In the

United States Court of Appeals

For the Seventh Circuit

No. 18-3702

RUSSELL ARMFIELD,

Petitioner-Appellant,

v.

SONJA NICKLAUS, Warden,

Respondent-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 1:17-cv-03331 — **Thomas M. Durkin**, *Judge.*

ARGUED OCTOBER 30, 2020 — DECIDED JANUARY 11, 2021

Before MANION, ROVNER, and SCUDDER, *Circuit Judges.*

MANION, *Circuit Judge.* Russell Armfield, along with Kimothy Randall and Tyrene Nelson, was charged with first-degree murder in Illinois state court for the 2004 shooting death of Al Copeland in southwest Chicago.

The jury convicted Armfield. He appealed the conviction on the grounds that a transcript disclosed inadvertently to the jury violated his constitutional rights under the Sixth

Appendix A

Amendment's Confrontation Clause. He lost. He then pursued a collateral attack in state court alleging ineffective assistance of counsel. He lost again. He then filed for federal habeas relief via 28 U.S.C. § 2254. The district court denied relief and Armfield appeals.

Although Armfield's positions have been well briefed and argued by appointed counsel, we affirm denial of habeas relief on Armfield's Confrontation Clause claim because the state's strong case against him renders any constitutional error harmless. We also reject Armfield's ineffective assistance claim; he cannot show trial counsel's shortcomings resulted in prejudice.

I. Background

Around 6:00 pm on August 17, 2004, Kimothy Randall opened fire on Al Copeland's vehicle while Copeland drove by. Copeland's car was struck by gunfire, as was a bystander's vehicle. No one was injured. Russell Armfield and Tyrene Nelson were present.

Later that evening, between 8:00 and 9:00 pm, while riding with Armfield and Nelson in a car driven by Randall's girlfriend, Randall spotted Copeland again. Randall told his girlfriend to drive to his residence, where Armfield and Nelson armed themselves. They tracked down Copeland as he drove away from his own girlfriend's home. As Copeland approached an intersection, Randall gave the signal: shoot Copeland. Armfield and Nelson sprang from their car, ran toward Copeland, and fired multiple shots into his vehicle, killing him.

The state charged Armfield, Randall, and Nelson with first-degree murder. Armfield and his codefendants

proceeded to trial before two juries—one jury for Armfield and Randall, the other for Nelson. The two trials, though separate, occurred simultaneously before the same judge, with the juries and defendants shuffling in and out depending on the evidence presented.[1]

No doubt this arrangement contributed to the mishap at the center of this habeas petition. During deliberations, the Armfield/Randall jury requested a transcript of certain witnesses' testimony. The court, by mistake, tendered a trial transcript containing the prosecutor's opening statements from Nelson's case. The Armfield/Randall jury had not heard this version. Therein, the prosecutor referenced a videotaped statement from Nelson that purported to implicate all three defendants in the murder:

> And, ladies and gentlemen, you're also going to see a statement given to a Cook County assistant state's attorney that was videotaped of [Nelson] confessing to shooting Al Copeland and laying out essentially the same facts that I just told you. You will see him tell you how he and his partners murdered Al Copeland in his own words.

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[1] Trial courts sometimes employ this practice to increase efficiency. Simultaneous trials can circumvent the need for duplicate presentation of overlapping evidence. But their use does not come risk-free. Here, the trial court's confusion between two transcripts spawned years of postconviction litigation in state and federal court. Whatever resources the trial court hoped to save were cancelled out long ago by the tax on judicial economy. We take this opportunity to implore trial courts to exercise caution and diligence when holding simultaneous trials. The mistake at the center of this case was completely avoidable.

Supp. App'x at 164.

Neither this snippet nor Nelson's confession were presented as evidence of Armfield's involvement. For that, the state leaned primarily on eyewitness testimony rather than physical evidence.

Two witnesses placed Armfield, Nelson, and Randall at the 6:00 pm shooting scene. One of those witnesses actually saw Randall pull the trigger and believed Armfield acted as a lookout.

Grand jury testimony and a police statement from Randall's sister revealed how the defendants obtained guns just before they killed Copeland, though she recanted that story at trial.

Three more witnesses detailed the defendants' involvement in the fatal 9:00 pm shooting. Copeland's girlfriend and a bystander watched Armfield and Nelson shoot Copeland. The latter positively identified Armfield and Nelson as the shooters; he knew them from the neighborhood. Randall's girlfriend (the driver) told police and the grand jury Randall instructed Armfield and Nelson to shoot Copeland, and that when Armfield returned to the car, he admitted to firing his weapon. Like Randall's sister, she recanted this account on the stand.

Finally, the state introduced evidence regarding a subsequent shooting in March 2005 involving Nelson, following which police confiscated one of the firearms used in Copeland's murder. Armfield played no part in this shooting.

Neither Armfield nor Randall put on a defense, and none of the three defendants testified before the Armfield/Randall jury.

The jury convicted Armfield of first-degree murder.[2] He received a sentence of 33 years' imprisonment. Armfield appealed on grounds that disclosing the reference to Nelson's confession deprived him of a fair trial, along the lines of *Bruton v. United States*, 391 U.S. 123 (1968). The state appellate court acknowledged the error in allowing Armfield's jury access to opening statements from a separate trial. It nonetheless held this error non-reversible and further determined it to be harmless beyond a reasonable doubt. The Illinois Supreme Court denied review.

Armfield next launched a state collateral attack on the conviction. The basis: his trial counsel provided ineffective assistance in multiple respects, including by failing to move to exclude testimony about the March 2005 shooting that did not involve Armfield. The state appellate court rejected his claim for failure to satisfy prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). The Illinois Supreme Court denied review.

Armfield filed for federal habeas relief. The district court concluded the state appellate court did not unreasonably apply Supreme Court precedent to Armfield's Confrontation Clause claim or the related harmlessness analysis. Nor did the state court's prejudice determination unreasonably apply *Strickland*. We granted Armfield's request for a certificate of appealability on these two issues.

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[2] The jury was also asked to determine whether Armfield personally discharged a firearm during the commission of the offense. The jury found he did not.

II. Discussion

We review the district court's denial of federal habeas relief *de novo*, "but our inquiry is an otherwise narrow one." *Schmidt v. Foster*, 911 F.3d 469, 476 (7th Cir. 2018) (*en banc*).

A federal court may grant habeas relief following an adjudication on the merits in state court only if that decision (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §§ 2254(d)(1)–(2); *Schmidt*, 911 F.3d at 476–77.

This standard is difficult to meet. "Unreasonable means more than incorrect." *Winfield v. Dorethy*, 956 F.3d 442, 451 (7th Cir. 2020). The inquiry is "whether the decision was unreasonably wrong under an objective standard." *Dassey v. Dittmann*, 877 F.3d 297, 302 (7th Cir. 2017) (*en banc*).

On both Armfield's claims, the Illinois Appellate Court issued the "last reasoned decision on the merits," so we afford its analysis deference so long as that analysis is reasonable. *Gage v. Richardson*, 978 F.3d 522, 529 (7th Cir. 2020). Habeas relief is warranted only if Armfield shows the state court's determinations were "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). Given this demanding standard of review, we cannot award Armfield the relief he seeks.

A. Confrontation Clause

The Sixth Amendment's Confrontation Clause guarantees a criminal defendant the right to be confronted with the witnesses against him, so that he may cross-examine their testimony and allow the jury to weigh their credibility. *Douglas v. Alabama*, 380 U.S. 415, 418–19 (1965).

Armfield's jury received information that Nelson made a videotaped statement implicating Armfield in the murder. Yet Nelson did not testify at Armfield's trial. This information reached the jury as would an *ex parte* affidavit or deposition, thus depriving Armfield of the opportunity to rebut Nelson through cross-examination. Armfield argues the disclosure amounted to a violation of his constitutional rights and should result in habeas relief.

The state appellate court acknowledged the "unquestionabl[e] ... error by the trial court." Short App'x at 35. But it held the error did not create a constitutional violation contemplated by *Bruton v. United States*, 391 U.S. 123 (1968). Armfield claims this ruling was contrary to and unreasonably applied Supreme Court precedent, and that it rested on unreasonable determinations of fact.

i. *Constitutional violation?*

In *Bruton*, at a joint trial for armed robbery, an investigator testified to a codefendant's confession that implicated petitioner. 391 U.S. at 124. The codefendant did not testify. The Court held the admission violated petitioner's constitutional right to cross-examine his codefendant. *Id.* at 126. This, despite jury instructions prohibiting the confession's consideration toward determining petitioner's guilt. The jury could not

reasonably be expected to ignore the confession, which added substantial strength to the prosecution's case.

The *Bruton* Court also placed great emphasis on the confession being admitted into evidence; it was not merely paraphrased through attorney statements or argument. Rather, the jury received its entire substance, as was true in *Douglas*, where the prosecutor read a codefendant's confession into the record "under the guise of cross-examination to refresh [the codefendant's] recollection" after the codefendant refused to answer questions about the crime. 380 U.S. at 416. That confession inculpated petitioner. Though reading the codefendant's confession did not technically qualify as testimony, doing so risked the jury equating it with evidence and created an inference that the codefendant actually made the statement. The inference could not be tested on cross-examination because the prosecutor was not himself a witness; nor could the codefendant be cross-examined on a statement "imputed to but not admitted by him." *Id.* at 419. This procedure denied petitioner his right of confrontation.

The situation in *Frazier v. Cupp*, 394 U.S. 731 (1969), presented far less a threat to petitioner's confrontation rights.[3] In that case, the prosecutor summarized anticipated testimony from petitioner's codefendant (who had already pled guilty to the same offense) during opening statements. The summary itself "was not emphasized in any particular way," but it referenced a confession made by the codefendant. *Id.* at 733. That testimony never materialized; the codefendant invoked his right against self-incrimination when he took the stand.

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[3] The state appellate court did not consider *Frazier*, but the district court did.

Even if it had, the statement "was not a vitally important part of the prosecution's case," and the jury was instructed that opening statements must not be considered as evidence. *Id.* at 735.

These facts led the *Frazier* Court to conclude no constitutional violation had occurred. In so holding, the Court rejected the same general argument Armfield makes: the reference to his codefendant's confession in opening statements—albeit in Nelson's trial, not his own—"placed the substance of [Nelson's] statement before the jury in a way that 'may well have been the equivalent in the jury's mind of testimony.'" *Id.* at 734 (quoting *Douglas*, 380 U.S. at 419).

Resolving Armfield's Confrontation Clause challenge boils down to determining on which side of the *Bruton/Frazier* line his case falls.

Armfield maintains his conviction flies in the face of *Bruton* as well as analogous Supreme Court precedent addressing the use of redacted codefendant confessions at joint trials. For example, Armfield argues while the summary of Nelson's confession did not mention Armfield by name, that quasi redaction would still permit the jury to consider it against him. The prosecutor's summary stated "[Nelson] and *his partners* murdered Al Copeland." Having just sat through three days of testimony corroborating the state's theme that Armfield, Randall, and Nelson acted as a team, a juror at Armfield's trial "need only lift his eyes to [Armfield], sitting at counsel table," to figure out the identity of Nelson's "partners." *Gray v. Maryland*, 523 U.S. 185, 193 (1998) (holding confession redactions that obviously refer to defendant fall within *Bruton*'s protective rule); *but see Richardson v. Marsh*, 481 U.S. 200, 211 (1987) ("[T]he Confrontation Clause is not violated by the admission

of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence.").

Armfield further distinguishes his case from *Frazier* by claiming his jury received the substance of Nelson's confession, i.e., *how* Nelson and his partners murdered Copeland. Because his jurors had already heard testimony about the murder's details, Armfield argues the disclosure of the fact that Nelson confessed validated those facts in their minds.

On the flipside, Armfield's jury was not exposed to Nelson's confession itself. The wayward transcript contained only opening statements from Nelson's trial; it did not include evidence that Armfield's jurors did not observe.

Moreover, the allusion to Nelson's confession was generic and fleeting, occupying only seven lines of transcript text toward the end of the prosecutor's monologue. Nelson's confession (and the fact that he gave one) played no part in the prosecution's case-in-chief against Armfield. In addition, the trial judge instructed Armfield's jury to consider only evidence in the form of witness testimony, exhibits, and stipulations; the judge then gave a clear follow-up instruction that opening statements are not evidence.[4] These instructions did not present the same concerns outlined by the Court in *Bruton*. *See Frazier*, 394 U.S. at 736 ("Even if it is unreasonable to assume that a jury can disregard a coconspirator's statement when

[4] Query whether the jury would interpret this second instruction to prohibit treating opening statements from *Nelson*'s trial as evidence, or whether that instruction carried such force at all. We need not answer these questions given our holding.

introduced against one of two joint defendants, it does not seem at all remarkable to assume that the jury will ordinarily be able to limit its consideration to the evidence introduced during the trial.").

We need not answer whether the state appellate court unreasonably applied Supreme Court precedent or rested its decision on an unreasonable interpretation of the facts when it held the transcript mix-up caused no reversible constitutional error. Even were Armfield's Confrontation Clause rights violated, any such violation was harmless.

ii. *Harmlessness*

Federal habeas relief "is appropriate only if the prosecution cannot demonstrate harmlessness." *Davis v. Ayala*, 576 U.S. 257, 267 (2015). And Armfield does not argue the jury's receipt of Nelson's trial transcript constitutes "the rare type of error" that overrides the harmlessness requirement. *See id.* (citing *Glebe v. Frost*, 574 U.S. 21, 23 (2014)).

Procedural posture determines how we assess harmless error. Courts reviewing cases on direct appeal may find a constitutional violation harmless only if the error was "harmless beyond a reasonable doubt." *Ayala*, 576 U.S. at 267 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). Collateral proceedings like this one require more from the habeas petitioner. Armfield is "not entitled to habeas relief based on trial error unless [he] can establish that it resulted in 'actual prejudice.'" *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). In other words, relief is proper only if the federal court has "grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict.'" *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995).

We employ *Brecht*'s "actual prejudice" test even if the state appellate court reviewed the matter through *Chapman*'s harmless-beyond-a-reasonable-doubt lens. *Jones v. Basinger*, 635 F.3d 1030, 1052 (7th Cir. 2011); *see also Ayala*, 576 U.S. at 268–70 (explaining the *Brecht* standard subsumes § 2254(d)'s requirements when a federal habeas petitioner challenges the state court's *Chapman* finding). We employ a *de novo* review of the entire record, asking "whether a properly instructed jury would have arrived at the same verdict, absent the error." *Czech v. Melvin*, 904 F.3d 570, 577 (7th Cir. 2018).

Note: harmless-error review is distinct from assessing whether there was enough evidence at trial to support a verdict. *Jensen v. Clements*, 800 F.3d 892, 902 (7th Cir. 2015). The question here is whether the error "had or reasonably may be taken to have had" a substantial influence on the jury's decision. *Kotteakos v. United States*, 328 U.S. 750, 764 (1946). When sizing up the state's case, we look at the case's overall strength, not just the evidence in the state's favor. *Jensen*, 800 F.3d at 906. For cases involving Confrontation Clause errors, we examine factors like the importance of the disclosed statements to the prosecution's case, whether the disclosure was cumulative, the presence of corroborating evidence, and the extent of cross-examination permitted. *Id.* at 904.

It's obvious Armfield had no chance to cross-examine Nelson (or anyone) about Nelson's statement to police. The short summary of Nelson's confession can also be considered mostly cumulative; the disclosed opening statement indicates the confession "lay[s] out essentially the same facts" as those making up the state's theory against Armfield. The summary filled no gaps in the state's evidence.

The bigger question here is what role, if any, the inadvertent disclosure played in the government's case. Based on the detailed, consistent testimony from several independent witnesses confirming Armfield's involvement, we cannot conclude the disclosure of Nelson's confession had or reasonably may have had a substantial influence on the jury's decision.

Two separate witnesses placed all three defendants at the 6:00 pm shooting. Willie Williams spotted Nelson pushing Randall in a wheelchair. Williams knew both men from the neighborhood. He watched as Nelson handed Randall a pistol. He saw Randall open fire on a gray Chevrolet. Williams also noticed a third man, later identified as Armfield, standing in a nearby alley. To Williams, it seemed Armfield was acting as a lookout.

Yakirah Robinson was driving her own car close to the gray Chevrolet. She saw Randall in a wheelchair with Nelson standing behind him. She saw Armfield nearby, too. She heard close-range gunshots and sped off without seeing who fired them. When she reached safety, Robinson noticed her car had been struck by at least one bullet. She made a police report and watched as Al Copeland spoke with law enforcement. His vehicle, a gray Chevrolet Cavalier, had also been shot.

Three hours later (around 9:00 pm) and a few blocks from the first shooting, Calshaun Vinson observed Copeland driving away from a restaurant. Vinson had known Copeland since childhood. Vinson also saw all three defendants in a black car. He could see Randall in the front passenger seat with Nelson and Armfield in the rear. He could tell Randall's girlfriend, Ayeshia Floyd, was driving. Vinson knew the three defendants.

The vehicle in which Vinson was riding came to a stop. From there, he could see Copeland's car approach a nearby intersection. Vinson watched Armfield and Nelson exit the black car and run toward the intersection. He saw them shoot at Copeland's car.

Copeland had just dropped off Kawana Jenkins and her three children at Jenkins's home. As Copeland drove away, Jenkins saw a young man flag him down. She saw Copeland open his car door. She saw the young man open fire on Copeland. She saw Copeland accelerate away, but as he reached an intersection, another individual emerged and began shooting at Copeland. Copeland crashed. Jenkins ran to his car and found him slumped over.

The assailants shot Copeland five times. He died before reaching the hospital.

Physical evidence collected from the murder scene supported this two-shooter narrative. Investigators found bullet fragments and spent cartridge cases of two different calibers, 9mm and .40 caliber, fired from two different guns. The spent cases were found at different positions; the 9mm cases were grouped in the middle of the street, and the .40-caliber cases were grouped several addresses away, on the sidewalk.

In March 2005, Floyd gave a statement to investigators about Copeland's murder and testified before a grand jury. With Floyd on the stand at trial, the state introduced her grand jury testimony for impeachment purposes. Floyd told the grand jury that, around 9:00 pm on August 17, 2004, she was driving a car with Randall in the front passenger seat and Nelson and Armfield in the rear.

Floyd stated, after Randall spotted Copeland, he called his sister and asked her to retrieve a hooded sweatshirt and some urine bags[5] from his house. Floyd drove the trio to Randall's home. There, Randall's sister, Sinquis Prosper, brought the requested items to the car. Floyd observed Randall's sister cradling the sweatshirt with two hands.

Floyd informed the grand jury she then drove the defendants to the vicinity of Jenkins' home, where Randall watched Copeland drop off Jenkins and her children. Floyd witnessed Randall instruct Armfield and Nelson to "take care of business." Floyd understood this to mean Armfield and Nelson should shoot Copeland.

Armfield and Nelson exited the vehicle and headed toward Copeland. Floyd heard several gunshots and then saw Armfield and Nelson running back to her car. Armfield had a gun in his hand and Nelson was holding his side as if carrying a gun. They got back in Floyd's car. Armfield, complaining about Nelson's hesitancy, exclaimed: "[He] didn't want to shoot until I started to shoot."

Prosper testified at trial, too. She attested to the phone call and visit from her brother occurring shortly before 9:00 pm on August 17, 2004. She also confirmed Randall arrived in a car driven by Floyd, with Armfield and Nelson sitting in the rear. She gave Randall the requested sweatshirt and urine bags. Prosper told police and the grand jury the sweatshirt contained hard, heavy objects in its pockets. Though Prosper did not look inside the pockets, she believed they contained guns; she knew Randall kept guns in the house. The state

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[5] For Randall's medical condition. He is paralyzed.

introduced Prosper's police statement and grand jury testimony for impeachment purposes.

Despite these accounts, the prosecution's case against Armfield did not go unchallenged. No physical evidence tied Armfield to either the 6:00 pm or the 9:00 pm shooting. No suitable latent fingerprints were left on any of the cartridge cases found at the murder scene. Police did confiscate a 9mm pistol after responding to a March 2005 shooting involving Armfield's codefendant, Nelson (more on that, below). Although forensic analysis matched that gun to the 9mm cartridge cases recovered from the murder scene, Armfield had nothing to do with the events surrounding the pistol's confiscation.

The state's witnesses had their share of credibility issues. Williams did not identify Armfield at the scene until he picked Armfield from a police photo lineup in April 2005—a full eight months after the shooting. Nor did he even recognize Armfield in the courtroom at trial. Williams also admitted to testifying while on heroin.

Vinson spoke to police the night of Copeland's murder, but he did not provide his full account until being charged with a felony firearm offense in March 2005. He received no promises for cooperating yet his gun charge was dismissed.

Prosper and Floyd each recanted at trial and told the jury they had been threatened by police to lie. Prosper testified the police and a state's attorney instructed her to falsely claim she felt heavy, hard objects in the sweatshirt, or else face jail. She claimed the entirety of her grand jury testimony was fabricated other than the fact that she delivered urine bags and a sweatshirt to her brother on August 17, 2004.

Floyd stated police gave her a bogus series of events to memorize and regurgitate before the grand jury. She purported to comply only after investigators threatened her with a first-degree murder charge and 12 years' imprisonment on three unrelated drug counts. Per Floyd's revised story, she and the three defendants spent the day Copeland died driving around smoking marijuana. Floyd confirmed the encounter with Prosper involving urine bags and a sweatshirt, but she denied everything else she had told police regarding Copeland's murder. She claimed those additional events did not happen. She also testified she could not remember what she told the grand jury, adding it was all a lie anyway.

Floyd and Prosper's claims of coercion conflicted with their grand jury testimony, in which they stated no promises or threats had been made in connection with their willingness to talk with investigators. The government also put on witnesses who denied Prosper and Floyd's accusations of threats from law enforcement. The jurors had the opportunity to weigh those rebuttals against the allegations. They knew of Prosper and Floyd's close relationships with Randall and could infer from them a motive to protect him. They also heard a portion of Floyd's grand jury testimony in which she explained Randall abused her and she was scared he could have her harmed or killed.

Armfield contends the flaws in the state's case made the question of his guilt a razor-thin call. The jury, after all, deliberated for nearly fourteen hours. At one point the jurors informed the judge they reached an impasse and had to be instructed to keep deliberating. He also points to the jury's conclusion that he did not fire a weapon during the murder as proof that it rejected evidence to the contrary, such as Vinson

and Floyd's accounts. Since the jury discredited those key witnesses, there was little left of the prosecution's case and the disclosed opening statements from Nelson's trial must have tipped the scale against him, he claims.

We disagree. First, that the jury determined Armfield did not discharge a weapon does not mean the jury rejected Vinson and Floyd's testimony entirely. Nor does the special verdict bear on Armfield's guilt for first-degree murder because he still faced accomplice liability. The jury found him guilty of that crime; he participated directly in bringing about Copeland's death. In other words, even if the jury discounted testimony that Armfield himself fired at Copeland, that does not elevate the disclosed summary of Nelson's confession automatically (or at all); the special verdict does not tell us whether the disclosure had a "substantial and injurious" influence on the jury's ability to find Armfield guilty of murder.

More significant is the weight of evidence against Armfield. Multiple unconnected witnesses corroborated the state's theory: Armfield acted as part of a three-man crew that tried to kill Copeland once, failed, tried again only hours later, and succeeded. Two bystanders placed him, along with Nelson and Randall, at the scene of the 6:00 pm attempt on Copeland's life. Two more witnesses—one bystander and one accomplice—confirmed Armfield and Nelson's roles as trigger men in the 9:00 pm shooting and additionally placed Randall at the scene. Physical evidence and an additional witness supported the two-shooter theory. Another witness identified all three men together, only minutes before the fatal shooting, when delivering them a sweatshirt containing what she believed to be guns. For all their personal credibility baggage, the witnesses' narratives were consistent in substance and

detail. Vinson's testimony and Floyd's grand jury statements were especially damning.

The trial evidence alone spanned almost 450 pages of transcript. Not once did the state discuss or even hint at Nelson's confession. Only during deliberations was Armfield's jury exposed to a summary of Nelson's confession—a summary lasting two sentences, made during opening statements (not evidence) in another trial, that revealed no new details about the murder. Review of the entire record leaves us with no "grave doubt" about harmlessness. The disclosure was inconsequential next to the evidence, and a "properly instructed jury would have arrived at the same verdict" absent the disclosure. *Czech*, 904 F.3d at 577. Armfield's Confrontation Clause claim warrants no habeas relief.

B. Ineffective Assistance of Counsel

Armfield also maintains he received ineffective assistance of counsel because his trial attorney did not move to exclude evidence concerning a shooting that happened in March 2005. Armfield raised this claim in a collateral postconviction proceeding. The state appellate court denied him relief. Armfield now insists the state court unreasonably applied *Strickland* in concluding trial counsel's error did not prejudice his case.

At trial, Tykima Walker testified that on March 18, 2005, she drove her two children to the Cook County jail to visit one of the children's fathers. Three men in another vehicle, a Grand Prix, followed her. She identified one of them as Nelson. At some point along the way, they began shooting at her car. When Walker arrived at the jail, Nelson and another of the Grand Prix occupants exited their car and followed her inside.

Officer Frank Ramaglia responded to reports of a person with a gun in a white Grand Prix. He located the Grand Prix, parked. At this point, only one individual remained in the car: a *Calvin* Armfield—not our petitioner, Russell Armfield. Ramaglia testified he placed Calvin Armfield in custody and retrieved three firearms from the car: a .380-caliber machine pistol; a .40-caliber pistol; and a 9mm pistol. Forensic ballistics analysis determined the 9mm pistol had been used in Copeland's murder. The jury viewed all three guns while the prosecutor had Ramaglia verify chain of custody.

Strickland v. Washington provides the clearly established federal law for Armfield's ineffective assistance of counsel claim. 466 U.S. 668 (1984). Pursuant to *Strickland*, Armfield must show (1) counsel's performance "fell below an objective standard of reasonableness," and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688, 694. Failure to prove either deficient performance or prejudice defeats a petitioner's claim. *Winfield*, 956 F.3d at 452.

For prejudice, a reasonable probability is one "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The "likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112.

The state appellate court did not address whether trial counsel performed deficiently under *Strickland*'s first prong. We need not address performance either if resolving the claim on prejudice will do. *McNary v. Lemke*, 708 F.3d 905, 914 (7th Cir. 2013). But the state court indeed assessed prejudice, and our review is "doubly" deferential at this stage. *Richter*, 562 U.S. at 105.

Here, even if counsel's failure to object was sub-standard, that failure did not prejudice Armfield's case.

As with Armfield's briefing of harmlessness, much of his argument for prejudice rests on his view that the state brought a weak case against him. *See Strickland*, 466 U.S. at 696 ("[A] verdict ... weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."). Granted, the state's evidence against Armfield was not one-sided, but it was both robust and compelling. We discussed the evidence's strength (and shortcomings) in the preceding section and need not repeat ourselves.

In addition, Armfield highlights the Illinois Appellate Court's adoption of its earlier assessment of Armfield's case on direct appeal. On direct appeal, the state court incorrectly determined police recovered the 9mm pistol used in Copeland's murder from *petitioner*'s car, not that of Calvin Armfield. Armfield argues this mistake constitutes an unreasonable determination of fact that should result in habeas relief.

But nothing indicates the *jury* made that same mistake. Early on in closing arguments, while referring to Armfield and Randall, the prosecutor said "they" are so bold as to shoot up the area around the Cook County jail. That was technically incorrect; only Nelson took part in the shooting near the jail. Armfield and Randall had nothing to do with it. The misstatement, however, was minor, and we can find no prejudice resulting from it. Indeed, the prosecutor made sure to include Calvin Armfield's first name when later getting into the particulars of the March 2005 shooting, distinguishing that individual from petitioner. At one point, the prosecutor began to refer to Calvin Armfield as petitioner's brother. Defense

counsel objected and the judge sustained the objection, explaining, "There is no testimony about what relation the one bore to the other." Supp. App'x at 574. Given this context, there was little room for the jury to confuse the two. Nor was the jury likely to associate the .380- and .40-caliber guns recovered in March 2005 with Copeland's murder. Nothing linked those weapons to the fatal August 2004 shooting in any way, and the jury's exposure to them was momentary and procedural at most.

Relatedly, Armfield implies trial counsel's failure to object allowed the state to unfairly lump him in with "superpredators" brazen enough to shoot up an area with heavy law enforcement presence near the jail and courthouse. The prosecution didn't need to reference the March 2005 shooting for the jury to draw that conclusion. Armfield fit the bill thanks to his role in two shootings on the same day on the public streets of the same neighborhood.

The state appellate court did not apply *Strickland*'s prejudice test unreasonably. Considering the strength of the prosecution's evidence against the secondary value added by the March 2005 shooting, there exists no substantial likelihood of a different result here.

III. Conclusion

The Illinois Appellate Court reviewed Armfield's conviction twice: once on direct appeal (his Confrontation Clause challenge), and again through collateral proceedings (his ineffective assistance of counsel challenge). In neither instance did the state court resort to an unreasonable analysis that would permit federal habeas relief. The state's case against Armfield was strong, with multiple, independent witnesses

swearing to the same events and implicating him as a key player in Al Copeland's murder. Thus, Armfield cannot overcome harmlessness or make a showing of prejudice, as required for his two claims. The district court's judgment is AFFIRMED.

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

RUSSELL ARMFIELD,	)	
	)	
Petitioner,	)	No. 17 C 3331
	)	
v.	)	
	)	Judge Thomas M. Durkin
	)	
CAMERON WATSON, Warden,	)	
Western Illinois Correctional Center,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION AND ORDER

Petitioner Russell Armfield, an Illinois state prisoner, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the following reasons, the Court denies Armfield's petition [1, 8].[1] The Court declines to issue a certificate of appealability.

Background

Kimothy Randall, Tyrene Nelson, and Armfield were all charged with the 2004 murder of Al Copeland. R. 12-1 at 1-2. Nelson confessed to his role in the homicide and implicated Armfield and Randall in his confession. *Id.* at 1. Nelson's trial was severed from Armfield and Randall's. *Id.*

A number of witnesses' testimony at Armfield and Randall's trial implicated Armfield in Copeland's murder. The most direct evidence was testimony by a friend of Copeland's named Calshaun Vinson that he saw Armfield and Nelson (both of whom he previously knew) fire the shots in the direction of Copeland's vehicle that

[1] Armfield filed the same petition twice, which is in the record at R. 1 and R. 8.

Appendix B

killed Copeland. R. 12-2 at 2. Kawana Jenkins, Copeland's girlfriend, offered corroborating testimony that she saw two men shoot Copeland's car while he was driving away from her house after dropping off her and her children, and then found Copeland shot in his car. *Id.* at 2-3. Willie Williams testified that earlier on the night of Copeland's murder, he saw Nelson and Randall shoot at Copeland's car with Armfield present, but Copeland escaped. *Id.* at 4. Yakirah Robinson corroborated Williams's account. *Id.*

Randall's girlfriend Ayeshia Floyd recanted her prior statements to police and the grand jury at trial, denying any knowledge about Copeland's shooting. R. 12-16 at 86-147. But in her grand jury testimony, which was admitted as substantive evidence at trial, Floyd explained that the night of the shooting, she drove Armfield, Nelson, and Randall near the site of the shooting. R. 12-2 at 3-4, 10. She explained that Randall instructed Armfield and Nelson to "take care of business," which she understood to mean that they should shoot Copeland. *Id.* at 10. After Armfield and Nelson got out of the car, Floyd heard gunshots. *Id.* Floyd and Randall drove away and eventually picked up Armfield and Nelson. *Id.* Floyd told the grand jury that Armfield admitted to Floyd when he returned to the car that he fired his gun and Armfield complained that Nelson did not shoot until after Armfield did. *Id.*

An Assistant State's Attorney testified that he advised Floyd of her rights before questioning her after the shooting, and that he made no promises or threats in exchange for her grand jury testimony. R. 12-16 at 180-84. Two detectives likewise

testified that they did not threaten Floyd or promise her anything in exchange for her grand jury testimony. R. 12-2 at 3.

The trial court also admitted evidence that police discovered one of the guns used in Copeland's shooting in a car in which Nelson had been a passenger during a subsequent shooting outside the Cook County Jail. R. 12-2 at 6. There was no forensic evidence presented connecting Armfield to that gun.

Jury deliberations began on the evening of June 14, 2007 and ended the evening of June 15. R. 12-13 at 7. At some point during the first half of the day on June 15, the trial court provided the jury with certain transcripts they requested, including of Floyd's grand jury testimony and various courtroom proceedings. R. 12-19 at 4-11. The transcripts of courtroom proceedings provided to the jury inadvertently contained not only the witness testimony requested, but also opening statements from Nelson's separate trial. The transcript of the prosecutor's opening statement from Nelson's trial referred to Nelson's confession implicating Armfield. R. 12-1 at 8-9. Specifically, the transcript of the opening statement in Nelson's trial stated:

> ladies and gentlemen, you're also going to see a statement given to a Cook Count assistant state's attorney that was videotaped of [Nelson] confessing to shooting Al Copeland and laying out essentially the same facts that I just told you. You will see him tell you how he and his partners murdered Al Copeland in his own words.
>
> Now, these defendants, this defendant and his two partners, they acted as a team. [Nelson] confined to a wheelchair couldn't have done these things on his own. And these defendants were provided guns by [Nelson]. Without [Nelson's] part, they couldn't have killed Al Copeland.

R. 12-14 at 12.

In the middle of the afternoon on June 15, some time after the jury received the transcripts, the jury wrote the following note: "We have reached an impasse – further discussion will not change, + in fact, may cause more hostility among jury." R. 12-13 at 116; R. 12-19 at 9-12. In response to the note, the court re-instructed the jury as to their duties as jurors, including "to deliberate with a view toward reaching an agreement if you can do so without violence to individual judgment." R. 12-19 at 13. The court "ask[ed] the jurors to return to the jury room and re-commence their deliberation." *Id.* at 14.

Later that afternoon, defense counsel raised with the court the issue of whether the transcripts given to the jury earlier that day contained "not only the testimony of witnesses, but also the opening arguments of both the defense and the prosecution." *Id.* at 15. The court asked the prosecution if it knew whether this was the case, the prosecution said it did not know, and the court said, "there's your answer." *Id.* at 16-17. Defense counsel again raised the issue of whether the transcripts "contained the opening statements" during a subsequent discussion with the court, and the court said, "We're not at that bridge, and we'll reach it if we ever come to it." *Id.* at 19. In neither of these exchanges did defense counsel specifically raise with the court the fact that Nelson's confession was mentioned in the prosecutor's opening statement in Nelson's trial that defense counsel believed might have been (and, it turns out, was) provided to Armfield's jury.

A number of hours later, in the late evening of June 15, the jury reached a unanimous verdict. R. 12-13 at 7. The jury convicted Armfield of first-degree murder,

and it found Armfield not guilty of "personally discharg[ing] a firearm." R. 12-13 at 127, 129. The court later sentenced Armfield to 33 years in prison. *Id.* at 168.

On direct appeal in the Illinois Appellate Court, Armfield argued that his Sixth Amendment right to confrontation and his Fourteenth Amendment due process rights were violated when the transcript of opening statements in Nelson's trial referring to Nelson's confession was submitted to Armfield's jury during its deliberations. R. 12-3 at 4. Armfield maintained that submission of this statement to the jury ran afoul of *Bruton v. United States*, 391 U.S. 123 (1968), in which the Supreme Court held that the admission into evidence of a codefendant's statement implicating the defendant without the codefendant testifying and being subject to cross-examination violates the defendant's constitutional right to confront witnesses against him, regardless of any jury instruction to consider the statement against the codefendant only.

The Illinois Appellate Court affirmed Armfield's conviction. R. 12-1 at 14. The Illinois Appellate Court found that there was "unquestionably an error" committed by the trial court when it submitted the opening transcript from Nelson's trial to the jury. *Id.* at 11. It explained:

> The jury was allowed to read something that it was not allowed to hear at trial: the opening statements to codefendant's jury. That proscribed material included an ASA's reference to codefendant's statements implicating [Armfield], a statement that would clearly have been inadmissible against [Armfield] because codefendant did not testify.

Id. at 11-12. But the Illinois Appellate Court found that this error was not reversible. *Id.* at 12-13. It determined that the case was "not subject to *Bruton*" "[b]ecause the

State did not attempt to introduce codefendant's statement into evidence against defendant" and "[b]ecause the jury did not hear (or, more precisely, read) the substance or content of codefendant's statement." *Id.* Instead, the jury was provided with "only a reference to the confession in an . . . opening statement." *Id.*

The Illinois Appellate Court emphasized that "the jury was duly admonished that opening statements are not evidence and that each defendant should be judged on his particular evidence." *Id.* The Illinois Appellate Court relied on the Supreme Court's decision in *Richardson v. Marsh*, 481 U.S. 200 (1987), which found no *Bruton* violation where the inculpation of defendant in the codefendant's confession admitted in their joint trial was not "express[ ]" but "inferential" (*i.e.*, only clear when considered in light of other evidence) and an appropriate limiting instruction was provided to the jury. *Id.* at 208. The Illinois Appellate Court found the opening statement transcript's "mere reference to an inculpatory confession, without actual evidence, to be similarly attenuated" to the inculpation of the defendant in *Richardson*. R. 12-1 at 13. It therefore concluded that "the trial court's instruction that an opening statement is not evidence ha[d] the weight afforded to the limiting instruction in *Richardson*, rather than the discounting of limiting instructions in *Bruton* and its progeny." *Id.* Finally, and in the alternative, the Illinois Appellate Court found the error harmless "as there was ample evidence of [Armfield's] guilt." *Id.* The Illinois Supreme Court denied Armfield's petition for leave to appeal ("PLA"). R. 12-7.

After his unsuccessful direct appeal, Armfield pursued state post-conviction relief. The trial court and Illinois Appellate Court rejected his arguments (R. 12-2), and the Illinois Supreme Court denied his PLA on September 28, 2016. R. 12-12. The specific claims raised and not raised in Armfield's post-conviction filings are discussed in more detail below.

Armfield filed a timely, *pro se* 28 U.S.C. § 2254 petition in this Court on May 2, 2017. R. 8 at 1. Armfield set forth ten claims in support of his petition: (1) ineffective assistance of appellate counsel for failure to challenge the sufficiency of evidence and to prove that any shots fired by Armfield caused Copeland's death; (2) ineffective assistance of appellate counsel for failure to challenge sufficiency of guilt based on an "accountability theory" given Armfield's position that there was no evidence of causation; (3) a violation of Armfield's Sixth Amendment right to confrontation based on the submission of the transcript of opening statements in Nelson's trial to Armfield's jury; (4) prosecutorial misconduct in violation of due process based on allegedly inflammatory statements in closing argument; (5) ineffective assistance of trial counsel for failure to object to introduction of evidence of the attempted shooting of Copeland earlier on the night of his death; (6) ineffective assistance of trial counsel for failure to object to introduction of evidence of the subsequent Cook County Jail shooting from which a weapon used in Copeland's shooting was recovered; (7) ineffective assistance of trial counsel for failure to object to the admission of physical (weapons) evidence; (8) ineffective assistance of trial counsel for failure to impeach Jenkins with prior inconsistent statements; (9) ineffective assistance of trial counsel

for failure to request the redaction of portions of Floyd's grand jury testimony describing Armfield as a gang member; and (10) ineffective assistance of trial counsel on the basis of "cumulative error" committed by trial counsel and the prosecution. R. 8 at 6-11.

Respondent Cameron Watson, warden of the Western Illinois Correctional Center where Armfield currently resides, answered the petition. Watson's answer maintains that the petition should be dismissed because six of Armfield's claims (claims one, two, four, five, seven, and eight) are procedurally defaulted, three of Armfield's claims (claims three, six, and nine) were reasonably rejected by the Illinois Appellate Court, and claim ten is fairly encompassed by claims six and nine. R. 11. Following the filing of Watson's answer, counsel appeared for Armfield and filed a reply brief on his behalf (without amending Armfield's original *pro se* petition). R. 15.

Analysis

I. Procedural Default: Claims One, Two, Four, Five, Seven, and Eight

A. Default

A prerequisite to this Court ordering relief on a § 2254 habeas petition is the petitioner's exhaustion of remedies available in state court. 28 U.S.C. § 2254(b)(1)(A). "[A] claim [is] procedurally defaulted when a petitioner fails to fairly present his claim to the state courts, regardless of whether he initially preserved it with an objection at the trial level." *Richardson v. Lemke*, 745 F.3d 258, 268 (7th Cir. 2014). "To fairly present his federal claim, a petitioner must assert that claim throughout at least one complete round of state-court review, whether on direct appeal of his conviction or in

post-conviction proceedings." *Id.* "In Illinois, this means that a petitioner must have directly appealed to the Illinois Appellate Court and presented the claim in a petition for leave to appeal to the Illinois Supreme Court." *Guest v. McCann*, 474 F.3d 926, 930 (7th Cir. 2007).

Here, Armfield did not raise before the Illinois Appellate Court on post-conviction review either theory of ineffective assistance of appellate counsel that he raises in claims one and two of his petition. *Compare* R. 8 at 6 *with* R. 12-8 at 47-50. He also did not present three of his theories of ineffective assistance of trial counsel to the Illinois Appellate Court on direct appeal or post-conviction review: (1) claim five, for failure to object to the admission of evidence of the attempted shooting of Copeland earlier on the day of his murder; (2) claim seven, for failure to object to the admission of weapons evidence; and (3) claim eight, for failure to impeach Jenkins. *Compare* R. 12-1 *and* R. 12-8 at 18-41 *with* R. 8 at 8-10. Accordingly, all of these claims are procedurally defaulted.

Turning to claim four—Armfield's claim for prosecutorial misconduct violating due process on the basis of inflammatory statements made during closing arguments (R. 8 at 7)—Armfield did not raise this claim on direct review with the Illinois Appellate Court or the Illinois Supreme Court. R. 12-1 at 1-14; R. 12-6 at 1-17. On post-conviction review in the Illinois Appellate Court, Armfield challenged the statements made in closing argument. But he made this argument only through Sixth Amendment ineffective assistance of trial and appellate counsel claims. R. 12-8 at 33-45. A Sixth Amendment ineffective assistance claim based on counsel's failure to raise

a constitutional claim is distinct from the underlying constitutional claim. *See, e.g.*, *Lewis v. Sternes*, 390 F.3d 1019, 1026 (7th Cir. 2004). An underlying constitutional claim is therefore procedurally defaulted when only a related ineffectiveness claim was raised in the Illinois courts. *Id.* For this reason, Armfield's claim four, which alleges a violation of due process but not ineffective assistance, is procedurally defaulted.[2]

B. Exceptions

A procedural default can be excused "if the petitioner can show both cause for and prejudice from the default or can demonstrate that [the] failure to consider the

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[2] Even if this claim was not procedurally defaulted, the Court would reject it as meritless. Armfield challenges as "[i]nflammatory" and "making the case into a [s]ocial [i]ssue" the prosecutor's remarks at closing that Armfield and his codefendants created fear in the community that caused several witnesses to be reluctant to come forward and testify. R. 8 at 7; R. 12-2 at 14. Armfield emphasizes that no evidence of witness intimidation was presented at trial. R. 15 at 21. But Armfield has not shown (and indeed, does not argue (*see id.*)) that these discrete remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process"—the standard for showing a due process violation based on a prosecutor's comments in closing statement. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). When addressing Armfield's ineffective assistance claim based on these comments, the Illinois Appellate Court appropriately applied Supreme Court law to find no ineffective assistance partially in light of the jury instruction that arguments are not evidence and must be disregarded if not supported by the evidence. R. 12-2 at 15; *see Darden*, 477 U.S. at 182 (no due process violation based on comments in closing argument in part because jury was instructed "that the arguments of counsel were not evidence"). Nor has Armfield shown that the Illinois Appellate Court made an "unreasonable determination of the facts," 28 U.S.C. § 2254(d)(2), when it found that the prosecutor's comments were at least in part based on evidence at trial (*i.e.*, evidence that the first shooting occurred during daylight hours and was witnessed by a child). R. 12-2 at 14. And for the reasons discussed below, the Illinois Appellate Court appropriately found that, in any event, Armfield did not establish the prejudice required to demonstrate ineffective assistance "in light of the overwhelming evidence of [Armfield's] guilt." R. 12-2 at 15.

claim would result in a fundamental miscarriage of justice." *Richardson*, 745 F.3d at 272. "Cause for a default is ordinarily established by showing that some type of external impediment prevented the petitioner from presenting his claim." *Id.* And the fundamental miscarriage of justice exception requires a petitioner to "convince the court that no reasonable trier of fact would have found him guilty but for the error allegedly committed by the state court." *Bolton v. Akpore*, 730 F.3d 685, 697 (7th Cir. 2013).

Armfield does not even attempt to satisfy these exceptions in his briefs. Armfield has not cited any "external impediment" preventing him from raising his procedurally defaulted claims before the state courts. *See Richardson*, 745 F.3d at 272. Armfield also fails to provide the requisite "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial" necessary to make out a fundamental miscarriage of justice claim. *House v. Bell*, 547 U.S. 518, 537 (2006). The Court therefore finds that no exceptions apply to excuse Armfield's procedural default of claims one, two, four, five, seven, and eight.

II. Preserved Claims Three, Six, and Nine (and Related Claim Ten)

Because Armfield raised claims three, six, and nine through a full round of review (either on direct appeal or post-conviction), the Court addresses those claims on their merits. The Court finds that claim ten is subsumed in claims six and nine and therefore addresses it in conjunction with those claims.

An application for a writ of habeas corpus shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

A. Claim Three

Claim three raises Armfield's most significant argument—*i.e.*, his argument that submission to the jury of the opening statement transcript from Nelson's trial containing a reference to Nelson's confession constituted a violation of clearly established Supreme Court in *Bruton* applying the Sixth Amendment's Confrontation Clause, warranting relief under § 2254(d)(1). The Illinois Appellate Court rejected Armfield's Confrontation Clause argument on two bases: (1) a finding that no reversible Confrontation Clause violation occurred; and (2) a finding that any error was harmless. The Court considers each basis in turn.

1. Confrontation Clause Analysis

The Sixth Amendment guarantees a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. A "major reason underlying the constitutional confrontation rule is to give a defendant charged with [a] crime an opportunity to cross-examine the witnesses against him." *Pointer v. Texas*, 380 U.S. 400, 406-07 (1965). This principle was at issue in *Bruton*, the primary case on which Armfield relies. In *Bruton*, the petitioner and his codefendant were tried together for an armed postal robbery. The codefendant did not take the stand, but the jury heard his full confession during a postal inspector's testimony. 391 U.S. at 124. The trial judge instructed the jury that the confession could be used as evidence against the codefendant but not against Burton. *Id.*

The Supreme Court held that the admission of the confession into evidence violated the Confrontation Clause, and that limiting instructions were incapable of curing that violation. *Id.* at 135-36. It explained that "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Id.* at 135. It continued:

> Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be

> tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed.

Id. at 135-36.

Applying *Bruton* to this case, the Illinois Appellate Court found that although there "was unquestionably an error by the trial court," there was no *reversible* error because of key distinctions between the situation here and the situation in *Bruton*. R. 12-1 at 11-12. Namely, *Bruton* held that the *admission into evidence* of a non-testifying codefendant's *confession* that incriminated the defendant constituted a violation of the Sixth Amendment's right to confrontation. *See id.* at 12. Here, by contrast, Nelson's confession itself was not admitted into evidence during trial. Instead, an opening statement referring to that confession was provided to the jury outside of the formal evidence submission process. *See id.*

This Court agrees with the Illinois Appellate Court's distinctions of *Bruton*. Indeed, unlike in *Bruton*, Armfield's trial was properly severed from Nelson's. Armfield did not "stand[ ] accused side-by-side" with Nelson and have "powerfully incriminating extrajudicial statements [of Nelson] . . . deliberately spread before the jury" during a witness's testimony "in a joint trial" where Armfield was unable to cross-examine Nelson. *See Bruton*, 391 U.S. at 135. Nor was the jury asked to disregard certain testimony with respect to Armfield but not with respect to Nelson. *Compare id.* Instead, as the Illinois Appellate Court properly reasoned, this case is more like the Supreme Court's subsequent decision in *Richardson* declining to find a Confrontation Clause violation. 481 U.S. at 208. Like in *Richardson*, the inculpation of Armfield was "inferential" rather than direct (*see* 481 U.S. at 208): it came in a

paraphrase of a confession in an opening statement transcript referring generally to Nelson's "partners," and not referring to Armfield by name. R. 12-14 at 12.

The Supreme Court's application of *Bruton* in a subsequent case—*Frazier v. Cupp*, 394 U.S. 731 (1969)—further supports the Illinois Appellate Court's decision here. In *Frazier*, the prosecutor in opening argument summarized the confessing testimony he expected to receive from the petitioner's codefendant. *Id.* at 733-34. The State admitted "that the jury might fairly have believed that the prosecutor was referring to [the codefendant's] statement," but he "did not explicitly tell the jury that this paper was [the codefendant's] confession." *Id.* at 734. The codefendant subsequently invoked his privilege against self-incrimination and did not testify. *Id.* At the end of the trial, the court gave a general limiting instruction to the jury that it "must not regard any statement made by counsel in [its] presence during the proceedings concerning the facts of this case as evidence." *Id.*

The petitioner in *Frazier* argued that his Confrontation Clause rights were violated because "this series of events placed the substance of [the codefendant's confession] before the jury in a way that may well have been the equivalent in the jury's mind of testimony," and as in *Bruton*, "the statement added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination." *Id.* The petitioner therefore argued that, like in *Bruton*, limiting instructions could not "cure the error." *Id.*

The Supreme Court rejected these arguments, finding that "in these circumstances the limiting instructions given were sufficient to protect petitioner's

constitutional rights." *Id.* at 735. The Court highlighted four key differences between that case and *Bruton*. First, "only a paraphrase of the statement was placed before the jury." *Id.* Second, the paraphrase of the confession was introduced not through witness testimony, but through an "opening statement," and "the jury was told that the opening statement should not be considered as evidence." *Id.* Third, "the jury was not being asked to perform the mental gymnastics of considering an incriminating statement against only one of two defendants in a joint trial." *Id.* And fourth, "[the codefendant's] statement was not a vitally important part of the prosecution's case." *Id.* The Court therefore upheld the court of appeals's determination that the petitioner had not been denied his Sixth Amendment rights to confrontation in a way that warranted federal habeas relief. *Id.* at 737.

This case is like *Frazier* and unlike *Bruton* in each of these respects. First, only a paraphrase of Nelson's confession was placed before the jury. Second, the paraphrase did not occur during witness testimony but in an opening statement, and the jury was instructed to not consider opening statements as evidence. *See* R. 12-13 at 98 (jury instruction that "[n]either opening statements nor closing arguments are evidence, and any statement or argument made by the attorneys which is not based on the evidence should be disregarded"). Third, the jury was not asked to perform "mental gymnastics" (*Frazier*, 394 U.S. at 735) by disregarding the statement when assessing Armfield's guilt but considering it for Nelson. Instead, the trials were properly severed.

Fourth, the statement was far from "a vitally important part of the prosecution's case." *See id.* Indeed, the paraphrase did not occur during the opening statement in Armfield's trial itself as it did in *Frazier*, or at any other point in Armfield's trial. The paraphrase was therefore not part of the prosecution's case against Armfield at all.

It is true that the paraphrase here appears to have more directly referred to Nelson's confession and more directly inculpated Armfield than the paraphrase in *Frazier*. But this fact does not change the Court's analysis in light of the other close parallels between this case and *Frazier*, and in light of the context in which the statement was submitted to the jury—as a portion of one of a number of transcripts submitted to the jury for reference after the trial concluded.

As the Supreme Court made clear in *Frazier*, "inadvertent[ ]" errors often occur in trials, but only a select few amount to "reversible error unavoidable through limiting instructions." *Id.* This was not one of them. As in *Frazier*, the Illinois Appellate Court properly found the general limiting instruction given by the trial court regarding opening statements sufficient to cure any harm.

Armfield maintains that the limiting instruction that "any statement or argument made by the attorneys which is not based on the evidence should be disregarded" (R. 12-13 at 98) may not have worked because the jury could have found the prosecutor's statement "based on the evidence." But the evidence supporting this statement—*i.e.*, Nelson's videotaped confession—was not admitted into evidence in

Armfield's trial. There was thus no evidence presented at Armfield's trial supporting this statement by the prosecutor.

Armfield also says that the trial court should have done more to correct the error once the issue of the inadvertent submission of opening statements along with witness testimony was raised by defense counsel during deliberations. But defense counsel never specifically raised with the trial court the issue of the reference to Nelson's confession being included in the transcript. The issue was raised only in general terms. And the trial court already had given the proper mitigating instruction —*i.e.*, the instruction regarding opening statements not constituting evidence. *Compare Frazier*, 394 U.S. at 734 (general instruction that statements by counsel are not evidence was sufficient).

In sum, the Court finds that the Illinois Appellate Court did not make a decision that was contrary to or unreasonably applied clearly established Supreme Court law in concluding that no reversible Confrontation Clause violation occurred. *See, e.g., Evans v. Roe*, 275 F. App'x 620, 621 (9th Cir. 2008) (finding that "the California Court of Appeal's determination that there was no deprivation of the right of confrontation was also not contrary to or an unreasonable application of Supreme Court precedent" where, like here, the "paraphrase of the problematic testimony . . . placed before the jury during [an] opening statement" was distinguishable on all four bases on which the *Frazier* court distinguished *Bruton*, and "the jury . . . was instructed that statements made by counsel do not constitute evidence"). At the very least, the Supreme Court cases do not give a "clear answer . . . in [Armfield's] favor"

to the question of whether submission to the jury of the opening statement referencing Nelson's confession was reversible error, meaning that "it cannot be said that the state court unreasonabl[y] appli[ed] clearly established Federal law." *Wright v. Van Patten*, 552 U.S. 120, 126 (2008).

2. Harmlessness Determination

In any event, the Illinois Appellate Court further determined that any error was harmless. R. 12-1 at 13. And this harmlessness determination is entitled to substantial deference under § 2254(d). Armfield "must show that the state court's [harmlessness determination] was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Davis v. Ayala*, 135 S. Ct. 2187, 2199 (2015).

Here, the Court finds that the Illinois Appellate Court reasonably concluded that there was "ample evidence of [Armfield's] guilt." R. 12-1 at 13-14. This evidence included Vinson's testimony that Armfield and Nelson fired the shots at Copeland's vehicle that killed him (R. 12-2 at 2), and Jenkins's corroborating testimony about seeing two men shoot at Copeland's vehicle (*id.* at 2-3). The evidence also included Floyd's grand jury testimony that Armfield exited Floyd's car when Randall instructed him to "take care of business" and returned with a gun in hand shortly after Floyd heard gunshots, and he told Floyd he had shot his gun. *Id.* at 10-11. And it included Robinson's testimony placing Armfield at the scene of the earlier attempted shooting of Copeland, and Williams's identification of Armfield in a line-up as being present during that shooting. *Id.* at 4.

None of these witnesses' additional testimony on which Armfield focuses meaningfully undermine the strength of their testimony against him. *See* R. 12-15 at 53, 58 (Vinson testifying that he did not remember if he told the police he saw the shooters when he met with the police the night of the shooting); R. 12-15 at 70-79 (Jenkins never asked to identify Armfield); R. 12-15 at 81-91 (Williams testifying that he identified Armfield to the police as a man "standing in the alley" during the earlier shooting, but "wasn't for sure if he was with them or not"); R. 12-15 at 109 (Robinson testifying that during the earlier shooting, she wasn't sure if Armfield was on the same side of the street as Nelson and Randall).

Armfield emphasizes the jury's note on the second day of deliberations that it had reached an impasse as evidence that any error was not harmless. Armfield implies that the jury was hung before receiving the transcripts and then reached a verdict after receiving them, showing their prejudicial effect. But those are not the facts. The jury reported that it reached an impasse *after* receiving the transcripts. Then the trial court gave the renewed instruction about the jury's duty to deliberate. If was after this instruction that the jury reported making progress and ultimately reached a verdict. The Court therefore finds, in the alternative, that the Illinois Appellate Court did not make "an error well understood and comprehended in existing law" in determining that any error was harmless in light of the strength of the evidence against Armfield. *See Davis*, 135 S. Ct. at 2199.

B. Claims Six, Nine, and Ten

In claims six and nine, Armfield asserts ineffective assistance of trial counsel—first, in failing to object to the admission of evidence related to the subsequent shooting in front of Cook County Jail (claim six), and second, in failing to redact references to Armfield's membership in a gang in Floyd's grand jury testimony submitted to the jury (claim nine). R. 8 at 9-11.

To show that counsel was ineffective, Armfield must prove (1) "deficient performance—that the attorney's error was 'so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment'"; and (2) "that the attorney's error 'prejudiced the defense.'" *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1910 (2017) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Scrutiny of an attorney's performance is "highly deferential." *Strickland*, 466 U.S. at 689. Even "professionally unreasonable" errors do not warrant "setting aside the judgment of a criminal proceeding" if the error in question "had no effect on the judgment." *Id.* at 691.

With respect to both claims, the Illinois Appellate Court bypassed the first prong of *Strickland* and determined for purposes of the second prong that Armfield's "ineffective assistance of trial counsel claims fail because he cannot show that he was prejudiced by counsel's alleged deficient performance" in light of the substantial evidence of Armfield's guilt. R. 12-2 at 9. For the reasons already explained, the Court finds that this determination did not unreasonably apply *Strickland's* standard or make an unreasonable determination of the facts. The Illinois Appellate Court

reasonably concluded that Floyd's romantic relationship with Randall could have been easily found by the jury to explain why she recanted at trial. *Id.* at 11. And it reasonably concluded that this recantation in no way undermined Vinson's testimony that Armfield participating in shooting Copeland, Jenkins's partially corroborating testimony, and Williams's and Robinson's testimony that Armfield was at the scene of the attempted shooting of Copeland hours before Copeland's murder. *Id.* at 10-11. The Court therefore finds that claims six and nine do not present grounds for federal habeas relief. The Court further finds that Armfield's claim ten for cumulative impact fails for the same reasons. *See Williams v. Lemmon*, 557 F.3d 534, 538 (7th Cir. 2009) (ineffective assistance habeas claim necessarily entails "evaluat[ing] the entire course of the defense").

III. Certificate of Appealability

Rule 11(a) of the Rules Governing § 2254 Cases provides that the district court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." A habeas petitioner must make a "substantial showing of the denial of a constitutional right" to obtain a certificate of appealability. 28 U.S.C. § 2253(c)(2). This demonstration includes "includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In other words, "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" *Miller-*

El v. Cockrell, 537 U.S. 322, 338 (2003). Because this Court does not believe that reasonable jurists would disagree as to its resolution of Armfield's petition, the Court declines to issue a certificate of appealability.

Conclusion

For the foregoing reasons, this Court denies Armfield's § 2254 petition [1, 8] and declines to issue a certificate of appealability.

ENTERED:

Thomas M Durkin

Honorable Thomas M. Durkin
United States District Judge

Dated: November 27, 2018

SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721

September 28, 2016

Hon. Lisa Madigan
Attorney General, Criminal Appeals Div.
100 West Randolph St., 12th Floor
Chicago, IL 60601

No. 121165 - People State of Illinois, respondent, v. Russel Armfield, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on November 2, 2016.

APPENDIX C

(ORDER LIST: 589 U.S.)

THURSDAY, MARCH 19, 2020

ORDER

In light of the ongoing public health concerns relating to COVID-19, the following shall apply to cases prior to a ruling on a petition for a writ of certiorari:

IT IS ORDERED that the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. See Rules 13.1 and 13.3.

IT IS FURTHER ORDERED that motions for extensions of time pursuant to Rule 30.4 will ordinarily be granted by the Clerk as a matter of course if the grounds for the application are difficulties relating to COVID-19 and if the length of the extension requested is reasonable under the circumstances. Such motions should indicate whether the opposing party has an objection.

IT IS FURTHER ORDERED that, notwithstanding Rules 15.5 and 15.6, the Clerk will entertain motions to delay distribution of a petition for writ of certiorari where the grounds for the motion are that the petitioner needs additional time to file a reply due to difficulties relating to COVID-19. Such motions will ordinarily be granted by the Clerk as a matter of course if the length of the extension requested is reasonable under the circumstances and if the motion is actually received by the Clerk at least two days prior to the relevant distribution date. Such motions should indicate whether the opposing party has an objection.

APPENDIX D

CHICAGO POLICE — 17 AUG 04 — 2103HOU

1. INCIDENT/OFFENSE CLASSIFICATION LAST PREVIOUS REPORT	1-UCR OFF. CODE	2. ADDRESS OF ORIG. INCIDENT/OFFENSE ☒1 VERIFIED ☐2 CORRECTED	3. BEAT OF OCCUR.
HOMICIDE FIRST DEGREE MURDER	0110	4605 S. LECLAIRE	0814

5. VICTIM'S/SUBJECT'S NAME AS SHOWN ON LAST PREVIOUS REPORT	CORRECT	6. FIRE RELATED	7. BEAT ASSIGNED
COPELAND, AL AKA "POOH POOH"	☒1 YES ☐2 NO	☐1 YES ☒2 NO	6175A

8. VICTIM'S/SUBJECT'S ADDRESS	9. TYPE OF LOCATION OR PREMISE WHERE INCIDENT/OFFENSE OCCURRED	LOCATION CODE
4645 SOUTH LAMON ST.	STREET	304

10. PROPERTY — DESCRIBE PROPERTY IN NARRATIVE T = TAKEN; R = RECOVERED. FILL IN THE FULL AMOUNT OF ONLY THOSE VALUES WHICH EITHER DIFFER FROM OR WERE NOT REPORTED ON THE ORIGINAL CASE REPORT OR THE LAST PREVIOUS SUPPLEMENTARY REPORT.

1 MONEY	2 JEWELRY	3 FURS	4 CLOTHING	7 OFFICE EQUIPMENT	8 TV, RADIO, STEREO	PROPERTY INVENTORY NO(S).
☐T $ ☐R	☐T $ ☐R	☐T $ ☐R	☐T $ ☐R	☐T $ ☐R	☐T $ ☐R	

9 HOUSEHOLD GOODS	0 CONSUM. GOODS	11 FIREARMS	6 NARC./DANGEROUS DRUGS	5 OTHER	6 NONE
☐T $ ☐R	☐T $ ☐R	☐T $ ☐R	☐T $ ☐R	☐T $ ☐R	☐Y ☐R

OFFENDERS

11. OFFENDER'S NAME (OR DESCRIBE CLOTHING, ETC.)	12. HOME ADDRESS	13. SEX-RACE-AGE CODE	HEIGHT	WEIGHT	EYES	HAIR	COMP
1							
2							

14. C.B. NO.	I.R. NO., Y.D. NO. OR J.D.A. NO.	OFFENDER REL. CODE	C.B. NO.	I.R. NO., Y.D. NO. OR J.D.A. NO.	OFFENDER REL. CODE	15. NO. ARRESTED	ARRE UNIT
OFF. 1			OFF. 2				

16. OFF'S. VEHICLE ☐USED ☐STOLEN	YEAR	MAKE	BODY STYLE	COLOR	V.I.N.	STATE LICENSE NO.	STA

20. NARRATIVE

R/O'S OF THE PROJECT SAFE NEIGHBORHOODS GUN TASK FORCE EXECUTED SEARCH WARRANT #05SW4813 UNDER RD#HL-244227 ON 19MAR05 @ 1437 HOURS. R/O'S UPON DEBRIEFING THE FOLLOWING SUBJECTS DETERMINED THAT BOTH SUBJECTS HAD INFORMATION REGARDING AN OPEN/ASSIGNED HOMICIDE INVESTIGATION UNDER RD # HK-564454.

SUBJECT #1: VINSON, CALSHAUN M/1/21 D.O.B.11JUN83 S.S.#341-74-3414
20 17TH ST., MAYWOOD, IL (708) 410-1021

SUBJECT #2: WALKER, TUYKIMA F/1/21 D.O.B. 09JUL83 S.S. # 345-72-8186
4704 W. 47TH ST. (BASEMENT) CHICAGO, IL 60629 (773) 308-2680

R/O'S CONTACTED AREA 1 HOMICIDE, GANG, ROBBERY DETECTIVE DIVISION AND DETECTIVE'S STRUCK #20857 AND O'DONNELL #60029 SUBSEQUENTLY RESPONDED AND INTERVIEWED BOTH SUBJECT'S WHICH PROVIDED STATEMENTS.

ASSISTING UNITS: BT 6175B P.O. C. WILLIAMS #17004, P.O. T. HENRY #18642
BT 6176A P.O. D. GREENWOOD #15128, P.O. C. BAUMAN #15110
BT 6176B P.O. T. OLIVER #7126
BT 6176 SGT. L. MANN #1717
BT 1190 LT. F. WHEAT #280

☐ CONTINUED OTHER SIDE

90. EXTRA COPIES REQUIRED (NO. & RECIPIENT)	91. DATE THIS REPORT SUBMITTED — DAY / MO. / YR.	TIME	92. SUPERVISOR APPROVING (PRINT NAME)	STAR NO.
AREA 1/HGR	19 MAR 05	2100	SGT. L. MANN	#1717

93. REPORTING OFFICER (PRINT NAME)	STAR NO.	94. REPORTING OFFICER (PRINT NAME)	STAR NO.	SIGNATURE
F. PAZ #7567		E. TORRES #15049		
SIGNATURE		SIGNATURE		95. DATE APPROVED (DAY-MO.-YR.) / TIME
				19 MAR 05 / 2130

CPD-11.411-A (REV. 8/85) *MUST BE COMPLETED IN ALL CASES

Appendix E

State of Illinois
Circuit Court of Cook County
Criminal Division

James M. Schreier
Judge

2600 South California Avenue
Chicago, Illinois 60608
(773) 869-3170

HAS THE JURY MADE PROGRESS TOWARD REACHING A UNANIMOUS VERDICT SINCE YOU WERE CALLED INTO COURT ~~[illegible]~~ ABOUT 3P.M.

We are making progress, but not at a verdict yet

YES ☐
NO ☒

ENTERED
JUDGE JAMES SCHREIER-0458
JUN 15 2007
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Judge James Schreier

GROUP APPENDIX (F)

L.13

We have reached an impasse —

Further discussion will not change, & in fact, may cause more hostility among jury

One juror strongly fears repercussions & will not articulate her decision.

1135

THE COURT: I can't -- a little louder.

MR. COHN: Originally, the State told me they were not going to call Mr. Williams, but they have a right to change their mind. But if I knew in advance, I only got this notice Thursday or Friday of last week, maybe Wednesday, I could have done more of a background check as to Mr. Williams.

THE COURT: Is he on the list of witnesses?

MR. COHN: He is on the list of witnesses.

MR. LEAFBLAD: He is on our answer to discovery too, Judge.

MR. COHN: He is on the list of discovery.

The other argument I make is I called Mr. Williams. Two of the people he saw did something. I have to get the motion. I don't have it in front of me. If I could borrow the State's copy.

MR. LEAFBLAD: It has my notes --

THE COURT: Here.

MR. LEAFBLAD: In a nutshell, basically, what Williams sees is he sees Tyrene Nelson hand Kimothy Randall a handgun. Kimothy Randall then fires on a car with Al Copeland inside it, Al Copeland who is our victim in the homicide later

that day.

MR. COHN: He does not see --

MR. LEAFBLAD: He says he sees Randall as acting as kind of like a look out.

MR. COHN: Well, he says he sees Randall standing there --

MR. LEAFBLAD: Right --

MR. COHN: -- on the corner. Doesn't see Randall doing anything, talking to the other people, making any gestures. So even if this happens to be admissible against Nelson and Armfield, I don't think it would be admissible against Randall.

THE COURT: Motion to admit evidence of this other crime, this other incident will be allowed over objection.

MR. SOSMAN: Judge, may I have a statement as far as that because it affects my client as well.

THE COURT: You may -- wait until we pick your jury. You know my inclination.

MR. SOSMAN: I have a completely different line of argument, Judge.

THE COURT: Do you have it in writing?

MR. SOSMAN: Judge, I was just served with this two days ago. I don't have it in writing. I

INTERVIEWED:
Tykima Walker
Ayeshia Floyd
Lucille Floyd
Calshaun Vinson
Sinquis Prosper
Tyrene Nelson
Kimothy Randall
Russell Armfield
Willie WILLIAMS

INVESTIGATION:
This report is to be read in conjunction with all other reports previously generated under Record Division Numbers HK-564454, HK- 564532, HK-564659, and HK-564068and HL241792. This report is a summarization of the investigation and interviews. All interviews are in essence and not to be considered verbatim. This report is a continuation of an on-going investigation.

On 19 Mar 2005, the A/4 Gun Team, PO F. Paz #7567 and PO E. Torres #15049 contacted the undersigned. They related that they had executed a Search Warrant and arrested several individuals. While they were processing and debriefing the arrestees they were informed by Tykima WALKER and Calshaun VINSON that they had information in regards to a Homicide that had occurred in LeClaire Courts in August of 2004. VINSON and WALKER were able to provide them with the victims name and they then contacted A/1 in regards to the COPELAND Homicide. The undersigned then responded to A/4 for the purposes of this investigation.

Upon arrival the undersigned spoke with Officers Paz and Torres, who related that WALKER and VINSON were willing to cooperate with this investigation. The undersigned was then directed to both WALKER and VISNON who agreed to be interviewed.

The undersigned interviewed WALKER who related the following information: She stated that she had not actually witnessed the Homicide however one of the offenders known to her as Tyrene NELSON "TY" had made statements in regards to the COPELAND Homicide. She stated that "TY" was like a brother to her and that she has known him almost his entire life. She stated that NELSON had called her in November of 2004, and told her that he had killed "Poo-Poo", back in August. She stated that "Poo-Poo" was Al Copeland and that she knew the victim and his family. She stated that She stated that NELSON had made a comment to her during the conversation that "You all keep fucking with me and I'm going to fuck you up like I did to Poo-Poo." She further stated that NELSON had made comments about getting "Poo-Poo" in the head.

She then related that on 18 Mar 2004, she had seen NELSON in a car, along with several other males near her house and that she had felt threatened. She stated that one of the guys in the car was "Calbo" nka Calvin ARMFIELD. She stated that when she left the house NELSON had chased her and that they had shot at the vehicle she was driving. She stated that they chased her down the expressway and that she was calling the police on her cell phone. She stated that she then drove to Cook County Jail to visit her boyfriend, "JR" nka Gregory Wright CPD IR# 1360149. She stated that the car pulled over and parked near the jail. She stated that when she went into the jail "TY" and another boy had followed her into the jail. She stated that they had signed into the jail and

2015 IL App (1st) 130010-U

SECOND DIVISION
June 7, 2016

No. 13-0010

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, v. RUSSEL ARMFIELD, Petitioner-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County. 05 CR 9216 (02) Honorable Lawrence Edward Flood Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Pierce and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in dismissing petitioner's second stage postconviction petition. Petitioner failed to make a substantial showing of constitutional violations. Petitioner failed to establish that he was prejudiced by counsel's alleged deficient performance. Postconviction counsel provided reasonable assistance to petitioner.

¶ 2 Petitioner Russell Armfield appeals from a judgment of the Circuit Court of Cook County denying his postconviction petition at the second stage proceedings. For the following reasons, we affirm.

APPENDIX I

No. 13-0010

¶ 3 BACKGROUND

¶ 4 Following a jury trial, petitioner was charged and convicted of first degree murder and sentenced to 33 years in the Illinois Department of Corrections.[1] Petitioner's conviction and sentence were affirmed on direct appeal. *People v. Russell Armfield and Kimothy Randall*, No. 1-07-2902 & No. 1-07-2903 (2009). The factual background underlying petitioner's conviction was recounted in our previous decision on direct appeal. *Id.*

¶ 5 In relevant part, the following evidence was presented at petitioner's trial. Al Copeland was shot and killed on August 17, 2004. Calshaun Vinson testified that he was a friend of Al Copeland and also knew petitioner and codefendants Kimothy Randall and Tyrene Nelson. At about 9 p.m., Vinson saw Copeland driving with his girlfriend and their children near 47th Street and Cicero Avenue. Vinson also saw a car driven by a woman he knew as "Ride" and occupied by petitioner and codefendants. A short time later, Ride's vehicle stopped, petitioner and Nelson got out and ran towards 46th and Leclaire Avenue. Vinson heard several gunshots from that direction and saw petitioner and Nelson firing at Copeland's vehicle. Vinson spoke with the police later that night, although he did not recall what he told the officers.

¶ 6 Vinson admitted that he was arrested on March 19, 2005, on a weapons charge that was dismissed at the preliminary hearing. Following his arrest, he spoke with the police about Copeland's murder. Vinson denied that he had been promised anything regarding his weapons charge in exchange for his cooperation. On cross-examination, Vinson stated that he had not spoken with the police about the instant case between the night of his murder and his own arrest.

¶ 7 Kawana Jenkins testified that she was Copeland's girlfriend. At about 9 p.m. on august 7, 2004, Copeland dropped her and her children off at her home near 46th and Leclair. Copeland

[1] Codefendant Kimothy Randall was tried jointly with defendant, while codefendant Tyrene Nelson was tried simultaneously but by a separate jury. Both codefendants were also convicted of first degree murder.

had driven a short distance when a man flagged him down. When Copeland stopped, Jenkins heard gunshots and saw Copeland speed away. When Copeland's vehicle reached the corner, another man fired several shots at Copeland's car and ran into a parked car. Jenkins found Copeland slumped over the steering wheel, motionless. Copeland died before he reached the hospital. The cause of death was determined to be from five gunshot wounds.

¶ 8 Ayeshia Floyd testified that she was also known as "Ride" and she knew petitioner and codefendants. Floyd testified she was riding aimlessly around in her vehicle, smoking marijuana with petitioner and the codefendants. She specifically denied being in the area of 45th and Leclaire until late in the evening. However, Floyd could not recall when the group returned because she was under the influence of marijuana.

¶ 9 Floyd admitted that she spoke to police in March 2005 but denied telling them that codefendant Randall saw a man "had gotten into it with" earlier in the day and told petitioner and Nelson to "take care of business." Floyd denied telling police that Nelson and petitioner later left her car and walked toward Leclaire and that she heard gunshots from that direction. She also denied telling police that petitioner and Nelson were carrying guns when they returned to her car. Floyd also denied and could not recall that she so testified before the grand jury. Floyd also testified that during her police interview, she was threatened with imprisonment for murder on a pending narcotics case if she did not cooperate.

¶ 10 The parties stipulated that Floyd's testimony before the grand jury was substantially as she denied at trial, and also that she denied in that that testimony that she had been coerced or promised anything in exchange for her testimony. Floyd's claim that she was coerced was rebutted by Detective Walter Chudzik and Detective Michael O'Donnell who testified that they did not threaten or promise her anything in exchange for her statement. Former Assistant States

Attorney Bryant Hofeld testified that he met with Floyd at the police station but did not take a statement from her because she was taken directly to the grand jury. Hofeld testified that he did not threaten or promise Floyd anything in exchange for her testimony, nor hear anyone else make such a threat or promise, nor did Floyd tell him that she had been threatened.

¶ 11 Willie Williams testified that about 6:00 p.m. on August 17, 2004, he was walking near 45th and Lavergne Avenue when he saw Nelson pushing Randall in a wheelchair. As a gray vehicle and another vehicle passed them, Nelson handed Randall a pistol which Randall fired at the vehicles. Williams did not report the shooting to the police but did speak to them within a week of the incident. Williams testified that petitioner was also in the area near an alley. Williams admitted that he gave a statement at the police station in April 2005 where he told the police that he thought petitioner was acting as a lookout. Williams denied using heroin at the time of the shooting or during his statement to police, but admitted he had taken heroin on the day of trial.

¶ 12 Yakirah Robinson testified that, at about 6 p.m. on August 17, 2004, she saw petitioner and codefendants as she was driving near 45th and Lavergne with her fiancé and 1-year-old daughter in the car. She saw Nelson pushing Randall in his wheelchair, while petitioner was standing nearby. Robinson heard several gunshots and drove away. She went around the corner, parked her car, got out and saw that her car had been shot on the passenger side near her baby's car seat. She ran with her baby into her grandmother's house. When she came back, she saw that Al Copeland was talking with the police because his car had also been shot. Robinson made a police report at that time, but later signed a refusal to prosecute.

¶ 13 Sinquis Prosper, codefendant Randall's sister, testified that on August 17, 2004, between 8:00 and 9:00 p.m., she received a call from Randall, requesting that she get a hoody and two

"pee bags" that he needed for his medical condition. Prosper retrieved the items and brought them out front to Randall, who was sitting in his girlfriend's car outside of their grandmother's house. Randall's girlfriend, also known as "Ride," codefendant Nelson, and petitioner were with Randall in the car.

¶ 14 At trial, Prosper testified that there was nothing unusual about the hoody that she gave to her brother. She also testified that about an hour later, she stepped outside of her house with her neighbor Chris, when she heard a car crash, but denied going down the street to check it out. She did not recall whether Chris got shot. Prosper admitted that she spoke with the police and ASA Brian Hofeld in March 2005. Prosper admitted that she told them that: they were hard, heavy objects in the hoody that she gave to her brother; she and her neighbor went down the street after the crash; that she helped a woman pull a boy out of the car; that the boy had blood on him and she thought he had been shot; that somebody started shooting in their direction while she and Chris were by the car, and Chris got shot in the leg; and that Randall later asked her if Chris got shot. Prosper testified that her grandmother was present when she spoke with the police and ASA Hofeld and that both of them signed her handwritten statement that memorialized her interview with them. Prosper testified at trial that everything she told the police and ASA Hofeld other than giving Randall his hoodie and pee bags was a lie.

¶ 15 Prosper also admitted that she testified before the grand jury in March 2005. Her testimony before the grand jury was consistent with her statements made to the police. Prosper claimed that she lied before the grand jury because the ASA and the police threatened her that if she did not cooperate with them she would go to jail. ASA Hofeld and Michelle Papa testified that nobody threatened Prosper.

No. 13-0010

¶ 16 The State introduced testimony regarding another shooting that involved codefendant Nelson. Tykima Walker testified that she was driving to the county jail on March 18, 2005, to visit her boyfriend Gregory Wright. She noticed she was being followed by a Pontiac Grand Prix containing Nelson and three other men. Nelson and one of the other men fired shots at her vehicle.

¶ 17 Officer Frank Ramaglia testified that on the early afternoon of March 18, 2005, he responded to call of a man with a gun in a Pontiac Grand Prix in the vicinity of the county jail. When he arrived, Officer Ramaglia saw the sole occupant of the car with a submachine gun at his feet. Following the occupant's arrest, a 9 millimeter and .40 caliber pistols were also recovered from the car. Forensic scientist Melissa Nally, who processed the weapons, testified that she compared tests shots from the guns recovered from the Grand Prix to the fired evidence from Copeland's murder scene. The 9 millimeter cartridge cases from Copeland's murder scene were fired from the 9 millimeter pistol recovered from the Grand Prix.

¶ 18 The jury found petitioner guilty of first degree murder. The trial court sentenced petitioner to 33 years of imprisonment. Petitioner's convictions and sentence were affirmed on direct appeal. *People v. Russell Armfield and Kimothy Randall*, No. 1-07-2902 & No. 1-07-2903 (2009).

¶ 19 On March 23, 2010, a typewritten petition was filed bearing petitioner's name and that of codefendant Randall. Petitioner raised numerous allegations of ineffective assistance of counsel, claims of trial court errors and prosecutorial misconduct. On March 29, 2010, petitioner filed another handwritten post-conviction petition raising various claims of ineffective assistance of trial counsel and appellate counsel, claims of trial court's errors, and prosecutorial misconduct.

¶ 20 On July 27, 2011, postconviction appointed counsel filed a certificate indicating his compliance with Supreme Court Rule 651(c). Postconviction counsel did not amend or supplement the *pro se* pleadings. On August 22, 2012, the State filed a motion to dismiss petitioner's postconviction petition. Following the hearing on the State's motion to dismiss, the trial court granted the State's motion denying petitioner's claims. This appeal follows.

¶ 21 ANALYSIS

¶ 22 The Illinois Post–Conviction Hearing Act (Act) provides a process by which a criminal defendant may challenge his or her conviction. 725 ILCS 5/122–1 *et seq.* (West 2012). A postconviction action is a collateral attack on a prior conviction and sentence, "not a substitute for, or an addendum to, direct appeal." *People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994). To be accorded relief under the Act, a defendant must show there was a substantial deprivation of his or her constitutional rights in the proceedings that produced the conviction. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006). The Act "provides for postconviction proceedings that may consist of as many as three stages." *Id.* at 472. During the first stage, the trial court has 90 days to summarily dismiss any "frivolous" petitions. *Id.* If not dismissed, the petition advances to the second stage. *Id.* During second-stage proceedings, counsel may be appointed for the defendant and the State may move to dismiss the petition or answer its allegations. *Id.* If the petition is not dismissed at the second stage, it advances to the third stage and an evidentiary hearing is held. *Id.* at 472-73.

¶ 23 A second-stage dismissal of a defendant's petition presents a legal question we review *de novo*. *People v. Whitfield*, 217 Ill. 2d 177, 182 (2005). The relevant question raised during a second-stage postconviction proceeding is whether the petition's allegations, supported by the trial record and accompanying affidavits, demonstrate a substantial showing of a constitutional

deprivation, which requires an evidentiary hearing. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). All well-pled facts in the petition and affidavits are taken as true, but assertions that are really conclusions add nothing to the required showing to trigger an evidentiary hearing under the Act. *Id.* The Act does not provide a defendant with an opportunity to retry the case. *People v. Evans*, 186 Ill. 2d 83, 89 (1999). Issues that could have been raised on direct appeal, but were not, are procedurally defaulted. *People v. Williams*, 209 Ill. 2d 227, 233 (2004). As a reviewing court, we can "affirm the trial court on any basis supported by the record." *People v. Lee*, 344 Ill. App. 3d 851, 853 (2003). We review the trial court's judgment, not its reasoning. *Id.*

¶ 24 On appeal, petitioner argues that the trial court erred in dismissing his second stage postconviction petition because he made a substantial showing that his trial counsel provided ineffective assistance of counsel for (1) failing to request the redaction of Ayeshia Floyd's grand jury testimony, which identified petitioner as an alleged gang member; (2) failing to move to exclude the prejudicial testimony of another shooting not involving petitioner but involving codefendant Nelson which led to the recovery, among others, of the weapon used in Copeland's murder; and (3) for failing to object to the State's improper closing argument, which, according to petitioner, was inflammatory and prejudicial. In addition, petitioner argues that his postconviction counsel provided him with ineffective assistance for failing to amend petitioner's postconviction petition to allege that his appellate counsel was ineffective. Petitioner claims that appellate counsel should have raised on appeal the trial court's error in denying his motion for mistrial based on the prosecutor's inflammatory and prejudicial closing argument.

¶ 25 Generally, the failure to raise a claim of ineffectiveness of trial counsel in the direct appeal renders the issue waived in post-conviction proceedings. *People v. Wilson*, 307 Ill. App. 3d 140, 145 (1999). However, a claim of incompetence of counsel in a post-conviction

proceeding will not be barred where, as here, the attorney who represented the defendant at trial also represented the defendant on direct appeal. See *id.*

¶ 26 To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, "a defendant must prove that defense counsel's performance fell below an objective standard of reasonableness and that this substandard performance created a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *People v. Graham*, 206 Ill. 2d 465, 476 (2003). We apply the two-pronged *Strickland* test where the trial court has entered a second-stage dismissal of an ineffective assistance of counsel claim. *People v. Alberts*, 383 Ill. App. 3d 374, 377 (2008); *Coleman*, 183 Ill. 2d at 400.

¶ 27 Unless the defendant makes both showings under *Strickland*, we cannot conclude that he received ineffective assistance. See *People v. Munson*, 171 Ill. 2d 158, 184 (1996). Courts may resolve ineffectiveness claims under the two-part *Strickland* test by reaching only the prejudice component, for lack of prejudice renders irrelevant the issue of counsel's performance. *People v. Coleman*, 183 Ill. 2d 366, 397-98, (1998); *Graham*, 206 Ill. 2d at 476 ("[I]f an ineffective-assistance claim can be disposed of because the defendant suffered no prejudice, we need not determine whether counsel's performance was deficient."); *People v. Hale*, 2013 IL 113140, ¶ 17.

¶ 28 Here, petitioner's ineffective assistance of trial counsel claims fail because he cannot show that he was prejudiced by counsel's alleged deficient performance. In order to establish the prejudice prong, a petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Graham*,

206 Ill. 2d at 476. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *People v. Enis*, 194 Ill. 2d 361, 376 (2000).

¶ 29 Here, the State presented overwhelming evidence of petitioner's guilt and even assuming that trial counsel's performance was unreasonable for the reasons argued by petitioner, petitioner failed to establish that there is a reasonable probability that the result of his trial would have been different. Eyewitness Vinson testified that he was in the area and he saw petitioner, codefendant Nelson, and codefendant Randall in a car before the shooting. Vinson then testified that he saw petitioner and Nelson get out of Floyd's car and shoot at Copeland's vehicle. Venison's testimony was substantially corroborated by Jenkins, Copeland's girlfriend, who testified that she saw two people shooting at Copeland's vehicle.

¶ 30 Floyd also corroborated Vinson's account in her statement and grand jury testimony although she recanted her statements at trial. Floyd testified that petitioner, Randall, and Nelson were together in her car in the evening hours of the day of the shooting. Floyd testified before the grand jury that: she was driving Randall around the neighborhood when Randall saw someone he had "been into it with" referring to Copeland; petitioner and Nelson were also passengers in her car; she drove them all to Randall's house; they drove back to Leclair where she saw Copeland and his girlfriend; petitioner and Nelson exited the car after Nelson told them to "take care of business" which Floyd understood to mean that they should shoot Copeland; after petitioner and Nelson got out of the car, she heard gunshots and she and Randall drove away; Randall ordered her at gunpoint to return to the alley where petitioner and Nelson had left the car; she saw petitioner and Nelson armed with handguns when they returned to the alley; petitioner admitted that he fired his gun, but complained that Nelson did not shoot until after petitioner did; she drove off from the alley with all three of them and headed toward the

expressway; Randall apologized to her for involving her in the incident and instructed her to tell the police, if they asked, that she had let him use her car; during the ride Randall told Nelson not to involve Floyd if the police asked about what had happed.

¶ 31 Floyd's recanted statements corroborated the eyewitness testimony in the case because it placed petitioner and codefendants at the crime scene, it established that they were armed and it indicated the sequence of events leading up to Copeland's shootings. Despite her recantation at trial, her previous inconsistent statement, her grand jury testimony, was admitted into evidence. Moreover, as we noted in our previous order, Floyd's recantation at trial was reasonably explained by the fact that codefendant Randall had been her boyfriend and she knew petitioner and codefendant Nelson as well. See *People v. Russell Armfield and Kimothy Randall*, No. 1-07-2902 & No. 1-07-2903 (2009). Similarly, Prosper's recanted grand jury testimony corroborated the eyewitness testimony in the case and her recantation was most likely due to the fact that she is codefendant Randall's sister. In addition, the evidence established that petitioner and codefendants were involved in an earlier shooting of Copeland's and Robinson's cars just hours before Copeland's murder, and one of the weapons used in the murder was found in a car occupied by codefendant Nelson.

¶ 32 As we previously held on direct appeal, and upon reviewing the record, we find that the evidence of petitioner's guilt was substantial. See *People v. Russell Armfield and Kimothy Randall*, No. 1-07-2902 & No. 1-07-2903 (2009). Even if trial counsel's performance was unreasonable for the failing to request the redaction of Floyd's grand jury testimony, for failing to move to exclude the testimony of a substantive shooting involving codefendant Nelson, and for failing to object to the State's alleged improper closing argument, petitioner cannot establish that there is a reasonable probability that the outcome of his trial would have been different.

Accordingly, petitioner did not establish that his trial counsel provided ineffective assistance of counsel.

¶ 33 Petitioner next argues that postconviction counsel provided him with ineffective assistance by failing to amend his postconviction petition to include a claim of ineffective assistance of appellate counsel for failing to argue on direct appeal that the trial court erred in denying petitioner's motion for mistrial based on the prosecutor's inflammatory and prejudicial closing argument.

¶ 34 Under the Act, petitioners are entitled to a "reasonable" level of assistance of counsel. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 18; *People v. Perkins,* 229 Ill. 2d 34, 42 (2007). To ensure this level of assistance, Rule 651(c) imposes three duties on appointed postconviction counsel. *Perkins*, 229 Ill. 2d at 42. Pursuant to the rule, either the record or a certificate filed by the attorney must show that counsel (1) consulted with the petitioner to ascertain his contentions of constitutional deprivations; (2) examined the record of the trial proceedings; and (3) made any amendments to the filed *pro se* petitions necessary to adequately present the petitioner's contentions. Ill. S.Ct. R. 651(c) (eff. Dec. 1, 1984); *Perkins*, 229 Ill. 2d at 42. The purpose of the rule is to ensure that postconviction counsel shapes the defendant's claims into a proper legal form and presents them to the court. *Perkins*, 229 Ill. 2d at 44. Substantial compliance with Rule 651(c) is sufficient. *People v. Richardson*, 382 Ill. App. 3d 248, 257 (2008).

¶ 35 The filing of a Rule 651(c) certificate gives rise to a rebuttable presumption that post-conviction counsel provided reasonable assistance. In the instant case, counsel filed a Rule 651(c) certificate. Thus, the presumption exists that petitioner received the representation required by the rule. It is defendant's burden to overcome this presumption by demonstrating his attorney's failure to substantially comply with the duties mandated by Rule 651(c). *Id.*

¶ 36 Petitioner does not argue that postconviction counsel failed to consult with him about allegations contained in his petition or failed to read those portions of the record relevant to his claims. Rather, petitioner contends that postconviction counsel should have amended the petition to include a claim of ineffective assistance of appellate counsel to save the issue from forfeiture. Petitioner claims that appellate counsel should have raised on appeal the claim that the trial court erred in denying his motion for mistrial when the prosecution made improper, prejudicial comments that deprived him of a fair trial. According to petitioner, the State made improper comments in closing and rebuttal that petitioner and his codefendants invoked fear and terror in their neighborhood causing several witnesses to be reluctant to come forward and testify at trial.

¶ 37 In assessing claims of ineffective assistance of appellate counsel, the court follows the two-pronged test of *Strickland v. Washington*, 466 U.S. 668. To succeed on a claim of ineffective assistance of appellate counsel, petitioner must show that the failure to raise a particular issue was objectively unreasonable and that his appeal was prejudiced by the omission. *People v. Williams*, 209 Ill. 2d 227, 243 (2004). "Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong." *People v. Easley*, 192 Ill. 2d 307, 329 (2000). Thus, a petitioner has not suffered prejudice from appellate counsel's decision not to raise certain issues on appeal unless such issues were meritorious. *Easley*, 192 Ill. 2d at 329.

¶ 38 In presenting a closing argument, the prosecutor is allowed a great deal of latitude and is entitled to argue all reasonable inferences from the evidence. *People v. Jones*, 2014 IL App (3d) 121016, ¶ 37. The prosecutor is allowed to comment on the evidence and reasonable inferences

from the evidence, including a defendant's credibility or the credibility of the defense's theory of the case. *Id.* We review a trial court's denial of a motion for mistrial for abuse of discretion. *People v. Walker*, 386 Ill. App. 3d 1025, 1030 (2008).

¶ 39 The trial court did not abuse its discretion in denying petitioner's motion for mistrial. Upon reviewing the record, we note that the State never argued that petitioner individually or the defendants threatened any witness in particular. Rather, the State argued that petitioner's actions in the neighborhood on the night of the shooting, along with that of codefendants created a general fear in the community which caused several witnesses to be reluctant to come forward and testify. The terror and fear in the neighborhood comments were, however, based on the evidence at trial. Specifically, the evidence established at 6:00 on the night when the crime occurred, a few hours before the shooting murder of Al Copeland occurred, petitioner was in close proximity with codefendants, acting as a lookout for codefendants who shot at Copeland's and Robinson's cars. Notably, the shootings did occur on a public street during daylight hours and it is certainly reasonable to infer that being shot at, as witness Robinson was, with a 1-year-old child in the car, is an intimidating and fearful event.

¶ 40 In addition, petitioner claims that the State made improper comments to install fear in the jurors when arguing that defendants shoot at people in broad daylight close to the courthouse. However, the comments were based entirely on the evidence introduced at petitioner's trial when Walker testified that codefendant Nelson and three others shot at her while she was driving to Cook County jail in the vicinity of the criminal courthouse. Accordingly, the comments were based on the evidence and reasonable inferences drawn therefrom were proper. See *People v. Cox*, 377 Ill. App. 3d 690, 708 (2007) (not an error for the State to argue that two witnesses and

their families "still lived in the area where the shooting occurred and that the kind of violence that defendant perpetrated out there impacts the community").

¶ 41 Moreover, even if the State's comments, or some of them, were improper, they were cured by the trial court's sustaining several defense objections, informing the jury that arguments are not evidence and must be disregarded if not supported by the evidence, or giving the jury proper instructions on the law to be applied. See *People v. Simms*, 192 Ill. 2d 348, 398 (2000). Furthermore, in the light of the overwhelming evidence of his guilt, petitioner did not establish that he was substantially prejudiced by the remarks such that it is impossible to say whether or not a verdict of guilt resulted from those comments. See *People v. Henderson*, 142 Ill. 2d 258, 323 (1990). Therefore, the trial court did not abuse its discretion when it denied petitioner's motion for mistrial based on such remarks and appellate counsel was not ineffective for failing to raise this issue when it was not meritorious. We conclude that defendant did not show that postconviction counsel was ineffective in failing to preserve the alleged error for review, or that appellate counsel was ineffective in failing to challenge the remarks on appeal.

¶ 42 In sum, we find that the circuit court did not err in dismissing petitioner's second stage potconviction petition when petitioner did not make a substantial showing of constitutional violation for his claims of ineffective assistance of trial, appellate and postconviction counsel.

¶ 43 CONCLUSION

¶ 44 Based on the foregoing, we affirm.

¶ 45 Affirmed.