NOTICE
Decision filed 10/10/14. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2014 IL App (5th) 130100-U

NO. 5-13-0100

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Bond County.
	)	
v.	)	No. 10-CF-2
	)	
THOMAS S. SMITH,	)	Honorable
	)	John Knight,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE SCHWARM delivered the judgment of the court.
Justices Chapman and Spomer concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed the defendant's petition for postconviction relief.

¶ 2 BACKGROUND

¶ 3 In May 2010, after deliberating less than an hour, a Bond County jury found the defendant, Thomas S. Smith, guilty on two counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(b) (West 2006)), one count of criminal sexual assault (720 ILCS 5/12-13(a)(3) (West 2006)), and one count of sexual exploitation of a child (720 ILCS 5/11-9.1(a-5) (West 2006)). The underlying charges stemmed from acts of sexual misconduct that the defendant committed against his teenage stepdaughter, B.P., between

December 1, 2006, and January 15, 2007. The defendant was ultimately sentenced to serve an aggregate term of 15 years on his convictions.

¶ 4 This court previously set forth the evidence adduced at the defendant's trial when affirming his convictions on direct appeal. See *People v. Smith*, 2012 IL App (5th) 100360-U. We nonetheless note that B.P.'s testimony was corroborated by the eyewitness testimony of her brother and her half-brother and that DNA evidence also supported her claims. We further note that the jury rejected the defendant's testimony and explanations, which the State argued "didn't make sense," and that when imposing sentence, the trial court noted that B.P. was credible.

¶ 5 In October 2012, the defendant filed a 60-page *pro se* petition for relief pursuant to the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). The petition raised numerous allegations of error culminating in his request the he be given "a second chance at a fair trial." Approximately 90 pages of documents were attached to the defendant's petition in support of his various contentions.

¶ 6 In January 2013, describing the defendant's postconviction petition as a "rambling collection of facts, opinions, legal citations, and arguments," the trial court entered a written order summarily dismissing it as patently without merit. The court opined that "viewed as a whole," the defendant's petition was "nothing more than an express dissatisfaction with the trial outcome" and the outcome of his direct appeal. The court further concluded that the various documents attached to the petition were "insufficient to support the [defendant's] allegations." The present appeal followed.

¶ 7 DISCUSSION

¶ 8 The defendant argues that the trial court erred in summarily dismissing his postconviction petition because three of the petition's claims are neither frivolous nor patently without merit. Specifically, the defendant maintains that he presented the gist of a constitutional claim with respect to each of the following issues: (1) his trial attorney was ineffective for improperly advising him to reject a favorable plea offer, (2) his trial attorney was ineffective for failing to find and present a scientific study that could have provided an alternative explanation for the presence of semen found in the crotch area of B.P.'s underwear, and (3) his trial attorney was ineffective for not attempting to present evidence that B.P. had previously made false accusations that her biological father had molested her. In response, the State contends that the trial court rightfully rejected these claims as unsupported and otherwise meritless. We agree with the State.

¶ 9 The Post-Conviction Hearing Act

¶ 10 The Act sets forth a procedural mechanism through which a defendant can claim that "in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2012). "A postconviction proceeding is not a direct appeal or a continuation of a criminal case but is an independent, collateral attack on a judgment of conviction." *People v. Vasquez*, 307 Ill. App. 3d 670, 673-74 (1999). The Act provides a three-stage process for the adjudication of postconviction petitions in noncapital cases. *People v. Boclair*, 202 Ill. 2d 89, 99 (2002).

¶ 11 At the first stage, the trial court independently reviews and assesses the defendant's petition, and if the court determines that the petition is "frivolous" or "patently without merit," the court can summarily dismiss it. 725 ILCS 5/122-2.1(a)(2) (West 2012); *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). A *pro se* petition for postconviction relief is considered frivolous or patently without merit "only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). "A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation." *Id*.

¶ 12 If a postconviction petition is not dismissed at the first stage, it advances to the second stage, where an indigent defendant can obtain appointed counsel and the State can move to dismiss the petition. 725 ILCS 5/122-2.1(b), 122-4, 122-5 (West 2012). At the second stage, the trial court determines whether the defendant has made a substantial showing of a constitutional violation, and if a substantial showing is made, the petition proceeds to the third stage for an evidentiary hearing; if no substantial showing is made, the petition is dismissed. *Edwards*, 197 Ill. 2d at 245. "The dismissal of a postconviction petition without an evidentiary hearing is reviewed *de novo*." *People v. Hall*, 217 Ill. 2d 324, 334 (2005).

¶ 13 Pursuant to section 122-1(b) of the Act, a defendant's postconviction petition must be "verified by affidavit." 725 ILCS 5/122-1(b) (West 2012). The verification described in section 122-1(b), "like all pleading verifications, confirms that the allegations are brought truthfully and in good faith." *People v. Collins*, 202 Ill. 2d 59, 67 (2002).

¶ 14 To survive the first stage of a postconviction proceeding, "a petition need only present the gist of a constitutional claim." *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). "This is a purposely low threshold for survival because most petitions are drafted at this stage by defendants with little legal knowledge or training." *People v. Ligon*, 239 Ill. 2d 94, 104 (2010). Nevertheless, claims of error set forth in a postconviction petition "must be based on factual allegations and not mere conclusory statements." *People v. Ivy*, 313 Ill. App. 3d 1011, 1019 (2000).

¶ 15 When determining a petition's legal sufficiency at the first stage, "[a]llegations based on established facts should be 'liberally construed and taken as true.' " *People v. Douglas*, 2011 IL App (1st) 093188, ¶ 19 (quoting *Boclair*, 202 Ill. 2d at 99). With respect to allegations based on unestablished facts, however, "[t]o warrant consideration past the first-stage inquiry, a petition 'must set forth some facts which can be corroborated and are objective in nature or contain some explanation as to why those facts are absent.' " *Id*. ¶ 20 (quoting *People v. Delton*, 227 Ill. 2d 247, 255 (2008)).

¶ 16 Section 122-2 of the Act states that a postconviction petition "shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2012). "[T]he affidavits and exhibits which accompany a petition must [also] identify with reasonable certainty the sources, character, and availability of the alleged evidence supporting the petition's allegations." *Delton*, 227 Ill. 2d at 254. "[T]he purpose of section 122-2 is to establish that a petition's allegations are capable of 'objective or independent corroboration' " (*id*. (quoting *People v. Hall*, 217 Ill. 2d 324, 333 (2005)), and the failure to comply with

section 122-2 "by itself justifies the petition's summary dismissal" (*Collins*, 202 Ill. 2d at 66). Moreover, a defendant's sworn verification filed pursuant to section 122-1(b) cannot serve as a substitute for section 122-2's affidavit requirement. *Id.* "[T]he sworn verification described in section 122-1 serves a purpose wholly distinct from the 'affidavits, records, or other evidence' described in section 122-2" (*id.*), and "[a]ccordingly, section 122-1(b) verification affidavits are readily distinguishable from section 122-2 affidavits" (*People v. Brown*, 2014 IL App (1st) 122549, ¶ 55). A *pro se* petitioner is not excused from complying with the requirements set forth in section 122-2. *People v. Payne*, 336 Ill. App. 3d 154, 165-66 (2002).

¶ 17 Ineffective Assistance of Counsel

¶ 18 A criminal defendant is guaranteed the right to the effective assistance of counsel under both the United States Constitution and the Illinois Constitution. *People v. Mata*, 217 Ill. 2d 535, 554 (2005). To succeed on a claim of ineffective assistance of counsel, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), *i.e.*, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance resulted in prejudice. *People v. Shaw*, 186 Ill. 2d 301, 332 (1998). "Further, in order for a defendant to establish that he suffered prejudice, he must show a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different." *People v. Burt*, 205 Ill. 2d 28, 39 (2001). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "Because a defendant must establish both a deficiency in counsel's performance and prejudice resulting from the

alleged deficiency, failure to establish either proposition will be fatal to the claim." *People v. Sanchez*, 169 Ill. 2d 472, 487 (1996).

¶ 19 "At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Hodges*, 234 Ill. 2d at 17. "Proof of prejudice, however, cannot be based on mere conjecture or speculation as to outcome." *People v. Palmer*, 162 Ill. 2d 465, 481 (1994). Additionally, "[t]here is a strong presumption that counsel's performance at trial was competent." *People v. Beck*, 295 Ill. App. 3d 1050, 1062 (1998).

¶ 20 The Favorable Plea Offer

¶ 21 The defendant's petition alleged that he rejected a plea offer of four years' probation because his trial attorney "wrongly advised [him] to go to trial with a false confidence on being able to use certain evidence under the 'rape shield' statute which the court would not allow." On appeal, the defendant argues that "a reasonably effective defense counsel would have strongly urged [him] to accept the State's offer of four years' probation, presumably to a lesser charge, and avoid an essentially unwinnable trial and a minimum sentence of seven years' imprisonment." The State counters that the trial court properly dismissed this claim as insufficiently supported.

¶ 22 A criminal defendant's right to the effective assistance of counsel applies to the plea-bargaining process. *People v. Hale*, 2013 IL 113140, ¶ 15. To prevail on an ineffective-assistance-of-counsel claim alleging that a plea offer was rejected due to counsel's deficient performance, a defendant must demonstrate a reasonable probability

that he would have accepted the plea but for counsel's deficient performance, that the trial court would have accepted the plea, and that the plea would have resulted in a disposition more favorable than that which was ultimately imposed. *Id*. ¶ 19. Furthermore, to demonstrate a reasonable probability that a plea would have been accepted but for counsel's ineffectiveness, a defendant must offer more than his own self-serving statements. *Id*. ¶ 18. "Rather, there must be 'independent, objective confirmation that [the] defendant's rejection of the proffered plea was based upon counsel's erroneous advice,' and not on other considerations." *Id*. (quoting *People v. Curry*, 178 Ill. 2d 509, 532 (1997)).

¶ 23 Here, the defendant failed to support his claim regarding counsel's plea-offer advice with affidavits or other supporting documents as required by section 122-2, and he offered no excuse for their absence. The defendant did not attach an affidavit personally attesting to his allegations, and although he verified his petition by affidavit in accordance with section 122-1(b), as previously noted, that affidavit cannot serve as a substitute for section 122-2's affidavit requirement. *Collins*, 202 Ill. 2d at 66; *Brown*, 2014 IL App (1st) 122549, ¶¶ 54-55. Furthermore, the only document that the defendant offered as objective confirmation of his unsupported contentions was an unnotarized letter purportedly written by his friend, Kathy Brink. Brink's letter asserts that trial counsel called her and told her that "he had advised [the defendant] not to take the plea because [the defendant] was not guilty and they were going to win." The letter does not constitute a valid affidavit for purposes of section 122-2, however, and even if it did, its

contents are hearsay, and "[a]ffidavits containing hearsay are insufficient to support a claim under the Act." *Brown*, 2014 IL App (1st) 122549, ¶¶ 56-58.

¶ 24 Because the defendant failed to support his postconviction plea-offer claim with proper affidavits, records, or other supporting evidence and failed to explain why he did not comply with section 122-2, the trial court did not err in summarily dismissing the allegation. *Id*. ¶¶ 60-61.

¶ 25 The Scientific Study

¶ 26 A pair of B.P.'s underwear was collected as evidence during the investigation in the present case. Semen was later found in a stain identified in the crotch area of the underwear, and a sample of the defendant's DNA was analyzed and compared to DNA that was extracted from the semen. At trial, the parties stipulated the following findings:

> "A major Y-S-T-R Haplotype was identified in the sperm fraction of the stain removed from the crotch area of the victim's underwear which matches the Y-S-T-R Haplotype of [the defendant]. With a 95% upper confidence limit, the major Y-S-T-R Haplotype would be expected to occur in approximately 1 in 370 unrelated African American males, 1 in 430 unrelated Caucasian males, and 1 in 290 unrelated Hispanic males, based on a database of 1,108 African American, 1,311 Caucasian, and 894 Hispanic males."

¶ 27 During closing arguments, the State acknowledged that the DNA evidence regarding the semen found in B.P.'s underwear did not independently prove the defendant's guilt but rather put him in a limited "class of people that could have been the contributors of that semen." Emphasizing that by the State's own admission, the DNA

evidence was "not particularly strong," counsel suggested that the semen found in B.P.'s underwear could have come from someone other than the defendant.

¶ 28 The defendant's postconviction petition alleged that trial counsel was ineffective for failing to find and present a scientific study that could have provided an alternative explanation for the presence of the semen found in B.P.'s underwear. In support of this claim, the defendant attached to his petition a Canadian study finding that in "three independent trials, trace quantities of spermatozoa on clothing resulted from transfer during machine washing." E. Kafarowski *et al.*, *The Retention and Transfer of Spermatozoa in Clothing by Machine Washing*, 29 Can. Soc. Forens. Sci. J. 7, 9 (1996). The defendant thus suggests that it is possible that the semen found in B.P.'s underwear may have been transferred there from other laundry via machine washing and that counsel was ineffective for failing to investigate that possibility. On appeal, the defendant contends that this assertion "is not an indisputedly meritless legal theory."

¶ 29 The defendant's proffered study involved semen that was deposited in and transferred from the inside crotch areas of pairs of underwear onto "pristine pairs" of underwear at random-sample locations. *Id.* at 8-9. The amounts of deposited semen were sufficient for DNA testing before and after machine washing, and the amounts of transferred material were "trace quantities" that were measured in "sperm heads." *Id.* at 9-10. We also note that the transfers were accomplished under controlled conditions, *i.e.*, "[a] 10 minute warm wash, cold rinse setting and phosphate-free detergent were used." *Id.* at 8.

¶ 30 The study states that the trace amounts of transferred material that were identified on the random samples were, unlike the sample here, insufficient to produce DNA profiles and that it is further "unlikely" that such transfers could result in sufficient amounts. *Id.* at 10. Noting that "[t]he potential for further characterization of trace amounts of spermatozoa is limited," the study further suggests that only "[i]n the absence of DNA results and other indicators such as [acid phosphatase] activity" does "transfer during machine washing warrant[ ] equal consideration with direct and secondary transfer as a possible explanation for the presence of small numbers of spermatozoa." *Id*.

¶ 31 Because the sample in the present case was sufficient to produce DNA results, in context, the defendant's proffered study does not support his theory regarding the semen found in B.P.'s underwear. The study indicates that during machine washing, an amount of semen sufficient to produce a DNA profile can be dispersed onto other clothing in amounts insufficient to produce such profiles, not vice versa. In any event, "[i]n Illinois, scientific and medical treatises are hearsay and are inadmissible as proof of the statements contained therein." *Lewis v. Stoval*, 272 Ill. App. 3d 467, 470 (1995). Suggesting that counsel should have found a witness who could have somehow established the relevancy of the machine-washing study to the facts of this case, however, the defendant's petition alleged that counsel was ineffective for not consulting or employing a DNA expert.

¶ 32 It is well-established that "[a] claim that trial counsel failed to investigate and call a witness must be supported by an affidavit from the proposed witness." *People v. Enis*, 194 Ill. 2d 361, 380 (2000); see also *People v. Jones*, 399 Ill. App. 3d 341, 371 (2010).

"In the absence of such an affidavit, a reviewing court cannot determine whether the proposed witness could have provided testimony or information favorable to the defendant, and further review of the claim is unnecessary." *Enis*, 194 Ill. 2d at 380.

¶ 33 Here, the defendant did not support his scientific-study claim with an affidavit from a proposed witness, and he offered no reason for its absence. The apparent inapplicability of the study to the facts of the defendant's case notwithstanding, the trial court thus properly dismissed the claim as unsupported speculation. Furthermore, even if the jury had been presented with an alternative explanation for the semen found in B.P.'s underwear, we cannot say that there is a reasonable probability that the outcome of the defendant's trial would have been different.

¶ 34 The Alleged False Allegations

¶ 35 Prior to trial, the State filed a motion *in limine* seeking to bar the defense from eliciting "testimony from the victim regarding her father's prior conviction for a sex offense." The State argued that the evidence was irrelevant to the defendant's case and that its admission would thus violate the rape shield statute (725 ILCS 5/115-7 (West 2006)). Defense counsel countered that the evidence was relevant with respect to B.P.'s knowledge and motive. By agreement, the trial court tentatively granted the State's request but ruled that counsel could ask B.P. if she was aware of what "the consequences of reporting would be." Notably, there were no suggestions that B.P. had ever accused her father of sexually abusing her. Additionally, when interviewed during the investigation in the present case, she stated that he never had.

¶ 36 The Illinois Department of Corrections' website indicates that in Montgomery County case number 03-CF-25, B.P.'s father, Bryan S. Phillips, was convicted on one count of aggravated criminal sexual abuse of a family member. See http://www2.illinois.gov/idoc/Offender/Pages/InmateSearch.aspx (last visited Oct. 3, 2014); *Rodriguez v. Illinois Prisoner Review Board*, 376 Ill. App. 3d 429, 430 (2007) (noting that a court can take judicial notice of information posted on the Illinois Department of Corrections' official website). The record indicates that Phillips's victim was B.P.'s stepsister, S.M.

¶ 37 The defendant's postconviction petition alleged that his trial attorney "possessed evidence that [B.P.] had made previous unfounded allegations to DCFS about her biological father, Bryan Phillips, prior to this incident." The petition further alleged that trial counsel was ineffective for failing to use that evidence to attack B.P.'s credibility.

¶ 38 In support of these assertions, the defendant attached what appears to be a two-page internet-obtained printout of data entries generated during the investigation into Phillips's sexual molestation of S.M. We note that the document does not specifically identify what investigative agency assembled the information. The document's heading states, "Prior History," and although the entries generally pertain to S.M., B.P.'s name is listed at the top, ostensibly as a search query. One of the entries listed in a section captioned "Intakes" and dated "02/04/2003" states as follows:

> "REP. STATES THAT [B.P.] HAS BEEN TELLING HER CLASSMATES THAT SHE IS HAVING SEX WITH HER FATHER AND THAT SHE MAY BE PREGNANT. SHE SPEAKS VERY EXPLICITLY ABOUT ORAL SEX,

DILDOS, AND HOW MUCH SHE BLEEDS WHEN SHE HAS SEX. SHE SAYS THAT THE SAME THING IS HAPPENING TO [S.M.] INSUFFICIENT INFO FOR LEADS. REP. HAS CALLED CINDY SMITH (MOTHER) TO SCHOOL TODAY FOR A CONFERENCE. PLEASE ADD A VICTIM ([B.P.]) TO THE PENDING REPORT."

¶ 39 A separate entry listed in a section captioned "Allegations" states that the alleged "[s]exual [p]enetration" of B.P. was determined to be "[u]nfounded."

¶ 40 On appeal, the defendant maintains that the two-page printout substantiates his claim that trial counsel was ineffective for failing to impeach B.P. with evidence that she had made previous unfounded allegations to DCFS about her biological father. The defendant failed to attach an affidavit avowing that his attorney had access to the document, however, and as the State notes on appeal, he offers no information as to the source or reliability of the information contained therein. The printout indicates that the intake entry regarding B.P. was generated by "[w]orker" Susan Dubre, for instance, but the defendant failed to attach an affidavit from Dubre identifying the source of the information or explaining why the report was deemed unfounded. Moreover, to the extent that it appears that Dubre was merely recounting what had been reported to her by an unidentified source who was reporting what B.P. had allegedly said to her classmates, the document is, at best, double hearsay. See *Babich v. River Oaks Toyota*, 377 Ill. App. 3d 425, 430 (2007).

¶ 41 As previously stated, "the affidavits and exhibits which accompany a petition must identify with reasonable certainty the sources, character, and availability of the alleged

evidence supporting the petition's allegations," and "the purpose of section 122-2 is to establish that a petition's allegations are capable of 'objective or independent corroboration.' " *Delton*, 227 Ill. 2d at 254 (quoting *People v. Hall*, 217 Ill. 2d 324, 333 (2005)). Here, as with the other claims that he presents on appeal, the defendant failed to satisfactorily comply with section 122-2's "affidavits, records, or other supporting evidence" requirement, which "by itself" justified the trial court's summary dismissal of his petition. *Collins*, 202 Ill. 2d at 66. Moreover, a postconviction claim supported by nothing more than unreliable hearsay further warrants summary dismissal (*Douglas*, 2011 IL App (1st) 093188, ¶¶ 25, 28), and an ineffective-assistance-of-counsel claim cannot be sustained on the failure to offer inadmissible evidence (*People v. Orange*, 168 Ill. 2d 138, 161 (1995); *People v. Denson*, 250 Ill. App. 3d 269, 281 (1993)).

¶ 42 CONCLUSION

¶ 43 To state the gist of a constitutional claim, a postconviction petitioner must satisfy the corroboration requirements of section 122-2. *Hodges*, 234 Ill. 2d at 10, 18. Here, because the defendant failed to meet those requirements, the trial court properly dismissed his petition at the first stage, and we accordingly affirm the court's judgment.

¶ 44 Affirmed.