2019 IL App (1st) 171533-U
Order filed: September 20, 2019

FIRST DISTRICT
Fifth Division

No. 1-17-1533

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 01 CR 2607
	)	
EDWIN MARTINEZ,	)	Honorable
	)	Colleen Ann Hyland,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: Due to evidentiary errors at the hearing, this matter is remanded for additional third-stage postconviction proceedings.

¶ 2 Following a third-stage evidentiary hearing, the trial court denied postconviction petitions for a new trial filed by defendant-appellant, Edwin Martinez. For the following reasons, we remand for additional third-stage postconviction proceedings consistent with this order.[1]

¶ 3 I. BACKGROUND[2]

[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order stating with specificity why no substantial question is presented.

[2] Relevant portions of this order have been taken from prior decisions issued by this court with respect to this matter. See *People v. Martinez*, 366 Ill. App. 3d 1223 (2006) (table) (unpublished order

¶ 4 In January 2001, defendant was charged by indictment with, *inter alia*, multiple counts of first degree murder. The indictment generally alleged that, on or about December 27, 2000, defendant shot and killed Robert Sanchez with a firearm. The matter proceeded to a bench trial in 2003.

¶ 5 Adam Reyes, a member of the Satan Disciples street gang and a convicted felon, testified at defendant's bench trial. Mr. Reyes stated defendant was a leader of the Satan Disciples and nicknamed "Chico." Both Mr. Reyes and Mr. Sanchez sold drugs supplied by defendant. In November 2000, defendant asked Mr. Reyes to deal with Mr. Sanchez because he was an informant and "tellin' the cops on [defendant]." Mr. Reyes dismissed defendant's request as "just talk" and did not take defendant seriously. The following month, Mr. Reyes declined defendant's request to "take care" of Mr. Sanchez and defendant indicated he would deal with the problem himself. However, several days later, on December 24, defendant was with Mr. Reyes and Rachel Narbaiz, a/k/a, Rachel Martinez, the mother of defendant's nephew, in an automobile behind Ms. Narbaiz's home. Defendant asked them to shoot Mr. Sanchez. When Mr. Reyes and Ms. Narbaiz both refused, defendant became angry. Ms. Narbaiz told defendant to leave. Despite disobeying defendant's orders to kill Mr. Sanchez, Mr. Reyes was never punished by the gang.

¶ 6 At about 7:30 p.m. on December 27, 2000, defendant called Mr. Reyes and asked to borrow a .380–caliber pistol which Mr. Reyes had obtained from Mark Alonzo, who was known as "Shortie." Approximately 20 to 30 minutes thereafter, defendant arrived at Mr. Reyes' residence located at 1406 W. 59th Court in Cicero, Illinois. Defendant told Mr. Reyes that he planned to lure Mr. Sanchez into the woods by explaining that he had to dispose of the gun. After receiving the gun, defendant drove away with Mr. Sanchez in the car. At about 9:40 p.m.,

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under Supreme Court Rule 23); *People v. Martinez*, 2014 IL App (1st) 112794-U.

defendant called Mr. Reyes and stated that everything was "mashed potatoes and gravy." Mr. Reyes understood this statement to mean that defendant had killed Mr. Sanchez. Mr. Reyes and defendant met at the home of their mutual friend, Samantha Mercado, at about 1:30 a.m., and then went for a drive. Defendant told Mr. Reyes that he "smoked Bobby, shot him in the head, and that he cried like a bitch." Defendant said he disposed of the gun he used to murder Mr. Sanchez. On New Year's Day, defendant called Mr. Reyes and warned him not to speak to anyone about the incident.

¶ 7 On cross-examination, Mr. Reyes testified that he had an agreement with the State whereby he would not be charged in the murder of Mr. Sanchez if he told the State everything he knew about the shooting. Mr. Reyes also testified that after he received the gun from Shortie, he kept it at his house for a time. He later wrapped the gun in a towel and stored it at Samantha Mercado's house for a few days. On redirect examination, Mr. Reyes clarified that his agreement with the State was to tell only the truth and that the State made no promise that he would not be charged in the murder of Mr. Sanchez.

¶ 8 Samantha Mercado testified she was a friend of Mr. Reyes and had known defendant for two years. At that time, she lived at 5401 W. 54th Street in Cicero, Illinois. Mr. Reyes, Mr. Sanchez and defendant would come to her house "and party." On the evening of December 27, 2000, she was at Mr. Reyes' house. Defendant came to the house that night, talked to Mr. Reyes, and then left. On cross-examination, she testified that she did not see Mr. Reyes hand a gun, or anything else, to defendant when he was at Mr. Reyes' house on the night of December 27.

¶ 9 Mario Abarca, Mr. Sanchez's stepfather, testified his stepson and defendant were friends. Defendant had been living at Mr. Abarca's home located at 5343 W. 24th Street in Cicero,

Illinois. On December 27, 2000, Mr. Sanchez left the house with defendant between 7 and 8 p.m. Mario Arbaca never saw Mr. Sanchez again.

¶ 10 Benjamin Abarca, Mario Abarca's brother, who was involved in drug transactions with Mr. Sanchez, was also living in his brother's house with Mr. Sanchez. He last saw Mr. Sanchez on December 27, 2000, when Mr. Sanchez left the house between 6:30 and 7:30 p.m. Benjamin Abarca later called Mr. Sanchez several times on the evening of December 27; Mr. Sanchez never returned his calls. When Benjamin Abarca called Mr. Sanchez again between 9:30 and 10 p.m., defendant answered the phone. Defendant explained that Mr. Sanchez had lent defendant his cell phone.

¶ 11 Iliana Herrera, Mr. Sanchez's girlfriend, testified that on December 27, 2000, she called Mr. Sanchez's cell phone at 7:33 p.m. and his pager at 11:15 p.m. Mr. Sanchez did not respond. When she called Mr. Sanchez's cell phone shortly after midnight on December 28, 2000, defendant answered. Defendant told her that he had driven Mr. Sanchez to the home of Oscar Solis, and that Mr. Sanchez had left his cell phone in defendant's car. Mr. Solis testified, however, that he did not see Mr. Sanchez on the night of December 27.

¶ 12 Elba Luna testified her sister June was dating defendant in December 2000. On December 24, Ms. Luna and her mother and sister moved to "the south side." On the afternoon of December 28, Ms. Luna gave Mr. Sanchez's cell phone to Mr. Sanchez's sister at Mr. Sanchez's home, after defendant had given the phone to her and driven her there.

¶ 13 Cook County Sheriff's investigator John G. Sheridan testified that Mr. Sanchez's body was discovered by police at Sundown Meadows Forest Preserve (forest preserve) near the Village of Hodgkins at about 6 p.m. on December 28, 2000. The body was found in an area of the forest preserve which was about four to five blocks' distance from the entrance to the forest

preserve. Mr. Sanchez had suffered gunshot wounds to the head. Shell casings were found around the body. On cross-examination, investigator Sheridan was asked if he found a restaurant receipt on the body and he answered that "[t]here was a receipt found," which was turned over as evidence.

¶ 14 Elwin Trammell, who was a Cook County Forest Preserve police sergeant, testified that he interviewed defendant on January 4, 2001. Special agent Todd Mayberry of the Federal Bureau of Investigation (FBI) was present during the interview. At the time of the interview, defendant was not in custody, but was taken into custody by the FBI on January 6, 2001. Defendant was arrested and charged with the murder of Mr. Sanchez on January 10, 2001.

¶ 15 In the interview, defendant admitted to being a member of the Satan Disciples and a drug dealer. Both Mr. Reyes and Mr. Sanchez helped him sell drugs. Defendant said he had lived at Mr. Sanchez's home for about three months, but was now living at his grandmother's house at 1518 N. Monticello Avenue in Chicago. Defendant first told the sergeant that he last saw Mr. Sanchez on December 26, 2000, at defendant's mother's home at 5232 W. 24th Street in Cicero, Illinois. Mr. Sanchez had been in defendant's car on that night. On the night of December 27, after discovering Mr. Sanchez's cell phone in the back seat of his car, he went to Mr. Sanchez's house to return it, but no one was home. Defendant later told Sergeant Trammell that on December 27, after helping his girlfriend move, he visited Mr. Sanchez at his home between 8 and 9 p.m., and that Mr. Sanchez's stepfather (Mario Abarca) answered the door. He also said he spent the night at his girlfriend's new home on December 27. Defendant also said that on December 28, 2000, he went to the Sanchez home and gave Mr. Sanchez's phone to his sister. When Sergeant Trammell pointed out the discrepancies in his statements, defendant responded he was confused about the dates.

¶ 16 The parties stipulated to the admission of phone records, which indicated a number of incoming and outgoing calls from Mr. Sanchez's cell phone on the evening in question, including incoming calls from Benjamin Abarca and Ms. Herrera. Mr. Sanchez's cell phone records also showed that calls were made from Mr. Sanchez's cell phone to Mr. Reyes' cell phone on December 27, 2000, between 7:32 p.m. and 9:42 p.m. Other telephone records admitted into evidence by stipulation showed calls made to Mr. Sanchez's cell phone from Benjamin Abarca's phone at 8:21 p.m., 8:22 p.m., 8:23 p.m., 8:27 p.m., 8:28 p.m., 8:29 p.m., 8:32 p.m., 8:35 p.m., 8:44 p.m., 8:58 p.m., 9:30 p.m., 9:31 p.m., and 10:06 p.m. on the evening of December 27, 2000. It was further stipulated that the shell casings found near the body of Mr. Sanchez were from a gun described as a "Winchester 380 Auto caliber."

¶ 17 After the State rested, and defendant's motion for directed finding was denied, trial counsel told the trial court there was a stipulation that the police evidence inventory listed "two receipts." The trial court stated that the information on the receipts was hearsay and could not "be used" as substantive evidence. The State and trial counsel agreed with this conclusion.

¶ 18 Following closing arguments, the trial court found defendant guilty of first-degree murder after concluding that the evidence, although circumstantial, was sufficient to prove defendant guilty of murder beyond a reasonable doubt. In making its determination, the trial court credited Mr. Reyes' testimony, *i.e.*, that defendant solicited him to kill Mr. Sanchez, that defendant explained to Mr. Reyes why he had to borrow his .380-caliber gun and, later, that defendant called Mr. Reyes to tell him that he killed Mr. Sanchez. The trial court found that this testimony was corroborated by the forensic evidence and the phone records introduced at trial. The trial court also noted the inconsistencies in defendant's statements to Sergeant Trammel. The trial court sentenced defendant to 50 years' imprisonment.

¶ 19 In *People v. Martinez*, 366 Ill. App. 3d 1223 (2006) (table) (unpublished order under Supreme Court Rule 23), this court affirmed defendant's conviction on direct appeal. In so ruling, we rejected defendant's challenge to the sufficiency of the evidence after specifically noting that the trial court found Mr. Reyes to be a credible witness and that Mr. Reyes' testimony was corroborated by the telephone records, the forensic evidence, and the testimony of other witnesses. *Id.*, slip order at 10-11.

¶ 20 On July 24, 2007, defendant filed a *pro se* postconviction petition, pursuant to the Post–Conviction Hearing Act (Act) (720 ILCS 5/122–1 *et seq*. (West 2008)), alleging in pertinent part that his trial counsel was ineffective for failing to interview and subpoena Rachel Narbaiz. Defendant attached the affidavit of Ms. Narbaiz, in which she attested that defendant never asked her to kill Mr. Sanchez, nor did he ask Mr. Reyes to kill Mr. Sanchez in her presence. She denied being in a car behind her house with Mr. Reyes and defendant on December 24, 2000. Ms. Narbaiz further attested that she was interviewed by investigators from the office of the Cook County State's Attorney in October 2002, but was never contacted by defendant's attorney. Defendant's *pro se* petition also attached a report describing the interview of Ms. Narbaiz, conducted at her home by investigators from the office of the Cook County State's Attorney. The summary of the interview states Ms. Narbaiz denied that defendant had asked her and Mr. Reyes to kill Mr. Sanchez. Ms. Narbaiz told the investigators she was in jail at the time of the murder having been arrested on December 26, 2000, when her actual arrest date was December 27, 2000. The report reveals that defendant's brother, Giovanni Martinez, was in the kitchen and listening to the interview.

¶ 21 Defendant's own affidavit, also attached to the petition, stated that he informed trial counsel about Rachel Martinez (Narbaiz). Defendant also averred that he told trial counsel there

was no truth to Mr. Reyes' claims that he solicited Mr. Reyes and Rachel Martinez (Narbaiz) "to kill anyone."

¶ 22 The *pro se* petition advanced to the second stage. On October 1, 2010, defendant's appointed postconviction counsel filed a supplemental petition which both reiterated defendant's ineffectiveness of trial counsel claim for the failure to interview or subpoena Ms. Narbaiz, and presented additional ineffectiveness claims. The supplemental petition claimed counsel was ineffective for failing to interview or present Diana Mercado as a witness at trial. In her attached notarized and signed statement, Diana Mercado stated that approximately one week prior to the murder, Mr. Reyes came to her house with a gun which he wanted to leave there. When Diana Mercado told Mr. Reyes that he could not leave the gun, he called a cab and waited outside the house to be picked up. Mr. Reyes told her that he was going to use the gun to kill Mr. Sanchez. Her daughter, Samantha Mercado, never told her that Mr. Reyes had asked to hide a gun in their house. Diana Mercado did not see a gun in the house at any time in December 2000. Diana Mercado was not interviewed by the police, nor was she interviewed by defense counsel. Diana Mercado, however, was interviewed by the FBI regarding the shooting.

¶ 23 The supplemental petition attached a supplementary report of Sergeant Trammell. This report provided that Mr. Reyes, during an interview, stated that Shortie gave him a .380–caliber automatic pistol in mid-December 2000. Mr. Reyes wanted the gun for protection from a rival gang. He brought the gun to Samantha Mercado's house and asked Samantha's mother, Diana Mercado, if he could leave the gun there. Mr. Reyes wrapped the gun in a towel, and "stashed the weapon underneath Sam's bed, unbeknownst to her." The supplementary report also stated that after defendant had asked Mr. Reyes and Ms. Narbaiz to shoot Mr. Sanchez on December 24,

2000, Mr. Reyes was upset and went to the Mercado house. Mr. Reyes said Diana Mercado noticed something was wrong.

¶ 24 The supplemental petition also added a claim that trial counsel was ineffective for failing to present the testimony of defendant's mother, Maritza Amaya, and for failing to present the contents of a restaurant receipt which was recovered from Mr. Sanchez's pocket when his body was discovered. In support, the supplemental petition included a police inventory report which showed that a receipt from the Aguascalientes restaurant, located at 2110 South Cicero Avenue, in Cicero, Illinois, which was dated December 27, 2000, and time stamped "20:24 p.m." (presumed to be 8:24 p.m.), was recovered from Mr. Sanchez's body. In an attached affidavit, Ms. Amaya averred that on December 27, 2000, at approximately 6:30 p.m., defendant and Mr. Sanchez left her house at 5232 W. 24th Street to go to the Aguascalientes restaurant and that defendant returned "sometime before 9 p.m.," and stayed for about an hour. Ms. Amaya said she attended most court dates in the case, and trial counsel neither interviewed her nor asked her about the whereabouts of defendant on December 27.

¶ 25 Based on the affidavits and receipt, defendant argued that it is "highly unlikely" that he killed Mr. Sanchez because the restaurant receipt showed that Mr. Sanchez was still alive at 8:24 p.m., while defendant had returned to his mother's house sometime before 9 p.m.

¶ 26 On December 10, 2010, the State moved to dismiss defendant's postconviction petitions and defendant filed a response. Following a hearing, the postconviction court granted the State's motion to dismiss in a written order reviewing all of defendant's claims.

¶ 27 On appeal from that decision, defendant argued that his postconviction petitions made a substantial showing that his trial counsel was ineffective for failing to investigate and present available testimony from Ms. Narbaiz, Diana Mercado, and Ms. Amaya, and by failing to

introduce the contents of the restaurant receipt as substantive evidence. Defendant maintained the testimony and evidence would have undermined the credibility of Mr. Reyes, and would have established a timeline showing it was improbable that defendant committed the murder. After noting that "[t]he case against defendant was largely circumstantial and turned almost entirely on the testimony of Mr. Reyes" (*Martinez*, 2014 IL App (1st) 112794-U, ¶ 34), this court agreed. We specifically explained that "based on the record before us and taking defendant's well-pleaded facts and accompanying affidavits as true, we hold that defendant has made a substantial showing of ineffective assistance of trial counsel based on the cumulative failure to investigate the testimony of witnesses Rachel Narbaiz, Diana Mercado, and Maritza Amaya and to introduce the receipt from the Aguascalientes restaurant as substantive evidence" (*id.* ¶ 47). We therefore reversed the judgment of the circuit court, which dismissed the postconviction petitions, and remanded for an evidentiary hearing. *Id.* ¶ 48.

¶ 28 Upon remand, the parties and the circuit court addressed a number of prehearing issues. First, the parties exchanged witness lists in preparation for the evidentiary hearing. The potential witnesses identified by defendant included, *inter alia*: (1) the keeper of records for the Aguascalientes restaurant, later identified as Martha Macias, (2) Ms. Amaya's husband and defendant's step-father, Pablo Amaya, and (3) Eladio Valdez, an investigator employed by defendant's postconviction counsel. The State orally objected to these proposed witnesses, and the circuit court asked the parties to place their arguments with respect to these witnesses in writing, so as to resolve any issues prior to the evidentiary hearing.

¶ 29 Defendant responded on April 4, 2016, by filing a "Second Supplemental Petition" that included affidavits executed by Ms. Macias, Mr. Amaya[3] and Mr. Valdez. In her affidavit, Ms.

[3] Mr. Amaya's affidavit was completed in Spanish, and was accompanied by an English

Macias generally averred that the Aguascalientes restaurant was her family's business and that she had worked there since at least 2000. She also averred that the receipt recovered from Mr. Sanchez's pocket was "consistent with a receipt printed during the regular course of business activity at Tacqueria Aguascalientes in December 2000. The date and time on this receipt indicates to me that it was printed on December 27, 2000 at 20:24, or 8:24 p.m." Finally, Ms. Macias asserted that no one associated with defendant's trial counsel—Joseph Lopez—ever contacted anyone associated with the restaurant.

¶ 30 Mr. Amaya averred facts that would have corroborated his wife's account of the evening of December 27, 2000; *i.e.*, that he was also home that evening and also observed that defendant returned home before 9:00 p.m. He also averred that no one associated with Mr. Lopez ever contacted him.

¶ 31 Mr. Valdez's affidavit documented the time it took him to drive—at the speed limit and obeying all traffic laws—from Mr. Reyes' house to the Aguascalientes restaurant at 7:32 p.m. (8 minutes), from the restaurant to the entrance to the forest preserve at 8:25 p.m. (16 minutes), and then from the forest preserve entrance to Mr. and Ms. Amaya's home (19 minutes). Mr. Valdez asserted that these driving times were based on the fastest routes identified by Google Maps, and the routes were traveled a single time each and timed on February 15 and March 8, 2016.

¶ 32 The State thereafter filed a combined motion *in limine* and objection to the second supplemental petition, asking the circuit court to deny leave to file the second supplemental petition and/or preclude the new witnesses identified therein from testifying at the evidentiary hearing. The State argued that allowing the newly identified witnesses to testify would go beyond the limited scope of this court's remand, would violate the statutory scheme of the Act

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translation.

by allowing defendant to assert additional claims of ineffective assistance of counsel and actual innocence at the third-stage, and would introduce irrelevant matters into the hearing.

¶ 33 Defendant filed a written response and the circuit court heard oral argument on these issues. In an oral ruling issued on July 22, 2016, the circuit court ruled as follows: (1) Ms. Macias would be allowed to testify, as this court's remand for an evidentiary hearing had specifically called for a consideration of Mr. Lopez's possible ineffectiveness in failing to introduce the Aguascalientes restaurant receipt as substantive evidence at trial; (2) Mr. Amaya would not be allowed to testify, as his proposed testimony had not previously been raised in any of defendant's postconviction petitions, and was not contemplated by or related to any issue identified by this court's remand order, and (3) Mr. Valdez would not be allowed to testify, because whatever Mr. Valdez did in 2016 was irrelevant to determining Mr. Lopez's possible ineffectiveness at defendant's 2003 trial.

¶ 34 The circuit court also granted a prehearing motion filed by the State seeking a finding that, in light of defendant's allegations of ineffective assistance of counsel, defendant had waived his attorney-client privilege. The circuit court ruled that Mr. Lopez would therefore be allowed to testify regarding his conversations with defendant.

¶ 35 In its final prehearing ruling, the circuit court denied a written discovery request made by defendant seeking to compel the State to provide additional material related to a separate criminal investigation and prosecution. Defendant asserted that Mr. Lopez was identified as a potential witness in, or a potential target of, that criminal investigation, and that such information would be relevant to establish Mr. Lopez's potential for bias in favor of the State. The State's written response to this request contended that defendant was merely going on a "fishing expedition," and was not entitled to discover or introduce any evidence of any possible criminal

investigations that had not led to pending criminal charges or convictions. After hearing oral argument on the issue, the circuit court denied defendant's request.

¶ 36 At the evidentiary hearing, Ms. Macias, Ms. Amaya, Ms. Narbaiz and defendant all generally testified consistently with their previously filed affidavits. Ms. Macias further indicated that the receipts at her restaurant were only printed after a guest had completed their meal. With respect to Ms. Amaya, we additionally note that she specifically admitted that, while she never looked at a clock, she knew defendant returned to her home around 9:00 p.m. on December 27, 2000, because defendant returned just as her husband was brushing his teeth and getting ready for bed, which he always did at that time. On cross-examination, Ms. Amaya admitted that her previously executed affidavit did not indicate exactly how she knew defendant returned around 9:00 p.m. Ms. Amaya's testimony also reflected some amount of confusion regarding the circumstances that surrounded the execution of her affidavit. Ms. Narbiaz's testimony also revealed similar confusion regarding the execution of her affidavit.

¶ 37 Defendant testified that Mr. Lopez never visited him in jail or spoke to him on the phone in preparation for trial. His only conversations with Mr. Lopez were brief and occurred in connection with status hearings, at which time Mr. Lopez only discussed the payment of his fees. Defendant contended that he never had substantive discussions with Mr. Lopez about his case prior to trial, with Mr. Lopez rebuffing his attempts by telling defendant not to worry, and that everything was under control. During the trial, defendant testified that he told Mr. Lopez that Mr. Reyes was lying regarding any conversations he had with Ms. Narbiaz, and told Mr. Lopez that he was at his mother's home on December 27, 2000. Defendant claimed that Mr. Lopez never discussed the receipt with him.

¶ 38 On cross-examination, defendant denied that he ever admitted to Mr. Lopez that he had murdered Mr. Sanchez.

¶ 39 Thereafter, the State called its only witness—Mr. Lopez—to testify. Mr. Lopez testified that he was a criminal defense attorney with extensive experience in murder cases. While he initially had no independent recollection of defendant's case, his memory was refreshed after reviewing various documents in preparation for the hearing.

¶ 40 Specifically, Mr. Lopez testified that he recalled having numerous, substantive conversations regarding defendant's case and trial strategy prior to trial, including conversations with defendant, Ms. Amaya and other members of defendant's family, and Ms. Narbiaz. With respect to Ms. Narbiaz, Mr. Lopez testified that, despite referencing her proposed testimony in his opening statement, he made the strategic decision not to call her as a witness. This was because the presence of defendant's brother when Ms. Narbiaz was interviewed by investigators from the office of the Cook County State's Attorney in October 2002 made her denials regarding defendant's purported statements to her and Mr. Reyes "look[] kind of staged."

¶ 41 With respect to defendant himself, Mr. Lopez testified that he never asked defendant about fees. In preparing for trial, Mr. Lopez and defendant discussed the State's timeline, the restaurant receipt, and defendant's whereabouts on December 27, 2000. Additionally, Mr. Lopez testified that defendant inquired about the possibility Mr. Sanchez could be a government informant prior to Mr. Sanchez's death, and that defendant admitted to shooting and killing Mr. Sanchez prior to trial.

¶ 42 Mr. Lopez explained that his trial strategy was to establish that Mr. Reyes was an unreliable witness and focus on the lack of corroborating evidence. With respect to the State's timeline, Mr. Lopez admitted that he described the restaurant receipt as "the most telling piece of

evidence" in his opening statement at trial. He also admitted that he was aware of the business record exception to the rule against the substantive admission of hearsay evidence at the time of trial, but did not seek to lay a foundation for the substantive admission of the receipt on that basis. Finally, Mr. Lopez admitted that he had the ability to determine the time it would take to travel from Mr. Reyes' home to the Aguascalientes restaurant, from the restaurant to the entrance to the forest preserve, and then from the forest preserve entrance to Mr. and Ms. Amaya's home, but he did not do so.

¶ 43 During his testimony, the circuit court refused to allow defendant to cross-examine Mr. Lopez about possible bias with respect to the separate criminal investigation and prosecution referenced in defendant's previously discussed discovery request. After defendant admitted in an offer of proof that Mr. Lopez was not a defendant in any pending proceeding, the circuit court concluded that it would be "entirely speculative and improper" for defendant to cross-examine Mr. Lopez regarding such matters.

¶ 44 At the conclusion of the hearing, the circuit court denied defendant's written motion to take judicial notice of certain driving distances. In the motion, which was supported by Google Maps printouts, defendant specifically asked that the circuit court take judicial notice of the shortest driving distance between Mr. Reyes' house and the Aguascalientes restaurant (2.1 miles), from the restaurant to the entrance to the forest preserve (10.8 miles), and from the forest preserve entrance to Mr. and Ms. Amaya's home (10.9 miles). After noting that the Google Maps website automatically determined the shortest route, and that there was "no indication of the driving conditions, the time period, the weather, or any of those things that obviously would affect the reliability of such Google map," the circuit court concluded "I have no indication how

reliable those Google Maps are, or if they were in existence back in 2000. So your motion is respectfully denied with regards to these driving distances."

¶ 45 Following oral argument, the circuit court denied defendant's postconviction petition in an oral ruling issued on June 16, 2017. In its ruling, the circuit court began by noting its understanding that this court's order remanding the matter for an evidentiary hearing, which accepted the truth of the well-pleaded facts and affidavits in defendant's petitions, concluded that defendant had made a substantial showing of Mr. Lopez's ineffectiveness based on "the cumulative failure to investigate" the testimony of Ms. Narbaiz, Ms. Mercado, and Ms. Amaya, and to introduce the Aguascalientes restaurant receipt as substantive evidence. The trial court then indicated its understanding that, in our prior order, this court "ordered the hearing so that the postconviction court could resolve *those issues*, and determine whether defendant had met his burden and shown that Lopez was ineffective." (Emphasis added.)

¶ 46 In general, the circuit court found Ms. Narbaiz, Ms. Amaya and defendant to be incredible witnesses, while Mr. Lopez was found to have "testified very credibly."[4] More specifically, with respect to Ms. Narbiaz, the circuit court found her to have a "very selective memory" and to have a "very questionable memory" with respect to the execution of her affidavit. As such, the circuit court concluded that Mr. Lopez's decision not to call her at trial was "a sound decision due to serious credibility concerns that [Narbaiz] posed."

¶ 47 With respect to Ms. Amaya, the circuit court specifically considered whether Lopez interviewed defendant's mother, Amaya, and whether he "was ineffective for not calling her as a witness in order to dispute the State's timeline." The court found Ms. Amaya's testimony to be

[4] After noting that Ms. Mercado was not called to testify at the evidentiary hearing, nor had postconviction counsel specifically argued Lopez's ineffectiveness for failing to call her as a witness at the hearing, the circuit court also concluded that the decision not to call her "should be considered sound trial strategy." That ruling is not challenged on appeal.

"very incredible," and specified that she became "very confused" when "confronted with questions about her affidavit." The court thus gave "little to no weight" to her testimony about her affidavit, and further concluded that her testimony that she knew defendant returned to her home around 9:00 p.m. on December 27, 2000, "because her husband was brushing his teeth is very implausible." After noting that it credited Mr. Lopez's testimony that he spoke with Ms. Amaya in preparation for trial, the circuit court concluded that "[t]here is no question in my mind that trial counsel was not ineffective for [not] presenting Ms. Amaya at trial because of the dubious nature of the information and the manner that it came out during the third stage evidentiary hearing."

¶ 48 The circuit court also contrasted defendant's testimony with that of Mr. Lopez, "a 30-year veteran criminal defense attorney, who testified very credibly as to his many conversations with the defendant about the case and his trial strategy to attack the credibility of the State's witness, who, according to Mr. Lopez, was not corroborated." After discussing Mr. Lopez's testimony regarding defendant's purported (and disputed) admission to committing the murder, and recognizing Mr. Lopez's continuing obligation to provide a vigorous defense without suborning perjury, the circuit court concluded that Mr. Lopez used "appropriate trial strategy and did use the consideration of how to proceed with the case with the knowledge of all of the facts that he had presenting the appropriate trial strategy."

¶ 49 The circuit court again discussed its understanding that this court remanded for an evaluation of Mr. Lopez's failure to introduce the Aguascalientes restaurant receipt as substantive evidence at trial. The circuit court agreed that Mr. Lopez did not introduce the receipt as "substantive evidence," and that "information on the receipt" shows "that the victim would be alive as [of] 8:24 p.m. on December 27th of 2000." However, the circuit court did "not agree that

the time on the receipt necessarily helps the Defense." The circuit court reasoned that the State's timeline showed that defendant called Mr. Reyes to get the gun at 7:30 p.m., and made another call to Reyes around 9:40 p.m., reporting that he had killed Mr. Sanchez. The circuit court also noted that defendant "actually did have the victim's phone. So the victim's phone can be placed in the defendant's presence. The receipt is actually consistent with the State's timeline, [as] there is no argument by the State that the victim was not alive at 8:24 p.m." The circuit court therefore did not find Mr. Lopez "ineffective for [not] introducing the receipt at trial."

¶ 50 "As an additional consideration" the circuit court stated that defendant had called Ms. Macias, from the Aguascalientes restaurant, to testify that the receipt could have been introduced as substantive evidence. The circuit court found that her testimony was "not definitive," despite noting that Ms. Macias believed that the cash register that produced the receipt functioned properly on December 27, 2000, and that the receipt was accurate. The circuit court noted that a separate company her family hired maintained the cash register, Ms. Macias was not working on December 27, 2000, and she "could not definitively say" that the cash register was operating properly that day.

¶ 51 In sum, the circuit court concluded that "after conducting evidentiary hearing and having had the opportunity to observe and assess the credibility of the witnesses presented by [defendant] I do not find that [defendant] has met [his] burden. I find that [defendant] had failed to show that trial counsel was ineffective."

¶ 52 Defendant timely appealed.

¶ 53 II. ANALYSIS

¶ 54 On appeal, defendant contends that the circuit court improperly refused to admit certain evidence at the evidentiary hearing on his postconviction petitions, and ultimately incorrectly

denied his postconviction claims of ineffective assistance of trial counsel. Because we conclude that the circuit court did improperly refuse to consider or admit certain evidence, we remand for additional postconviction proceedings.

¶ 55 A. Legal Framework and Standard of Review

¶ 56 As noted above, defendant filed the instant petitions pursuant to the Act. "The Post–Conviction Hearing Act * * * provides a method by which persons under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both. [Citations.] A postconviction action is not an appeal from the judgment of conviction, but is a collateral attack on the trial court proceedings." *People v. Tate*, 2012 IL 112214, ¶ 8. A postconviction proceeding contains three stages, the third stage of which is an evidentiary hearing. *Id*. at ¶ 9. At a third-stage evidentiary hearing, the defendant must show, by a preponderance of the evidence, a substantial violation of a constitutional right. *People v. Coleman*, 2013 IL 113307, ¶ 92.

¶ 57 At a third-stage evidentiary hearing, the circuit court "may receive proof by affidavits, depositions, oral testimony, or other evidence [and] * * * may order the petitioner brought before the court." 725 ILCS 5/122–6 (West 2016). The circuit court has wide discretion in deciding what evidence to consider (*People v. Coleman*, 206 Ill. 2d 261, 278 (2002)), and acts as the finder of fact at the evidentiary hearing, resolving any conflicts in the evidence and determining the credibility of witnesses and the weight to be given particular testimony (*People v. Domagala*, 2013 IL 113688, ¶ 34). Whether evidence is admitted in an evidentiary hearing on a postconviction petition is a matter committed to the sound discretion of the trial court, and its decision in the matter will not be disturbed on review absent an abuse of that discretion. *People v. Jones*, 2012 IL App (1st) 093180, ¶ 52. A trial court abuses its discretion in admitting or

refusing to admit evidence when its decision is arbitrary, fanciful or unreasonable or when no reasonable person would take the view adopted by the trial court. *Id*. (citing *People v. Donoho*, 204 Ill. 2d 159, 182 (2003)).

¶ 58 "Following a third-stage evidentiary hearing where fact-finding and credibility determinations are made, the circuit court's decision will not be reversed unless it is manifestly erroneous." *People v. Logan*, 2011 IL App (1st) 093582, ¶ 30. "Manifest error is error that is 'clearly evident, plain and indisputable.' " *People v. Beaman*, 229 Ill. 2d 56, 73 (2008) (quoting *People v. Morgan*, 212 Ill. 2d 148, 155 (2004)). This deferential standard of review reflects the understanding that the circuit court is in the best position to observe and weigh the credibility of the witnesses. *People v. Coleman*, 183 Ill. 2d 366, 384–85 (1998).

¶ 59 All of the claims raised in defendant's petition involve allegations that he received ineffective assistance of trial counsel. A claim of ineffective assistance of counsel is judged according to the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Lawton*, 212 Ill. 2d 285, 302 (2004). In order to obtain relief under *Strickland*, a defendant must prove defense counsel's performance fell below an objective standard of reasonableness and that this substandard performance caused defendant prejudice by creating a reasonable probability that, but for counsel's errors, the trial result would have been different. *People v. Wheeler*, 401 Ill. App. 3d 304, 313 (2010).

¶ 60 B. Evidentiary Errors

¶ 61 We first address the circuit court's refusal to allow defendant to present the testimony of Mr. Amaya at the evidentiary hearing. As noted above, the circuit court explained this decision by reasoning that allowing such testimony would violate the Act, because Mr. Amaya's proposed testimony had not previously been raised in any of defendant's postconviction petitions, and that

such testimony was not contemplated by or related to any issue identified by this court's remand order. We disagree.

¶ 62 With respect to the circuit court's first rationale, we note that our supreme court has specifically recognized that the Act "does not require that a defendant attach to a post-conviction petition the entire record necessary to adjudicate the merits of the asserted constitutional claim. Rather, under the Act, the purpose of the post-conviction petition is to permit the court to determine whether to grant an evidentiary hearing." *People v. Thompkins*, 181 Ill. 2d 1, 16 (1998). Expanding on this notion, our supreme court explained:

> " '[W]here the claims are based upon matters outside the record * * * it is not the intent of the [A]ct that these claims be adjudicated on the pleadings. The function of the pleadings in a proceeding under the [A]ct is to determine whether the petitioner is entitled to a hearing. If the trial court determines that the allegations of the petition are sufficient to require a hearing, the petitioner *must* be afforded an opportunity to prove his allegations.' " (Emphasis added.) *Id.* (quoting *People v. Airmers*, 34 Ill. 2d 222, 226 (1966)).

As such, a defendant does not waive the opportunity to present testimony at an evidentiary hearing simply by failing to attach affidavits to his post-conviction petition. *Id.*

¶ 63 Here, one of the issues specifically raised in defendant's postconviction petitions was Mr. Lopez's purported ineffectiveness in failing to investigate and present the testimony of Ms. Amaya. In rejecting this claim following the evidentiary hearing, the circuit court specifically relied upon its conclusion that Ms. Amaya's testimony—that she knew defendant returned to her home around 9:00 p.m. on December 27, 2000, because her husband was brushing his teeth and preparing for bed—"[was] very implausible." However, Mr. Amaya's proposed testimony

contained facts that could have corroborated his wife's account of that evening. Pursuant to the *Thompkins* decision, it was error for the circuit court to refuse to permit Mr. Amaya to provide that potentially corroborating testify at the hearing merely because that testimony was not previously and specifically "raised" in the postconviction petitions filed by defendant.[5]

¶ 64 We also reject the circuit court's contention that allowing Mr. Amaya to testify would have been beyond the purportedly limited scope of this court's prior remand for an evidentiary hearing. It is certainly true that in our prior order, we remanded for an evidentiary hearing after concluding that "defendant ha[d] made a substantial showing of ineffective assistance of trial counsel based on the cumulative failure to investigate the testimony of witnesses Rachel Narbaiz, Diana Mercado, and Maritza Amaya and to introduce the receipt from the Aguascalientes restaurant as substantive evidence." *Martinez*, 2014 IL App (1st) 112794-U, ¶ 47. It is also the case that, on remand, the circuit court has no authority to act beyond the scope of the appellate mandate. *People v. Gonzalez*, 407 Ill. App. 3d 1026, 1036 (2011). Thus, where the direction of our mandate is to specifically proceed in conformity with our opinion or order, then the opinion or order must be consulted to determine the appropriate course of action. *Id*.

¶ 65 However, in our prior order we simply addressed the reasons why we concluded that defendant's petitions made a substantial showing of ineffective assistance, such that an evidentiary hearing was warranted. As discussed above, defendant's petitions did not absolutely define the scope of the evidence he could present at the subsequent evidentiary hearing. Furthermore, our prior order did not contain any *specific* limitation on the evidentiary hearing we

[5] We note again that that defendant did file a second supplemental postconviction petition, following our prior remand for an evidentiary hearing, which did attach Mr. Amaya's affidavit. However, that supplement asked for leave to file, the State filed an objection thereto, and there is no indication in the record that leave to file that second supplemental petition was ever granted.

directed the circuit court to conduct on remand. See *Martinez*, 2014 IL App (1st) 112794-U, ¶ 48 (in which we generally held that "[f]or the foregoing reasons, we reverse the judgment of the circuit court which dismissed the postconviction petitions and remand for an evidentiary hearing."). Thus, our mandate did not direct the circuit court to proceed in any particular way with respect to an evidentiary hearing. Indeed, it has specifically been recognized that such generalized language does "not otherwise dictate the scope of the evidentiary hearing." *Gonzalez*, 407 Ill. App. 3d at 1038.

¶ 66 Even if our prior order could be read to limit the issues on remand, Mr. Amaya's proposed testimony was (at least potentially) directly relevant to the issue of Mr. Lopez's purported ineffectiveness for failing to investigate and present the testimony of Ms. Amaya, an issue specifically addressed in defendant's petitions and in this court's prior order.

¶ 67 For these reasons, it was also error for the circuit court to refuse to permit Mr. Amaya to testify at the hearing simply because that testimony was beyond the purportedly limited scope of this court's prior remand for an evidentiary hearing.

¶ 68 We next consider the circuit court's refusal to allow the introduction of evidence as to the shortest driving distance between Mr. Reyes' house and the Aguascalientes restaurant, from the restaurant to the entrance to the forest preserve, and from the forest preserve entrance to Mr. and Ms. Amaya's home, either in the form of Mr. Valdez's proposed testimony or by taking judicial notice of those distances.

¶ 69 As noted above, with respect to Mr. Valdez's proposed testimony, the circuit court concluded that whatever Mr. Valdez did in 2016 was irrelevant to determining Mr. Lopez's possible ineffectiveness at defendant's 2003 trial. Defendant cites to *Beaman*, 229 Ill. 2d 56, in support of his argument that the circuit court abused its discretion by rejecting this proposed

evidence. In that case, a defendant was permitted to introduce the testimony of an investigator hired for postconviction proceedings at an evidentiary hearing. *Id*. at 68. That investigator testified regarding recorded travel times along several specified routes traveled in 1999, in an effort to dispute the State's proposed timeline and its evidence of defendant's opportunity to commit a 1993 murder. *Id*.; *People v. Beaman*, 368 Ill. App. 3d 759, 762, 765 (2006).

¶ 70 We do not believe that *Beaman* supports defendant's argument that the circuit court abused its discretion by rejecting Mr. Valdez's proposed testimony. In that case, there is no indication that the investigator's proposed testimony was ever challenged by the State, the routes traveled by the investigator were traveled multiple times and were specifically selected based upon other relevant evidence presented in the case, and only six years separated the time of the murder and the time of the investigator completed his work. *Id*. In contrast, here Mr. Valdez's proposed testimony was challenged by the State, the routes were automatically selected by Google Maps and were each traveled a single time, and over 16 years separated December 27, 2000, and the time Mr. Valdez completed his work. We therefore conclude that defendant has not showed that the circuit court abused its discretion in refusing to admit Mr. Valdez's proposed testimony.

¶ 71 However, we need not resolve this issue in favor of defendant to find error, as we conclude that the circuit did abuse its discretion in refusing defendant's request to take judicial notice of the relevant distances.

¶ 72 "A judicially noticed fact must be one not subject to *reasonable dispute* in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." (Emphasis added.) Ill. R. Evid. Rule 201(b) (eff. January 1, 2011). "A court *shall* take judicial

notice if requested by a party and supplied with the necessary information." (Emphasis added.) Ill. R. Evid. Rule 201(d) (eff. January 1, 2011). Courts often take judicial notice of the distances between two or more locations, as well as the customary routes and usual time required for travel between them. *Dawdy v. Union Pacific R.R. Co.*, 207 Ill. 2d 167, 177 (2003).

¶ 73 "Moreover, case law supports the proposition that information acquired from mainstream Internet sites such as Map Quest and Google Maps is reliable enough to support a request for judicial notice." *People v. Clark*, 406 Ill. App. 3d 622, 633 (2010). Courts have repeatedly relied upon Google Maps in taking judicial notice of the distances between two or more locations. *Hess v. Miller*, 2019 IL App (4th) 180591, ¶ 9; *Peters v. Riggs*, 2015 IL App (4th) 140043, ¶ 49; *People v. Crawford*, 2013 IL App (1st) 100310, n. 9; *Clark*, 406 Ill. App. 3d at 633; *People v. Stiff*, 391 Ill. App. 3d 494, 504 (2009). Indeed, we are not aware of any reported decisions finding a court's reliance upon Google Maps improper.

¶ 74 Here, defendant's motion asked the circuit court to take judicial notice of the shortest driving distance between Mr. Reyes' house and the Aguascalientes restaurant, from the restaurant to the entrance to the forest preserve, and from the forest preserve entrance to Mr. and Ms. Amaya's home, and was supported by Google Maps printouts. After noting that the Google Maps website automatically determined the shortest routes, and that there was "no indication of the driving conditions, the time period, the weather, or any of those things that obviously would affect the reliability of such Google map," the circuit court denied the request after concluding "I have no indication how reliable those Google Maps are, or if they were in existence back in 2000."

¶ 75 In light of the above authority, we find this conclusion to be an abuse of discretion. Such concerns are not the type of "reasonable disputes" that would preclude the circuit court from

taking judicial notice of the distances. At most, these concerns involved the weight that should have been given to this evidence at the evidentiary hearing.

¶ 76 We next consider defendant's contention that the circuit court improperly refused to allow Mr. Lopez to be cross-examined regarding bias, specifically as to a separate criminal investigation and prosecution in connection with which Mr. Lopez was purportedly still under investigation. We disagree.

¶ 77 As our supreme court has recognized:

> "[T]he circuit court has wide discretion to limit the type of evidence it will admit at a postconviction evidentiary hearing. [Citation.] A criminal defendant has a fundamental constitutional right to confront the witnesses against him and this includes the right to conduct a reasonable cross-examination. The defendant has the right to inquire into a witness' bias, interest, or motive to testify falsely. [Citation.] The evidence used to impeach, however, must give rise to an inference that the witness has something to gain or lose by his testimony. Accordingly, the evidence must not be remote or uncertain. [Citation.]" *Coleman*, 206 Ill. 2d at 278.

¶ 78 As such, courts have recognized that a defendant has a right to cross-examine and otherwise inquire of a witness concerning *pending* criminal charges. *People v. Harmon*, 2015 IL App (1st) 122345, ¶ 98. This is because "the fact that a prosecution witness has charges pending against him indicates a possibility that the witness might attempt to curry favor with the government by testifying for the State." *Id*. However, courts have traditionally not allowed cross-examination for potential bias where the witness is merely under investigation or has been questioned. *People v. Foster*, 322 Ill. App. 3d 780, 785 (2000); *People v. Lawson*, 193 Ill. App. 3d 396, 400 (1990) (collecting cases). The only exception to this rule citied by defendant is the

decision in *People v. Baugh*, 96 Ill. App. 3d 946, 951 (1981), where the court found that it was error to disallow a defendant to inquire into the potential for bias as to two witnesses who were *admitted* to be under investigation for "the same kind of offense with which defendant was charged."

¶ 79 Here, it is undisputed that Mr. Lopez was not facing any pending criminal charges. Rather, defendant contends that the State "acknowledged that during these post-conviction proceedings Lopez remained under investigation." This is simply untrue. The record clearly indicates that during argument on defendant's pretrial motion for discovery, the State acknowledged the existence of an unrelated investigation. However, the record also clearly reflects that the State specifically informed the court of its understanding that there was no "target letter" indicating that Mr. Lopez was a focus of that investigation. Thus, it is not at all clear from the record that defendant's fundamental premise—that Mr. Lopez was under criminal investigation at the time of the evidentiary hearing—is even correct.

¶ 80 Moreover, we also reject defendant's contention that the trial court made a legal error in refusing to allow defendant to cross-examine Mr. Lopez regarding the unrelated investigation, because it would be "entirely speculative and improper" for defendant to do so when Mr. Lopez had not been convicted or even charged. As explained above, any evidence of bias must not be remote or uncertain, and the clear weight of authority supports the circuit court's understanding that cross-examination for potential bias is not allowed where the witness is merely under investigation or has been questioned. *Supra*, ¶¶ 85-86. The only exception to this rule citied by defendant is the decision in *Baugh*, 96 Ill. App. 3d at 951, and we do not fault the circuit court for not following *Baugh*, where it is an outlier decision and the court only found that it was error to disallow a defendant to cross-examine witnesses where they were *admitted* to be under

investigation for "the same kind of offense with which defendant was charged," circumstances not present here.

¶ 81 Ultimately, we find no abuse of discretion in the circuit court's limitation on defendant's cross-examination of Mr. Lopez, where it is not even clear that he was under criminal investigation, let alone facing pending criminal charges.

¶ 82 C. Relief and Scope of Remand

¶ 83 Having found that the circuit court committed two evidentiary errors, we now turn to determining the appropriate relief and the scope of our remand.

¶ 84 With respect to the refusal to permit Mr. Amaya to testify at the hearing, as explained above it is evident that this decision was caused by the circuit court's incorrect understanding that such testimony was beyond the purportedly limited scope of this court's prior remand for an evidentiary hearing. As such, the circuit court clearly and incorrectly believed it had no discretion in the matter.

¶ 85 A court commits error when it refuses to exercise its discretion based on the erroneous belief that it does not have any such discretion. *People v. Pinkston*, 2013 IL App (4th) 111147, ¶ 14 (citing *People v. Queen*, 56 Ill. 2d 560, 565 (1974) and *People v. Autman*, 58 Ill. 2d 171, 176 (1974)). "Where a trial court erroneously believes it has no discretion or authority to perform some act, the appellate court should not preempt the exercise of such discretion, but should remand the cause back to the trial court." *Greer v. Yellow Cab Co*., 221 Ill. App. 3d 908, 915 (1991). The appellate court must not usurp the trial court's function in exercising its discretion. *Id*.; *Pinkston*, 2013 IL App (4th) 111147, ¶ 18; *People v. Partee*, 268 Ill. App. 3d 857, 869 (1994). Therefore, if for no other reason, we must remand for the circuit court to consider

whether, in its discretion, Mr. Amaya should be allowed to testify. We express no opinion on the merits of that question. *Partee*, 268 Ill. App. 3d at 869.

¶ 86 In addition, however, we also conclude that a remand is warranted in light of the circuit court's improper refusal to take judicial notice of the shortest driving distance between Mr. Reyes' house and the Aguascalientes restaurant (2.1 miles), from the restaurant to the entrance to the forest preserve (10.8 miles), and from the forest preserve entrance to Mr. and Ms. Amaya's home (10.9 miles).

¶ 87 In rejecting defendant's claim that Mr. Lopez's failure to introduce the Aguascalientes restaurant receipt as substantive evidence at trial amounted to ineffective assistance, the circuit court agreed that Mr. Lopez did not introduce the receipt as "substantive evidence," and that "information on the receipt" shows "that the victim would be alive as 8:24 p.m. on December 27th of 2000." However, the circuit court did "not agree that the time on the receipt necessarily helps the Defense," after discrediting Ms. Amaya's testimony and concluding that "[t]he receipt is actually consistent with the State's timeline, [as] there is no argument by the State that the victim was not alive at 8:24 p.m."

¶ 88 However, we note that Mr. Reyes' testimony—upon which the State's case predominantly relied—indicated that defendant might have arrived at Mr. Reyes' home to pick up the gun as late as 8:00 p.m. that evening. It was then only after having a conversation and obtaining the gun that defendant purportedly left with Mr. Sanchez. And, Ms. Macias further indicated that the receipts at her restaurant were only printed after a guest had completed their meal.

¶ 89 It is clear that defendant was prejudiced by not being able to cite to the 2.1 mile driving distance between Mr. Reyes' home and the restaurant in attacking the State's timeline, which

required Mr. Sanchez to have left Mr. Reyes' home as late as sometime after 8:00 p.m., travel 2.1 miles, complete a meal, and then obtain a receipt, all by 8:24 p.m. This evidence alone could have supported defendant's claim that Mr. Lopez's failure to introduce the Aguascalientes restaurant receipt as substantive evidence at trial amounted to ineffective assistance.

¶ 90 Moreover, the circuit court's conclusion to the contrary was also made without considering the possibility of Mr. Amaya providing testimony corroborating Ms. Amaya's testimony that defendant returned home around 9:00 p.m. on December 27, 2000. Should the circuit court allow and credit such testimony on remand (we express no opinion on these issues at this time), the nearly 11 mile driving distances between the restaurant and the entrance to the forest preserve, and from the forest preserve entrance to Mr. and Ms. Amaya's home—combined with the receipt which the circuit court itself accepted showed that Mr. Sanchez was alive at the restaurant at 8:24 p.m.—could provide further evidence to question Mr. Lopez's failure to introduce the receipt as substantive evidence.

¶ 91 In so ruling, we reject the State's argument that certain admissions made by Mr. Lopez at the evidentiary hearing render any error in the circuit court's failure to take judicial notice of these distances harmless. Specifically, the State points to testimony in which Mr. Lopez acknowledged that at the time of trial he either knew or had the ability to discover that the forest preserve was "roughly" 11 miles from Cicero, and that it was "fair" to say this distance would take "roughly" 20 minutes to travel by car. However, we find Mr. Lopez's acknowledgments were not nearly as specific as the distance evidence defendant sought to introduce, and did not include any reference to the shortest driving distance between Mr. Reyes' house and the Aguascalientes restaurant.

¶ 92 We also note that "[a]s an additional consideration" the circuit court expressed some concern that defendant had not fully established that the Aguascalientes restaurant receipt could have been introduced substantively as a business record at trial. However, it is not clear that the circuit court actually relied on this consideration in denying defendant's claim that Mr. Lopez's failure to introduce the receipt as substantive evidence at trial amounted to ineffective assistance. To the extent that the circuit court did so rely, it did so in error.

¶ 93 Section 115-5(a) of the Code of Criminal Procedure clearly provides as follows:

> "Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility." 725 ILCS 5/115-5 (West 2014).

¶ 94 The record clearly establishes that Ms. Macias provided direct testimony meeting the requirements of the first paragraph section 115-5-(a). Nevertheless, the circuit court found that Ms. Macias' testimony was "not definitive." The circuit court specifically noted that a separate company her family hired maintained the cash register, Ms. Macias was not working on December 27, 2000, and she "could not definitively say" that the cash register was operating properly that day.

¶ 95 First, this is not an entirely accurate recitation of Ms. Macias' testimony. Ms. Macias never testified that she was not working on December 27, 2000. She testified that she could not recall one way or the other. Second, under the second paragraph of section 115-5(a), all of these concerns go to the weight to be given to the receipt, not its admissibility.

¶ 96 Having determined that a remand is necessary, we briefly detail the nature of our ruling and the scope of the proceedings to be held on remand. As explained above, we have concluded that the circuit court made two potentially prejudicial evidentiary errors with respect to the evidentiary hearing on defendant's postconviction petitions. Our supreme court had recognized that in such situations, we should remand and direct the postconviction court to reopen the evidentiary hearing to address the evidentiary errors. *People v. Montgomery*, 162 Ill. 2d 109, 133 (1994). As our supreme court has noted, in such situations:

> "The post-conviction court may rely on the record and need not receive the rest of the evidence a second time. Of course, it may in its discretion allow either side to re-present evidence to the extent it feels that reception will aid it in making its ultimate findings.
>
> Our order renders the post-conviction hearing incomplete. It would therefore be premature to consider defendant's remaining allegations of error, which go to the adequacy of the post-conviction court's findings following what it perceived to be the completion of the post-conviction trial. Our order to reopen the hearing necessitates new factual findings upon the completion of the evidence." *Id*.; *People v. Thompkins*, 181 Ill. 2d 1, 20 (1998) (same).

¶ 97 Therefore, we remand and direct the circuit court to reopen the evidentiary hearing to address the evidentiary errors discussed in this order. That would specifically involve the circuit court exercising its discretion with respect to whether defendant may present Mr. Amaya's

proposed testimony, and then considering any evidence Mr. Amaya provides if he is allowed to testify. It would also involve the circuit court taking judicial notice of the distances discussed above, and considering the impact of that evidence.

¶ 98 Following our supreme court's example, therefore, we conclude that "we are not able to address defendant's primary contention that the facts presented at the evidentiary hearing establish that he was deprived of his constitutional right to effective assistance of counsel." *Thompkins*, 181 Ill. 2d at 20. We therefore remand for further proceedings as discussed above, and "if necessary, the circuit court on remand should make new findings regarding defendant's claim he was deprived of his constitutional right to effective assistance of counsel at the completion of the reopened hearing. *Id*.

¶ 99 "The circuit court shall report all its findings to the clerk of this court as directed at the conclusion of this opinion. We retain jurisdiction over this cause and will address this issue following our receipt of the circuit court's findings." *Id*. at 21.

¶ 100 D. New Judge

¶ 101 Finally, we consider defendant's request that a new judge preside over the reopened evidentiary hearing. Defendant contends that assignment of a new judge is required, because here the circuit court's rulings "at both stage three and stage two of the post-conviction process demonstrate prejudgment of the central issue in the case—namely, the effect the receipt has on the timeline of the State's case."

¶ 102 We disagree. The cases cited by defendant in support of this argument all involved a court prejudging a postconviction petition at the first stage, or a criminal trial, without the basis of hearing any evidence or on the basis of preconceived notions or matters outside the record. See, *People v. Reyes*, 369 Ill. App. 3d 1, 26 (2006); *People v. Kennedy*, 191 Ill. App. 3d 86, 91

(1989); *People v. McDaniels*, 144 Ill. App. 3d 459, 462-63 (1986). None involve a judge being replaced with respect to further postconviction proceedings on the basis of findings or rulings—even incorrect rulings—made at the second or third stage, after affidavits and other evidence have been put forth. Notably, our supreme court did not order new judges to be appointed in *Montgomery*, 162 Ill. 2d at 133, or *Thompkins*, 181 Ill. 2d at 20, when it remanded for the reopening of evidentiary hearing, even after the circuit courts in those cases had denied postconviction relief only after making incorrect evidentiary rulings.

¶ 103 While the circuit court in this matter did not grant defendant postconviction relief based upon the evidence before it, we find nothing in the record to support defendant's contention that the circuit court will not give fair consideration to the issues identified in our current remand order, or to defendant's ultimate right to any postconviction relief in light of additional evidence presented upon remand. Accordingly, we decline the defendant's request that this case be assigned to a different judge on remand.

¶ 104 III. CONCLUSION

¶ 105 For the foregoing reasons, this cause is remanded to the circuit court of Cook County with directions to reopen the evidentiary hearing for the limited purposes described in this order. We retain jurisdiction over this cause. The circuit court shall report its findings to the clerk of this court within 90 days of issuance of the mandate in this case, accompanied by a record of the proceedings on remand. *Thompkins*, 181 Ill. 2d at 23-24.

¶ 106 Cause remanded with directions; jurisdiction retained.