28.

¶ 42 At the third stage, the circuit court determines whether the evidence presented demonstrates that the defendant is entitled to relief. *People v. Domagala*, 2013 IL 113688, ¶ 34. It is the defendant's burden to make a substantial showing of a constitutional violation at the third-stage

proceeding. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). "At such a hearing, the circuit court serves as the fact finder, and, therefore, it is the court's function to determine witness credibility, decide the weight to be given testimony and evidence, and resolve any evidentiary conflicts." *Domagala*, 2013 IL 113688, ¶ 34. As such, a reviewing court will not reverse a circuit court's decision unless it is manifestly erroneous. *People v. English*, 2013 IL 112890, ¶ 23. A decision is manifestly erroneous only if it is "arbitrary, unreasonable, and not based on the evidence." *People v. Wells*, 182 Ill. 2d 471, 481 (1998). This court also "may affirm the circuit court's judgment on any basis appearing in the record, whether or not the circuit court relied on that basis or whether or not the circuit court's ruling was correct." *People v. Gomez*, 2021 IL App (1st) 192020, ¶ 65.

¶ 43 B. Rule 651(c) Compliance

¶ 44 Since we find this issue dispositive, we first address defendant's claim that postconviction counsel failed to comply with Rule 651(c) for failing to make the amendments necessary for adequate presentation of his claims. See Ill. S. Ct. R. 651(c) (eff. July 1, 2017).

¶ 45 In postconviction proceedings, the defendant has a statutory, rather than constitutional, right to counsel. 725 ILCS 5/122-4 (West 2022); *People v. Turner*, 187 Ill. 2d 406, 410 (1999). The Act requires postconviction counsel to provide a "reasonable level of assistance." *Turner*, 187 Ill. 2d at 410. Illinois Supreme Court Rule 651(c) imposes specific duties on postconviction counsel to ensure that a reasonable level of assistance has been provided. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). Rule 651(c) provides as follows:

> "The record filed in that court shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, and has made

any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." Ill. S. Ct. R. 651(c) (eff. July 1, 2017).

¶ 46 Filing a Rule 651(c) certificate creates a rebuttable presumption of reasonable assistance. *Addison*, 2023 IL 127119, ¶ 21. "The defendant bears the burden of overcoming that presumption by showing that postconviction counsel did not substantially comply with the strictures of the rule." *Id.* One way a defendant may overcome this presumption is by demonstrating that postconviction counsel did not make all the necessary amendments to a *pro se* petition, including those amendments necessary to overcome any procedural bars. *Id.* For example, when a defendant asserts claims that could have been raised on direct appeal, but were not, the defendant can avoid the procedural bar of forfeiture by casting the claims as ineffective assistance of appellate counsel for failing to raise the issues on direct appeal. *Id.* ¶ 23. The failure to allege ineffective assistance of appellate counsel when necessary to overcome forfeiture results in a "clear" violation of Rule 651(c). *Id.* ¶ 27. In addition, when the trial court has advanced a *pro se* petition to the second stage of proceedings because the petition states the gist of a meritorious constitutional claim, and appointed postconviction counsel identifies claims worth pursuing, but fails to shape the claims into proper legal form, there has not been reasonable assistance of postconviction counsel as required by Rule 651(c). *Id.* ¶ 26. The failure to comply with Rule 651(c) is not subject to a harmless error analysis; accordingly, if for any reason postconviction counsel fails to meet their duties under Rule 651(c), a remand is necessary, regardless of the petition's merit. *Id.* ¶¶ 33-42. Whether postconviction counsel rendered reasonable assistance in compliance with Rule 651(c) is reviewed *de novo*. *People v. Wallace*, 2018 IL App (5th) 140385, ¶ 31. When a case is remanded due to unreasonable assistance of counsel, new postconviction counsel must be appointed on remand. See, *e.g.*, *People v. Schlosser*, 2017 IL App (1st) 150355, ¶ 36.

¶ 47 In this case, defendant contends postconviction counsel failed to comply with Rule 651(c) and provide reasonable assistance because: (1) he filed an improper affidavit where the attached statement from Wilkinson was unnotarized, and (2) he did not make the amendments necessary to avoid procedural default of the additional claim in the amended petition that trial counsel was ineffective for failing to properly interview Wilkinson.

¶ 48 A third-stage "evidentiary hearing will be held only where the allegations of the post-conviction petition make a substantial showing that the defendant's constitutional rights have been violated [citations], and the petition is supported by 'affidavits, records, or other evidence' or explains 'why the same are not attached' [citation]." *People v. Johnson*, 154 Ill. 2d 227, 239-40 (1993). "A post-conviction petition which is not supported by affidavits or other supporting documents is generally dismissed [at the second stage] without an evidentiary hearing unless the petitioner's allegations stand uncontradicted and are clearly supported by the record." *Id.* at 240. The affidavits must identify with reasonable certainty the sources, character, and availability of the alleged evidence supporting the defendant's allegations. *Id.* Accordingly, the necessary amendments under Rule 651(c) include attaching supporting evidence or affidavits (see *id.* at 243; *People v. Urzua*, 2023 IL 127789, ¶ 60) and remedying an invalid affidavit. *Urzua*, 2023 IL 127789, ¶ 64; *People v. Turner*, 2012 IL App (2d) 100819; *People v. Peterson*, 2024 IL App (5th) 220530-U, ¶¶ 36-37.

¶ 49 Here, it is undisputed that the attached statement from Wilkinson, because it was not notarized, is an invalid affidavit. *People v. Carr*, 407 Ill. App. 3d 513, 516 (2011) ("an affidavit filed pursuant to the Act must be notarized to be valid"). This alone, however, is not dispositive. As stated above, counsel must only make the amendments necessary for *adequate* presentation of defendant's claims. Ill. S. Ct. R. 651(c) (eff. July 1, 2017).

¶ 50 Rule 651(c) does not require counsel to present "each and every witness or shred of evidence" that "could potentially support [defendant's] position." *People v. Custer*, 2019 IL 123339, ¶ 38. Cumulative evidence and evidence lacking probative value are not necessary "for an adequate presentation" of defendant's claim. See *People v. Young*, 2022 IL App (4th) 210376-U, ¶ 74 (postconviction counsel complied with Rule 651(c) although he failed to attach some supporting evidence where such evidence had little probative value and the claim was otherwise supported). Thus, to determine whether the failure to attach a properly notarized affidavit rebuts the presumption of compliance created by a Rule 651(c) certificate, we must decide whether Wilkinson's affidavit was necessary to support defendant's claim. See *People v. Dupree*, 2018 IL 122307, ¶ 34 ("an affidavit from the proposed witness will be required if it is essential for the postconviction petitioner to make the necessary 'substantial showing' to support a claim of ineffective assistance").

¶ 51 The State argues that Wilkinson's affidavit was unnecessary because the text messages attached thereto were not new evidence; rather they were known at the time of the trial. The State further notes that defendant's claim was already supported by the record where trial counsel admitted the text messages into evidence at the *Krankel* hearing.

¶ 52 Even assuming the State's argument is true, we find Wilkinson's affidavit was necessary for raising the claim that defense counsel failed to properly investigate and interview Wilkinson. According to defendant, this failure prevented defense counsel from timely discovering and using the text messages to impeach D.S.'s claims that defendant and others pressured her into recanting her statements to the police. During the *Krankel* hearing, defense counsel stated that Wilkinson did not mention the text messages in the initial interview, but there is no information in the record regarding the circumstances surrounding the interview to determine whether defense counsel (or the investigator) conducted a sufficient interview or asked a question that would have prompted

Wilkinson to raise the existence of the text messages. The question of whether trial counsel conducted a reasonably sound interview therefore depended on new information not in the record, and Wilkinson's affidavit, an affidavit of the defense counsel's investigator, or other evidence was needed to support defendant's claim.

¶ 53 Accordingly, without other evidence to support defendant's allegation that counsel failed to conduct a reasonable interview, postconviction counsel's failure to have Wilkinson's statement notarized—which was necessary to support a material allegation—rebuts the presumption that counsel complied with Rule 651(c). "Once the presumption has been rebutted, it would make no sense to treat the petitioner differently than the petitioner in any other case in which compliance with the rule is not shown." *Addison*, 2023 IL 127119, ¶ 35. Postconviction petitioners are entitled to have counsel comply with the limited duties of Rule 651(c) before the merits of their petitions are determined. *Id.* ¶ 37. Thus, failure to comply with Rule 651(c) requires reversal regardless of whether the petition's claims are meritless. *Id.* ¶ 33. Because defendant has rebutted the presumption that counsel satisfied the Rule 651(c) requirements, we reverse and remand for new second-stage proceedings so that new counsel can comply with Rule 651(c).

¶ 54 Defendant alternatively asserts that postconviction counsel failed to make all of the necessary amendments where the additional claim asserted by postconviction counsel in the amended petition, that defense counsel failed to properly interview Wilkinson, was the same claim defendant asserted at his *Krankel* hearing and was thus barred by *res judicata*. The State argues that the additional claim was forfeited rather than barred by *res judicata* but contends that reversal was not required where the circuit court denied the claim based on the merits.

¶ 55 Because we find the record rebuts the postconviction counsel's presumptive compliance with Rule 651(c), we need not address whether the failure to reframe the claim was necessary for adequate presentation. Nevertheless, particularly where the parties agree the issue was

procedurally defaulted to some degree, we would be remiss in failing to note that postconviction counsel's duties under Rule 651(c) include making amendments to avoid procedural default (*People v. Perkins*, 229 Ill. 2d 34, 44 (2007)), and new counsel should comply with Rule 651(c) on remand.

¶ 56 C. Defendant's Request for Appointment of a New Judge

¶ 57 Defendant requests the appointment of a new judge on remand. Specifically, defendant claims he was denied due process where the trial court improperly considered its personal knowledge of trial counsel's past performance in unrelated cases as a reason to deny defendant's petition.

¶ 58 The United States and Illinois Constitutions provide that no person should be deprived of liberty "without due process of law." U.S. Const., amend. XIV; Ill. Const. 1970, art. I, § 2. Such right also extends to a petitioner in postconviction proceedings. *People v. Wright*, 189 Ill. 2d 1, 17 (1999), *overruled on other grounds by People v. Boclair*, 202 Ill. 2d 89 (2002), *and modified by People v. Pitsonbarger*, 205 Ill. 2d 444 (2002). Due process requires a trial before a fair tribunal. *Wright*, 189 Ill. 2d at 17. As such, due process precludes a court from considering information outside the record, unless the information is a matter of which a court may take judicial notice. See *People v. Steidl*, 177 Ill. 2d 239, 265-66 (1997).

¶ 59 In *Class*, our supreme court had the opportunity to review the circumstances under which an appellate court, in a postconviction proceeding, should *sua sponte* order a case be reassigned to a new judge upon remand. *People v. Class*, 2025 IL 129695. It determined that an appellate court may order judicial reassignment in subsequent postconviction "when the record on appeal clearly reveals bias, the probability of bias, or prejudice on the part of the trial judge." *Id.* ¶ 37.

¶ 60 Defendant argues that appointment of a new judge is necessary due to both prejudice and judicial bias. We disagree.

¶ 61 Regarding prejudice, defendant contends that the trial court did not mention any factors other than its personal knowledge of trial counsel's performance as the reason it found defendant's claim unbelievable. He further contends that the court considered the extrajudicial information in making its credibility determinations, which impacted its analysis of both *Strickland* prongs (see *Strickland v. Washington*, 466 U.S. 668 (1984)).

¶ 62 The record, when read in context, reveals that the trial court began its consideration of defendant's testimony by indicating the court was "evaluating the credibility" of the information relevant to the proceedings. The court further stated it was considering defendant's testimony, not limited to what was testified to during the hearing, but also during trial, as well as defendant's statement in allocution and his continued assertion of innocence. The court addressed defendant's assertion that, but for the ineffective assistance of counsel, he would have pled guilty to the 20 years in IDOC, and concluded that this uncorroborated assertion was "not true." The court indicated that defendant carried the burden of proving his claim of ineffective assistance of counsel by a preponderance of the evidence. The defendant's allegation that his counsel told defendant that "he could not get consecutive sentences" and that the one-act, one-crime rule applied to the alleged criminal acts, which occurred several hours apart and "were separated by a period of sleeping" was also considered, and the court found defendant's allegations "patently" incredulous.

¶ 63 As a part of its continuing credibility determination, the trial court commented, "No attorney, even marginally competent, would advise their client that the offenses he was charged with would be considered as one act." The court immediately followed this statement with, and "[trial counsel] is anything less than marginally competent. She conducted many trials in this courtroom. I can't believe she would have told her client that." The court then considered trial counsel's testimony and believed her statements that she told defendant that "if he went to trial

and lost, he could do worse or would get more time than 20. And she rejects the notion that he asked even about how much. She didn't recall him saying that at all."

¶ 64 As is evident from the comments by the trial judge, he was weighing the credibility of the witnesses and other evidence, during which he made a fleeting comment regarding his knowledge of trial counsel's ability. The trial court had already determined that defendant lacked credibility when the statement regarding trial counsel was made. In our view, this brief statement did not portray even potential prejudice, as defined by our supreme court in *Class*.

¶ 65 Regarding judicial bias, defendant contends that *People v. Steidl*, 177 Ill. 2d 239, 265-66 (1997), is directly on point where the circuit court here improperly relied on its personal knowledge of counsel's performance, and requires appointment of a new judge on remand. We find *Steidl* distinguishable.

¶ 66 The fleeting comment in this case is substantially different than the information used by the trial judge in *Steidl*, where the court relied on its experience with trial counsel in two separate cases. See *id.* at 266-67. Further, *Steidl*'s finding of bias was premised on both the court's reliance on an extrajudicial source and on the judge's personal relationship with trial counsel, who was the judge's law partner 15 years earlier. See *id.* at 266. The record here did not indicate any evidence of reliance by the trial court on the brief comments made, nor was there a personal relationship between the judge and trial counsel. *Steidl* is therefore not directly on point and does not require appointment of a new judge on remand.

¶ 67 " '[J]udicial rulings alone almost never constitute a valid basis or partiality motion.' " *Class*, 2025 IL 129695, ¶ 38 (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)). However, judicial remarks "*may*" support a bias challenge if the remarks " 'reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or

antagonism as to make fair judgment impossible.' " (Emphasis in original.) *Id.* (quoting *Liteky*, 510 U.S. at 555).

¶ 68 On this record before us, we find no such "high degree of favoritism or antagonism as to make fair judgment impossible" that would justify reassignment upon remand to a new judge. *Id.* We cannot agree that the circumstances of this case support a finding of bias that approaches a denial of due process. Therefore, we decline to direct the assignment of a new judge to hear the postconviction proceedings upon remand.

¶ 69 D. Defendant's Third-Stage Claim

¶ 70 Defendant's final claim is that the trial court erred in denying his petition, arguing that he demonstrated, by a preponderance of the evidence, that defense counsel provided him with ineffective assistance of counsel during plea negotiations. In our view, this issue should not have been allowed to proceed to the third stage considering postconviction counsel's failure to provide reasonable assistance pursuant to Rule 651(c).

¶ 71 Our colleague has joined us in concluding that postconviction counsel failed to comply with Rule 651(c), thus requiring remand. The special concurrence, however, goes on to consider the merits of defendant's third-stage claim that counsel was ineffective for failing to properly advise defendant during plea negotiations. In support of this position, our colleague does not read *Addison* "to conclude that Rule 651(c) noncompliance precludes defendant from outright reversal of the third-stage determination." *Infra* ¶ 82. The difficulty with this position is that the merits of all claims raised by defendant would have to be scrutinized to determine which claim might grant "outright reversal" that would moot the other claims raised by defendant, thus leaving nothing to remand. This method of approach does not take into consideration our supreme court's ruling in *Addison* that, if for any reason postconviction counsel fails to meet their duties under Rule 651(c), a remand is necessary, regardless of the petition's merit. *Addison*, 2023 IL 127119, ¶¶ 33-42. And

even if we accepted our colleague's approach, the issue considered at the third stage in defendant's proceedings before the trial court would not, necessarily, have required the outright reversal of the remaining claims for relief, and thus "moot the other issues on appeal" (*infra* ¶ 81).

¶ 72 Our supreme court's decision in *Addison*, 2023 IL 127119, did not divide out those claims with potential merit and those meritless claims. Rather, the *Addison* court refused to overturn years of supreme court precedent which explained that, when counsel has not complied with Rule 651(c), the court will not consider the merits of the petition:

> "[I]n this case it is improper to determine the merit of petitioner's claims where counsel essentially did nothing to shape the petitioner's claims into the appropriate legal form. To tolerate such inadequate representation would render the appointment of counsel in post-conviction proceedings nothing but 'an empty formality.' *People v. Garrison*, 43 Ill. 2d 121, 123 (1969); *People v. Wilson*, 40 Ill. 2d 378, 381 (1968) (representation by appointed counsel in post-conviction proceedings must be more than mere 'tokenism'). Petitioner must be given an opportunity to replead his post-conviction petition with the benefit of reasonable assistance of counsel." (Internal quotation marks omitted.) *Addison*, 2023 IL 127119, ¶ 41.

Indeed, contrary to the reasoning by our colleague, even if defendant prevailed on the merits of his third-stage argument, the facts of this case do not present a circumstance where the defendant would be granted a new trial and all of his other complaints might be moot. Rather, this defendant, as one of his claims, argues that he would have accepted a plea offer but for his trial counsel being ineffective. Under these circumstances, there are multiple forms of potential relief that could be afforded defendant, as instructed by *Lafler v. Cooper*, 566 U.S. 156 (2012). Specifically, the trial court may sentence the defendant to the term of imprisonment extended in the plea offer, or, alternatively, defendant could receive the same sentence he received after trial, or "something in

between." *Id.* at 171. This remedy is not, however, absolute. Under some circumstances, "resentencing based on the conviction at trial may not suffice." *Id.* The remedy for the "constitutional injury may be to require the prosecution to reoffer the plea proposal." *Id.* Where the plea offer is extended once again, however, "the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed." *Id.* And even assuming defendant prevailed on this issue, alone, we do not agree that all of defendant's remaining issues would be moot.

¶ 73 We only discuss the various forms of relief that can be afforded defendant to illustrate the importance that defendant be given the opportunity to plead anew his ineffective assistance of counsel claims through new postconviction counsel and pursuant to an amended postconviction petition. To separate out certain claims simply because a claim may allow for outright reversal, while also finding that postconviction counsel's representation was inadequate, is contrary to our supreme court's pronouncement that the case law in Illinois "clearly establishes that *all* postconviction petitioners are entitled to have counsel comply with the limited duties of Rule 651(c) before the merits of their petitions are determined." (Emphasis in original.) *Addison*, 2023 IL 127119, ¶ 37.

¶ 74 Because we have found that postconviction counsel did not provide reasonable assistance at the second stage, we will not assume that postconviction counsel's representation was proper as it related to defendant's claims considered by the trial court during the third-stage evidentiary hearing.

¶ 75 On remand, new counsel may again amend the defendant's postconviction petition to adequately shape his constitutional claims into proper form, which may include the issue that trial counsel provided ineffective assistance of counsel during plea negotiations.

¶ 76 Finally, we find that defendant is entitled to have the trial court consider defendant's amended postconviction petition, as the majority has not made any findings regarding the merits of defendant's claims. While our colleague extends the same recommendation to the trial court, the fact remains that the special concurrence went through an analysis and made certain findings. We reiterate that the majority has made no conclusions regarding the merits of defendant's claims. Therefore, we remand this cause for appointment of new postconviction counsel, who shall be allowed to amend the defendant's postconviction petition as needed to present and protect the defendant's claims.

¶ 77 III. CONCLUSION

¶ 78 For the foregoing reasons, we reverse the judgment of the circuit court of Champaign County that dismissed defendant's amended petition and remand for further second-stage proceedings with new counsel. We direct both appellate counsels to provide copies of their briefs to circuit court counsel (including new postconviction counsel) and to the circuit court. See, *e.g.*, *People v. Endicott*, 2025 IL App (5th) 230438, ¶ 40.

¶ 79 Reversed and remanded for further proceedings with new counsel.

¶ 80 JUSTICE VAUGHAN, specially concurring:

¶ 81 While I agree with my colleagues that postconviction counsel failed to comply with Rule 651(c), requiring a remand, I believe this court should have first addressed the issue of the third-stage determination. Defendant would be entitled to postconviction relief—not a remand for postconviction proceedings—if the circuit court's denial after a third-stage hearing was against the manifest weight of the evidence. See 725 ILCS 5/122-6 (West 2022) ("If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the

former proceedings ***."). On appeal, defendant's requested relief was reversal of the third-stage denial of his postconviction petition and—in the alternative—a remand due to Rule 651(c) noncompliance and judicial bias. Thus, under the circumstances of this case, success of the third-stage determination issue would also moot the other issues on appeal.

¶ 82 I do not read *Addison* to indicate that review of the circuit court's third-stage determination would be improper if counsel failed to comply with Rule 651(c). *Addison* addressed whether postconviction counsel complied with Rule 651(c) and whether a remand for Rule 651(c) noncompliance requires a showing of prejudice. See *People v. Addison*, 2023 IL 127119, ¶¶ 17, 44. The defendant in *Addison* did not assert a challenge to a circuit court's third-stage determination. As such, I read the *Addison* statements cited by the majority only in the limited context of deciding whether the reviewing court was required to grant the requested relief of a remand due to Rule 651(c) noncompliance regardless of the merits of defendant's postconviction claims. See *id.* ¶¶ 33-42. *Addison* makes clear Rule 651(c) noncompliance entitles defendant to a remand, but the Act also affords the right to postconviction relief if the defendant proved the postconviction claim. See 725 ILCS 5/122-6 (West 2022). I find none of *Addison*'s statements to imply postconviction counsel's failures regarding Rule 651(c) would preclude any other right afforded to defendant or removes all possibility that a defendant could prove a postconviction claim at a third-stage hearing. In other words, *Addison* precludes a reviewing court from affirming a dismissal or denial of a postconviction petition when postconviction counsel fails to comply with Rule 651(c) but says nothing to conclude that Rule 651(c) noncompliance precludes defendant from outright reversal of the third-stage determination. I therefore find *Addison* does not provide guidance here.

¶ 83 Despite the Rule 651(c) noncompliance providing defendant with another opportunity to present his claims through further postconviction proceedings, such relief does not resolve or

render moot whether the trial court's denial of defendant's petition following a third-stage hearing was manifestly erroneous. Given defendant would be entitled to greater relief if successful and the resolution of this issue could have rendered the remaining issues moot, I believe this court should have addressed the merits.

¶ 84 Turning to the merits—the circuit court's denial of his postconviction petition after a third-stage evidentiary hearing, I remind that a defendant is entitled to relief if he or she makes a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). A circuit court's third-stage determination is reviewed for manifest error. *People v. English*, 2013 IL 112890, ¶ 23. A decision is manifestly erroneous only if it is "arbitrary, unreasonable and not based on the evidence." *People v. Wells*, 182 Ill. 2d 471, 481 (1998).

¶ 85 Claims of ineffective assistance of counsel are evaluated under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984). To prevail, a defendant must demonstrate counsel provided deficient performance that resulted in prejudice. *People v. Bailey*, 2020 IL App (5th) 160458, ¶ 86. The failure to establish either deficient performance or prejudice precludes finding ineffective assistance of counsel. *People v. Hotwagner*, 2015 IL App (5th) 130525, ¶ 34.

¶ 86 To prove prejudice in cases involving allegations that a defendant rejected a plea based upon counsel's improper advice, defendant must show there was a reasonable probability that he would have accepted the plea had counsel provided correct advice. *People v. Hale*, 2013 IL 113140, ¶ 18. This standard requires "more than a defendant's own subjective, self-serving testimony." (Internal quotation marks omitted.) *Id.* "Rather, there must be 'independent, objective confirmation that defendant's rejection of the proffered plea was based upon counsel's erroneous advice,' and not on other considerations." *Id.* (quoting *People v. Curry*, 178 Ill. 2d 509, 532 (1997)). The fact that the plea offer involved a significantly shorter sentence than defendant

received after trial is relevant to determining whether defendant would have taken a plea but for counsel's deficient advice (*id.*)—but it is only one consideration. In determining prejudice under similar circumstances, the Illinois Supreme Court also considered the defendant's self-serving statements that he would have taken the plea, the defendant's consistent assertion of innocence and desire for trial throughout the proceedings, the strength of the defendant's case, the disparity between the applicable sentencing range at trial and the potential sentence under the plea offer, and the defendant's understanding at the time he rejected the plea. *Id.* ¶¶ 26-28.

¶ 87 Here, the record shows that the circuit court's finding that defendant's claim lacked prejudice was supported by evidence. The record shows defendant asserted his innocence through trial. Defendant testified that he informed his first trial counsel that he would not be taking a plea deal. Moreover, trial counsel's testimony indicated that defendant was focused on trial and not interested in a plea deal that included a prison sentence. While defendant testified to the contrary at the third-stage hearing, the circuit court was allowed to use its discretion to determine defendant's credibility. *People v. Domagala*, 2013 IL 113688, ¶ 34. In the absence of corroborating evidence, the court's finding of prejudice cannot be found manifestly erroneous based on defendant's self-serving statements alone. *Hale*, 2013 IL 113140, ¶ 30 (holding the court's finding of *Strickland* prejudice is not manifestly erroneous based on defendant's self-serving statements where defendant did not present corroborating evidence and the State presented contradictory evidence). I further consider the disparity between the potential maximum total of 60 years that defendant faced at trial and the 20-year sentence cap but acknowledge that "there was also the possibility, however remote, that defendant could receive the minimum 12-year consecutive term." *Id.* ¶ 28; see 720 ILCS 5/11-1.30(d) (West 2018); 730 ILCS 5/5-4.5-25(a) (West 2018). Moreover, based on defendant's understanding of the plea at the time of his rejection, he was willing to risk a 30-year sentence at trial rather than plead guilty to a 20-year sentencing

cap. See *Hale*, 2013 IL 113140, ¶ 28. Under these circumstances, I cannot say the circuit court's holding that defendant failed to establish prejudice under *Strickland* was arbitrary, unreasonable, or not based on the evidence. See *id.* ¶¶ 26-28. Accordingly, the circuit court did not err in denying the petition.

¶ 88 Importantly, I emphasize that my analysis should in no way influence the proceedings below. The inquiry under a manifest weight of evidence standard " 'is not whether the reviewing court or any other tribunal might reach the opposite conclusion on the same evidence, but whether there was sufficient factual evidence in the record to support' the decision." *Rivas v. Benny's Prime Chophouse, LLC*, 2025 IL App (1st) 242044, ¶ 50 (quoting *Benson v. Industrial Comm'n*, 91 Ill. 2d 445, 450 (1982)). I thus express no opinion on whether I would have found the same as the circuit court or whether defendant could have presented sufficient evidence to support his claims.

¶ 89 For these reasons, I specially concur.