APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 18-1005

ANTHONY D. LEE, SR.,

Petitioner-Appellant,

v.

KEVIN KINK, Warden, Lawrence Correctional Center,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 11 C 00183 — **Edmond E. Chang**, *Judge.*

ARGUED OCTOBER 22, 2018 — DECIDED DECEMBER 21, 2018 — AMENDED ON DENIAL OF REHEARING JANUARY 25, 2019

Before FLAUM, EASTERBROOK, and SCUDDER, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* After a bench trial, Anthony Lee was convicted of kidnapping and rape. He is serving sentences that add to 100 years'

imprisonment. The state-court judge found that Lee and his friend Burlmon Manley forcibly abducted L.M. about 1 A.M. one day, dragging her into their blue Cadillac while she kicked and screamed. Both Manley and Lee struck and raped L.M. When L.M. resisted, Lee retrieved a pistol from the car's trunk to make her more cooperative. About 3 A.M. L.M. escaped and ran naked to a nearby house. Police took pictures of L.M.'s bloody face. Lee, the only defense witness, said that L.M. entered the car voluntarily and that he did not touch her sexually — though before trial Lee said that he and L.M. had consensual oral sex. The state judge found L.M.'s testimony about her ordeal was "very credible" and stated that the pictures showing her injuries, and the testimony of the person who opened the door to L.M., negated the defense of consent. Lee's convictions were affirmed on direct and collateral review. See *People v. Lee*, 2016 IL App (1st) 152425 (June 30, 2016).

Lee's federal petition under 28 U.S.C. §2254 contends that he did not receive effective assistance of counsel. He asserts that before trial his lawyer received five affidavits that corroborated Lee's story or provided exculpatory details, but that counsel did not interview the affiants. In Lee's post-conviction proceedings the state judiciary did not hold an evidentiary hearing. The appellate decision concluded that none of the affidavits is *necessarily* inconsistent with Lee's guilt, while the evidence against him is strong, so the absence of these witnesses at trial was not prejudicial. The federal district judge held that the state court's decision was not unreasonable, and he denied Lee's petition. *Lee v. Lamb*, 2017 U.S. DIST. LEXIS 198451 (N.D. Ill. Dec. 4, 2017).

The state court's decision includes the text of the affidavits, and the district court's decision summaries them. It is enough for current purposes to give the flavor of how those courts treated the affidavits. Here is the district court's discussion of affidavits signed by Brian and Gayland Massenburg:

> [T]he Massenburgs stated that they witnessed a white woman get into a blue Cadillac. If the woman was indeed L.M., this testimony would have contradicted L.M.'s assertion that she was dragged kicking and screaming into the car, and would have supported Lee's testimony that L.M. willingly joined him and Manley. But as the [Illinois] Appellate Court noted, there are some problems with the proposed testimony. First, the Massenburgs identified the wrong date in their affidavits, stating that the event they witnessed was on April 16, when the crime in fact happened on April 15. Even without the date mix-up, the Illinois Appellate Court reasoned that still the Massenburg's [sic] testimony would not have affected the outcome because their affidavits do not clearly identify L.M., Lee, or Manley. The affidavits state only that the Massenburgs saw a white woman get into a blue Cadillac with two men, but did not provide names or detailed descriptions. Of course, if defense counsel had called these witnesses at trial, then he might have been able to elicit more detail to establish the likelihood that the individuals the Massenburgs saw were the victim and the defendants. But this testimony was not developed (and still has not been

> developed), and the Appellate Court was limited to the affidavits alone. It was not unreasonable for the Appellate Court to conclude, on the limited record available, that the Massenburg's [sic] testimony had ambiguities that would diminish its exculpatory value.

2017 U.S. DIST. LEXIS 198451 at *16-17 (footnotes and citations omitted). This analysis would be convincing, if the law prevented a court from going beyond the affidavits on collateral review. But it does not; a federal court may hold an evidentiary hearing if, through no fault of petitioner's, the state-court record lacks essential facts. 28 U.S.C. §2254(e)(2).

The district judge was right to observe that, "if defense counsel had called these witnesses at trial, then he might have been able to elicit more detail to establish the likelihood that the individuals the Massenburgs saw were the victim and the defendants." At trial the Massenburgs may have avoided the date error and positively identified L.M., Lee, or Manley. Yet there are many blue Cadillacs in the world, so the Massenburgs might also have stated that they did *not* see L.M., Lee, or Manley. Perhaps Lee's lawyer interviewed them and they told him these things, which if so would explain why he did not call them at Lee's trial. Counsel told the state judge at a pretrial conference that "I just have not had time to meet with all these people," but we don't know what, if anything, he did to investigate their potential testimony between then and trial. Perhaps he tried to interview the Massenburgs but could not find them. We just don't know.

The state judiciary's conclusion that the Massenburgs' testimony would not have helped Lee depends on an unstated belief that, if called at trial, they would have parroted their affidavits and refused to say another word. That's unlikely. They might have provided exculpatory testimony, and then, if counsel neglected to contact them (another issue on which the record is short of evidence), a finding of ineffectiveness could follow. See, e.g., *Washington v. Smith*, 219 F.3d 620, 631, 635 (7th Cir. 2000); *Hall v. Washington*, 106 F.3d 742, 749-50 (7th Cir. 1997).

After oral argument, we invited counsel for both sides to file supplemental briefs addressing whether Lee sought an evidentiary hearing in state court, what evidence he proposed to present, and (if Lee asked) why the state judiciary declined to hold a hearing. Counsel representing Illinois did not respond to this invitation, but Lee responded with enthusiasm and, more important, details. The state-court record contains more than a dozen express requests for evidentiary hearings — and, as far as we could see, no explanation by any state judge why these requests were denied. (Indeed, most of the requests do not appear to have been ruled on.)

Section 2254(e)(2) begins: "If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that . . . ." The "unless" clause does not apply, so if Lee "has failed to develop the factual basis of [his] claim," he cannot receive an evidentiary hearing. Yet the affidavits, plus the multiple requests for hearings, show that he did try to develop the record in state court.

What one can say against this is that Lee did not articulate in state court, as clearly as his lawyers have articulated in this appeal, the subjects that a hearing would have covered: what the affiants would have said, had they been called at trial (and whether trial counsel ever met with them to learn what they would have said, if called). Yet by asking for a hearing to explore an ineffective-assistance theory — a theory supported by multiple affidavits — Lee strongly implied what topics would be covered at a hearing. This makes it impossible to say that Lee has "failed to develop [in state court] the factual basis of" his claim. He did what he could, and the absence of evidence about what the trial would have been like, had these affiants testified, must be attributed to the state judiciary's failure to afford him a hearing. He is entitled to one in federal court, and the case is remanded so that one can be held and we can learn what his attorney did (or omitted) and what the affiants would have said on the stand at trial. Only once that information has been gathered can the district court make a reliable decision about the ineffective-assistance claim.

Our analysis has an additional implication: By deciding the merits without receiving the evidence that Lee sought to have considered, the state judiciary acted unreasonably. Illinois observes that *Cullen v. Pinholster*, 563 U.S. 170, 180-86 (2011), holds that, when 28 U.S.C. §2254(d)(1) requires a federal court to reject a collateral challenge, the court may not hold an evidentiary hearing and consider evidence not presented to the state judiciary. Illinois wants us to treat this as equivalent to a rule that state courts may insulate their decisions from federal review by refusing to entertain vital evidence. Yet a state court's

refusal to consider evidence can render its decision unreasonable under §2254(d)(2) even when its legal analysis satisfies §2254(d)(1).

Section 2254(d)(2) provides that "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding" lacks the shelter of §2254(d) as a whole. If the affidavits were all Lee had offered the state judiciary, then its decision may have been a reasonable application of the law to a reasonable determination of the facts. But Lee wanted to introduce more, and the state barred the door. *Pinholster* concerns the application of §2254(d)(1) to a state court's legal reasoning; it does not prevent a federal court from finding factual aspects of a state court's decision unreasonable under §2254(d)(2). See 563 U.S. at 184-85 n.7. By assuming that the language of the five affidavits would have been the totality of the witnesses' testimony had they been called a trial, the state made an unreasonable factual determination under §2254(d)(2), which permits a federal evidentiary hearing under §2254(e)(2).

VACATED AND REMANDED

APPENDIX B

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VACATED AND REMANDED

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANTHONY LEE,	)	
	)	
Petitioner,	)	Case No. 11 C 00183
	)	
v.	)	Judge Edmond E. Chang.
	)	
NICHOLAS LAMB, Warden, Lawrence Correctional Center,	)	
	)	
	)	
Respondent.	)	

MEMORANDUM OPINION AND ORDER

Anthony Lee has filed a petition for a writ of habeas corpus, challenging his 1996 state-court convictions for rape and kidnapping. He argues that his lawyer did not provide effective assistance, in violation of the Sixth Amendment right to counsel.[1]

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[1] This Court has subject matter jurisdiction over the case under 28 U.S.C. § 2241. The previous caption referenced Tarry Williams as Respondent because he was the warden of the facility where Lee was incarcerated when he originally filed his federal habeas petition. Lee is now incarcerated at Lawrence Correctional Center. Under Federal Rule of Civil Procedure 25(d), the Clerk's Office shall substitute Nicholas Lamb, the current warden of Lawrence Correctional Center, as Respondent.

R. 96, Am. Pet.[2] The state responds that Lee cannot obtain relief because the Illinois Appellate Court rejected Lee's claim on the merits, and did not unreasonably apply federal law. R. 107, Answer at 15. The Court agrees: the Illinois Appellate Court's decision on Lee's ineffective-assistance claim was not unreasonable, so Lee's habeas petition must be denied. But because it is a close enough question, a certificate of appealability will issue.

I. Background

Anthony Lee was convicted in a bench trial of kidnapping and raping a woman, whom the parties refer to as L.M. At trial, the only defense witness was Lee himself. Defense counsel did not call five witnesses who Lee says would have corroborated his version of the events (or at least parts of Lee's version). Counsel's failure to call—and, Lee asserts, to even investigate—the five witnesses is the basis of this habeas petition. To understand how those witnesses might have fit into the case, it is necessary to learn about the prosecution's evidence.

A. Trial Court Proceedings

1. The State's Case

The state's first witness, Teresa Baragas, testified that, at around 3 o'clock in the morning on April 15, 1995, she awoke to hear a young woman banging on her door. Am. Pet. Exh. 5, Trial Tr. Vol. B at 13:22-14:14:8. The young woman, whom Baragas identified

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See Rule 2(a) of the Rules Governing Section 2254 Cases in the United States District Courts.

[2] Citations to the record are noted as "R." followed by the docket number and the page or paragraph number.

as L.M., was screaming and saying that she had been raped. *Id.* at 14:21-24. Baragas testified that L.M. was completely naked and that she had black eyes and her face was "marked up and scarred." *Id.* at 14:10-20.

Next, the state called L.M. She testified that, in the early morning hours of April 15, 1995, she argued with a friend at the Sweet Water Lounge in Calumet City. Am. Pet. Exh. 5, Trial Tr. Vol. B at 18:5-19:2. L.M. left the lounge around 1:00 a.m. and began to walk down State Street toward her sister's house. *Id.* at 18:13-18. As she was walking, she was approached by two men in a Cadillac, who asked whether she needed a ride. L.M. declined. *Id.* at 19:6-12. The car pulled away, but it soon turned around and pulled over. *Id.* at 19:19-24. The passenger, Burlmon Manley, got out of the car and grabbed L.M. from behind. L.M. testified that she kicked and screamed, but that Manley bound her hands and dragged her into the back seat of the Cadillac. *Id.* at 20:6-24. L.M. identified Lee as the driver of the Cadillac. *Id.* at 21:24.

L.M. testified that the two men took her to a liquor store or lounge in Hammond, Indiana. Am. Pet. Exh. 5 Trial Tr. Vol. B at 22:6-7. She stated that Lee went into the store to get drinks while Manley remained in the back seat with her and kissed and fondled her without consent. *Id.* at 22:14-23:24. Lee then drove the car back to Chicago. *Id.* at 25:1-18. During the drive, Manley and L.M. had a conversation about Manley's job and their birthdays. *Id.* at 26:7-12. Manley also asked whether L.M. had ever been with a black man, and continued to stroke and kiss her despite her protests. *Id.* at 26:7-27:5.

Lee eventually parked the car in an unfamiliar place. Lee got out of the driver's seat and into the back seat next to L.M. Am. Pet. Exh. 5 Trial Tr. Vol. B at 28:16-29:17. Lee began to pull off L.M.'s clothing, hitting her in the head with his fists when she told him to stop. *Id.* at 29:19-30:22. Lee then forced L.M.'s head down into Manley's lap and forced her to perform oral sex on Manley. *Id.* at 31:18-32:11. At some point, Lee left the car and went into a nearby "crack house." *Id.* at 32:22-23. After several minutes of oral sex, Manley pushed L.M. onto her back in the back seat and vaginally raped her. *Id.* at 33:12-34:14. About five minutes later, Lee came back to the car and beat L.M. again with his fist, swearing at her and striking her in the head and face ten to fifteen times. *Id.* at 34:17-36:6. Lee threatened to take L.M. into the crack house and sell her to the men inside, who, according to Lee, would rape and kill her. *Id.* at 36:10-13.

L.M. further testified that Lee became more and more angry that L.M. was "hysterical," and told Manley "fuck this bitch, go in the trunk and get the nine." Am. Pet. Exh. 5 Trial Tr. Vol. B at 38:21-39:4. Manley got out of the car and got a handgun from the trunk. Id. at 39:6-7. Manley gave the gun to Lee, who held it to L.M.'s forehead as he raped her vaginally and anally. Id. at 39:6-42:4. L.M. testified that she had bruises on her back and sides from Lee forcing her down in the back seat. *Id.* at 42:22-24. At some point, Manley, who had been driving, stopped the car and had an argument with Lee. *Id.* at 43:11-44:17. Lee got back in the driver's seat and Manley left the car and went into a building. *Id.* at 45:4-10. Lee drove another few blocks, then stopped the car again. *Id.* at 45:24-46:2. Lee reclined the driver's seat, and, still holding the gun, told L.M. "okay, bitch, you are going to suck

me off now." *Id.* at 46:4-23. Lee pushed L.M.'s head down and forced her to perform oral sex until he ejaculated. *Id.* at 47:1-48:3. At this point, L.M. realized that Lee had dropped the gun. *Id.* at 48:10-11. Seeing her chance, L.M. started striking Lee in the face. *Id.* at 48:18-23. During the scuffle, L.M. was able to open the door and tumble out of the car. *Id.* at 49:5-10. Lee "took off like a maniac," and L.M. ran to a nearby house and started beating on the door, naked and screaming for help. *Id.* at 49:19-50:9. Teresa Baragas answered the door and called the police. *Id.* at 50:10-16.

The state introduced photographs of L.M. taken in the days after the attack. The photographs showed evidence of a severe beating: L.M.'s eyes were blackened, and her nose and mouth were swollen. Am. Pet. Exh. 5 Trial Tr. Vol. B at 51:19-22. Another photograph showed bite marks on L.M.'s left hand, which resulted in a permanent scar. *Id.* at 53:16-21. Other photographs showed bruising on L.M.'s back and arms from being restrained and forced down. *Id.* at 55:8-17.

Next, the state called Detective Robert Morrison, who read a written statement given by Lee during police interrogation. Am. Pet. Exh. 6, Trial Tr. Vol. C at 8:18-20. In the statement, Lee related that Manley had consensual sex with L.M. in Lee's car, and that L.M. had performed oral sex on Lee in exchange for an offer of drugs. *Id.* at 14:4-15:17. Finally, the state presented evidence of Lee's prior felony stalking conviction. *Id.* at 37:11-38:2

2. Lee's Case

Lee's trial counsel called only Lee himself as a witness. Lee testified that L.M. got into the car voluntarily after she spoke with Manley for a few minutes. Am. Pet. Exh. 7, Trial Tr. Vol. D at 59:19-24. L.M. directed them to Dad's liquor store in Hammond, Indiana. *Id.* at 60:13-61:9. At the liquor store, Manley and Lee both got out of the car and went inside, leaving L.M. alone in the car for about 20 minutes. *Id.* at 61:18-62:17. Lee testified that he left his keys in the car with L.M. *Id.* at 62:2-5. The group then drove to L.M.'s house in Hammond so that L.M. could drop something off. *Id.* at 63:13-18.

The three returned to Chicago, where they stopped to let L.M. buy marijuana from a street dealer. Am. Pet. Exh. 7, Trial Tr. Vol. D at 64:4-6. They continued to Merrill Park, where they sat around drinking and talking. *Id.* at 64:7-17. At the park, L.M. and Lee got into a fight because L.M. put out a cigarette on the carpet of Lee's car. *Id.* at 64:19-6. Lee swore at L.M. and hit her on the head. *Id* at. 66:6-67:10. The two fought, and Lee punched L.M. and bit her. *Id.* at 67:17-22.

Lee got out of the car and sat on a nearby stump drinking beer for about 30 minutes. Am. Pet. Exh. 7, Trial Tr. Vol. D at 68:5-14. Manley got out of the car and asked if Lee had condoms, and Lee gave Manley two condoms from the trunk. *Id.* at 69:20-70:1. Lee waited on the stump another 20 or 30 minutes. *Id.* at 70:13-14. When he came back to the car, he saw Manley lying on top of L.M. *Id.* at 70:21-24. Lee got into the car and drove to 84th and Buffalo, where Manley got out. *Id.* at 71:13-20.

After Manley left the car, L.M., who was naked, got into the front passenger seat. Am. Pet. Exh. 7, Trial Tr. Vol. D at 72:2-9. According to Lee, L.M. abruptly hit him in the eye, jumped out of the car, and said "you bastards are going to pay for this." *Id.* at 72:11-15. Lee testified that he never had intercourse or oral sex with L.M. *Id.* at 72:19-23. On redirect, Lee's counsel asked about Lee's statement to police (in which he stated that he asked L.M. to perform oral sex on him). Lee explained that he was not in the room during the entire time the statement was typed, and that he did not read all of the typed statement before signing it. *Id.* at 125:6-12.

3. Verdict and Sentencing

After closing arguments, the trial judge found Lee guilty of aggravated sexual assault and aggravated kidnapping. Am. Pet. Exh. 7 at 172:8-17. The judge stated that "[t]he case does come down to credibility. The Court finds [L.M.] very credible." *Id.* at 166:11-13. He also noted that the picture showing L.M. with black eyes and a split lip "itself shows the sex was not consensual." *Id.* at 166:13-23. Lee was sentenced to 100 years' imprisonment in the Illinois Department of Corrections. Am. Pet. Exh. 8, Sentencing Tr. at 26:2-14. At the same hearing, the trial court denied Lee's motion for a new trial based on his counsel's failure to interview witnesses. *Id.* at 29:3-12.

B. Witnesses Not Called at Trial

Lee's sole claim for habeas relief is based on his trial counsel's failure to call five particular witnesses. *See* Am. Pet. at 1-3. According to Lee, these witnesses would have backed up his version of events or cast

doubt on L.M.'s credibility. Lee claims that his counsel failed to even investigate these witnesses, despite receiving affidavits from the five witnesses describing their likely testimony.[3] The affidavits submitted by the witnesses are summarized below.

1 and 2. Brian and Gayland Massenburg

Brian and Gayland Massenburg submitted affidavits stating that "on or about" April 16, 1995 at approximately 12:30-1:30 a.m., Gayland's car broke down in Calumet City. As they were pushing the car down State Street, two men approached in a blue Cadillac and asked if they needed help. The Massenburgs declined. The two men turned the car around and started talking to a white woman. The woman "got into the rear of the car," and they drove off going east on State Street. Am. Pet. Exh. 2, Brian Massenburg Aff., Gayland Massenburg Aff.

3. Charlene Parker

Charlene Parker's affidavit states that she was in Dad's Lounge and Package Goods in Hammond, Indiana on April 15, 1995. She reported that she took a photo of Anthony Lee and Burlmon Manley together

[3] Around five months before the trial, Lee's trial counsel stated, at a pretrial conference, that he had been contacted by several witnesses, but that he had not yet had time to meet with them. Am. Pet. Exh. 3 at 2:19-3:4. There is no evidence that Lee's counsel ever followed up with these witnesses: he did not respond when Lee accused him of failing to investigate the witnesses, *see* Am. Pet. Exh. 8, Sentencing Tr. at 28:14-30:4, and one of the witnesses, Phillip Elston, submitted an affidavit saying he was never contacted. Am. Pet. Exh. 2, 2008 Elston Aff. But, because Lee's petition fails on the prejudice element, it ultimately does not matter what steps (if any) counsel took to investigate these witnesses.

at Dad's between approximately 1:00 and 1:30 a.m. She also mentions that the photo is attached to the affidavit, but no photo was part of the record submitted to the Illinois Appellate Court. Am. Pet. Exh. 2, Parker Aff.; Am. Pet. Exh. 16, Appellate Ct. Postconviction Op. at 29-30.

4. Phillip Elston

Phillip Elston's 1995 affidavit attests that he was driving past Merrill Park between 3:30 and 4:00 a.m. when he noticed Anthony Lee's car. Lee was sitting on a curb near his car drinking beer. Elston noticed a man and a woman entering Lee's car via the rear door. Lee walked up to Elston's car. Elston asked what was going on and Lee said "His friend Jr.[4] pulled this female." Lee got in Elston's car and the two went to get cigarettes. Elston drove Lee back to his car, and Lee got in and drove north. Am. Pet. Exh. 2, 1995 Elston Aff.

Elston provided a second affidavit in 2008. In this affidavit, Elston states that the incident described in his first affidavit took place on "April 15/16, 1995." He further averred that he sent copies of his affidavit to Lee's trial counsel and sent him a letter saying that he was willing to testify on Lee's behalf, but that counsel never contacted him. Am. Pet. Exh. 2, 2008 Elston Aff.

[4] Manley apparently went by "Junior." *See* Am. Pet. Exh. 5, Trial Tr. Vol. B at 26:11.

5. Gail Pinkston

Gail Pinkston's affidavit states that on August 4, 1995, she received a call from "Burrell Manny," who was then in jail. "Burrell" told her about an incident in April 1995 with a "white female." Specifically, he told Pinkston that he had sex with the white woman in the back seat of Lee's car, and that Lee was "no where around during that sexual encounter." He further stated that "if he (Burrell) goes down on this case that he would take Anthony down with him." Am. Pet. Exh. 2, Pinkston Aff.

C. Postconviction Review

Lee's quest to overturn his conviction spanned decades and numerous claims for relief in Illinois and federal court. See Am. Pet. Exh. 12, Am. Successive Pet. for Postconviction Relief at 11-16 (describing the state court procedural history); Am. Pet. ¶¶ 28-42 (describing the federal habeas petition). The details of Lee's trek through the labyrinth of state and federal postconviction review are mostly irrelevant here.[5] The only procedural steps that are important for purposes of the current Amended Petition are as follows: After several denials of relief in the lower Illinois courts, the Illinois Supreme Court exercised its supervisory

[5] The state (rightly) does not argue that Lee's petition is barred by the doctrines of exhaustion or procedural default, so the details of when he presented his claim and why it was rejected do not matter, except when it comes to the last state court adjudication on the merits, which is the state-court decision relevant for § 2254(d) purposes.

authority to instruct the Appellate Court to instruct the Circuit Court to permit Lee to file a successive petition for postconviction relief on his ineffective assistance of counsel theory. R. 108, State Court Record Exh. E, Denial of Pet. Leave App. On remand, the Cook County Circuit Court denied Lee's successive petition on the merits, holding that he had not established the "prejudice" element of the *Strickland* test. Am. Pet. Exh. 14, Circuit Ct. Hearing Tr. at 13:9-12. The Illinois Appellate Court heard the appeal and affirmed the Circuit Court's denial on the merits, likewise holding that Lee could not establish that he was prejudiced by his counsel's allegedly defective performance. Am. Pet. Exh. 16, Appellate Ct. Postconviction Op. at 32. Lee petitioned for leave to appeal the decision to the Illinois Supreme Court and was denied in a summary order. Am. Pet. Exh. 18. Lee timely filed this Amended Petition for federal habeas corpus under 28 U.S.C. § 2254. R. 95-96.

II. Legal Standard

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, sets up a "formidable barrier" for prisoners seeking habeas relief. *Burt v. Titlow*, 134 S. Ct. 10, 16 (2013). If a state court has adjudicated the prisoner's claim on the merits, a federal court may not grant habeas relief unless the state court's decision was contrary to, or an unreasonable application of, clearly established federal law as determined by the United

States Supreme Court. 28 U.S.C. § 2254(d)(1). A state court's decision is "contrary to" clearly established Supreme Court law "if the state court arrives at a conclusion opposite to that reached by th[e] Court on a question of law or if the state court decides a case differently than th[e] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). Alternatively, under the "unreasonable application" part of the AEDPA standard, a habeas petitioner must demonstrate that although the state court identified the correct legal rule, it unreasonably applied the controlling law to the facts of the case. *See id.* at 413. A merely erroneous decision is not necessarily an "unreasonable application" of federal law under the meaning of § 2254(d). *Hardaway v. Young*, 302 F.3d 757, 762 (7th Cir. 2002).

In this case, Lee argues that he was denied effective assistance of counsel in violation of the Sixth Amendment. Under *Strickland v. Washington*, 466 U.S. 668 (1984), a trial lawyer is ineffective if the performance was deficient and if prejudice resulted. *Id.* at 687. For the performance element, the question is whether "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. On prejudice, the question is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In making the prejudice determination, a court must consider "the

totality of the evidence before the judge or jury." *Id.* at 695. Lee must satisfy both prongs to make out an ineffective assistance claim. *Id.* at 687.

III. Analysis

Under 28 U.S.C. § 2254(d), the relevant decision for review is the decision of the last state court to decide the merits of the petitioner's claims. *Morgan v. Hardy*, 662 F.3d 790, 797 (7th Cir. 2011). In this case, the relevant decision is the Illinois Appellate Court's June 30, 2016 opinion upholding the circuit court's dismissal of Lee's successive petition for postconviction relief. *See* Am. Pet. Exh. 16.

A. Reasonableness of the Illinois Appellate Court Decision

The Illinois Appellate Court correctly identified the governing legal standard for the prejudice element of the *Strickland* analysis, noting that Lee must show a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. Am. Pet. Exh. 16, Appellate Ct. Postconviction Op. at 26. The Illinois Appellate Court's decision cannot be disturbed if its application of the *Strickland* standard was "minimally consistent with the facts and circumstances of the case." *Schultz v. Page*, 313 F.3d 1010, 1015 (7th Cir. 2002).

The Appellate Court's decision—although perhaps not the result this Court would reach on a blank slate—is not so deficient as to be unreasonable. The

Appellate Court considered each affidavit in some detail, and considered how those affidavits fit into the evidentiary picture of the trial as a whole. As the Appellate Court pointed out, each affidavit has problems that would tend to undermine the evidentiary value of the proposed witness testimony. Considered against the backdrop of the state's relatively strong evidence at trial, it was not unreasonable for the Appellate Court to conclude that Lee was not prejudiced by counsel's failure to call the affiants.

First, the Massenburg affidavits. The possible value of the Massenburgs' testimony is obvious: the Massenburgs stated that they witnessed a white woman get into a blue Cadillac. If the woman was indeed L.M., this testimony would have contradicted L.M.'s assertion that she was dragged kicking and screaming into the car, and would have supported Lee's testimony that L.M. willingly joined him and Manley.[6] But, as the Appellate Court noted, there are some problems with the proposed testimony. First, the Massenburgs identified the wrong date in their affidavits, stating that the event they witnessed was on April 16, when the crime in fact happened on April

[6] The Appellate Court suggests that it is unclear from the affidavits whether the woman was coerced into the vehicle. Am. Pet. Exh. 16, Appellate Ct. Postconviction Op. at 29. But the affidavits state that the woman "got into the car." To read this phrase as being inconsistent with the coercion L.M. described—she testified that she was dragged kicking and screaming into the car—is not reasonable.

15. Even without the date mix-up, the Illinois Appellate Court reasoned that still the Massenburg's testimony would not have affected the outcome because their affidavits do not clearly identify L.M., Lee, or Manley. *See* Am. Pet. Exh. 16, Appellate Ct. Postconviction Op. at 29. The affidavits state only that the Massenburgs saw a white woman get into a blue Cadillac with two men, but did not provide names or detailed descriptions. Of course, if defense counsel had called these witnesses at trial, then he might have been able to elicit more detail to establish the likelihood that the individuals the Massenburgs saw were the victim and the defendants. But this testimony was not developed (and still has not been developed), and the Appellate Court was limited to the affidavits alone. It was not unreasonable for the Appellate Court to conclude, on the limited record available, that the Massenburg's testimony had ambiguities that would diminish its exculpatory value.

The Parker affidavit also had a weakness that would tend to lower its value. Parker testified that she saw Manley and Lee together in Dad's Lounge in Hammond, Indiana around 1:00-1:30 a.m. on April 15. This testimony might have undermined L.M.'s credibility and supported Lee's story: L.M. testified that Manley stayed in the back seat of the car with her while Lee went into a liquor store in Hammond, whereas Lee testified that he and Manley went into the liquor store together, leaving L.M. alone in the

car. Parker's testimony that she saw Lee and Manley together in Dad's would support Lee's version. But the affidavit was not a slam dunk for Lee, because Parker's testimony was not necessarily inconsistent with L.M.'s version of events. L.M. testified that she was abducted at "approximately" 1:00 a.m., but the timeline was not firm. *See* Am. Pet. Exh. 5, Trial Tr. Vol. B at 18:5-10. She also testified that Manley told her he had "just left a club in Hammond" before he grabbed her. *Id.* at 26:9-10. The Appellate Court reasoned that Parker might have seen Lee and Manley together in Dad's *before* they abducted L.M., and that would not undermine L.M.'s version that the three later returned to Dad's and only Lee went inside. *See* Am. Pet. Exh. 16, Appellate Ct. Postconviction Op. at 29-30. This sequence of events is perfectly possible given the uncertain timing of the events described by L.M. and Parker. The Appellate Court was not unreasonable to decide that Parker's testimony was consistent with L.M.'s testimony.

Elston's affidavits also suffer from unclarity about timing. Elston stated that he saw Lee sitting near his car drinking beer around 3:30 or 4:00 a.m., and that he saw a man and a woman enter Lee's backseat while Lee was sitting outside. Elston also said that he spoke to Lee, who said "His friend Jr. pulled this female,"[7]

[7] The Appellate Court thought that "pulled" might mean "coerced," but gave Lee the benefit of the doubt and assumed that it did not mean coerced. Am. Pet. Exh. 16, Appellate Ct. Postconviction Op. at 30-31.

and that Elston and Lee went on a cigarette run together. There is a problem with the timeline: Elston stated that he saw Lee around 3:30 or 4:00 a.m., but Teresa Baragas testified at trial that L.M. knocked on her door around 3:00 a.m. Am. Pet. Exh. 5, Trial Tr. Vol. B at 13:22-14:3. Of course, either Baragas or Elston might have been mistaken about the time, but there was no evidence to tip the scale in Elston's favor before the Appellate Court. And as between the two, the state could have argued that Baragas was the more reliable witness, both because she did not know Lee (so had no bias one way or the other) and because she described a harrowing experience that would be more likely impressed on her memory. Most importantly, at a minimum, it was reasonable for the Illinois Appellate Court to conclude that Elston's uncertainty on timing might undercut the value of his testimony.[8]

Finally, the Appellate Court dismissed the Pinkston affidavit as unhelpful. Pinkston averred

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[8] The state points out in its brief that, even aside from the timing issue, Elston's account may actually have undermined Lee's testimony, because Lee never mentioned the cigarette run. *See* Answer at 23. But this reasoning does not appear to have played a role in the Appellate Court's decision, which focuses entirely on the timing issue. When a state court's last adjudication on the merits is a reasoned decision, the issue is the reasonableness of the state court's analysis, not the reasonableness of the overall result on a blank slate untethered from the state court's reasoning. *See Williams*, 529 U.S. at 413. The same can be said of the state's arguments about the other affidavits: the focus must be on the state court's reasoned decision.

that she received a call from "Burrell Manny" (clearly referring to Burlmon Manley), and that Manley stated that he "had sex with that white female in the back seat of Anthony's car, and that Anthony was no where around." Am. Pet. Exh. 2, Pinkston Aff. The Appellate Court reasoned that this proposed testimony actually contradicted Lee's trial testimony, because Lee testified that he was driving his car while Manley and L.M. had sex in the back seat.[9] *See* Am. Pet. Exh. 16, Appellate Ct. Postconviction Op. at 31-32. Again, this detail might not have been fatal to Pinkston's testimony—Manley, after all, might have been referring to the time when Lee was sitting outside on the stump while Manley and L.M. were in the back seat—but the uncertainty does detract from the probative value of the proposed testimony.

The Appellate Court concluded that, even assuming that the affiants would testify consistent with their affidavits and that they would be found completely credible, there was no reasonable probability that their testimony would have changed the outcome at trial. Am. Pet. Exh. 16 at 32. Although it is a close call, the Appellate Court's conclusion was not unreasonable in light of the strength of the state's case against Lee. This point is crucial: the trial did *not* just boil down to a "swearing contest" between Lee

[9] Lee actually testified that he started driving while Manley was lying on top of L.M., Am. Pet. Exh. 7, Trial Tr. Vol. D at 70:21-23, but did not state outright that they were having sex. But it would not be unreasonable to infer from this comment that Manley and L.M. were having sex.

and L.M., despite Lee's argument to the contrary. See Am. Pet. at 1. L.M.'s story was backed up by strong circumstantial evidence, as the Illinois Appellate Court explained in the opinion affirming the postconviction petition's denial. Am. Pet. Exh. 16, Appellate Ct. Postconviction Op. at 9. Teresa Baragas, a disinterested witness with no motive to lie, testified that L.M. banged on her door at three in the morning, naked, bloody, bruised, and screaming that she had been raped. *See* Am. Pet. Exh. 5, Trial Tr. Vol. B at 14:2-24. This behavior is utterly inconsistent with Lee's tale of a consensual encounter. L.M.'s testimony was also backed up by extensive evidence of her injuries, including photographs showing bruises to her face, head, back, and arms. These injuries are not at all likely to have been caused by consensual sex, and are too extensive to be explained by the scuffles that Lee described. Considering the strength of the circumstantial evidence in L.M.'s favor and the assorted inconsistencies and ambiguities in the testimony of the five proposed witnesses, the Appellate Court's conclusion that Lee was not prejudiced was reasonable. This means that the Court cannot grant Lee relief. To be entitled to relief, Lee must show that the Illinois Appellate Court unreasonably held that he failed to meet the prejudice element of the *Strickland* test. This he has not done.[10]

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[10] In light of the conclusion on the prejudice element, like the Illinois Appellate Court, this Court need not reach the deficient-performance element.

B. Certificate of Appealability

Under Rule 11(a) of the Rules Governing § 2254 Cases, the Court must issue or deny a certificate of appealability when it enters a final order adverse to a petitioner. To obtain a certificate of appealability, "the applicant [must] ma[ke] a substantial showing of the denial of a constitutional right." § 2253(c)(2). A "substantial showing" has been made when "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner." *Slack v. McDaniel*, 529 U.S. 473, 475 (2000). As discussed, this case is a close call. Ultimately, the § 2254(d) deference mandate tipped the balance, along with the strength of the evidence supporting the state's case. But reasonable minds could disagree. Accordingly, a certificate of appealability shall issue on whether the Illinois Appellate Court reasonably held that Lee's trial counsel failed to provide ineffective assistance of counsel under the Sixth Amendment.

IV. Conclusion

The Court is bound by § 2254(d) to defer to the Illinois Appellate Court's decision. The habeas petition is denied, but because reasonable minds could differ, the Court issues a certificate of appealability.

ENTERED:

s/Edmond E. Chang
Honorable Edmond E. Chang
United States District Judge

DATE: December 4, 2017

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

January 25, 2019

Before

JOEL M. FLAUM, *Circuit Judge*

FRANK H. EASTERBROOK, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 18-1005	)	Appeal from the
	)	United States District
ANTHONY D. LEE, SR.,	)	Court for the
Petitioner-Appellant,	)	Northern District of
	)	Illinois, Eastern
v.	)	Division.
	)	
KEVIN KINK,Warden,	)	No. 11 C 00183
Lawrence Correctional	)	Edmond E. Chang,
Center,	)	*Judge*.
Respondent-Appellee.	)	

Order

Respondent-appellee filed a petition for rehearing and rehearing en banc on January 3, 2019. No judge in regular active service has requested a vote

on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing and to issue an amended opinion. This court's opinion dated December 21, 2018, is amended in a separately filed opinion released today. The petition for rehearing is therefore DENIED.

APPENDIX E

People v. Lee, 65 N.E.3d 845 (Table) (2016)

65 N.E.3d 845 (Table)
(This disposition of a Petition for Leave to Appeal is referenced in the North Eastern Reporter.)

Supreme Court of Illinois

People

v.

Anthony D. Lee, Sr.

NO. 121061

NOVEMBER TERM, 2016

November 23, 2016

Synopsis
Lower Court: 2016 IL App (1st) 152425, 405 Ill.Dec. 1, 57 N.E.3d 686

Opinion
Disposition: Denied.

All Citations

65 N.E.3d 845 (Table), 408 Ill.Dec. 369

APPENDIX F

2016 IL App (1st) 152425

No. 1-15-2425

Opinion filed June 30, 2016

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellant,	)	
v.	)	No. 95 CR 24818
ANTHONY D. LEE, SR.,	)	Honorable Michell M. Pittman,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE GORDON delivered the judgment of the court, with opinion.

Presiding Justice Reyes and Justice Lampkin concurred in the judgment and opinion.

OPINION

¶ 1 Defendant Anthony Lee was convicted after a bench trial of five counts of aggravated criminal sexual assault and one count of aggravated kidnapping, and sentenced to a total of 100 years in the Illinois Department of Corrections (IDOC). Defendant's convictions and sentences were affirmed on direct appeal. *People v. Lee*, No. 1-96-3069 (1998) (unpublished order under Supreme Court Rule 23).

¶ 2 On this postconviction appeal, defendant claims that the trial court erred in dismissing his successive postconviction petition at the second stage, because he made a substantial showing of ineffective assistance of trial counsel. Defendant included supporting affidavits from five affiants with his petition, and he claims that his counsel was ineffective for failing to call these individuals at trial.

¶ 3 Defendant's postconviction proceedings have been the subject of two separate supervisory orders from the Illinois Supreme Court directing this court to vacate our prior orders affirming dismissal and to reconsider defendant's petition and supporting affidavits. Thus, we have quoted below the supporting affidavits in full. However, even after considering carefully both our supreme court's orders and the petition and supporting affidavits, we find that we have no choice by to affirm this dismissal.

¶ 4 BACKGROUND

¶ 5 When we affirmed defendant's convictions and sentences on direct appeal, we set forth the underlying facts of the case. Thus we will repeat here

only what is necessary to understand the issues on this appeal.

¶ 6 At trial, the victim, L.M., testified that on April 15, 1995, at around 1 a.m. she was walking on State Street in Calumet City to her sister's home, when two men in a vehicle pulled up, grabbed her and forced her into their vehicle. They then drove to Indiana, where defendant entered either a "liquor store or lounge," while codefendant, Burlmon Manley, remained in the vehicle and touched the victim against her will, specifically, touching her breast and vaginal area through her clothing and kissing her face and neck. At some point, codefendant told the victim where he worked and that he had "just left a club in Hammond." After defendant returned to the vehicle, they drove to an unknown location where defendant ripped off the victim's clothing, struck her head and face repeatedly with his fist and forced her to perform oral sex on codefendant. The victim was crying hysterically, and defendant became angry and instructed codefendant to "get the nine" from the vehicle's trunk. Codefendant returned with a gun, gave the gun to defendant, and then drove to another location. Defendant held the gun to the victim's head while he forced her to have vaginal intercourse and to perform oral sex on him. When the victim realized that defendant had released his grip on the gun, she struggled with defendant and managed to escape the vehicle. She ran into a nearby house and defendant drove away.

¶ 7 Teresa Baragas testified that at 3 a.m., she was awakened by the victim banging on her door. Baragas and her aunt opened the door to find the victim who was naked, with black eyes and a "marked up and scarred" face, screaming that she had been raped.

They called the police and the victim was transported to the hospital in an ambulance.

¶ 8 Several months later, the victim identified defendant in a lineup.

¶ 9 Defendant testified that the victim voluntarily entered his vehicle, that she waited while he and codefendant entered a liquor store or lounge together, and that the three of them drank alcohol and smoked marijuana together. Defendant cussed at her after she stamped out a cigarette on the floor of his vehicle. She then pushed his arm, causing him to spill his drink, and he struck her. After the two of them exchanged blows, he exited the vehicle and sat on the curb, drinking beer, while the victim and codefendant remained in the vehicle. After close to an hour, defendant returned to the vehicle and drove to another location, while the victim and codefendant had sex in the backseat. When they stopped, codefendant exited the vehicle; and the victim, who was completely naked, hit defendant in the eye and jumped out of the vehicle, stating "you bastards are going to pay for this." At trial, defendant denied having any sex or any sexual contact with the victim,[1] and he denied that either he or codefendant had a gun that night.

¶ 10 At the end of the bench trial, the trial court stated that it found the victim "very credible" and found defendant's testimony "incredible." The trial court further stated that the photograph of the victim's

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[1] Giving defendant every benefit of the doubt on this appeal, we do not consider defendant's pretrial statement which defendant has consistently denied making. In the statement, he stated that he had consensual oral sex with the victim.

injures "shows that this was not a consensual act." The trial court found defendant guilty of five counts of aggravated criminal sexual assault and one count of aggravated kidnapping and, after considering factors in aggravation and mitigation, sentenced defendant to a total of 100 years in IDOC. This total included an extended term sentence of 60 years on three counts of aggravated criminal sexual assault, a consecutive extended term sentence of 40 years on the other two counts of aggravated criminal sexual assault under an accountability theory for codefendant's sex with the victim, and a concurrent 15 years for aggravated kidnapping. Defendant did not raise an ineffective assistance claim on direct appeal and his convictions and sentences were affirmed on direct appeal. *People v. Lee*, No. 1-96-3069 (1998) (unpublished order under Supreme Court Rule 23).

¶ 11 On December 23 1998, after this court's decision on direct appeal and our supreme court's decision to deny leave to file an appeal, defendant filed a *pro se* postconviction petition, alleging, among other claims, that his trial counsel was ineffective for failing to interview or call eight witnesses after defendant had informed counsel about them. These witnesses included Brian and Gayland Massenburg; Charlene Parker; and Philip Elston. Defendant's 1998 petition included affidavits from these witnesses, and defendant alleged that they could have exonerated him at trial.

¶ 12 The 1998 petition advanced to the second stage, and defendant's appointed counsel filed a supplemental petition on June 25, 2001. One June 10, 2002, the trial court granted the State's motion to dismiss on the ground that the petition was untimely.

On March 5, 2004, we reversed and remanded, in order to permit counsel to comply with Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984). *People v. Lee*, No. 1-02-1707 (unpublished order under Supreme Court Rule 23). After the case was remanded, the trial court again dismissed it on March 30, 2007, "based on *res judicata* and untimeliness." On appeal, we affirmed the dismissal as untimely. *People v. Lee*, 1-07-0914 (2008) (unpublished order under Supreme Court Rule 23). On May 29, 2009, the Illinois Supreme Court issued a supervisory order that directed this court to vacate the portion of our 2008 order, which found the petition untimely, and to review the trial court's dismissal based on *res judicata*. *People v. Lee*, No. 108250 (Ill. May 2009) (supervisory order).

¶ 13 This court then withdrew our 2008 order, but we again affirmed the dismissal of defendant's petition, which defendant had originally filed in 1998. *People v. Lee*, No. 1-07-0914 (2009) (unpublished order under Supreme Court Rule 23). We observed that defendant had raised claims of ineffective assistance of trial counsel, and we found those claims forfeited because they related to information known to defendant before he filed his direct appeal, and thus these claims should have been raised at that time. *Lee*, No. 1-07-0914, slip order at *3. Defendant filed both a petition for rehearing and a petition for leave to appeal, which were both denied.

¶ 14 In June 2010, petitioner filed a *pro se* motion for leave to file a successive postconviction petition, in which he alleged that trial counsel was ineffective for failing to interview or call as witnesses: Phillip Elston, Charlene Parker, and Brian and Gayland

Massenburg. Defendant alleged that these witnesses would have testified that the victim entered his vehicle willingly and remained there voluntarily with him and codefendant. Defendant attached the same affidavits that he had originally attached to his 1998 petition, with the addition of a second affidavit from Philip Elston, in which Elston clarified that he had observed defendant on the date of the offense and that he was never contacted by defendant's attorney, although he had written counsel concerning his willingness to testify.

¶ 15 Defendant claimed that he should be granted leave to file a successive petition, even though his ineffective assistance claim had been raised in his first petition. First, defendant argued that the initial postconviction proceedings were flawed because his claim failed to receive substantive review during that time, due to the allegedly erroneous determinations by the appellate and trial courts that the claim was procedurally barred. Second, defendant argued that his claim was not procedurally forfeited, because the affidavits supporting his claim were not part of the record on the direct appeal. On August 13, 2010, the trial court denied defendant leave to file his successive petition, on the ground that defendant failed to satisfy the cause and prejudice test.

¶ 16 On September 18, 2012, this court affirmed the trial court's order denying defendant leave to file a successive petition. This court found that, "even if we were to decide in defendant's favor as to cause, he has not shown prejudice" to justify the filing of a successive petition." *People v. Lee*, 2012 IL App (1st) 102592-U, ¶ 20. We explained that, "[e]ven if these four witnesses had testified at trial consistent with

their affidavits, there is no reasonable probability that the outcome of the proceeding would have been different." *Lee*, 2012 IL App (1st) 102592-U, ¶ 25.

¶ 17 Reviewing the evidence at trial, we stated that, at trial, the victim "testified that defendant and codefendant abducted her off the street, drove her to various locations, sexually assaulted her, threatened her with a gun, and beat her before she was able to escape and run to a nearby house for help. Teresa Baragas, a disinterested witness, testified that about 3 a.m. on the morning in question, she woke to banging on her front door. She answered the door to L.M., who was naked, had black eyes and other marks on her face, and was screaming that she had been raped." *Lee*, 2012 IL App (1st) 102592-U, ¶ 25.

¶ 18 After reviewing the evidence at trial, we reviewed the affidavits. With respect to the Massenburg brothers' affidavits, we stated that they "reference the date following the date in question, and moreover, [they] simply relate that they saw two men in a car matching the description of defendant's car talking to a white woman, who then 'got into the rear of the car.' Even if the affidavits referenced the correct date, the brothers' proposed testimony does not establish that the men in the car were defendant and codefendant, that the woman who 'got into' the car was L.M., or that L.M. was not forced into defendant's car that night." *Lee*, 2012 IL App (1st) 102592-U, ¶ 26.

¶ 19 With respect to Parker, we observed that she "averred in her affidavit that between 1:00 and 1:30 a.m. on the date in question, she took a photograph of defendant, codefendant and a third man in a lounge in Hammond, Indiana." *Lee*, 2012 IL App (1st)

102592-U, ¶ 7. We concluded that "Parker's proposed testimony is unhelpful to defendant, as the photograph she states is attached does not appear in the record. Additionally, L.M. testified that codefendant told her he had just left a club in Hammond. Therefore, Parker's proposed testimony could support L.M.'s version of events, as opposed to defendant's." *Lee*, 2012 IL, App (1st) 102592-U, ¶ 26.

¶ 20 With respect to Ellston, we observed that "Ellston's affidavit relates to events that occurred around 3:30 or 4:00 a.m., a time period after Teresa Baragas placed L.M. at her front door, naked and beaten. Accordingly, his proposed testimony would not have helped defendant's cause" *Lee*, 2012 IL App (1st) 102592-U, ¶ 26.

¶ 21 Thus, we concluded that defendant failed to show that "he suffered prejudice from trial counsel's failure to call" these four witnesses at trial, and we affirmed the trial court's denial of defendant's motion for leave to file a successive petition. *Lee*, 2012 IL App (1st) 102592-U, ¶ 27.

¶ 22 On May 29, 2013,[2] the Illinois Supreme Court denied defendant's petition for leave to appeal. However, in the same order, our supreme court stated:

> "In the exercise of this Court's supervisory authority, the Appellate Court, First District, is directed to vacate its judgment in *People v. Lee*,

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[2] The order stated that, "[o]n the twenty-ninth day of May 2013, the Supreme Court entered the following judgment," and the Clerk of the Supreme Court stated that "I have hereunto subscribed my name and affixed the Seal of said Court, this third day of July, 2013."

> case No. 1-10-2592 *** (09/18/12). The Appellate Court is directed to remand the matter to the circuit court with directions that the circuit court permit defendant to file a successive *pro se* petition for post-conviction relief alleging the ineffective assistance of trial counsel, at which point the circuit court may engage in first stage review. This court expresses no opinion regarding the ultimate merits of the claim or whether defendant can state the gist of a constitutional claim." *People v. Lee*, No. 115020 (Ill. May 29, 2013) (supervisory order).

¶ 23 On July I2, 2013, this court entered an order stating:

> "Upon the Illinois Supreme Court's supervisory order of May 29, 2013, this court vacates its judgment in *People v. Lee*, No. 1-10-2592 (filed September 18, 2012), and remands the matter to the circuit court.
>
> The circuit court is directed to permit petitioner to file a successive *pro se* petition for post-conviction relief alleging ineffective assistance of trial counsel, at which point the circuit court may engage in first stage review."

¶ 24 On November 22, 2013, the trial court granted defendant leave to file a successive postconviction petition; and on August 1, 2014, his counsel received leave to file an amended petition, which was filed on September 26, 2014. The petition contained the following six affidavits from five different affiants, which we quote in full.

¶ 25 Brain Massenburg's affidavit, dated December 28, 1995, stated:

> "I remember the incident on or about April 16, 1995, at approximately 12:30 A.M. – 1:00 A.M., my brother's car broke down on us three blocks from my brother Greg's house at [a street address] in Calumet City.
>
> We were pushing the car on State Street, when two men in a blue Cadillac asked if we needed some help; we said no.
>
> They turned the car around and started talking to a white woman and she then got into the rear of the car, and they drove off going east on State Street."

¶ 26 Gayland Massenburg's affidavit, also dated December 28, 1998, stated in full:

> "I recall the incident that happened on or about April 16, 1995, at approximately 12:30 A.M. – 1:00 A.M.; me (Gayland) and Brian were pushing my vehicle on State Street going to [a street address] in Calumet City.
>
> Two men in a blue [C]adillac stopped to see if we needed help; we told them no.
>
> They then stopped and talked to a white woman that was walking on east on State Street.
>
> The lady got into the rear of the car and they drove off going east on State Street."

¶ 27 Charlene Parker's affidavit, dated December 12, 1995, stated in full:

> "I was at Dad's Lounge and Package Goods in Hammond, Indiana on April 15, 1995 and that I took the photo attached to this affidavit on that night.
>
> The attached picture show's [sic] Anthony Lee, Berlman Manley, and Keith Adams, I took this picture of the three of them around 1:00 a.m. – 1:30 a.m. in the lounge part of Dad's Lounge.
>
> I will testify in open court under oath that all three of these gentlemen were in Dad's Lounge at the same time on the night of April 15, 1995."

Although Parker's affidavit states that a photograph was attached, no photograph was attached to the exhibit in the amended petition.

¶ 28 Phillip Elston swore out two affidavits. His first affidavit, dated October 2, 1995, stated in full:

> "I was driving pass [sic] Merrill Park when I notice Anthony Lee's car between 3:30-4:00 a.m.;
>
> Anthony Lee was sitting on a curb, 3'-4' away from his car, drinking beer;
>
> I noticed a man and a woman entering the rear door of Anthony Lee's car;
>
> Anthony then walked up to my car with three (3) beers and got in;

> I asked him what was going on, and he replied, 'His friend Jr. pulled this female.';[3]
>
> I then asked Anthony to ride with me to get a pack of cigarettes, and we proceeded to a store;
>
> When we returned to Anthony's car, Anthony got into his car and drove north, and I drove south;
>
> I make this affidavit of my personal knowledge."

¶ 29 Elston's second affidavit, dated August 23, 2008, stated in full:

> "That, on October 2, 1995, I prepared and signed a[n] affidavit concerning a[n] incident that I witnessed at Merrill Park on April 15/16, 1995. When I was preparing the affidavit I was in a rush to get the affidavit out and forgot to put the date of the incident on the affidavit. I put the 15/16, because of the time change and that it was after 12am [*sic*] on the 15th which would have made it the 16th day of April because it was 3:30 to 4am [*sic*] in the morning.
>
> Also copies of my affidavit was sent to Anthony Lee Sr. and his attorney [name] at [counsel's address], and I also wrote him a letter stating that I would not have a problem testifying on Mr. Lee's behalf. I was never contacted by attorney [name] after I sent him the affidavit & letter.

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[3] This is the punctuation in the affidavit.

> I hope that this second affidavit will clear up any concerns that may have arise[n] from my first affidavit and the fact that I forgot to put the date of the incident on that affidavit. If needed I am willingly to testify at any trial or hearing concerning the incident that Anthony Lee Sr., was involved in back on April 15/16, 1995.
>
> I make this affidavit of my own personal knowledge."

¶ 30 Gail Pinkston's affidavit, dated October 2, 1995, stated in full:

> "On August 4, 1995, I received and accepted a collect call from Burrell Manny,[4] who was in jail in Memphis Tenn.;
>
> Burrell stated in that conversation to me about the incident that happened in April, 1995 regarding some white female;
>
> Burrell stated further that he had sex with that white female in the back seat of Anthony's car, and that Anthony was no where around durinb that sexual encounter with that white female;
>
> Burrell made the statement to me, 'that if he (Burrell) goes down on this case that he would take Anthony down with him.'

[4] Codefendant's name is Burlmon Manley.

> I make this affidavit of my personal knowledge and conversation with Burrell Manny."

¶ 31 On January 9, 2015, the State filed a motion to dismiss, arguing that defendant was not entitled to a third-stage evidentiary hearing for several reasons including that he had failed to file a verification affidavit. In response, on March 6, 2015, defendant moved for leave to file a verification affidavit, which the trial court granted. Defendant's verification affidavit, dated January 28, 2015, stated that defendant verified that the statements and facts set forth in the amended successive petition were true and correct.

¶ 32 On June 12, 2015, the trial court heard argument from both sides. Although the Supreme Court's and appellate court's orders had stated that the matter was remanded for first-stage review, both attorneys during argument indicated that the matter was then under second-stage review and that the issue was whether the case would proceed to a third-stage evidentiary hearing. Similarly, at the conclusion of argument, the trial court stated that "we are at the second stage." The trial court then continued the matter to permit the court "time to review everything."

¶ 33 The trial court then granted the State's motion to dismiss on August 7, 2015, and it is this decision that we are now asked to review.

¶ 34 The trial court stressed that it was reviewing defendant's ineffectiveness claim on the merits, stating: "I want the record to be clear that this issue

is being decided on the merits." The trial court then concluded that there was no "reasonable probability that the result of the proceedings would have been different than the results of the proceedings that were had in this matter." As a result, the trial court found that defendant failed to show that he suffered any prejudice from the trial counsel's alleged failure to call these witnesses. Without a showing of prejudice, the trial court found that defendant could not succeed on his ineffectiveness claim.

¶ 35 In reaching this conclusion, the trial court reviewed the affidavits included with defendant's petition:

> "There were four witness affidavits that were submitted with regards to witnesses, plus one rather, who— Four in particular that defense counsel did not call at trial. The first two are Brian and Galin Massenberg. Their affidavits have been reviewed by this Court. They state in their affidavits, they indicate a date, following the date in question which is April 16th of 1995. But more so regardless of the date, the Court finds in their affidavit[s] they never established who the men in the car, who they were, who they saw talking to as they put it a white woman who got into the rear of the car. The affidavits do not establish that it is the Defendant Mr. Lee or his co-defendant, or that the woman was in fact the victim in this case. I will initial her name L.M. Or their affidavits also don't establish that she was still not forced into their car.

The next affidavit is of Charlene Parker. I have reviewed her affidavit. She references being in Dad's Lounge in Hammond, Indiana at a particular time. The complainant, L.M., in this matter testified that the co-defendant told her that he had just left a club in Hammond. Attached to Charlene Parker's affidavit she mentions a photograph or a picture, and it is not attached to her affidavit.

The Court in reviewing the record [*sic*] clearly consent was the defense in this case. Looking at the time that she is stating that she saw the Defendant, or looking at the place that she is saying she saw the Defendant, it seems as if it's a[n] alibi that she is giving, saying he could not have been there. But again there is no picture attached or anything to show of who the people are in the photo that she is speaking of.

With regards to Phillip Elston, he submits two affiavit[s]; one October 2nd of 1995. He references no date referred in what he saw on the date in question. Thirteen years later, August 23rd of 2008, he then references that he saw the Defendant between 3:30 and 4:00 a.m. on April 15/16, 1995. He is correcting his prior affidavit that he indicates he was in a rush to sign back [in] October 2nd of 1995. And August 23rd of 2008, he indicates that he is correcting it, and he recalls it was April 15/16, 1995. And it's at 3:30 or 4:00 o'clock in the morning. He says he saw the Defendant at Merrill Park, or around Merill Park at this time. He indicates that he sent a copy of his affidavit to [trial counsel]. And he wrote him a letter stating that

> he would not have had a problem testifying on Mr. Lee's behalf. This time and of course looking at his affidavit, this is the time where it's after the incident in question and when the independent witness Teresa Baracus, places the victim at her front door, knocking on her door, indicating that she—At that time the witness indicated that she was naked and she could visually see that she had been beaten. This is after the incident that Mr. Elston is stating in his affidavit that he saw the Defendant. It's at 3:30 or 4:00 o'clock in the morning.
>
> Gail Pinkston has submitted an affidavit as well. She indicated she had a conversation with Burell Manny. The co-defendant in this matter is Burlmon, B-u-r-l-m-o-n, Manley, M-a-n-l-e-y. She indicates that this person told her that if he goes down on this case, that he would take Anthony down. [Defendant] has submitted this affidavit. The record shows that, the Defendant, Mr. Lee was arrested[,] I see[,] July 27th of 1995, and the co-defendant Mr. Manley was out to warrant at that time."

¶ 36 Although the record on appeal does not contain a written order entered by the trial court dismissing defendant's petition, the record does contains a "Criminal Disposition Sheet," dated August 7, 2015, which states "State's Motion to Dismiss Defendant's Post Conviction Petition—Granted[.] Petition Dismissed[.] Clerk to notify D[.] Off Call[.]" The record also contains a half-sheet entry for August 7, 2015, which states: "State's mtn to dismiss def's post

conviction petition-granted, petition dismissed, clerk to notify def. Off call."

¶ 37 On August 27, 2015, defendant filed a notice of appeal, appealing the trial court's August 7, 2015, second-stage dismissal of his successive postconviction petition, and this appeal followed.

¶ 38 ANALYSIS

¶ 39 On this postconviction appeal, defendant claims that the trial court erred in dismissing his successive petition at the second stage, because he made a substantial showing of ineffective assistance of trial counsel. Defendant included supporting affidavits from five affiants with his petition, and he claims that his counsel was ineffective for failing to call these individuals at trial. For the following reasons, we affirm.

¶ 40 I. Stages of a Postconviction Petition

¶ 41 This appeal is taken pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2012)), which provides a statutory remedy for criminal defendants who claim their constitutional rights were violated at trial. *People v. Edwards*, 2012 II, 111711, ¶ 21. The Act is not intended to be a substitute for a direct appeal; instead, it is a collateral proceeding which attacks a final judgment. *Edwards*, 2012 IL 111711, ¶ 21.

¶ 42 The Act provides for three stages of review by the trial court. *People v. Domagla*, 2013 IL 113688, ¶ 32. At the first stage, the trial court may summarily dismiss a petition that is frivolous or patently without

merit. 725 ILCS 5/122-2.1(a)(2) (West 2012); *Domagala*, 2013 IL 113688, ¶ 32.

¶ 43 However, this appeal involves a successive petition and, for a successive petition to even be filed, the trial court must first determine whether the petition (1) states a colorable claim of actual innocence (*Edwards*, 2012 IL 111711, ¶ 28) or (2) establishes cause and prejudice (*People v. Smith*, 2014 IL 115946, ¶ 34). This standard is higher than the normal first-stage "frivolous or patently without merit" standard applied to initial petitions. *Edwards*, 2012 IL 111711, ¶¶ 25-29; *Smith*, 2014 IL 115946, ¶ 35 ("the cause-and-prejudice test for a successive petition involves a higher standard than the first-stage frivolous or patently without merit standard that is set forth in section 122-2.1(a)(2) of the Act").

¶ 44 Since a filed successive petition has already satisfied a higher standard, the first stage is rendered unnecessary and the successive petition is docketed directly for second-stage proceedings. See *People v. Saunders*, 2016 IL 118123, ¶¶ 25, 28 (with a successive petition, the initial issue before the trial court is whether it "should be docketed for second-stage proceedings"); *People v. Wrice*, 2012 IL 111860, ¶ 90 ("reversing the trial court's order denying defendant leave to file his second successive postconviction petition and remand[ing] to the trial court for *** second-stage postconviction proceedings"); *People v. Jacksan*, 2015 IL App (3d) 130575, ¶ 14 ("When a defendant is granted leave to file a successive postconviction petition, the petition is effectively advanced to the second stage of postconviction proceedings."); *People v. Almodovar*, 2013 IL App (1st) 101476, ¶ 1 (reversing the trial

court's denial of the defendant's motion for leave to file a successive petition and remanding for second-stage proceedings).

¶ 45 If the court permits a successive petition to be filed or does not dismiss an initial petition at the first stage, the petition then advances to the second stage, where counsel is appointed if a defendant is indigent. 725 ILCS 5/122-4 (West 2012); *Domagala*, 2013 IL 113688, ¶ 33; *Wrice*, 2012 IL 111860, ¶ 90 (after reversing the trial court's denial of leave to file a successive petition, the supreme court remanded "for appointment of postconviction counsel and second-stage postconviction proceedings"). After counsel determines whether to amend the petition, the State may file either a motion to dismiss or an answer to the petition. 725 ILCS 5/122-5 (West 2012); *Domagala*, 2013 IL 113688, ¶ 33. At the second stage, the trial court must determine "whether the petition and any accompanying documentation make a substantial showing of a constitutional violation." *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). In the case at bar, the petition was dismissed at the second stage.

¶ 46 "The second stage of postconviction review tests the legal sufficiency of the petition. Unless the petitioner's allegations are affirmatively refuted by the record, they are taken as true, and the question is whether those allegations establish or 'show' a constitutional violation. In other words, the 'substantial showing' of a constitutional violation that must be made at the second stage [citation] is a measure of the legal sufficiency of the petition's well-pled allegations of a constitutional violation, which if proven at an evidentiary hearing, would entitle

petitioner to relief." (Emphasis in original.) *Domagla*, 2013 IL 113688, ¶ 35.

¶ 47 Both the second stage and a motion for leave to file a successive petition require a review of "the petition and any accompanying documentation." *Edwards*, 197 Ill. 2d at 246 (second-stage review); *Edwards*, 2012 IL 11171, ¶ 24 (motion for leave to file a successive petition). For the second stage to not be superfluous for a successive petition, it must be that the "substantial showing" required at the second stage is greater than the "probability" required for a successive petition to receive leave for filing. *Smith*, 2014 IL 115946, ¶ 29 (expressing a desire not to "render the entire three-stage postconviction process superfluous").

¶ 48 If the defendant makes a "substantial showing" at the second stage, then the petition advances to a third-stage evidentiary hearing. *Domagala*, 2013 IL 113688, ¶ 34. At a third-stage evidentiary hearing, the trial court acts as factfinder determining witness credibility and the weight to be given particular testimony and evidence and resolving any evidentiary conflicts. *Domagala*, 2013 IL 113688, ¶ 34. This third stage is the same for both initial and successive petitions. *Cf. S'mith*, 2014 IL 115946, ¶ 29 ("The legislature clearly intended for further proceedings on successive postconviction petitions."). It is this third-stage evidentiary hearing, which defendant is seeking in the case at bar.

¶ 49 II. Standard of Review

¶ 50 As we noted above, defendant's petition was dismissed at the second stage. *People v. Pendleton*,

223 Ill. 2d 458, 473 (2006) (second-stage dismissals are reviewed *de novo*). When our review is limited to documentary materials, as it is at the second stage, then our review is generally *de novo*. *Townsend v. Sears, Roebuck & Co.*, 227 Ill. 2d 147, 154 (2007) ("Where the circuit court does not hear testimony and bases its decision on documentary evidence, the rationale underlying a deferential standard of review is inapplicable and review is *de novo*."); *Dowling v. Chicago Options Associates, Inc.*, 226 Ill. 2d 277, 285 (2007) (where the trial count "did not conduct an evidentiary hearing" or "make any findings of fact," and "relied on the parties' oral argument and the record," "we review the court's ruling on this issue *de novo*").

¶ 51 Thus, we apply a *de novo* review to defendant's claim. *De novo* consideration means that we perform the same analysis that a trial judge would perform. *In re N.H.*, 2016 IL App (1st) 152504, ¶ 50 (citing *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011)).

¶ 52 III. Ineffective Assistance of Counsel

¶ 53 Defendant claims that the trial court erred in dismissing his successive petition at the second stage, because he made a substantial showing of ineffective assistance of trial counsel.

¶ 54 Every Illinois defendant has a constitutional right to the effective assistance of counsel under the sixth amendment to the United States Constitution and under article I, section 8 of the Illinois Constitution. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8; *People v. Domagala*, 2013 IL 113688,

¶ 36. Claims of ineffective assistance are judged against the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Domagala*, 2013 IL 113688, ¶ 36 (citing *People v. Albanese*, 104 Ill. 2d 504, 526 (1984) (adopting *Strickland* for Illinois)). To prevail on a claim of ineffective assistance, a defendant must show both: (1) that counsel's performance was deficient; and (2) that this deficient performance prejudiced defendant. *Domagala*, 2013 IL 113688, ¶ 36 (citing *Strickland*, 466 U.S. at 687).

¶ 55 To establish the first prong, that counsel's performance was deficient, a defendant must show "that counsel's performance was objectively unreasonable under prevailing professional norms." *Domagala*, 2013 IL 113688, ¶ 36. To establish the second prong, that this deficient performance prejudiced the defendant, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Domagala*, 2013 IL 113688, ¶ 36 (citing *Strickland*, 466 U.S. at 694). "A reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome"— or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair. *People v. Colon*, 225 Ill. 2d 125, 135 (2007); *People v. Evans*, 209 Ill. 2d 194, 220 (2004).

¶ 56 Although the *Strickland* test is a two-prong test, our analysis may proceed in any order. Since a defendant must satisfy both prongs of the *Strickland* test in order to prevail, a trial court may dismiss the claim if either prong is missing. *People v. Flores*, 153

III. 2d 264, 283 (1992). Thus, if a court finds that defendant was not prejudiced by the alleged error, it may dismiss on that basis alone without further analysis. *People v. Graham*, 206 Ill. 2d 465, 476 (2003); *People v. Albanese*, 104 Ill. 2d 504, 527 (1984).

¶ 57 IV. No Prejudice

¶ 58 In the case at bar, we agree with the trial court, and find that there was no reasonable probability that, but for counsel's allegedly unprofessional errors, the result of the proceeding would have been different. See *Domagala*, 2013 IL 11368.8, ¶ 36 (citing *Strickland*, 466 U.S. at 694).

¶ 59 In the case at bar, there was no issue about identity. The dispute was about what exactly happened. These issues generated a credibility dispute between defendant and the victim, resulting in a "he said/she said" case. The victim's trial testimony was corroborated by: (1) trial testimony from Teresa Barags who described the victim's immediate outcry to total strangers, and the victim's beaten and naked appearance; (2) photographs of the victim's injuries, which were inconsistent with consent; and (3) the victim's prior lineup identification of defendant. After listening to the testimony and reviewing the evidence at a bench trial, the trial court found the victim "very credible" and defendant "incredible."

¶ 60 On this appeal, defendant argues that his postconviction affidavits make a substantial showing that there was a reasonable probability that the outcome of his trial would have been different if these

affiants had been called at trial. Like the court below, we cannot agree.

¶ 61 Even assuming that the affiants would testify at an evidentiary hearing and that they would testify to what is stated in their affidavits, we cannot find a reasonable probability that the result would have been different. We observe that a different panel of this court previously reached the same conclusion, as did the court below. *Lee*, 2012 IL App (1st) 102592-U, ¶ 25 ("Even if these four[5] witnesses had testified at trial consistent with their affidavits, there is no reasonable probability that the outcome of the proceedings would have been different."). However, we make our own independent assessment here, since our review is *de novo*. *Pendleton*, 223 Ill. 2d at 473 (second-stage dismissals are reviewed *de novo*).

¶ 62 First, the Massenburg brothers' affidavits aver that they observed two men in a blue Cadillac on State Street in Calumet City between 12:30 and 1 a.m. on April 16, 1995; that these two men started "talking to a white woman"; that she entered the backseat of the Cadillac; and that they drove off. While the description of the vehicle matches defendant's vehicle, the Massenburgs' affidavits state that they made these observations on April 16, 1995, which is the day *after* the date of the offense. Even if we were to assume that they meant the correct offense date, and that they would testify in accord with their affidavits, and that they would be found to be completely credible, their affidavits do not identify the two men as defendant and codefendant or the woman as the

[5] Defendant has added the affidavit of Gail Pinkston, which now brings the number of affiants to five.

victim. The Massenburgs do not indicate that they knew any of these three people; and they do not offer any physical description of either the two men or the woman, except for the fact that she was white. The Massenburgs also do not state whether the woman was coerced into the vehicle or whether they were at a vantage point where they could observe whether she was coerced into the vehicle.

¶ 63 Second, Charlene Parker's affidavit states that she was at a lounge and "package goods" store in Hammond, Indiana, on the date in question; that she took a photograph there "around 1:00 a.m.-1:30 a.m." of defendant, "Berlman Manley, and Keith Adams"; and that the photograph is attached. Even if we were to assume that "Berlman Manley" was codefendant, Burlmon Manley, the photograph is not attached, either in the original petition or the petition more recently supplemented by counsel. In addition, the victim testified that she first encountered defendant and codefendant around 1 a.m. and that codefendant informed her that he had "just left a club in Hammond." Thus, even if we were to assume that Parker would testify in accord with her affidavit and that she would be found to be completely credible, her proposed testimony does not necessarily contradict the victim's testimony.

¶ 64 Third, similar to Parker's affidavit, Phillip Elston's affidavits specifically identify defendant. While Elston's first affidavit did not identify the date in question, his second affidavit identified the date of his observations as the date of the offense. Thus, we will assume that Elston will testify that, on the date of the offense, at between 3:30 and 4 a.m., Elston observed defendant sitting on the curb, near

defendant's vehicle, drinking beer; and that a man and a woman entered the backseat of defendant's vehicle; that defendant entered Elston's vehicle; that Elston and defendant drove to a store and back; and that defendant entered his own vehicle and drove away. Elston averred that, when he asked defendant "what was going on," defendant replied that: "His friend Jr. pulled this female."

¶ 65 We do not know what Elston meant by "pulled." It could mean "coerced." However, giving defendant the benefit of the doubt, we will assume for the purposes of our *de novo* review that "pulled" does not equal "coerced."

¶ 66 The main problem with Elston's affidavits is that his observations occurred after the offense concluded. The victim in this offense testified that she first encountered defendant at around 1 a.m., and Teresa Baragas testified that the victim appeared, naked and beaten, outside Baragas' door around 3 a.m. Thus, even if we were to assume that Elston would testify, and that he would testify in accord with his affidavit, and that he would be found to be completely credible, his observations of defendant between 3:30 and 4 a.m. occurred after the events at issue had already concluded.

¶ 67 Lastly, Gail Pinkston's affidavit states that on August 4, 1995, she received a telephone call from "Burrell Manny" who was in jail and who stated that in April 1995 "he had sex with that white female in the back seat" of defendant's vehicle, that defendant was "no where around," and that if he "goes down on this case that he would take [defendant] down with him." Even if we were to assume that "Burell Manny"

was codefendant Burlmon Manley, and that Pinkston would testify in accord with her affidavit and that she would be found to be completely credible, her proposed testimony contradicts defendant's trial testimony. Defendant testified at trial that he was driving his vehicle, while codefendant and the victim had sex in the backseat of it.

¶ 68 Thus, after carefully considering defendant's affidavits, which we quoted in full, and even assuming that all the affiants would testify in accord with their affidavits and that they would all be found to be completely credible by the factfinder, we still cannot find that defendant suffered prejudice from his trial counsel's alleged failure to call these affiants at trial. After considering defendant's petition fully on its merits, we cannot find a reasonable probability that, but for counsel's allegedly unprofessional errors, the result of the proceeding would have been different. See *Domagala*, 2013 IL 113688, ¶ 55. As a result, we have no choice but to affirm the trial court's dismissal.

¶ 69 CONCLUSION

¶ 70 In conclusion, we find that that the trial court did not err in dismissing defendant's successive petition at the second stage, because his petition did not make a substantial showing of ineffective assistance of trial counsel. In reaching this conclusion, we are keenly aware that defendant's postconviction proceedings have been the subject of two separate supervisory orders from the Illinois Supreme Court directing us to vacate our prior orders affirming dismissal and to reconsider defendant's petition and supporting affidavits. However, we have carefully reviewed the supporting affidavits, which defendant included with

his petition and which we quoted in full in this opinion, and we find that we have no choice but to affirm.

¶ 71 Affirmed.