

regarding a plea offer that was rejected and (2) defendant was misinformed regarding the availability of credit for good conduct for the plea offer he accepted. We reverse and remand with directions.

¶ 3

FACTS

¶ 4 Defendant appeals the dismissal of his postconviction petition at the second stage of proceedings under the Act. In his postconviction pleadings, defendant listed claims of error for both his original appointed counsel and subsequent retained counsel. This court finds that the circuit court erred by not granting an evidentiary hearing on the claims stemming from the representations allegedly made by defendant's retained counsel about the availability of credit for good conduct.

¶ 5 Defendant was arrested on December 22, 2004, in connection with the manufacture of methamphetamine. Steven Boggs was arrested at the same location as defendant, and Shane Hans was arrested later that date in a different location. On appeal, defendant asserts that Hans pleaded guilty to a reduced charge of unlawful manufacture of a controlled substance of between 100 and 400 grams of methamphetamine and was sentenced to imprisonment for a term of 10 years and 9 months and that Boggs was sentenced to a sentence of 1 year of imprisonment on the charge of possession of a controlled substance. Defendant also asserts that his wife, Cathy Nickels, had pleaded guilty to a felony charge and received a negotiated sentence of probation.

¶ 6 On December 23, 2004, defendant was charged by information with two Class X felonies—unlawful manufacture of more than 900 grams of a substance containing methamphetamine (720 ILCS 570/401(a)(6.5)(D) (West 2004)) and criminal synthetic drug manufacture conspiracy (720 ILCS 570/405.3 (West 2004)) in violation of the Illinois Controlled Substances Act. Each of these counts was punishable by 15 to 60 years' imprisonment. At a hearing, the court found probable cause, appointed counsel to represent

defendant, and set a first appearance for counsel for January 3, 2005.

¶ 7 On January 19, 2005, defendant appeared with his appointed counsel for a preliminary hearing. Also present were counsel for Boggs and Hans. At the hearing, Deputy Washburn of the Fayette County sheriff's department testified that on December 22, 2004, he went to defendant's residence after receiving a tip from a Bond County sheriff's deputy that methamphetamine was being produced at that location. Deputy Washburn stated that he noticed a strong odor of ether emanating from defendant's garage and that defendant and Boggs were in the garage. Deputy Washburn testified that defendant consented to a search and that containers of liquid that later tested positive for methamphetamine were in the garage. Deputy Washburn testified that defendant told him Hans had been cooking the methamphetamine. Hans was not at the garage at that time and was arrested later that day.

¶ 8 On March 3, 2005, an assistant State's Attorney sent the following correspondence to appointed counsel:

"My offer for your client is as follows:

Ten (10) years in the Illinois Department of Correction

\$2000 fine

\$3000 drug assessment fine

Agree to testify in Shane Hans case—swear to truth of his written statement along with an explanation of his fingerprints.

Please let me know if your client is interested in this offer."

¶ 9 On March 7, 2005, defendant filed a motion to quash the arrest and suppress evidence (725 ILCS 5/114-12 (West 2004)). Subpoenas were issued to arresting officers requesting their presence in court on April 18, 2005. On May 11 and May 13, 2005, the court conducted a hearing on the motion to quash the arrest and suppress evidence. On May 27, 2005, the court entered an order denying the motion to quash the arrest and suppress evidence.

¶ 10 On June 30, 2005, retained counsel entered his appearance as counsel for defendant. On July 20, 2005, defendant, through his retained counsel, filed a waiver of a jury trial.

¶ 11 On August 16, 2005, defendant appeared with retained counsel and entered a plea of guilty to count II for criminal synthetic drug manufacturing conspiracy. The State recommended a sentence of 15 years' imprisonment and a fee of \$3,000, in return for a dismissal of count I. Defendant's retained counsel also asked the court for a recommendation that defendant be afforded Gateway drug treatment in the prison system. At the hearing, the following colloquy occurred:

"Q. [The Court:] Previously you were represented by the conflicts public defender. Are you satisfied with the representation and advice that you received from [retained counsel]?"

A. [Defendant:] I guess so.

Q. That's not a certainty.

A. I'm just not happy with any of it. I don't feel like I was ever treated fairly with my [appointed counsel] and I never even had an option taking my plea to begin with, and now I'm stuck at a 15 year offer and I was offered ten to begin with but my [appointed counsel] wouldn't even let me accept that to begin with, and here I am now taking a 15. I don't understand.

Q. Are you telling me you don't want to plead guilty?

A. Well, if I don't I understand that I could be looking at a 25 year sentence—

Q. I advised you what the penalty range was. It could be anywhere from 15 to 60. Do you want to plead guilty?

A. Yes, sir."

¶ 12 On August 23, 2005, the court entered a judgment sentencing defendant to a term of 15 years' imprisonment with 3 years' mandatory supervised release. The court recommended

that drug treatment be provided to defendant.

¶ 13 On January 11, 2006, defendant filed in the appellate court a motion to file a late notice of appeal pursuant to Supreme Court Rule 606(c) (eff. Dec. 13, 2005). On January 20, 2006, this court filed an order appointing the Office of State Appellate Defender to represent defendant and granting defendant seven days to file an amended motion for leave to file a late notice of appeal. On February 17, 2006, this court dismissed that appeal for defendant's failure to comply with Supreme Court Rule 604(d) (eff. Dec. 13, 2005).

¶ 14 On June 9, 2006, defendant filed a *pro se* petition for postconviction relief pursuant to the Act (725 ILCS 5/122-1 (West 2006)). Defendant made numerous arguments in the petition. He argued that the search of his residence was illegal and asserted that officers at the scene told him "that if he signed the consent to search form, they would 'not' arrest his wife or place their children with Child Welfare Agency, which resulted in fraudulent acts because his wife was arrested the very next day for this same offense." Defendant also argued that his original appointed counsel was ineffective. The petition stated the following:

"Defendant had ineffective counsel by [appointed counsel] in that she filed a Motion to Suppress the arrest & Evidence, and did not present the Motion in the proper form. Additionally, [appointed] counsel ws (sp) given a pleas agreement to consider with the defendant for (10 years) with testimony against the actual person who was the Manufacturer, [*sic*] [appointed counsel] turned down this plea, saying it was not an option, thus not allowing the defendant to choose his own fate."

¶ 15 Defendant also stated that retained counsel failed to raise the ineffectiveness of previous counsel. The petition stated the following:

"[Retained counsel] coerced me into signing the Jury Trial Waiver form, saying that I would get 25 years if I took the case to trial, I'd be better off taking the now offered 15 years to plead guilty. Also, [retained counsel] kept stating that the Appellate Court

Attorneys are good at what they do, because it's the main thing they argue, appeals. I told him I did not understand this [*sic*], apparently, he did not wish to argue my case to present it to a meaningful adversarial testing under the 6th amendment. [Retained counsel] also told me that the Assistant State Attorney Bob Metuch was pissed off because my [appointed attorney] refused to accept the 10 year offer, and was taking it out on me!"

¶ 16 On June 11, 2007, Bode Courtney Scott, as the court-appointed attorney for defendant, filed an "Amended Petition for Post-Conviction Petition." The amended petition started by stating that it "incorporates by reference the entire" *pro se* postconviction petition that had been filed on June 9, 2006. The petition stated as follows:

"2. That by way of clarification and emphasis this Amended Petition alleges that [defendant] received Ineffective Assistance of Counsel in that his first attorney, [appointed counsel][,] refused to allow the Defendant to consider a plea agreement and gave him no choice to accept it by saying it was not an option.

3. That by way of clarification and emphasis this Amended Petition alleges that [defendant] received Ineffective Assistance of Counsel in that his second attorney, [retained counsel][,] advised him that he would get plenty of good-time for attending school educational programs in D.O.C. even though the Class X charges for which he was convicted clearly do not allow for such good-time."

¶ 17 On January 24, 2008, the court entered an order granting the State's motion to dismiss. The court described the petition's claims (set out in italics in the quotation below), and the court addressed each claim made by defendant:

"[Appointed counsel] 'refused to allow' the defendant to consider a plea offer made by the People.

Even if true, there is no remedy available for the defendant. He subsequently

entered a plea to the minimum sentence available on the offense charged. He has no constitutional right to have the charges against him reduced nor does he have a right to a plea offer from the People. If defendant were granted a new trial, he would still be unable to receive the 10 year sentence he claims [appointed counsel] prevented him from accepting. As a consequence the defendant is unable to meet the second part of the *Strickland* test, i.e., that the outcome would be different.

* * *

[Appointed counsel] persuaded the defendant to accept a subsequent plea offer, in part by misrepresenting the availability of good time the defendant could earn in the Illinois Department of Corrections (DOC).

Again, even if true the defendant's petition must fail. First of all the good time credit which defendant says he was advised were [sic] available are [sic] not automatic[;] they must be earned. Since the earning of that good time credit is speculative in nature, counsel's mistake regarding its availability is harmless. Also, the defendant fails to show how the outcome would have been different. The defendant received the minimum sentence possible. Even if counsel gave the advice alleged and was incorrect as alleged, the defendant's sentence would have been the same."

Defendant appeals.

¶ 18

ANALYSIS

¶ 19 This case is reviewed at the second stage of the postconviction process under the Act. At this stage, the relevant question is whether defendant, in light of the record and supporting documents, demonstrates a substantial showing of a constitutional violation. *People v. Barrow*, 195 Ill. 2d 506, 519, 749 N.E.2d 892, 901 (2001). At this stage, all well-pleaded facts that are not contradicted by the record are to be taken as true. *People v. Alberts*, 383

Ill. App. 3d 374, 376, 890 N.E.2d 1208, 1211 (2008).

¶ 20 Defendant presented a substantial showing of a violation of his constitutional rights regarding the plea he accepted. In his amended petition, defendant contends that his retained counsel told him he was eligible for credit for good conduct under the plea offer he accepted. In fact, defendant was not eligible for that credit when he pled to a Class X felony. See 730 ILCS 5/3-6-3 (West 2006).

¶ 21 The State contends that this claim fails because the availability of credit for good conduct was merely a collateral consequence of the plea. The failure to inform a defendant of a consequence of a guilty plea may constitute ineffective assistance only if the matter is a direct consequence of the plea. *People v. Huante*, 143 Ill. 2d 61, 69, 571 N.E.2d 736, 740 (1991); *People v. Frison*, 365 Ill. App. 3d 932, 934, 851 N.E.2d 890, 892 (2006). Direct consequences have an immediate, direct, and automatic bearing on a defendant's punishment. *Frison*, 365 Ill. App. 3d at 934, 851 N.E.2d at 893. In contrast, collateral consequences are not inherent to the sentence imposed. *Frison*, 365 Ill. App. 3d at 934, 851 N.E.2d at 893. Good-time credit is contingent and indefinite. Thus, the availability of good-time credit is a collateral consequence of a guilty plea. *People v. Castano*, 392 Ill. App. 3d 956, 959, 912 N.E.2d 320, 323 (2009); *Frison*, 365 Ill. App. 3d at 934, 851 N.E.2d at 893.

¶ 22 The collateral nature of good-time credit, however, does not bar defendant's claim. Defendant is not asserting that his counsel remained silent on a collateral consequence of the plea. *Cf. Huante*, 143 Ill. 2d at 64, 571 N.E.2d at 738 ("failed to advise"); *Frison*, 365 Ill. App. 3d at 933, 851 N.E.2d at 892 ("failure to inform"). Instead, defendant asserts that his counsel affirmatively misadvised him regarding the availability of the credit. Illinois finds this distinction to be crucial. *People v. Correa*, 108 Ill. 2d 541, 551, 485 N.E.2d 307, 311 (1985).

¶ 23 In *Correa*, a defendant alleged that his plea of guilty to delivery of a controlled

substance was involuntary because his counsel had advised that the plea would not subject the defendant to deportation. The Illinois Supreme Court drew a distinction between the passive conduct of counsel and an active misrepresentation in response to a specific inquiry by a client. *Correa*, 108 Ill. 2d at 551, 485 N.E.2d at 311. *Correa* held that although deportation was a collateral issue, the plea was involuntary due to the erroneous and misleading advice. *Correa*, 108 Ill. 2d at 553, 485 N.E.2d at 312.

¶ 24 The State contends that the case at hand is analogous to *People v. Maury*, 287 Ill. App. 3d 77, 80, 678 N.E.2d 30, 32 (1997). In *Maury*, the defendant alleged that he was incorrectly informed that good-time credit would be available upon entering a plea. *Maury* held that the misrepresentation did not result in a constitutional violation because the matter of good-time credit was a collateral matter. *Maury*, 287 Ill. App. 3d at 81, 678 N.E.2d at 34; see *People v. Menke*, 74 Ill. App. 3d 220, 222, 390 N.E.2d 441, 443 (1979) (there is no requirement that a defendant be informed of the availability of good-time credit).

¶ 25 *Maury*, however, has been roundly criticized. *Maury* failed to address *Correa*. In *People v. Young*, the court described how *Maury* was based on a misinterpretation of the reach of *Haunte*:

"As defendant points out, *Maury* completely fails to consider *People v. Correa*, 108 Ill. 2d 541 (1985), which draws a crucial distinction between 'the passive conduct of counsel in failing to discuss with a defendant the collateral consequences of a guilty plea' and 'unequivocal, erroneous, misleading representations' that counsel makes in response to a defendant's specific inquiries. *Correa*, 108 Ill. 2d at 551-52. *Correa* involved the latter situation. While the court refused to decide whether the defendant's counsel would have been ineffective had he 'simply failed to advise the defendant of the collateral consequence' (*Correa*, 108 Ill. 2d at 550), it held that counsel's 'unequivocal, erroneous, misleading representations' about the collateral

consequences of the plea amounted to ineffective assistance that rendered the defendant's plea involuntary. *Correa*, 108 Ill. 2d at 552. In *Huante*, the court addressed the issue that *Correa* had not resolved, holding that the defendant's counsel did not perform unreasonably in 'failing to volunteer to his client advice concerning' a collateral consequence of pleading guilty. *Huante*, 143 Ill. 2d at 71.

Although *Huante* declined to extend *Correa*'s reach, it plainly did not overrule *Correa*. Thus, *Maury* is simply mistaken in holding that there is no legally meaningful distinction between counsel's passive failure to inform a defendant of the collateral consequences of a guilty plea and counsel's affirmative misrepresentation of those consequences. As *Maury* is unsound, we decline to follow it." *People v. Young*, 355 Ill. App. 3d 317, 323, 822 N.E.2d 920, 925-26 (2005).

See *People v. Stewart*, 381 Ill. App. 3d 200, 206, 887 N.E.2d 461, 466-67 (2008) ("We agree with *Young* that the Illinois Supreme Court drew a distinction in *Correa* and *Huante* between failure to give advice and actively giving wrong advice regarding collateral consequences of a plea."); see also *People v. Clark*, 386 Ill. App. 3d 673, 677, 899 N.E.2d 342, 346 (2008).

¶ 26 In *People v. Manning*, 227 Ill. 2d 403, 883 N.E. 2d 492 (2008), the supreme court recognized the distinction between *Huante* and *Correa*. In *Manning*, the defendant contended that his counsel failed to advise him of a possible alternative strategy of pleading guilty but mentally ill. *Manning* reiterated that *Huante* dealt with a failure to advise, whereas *Correa* controlled situations where counsel renders erroneous advice:

"However, actual knowledge of the plea entered is not the basis of defendant's claim. Defendant claims that he was prejudiced by not being informed about the GBMI alternative. This court has previously had the opportunity to examine the impact of an attorney's failure to advise a defendant on an important, albeit nondirect, consequence of a guilty plea. In *People v. Huante*, this court concluded that defense

counsel's failure to advise a criminal defendant on the deportation consequences of a guilty plea did not amount to ineffective assistance of counsel. *People v. Huante*, 143 Ill. 2d 61 (1991). *Huante* distinguished itself from the earlier case of *People v. Correa*, where the court held that defense counsel's erroneously advising the defendant that he would not be deported was ineffective assistance. *People v. Correa*, 108 Ill. 2d 541, (1985).

The present case is analogous to *Huante*. In *Huante*, the court held that an attorney's failure to provide any advice on deportation was not sufficient to show ineffective assistance of counsel. In the present case, trial counsel did not provide defendant with any advice on pleading GBMI. While the distinction between direct and collateral consequences is not directly implicated in the present case, the reasoning is nonetheless compelling." *People v. Manning*, 227 Ill. 2d 403, 420-21, 883 N.E.2d 492, 503-04 (2008).

The supreme court's pronouncement in *Correa* controls our ruling. Defendant's claim that he was prejudiced by the misrepresentation regarding good-time credit warrants an evidentiary hearing.

¶ 27 Defendant also contends that his original appointed counsel misinformed him about his right to accept a tendered plea offer. On appeal, the question is whether defendant has made a substantial showing of a constitutional violation regarding this alleged conduct. See *People v. Morris*, 335 Ill. App. 3d 70, 76, 779 N.E.2d 504, 510 (2002). Defendant has failed to make that showing.

¶ 28 This case is distinct from other instances in which counselors failed to inform their clients of the existence or terms of a plea offer. See *People v. Whitfield*, 40 Ill. 2d 308, 311, 239 N.E.2d 850, 852 (1968); *People v. Curry*, 178 Ill. 2d 509, 517, 687 N.E.2d 877, 884 (1997). Instead, defendant asserts that his counsel misinformed him of the right to accept the

plea. Initially, defendant's claim appears problematic because of the difficulty of drawing a distinction between a misrepresentation that he could not accept a plea and a forceful suggestion that he should not accept a plea. As the State points out, the pending motion to quash the arrest and the early timing of the offer place a recommendation to reject the offer within the realm of sound strategy. Furthermore, although defendant requested a reduction in the offense level and the sentence, the circuit court pointed out that defendant had no constitutional right to have the charges reduced.

¶ 29 Fatal to defendant's claim is the lack of an indication that the plea would have been entered but for his counsel's conduct. Defendant fails to make any showing that the circuit court would have entered a different judgment but for his counsel's conduct. See *People v. Meza*, 376 Ill. App. 3d 787, 790, 877 N.E.2d 1189, 1190 (2007). More specifically, defendant does not allege that but for his counsel's conduct he would have accepted the plea at the time it was offered.

¶ 30 On appeal, defendant asserts that a liberal reading of the pleadings leads to the conclusion that he would have accepted the offer. This is a stretch. Neither defendant's affidavit nor those of his wife and his mother make that claim. Defendant fails to allege any prejudice stemming from his original appointed counsel's conduct. Thus, defendant fails to make a showing sufficient to warrant an evidentiary hearing on the conduct of his appointed counsel. On remand, the circuit court is directed to limit the evidentiary hearing to the allegations stemming from the advocacy of his retained counsel regarding good-conduct credit.

¶ 31

CONCLUSION

¶ 32 Accordingly, the order of the circuit court of Fayette County dismissing defendant's petition at the second stage of proceedings is hereby reversed, and the matter is remanded with directions to conduct an evidentiary hearing on the allegations regarding the conduct of

his retained counsel.

¶ 33 Reversed; cause remanded with directions.