



(West 2004)). At the plea hearing, defendant stated he understood the charge and the possible sentence he could receive. Defendant stated he understood he had a right to either a bench or jury trial and the State would have to prove his guilt beyond a reasonable doubt. Defendant further stated he understood he could call his own witnesses, cross-examine the State's witnesses, and he could testify if he wanted, but no one could force him to do so. Finally, defendant stated he understood by pleading guilty he was giving up his right to a trial of any kind.

¶ 5           Shortly after the trial court accepted defendant's plea and reduced his bond, defendant's trial counsel, Walter Ding, and the court had the following exchange:

"[TRIAL COUNSEL]: Judge, there's an issue that perhaps the Court needs to address I'm just now talking to Mr. Miller about.

In mitigation, I think he would be asking that a mental health evaluation be completed, and I then asked a follow-up question, 'Are you on medication now?' Mr. Miller stated he is on Thorazine. I have no doubt that he is fit to stand trial, but perhaps that's something the Court should follow up with.

[TRIAL COURT]: All right. Mr. Miller, again, the rights that I explained that you were giving up when you pled guilty, you understand we have a jury downstairs ready to start your trial this morning, but when you plead guilty, that means we're not going to have a trial, either a bench trial or a jury trial; you understand that?

[DEFENDANT]: Yes, sir.

[TRIAL COURT]: And the medication that you're taking,

how does that affect your ability to comprehend and understand things?

[DEFENDANT]: It's okay.

[TRIAL COURT]: So, you really don't have any problems at all and you understand the rights you've been giving—you're giving up and the fact that we're going to set this for a sentencing hearing; you understand that?

[DEFENDANT]: My medication is for voices and seeing things—seeing stuff and committing suicide, stuff like that.

[TRIAL COURT]: And you have been taking that medication while you've been in custody?

[DEFENDANT]: Until about three weeks ago, they took me off of it, 'cause I tried to commit suicide by gorging my medication.

[TRIAL COURT]: And how has that affected you now that you've been off of it?

[DEFENDANT]: I'm more anxious and nervous and I hear voices and stuff.

[TRIAL COURT]: All right.

[DEFENDANT]: I'm able to understand, though."

¶ 6 On July 31, 2006, defendant failed to appear for his sentencing hearing. Attorney Ding stated defendant's family represented to him defendant had been admitted to the mental

health ward of the Provena Medical Center. Attorney Ding referenced some documentation he provided to the court regarding a mental health assessment performed by Dr. Arthur Traugott in June. This report referenced some of defendant's mental health issues, including defendant's thoughts of harming himself and suicide. Ding represented to the trial court defendant's family's belief defendant had tried to commit suicide via an automobile accident. Defendant's wife told Ding Dr. Traugott recommended a residential stay to address some of defendant's mental health issues. The trial court stated it did not intend to excuse defendant's absence, stating it appeared defendant was attempting to avoid his sentencing hearing. The court directed the issuance of a warrant for defendant.

¶ 7 On August 28, 2006, defendant appeared, and the trial court sentenced defendant to 28 years in prison. Attorney Ding did not call any witnesses on defendant's behalf, instead focusing on defendant's mental health issues as mitigation. Defendant did not file a direct appeal.

¶ 8 On September 16, 2008, defendant filed a *pro se* postconviction petition pursuant to the Act and a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2006)). The petition for postconviction relief and the section 2-1401 petition alleged, among other things, Attorney Ding was ineffective for failing to seek a fitness evaluation and hearing.

¶ 9 On July 1, 2009, the trial court issued an order denying both defendant's postconviction petition and his section 2-1401 petition. That same month, defendant filed a notice of appeal. In March 2010, this court vacated the trial court's first-stage dismissal of defendant's postconviction petition because more than 90 days passed between the filing of

defendant's postconviction petition and the court's ruling thereon. As a result, the court was required to appoint counsel for defendant and proceed to stage two of postconviction proceedings. *People v. Miller*, No. 4-09-0550 (Mar. 12, 2010) (unpublished summary order under Supreme Court Rule 23(c)(2)).

¶ 10 On September 3, 2010, the State filed a motion to dismiss defendant's *pro se* petition for postconviction relief. On May 12, 2011, defendant's appointed counsel filed a supplement to defendant's postconviction petition. On May 20, 2011, the State filed a motion to dismiss defendant's postconviction petition as well as the supplement to the petition. The record does not contain an explicit ruling from the trial court on the State's motion to dismiss. Instead, the court set a hearing date for the petition.

¶ 11 On July 27, 2011, the trial court held a hearing on defendant's postconviction petition. At the hearing, defendant testified he had been in an empty cell with only a suicide gown prior to entering his guilty plea. His medication had been withdrawn because he had been caught hoarding it for a possible suicide attempt. Defendant stated he was taking the medication because he was seeing and hearing things. Defendant stated, "they said I was schizophrenic or something like that." From the record, it is unclear who "they" were. According to defendant, because he was not receiving his medication, he was not "thinking straight" and "didn't know exactly what was going on" at his plea hearing.

¶ 12 Before he entered his plea, he met with his trial counsel, who said defendant could have a trial that day or enter a guilty plea. Defendant testified his trial counsel told him he saw no reason why defendant could not get a 15- to 20-year sentence if he entered an open guilty plea. Defendant testified he thought the State was offering either a 20- or 25-year sentence as part of a

negotiated plea at that time. He testified his trial counsel also said by pleading guilty to a Class 1 as opposed to a Class X offense, defendant would be eligible for "drug rehab" and "school good time" credit. When he got to prison, he found out he was not eligible for these credits.

¶ 13 Defendant testified he was able to bond out of jail after he entered his guilty plea while he awaited sentencing. At some point, while defendant was on bond, defendant's wife took him to see a doctor who hospitalized him. He was hospitalized when his sentencing hearing was scheduled. As a result, he did not appear at the hearing. The trial court issued a warrant for defendant, and defendant was removed from the hospital and taken to jail to await sentencing. He was later sentenced to 28 years in prison.

¶ 14 Defendant testified his attorney did not call his family members to testify at the sentencing hearing as defendant expected. His doctor did not testify either. Defendant testified the sentencing hearing did not go as he thought it would. Defendant's postconviction counsel called no other witnesses on defendant's behalf.

¶ 15 The State called Walter Ding, defendant's trial counsel. Ding testified he had practiced criminal defense law for 18 years. Ding testified defendant was charged with two counts of possession with intent to deliver cannabis. Under the first count, if convicted, defendant would have received a mandatory life sentence. Under the second count, defendant would be sentenced as a Class X offender. Ding stated he met with defendant multiple times and talked with defendant about the elements of the charged offenses and the facts as he understood them from discovery. He testified defendant had no apparent difficulty understanding the facts of his case, the elements of the offense, and the sentencing range for the two counts.

¶ 16 Ding stated defendant eventually entered an open plea to count II, which was a

Class 1 felony but would carry a Class X sentence. Defendant's decision to enter a guilty plea was primarily based on the State dismissing the count carrying a mandatory life sentence. Ding testified he never promised any particular sentencing credit. According to Ding, defendant did not seem any more anxious or nervous than at any other time prior to the plea hearing.

Defendant's demeanor at the sentencing hearing was consistent with his demeanor in Ding's other interactions with defendant.

¶ 17 According to Ding, during the course of the plea, defendant brought up the fact he was on medication. Ding asked defendant if he had any mental health issues, and defendant said he did. As a result, Ding asked for a mental health exam as part of the presentence investigation report. Ding believed this might give rise to mitigating evidence. Ding testified he had no doubt defendant was fit. According to Ding:

"[Defendant] understood the nature of the offense, the elements of the offense, the facts of the case. He was able to cooperate with me during the course of the case pending. He was able to assert certain defenses and come up with issues, relevant issues, as to his case and fact pattern and that continued through the course of the plea."

Ding had no concerns defendant was unable to understand what was going on during the plea hearing.

¶ 18 According to Ding, prior to the plea hearing, he talked with defendant about possible mitigating evidence for sentencing. He told defendant they could call character witnesses if he wanted. However, he decided not to call mitigation witnesses because he wanted

to focus on the mental health issues.

¶ 19 Ding testified defendant was evaluated by a psychiatrist one week after defendant entered his guilty plea. Ding testified he received a report from the psychiatrist, which was tendered to the trial court at sentencing. The report noted defendant had been having panic attacks. Ding testified he was unaware of any panic attacks at the time defendant entered his guilty plea. According to Ding's testimony, nothing about defendant's demeanor at the time of the plea suggested panic attacks would interfere with his ability to understand the proceedings.

¶ 20 The report also noted defendant's memory was poor and his concentration and insight were impaired. Ding testified these findings were inconsistent with his observations of defendant at the time of the guilty plea hearing. According to Ding, "I did not have any belief he was having any problems understanding the nature of the proceedings or cooperating with me during the course of his defense." Ding stated the reports finding defendant was oriented as to person and place were consistent with his observations of defendant. According to Ding's testimony, even if he had this psychiatric report prior to the plea hearing, he would not have moved for a fitness evaluation. Ding testified, "Combined with the nature of our conversations during the course of my representing him, numerous conversations on the phone, and again his ability to focus on the issues at hand in regards to his case I didn't think that there was a fitness issue." Ding also testified defendant did not seem suicidal to him at the time of the plea.

¶ 21 With regard to the sentencing hearing, Ding testified defendant did not appear confused about the process. Ding generally advised his clients, when making a statement in allocution, to take responsibility for their conduct, make statements about how they will change their conduct, and explain how they will use their time in prison to make themselves better

persons. Defendant gave a statement in allocution at the sentencing hearing consistent with this advice. Ding testified he explained to defendant he would be sentenced as a Class X offender. According to Ding, defendant did not appear to have any difficulty understanding what Ding told him.

¶ 22 Jeff Nugent, a probation officer in Champaign County, testified he conducted a presentence investigation of defendant on May 31, 2006, approximately two weeks after he entered his guilty plea. Nugent stated defendant did not have any trouble communicating with him. He was able to give specific information about his prior employment, family relationships, and prior drug use. Defendant was also able to indicate he had panic attacks, mood swings, insomnia, and paranoia. Defendant's demeanor was not out of the ordinary for someone facing a significant sentencing range. Nugent testified nothing about defendant's demeanor or history suggested he was in need of mental health services at that time. Defendant did not appear to have any difficulty understanding the elements of the offense and understood dealing drugs was wrong. Defendant also understood the charged offense and the sentencing range.

¶ 23 At the end of the hearing, the trial court denied defendant's postconviction petition. As to the issue regarding defendant's mental health, the court stated:

"Mr. Ding brought to the Court's attention during the plea that the Defendant had been on some form of medication, and the Court then began to question the Defendant about that medication. It was apparent from the transcript and the questions asked that the Defendant had been taken off the medication as he indicated today by the Sheriff's Department but when he was questioned about the

effect that it had he indicated he understood what was going on.

He had no problems with understanding the plea, the rights he was giving up; and the Court spent a considerable period of time discussing with the Defendant his mental health situation at the point of the plea."

¶ 24 This appeal followed.

¶ 25 II. ANALYSIS

¶ 26 On appeal, defendant argues the trial court erred in denying his postconviction petition. He contends his guilty plea counsel was ineffective for failing to request a fitness evaluation prior to defendant entering his guilty plea because a *bona fide* doubt existed as to defendant's fitness to plead guilty and be sentenced. We disagree.

¶ 27 During the third-stage of postconviction proceedings, a defendant has the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473, 861 N.E.2d 999, 1008 (2006). A trial court's denial of a postconviction petition after a third-stage evidentiary hearing will not be reversed unless manifestly erroneous. *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008. " 'A ruling is manifestly erroneous only if it contains error that is clearly evident, plain, and indisputable.' " *People v. Slover*, 2011 IL App (4th) 100276, ¶ 17, 959 N.E.2d 72, 76 (2011) (quoting *People ex rel. Madigan v. Petco Petroleum Corp.*, 363 Ill. App. 3d 613, 623, 841 N.E.2d 1065, 1073 (2006)). "[R]eviewing courts apply the manifestly erroneous standard in recognition of 'the understanding that the post-conviction trial judge is able to observe and hear the witnesses at the evidentiary hearing and, therefore, occupies a position of advantage in a search for the truth which is infinitely superior to that of a tribunal where the sole

guide is the printed record.' " *Slover*, 2011 IL App (4th) 100276, ¶ 14, 959 N.E.2d at 75 (quoting *People v. Coleman*, 183 Ill. 2d 366, 384, 701 N.E.2d 1063, 1073 (1998)). In this case, the trial judge who ruled on the postconviction petition also presided over defendant's plea and sentencing hearings and had direct knowledge of defendant's behavior and demeanor at those hearings.

¶ 28 According to defendant, this appeal "boils down to whether there was a *bona fide* doubt of Miller's fitness to plead guilty and be sentenced, such that a fitness hearing was required." This is not accurate. This appeal turns on whether the trial court's finding a *bona fide* doubt did not exist was a clearly evident, plain, and indisputable error.

¶ 29 Our supreme court has stated:

"A defendant is entitled to a pretrial hearing to determine whether he is fit only when a *bona fide* doubt of the defendant's fitness to stand trial or be sentenced is raised. [Citation.] A defendant is presumed to be fit to stand trial. [Citation.] A defendant is considered unfit to stand trial if, because of a mental or physical condition, he is unable to understand the nature and purpose of proceedings against him or to assist in his defense. [Citation.] Thus, to establish that he was prejudiced by his trial counsel's alleged incompetency, the petitioner must demonstrate that facts existed at the time of his trial which raised a *bona fide* doubt of his ability to understand the nature and purpose of the proceedings and to assist in his defense. The petitioner is entitled to post-conviction

relief on his ineffective-assistance claim only if he shows that the trial court would have found a *bona fide* doubt of his fitness and ordered a fitness hearing if it had been informed of the evidence raised in his post-conviction petition." *People v. Eddmonds*, 143 Ill. 2d 501, 512-13, 578 N.E.2d 952, 957 (1991).

While it does appear defendant had some mental health issues, this does not establish a *per se bona fide* doubt of his ability to understand the nature and purpose of the proceedings and to assist in his defense. See *Eddmonds*, 143 Ill. 2d at 519, 578 N.E.2d at 960. "Fitness speaks only to a person's ability to function within the context of a trial. It does not refer to sanity or competence in other areas. A defendant can be fit for trial although his or her mind may be otherwise unsound." *People v. Easley*, 192 Ill. 2d 307, 320, 736 N.E.2d 975, 986 (2000).

¶ 30 The record establishes defense counsel told the trial court defendant wanted a mental health evaluation after defendant entered his guilty plea. Defense counsel told the court defendant stated he was on Thorazine. The court immediately questioned defendant to verify defendant understood he could have a jury trial that morning if he wanted and did not have to plead guilty. The court also asked defendant if he understood he was giving up his right to a jury trial by entering a guilty plea. Defendant stated he understood.

¶ 31 Defendant told the trial court his ability to comprehend and understand was "okay." Defendant informed the court he took medication because he heard voices and saw things but had not been given his medication for three weeks because he tried to commit suicide "by gorging [his] medication" while in jail. The court then asked defendant how not taking the medication affected him. Defendant stated he was more anxious and nervous, but he plainly

stated he was able to understand.

¶ 32 At the hearing on the postconviction petition, defendant's recall of the details of the plea and sentencing hearings and the advice Ding gave him approximately five years earlier was very good. This suggests he understood what was happening at those hearings. While defendant's recall does not necessarily equate to comprehension, defendant did not call an expert witness to provide another explanation as was his burden. In fact, although he bore the burden of making a substantial showing of a constitutional violation, defendant did not offer any expert medical testimony at the third-stage evidentiary hearing to establish why a *bona fide* doubt existed as to his fitness to plead guilty and be sentenced in this case.

¶ 33 At the postconviction evidentiary hearing, Ding testified he met with defendant multiple times and defendant had no apparent difficulty understanding the facts of his case, the elements of the charged offenses, and the sentencing range for the two charged counts. According to Ding, defendant did not seem any more anxious or nervous prior to the plea hearing than he did at any other time. Further, Ding testified defendant's demeanor at the sentencing hearing was consistent with his demeanor in the attorney's other interactions with defendant. Ding testified defendant did not appear to be confused about the sentencing process at all. Defendant gave a statement in allocution consistent with advice his trial counsel generally gave other defendants in defendant's situation.

¶ 34 Jeff Nugent, the probation officer who also testified at the hearing on defendant's postconviction petition, stated he spoke with defendant approximately two weeks after he entered his guilty plea as part of defendant's presentence investigation. Nugent testified defendant had no trouble communicating with him. According to the probation officer, defendant's demeanor was

not out of the ordinary for someone facing a significant sentencing range. Finally, the probation officer testified defendant did not appear to have any difficulty understanding the charged offense and the sentencing range.

¶ 35 The dissent appears to contend we should discount the trial court's findings, which were based in part on its personal observations of the defendant at the plea and sentencing hearings. According to the dissent:

"Just because defendant had the capacity to comprehend the proceedings, it does not follow that he had the capacity to rationally assist in his defense, afflicted as he was by hallucinations and a pathological yearning for death. Mental illness can neutralize the will and deprive a person of the capacity for self-preservation." *Infra* ¶ 47 (Appleton, J., dissenting).

This may be true in some cases of mental illness. However, here, this would be pure speculation. At the third-stage hearing on his postconviction petition, defendant bore the burden of establishing a *bona fide* doubt he was unable to comprehend the proceedings and assist in his defense. He failed to establish he did not have the capacity to comprehend the proceedings and assist in his defense. Defendant called no expert witness to testify his mental conditions neutralized his will and diminished his capacity for self-preservation. In addition, trial counsel, to the contrary, stated defendant was able to assist in his defense, was able to assert certain defenses, and raise issues relevant to his case.

¶ 36 The dissent also questions why the majority accepts the trial court's opinion regarding defendant's fitness over the opinion of Dr. Traugott. According to the dissent, "So, on

the one hand, Traugott, a qualified psychiatrist, opined that mental illness made defendant unfit to participate in the sentencing hearing, and on the other hand, the trial court opined that defendant was merely malingering." *Infra* ¶ 50 (Appleton, J., dissenting). The dissent's argument is speculative and not based on established facts.

¶ 37 First, Dr. Traugott never testified. Second, his reports do not state an opinion based on the legal definition of fitness as to whether defendant was unfit to participate in the plea or sentencing hearing. Defendant and the dissent rely on the following statement from Dr. Traugott's note dated July 26, 2006: "I apprised [defendant's] wife that I felt that under the present circumstances, Jim was in no condition to attend court next Monday." This statement, by itself, fails to establish Dr. Traugott believed defendant would not be able to comprehend his sentencing hearing or assist in his defense. Defendant failed to have Dr. Traugott testify and explain what the statement in his note meant. Regardless, defendant's sentencing hearing was not held until a month later on August 28, 2006.

¶ 38 Further, Dr. Traugott did not diagnose defendant with schizophrenia. Instead, in a note based on his meeting with defendant on June 5, 2006, Dr. Traugott offered the following diagnosis: "Generalized Anxiety Disorder. Possible Psychotic Disorder." In a note dated July 3, 2006, Dr. Traugott offered the following diagnosis: "Generalized anxiety disorder." In a note dated July 27, 2006, Dr. Traugott added "[d]epressive disorder, not otherwise specified."

¶ 39 Based on the record in this case, we cannot say the trial court's finding was manifestly erroneous. Defendant failed to establish the trial court at the plea or sentencing hearing would have found a *bona fide* doubt of his fitness to enter a guilty plea had Ding requested a fitness evaluation and hearing. As a result, defendant was not prejudiced by his trial

counsel's failure to make that request. See *Eddmunds*, 143 Ill. 2d at 512-13, 578 N.E.2d at 957 ("[T]o establish that he was prejudiced by his trial counsel's alleged incompetency, the petitioner must demonstrate that facts existed at the time of his trial which raised a *bona fide* doubt of his ability to understand the nature and purpose of the proceedings and assist in his defense"). To establish a claim of ineffective assistance of counsel, a defendant must show his attorney's representation was deficient and he was prejudiced by his attorney's performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶ 40 Based on the evidence before the trial court and considering defendant bore the burden of establishing a *bona fide* doubt of his fitness, the trial court's decision was not manifestly erroneous.

¶ 41 III. CONCLUSION

¶ 42 For the reasons stated, we affirm the trial court's ruling. As part of our judgment, we award the State its \$50 statutory fee against defendant as costs of the appeal.

¶ 43 Affirmed.

¶ 44 JUSTICE APPLETON, dissenting:

¶ 45 I respectfully dissent from the majority's decision because I think that, under any reasonable view, the facts raised a *bona fide* doubt of defendant's fitness and that the denial of his postconviction petition was therefore manifestly erroneous.

¶ 46 The majority accurately defines the concept of "unfitness": " 'A defendant is considered unfit to stand trial if, because of a mental or physical condition, he is unable to understand the nature and purpose of proceedings against him or to assist in his defense.' " Supra ¶ 29 (quoting *Eddmonds*, 143 Ill. 2d at 512, 578 N.E.2d at 957); see also 725 ILCS 5/104-10 (West 2010). Notice that those two characteristics are phrased in the alternative: "unable to understand the nature and purpose of proceedings against him *or* to assist in his defense." (Emphasis added.) *Eddmonds*, 143 Ill. 2d at 512, 578 N.E.2d at 957. Thus, defendant could have been unfit in that, despite his ability to understand the nature and purpose of the proceedings against him, he was unable to assist in his defense.

¶ 47 Just because defendant had the capacity to comprehend the proceedings, it does not follow that he had the capacity to rationally assist in his defense, afflicted as he was by hallucinations and a pathological yearning for death. Mental illness can neutralize the will and deprive a person of the capacity for self-preservation. Even though defendant could factually understand the charge, untreated schizophrenia and depression might have rendered him " [un]able to plead to it with that advice and caution that he ought.' " *Drope v. Missouri*, 420 U.S. 162, 171 (1975) (quoting 4 William Blackstone, Commentaries 24).

¶ 48 In my view, it is untenable to say there was no *bona fide* doubt on that score. To be competent, the defendant had to have a rational as well as factual understanding of the

proceedings against him. See *Drope*, 420 U.S. at 172. I do not see how the trial court could be confident in defendant's rationality in the guilty-plea hearing, considering that the correctional staff in the jail had ceased giving him his prescribed psychotropic medication owing to his hoarding of the medication for the purpose of committing suicide by an overdose (he also attempted suicide on three previous occasions, in 1979, 1998, and 2005). Without the medication, defendant suffered heightened anxiety and experienced visual and auditory hallucinations. He heard the voices of God and his grandmother, commanding him to do things—commands he sometimes obeyed. Is it really beyond doubt that defendant was capable of rationally assisting in his defense while being importuned by unreal voices—or more precisely for our purposes, could one reasonably say there was no *bona fide* doubt? To me, the risk in denying a psychiatric evaluation was unacceptably high and totally unnecessary.

¶ 49 This case is similar to *Drope*, in which the Supreme Court found error in the refusal to give a psychiatric evaluation to the defendant, who had attempted suicide in addition to committing other irrational acts. See *Drope*, 420 U.S. at 180. Actually, this case is stronger in its facts than *Drope* because (1) the defendant in *Drope* did not have hallucinations (*id.* at 175) and (2) no psychiatrist actually opined in *Drope* that the defendant was unfit to appear in court; rather, the psychiatrists opined that he "might not be mentally competent" and that an evaluation was needed (*id.* at 169). In the present case, by contrast, defendant saw things and heard things, and four days before the scheduled sentencing hearing, Traugott opined that defendant was "in no condition to attend court next Monday [(July 31, 2006)]." Traugott recommended inpatient treatment after examining defendant and considering his medical and psychiatric history. Part of that history was Linda Miller's account that defendant was severely incapacitated—rendered

helpless by anxiety and depression to the point of having to be forced to get out of bed and eat—and that recently he attempted suicide again, while on bail, by rolling her car with his niece inside it. When confronted about this incident, defendant was unable to deny that he had intended to commit suicide by crashing the car. Not to mention the attempted self-destruction, endangering his niece in this manner "hardly could be regarded as rational conduct." *Id.* at 179.

¶ 50           Consequently, Traugott recommended inpatient treatment, and defendant was admitted to the mental-health ward of Provena Medical Center. As a further consequence, defendant missed his sentencing hearing on July 31, 2006. The trial court was of the opinion that he merely was trying to avoid the sentencing hearing, and the court issued an order for his arrest, pulling him out of the mental-health ward and back into jail to await a rescheduled sentencing hearing. So, on the one hand, Traugott, a qualified psychiatrist, opined that mental illness made defendant unfit to participate in the sentencing hearing; and on the other hand, the trial court opined that defendant was merely malingering. Given all the facts, I do not understand why the majority feels the necessity to accept the trial court's opinion over Traugott's opinion—instead of accepting the doubt that arises from the conflict between their opinions.

¶ 51           I acknowledge that some of the evidence could be regarded as reassuring, just as some of the evidence is disquieting. Granted, in the rescheduled sentencing hearing, defendant made a statement in allocution, but perhaps the statement was a rote exercise (as the majority puts it, "[d]efendant gave a statement in allocution consistent with advice his trial counsel generally gave other defendants in defendant's situation" (*Supra* ¶ 33)). And granted, Ding noticed no problems in his conversations with defendant (but, then, Ding also was unaware that defendant was suicidal). And granted, defendant told the trial court he understood what the court

was telling him. Maybe defendant was fit; I do not know—and my point is that the trial court and Ding could not have known for sure, either. In its discussion, the majority loses sight of the concept of doubt. Doubt is uncertainty. The majority seems to require defendant to hit the ball out of the park. The majority argues, for example, that defendant failed to prove he was unfit—"[defendant] failed to establish he did not have the capacity to comprehend the proceedings and assist in his defense" (*Supra* ¶ 35)—when, really, the question before the trial court was whether there was a "*need for further inquiry* to determine fitness to proceed." (Emphasis added; internal quotation marks omitted.) *Eddmonds*, 143 Ill. 2d at 518, 578 N.E.2d at 959. Also, the majority criticizes defendant for not calling a psychological expert in the third-stage hearing. *Supra* ¶ 32. If defendant's burden were to *banish doubt*—that is, to definitively establish, beyond doubt, that he was unfit—I could see the need to call a psychological expert; but for purposes of raising a *bona fide* doubt, I do not see the need, considering that *bona fide* doubt is supposed to lead to a fitness examination. See 725 ILCS 5/104-11(b), 104-13(a) (West 2010). The fitness examination is supposed to come after *bona fide* doubt, not before.

¶ 52 In a word, the majority's decision strikes me as very exacting and therefore inconsistent with the idea of indeterminacy inherent in *bona fide* doubt. For example, the majority notes that even though Traugott opined that defendant " 'was in no condition to attend' " the sentencing hearing, Traugott did not thereby opine that defendant met the elements of "the legal definition of unfitness." *Supra* ¶ 37. That is quite true, but under the circumstances, any reasonable person would have been concerned about the possibility that Traugott meant the legal definition of unfitness—concerned enough, anyway, to make a "further inquiry." (Internal quotation marks omitted.) *Eddmonds*, 143 Ill. 2d at 518, 578 N.E.2d at 959. And it is quite true,

as the majority says, that Traugott "did not diagnose defendant with schizophrenia"; rather, he diagnosed " 'Possible Psychotic Disorder,' " perhaps because defendant reportedly saw things and heard things. *Supra* ¶ 38. So, here, in a nutshell, is my trouble with the majority's analysis: the majority dismisses, as "pure speculation," anything that is not knockdown proof of unfitness. *Supra* ¶ 35. In the guise of excluding "speculation," the majority requires something more than the iffiness of *bona fide* doubt. I think that, under any reasonable view, there was a *bona fide* doubt of defendant's fitness to plead guilty, let alone undergo sentencing, and that the failure to observe procedures adequate to protect his right not to be convicted while unfit deprived him of due process. See *Drope*, 420 U.S. at 172.