

NOTICE
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2013 IL App (4th) 110459-U
NOS. 4-11-0459, 4-11-1094 cons.

FILED
March 13, 2013
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.)	McLean County
ANDREW D. COE,)	No. 06CF219
Defendant-Appellant.)	
)	Honorable
)	Scott Drazewski,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Steigmann and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* (1) As the trier of fact, the judge committed reversible error by relying on an extrajudicial source in denying defendant's petition for postconviction relief, namely, the judge's personal knowledge of trial counsel's rectitude and honesty in other cases.

(2) When denying defendant's motion for new postconviction counsel, the trial court committed reversible error by assuming it lacked the discretion or authority to appoint new postconviction counsel.

¶ 2 Defendant, Andrew D. Coe, is serving a sentence of 12 years' imprisonment for unlawfully delivering a controlled substance within 1,000 feet of a school (720 ILCS 570/407(b)(1) (West 2006)). After unsuccessfully petitioning the trial court for postconviction relief, he has filed two appeals, which we have consolidated.

¶ 3 In case No. 4-11-0459, he appeals from the trial court's denial of his petition for

postconviction relief, a decision the court made after hearing testimony. We agree with both of the arguments that defendant makes in that appeal. We hold, first, that the judge committed reversible error by relying on an extrajudicial source in denying the petition for postconviction relief. Second, we hold that the court committed reversible error by assuming, incorrectly, that it lacked authority to appoint new postconviction counsel in response to defendant's motion for new counsel.

¶ 4 In the other appeal, case No. 4-11-1094, defendant appeals from the trial court's refusal to allow him to file a successive postconviction petition after the court denied his first petition. In support of his motion to file a successive petition, defendant submitted affidavits averring that someone other than he committed the offense of unlawful delivery of a controlled substance. One of the affiants, Bryant "Rio" Smith, actually confessed that he, rather than defendant, was the perpetrator. By our disposition of case No. 4-11-0459, we effectively dispose of this other appeal. The motion to file a successive petition presupposed the denial of the first petition—a denial we reverse. Without the denial of the first petition, there simply is no occasion for a successive petition. Instead, postconviction counsel (whoever that may be) may amend the first petition, if necessary, and subpoena Bryant Smith and the other affiants to testify in the new evidentiary hearing. See Ill. S. Ct. R. 651(c) (eff. Apr. 26, 2012).

¶ 5 Therefore, in case No. 4-11-0459, we reverse the trial court's judgment and remand this case for a new evidentiary hearing, and we dismiss case No. 4-11-1094 as moot.

¶ 6 I. BACKGROUND

¶ 7 A. Evidence in the Jury Trial

¶ 8 In the jury trial, in June 2006, the State presented evidence of a controlled purchase of narcotics that occurred on February 15, 2006, at 807 North Roosevelt Street, in Bloomington.

(The State also presented evidence of a subsequent incident: an unsuccessful attempt to make a controlled purchase of cocaine from defendant on February 21, 2006. This other evidence was the basis of a solicitation conviction (720 ILCS 5/8-1(a), 570/401(d) (West 2006)), which we reversed on direct appeal, because of the insufficiency of the evidence, while affirming the conviction of unlawfully delivering cocaine on February 15, 2006 (*People v. Coe*, No. 4-07-0562, slip order at 2 (June 25, 2008) (unpublished order under Supreme Court Rule 23).)

¶ 9 A confidential informant, Nathan Hansen, testified that the police arrested him on February 11, 2006, for possessing 2.5 grams of cannabis. Detective Darren Wolters met with Hansen after the arrest, and ultimately the State filed no charges against Hansen for this drug offense. Hansen had a charge pending against him, however, for unlawful delivery of cannabis, and as he admitted at trial, he hoped his services as an informant would gain him some leniency with respect to that charge.

¶ 10 On February 15, 2006, Wolters and Hansen had a meeting at the police station, and Wolters suggested that Hansen make a controlled purchase of cocaine from defendant. Hansen had known defendant for about six months. He was not sure, but he thought defendant lived with a relative or friend named "TT," at 807 North Roosevelt Street. In any event, Hansen knew defendant's telephone number, having bought cocaine from him in the past. He dialed defendant's number and recognized defendant's voice on the telephone. Defendant told him to come to TT's apartment.

¶ 11 Wolters gave Hansen \$200 in prerecorded bills, and the two of them left the police station in an unmarked police car. Wolters dropped Hansen off approximately a block from 807 North Roosevelt Street. Hansen testified he then walked to that address, defendant let him in

through the rear door of the apartment, he handed defendant the \$200, and defendant handed him 10 pieces of aluminum foil with rock cocaine inside each piece of foil. Hansen identified defendant, in court, as the man who had sold him this cocaine (People's exhibit No. 2). Hansen testified that, after the transaction, he left the apartment and walked back to the car. Wolters held open an evidence bag, into which Hansen dropped the 10 pieces of foil-wrapped cocaine, whereupon they returned to the police station.

¶ 12 Another detective, Brian Quinn, testified he was assigned to perform video surveillance of the controlled purchase on February 15, 2006. His surveillance van was parked at the intersection of North Roosevelt Street and East Walnut Street, north of the residence. From his vantage point, Quinn was too far away to make out any facial features, but he assumed the man he saw walking down North Roosevelt Street from the south was the confidential source, for Wolters had radioed him that the source was approaching the residence. Quinn watched the source walk up the driveway and disappear around the corner of the residence. Shortly thereafter, he saw the source emerge from behind the residence and walk down the driveway. The source then walked north on North Roosevelt Street, and Wolters picked him up.

¶ 13 Defense counsel asked Quinn:

"Q. And you did not see nor did your camera record the exact place where the [source] entered any of the buildings ***, is that accurate?

A. That's correct, he was on the south side of the building and I was on the north.

Q. So we can't really tell from what you saw personally or from what your camera recorded whether he even entered the building, what building he entered or what door of what building he entered?

A. That's correct.

* * *

Q. In the video, *** was there anything that you saw that was clearly some illegal activity? I mean, it's just a fellow walking between two houses and then returning, would that be accurate?

A. That's what I saw from my vantage point, yes, sir."

¶ 14 Thus, none of the police officers actually saw defendant sell the cocaine to Hansen. In fact, none of the police officers saw defendant at all on February 15, 2006. Hansen's testimony was the only eyewitness evidence that the seller was defendant.

¶ 15 B. Defendant's Motion for New Postconviction Counsel

¶ 16 In January 2009, defendant filed a petition for postconviction relief, alleging, *inter alia*, ineffective assistance by the trial counsel, Tracy Smith, in failing to call alibi witnesses, who would have testified that defendant was in Chicago on February 15, 2006.

¶ 17 In April 2009, the trial court appointed W. Keith Davis to represent defendant in the postconviction proceedings. Defendant began having doubts about Davis early on, when he received Davis's letter of May 18, 2009. In this letter, Davis informed defendant he had been appointed as defendant's postconviction counsel, and he wrote: "The transcript of your trial paints a VERY STRONG case against you. There are multiple eyewitnesses to the delivery and aspects of your

actions are videotaped. There is [*sic*] also the 'wire' conversations." (Capitalization in original.) This passage contained several gross errors. For one thing, there were not "multiple eyewitnesses" to the actual delivery on February 15, 2006; instead, the record revealed only two eyewitnesses to the actual delivery: the seller and Hansen. Although Wolters and Quinn saw Hansen walking to the residence and walking back from the residence, the transaction occurred out of their sight. The police officers never even saw defendant on February 15, 2006, let alone videotaped him. Nor did they audiotape him on that day.

¶ 18 Both Wolters and Hansen saw defendant with some quantity of suspected cocaine on *February 21, 2006* (not February 15), when they tried, unsuccessfully, to make a controlled purchase from him on that date. Defendant brought out a small quantity of off-white substance, demanding, preliminarily to a sale, that Wolters smoke it to prove he was not a police officer—a demand that Wolters declined, to defendant's alarm. *Coe*, slip order at 5-8. As we have noted, however, only Hansen claimed eyewitness knowledge that defendant was the seller on February 15, 2006, because the seller was inside the residence, hidden from the view of the police officers, who were keeping the residence under surveillance at a distance.

¶ 19 Davis's letter to defendant continued: "Please explain how you could be in Chicago at the same time as you were being videotaped in Bloomington. Do you contend that the tape is fraudulent?" Again, defendant was not videotaped in Bloomington on February 15, 2006.

¶ 20 After remarking that it was "telling" that defendant exercised his constitutional right not to testify in the trial, Davis recommended that he voluntarily dismiss his *pro se* postconviction petition. Davis wrote: "Because I do not feel that your Petition is going to help you in any way, I will not file an 'Amended' Petition on your behalf."

¶ 21 Evidently, Davis relented, for on August 20, 2009, he filed an eight-page amended postconviction petition along with a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984). Page 8 of the amended petition claimed that defendant had "a compelling alibi defense" and that the trial counsel, Tracy Smith, had rendered ineffective assistance by failing to investigate the alibi witnesses and call them to testify in the trial. The preceding seven pages of the amended petition affirmatively argued against the other claims that defendant had raised in his *pro se* petitions—instead of simply omitting those claims. See *Bowman v. County of Lake*, 29 Ill. 2d 268, 272 (1963) ("Where an amendment is complete in itself and does not refer to or adopt the prior pleading, the earlier pleading ceases to be a part of the record for most purposes, being in effect abandoned and withdrawn.")

¶ 22 In September 2009, defendant filed a *pro se* motion to dismiss Davis, and to appoint new postconviction counsel, on the ground that Davis was providing substandard assistance. In October 2009, the trial court addressed defendant's motion for a new attorney. The court said:

"What you have asked within your petition *** is for an order directing Mr. Davis to withdraw from your case and to appoint you new counsel. I can answer that question fairly simply, which is that's not an option. You've got three options, but that's not one of them. One of them is to go ahead and remain with Mr. Davis as your attorney. Because you were appointed counsel due to your indigency when you received the appointment of an attorney to represent you, once indigent, you don't get to choose who the lawyer is, and so we can go ahead and continue Mr. Davis as your attorney. That's option

one. Option two, you can go ahead and represent yourself, proceed pro se, even though you are entitled to go ahead and have an attorney appointed for you, based upon your indigency, excuse me, whatever I indicated to you, that if you choose that route, it will be Mr. Davis as opposed to another attorney that you may want. The third is even though you are indigent, and I cannot require that you retain or hire private counsel, you obviously have that option as well. But what I'm telling you is that I don't have the authority nor does the law allow for me to substitute or replace Mr. Davis as Court appointed counsel without any cost to you."

¶ 23 After a discussion between defendant and the judge as to whether it was possible for defendant or his family to retain private counsel, defendant argued that his motion for new appointed counsel was meritorious due to the "conflict between [him] and [his] attorney." The trial court responded: "I've already indicated to you that there is no basis upon which to remove Mr. Davis as your attorney in this case." Finally, defendant elected to proceed *pro se* rather than have Davis continue to represent him.

¶ 24 In a subsequent hearing, in July 2010, the trial court asked defendant whether he wanted the court to reappoint Davis to represent him. Defendant again argued that Davis had provided deficient representation and that it would be "inappropriate for [defendant] to allow Keith Davis to get back into [his] case." The court reiterated that appointing a different attorney was not an option, stating: "[I]t's not my determination to make, it's the PD's [(public defender's)] determination as to which attorney is assigned to represent you." According to the court, the

decision of whether Davis's performance required substitute counsel was "between [defendant] and [the public defender] as opposed to [the court] and the public defender."

¶ 25 Defendant decided to remain unrepresented. He examined his witnesses *pro se* in the third-stage evidentiary hearing.

¶ 26 C. The Third-Stage Evidentiary Hearing

¶ 27 The evidentiary hearing on the postconviction petition commenced in the second half of 2010 and was continued several times, extending into the first half of 2011, as the trial court made arrangements to secure the attendance of witnesses that defendant requested.

¶ 28 Defendant's mother, Lydia Coe, testified she was with defendant in Chicago on February 15, 2006. She remembered that date because her mother always cooked for the entire family on Valentine's Day but nobody showed up on February 14. Instead, everybody, including defendant, showed up on February 15. He arrived at about 10 a.m. with his girlfriend, his sister, and his sister's boyfriend, in an ugly green rental car. He was still at his grandmother's house when Lydia Coe left at 4 p.m. Smith never contacted her and never subpoenaed her for trial. (We will refer to Tracy Smith by his last name. When we say "Smith," we do not mean Bryant "Rio" Smith, to whom we will refer by his full name.)

¶ 29 Cynthia Seymon was defendant's aunt. She testified she saw defendant in Chicago around Valentine's Day in 2006 but that she could not recall the exact date. Her mother cooked for the entire family that day, but no one came. Smith contacted Seymon, and they set up a time for an interview, but she "neglected to meet with him." She did not recall if she was subpoenaed for the trial.

¶ 30 Nina Seymon, who had two felony convictions, was defendant's cousin. She testified she saw him at their grandmother's house in Chicago on February 15, 2006. When she arrived at their grandmother's house at 5 p.m., defendant already was there. She did not know what time he left. Defendant had asked her to testify in his trial, and she had been willing to do so, but Smith never contacted her, and he never subpoenaed her.

¶ 31 Sheila Harris, who had a previous drug conviction, was a good friend of defendant's. She lived at 807 North Roosevelt Street in Bloomington, where the controlled purchase allegedly occurred. On the date of the controlled purchase, February 15, 2006, defendant "maybe" was at her house around 8 a.m., but he was "in and out" that day, remaining for only a half an hour at a time. He left and did not return until about 9 p.m. He was driving a rental car. Harris was home all day, and according to her, defendant did not sell any drugs at her house. Smith never contacted her and never asked her to testify.

¶ 32 Michael Magana testified that he made defendant's acquaintance at a house party in Streator in 2004. On February 15, 2006, Magana was on the back porch of Harris's house, smoking a blunt with a man nicknamed Rio. Magana did not see defendant at all that day, but he did see Rio sell crack cocaine to Hansen. Upon learning that the State had charged defendant with making that sale, Magana called Smith and left a detailed message with his secretary. Smith never returned his call. Although Magana was in jail at the time of defendant's trial, he would have been willing to testify.

¶ 33 Smith testified that he was "basically retired" and that he no longer was working for the Bloomington public defender's office. Several months before the evidentiary hearing, he reviewed his file from defendant's case, but he did not bring the file to court, and his memory of the

case was "somewhat hazy." On a scale of 1 to 10, his memory was "probably a 5." Smith agreed that defendant had told him he had an alibi, but he did not remember how many potential alibi witnesses defendant had identified for him.

¶ 34 Smith remembered calling two female witnesses, to see if they could establish an alibi, but the dates they gave him did not line up with the date of the offense. He also tried to interview a witness who was in custody, but the public defender representing that witness refused to allow an interview. "[A] couple of ladies" might have contacted Smith about testifying on defendant's behalf, but he did not remember the details, and he did not remember if anyone else had contacted him.

¶ 35 In rebuttal, defendant testified he disclosed the witnesses to Smith before trial and that he also provided him the contact information for the witnesses. He told Smith the witnesses would testify that he was in Chicago on February 15, 2006, the date of the drug offense. Smith assured defendant that he would contact these witnesses, but none of them appeared in the trial.

¶ 36 On May 3, 2011, the trial court denied defendant's petition for postconviction relief. In so ruling, Judge Drazewski stated:

"As to Mr. Tracy Smith, the court did hear the testimony of Mr. Smith. Let me first observe that the court can in these instances take into account, that being the court's familiarity with a particular witness based upon that person being an officer of the court. Mr. Smith appeared before this court literally hundreds of time[s] during the space of two to three years when I was assigned to the felony

division full time, and the court always found Mr. Smith to be a person of great moral turpitude [*sic*], truthful, and honest."

¶ 37 Judge Drazewski reasoned that it was logically impossible to reconcile the testimony of all the witnesses: he would have to accept some testimony and reject other testimony. He found the testimony of defendant's witnesses "not to be credible" because of their "bias" in favor of defendant and their "hostility" toward the State, and he chose to believe Smith's testimony, which "contradicted" their testimony. Judge Drazewski explained:

"As a result, then, of the court making those findings, the court finds that the actions taken by Mr. Smith, based upon what the court finds to be the facts in this case, that there were only two witnesses disclosed by Mr. Coe that Smith was asked to go ahead and contact, that he contacted those two individuals, made a trial strategic decision not to call those witnesses at trial, and that Mr. Coe further elected not to testify in his behalf, the presentation of the evidence in this case was to attack, in essence, the state's presentation of the case as being insufficient to satisfy the state's burden of proof of [*sic*] beyond a reasonable doubt, but not to go ahead and present due to the inability to go ahead and persuade a trier of fact, that being a jury[,] of an alibi defense based upon the credibility concerns of the two witnesses that were interviewed and/or the lack of any additional witnesses that Mr. Coe indicated that he had provided to Mr. Smith,

that the court finds that he did not, based upon Mr. Smith's testimony, to be the case.

So, from that perspective, the court finds, then, that the Petition for Post-Conviction relief of Mr. Coe ought and will be denied."

¶ 38 D. Defendant's Motion To File a Successive Postconviction Petition

¶ 39 On June 10, 2011, after the trial court's denial of his initial postconviction petition, defendant moved for permission to file a successive postconviction petition. See 725 ILCS 5/122-1(f) (West 2010). Along with this motion, he resubmitted an affidavit by Magana. He also submitted a new affidavit, one by Bryant Smith, who averred that (1) his street name was Rio; (2) he sold drugs to Hansen at Sheila Harris's residence on February 15, 2006, at about 1:20 p.m., after telling Hansen that defendant was not there; and (3) Magana was present during this drug sale.

¶ 40 On July 11, 2011, the trial court denied permission to file a successive postconviction petition, holding that defendant was aware of the new evidence when his first postconviction petition was still pending and that he had pleaded no "cause" for failing to present the evidence in the recently concluded evidentiary hearing. *Id.*

¶ 41 Defendant filed a timely motion for reconsideration, which the trial court denied on November 23, 2011 (the delay was due ultimately to a premature notice of appeal, which had to be dismissed in order for the court to rule on the motion for reconsideration, after which defendant refiled a notice of appeal).

¶ 42

II. ANALYSIS

¶ 43

A. The Use of Personal Knowledge

as a Basis for Denying the Postconviction Petition

¶ 44 Defendant maintains that Judge Drazewski committed reversible error by relying on his "literally hundreds" of previous experiences with Smith when Smith served as defense counsel in cases other than the present one. In those other cases, the judge "always found Mr. Smith to be a person of great moral turpitude [*sic*], truthful, and honest." (Instead, of "turpitude," the judge must have meant "rectitude.") Quoting *People v. Dameron*, 196 Ill. 2d 156, 171-72 (2001), defendant argues: "It is well established that a ruling based on information outside of the record 'constitutes a denial of due process of law' and reversible error." For purposes of this purely legal argument, our standard of review is *de novo*. See *People v. English*, 406 Ill. App. 3d 943, 952 (2010).

¶ 45 The State offers a twofold response to defendant's argument. First, the State asserts that defendant has forfeited this issue by failing to object, in the postconviction hearing, to Judge Drazewski's reliance on his personal knowledge of Smith's conduct in other cases. See *People v. Rippatoe*, 408 Ill. App. 3d 1061, 1068 (2011). Second, the State maintains there was no prejudice, and hence no plain error, because the outcome of the postconviction proceeding would have been the same had the judge refrained from relying on this personal knowledge.

¶ 46 Before evaluating this twofold response by the State, we first will consider whether the due-process right to an impartial trier of fact extends to postconviction proceedings, considering that not all constitutional rights extend beyond a direct appeal. Then we will discuss precisely what is an "impartial trier of fact."

¶ 47 1. *The Due-Process Right to an Impartial Judge in Postconviction Proceedings*

¶ 48 As we said, not all constitutional rights extend to postconviction proceedings. *People v. Wright*, 189 Ill. 2d 1, 17 (1999). For example, even though the sixth amendment (U.S. Const.,

amend. VI) and the due-process clause of the fourteenth amendment (U.S. Const., amend. XIV) guarantee defendants a right to counsel in criminal cases (*Brewer v. Williams*, 430 U.S. 387, 398 (1977)), that right "extends to the first appeal of right, and no further" (*Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987)). See *People v. Kelly*, 2012 IL App (1st) 101521, ¶ 28 (the right to counsel in postconviction proceedings is purely statutory, not constitutional).

¶ 49 The Supreme Court of Illinois has held, however, that the due-process right to an impartial judge does extend to postconviction proceedings. *Wright*, 189 Ill. 2d at 17. Just because "a defendant is not entitled to the full panoply of constitutional rights that accompany an initial criminal prosecution, this does not mean that a defendant in a post-conviction proceeding is not entitled to due process at all. A fair trial before a fair tribunal is a basic requirement of due process." *Id.* In a postconviction proceeding, as in a criminal proceeding, the due process clause (see Ill. Const. 1970, art. I, § 2) entitles the defendant to an impartial trier of fact. *Id.*

¶ 50 *2. The Meaning of "Bias" in the Judicial Context*

¶ 51 What does it mean for a judge, as trier of fact, to be "impartial," and what constitutes a lack of "impartiality"? "Impartial" means "not partial or biased." Merriam-Webster's Collegiate Dictionary 580 (10th ed. 2000). In the judicial context, "bias" is not limited to "a high degree of favoritism or antagonism" toward a party, although that is certainly one of its meanings. (Internal quotation marks omitted.) *In re Marriage of O'Brien*, 2011 IL 109039, ¶ 31. "Bias" also can mean reliance on an "extrajudicial source." (Internal quotation marks omitted.) *Id.* An "extrajudicial source" is a source other than the case presently before the judge. *In re Estate of Wilson*, 238 Ill. 2d 519, 554 (2010).

¶ 52 Two cases that are featured prominently in defendant's brief, *Dameron* and *People v. Steidl*, 177 Ill. 2d 239 (1997), scrutinize this second form of bias, reliance on an extrajudicial source.

¶ 53 a. *Dameron*

¶ 54 In *Dameron*, 196 Ill. 2d at 158-59, a jury found the defendant guilty of the first degree murder of his three-month-old daughter. The defendant waived his right to a sentencing-phase jury. *Id.* at 159. After finding him eligible for the death penalty, the trial court found no mitigating circumstances sufficient to preclude the death penalty, and sentenced him to death. *Id.*

¶ 55 In the sentencing hearing, the trial judge quoted from two extrajudicial sources: a social science book (*id.* at 172-74) and the transcript of sentencing comments the judge's father made in a 1966 murder trial (*id.* at 177-78). In the posttrial hearing, the defendant complained of the judge's use of the social science book. The judge responded that the book had not "'controlled any part of [his] decision in this case.'" *Id.* at 178.

¶ 56 Even so, on direct review, the supreme court said: "A judge need not give controlling weight to the improper evidence to trigger our reversal; even giving very little weight is improper." (Internal quotation marks omitted.) *Id.* at 178. It was evident that the judge had given "some weight" to the social science book and to the transcript from the 1966 murder case, and doing so was reversible error. *Id.* at 179. "A determination made by the trial judge based upon a private investigation by the court or based upon private knowledge of the court, untested by cross-examination, or any of the rules of evidence constitute[d] a denial of due process of law." (Internal quotation marks omitted.) *Id.* at 171-72.

¶ 57 b. *Steidl* and a Decision It Cites, *Cooper*

¶ 58 In *Steidl*, 177 Ill. 2d at 244-45, a jury found the defendant guilty of murder, and he was sentenced to death. He filed a postconviction petition alleging that his trial counsel, S. John Muller, had rendered ineffective assistance. *Id.* at 251. Judge Paul Komada dismissed the postconviction petition without an evidentiary hearing. When denying the defendant's request for an evidentiary hearing, Judge Komada remarked that Muller had appeared before him on numerous previous occasions, in both criminal cases and civil cases, and that he had always found Muller to be a skillful defense attorney, winning not-guilty verdicts in cases in which the defendants probably were guilty. *Id.* at 265-66. In Judge Komada's view, these past successes were " 'probably attributable to trial counsel's tactics.' " *Id.* at 265.

¶ 59 The supreme court held that the judge's reliance on impressions of Muller he had received in other cases was reversible error. *Id.* at 266. The supreme court explained:

"Deliberations of the court must necessarily be limited to the record before it. [Citations.] While all judges come to the courtroom influenced, either consciously or unconsciously, by the experiences, associations, and prejudices developed over a lifetime, they are expected to make an effort to put those predilections aside and make determinations based only upon the evidence presented. [Citation.] Judge Komada's statements upon denial of the evidentiary hearing indicate that he relied on personal knowledge of Muller's performance in previous cases to determine his competency in the instant case. In so doing, Judge Komada considered information outside the record, which is prejudicial error. [Citations.] Judge Komada's remarks

indicate that his associations with Muller have rendered him biased against defendant's ineffective-assistance claims. Therefore, we hold that Judge Komada should be recused from further consideration of this case." *Id.*

¶ 60 One of the cases that the supreme court cited, in the above-quoted passage from *Steidl*, was *People v. Cooper*, 398 Ill. 468, 472 (1947). In *Cooper*, the judge who presided over the defendant's bench trial performed "two private judicial investigations." *Cooper*, 398 Ill. at 471.

¶ 61 The judge performed the first investigation prior to finding the defendant guilty of murder: he "recognized several of [the] defendant's character witnesses as the same persons who had testified for other defendants in previous murder cases" (*id.* at 470), and he confirmed his recollection by reviewing "his personal notes and the records of prior criminal proceedings" (*id.* at 472).

¶ 62 The judge performed his second investigation after finding the defendant guilty and before denying his motion for a new trial: the judge "visited the premises where the homicide occurred." *Id.* at 471.

¶ 63 The supreme court held that each of these two investigations, by itself, was grounds for reversal. *Id.* at 471-72. As for investigating the defendant's character witnesses, the judge had committed reversible error by consulting not only his notes from prior cases but also his memory of the prior cases. *Id.* at 472. The supreme court said:

"The investigation of three of [the] defendant's character witnesses during the course of the trial constitutes further grounds for reversal. It is axiomatic that [the] defendant was entitled to a fair and

impartial trial. [Citations.] In particular, [the] defendant had the right to be confronted with the witnesses against her. (Ill. Const. art. II, par. 9.) The quoted remarks of the trial judge show unmistakably that he participated in the trial both as a judge and as a witness and that, in addition to his recollection of matters previously occurring within his own courtroom and which he knew of his own knowledge independent of any other source of information, he relied on his personal notes and the records of prior criminal proceedings." *Id.*

The defendant had received no opportunity to cross-examine the judge or to introduce evidence in opposition to the judge's investigation. *Id.* at 473.

¶ 64 In summary, then, "a preconceived or unreasoning animus" does not exhaust the meaning of "bias" (and, we might add, we find no evidence that Judge Drazewski had such an attitude toward defendant or that he lacked intellectual integrity or the sincere desire to be fair). In the judicial context, "bias" includes a specialized meaning, namely, consulting an extrajudicial source, using personal knowledge acquired outside the case—even though, in a nonjudicial setting, it would be perfectly rational to use such knowledge. See *People v. Rivers*, 410 Ill. 410, 419 (1951) ("However innocently any private investigation may have been made, for whatever purpose, and regardless of its results, the defendants' constitutional right to have everything considered against them produced in open court has been violated.") For legal purposes, an "impartial trier of fact" means not only a trier of fact that is free of "deep-seated favoritism or antagonism" (internal quotation marks omitted) (*Wilson*, 238 Ill. 2d at 555) but also a trier of fact that is "capable and willing to decide the case solely on the evidence before it." (Internal quotation marks omitted.)

People v. Hanks, 335 Ill. App. 3d 894, 900 (2002). See also *People v. Massarella*, 80 Ill. App. 3d 552, 565 (1979).

¶ 65 It follows that a well-intentioned judge who feels no ill will at all against the defendant would nevertheless not be "impartial" if he or she used knowledge from outside the case to deny the defendant's postconviction petition. It makes no difference that this private knowledge is probative. It makes no difference that this private knowledge comes from the judge's experience presiding over a different case. (In this regard, the term "extrajudicial source" might be a little misleading. Even another case is, paradoxically, an "extrajudicial source" if it is the judge's personal experience from a case other than the one presently before the judge. *Wilson*, 238 Ill. 2d at 554.) The problem with extrajudicial sources is procedural. The judge would be making "[a] determination *** based upon private knowledge of the court, untested by cross-examination, or any of the rules of evidence," thereby denying the defendant the due process of law. (Internal quotation marks omitted.) *Dameron*, 196 Ill. 2d at 171-72. By looking outside the record, the judge becomes a producer of evidence, a witness for the prosecution or the defense. *Cooper*, 398 Ill. at 471. "Exclusive of certain matters of which the court may take judicial notice, the deliberations of the trial judge are limited to the record made before him in open court." *Id.* at 472. But see also *People v. Smith*, 176 Ill. 2d 217, 238 (1997) ("[I]f an accused is not informed at trial of the facts of which the court is taking judicial notice, he does not know upon what evidence he is being convicted, and he is deprived of any opportunity to challenge the deductions drawn from such notice or to dispute the truth of the facts allegedly relied upon.").

¶ 66

3. *The Judge's Partiality in Relying Upon
His Personal Knowledge of Smith's Conduct in Other Cases*

¶ 67 The State does not appear to dispute that Judge Drazewski erred by relying upon his personal knowledge of Smith's conduct in other cases. Judge Komada erroneously did the same thing in *Steidl*. The supreme court said: "Judge Komada's statements upon denial of the evidentiary hearing indicate that he relied on personal knowledge of Muller's performance in previous cases to determine his competency in the instant case." *Steidl*, 177 Ill. 2d at 266. The supreme court held that, "[i]n so doing, Judge Komada considered information outside the record, which [was] prejudicial error." *Id.*

¶ 68 *4. Plain Error*

¶ 69 The State agrees that "[a] judge is expected to put aside any predilections from outside the record and decide a case based only on evidence presented." Even so, the State argues that "[d]efendant forfeited the issue by failing to object" and hence "he must establish plain error." In support of this contention, the State cites *Rippatoe*, 408 Ill. App. 3d at 1068.

¶ 70 *Rippatoe* was a criminal proceeding, whereas the present case is a postconviction proceeding and is, as such, civil in nature (see *People v. Johnson*, 191 Ill. 2d 257, 269-70 (2000)). Nevertheless, even in civil proceedings, arguments that the appellant never made in trial court are considered, on appeal, to be forfeited. *People v. Four Thousand and Eight Hundred Fifty Dollars (\$4,850) United States Currency*, 2011 IL App (4th) 100528, ¶ 19; *Bank of Carbondale v. Kansas Bankers Surety Co.*, 324 Ill. App. 3d 537, 539-40 (2001).

¶ 71 Illinois Supreme Court Rule 615(a) (eff. Aug. 27, 1999) provides, however: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." From Rule 615(a), Illinois case law has developed the doctrine of plain error. *People v. Kitch*, 239 Ill. 2d 452, 461 (2011).

¶ 72 We have held that "application of the plain-error doctrine to civil cases is exceedingly rare and limited to circumstances amounting to an affront to the judicial process." (Internal quotation marks omitted.) *In re J.R.*, 342 Ill. App. 3d 310, 317 (2003). Necessarily, postconviction cases are an exception to that holding because Rule 615(a) is part of article VI of the Illinois Supreme Court Rules, an article entitled, "Appeals in Criminal Cases, *Post-Conviction Cases*, and Juvenile Court Proceedings." (Emphasis added.) It follows that, even though postconviction cases are civil cases, the plain-error doctrine in Rule 615(a) fully applies to postconviction cases just as it does to criminal cases. To conclude otherwise would be to read an exception or qualification into the Illinois Supreme Court Rules that has no basis in the text of the rules, something we should be extremely reluctant to do (*State Farm Mutual Automobile Insurance Co. v. Hayek*, 349 Ill. App. 3d 890, 892 (2004)).

¶ 73 In deciding, then, whether the doctrine of plain error averts the forfeiture in this postconviction case, we should use precisely the same analysis we would use in a criminal case. We should apply the plain-error doctrine, unqualified and unmodified. The supreme court has explained that an error can qualify as plain error in either of two ways:

"(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the

evidence." (Internal quotation marks omitted.) *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 74 The first step in plain-error analysis is to determine whether a "clear or obvious error" occurred. (Internal quotation marks omitted.) *Id.* Under *Steidl*, 177 Ill. 2d at 266, it clearly was an error on Judge Drazewski's part to rely on his personal knowledge of Smith's conduct in previous cases to determine, or help determine, Smith's credibility in the instant case.

¶ 75 The second step in plain-error analysis is to decide whether the error meets the description of either (1) or (2), above. The supreme court has equated (2) with "structural error": a "systemic error" that "erode[s] the integrity of the judicial process and undermine[s] the fairness of the defendant's trial." (Internal quotation marks omitted.) *Thompson*, 238 Ill. 2d at 613-14. "[T]rial before a biased judge" is a structural error. *Id.* at 609. See also *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991). The denial of the defendant's due-process right to an impartial adjudicator—"be it judge or jury"—is a structural defect in the trial (internal quotation marks omitted) (*Gomez v. United States*, 490 U.S. 858, 876 (1989)) and, hence, plain error in the sense of (2) (*Thompson*, 238 Ill. 2d at 613-14).

¶ 76 *5. Prejudice*

¶ 77 The State argues: "An improper inclusion of outside knowledge in a judicial ruling is not necessarily prejudicial when an evidentiary hearing is held," and the State cites *Rippatoe*, 408 Ill. App. 3d at 1068; *People v. Hamilton*, 361 Ill. App. 3d 836, 849-50 (2005); and *People v. Sesmas*, 227 Ill. App. 3d 1040, 1048 (1992). In each of those cases, the judge cited an extrajudicial source (or more than one extrajudicial source) when making a decision adverse to the defendant, and in each of those cases, the appellate court found no resulting prejudice and consequently no plain error.

Rippatoe, 408 Ill. App. 3d at 1069 ("While it was clear and obvious error for the trial judge to consider his personal knowledge of [defense counsel's] performance on other matters, the defendant has failed to establish that he was prejudiced by the trial judge's error."); *Hamilton*, 361 Ill. App. 3d at 849-50 ("we find that the trial judge's remarks as to his knowledge of his own children were not prejudicial," and "the inclusion of this outside knowledge [of trial counsel's performance in other cases] did not affect the judge's ruling and was therefore not prejudicial"); *Sesmas*, 227 Ill. App. 3d at 1048 ("[A]ny error here is harmless. In ruling on the issue during the post-trial motion, the judge stated that even disregarding the prior conduct of Trooper Lower, the outcome would have been the same. These comments do not warrant a reopening of the suppression hearing or a new trial.").

¶ 78 Setting aside the question of whether we agree or disagree with *Rippatoe*, *Hamilton*, and *Sesma*, those cases are distinguishable because although the judge's use of personal knowledge was inessential to the outcome in those cases (so the appellate court held), one cannot be sure it was inessential in the present case. The State admits that this case came down to a "credibility determination" and that Judge Drazewski found Smith to be credible and defendant's witnesses to be incredible.

¶ 79 One must *believe* Smith in order to conclude that he used a reasonable strategy. Defendant argues: "Even if defendant in fact disclosed additional alibi witnesses, some hypothetical attorney could have reasonably terminated the line of investigation upon learning from the first two contacts that defendant left Chicago two days before the offense." But this argument assumes that Smith was reliable in his account of what the first two contacts had told him, namely, that defendant left Chicago two days before the offense. And, evidently, Judge Drazewski regarded Smith as reliable in part because Smith had "appeared before this court literally hundred[s] of times during

¶ 85 In response to defendant's motion for substitute counsel, the trial court told defendant: "I don't have the authority nor does the law allow me to substitute or replace Mr. Davis as court appointed counsel without any cost to you." It is true that the court also said "there [was] no basis upon which to remove Mr. Davis," but this brief comment does not convince us that the court exercised its discretion, given the court's insistence that it lacked legal "authority" to replace Davis and or that the replacement of Davis was not an "option."

¶ 86 The trial court was mistaken: it had the authority, the discretion, to replace postconviction counsel. In *Partee*, 268 Ill. App. 3d at 868, the appellate court held: "A petitioner [in a postconviction proceeding] is entitled to appointment of an attorney other than the public defender only upon a showing of good cause *** and, in the absence of a showing of good cause, it is within the trial court's discretion to deny such a request." (Internal quotation marks omitted.) In this case, defendant did not request an attorney other than the public defender; he requested an attorney other than Davis. If, upon a showing of good cause, defendant would be entitled to an attorney other than the public defender, it follows that, upon a showing of good cause, he would be entitled to an attorney other than Davis. "[W]here a circuit court erroneously believes that it has no discretion in a matter, its ruling on a matter requiring the exercise of discretion must be reversed on appeal where it palpably fails to exercise that discretion." *Id.* at 869. We remand this case with directions that the trial court exercise its discretion in ruling on defendant's motion for substitute counsel. See *id.*; *Greer v. Yellow Cab Co.*, 221 Ill. App. 3d 908, 915 (1991) ("Where a trial court erroneously believes it has no discretion or authority to perform some act, the appellate court should not preempt the exercise of such discretion, but should remand the cause back to the trial court.").

¶ 87

III. CONCLUSION

¶ 88 For the foregoing reasons, in case No. 4-11-0459, we reverse the trial court's judgment and remand this case for a new evidentiary hearing. Case law requires us to direct that the new evidentiary hearing take place before a different judge. See *Steidl*, 177 Ill. 2d at 266. We dismiss case No. 4-11-1094 as moot.

¶ 89 No. 4-11-0459, Reversed and remanded with directions.

¶ 90 No. 4-11-1094, Dismissed as moot.