APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 18-1507

JOSEPH WILBORN,

Petitioner-Appellant,

v.

ALEX JONES, Acting Warden,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 14 C 05469 — John Robert Blakey, Judge.

ARGUED DECEMBER 2, 2019 — DECIDED JULY 6, 2020

Before SYKES, *Chief Judge*, and BAUER and EASTERBROOK, *Circuit Judges*.

BAUER, Circuit Judge. An Illinois jury convicted Joseph Wilborn for the murder of a rival gang member in Chicago. In opening statements, Wilborn's defense attorney told the jury it would hear from his codefendant, Cedrick Jenkins, identifying him as the

actual shooter. During the trial, Jenkins indicated his testimony would no longer be favorable to Wilborn.

Defense counsel, with Wilborn's approval, did not call Jenkins to the stand. Wilborn filed for *habeas corpus* relief, alleging ineffective assistance of counsel. The district court denied his petition and he appealed. We consider whether trial counsel performed deficiently and caused cognizable prejudice when he told the jury in opening statements that Wilborn's codefendant would testify but then declined to call Jenkins as a witness. For the following reasons, we affirm.

I. BACKGROUND

On July 28, 2004, Emmit Hill ("the victim") followed rival gang members Wilborn and Jenkins into a gangway near 63rd Street between Wabash and Michigan Avenues, in Chicago, Illinois. Witnesses heard multiple gunshots and found the victim murdered.

Police located and arrested Wilborn and Jenkins. A jury found Wilborn guilty of first-degree murder and he was sentenced to 30 years, plus 25 years for personally discharging a firearm. Wilborn appealed and the Illinois Appellate Court affirmed the conviction. The Illinois Supreme Court granted and then ultimately denied Wilborn's petition for leave to appeal.

Wilborn then filed a petition with the United States District Court for the Northern District of Illinois. He claimed that trial counsel's promises during opening arguments amounted to ineffective assistance of counsel. Trial counsel indicated multiple times that Jenkins would testify to shooting the victim. However, as the trial progressed, Jenkins changed his proposed

testimony and defense counsel determined Jenkins would no longer be credible. Wilborn agreed with this recommendation on the record.

II. DISCUSSION

We review the district court's decision to deny a *habeas corpus* petition for ineffective assistance of counsel under the de novo standard. *Taylor v. Bradley*, 448 F.3d 942, 948 (7th Cir. 2006). The federal courts as a whole engage in "doubly deferential" review of ineffective assistance claims when § 2254(d) applies, as it does here. *See Knowles v. Mirzayance*, 556 U.S. Ill, 123 (2009). "By its terms § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (2)." *Harrington v. Richter*, 562 U.S. 86, 98 (2011).

"An application for a writ of *habeas corpus* on behalf of a person in custody pursuant to the judgment of a State court 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). In other words, Wilborn must show either clearly established Supreme Court precedent or an unreasonable application in the State court proceeding.

"The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the

adversarial system to produce just results." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). In order to prevail in an ineffective assistance of counsel claim, "defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Id.* at 687.

Wilborn is relying on § 2254(d)(1) as well as (d)(2). The only Supreme Court decision Wilborn relies on is *Strickland*, arguing that when counsel refers to someone during opening statements, that person must then be called. Yet this has not stopped Wilborn from making a "contrary to" argument under § 2254(d)(1). The problem is that this relies only on our Court, particularly *Hampton v. Leibach*, 347 F.3d 219, 257 (7th Cir. 2003). Although we think highly of our own decisions, we are not the Supreme Court. *See also Kernan v. Cuera*, 138 S. Ct. 4 (2017) (summarily reversing a court of appeals for relying on circuit precedent).

Wilborn's representation did not contain serious errors amounting to deprivation of a fair trial. Indeed, unforeseen situations may arise during trial. During opening statements, counsel reasonably believed that Jenkins would testify to shooting the victim, exculpating Wilborn. While Jenkins originally indicated his testimony would be favorable to Wilborn, Jenkins later changed his story multiple times. Counsel determined Jenkins' testimony to be unreliable and consulted with Wilborn. Wilborn agreed on the record that it was best not to call Jenkins.

Counsel's failure to present Jenkins to the jury or present testimonial evidence does not rise to the level of prejudice under *Strickland*. Promising the jury it

will hear testimony that Wilborn did not participate in the crime does not necessarily create prejudice. The record reflects that Jenkins' testimony wavered multiple times and could have been more of a hindrance to Wilborn. Furthermore, counsel discussed the issue with Wilborn and made a record of the issue in open court, where Wilborn agreed with the decision. Therefore, according to *Strickland*, Wilborn failed to show counsel's performance was deficient or how it deprived him of a fair trial.

We next consider whether the State court's decision resulted from reasonably applied facts in light of the evidence presented. Here, Wilborn fails the *Strickland* requirements for demonstrating prejudice. He fails to "present both the operative facts and the legal principles that control the claim in a manner that would sufficiently alert the state court to the issue." *McGhee v. Watson*, 900 F.3d 849, 854 (7th Cir. 2018).

The state appellate court concluded that Wilborn could not demonstrate ineffective assistance of counsel on the merits. Wilborn has not presented sufficient facts or legal principles to show his counsel's performance fell below the objective standard of reasonableness. We find the Illinois state court's application was reasonable.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the denial of Wilborn's *habeas corpus* relief.

APPENDIX B

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

Joseph Wilborn, (R17937),	)	
	)	
Petitioner,	)	
	)	Case No. 14 C 5469
v.	)	
	)	Judge John Robert Blakey
Randy Pfister, Warden,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION AND ORDER

Petitioner Joseph Wilborn,[1] a prisoner at the Pontiac Correctional Center, brings this *pro se* habeas corpus petition pursuant to 28 U.S.C. § 2254, challenging his 2006 first-degree murder conviction in the Circuit Court of Cook County. Petitioner was convicted of first-degree murder for the shooting death of Emmit Hill. He was sentenced to 55 years of imprisonment. For the following reasons, the Court

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[1] The state court record contains spellings of Petitioner's last name as both Wilborn and Wilbourn. Petitioner spells his name as Wilborn in his *habeas corpus* petition, so the Court adopts that spelling throughout this opinion.

denies the petition and declines to issue a certificate of appealability.

I. Legal Standard

Federal review of state court decisions under § 2254 is limited. With respect to a state court's determination of an issue on the merits, habeas relief can be granted only if the decision "was contrary to, or involved an unreasonable application of, clearly established Federal law," or "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); *Harrington v. Richter*, 562 U.S. 86, 100 (2011). This Court "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see Coleman v. Hardy*, 690 F.3d 811, 815 (7th Cir. 2012).

State prisoners must give the state courts "one full opportunity" to resolve any constitutional issues by "invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). If a petitioner asserts a claim for relief that he did not present in the first instance to the state courts, the claim is procedurally defaulted and "federal courts may not address those claims unless the petitioner demonstrates cause and prejudice or a fundamental miscarriage of justice if the claims are ignored." *Byers v. Basinger*, 610 F.3d 980, 985 (7th Cir. 2010).

II. Background and Procedural History

This Court begins by summarizing the facts and procedural posture from the state court record [22] (attaching Exhibits A to O), including the Illinois Appellate Court's opinions on direct appeal, *Illinois v. Wilborn*, No. 1-06-2088 (Ill. App. Ct. May 22, 2008)

(Exhibit D [22-4]), and post-conviction review, *Illinois v. Wilborn*, 962 N.E.2d 528 (Ill. App. Ct. 2012) (Exhibit L [22-12]). This Court presumes that the state court's factual determinations are correct for the purposes of habeas review, as Petitioner does not point to any clear and convincing contrary evidence. 28 U.S.C. § 2254(e)(1); *Brumfield v. Cain*, 135 S. Ct. 2269, 2282 n.8 (2015) (citing 28 U.S.C. 2254(e)(1)).

The case arises out of the July 28, 2004 shooting death of Emmit Hill near East 63rd Street and South Michigan Avenue on Chicago's Southside. [22-4], pp. 1-2. The evening's events began in front of an apartment building at 6253 South Michigan, which is located at the intersection of 63rd and Michigan. *Id.* at 2. At least nine men were present in the area that evening: Petitioner, the victim (Emmit Hill), Cedrick Jenkins (who would later be tried as Petitioner's co-defendant), an individual known as "Chub," and Clarence Morgan, David Parker, Keith Wright, Samuel ("Moochie") Richards, and Frederick Sanders. *Id.* at 2-3; *Wilborn*, 962 N.E.2d at 532.

The victim and David Parker were associated with the Black Gangster Disciples. [22-4], p. 3. Petitioner, Cedrick Jenkins, and Chub were members of a rival gang, the Insane Gangster Disciples. *Id.* By way of background, the Black Gangster Disciples initially claimed the apartment building at 6253 South Michigan as drug territory, and prevented the Insane Gangster Disciples from selling drugs at that location. *Id.* The Black Gangster Disciples later lost control of the building when federal authorities arrested several of that gang's members. Following the arrests, the Insane Gangster Disciples attempted to take over the drug business in the building. *Id.* Two weeks before his

murder, the victim confronted Petitioner, Jenkins, and Chub regarding drugs sales at the building. *Id.*

Sometime between 11:00 and 11:30 p.m. on July 28, 2004, Petitioner, Jenkins, Chub, Clarence Morgan, David Parker, and the victim were present outside the building. *Id.* Morgan and Parker both testified at trial that neither saw the victim with a gun. [22-4], pp. 2, 3. Morgan and Parker saw Chub hand Jenkins a sweatshirt, which seemed strange to them, given the hot late July weather. *Id.* In response, the victim told Chub that he "'was [] bullshit.'" *Wilborn*, 962 N.E.2d at 532. Morgan took this to mean that the victim was telling Chub that he was "'up to no good . . . .'" *Id.*

Following the exchange, Petitioner and Jenkins walked away from the building into a gangway. [22-4], p. 2. The gangway, which is a small area between two buildings, ran east/west connecting Michigan and Wabash Avenues just north of 63rd Street. *Wilborn*, 962 N.E.2d at 532-33. 63rd Street runs east/west, and Wabash and Michigan Avenues run north/south. Wabash is a one street west of Michigan.

Morgan testified that he saw the victim follow Petitioner and Jenkins into the gangway. [22-4], p. 2. Morgan lost sight of the group, and about a minute later, he heard five gunshots coming from the gangway. *Id.* Parker testified that he also heard seven gunshots and saw the gangway "'lighting up with sparks.'" *Id.* at 4.

Morgan, Parker, Keith Wright, and Moochie Richards investigated the shooting, walking south on Michigan to 63rd Street, west on 63rd to Wabash, and then north to the gangway. *Id.* at 3-4. There, they found the victim shot dead in the gangway by Wabash. *Id.* The group did not *see* Petitioner, Jenkins, or

anyone else on the scene. *Id.* They did not find a gun at the scene or on the victim's body. *Id.* Richards searched the victim's pockets for drugs. *Id.* at 4.

Sanders, who lived in the area, heard the gun shots while driving in his car. *Id.* at 2. He testified that he drove over to Wabash and saw Richards standing over the victim's body. *Id.* Sanders called the police. *Id.* He did not see anyone in the area with a gun and did not see Richards take a gun from the victim's body. *Id.* Sanders testified that he did not *see* Petitioner or Jenkins in the area. *Id.*

Chicago Police Department Forensic Investigator John Kaput testified that he walked the crime scene the night of the murder and recovered five fired Wolf brand 9-millimeter Luger cartridge casings and a 9-millimeter fired bullet. *Wilborn*, 962 N.E.2d at 535. No gun was found at the crime scene. *Id.* at 543. An Assistant Cook County Medical Examiner testified that she performed an autopsy on Hill's body and determined that he had seven bullet entrance wounds, and five exit wounds; she recovered two bullets from the body and found a third bullet in the victim's clothing. *Id.* at 535.

A responding Chicago Police Department detective testified that he interviewed witnesses at the scene, and, as a result of the on-scene investigation, police began a search for Petitioner, Jenkins, and Chub. *Id.* at 534. The police were unable to locate the three men that night. *Id.*

Stacy Daniels, a friend of Petitioner's for more than four years, testified that two weeks after the shooting, on August 12, 2014, Petitioner told Daniels that, "he 'got into some problems,' and that he was in 'some serious shit.'" *Id.* Daniels testified that Daniels and

Petitioner then went to Daniels' apartment, which Daniels shared with Xavier Woolard. *Id.* Woolard and his girlfriend, LaKeisha,[2] were at the apartment when Daniels and Petitioner arrived, and Jenkins was also there. *Id.*

Once at the apartment, Petitioner told Daniels about the shooting. Daniels testified that Petitioner explained that the victim had followed him into the gangway, and was "'fittin' to do something to him.'" *Id.* Petitioner "'turned around busting,'" which Daniels understood to mean shooting. *Id.* Petitioner then told Daniels that he needed money to leave town. *Id.* He said he might "'hit a lick or something like that,'" which Daniels understood to mean that he might commit a robbery. *Id.*

Daniels and Woolard left the apartment to go to a party, while Petitioner, Jenkins, and LaKeisha stayed behind at the apartment. *Id.* Chicago police officers arrested Woolard at the party for an unrelated battery offense, and, following his arrest, Woolard told the police that there were two men in his apartment wanted on murder charges. *Id.* He gave consent for the police to search the apartment. *Id.*

The police then conducted the search of Daniels and Woolard's apartment. *Id.* The search revealed firearms and ammunition. *Id.* Petitioner, Jenkins, and LaKeisha were present in the apartment during the police search, as was Daniels, who had returned there after Woolard was arrested at the party. *Id.* During their search, the police found in Woolard's bedroom a

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[2] The state appellate court opinion refers to the girlfriend by her first name only. Petitioner identifies her as "Laquisha Bondsby" in his habeas corpus petition. [1], p. 31.

9-millimeter Glock brand handgun loaded with two bullets, as well as an additional 28 rounds. *Id.* The police also searched Petitioner, who had one Wolf brand Luger bullet and four "hollow point" Luger bullets in his pocket, and Jenkins, who had a 9-millimeter High Point handgun loaded with seven bullets. *Id.*

The Illinois State Police Crime Lab performed forensic testing on the weapons and ammunition seized during the police search, to compare them to the cartridges and bullets recovered from the crime scene and from the victim's body. Consistent with that testing, the parties stipulated that one of the five cartridge casings recovered at the crime scene was fired from the Glock handgun found in Woolard's bedroom. *Id.* at 535. They further stipulated that the other four cartridge casings were all fired from the same gun, but that neither the Glock nor the High Point handgun recovered during the search had fired those four cartridges. *Id.* The fired bullet recovered at the scene was not fired from the High Point handgun, but the forensic testing was inconclusive as to whether the bullet was fired from the Glock handgun found in Woolard's bedroom. *Id.* The parties further stipulated that forensic testing showed that the three bullets recovered from the victim's body via the autopsy were fired from the same gun, but not from the Glock or High Point handguns. *Id.* Additionally, testing determined that the one fired bullet recovered by the police at the crime scene and the three bullets recovered during the autopsy were not fired from the same gun. *Id.*

Although counsel suggested in his opening statement that Cedrick Jenkins would testify for the

defense, counsel ultimately elected not to present Jenkins as a witness. *Id.*

The jury found Petitioner guilty of first-degree murder, and the trial court sentenced him to 30 years, plus 25 years for personally discharging a firearm.

Petitioner appealed, raising three claims. *See* Exhibits A [22-1], C [22-3]. First, he argued that the state committed prejudicial error in interpreting the phrase "hit a lick" to mean that Petitioner intended to commit a future robbery. Next, Petitioner claimed that the state's closing argument denied him a fair trial, because the prosecutor told the jury that if he had acted in self-defense he would have turned himself in to the police. Finally, Petitioner argued that the trial court erred in imposing a 25-year firearm enhancement when the jury never actually determined that he had personally discharged a firearm.

The Appellate Court affirmed Petitioner's conviction and sentence. *See* Exhibit D [22-4]. Counsel then filed a petition for leave to appeal ("PLA"), raising just this last issue regarding the applicability of the firearm enhancement, *see* Exhibit E [22-5]. Petitioner then sought leave to file a *pro se* PLA raising the "hit a lick" argument as well. *See* [22-7]. The Illinois Supreme Court granted Petitioner the opportunity to file his *pro se* PLA, *see* Exhibit F [22-6], but ultimately denied the PLA, *see* Exhibit H [22-8].

Petitioner also filed a pro se post-conviction petition claiming ineffective assistance of trial and appellate counsel; his petition was rejected both initially and on appeal, *see* Exhibits I [22-9], L [22-12]. Petitioner then filed a PLA with the Illinois Supreme Court, and the

Supreme Court denied the PLA on March 26, 2014. Exhibit M [22-13].

Petitioner then filed the instant habeas corpus petition [1] on July 16, 2014.

III. Petitioner's Claims

In his habeas petition, Petitioner asserts seven claims. In claim one, he alleges ineffective assistance of trial counsel for: (a) presenting a self-defense theory that was unsupported by the evidence; (b) promising the jury eyewitness testimony, then changing his mind mid-trial; (c) failing to call co-defendant Cedrick Jenkins at trial; and (d) failing to call exonerating witness Randell Walton. In claim two, he alleges that the jury received conflicting instructions concerning accountability. In claim three, he alleges that: (a) the trial court erred in failing to strike biased jurors; and (b) his appellate counsel was ineffective for failing to raise the biased juror issue on appeal. In claim four, he alleges that the prosecution made improper arguments before the jury by suggesting Petitioner was planning a robbery. In claim five, he alleges that the prosecution improperly commented on Petitioner's pre- and post-arrest silence. In claim six, he alleges that the trial court erred in imposing a 25-year sentencing enhancement. And, in claim seven, he alleges that the trial court erred in allowing the introduction of hearsay. *See* [1], p. 9.

A. Procedural Default - Claims 1(a), 1(d), 2, 3(a), 3(b), and 5

Respondent argues that claims 1(a), 1(d), 2, 3(a), 3(b) and 5 are procedurally defaulted. Claim 1(a) alleges ineffective assistance of trial counsel for raising an unsupported self-defense theory to the jury. Petitioner argues that a self-defense theory was

contradicted by the victim's gunshot wounds identified by the autopsy. [1], p. 10. The autopsy showed that the victim had seven entrance and five exit gunshot wounds. *Id.* The doctor who performed the autopsy testified that four of entrance wounds were on the victim's back, which led her to conclude that the victim was shot while lying down or bent over, or that he was shot from behind. *Id.* Given this evidence, Petitioner argues, his lawyer was ineffective for presenting a flawed self-defense argument that the jury rejected when finding him guilty. Claim 1(d) alleges ineffective assistance of trial counsel for failing to call Randall Walton as a witness at trial. *Id.* at 31. Petitioner claims that he never confessed to Stacy Daniels, and that Daniels' testimony to the contrary was a lie. Petitioner argues that Walton, who was present in the apartment, could have rebutted Daniels' testimony. In claim 2, Petitioner alleges that the jury received conflicting instructions regarding accountability liability. *Id.* at 34. Although Petitioner's trial was severed from Jenkins' trial, the jury was instructed that it could hold Petitioner liable for Jenkins' conduct. In claim 3(a), Petitioner alleges that his trial attorney was ineffective for failing to strike biased jurors, *id.* at 40. Relatedly, in claim 3(b), he argues that his appellate counsel was ineffective for failing to raise this biased juror issue on appeal. *Id.* at 42. Lastly, in claim 5, Petitioner alleges that the prosecutor improperly commented on Petitioner's pre- and post-trial silence. *Id.* at 48.

Respondent is correct that claims 1(a), 1(d), 2, 3(a), and 3(b) are procedurally defaulted because Petitioner failed to present these claims in the state court proceedings. In order to obtain federal habeas review, a state prisoner must first submit his claim "through

one full round of state-court review." *Johnson v. Hulett*, 574 F.3d 428, 431 (7th Cir. 2009) (citing *Picard v. Connor*, 404 U.S. 270, 275-76 (1971)); *see* also 28 U.S.C. § 2254(b)(1). Petitioner must present the operative facts and controlling law of the claim before the state courts so that they have a meaningful opportunity to consider the claim before it is raised in federal court. *Anderson v. Benik*, 471 F.3d 811, 814 (7th Cir. 2006) (citations omitted). Petitioner must also raise the claim through all levels of the Illinois courts, including in a petition for leave to appeal (PLA) before the Supreme Court of Illinois. *Guest v. McCann*, 474 F.3d 926, 930 (7th Cir. 2007) (citing *O'Sullivan v. Boerckel*, 526 U.S. 838, 842-46 (1999)). As explained above, these claims were not raised to the state courts in the first instance, and the time for raising them in the state courts has expired. As a result, claims 1(a), 1(d), 2, 3(a) and 3(b) are procedurally defaulted.

Furthermore, even though Petitioner did raise an ineffective assistance claim in his state court appeal, he failed to raise the underlying factual theories for the claim that he asserts here. Although ineffective assistance of counsel is a single claim, *Pole v. Randolph*, 570 F.3d 922, 934 (7th Cir. 2009) (citing *Peoples v. United States*, 403 F.3d 844, 848 (7th Cir. 2005)), Petitioner must raise the particular factual basis for each aspect of the alleged ineffective assistance of counsel to preserve the respective argument. *Pole*, 570 F.3d at 935 (citing *Stevens v. McBride*, 489 F.3d 883, 894 (7th Cir. 2007)). "A bare mention of ineffective assistance of counsel is not sufficient to avoid a procedural default; [Petitioner] must have 'identified the specific acts or omissions of counsel that form the basis for [his] claim of ineffective assistance.'" *Johnson v. Hulett*, 574 F.3d 428, 432 (7th

Cir. 2009) (quoting *Momient-El v. DeTella*, 118 F.3d 535, 541 (7th Cir. 1997)). "Petitioner cannot argue one theory [of ineffective assistance of counsel] to the state courts and another theory, based on different facts, to the federal court." *Johnson*, 574 F.3d at 432 (citing *Everett v. Barnett*, 162 F.3d 498, 502 (7th Cir. 1998)). Petitioner did not present the factual basis for claims 1(a) or 1(d) to the Illinois courts, and those claims are therefore defaulted.

Respondent is also correct that claim 5 is procedurally defaulted because it was dismissed on an adequate and independent state law ground. The Illinois appellate court held that Petitioner waived this issue on appeal because he failed to raise a proper objection at trial, and failed to renew the issue in a post-trial motion, as required by Illinois law. [22-4], p. 11. As a result, this claim is also procedurally defaulted here, even though the appellate court considered the merits in the alternative under a plain error review. *See Kaczmarek v. Rednour*, 627 F.3d 586, 592-93 (7th Cir. 2010) ("when a state court refuses to reach the merits of a petitioner's federal claims because they were not raised in accord with the state's procedural rules (i.e., because the petitioner failed to contemporaneously object), that decision rests on independent and adequate state procedural grounds"; where the state court "reviews a federal constitutional claim for plain error because of a state procedural bar (here, the doctrine of waiver), that limited review does not constitute a decision on the merits.").

Certainly, a federal court in a § 2254 case can review a procedurally defaulted claim upon showing: (1) that there was cause for the default and prejudice; or (2) that a fundamental miscarriage of justice would result if the claim is not reviewed. Petitioner here,

however, demonstrates neither. Cause is an "'objective factor, external to [Petitioner] that impeded his efforts to raise the claim in an earlier proceeding.'" *Weddington v. Zatecky*, 721 F.3d 456, 465 (7th Cir. 2013) (quoting *Smith v. McKee*, 596 F.3d 374, 382 (7th Cir. 2010)). Examples of cause include: (1) interference by officials making compliance impractical; (2) the factual or legal basis was not reasonably available to counsel; or, (3) ineffective assistance of counsel. *Guest v. McCann*, 474 F.3d 926, 930 (7th Cir. 2007) (citing *McCleskey v. Zant*, 499 U.S. 467 (1991)). Only the third example is relevant here: Petitioner faults his counsel at trial, on direct appeal, and in his post-conviction proceedings for failing to properly preserve his defaulted claims. For counsel's ineffective assistance to amount to "cause" excusing the default of an underlying issue, however, the ineffective assistance of counsel that resulted in the failure to preserve the claim must itself be properly preserved in the state courts. *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000); *Smith v. Gaetz*, 565 F.3d 346, 352 (7th Cir. 2009). Petitioner failed to preserve such ineffective assistance of counsel arguments in state court as well; and therefore, Petitioner cannot demonstrate cause and prejudice to excuse his procedural defaults.

This leaves Petitioner with only the fundamental miscarriage of justice (actual innocence) gateway to excuse his default. Proving actual innocence in this context requires Petitioner to demonstrate that "'in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.'" *McQuiggins v. Perkins*, 133 S. Ct. 1924, 1928 (2013) (quoting *Schlup v. Delo*, 513 U.S. 298, 329 (1995)). This is a "demanding" and "seldom met" standard. *McQuiggins*, 133 S. Ct. at 1928 (citing

House v. Bell, 547 U.S. 518, 538 (2006)). To make a credible claim of actual innocence, Petitioner must present new, reliable evidence that was not presented at trial − such as exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence. *House*, 547 U.S. at 537 (citing *Schlup*, 513 U.S. at 324); *see McDonald v. Lemke*, 737 F.3d 476, 483-84 (7th Cir. 2013) ("[A]dequate evidence is 'documentary, biological (DNA), or other powerful evidence: perhaps some non-relative who places him out of the city, with credit card slips, photographs, and phone logs to back up the claim.") (internal quotation omitted). Petitioner has no such evidence. Instead, he argues that the state's witnesses lied, and he ignores the fact that several eyewitnesses placed him in the gangway immediately before the shooting. Such evidence does not demonstrate actual innocence. *McQuiggins*, 133 S. Ct. 1928.

For all of these reasons, claims 1(a), 1(d), 2, 3(a), 3(b), and 5 are denied because they are procedurally defaulted.

B. Merits Review – Claims 1(b), 1(c), 4, 6, and 7)

Petitioner's remaining claims – claims 1(b), 1(c), 4, 6, and 7 − are denied on the merits. A writ of habeas corpus cannot issue unless Petitioner demonstrates that he is in custody in violation of the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2254(a). Because the state courts adjudicated Petitioner's claims on the merits, the Court's review of the present habeas corpus petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Under the AEDPA, the Court may not grant habeas relief unless the state court's decision on the

merits was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or unless the state court decision was based upon an unreasonable determination of facts. 28 U.S.C. § 2254(d).

A federal habeas court "may issue the writ under the 'contrary to' clause if the state court applies a rule different from the governing law set forth in [the Supreme Court's] cases, or if it decides a case differently than [the Supreme Court has] done on a set of materially indistinguishable facts." *Premo v. Moore*, 562 U.S. 115, 128 (2011) (quoting *Bell v. Cone*, 535 U.S. 685, 694 (2002)). "An 'unreasonable application' occurs when a state court 'identifies the correct legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of Petitioner's case.'" *Rompilla v. Beard*, 545 U.S. 374, 380 (2005) (quoting *Williams v. Taylor*, 529 U.S. 362, 413 (2000)).

Clearly established federal law refers to the "'holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision.'" *Carey v. Musladin*, 549 U.S. 70, 74 (2006) (quoting *Williams*, 529 U.S. at 412). The state court is not required to cite to, or even be aware of, the controlling Supreme Court standard, as long as the state court does not contradict that standard. *Early v. Packer*, 537 U.S. 3, 8 (2002). The Court begins with a presumption that state courts both know and follow the law. *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (citations omitted). This presumption is especially strong when the state court is considering well established legal principles that have been routinely

applied in criminal cases for many years. *Burt v. Titlow*, 134 S. Ct. 10, 15 (2013).

Finally, the Court's analysis is "backward looking." *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011). The Court is limited to reviewing the record before the state court at the time that court made its decision. *Id.* Thus, the Court is limited in considering the Supreme Court's "precedents as of 'the time the state court renders its decision.'" *Greene v. Fisher*, 132 S. Ct. 38, 44 (2011) (quoting *Cullen*, 562 U.S. at 182; *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003)).

The AEDPA's standard is "intentionally 'difficult for Petitioner to meet.'" *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (per curiam) (quoting *White v. Woodall*, 134 S. Ct. 1702 (2014)); *Metrish v. Lancaster*, 133 S. Ct. 1781, 1786 (2013)). As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair minded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). This "'highly deferential standard" demands that state-court decisions be "given the benefit of the doubt.'" *Cullen*, 563 U.S. at 181 (quoting *Woodford*, 537 U.S. at 24).

1. Claims 1(b) and (c)

In claims 1(b) and 1(c), Petitioner alleges that his trial counsel was ineffective for promising the jury during opening statements that they would hear from co-Defendant Cedrick Jenkins, but later failing to call Jenkins to testify. Petitioner argues that Jenkins' testimony would have exonerated him.

Petitioner and Jenkins were indicted together for Hill's first degree murder. *Wilborn*, 962 N.E.2d at 531. Petitioner moved to sever his jury trial from Jenkins' jury trial, and that motion was granted. *Id.* In moving to sever, Petitioner argued that Jenkins had made statements implicating Petitioner, and that, at trial, Jenkins would be presenting a defense that conflicted with Petitioner's defense. *Id.* at 544.

During opening statements, Petitioner's attorney told the jury that "you'll see and hear from Jenkins."[3] *Id.* at 531. Counsel explained that the victim had "problems" with Petitioner and Jenkins. *Id.* He told the jury they would hear that the victim approached Petitioner and Jenkins on the day of the shooting, and accused Jenkins of "being out and looking for him with a gun." *Id.* The victim also told Jenkins that "I'll have this neighborhood flooded and you won't get out." *Id.* Defense counsel promised the jury that Jenkins would testify about what happened inside the gangway. *Id.* He argued that this evidence would show that: (1) Petitioner and Jenkins reasonably feared the victim; (2) the victim followed them into the gangway; and, (3) Petitioner was reasonable in his actions in the gangway to protect himself and Jenkins from the victim. [22-16], p. 326.

Despite defense counsel's opening statement, neither Jenkins nor Petitioner testified. *Wilborn*, 962 N.E.2d at 535. Following the close of the state's case, defense counsel communicated to the trial court that he had concluded, based upon an interview of Jenkins, that it was best to not call Jenkins as a witness. *Id.* The trial court confirmed on the record with Petitioner

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[3] Defense counsel's opening statement appears in the record at [22-16], pp. 323-26.

that Petitioner had spoken to his attorney about this issue, and that Petitioner agreed that it was best to not call Jenkins.[4] *Id.*

The defense's case consisted of calling a Chicago police officer who responded to the murder scene. *Id.* The officer explained that he went to the scene after being flagged down by two men. *Id.* At the scene, he observed other men kneeling next to the victim, and approximately 60 other people in the area near the victim. *Id.* He asked several people, including Richards, to stay to speak to detectives. *Id.* Richards nevertheless left the area before the detectives arrived. *Id.*

Defense counsel pressed the theory that the victim was after Petitioner and Jenkins because they were in a dispute over drug territory, and argued that the victim had pursued them, not the other way around. Defense counsel claimed that Petitioner was not guilty because "he tried to walk away." [22-16], p. 267. Although neither Petitioner nor Jenkins testified, defense counsel was able to rely upon testimony from the State's witnesses to suggest that this was a dispute between rival gang members, and that the victim pursued Petitioner and Jenkins into the gangway. *Id.* at 254-55.

Additionally, defense counsel pursued alternative arguments suggesting that the prosecution had presented insufficient evidence to support a guilty finding as to Petitioner. *Id.* at 249. Counsel elicited testimony and evidence demonstrating that Petitioner was not armed with a handgun when the police

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[4] The trial court's colloquy with Petitioner appears in the record at [22-16], pp. 195-97.

searched Woolard and Daniels' apartment, and that only one gun recovered in the search could be conclusively linked to a shell casing recovered from the crime scene, and that gun was found in Woolard's bedroom. *Id.* Counsel relied upon the testimony of the State's witnesses to show that there was animosity between Petitioner and the victim, and that the victim followed Petitioner into the gangway. *Id.* at 251. Defense counsel also pointed out that Richards was seen standing over the victim's body and then chose to flee the scene, instead of speaking to detectives as requested. *Id.* at 260.

Petitioner submitted an affidavit from Jenkins in support of the ineffective assistance of counsel arguments he raised in his post-conviction petition. *Wilborn*, 962 N.E.2d at 536. In that affidavit, Jenkins claimed that he had been willing to testify at Petitioner's trial that the victim followed him and Petitioner into the gangway with his hands in his pockets and said, "G.K.D. yall some bitches." Jenkins claims he told the victim to "go about his business," and then turned to catch up with Petitioner. *Id.* The victim continued to pursue Petitioner and Jenkins while "talking crazy with his hand in his pocket." *Id.*

Jenkins explained that he turned around a second time, again telling the victim "to go about his business." *Id.* At that time, Jenkins believed that the victim was about to pull out a gun. *Id.* Jenkins then drew a handgun and shot the victim once. *Id.* Jenkins explained that Petitioner did not know he was armed and fled when he heard the shot. *Id.* Jenkins stated he shot the victim two more times before the gun jammed. *Id.* He then pulled out a second gun and shot the victim four more times. *Id.* Jenkins said that he was arrested with one of the two handguns used in the shooting and

disposed of the second gun. *Id.* He also claims he told the police that he alone shot the victim. *Id.*

The state appellate court on post-conviction review (the last court to consider Petitioner's claims on the merits) concluded that Petitioner could not demonstrate ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.* at 542-47. The state court identified *Strickland's* familiar two-prong standard of deficient performance and prejudice. *Id.* at 542. Considering the first prong, the court concluded that Petitioner could not demonstrate that counsel's performance fell below an objective standard of reasonableness. *Id.* The state court concluded that it was proper for defense counsel to change strategy once he determined that Jenkins was adversarial to Petitioner. *Id.* at 544. Counsel discussed the issue with Petitioner and made a record of the issue in open court, where Petitioner agreed with the decision. *Id.* The court further noted that defense counsel provided a competent defense at trial. *Id.* at 544.

The Court cannot conclude that the state court ruling on these issues was either contrary to, or an unreasonable application of, *Strickland*. Both *Strickland* and the AEDPA are deferential standards, so the Court must apply a doubly deferential standard when evaluating these issues. *Knowles v. Mirzayance*, 556 U.S. Ill, 123 (2009). Because the state court considered *Strickland*'s performance prong and did not need to address the question of prejudice, the Court applies AEDPA deference to the state court's performance ruling and reviews the prejudice prong *de novo*. *Campbell v. Reardon*, 780 F.3d 752, 769 (7th Cir. 2015).

Regarding the performance prong, the Court's analysis is highly deferential because there is presumption that the challenged action might be considered sound trial strategy. *Bell v. Cone*, 535 U.S. 685, 698 (2002) (internal quotation marks and citations omitted). Here, the state court concluded that counsel's change of course during trial was a matter of sound trial strategy. An attorney may reasonably change a previously announced trial strategy when "unexpected developments" require it. *United States ex rel. Hampton v. Leibach*, 347 F.3d 219, 257 (7th Cir. 2003). When the failure to provide promised testimony cannot, however, be "chalked up to unforeseen events, the attorney's broken promise may be unreasonable, for little is more damaging than to fail to produce important evidence that had been promised in an opening." *Id.* (internal quotation marks and citations omitted).

Here, the record shows that Jenkins shifted his position regarding Petitioner at various times during these proceedings. Petitioner sought to sever his trial from Jenkins' trial because Jenkins made statements to the police implicating Petitioner and was expected to be a hostile witness if called by Petitioner to testify. Additionally, it appears that, before trial, defense counsel spoke with Jenkins and determined that Jenkins would testify that Petitioner was not involved with Hill's murder. Before counsel could present him, however, Jenkins reverted to his prior story and was again expected to testify against Petitioner's interest. Counsel raised the issue with the trial judge, who then asked Petitioner about the issue on the record:

> THE COURT: Mr. Wilbourn, your attorney informed me that he has your co-defendant, Mr. Cedric Jenkins, present. And he is available. He

has been interviewed. Based on that interview, your attorney has decided that he thinks it is to your best interest not to call this witness. He also explained to me he discussed that with you. Is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: Do you agree with that?

THE DEFENDANT: Yes, sir.

THE COURT: Also, he's informed me that you have decided that you do not wish to testify in your own behalf. Is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: Anyone threatened you or force you not to testify?

THE DEFENDANT: No, sir.

THE COURT: Anybody promise you anything to get you not to testify?

THE DEFENDANT: No, sir.

THE COURT: You have discussed this with your attorney as well?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand even though based on his knowledge, expertise and experience he may make a recommendation to you as to how he suggests you proceed, but the decision to testify or not to testify is your decision and not his. Do you understand that?

THE DEFENDANT: Yes, sir.

[22-16], pp. 195-196.

Trial counsel cannot be faulted for the shifting nature of Jenkins' position. Counsel properly investigated the issue and made strategic choices based on the information he gathered. *Strickland*, 466 U.S. at 690-91 (instructing that strategic choices made after thorough investigation of the law and facts are virtually unchallengeable). It was Jenkins, not the defense attorney, who turned on Petitioner. The record provides no evidence to suggest that defense counsel should have anticipated Jenkins' story change. Additionally, counsel pursued arguments that were plausible without Jenkins' testimony by asserting the same self-defense theory and arguing that the state presented insufficient evidence to convict Petitioner. The state court's ruling that defense counsel did not provide deficient performance is neither contrary to, nor an unreasonable application of, *Strickland*.

Nor can Petitioner demonstrate prejudice from counsel's change in strategy or his failure to call Jenkins as a witness. To demonstrate prejudice, Petitioner must show that there was "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Buck v. Davis*, 137 S. Ct. 759, 776 (2017) (citing *Strickland*, 466 U.S. at 694). This Petitioner cannot do. Several eyewitnesses placed Petitioner in the gangway with Jenkins and the victim immediately before the shooting. Petitioner implicated himself to Daniels, and, at the time of his arrest, he possessed the same type of ammunition that was found at the crime scene.

Failing to undermine such compelling evidence, Jenkins' contrary story in support of Petitioner's post-conviction petition suffers from a fatal lack of credibility. Even though Jenkins now claims in his

affidavit that he was the sole shooter, and that Petitioner was merely an innocent bystander, the record shows that Jenkins' version of events has turned and twisted, like leaves in an autumn wind, running the gamut from one extreme (implicating Petitioner) to the other (now allegedly exonerating him). Beyond such material inconsistencies, Jenkins' most recent story appears contrived to fit the forensic testing showing that the victim was shot with bullets from two different guns. Only after such testing came to light, Jenkins claims, conveniently, that he first shot the victim with one gun, and then used a second gun when the first gun jammed. He further claims now that he got rid of one gun, but was arrested with the second gun. That Jenkins would make the effort to dispose of one murder weapon but hold on to the second used in the same offense defies common sense. Far from demonstrating prejudice, Jenkins' affidavit lacks credibility and raises as many questions as it answers.

Moreover, the undisputed facts confirm that Petitioner and Jenkins were fellow gang members in the midst of an ongoing fight with the victim's gang over drug territory. Consistent with the jury's verdict convicting the Petitioner, a fair reading of the record indicates that the murder Petitioner committed resulted from a simple, but tragic, turf war over drug territory.

In short, Petitioner has failed to demonstrate constitutional error, and so the state court ruling is neither contrary to, nor an unreasonable application of, *Stickland*. Claims 1(b) and 1(c) are denied on the merits.

2. Claim Four

Petitioner argues in claim four that the prosecutor made improper comments in closing arguments by suggesting that Petitioner's statement that he might "hit a lick" demonstrated his intent to commit a robbery. A prosecutor's comments violate due process only if: (1) the comments are improper; and (2) the improper comments violated the prisoner's right to a fair trial in context of the record as a whole. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986); *Ellison v. Acevedo*, 593 F.3d 625, 635-36 (7th Cir. 2010). On direct appeal, the state appellate court rejected this claim, explaining that the prosecutor's argument was supported by Daniels' testimony. [22-4]. True enough: Daniels testified that he took "hit a lick" to mean that Petitioner might try to commit a robbery to get money quickly. Thus, the comment was supported by the trial record. [22-17], p. 11. As a result, the challenged comment is not improper, *see United States v. Tucker*, 820 F.2d 234, 237 (7th Cir. 1987) (instructing that a prosecutor may make comments at closing argument that are supported by the evidence at trial), and there is no constitutional error. Claim four is denied on the merits.

3. Claim Six

Claim six is premised upon *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Apprendi* holds that any fact, other than the fact of a prior conviction, that must be proved in order to increase the prisoner's sentence above what would otherwise be the statutory maximum, must be found by a jury beyond a reasonable doubt. 530 U.S. at 490. Petitioner claims that the trial court's sentence violated *Apprendi* because it included a 25-year enhancement for

personally discharging the gun that caused the victim's death, even though the jury did not find beyond a reasonable doubt that petitioner personally discharged the gun that caused Hill's death.

As explained above, the trial court sentenced Petitioner to a term of imprisonment of 55 years; that term included 30 years for the first degree murder, plus the 25-year enhancement mentioned. Yet, in total, Petitioner's 55-year sentence was less than the 60-year statutory maximum sentence he faced for his murder conviction. *See* 730 ILCS 5/5-8-1(a)(1)(a) (establishing sentencing range for murder without any sentencing enhancements at not less than 20 years and not more than 60 years). As a result, there was no *Apprendi* violation. *See, e.g.*, *United States v. Knox*, 301 F.3d 616, 620 (7th Cir. 2002) (term of imprisonment that does not exceed the statutory maximum prison sentenced does not violate *Apprendi*); *United States v. Martinez*, 301 F.3d 860, 864 (7th Cir. 2002) (*Apprendi* does not apply where sentence imposed by the court falls within the statutory range). Claim six is denied on the merits.

4. Claim Seven

Petitioner argues in claim seven that the trial court erred in allowing the introduction of hearsay evidence. In this case, the challenge to the introduction of hearsay raises a non-cognizable state law issue. *Estell v. McGuire*, 502 U.S. 62, 72 (1991). Accordingly, claim seven is denied.

IV. Certificate of Appealability

The Court declines to issue a certificate of appealability under Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts. Petitioner cannot make a substantial showing

of the denial of a constitutional right, nor can he show that reasonable jurists would debate (much less disagree), with this Court's resolution of this case. *Resendez v. Knight*, 653 F.3d 445, 446-47 (7th Cir. 2011) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)).

Petitioner is advised that this is a final decision ending his case in this Court. If Petitioner wishes to appeal, he must file a notice of appeal with this Court within thirty days of the entry of judgment. *See* Fed. R. App. P. 4(a)(1). Petitioner need not bring a motion to reconsider this Court's ruling to preserve his appellate rights, but if he wishes to do so, he may file a motion under Federal Rule of Civil Procedure 59(e) or 60(b). Any Rule 59(e) motion must be filed within 28 days of the entry of this judgment. *See* Fed. R. Civ. P. 59(e). The time to file a motion pursuant to Rule 59(e) cannot be extended. *See* Fed. R. Civ. P. 6(b)(2). A timely Rule 59(e) motion suspends the deadline for filing an appeal until the Rule 59(e) motion is ruled upon. *See* Fed. R. App. P. 4(a)(4)(A)(iv). Any Rule 60(b) motion must be filed within a reasonable time and, if seeking relief under Rule 60(b)(1), (2), or (3), must be filed no more than one year after entry of the judgment or order. *See* Fed. R. Civ. P. 60(c)(1). The time to file a Rule 60(b) motion cannot be extended. *See* Fed. R. Civ. P. 6(b)(2). A Rule 60(b) motion suspends the deadline for filing an appeal until the Rule 60(b) motion is ruled upon, but only if the motion is filed within 28 days of the entry of judgment. *See* Fed. R. App. P. 4(a)(4)(A)(vi).

V. Conclusion

Petitioner's habeas corpus petition [1] is denied on the merits. Any pending motions are denied as moot. The Court declines to issue a certificate of appealability. The Clerk is instructed to enter a judgment in favor of Respondent and against Petitioner. On the Court's own motion, Respondent Randy Pfister is terminated, and Michael Melvin, the current Warden of Pontiac Correctional Center, is added as Respondent. The Clerk shall alter the case caption to *Wilborn v. Melvin*. Civil case terminated.

Dated: August 2, 2017

ENTERED:

s/ *John Robert Blakey*
John Robert Blakey
United States District Judge

APPENDIX C

2011 IL App (1st) 092802
Appellate Court of Illinois,
First District, Sixth Division.

The PEOPLE of the State of
Illinois, Plaintiff-Appellee,

v.

Joseph WILBORN, Defendant-Appellant.

No. 1-09-2802.

Sept. 23, 2011.

As Modified upon denial of rehearing Feb. 24, 2012.

Attorneys and Law Firms

Michael J. Pelletier, State Appellate Defender, Alan D. Goldberg, Deputy Defender, Office of the State Appellate Defender (David T. Harris, Assistant Public Defender), for Appellant.

Anita M. Alvarez, State's Attorney, County of Cook (Alan J. Spellberg, Douglas P. Harvath, Sheliah C. O'Grady, of counsel), for the People.

OPINION

Presiding Justice R. GORDON delivered the judgment of the court, with opinion.

¶ 1 Following a jury trial, defendant Joseph Wilborn[1] was convicted of first-degree murder. 720 ILCS 5/9-1(a)(1) (West 2000). After hearing aggravation and mitigation, defendant was sentenced to 55 years in the Illinois Department of Corrections, 30 years for the first-degree murder and 25 years as a firearm enhancement. Defendant's conviction was affirmed on direct appeal (*People v. Wilbourn*, No. 1-06-2088 (2008) (unpublished order under Supreme Court Rule 23)). Defendant then filed a petition for postconviction relief in which he claimed ineffective assistance of trial and appellate counsel. The trial court dismissed defendant's postconviction petition at the first stage of the proceedings, finding that: (1) the issues presented in the petition are barred by the doctrine of *res judicata*; (2) defendant's allegations were conclusory and the petition lacked supporting documentation; and (3) the petition is frivolous and patently without merit. Defendant now appeals, and we affirm. *See People v. Jones*, 399 Ill.App.3d 341, 359, 339 Ill.Dec. 870, 927 N.E.2d 710 (2010) (we may affirm the decision of the trial court on any grounds substantiated by the record, regardless of the trial court's reasoning).

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[1] Defendant's direct appeal records use the spelling "Wilbourn" for his last name. However, his postconviction records, as well as his signature on his postconviction filings, use the spelling "Wilborn" for his last name. In this decision we will use the spelling of defendant's last name found on his postconviction petition and records.

¶2 I. BACKGROUND

¶ 3 Defendant and codefendant, Cedrick Jenkins, were arrested and charged by indictment with the first-degree murder of Emmit Hill (victim). The trial court granted defendant's motion for severance and defendant's jury trial commenced on June 12, 2006.

¶ 4 During opening statements, defense counsel told the jury that "you'll see and hear from Jenkins." He stated that the victim had "problems" with defendant and Jenkins, and that Jenkins "will talk to you about [their] relationship with [the victim]." He also told the jury that the victim had approached defendant and Jenkins on the day of the shooting, accused Jenkins of "being out and looking for him with [a] gun," and told Jenkins that "I'll have this neighborhood flooded and you won't get out." Defense counsel further stated as follows:

> "[Jenkins] will tell you what happened inside that gangway [where the victim was found shot]. It won't be the same story that you here from [another witness] but the facts of who pursued, who wouldn't let this go, who having seen what he regards as suspicious, disregards it and it follows him through that gangway anyway * * *."

¶ 5 Following opening statements, the State called eight witnesses: (1) Frederick Sanders; (2) Clarence Morgan; (3) David Parker; (4) Chicago police detective Mike Qualls; (5) Stacey Daniels; (6) Chicago police officer Andre Bedford; (7) forensic investigator John Kaput; and (8) Cook County medical examiner Dr. Valerie Arangelovich.

¶ 6 A. Frederick Sanders's Testimony

¶ 7 Sanders testified that, at approximately 11:30 p.m. on July 28, 2004, he exited his apartment building located on the 6200 block of South Michigan Avenue and walked to his automobile where his friend, Randy Griffin, was waiting in the passenger seat. Sanders testified that Griffin told him that he had heard "a couple of gunshots" while he was waiting. Sanders then drove his vehicle westbound on 63rd Street to Wabash. Sanders testified that when he turned north, he observed a person he knew by the nickname of "Moochie," whose real name is Samuel Richards, standing over a body lying in a gangway located near the northeast corner of 63rd Street and Wabash. Sanders testified that he then stopped his vehicle, exited it, and telephoned the police with his cellular telephone. While he waited for the police to arrive, he did not observe anyone in the area with a gun, nor did he observe Richards remove a handgun from the body. He did not observe defendant or Jenkins in the area.

¶ 8 Sanders also testified that he was not friends with defendant, the victim or Jenkins. He testified that he knew defendant because he observed him "being around the [apartment] building." In addition, he testified that he "knew [the victim] from the neighborhood" and knew Jenkins because Jenkins previously resided at the apartment building.

¶ 9 B. Clarence Morgan's Testimony

¶ 10 Morgan testified that on July 28, 2004, at 11 p.m., he was standing on the South Michigan Avenue side of Sanders's apartment building, drinking liquor with the victim, who was a friend of his, and with "other people," which included Richards and a man named David Parker. He testified that defendant, Jenkins,

and a man known as "Chub" were standing "in front" of the apartment building. He testified that he had known defendant and Jenkins for approximately 10 years because, at one time, they both lived in the same apartment building as him.

¶ 11 Morgan testified that "Chub" handed a hooded sweatshirt to Jenkins and the victim then made a "smart comment" to "Chub." Morgan testified that the victim said to "Chub," "was he on bullshit," which he understood to mean, he was "up to no good at the time." Morgan testified that he did not hear the victim threaten defendant or Jenkins at any time on the night of the shooting. Morgan further testified that prior to the shooting he was unaware of any animosity between defendant, Jenkins, and the victim.

¶ 12 Morgan also testified that, after the victim made the comment to "Chub," he observed defendant and Jenkins walk in a westerly direction across South Michigan Avenue and through a gangway toward Wabash. He testified that the victim followed them into the gangway, but then he lost sight of the victim. He testified that he did not observe a handgun on the victim. Morgan testified that, approximately one minute later, he heard five gunshots coming from the direction of the gangway. When the victim did not return, Morgan decided to walk to Wabash to determine if the victim had arrived at the other side of the gangway. He testified that he walked south to 63rd Street then west to Wabash to avoid walking through the gangway. When he arrived at the corner of 63rd Street and Wabash, he observed the victim lying on the ground in the gangway. He also observed several people, including Richards and Parker, standing near the victim's body, but he did not observe defendant or Jenkins in the area.

¶ 13 On cross-examination, Morgan testified that defendant, Jenkins, and "Chub" were members of the "Insane Gangster Disciples" gang, while he was a member of the "Black Gangster Disciples," a rival gang. He testified that his gang "controlled" Sanders's apartment building, but after a series of arrests of Black Gangster Disciple members, defendant and Jenkins started "hanging around" the apartment building. He further testified that the victim had a confrontation with defendant, Jenkins, and "Chub" two weeks before the shooting because they were trying to take over the drug sales at the building.

¶ 14 C. David Parker's Testimony

¶ 15 Parker testified that he was a friend of the victim and that Jenkins had a "beef" with the victim because the victim had been discussing Jenkins and Jenkins's "parent" in the presence of others. He testified that two days before the shooting, defendant asked Parker to tell the victim to stop talking about Jenkins.

¶ 16 Parker testified that at 11 p.m. on the evening of July 28, 2004, he was visiting with the victim, Richards, Morgan, and a man by the name of Keith Wright. He testified that they were drinking liquor and standing on the South Michigan Avenue side of Sanders's apartment building. He testified that defendant, Jenkins and "Chub" walked passed them. Parker observed "Chub" remove his hooded sweatshirt and hand it to Jenkins. Parker testified that he thought it was unusual for a person to wear a hooded sweatshirt because the evening was "cool, but it wasn't cool enough for a [hooded sweatshirt]." Parker denied that he heard the victim say anything to defendant, Jenkins or "Chub" at that time.

¶ 17 Parker testified that two people began arguing across the street from the apartment building, and he walked toward the couple to stop the argument. He testified that he then heard seven gunshots and observed the gangway "lighting up from sparks." Parker testified that he noticed that the victim was no longer in the area and Morgan told him that "I think [the victim] just followed [defendant] and [Jenkins] to the gas station." Parker testified that he told the group that they should run to 63rd and Wabash to find out if anyone had been shot. He testified that when they arrived at Wabash, he observed the victim on the ground in the gangway. Parker testified that he and Morgan then ran to the victim's residence to inform his family of the shooting. He testified that he did not observe a gun on the victim that evening. Parker testified that Richards searched the victim's pockets to ensure there were no drugs on the victim.

¶ 18 D. Chicago Police Detective Mike Qualls's Testimony

¶ 19 Detective Qualls testified that when he arrived at the scene at approximately 12:30 a.m., he did not locate a weapon near the body. He testified that he spoke with Parker the following day, who told him that just before he heard the gunshots, he heard the victim ask Jenkins, "What you all bitches doing with those hoodies?" He testified that after he and other officers interviewed witnesses, an investigative alert was issued for defendant, Jenkins, and "Chub." Detective Qualls testified that he and other detectives were initially unable to locate the three men.

¶ 20 E. Stacey Daniels's Testimony

¶ 21 Daniels testified that he had been a friend of defendant's for more than four years. He testified that two weeks after the shooting, on August 12, 2004, he was with defendant at a mutual friend's home when defendant told Daniels that he "got into some problems" and that he was in "some serious shit." Daniels testified that defendant did not immediately explain this remark. Daniels, defendant and Jenkins then departed from their friend's home and walked to Daniels's apartment, which he shared with a man named Xavier Woolard. Daniels testified that when they arrived at his apartment, Woolard was in the apartment along with his girlfriend, named LaKeisha.

¶ 22 Daniels testified that he was standing on a rear porch of his apartment with defendant and Jenkins when defendant explained to him that he "got into it with some dude," that there was a shooting, and that he "had to give it to [the] n***er." According to Daniels, defendant explained that he was walking through a gangway and observed that the "dude was following him." He told Daniels that he "didn't know what dude had or something and he thought dude was fittin' to do something to him" and that defendant said that he "turned around busting," which Daniels understood to mean shooting. Daniels testified that defendant then told him he needed to obtain money to leave town and that he might try to "hit a lick or something like that," which Daniels understood to mean "come up on some money" or to commit a robbery.

¶ 23 After his conversation with defendant, Daniels testified that he went to a party with Woolard, while defendant, Jenkins, and LaKeisha stayed at Daniels's and Woolard's apartment. Woolard was arrested at the

party for an unrelated battery offense and Daniels then returned to his apartment.

¶ 24 F. Chicago Police Officer Andre Bedford's Testimony

¶ 25 Officer Bedford testified that he arrested Woolard at the party. Following the arrest, Woolard told him that there were two people, nicknamed "Little Joe and Ced," who were at his apartment and were wanted on murder charges. Woolard then consented to a search of his apartment. Officer Bedford performed a police computer search of the nicknames and discovered that "Little Joe" was a nickname for defendant and that "Ced" was a nickname for Jenkins. Officer Bedford observed that there was an investigative alert for defendant and Jenkins in relation to the July 28 shooting.

¶ 26 Officer Bedford testified that, at 5 a.m. the following day, he and two other police officers conducted a search of Daniels's and Woolard's apartment, where they found four individuals, defendant, Jenkins, Daniels and LaKeisha. During the search, the officers found a 9-millimeter Glock brand handgun, loaded with two bullets, and an additional 28 bullets in Woolard's bedroom. The officers also searched defendant, who had one Wolf brand Luger bullet and four "hollow point" Luger bullets in his pocket; and Jenkins, who had a 9-millimeter High Point handgun, loaded with seven bullets, on his person.

¶ 27 G. Forensic Investigator Kaput's Testimony

¶ 28 Forensic investigator Kaput testified that he arrived at the crime scene at approximately 10 minutes after midnight on July 29, 2004. He testified

that he conducted a walk-through of the crime scene, where he found five fired Wolf brand 9-millimeter Luger cartridge casings and a 9-millimeter fired bullet. Kaput placed the cartridge casings and fired bullet into individual envelopes and submitted the envelopes to the Illinois State Police crime lab.

¶ 29 H. Assistant Cook County Medical Examiner Dr. Valerie Arangelovich's Testimony

¶ 30 Dr. Arangelovich testified that she performed an autopsy on the victim. She observed that the victim had seven bullet entrance wounds and five exit wounds. She recovered two bullets from the victim's body and a third bullet "hanging loose in his clothes." Dr. Arangelovich placed the bullets into individual envelopes and submitted the envelopes to the Illinois State Police crime lab. She concluded that the victim died from multiple gunshot wounds.

¶ 31 I. Stipulations

¶ 32 The parties stipulated that four of the five fired cartridge casings Kaput found at the crime scene were fired from the same handgun, but not by either the Glock handgun that was found in Woolard's bedroom, or the High Point handgun, which was found on Jenkins, during the search of Woolard's apartment. However, the fifth fired cartridge casing found at the crime scene was fired from the Glock handgun.

¶ 33 The parties further stipulated to the following: (1) the fired bullet found at the crime scene by Kaput was not fired by the High Point handgun, but the forensic test on the bullet was inconclusive as to whether the bullet was fired from the Glock handgun; (2) the three bullets recovered by Dr. Arangelovich were fired from the same handgun, but not from the

Glock or High Point handgun; and (3) the fired bullet recovered by Kaput from the crime scene was not fired by the same handgun as the three bullets recovered by Dr. Arangelovich from the victim's body and clothes.

¶ 34 After the State rested, defense counsel moved for a directed verdict, which was denied. During a recess before defense counsel presented the defense, the following colloquy took place:

> "THE COURT: [Defendant], your attorney informed me that he has your co-defendant, [Jenkins], present. And he is available. He has been interviewed. Based on that interview, your attorney has decided that he thinks it is to your best interest not to call this witness. He also explained to me [that] he discussed that with you. Is that correct?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Do you agree with that?
>
> DEFENDANT: Yes, sir."

¶ 35 The defense did not call Jenkins as a witness, and defendant did not testify on his own behalf. Defense counsel called one witness, Sergeant Cherry[2], who testified that he responded to the crime scene at midnight on July 28, 2004. He testified that when he arrived at the scene two men flagged him down. He observed two other men kneeling next to the victim and that approximately 60 other people were in the area near the victim. He testified that he asked several people, including Richards, to stay to speak with

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[2] Sergeant Cherry's first name does not appear in the record.

detectives. He testified that when the detectives arrived, Richards had left the area.

¶ 36 As noted, the jury found defendant guilty of first-degree murder. The trial court sentenced defendant to 30 years in the Illinois Department of Corrections plus 25 years for personally discharging a firearm. Defendant appealed his conviction, which did not include a claim of ineffective assistance of counsel. Defendant's conviction was affirmed on direct appeal.

¶ 37 J. Defendant's *Pro Se* Postconviction Petition

¶ 38 On June 16, 2009, defendant filed a *pro se* petition for postconviction relief, in which he argued, inter alia, that his trial counsel was ineffective for failing to present the exculpatory testimony of Jenkins, which would have fulfilled a promise made to the jury in defense counsel's opening statements that Jenkins would "tell [them] what happened inside that gangway." Defendant also claims that appellate counsel was ineffective for not raising the issue on direct appeal.

¶ 39 In support of his petition, defendant attached a signed affidavit from Jenkins. Above Jenkins's signature is written: "Pursuant to *** 735 ILCS 5/1-109, I declare, under penalty of perjury, that everything contained herein is true and accurate to the best of my knowledge and belief." The affidavit is not notarized. In his petition, defendant alleged that Jenkins's affidavit is "not notarized [because the] Menard Correctional Center law library refused to do so."

¶ 40 Jenkins stated in his affidavit that he was willing to testify at defendant's trial and that he would have testified that the victim followed him and defendant

into the gangway and then said to them, "G.K.D. yall some bitches" with his hand in his pocket. Jenkins stated that he told the victim to "go about his business," and turned to "catch up" with defendant. He stated that the victim continued to follow them and that the victim was "talking crazy with his hand in his pocket."

¶ 41 Jenkins stated that he turned around "a second time" and told the victim "to go about his business." Jenkins stated that the victim then "acted like he was about to pull a gun out of his pocket." Jenkins stated that he then "pulled out" a handgun and shot at the victim once. He stated that defendant did not know that he was armed and fled when he heard the shot. Jenkins stated that he shot the victim two more times and then his handgun jammed. He then "pulled out" a second handgun and fired four more shots at the victim. Jenkins stated that he was arrested with one of the handguns that he used in the shooting and that he told police he had discarded the second handgun. He also stated that he told an arresting police officer that he alone shot the victim.

¶ 42 A hearing was held on defendant's petition. On September 10, 2009, the trial court dismissed defendant's postconviction petition in a written order, finding that: (1) the issues raised in the petition were also raised on direct appeal and therefore barred by the doctrine of *res judicata*; (2) defendant's allegations were conclusory and defendant's petition lacked required supporting documents "such as affidavit or other sworn statements"; and (3) defendant's petition was frivolous and patently without merit.

¶ 43 This appeal follows.

¶ 44 II. ANALYSIS

¶ 45 Although defendant's postconviction petition raises 15 claims of ineffective assistance of trial and appellate counsel, we consider only those claims that defendant has raised in this appeal. *See* Ill. S.Ct. R. 341(h)(7) (eff. July 1, 2008).

¶ 46 On appeal, defendant claims that the trial court erred in dismissing his postconviction petition at the first stage because: (1) he raised the "non-frivolous constitutional claim[s]" that trial counsel was ineffective for "making an unfulfilled promise to the jury to present exonerating testimony of co-defendant Jenkins," and that appellate counsel was ineffective for failing to raise this issue on direct appeal; and (2) the trial court "overlook[ed] Jenkins's affidavit," which supported defendant's petition.

¶ 47 A. Standard of Review

¶ 48 A trial court's dismissal of a postconviction petition at the first stage is reviewed *de novo*. *People v. Hodges*, 234 Ill.2d 1, 9, 332 Ill.Dec. 318, 912 N.E.2d 1204 (2009); *People v. Torres*, 228 Ill.2d 382, 394, 320 Ill.Dec. 874, 888 N.E.2d 91 (2008); *People v. Edwards*, 197 Ill.2d 239, 247, 258 Ill.Dec. 753, 757 N.E.2d 442 (2001); *People v. Coleman*, 183 Ill.2d 366, 388-89, 233 Ill.Dec. 789, 701 N.E.2d 1063 (1998). "A *de novo* review entails performing the same analysis a trial court would perform"; in other words, we accept all well-pleaded facts in the complaint as true while disregarding legal or factual conclusions unsupported by allegations of fact. *Khan v. BDO Seidman, LLP*, 408 Ill.App.3d 564, 578, 35O Ill.Dec. 63, 948 N.E.2d 132 (2011).

¶ 49 B. Post-Conviction Hearing Act

¶ 50 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2008)) provides that a defendant may challenge his or her conviction or sentence for violations of federal or state constitutional rights. *People v. Pendleton*, 223 Ill.2d 458, 471, 308 Ill.Dec. 434, 861 N.E.2d 999 (2006) (citing *People v. Whitfield*, 217 Ill.2d 177, 183, 298 Ill.Dec. 545, 840 N.E.2d 658 (2005)).

In a postconviction proceeding, a petitioner is not entitled to an evidentiary hearing as a matter of right. *People v. Simms*, 192 Ill.2d 348, 359, 249 Ill.Dec. 654, 736 N.E.2d 1092 (2000). To be entitled to postconviction relief, a defendant bears the burden of showing that he or she suffered a substantial deprivation of his or her federal or state constitutional rights in the proceedings. 725 ILCS 5/122-1(a) (West 2008); *Pendleton*, 223 Ill.2d at 471, 308 Ill.Dec. 434, 861 N.E.2d 999 (citing *Whitfield*, 217 Ill.2d at 183, 298 Ill.Dec. 545, 840 N.E.2d 658); *People v. Evans*, 186 Ill.2d 83, 89, 237 Ill.Dec. 118, 708 N.E.2d 1158 (1999); *People v. Lacy*, 407 Ill.App.3d 442, 455, 347 Ill.Dec. 1013, 943 N.E.2d 303 (2011).

¶ 51 1. A Summary Dismissal Is Proper When Barred by Res *Judicata* or Forfeiture

¶ 52 A proceeding under the Act is a collateral proceeding, not an appeal from the underlying judgment. *People v. Coleman*, 206 Ill.2d 261, 277, 276 Ill.Dec. 380, 794 N.E.2d 275 (2002) (citing *People v. Williams*, 186 Ill.2d 55, 62, 237 Ill.Dec. 112, 708 N.E.2d 1152 (1999)); *Evans*, 186 Ill.2d at 89, 237 Ill.Dec. 118, 708 N.E.2d 1158. The purpose of the proceeding is to allow inquiry into constitutional issues relating to the conviction or sentence that were

not, and could not have been, determined on direct appeal. *Whitfield*, 217 Ill.2d at 183, 298 Ill.Dec. 545, 840 N.E.2d 658; *Coleman*, 206 Ill.2d at 277, 276 Ill.Dec. 380, 794 N.E.2d 275. Thus, all issues decided on direct appeal are barred by the doctrine of res judicata, and all issues that could have been raised in the original proceeding, but were not, are procedurally forfeited. *People v. Taylor*, 237 Ill.2d 356, 372, 341 Ill.Dec. 445, 930 N.E.2d 959 (2010).

¶ 53 2. A Summary Dismissal Is Proper When a Petition Violates Section 122-2 of the Act

¶ 54 The petition cannot consist of nonfactual and nonspecific assertions that merely amount to conclusions that errors occurred at trial. *People v. Simms*, 192 Ill.2d 348, 359, 249 Ill.Dec. 654, 736 N.E.2d 1092 (2000) (citing *People v. Kitchen*, 189 Ill.2d 424, 433, 244 Ill.Dec. 890, 727 N.E.2d 189 (1999)). Rather, a petition filed under the Act must "clearly set forth the respects in which petitioner's constitutional rights were violated." 725 ILCS 5/122-2 (West 2008).

¶ 55 While a *pro se* postconviction petition is not expected to set forth a complete and detailed factual recitation, the petition "'must set forth some facts which can be corroborated and are objective in nature or contain some explanation as to why those facts are absent.'" *Hodges*, 234 Ill.2d at 10, 332 Ill.Dec. 318, 912 N.E.2d 1204 (quoting *People v. Delton*, 227 Ill.2d 247, 254-55, 317 Ill.Dec. 636, 882 N.E.2d 516 (2008)); 725 ILCS 5/122-2 (West 2008) (a petition must have attached "affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached"). The purpose of the "affidavits, records, or other evidence" requirement in section 122-2 of the Act (725 ILCS 5/122-2 (West 2008)) is to

establish that a petition's allegations are capable of "'objective or independent corroboration.'" *Delton*, 227 Ill.2d at 254, 317 Ill.Dec. 636, 882 N.E.2d 516 (quoting *People v. Hall*, 217 Ill.2d 324, 333, 299 Ill.Dec. 181, 841 N.E.2d 913 (2005), citing *People v. Collins*, 202 Ill.2d 59, 67, 270 Ill.Dec. 1, 782 N.E.2d 195 (2002)). Thus, a trial court may summarily dismiss a petition if the defendant fails to attach the required "affidavits, records, or other evidence" or fails to explain their absence from his or her postconviction petition. *Delton*, 227 Ill.2d at 255, 317 Ill.Dec. 636, 882 N.E.2d 516 ("failure to either attach the necessary 'affidavits, records, or other evidence' or explain their absence is 'fatal' to a post-conviction petition [citation] and by itself justifies the petition's summary dismissal" (internal quotation marks omitted) (quoting *Collins*, 202 Ill.2d at 66, 270 Ill.Dec. 1, 782 N.E.2d 195, citing *People v. Coleman*, 183 Ill.2d 366, 380, 233 Ill.Dec. 789, 701 N.E.2d 1063 (1998), quoting *People v. Jennings*, 411 Ill. 21, 26, 102 N.E.2d 824 (1952))).

¶ 56 3. Three Stage Process for Adjudicating a Postconviction Petition

¶ 57 In noncapital cases, the Act provides a three-stage process for adjudicating a petition for postconviction relief. 725 ILCS 5/122-1 *et seq*. (West 2008); *Pendleton*, 223 Ill.2d at 471-72, 308 Ill.Dec. 434, 861 N.E.2d 999. At the first stage, the trial court examines the petition independently and without any further pleadings from the defendant or any motions or responsive pleadings from the State. *People v. Brown*, 236 Ill.2d 175, 184, 337 Ill.Dec. 897, 923 N.E.2d 748 (2010) (citing *People v. Gaultney*, 174 Ill.2d 410, 418, 221 Ill.Dec. 195, 675 the petition, taken as true and liberally construed, need to present the "'gist of a constitutional claim.'"

Delton, 227 Ill.2d at 254, 317 Ill.Dec. 636, 882 N.E.2d 516 (quoting *Gaultney*, 174 Ill.2d at 418, 221 Ill.Dec. 195, 675 N.E.2d 102); *People v. Porter*, 122 Ill.2d 64, 74, 118 Ill.Dec. 465, 521 N.E.2d 1158 (1988) (in order to avoid dismissal, defendant need only present the "gist" of a constitutional claim that would provide relief under the Act). This "gist" standard is a low threshold which requires the defendant to present only a limited amount of detail, not the claim in its entirety or legal argument or citation to legal authority. *Hodges*, 234 Ill.2d at 9, 332 Ill.Dec. 318, 912 N.E.2d 1204 ("[b]ecause most petitions are drafted at this stage by defendants with little legal knowledge or training, this court views the threshold for survival as low").

¶ 58 In considering the petition at the first stage, the trial court may examine "the trial record, the court file of the proceeding in which the defendant was convicted, any action taken by an appellate court in such a proceeding, any transcripts of such proceedings, and affidavits or records attached to the petition." *People v. Diehl*, 335 Ill.App.3d 693, 700, 270 Ill.Dec. 678, 783 N.E.2d 640 (2002) (citing 725 ILCS 5/122-2.1(c) (West 1998)). The trial court may summarily dismiss the petition if the allegations in the petition are positively rebutted in the record. *See Coleman*, 183 Ill.2d at 381-82, 233 Ill.Dec. 789, 701 N.E.2d 1063 ("this court has consistently upheld the dismissal of a post-conviction petition when the allegations are contradicted by the record from the original trial proceedings" (citing *People v. Gaines*, 105 Ill.2d 79, 91-92, 85 Ill.Dec. 269, 473 N.E.2d 868 (1984), and *People v. Arhuckle*, 42 Ill.2d 177, 182, 246 N.E.2d 240 (1969))); *see*, e.g., *People v. Williams*, 364 Ill.App.3d 1017, 1025, 302 Ill.Dec. 254, 848 N.E.2d 254 (2006) (concluding

that defendant failed to state the gist of a constitutional claim that he was unfit to plead guilty when the record "clearly show[ed] that defendant understood the nature and purpose of the proceedings," informed the trial court that he understood the charges against him, did not exhibit "irrational" behavior in court, and actively participated in the proceedings and conferred with trial counsel).

¶ 59 4. A Summary Dismissal Is Proper When Petition Is Considered "Frivolous or Patently Without Merit"

¶ 60 The trial court must dismiss the petition in a written order if the court finds that the petition is "frivolous or * * * patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2008). Neither "frivolous" nor "patently without merit" is defined in the Act. However, the Illinois Supreme Court has held that a postconviction petition is considered frivolous or patently without merit only if it "has no arguable basis either in law or in fact." *Hodges*, 234 Ill.2d at 16, 332 Ill.Dec. 318, 912 N.E.2d 1204. A petition lacking an arguable basis in law or fact is one "based on an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill.2d at 16, 332 Ill.Dec. 318, 912 N.E.2d 1204. A claim completely contradicted by the record is an example of an indisputably meritless legal theory. *Hodges*, 234 Ill.2d at 16, 332 Ill.Dec. 318, 912 N.E.2d 1204. Fanciful factual allegations include those that are fantastic or delusional. *Hodges*, 234 Ill.2d at 17,332 Ill.Dec. 318,912 N.E.2d 1204.

¶ 61 If the trial court does not dismiss the petition as frivolous or patently without merit, then the petition

advances to the second stage. If the petition advances to the second stage, the trial court may appoint counsel for an indigent defendant and counsel will have an opportunity to amend the petition. 725 ILCS 5/122-4 (West 2008). The State can file a motion to dismiss or an answer to the petition and the trial court must then determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. 725 ILCS 5/122—5 (West 2008); *Edwards*, 197 Ill.2d at 246, 258 Ill.Dec. 753, 757 N.E.2d 442 (citing *Coleman*, 183 Ill.2d at 381, 233 Ill.Dec. 789, 701 N.E.2d 1063). If no such showing is made, the petition is dismissed. If, however, a substantial showing of a constitutional violation is made, the petition is advanced to the third stage, where the trial court conducts an evidentiary hearing. 725 ILCS 5/122-6 (West 2008); *Edwards*, 197 Ill.2d at 246, 258 Ill.Dec. 753, 757 N.E.2d 442.

¶ 62 In the case at bar, the trial court dismissed defendant's postconviction petition at the first stage and provided in its written order three reasons for the dismissal: (1) the issues raised in the petition were also raised on direct appeal and therefore barred by the doctrine of res judicata; (2) defendant's allegations were conclusory and defendant's petition lacked required supporting documents such as affidavits or other sworn statements as required under section 122-2 of the Act; and (3) defendant's petition was frivolous and patently without merit. However, the trial court did not specify which issues were dismissed for which reason. Thus, we consider each of the trial court's reasons as it applies to defendant's claims on appeal.

¶ 63 C. Whether Defendant's Claims Are Barred by *Res Judicata*

¶ 64 First, defendant claims that the trial court erred in summarily dismissing his postconviction petition when it found that the issues raised in the petition were barred by res judicata.

¶ 65 In the context of a postconviction petition, res judicata bars consideration of claims that were previously raised and decided on direct appeal. *People v. Blair*, 215 Ill.2d 427, 443, 294 Ill.Dec. 654, 831 N.E.2d 604 (2005). Defendant's claims of ineffective assistance of counsel were not raised on direct appeal and, thus, cannot be barred by res judicata. Accordingly, res judicata does not bar consideration of defendant's claims of ineffective assistance of trial and appellate counsel.

¶ 66 D. Whether Defendant's Petition "Lacked Supporting Documents"

¶ 67 Second, defendant claims that the trial court erred in finding that the petition "lack[ed] supporting documentation." The pleading requirements of the Act are found in section 122-2 (see *Hodges*, 234 Ill.2d at 9, 332 Ill.Dec. 318,912 N.E.2d 1204), which requires that the petition "clearly set forth the respects in which petitioner's constitutional rights were violated." 725 ILCS 5/122—2 (West 2008). Section 122-2 also requires that "[t]he petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2008). As noted, defendant attached Jenkins's affidavit, which was signed but not notarized.

¶ 68 The State argues that although defendant attached Jenkins's affidavit to the petition, the affidavit is not valid because it is not notarized. Thus, the State concludes, the trial court was not required to consider Jenkins's affidavit and the court properly dismissed defendant's postconviction petition because it lacked supporting documentation. We disagree.

¶ 69 To be considered a valid affidavit, our supreme court has held that an affidavit must be notarized unless otherwise provided for by a specific supreme court rule or statutory authorization. *See Roth v. Illinois Farmers Insurance Co.*, 202 Ill.2d 490, 496, 270 Ill.Dec. 18, 782 N.E.2d 212 (2002). In *Roth*, our supreme court explained that " '[a]n affidavit is simply a declaration, on oath, in writing, sworn to * * * before some person who has authority under the law to administer oaths.'" *Roth*, 202 Ill.2d at 493, 270 Ill.Dec. 18, 782 N.E.2d 212 (quoting *Harris v. Lester*, 80 Ill. 307,311 (1875)). Thus, the supreme court concluded, statements in writing that have not been sworn to before an authorized person cannot be considered as affidavits. *Roth*, 202 Ill.2d at 494, 270 Ill.Dec. 18, 782 N.E.2d 212.

¶ 70 In determining the validity of Jenkins's proposed affidavit, we find instructive a case from the Second District of the Appellate Court, *People v. Niezgoda*, 337 Ill.App.3d 593, 271 Ill.Dec. 998, 786 N.E.2d 256 (2003). In *Niezgoda*, the defendant filed a *pro se* postconviction petition alleging ineffective assistance of counsel and attached his own affidavit and section 122-2 supporting affidavits from three other potential witnesses. *Niezgoda*, 337 Ill.App.3d at 595, 271 Ill.Dec. 998, 786 N.E.2d 256. None of the affidavits were notarized. *Niezgoda*, 337 Ill.App.3d at 595, 271 Ill.Dec. 998, 786 N.E.2d 256. The Second District, following

Roth, found that affidavits filed pursuant to the Act must be notarized to be val*id*. *Niezgoda*, 337 Ill.App.3d at 597, 271 Ill.Dec. 998, 786 N.E.2d 256. The *Niezgoda* court then found that "the affidavits the defendant filed had no legal effect" because the affidavits were not notarized or sworn before a person who had the authority to administer oaths, and, as a result, the trial court properly dismissed the petition. *Niezgoda*, 337 Ill.App.3d at 597, 271 Ill.Dec. 998, 786 N.E.2d 256 (citing *People v. Johnson*, 183 Ill.2d 176, 191, 233 Ill.Dec. 288, 700 N.E.2d 996 (1998)).

¶ 71 Here, similar to the defendant's petition in *Niezgoda*, Jenkins's affidavit is not notarized and, thus, not a valid affidavit on its face. However, in *Niezgoda*, the defendant appealed from a second-stage dismissal of his petition. To support a claim of failure to present a witness, a defendant must tender a valid affidavit from the individual who would have testified. *People v. Enis*, 194 Ill.2d 361, 380, 252 Ill.Dec. 427, 743 N.E.2d 1 (2000) (citing *People v. Johnson*, 183 Ill.2d 176, 192, 233 Ill.Dec. 288, 700 N.E.2d 996 (1998), and *People v. Thompkins*, 161 Ill.2d 148, 163, 204 Ill.Dec. 147, 641 N.E.2d 371 (1994)). Without a valid affidavit, a reviewing court cannot determine whether the proposed witness could have provided information or testimony favorable to the defendant. *Johnson*, 183 Ill.2d at 192, 233 Ill.Dec. 288, 700 N.E.2d 996 (citing *People v. Guest*, 166 Ill.2d 381, 402, 211 Ill.Dec. 490, 655 N.E.2d 873 (1995), and People v. Ashford, 121 Ill.2d 55, 77, 117 Ill.Dec. 171, 520 N.E.2d 332 (1988)). After this case was initially filed, the Second District decided *People v. Carr*, 407 Ill.App.3d 513, 348 Ill.Dec. 618,944 N.E.2d 859 (2011). In *Carr*, the defendant appealed from the summary dismissal of his *pro se* postconviction petition at the first stage. *Carr*, 407

Ill.App.3d at 515, 348 Ill.Dec. 618, 944 N.E.2d 859. Relying on *Niezgoda*, the Second District held that because the defendant's section 122-1 affidavit was not notarized, it was not valid. *Carr*, 407 Ill. App.3d at 515,348 Ill.Dec. 618, 944 N.E.2d 859. The court also declined to distinguish affidavits filed pursuant to section 122-1 from the section 122-2 affidavit at issue in *Niezgoda* because *Niezgoda* held that the notarization requirement for affidavits applies to the entire Act. *Carr*, 407 Ill.App.3d at 515, 348 Ill.Dec. 618, 944 N.E.2d 859. Accordingly, the court did not consider the differing purposes of the two affidavit requirements. The court found that because the defendant's section 122-1 affidavit was not notarized, it was not valid and he was not entitled to relief. *Carr*, 407 Ill.App.3d at 516, 348 Ill.Dec. 618, 944 N.E.2d 859.

¶ 72 Recently, in *People v. Henderson*, 2011 IL App (1st) 090923, 356 Ill.Dec. 311, 961 N.E.2d 407, Justice Lavin authored an opinion analyzing the case based on a defendant's failure to obtain notarization of a verifying affidavit where defendant was imprisoned and there was no guarantee that a defendant would be afforded the services of a notary public. *Henderson*, 2011 IL App (1st) 090923,126, 356 Ill.Dec. 311, 961 N.E.2d 407. The court in *Henderson* found that "the purposes of the Act and section 122-2.1 would be hindered by preventing petitions which are neither frivolous nor patently without merit from proceeding to the second stage due to the technicality at issue." *Henderson*, 2011 IL App (1st), 090923, ¶ 35, 356 Ill.Dec. 311, 961 N.E.2d 407. The *Henderson* court further found that "[a]t the second stage, the State will have the opportunity to object to the lack of notarization" and that "appointed counsel can assist in arranging for the notarization of the verification

affidavit." *Henderson*, 2011 IL App (1st), 090923, ¶ 35, 356 Ill.Dec. 311,961 N.E.2d 407. *Henderson* declined to follow *Carr* as we do.

¶ 73 E. Whether Defendant's Petition Is Frivolous and Patently Without Merit

¶ 74 Third, defendant claims that the trial court erred when it summarily dismissed his petition as frivolous and patently without merit. Specifically, defendant argues that he presented a non-frivolous constitutional claim that his trial counsel was ineffective for failing to fulfill his promise to the jury to present Jenkins's exculpatory testimony and that appellate counsel was ineffective for failing to raise the issue on appeal.

¶ 75 A defendant has a sixth amendment right to effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. The Illinois Supreme Court has held that, to determine whether a defendant was denied his or her right to effective assistance of counsel, an appellate court must apply the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), which the Illinois Supreme Court adopted in *People v. Alhanese*, 102 Ill.2d 54, 79 Ill.Dec. 608, 464 N.E.2d 206(1984).

¶ 76 Under *Strickland*, a defendant must prove both that: (1) his attorney's actions or inactions constituted error(s) so serious as to fall below an objective standard of reasonableness "under prevailing professional norms" (*People v. Colon*, 225 Ill.2d 125, 135, 310 Ill.Dec. 396, 866 N.E.2d 207 (2007); *People v. Evans*, 209 Ill.2d 194, 220, 283 Ill.Dec. 651, 808 N.E.2d 939 (2004)); and (2) defense counsel's deficient performance prejudiced the defendant. *People v.*

Hodges, 234 Ill.2d at 17, 332 Ill.Dec. 318, 912 N.E.2d 1204 (citing *Strickland*, 466 U.S. at 687-88, 104 S.Ct. 2052). "At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Hodges*, 234 Ill.2d at 17, 332 Ill.Dec. 318, 912 N.E.2d 1204. The failure to satisfy either the deficiency prong or the prejudice prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *Strickland*, 466 U.S. at 697, 104 S.Ct. 2052; *People v. Patterson*, 192 Ill.2d 93, 107, 249 Ill.Dec. 12, 735 N.E.2d 616 (2000).

¶ 77 Ineffective assistance of appellate counsel is determined under the same standard as a claim of ineffective assistance of trial counsel. *People v. Edwards*, 195 Ill.2d 142, 163, 253 Ill.Dec. 678, 745 N.E.2d 1212 (2001) (citing *People v. West*, 187 Ill.2d 418, 435, 241 Ill.Dec. 535, 719 N.E.2d 664 (1999)). Appellate counsel is not required to raise every conceivable issue on appeal, and it is not incompetence for counsel to refrain from raising issues that counsel believes are without merit. *Edwards*, 195 Ill.2d at 163-64, 253 Ill.Dec. 678,745 N.E.2d 1212 (citing *People v. Johnson*, 154 Ill.2d 227, 236, 182 Ill.Dec. 1, 609 N.E.2d 304 (1993)). Accordingly, unless the underlying issue has merit, there is no prejudice from appellate counsel's failure to raise an issue on appeal. *Edwards*, 195 Ill.2d at 164, 253 Ill.Dec. 678, 745 N.E.2d 1212 (citing *People v. Childress*, 191 Ill.2d 168, 175, 246 Ill.Dec. 352, 730 N.E.2d 32 (2000)).

¶ 78 Defendant claims that it is arguable that trial counsel's performance fell below an objective standard of reasonableness because counsel promised the jury

during his opening statement that Jenkins would provide exculpatory testimony on defendant's behalf, and then failed to provide the promised testimony during trial.

¶ 79 A defendant is entitled to reasonable, not perfect, representation. *People v. Fuller*, 205 Ill.2d 308, 330, 275 Ill.Dec. 755, 793 N.E.2d 526 (2002) (citing *People v. Palmer*, 162 Ill.2d 465, 476, 205 Ill.Dec. 506, 643 N.E.2d 797 (1994)); *West*, 187 Ill.2d at 432, 241 Ill.Dec. 535, 719 N.E.2d 664 (citing *People v. Stewart*, 104 Ill.2d 463, 492, 85 Ill.Dec. 422, 473 N.E.2d 1227 (1984)). Decisions concerning which witnesses to call at trial and what evidence to present on defendant's behalf ultimately rest with trial counsel. *People v. Munson*, 206 Ill.2d 104, 139-40, 276 Ill.Dec. 260, 794 N.E.2d 155 (2002); *West*, 187 Ill.2d at 432, 241 Ill.Dec. 535, 719 N.E.2d 664 (citing *People v. Ramey*, 152 Ill.2d 41, 53-55, 178 Ill.Dec. 19, 604 N.E.2d 275 (1992)). It is well established that these types of decisions are considered matters of trial strategy and are generally immune from claims of ineffective assistance of counsel. *People v. Smith*, 195 Ill.2d 179, 188, 253 Ill.Dec. 660, 745 N.E.2d 1194 (2000); West, 187 Ill.2d at 432, 241 Ill.Dec. 535, 719 N.E.2d 664. "In recognition of the variety of factors that go into any determination of trial strategy, * * * claims of ineffective assistance of counsel must be judged on a circumstance-specific basis, viewed not in hindsight, but from the time of counsel's conduct, and with great deference accorded counsel's decisions on review." *People v. Fuller*, 205 Ill.2d 308, 330-31, 275 Ill.Dec. 755, 793 N.E.2d 526 (2002) (citing *Roe v. Hares Ortega*, 528 U.S. 470, 477, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000), and *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052). Thus, "[mistakes in trial strategy or tactics or

in judgment do not of themselves render the representation incompetent." (Internal quotation marks omitted.) *People v. Hillenbrand*, 121 Ill.2d 537, 548, 118 Ill.Dec. 423, 521 N.E.2d 900 (1988).

¶ 80 A defense counsel's failure to provide testimony promised during opening statements is not ineffective assistance of counsel *per se*. *People v. Manning*, 334 Ill.App.3d 882, 892, 268 Ill.Dec. 600, 778 N.E.2d 1222 (2002). We agree with defendant that counsel's assistance may be ineffective if he or she promises that a particular witness will testify during opening statements, but does not provide the promised testimony during trial. *See* generally *People v. Briones*, 352 Ill.App.3d 913, 287 Ill.Dec. 909, 816 N.E.2d 1120 (2004). However, we have also recognized that counsel's decision to abandon a trial strategy during trial may be reasonable under the circumstances and that the decision not to provide promised testimony may be warranted by unexpected events. *People v. Ligon*, 365 Ill.App.3d 109, 120, 301 Ill.Dec. 753, 847 N.E.2d 763 (2006). In either case, a defendant must overcome a strong presumption that the challenged action or inaction of defense counsel may have been the product of sound trial strategy. *Evans*, 186 Ill.2d at 93, 237 Ill.Dec. 118, 708 N.E.2d 1158; *People v. Coleman*, 183 Ill.2d 366, 397, 233 Ill.Dec. 789, 701 N.E.2d 1063 (1998); *People v. Griffin*, 178 Ill.2d 65, 73-74, 227 Ill.Dec. 338, 687 N.E.2d 820 (1997); *see* also *People v. Gacy*, 125 Ill.2d 117, 126, 125 Ill.Dec. 770, 530 N.E.2d 1340 (1988) ("The burden of * * * overcoming the presumption that an attorney's decision is the product of 'sound trial strategy' rests upon the defendant* * *.").

¶ 81 A defendant may overcome the strong presumption that defense counsel's choice of strategy

was "sound if counsel's decision appears so irrational and unreasonable that no reasonably effective defense attorney, facing similar circumstances, would pursue such a strategy." (Emphasis in original.) *People v. King*, 316 Ill.App.3d 901,916,250 Ill.Dec. 340, 738 N.E.2d 556 (2000) (citing *People v. Faulkner*, 292 Ill.App.3d 391, 394, 226 Ill.Dec. 749, 686 N.E.2d 379 (1997)). "[Sound trial strategy] embraces the use of established rules of evidence and procedure to avoid, when possible, the admission of incriminating statements, harmful opinions, and prejudicial facts." *People v. Moore*, 279 Ill.App.3d 152, 159, 215 Ill.Dec. 479, 663 N.E.2d 490 (1996).

¶ 82 Here, we cannot say that defense counsel's decision not to call Jenkins as a witness was outside the realm of sound trial strategy. The record shows that defense counsel contemplated calling Jenkins as a witness. However, after interviewing him, defense counsel determined that Jenkins's testimony would not be in defendant's "best interest." Defense counsel then informed defendant and the trial judge of his decision not to call Jenkins as a witness. The trial court discussed the matter with defendant and his counsel in open court and defendant informed the court that he agreed with his counsel's decision. Based on the record, defense counsel's decision to not call Jenkins as a witness appears to be the product of sound trial strategy, a strategy that the defendant agreed with. *See People v. Flores*, 128 Ill.2d 66, 106, 131 Ill.Dec. 106, 538 N.E.2d 481 (1989) ("defense counsel need not call a witness if he reasonably believes that under the circumstances the individual's testimony is unreliable or would likely have been harmful to the defendant").

¶ 83 Considering Jenkins' affidavit in addition to the record, we still conclude that defendant did not overcome the strong presumption that defense counsel's decision was the product of sound trial strategy at the time that he interviewed Jenkins.

¶ 84 The record also shows that two of the State's witnesses, Morgan and Parker, testified that there was animosity between defendant and Jenkins and the victim, which supported the defense counsel's self-defense theory. Specifically, Morgan testified that the victim was in a gang rival to defendant's and Jenkins's gang. He further testified that the victim had a confrontation with defendant and Jenkins two weeks prior to the shooting. Parker testified that the victim had a "beef" with Jenkins. Both Morgan and Parker testified that the victim pursued defendant and Jenkins as they were walking into the gangway. Jenkins's purported testimony now, as stated in his affidavit, would have not supported defendant's theory that he acted in self-defense. According to Jenkins's affidavit, Jenkins would have testified that defendant had nothing to do with the shooting and that he alone shot the victim. This was not the theory that was presented by the defense at trial.

¶ 85 Moreover, Jenkins was a codefendant and his testimony may have been harmful to defendant. The chance of such harm is even more likely considering that defendant successfully moved for severed trials on the grounds that Jenkins had made statements which, if introduced at trial, would be prejudicial to defendant. In *People v. Ashford*, 121 Ill.2d 55, 75, 117 Ill.Dec. 171, 520 N.E.2d 332 (1988), our supreme court rejected the defendant's postconviction petition claim that his counsel was ineffective for not subpoenaing

his codefendant to testify. The supreme court found that subpoenaing his codefendant

> "would surely have been an incomprehensible, if not utterly egregious, trial tactic * * *. Having successfully moved for severed trials on the ground that [his codefendant] had made statements which, if introduced at trial, would be prejudicial to him, we cannot understand how the defendant can now fault counsel for failing to subpoena [his codefendant]." *Ashford*, 121 Ill.2d at 75, 117 Ill.Dec. 171, 520 N.E.2d 332.

¶ 86 In his motion for severance, defendant alleged that Jenkins "has made written and/or oral statements implicating [him]." He further alleged that he believed that Jenkins's defense "is in conflict and antagonistic toward [him] and he cannot obtain a fair and impartial trial because of the prejudice created by the inconsistent, conflicting, and antagonistic defenses."

¶ 87 Accordingly, we cannot say that defense counsel's decision not to call Jenkins was so irrational or unreasonable that his performance fell below an objective standard of reasonableness when, before trial, defendant sought to sever Jenkins's trial from his own, and when, during trial, defense counsel determined after interviewing Jenkins that his testimony would not be in defendant's best interest.

¶ 88 We find the case at bar distinguishable from the cases defendant cites where defense counsel's performance was deficient for failing to fulfill his promise to the jury to present exculpatory testimony from witnesses. Defendant cites *People v. Bryant*, 391 Ill.App.3d 228, 330 Ill.Dec. 49, 907 N.E.2d 862 (2009), and *People v. Briones*, 352 Ill.App.3d 913, 287 Ill.Dec. 909, 816 N.E.2d 1120 (2004).

¶ 89 In *Bryant*, the Fifth District found that defense counsel was ineffective in the defendants' joint murder case for failing to call any witnesses, who were available to testify at trial, in support of the defense theory proffered in opening statements to the jury that the murder was committed by others. *Bryant*, 391 Ill.App.3d at 229, 330 Ill.Dec. 49, 907 N.E.2d 862. On review, the *Bryant* court found that defense counsel's performance was deficient because trial counsel attempted to present his defense entirely through cross-examination of the State's witnesses, but his questions were repeatedly and successfully challenged by "beyond the scope" objections from the *State*. *Bryant*, 391 Ill.App.3d at 239, 330 Ill.Dec. 49, 907 N.E.2d 862. The court found that, although counsel's decision not to call any witnesses was a matter of trial strategy, said strategy was not reasonable, and the resulting prejudice was not harmless, as it "appears that counsel concluded that rather than support the defense theory with evidence that the jury might reject, it was better to not support the theory at all." *Bryant*, 391 Ill.App.3d at 241, 330 Ill.Dec. 49, 907 N.E.2d 862.

¶ 90 In the case at bar, there is no indication in the record, and defendant does not argue, that defense counsel entirely failed to support his theory of self-defense similar to the defense counsel in Bryant. Rather, our examination of the record in this case shows that defense counsel's performance was not deficient because counsel exhibited an understanding of the fundamental rules of criminal procedure, subjected the State's witnesses to meaningful adversarial testing, and presented a trial strategy without flawed legal arguments. *People v. Schlager*,

247 Ill.App.3d 921, 932, 187 Ill.Dec. 554, 617 N.E.2d 1275 (1993).

¶ 91 In *Briones*, the Fifth District of the Appellate Court found that defense counsel's performance was deficient after counsel reneged on a promise to the jury during opening statements that the defendant would testify. *Briones*, 352 Ill.App.3d at 919, 287 Ill.Dec. 909, 816 N.E.2d 1120. During trial the defendant informed the trial court that he decided, after speaking to his trial counsel, that he would not testify on his own behalf. *Briones*, 352 Ill.App.3d at 916, 287 Ill.Dec. 909, 816 N.E.2d 1120. On appeal, defendant claimed that his defense counsel's decision for him not to testify was unsound trial strategy and the appellate court agreed. *Briones*, 352 Ill.App.3d at 918, 287 Ill.Dec. 909, 816 N.E.2d 1120.

¶ 92 In deciding whether defense counsel's decision constituted deficient performance, the court recognized that it was trial counsel's "responsibility to evidence in the record that [her performance] was not deficient, that the determination [that defendant would not testify] was a result of the defendant's fickleness or of counsel's sound trial strategy due to unexpected events." *Briones*, 352 Ill.App.3d at 919, 287 Ill.Dec. 909, 816 N.E.2d 1120. In its review, the court found that defense counsel "failed to show in the record that the defendant inexplicably changed his decision to testify or that, because of unexpected events, sound trial strategy required her to break her promise that the defendant would testify." *Briones*, 352 Ill.App.3d at 919, 287 Ill.Dec. 909, 816 N.E.2d 1120. As a result, the appellate court declined to presume that defense counsel's decision not to present the defendant's testimony, after promising to do so in opening statements, was the result of sound trial

strategy and thus concluded that counsel's performance was deficient. *Briones*, 352 Ill.App.3d at 919, 287 Ill.Dec. 909, 816 N.E.2d 1120. *See* also *People v. Tate*, 305 Ill.App.3d 607, 612, 238 Ill.Dec. 722, 712 N.E.2d 826 (1999) (unable to determine "as a matter of law" whether defense counsel's decision to not call certain witnesses was a "professionally reasonable tactical decision" because the record did not reflect counsel's reasoning for the decision).

¶ 93 Here, unlike *Briones* and *Tate*, the record shows that defense counsel had a reason for not calling Jenkins to testify—he reasonably believed that, after interviewing Jenkins, the testimony Jenkins would provide would not be in defendant's best interest. Defense counsel interviewed Jenkins before presenting the testimony and, as a result of that interview, determined that his testimony would not be in the best interest of the defendant. Defense counsel then informed the trial court and defendant of his decision, and defendant informed the court that he agreed with his counsel's decision.

¶ 94 Defendant also argues that defense counsel's "failure to present Jenkins's exculpatory testimony to support defendant's otherwise uncorroborated defense amounts to ineffective representation." Defendant cites *People v. King*, 316 Ill.App.3d 901,250 Ill.Dec. 340, 738 N.E.2d 556 (2000), but we find that case also distinguishable to the case at bar.

¶ 95 In *King*, the defendant was convicted of aggravated criminal sexual assault and aggravated kidnaping for the abduction and rape of a 17-year-old passenger on the defendant's school bus route. *King*, 316 Ill.App.3d at 903-04, 250 Ill.Dec. 340, 738 N.E.2d 556. Defendant maintained that he did not rape the

passenger and was never alone with her on the bus. Defendant provided his defense counsel with the name of an alibi witness who worked as a bus attendant on defendant's bus and who was working on the bus on the day of the alleged rape. *King*, 316 Ill.App.3d at 904, 250 Ill.Dec. 340, 738 N.E.2d 556. The defendant alleged that his trial counsel never interviewed the bus attendant in preparation for trial and never called her as a witness, although she was present at court and available to testify on the trial date. *King*, 316 Ill.App.3d at 904, 250 Ill.Dec. 340, 738 N.E.2d 556. The bus attendant's affidavit stated that she was on the bus the entire time the students were riding home and that the 17- year-old passenger was never alone on the bus with the defendant. *King*, 316 Ill.App.3d at 904, 250 Ill.Dec. 340, 738 N.E.2d 556.

¶ 96 This court held that defense counsel's performance was deficient because defense counsel was aware of the alibi witness but failed to interview the witness at any time before or during trial and failed to provide an explanation for failing to call or even interview the exculpatory witness. *King*, 316 Ill.App.3d at 916, 250 Ill.Dec. 340, 738 N.E.2d 556. We could not conceive of any sound trial strategy for failing to do so. *King*, 316 Ill.App.3d at 916, 250 Ill.Dec. 340, 738 N.E.2d 556.

¶ 97 Here, on the other hand, defendant does not claim in his postconviction petition that defense counsel failed to interview Jenkins before trial commenced, nor did Jenkins state in his unnotarized affidavit that defense counsel failed to interview him prior to trial. There is no dispute that defense counsel did interview Jenkins before presenting his defense. As a result of that interview, defense counsel presented defendant and the trial judge with a reason for deciding not to

call Jenkins as a witness—namely, that after interviewing the witness during a recess, he determined that calling Jenkins was not in defendant's best interest.

¶ 98 Defendant further argues that defense counsel's performance was deficient for failing to interview Jenkins, a known witness, before opening statements. However, we do not find any factual support for this argument. Defendant does not allege in his postconviction petition that his defense counsel did not interview Jenkins before opening statements. Jenkins, in his unnotarized affidavit, also did not allege that he was not interviewed before opening statements. We also do not find any indication in the record that Jenkins was not interviewed before opening statements. Normally witnesses are interviewed well in advance of trial. It is also possible for a witness to change his testimony from the time he or she was first interviewed to the time he or she is called as a witness. However, a codefendant in a criminal trial may not agree to an interview until his trial has been concluded. We do not know, nor does the petition state, when Jenkins was first interviewed or what attempts were made to interview Jenkins prior to trial.

¶ 99 The record shows that defendant's decision not to call Jenkins as a witness, even after promising to call him as a witness during opening statements, appears to be the product of sound trial strategy. Considering Jenkins's affidavit in addition to the record, we cannot say that defendant overcame the presumption that his defense counsel's decision not to call Jenkins was the product of reasonable trial strategy. Since we are unable to conclude that defense counsel's performance arguably fell below objective standards, defendant's claim of ineffective assistance of trial counsel and

appellate counsel must fail. *Patterson*, 192 Ill.2d at 107, 249 Ill.Dec. 12, 735 N.E.2d 616. Accordingly, we cannot say that the trial court's summary dismissal of defendant's postconviction petition as frivolous and patently without merit was not proper.

¶100 III. CONCLUSION

¶ 101 We affirm the trial court's summary dismissal of defendant's *pro se* postconviction petition as frivolous and patently without merit.

¶ 102 Affirmed.

Justice PALMER[3] concurred in the judgment and opinion.

Justice GARCIA specially concurred, with opinion.

¶ 103 JUSTICE GARCIA, specially concurring:

¶ 104 I do not subscribe to the majority's rejection of *People v. Carr*, 407 Ill.App.3d 513, 348 Ill.Dec. 618, 944 N.E.2d 859 (2011), which held that an unsigned affidavit is not valid, for being at odds with this court's decision in *People v. Henderson*, 2011 IL App (1st) 090923, 356 Ill.Dec. 311, 961 N.E.2d 407. Supra ¶ 72. Specifically, I disagree with the implicit suggestion by the majority that because a first-stage postconviction petition should not necessarily be dismissed for lack of supporting documentation based on an unsworn

[3] Justice Robert Cahill originally sat on the panel of this appeal and participated in its disposition. Justice Cahill passed away on December 4, 2011. Therefore, Justice Palmer will serve in his stead and has read the briefs, record and the decision, which is the subject of the petition for rehearing.

"affidavit" from a postconviction defendant under *Henderson*, the same result should obtain when the unsworn "affidavit" purports to be from a codefendant on behalf of a postconviction defendant. I agree with the observation in *Henderson*, "We need not address the result in *Wilborn*, as that case did not present an issue identical to the one before us." *Henderson*, 2011 IL App (1st) 090923, ¶ 36, 356 Ill.Dec. 311, 961 N.E.2d 407.

¶ 105 In this case, defendant offers the excuse that Jenkins's efforts to notarize his statement were rebuffed by the Illinois Department of Corrections. It is fair to say that the defendant's assertion cannot be based on his own knowledge. There may be another equally plausible reason for Jenkins's statement not being notarized. In any event, I am not persuaded that an unsigned "affidavit" from a postconviction petitioner and an unsigned "affidavit" from a purported witness should be treated alike.

¶ 106 However, I agree with the majority's conclusion that upon *de novo* review the postconviction petition, with its supporting documentation, meets the legal standard of frivolous and patently without merit to warrant dismissal at the first stage, which after all is the true holding of this case and is the same result we reached as to the postconviction petition we reviewed in *Henderson*.

APPENDIX D

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

August 4, 2020

Before

DIANE S. SYKES, Chief Judge

WILLIAM J. BAUER, Circuit Judge

FRANK H. EASTERBROOK, Circuit Judge

No. 18-1507

JOSEPH WILBORN, *Petitioner-Appellant,*	Appeal from the United States District Court for the Northern District of
v.	Illinois, Eastern Division.
ALEX JONES, Acting Warden, *Respondent-Appellee.*	No. 14 C 05469 John Robert Blakey, *Judge.*

O R D E R

On consideration of petitioner-appellant's petition for panel rehearing and petition for rehearing *en banc* filed on July 20, 2020, in connection with the above-

referenced case, no judge in active service has requested a vote on the petition for rehearing *en banc*,* and all of the judges on the original panel have voted to deny the petition for panel rehearing. It is, therefore, **ORDERED** that the petition for panel rehearing and the petition for rehearing *en banc* are **DENIED**.

*Circuit Judge Joel M. Flaum did not participate in the consideration of this petition for rehearing.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

FINAL JUDGMENT

July 6, 2020

Before: DIANE S. SYKES, Chief Circuit Judge
WILLIAM J. BAUER, Circuit Judge
FRANK H. EASTERBROOK, Circuit Judge

No. 18-1507	JOSEPH WILBORN, Petitioner – Appellant v. ALEX JONES, Acting Warden Respondent – Appellee
Originating Case Information:	
District Court No: 1:14-cv-05469 Northern District of Illinois, Eastern Division District Judge John Robert Blakey	

The judgment of the District Court is **AFFIRMED**, with costs, in accordance with the decision of this court entered on this date.

APPENDIX F

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

October 19, 2018

Before

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 18-1507

JOSEPH WILBORN, *Petitioner-Appellant*, v. MICHAEL MELVIN, *Respondent-Appellee*.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 14CV5469 John Robert Blakey, *Judge*.

O R D E R

Joseph Wilborn has filed a notice of appeal from the denial of his *habeas corpus* petition under 28 U.S.C. § 2254 and an application for a certificate of

appealability. This court has reviewed the final order of the district court and the record on appeal.

We find that Wilborn has made a substantial showing of the denial of a constitutional right, *see* 28 U.S.C. § 2253(c)(2), specifically as to whether trial counsel performed deficiently and caused cognizable prejudice when he told the jury in his opening statement that Wilborn's codefendant would testify but then declined to call the codefendant as a witness. *Cf. Hampton v. Leibach*, 347 F.3d 219, 257 (7th Cir. 2003) ("[W]hen the failure to present the promised testimony cannot be chalked up to unforeseeable events, the attorney's broken promise may be unreasonable, for little is more damaging than to fail to produce important evidence that had been promised in an opening.") (cleaned up).

Accordingly, the request for a certificate of appealability is GRANTED. On the court's own motion, we appoint counsel for Wilborn. A separate order naming counsel and setting a briefing schedule will follow.