No. 124992

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, v. JUSTIN KNAPP, Petitioner-Appellant.	)))))))))))	On Appeal from the Appellate Court of Illinois, Second Judicial District, No. 2-16-0162 There on Appeal from the Circuit Court of McHenry County, No. 08 CF 562 The Honorable Sharon L. Prather, Judge Presiding.

BRIEF OF RESPONDENT-APPELLEE
PEOPLE OF THE STATE OF ILLINOIS

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

NATURE OF THE ACTION

Defendant Justin Knapp appeals from the appellate court's judgment affirming the summary dismissal of his postconviction petition. A question is raised concerning the sufficiency of the postconviction pleadings, namely, whether defendant's petition failed to allege the gist of a constitutional claim of ineffective assistance of counsel.

ISSUE PRESENTED

Whether defendant's petition failed to allege the gist of a constitutional claim of ineffective assistance of counsel.

STANDARD OF REVIEW

The summary dismissal of a postconviction petition is reviewed de novo. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009).

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315 and 612(b). On September 25, 2019, this Court allowed defendant's petition for leave to appeal. *People v. Knapp*, No. 124992 (Sept. 25, 2019).

STATEMENT OF FACTS

Shortly before 5:30 a.m. on June 10, 2008, police and paramedics responded to an emergency at an Aldi grocery store in Woodstock. R435, 474-75. Upon arrival, they discovered Jorge "George" Avitia lying bloodied and unconscious in the store's parking lot. R437-37. Avitia had been stabbed repeatedly in the abdomen and upper body, resulting in a puncture wound to

his heart that required emergency surgery to save his life. R561, 615-16. Andres Pedroza, a friend of Avitia and defendant, witnessed the attack, and he provided police with a description of the two assailants (including the fact that both wore white t-shirts) and their direction of travel as they fled the scene. R476-77. Police found defendant at a nearby residence and arrested him. R518, 520. Shortly thereafter, police drove Pedroza to the residence, where he identified defendant as one of the assailants. R480.

On July 3, 2008, a grand jury indicted defendant and codefendant Luis Rodriguez on charges of attempted first degree murder, mob action, and two counts of aggravated battery. C8-10. The case proceeded to jury trial in September 2008. R417.

A. Trial and sentencing

The trial evidence showed that early in the morning of June 10, 2008, defendant and his two longtime friends, Avitia and Pedroza, gathered at Pedroza's Crystal Lake home. R440-42. Pedroza testified that the trio had been friends since third grade. R441. Around 2:30 that morning, another friend, Christian Saenz, drove to Pedroza's home with codefendant Luis Rodriguez. R445. Pedroza did not know Rodriguez. R444-45. Saenz and Rodriguez picked up defendant, Avitia, and Pedroza and, after making a brief stop, drove to a house at 672 Brink Street in Woodstock. R446-47, 489-91. The house belonged to James Kelley, who, along with his girlfriend, was asleep by the time the group arrived. R448, 492. Kelley and Rodriguez were

close friends, and Rodriguez regularly spent time at Kelley's house. R499, 503.

Saenz left Kelley's house, and sometime thereafter, Avitia and Rodriguez began to argue in the living room. R448-50. Pedroza heard Rodriguez say "fuck you, George," and "King killer." *Id.* Pedroza understood "King killer" to refer to the Latin Kings street gang. R450. Pedroza testified that he was unsure whether defendant was involved in the argument, but he did hear defendant talking while Avitia and Rodriguez argued. R449-50. Pedroza could not hear exactly what either defendant or Avitia were saying. *Id*. Pedroza then told Avitia it was time to leave. R451. The pair left and, as they walked in the direction of the train station, they were followed by defendant and Rodriguez, both of whom were wearing white t-shirts. R452, 460.

As Pedroza and Avitia walked through the Aldi parking lot on their way to the train station, Pedroza heard Rodriguez say "Fourteen something," but did not hear what defendant was saying. R452. Pedroza understood this to be a reference to the "Fourteens" or Norteños 14 street gang, a rival of the Latin Kings street gang. R452; *see* R591. Defendant and Rodriguez then closed in on Pedroza and Avitia and began hitting Avitia "on his body," while Pedroza stood 10 to 15 feet away. R453-54. Defendant stood to Avitia's left and Rodriguez to his right as they hit him. R454. Pedroza saw one of the two assailants holding something "shiny," which he opined may have been a

screwdriver. R460-61. Pedroza grabbed defendant and asked him what he was doing. R454. Defendant and Rodriguez then fled, but not before Rodriguez struck Avitia one last time. *Id*. Avitia collapsed, and Pedroza called 9-1-1. R456-57.

Avitia similarly testified that he and defendant had been friends since elementary school. R551. He, defendant, Pedroza, Saenz, and Rodriguez went to Kelley's house around 3:30 a.m. on June 10, 2008. R555. Upon arriving, Avitia drank a few beers. R569. Avitia, Rodriguez, and defendant then argued about the Norteños 14 and Latin Kings, and Avitia recalled defendant professing his love for the Norteños 14. R556. Although Avitia was not a gang member, he associated with members of the Latin Kings, and he knew that defendant was a member of the rival Norteños 14. R557, 571. Officer Dmitri Boulanahnis, who testified as an expert on local street gangs, confirmed that the Norteños 14 and the Latin Kings were rivals; he had conducted surveillance on defendant over a period of several years and witnessed defendant wearing Norteños 14 colors and flashing gang signs at him while in uniform in a marked squad car. R586-91. Boulanahnis further testified that defendant previously admitted to being a member of the Norteños 14 and visibly displayed four tattoos signifying his membership in that gang. R593-94.

As Avitia and Pedroza walked toward the train station, Avitia heard defendant and Rodriguez saying "fuck you" and "Norteños, what," to which he

responded, "fuck you too." R558. Avitia testified that defendant then attacked him from the left, and Rodriguez attacked him from the right in the Aldi parking lot. R559-560. Avitia did not remember how many times they struck him. R560. The next thing he remembered was waking up in the hospital with stab wounds near his left collarbone, left armpit, and lower right abdomen. R561; *see* R615-16.

Officer Jeremy Mortimer testified that he was the first police officer to arrive at the Aldi parking lot, where he saw an unconscious and bloodied Avitia on the ground. R474-75. After a discussion with Pedroza, Mortimer relayed defendant's and Rodriguez's descriptions and direction of travel to fellow officers. R476-77. Shortly thereafter, Mortimer learned that defendant had been spotted near Kelley's house on Brink Street. R477. Officer Daniel Henry saw defendant standing near the front door of the Brink Street house holding two red gas cans. R517. Defendant ran into the house with the gas cans upon seeing Henry's marked squad car. R518.

Officers Henry and Matthew Harmon then secured the two entrances to Kelley's house. R519, 530. While at the back door, Harmon discovered a wooden-handled steak knife on the grass. R530. Kelley's girlfriend, Katrina Cardella, testified that she had used this knife a few hours earlier and that she had placed it next to the kitchen sink. R508-09. A fingerprint examiner later testified that there were no fingerprints on the knife, which was the

expected result with that type of wooden handle. R624, 630-31. Nor was there any blood on the knife. R538.

Meanwhile, inside the house, Kelley awoke to hear someone banging on his front door; defendant was pacing in the living room and told Kelley not to open the door. R493. Kelley did not know defendant or why defendant was in his home. *Id.* He told defendant to sit down, then opened the door and allowed the officers to enter and search his home. R493-94. Officer Henry entered and observed defendant lying on the couch under a blanket, fully clothed. R519. Defendant's white t-shit and shoes were muddy, and he was sweating and appeared to be slightly out of breath, but his hands did not appear to be cut or bruised. R506, 519-20, 522. Cardella and Kelley testified that two gas cans inside the home near the front door were not there when they went to bed a few hours earlier. R495, 507-08, 525. Kelley stated that they were likely from his backyard fire pit. R500.

Police arrested defendant inside Kelley's house. R520. He then became aggressive and threatened to find and kill Kelley and Cardella. R507. He also threatened to rape and murder the police officers' wives and to hurt their children. *Id.*; R526. Throughout, defendant "kept yelling gang slogans about the Fourteens and how he was a gang banger and they never die." *Id.* Police removed defendant from the house, and Pedroza identified him in a showup, in which police brought defendant to the end of the driveway and Pedroza viewed him from his seat in Officer Mortimer's vehicle.

R480. Pedroza later also identified Rodriguez from a photo array. R459-60, 545-46.

The parties stipulated that two suspected blood stains from defendant's watch and shoe were not a match to Avitia's DNA. R643-47. Neither defendant nor Rodriguez testified. R649-50. Before closing argument, the State requested that the court admonish defendant of his right to testify, which led to the following exchange:

> THE COURT: … Sir, your attorney has just rested the defense case. Have you discussed with Mr. Sugden [defense counsel] your right to testify?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: Sir, is it your choice not to testify?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: You discussed this thoroughly with Mr. Sugden?
>
> THE DEFENDANT: Yes.
>
> THE COURT: You understand that the right to testify is a decision that you and you alone have the right to make but you should make that decision only after discussing it with your attorney. You have done that?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: It's your choice not to testify?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: Thank you.
>
> DEFENSE COUNSEL: I have discussed it at great length with him and it's his decision and I respect it.

THE COURT: Okay. The record will so reflect. Thank you.

Id.

During the State's closing argument, the prosecutor argued that the evidence overwhelmingly demonstrated that defendant participated in the stabbing of Avitia. *See generally*, R658-683, 692-702. Defendant was likely the person who stabbed Avitia since he attacked from Avitia's left side, where Avitia received stab wounds to his heart and left armpit. R667, 670-72. But regardless of whether defendant actually did the stabbing, the prosecutor argued, defendant was guilty because he was accountable for Rodriguez's conduct. R695-96.

The State further argued that the jury should not credit the defense theory that defendant had merely followed Avitia, Pedroza, and Rodriguez to make sure that his friends (Avitia and Pedroza) did not get hurt. *See* R678-79. As defendant's longtime friends, Avitia and Pedroza had no reason to falsely implicate defendant and could instead have blamed the attack on Rodriguez, whom they did not know. R665-66. Defendant's admission that he was a member of the Norteños 14 and his repeated display of gang colors, signs, and visible tattoos, even in front of uniformed police officers, demonstrated that defendant's loyalty to the Norteños 14 was so intense that he prioritized it over his friendship with Avitia. R674-77, 682.

Although no forensic evidence linked defendant to the knife recovered outside Kelley's home, neither were Cardella's prints on the knife, though she

had used it that evening. R680; *see* R624, 630-31. And defendant's conduct after the attack — directing Kelley not to open the door, hiding under a blanket in Kelley's home, moving the gas cans, and his flight from a marked patrol car — demonstrated his consciousness of guilt. R679-81. Defendant neither remained on the scene nor called 9-1-1, as Pedroza had, and as one would have expected him to do if he were "concerned" about his friends. R678-79; *see* R433. The prosecutor further suggested that defendant's removal of the two gas cans from the fire pit in the backyard to inside the house was "the most powerful evidence that the defendant knew he had committed a criminal offense," because the jury could infer that defendant was concerned that there was blood on his clothing and was planning on destroying that evidence. R679.

In response, the defense attempted to undermine the State's theory that defendant's gang affiliation prompted the attack since defendant had remained friends with Avitia and Pedroza despite their known gang affiliations. R685, 691. No forensic evidence linked defendant to the knife, and counsel urged the jury to reject the witness testimony, noting that all witnesses to the attack had been drinking that night, including Avitia, who had a blood alcohol concentration of .184. R687-89.

The jury found defendant guilty on all counts, R724, C230-34, and the court entered judgment on the attempted first degree murder charge and sentenced defendant to 16 years in prison, C246-49.

B. Direct appeal

On appeal, defendant argued that his counsel was ineffective because he "elicited inadmissible other crimes evidence that was similar to the charged offense and also false" and failed to "'pursue a ruling on the state's motion to introduce gang evidence' or 'renew his objection' to the admission of such evidence." C485-87. Finding that defendant could not establish prejudice in light of the overwhelming evidence of his guilt, the appellate court affirmed in an unpublished summary order. *People v. Knapp*, No. 2-09-0089 (2010); C485-87.

C. Postconviction proceedings

Nearly five years after trial, in November 2015, C490, defendant filed a postconviction petition that raised claims of actual innocence, involuntary waiver of his right to testify, and ineffective assistance of appellate counsel, C496. As to his right-to-testify claim, defendant alleged that his "decision not to testify was induced by his attorney illegally withholding information critical to [defendant's] decision, thus rendering his decision involuntary." C503. Defendant did not allege, however, that he ever explicitly told defense counsel he wanted to testify. *See* C503-10.

Defendant's petition averred that he would have testified that the dispute between Rodriguez and Avitia erupted over a girl, Jackie Gutierrez, which fact he asserted would have impeached the "inconsistent and wholly unbelievable testimony of [Avitia] and [Pedroza]." C507-08. He would have

further testified that he did not know Rodriguez, having met him only once before that evening, C505, 508, 568, and that he merely moved the two gas cans after Rodriguez attempted to burn his (Rodriguez's) bloody shirts, C508. Defendant asserted that his proposed testimony would have rebutted the State's allegations that defendant and Rodriguez "acted in concert to commit an aggravated battery upon Avitia . . . because of an alleged mutual gang membership." C508.

As to discussions with counsel, defendant alleged that, before trial, counsel informed him that his proposed testimony that the argument at Kelley's house had nothing to do with gangs was unnecessary because Avitia had told the police that the incident was not gang related; his proposed testimony that the argument was over a girl was not supported by independent evidence; his proposed testimony that Rodriguez was not a member of the Norteños would open the door for the State to introduce its gang expert; and his proposed testimony that he met Rodriguez only once before this incident was not supported by independent evidence. C505. Before trial, counsel also informed defendant that portions of his proposed testimony — that he merely moved the two gas cans from the location where Rodriguez started a fire to burn Rodriguez's bloody shirts; that Rodriguez washed blood off his hands; that he saw blood on Rodriguez's pants; and that the girl they argued over was briefly at the Kelley residence but left because Rodriguez insulted her — was unsupported by the evidence. C506.

Defendant claimed that photographs obtained from the Woodstock Police Department showed "what appeared to be blood" on Rodriguez's pants. C510. He argued that his proposed testimony would have discredited the State's theory of the case. C507-10. And he concluded that counsel's deficient advice regarding the value of his proposed testimony deprived him of his constitutional right to testify. C510.

Defendant included several exhibits with his petition, including Woodstock police reports and photographs, as well as a transcript of a police interview with Rodriguez. C515-600. The transcript reflected that Rodriguez told police that the argument was gang-related and that Avitia was "throwing up [Latin] King" gang signs, C531; that defendant approached Rodriguez shortly after the attack, claimed to have stabbed Avitia, and bragged "that's why they call me Machete," C534-35 and that defendant showed him the knife used in the attack, *id.* After the attack, Rodriguez saw blood on defendant and asked if he was bleeding, to which defendant replied, "no." C536. Defendant also told Rodriguez that he (defendant) needed to destroy any DNA evidence on his clothing and person, and suggested that urinating on himself might accomplish this goal. C536-37. Rodriguez claimed that defendant said that he needed to burn his shirts and burn the DNA, C535-39, and later Rodriguez saw defendant with two gas cans and saw some white shirts burning outside Kelley's house.

Defendant also included his own affidavit in which he asserted that he was lifelong friends with Avitia and Pedroza; he was a member of the Norteños 14 street gang; Avitia associated with members of the Latin Kings, but defendant was not aware that Avitia was a member of that gang; he met Rodriguez at a party in Chicago, but did not know him personally and did not know Rodriguez's "gang membership status as a Norteño 14"; the answers defendant gave during the colloquy regarding his right to testify were caused by his attorney's representations that there must be corroborating evidence to support his testimony; and his attorney and the court never told him that he had the absolute right to testify. C568-69.

In January 2016, the circuit court summarily dismissed the petition as frivolous and patently without merit. C604-08.

Defendant appealed, raising only the right to testify claim. C612; *People v. Knapp*, 2019 IL App (2d) 160162, ¶ 32. Construing the claim to allege that counsel prevented defendant from testifying, the appellate majority affirmed, holding that defendant's claim was positively rebutted by the record. *Id.* ¶ 1. The court explained that defendant's repeated affirmative responses to the trial judge's admonishments, including defendant's confirmation that he knew of his right to testify, the decision was his alone to make, and he discussed this strategy with counsel, rendered his claim meritless. *Id.* ¶ 43. And even if defendant had alleged the gist of a claim of constitutionally deficient performance, his claim failed because he

did not sufficiently allege *Strickland* prejudice. *Id.* ¶ 42; *see also Strickland v. Washington*, 466 U.S. 668, 694 (1984).

In dissent, Justice McLaren would have held that the *Strickland* analysis was inapplicable at first stage postconviction proceedings. *Id.* ¶¶ 76-78 (McLaren, J., dissenting). Justice McLaren further opined that defendant's right to testify claim was not positively rebutted by the record, as his claim that counsel misled him into relinquishing his right to testify relied upon off-the-record conversations. *Id.* ¶¶ 84-86 (McLaren, J., dissenting). Finally, Justice McClaren concluded that the denial of defendant's postconviction petition should be reversed and remanded for second stage proceedings because defendant's proposed testimony would have undermined the credibility of the State's witnesses, and defendant sufficiently alleged an "arguable" claim of ineffective assistance of counsel. *Id.* ¶¶ 87-91(McLaren, J., dissenting).

ARGUMENT

The Circuit Court Properly Dismissed Defendant's Petition at the First Stage.

Pursuant to the Post-Conviction Hearing Act, a defendant may argue that the trial proceedings resulted in a substantial denial of his constitutional rights. 725 ILCS 5/122-1(a)(1). At the first stage of proceedings, "the court considers solely the petition's substantive value." *People v. Allen*, 2015 IL 113135, ¶ 33. "Section 122-2.1 of the Act directs the circuit court to dismiss the petition if . . . the court determines that the petition is frivolous or is

patently without merit," *People v. Coleman*, 183 Ill. 2d 366, 379 (1998) (citing 725 ILCS 5/122-2.1(a)(2)), *i.e.*, if it has no arguable basis in law or fact, *Hodges*, 234 Ill. 2d at 12. A postconviction "petition is considered frivolous or patently without merit if the petition's allegations, taken as true, fail to present the gist of a meritorious constitutional claim." *People v. Collins*, 202 Ill. 2d 59, 66 (2002) (citation omitted). A petition must be supported by "affidavits, records, or other evidence," 725 ILCS 5/122-2, so that the allegations contained therein are capable of objective or independent corroboration, *Hodges*, 234 Ill. 2d. at 1.

The defendant's right to testify is a fundamental right that only he may waive and is not among the strategic or tactical matters best left to trial counsel. *People v. Smith*, 326 Ill. App. 3d 831, 845 (1st Dist. 2001). However, the decision whether to testify should be made with the advice of counsel. *Id.* "Ultimately, the decision whether to testify belongs to the defendant." *Id.*

To demonstrate ineffective assistance of counsel, a defendant must show both that counsel's (1) performance fell below an objective standard of reasonableness, and (2) counsel's deficient performance resulted in prejudice to the defendant such that, but for counsel's errors, the result of the proceeding would have been different. *People v. Tate*, 2012 IL 112214, ¶ 18; *see also Strickland*, 466 U.S. at 688, 694. To establish the first prong of *Strickland*, a defendant must demonstrate that counsel's performance was so deficient "'that counsel was not functioning as the counsel guaranteed … by

the Sixth Amendment.'" *People v. Clendenin*, 238 Ill. 2d 302, 317 (2010) (quoting *Strickland*, 466 U.S. at 687). The defendant "must overcome the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not of incompetence." *Id.* Under *Strickland's* second prong, a defendant must show a '"reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *People v. Cherry*, 2016 IL 118728, ¶ 24 (quoting *Strickland*, 466 U.S. at 694). Thus, on postconviction review, "a petition alleging ineffective assistance may not be summarily dismissed if (1) it is arguable that counsel's performance fell below an objective standard of reasonableness, and (2) it is arguable that the defendant was prejudiced." *Hodges*, 234 Ill. 2d at 17.

In the right to testify context, courts have recognized *Strickland* claims alleging that (1) counsel *prevented* the defendant from testifying, *e.g.*, *People v. Youngblood*, 389 Ill. App. 3d 209 (2d Dist. 2009), (2) counsel *forced* the defendant to testify, *e.g.*, *People v. Madej*, 177 Ill. 2d 116 (1997), and (3) but for counsel's allegedly erroneous advice, the defendant would have testified, *e.g.*, *Smith*, 326 Ill. App. 3d at 845-46; *People v. Seaberg*, 262 Ill. App. 3d 79 (2d Dist. 1994). Because defendant's brief below relied on three cases in which counsel was alleged to have prevented the defendant from testifying, the appellate court construed defendant's argument as one that counsel prevented him from testifying. *Knapp*, 2019 IL App (2d) 160162, ¶ 32 ("On

appeal, defendant argues only that the trial court erred with respect to his second claim, that trial counsel was ineffective for not allowing defendant to testify, citing *People v. Palmer*, 2017 IL App (4th) 150020, ¶ 17; *People v. Youngblood*, 389 Ill. App. 3d 209, 217 (2009) and *People v. Whiting*, 365 Ill. App. 3d 402, 408 (2006).”). The dissenting justice construed defendant’s claim as one alleging that but for counsel’s allegedly erroneous advice, he would have testified. *Id.* ¶ 84 (McLaren, J., dissenting) (“The claim is that counsel misled defendant by misstating the law, telling him that he could not testify if he did not have extrinsic evidence supporting his proposed testimony. In addition, counsel did not tell him that certain evidence existed that would have supported his testimony, thus making his advice to defendant both legally and factually inaccurate.”).

Given appellate counsel’s reliance on the “prevented-me-from-testifying” cases, as well as defendant’s assertions in his affidavit that counsel told him that he could not testify, he was never told that he had an absolute right to testify, and the decision whether to testify belonged to him alone, C569, the appellate court reasonably construed the claim as alleging that counsel would not let him testify. Yet, as the dissenting justice noted, the claim also could be characterized as arguing that defendant waived his right to testify in reliance on his counsel’s allegedly flawed advice. Regardless, even if the appellate court applied the wrong postconviction standard and misunderstood defendant’s claim, it still reached the correct

result because defendant failed to allege an arguable claim of deficient performance or prejudice.[1] Accordingly, this Court should affirm the appellate court's judgment.

A. Defendant Failed to Present the Gist of a Claim that Counsel Prevented Him from Testifying.

As the appellate court correctly found, defendant failed to present the gist of a meritorious constitutional claim that counsel prevented him from testifying, for defendant made no contemporaneous assertion that he wished to exercise his right to testify. *People v. Brown*, 54 Ill. 2d 21, 24 (1973) (requiring defendant to make a "contemporaneous assertion" of his right to testify to counsel); *Youngblood*, 389 Ill. App. 3d at 217 (reviewing court must affirm dismissal of claim alleging that trial counsel was ineffective for refusing to allow that defendant to testify unless defendant made contemporaneous assertion of his right to testify) (quoting *Brown*, 54 Ill. 2d 21 at 24); *see Knapp*, 2019 IL App (2d) 160162, ¶ 39; *see also People v. Cleveland*, 2012 IL App (1st) 101631, ¶¶ 66-67 ("As with many constitutional rights that may be waived, it is incumbent upon the defendant to assert his right to testify such that his right can be vindicated during the course of the trial.").

[1] Under de novo review, this Court is "free to substitute its own judgment for that of the circuit court in order to formulate the legally correct answer." *Coleman*, 183 Ill. 2d at 388.

Moreover, not only did defendant fail to assert his right to testify, the record positively rebuts any claim that counsel prevented defendant from testifying, as the appellate majority recognized. *See Knapp*, 2019 IL App (2d) 160162, ¶ 41. During the colloquy with the judge, defendant "made no mention of any pressure from counsel" and "stated clearly that he understood the decision was his and his alone." *Id.* Thus, defendant failed to establish the gist of a claim that counsel prevented him from testifying. *Id.*

B. Alternatively, Defendant Failed to Allege the Gist of a Claim that Counsel Was Ineffective For Advising Him Not to Testify.

1. Trial counsel's performance was not arguably deficient.

Even assuming that defendant is claiming that he declined to testify based on the incorrect advice of his counsel, defendant's postconviction complaint would still have been properly dismissed at the first stage. Illinois courts have noted the "potential reversible error associated with a defendant's constitutional right to testify 'lurk[ing] — like an unexploded bomb — in every case resulting in a conviction,'" *People v. Williams*, 2016 IL App (4th) 140502, ¶ 34 (quoting *People v. Frieberg*, 305 Ill. App. 3d 840, 852 (4th Dist. 1999)), and have cautioned "against blindly accepting claims such as the one defendant makes here," *People v. Coleman*, 2011 IL App (1st) 091005, ¶ 32 (citing *People v. Knox*, 58 Ill. App. 3d 761, 767-68 (1st Dist. 1978)). This is because trial counsel's "'advice [not to testify] will in retrospect appear to the defendant to have been bad advice, and he will stand

to gain if he can succeed in establishing that he did not testify because his lawyer refused to permit him to do so'" or gave him bad advice. *Knox*, 58 Ill. App. 3d at 767-68 (citing *Brown*, 54 Ill. 2d at 24). For this Court to conclude otherwise would mean that "whenever a defendant is advised by defense counsel that taking the stand is a bad idea, it would necessarily follow that the defendant has an arguable claim of ineffective assistance of counsel by simply claiming that he wanted to testify, but did not because defense [counsel] advised against it." *Coleman*, 2011 IL App (1st) 091005, ¶ 34.

Defendant's claim that counsel advised him not to testify because his proposed testimony was uncorroborated is precisely the kind of claim disapproved by *Coleman*: counsel simply gave his professional opinion, based on the evidence in the case, that testifying was a "bad idea." *Id.* ¶ 31. Moreover, as discussed in section I.A, *supra*, defendant concedes that he failed to explicitly tell counsel that he desired to testify. *See* Def. Br. 17; *see also Knapp*, 2019 IL App (2d) 160162, ¶ 39. Although Illinois courts have not directly addressed the requirement that a defendant alert counsel with a "contemporaneous assertion" in this context, the reasoning from *Brown* and its progeny applies here with equal force. *Brown*, 54 Ill. 2d 21 at 24. Regardless of the context from which the claim arises, "[i]t was incumbent upon the defendant to raise his desire to testify," either to counsel or the court. *Cleveland*, 2012 IL App (1st) 101631, ¶ 66. Where, as here, a defendant does not raise this desire and waives his right to testify, he cannot

post-hoc "disavow responsibility for that waiver and lay fault on counsel by claiming ineffectiveness." *People v. Fretch*, 2017 IL App (2d) 151107, ¶ 128.

In any event, defendant fails to sufficiently allege that his counsel's advice was even arguably erroneous. Counsel advised defendant to not testify because his proposed testimony would not have been credible, and defendant's argument points to nothing that would call into question defense counsel's assessment. In fact, the evidence defendant presented in support of his petition confirms that the argument was gang related, rather than arising from lewd comments directed at Jackie Gutierrez. Defendant's supporting evidence shows only that Pedroza told police that the group got a ride from a girl named "Jackie," everyone was drinking, and then they noticed Jackie was gone. C570. Pedroza did not state that anyone made lewd comments to Jackie, much less that they precipitated the argument.

And other evidence submitted by defendant in support of his postconviction petition contradicts his contention that Gutierrez was even present. Defendant provided Rodriguez's statement to police, wherein Rodriguez denied that any girls were present at Kelley's that evening, C544, and confirmed that the argument was gang-related. As the statement reflects, Rodriguez told police that he is a Norteño and believed defendant was one as well, while he believed Pedroza and Avitia were Latin Kings, C517; that Avitia disrespected Rodriguez by "throwing up the crown," C526; and that defendant saw Avitia disrespect Rodriguez, C530. And the

transcript of Rodriguez's guilty plea proceedings submitted in support of the claim further establishes that the attack on Avitia was gang-related, as Rodriguez did not contest the factual basis set forth by the State demonstrating it was gang-related. C563.

Rodriguez's statement also belies defendant's claim that his role was limited to moving the two gas cans after Rodriquez sought to burn his (Rodriguez's) bloody clothing. Rodriguez told police that when they returned to Kelley's home after the attacks, defendant was pacing and asking whether Rodriquez had any gas. C518. Asked why he wanted gas, defendant said he needed it to "burn the DNA on his shirts." *Id.* Rodriguez also denied having given his shirts to defendant to burn, and he said that he saw defendant grab the two gas cans and set his (defendant's) white shirts on fire. *Id.*; R537-39.

Nor did defendant provide evidence corroborating his claim that he saw Rodriguez wash blood off of his hands and blood on Rodriguez's pants. The photographs defendant attached to his postconviction petition are poor photocopies; almost nothing can be discerned from them. C579-82. But even if, as defendant asserts, one of the photos depicts blood on the washing machine in Kelley's home, that would not corroborate defendant's claim that he saw Rodriguez wash blood off of his hands or blood on Rodriguez's pants. *See* C579. In fact, as to the pants, the photographs suggest at most that Rodriguez's pants had a stain *inside* the pocket. *See* C518, 580-82. They do

not indicate that the stain was blood, much less explain how defendant could have seen into Rodriguez's pockets.

Finally, contrary to defendant's claim, there is no evidence that Avitia told police that the argument was not gang-related; rather, the evidence shows only that Avitia told police that he got into a fight with Rodriguez at Rodriguez's house. *See* C518. Accordingly, defendant has not shown that defense counsel's advice not to testify was arguably deficient; to the contrary, given the evidence, counsel correctly advised defendant that the jury was not likely to credit his testimony and thus that a decision by defendant to testify likely would have undermined his case.

2. Defendant failed to allege arguable Strickland prejudice.

Even if defendant could be said to have sufficiently alleged an arguable claim of deficient performance, he cannot show that he was arguably prejudiced. *Hodges*, 234 Ill.2d at 17 (under liberal standard governing first stage proceedings, defendant must present an arguable basis that he was prejudiced by counsel's performance).

As the appellate court correctly noted, defendant's proposed testimony would have merely provided an alternative motive for his attack on Avitia; he would not have denied assaulting Avitia. C505-06. Nevertheless, defendant alleges that he wished to testify that he did not know Rodriguez (despite having admitted that he met him once before), C505, 508, 568; Rodriguez was not a "known member of the Norteños"; and he (defendant) merely moved the

gas cans. C505-06. He argues that the weight of this proposed testimony would have "undermined claims by state witnesses that this was a gang-related attack," Def. Br. 15, and rebutted the "State's theory that [defendant] and Rodriguez acted in concert to commit an aggravated battery upon Avitia," C508.

There is no reasonable probability that the outcome of defendant's trial would have changed with the addition of this proposed testimony. As noted by the appellate court, even defendant's appellate counsel could not explain how the outcome of trial would have changed: when asked what difference defendant's proposed testimony would have made, he responded, "I don't know." *Knapp*, 2019 IL App (2d) 160162, ¶ 42. Again, defendant does not deny participating in the attack, and by his own admission, he merely would have offered a different account of the events before and after the attack. *See People v. Barkes*, 399 Ill. App. 3d 980, 99 (2d Dist. 2010) (where defendant did not indicate that, had he been called to testify, he would have stated he did not have sexual intercourse with the victim or was not in a position of trust, authority, or supervision over her — the central issues in the case — defendant failed to sufficiently allege prejudice); *Youngblood*, 389 Ill. App. 3d at 218-19 (where defendant indicated he would have testified about location of his arrest, which had no bearing on whether defendant committed the charged offense, defendant "failed to allege anything that would satisfy the second prong of the test for determining whether counsel was ineffective").

Moreover, the evidence against defendant was overwhelming, as the appellate court recognized on direct appeal. *See* C600 (denying *Strickland* claim for lack of prejudice because evidence was "overwhelming"); *see also Watson v. Anglin*, 560 F.3d 687, 693 (7th Cir. 2009) ("[S]trong evidence" of guilt "vitiates [defendant's] claim that he suffered prejudice"); *Richardson*, 189 Ill. 2d 401 at 416 ("A court must assess prejudice realistically based on the totality of the evidence."); *People v. Smith*, 341 Ill. App. 3d 530, 542-44 (1st Dist. 2003) (denying *Strickland* claim for lack of prejudice where defendant failed to show that counsel's decision to not call witness would have changed the outcome of the trial). Avitia and Pedroza testified that Avitia and Rodriguez got into a gang-related argument at Kelley's house, which prompted Avitia and Pedroza to leave. Defendant and Rodriguez yelled gang-related threats and insults while following Avitia and Pedroza as they walked to the train station and before they attacked Avitia from behind. R452, 557-58. Pedroza and Avitia further testified that defendant attacked from Avitia's left side, which corresponds to the location of the two stab wounds on the left side of Avitia's body, including a deep wound that punctured his heart. R454, 559-60, 615-16. Defendant neither denies his participation in the attack nor offers any evidence to support the defense theory at trial: that he merely followed Pedroza and Avitia to make sure they were safe.

Then, rather than remaining in the Aldi parking lot or calling 9-1-1 to ensure that his friend was safe following the stabbing, defendant fled to Kelley's house, where, demonstrating consciousness of guilt, he was seen holding two gas cans, attempted to hide under a blanket, and urged Kelley not to open the door to police. When Kelley let the police inside, defendant threatened the police officers' families, Kelley, and Cardella with physical violence. Even as he was arrested, defendant "kept yelling gang slogans about the Fourteens and how he was a gang banger and they never die." R507. Thus, the evidence of defendant's guilt was overwhelming, and his proposed testimony would not have even arguably changed the outcome of his case.

Furthermore, rather than undermining the evidence of guilt, the evidence defendant attached in support of his petition undercuts any contention that he was prejudiced by his failure to testify. As explained, Rodriguez's statement to police confirms that he, defendant, and Avitia had argued about gangs while at Kelley's house. C531. Rodriguez confirmed that he and defendant followed Avitia and Pedroza to the Aldi parking lot. C517. There, Rodriguez exchanged punches with Avitia, and, although he did not claim to see the stabbing, he stated that defendant bragged to him about having stabbed Avitia C517-18; C534-35. Rodriguez also said that he saw blood on defendant. C535. Finally, Rodriguez told police that defendant burned his own clothing in an attempt to destroy DNA. C536-538.

Thus, the totality of the evidence established at trial overwhelmingly establishes defendant's guilt, and the additional evidence that defendant submitted in support of his postconviction petition confirms rather than undermines the verdict. Because defendant fails to allege even an arguable claim of prejudice, his *Strickland* claim fails.

CONCLUSION

This Court should affirm the judgment of the appellate court.

June 9, 2020

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is twenty-seven pages.

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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On June 9, 2020 the foregoing **Brief of Respondent-Appellee People of the State of Illinois** was electronically filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and served upon the following e-mail address of record:

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Additionally, upon the brief's acceptance by the Court's electronic filing system, the undersigned will mail an original and thirteen copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

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