APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 18-2908

DAMON GOODLOE,

Petitioner-Appellant,

v.

CHRISTINE BRANNON,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 1:13-cv-02650—**Sara L. Ellis**, *Judge.*

ARGUED SEPTEMBER 15, 2020—
DECIDED JULY 12, 2021

Before FLAUM, ROVNER, and WOOD, *Circuit Judges*.

ROVNER, *Circuit Judge.* An Illinois jury convicted Damon Goodloe of first degree murder in the death of Pierre Jones. After losing his direct appeal and all post-conviction proceedings available in state court, Goodloe petitioned for a writ of *habeas corpus* in federal court under 28 U.S.C. § 2254. After the district court denied relief on all of his claims, this court granted a certificate of appealability on his claim that evidence was admitted at his trial in violation of the Confrontation Clause. We later

expanded that certificate to include his assertion that his trial counsel provided ineffective assistance. We now affirm the district court's denial of *habeas* relief.

I.

We presume that the factual findings of the state court are correct for the purposes of *habeas* review unless the petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Goodloe has not provided clear and convincing evidence rebutting the state court findings and so we defer to the state court's version of events. *Weaver v. Nicholson*, 892 F.3d 878, 886 (7th Cir. 2018). Shortly before 2 a.m. on December 24, 2002, police officers Joseph Hodges and Jason Venegas responded to a call of "shots fired" near 113th Street and South Edbrooke Avenue in Chicago. On arriving at the scene, the officers found Pierre Jones on the ground, bleeding from a gunshot wound to the leg. Officer Hodges called for an ambulance as two additional officers, Ronald Bialota and Michael Martinez, arrived at the scene. It was then 1:58 a.m. Officer Bialota asked Jones who shot him, and Jones replied, "Damon shot me." Jones also told the officers that Damon was wearing a "black hoodie."

Officers Hodges and Venegas remained with Jones while Officers Bialota and Martinez searched for the offender. Approximately a minute and a half later, Bialota and Martinez encountered Goodloe coming out of an alley near 114th Street and Prairie Avenue, just a few blocks away from the scene of the crime. Goodloe was wearing a black hoodie under a jacket, but was not armed. After initially telling the officers that his name was Mario, Goodloe produced identification revealing that his first name was Damon. Within minutes, the officers brought Goodloe

back to the scene, where paramedics were working on Jones in the back of an ambulance. Officer Bialota asked Jones, "Is this the individual that shot you?" Jones replied, "That's him, he's the one that shot me." Officer Martinez asked Jones if he was a hundred percent sure that Goodloe was the one who shot him, and Jones replied, "Yeah, that's the guy." The officers then arrested Goodloe, with the arrest report indicating that he was taken into custody at 2:03 a.m. Jones died at a hospital approximately an hour later, of the gunshot wound to his leg that had caused massive internal bleeding.

At trial, over Goodloe's objections, the State entered into evidence Jones's statements to the officers identifying Goodloe as the shooter. Additional evidence also implicated Goodloe. Gunshot residue tests performed on his hands within a few hours after the shooting revealed that he either recently fired a gun or was close to a gun when it was fired.[1] A disinterested witness to the shooting also testified, albeit very reluctantly. Michelle Lovett appeared at trial in prison garb, having been taken into custody to assure her appearance at trial. She testified that she was sitting in a car with a man near the shooting when she saw Goodloe (whom she knew from the neighborhood) and another man, both in black hoodies, coming towards the car. She then heard approximately ten gunshots but ducked before she could see who was firing a gun. She called 911 to report the shooting, and subsequently identified Goodloe in a line-up as one of the men she saw immediately before the shooting. She also testified

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[1] The expert who testified about the test results conceded that it was also possible that the particles were transferred to Goodloe's hands from some other source.

that, at the request of Goodloe's cousin, she later signed an affidavit denying that she had seen Goodloe that night, in exchange for a promise that "they were going to quit threatening" her. She had been threatened prior to signing the affidavit, and an unknown person had fired shots at her, but the threats ceased once she signed the affidavit.

Edward Loggins testified at trial that he had been purchasing cocaine from Jones when the shots were fired. He too observed two men in black hoodies immediately before the shooting but could not see their faces. When the shots were fired, he saw Jones fall to the ground. He fled the scene on foot, running home, only to realize on his arrival that he too had been shot in the leg. Police officers arrived at his home shortly thereafter to question him about the shooting, and he was taken to a hospital for treatment.

The jury convicted Goodloe of first degree murder but declined to make an additional finding that he personally discharged a firearm during the commission of the offense, a finding that could have led to a higher sentence. After the trial and prior to sentencing, Goodloe moved orally for a new trial based on ineffective assistance of counsel. The trial court allowed his trial counsel to withdraw and appointed a public defender to represent him. The court then held a hearing on a counseled motion for a new trial based on ineffective assistance. The court rejected Goodloe's claims after finding that counsel's decisions relating to the investigation of witnesses and the impeachment of Michelle Lovett were based on a reasonable trial strategy and did not prejudice Goodloe. The trial court then sentenced Goodloe to thirty years' imprisonment. Goodloe subsequently

lost on direct appeal and in state post-conviction proceedings before bringing his federal *habeas* petition, which the district court denied.

II.

We certified only two issues for appeal. First, we found that "reasonable jurists could debate whether a reversible violation of the Confrontation Clause occurred when the trial court admitted police accounts of statements from the wounded gunshot victim who soon died." R. 13. On Goodloe's motion, we later expanded the certificate of appealability to address "whether his trial counsel was ineffective for failing to investigate three witnesses who could have provided an alternative explanation for Goodloe's presence near the scene of the crime." R. 18. We review the district court's denial of Goodloe's *habeas* petition *de novo*. *Jordan v. Hepp*, 831 F.3d 837, 842 (7th Cir. 2016). Because this appeal is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), we give great deference to the state court. *Jordan*, 831 F.3d at 843. Where the state court has made a decision on the merits, we may grant relief only if that decision was "contrary to, or involved an unreasonable application of clearly established Federal law" as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1); *Jordan*, 831 F.3d at 843.

We begin with Goodloe's Confrontation Clause claim. At this stage of the proceedings, Goodloe does not contend that the admission of Jones's initial statements—that a person named Damon shot him and that the shooter was wearing a black hoodie—violated the Confrontation Clause. He challenges only the statements that Jones made when Goodloe was brought to the ambulance for identification. In particular, he asserts that the admission of Jones's

statements, "That's him, he's the one that shot me," and "Yeah, that's the guy," (collectively the "Show-Up Statements") violated his rights under the Confrontation Clause.

The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him[.]" The Confrontation Clause bars the admission of testimonial statements against the defendant, unless the declarant is both unavailable at trial, and the defendant had a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). Because Jones was unavailable at trial and because Goodloe had no prior opportunity to cross-examine Jones on the Show-up Statements, the determinative issue for the state courts was whether Jones's Show-Up Statements were testimonial in nature:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 547 U.S. 813, 822 (2006).

The Illinois Appellate Court properly identified the controlling Supreme Court precedent, citing both *Crawford* and *Davis*, and applied those cases to conclude that Jones's statements were not testimonial

but were made to enable police assistance to meet an ongoing emergency. The appellate court found that Jones was interrogated in an emergency setting, where the police were responding to a call of "shots fired," and found the victim on the ground with a bullet wound, in obvious pain. The police were concerned that an armed criminal was at large nearby, the court remarked, and the purpose of the police questioning was to meet an ongoing emergency and to protect the public from an armed shooter. Moreover, the scene was not tranquil and safe; Jones's initial statements were made when he was on the ground immediately after being shot, and the Show-up Statements were made when he was in the back of an ambulance at the scene of the shooting, in great pain, and required assistance breathing. His answers to the officers' initial questions, the court found, were given to help resolve an emergency. The court also found that Jones's Show-up Statements confirming that the man the police had apprehended was the "Damon" in question were not formal or testimonial because the emergency was ongoing until the officers knew that they had apprehended the shooter. The shooter might still have been in the vicinity, the court remarked, and the police needed the identification in order to end the emergency. The court rejected Goodloe's claim that the emergency was over because the only suspect was in custody at the scene. The court noted that the police did not know that they had the right man until Jones confirmed Goodloe's identity. The appellate court also relied on the existence of an unidentified second shooter as supporting the finding of an ongoing emergency. And in fact the record reflected that there was a second shooter, although the officers were not aware of the

existence of the second shooter at the moment they returned to the scene with Goodloe.

Goodloe contends that the court unreasonably applied Supreme Court precedent when it concluded that Jones's statements were not testimonial. But the "unreasonable application" standard is a rigorous one:

> Under § 2254(d), a *habeas* court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.

Harrington v. Richter, 562 U.S. 86, 102 (2011). The Court has noted that this standard is difficult to meet and was meant to be so:

> It preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no further. Section 2254(d) reflects the view that *habeas corpus* is a "guard against extreme malfunctions in the state criminal justice systems," not a substitute for ordinary error correction through appeal.

Harrington, 562 U.S. at 102–03 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment)).

Goodloe has not met the standard for *habeas* relief here. The state court reasonably concluded that statements made to identify the perpetrator in the minutes following a shooting, with a manhunt

underway, were made to meet an ongoing emergency. Goodloe's position that the emergency passed as soon as he was handcuffed presumes that the police knew at that time that they had the right man and that the hunt for the shooter was over. But Goodloe only partly matched the description of the shooter. Although his name was Damon, he initially gave the officers another name. He was not armed, and although he was wearing a black hoodie, it was partly hidden under a coat.[2] Given these discrepancies, it was prudent for the police to confirm that they had the right suspect before stopping the search, and reasonable for the Illinois courts to decide that the questions posed and answers given were intended to meet an ongoing emergency in the minutes following the shooting. The Illinois court reasonably found that this was not a formal interrogation conducted to create a substitute for live testimony. Indeed, the officers could not have known at that time that they would need a substitute for Jones's live testimony because they did not know that his leg wound would soon lead to his death. Moreover, the appellate court's use of the existence of a second shooter (a fact not known by the officers at the time) in finding that the emergency was ongoing even after Goodloe was in custody is largely irrelevant to the question presented in this appeal: whether the state appellate court unreasonably applied *Crawford* and *Davis* when it concluded that the emergency was ongoing in the

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[2] Goodloe contends that because he was unarmed, he posed no further danger. We disagree. A shooter could stash the gun nearby and retrieve it. And in any case, the police officers recovered no gun from Goodloe, and that discrepancy (together with the slightly different clothing and the denial that his name was Damon) created doubt regarding his identity as the shooter, necessitating the show-up to verify that they had the right man.

minutes after the shooting when the officers did not know whether any armed offender was still in the area.

It might be fair to characterize the question of whether there was an ongoing emergency when the officers brought Goodloe to the ambulance in handcuffs as a close question, and reasonable jurists may even disagree with the state court's answer to that question. But a "state court's determination that a claim lacks merit precludes federal *habeas* relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington*, 562 U.S. at 101 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Because fairminded jurists could disagree on the correctness of the state court's determination, the district court correctly held that *habeas* relief is precluded here.

Goodloe also contends that the state courts unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984), in finding that his trial counsel was not ineffective. According to Goodloe, counsel was ineffective because he failed to investigate three witnesses who could have provided an innocent explanation for his presence near the scene of the crime on the night in question. In particular, he asserts that counsel should have interviewed and presented testimony from his friend, Maceo Lee; his girlfriend, Shana Young; and his uncle, Algeron McKinley. According to Lee's 2010 affidavit, Lee would have testified that he was with Goodloe in the early morning hours of December 24, 2002. From midnight to approximately 1:30 a.m., Goodloe, Lee and a man named Trell were drinking in Goodloe's car at 48th Street and Prairie to celebrate Trell's birthday. After Goodloe dropped Trell off at his home,

Lee and Goodloe headed south so that Goodloe could meet his girlfriend, Shana, at 2:00 a.m. when she got off work at 114th Street and Calumet Avenue. Goodloe's car began acting up as they drove, so he told Lee that he intended to park the car and walk to meet Shana. Goodloe then dropped Lee off at 113th and Forest Street.

Shana Young provided in her 2010 affidavit that she would have testified that, on December 24, 2002, she was supposed to get off work at 1:00 a.m., go home to her aunt's house at 114th Street and Calumet Avenue by 2:00 a.m., and then meet Goodloe there. She averred that she called Goodloe throughout the previous day to make sure he would be at her aunt's house on time to pick her up. After arriving home, she waited thirty minutes before calling Goodloe's cellphone, only to go into his voicemail. Goodloe then called her back a few minutes later and told her that he was at the police station after being stopped on his way to meet her.

Finally, Goodloe was unable to obtain an affidavit from his uncle, Algeron McKinley, who had apparently moved from the area, so Goodloe filed an affidavit stating what McKinley's testimony would be if he had been called. According to Goodloe, McKinley would have testified that between 1:45 a.m. and 2:15 a.m. on December 24, 2002, he was at his home at 114th Street and Indiana Avenue cooking for the holidays when Damon came into the house and went into the washroom. McKinley would have testified that when Damon came out of the washroom, he asked McKinley if Shana had called. Damon then left and walked east towards Calumet Avenue to meet Shana.

The State argues that Goodloe procedurally defaulted this claim as it relates to Lee and McKinley

by failing to raise it through one complete round of state court review. The State similarly contends that Goodloe procedurally defaulted the claim as to Young by waiving it. The district court rejected the State's claim of procedural default, found both claims preserved, and then rejected them on the merits, finding that the state courts reasonably concluded that Goodloe was not prejudiced by his counsel's failure to investigate or call these three witnesses.

We agree with the district court that the claims were not procedurally defaulted. The State argues that the claims related to Lee and McKinley were defaulted because Goodloe did not raise them through a complete round of state-court review on direct appeal, instead attempting to bring them through a complete round of post-conviction review, where the Illinois Appellate Court held that they were barred by *res judicata*. The State also argues that the claim pertaining to Young was procedurally defaulted because the Illinois Appellate Court found that it had been waived. But in both instances, the Illinois Appellate Court, in post-conviction proceedings, ruled on the merits of the claim in addition to citing these state procedural obstacles, and the state appellate court decision lacked any plain statement that the court was relying on a state-law ground. As the Supreme Court recently reiterated in *McGirt v. Oklahoma*, when the state court "opinion 'fairly appears to rest primarily on federal law or to be interwoven with federal law' and lacks any 'plain statement' that it was relying on a state-law ground, we have jurisdiction to consider the federal-law question presented to us." 140 S.Ct. 2452, 2479 n.15 (2020) (quoting *Michigan v. Long*, 463 U.S. 1032, 1040–41, 1044 (1983)). *See also Harris v. Reed*, 489 U.S. 255, 263 (1989) ("a procedural default does not

bar consideration of a federal claim on either direct or *habeas* review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar.") (internal quotation marks omitted). At no point in the state appellate court opinion in the post-conviction proceedings did the court "clearly and expressly state[]" that it was resting its decision on a state procedural bar. The state appellate court instead addressed the claim of ineffective assistance with regard to these three witnesses both on the merits and on state procedural grounds, without ever indicating that it intended to rest its decision on a state procedural bar, and we may therefore treat the claim as preserved for *habeas* review on the merits.

On the merits, the state appellate court rejected Goodloe's claims of ineffective assistance as related to Lee and McKinley because neither man's affidavit provided an alibi for Goodloe and in fact their testimony might have been damaging to Goodloe's theory of the case.[3] Because Goodloe could not point to any favorable testimony from either Lee or McKinley, the appellate court concluded that counsel was not ineffective for failing to investigate or call them, essentially finding that Goodloe was not prejudiced by his counsel's failure. As for Young, the court similarly concluded that because she was not in the area with Goodloe at the time of the shooting, she could not have provided an alibi, could not have contributed to Goodloe's theory of the case, and could not have provided any exculpatory testimony. The

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[3] Counsel testified in part that the police report contained information about Lee's membership in a gang, and he did not want Lee possibly testifying about being in the same gang as Goodloe.

court concluded that counsel was therefore not ineffective for failing to call her, again essentially finding that Goodloe was not prejudiced by the failure to investigate or call this witness. Goodloe complains that the state court's conclusion was unreasonable because the evidence against him was slim, and these witnesses could have provided an innocent explanation for his presence near the shooting. He asserts that their testimony would also have buttressed Loggins's "unequivocal testimony that he did not see Goodloe at the scene and did not believe Goodloe was one of the shooters."[4] He also points out that the jury declined to find that he personally fired a gun. Finally, he complains that the state court wrongly limited the value of these witnesses to whether they could provide an alibi for him.

A fair reading of the Illinois appellate court's opinion demonstrates that the court did not limit the value of these three potential witnesses to alibi testimony, as Goodloe claims. But even if we were to find that trial counsel's performance was deficient, an assessment we need not make in this case, we cannot conclude that the state court unreasonably applied *Strickland* when it determined that Goodloe was not

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[4] Loggins's testimony was far less favorable than Goodloe portrays. Goodloe ignores Loggins's admission that he could not see the faces of the two men in black hoodies. Although he also testified that he knew Goodloe and did not see him that night, because he could not see the faces of the two men in black hoodies, his testimony does little to support Goodloe's claim that Loggins would verify that he was not present at the shooting. Moreover, Loggins did not testify, as Goodloe claims, that he "did not believe that Goodloe was one of the shooters." Instead, when asked how he replied to police questions regarding whether Goodloe was involved in the shooting, he testified that he told the police officers, "Not that I know of, no."

prejudiced by the failure to call these witnesses. *Strickland*, 466 U.S. at 692 (any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution). The evidence against Goodloe was actually quite strong. The victim named him, described an article of clothing he was wearing when he was apprehended, and confirmed his identity to police officers, all within a matter of minutes after the shooting. Not only was Goodloe found a few blocks from the scene shortly after the shooting, he gave a false name at first and forensic tests demonstrated that he had either recently fired a gun or had been near a gun when it was fired. Finally, a disinterested witness, a woman who knew him from the neighborhood, testified to his presence at the scene at the time of the shooting. She also testified that she had signed an affidavit denying that Goodloe was at the scene only after she had been threatened and shot at. So reluctant was she to testify that she had been taken into custody to assure her appearance at trial.

Weighed against this relatively strong evidence, the testimony of these witnesses that Goodloe had an innocent reason for being near the scene of the shooting was unlikely to create a reasonable probability that the result of the proceeding would have been different had the jury considered their accounts.[5] *Strickland*, 466 U.S. at 694. Under *Strickland*:

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[5] In addition to the fact that none of these witnesses were with Goodloe at the time of the shooting, we note that the record already contained an innocent reason for Goodloe to be present at 114th Street and Prairie Avenue. The identification that he provided to Officer Bialota showed a home address at 11514

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694. The state appellate court reasonably applied *Strickland* when it found that counsel's failure to present the testimony of these three witnesses did not meet this standard. *Harrington*, 562 U.S. at 104 (it is not enough to show that the errors had some conceivable effect on the outcome of the proceeding; counsel's errors must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable). The district court therefore correctly denied Goodloe's petition for a writ of *habeas corpus*.

AFFIRMED.

South Indiana, just a few blocks away. He was not out of place in the neighborhood.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAMON GOODLOE, Petitioner, v. STEPHANIE DORETHY, Warden, Hill Correctional Center,[1] Respondent.	)	No. 13 C 2650 Judge Sara L. Ellis August 14, 2018

OPINION AND ORDER

Petitioner Damon Goodloe, currently incarcerated at Hill Correctional Center, is serving a thirty-year sentence for first degree murder. Goodloe has petitioned this Court for a writ of habeas corpus under 28 U.S.C. § 2254. Both of Goodloe's jury instruction claims are procedurally defaulted. Although the Court reaches his Confrontation Clause and ineffective assistance of counsel claims on the merits, Goodloe has not shown that the state court's decisions on these issues were contrary to or an unreasonable application of clearly established federal law. Thus, the Court denies Goodloe's petition.

[1] Stephanie Dorethy is presently the warden at Hill Correctional Center and the Court substitutes her as the proper Respondent in this matter. *See* Rule 2(a) of the Rules Governing Section 2254 Cases in the United States District Courts.

BACKGROUND

The Court will presume that the state court's factual determinations are correct for the purposes of habeas review, as Goodloe has not pointed to clear and convincing evidence to the contrary. *See* 28 U.S.C. § 2254(e)(1); *Todd v. Schomig*, 283 F.3d 842, 846 (7th Cir. 2002). The Court thus adopts the state court's recitation of the facts and begins by summarizing the facts relevant to Goodloe's petition.

I. Goodloe's Trial and Conviction

In the early morning of December 24, 2002, Chicago Police Officers Joseph Hodges and Jason Venegas responded to a "shots fired" call at 113th Street and Edbrooke. When the officers arrived, they found the victim, Pierre Jones, in the backyard. Officer Hodges called an ambulance as two additional officers, Ronald Bialota and Michael Martinez, arrived at the scene. Officer Bialota asked Jones who shot him. Jones replied, "Damon shot me." Ex. A at 2.[2] Jones also told the officers that Damon "was wearing a black hoodie." *Id*.

Officers Hodges and Venegas remained with Jones while Officers Bialota and Martinez left to search for the offender. After about a minute and a half, Officer Bialota testified that they saw Goodloe coming out of an alley near 114th Street and Prairie Avenue. The officers stopped Goodloe—whose black hoodie was visible under his jacket—and checked him for a weapon and identification. The officers did not find a weapon, but his identification card revealed that his name was Damon Goodloe.

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[2] All references are to exhibits filed by Respondent as the state court record at Doc. 16.

Officers Bialota and Martinez detained Goodloe and brought him back to the shooting scene, where paramedics had begun treating Jones in an ambulance. Officer Bialota asked Jones, "is this the individual that shot you?" *Id*. at 3. Jones said, "[t]hat's him, he's the one that shot me." *Id*. Officer Martinez asked Jones whether he was a hundred percent sure the person they brought was the one who shot him. Jones confirmed, "[y]eah, that's the guy." *Id*. at 5. The police report, however, does not include Officer Martinez asking this question.

Officers arrested Goodloe and the State charged him with six counts of first degree murder and one count of aggravated battery with a firearm. Before trial, Goodloe filed a motion to quash his arrest and suppress evidence, which the trial court denied after a hearing. The court found that the officers' initial stop and pat-down of Goodloe was based on reasonable suspicion, and that the officers had probable cause to arrest after they learned Goodloe's name.

Goodloe renewed his arguments in a motion *in limine* to exclude Jones' initial statements to the police and his later positive identification of Goodloe as the shooter. Goodloe argued the statements were hearsay, the dying declaration exception did not apply, and that permitting the out-of-court statements would violate his constitutional confrontation rights. The trial court denied the motion, finding that Jones' statements, although not dying declarations, were admissible under the excited utterance exception to the hearsay rule. The court also found that Jones' statements were not testimonial, and thus Goodloe's confrontation rights would not be violated by their admission into evidence.

At trial, numerous witnesses, including Officer Hodges, testified as to the circumstances surrounding Goodloe's arrest and Jones' statements. Further, the parties stipulated that Officer Samuel Jones would testify that he spoke with someone who identified herself as Danielle Lovett, and that she told him she observed two black males dressed in dark clothing appear from a vacant lot located at 11311 South Edbrooke and start shooting across the street. The parties further stipulated that Officer Jones would testify that Danielle Lovett never identified Goodloe as one of those individuals.

Michelle Lovett testified that she saw Goodloe around 1:00 a.m. on December 24, 2002 with another man—both wearing black hoodies—coming toward the vehicle in which she was sitting on South Edbrooke Avenue. She then heard at least ten gunshots but ducked before she could see Goodloe's hands, whether he had a gun, or whether he shot anyone. Lovett called 911 to report the shooting. She later identified Goodloe in a lineup at the police station as the person she had seen walking toward her friend's car. She acknowledged it was dark but noted that the streetlights were on. At Goodloe's cousin's request, Lovett later signed an affidavit stating that she did not see Goodloe at any time in the early morning hours of December 24, 2002. She testified, however, that she signed the affidavit without reading it and "out of fear of [her] life." Ex. A at 7 (alteration in original). She further testified that she had been shot at and threatened, but that upon signing the affidavit, she was left alone. Finally, Lovett acknowledged that her sister's name was Danielle but testified that she did not remember ever telling police that her name was Danielle.

The forensic investigator assigned to the case testified that he administered a gunshot residue test to Goodloe at 5:15 a.m. on December 24, 2002. A trace evidence analysis expert for the Illinois State Police analyzed the results and identified four unique gunshot residue particles and a significant number of consistent particles from the sample taken from the back of Goodloe's right hand. The expert stated that Illinois State Police require three unique particles for test results to be considered positive for gunshot residue. He acknowledged that being in an environment where a weapon is discharged could produce a positive test result and that particles could be transferred by contact. Based on Goodloe's test results, the expert testified that Goodloe either fired the gun, contacted an item with gunshot residue on it, or his right hand was near a weapon when it was discharged. Goodloe did not testify or present any evidence in his defense.

Over Goodloe's objection, the State tendered and the court gave the following jury instruction on accountability:

> A person is legally responsible for the conduct of another person when, either before or during the commission of an offense, and with the intent to promote or facilitate the commission of an offense, he knowingly solicits, aids, abets, agrees to aid, or attempts to aid the other person in the planning or commission of an offense.

Ex. A at 9–10. The jury also received instructions on the definition and elements of first degree murder, which provided that Goodloe was responsible for first degree murder if his intentional or knowing act caused the death of the victim or another. On June

21, 2006, the jury found Goodloe guilty of first degree murder but did not find that he personally discharged a firearm during the commission of that offense.

The trial court sentenced Goodloe to thirty years in prison. During his sentencing hearing, Goodloe made a verbal motion for a new trial based on ineffectiveness of counsel, claiming his private counsel had failed to communicate with him. The trial court allowed Goodloe's counsel to withdraw and appointed a public defender to further represent Goodloe. The court then held a hearing on Goodloe's motion, eliciting testimony from Goodloe and his former counsel. The trial court denied Goodloe's motion for a new trial, finding that counsel's decisions at trial related to investigating witnesses and impeaching Michelle Lovett constituted trial strategy and that Goodloe had not shown that counsel's decisions were unreasonable or prejudicial.

Goodloe also filed a post-trial motion for a new trial, in which he argued that because the jury did not find that he personally discharged the gun, it could only have found him guilty based on the accountability theory, on which he claimed there was no evidence. The trial court denied Goodloe's motion, commenting that the jury performed an act of "mercy" on Goodloe by acquitting him of personally discharging the gun. Ex. A at 12.

II. Direct Appeal

With the assistance of counsel, Goodloe appealed to the Illinois Appellate Court. He raised the following claims: (1) that the admission of the victim's out-of-court statements violated his rights under the Confrontation Clause, (2) that the trial court erred when it instructed the jury on accountability and

transferred intent, (3) that his trial counsel was ineffective for failing to properly impeach Michelle Lovett and call Officer Jones as a witness, and (4) that the Illinois Appellate Court should vacate various fees and fines. On December 31, 2009, the Illinois Appellate Court affirmed Goodloe's conviction but vacated the fees that the trial court had assessed.

Goodloe then filed a petition for leave to appeal ("PLA") with the Illinois Supreme Court. In the PLA, Goodloe argued that the trial court erred in admitting the victim's out-of-court statements in violation of his confrontation rights and that his trial counsel had been ineffective in impeaching Michelle Lovett. The Illinois Supreme Court denied the PLA on March 24, 2010. Goodloe did not file a petition for a writ of certiorari with the United States Supreme Court.

III. State Post-Conviction Proceedings

Goodloe filed a timely *pro se* post-conviction petition pursuant to 725 Ill. Comp. Stat. § 5/122-1 on December 10, 2010.[3] He argued among other things that his trial counsel was ineffective for failing to investigate and call three witnesses—Maceo Lee, Shana Young, and Algeron McKinley—and for failing to adequately impeach Michelle Lovett. The trial court summarily dismissed the petition on February 10, 2011 without an evidentiary hearing.

Goodloe appealed to the Illinois Appellate Court. With the assistance of counsel, he argued that the trial court erred in dismissing his petition without an evidentiary hearing because he presented an arguable claim that trial counsel was ineffective for failing to investigate and call Lee, Young, and McKinley. The

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[3] The petition was mailed on November 24, 2010.

Illinois Appellate Court affirmed the dismissal of Goodloe's petition on December 21, 2012, finding that the issue was barred by *res judicata* and waiver.

Proceeding again *pro se*, Goodloe filed a PLA in which he argued that his trial counsel was ineffective for failing to investigate and call Lee, Young, and McKinley. The Illinois Supreme Court denied the PLA on March 27, 2013. Goodloe did not file a petition for a writ of certiorari with the United States Supreme Court.

In addition to pursuing traditional post-conviction relief, Goodloe also filed a motion for leave to file a petition for writ of habeas corpus with the Illinois Supreme Court on May 10, 2012, arguing that the jury had been improperly instructed on accountability and transferred intent. The Illinois Supreme Court denied Goodloe's motion on September 21, 2012.

LEGAL STANDARD

A habeas petitioner is entitled to a writ of habeas corpus if the challenged state court decision is either "contrary to" or "an unreasonable application of" clearly established federal law as determined by the United States Supreme Court or if the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). A state court decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law" or "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [the Court]." *Williams v. Taylor*, 529 U.S. 362, 404–05, 120

S. Ct. 1495, 146 L. Ed. 2d 389 (2000). An "unreasonable application" of federal law occurs if the state court correctly identified the legal rule but unreasonably applied the controlling law to the facts of the case. See *id*. at 407. Whether a state court's application of Supreme Court precedent is unreasonable is judged by an objective standard. *Id*. at 409; *Winston v. Boatwright*, 649 F.3d 618, 624 (7th Cir. 2011).

ANALYSIS

Goodloe asserts five grounds for relief: (1) that the trial court erred when it instructed the jury on the theory of accountability, (2) that the trial court erred when it instructed the jury on transferred intent, (3) that the trial court's admission of the victim's out-of-court statements violated Goodloe's rights under the Confrontation Clause, (4) that trial counsel was ineffective for failing to adequately impeach Michelle Lovett, and (5) that trial counsel was ineffective for failing to investigate and call Lee, Young, and McKinley. Respondent argues that claims 1, 2, and 5 are procedurally defaulted or not cognizable on federal habeas review, and that claims 3 and 4 are meritless.

I. Procedural Default

A petitioner must fairly present his claims to all levels of the Illinois courts to avoid procedural default. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 848, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999). To be "fairly presented," a claim must be brought forth on one complete round of state court review, either on direct appeal or in post-conviction proceedings. *Lewis v. Sternes*, 390 F.3d 1019, 1025 (7th Cir. 2004). In Illinois, this means appeals up to and including the

filing of a PLA to the Illinois Supreme Court. *O'Sullivan*, 526 U.S. at 845–46; *Duncan v. Hathaway*, 740 F. Supp. 2d 940, 945 (N.D. Ill. 2010). When a petitioner has failed to present his federal claim to the state courts and the opportunity to raise that claim has subsequently passed, the petitioner has procedurally defaulted the claim and it is not available for federal habeas review. *Gonzales v. Mize*, 565 F.3d 373, 380 (7th Cir. 2009).

A petitioner may nonetheless pursue a procedurally defaulted claim if he can establish cause for the default and actual prejudice as a result of the alleged violation of federal law or can demonstrate that the court's failure to consider the claim will result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991); *Johnson v. Loftus*, 518 F.3d 453, 455–56 (7th Cir. 2008). Cause exists where "some objective factor external to the defense impeded [the petitioner's] efforts to comply with the State's procedural rule." *Strickler v. Greene*, 527 U.S. 263, 283 n.24, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999) (citation omitted) (internal quotation marks omitted). Prejudice exists where the petitioner shows that the violation of his federal rights "worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Lewis*, 390 F.3d at 1026 (quoting *United States v. Frady*, 456 U.S. 152, 170, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982)). The fundamental miscarriage of justice exception is "limited to situations where the constitutional violation has probably resulted in a conviction of one who is actually innocent." *Dellinger v. Bowen*, 301 F.3d 758, 767 (7th Cir. 2002). This requires new, reliable evidence of the petitioner's innocence in light of which "no juror, acting

reasonably, would have voted to find him guilty beyond a reasonable doubt." *Woods v. Schwartz*, 589 F.3d 368, 377 (7th Cir. 2009) (quoting Schlup v. Delo, 513 U.S. 298, 329, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)).

A. Jury Instruction Claims (Claims 1 and 2)

Goodloe did not present claims 1 and 2 through one complete round of state court review. Goodloe objected to the accountability instruction at trial and argued on his direct appeal that the trial court should not have instructed the jury on accountability or transferred intent. He did not include those claims in his direct appeal PLA, however. Similarly, he did not include the jury instruction claims in his post-conviction petition. Goodloe did, however, include his claims regarding the jury instructions in a motion seeking leave to file a writ of habeas corpus with the Illinois Supreme Court.

Goodloe's filings on his jury instruction claims on his direct appeal are not sufficient to avoid procedural default because he never raised the claims in his PLA. *See Guest v. McCann*, 474 F.3d 926, 930 (7th Cir. 2007) (to avoid procedural default by way of direct appeal, "a petitioner must have directly appealed to the Illinois Appellate Court and presented the claim in a petition for leave to appeal to the Illinois Supreme Court"). Although Goodloe argues he met the fair presentment requirement by seeking leave to file a writ of habeas corpus with the Illinois Supreme Court, such a request does not satisfy the fair presentment requirement. *See United States ex rel. Keller v. McCann*, 553 F. Supp. 2d 1002, 1013 (N.D. Ill 2008) ("A habeas petitioner cannot exhaust a claim by raising it for the first time in a request for discretionary review with the State's highest court.");

United States ex rel. Walton v. Barnett, No. 2001 C 6023, 2001 WL 1519421, at *6 (N.D. Ill. Nov. 29, 2001) ("Presenting federal claims for the first time in a discretionary petition addressed to the state's highest court will not satisfy the fair presentment requirement for federal habeas purposes, and results in a procedural default."). Moreover, a state habeas petition is limited to jurisdictional challenges and does not include the due process issues Goodloe was seeking to raise. *See United States ex rel. Shelton v. Cook County Jail Exec. Dir.*, No. 12 C 4664, 2012 WL 2374709, at *4 (N.D. Ill. June 20, 2012) ("[C]onstitutional claims cannot be brought in an Illinois habeas corpus proceeding[.]"); *Hughes v. Kiley*, 367 N.E.2d 700, 702–03, 67 Ill. 2d 261, 10 Ill. Dec. 247 (1977) (alleged denial of due process could not be reviewed by way of petition for writ of habeas corpus). Thus, Goodloe's filing of a motion for leave to file a writ of habeas corpus before the Illinois Supreme Court does not meet the fair presentment requirement and he has procedurally defaulted the jury instruction claims.[4]

B. Ineffective Assistance of Counsel for Failure to Investigate and Call Witnesses (Claim 5)

Goodloe argues that his trial counsel was ineffective for failing to investigate and call three defense witnesses—Lee, Young, and McKinley—who would have provided an innocent explanation for his presence blocks away from the scene of the crime.

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[4] Because Goodloe procedurally defaulted the jury instruction claims, the Court need not address Respondent's alternative argument that these claims raise no federal constitutional violation.

Although Respondent argues that Goodloe did not present his claim with respect to Lee and McKinley to all three levels of the Illinois courts because the Illinois Appellate Court on post-conviction review found that the claim was barred by *res judicata*, this does not change the fact that Goodloe included this claim in his post-conviction petition, appeal, and PLA. *See Patrasso v. Nelson*, 121 F.3d 297, 301 (7th Cir. 1997) ("*Res judicata*, however, is not a bar to consideration of claims in a federal habeas action. '[F]ederal review is precluded only by procedural forfeitures, not by *res judicata* concerns.'" (alteration in original) (citations omitted)). Thus, the Court will proceed to analyze Goodloe's claim on the merits as to Lee and McKinley.

Respondent further argues that Goodloe has procedurally defaulted his claim with respect to Young because the state court's decision on that claim rests on an independent and adequate state ground. A claim is procedurally defaulted if the state court clearly and expressly decided it on a state procedural ground. *Lee v. Foster*, 750 F.3d 687, 693 (7th Cir. 2014) ("[W]e will not entertain questions of federal law in a habeas petition when the state procedural ground relied upon in the state court 'is independent of the federal question and adequate to support the judgment.'" (quoting *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991))). The Illinois Appellate Court, in reviewing the dismissal of Goodloe's post conviction petition, found that Goodloe waived his claim of trial counsel's ineffectiveness for failure to investigate and call Young because he could have raised it during post-trial proceedings or on direct appeal but did not. Waiver is an adequate state ground for purposes of barring federal habeas review. *See Richardson v.*

Lemke, 745 F.3d 258, 271–72 (7th Cir. 2014) (Illinois waiver rule is an adequate state law ground). Here, however, the Illinois Appellate Court continued to address the merits of Goodloe's claim:

> Additionally, defendant's allegations in the post-conviction petition and the statements in his girlfriend's affidavit attached to his petition indicate that she was not with defendant when he was in the area of the shooting, thus she would not have been an alibi witness. It follows then that counsel was not ineffective for failing to call a witness who could not contribute to the defense theory of the case and whose testimony was not exculpatory.

Ex. G at 7–8.

"[I]n order to foreclose review on habeas, the state court must actually state in plain language that it is basing its decision on the state procedural default and that other grounds are reached only in the alternative." *Jenkins v. Nelson*, 157 F.3d 485, 491 (7th Cir. 1998). The Illinois Appellate Court arguably based its decision on both procedural and substantive grounds, as there was no explicit language that its discussion of the substance of Goodloe's ineffective assistance of counsel claim was merely in the alternative. *See* Ex. G at 7 (using "additionally" to introduce its substantive discussion of Goodloe's claim). Because the language of the opinion is not clear, the Court will address the merits of Goodloe's claim. *Jenkins*, 157 F.3d at 491 (reaching merits of claim where there was no "clear statement of intent by the state court" to rely on procedural default and to reach the merits of the federal claim only in the alternative); *cf. Romero v. Battles*, 234 F.3d 1273

(Table), 2000 WL 1206691, at *3 (7th Cir. 2000) (claim procedurally defaulted where state court prefaced analysis by stating "even if we considered the merits"); *Stevenson v. Gaetz*, No. 11 C 4394, 2013 WL 1385557, at *3 (N.D. Ill. Apr. 3, 2013) (claim procedurally defaulted where state court prefaced discussion of merits by stating "assum[ing], arguendo, that defendant had not [forfeited the claim]" (second alteration in original)); *United States ex rel. Wyatt v. Atchison*, 920 F. Supp. 2d 894, 898–99 (N.D. Ill. 2013) (habeas review precluded where state court addressed merits with preface "[w]aiver notwithstanding" (alteration in original)).

In his reply, Goodloe also contends that his post-trial counsel was ineffective for failing to call Lee, Young, and McKinley at the hearing on his motion for a new trial. Goodloe did not raise this claim in his § 2254 petition, which only alleged that his trial counsel was ineffective for not calling these witnesses. Thus, this Court could determine that Goodloe has waived the claim with respect to post-trial counsel. *See Gonzales v. Mize*, 565 F.3d 373, 382 (7th Cir. 2009); *White v. United States*, No. 12 C 50272, 2013 WL 1499182, at *3 n.1 (N.D. Ill. Apr. 11, 2013). Putting aside waiver, the Court finds that Goodloe has procedurally defaulted this claim because Goodloe did not raise the claim in his post-conviction petition in the state trial court, raising it for the first time in appealing the dismissal of his post-conviction petition and then in his PLA. *See* Ex. G at 8 (finding that Goodloe's claim that his post-trial counsel was ineffective was "waived because the issue was not raised in his post-conviction petition"). Because Goodloe did not raise that claim on one complete round of state court review, he has procedurally defaulted it. *Lewis*, 390 F.3d at 1025.

C. Exceptions to Procedural Default

Goodloe can nonetheless proceed on his procedurally defaulted claims if he can establish cause and prejudice for the default or that the Court's failure to consider the claim would result in a fundamental miscarriage of justice. *Johnson*, 518 F.3d at 455–56. Goodloe does not present any argument for why the Court should excuse default of his ineffective assistance of post-trial counsel claim, and thus the Court will not consider that claim further. *See Crockett v. Hulick*, 542 F.3d 1183, 1193 (7th Cir. 2008). In reply to Respondent's answer, Goodloe argues that the ineffectiveness of his appellate counsel resulted in the failure to raise his jury instruction claims in his direct appeal PLA. "Ineffective assistance of counsel . . . is cause for a procedural default." *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986). However, Goodloe's claim of ineffective assistance of counsel needs to have been "presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." *Id*. at 489; *Toliver v. Pfister*, No. 13 C 8679, 2014 WL 4245788, at *4 (N.D. Ill. Aug. 27, 2014). Goodloe did not argue in his post-conviction proceedings that his appellate counsel was ineffective for failing to raise the jury instruction issue in his direct review PLA. Thus, he has procedurally defaulted that claim as well. *See Toliver*, 2014 WL 4245788, at *4. Nor does Goodloe provide any basis for the Court to find cause or prejudice to excuse that procedural default. *See Edwards v. Carpenter*, 529 U.S. 446, 453, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000) (ineffective assistance asserted as cause for procedural default may itself be excused from procedural default if cause and prejudice

is shown). Thus, the Court cannot consider Goodloe's defaulted jury instruction claims.

II. Non-Defaulted Claims

A. Admission of Jones' Out-of-Court Statements (Claim 3)

Goodloe argues that Jones' statements identifying Goodloe as the shooter were testimonial in nature, and thus the Sixth Amendment barred their admission under the Supreme Court's decisions in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), and *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). Respondent argues that the Illinois Appellate Court's decision on the merits of this claim was not contrary to nor an unreasonable application of clearly established federal law.

The Confrontation Clause of the Sixth Amendment provides a criminal defendant with the right to confront adverse witnesses. U.S. Const. amend. VI. The Confrontation Clause bars the admission of all testimonial statements against the defendant unless the declarant is both unavailable at trial and the defendant had a prior opportunity to cross-examine the declarant. *Crawford*, 541 U.S. at 68. But the Confrontation Clause does not cover statements that are not considered testimonial. *Id*. Because it is undisputed that Jones was unavailable at trial and that Goodloe did not have a prior opportunity to cross-examine Jones, the critical issue in determining whether the admission of Jones' statements violated the Confrontation Clause is whether those statements were testimonial in nature.

Statements made in the course of police interrogations are generally considered testimonial

"when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id*. at 52; *Davis*, 547 U.S. at 822; *see also Crawford*, 541 U.S. at 52. There are exceptions, however: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Davis*, 547 U.S. at 822.

After examining the circumstances surrounding Jones' statements and surveying the relevant law, including *Crawford* and *Davis*, the Illinois Appellate Court concluded that Jones' statements were not testimonial. Goodloe challenges this conclusion, but he has not demonstrated that the state court's rejection of his Confrontation Clause claim was contrary to or an unreasonable application of clearly established federal law under *Crawford* or *Davis*. The Illinois Appellate Court carefully considered the Confrontation Clause issue and correctly identified *Crawford* and *Davis* (and its companion case *Hammon v. Indiana*, which was decided in the same opinion as *Davis*) as the relevant Supreme Court cases setting forth the applicable legal principles. The Illinois Appellate Court then compared the facts of those cases to Jones' statements. The Supreme Court in *Davis* concluded that a victim's statements to a 911 operator were not testimonial because they were made during an ongoing emergency where the victim was seeking "help against [a] bona fide physical threat." 547 U.S. at 827–28. In *Hammon*, on the other hand, the Supreme Court found that the declarant's statements were testimonial because

police officers arrived at the scene and took those statements only after the reported domestic disturbance had ended, when there was no ongoing emergency and both persons involved in the domestic disturbance were under police control. *Id*. at 829–30. The Illinois Appellate Court compared the statements in *Davis* and *Hammon* to those made by Jones. As in *Davis*, the court found that Jones made his statements during an ongoing emergency, with police "concerned that an armed criminal suspect was at large nearby." Ex. A at 24. The court distinguished *Hammon*, where the statements were made in response to formal questioning after the emergency was over, *Davis*, 547 U.S. at 830. Unlike in *Hammon*, Jones' statements were given informally to police officers before and after those officers conducted a search for an armed suspect who remained a threat to the wider community. Finally, the Illinois Appellate Court concluded that Jones' second statement did not become testimonial just because Goodloe had been apprehended, as the emergency continued to exist at that time with the police unsure that they had the right person and with another shooter still at large.

Although Goodloe quibbles with the Illinois Appellate Court's interpretation of *Davis* and *Hammon*, he does not cite any cases that reach the opposite result on materially indistinguishable facts nor has he demonstrated that the court's application of *Davis* and *Hammon* was "objectively unreasonable." Indeed, subsequent Supreme Court precedent undermines any such argument. *See Michigan v. Bryant*, 562 U.S. 344, 131 S. Ct. 1143, 179

L. Ed. 2d 93 (2011).[5] In Bryant, Michigan police officers responded to an emergency call and arrived at a gas station parking lot to find a man lying on the ground suffering from a gunshot wound. *Id*. at 349. The officers asked the victim "what had happened, who had shot him, and where the shooting had occurred." *Id*. (citation omitted) (internal quotation marks omitted). He stated that "Rick," the defendant, shot him, and gave further details regarding the shooting. *Id*. The victim died within hours. *Id*. Although the police searched for the defendant at the time, they only located defendant a year later in a different state. *Id*. at 349–50, 374. At trial, the police officers testified to the victim's statements in the gas station parking lot. *Id*. at 350. The Supreme Court considered the facts surrounding the victim's statements to determine whether they were made in the context of an ongoing emergency. *Id*. at 374–76. The Supreme Court reiterated that "the ultimate inquiry is whether the 'primary purpose of the interrogation [was] to enable police assistance to meet [the] ongoing emergency.'" *Id*. at 374 (quoting Davis, 547 U.S. at 822). It found that the primary purpose of the questioning in *Bryant* was indeed to help police meet an ongoing emergency, as at the time of the questioning, the defendant's motive and location were unknown and the victim was severely injured. *Id*. at 375–77. Thus, the victim's statements were not considered testimonial. *Id*. at 378.

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[5] Although decided after the Illinois Appellate Court's decision, *Bryant* did not establish new law but only "elucidated" the standards set forth by the Supreme Court in *Crawford* and *Davis*. See *Alvarez v. Ryan*, No. CV 11-98-TUC-FRZ JJM, 2014 WL 1152886, at *15 (D. Ariz. Mar. 21, 2014).

In finding Jones' statements nontestimonial and their admission in Goodloe's trial proper, the Illinois Appellate Court applied virtually the exact analysis as in Bryant. According to the Illinois Appellate Court:

> The victim was interrogated in a [*sic*] emergency setting when police responded to a call of "shots fired" and found the victim on the ground with a bullet wound and in obvious pain. The police were concerned that an armed criminal suspect was at large nearby. The purpose of the police questioning enabled police assistance to meet an ongoing emergency and protect the public from the armed shooter.
>
> . . . .
>
> . . . . We cannot say that the emergency had concluded because the police needed a description of the offender to protect the public.
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> . . .
>
> In addition, we cannot say that the subsequent questioning of the deceased victim at the ambulance was formal and testimonial. Here the emergency was ongoing because, according to the record, there were at least two shooters and the police had apprehended just one suspect. The police needed the victim to identify the suspect to aid in ending the emergency. Even with the apprehension of one suspect, a second shooter remained at large keeping the emergency alive.

Ex. A at 24–25, 27 (citations omitted). Given the circumstances, it was reasonable for the Illinois Appellate Court to find that the primary purpose of the questioning was to enable police assistance to meet the ongoing emergency, making Jones' statements non-testimonial. *See Bryant*, 562 U.S. at 375–77. Thus, the Illinois Appellate Court's decision on the Confrontation Clause issue was not contrary to or an unreasonable application of clearly established federal law.

B. Ineffective Assistance of Trial Counsel for Failure to Adequately Impeach Michelle Lovett (Claim 4)

Goodloe also argues that his trial counsel was ineffective for failing to adequately impeach Michelle Lovett. Specifically, he contends that his trial counsel should have called Officer Jones instead of stipulating to his testimony and that trial counsel failed to lay an adequate foundation while cross-examining Lovett so as to allow for further impeachment on her prior failure to identify Goodloe as being present at the scene of the crime. The Illinois Appellate Court rejected this claim on direct appeal. Goodloe cannot show that the Illinois Appellate Court's decision on the merits regarding this claim was contrary to, or an unreasonable application of, clearly established federal law.

As the Illinois Appellate Court correctly identified, in order to establish constitutionally ineffective assistance of counsel, Goodloe must show (1) "that counsel's representation fell below an objective standard of reasonableness," and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v.*

Washington, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In considering the first prong, the Court indulges "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and may not let hindsight interfere with its review of counsel's decisions. *Id*. at 689. For the second prong, a "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Id*. at 694. This means a "substantial," not just "conceivable," likelihood of a different outcome in the case. *Cullen v. Pinholster*, 563 U.S. 170, 189, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011) (quoting *Richter*, 131 S. Ct. at 792). The Court need not address both prongs of the *Strickland* test if one provides the answer; that is, if the Court determines that the alleged deficiency did not prejudice Goodloe, it need not consider the first prong. *Ruhl v. Hardy*, 743 F.3d 1083, 1092 (7th Cir. 2014). In reviewing the Illinois Appellate Court's decision, the Court must apply a "'doubly deferential' standard of review that gives both the state court and the defense attorney the benefit of the doubt." *Burt v. Titlow*, 571 U.S. 12, 15, 134 S. Ct. 10, 13, 187 L. Ed. 2d 348 (2013) (quoting *Cullen*, 131 S. Ct. at 1403).

Goodloe has not shown that the Illinois Appellate Court was unreasonable in rejecting his claim and finding that he satisfied neither prong of the *Strickland* test. Goodloe argues that it was objectively unreasonable for his trial counsel to not call Officer Jones to the witness stand and to fail to lay an adequate foundation during the cross-examination of Michelle Lovett so as to impeach her with another report. The Illinois Appellate Court cited two Illinois Supreme Court cases for the proposition that the decision not to cross-examine or impeach a witness is generally "a matter of trial

strategy which will not support a claim of ineffective assistance of counsel." *People v. Pecoraro*, 677 N.E.2d 875, 891, 175 Ill. 2d 294, 222 Ill. Dec. 341 (1997); see Ex. A at 40 (citing *Pecoraro*, 677 N.E.2d at 890–91, and *People v. Franklin*, 656 N.E.2d 750, 759, 167 Ill. 2d 1, 212 Ill. Dec. 153 (1995)). The court concluded that the stipulation regarding Officer Jones' testimony that Lovett did not identify Goodloe to him by name established the extent of Officer Jones' testimony, making the additional value of calling Officer Jones minimal. The court also found counsel's failure to lay a foundation with Lovett so as to introduce additional police reports to discredit her placement of Goodloe at the scene was not objectively unreasonable because there was other evidence of Goodloe's presence at the scene. Thus, in the court's view, the decision not to further impeach Lovett with these reports was not problematic and did not prejudice Goodloe. The court found that the evidence was "so overwhelming" that even if counsel's actions were considered objectively unreasonable, the result of Goodloe's trial would not have been different. Ex. A at 42.

Given the circumstances surrounding Lovett's testimony, the fact that the stipulation did not have impeachment value, Jones' identification of Goodloe as the shooter, and other testimony that placed Goodloe at or near the scene of the crime, the Court finds that the Illinois Appellate Court did not unreasonably apply *Strickland* to Goodloe's ineffectiveness claim regarding counsel's alleged failure to adequately impeach Lovett. *See United States ex rel. Jones v. Harrington*, No. 13 C 3838, 2014 WL 859532, at *8–9 (N.D. Ill. Mar. 3, 2014) (appellate court decision was not unreasonable with respect to counsel's alleged failure to impeach a witness).

C. Ineffective Assistance of Counsel for Failure to Investigate and Call Witnesses (Claim 5)

Finally, the Court considers Goodloe's argument that his trial counsel was ineffective for failing to investigate and call Lee, Young, and McKinley. In addressing Goodloe's post-conviction petition, the Illinois Appellate Court found that, with respect to Lee and McKinley, the claim was barred by *res judicata* because the trial court had decided this claim on the merits during the post-trial hearing. Moreover, the court stated that "[t]rial counsel cannot be deemed ineffective for failing to investigate witnesses because the affidavits [Lee and McKinley submitted] do not provide an alibi for defendant and in fact, such testimony might have been damaging to defendant's theory of the case." Ex. G at 6–7. With respect to Young, in addition to finding the claim waived, the court found that Young was not an alibi witness and that therefore "counsel was not ineffective for failing to call a witness who could not contribute to the defense theory of the case and whose testimony was not exculpatory." Ex. G at 8.

The Court cannot find that the Illinois Appellate Court's conclusions were contrary to or an unreasonable application of clearly established federal law. The Illinois Appellate Court concluded that Goodloe cannot prove that he was prejudiced by the failure to call these witnesses, where their testimony was not exculpatory and could have been damaging. Goodloe has not established why the Illinois Appellate Court was wrong in finding that their testimony would not have been helpful to his case. And the Illinois Appellate Court's conclusion is bolstered by the facts of the case, where the victim

identified Goodloe as the shooter, not only by name but also in person, Goodloe was found with gunshot residue on his hands, and disinterested eyewitness testimony placed him at the scene of the crime. *See Strickland*, 466 U.S. at 696 ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."). This evidence distinguishes Goodloe's case from that in *Campbell v. Reardon*, a recent Seventh Circuit decision in which counsel was found ineffective for failing to investigate witnesses, for in that case there was no physical evidence linking the petitioner to the crime and the eyewitness testimony (much of it coming from biased witnesses) was weak. 780 F.3d 752, 768–70 (7th Cir. 2015). Thus, even if counsel's performance could have been better, the Court cannot find prejudice, particularly under the "doubly deferential" standard that must be applied here. See *Morales v. Johnson*, 659 F.3d 588, 600–02 (7th Cir. 2011) (although counsel's performance was deficient, it did not prejudice petitioner where the prosecution presented two eyewitnesses and their testimony was corroborated by physical evidence). Thus, Goodloe's challenge regarding his counsel's failure to investigate and call Lee, Young, and McKinley as witnesses fails.

CERTIFICATE OF APPEALABILITY

Pursuant to Rule 11(a) of the Rules Governing § 2254 Cases, the Court must issue or deny a certificate of appealability when it enters a final order adverse to a petitioner. A habeas petitioner is entitled to a certificate of appealability only if he can make a substantial showing of the denial of a constitutional right. *See Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (citing 28 U.S.C. § 2253(c)(2)). To make a substantial showing, the petitioner must show that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983)). The requirement of a certificate of appealability is a threshold issue and a determination of whether one should issue neither requires nor permits full consideration of the factual and legal merits of the claims. "The question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Miller-El*, 537 U.S. at 342.

For the reasons stated above, the Court finds that there can be no showing of a substantial constitutional question for appeal, as reasonable jurists would not find this Court's rulings debatable. *See Lavin v. Rednour*, 641 F.3d 830, 832 (7th Cir. 2011) (citing *Slack*, 529 U.S. at 484–85). Accordingly, the Court declines to issue a certificate of appealability.

CONCLUSION

For the foregoing reasons, Goodloe's petition for a writ of habeas corpus pursuant to 22 U.S.C. § 2254 is denied and the Court declines to certify any issues for appeal under 28 U.S.C. § 2253(c).

Goodloe is advised that this is a final decision ending his case in this Court. If Goodloe 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). Goodloe need not bring a motion to reconsider this Court's ruling to preserve his appellate rights. Motions for reconsideration serve a limited purpose and are only appropriate to bring to the Court's attention a manifest error of law or fact or newly discovered evidence. *Bordelon v. Chicago Sch. Reform Bd. of Trs.*, 233 F.3d 524, 529 (7th Cir. 2000). A motion for reconsideration "is not appropriately used to advance arguments or theories that could and should have been made before the district court rendered a judgment." *County of McHenry v. Ins. Co. of the W.*, 438 F.3d 813, 819 (7th Cir. 2006) (citation omitted) (internal quotation marks omitted); *see also Matter of Reese*, 91 F.3d 37, 39 (7th Cir. 1996) (a Rule 59(e) motion does not "enable a party to complete presenting his case after the court has ruled against him" (quoting *Frietsch v. Refco, Inc.*, 56 F.3d 825, 828 (7th Cir. 1995))).

However, if Goodloe wishes the Court to reconsider its judgment, 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 only if the motion is filed within 28 days of the entry of judgment. *See* Fed. R. App. P. 4(a)(4)(A)(vi).

Dated: August 14, 2018

/s/ Sara L. Ellis
SARA L. ELLIS
United States District Judge

APPENDIX C

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
Supreme Court Building
Springfield, Illinois 62701
(217) 782-2035

March 24, 2010

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

No. 109870 - People State of Illinois, respondent, v. Damon Goodloe, petitioner. Leave to appeal, Appellate Court, First District.

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

The mandate of this Court will issue to the Appellate Court on April 28, 2010.

APPENDIX D

FIFTH DIVISION
December 31, 2009

No. 1-07-1095

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DAMON GOODLOE, Defendant-Appellant.	Appeal from the Circuit Court of Cook County. No. 03 CR 2090 Honorable Dennis J. Porter, Judge Presiding.

ORDER

After a jury trial, defendant Damon Goodloe was convicted of first degree murder in the shooting death of Pierre Jones. Defendant was sentenced to 30 years imprisonment. On appeal, Defendant alleges the trial court erred when it allowed statements of the deceased victim, identifying defendant as the shooter, to be admitted as evidence in the trial. Defendant claims the admission of the victim's statements violated his 6th amendment right to confront witnesses. Defendant also claims the trial court gave erroneous jury instructions, his counsel was ineffective, and he contests fines assessed by the trial

court. For the reasons set forth below, we affirm the defendant's conviction and vacate the fees assessed.

BACKGROUND

Defendant was charged with six counts of first degree murder and one count of aggravated battery with a firearm. The indictment charged that on December 24, 2002, the defendant shot and killed the victim, Pierre Jones. Defendant was also charged with personally discharging a firearm during the offense.

Hearing on the Motion to Suppress

On March 16, 2005, a hearing was held on the defendant's "Motion to Quash Arrest and Suppress Evidence." At the hearing, Officer Ronald Bialota testified that on December 24, 2002, at approximately 1:58 a.m., he and Officer Michael Martinez responded to a call of "shots fired." The officers arrived at South Edbrooke Avenue where witnesses directed the officers to the alley. Officer Bialota testified that he did not talk to any of the witnesses. The officers found the victim lying on the ground in the alley. Officer Bialota testified that he asked the victim who shot him and the victim responded, "Damon shot me." Officer Bialota testified that he asked for a description and the victim stated that "he was wearing a black hoodie."

Officer Bialota testified that he and Officer Martinez began searching the area and after about a minute and a half they stopped defendant at 114th Street and Prairie Avenue, after observing him come out of an alley. Officer Bialota testified that defendant had a black hoodie sticking out of his jacket when stopped. Officer Bialota did not find a weapon on defendant. Officer Bialota testified that defendant

said his name was Mario but the officer did not include this information in his report. Officer Bialota testified that defendant produced an identification card that indicated his name was Damon Goodloe.

Officer Bialota testified that he and Officer Martinez detained defendant and brought him back to the scene. Officer Bialota testified that he asked the victim, "is this the individual that shot you?" The victim raised his hand and said, "That's him, he's the one that shot me." The time of arrest indicated on the arrest report was 2:03 a.m.

The trial court denied defendant's motion to suppress. The trial court found that the police had reasonable articulable suspicion to make the initial stop and pat-down of defendant. The trial court further found that the officers had probable cause to arrest defendant after they learned his correct name.

Motion *in Limine*

Prior to the commencement of trial, defendant made a motion *in limine* to exclude the victim's initial statements to the police and his subsequent identification of defendant. Defendant argued that the statements by the victim were hearsay, that the dying declaration exception to the hearsay rule did not apply, and his constitutional right to confront witnesses would be violated if the victim's out of court statements were presented because defendant would have no opportunity to cross-examine the victim. The trial court denied defendant's motion. The trial court ruled that the statements were not dying declarations, but they were admissible under the excited utterances exception to the hearsay rule. The court also ruled that neither the victim's initial

statement nor his subsequent identification of defendant was testimonial.

The Trial

At the trial, officer Joseph Hodges testified that he and Officer Jason Venegas responded to a "shots fired" call at 113th street and Edbrooke on December 24, 2002, and arrived shortly before officers Bialota and Martinez. Officer Hodges testified that when they pulled up to the front of a residence, he could hear somebody moaning. The officers went through a gangway into a backyard and saw the victim on the ground of a concrete patio rolling back and forth on his back, moaning in pain. Officer Hodges testified that he called an ambulance as officers Bialota and Martinez arrived. Officer Bialota asked the victim who shot him. The victim stated, "Damon shot me." Officer Hodges testified that he and his partner stayed with the victim while officers Bialota and Martinez went to look for the offender.

When the ambulance arrived, two paramedics exited and began to administer first aid to the victim. When the victim was in the ambulance, officers Bialota and Martinez returned to the scene with defendant in custody. The officers brought the defendant to the back of the ambulance. Officer Hodges testified that Officer Bialota asked the victim if the defendant was the person who shot him. Officer Hodges testified that the victim said, "that's him, he shot me."

Officer Hodges testified that Officer Martinez asked the victim "are you a hundred percent sure this is the guy," and the victim replied, "Yeah, that's the guy." The police report does not state that Officer

Martinez asked the victim if he was a 100 percent sure that defendant shot him.

Witness Edward Loggins testified at trial that shortly before 2 a.m. on December 24, 2002, he met the victim in the vicinity of South Edbrooke Avenue to purchase drugs. As Loggins was walking down 113th Street, he observed two individuals standing on the corner of Edbrooke Avenue and 113th Street. Loggins testified that he could not see the faces of the individuals but observed that they were wearing "black hoodie sweaters." Loggins met the victim in a vacant lot and observed that there were several people on the street that evening besides the victim and the two men in hoodies.

Loggins testified that he heard gunfire and "ran for cover." He testified that he was on the west side of Edbrooke Avenue and saw fire coming out of guns "across in front of me." He testified that the shots came from both the east and the west on Edbrooke Avenue. The shooters were firing rapidly back and forth at each other. Loggins testified that he observed the victim shot and saw him fall. Loggins testified that he did not see the face of anyone who was shooting and he could not determine who the shooters were or what the shooters were wearing.

Loggins ran home and upon his arrival he noticed that he had been shot in his right leg. Detectives arrived at his home to question him about the shooting. After speaking to the detectives he was taken to a hospital for treatment.

The parties stipulated that Officer Samuel Jones would testify that he spoke with someone who said her name was Danielle Lovett and she told him that: "two male black subjects dressed in dark clothing appeared

from a vacant lot located at 113311 South Edbrooke and both started shooting across the street. She never stated that it was [defendant]."

Witness Michelle Lovett testified that she did not recall telling police her name was Danielle. Danielle Lovett is her sister's name. Lovett testified that she was sitting in a friend's automobile at about 1 a.m. on December 24, 2002, on South Edbrooke Avenue. She observed two individuals coming toward the vehicle and wearing "black hoodies" over their heads. She testified that she recognized one of the men as the defendant.

Lovett testified that she heard gunshots and "ducked down." She did not observe a gun in defendant's hand and did not observe defendant shoot anyone. Lovett testified that she did not observe defendant's hands. She heard at least 10 gunshots before the shooting ceased. She called 911 to report the shooting.

Lovett spoke with police at the station and identified defendant in a lineup as the person she saw walk up to her friend's vehicle just before the shooting began. She testified that although it was dark that evening, the street lights were on.

Lovett testified that she signed an affidavit at the request of defendant's cousin that stated that she did not see defendant at any time on the morning of December 24, 2002. She testified that she did not read it but signed it "out of fear of [her] life." She testified that she had been shot at and threatened, and when she signed the document she was promised that she would be left alone.

Paramedic Robert Klinger testified that he provided basic and advanced life support to the victim.

He provided the victim with a blood pressure monitor, heart monitor, IV access, oxygen intubation and albuterol treatments. Klinger testified that the victim needed help breathing. Klinger testified that albuterol, a drug used to open airways for breathing, does not affect a person's ability to recall incidents or affect their sight or vision.

Chicago Police Department forensic investigator Joseph Bembynista testified that on December 24, 2002, at approximately 5:15 a.m., he administered a gunshot residue test to defendant.

The test results were analyzed by Robert Berk, a trace evidence analysis expert for the Illinois State Police. Berk testified that he was able to identify four unique gunshot residue particles along with a significant number of consistent particles in the sample collected from the back, of defendant's right hand. Berk testified that the Illinois State Police require a minimum of three unique particles for the test results to be considered positive for gunshot residue. Defendant claims other states have thresholds of five unique particles or greater.

Berk testified that a positive test result can be obtained by simply being in an environment where a weapon is discharged. He also testified that particles can be transferred from one person to another by touching someone.

Berk opined, within a reasonable degree of scientific certainty, that the test results from the back of defendant's hand were positive, which indicated defendant had either fired a weapon, had contacted an item that had gunshot residue on it or had his right hand in the environment of a weapon when it was discharged.

An autopsy of the victim was performed by Dr. Mitra Kalelkar, a medical doctor who is assistant chief medical examiner of Cook County. Dr. Kalelkar opined the victim died as a result of a single gunshot wound that went through the femoral artery and vein causing massive internal bleeding and exited from the right side. The victim's manner of death was homicide.

The State rested and the defense moved for a directed verdict which was denied.

Defendant did not testify nor present any witnesses or evidence.

During the jury instruction conference, the State tendered Illinois Pattern Criminal Jury Instruction (IPI) 5.03, an instruction on accountability, which was given over defendant's objection. The instruction provides as follows:

> "A person is legally responsible for the conduct of another person when, either before or during the commission of an offense, and with the intent to promote or facilitate the commission of an offense, he knowingly solicits, aids, abets, agrees to aid, or attempts to aid the other person in the planning or commission of an offense."

Pursuant to IPI Criminal Nos. 7.01 and 7.02, the jury was instructed on the definition and elements of first degree murder. Both of these instructions alerted the jury that defendant was responsible for first degree murder if his intentional or knowing act caused the death of the victim "or another."

The jury found defendant guilty of first degree murder, with the following findings: "We, the jury, find the fact does not exist that during the commission

of the offense of first degree murder, the defendant personally discharged a firearm."

At the sentencing hearing, the trial court sentenced defendant to 30 years in the Illinois Department of Corrections. Pursuant to 55 ILCS 5/5-1101 (West 2006), the trial court assessed costs including a $5 "Court System" cost, a $10 "Mental Health Court" cost, and a $5 "Youth Diversion/Peer Court" cost.

During the sentencing hearing, defendant made his own verbal motion claiming ineffective assistance of his private counsel based upon lack of communication. The trial court appointed the public defender to represent defendant on a hearing on that issue. Defendant's private trial counsel was given leave to withdraw from the case and did so.

A hearing was held on defendant's motion which claimed ineffective assistance of counsel, which included the testimony of defendant and his private trial counsel. Defendant claimed his trial counsel failed to sufficiently investigate the case and failed to lay the proper foundation at trial to impeach witness Michelle Lovett.

At the conclusion, the trial court denied defendant's post-trial motion for a new trial based on ineffective assistance of counsel. The trial court found trial counsel testified very credible, he was unequivocal in his testimony and it is clear that he remembers.

The trial court found defendant's testimony was "riddled with I don't remember, I don't recall, maybe he did, I don't know." The trial court further found that defendant's case at trial "was contested vigorously by an experienced attorney every step of

the way." The trial court found that trial counsel's decisions on how to impeach a witness, whether to call an alleged alibi witness to the stand, are decisions that an experienced attorney makes every day. They are strategy decisions, and trial counsel had a valid basis for making those decisions. The trial court found that defendant had not shown a lack of reasonable representation by trial counsel.

After sentencing, defendant filed a post-trial motion for new trial claiming that the guilty verdict was against the manifest weight of the evidence. Defendant claims that since the jury found that there was insufficient evidence to prove that defendant personally discharged a firearm, the jury could only have convicted defendant based upon the theory of accountability. Defendant claims that because there was no evidence of accountability, the jury's verdict is inconsistent and cannot stand.

The trial court denied defendant's motion stating that the jury performed an act of "mercy" on defendant when they acquitted him of personally discharging a firearm.

Defendant then moved to reconsider his sentence which was denied. This appeal followed.

ANALYSIS

In this appeal defendant argues: 1) the trial court erred when it admitted into evidence the deceased victim's out-of-court statements; 2) the trial court erroneously instructed the jury on the legal theories of accountability and transferred intent; 3) his trial counsel was ineffective for failing to call a witness and to lay an adequate foundation for impeachment; and 4) that various fees and fines should be vacated.

I.

Admissibility of the Victim's Out-Of-Court Statements

Hearsay testimony is testimony relating to an out-of-court statement offered to establish the truth of the matter asserted therein, and resting for its value upon the credibility of the out-of-court declarant. *Waechter v. Carson Pirie Scott & Company,* 170 Ill. App. 3d 370, 371 (1988). A hearsay statement is not admissible evidence unless it satisfies one of the recognized exceptions to the rule. *Carson Pirie Scott & Company,* 170 Ill. App. 3d at 371.

In the case at bar, there are two hearsay issues: 1) Whether the deceased victim's statements qualified as an excited utterance exception to the hearsay rule; and 2) if the deceased victims statements qualified as excited utterances did their admission violate the defendant's constitutional right to confront witnesses.

A. Excited Utterance Analysis

The standard of review when determining whether a hearsay statement is admissible evidence is abuse of discretion. *People v. Spicer,* 379 Ill. App. 3d 441, 451 (2008). Abuse of discretion may be found only where no reasonable person would take the view adopted by the trial court. *Dremco v. Hartz Construction,* 261 Ill. App. 3d 531, 536 (1994).

Defendant acknowledges in the briefs filed in this appeal that the deceased victim's initial statements to police officers when they first arrived on the scene indicating that "Damon" shot him and was wearing a "black hoodie" were excited utterances. Defendant claims that the victim's subsequent identification of defendant as the shooter and his hand gestures are

inadmissible hearsay because they were not excited utterances.

For a statement to be admissible under the spontaneous declaration or excited utterance exception to the hearsay rule, three requirements must be met, including: 1) there must be an occurrence sufficiently startling to produce a spontaneous and unreflecting statement; 2) there must be an absence of time for the declarant to fabricate the statement; and 3) the statement must relate to the circumstances of the occurrence. *People v. Williams,* 193 Ill. 2d 306, 352 (2000).

In determining whether a hearsay statement is admissible under the spontaneous declaration exception, courts employ a totality of the circumstances analysis. *Williams,* 193 Ill. 2d at 352. This analysis involves the consideration of several factors, including time, the nature of the event, the mental and physical condition of the declarant, and the presence or absence of self-interest. *Williams,* 193 Ill. 2d at 352. No one factor is dispositive. *Williams,* 193 Ill. 2d at 353.

The fact that a declarant's statement is made at the first opportunity to speak supports a finding of spontaneity but a declarant may make .a spontaneous declaration to a person even after having spoken previously to another. *Williams,* 193 Ill. 2d at 352. Defendant claims that victim's statements of identification cannot be considered excited utterances because they were made 10 to 25 minutes after being shot.

The time factor has been described.as an elusive factor whose significance will vary with the facts of each case. *Williams,* 193 Ill. 2d at 353. The period of

time that may pass without affecting the admissibility of a statement under the spontaneous declaration exception varies greatly. *Williams,* 193 Ill. 2d at 352. The critical inquiry is whether the statement was made while the excitement of the event predominated. *Williams,* 193 Ill. 2d at 352.

Defendant claims that the deceased victim's statements and identification of defendant made while the victim was receiving treatment at the ambulance, were not excited utterances because they were made in response to police questioning.

In support of his claim, defendant relies on *People v. Sommerville,* 193 Ill. App. 3d 161 (1990), which held that a victim's statements about a sexual assault were not spontaneous when made in response to a series of questions by the victim's boyfriend. *People v. Pitts,* 299 Ill. App. 3d 469, 477-78 (1998), citing *Sommerville,* 193 Ill. App. 3d at 161.

In *Sommerville,* the victim's boyfriend asked a series of questions and received a series of detailed responses. *Sommerville,* 193 Ill. App. 3d at 175. The Appellate Court noted that the victim's detailed repetition of answers to the successive questions removed the spontaneity and immediacy required for spontaneous declarations. *Sommerville,* 193 Ill. App. 3d at 175.

In *Pitts*, we found statements made by two victims to their grandmother, concerning a sexual assault, admissible because the grandmother did not ask the children repeated questions as in *Sommerville* and the questioner's handling of the matter differed. *Pitts,* 299 Ill App. 3d at 478.

The case at bar is more akin to *Pitts* because police asked few questions and, unlike *Sommerville,* the victim here did not offer particular detailed responses.

Defendant also claims that the victim had been communicating for an extensive period of time prior to making his statements of identification.

Officer Bialota testified that he responded to the "shots fired" call at 1:58 a.m. He testified that upon arrival to the scene he questioned the victim. Just minutes later officers Bialota and Martinez picked up defendant and brought him to the victim for identification purposes.

Defendant claims that the victim identified defendant 10 to 25 minutes after the initial questioning by Officer Bialota. However, we cannot say that 10 or 25 minutes is an extensive period of time under the facts of this case.

The Illinois Supreme Court in *Williams* noted that the declarant's statements made a day after witnessing two murders were spontaneous declarations because the stress caused by the murders lingered long after the acts themselves were committed. *Williams,* 193 Ill. 2d at 355.

In the case at bar, we cannot say that the stress caused by being shot had dissipated at anytime from the shooting of the victim until the victim's death a short while later.

We are not persuaded that the victim may have remained calm in the aftermath of the shooting. The record shows that the victim was moaning in pain prior to receiving treatment from paramedics. Once paramedics arrived, they administered oxygen and albuterol to help the victim breath. The record also shows that the victim suffered from massive internal

bleeding. We cannot say that this event was not startling or that the victim's statements were not made while the excitement of the event predominated. *Williams*, 193 Ill. 2d at 352.

In regards to the second excited utterance element, we find the State's argument persuasive that there was an absence of time for the declarant to fabricate the statement. *Williams,* 193 Ill. 2d at 352. The victim was in severe pain and was having difficulty breathing and obviously concerned with his own physical condition. There was no evidence presented at trial that the deceased victim's statements were fabricated or that the deceased victim had reason to fabricate his identification.

Here the trial court determined that the deceased victim's identification of the defendant was an excited utterance because, the shooting was sufficiently startling to produce a spontaneous and unreflecting statement, there was not enough time for the victim to fabricate the statements, and the statements related to the circumstances of the occurrence. *Williams,* 193 Ill. 2d at 352. The victim's statements to police concerned the circumstances of the shooting, thus satisfying the third element of the excited utterance requirement. We cannot say that no reasonable person would take the view of the trial court that the victim's statements were excited utterances. Therefore, we find there was no abuse of discretion by the trial court.

B. *Crawford* Confrontation Clause Analysis

Since we hold that the victim's statements to police at the scene of the shooting fall within the excited utterance exception to the hearsay rule, we must determine whether the admission of those

statements violated the defendant's right to confront the witnesses against him. *Spicer,* 379 Ill. App. 3d at 451.

We review the issue of admissibility of out-of-court statements *de novo* because in the case at bar we are required to determine whether the admission of the statements made by the victim violate the defendant's constitutional rights. *People v. Ingram,* 382 Ill. App. 3d 997, 1001 (2008), *Sutton,* 233 Ill. 2d 89, 112 (2009).

Defendant claims that all of the deceased victim's statements were testimonial and admitted in violation of his constitutional right to confront witnesses. U.S. Const. Amends. VI, XIV; Ill. Const. 1970, Art. I, §8; *Crawford v. Washington,* 541 U.S. 36, 158 L. Ed. 2d 177, 124 S. Ct. 1354 (2004).

Pursuant to the 6th amendment: "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." U.S. Const. Amend. VI. This part of the 6th amendment is known as the "confrontation clause" and applies to the states through the 14th amendment. *Spicer,* 379 Ill. App. 3d at 452.

In 2004, with *Crawford,* the United States Supreme Court fundamentally altered its approach to confrontation clause analysis. *Spicer,* 379 Ill. App. 3d at 452. Prior to *Crawford,* the United States Supreme Court had held that the 6th amendment permitted the introduction of hearsay statements by unavailable declarants so long as the statements had "adequate indicia of reliability." *Ohio v. Roberts,* 448 U.S. 56, 66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980); *Spicer,* 379 Ill. App. 3d at 452.

In *Crawford,* the United States Supreme Court determined that the "indicia of reliability" rationale from *Roberts* had departed from the original common law principles underlying the confrontation clause by allowing the introduction of testimonial statements of witnesses that were never subject to cross-examination. *Ingram,* 382 Ill. App. 3d at 1001, discussing *Crawford,* 541 U.S. at 60, 158 L. Ed. 2d at 198, 124 S. Ct. at 1369.

As a result, if a court determines that an out-of-court statement is testimonial, that statement may not be admitted into evidence. *Ingram,* 382 Ill. App. 3d at 1001-02; *Spicer,* 379 Ill. App. 3d at 452. The United States Supreme Court in *Crawford* noted that one exception to the testimonial rule is the dying declaration. *Crawford,* 541 U.S. at 56, 158 L. Ed. 2d at 196, 124 S. Ct. at 1367 ("although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are.").

However, we are not persuaded by the State's claim that the victim's statements at the scene qualifies as admissible evidence under the hearsay exception of dying declaration. A testimonial dying declaration is an exception to *Crawford* and admissible evidence. *People v. Gilmore,* 356 Ill. App. 3d 1023, 1032 (2005).

The requirements for admitting a dying declaration include 1) the declaration pertains to the cause or circumstances of the homicide; 2) the declarant [has] the fixed belief and moral conviction that death is impending and almost certain to follow almost immediately; and 3) the declarant [has the] mental faculties sufficient to give an accurate statement about the cause or circumstances of the homicide. *Ingram,* 382 Ill. App. 3d at 1005.

The State has not presented palpable evidence that when the statements were made the victim had the fixed belief and moral conviction that death was impending and almost certain to follow almost immediately. *Ingram,* 382 Ill. App. 3d at 1005. The State claims that we can infer from the circumstances that the victim had a fixed belief and moral conviction that death was impending. However, the State had not cited any authority that would allow us to make such an inference.

As a result, we cannot say that the trial court erred in finding that the victim's statements were not dying declarations.

Since we do not have a dying declaration exception to *Crawford*, we must determine whether the trial court erred in finding the victim's out-of-court statements as non-testimonial. *Spicer*, 379 Ill. App. 3d at 452.

Crawford instructs that a testimonial statement at a minimum applies to prior testimony at a preliminary hearing, before a grand jury, a formal trial; and to police interrogations." *Crawford,* 541 U.S. at 68, 158 L. Ed. at 203, 124 S. Ct. at 1374.

The United States Supreme Court further defined testimonial in *Davis v. Washington,* 547 U.S. 813, 165 L. Ed. 2d 224, 126 S. Ct. 2266 (2006). *Davis* is a consolidation of two cases, *State v. Davis,* 154 Wash.2d 291, 11 P.3d 844 (2005); and *Hammon* v. State, 829 N.E. 2d 444 (2005).

Pursuant to *Davis,* non-testimonial statements are those "made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."

Davis, 547 U.S. at 822, 165 L. Ed. at 237, 126 S. Ct. at 2273.

Testimonial statements are those made when the primary purpose of the police interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Davis,* 547 U.S. at 822, 165 L. Ed. at 237, 126 S. Ct. at 2273.

The defendant claims that the victim's initial statements that "Damon shot me" and the description of the assailant wearing a black "hoodie" are testimonial using a *Davis* analysis because these statements were made in response to a police officer's direct questioning, using the past tense and describing concluded events. Furthermore, defendant claims that the emergency had concluded because the assailant had fled the scene.

Davis details both an ongoing emergency and a situation where an emergency had concluded. The declarant in *Davis v. Washington,* Michelle McCottry gave statements concerning a domestic disturbance with her former boyfriend Adrian Davis to a 911 emergency operator. McCottry told the 911 operator that she had been beaten by "Adrian." *Davis,* 547 U.S. at 818, 165 L. Ed. at 234,.126 S. Ct. at 2271. As the conversation continued, McCottry alerted the operator that Davis had "just r[un] out the door" after hitting McCottry and fled the scene in an automobile with another person. *Davis,* 547 U.S. at 818, 165 L. Ed. at 234, 126 S. Ct. at 2271. Davis was charged with a felony violation of a domestic no-contact order. McCottry did not appear at his trial to testify. The trial court admitted the recording of her exchange with the 911 operator into evidence and the jury convicted Davis. *Davis,* 547 U.S. at 818-19, 165 L. Ed. at 235, 126 S. Ct. at 2271.

In concluding that McCottry's interrogation by the 911 operator was not testimonial, the United States Supreme Court noted that her statements were made during an ongoing emergency. *Davis,* 547 U.S. at 827, 165 L. Ed. at 240, 126 S. Ct. at 2276. "McCottry's call was plainly a call for help against a bona fide physical threat." *Davis;* 547 U.S. at 827, 165 L. Ed. at 240, 126 S. Ct. at 2276.

In addition, the United States Supreme Court found that the nature of what was asked and answered in *Davis* was such that the elicited statements were necessary in order to resolve the present emergency, rather than simply to learn what had happened in the past. *Davis,* 547 U.S. at 827, 165 L. Ed. at 240, 126 S. Ct. at 2276.

The United States Supreme Court notes that McCottry's answers were frantic and made in an environment that was not tranquil or even safe. *Davis,* 547 U.S. at 827, 165 L. Ed. at .240, 126 S. Ct. at 2276.

In the case at bar, we cannot say that the victim's statements were testimonial. The victim was interrogated in a emergency setting when police responded to a call of "shots fired" and found the victim on the ground with a bullet wound and in obvious pain. The police were concerned that an armed criminal suspect was at large nearby. The purpose of the police questioning enabled police assistance to meet an ongoing emergency and protect the public from the armed shooter. *Davis,* 547 U.S. at 827, 165 L. Ed. at 240, 126 S. Ct. at 2276.

As in *Davis,* we cannot say that the victim's answers to police questioning were made in an environment that was tranquil or even safe. One

difference between *Davis* and the case at bar, is that McCottry was beaten and in a frantic state when talking with the 911 operator. Here, the victim had been shot, mortally wounded, laying in an empty lot near 2 a.m. He needed assistance to breathe, and his responses to police questioning were apparently labored but simple, not frantic. We cannot say that the victim was acting as a witness when he was trying to help resolve the emergency.

Defendant claims that the victim's statements are testimonial because they were made at the scene after the crime occurred, as in *Hammon.*

In *Hammon,* police responded to a domestic disturbance. Upon arrival to the home, they found the "frightened" wife standing in front of the house, though she denied that there was a disturbance. *Davis*, 547 U.S. at 819, 165 L. Ed. at 235, 126 S. Ct. at 2271. Inside the house, the husband informed the police that the couple had argued. The police then interviewed the husband and wife in separate rooms. *Davis,* 547 U.S. at 819, 165 L. Ed. at 235, 126 S. Ct. at 2271. The wife filled out a battery affidavit where she described how the husband beat her and her daughter. *Davis,* 547 U.S. at 820, 165 L. Ed. at 235, 126 S. Ct. at 2272. The husband was charged with domestic battery and with violating his probation. The wife did not appear to testify. Instead, the officer that interviewed the wife at the scene, testified as to the conversation. *Davis,* 547 U.S. at 820, 165 L. Ed. at 235, 126 S. Ct. at 2272.

The United States Supreme Court determined that the officer's conversation with the wife was part of an investigation into past criminal conduct because there was no emergency in progress as the husband was not attacking the wife and she was not under an

immediate threat to her person. *Davis,* 547 U.S. at 829, 165 L. Ed. at 242, 126 S. Ct. at 2278.

The United State Supreme Court also determined that the police questioning of the wife was formal because it was conducted in a separate room from the husband. *Davis,* 547 U.S. at 829, 165 L. Ed. at 242, 126-S. Ct. at 2278. The interrogation in *Hammon* occurred after the emergency was over.

"Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely what a witness does on direct examination; they are inherently testimonial." *Davis,* 547 U.S. at 830, 165 L. Ed. at 242, 126 S. Ct. at 2278.

In the case at bar, we cannot say that the initial questioning of the victim is formal or testimonial as in *Hammon*. At the initial questioning of the deceased victim, in the case at bar, the offender had not been apprehended. We cannot say that the emergency had concluded because the police needed a description of the offender to protect the public. Meanwhile, in *Hammon,* the emergency had ended because the husband was with police in one room while the wife was safely away from the husband with police in a second room. *Davis*, 547 U.S. at 829, 165 L. Ed. at 242, 126 S. Ct. at 2278.

In addition, we cannot say that the subsequent questioning of the deceased victim at the ambulance was formal and testimonial. Here the emergency was ongoing because, according to the record, there were at least two shooters and the police had apprehended just one suspect. The police needed the victim to identify the suspect to aid in ending the emergency. Even with the apprehension of the one suspect, a

second shooter remained at large keeping the emergency alive.

Defendant claims that the officers were asking "what had happened," as in *Hammon,* not "what was happening," as in *Davis.* In the case at bar, the offenders were not safely with police in another room, as in *Hammon.* The offenders may have been in the vicinity like *Davis* where the suspect was in the house until victim notified the 911 operator that he had fled in an automobile.

We are also not persuaded by defendant's claim that the victim's statements of identification at the ambulance evolved into testimonial statements.

The United States Supreme Court in *Davis* determined that the victim's statements to the 911 operator could have evolved into testimonial statements once the former boyfriend had driven away because the emergency had ended. *Davis,* 547 U.S. at 828-29, 165 L. Ed. at 242, 126 S. Ct. at 2278.

However, in the case at bar, unlike *Davis,* the deceased victim did not inform the police that the offenders had fled the scene. There is no evidence that the police had any information on the whereabouts of the shooters. Thus, we cannot say that the questioning by police evolved into testimonial statements because the shooters may have still been in the vicinity. The police needed the identification of the shooters to end the emergency.

Defendant claims that the emergency had ended at the time of the deceased victim's identification of defendant because police and paramedics were on the scene. In addition, the defendant claims that the emergency had ended because police had searched the

defendant and not found any weapons. Also, the defendant was in handcuffs and no longer a threat.

We are not persuaded by the defendant's claim because when the police apprehended the defendant they were not 100 percent sure that the defendant was "Damon" until they brought the defendant to the victim for identification. Thus, the emergency had not ceased because the threat of danger existed until the deceased victim identified the defendant as the shooter. Furthermore, as previously noted, there was more than one shooter and a second shooter remained at large. Thus, the officers did not know whether the violence had ended or might continue elsewhere. *Sutton,* 233 Ill. 2d at 116.

In addition: "Even when the assailant has fled, the circumstances of the police officer's questioning of the deceased victim may objectively indicate that the officer reasonably assumed an ongoing emergency and acted with the primary purpose of preventing further harm." *Sutton,* 233 Ill. 2d at 115, quoting *People v. Nieves-Andino,* 9 N.Y. 3d 12, 872 N.E. 2d 1188 (2007).

The Illinois Supreme court in *Sutton* found that *Davis* did not impose a restricted interpretation of what constitutes a continuing emergency. *Sutton,* 233 Ill. 2d at 115.

In the case at bar, upon arrival the police found the victim moaning in pain, suffering from massive internal bleeding, and were only able to obtain a first name of the offender and a description of an item of clothing worn by the offender.

As previously noted, the police did not know that the defendant was a shooter until it was confirmed by the victim. There was also at least two shooters and a second shooter was never apprehended. We are not

persuaded by the defendant's claim that the emergency had ended because police did not know if a second offender was in the vicinity or had fled.

As a result, we cannot say that the trial court erred by admitting into evidence the statements by the victim.

II.

Jury Instructions On Accountability and Transferred Intent

Jury instructions are generally within the sound discretion of the trial court, however, we review *de novo* the question of whether the jury instructions accurately conveyed to the jury the applicable law. *Ingram,* 382 Ill. App. 3d at 1007.

Defendant claims the trial court erroneously allowed the jury to receive instructions on the theories of accountability and transferred intent when there was insufficient evidence to support these theories.

The State, on the other hand, claims that the defendant failed to preserve these issues for review. The State claims that the defendant objected to the jury instruction on accountability but did not object to the trial court's instruction on transferred intent.

To preserve an error for review, a defendant must make an objection at trial and include the error in a post-trial motion. *People v. Normand,* 215 Ill. 2d 539, 543-44 (2005). Failure to follow this procedure results in waiver of the issues on appeal. *Normand,* 215 Ill. 2d at 544.

However, Supreme Court Rule 451(c) provides:

> "substantial defects are not waived by failure to make timely objections thereto if the

interests of justice require." 177 Ill. 2d R. 451(c).

While defendant did fail to properly preserve the jury instruction issues for appeal, we find the interests of justice requires us to review the defendant's claims here because of the importance of jury instructions in the trial process.

Jury instructions are integral to a fair trial because the instructions convey to the jury the correct principles of law applicable to the evidence so that the jury may reach a correct conclusion according to the law and the evidence. *Ingram,* 382 Ill. App. 3d at 1006-07. Fundamental fairness requires the trial court to give correct instructions on the elements of the offense in order to insure a fair determination of the case by the jury. *People v. Williams,* 181 Ill. 2d 297, 318 (1998).

The Illinois Supreme Court instructs that when an error affects a defendant's substantial rights, we must consider it under the plain error doctrine. 134 Ill. 2d R. 615; *Williams,* 181 Ill. 2d at 317. Therefore, we have the authority to review the jury instruction issue under the plain error doctrine.

It is the trial court's burden to insure the jury is given the essential instructions as to the elements of the crime charged, the presumption of innocence, and the question of burden of proof. *Williams,* 181 Ill. 2d at 318. Failure to so instruct the jury constitutes plain error. *Williams,* 181 Ill. 2d at 318.

The plain error rule allows errors or defects which affect substantive rights to be noticed on appeal, even though they were not previously brought to the attention of the trial court. *Pierce,* 262 Ill App. 3d 859 (2006).

Additionally, the plain error rule is set forth in Supreme Court Rule 615(a) which states:

> "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." 134 Ill.2d R. 615(a); People v. *Johnson,* 208 Ill. 2d 53, 64 (2004).

Furthermore, the plain error rule may be invoked when: 1) the evidence in a criminal case is closely balanced, or 2) the error is so fundamental and of such magnitude that the accused is denied the right to a fair trial and remedying the error is necessary to preserve the integrity of the judicial process. *Johnson,* 208 Ill. 2d at 64.

The State claims that the defendant cannot satisfy the "closely balanced" prong of the plain error doctrine.

Defendant, on the other hand, claims that the alleged erroneous jury instructions contributed to the jury's guilty verdict and this court should consider it under the second prong, that he was denied the right to a fair trial and that remedying the error is required to preserve the integrity of the judicial process. Before we find plain error we must first find that the trial court erred.

A. Transferred Intent Instruction

Defendant claims the trial court erred when it allowed the inclusion of the words "or another" in the jury instructions on first degree murder.

The Illinois Criminal Code defines first degree murder as:

> "A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death: he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another." 720 ILCS 5/9-1(a)(1).

We acknowledge the defendant's claim that the Committee Note to IPI Criminal No. 7.01 states, "The Committee has elected to put the phrase 'or another' in brackets because in the usual case, this portion of the statutory definition is not applicable to the factual context presented, and the presence of this might cause confusion."

Under the doctrine of transferred intent, if a defendant shoots at one person, with the intent to kill or cause great bodily harm, but actually kills an unintended victim, the defendant may be convicted of the crime of murder for the death of the unintended victim. *People v. Shelton,* 293 Ill. App. 3d 747, 751 (1997).

In the case at bar, it is not entirely clear who the intended victims of the shooters were that night. The State's theory of the case is that the defendant and another shooter targeted the deceased victim for the shooting. However, witness Edward Loggins testified he saw two shooters who were firing their guns back and forth at each other. Loggins ran for cover when the shooting started, but later discovered that he was himself shot. One of the shooters fired in the direction of the victim, fatally striking him in the leg. It is

reasonable to assume that the shooters knew that the act of firing guns created a strong probability of death or great bodily harm to the victim or another. *Shelton,* 293 Ill. App. 3d at 751.

This case is similar to *Shelton* where shooters fired guns into a group of people killing one and injuring another. *Shelton,* 293 Ill. App. 3d at 749. In *Shelton,* the defendant argued the trial court erred in instructing the jury on transferred intent. *Shelton,* 293 Ill. App. 3d at 751. We found that the doctrine of transferred intent was applicable because the defendant knew that by firing a gun into a crowded party of people that this act created a strong probability of death or great bodily harm to innocent people. *Shelton,* 293 Ill. App. 3d at 751.

Thus, in the case at bar, we cannot say that the trial court erred in allowing the jury to receive an instruction on transferred intent.

B. Accountability Instruction

Next, the defendant claims that the jury instructions on the theory of accountability were erroneous by not correctly stating the law.

A person is legally accountable for another's criminal conduct when "[e]ither before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense." *People v. Dennis,* 181 Ill. 2d 87, 96 (1998), citing 720 ILCS 5/5-2(c) (West 2006).

Section 5-2(c) incorporates the common design rule which provides that where two or more persons engage in a common criminal design or agreement, any acts committed in furtherance of the plan by any

one party are considered to be the acts, of all the parties, and all are accountable for those acts. *Shelton,* 293 Ill. App. 3d at 754.

Even slight evidence upon the theory of accountability will justify the giving of an accountability instruction. *People v. Thomas,* 72 Ill. App. 3d 28, 36 (1979). The defendant was identified by witness Lovett as being at the scene with at least one other person wearing a "hoodie." Witness Loggins testified he saw two people standing on the corner that night and that later the two shooters were firing on both sides of the street. The deceased victim identified the defendant as the shooter.

Defendant claims that presence at the scene coupled with knowledge that a crime is being committed, is insufficient without more for an accountability instruction. *Dennis,* 181 Ill. 2d at 108. However, there are cases that hold where the evidence showed that the defendant was present at the crime, without disapproving or opposing it, the trier of fact could consider that conduct in connection with other circumstances and thereby conclude that such person assented to the commission of the offense, lent his countenance and approval, and thereby aided and abetted the crime. *Thomas,* 72 Ill. App. 3d at 36.

Here, there was evidence that defendant was near the scene of a murder wearing a "hoodie." He was standing with another individual just prior to the shooting. A few minutes later two individual wearing "hoodies" were seen shooting toward the victim by a witness. This was sufficient evidence to allow an instruction of accountability. As a result, we cannot say that the trial court erred when instructing the jury on the theory of accountability.

III.

Ineffective Assistance of Counsel

Defendant claims trial counsel was ineffective because he failed to call Officer Jones as a witness and failed to effectively impeach witness Michelle Lovett.

In order to prevail on a claim of ineffective assistance of counsel, a defendant must show: 1) his attorney's actions constituted errors so serious as to fall below an objective standard of reasonableness, and that, without those errors, there was a reasonable probability his trial would have resulted in a different outcome; and 2) counsel's deficient performance prejudiced the defense. *People v. Ward,* 371 Ill. App. 3d 382 (2007); *Strickland v. Washington,* 466 U.S. 668, 687-94, 80 L. Ed. 2d 694, 104 S. Ct. 2052, 2065-68 (1984). Courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland,* 446 U.S. at 689, 80 L. Ed. at 694, 104 S. Ct. at 2065; *People v. Edwards,* 195 Ill. 2d 142, 163 (2001). Mistakes in strategy or tactics alone do not normally amount to ineffective assistance of counsel nor does the fact that another attorney may have handled things differently. *Ward,* 371 Ill. App. 3d at 434, citing *People v. Palmer,* 162 Ill. 2d 465, 476 (1994).

Because a defendant's failure to satisfy either prong of the *Strickland* test will defeat an ineffective assistance of counsel claim, we are not required to "address both components of the inquiry if defendant makes an insufficient showing on one." *Strickland,* 466 U.S. at 697, 80 L. Ed. at 700, 104 S. Ct. at 2070. Accordingly, we need not determine whether counsel's performance was actually deficient if we determine defendant suffered no prejudice as a result of his

counsel's alleged deficiencies. *Edwards,* 195 Ill. 2d at 163, citing *Strickland,* 466 U.S. at 697, 80 L. Ed. 2d at 700, 104 S. Ct. at 2070. It is the defendant's burden to affirmatively prove prejudice. *Strickland,* 466 U.S. t 693, 80 L. Ed. 2d at 697, 104 S. Ct. at 2067.

Defendant claims that trial counsel was ineffective for failing to effectively impeach Lovett's testimony with evidence she gave Officer Jones the name of her sister, rather than her own, while being interviewed at the scene, and for her previous failure to identify defendant on the night of the incident and in the days following when interviewed by a detective.

Defendant claims that the parties stipulation to Officer Jones testimony eliminated any impeachment value that trial counsel sought to establish.

The parties stipulated that Officer Jones would testify that he talked with someone who said her name was Danielle Lovett and she told him "that two male black subjects dressed in dark clothing appeared from the vacant lot at * * * South Edbrooke and both offenders started shooting across the street. That she never in the body of that report stated that it was [defendant]. The report does contain [defendant's name] in the report."

We are not persuaded by defendant's claim here. On the contrary, the stipulation reflects that Lovett did not identify defendant by name on the night of the offense.

Defendant has issue with the manner in which defendant's trial counsel cross-examined Lovett. Defendant claims that trial counsel should have called Officer Jones to the stand rather than agree to the stipulation.

Generally, counsel's trial decisions regarding the cross-examination or impeachment of a witness will not support an ineffective assistance of counsel claim because those decisions are normally a part of counsel's trial strategy. *People v. Franklin,* 167 Ill. 2d 1, 22 (1995). The manner in which to cross-examine a particular witness "involves the exercise of professional judgment which is entitled to substantial deference from a reviewing court." *People v. Pecoraro,* 175 Ill. 2d 294, 326-27 (1997). Defendant can only prevail on an ineffectiveness claim by showing that counsel's approach to cross-examination was objectively unreasonable. *Pecoraro,* 175 Ill. 2d at 327. We cannot say that trial counsel's approach to impeaching Lovett's testimony with a stipulation rather than testimony from Officer Jones is objectively unreasonable because the stipulation established that Lovett did not identify defendant as a shooter in her interview with Officer Jones.

We are not persuaded by defendant's claim that he was prejudiced by his trial counsel's inability to impeach Lovett's testimony in which she stated that she observed the defendant in the vicinity of the shooting just prior to its occurrence.

In addition, defendant's claim that Lovett's testimony is the only direct evidence that places defendant in the vicinity of the crime is refuted by the record.

Officer Bialota's testimony alerted the jury to the defendant's presence in the vicinity when he stated that he observed defendant coming out of an alley shortly after police arrival to the crime scene.

In addition, Officer Bialota testified that the victim identified the defendant as the shooter at the scene.

Thus, based on the testimony of Officer Bialota, we cannot say that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Ingram,* 382 Ill. App. 3d at 1005.

To prove the prejudice prong, the defendant must show that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable and where, as noted, there was a reasonable probability his trial would have resulted in a different outcome. *Ingram,* 382 Ill. App. 3d at 1006.

In the case at bar, the evidence is so overwhelming that even if defendant's trial counsel's actions constituted errors so serious as to fall below an objective standard of reasonableness, there is not a reasonable probability the outcome of the trial would have been different. The deceased victim made a positive identification of the defendant as the person who shot him. Witness Michelle Lovett testified that she observed the defendant at or near the scene of the shooting wearing a "black hoodie," as described by the deceased victim and immediately heard gunshots. She further testified she signed an affidavit at the request of defendant's cousin stating that she did not see defendant at any time on the morning of December 24, 2002. She testified that she did not read the affidavit "out of fear of [her] life." She testified that she had been shot at and threatened and when she signed the document she was promised that she would be left alone.

The forensic police investigator Joseph Bembynista testified that at 5:15 a.m. on December 24, 2002, he administered a gunshot residue test to defendant that was positive indicating that defendant either fired a weapon, had his right hand in the environment of a weapon when it was discharged, or had contact with an item that had gunshot residue on it.

A defendant's failure to make a requisite showing of either deficient performance or sufficient prejudice defeats an ineffective assistance of counsel claim. *Ingram,* 382 Ill. App. 3d at 1006. In this case, the defendant failed on both prongs of the *Strickland* test.

The trial court found that defendant's case "was contested vigorously by an experienced attorney every step of the way." The trial court presided over the case and made these observations as an experienced criminal trial judge.

We are unpersuaded that trial counsel's representation was ineffective.

IV.

Court Fees and Fines

Both defendant and the State claim the trial court erred when it assessed a $5 Court System fee, a $10 Mental Health Court fee and a $5 Youth Diversion/Peer Court fee.

Defendant claims the $5 Court System fee, imposed pursuant to 55 ILCS 5/5-1101(a), should only be imposed when a defendant has violated the Illinois Vehicle Code or similar ordinance. Additionally, the defendant claims he should receive a credit, pursuant to 725 ILCS 5/110-14(a), for the $10 Mental Health Court fee and the $5 Youth Diversion/Peer Court fee.

These fees were authorized under 55 ILCS 5/5-1101(d-5) and 55 ILCS 5/5-1101(e) respectively.

Lastly, the defendant claims the Mental Health Court fee and the Youth Diversion/Peer Court fee should be vacated because the section of the statutes authorizing said fines became effective after the date of the instant offense, thereby violating the *ex post facto* prohibitions of the United States and Illinois constitutions. U.S. Const., art. I, §10; Ill. Const. 1970, art. I, §16.

The propriety of a trial court's imposition of fines and fees raises a question of statutory interpretation, which we review *de novo*. *People v. Price,* 375 Ill. App. 3d 684 (2007). In addition, whether a statute is constitutional is reviewed under a *de novo* standard as well. *People v. Paige,* 378 Ill. App. 3d 95 (2007).

In regards to the Court System fee imposed pursuant to section 5-1101(a), the statutes provides:

> "A $5 fee to be paid by the defendant on a judgment of guilty or a grant of supervision for violation of the Illinois Vehicle Code [625 ILCS 5/1-100 et *seq.]* other than Section 11-501 [625 ILCS 5/11-501] or violations of similar provisions contained in county or municipal ordinances committed in the county, and up to a $30 fee to be paid by the defendant on a judgment of guilty or a grant of supervision for violation of the Section 11-501 of the Illinois Vehicle Code or a violation of a similar provision contained in county or municipal ordinances committed in the county." 55 ILCS 5/5-1101(a) (West 2006).

Defendant claims that because he was convicted of first degree murder, the Court System fee does not

apply to him. In support of this claim, the defendant cites *Paige* where we vacated the same fee against a defendant convicted of possession of a controlled substance. *Paige,* 378 Ill. App. 3d at 105.

We agree and vacate the $5 Court System fee because defendant was found guilty of murder, which is not a violation of the Illinois Vehicle Code or of similar provisions contained in county or municipal ordinances. *Paige,* 378 Ill. App. 3d at 105.

Next defendant claims he should receive a credit for the $10 Mental Health Court fee and the $5 Youth Diversion/Peer Court fee because we have consistently held that these assessments, though labeled fees, constitute fines and thus implicate 725 ILCS 5/110-*14(a).* *Paige,* 378 Ill. App. 3d at 103-04; *People v. Price,* 375 Ill. App. 3d 684, 699-701 (2007).

Section 5/110-14(a) states as follows:

> "Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of $5 for each day so incarcerated upon application of the defendant. However, in no case shall the amount so allowed or credited exceed the amount of the fine." 725 ILCS 5/110-14(a) (West 2006).

Defendant claims that he was incarcerated for 1,576 days prior to his sentence for first degree murder, a bailable offense. Defendant's bail was $500,000.

In *Paige,* we credited the defendant $5 per day for the time he spent in presentence custody to offset a court imposed $500 assessment pursuant to the

Illinois Controlled Substances Act (720 ILCS 570/411.2 (West 2006)). *Paige,* 378 Ill. App. 3d at 104.

Meanwhile in *Price,* we determined that the Youth Diversion/Peer Court fee are actually fines and credited the defendant for the days he spent in custody prior to posting bail. *Price,* 375 Ill. App. 3d at 701-02.

In the case at bar, we find both *Paige* and *Price* instructive and under normal circumstances would credit defendant for the time spent in custody against the Diversion/Peer Court fee. However, defendant claims that the Mental Health Court and Youth Diversion/Peer Court fees should not apply to him at all because these fees were enacted by the Illinois General Assembly approximately three years after defendant committed the offense. Defendant claims the imposition of these fees violate the *ex post facto* prohibitions of the United States and Illinois constitutions.

Under either the United States or Illinois constitutions, a criminal law will be considered *ex post facto* where it: 1) is retrospective in that it applies to events occurring prior to its enactment, and 2) falls into one of the traditional categories of prohibited criminal laws including any statute that punishes as a crime an act previously committed and innocent when done; laws that make the punishment for a crime more burdensome after its commission; and statutes that deprive one charged with a crime of any defense available at the time when the act was committed. *Toia v. State,* 333 Ill. App. 3d 523, 528 (2002).

The ban against *ex post facto* laws applies only to laws that are punitive in nature, and does not apply

to costs, which are compensatory in nature. *People v. Gutierrez,* 365 Ill. App. 3d 783, 784-85 (2006).

In *Gutierrez,* we vacated a $4 assessment pursuant to the Traffic and Criminal Conviction Surcharge Fund (730 ILCS 5/5-9-1(c-9) (West 2006)) because the statute was not in effect at the time of the offense. *Gutierrez,* 365 Ill. App. 3d at 784-85.

In the case at bar, as in *Gutierrez,* we must vacate the imposition of the $10 Mental Health Court fee and the $5 Youth Diversion/Peer Court fee because the use of these fees here are retrospective and, as previously determined, punitive in nature. *Toia,* 333 Ill. App. 3d at 528, *Gutierrez,* 365 Ill. App. 3d at 784-85.

CONCLUSION

We affirm the trial court and find it did not err when it admitted into evidence the deceased victim's out-of-court statements, when it instructed the jury on transferred intent and accountability, and when it denied defendant's claim for ineffective assistance of trial counsel.

We vacate the $5 Court System fee, the $10 Mental Health Court fee and the $5 Youth Diversion/Peer Court fee erroneously assessed by the trial court.

Affirmed in part, vacated in part.

Howse, J., with Tully, and Smith, JJ., concurring.