No. 128824

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- JEAN FUKAMA-KABIKA, Petitioner-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-20-0371. There on appeal from the Circuit Court of the Sixth Judicial Circuit, Champaign County, Illinois, No. 15-CF-648. Honorable Thomas J. Difanis, Judge Presiding.

BRIEF AND ARGUMENT FOR PETITIONER-APPELLANT

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NATURE OF THE CASE

Jean A. Fukama-Kabika, petitioner-appellant, was convicted of two counts of criminal sexual assault, one count of unlawful restraint, and one count of criminal sexual abuse. On October 27, 2017, he was sentenced to 15 years in prison seven years on each count of criminal sexual assault and one year for unlawful restraint, to be served consecutively, as well as a three-year sentence for criminal sexual abuse, to be served concurrently plus three years of mandatory supervised release. On March 1, 2019, the circuit court entered an order changing Fukama-Kabika's mandatory supervised release term to three years to natural life.

Fukama-Kabika subsequently filed a *pro se* post-conviction petition, which was summarily dismissed. On appeal from the summary dismissal, Fukama-Kabika challenged the circuit court's order changing his term of mandatory supervised release. He raises this identical issue before this Court; no questions are raised on the pleadings.

ISSUE PRESENTED FOR REVIEW

Does Illinois Supreme Court Rule 472 give a circuit court jurisdiction to change a mandatory supervised release term at any time?

RULE INVOLVED

Illinois Supreme Court Rule 472. Correction of Certain Errors in Sentencing

(a) In criminal cases, the circuit court retains jurisdiction to correct the following sentencing errors at any time following judgment and after notice to the parties, including during the pendency of an appeal, on the court's own motion, or on motion of any party:

(1) Errors in the imposition or calculation of fines, fees, assessments, or costs;

(2) Errors in the application of *per diem* credit against fines;

(3) Errors in the calculation of presentence custody credit; and

(4) Clerical errors in the written sentencing order or other part of the record resulting in a discrepancy between the record and the actual judgment of the court.

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STATEMENT OF FACTS

The State charged Jean Fukama-Kabika with one count of criminal sexual assault, one count of unlawful restraint, and one count of criminal sexual abuse, occurring in Champaign County in 2015. (C. 22-24, 71) At the arraignment, the circuit court admonished Fukama-Kabika that, if convicted, the mandatory supervised release (MSR) term would be "2 years." (R. 6-7) The State subsequently charged Fukama-Kabika with a second count of criminal sexual assault, involving the same complainant and occurring on the same date. (C. 71) At this arraignment, the court told him that, if convicted, the MSR term would be "up to natural life." (R. 157-58)

Fukama-Kabika had a jury trial on all charges. At the trial, the court stated that the MSR term, if convicted, would be "three years up to natural life." (R. 221) The evidence at trial was that Fukama-Kabika and complainant R.C. met in a college class. (R. 359-62) One night, they watched a boxing match together, and R.C. drove Fukama-Kabika home. (R. 375-78, 397-98) R.C. claimed Fukama-Kabika assaulted and restrained her in the car. (R. 401-16, 482) Fukama-Kabika raised the affirmative defense of consent. (C. 67) The jury found Fukama-Kabika guilty of all counts. (C. 307-10; R. 875-76)

On October 27, 2017, the circuit court sentenced Fukama-Kabika to 15 years in the Illinois Department of Corrections (IDOC) seven years for each count of criminal sexual assault, and one year for unlawful restraint, to be served consecutively, as well as a three-year sentence for criminal sexual abuse, to be served concurrently. (R. 911-12; C. 394) The court did not discuss an MSR term at the sentencing hearing. The court entered a written "Judgment Sentence to

Illinois Department of Corrections," signed by the sentencing judge, reflecting these prison terms, and ordering Fukama-Kabika to also serve "3 years" MSR for his criminal sexual assault conviction. (C. 394)

Fukama-Kabika filed a direct appeal, and the Appellate Court affirmed. *People v. Fukama-Kabika*, 2020 IL App (4th) 170809-U.

On February 25, 2019, an IDOC record office supervisor sent a letter to the circuit court, asserting that Fukama-Kabika was eligible for an MSR term of three years to life, pursuant to 730 ILCS 5/5-8-1. (C. 432-41) IDOC asked the circuit court to "forward the amended [sentencing] order, issued *nunc pro tunc*" to the IDOC official's attention. (C. 433) The record also contains a note from "Troy" (the first name of the prosecutor who tried this case), asserting that he also received IDOC's letter and that the court could "amend the mittimus" "on its own" under "new rule 472." (C. 432, 439-41; see also R. 208) The note further states, "I looked at the transcripts and the court DID advise of the correct MSR term." (C. 432) The record includes an additional copy of a portion of the trial transcript, in which the court mentioned a "three years up to natural life" MSR term (compare C. 435-38, with R. 208, 220-22).

On March 1, 2019, the circuit court entered an "Amended Judgment-Sentence to the Illinois Department of Corrections," changing the MSR term from three years to "3 years natural life." (C. 442) The court entered the order *nunc pro tunc*. (C. 442) It did not cite Rule 472.

Fukama-Kabika filed a *pro se* post-conviction petition, raising constitutional claims. (C. 443-82) The circuit court summarily dismissed the petition. (C. 523)

Fukama-Kabika appealed and raised two issues, asking the Appellate Court

to: (I) reverse the summary dismissal of his *pro se* post-conviction because he raised an arguable constitutional claim, and (II) vacate the circuit court's 2019 order changing his MSR term. (C. 530, 534-36); *People v. Fukama-Kabika*, 2022 IL App (4th) 200371-U (available at Appendix, A-11). He argued that the circuit court lacked jurisdiction to enter the 2019 order because more than 30 days had elapsed since sentencing, and that the court could not have entered the order *nunc pro tunc* or pursuant to Illinois Supreme Court Rule 472 because it was not correcting a clerical error. See *Fukama-Kabika*, 2022 IL App (4th) 200371-U, ¶¶ 29-34. For support, he cited the First District Appellate Court's decision in *People v. Lake*, 2020 IL App (1st) 170309, which concluded that Rule 472 did not give a circuit court jurisdiction to enter an order changing an MSR term.

The Fourth District Appellate Court disagreed and affirmed. *Fukama- Kabika*, 2022 IL App (4th) 200371-U, ¶¶ 29-34. It concluded that, by statute, the required MSR term was three years to life, not three years. *Id*. ¶ 33. Therefore, the circuit court's 2019 order changing Fukama-Kabika's MSR term "was the equivalent of a 'clerical error,' and Illinois Supreme Court Rule 472 (eff. May 17, 2019) permits the circuit court to retain jurisdiction to correct clerical errors such as this." *Id*. ¶ 34. The Appellate Court denied Fukama-Kabika's petition for rehearing, challenging the court's interpretation of Rule 472.

Fukama-Kabika filed a petition for leave to appeal, highlighting the conflict in the Appellate Court regarding whether Rule 472 gives a circuit court jurisdiction to change an MSR term over 30 days after entry of final judgment, and asking this Court to resolve the issue.

This Court granted leave to appeal on November 30, 2022.

ARGUMENT

Illinois Supreme Court Rule 472 does not give a circuit court jurisdiction to change a mandatory supervised release term at any time.

The circuit court lacked jurisdiction, over 16 months after entry of final judgment, to increase Jean Fukama-Kabika's term of mandatory supervised release (MSR). Contrary to the Appellate Court's conclusion here, Illinois Supreme Court Rule 472 does not give a circuit court jurisdiction to change an MSR term at any time. Correction of the MSR term is not among the Rule's sentencing errors subject to correction, and changing an MSR term does not fit within the popularly understood or settled legal meaning of a "clerical error." Further, the drafters of Rule 472 could not have intended to give a circuit court jurisdiction to change and even increase an MSR term at any time because such an interpretation is inconsistent with precedent that abolished the void sentencing rule, that prohibits a circuit court from increasing a sentence, and that prohibits State appeals of sentencing orders. In light of this precedent, there is no indication that the drafters of Rule 472 intended to permit the Illinois Department of Corrections (IDOC) an administrative, non-party to a criminal proceeding to, at any time, direct a court to reassess and increase an MSR term, as occurred here. Therefore, Rule 472 does not give a circuit court jurisdiction to change an MSR term, and the Appellate Court's conclusion here was incorrect. *People v. Fukama- Kabika*, 2022 IL App (4th) 200371-U.

As the circuit court otherwise lacked jurisdiction to enter the March 1, 2019 order changing and increasing Fukama-Kabika's MSR term, the order is void, and this Court should vacate it.

A. Applicable law

Principles of statutory construction apply to interpretation of Illinois Supreme Court Rules. *People v. Abdullah*, 2019 IL 123492, ¶ 25. The primary goal when interpreting a rule is to ascertain and give effect to the drafters' intent. *Id.* To do so, this Court starts by looking to the rule's plain language, the best indicator of the drafters' intent. *Id.* This Court reviews the rule as a whole, construing words and phrases in light of other relevant provisions. *Id.* When a rule lists the things to which it refers, there is an inference that all omissions should be understood as exclusions. *People v. O'Connell*, 227 Ill. 2d 31, 37 (2007).

When interpreting a rule, this Court can consider the reasons for the rule, the problem sought to be remedied, the purposes to be achieved, and the consequences of construing the rule one way or another. *Abdullah*, 2019 IL 123492, ¶ 25. In doing so, this Court presumes that the drafters did not intend to produce absurd, inconvenient, or unjust results. *Id.*

If a rule's term is undefined, this Court presumes the drafters intended the term to have its popularly understood meaning. *People v. Johnson*, 2013 IL 114639, ¶ 9. Moreover, if a term has a settled legal meaning, this Court will normally infer that the drafters intended to incorporate that established meaning. *Id.*

If a rule is ambiguous, this Court can consider extrinsic aids of construction to discern the drafters' intent. *People v. Stewart*, 2022 IL 126116, ¶ 13. A rule is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more different ways. *Id.* When a criminal rule is ambiguous, this Court applies the rule of lenity and construes the rule in favor of the defendant. See, e.g., *People ex rel. Gibson v. Cannon*, 65 Ill. 2d 366, 370-71 (1976); *People v. Woodard*,

175 Ill. 2d 435, 444 (1997); *People v. Davis*, 199 Ill. 2d 130, 135, 140-41 (2002).

Interpreting a Supreme Court Rule, and assessing whether a court has jurisdiction, are both legal issues reviewed *de novo*. *Abdullah*, 2019 IL 123492, ¶ 18.

An order entered by a court that lacks jurisdiction is void and can be challenged at any time. *People v. Castleberry*, 2015 IL 116916, ¶ 11. A void order altering a sentence must be vacated, and the original sentence must be reinstated. See, e.g., *People v. Flowers*, 208 Ill. 2d 291, 307 (2003); *Abdullah*, 2019 IL 123492, ¶¶ 34-35.

B. By its plain language, Rule 472 does not give a circuit court jurisdiction to change an MSR term at any time.

The final judgment in a criminal case is the sentence. *Abdullah*, 2019 IL123492, ¶ 19. Typically, if no post-judgment motions are filed, a circuit court loses subject-matter jurisdiction to reconsider and modify a final judgment 30 days after it enters that judgment. *People v. Bailey*, 2014 IL 115459, ¶¶ 8, 14 (citing *Flowers*, 208 Ill. 2d at 303).

Effective March 1, 2019, Illinois adopted an exception to this general rule, Illinois Supreme Court Rule 472. Rule 472 gives the circuit court jurisdiction to correct certain sentencing errors at any time. It states:

> (a) In criminal cases, the circuit court retains jurisdiction to correct the following sentencing errors at any time following judgment and after notice to the parties, including during the pendency of an appeal, on the court's own motion, or on motion of any party:
>
> > (1) Errors in the imposition or calculation of fines, fees, assessments, or costs;
> >
> > (2) Errors in the application of *per diem* credit against fines;
> >
> > (3) Errors in the calculation of presentence custody credit; and

> (4) Clerical errors in the written sentencing order or other part of the record resulting in a discrepancy between the record and the actual judgment of the court.

Ill. S. Ct. Rule 472.

By its plain language, *Abdullah*, 2019 IL 123492, ¶ 25, Rule 472 does not give a circuit court jurisdiction to change an MSR term more than 30 days after it enters a sentencing order. The Rule lists certain sentencing errors that may be corrected at any time, but changing an MSR term is not among them. Because the Rule "lists the things to which it refers," the omission of any reference to MSR should be understood as an exclusion. *O'Connell*, 227 Ill. 2d at 37. Thus, Rule 472 does not give a circuit court jurisdiction to change an MSR term more than 30 days after entering a sentencing order.

The First District Appellate Court applied these basic principles of statutory construction in *People v. Lake*, 2020 IL App (1st) 170309, ¶ 1, in which the defendant challenged a circuit court's decision to change his MSR term. In *Lake*, the circuit court sentenced a defendant to serve a two-year MSR term in December 2011, ordering the term orally at the sentencing hearing and in the written sentencing order. *Id*. ¶¶ 5, 15-16. In January 2016, the IDOC sent a letter to the circuit court stating that the defendant's conviction for criminal sexual assault required an MSR term of three years to natural life, and the circuit court entered an order *nunc pro tunc* changing the MSR term to three years to natural life. *Id*. ¶ 6. The Appellate Court concluded that neither a *nunc pro tunc* order, *id*. ¶¶ 15-16, nor Rule 472 gave the circuit court jurisdiction to change the MSR term, *id*. ¶ 20. It reasoned that while Rule 472 "provides that the circuit court retains jurisdiction to correct certain sentencing errors at any time following the entry of a final

judgment, the correction of an erroneous MSR term is not one of the specified sentencing errors." *Id*. This Court should apply these basic principles of statutory interpretation and reach the same conclusion here.

In reaching the opposite conclusion below, the Fourth District Appellate Court did not cite or apply these principles. *Fukama-Kabika*, 2022 IL App (4th) 200371-U, ¶¶ 29-34 (Appendix, A-11). Instead, it concluded that because a specific MSR term is required by statute, when the circuit court imposes a non-compliant MSR term, this is "the equivalent of a 'clerical error,' and Illinois Supreme Court Rule 472 (eff. May 17, 2019) permits the circuit court to retain jurisdiction to correct clerical errors." *Id*. ¶¶ 33-34.

But a non-compliant MSR term imposed by the circuit court is not a "clerical error" as defined by the Rule. Rule 472 defines a clerical error as "Clerical errors in the written sentencing order or other part of the record resulting in a discrepancy between the record and the actual judgment of the court." Ill. S. Ct. Rule 472(a)(4). Here, there was no "discrepancy between the record and the actual judgment of the court" to correct. On October 27, 2017, the circuit court entered a written "Judgment Sentence to Illinois Department of Corrections" that ordered Fukama-Kabika to serve "3 years" MSR. (C. 394). Then, over 16 months later, on March 1, 2019, the court entered an "Amended Judgment Sentence to Illinois Department of Corrections," ordering Fukama-Kabika to serve "3 years natural life" MSR. (C. 442) This was a changing of the MSR term, not correcting a clerical error as defined by Rule 472.

Nor did the circuit court commit a "clerical error," according to the popularly understood or settled legal meaning of the phrase. *Johnson*, 2013 IL 114639, ¶

9. Black's Law Dictionary defines a clerical error as "[a]n error resulting from a minor mistake or inadvertence and not from judicial reasoning or determination." *Black's Law Dictionary* (11th ed. 2019) In 2017, the circuit court determined that Fukama-Kabika should serve a three-year MSR term and entered a written "Judgment Sentence to Illinois Department of Corrections," signed by the judge, that ordered him to serve a three-year MSR term. *Compare* (C. 394), *with People v. McChriston*, 2014 IL 115310, ¶ 3 (considering whether a defendant needed to serve an MSR term when the trial judge did not "mention MSR at the sentencing hearing" *and* the sentencing "order did not indicate that defendant would also be required to serve a term of mandatory supervised release"); *Round v. Lamb*, 2017 IL 122271, ¶¶ 3, 12-13 (considering whether a defendant was required to serve an MSR term when "no term of MSR connected to [a] conviction was mentioned during plea negotiations, during the sentencing hearing, or in the written sentencing order"). As the court did not orally order any other MSR term at the sentencing hearing, there was no minor mistake in documenting that order. (Compare R. 911-12, with C. 394) Nor was there an inadvertent failure to order an MSR term. The judicial imposition of a three-year term of MSR was not a "clerical error" as that term is commonly understood.

This Court has similarly defined a "clerical error" when evaluating the scope of *nunc pro tunc* orders. A circuit court has jurisdiction to enter an order *nunc pro tunc*, more than 30 days after it enters a final judgment, to incorporate something that was "actually previously done by the court but inadvertently omitted

by clerical error."[1] *People v. Melchor*, 226 Ill. 2d 24, 32-33 (2007). But a court does not have jurisdiction to enter a new order *nunc pro tunc* to "supply[] omitted judicial action, or correct[] judicial errors under the pretense of correcting clerical errors." *Melchor*, 226 Ill. 2d at 32-33; see also *Lake*, 2020 IL App (1st) 170309, ¶¶ 15-16 (concluding that the circuit court erred in using a *nunc pro tunc* order to alter an MSR term because it was not correcting a clerical error or attempting to conform the original sentencing order to the judgment pronounced in court). Contrary to the Fourth District's reasoning here, *Fukama-Kabika*, 2022 IL App (4th) 200371-U, ¶¶ 33-34, entering an order that *changes* a judicially-imposed MSR term to comply with a statute is correcting a judicial error not a clerical error.

This Court should conclude that, by its plain language, Rule 472 does not give a circuit court jurisdiction to change an MSR term at any time.

C. Interpreting Rule 472 to allow a change to an MSR term at any time cannot be what the drafters of the Rule intended, because such an interpretation is inconsistent with this Court's precedent and several statutes.

The Fourth District's interpretation of Illinois Supreme Court Rule 472, granting a circuit court jurisdiction to change and even increase an MSR term at any time, cannot be correct. Such an interpretation would produce absurd, inconvenient, and unjust results, and would be inconsistent with our Constitution,

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[1] Historically, this included correcting a mistake in a mittimus which was a separate document, distinct from the sentencing order maintained by the court, on which the court's order was transcribed, and which was sent to IDOC. *People v. Scheurich*, 2019 IL App (4th) 160441, ¶¶ 16-27 (citing *People v. Anderson*, 407 Ill. 503, 505 (1950)). But this no longer the case today, where a photocopy of the court's sentencing order is sent to the IDOC, and no person transcribes the court's order onto a separate mittimus. *Scheurich*, 2019 IL App (4th) 160441, ¶ 24 (citing Pub. Act 84-622, § 1 (eff. Sept. 20, 1985) (adding Ill. Rev. Stat. 1985, ch. 110, ¶ 2-1801, now codified at 735 ILCS 5/2-1801(a))).

this Court's precedent, and several statutes. *Abdullah*, 2019 IL 123492, ¶ 25.

1. Interpreting Rule 472 to allow a change to an MSR term at any time is inconsistent with this Court's precedent abolishing the void sentencing rule.

The Fourth District's assertion that the three-year MSR term ordered by the circuit court was the equivalent of a clerical error because it did not conform to the MSR term required by statute, *Fukama-Kabika*, 2022 IL App (4th) 200371-U, ¶¶ 29-34, is, in effect, an attempt to resurrect Illinois's former void sentence rule. But defining a clerical error in this way directly contradicts this Court's decision to abolish that rule.

Illinois used to have what was called the "void sentencing rule," which provided that a sentence that did not conform to a statutory requirement is "void" and, therefore, subject to challenge at any time, on the theory that the circuit court necessarily lacked "jurisdiction" to impose a non-conforming sentence. *Castleberry*, 2015 IL 116916, ¶ 1 (quoting *People v. Arna*, 168 Ill. 2d 197, 113 (1995)). But with agreement from both parties this Court abolished the void sentencing rule as constitutionally unsound. *Castleberry*, 2015 IL 116916, ¶¶ 16-17, 19. This is because our Constitution gives circuit courts original jurisdiction. *Id*. ¶¶ 14-15 (citing Ill. Const. 1970, art. VI, § 9). And if our Constitution gives a circuit court jurisdiction, it cannot be that the failure to satisfy a statutory requirement deprives the court of its power or jurisdiction. *Id*.

Another reason this Court cited for abolishing the void sentence rule was that permitting a party to challenge a sentence in perpetuity contradicted the goal of preserving the finality of judgments. *Castleberry*, 2015 IL 116916, ¶ 15. No one neither the judicial system, nor society, nor criminal defendants is

benefitted by a judgment that can continually be subject to fresh litigation. *Teague v. Lane*, 489 U.S. 288, 309 (1989). Yet, the void sentencing rule allowed an " ' "unwarranted and dangerous expansion of the situations where a final judgment may be set aside on a collateral attack." '" *Castleberry*, 2015 IL 116916, ¶ 15 (quoting *LVNV Funding, LLC v. Trice*, 2015 IL 116129, ¶ 38, quoting *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.,* 199 Ill. 2d 325, 341 (2002)) Abolishing the void sentence rule, thus, preserved the finality of judgments. See also *People v. Price*, 2016 IL 118613, ¶ 17 (reiterating the importance of finality of judgments).

Characterizing a judicially-imposed, albeit erroneous, MSR term as a "clerical error" would be an absurd interpretation of Rule 472 that the drafters could not have intended, as such an interpretation would improperly revive the now discredited "void sentence" rule.

2. Interpreting Rule 472 to allow a change and, here, an increase–to an MSR term at any time is inconsistent with this Court's precedent and statutes prohibiting a circuit court from increasing a sentence.

Here, the circuit court ordered a three-year MSR term (C. 394) and then increased it to "3 years natural life" (C. 442). Interpreting Rule 472 to allow this would be absurd and unjust, *Abdullah*, 2019 IL 123492, ¶ 25, because our legislature and this Court have long prohibited a circuit court from increasing a person's sentence once it has been ordered.

An MSR term is very much a part of a person's sentence. While on MSR, persons are deprived of their liberty and are still considered imprisoned because they have not fully served their sentences. *People v. Pack*, 224 Ill. 2d 144, 150-52 (2007) (collecting cases); see also *People v. Whitfield*, 217 Ill. 2d 177, 195, 202-05 (2005) (describing an MSR term as part of a sentence). Our legislature has

established specific deprivations of liberty that are part of every MSR term, including reporting to an IDOC agent, consenting to a search of one's person or property, and obtaining permission from an IDOC agent to leave the state, change jobs, or move. 730 ILCS 5/3-3-7 (2015). A person convicted of criminal sexual assault must also wear an electronic monitoring device "for the duration" of their MSR term. 730 ILCS 5/3-3-7(a)(7.7) (2015) (imposing this condition for persons who qualify as a sexual predator under the Sex Offender Registration Act (SORA)); 730 ILCS 150/2(E) (2015) (SORA defines a sexual predator as a person who has been convicted of criminal sexual assault after July 1, 1999). In addition to these required MSR terms, the Prisoner Review Board may also impose even more extreme liberty deprivations for a person convicted of a sex offense, like criminal sexual assault, such as requiring such a person to obtain prior approval to "driv[e] alone in a motor vehicle" and then requiring that person to provide "a written daily log of activities." 730 ILCS 5/3-3-7(b-1) (2015) (listing additional conditions the Board "may" require when a person must register as a sex offender); 730 ILCS 150/2 (A)(1)(a), (B)(1) (2015) (defining a sex offender pursuant to SORA as a person who has been convicted of a sex offense, including criminal sexual assault).

The circuit court's decision here to increase Fukama-Kabika's MSR sentence to up to a lifetime of IDOC control contradicts longstanding prohibitions on a circuit court increasing a sentence. This Court has recognized that it has been the rule in Illinois for decades that persons "are not to be resentenced to longer periods of incarceration," unless the increased sentence is based on conduct occurring subsequent to the original sentencing. *People v. Moore*, 177 Ill. 2d 421, 422-24 (1997). Our legislature has stated that while a defendant may move to reduce

a sentence within 30 days of its imposition, "[t]he court may not increase a sentence once it is imposed." 730 ILCS 5/5-4.5-50(d) (2015) (enacted Pub. Act 95-1052, § 90 (eff. July 1, 2009)); (formerly 730 ILCS 5/5-8-1(c)). And our legislature has further stated that if a person is resentenced after a conviction or sentence is set aside, a court "shall not" impose a new sentence that is "more severe," unless the more severe sentence is based upon the defendant's conduct occurring after the original sentencing. 730 ILCS 5/5-5-4(a) (2015). Therefore, unless a person has engaged in new, aggravating conduct post-sentencing, a circuit court cannot increase a person's sentence.

Interpreting an increase of an MSR term, to what can be a *lifetime* of liberty deprivations, as something akin to a "clerical error," as the Fourth District did here, is an absurd and unjust result that the drafters of Rule 472 could not have intended, where our legislature and this Court have long prohibited circuit courts from increasing a sentence.

3. Interpreting Rule 472 to allow any party to move to change and increase an MSR term is inconsistent with this Court's precedent and rules prohibiting State appeals.

Rule 472 allows "any party," including the State, to move to correct the sentencing errors listed therein. Ill. S. Ct. Rule 472(a). The State did not file such a motion to change an MSR term here; the record only contains a note from a person with the same first name as the trial prosecutor, asserting that Rule 472 allowed the circuit court to change Fukama-Kabika's three-year MSR term to a three-year-to-life MSR term. (C. 432-41) Even if this were a formal motion by the State under Rule 472, interpreting the rule to allow such a motion would be an absurd result because this Court's rules and precedent prohibit State appeals of sentencing orders.

Abdullah, 2019 IL 123492, ¶ 25.

Rule 604(a) sets forth specific instances when the State can appeal in a criminal case:

> (a) **Appeals by the State**.
>
> > (1) *When State May Appeal*. In criminal cases the State may appeal only from an order or judgment the substantive effect of which results in dismissing a charge for any of the grounds enumerated in section 114-1 of the Code of Criminal Procedure of 1963; arresting judgment because of a defective indictment, information or complaint; quashing an arrest or search warrant; or suppressing evidence.

Ill. S. Ct. Rule 604(a). This Court has recognized that this "rule does not permit the State to appeal a sentencing order." *Castleberry*, 2015 IL 116916, ¶ 21 (collecting cases).

This Court has continued to apply and uphold this rule limiting State appeals even *after* adopting Rule 472. Rule 472 went into effect on March 1, 2019, and on November 21, 2019, this Court issued a unanimous opinion in *Abdullah*. The opinion in *Abdullah*, 2019 IL 123492, ¶ 30, repeated that "Rule 604(a) sets forth with specificity those instances where the State may appeal in a criminal case. The rule does not permit the State to appeal a sentencing order." (quotations and citations omitted) This Court in *Abdullah* applied this Rule to hold that the State was not authorized to file a post-sentencing motion to modify, and increase, a defendant's sentence by adding firearm enhancements. *Id*. ¶¶ 6, 11, 15, 30.

If the State wants to move to increase a sentence, it has a different remedy: a writ of *mandamus*. *Castleberry*, 2015 IL 116916, ¶¶ 26-27; *Price*, 2016 IL 118613, ¶ 17; *People ex rel. Berlin v. Bakalis*, 2018 IL 122435, ¶¶ 14-18; *Abdullah*, 2019 IL 123492, ¶¶ 30-31. This has been a longstanding, extraordinary remedy.

Castleberry, 2015 IL 116916, ¶¶ 26-27; *Abdullah*, 2019 IL 123492, ¶¶ 30-31. And this Court has original jurisdiction over such requests. Ill. Const. 1970, art. 6, § 4; *Castleberry*, 2015 IL 116916, ¶ 26.

Thus, interpreting Rule 472 to allow the State to move to increase a defendant's sentence in the circuit court would be an absurd result that the drafters could not have intended because such an interpretation would contradict this Court's rules and precedent long prohibiting State appeals of sentencing orders, and, instead, limiting such a challenge to a writ of *mandamus*.

4. Interpreting Rule 472 to allow the IDOC to direct a court to reassess and increase a person's sentence at any time would be an absurd result that the drafters could not have intended because it would contradict the IDOC's role.

Here, the circuit court increased Fukama-Kabika's MSR term upon receipt of a letter from an IDOC record office supervisor, informing the circuit court of the applicable MSR term and directing the court to "forward the amended [sentencing] order, issued *nunc pro tunc* to the original sentencing date to my attention ... ." (C. 433); *Fukama-Kabika*, 2022 IL App (4th) 200371-U, ¶ 31. But interpreting Rule 472 to permit the IDOC to direct a court to reassess and increase a person's sentence would be an absurd result that the drafters could not have intended, as it would be an unwarranted expansion of the IDOC's proper role.

It is the circuit court judge's job to determine and order an MSR term. Since January 1, 2012, our legislature has required circuit court judges to order a specific MSR term in its written sentencing order. 730 ILCS 5/5-8-1(d); Pub. Act 97-531, § 5 (eff. Jan. 1, 2012) (amending Section 5-8-1(d) to remove the phrase that all sentences shall include an MSR term "as though written therein" and replace

it with language that an MSR term "shall be written as part of the sentencing order."); see also 97th Ill. Gen. Assem., Senate Proceedings, April 14, 2011, at 74-75 (containing an explanation from then-Senator Kwame Raoul that this amendment added that when an individual is sentenced, "the amount of time that he must serve on parole or mandatory supervised release must be written as part of the sentencing order"); *McChriston*, 2014 IL 115310, ¶¶ 17-21 (recognizing that the purpose of this amendment was to change the law "to require that the judge specify the MSR term in writing in the sentencing order"). The court did so here. (C. 394)

It is not the IDOC's role to direct a court to reassess its sentence. The IDOC is an administrative office that must comply with court orders, valid or not. *Beasley v. Hanrahan*, 29 Ill. App. 3d 508, 510-11 (1st Dist. 1975) (directing a circuit court to issue a writ of *mandamus* requiring the IDOC to comply with court-ordered concurrent sentencing, regardless of its validity). An administrative office like the IDOC may neither "take it upon [it]self to decide which orders are valid and which are not," nor "sit in judgment of a court order" because "[a]ll orders are presumed valid." *Beasley*, 29 Ill. App. 3d at 510-11.

And, as just discussed, not even the circuit court judge, whose role is to impose a sentence, has jurisdiction to increase a sentence at any time, *supra* §§ B, C.1, C.2, and not even the State who is actually a party to a criminal proceeding is permitted to file a motion in the circuit court to appeal a sentencing order, *supra* § C.3. An interpretation of Rule 472 that instead allows the IDOC an administrative non-party to essentially move, via letter, for a reassessment and increase in a person's sentence is an absurd result that the drafters of the rule could not have

intended. The IDOC is not even an entity that is mentioned by Rule 472.

For all these reasons, the Fourth District's interpretation of Illinois Supreme Court Rule 472 here, as giving a circuit court jurisdiction to change and even increase an MSR term at any time, cannot be correct. And should this Court find any ambiguity in Rule 472, it must apply the rule of lenity and construe the rule in favor of defendant Fukama-Kabika to prohibit the circuit court from increasing his MSR sentence. See, e.g., *Gibson*, 65 Ill. 2d at 370-71; *Woodard*, 175 Ill. 2d at 444; *Davis*, 199 Ill. 2d at 135.

D. Remedy: Because Rule 472 does not give a circuit court jurisdiction to change a mandatory supervised release term, the court lacked jurisdiction to enter the March 1, 2019 order which did so here, and this Court should vacate that order.

Accordingly, Rule 472 does not give a circuit court jurisdiction to change an MSR term at any time. Changing an MSR term is not among the Rule's sentencing errors subject to correction and does not fit within the definition of a "clerical error." Further, the drafters of Rule 472 could not have intended to give a circuit court jurisdiction to change and even increase an MSR term at any time because such an interpretation would be inconsistent with our Constitution, this Court's precedent, and several statutes. Therefore, the Appellate Court's conclusion here that Rule 472 gave the circuit court jurisdiction to change Fukama-Kabika's MSR term was incorrect. *Fukama-Kabika*, 2022 IL App (4th) 200371-U.

The circuit court's conclusion that it had jurisdiction to change the MSR term *nunc pro tunc* was also incorrect. (C. 442) A court has jurisdiction to enter an order *nunc pro tunc* only to incorporate something that was "actually previously done by the court but inadvertently omitted by clerical error." *Melchor*, 226 Ill. 2d at 32-33. Here, the circuit court sentenced Fukama-Kabika on October 27, 2017

to three years MSR. (C. 394) The March 1, 2019 order changing that MSR term to three-years-to-life was not incorporating something that was actually previously done by the court but inadvertently omitted by clerical error.

Thus, the general rules regarding jurisdiction applied: the circuit court lost jurisdiction to modify the final judgment 30 days after entering it back on October 27, 2017. *Bailey*, 2014 IL 115459, ¶¶ 8, 14. This Court should conclude that the March 1, 2019 order is void, *Castleberry*, 2015 IL 116916, ¶ 11, vacate it, and reinstate the October 27, 2017 final judgment.

CONCLUSION

For the foregoing reasons, Jean A. Fukama-Kabika, petitioner-appellant, respectfully requests that this Court conclude that Illinois Supreme Court Rule 472 did not give the circuit court jurisdiction to change his mandatory supervised release term. Because the circuit court lacked jurisdiction to enter the March 1, 2019 order changing his MSR term, this Court should further conclude that the order is void, vacate it, and reinstate the October 27, 2017 final judgment.

Respectfully submitted,

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COUNSEL FOR PETITIONER-APPELLANT

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 22 pages.

/s/Kathryn L. Oberer
KATHRYN L. OBERER
Assistant Appellate Defender

APPENDIX TO THE BRIEF

Jean A. Fukama-Kabika No. 128824

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Petitioner,	)	APPELLATE CASE: 4-20-0371
— vs —	)	CIRCUIT CASE: 15-CF-648
	)	TRIAL JUDGE: DIFANIS
Jean A Fukama-kabika	)	
Respondent.	)	

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FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS, Petitioner,	)	
— vs —	)	APPELLATE CASE: 4-20-0371
	)	CIRCUIT CASE: 15-CF-648
	)	TRIAL JUDGE: DIFANIS
Jean A Fukama-kabika Respondent.	)	

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
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THE PEOPLE OF THE STATE OF ILLINOIS, Petitioner,	)	
— vs —	)	APPELLATE CASE: 4-20-0371
	)	CIRCUIT CASE: 15-CF-648
	)	TRIAL JUDGE: DIFANIS
Jean A Fukama-kabika Respondent.	)	

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APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Petitioner,	)	APPELLATE CASE: 4-20-0371
— vs —	)	CIRCUIT CASE: 15-CF-648
	)	TRIAL JUDGE: DIFANIS
Jean A Fukama-kabika	)	
Respondent.	)	

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Report of Proceedings ("R")

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,)
)
Vs.) Case Number: 2015-CF-000648
Jean A. Fukama-Kabika)

JUDGMENT – SENTENCE TO ILLINOIS DEPARTMENT OF CORRECTIONS

WHEREAS the above named defendant, whose date of birth is **February 22, 1984,** has been adjudged guilty of the offenses below; IT IS THEREFORE ORDERED that the defendant be and hereby is sentenced to confinement in the Illinois Department of Corrections for the year and months specified for each offense.

COUNT	OFFENSE	DATE OF OFFENSE	STATUTORY CITATION	CLASS	SENTENCE	MSR
01	Criminal Sexual Assault	May 03, 2015	720 ILCS 5/11-1.20(a)(1)	1	7 years	3 years
To run (concurrent with) (**consecutively to**) counts **4** and						
02	Criminal Sexual Abuse	May 03, 2015	720 ILCS 5/11-1.50(a)(1)	4	3 years	1 year
To run (**concurrent with**) (consecutively to) counts **1, 3 and 4** and						
03	Unlawful Restraint	May 03, 2015	720 ILCS 5/10-3(a)	4	1 year	1 year
To run (concurrent with) (**consecutively to**) counts **1 and 4** and served						
04	Criminal Sexual Assault	May 03, 2015	720 ILCS 5/11-1.20	1	7 years	3 years

This Court finds that the defendant is:

_____ Convicted a class ____ offense but sentenced as a class X offender pursuant to 730 ILCS 5/5-4.5-95(b)

__X__ The Court further finds that the defendant is entitled to receive credit for time actually served in custody of **166** days as of the date of this order.

_____ The Court further finds that the conduct leading to conviction for the offenses enumerated in counts _____ resulted in great bodily harm to the victim (730 ILCS 5/3-6-(a)(2)(iii))

_____ The Court further finds that the defendant meets the eligibility requirements for possible placement in the Impact Incarceration Program. (730 ILCS 5/5-4-1(a))

_____ The Court further finds that offense was committed as a result of the use of, abuse of alcohol, or addiction to alcohol or a controlled substance and recommends the defendant for placement in a substance abuse program.

_____ IT IS FURTHER ORDERED the sentence(s) imposed on count(s) _____ be (concurrent with) (consecutive to) the sentence imposed in case number _____ in the Circuit Court of Champaign County.

_____ It is FURTHER ORDERED that

The Clerk of the Court shall deliver a certified copy of this order to the sheriff. The Sheriff shall take the defendant into custody and deliver defendant to the Department of Corrections which shall confine said defendant until expiration of this sentence or until otherwise released by operation of law.

This order is effective immediately.

DATE: October 27, 2017 Entered: T Thomas J. Difanis

Thomas J. Difanis
Sixth Judicial Circuit Judge, Champaign County, Illinois

Approved by Conference of Chief Judges 6/20/14

C394

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, STATE OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,

-VS-

NO. 2015-CF-00648

JEAN FUKAMA _ KABIKA,

Defendant/APPELLANT

FILED
SIXTH JUDICIAL CIRCUIT
20 AUG 10 2020
CLERK OF THE CIRCUIT COURT
CHAMPAIGN COUNTY, ILLINOIS

NOTICE OF APPEAL

An appeal is taken from the Order or Judgement described below:

1.) Court to which appeal is taken:

APPEAL TO THE ILLINOIS APPELLATE COURT, FOURTH DISTRICT

2.) Name of appellant and address to which notices shall be sent:

Name: JEAN FUKAMA - KABIKA, Y25555 ; DANVILLE CORRECTIONAL CENTER
Address: #*@) 3820 EAST MAIN STREET ; DANVILLE , IL. 61834

3.) Name and address of appellant's attorney on appeal:

Name: JOHN M. McCARTHY : STATE APPELLATE DEFENDERS OFFICE
Address: 400 WEST MONROE STREET, Ste 503 ; SPRINGFIELD, IL. 62704

If appellant is indigent and has no attorney, does he want one appointed?
YES, PLEASE APPOINT COUNSEL

4.) Date of Judgement or Order: JULY 31, 2020

5.) Offense of which convicted: CRIMINAL SEXUAL ASSAULT ; CRIMINAL SEXUAL ABUSE AND UNLAWFUL RESTRAINT ect

6.) Sentence: SEVEN YEARS EACH FOR SEX RELATED CONVICTIONS ; ONE YEAR FOR RESTRAINT ~~TO RUN CONSECUTIVE~~

7.) If appeal is not from a conviction, nature of Order appealed from:
DISMISSAL OF POST CONVICTION PETITION

Signed: _____

C530

No. 4-20-0371

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- JEAN FUKAMA-KABIKA, Petitioner-Appellant.	))))))))))	Appeal from the Circuit Court of the Sixth Judicial Circuit, Champaign County, Illinois No. 15-CF-648 Honorable Thomas J. Difanis, Judge Presiding.

AMENDED NOTICE OF APPEAL

An appeal is taken to the Appellate Court, Fourth Judicial District:

Appellant(s) Name:	Mr. Jean A. Fukama-Kabika
Appellant's Address:	Danville Correctional Center 3820 East Main Street Danville, IL 61834
Appellant(s) Attorney:	Office of the State Appellate Defender
Address:	400 West Monroe Street, Suite 303 Springfield, IL 62704
Offense of which convicted:	Counts I, IV: Criminal Sexual Assault, Count II: Criminal Sexual Abuse, and Count III: Unlawful Restraint
Date of Judgment or Order:	July 29, 2020
Sentence:	Count I: 7 years in prison Count II: 3 years in prison Count III: 1 year in prison Count IV: 7 years in prison
Nature of Order Appealed:	Dismissal of Post-Conviction Petition

/s/ Catherine K. Hart
CATHERINE K. HART
ARDC No. 6230973
Deputy Defender

C535

No. 4-20-0371

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of
	)	the Sixth Judicial Circuit,
Respondent-Appellee,	)	Champaign County, Illinois
	)	
-vs-	)	No. 15-CF-648
	)	
JEAN FUKAMA-KABIKA,	)	
	)	Honorable
Petitioner-Appellant.	)	Thomas J. Difanis,
	)	Judge Presiding.

NOTICE AND PROOF OF SERVICE

TO: Katie M. Blakeman, Champaign County Circuit Clerk, Champaign County Courthouse 101 E. Main Street, Urbana, IL 61801;

Mr. David J. Robinson, Deputy Director, State's Attorney Appellate Prosecutor, 725 South Second Street, Springfield, IL 62704, 4thdistrict@ilsaap.org

Mr. Jean A. Fukama-Kabika, Register No. Y25555, Danville Correctional Center, 3820 East Main Street, Danville, IL 61834

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On August 11, 2020, the Amended Notice of Appeal was filed with the Champaign County Circuit Clerk's Office using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the appellant in an envelope deposited in a U.S. mail box in Springfield, Illinois, with proper postage prepaid.

/s/ Libby Bitschenauer
PARALEGAL ADMINISTRATOR
Office of the State Appellate Defender
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C536

2022 IL App (4th) 200371-U

NO. 4-20-0371

FILED
June 27, 2022
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
JEAN FUKAMA-KABIKA,	)	No. 15CF648
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Presiding Justice Knecht and Justice Turner concurred in the judgment.

ORDER

¶ 1 **Held**: Summary dismissal of petitioner's petition for postconviction relief was proper since petitioner's claims of error attributed to ineffectiveness of appellate counsel were waived and had no basis in law or fact even without waiver, and his claim of error for correcting his mittimus had no basis in law.

¶ 2 Defendant, Jean Fukama-Kabika, appeals from the first stage dismissal of his **pro se** petition for postconviction relief. After his conviction for criminal sexual assault, criminal sexual abuse, and unlawful restraint in 2017, defendant was sentenced to consecutive seven- and three-year terms along with a concurrent one-year sentence in the Illinois Department of Corrections (DOC). Defendant's conviction and sentence were affirmed on direct appeal. During the pendency of his appeal, defendant sought postconviction relief, alleging several substantive and procedural errors by the trial court which denied him a fair trial, along with claims of

ineffective assistance of trial counsel. The trial court dismissed the petition at the first stage, finding it to be "frivolous, patently without merit." We affirm.

¶ 3 I. BACKGROUND

¶ 4 In May 2017, a jury convicted defendant of two counts of criminal sexual assault, one count of criminal sexual abuse, and one count of unlawful restraint. Defendant was sentenced to seven years in DOC on each of the sexual assault counts and three years on the sexual abuse count, with each sentence to be served consecutively to each other. He was also sentenced to one year in prison on the count of unlawful restraint, to be served concurrently with the other sentences.

¶ 5 On direct appeal, defendant raised four issues. He claimed: (1) the trial court erred in its Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), or **Zehr** instructions (see **People v. Zehr**, 103 Ill. 2d 472, 469 N.E.2d 1062 (1984)); (2) the trial court violated his constitutional right to a public trial when it excused one of defendant's "supporters" who was caught shaking hands with one of the jurors during a recess; (3) the trial court erred when it permitted the victim to be recalled in rebuttal and, in effect, repeating her emotional testimony before the jury; and (4) that defendant was denied a fair trial when the prosecutor improperly shifted the burden of proof to defendant and vouched for the victim's credibility during his closing argument. Finding none of the errors claimed by defendant, in August 2020, this court affirmed the trial court's judgment. See **People v. Fukama-Kabika**, 2020 IL App (4th) 170809-U, ¶ 1.

¶ 6 While his direct appeal was still pending, defendant filed the underlying petition for postconviction relief on July 17, 2020 (the record reveals two identical petitions file marked July 17 and July 20, 2020). The petition asserted eight claims of error: (1) that appellate counsel was ineffective for failing to properly raise the various issues being raised in the postconviction

petition; (2) that the trial court violated his constitutional rights by denying his motion to suppress his statements made to police in the absence of **Miranda** admonishments (see **Miranda v. Arizona**, 384 U.S. 436 (1966)); (3) that trial counsel was ineffective for failing to object to the State's improper presentation of rebuttal evidence; (4) that he was denied a fair trial "where the State was permitted to introduce unfounded and prejudice [**sic**] evidence via other witnesses that was hearsay"; (5) that he was deprived of an impartial jury due to improper **Zehr** admonishments; (6) that he was denied a fair trial based on comments by the State that shifted the burden of proof; (7) that he was denied a fair trial by the delayed disclosure of a witness by the State; and (8) that the cumulative effects of counsel's errors deprived defendant of a fair trial.

¶ 7 The trial court entered a written order on July 29, 2020, finding defendant's claims to be "frivolous, patently without merit," and it ordered the petition dismissed. Defendant filed a timely notice of appeal within 30 days of the trial court's order, and this appeal followed.

¶ 8 II. ANALYSIS

¶ 9 On appeal, defendant contends the trial court erred in dismissing his claims for postconviction relief at the first stage because he raised an arguable claim of ineffective assistance of appellate counsel. Specifically, defendant contends appellate counsel was ineffective for failing to argue on direct appeal that the trial court erred in denying his suppression motion. In addition, defendant contends the trial court erred in finding his claim to be premature due to the pendency of his direct appeal at the time. Lastly, defendant raises, for the first time, an allegation that the trial court lacked jurisdiction to correct a mittimus to reflect a term of mandatory supervised release (MSR) required by law. The State responds by asserting defendant failed to present a meritorious claim in his petition and the trial court had authority to amend the mittimus to reflect the statutory MSR term.

¶ 10 A. Postconviction Proceedings

¶ 11 "The Post-Conviction Hearing Act [(Act)] provides a procedural mechanism through which criminal defendants can assert that their federal or state constitutional rights were substantially violated in their original trials or sentencing hearings." **People v. Buffer**, 2019 IL 122327, ¶ 12, 137 N.E.3d 763 (citing 725 ILCS 5/122-1(a) (West 2014)). "A postconviction proceeding is not a substitute for a direct appeal but rather is a collateral attack on a prior conviction and sentence. The purpose of the proceeding is to allow inquiry into constitutional issues involved in the original conviction and sentence that have not been, and could not have been, adjudicated previously on direct appeal." **Buffer**, 2019 IL 122327, ¶ 12 (citing **People v. Harris**, 224 Ill. 2d 115, 124, 862 N.E.2d 960, 966 (2007)).

¶ 12 Once filed, a postconviction petition is subject to a three-stage adjudicatory process. **Harris**, 224 Ill. 2d at 125. At the first stage, section 122-2.1 of the Act directs the trial court to independently assess the substantive merit of the petition. **Harris**, 224 Ill. 2d at 125-26 (citing 725 ILCS 5/122-2.1 (West 2002)). If the court finds the petition is "frivolous" or "patently without merit," the Act requires that the court dismiss it, and this dismissal is a final order. 725 ILCS 5/122-2.1(a)(2) (West 2018). A petition is frivolous or patently without merit when its allegations, taken as true and liberally construed, fail to present the gist of a constitutional claim. **People v. Edwards**, 197 Ill. 2d 239, 244, 757 N.E.2d 442, 445 (2001). A petition may be dismissed as frivolous or patently without merit "only if the petition has no arguable basis either in law or in fact." **People v. Hodges**, 234 Ill. 2d 1, 11-12, 912 N.E.2d 1204, 1209 (2009). "A petition lacks an arguable basis in law when it is grounded in 'an indisputably meritless legal theory,' for example, a legal theory which is completely contradicted by the record." **People v. Morris**, 236 Ill. 2d 345, 354, 925 N.E.2d 1069, 1075 (2010) (quoting **Hodges**,

234 Ill. 2d at 16). A petition "lacks an arguable basis in fact when it is based on a 'fanciful factual allegation,' which includes allegations that are 'fantastic or delusional' or belied by the record." **Morris**, 236 Ill. 2d at 354 (quoting **Hodges**, 234 Ill. 2d at 16-17). Our review of a first-stage dismissal of a postconviction petition is **de novo** (**Buffer**, 2019 IL 122327, ¶ 12), affording no deference to the trial court's judgment or reasoning. **People v. Walker**, 2018 IL App (1st) 160509, ¶ 22, 128 N.E.3d 978.

¶ 13 B. Ineffective Assistance of Counsel

¶ 14 Here, defendant contends he raised an arguable claim of ineffective assistance of appellate counsel. A defendant's claim of ineffective assistance of counsel is analyzed under the two-pronged test set forth in **Strickland v. Washington**, 466 U.S. 668 (1984). **People v. Veach**, 2017 IL 120649, ¶ 29, 89 N.E.3d 366. To prevail, "a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant." **People v. Petrenko**, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1203 (2010). To establish deficient performance, the defendant must show "counsel's performance 'fell below an objective standard of reasonableness.' " **People v. Valdez**, 2016 IL 119860, ¶ 14, 67 N.E.3d 233 (quoting **Strickland**, 466 U.S. at 688). Prejudice is established when a reasonable probability exists that, but for counsel's unprofessional error, the result of the proceeding would have been different. **People v. Evans**, 209 Ill. 2d 194, 219-20, 808 N.E.2d 939, 953 (2004) (citing **Strickland**, 466 U.S. at 694). A defendant must satisfy both prongs of the **Strickland** standard, and the failure to satisfy either prong precludes a finding of ineffective assistance of counsel. **People v. Clendenin**, 238 Ill. 2d 302, 317-18, 939 N.E.2d 310, 319 (2010). " 'Effective assistance of counsel refers to competent, not perfect representation.' " **Evans**, 209 Ill. 2d at 220 (quoting **People v. Stewart**, 104 Ill. 2d 463, 491-92, 473 N.E.2d 1227, 1240 (1984)). "[T]here is a strong presumption of

outcome reliability, so to prevail [on an ineffective assistance claim], a defendant must show that counsel's conduct 'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " **People v. Pineda**, 373 Ill. App. 3d 113, 117, 867 N.E.2d 1267, 1272 (2007) (quoting **Strickland**, 466 U.S. at 686).

¶ 15 "Claims of ineffective assistance of appellate counsel are measured against the same standard as those dealing with ineffective assistance of trial counsel." **People v. Childress**, 191 Ill. 2d 168, 175, 730 N.E.2d 32, 36 (2000). As we noted above, this means defendant must show (1) appellate counsel's performance fell below an objective standard of reasonableness and (2) counsel's deficient performance prejudiced the defense. **Strickland**, 466 U.S. at 687.

¶ 16 Defendant claims appellate counsel was ineffective for failing to argue on direct appeal the trial court erred in denying the motion to suppress his statements to police. Defendant's pretrial motion to suppress statements was based primarily on the failure of police to Mirandize defendant before what he claimed was a custodial interrogation. In general terms, he claimed in the motion that any statements given were involuntary but did not attribute their involuntariness to language or culture. Instead, defendant claimed the "substantial language barrier" made any statements "wholly unreliable and incompetent," with no reference to involuntariness. Defendant's posttrial motion did not address this issue at all, referencing instead a motion to suppress evidence in only the most general terms. His postconviction petition, on the other hand, asserted only that his constitutional rights were violated by the trial court's failure to suppress statements taken without **Miranda** warnings, with no mention of involuntariness based on language or cultural differences. In both his listing of claims ("Claim Two") and what he captioned as his "Memorandum of Law and Findings of Fact," defendant expressly limited his allegation of error to the court's denial of his motion to suppress "taken without **Miranda**

protections." Now, on appeal, defendant argues counsel was ineffective for failing to argue the involuntariness of his statements to police due primarily to differences in language and culture an issue never raised in the postconviction petition from which he appeals.

¶ 17 Under the Act, "[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2018); see also **People v. Jones**, 211 Ill. 2d 140, 145, 809 N.E.2d 1233, 1237 (2004). Defendant's postconviction claim of ineffective assistance of appellate counsel for failing to raise the trial court's error in denying his motion to suppress based on violations of **Miranda** is a claim separate and distinct from the one of involuntariness he asserts before this court. **People v. Banks**, 241 Ill. App. 3d 966, 978, 609 N.E.2d 864, 872 (1993) ("The standards established in **Miranda** 'have a separate constitutional status apart from considerations of voluntariness.' ") (quoting **People v. Doss**, 26 Ill. App. 3d 1, 14, 324 N.E.2d 210, 219 (1975)). As such, the voluntariness claim is waived.

¶ 18 Defendant makes no effort to argue this court should consider the issue notwithstanding waiver such as under the plain error doctrine. Instead, he contends there was "evidence" his statement "was involuntary," should have been suppressed, and appellate counsel was ineffective for failing to so argue. Unfortunately, this was not the issue presented to the trial court in the petition for postconviction relief. As a result, defendant is foreclosed from arguing any exception to its waiver. Ill. S. Ct. R. 341(h)(7) (eff. Oct. 1, 2020). Defendant cannot claim one basis for error in his postconviction petition, then argue a separate error of constitutional magnitude when appealing the trial court's denial of his petition. 725 ILCS 5/122-3 (West 2018); see also **People v. Jones**, 213 Ill. 2d 498, 505, 821 N.E.2d 1093, 1097 (2004) (claims not raised on defendant's postconviction petition cannot be raised for the first time on appeal).

¶ 19 Even absent waiver however, defendant's claim fails. The basis of his assertion of ineffective assistance of counsel is the claimed error by the trial court in denying his motion to suppress. If there was no error in denying the motion, there is no error by counsel. We apply a two-part standard of review to a circuit court's decision on a motion to suppress. **People v. Timmsen**, 2016 IL 118181, ¶ 11, 50 N.E.3d 1092. The trial court's factual findings are upheld unless they are against the manifest weight of the evidence, but we review **de novo** the legal conclusions as to whether suppression was warranted. **Timmsen**, 2016 IL 118181, ¶ 11.

¶ 20 Here, the trial court heard substantial evidence regarding defendant's statements to police. The court was in the best position to assess the credibility of the witnesses and resolve any conflicts in testimony. **People v. Myers**, 66 Ill. App. 3d 934, 935, 384 N.E.2d 516, 518 (1978).

¶ 21 Evidence presented at the suppression hearing established officers spoke with defendant at his residence at 1:50 in the afternoon. Their expressed intent was to "get his side of the story." When met at the door, defendant was "sober and oriented" and "awake." He immediately agreed to speak with the officers, stepping out in either "boxer shorts" or "regular shorts." At the suppression hearing, counsel for defendant also argued that regardless of whether they were aware English was not defendant's first language, the victim told them he "speaks English well," but with an accent. When defendant agreed to step outside the apartment to talk with the officers, they detected no inability on his part to understand their questions or provide intelligent and appropriate responses. At no time during the "less than ten minute" conversation did defendant contend he did not understand, did not want to talk to the officers, or request the assistance of an interpreter. According to the officers, defendant "was conversing appropriately. He was using standard words and phrases and seemed to or appeared to understand everything

[they were] saying as well." The officers denied the use of any threats or coercion, maintaining defendant was cooperative throughout, and defendant never contended otherwise.

¶ 22 Once they heard defendant corroborate much of what the victim had said, the decision was made there was probable cause for an arrest. The officers acknowledged they did not read defendant his **Miranda** rights because the interview was "noncustodial" and after the interview there was no intent to question him further.

¶ 23 The State also presented the testimony of the person who hired defendant at the Champaign County Nursing Home, where he was working part-time while attending Parkland College as a full-time nursing student. She had no difficulty communicating with defendant in English during his interview and subsequent conversations on the job.

¶ 24 The trial court found defendant was not "in custody" at the time he was questioned by the police the primary issue raised by the suppression motion. Defendant also argued that, even if not the product of custodial interrogation, his statements were still involuntary due to the language difference. The trial court found to the contrary when denying the motion, concluding there was sufficient evidence of defendant's ability to speak and understand English in a variety of contexts, including when questioned by police.

¶ 25 Defendant contends here the trial court's finding he "could adequately communicate in English stands in stark contrast to the court taking great care to ensure that [defendant] had access to a French interpreter throughout the hearing." Such an argument is disingenuous at its best because, upon the representations of counsel and/or a defendant that he cannot adequately communicate in English, any reasonably experienced trial court would have been remiss in failing to appoint an interpreter. While the determination of the need for an interpreter lies within the discretion of the trial court pursuant to section 1 of the Criminal

Proceeding Interpreter Act (725 ILCS 140/1 (West 2016)), as was noted in **People v. Argueta**, 2015 IL App (1st) 123393, ¶ 33, 36 N.E.3d 982, the Criminal Proceeding Interpreter Act does not provide the criteria for exercising that discretion. "The trial court must consider 'the factual question of whether an interpreter is needed; a trial court does not have the discretion to deny an interpreter to a defendant who needs one.' [Citation.] 'Where an abuse of that discretion deprives defendant of a basic right, a conviction will be reversed.' [Citation.]" **Argueta**, 2015 IL App (1st) 123393, ¶ 34.

¶ 26 Here, upon the representations of counsel and defendant that an interpreter was needed since the time of initial arraignment, the trial court was obligated to provide one or risk the possibility of reversing any subsequent conviction. Although it is true everyone else who dealt with defendant, either socially or in an employment setting, as well as the two police officers involved in his interview, said he spoke and understood English, the trial court, in a reasonable exercise of caution, allowed the appointment of an interpreter throughout. Defendant confuses the trial court's "great care" to avoid possible reversal, with "great care" to provide an interpreter. The court, after hearing the suppression evidence, concluded defendant was able to speak and understand English and that "his mastery of the English language was and is sufficient to understand the circumstances and to answer the questions that were asked." The court considered not only defendant's ability to converse intelligently with the officers outside his apartment, but also his employment interview, becoming certified as a nurse assistant, and his record of email conversations with the victim.

¶ 27 Based on the record, there is no reason to conclude the trial court's findings were against the manifest weight of the evidence and as a result, absent a custodial interrogation, there was no basis for suppression for either a **Miranda** violation or involuntariness. To establish

ineffective assistance based on appellate counsel's failure to argue on direct appeal the trial court erred in denying the suppression motion, defendant would need to show "both that the unargued suppression motion was meritorious and that a reasonable probability exists that the trial outcome would have been different had the evidence been suppressed." See **People v. Gayden**, 2020 IL 123505, ¶ 28, 161 N.E.3d 911 (citing **People v. Henderson**, 2013 IL 114040, ¶ 15, 989 N.E.2d 192). As we noted above, absent error in denying the motion, there was no error by appellate counsel in failing to argue it.

¶ 28 Defendant's additional claimed bases for concluding his statements were involuntary are waived as well, having never been raised before the trial court in his postconviction petition. **Jones**, 213 Ill. 2d at 505 (claims not raised in defendant's postconviction petition cannot be raised for the first time on appeal).

¶ 29 C. Correcting the Mittimus

¶ 30 Next, defendant contends the trial court lacked the authority to correct the mittimus to reflect the actual term of MSR imposed by statute. Defendant incorrectly characterizes the trial court's clerical correction to his sentencing order as an untimely alteration of his sentence entered without jurisdiction.

¶ 31 At defendant's sentencing hearing on October 27, 2017, the trial court imposed the prison sentences referenced previously but failed to mention the statutory terms of MSR. The court's "Judgment-Sentence Order" (mittimus) filed on the same date lists the MSR for criminal sexual assault as three years. In February 2019, the record office supervisor for Danville Correctional Center, where petitioner was housed, sent a letter to the trial court pointing out how the mittimus incorrectly listed the MSR as three years when, by statute, it was "for a minimum of 3 years to a maximum of natural life." Accordingly, the trial court then issued, **nunc pro tunc** as

of the date of defendant's sentencing in October 2017, an amended mittimus correctly listing the MSR for criminal sexual assault as "3 years-natural life."

¶ 32 Even where both the sentencing order and the trial judge failed to mention an MSR term attached to a defendant's sentence, the plain language of section 5-8-1 of the Unified Code of Corrections (730 ILCS 5/5-8-1 (West 2004)) was found to provide for its inclusion as a part of any sentence imposed (excluding natural life) in **People v. McChriston**, 2014 IL 115310, ¶ 17, 4 N.E.3d 29. At that time, the statute read, in part, " 'Except where a term of natural life is imposed, every sentence shall include as though written therein a term in addition to the term of imprisonment.' " **McChriston**, 2014 IL 115310, ¶ 9 (quoting 730 ILCS 5/5-8-1(d) (West 2004)). This language was later amended, removing the phrase "as though written therein" and replacing it with the requirement that the MSR term "shall be written as part of the sentencing order." Pub. Act 97-531, § 5 (eff. Jan. 1, 2012). In **Round v. Lamb**, 2017 IL 122271, ¶ 16, 90 N.E.3d 432, the supreme court, addressing the situation where the trial court fails to include the MSR term **after** the amendment, found "the MSR term is included in the sentence as a matter of law and that the failure to include the term in the written sentencing order does not on its own invalidate the sentence or any part of it." The court further cited **People v. Viverette**, 2016 IL App (1st) 122954, ¶ 24, 54 N.E.3d 944, for its observation that reading both the preamendment language referenced in **McChriston** (section 5-8-1(d)(1)) and the postamendment language of section 5-4.5-15(c), makes it clear an MSR term is a mandatory component of a defendant's sentence imposed by the court. **Round**, 2017 IL 122271, ¶ 16.

¶ 33 Here, the mittimus contained an incorrect MSR for criminal sexual assault three years, versus three years to life. The trial court was powerless to impose any term of MSR other than that provided by statute. **People v. Whitfield**, 217 Ill. 2d 177, 200-01, 840 N.E.2d 658, 672

(2005) (" '[T]he State has no right to offer the withholding of such a period as a part of the plea negotiations, and *** the court has no power to withhold such period in imposing sentence.' ") (quoting **People v. Brown**, 296 Ill. App. 3d 1041, 1043, 695 N.E.2d 1374, 1376 (1998)).

¶ 34 The trial court's amendment to the mittimus was the equivalent of a "clerical error," and Illinois Supreme Court Rule 472 (eff. May 17, 2019) permits the circuit court to retain jurisdiction to correct clerical errors such as this, "resulting in a discrepancy between the record and the actual judgment of the court." The trial court imposed a sentence for criminal sexual assault, which by statute had to include an MSR of three years to life. The mittimus simply read three years and required correction. As such, the trial court had jurisdiction to issue a corrected mittimus, and defendant's claim fails.

¶ 35 III. CONCLUSION

¶ 36 Since neither of defendant's claims were possessed of either legal or factual merit, the trial court did not err, and we affirm the judgment of the trial court, dismissing defendant's postconviction petition at the first stage.

¶ 37 Affirmed.

No. 128824

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- JEAN FUKAMA-KABIKA, Petitioner-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-20-0371. There on appeal from the Circuit Court of the Sixth Judicial Circuit, Champaign County, Illinois, No. 15-CF-648. Honorable Thomas J. Difanis, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On February 27, 2023, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the petitioner-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

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