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APPENDIX A

United States Court of Appeals
For the Seventh Circuit.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Submitted April 9, 2026

Decided April 28, 2026

Before

AMY J. ST. EVE, *Circuit Judge*

JOSHUA P. KOLAR, *Circuit Judge*

No. 24-2748

DONELL SIMMONS,
Petitioner-Appellant,

v.

RYAN WOODS,
Respondent-Appellee.

Appeal from the United States District
Court for the Northern District of
Illinois, Eastern Division.

No. 21 C 3032

LaShonda A. Hunt,
Judge.

ORDER

Donell Simmons has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254 and an application for a certificate of appealability. This court has reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is **DENIED**. Simmons's motion for appointment of counsel is **DENIED**.

APPENDIX B

United States District Court
N.D. Illinois, Eastern Division

2024 WL 3984274

Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.

Donell SIMMONS, (R12863), Petitioner,

v.

David GOMEZ,¹ Respondent.

Case No. 21 C 3032

Signed August 28, 2024

Attorneys and Law Firms

Donell Simmons, Sheridan, IL, Pro Se.

Eldad Zvi Malamuth, Illinois Attorney General's Office,
Chicago, IL, for Respondent.

MEMORANDUM OPINION AND ORDER

LASHONDA A. HUNT, United States District Judge

*1 Petitioner Donell Simmons, a state prisoner convicted of first-degree murder and aggravated battery with a firearm, brings this *pro se* habeas corpus action pursuant to 28 U.S.C. § 2254. He argues that his appellate counsel was ineffective for failing to challenge the circuit court's denial of his motion to suppress. (Dkt. 1). For the reasons discussed below, the petition is denied, and the Court declines to issue a certificate of appealability.

BACKGROUND

The relevant facts are drawn from the state court record (Dkt. 33) and the state appellate court opinion (Dkt. 33-1) and are presumed to be correct. 28 U.S.C. § 2254(e)(1). On June 4, 2003, Randy "Kato" Rangel, Jr. was shot and killed, and Harrison Hall and Estaban Claz were injured by gunfire in a barber shop. (State Ct. R., Ex. S, Pt. 1B at 76, Dkt. 33-20). In response to an investigative alert indicating that Petitioner was suspected of killing Rangel, Detective Keith Allen and ten other members of a tactical gang unit in the Chicago Police Department (CPD) proceeded to a residence to arrest Petitioner. *People v. Simmons*, 2020 IL App (1st) 170650, ¶ 4. After being taken into custody, Petitioner signed a handwritten statement confessing to Rangel's shooting.

Id. at ¶ 19. He was subsequently charged with first-degree murder and aggravated battery with a firearm along with three codefendants: Labar "Bro-Man" Spann, Martise "Shorty" Nunnery, and Marcus "Black" Ware (also known as John Coleman). *Id.* at ¶ 2.

A. Trial court proceedings

Petitioner moved to quash his arrest and suppress evidence obtained as a result of his arrest, contending the police lacked probable cause to arrest him without a warrant. (State Ct. R., Ex. S Pt. 1A at 5-7, Dkt. 33-19). During the suppression hearing, the State presented testimony from Sergeant Charles Daly, a CPD detective working in "Area 4 violent crime homicide" who was investigating the June 4 shootings. (State Ct. R., Ex. S Pt. 1B at 75-76, Dkt. 33-20). Sgt. Daly testified as follows in support of probable cause for Petitioner's arrest.

Sgt. Daly learned from CPD officers that a man named "Rio," who was facing unrelated charges, was cooperating with them. (*Id.* at 76; State Ct. R., Ex. S Pt. 1C at 14-15, Dkt. 33-21). While wearing a wire, Rio had recorded a conversation with Nunnery, Petitioner's co-defendant, that seemingly discussed Petitioner and Nunnery's involvement in Rangel's death. (State Ct. R., Ex. S Pt. 1B at 76-81, Dkt. 33-20). Sgt. Daly listened to that recording, read the transcript of that recording, and then spoke with Rio a few days later. (*Id.* at 76-79). During their discussion, Rio confirmed his belief that Nunnery told him Petitioner shot Rangel. (*Id.* at 79-81); *People v. Simmons*, 2020 IL App (1st) 170650, ¶ 5.

On November 13, 2003, Sgt. Daly contacted Spann, Petitioner's co-defendant, who had been arrested on unrelated charges. (State Ct. R., Ex. S Pt. 1C at 3-4, Dkt. 33-21). Spann told Sgt. Daly that he, Petitioner, and Nunnery drove to the barber shop after Nunnery received a phone call. (*Id.* at 5). Spann relayed that Nunnery handed Petitioner a .45 caliber handgun, Petitioner exited the vehicle, they heard gunshots, and Spann fled the area. (*Id.*). Spann said Petitioner later told him that Petitioner had killed Rangel. (*Id.*).

*2 Nunnery, Petitioner's co-defendant, was arrested on November 14, 2003, and provided a videotaped statement about Rangel's death to a CPD detective and an assistant state's attorney. (*Id.* at 7-8). According to Nunnery, he, Spann, and Petitioner went to the barber shop after Nunnery received a call from Ware stating that Rangel was inside the barber shop. (*Id.* at 8). Nunnery handed Petitioner his .45 caliber handgun, Petitioner entered the barber shop, and Nunnery

heard gunshots. (*Id.*). Nunnery said Petitioner later told him that Petitioner had killed Rangel. (*Id.* at 9).

Ware, Petitioner's remaining co-defendant, was also arrested on November 14, 2003, and provided a videotaped statement regarding the shooting. (*Id.* at 10). Ware stated that he called Nunnery to inform him of Rangel's location, and Nunnery later told Ware that "they" killed Rangel. (*Id.* at 11).

Finally, Sgt. Daly testified that Darren McCline was arrested on November 19, 2003, and provided a handwritten statement about Rangel's death. (*Id.* at 11-12). McCline said Petitioner told him that Petitioner killed Rangel because Petitioner was hired to do so. (*Id.* at 12).

Detective Allen, one of the members of the tactical gang unit who arrested Petitioner on November 22, also testified at the suppression hearing. (State Ct. R., Ex. S, Pt. 1B at 67-73, Dkt. 33-20). Detective Allen confirmed that he and the arresting officers, who were in plain clothes and unmarked vehicles, acted pursuant to an investigative alert, did not have a search or arrest warrant for Petitioner, and saw Petitioner in handcuffs, not violating any laws, when they entered the residence. (*Id.* at 69-71). Furthermore, that investigative alert listed Detective William Ruck in Area 4 as the contact person. (State Ct. R., Ex. S Pt. 4 at 126, Dkt. 33-24).

The circuit court denied Petitioner's motion to suppress, finding "more than sufficient, almost overwhelming probable cause" to arrest Petitioner. (State Ct. R., Ex. S Pt 2 at 10-11, Dkt. 33-22). Petitioner's confession was thus admitted at trial. After a severed bench trial, Petitioner was convicted of first-degree murder and aggravated battery with a firearm and sentenced to 47 years and 6 years, respectively, to be served consecutively. *People v. Simmons*, 2020 IL App (1st) 170650, ¶ 2, 19, 21.

B. Direct appeal

Petitioner appealed, arguing that his jury waiver was invalid, but the appellate court affirmed. *Id.* at ¶ 22. Petitioner then filed a petition for leave to appeal, which was denied by the Illinois Supreme Court. (State Ct. R., Ex. J, I, Dkts. 33-10, 33-9). Subsequently, the United States Supreme Court denied his petition for a writ of certiorari. (State Ct. R., Ex. U, Dkt. 33-27).

C. Post-conviction proceedings

Petitioner filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure, which the circuit court dismissed, and he appealed. *People v. Simmons*, 2020 IL App (1st) 170650, ¶ 23. Petitioner filed a motion to reconsider the denial of his section 2-1401 petition, which was denied and he subsequently appealed. *Id.* Both appeals were dismissed by the appellate court. *Id.* Petitioner then filed a postconviction petition in the circuit court, which the state moved to dismiss pursuant to the Post-Conviction Hearing Act. *Id.* at ¶ 1. The circuit court granted the State's motion, finding, among other things, that Petitioner's ineffective assistance claim regarding probable cause was meritless. *Id.* at ¶ 31.

Petitioner appealed, arguing that "he made a substantial showing that he is actually innocent of the crimes for which he was convicted, his trial counsel was ineffective for failing to investigate and present an eyewitness, and his appellate counsel was ineffective for failing to argue that the circuit court erred in denying his motion to suppress." *Id.* The appellate court affirmed in part and reversed in part, remanding for an evidentiary hearing only on the claim that counsel was ineffective in failing to investigate and present an eyewitness. *Id.* at ¶ 65. The appellate court affirmed the circuit court on probable cause for the arrest. *Id.* at ¶¶ 57-65. Petitioner filed a petition for leave to appeal, which the Illinois Supreme Court denied. (State Ct. R., Ex. O, Dkt. 33-15).

D. Federal Habeas Corpus Proceedings

*3 Petitioner filed the instant petition on June 7, 2021 (Dkt. 1), which was originally dismissed without prejudice to reinstating the case within the statute of limitations and after exhausting post-conviction remedies in state court (Dkt. 12). The petition was reinstated on August 15, 2022 (Dkt. 18), at which time Petitioner was given an opportunity to assert all claims he intended to bring. Petitioner stood on his original claim of ineffective assistance of counsel for failing to appeal the denied suppression motion (Dkt. 23). This matter is fully briefed and ripe for ruling.

LEGAL STANDARD

When a state court has adjudicated a claim on the merits in state court, a federal court may not grant habeas relief unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United

States” or was “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d). “Unreasonable application of clearly established law occurs if a state court identifies the correct legal rule, yet applies it in an objectively unreasonable manner,” which “requires that the state court do more than just get it wrong.” *Hicks v. Hepp*, 871 F.3d 513, 524 (7th Cir. 2017). On the contrary, to demonstrate an unreasonable application of clearly established law, a petitioner “must show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

Section 2254(d) is “designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions.” *Id.* As a result, state court decisions adjudicating the merits of a petitioner’s claim are afforded deference, establishing a high burden for a petitioner to overcome before any relief may be granted. *Hicks*, 871 F.3d at 524. *See also Harper v. Brown*, 865 F.3d 857, 860 (7th Cir. 2017) (describing the § 2254(d) standard as “demanding”).

The Constitution guarantees criminal defendants a right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Counsel is ineffective when (1) the representation falls below an objective standard of reasonableness, (the performance prong) and (2) prejudice results from that representation (the prejudice prong). *Id.* at 688, 692. The *Strickland* standard applies to both trial and appellate counsel alike. *Makiel v. Butler*, 782 F.3d 882, 897 (7th Cir. 2015). Because both prongs must be met, either may be analyzed first. *Strickland*, 466 U.S. at 697.

A petitioner who alleges ineffective assistance of counsel faces an even more stringent standard as “[t]he Supreme Court has instructed that under these circumstances, [the reviewing court] must employ a ‘doubly deferential’ standard, one which ‘gives both the state court and the defense attorney the benefit of the doubt.’” *Hicks*, 871 F.3d at 526 (quoting *Burt v. Titlow*, 571 U.S. 12, 15 (2013) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011))). *See also Harrington*, 562 U.S. at 105 (citations omitted) (“Establishing that a state court’s application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both ‘highly deferential,’ ... and when the two apply in tandem, review is ‘doubly so.’”). Of note is that this Court, in adjudicating a petition

for a writ of habeas corpus, is not to review whether a petitioner’s appellate counsel *was* effective, but whether the state appellate court was reasonable in its application of the federal law. *See id.* at 101 (“The pivotal question is whether the state court’s application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel’s performance fell below *Strickland*’s standard.”).

DISCUSSION

*4 Petitioner pursues only one claim for federal habeas relief—ineffective assistance of appellate counsel for not challenging the circuit court’s denial of his suppression motion. Since the state appellate court adjudicated Petitioner’s claim on the merits, that decision is reviewable by this Court pursuant to § 2254(d). Upon careful consideration of the arguments presented and the state court record, the Court finds that the state appellate court reasonably applied clearly established federal law and thus the petition must be denied.

I. Prejudice Prong

Prejudice requires a showing “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* “Where defense counsel’s failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice.” *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986). Thus, the Court begins by determining whether the state appellate court reasonably determined that Petitioner’s Fourth Amendment claim lacked merit. If so, Petitioner could not have been prejudiced by appellate counsel’s failure to raise the argument on direct appeal.

A. Probable Cause

Petitioner contends the police lacked probable cause to effectuate his arrest. The Fourth Amendment guarantees the right of the people to be secure in their persons against unreasonable searches and seizures and provides that probable cause is required for a warrant. “Probable cause

involves a practical, common sense determination about whether, given all the circumstances present, it is reasonably probable that a person has committed or is committing an offense.” *United States v. Valencia*, 913 F.2d 378, 382 (7th Cir. 1990).

Respondent's answer points out that Petitioner does not appear to argue that there was no probable cause for Sgt. Daly to arrest him. (Resp. Answer at 14, Dkt. 23). Petitioner, however, reiterates in his reply brief that at the suppression hearing there was no testimony from whoever issued the investigative alert and, specifically, no testimony from Sgt. Daly that he explicitly told any other officer what he knew about the investigation or that he and Detective Ruck worked together. (Pet. Reply at 2-4, Dkt. 37). Petitioner's argument essentially goes to the application of the collective knowledge doctrine, which is discussed further below. But for the sake of completeness, the Court notes that Sgt. Daly *himself* had probable cause to arrest Petitioner. The state appellate court agreed with the circuit court's probable cause finding. *People v. Simmons*, 2020 IL App (1st) 170650, ¶ 57. That conclusion is reasonable and wholly supported by Sgt. Daly's testimony at the suppression hearing that during his investigation, he received information from multiple sources implicating Petitioner in Rangel's shooting. As such, Sgt. Daly possessed sufficient information to justify arresting Petitioner.

B. Collective Knowledge Doctrine

The Court must now determine whether it was reasonable to impute the knowledge establishing probable cause from Sgt. Daly to the arresting officers. The collective knowledge doctrine instructs that it was.

*5 “The collective knowledge doctrine permits an officer to ... arrest a suspect at the direction of another officer or police agency, even if the officer himself does not have firsthand knowledge of facts that amount to the necessary level of suspicion to permit the given action. [] There is no Fourth Amendment violation if the knowledge of the officer directing the ... arrest—or the collective knowledge of the agency for which he works—is sufficient to constitute probable cause.” *United States v. Williams*, 627 F.3d 247, 252 (7th Cir. 2010). See also *United States v. Nafzger*, 974 F.2d 906, 911 (7th Cir. 1992) (“The Fourth Amendment rights of the defendant are adequately protected by the requirement that the officers issuing the order or request have an adequate basis for doing so, such that if they were present at the

scene, they could justifiably stop or arrest the suspect.”). Three requirements must be met for the collective knowledge doctrine to apply: “(1) the officer taking the action must act in objective reliance on the information received, (2) the officer providing the information—or the agency for which he works—must have facts supporting the level of suspicion required, and (3) the stop must be no more intrusive than would have been permissible for the officer requesting it.” *Williams*, 627 F.3d at 252-53. At its core, the collective knowledge doctrine embodies the reality that a police department involves a team of officers who work together.

The Court finds that the state appellate court reasonably determined that Detective Allen and the other arresting officers possessed probable cause to arrest Petitioner under the collective knowledge doctrine. Sgt. Daly was assigned to “Area 4's violent crime homicide” and to investigate the June 4 shootings. True, the record is silent as to who actually issued the investigative alert or why “WILLIAM RUCK UNIT 640 DET DIV AREA 4” is listed as the contact person. (State Ct. R., Ex. S Pt. 4 at 126, Dkt. 33-24). Petitioner contends that Detective Ruck did not expressly testify to working with Sgt. Daly or issuing the investigative alert. (Pet. Reply at 2-3). But Petitioner attached Detective Ruck's testimony indicating that he was assigned to Area 4 Homicide Gang section and was investigating Rangel's murder. (*Id.* at 18-19). Given that both Sgt. Daly and Detective Ruck worked in the same police department (Area 4) and on the same investigation, knowledge is presumed to be imputed between them. See *Nafzger*, 974 F.2d at 915.

Petitioner takes issues with the appellate court's finding that “given the sheer amount of information uncovered by Daly as part of his investigation, we believe that it was not unreasonable for the circuit court to infer that Daly was responsible for the investigative alert.” (Pet. Mem. of Law at 33-35, Dkt. 17; *People v. Simmons*, 2020 IL App (1st) 170650, ¶ 61). However, such an inference merely embraces the doctrine of collective knowledge as discussed herein. In other words, it does not matter whether, despite being listed as the contact person, Detective Ruck also issued the investigative alert. What controls is the collective knowledge of the police agency, of which Sgt. Daly, who possessed the knowledge sufficient to establish probable cause, was a part. See, e.g., *United States v. Randall*, 947 F.2d 1314, 1319 (7th Cir. 1991) (finding probable cause existed to support an arrest when “the police department possessed a great deal of collective knowledge about [defendant's] involvement in

the crimes ultimately charged at the time they effected his arrest.”).

Finally, it is irrelevant that neither Sgt. Daly nor Detective Ruck effectuated the arrest. The same way that the knowledge establishing probable cause was imputed from Sgt. Daly to Detective Ruck, it is imputed from Sgt. Daly to the officers who arrested Petitioner pursuant to the investigative alert. At the time of Petitioner's arrest, Detective Allen and the other arresting officers were assigned to the CPD gang tactical team. They objectively relied upon the investigative alert, as the law permits. See *Valencia*, 913 F.2d at 383 (“The police who actually make the arrest need not personally know all the facts that constitute probable cause if they reasonably are acting at the direction of another officer or police agency. In that case, the arrest is proper so long as the knowledge of the officer directing the arrest, or the collective knowledge of the agency he works for, is sufficient to constitute probable cause.”); *Nafziger*, 974 F.2d at 913 (“The law enforcement officer making the arrest or stop acts within the law so long as an objective interpretation of the flyer or bulletin would lead him or her to believe that the stop or arrest was permissible.”).

*6 Because Petitioner's Fourth Amendment claim was meritless, he cannot establish prejudice arising from appellate counsel's failure to contest the circuit court ruling on his motion to suppress.

II. Performance Prong

Because Petitioner cannot demonstrate prejudice, his petition fails and the Court need not consider whether counsel's performance fell below an objective standard of reasonableness. Nevertheless, the Court quickly discusses it for purposes of completion. While there are no specific guidelines in determining whether counsel's performance fell below an objective standard of reasonableness, the Court considers whether counsel's assistance was “reasonable considering all the circumstances,” including prevailing professional norms. *Strickland*, 466 U.S. at 688. Review of counsel's performance must be “highly deferential,” “the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Id.* at 689-90. “A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the

evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Id.* at 689 (citation omitted).

Counsel is not required to raise arguments it knows are groundless. “Failure to raise a losing argument, whether at trial or on appeal, does not constitute ineffective assistance of counsel.” *Stone v. Farley*, 86 F.3d 712, 717 (7th Cir. 1996) (finding failure of appellate counsel to pursue issue of whether probable cause supported arrest did not constitute ineffective assistance of counsel). Because Petitioner's Fourth Amendment argument was a losing one, his *Strickland* claim fails.

CERTIFICATE OF APPEALABILITY AND NOTICE OF APPEAL RIGHTS

A court may issue a certificate of appealability “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). An applicant makes such a “substantial showing” by demonstrating that “reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner” or that, because of the adequacy of the issues presented, the petitioner deserves encouragement to appeal. *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (citations and quotations omitted). Because Petitioner cannot make such a substantial showing, the Court declines to issue a certificate of appealability.

Petitioner is advised that this is a final decision ending his case in this Court. If Petitioner wishes to appeal, he must file a notice of appeal with this Court within thirty days of the entry of judgment. See Fed. R. App. P. 4(a)(1). Petitioner need not bring a motion to reconsider this Court's ruling to preserve his appellate rights. However, if Petitioner 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).

*7 For all the foregoing reasons, Petitioner's habeas corpus petition [1] is denied on the merits, and the Court declines to issue a certificate of appealability. The Clerk is directed to update the docket to reflect that the Respondent is Ryan Woods, Warden, Sheridan Correctional Center and alter the case caption to *Simmons v. Woods*. Judgment is entered in favor of Respondent and against Petitioner. All pending motions and deadlines are terminated as moot. Civil case terminated.

CONCLUSION

All Citations

Not Reported in Fed. Supp., 2024 WL 3984274

Footnotes

- 1 Petitioner is incarcerated at Sheridan Correctional Center, where the current warden is Ryan Woods. The Clerk is directed, forthwith, to substitute Ryan Woods for David Gomez as the Respondent in this case pursuant to Fed. R. Civ. P. 25(d).

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APPENDIX C

STATE of Illinois Supreme Court

169 N.E.3d 332 (Table)

(This disposition of a Petition for Leave to Appeal
is referenced in the North Eastern Reporter.)

Supreme Court of Illinois.

PEOPLE State of Illinois, respondent,

v.

Donell SIMMONS, petitioner.

No. 126377

May 26, 2021

Leave to appeal, Appellate Court, First District. 1-17-0650

Opinion

Petition for Leave to Appeal Denied.

All Citations

169 N.E.3d 332 (Table), 446 Ill.Dec. 67

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APPENDIX D

STATE of Illinois Appellate
Court First District

Defendant

NOTICE
The text of this opinion may
be changed or corrected
prior to the time for filing of
a Petition for Rehearing or
the disposition of the same.

2020 IL App (1st) 170650

FIFTH DIVISION
Opinion filed: July 10, 2020

No. 1-17-0650

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 03 CR 27277
	)	
DONELL SIMMONS,	)	Honorable
	)	Lawrence E. Flood,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court, with opinion.
Justices Rochford and Delort concurred in the judgment and opinion.

OPINION

¶ 1 The defendant, Donell Simmons, appeals from an order of the circuit court of Cook County, granting the State's motion to dismiss his postconviction petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 et seq. (West 2012)) at the second stage of proceedings. On appeal, the defendant argues that he made a substantial showing that: he is actually innocent of the crimes for which he was convicted; his trial counsel was ineffective for

failing to investigate and present an eyewitness; and his appellate counsel was ineffective for failing to argue that the circuit court erred in denying his motion to suppress. For the following reasons, we reverse and remand for a third-stage evidentiary hearing on the defendant's claim that his trial counsel was ineffective for failing to investigate and present an eyewitness.

¶ 2 The defendant was charged, along with codefendants Labar "Bro-Man" Spann, Martise "Shorty" Nunnery, and Marcus "Black" Ware, a.k.a. John Coleman, with, *inter alia*, multiple counts of first-degree murder and aggravated battery with a firearm. The charges against the defendant stemmed from the June 4, 2003 shooting that resulted in the death of Randy "Kato" Rangel, Jr. and the injury of Harrison Hall. Following a severed bench trial on June 2, 2008, the defendant was convicted of first-degree murder and aggravated battery with a firearm and sentenced to consecutive terms of 47 years' imprisonment for the murder and 6 years' imprisonment for the aggravated battery.

¶ 3 The following facts relevant to the disposition of this appeal were derived from the record.

¶ 4 Prior to his trial, the defendant filed a motion to quash his arrest and suppress evidence, alleging that police did not have probable cause to arrest him without a warrant. At the hearing, the defendant presented the testimony of Detective Keith Allen. According to Detective Allen, on November 22, 2003, he went to 4223 W. Wilcox Street with ten members of a gang tactical team. The officers went to the building because they had an investigative alert stating that the defendant was suspected of killing Rangel. Detective Allen was positioned at the rear entrance to the building and, after other officers entered, they opened the rear door for him. Inside, he saw

the defendant in handcuffs. Detective Allen acknowledged that he did not have a search or arrest warrant for the defendant.

¶ 5 The State presented Sergeant Charles Daly, who testified that, at the time, he was a detective assigned to investigate the June 4, 2003 shooting. As part of his investigation, Sergeant Daly learned that an individual named "Rio" wore a body wire to record conversations with Nunnery. Sergeant Daly stated that Rio was "fighting a federal drug case and decided to cooperate with investigative officers from organized crime." Sergeant Daly reviewed a transcript of the recorded conversation between Rio and Nunnery, testifying that the two largely used slang terms and expressions. According to Sergeant Daly, he subsequently spoke to Rio, who told him that it was his belief that the conversation referred to Nunnery's involvement in Rangel's shooting. Rio also told him that he believed that Nunnery was telling him that "Squeaky" shot Rangel and that "Bro-Man" was also involved.

¶ 6 On November 13, 2003, Sergeant Daly met with Spann following his arrest on unrelated charges. According to Sergeant Daly, Spann told him the following: he was with the defendant and Nunnery on the day of the shooting; Nunnery received a phone call and they drove to Sacramento and Roosevelt, where Nunnery handed the defendant a .45 caliber handgun; the defendant exited the vehicle, and shortly thereafter, he heard gunshots and left the area; he subsequently spoke with the defendant, who told him that he killed Rangel. Spann also told Sergeant Daly that Squeaky was the defendant's nickname.

¶ 7 Nunnery was arrested the following day and provided a videotaped statement. Sergeant Daly testified that he viewed the recording and he described the contents to the court. Nunnery stated that he received a phone call from Ware informing him that Rangel was at a barber shop

near the intersection of Sacramento and Roosevelt. He drove to that location with Spann and the defendant. He handed the defendant a handgun, who then exited the car and entered the barber shop. A short time later, he heard gunshots. He subsequently spoke with the defendant, who told him that he shot and killed Rangel. The parties stipulated that Nunnery initially denied any involvement in the shooting.

¶ 8 Ware, who goes by the nickname "Black," was arrested on November 14, 2003, and gave a videotaped statement. Sergeant Daly testified as to the contents of that statement. Ware stated that Nunnery asked him to call if he saw Rangel at the barber shop on Sacramento and Roosevelt. He believed that Nunnery intended to rob Rangel and that he would be paid \$1500 for making the phone call. On June 4, 2003, he saw Rangel at the barber shop and called Nunnery. Subsequently, he learned from Nunnery that "they" had successfully killed Rangel.

¶ 9 Sergeant Daly also obtained information from Darren McCline, who was arrested and made a statement to Detective O'Donovan and an assistant state's attorney, which was reduced to writing on November 19, 2003. According to McCline's statement, the defendant told him that he had shot and killed Rangel and that he was enticed to do so by Nunnery and Spann.

¶ 10 Defense counsel argued that the State did not establish that it had probable cause to arrest the defendant because Rio's recorded conversation with Nunnery did not explicitly reference either a shooting or Rangel and the information linking the defendant to the shooting was unreliable as it all came from individuals who were under arrest. The circuit court denied the defendant's motion, finding "that there was more than sufficient, almost overwhelming probable cause as to each defendant *** to make their arrest and any evidence derived there from should not be suppressed."

¶ 11 At the defendant's severed bench trial, Hall testified that, on June 4, 2003, he was in a trailer on the corner of Sacramento and Roosevelt where he worked as a barber. He was cutting Rangel's hair when a man, whom he identified in court as the defendant, entered the trailer and fired several shots at Rangel. Hall was standing about two feet away from the defendant when he opened fire and could see his face under bright florescent lights. Hall ran past the defendant, exiting the trailer. He went to the hospital where he learned that he was shot in the foot.

¶ 12 Hall acknowledged that he initially told the police that he did not get a good look at the shooter's face. He testified that he lied about seeing the shooter because he did not want to be involved in the situation. On November 22, 2003, he was asked to view a lineup at the police station. After viewing the lineup, he identified the defendant as the shooter. On cross-examination, Hall testified that the police told him prior to viewing the lineup that the shooter might be in the lineup. Defense counsel then asked Hall if, when he was viewing the lineup, he "expected that maybe somebody in there was the person who shot in the trailer at you?" He responded: "Right."

¶ 13 Lavelle Green testified that, on the day in question, he was 15 years old and he and his friend, Maurice Williams, were sitting outside the barber shop trailer waiting to get a haircut when a man went into the trailer. He heard gunshots and ran. Green testified at trial that he could not identify the individual he saw enter the trailer that day. He acknowledged that, on November 22, 2003, he viewed a lineup and identified the defendant as the man he saw enter the trailer that day. He stated that he identified the defendant after the police told him to "pick the person who looked like [the shooter]." The State impeached Green with a written statement that he provided to the police. He acknowledged that he signed the statement, but he stated that he could not

remember the particulars of the statement. He stated that he signed the statement so "they could let [him] go." In the written statement, Green identified the defendant as the shooter.

¶ 14 The parties also stipulated that, if called to testify, Chicago Police Sergeant Jose Lopez would state under oath that he was present when Green identified the defendant as the individual who shot Rangel.

¶ 15 Ware testified that his given name is John Coleman and that "Ware" is his "alias for the police." He acknowledged that he has prior convictions for unlawful use of a weapon, obstruction of justice, and traffic offenses. He testified that he was a named codefendant in this case and, pursuant to an agreement with the State, pled guilty to conspiracy to commit first-degree murder in exchange for an agreed sentence of 12 years and the truth of his testimony at trial. He explained that, pursuant to the agreement, he must testify truthfully or else be charged with first-degree murder and perjury. He stated that, as of the date of the trial, he was housed in the witness protection quarters of the county jail.

¶ 16 Ware testified that, in April 2003, Nunnery called and asked if he could call him if he saw Rangel. He believed that the plan was to kidnap Rangel, a high-ranking member of the Latin Kings, whom he had known for several years. Later in that month, he drove with Nunnery and the defendant looking for Rangel, but they were unsuccessful. A few days later, Nunnery told him that the plan was to kill, not kidnap, Rangel, and that there was a "ransom" of \$190,000 and 15 kilograms of cocaine. Nunnery offered to pay him \$2000 in exchange for providing Rangel's location. On June 4, 2003, he called Nunnery and told him that Rangel was in Hall's barber shop on Sacramento and Roosevelt. After the call, he waited in Douglas Park across the street from the trailer. Shortly thereafter, he heard gunshots coming from the trailer and could see people

running out of the trailer, including the defendant. He saw the defendant run down Sacramento towards Roosevelt and then into an alley. Ware did not see anything in the defendant's hand.

¶ 17 On cross-examination, Ware testified that he gave a videotaped statement to the police after his arrest on November 14, 2003. He acknowledged that, in the statement, he said he did not know Nunnery intended to kill Rangel. He also acknowledged that his testimony included several details he did not provide to the police, such as looking for Rangel with Nunnery and the defendant, that Nunnery was going to receive \$190,000 and 15 kilograms of cocaine for the murder, that he was at Douglas Park when Rangel was shot, and that he saw the defendant exit the trailer. Instead, he told the police and ASA that he was a few blocks away when he heard the gunshots and that it was a few days later that he found out that "Squeaky" shot Rangel. He acknowledged that he did not provide these details until after he entered plea negotiations and the plea deal was finalized. On redirect-examination, Ware stated that he did not tell the police and ASA "everything" at the time of his arrest because he did not want to "involve" himself in the case.

¶ 18 Chicago Police Detective Patrick O'Donovan testified that he interviewed the defendant on November 22, 2003, following his arrest. He advised the defendant of his *Miranda* warnings and the defendant agreed to speak with him. During the course of the interview, the defendant admitted that he was the shooter and detailed how Nunnery and Spann approached him and promised him money to shoot Rangel. Detective O'Donovan testified that the defendant provided him with the following version of events. On the date of the shooting, Spann and Nunnery picked him up and told him that they knew Rangel's location. They drove by a carwash and observed Rangel's truck there. They stopped one block west of Sacramento and Spann

handed him a firearm. The defendant walked into a trailer that was operating as a barber shop, saw Rangel in the barber's chair, and fired at him before fleeing. The defendant told Detective O'Donovan that the motive for killing Rangel was retribution for stealing a significant quantity of drugs.

¶ 19 ASA Andreana Turano testified that, in the early morning hours of November 22, 2003, she spoke with the defendant in an interview room. After advising him of his *Miranda* warnings, he agreed to have a conversation. He indicated that he had been treated fine and did not have any complaints. He agreed to make a handwritten statement, which was published at trial. According to the defendant's handwritten statement, he goes by the nickname "Squeaky." In May 2003, Spann, whom he knew as "Bro-Man," approached him about shooting someone and introduced him to Nunnery. He learned that the target was Rangel and that Spann would pay him \$30,000 for killing him. At some point, he rode in a car with Ware, whom he knew as "Black," Spann, and another person he did not know, when Spann got a phone call from Nunnery. They drove to a location where Spann pointed out that the man shaking hands with Nunnery was Rangel, the intended target. On June 4, 2003, he got into a van with Spann and Nunnery and drove to a trailer that operated as barber shop. They parked about one block away, where Spann gave him a firearm. He exited the car, entered the trailer, and shot Rangel as he was getting his haircut. He then ran back to the van and gave the gun to Spann. The defendant stated that he was enticed into the shooting by Nunnery and Spann but was never paid the money he was promised.

¶ 20 The court found the defendant guilty of first-degree murder. In announcing its verdict, the court stated that it believed Ware's testimony and that the defendant's confession was

“convincing and compelling,” and that his insistence that he was enticed by Nunnery and Spann “have a definite ring of truth going to the reliability and trustworthiness of [his] confession.”

¶ 21 The court denied the defendant’s motion for a new trial, stating that “I believe that the evidence in this case was overwhelming, not at all close and that any possible error in this bench trial would be harmless beyond a reasonable doubt ***.”¹ Following a sentencing hearing, the court sentenced the defendant to consecutive terms of 47 years’ imprisonment for first-degree murder and six years’ imprisonment for aggravated battery with a firearm.

¶ 22 On direct appeal, we affirmed the defendant’s convictions and sentences over his contention that his jury waiver was invalid. *People v. Simmons*, No. 1-08-2532 (2010) (unpublished order under Illinois Supreme Court Rule 23).

¶ 23 On December 1, 2008, the defendant filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2008)), arguing that the prosecution fabricated the indictment and that the homicide statute violated both the *ex post facto* doctrine and the single subject rule. On February 18, 2009, the circuit court dismissed the defendant’s section 2-1401 petition and the defendant filed an appeal (No. 1-09-0742). The defendant filed a motion to reconsider the circuit court’s denial of his section 2-1401 petition, which the court denied, and the defendant appealed (No. 1-09-1652). We granted the defendant’s motions to dismiss both appeals on December 14, 2009, and January 27, 2010, respectively.

¶ 24 On September 20, 2011, the defendant filed a combined *pro se* postconviction petition for relief under the Act and under section 2-1401 of the Code. In his petition, the defendant argued, *inter alia*, that his trial counsel was ineffective for failing to investigate and call Green’s brother,

¹ We could not find a copy of the defendant’s motion for a new trial in the record, nor did the parties cite to a copy in their briefs on appeal.

Shardell Green, as a witness. According to the defendant, Shardell was a witness to the shooting, gave a statement to the police, and was willing to testify that someone other than the defendant committed the offense.

¶ 25 In support of his claim, the defendant attached two affidavits from Shardell to his postconviction petition. In the first affidavit, which was signed by Shardell and notarized on July 30, 2009, he averred that, in September 2007, a lawyer he identified as "Mr. Fulton" came to visit him in jail and asked if he witnessed the June 4, 2003 shooting. Shardell told him that, after hearing gunshots coming from inside the barber shop, he saw "a skinny medium complexion man about [5'9"] run out of the barber shop." Shardell stated that the man "was still shooting" when he exited the shop and then "ran toward Whipple." Shardell also stated that the picture Fulton showed him did not depict the shooter he saw running out of the barber shop. Shardell told Fulton he would be willing to testify, but Fulton did not contact him again. In the second affidavit, which is notarized but undated, Shardell averred that he witnessed the June 4, 2003 shooting and spoke with the police. He stated that he told the police the same thing that he told a lawyer named "Mike Fulton," which was that he saw a "skinny light-skinned man run out the [sic] barber shop shooting." The man he saw then "ran west down Roosevelt Rd." Shardell also averred that Fulton showed him photographs of the defendant and Nunnery and he told Fulton that neither of them were the shooter. He told Fulton that he was "willing to come to court" but was never contacted.

¶ 26 On December 23, 2011, the circuit court appointed postconviction counsel to represent the defendant. On August 16, 2015, appointed counsel filed a supplemental petition that included the above mentioned claims from the defendant's *pro se* petition and added two claims: that the

defendant's appellate counsel was ineffective for failing to challenge the trial court's ruling on his motion to quash arrest and suppress evidence where the State failed to establish probable cause because the officer who issued the investigative alert did not testify; and that the defendant was actually innocent of the crimes for which he was convicted based on Shardell's affidavit. Regarding Shardell, the supplemental petition argued that he should have been known to trial counsel because his name is listed in police reports as a "potential eyewitness" to the shooting and he was interviewed by Nunnery's counsel.

¶ 27 Attached to the supplemental petition was a third affidavit from Shardell and a copy of the investigative alert. In Shardell's affidavit, which was signed and notarized on March 20, 2015, he stated that, on June 4, 2003, he was sitting on the steps of the barber shop with his brother Lavelle and Maurice Williams when a man ran past them into the barber shop. Shardell's description of the shooter and the ensuing events was the same as the previous two affidavits. He also averred that he saw a picture of the defendant and he was not the person he saw that day. Shardell also described meeting with Fulton "some time" before he pled guilty in a separate case in September 2007. Shardell stated that "[a]ny picture that Mr. Fulton showed me was not of the person I saw at the trailer that day." Shardell averred that no other lawyer or investigator ever interviewed him about the shooting.

¶ 28 The attached copy of the investigative alert stated that "[t]he above subject was identified as the person who shot the victim with a handgun thereby causing his death" and lists Detective William Ruck as the contact person.

¶ 29 On April 26, 2016, the State filed a motion to dismiss both the combined *pro se* postconviction petition and the supplemental petition, arguing that the defendant's section 2-

1401 petition was untimely and that the defendant's appellate counsel was not ineffective because the evidence at the suppression hearing established that the officers had probable cause to arrest. The State also argued that the defendant's actual innocence claim should be dismissed because Shardell's testimony was not of such a conclusive nature that it would probably change the result on retrial in light of the defendant's confession and Hall's eyewitness testimony. The State's motion does not appear to make any argument as to the defendant's claim that his trial counsel was ineffective for failing to investigate or present Shardell.

¶ 30 On July 21, 2016, the defendant filed a response to the State's motion to dismiss and a motion for leave to file a supplemental affidavit from Irineo Barbosa in support of his claim of actual innocence. In an attached affidavit, Barbosa averred that he was Spann's cellmate in December 2003. He stated that Spann told him, while "bragging" about past crimes, that someone named "the Post-man" shot Rangel and that Spann, the Post-man, and Spann's "girl's little brother" were the ones involved. According to Barbosa, Spann told Ware to say that Nunnery "set the whole thing up" and threatened Ware's mother. Barbosa subsequently met Nunnery and told him that he would be willing to sign an affidavit relating what Spann told him.

¶ 31 On February 21, 2017, the circuit court granted the State's motion to dismiss the defendant's combined *pro se* petition and supplemental petition. Regarding the defendant's section 2-1401 claims, the court found that the claims were untimely filed. As to the defendant's claim of actual innocence, the court found that Shardell's affidavit did not contain newly discovered evidence because he was listed on police reports as a potential eyewitness and, therefore, could have been discovered sooner with due diligence. Regarding Barbosa's affidavit, the court found that it was not of such a conclusive character that it would have changed the

result because it consisted of inadmissible hearsay, did not identify the actual shooter, or provide the defendant with an alibi. As to the defendant's claim of ineffective assistance of trial counsel for failing to investigate and call Shardell, the court concluded that the defendant could not establish prejudice because Shardell "did not observe the shooting and therefore cannot exonerate [the defendant]" and his testimony was "vastly outweighed by the multiple occurrence witnesses at the scene and [the defendant's] own inculpatory statements." Lastly, the court found that the defendant's claim of ineffective appellate counsel was "meritless." This appeal followed.

¶ 32 On appeal, the defendant argues that the circuit court erred in granting the State's motion to dismiss his postconviction petition at the second stage of proceedings because his petition made a substantial showing that: (1) he is actually innocent of the crimes for which he was convicted based on Barbosa's affidavit; (2) his trial counsel was ineffective for failing to investigate and present Shardell, an eyewitness to the shooting; and (3) his appellate counsel was ineffective for failing to argue that the State failed to establish that his arrest was supported by probable cause.

¶ 33 The Act provides a procedural mechanism through which a petitioner may assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. 725 ILCS 5/122-1 (West 2012). At the first stage of a postconviction proceeding, the circuit court independently reviews the defendant's petition, taking the allegations as true, and determines if it is frivolous or patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). If the postconviction petition is not summarily dismissed, as here, it advances to the second stage, where the State may file a motion to dismiss the petition and the postconviction court must determine whether the petition and any accompanying documents make a substantial showing of

a constitutional violation. *Id.* at 10-11 n. 3. At the second stage of proceedings, the postconviction court takes “all well-pleaded facts that are not positively rebutted by the trial record” as true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). If the petition fails to make a substantial showing of a constitutional violation, it is dismissed; if such a showing is made, the postconviction petition advances to the third stage where the court conducts an evidentiary hearing. 725 ILCS 5/122-6 (West 2012). We review a dismissal of a petition at the second stage *de novo*. *People v. Whitfield*, 217 Ill. 2d 177, 182.

¶ 34 The defendant first contends that he made a substantial showing that he is actually innocent of the crimes for which he was convicted. The defendant’s argument on appeal is based only on the evidence contained in Barbosa’s affidavit and does not include any argument regarding Shardell’s affidavit.

¶ 35 In order to succeed on a postconviction claim of actual innocence, the defendant must present new, material, noncumulative evidence that is so conclusive it would probably change the result on retrial. *People v. Washington*, 171 Ill. 2d 475, 489 (1996). New evidence means it was discovered after trial and could not have been discovered earlier through the exercise of due diligence. *People v. Burrows*, 172 Ill. 2d 169, 180 (1996). Material means the evidence is relevant and probative of the defendant’s innocence. *People v. Smith*, 177 Ill. 2d 53, 82-83 (1997). Noncumulative means the evidence adds to what the jury heard. *People v. Molstad*, 101 Ill. 2d 128, 135 (1984). And conclusive means the evidence, when considered along with the trial evidence, would probably lead to a different result. *People v. Ortiz*, 235 Ill. 2d 319, 336-37 (2009). This standard “is extraordinarily difficult to meet.” *People v. Coleman*, 2013 IL 113307,

¶ 94. The conclusiveness of the new evidence is the most important element. *People v. Sanders*, 2016 IL 118123, ¶ 47.

¶ 36 The defendant contends that the evidence contained in Barbosa's affidavit is newly discovered, noncumulative, material, and of such a conclusive character that it would probably change the outcome at retrial. He also argues that the circuit court erred in finding that the affidavit contained inadmissible hearsay because hearsay is admissible at collateral proceedings, citing to *People v. Sanchez*, 115 Ill. 2d 238, 284-85 (1986) and *People v. Warren*, 2016 IL App (1st) 090884, ¶¶ 89-90. The State responds that Barbosa's affidavit would not change the outcome of a retrial because of the overwhelming evidence of the defendant's guilt, such as his written confession, Ware's testimony detailing the defendant's involvement, and Hall's eyewitness identification. We agree with the State.

¶ 37 We first address the State's contention that Barbosa's affidavit fails because it contains inadmissible hearsay. The supreme court recently adopted and amended Illinois Rule of Evidence 1101, which added "postconviction hearings" to a list of proceedings to which the rules of evidence—including the rules against hearsay—"do not apply." Ill. R. Evid. 1101(b)(3) (eff. Apr. 8, 2013). Because the rules of evidence do not apply to postconviction proceedings, we will consider the contents of Barbosa's affidavit even though it contains hearsay. See *People v. Velasco*, 2018 IL App (1st) 161683, ¶ 119 (finding that the hearsay affidavits at issue in that case, indicating that a gang member had bragged to one of the affiants about shooting the victim, were admissible under Rule 1101(b)(3) and must be taken as true, at the second stage of postconviction proceedings).

¶ 38 Here, Barbosa's affidavit states that Spann told him, while "bragging" about his past crimes, that someone named "Post-Man" shot and killed Rangel. However, Barbosa's affidavit does not indicate that Spann's reference to Post-Man is a reference to someone other than the defendant. The defendant argues that the record indicates his nickname was Squeaky, not Post-Man. However, this argument supposes that an individual can have one, and only one, nickname. "Evidence of actual innocence must support total vindication or exoneration, not merely present a reasonable doubt." *People v. Adams*, 2013 IL App (1st) 111081, ¶ 36. Simply put, this evidence does rise to that level.

¶ 39 Moreover, Barbosa's affidavit must be viewed in light of the overwhelming evidence of the defendant's guilt presented at trial. Most significantly, the State presented the defendant's signed statement in which he confessed to shooting Rangel at the behest of Nunnery and Spann. "A confession is the most powerful piece of evidence the State can offer, and its effect *** is incalculable." *People v. Miller*, 2013 IL App (1st) 110879, ¶ 82 (quoting *People v. Fillyaw*, 409 Ill. App. 3d 302, 316 (2011)). Furthermore, an eyewitness and a codefendant both implicated the defendant as the shooter. Hall, who testified that the perpetrator stood two feet away from him and was illuminated by bright florescent lights, identified the defendant. Similarly, Ware testified that he once drove with the defendant and Nunnery looking for Rangel. He also testified that, after informing Nunnery of Rangel's location, he stood in Douglas Park and watched the defendant flee from the trailer after hearing gunshots. Lastly, he testified that he subsequently spoke with the defendant, who admitted to him that he shot and killed Rangel. Given this evidence, we conclude that Barbosa's affidavit was not conclusive enough that it would probably

lead to a different result. Accordingly, we find that the defendant failed to make a substantial showing of actual innocence.

¶ 40 The defendant next argues that he made a substantial showing that his trial counsel was ineffective for failing to investigate or present Shardell, an eyewitness to the shooting, who would testify that the man he saw shooting into the barber shop was not the defendant.

¶ 41 Ineffective assistance of counsel claims are considered under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). "To prevail on a claim of ineffective assistance of counsel under *Strickland*, a defendant must show both *** that counsel's performance 'fell below an objective standard of reasonableness' and that the deficient performance prejudiced the defense." *Hodges*, 234 Ill. 2d at 17 (quoting *Strickland*, 466 U.S. at 687-88). "If an ineffectiveness claim can be disposed of on the ground of insufficient prejudice, then that course should be taken, and the court does not need to consider the quality of the attorney's performance." *People v. Williams*, 2017 IL App (1st) 152021, ¶ 36.

¶ 42 It is well-established that the choice on what witnesses to call "is a matter of trial strategy, left to the discretion of counsel after consultation with the defendant." *People v. Peterson*, 2017 IL 120331, ¶ 80. However, trial counsel has a duty to conduct reasonable investigations into possible defenses. *People v. Domagala*, 2013 IL 113688, ¶ 38. The failure to interview known witnesses can indicate incompetence when their testimony could be exonerating. *People v. Steidl*, 177 Ill. 2d 239, 256 (1997). " '[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.' " *People v. Guest*, 166 Ill. 2d 381, 400

(1995) (quoting *Strickland*, 466 U.S. at 691); accord *People v. Pecoraro*, 175 Ill. 2d 294, 324 (1997).

¶43 We conclude that the defendant has made a substantial showing that his trial counsel was deficient for failing to contact Shardell as a potential exculpatory witness, meeting the first prong of the *Strickland* test. Shardell stated in his affidavit that he was present outside the barber shop on June 4, 2003, and that the person he saw fleeing the barber shop while shooting was not the defendant. He averred that he told this information to the police and to Mr. Fulton, who the defendant alleges was Nunnery's counsel. Shardell also stated that he would have testified at the defendant's trial but was never contacted by counsel. According to the record, police reports listed Shardell as a potential eyewitness. We can find no strategic reason to explain why counsel may have decided not to interview Shardell. Taking the facts presented in the affidavits as true, as we must at this stage (*Pendleton*, 223 Ill. 2d at 473), the defendant met his burden of making a substantial showing that his trial counsel was deficient.

¶44 To determine, under the second prong of the *Strickland* test, whether trial counsel's failure to investigate prejudiced the defendant, we must look at the evidence presented at his trial. "Prejudice is demonstrated if there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different." *People v. Makiel*, 358 Ill. App. 3d 102, 105-06 (2005). "Whether the failure to investigate constitutes ineffective assistance of counsel is determined by the value of the evidence not presented at trial and the closeness of the evidence that was presented at trial." *People v. Harmon*, 2013 IL App (2d) 120439, ¶ 26.

¶ 45 Here, the State presented the following evidence of the defendant's guilt at trial: the defendant's handwritten confession, Hall's identification of the defendant as the man who shot him and Rangel, and Ware's testimony regarding the defendant's involvement in the plot to kill Rangel. The defendant contends that, given the weaknesses in the State's evidence, Shardell's testimony would have increased his chances of acquittal. Specifically, the defendant argues that his confession occurred after ten hours in custody and multiple interrogations, Hall's identification is not credible given that he initially told police that he did not see the shooter's face, and Ware's testimony "was doubtful considering his status as a co-defendant testifying under a plea agreement." The State responds that the defendant failed to make a substantial showing of prejudice because the evidence of his guilt was overwhelming. We agree with the defendant.

¶ 46 Shardell's testimony that he was present at the barber shop and saw someone other than the defendant firing a weapon would have significantly bolstered defense counsel's argument that the State could not prove the defendant guilty beyond a reasonable doubt. Moreover, Shardell's testimony regarding the direction the shooter fled after the shooting would have contradicted Ware's testimony, possibly giving the trier of fact another reason to question his credibility. *People v. Rodriguez*, 227 Ill. App. 3d 397, 405 (1991) ("[T]he testimony of an accomplice is to be viewed with suspicion."). In reaching this decision, we acknowledge that the State did present considerable evidence indicating the defendant's guilt. However, prejudice "may be found even when the chance that minimally competent counsel would have won an acquittal is 'significantly less than 50 percent,' as long as a verdict of not guilty would be reasonable." *People v. McCarter*, 385 Ill. App. 3d 919, 936 (2008) (quoting *Miller v. Anderson*,

255 F.3d 455, 459 (7th Cir. 2001)). Here, we conclude that, if Shardell had testified in a manner consistent with his affidavit, a verdict of not guilty would at least be reasonable. As such, we conclude that the defendant made a substantial showing that his trial counsel was ineffective for failing to investigate or present Shardell, and the circuit court should proceed to a third-stage evidentiary hearing on that claim.

¶ 47 The defendant's next contention on appeal is that he made a substantial showing that his appellate counsel was ineffective for failing to challenge the circuit court's ruling on his motion to quash arrest and suppress evidence where the probable cause to arrest was based on an investigative alert and the officer who issued that alert did not testify at the hearing. He also argues, in the alternative, that his appellate counsel was ineffective for failing to argue that his trial counsel was ineffective for failing to preserve the issue for appeal.

¶ 48 Claims of ineffective assistance of appellate counsel are judged against the same two-pronged *Strickland* standard. *People v. Lacy*, 407 Ill. App. 3d 442, 457 (2011) (citing *Edwards*, 195 Ill. 2d at 163). "[A] defendant must show both *** that counsel's performance 'fell below an objective standard of reasonableness' and that the deficient performance prejudiced the defense." *Hodges*, 234 Ill. 2d at 17 (quoting *Strickland*, 466 U.S. at 687-88). "Appellate counsel is not required to brief every conceivable issue on appeal, however, and it is not incompetence for counsel to refrain from raising issues that counsel believes are without merit." *Edwards*, 195 Ill. 2d at 163-64. Unless the underlying issue has merit, a defendant suffers no prejudice as the result of appellate counsel's failure to raise an issue on appeal. *Lacy*, 407 Ill. App. 3d at 457.

¶ 49 Here, the defendant argues that his appellate counsel was ineffective for failing to challenge the trial court's denial of his motion to quash arrest and suppress evidence. On a

¶ 52 The State responds by raising three arguments. First, the State argues that the defendant failed to preserve this claim for appellate review because it is "dissimilar" to the claim he raised in his supplemental postconviction petition. Second, it argues that the defendant's claim should be dismissed because his current claim is "substantively dissimilar to the argument raised by trial counsel at the pretrial hearing, which explains why the argument was not previously raised." The State goes on to contend that "[h]ad trial counsel specifically argued, for example, that the officer who issued the investigative alert lacked probable cause to do so, both parties would have had an opportunity to develop the record and the trial court would have had an opportunity to make a ruling based on that issue." Lastly, the State argues that it presented sufficient evidence to establish that officers had probable cause to arrest the defendant and any claim to the contrary on appeal would not have been meritorious.

¶ 53 To begin, we first address the State's contention that the defendant's argument on appeal is dissimilar to the argument raised in his supplemental postconviction petition. We find no merit to the State's contentions. In his supplemental petition, the defendant argued that his appellate counsel was ineffective for failing to challenge the denial of his motion to quash arrest and suppress evidence because "the State failed to meet its burden of demonstrating that the arresting officers actually knew of sufficient facts or that the directive to arrest was actually made by an officer who knew sufficient facts." Noting that he was arrested pursuant to an investigative alert, the defendant argued that the record was silent as to who issued the alert and, given that Detective Ruck is listed as the contact person on the alert, "it should not be assumed" that it was Sergeant Daly, the officer who testified at the hearing. This is precisely the argument the

motion to quash arrest and suppress evidence, the defendant generally bears the burden of proof. *People v. Garcia*, 2017 IL App (1st) 142141, ¶ 28. However, “[a]n arrest without probable cause or a warrant based thereon violates” both the United States and Illinois constitutions. *People v. Lee*, 214 Ill. 2d 476, 484 (2005). Thus, “[o]nce the defendant submits evidence which shows that, at the time of the arrest, he was doing nothing unusual (*i.e.*, his conduct was not indicative of the commission of a crime) and he was arrested without a warrant, the defendant has made a *prima facie* case that the police lacked probable cause,” and the burden then shifts to the State to show that the warrantless arrest was based on probable cause. *People v. Drake*, 288 Ill. App. 3d 963, 964 (1997). That said, the ultimate burden of proof remains with the defendant. *People v. Cregan*, 2014 IL 113600, ¶23.

¶ 50 In the instant case, the parties do not dispute that the defendant was not arrested pursuant to a warrant. Additionally, Detective Allen testified at the suppression hearing that the defendant was already in handcuffs when he entered the residence and he did not see the defendant doing anything unusual or illegal at the time. Therefore, the State was required to demonstrate that the arrest was based on probable cause and, therefore, legally justified.

¶ 51 The defendant contends that the State failed to satisfy this burden because Detective Allen testified that he was arrested based solely on an investigative alert and the only other officer who testified, Sergeant Daly, offered no evidence that he was “connected” with the investigative alert. The defendant also notes that the investigative alert lists “Detective William Ruck” as the contact person. As a result, the defendant contends that we should not “presume” that Sergeant Daly “issued the directive to arrest.”

defendant now raises on appeal, and we conclude, therefore, that he has not forfeited this argument.

¶ 54 We next address the State's contention that the defendant's claim of ineffective assistance of appellate counsel fails because the claim is "substantively dissimilar to the argument raised by trial counsel at the pretrial hearing, which explains why the argument was not previously raised." At the suppression hearing, the defendant's only arguments were that Rio's tape-recorded conversations did not explicitly reference either a shooting or Rangel and that the information implicating the defendant was unreliable because it came from individuals who were under arrest. We agree with the State that the defendant's argument at the suppression hearing was substantively dissimilar to the claim he now faults his appellate counsel for failing to raise. However, the defendant also argued in his supplemental postconviction petition that "[i]n the event this claim is viewed as inadequately preserved for review, trial counsel's ineffectiveness in failing to adequately preserve it could have been raised on appeal." Consequently, the State's argument does not have merit, and we must, therefore, determine whether a challenge to the trial court's denial of the defendant's motion to quash arrest and suppress evidence on the grounds that the State failed to prove that the investigative alert was supported by probable cause would be meritorious.

¶ 55 An arrest secured without a warrant is valid only where it is supported by probable cause. *People v. Grant*, 2013 IL 112734, ¶ 11. Police have probable cause to arrest an individual when the facts known to the officer at the time of the arrest are sufficient to lead a reasonably cautious person to believe that the individual has committed a crime. *Id.* Whether probable cause exists depends on the totality of the circumstances at the time of the arrest. *Id.* An officer's factual

knowledge, based on his or her police experience, is relevant to determining probable cause. *Id.* Whether probable cause exists is governed by commonsense considerations, and the calculation concerns the probability of criminal activity, rather than proof beyond a reasonable doubt. *People v. Grant*, 2013 IL 112734, ¶ 11.

¶ 56 Although an arrest may be based on information of which the arresting officer does not have personal knowledge, the State must show that the information the officer relied on was based on facts sufficient to show probable cause to support an arrest. *Hyland*, 2012 IL App (1st) 110966 ¶ 22. An arresting officer may rely on information received in an official police communication, provided that the officer who issued the communication had probable cause to arrest. *Lawson*, 298 Ill. App. 3d 997, 1001 (1998).

¶ 57 After reviewing the record, we conclude that the State presented sufficient evidence to establish that the police had probable cause to arrest the defendant for the shooting death of Rangel. At the hearing, Detective Allen testified that he arrested the defendant pursuant to an investigative alert stating that the defendant was suspected of shooting Rangel. Sergeant Daly, a former detective who was assigned to investigate the June 4, 2003 shooting, testified that his investigation produced the following information: Rio, a confidential informant, told him that a recorded conversation with Nunnery indicated that the defendant shot and killed Rangel; Spann, who had admitted to being involved in the shooting, told him that the defendant subsequently confessed to him that he shot and killed Rangel; an individual named McCline provided a statement indicating that the defendant told him that he had shot and killed Rangel and that he was enticed to do so by Nunnery and Spann; and Nunnery recorded a confession implicating the

defendant as the shooter. We agree with the trial court that this evidence “was more than sufficient” to establish that police had probable cause to arrest the defendant.

¶ 58 In urging reversal, the defendant relies primarily on *People v. Hyland*, 2012 IL App (1st) 110966, to support his argument that his appellate counsel should have challenged the court’s denial of his motion to quash arrest and suppress evidence on appeal. In *Hyland*, a defendant was approached by two officers based on an investigative alert stating that the defendant violated an order of protection. The officers took the defendant into custody and performed a custodial search that produced a weapon. He was arrested and charged with unlawful use of a weapon by a felon and unlawful possession of a firearm by a street gang member. At the defendant’s motion to suppress, the State presented only the testimony of the arresting officer, who stated that he approached the defendant based on the investigative alert but did not have personal knowledge of the facts underlying the issuance of the investigative alert. We reversed the trial court’s denial of the defendant’s motion to quash his arrest and suppress evidence, finding that the State “presented no evidence that the underlying facts of the investigative alert established probable cause to arrest defendant, either from the officer who issued the investigative alert or from the individual who obtained the protective order that defendant allegedly violated.” *People v. Hyland*, 2012 IL App (1st) 110966, ¶ 25.

¶ 59 In relying on *Hyland*, the defendant acknowledges that his direct appeal was resolved on March 30, 2010, and that our opinion in *Hyland* case was issued on November 21, 2012, over two years later. See *People v. Simmons*, 1-08-2532 ((unpublished order under Illinois Supreme Court Rule 23). Appellate counsel’s assessment of the merits of an issue depends on the state of the law at the time of the direct appeal. *People v. English*, 2013 IL 112890, ¶ 34 (citing *People v.*

Weninger, 292 Ill. App. 3d 340, 345 (1997)). The defendant nevertheless insists that, although *Hyland* was not decided at the time his case was on appeal, his direct appellate counsel was “not required to be prescient in terms of knowing how [the appellate court] would eventually rule in *Hyland*” because the cases that formed the basis for *Hyland* were available, such as *People v. Lawson*, 298 Ill. App. 3d 997 (1998).

¶ 60 In *Lawson*, the circuit court granted a motion to quash arrest and suppress evidence filed by a defendant who was charged with, *inter alia*, armed robbery. The State appealed and we affirmed, finding that the only witness for the State at the suppression hearing was the arresting officer, who testified that he arrested the defendant solely because he matched the description of a suspect in a radio bulletin. We stated that “when the State attempts to justify a warrantless arrest on the basis of a radio bulletin it must establish that *the officer who issued the bulletin* had probable cause to effect an arrest. (Emphasis in original.) *Lawson*, 298 Ill. App. 3d at 1001.

¶ 61 We find that the instant case is meaningfully distinguishable from both *Lawson* and *Hyland*. Here, unlike in *Lawson* and *Hyland*, the State presented Sergeant Daly, a former detective who was assigned to investigate the June 4, 2003 shooting, and who testified to the considerable information that his investigation into Rangel’s death produced implicating the defendant as the shooter prior to his November 22, 2003 arrest. We acknowledge that Sergeant Daly did not directly testify as to whether he issued the investigative alert; however, his testimony regarding what investigators knew prior to the issuance of the alert and the defendant’s subsequent arrest is clearly an order of magnitude beyond what was presented to the court in *Lawson* and *Hyland*. Moreover, given the sheer amount of information uncovered by Sergeant Daly as part of his investigation, we believe that it was not unreasonable for the circuit court to

infer that Sergeant Daly was responsible for the investigative alert. Accordingly, we conclude that the circuit court did not err when it denied the defendant's motion to quash his arrest and suppress evidence, and therefore, his appellate counsel was not ineffective for failing to challenge the ruling on appeal.

¶ 62 Lastly, we address the defendant's citation to *People v. Bass*, 2019 IL App (1st) 160640 pet. for leave to appeal allowed, No. 125434 (March 25, 2020). In *Bass*, a divided panel of this court concluded that an arrest is unconstitutional when it is based solely on an investigative alert, even where the investigative alert is supported by probable cause. *Bass*, 2019 IL App (1st) 160640, ¶ 43. In reaching that conclusion, the majority found that the Illinois Constitution required a warrant, based on probable cause, to issue before an arrest could be made and that an investigative alert, validating an arrest without the issuance of a warrant, violated the Illinois Constitution. *Id.* at ¶ 62. The majority based its decision on the notion that the Chicago Police Department improperly utilized investigative alerts in an effort to circumvent the process of obtaining a warrant and arrest individuals without establishing probable cause to do so. *Id.*

¶ 63 The State argues that we should find that the defendant has forfeited any argument pursuant to *Bass* because he failed to raise such an argument in his supplemental postconviction petition. It also contends that, if we do address the issue, we should follow *People v. Braswell*, 2019 IL App (1st) 172810, which disagreed with the majority's decision in *Bass*. We agree with the State that the defendant failed to raise an argument similar to *Bass* in his postconviction petition, and he cannot raise it for the first time on appeal. *People v. Jones*, 213 Ill. 2d 498, 505, (2004) (finding that the courts have "generally held that a claim not raised in a petition cannot be argued for the first time on appeal").

¶ 64 Forfeiture aside, we agree with *Braswell* and decline to follow *Bass*. As the *Braswell* court stated, “The flaw in [*Bass*’s] reasoning [is] that arrests must be based on probable cause, not warrants as the majority in *Bass* suggests.” *People v. Braswell*, 2019 IL App (1st) 172810, ¶ 39. This flawed reasoning in *Bass* “creates the somewhat paradoxical situation where police may arrest an individual without a warrant and without an investigative alert if they have probable cause to do so, but that same arrest becomes unconstitutional if police issue an investigative alert based on the same facts that gave rise to the probable cause.” *Id.* Accordingly, we conclude, as did *Braswell*, that “the investigative alert must have a proper basis to show probable cause.” *Id.* And, as we have already concluded, the State did present sufficient evidence in this case to establish that the police had probable cause to arrest the defendant based on an investigative alert.

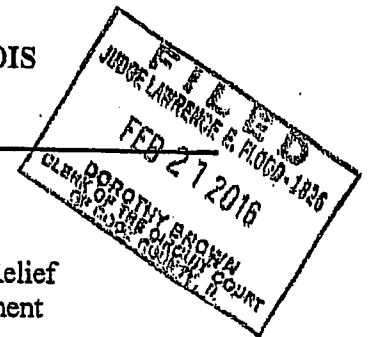
¶ 65 In sum, we find that the defendant made a substantial showing that his trial counsel was constitutionally ineffective for failing to investigate and present Shardell as an exculpatory witness, and we remand to the circuit court for a third-stage evidentiary hearing on that issue. We affirm the circuit court in all other respects.

¶ 66 Affirmed in part, reversed in part, and remanded with instructions.

APPENDIX E

STATE of Illinois Circuit Court
of Cook County

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION



PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Respondent,	)	Petition for Post-Conviction Relief
	)	Petition for Relief from Judgment
v.	)	03CR2727701
	)	
DONNELL SIMMONS,	)	
	)	
Defendant-Petitioner.	)	Honorable Lawrence E. Flood
	)	Judge Presiding

ORDER

Petitioner, Donnell Simmons, seeks post-conviction relief and relief pursuant to 735 ILCS 5/2-1401 from the judgment of conviction entered against him on August 19, 2008. Following a simultaneous, but severed, bench trial with co-defendant Labar Spann, the court found petitioner guilty of first-degree murder, 720 ILCS 5/9-1(a)(1) (LEXIS 2003), and aggravated battery with a firearm, 720 ILCS 5/12-4.2(a)(1) (LEXIS 2003). The court sentenced petitioner to serve a term of 47 years' imprisonment for the murder consecutively to a term of six years' imprisonment for the aggravated battery in the Illinois Department of Corrections. As grounds for relief, petitioner claims: (1) he is actually innocent based on newly discovered evidence from (a) Shardell Green, (b) Lavelle Green, and (c) Irineo Barbosa; (2) the State knowingly presented perjured testimony (a) at the hearing on the motion to suppress through Sergeant Daly and (b) at trial through John Coleman; (3) he was not given his *Miranda* rights properly; (4) the police lacked probable cause for his arrest; (5) he received ineffective assistance of trial counsel where counsel (a) did not properly argue the motion to quash his arrest, (b) did not allege that Sergeant Daly committed perjury, (c) did not call an expert witness to testify at the hearing on the motion to suppress, (d) did not allege that an alternate suspect committed the crime, (e) coerced him to waive his right to

On November 14, 2003, Coleman was also arrested. Coleman gave a videotaped statement. Coleman stated that he was offered \$1,500 to call Nunnery when Rangel arrived at the barbershop.

On November 19, 2003, Darren McCline, who had been arrested for an unrelated case, stated that petitioner told him he had killed a Puerto Rican man, who was a King in the Latin Kings gang. Petitioner told McCline that Nunnery had hired him for the killing.

On November 23, 2003, Labar Spann was arrested for an unrelated case. Spann told Daly that he had accompanied petitioner and Nunnery to Sacramento and Roosevelt, where Nunnery gave petitioner a gun. Petitioner exited the car and Spann heard gunshots. Petitioner later said he killed Rangel. The court denied the motion to quash petitioner's arrest.

On December 12, 2006, and January 25, 2007, the court held a hearing on defense counsel's motion to suppress petitioner's inculpatory statements. Counsel asserted that petitioner's statements were involuntary because he was intoxicated and coerced by police.

Detective O'Donovan testified that he first saw petitioner handcuffed to a bench at the station. Petitioner was later moved upstairs to a windowless room in the detective's area for questioning. On November 22, 2003, at approximately 2:40 a.m., Detectives O'Donovan and Deenihan interviewed petitioner. Detective O'Donovan advised petitioner of his *Miranda* rights and petitioner indicated he understood his rights. Petitioner told Detective O'Donovan that he was aware of Rangel's homicide from the news. Petitioner agreed to submit to a DNA sample and a buccal swab test was administered. At 4:09 a.m., Detective O'Donovan sent petitioner to lockup for processing. Petitioner was subsequently returned to an interview room. Detective O'Donovan testified that he did not observe any signs of intoxication including stumbling, unresponsive answers, slurred speech, glassy or bloodshot eyes, shaking hands, or complaints of

dizziness or nausea. Detective O'Donovan questioned petitioner for approximately two and a half hours. Assistant State's Attorney Turano-Michels arrived and received the same statement from petitioner. ASA Turano-Michels produced a written copy of the statement, which petitioner reviewed and signed.

Petitioner testified that on November 22, 2003, he was visiting his friends, the Hamptons. Petitioner consumed approximately one and a half cups of cognac and smoked marijuana. Petitioner also smoked \$10 worth of PCP. Petitioner was arrested and taken to the station at Harrison and Kedzie. Petitioner agreed to provide a DNA sample. While an officer took the sample, petitioner said he was tired and high on PCP. Petitioner explained that, while he was moved between rooms, he did not stumble because he was escorted by police. Petitioner spoke with Detective O'Donovan, but testified that he did not recall receiving his *Miranda* rights. Petitioner claimed that Detective O'Donovan threatened his family. Petitioner did recall receiving his *Miranda* rights from ASA Turano-Michels, but when he asked for a lawyer, Detective O'Donovan threatened him again.

Detective O'Donovan testified in rebuttal that he did not support petitioner as he walked and that there were no issues regarding the DNA collection.

ASA Turano-Michels testified in rebuttal that petitioner was not propped up by officers when walking, that petitioner did not request a lawyer, that Detective O'Donovan never made threats in her presence, and during a private conversation petitioner stated he was not mistreated. Furthermore, ASA Turano-Michels did not observe any signs of intoxication. The court denied the motion to suppress petitioner's inculpatory statements.

On December 10, 2007, January 4, 2008, January 8, 2008, and February 4, 2008, the court held a hearing on the defense's motion to suppress identification testimony. Petitioner alleged

that witnesses were shown an improperly conducted lineup that suggested the identification of petitioner.

Detective Ruck testified that participants in the lineup were placed in a room with Detectives Daley and Dyra. The witnesses were in another room with Detectives Ruck and Kato. Each witness viewed the lineup individually and were never in the same room. Harrison Hall and Anthony Compean made positive identifications while Esteban Class, Maurice Williams, and Yvonne Ward did not make identifications. All of the witnesses except Williams, who refused, signed lineup/photo spread advisory forms. Sergeant Lopez brought Lavelle Green to view the lineup later the same day. Green signed the advisory form before viewing the lineup and identified petitioner. The court found that the lineups were not suggestive.

On June 2, 2008, June 17, 2008, and July 17, 2008, the court held a bench trial. Detective O'Donovan testified that Mario Young was wearing a body wire on behalf on the police in July 2003. During a conversation, Rangel's homicide came up and the name Squeaky was mentioned. Following the arrests of co-defendants Spann and Nunnery, Detective O'Donovan learned that petitioner went by the nickname Squeaky. Petitioner was later arrested on November 22, 2003. Detective O'Donovan gave petitioner his *Miranda* rights and questioned him. Petitioner agreed to a buccal swab and said that he had worn a cap at the time of the shooting, but it had fallen off.

Detective O'Donovan stated that petitioner admitted he was the shooter. Petitioner told him he was approached by Spann and Nunnery and promised between \$10,000 and \$30,000 to kill Rangel because Rangel had stolen 150 kilos of cocaine. Spann and Nunnery took petitioner for a ride and pointed Rangel out on the street. On the day of the shooting, Spann and Nunnery picked petitioner up and gave him a gun. Petitioner entered a trailer being used as a barbershop at

Roosevelt and Sacramento. Rangel was in a barber chair. Petitioner fired the gun multiple times and fled.

Officer Rodriguez testified that he arrived at the scene and saw shell casings within the trailer and on the ground near the trailer. Officer Rodriguez and his partner prepared a report relating witness statements obtained by other officers.

Harrison Hall testified that he was working as a barber in the trailer. On the day in question, he was cutting Rangel's hair. Rangel was with two friends - Pete and a Hispanic man. An African American male came in, walked toward Rangel, and started shooting. Hall ran west on Roosevelt Road and later realized he had been shot. Hall went to the hospital and police station, but did not say he saw the shooter because he did not want to get involved. Hall eventually identified petitioner in a pre-trial lineup. Hall also made an in court identification of petitioner.

Co-defendant John Coleman, also known as Mario Ware, testified for the State. Coleman had entered into a plea agreement before trial. In return for a plea of guilty and his truthful testimony, Coleman was given a sentence of 12 years for conspiracy. At the time of the trial, he was in the witness protection unit of the jail. Coleman stated that he had known Nunnery for eight or nine years as a drug dealer. Coleman bought and sold drugs from Nunnery. Coleman met petitioner through Nunnery in April 2003. Coleman knew Rangel through his drug transactions. In April 2003, Coleman told Nunnery he would call him if he saw Rangel. A few days later, Coleman was standing in front of a car wash and Nunnery called to ask if Rangel was there. Coleman said Rangel was there, but could not be abducted at that location. Coleman picked up Nunnery and they went to a music studio, which they believed belonged to Rangel. They did not see Rangel at the studio and returned to the car wash. Nunnery gave petitioner a .45 caliber handgun and offered Coleman \$1,500 to call Nunnery if he saw Rangel. A few days later, Nunnery told

Coleman that they planned to kill Rangel in return for \$190,000 and some drugs instead of kidnapping him. Nunnery offered Coleman an additional \$500 for information about Rangel's whereabouts. On June 4, 2003, Coleman was riding with Delray Calcote and saw Rangel getting his hair cut in a trailer. Coleman called Nunnery. Coleman was out on the street near the trailer speaking with someone named Perkins when he heard gunshots inside the trailer. Coleman saw petitioner leave the trailer and run toward Roosevelt. Coleman did not see petitioner again and never received money from Nunnery.

After Coleman was arrested, he gave a videotaped statement. Coleman said the reason he called Nunnery was so Rangel could be robbed, not killed. Coleman also did not say that he saw petitioner at the scene, but was a few blocks away when he learned that petitioner had shot Rangel. Coleman only told the State his trial testimony after they began plea negotiations.

Lavelle Green testified that on June 4, 2003, he was sitting on the porch of the trailer, waiting to get a haircut. He was with a friend, Maurice Williams, and high on marijuana. Green saw someone go into the trailer and heard shots from inside the trailer. Green did not see the shooting. Green ran away and did not see anyone leave the trailer. At the time of his testimony, Green could not identify the person who entered the trailer. Green stated that police made him identify petitioner's photo as the person coming out of the trailer. Green was also shown a lineup and told to identify the person who looked like the person who entered the trailer.

ASA Turano-Michels testified that she spoke with petitioner after he was arrested. Petitioner was advised of his *Miranda* rights and made no complaints about his treatment. Petitioner gave a handwritten statement, which he signed. The statement was published to the court.

According to the statement, in May 2003, Spann approach petitioner about shooting Rangel in exchanged for \$30,000. Coleman, Nunnery, and Spann picked petitioner up and talked about

committing a robbery. Later, Spann pointed out Rangel, who was on the sidewalk with Nunnery. On June 4, 2003, petitioner got in the car with Nunnery, Spann, and another man. Nunnery parked a block away from the barbershop and gave Spann a gun. Spann gave the gun to petitioner. Nunnery told petitioner that Rangel was in the barbershop. Petitioner walked into the trailer and Rangel was seated in a barber chair. Petitioner fired multiple times toward Rangel and fled. Petitioner entered the car and gave Spann the gun. Spann never paid petitioner.

The parties stipulated to the testimony of Brian Smith, from a co-defendant's trial, and the testimony of Detective Ruck and Sergeant Lopez from earlier hearings.

The defense proceeded by stipulation, which included testimony from Officer Augustin and Officer Dyra.

PROCEDURAL HISTORY

On December 10, 2008, petitioner, *pro se*, filed a petition for relief from judgment. Petitioner claimed: (1) the State fabricated his indictment and (2) the first-degree murders statute violates the single-subject clause. On February 18, 2009, the circuit court denied the petition.

On direct appeal, petitioner claimed the court violated his rights to a jury trial and due process when it accepted his jury waiver without giving a sufficient admonishment. On March 30, 2010, the Appellate Court affirmed petitioner's conviction and sentence. *People v. Simmons*, No. 1-08-2532, 2010 Ill. App. LEXIS 3202 (Ill. App. 1st Dist. Mar. 30, 2010), *appeal denied*, No. 110500, 2010 Ill. LEXIS 1151 (Ill. Sept. 29, 2010). On April 4, 2011, the Supreme Court denied petitioner's request for a writ of certiorari. *Simmons v. Illinois*, No. 10-8793, 2011 U.S. LEXIS 2676 (2011).

On September 28, 2011, petitioner, *pro se*, filed the instant petition for relief pursuant to 735 ILCS 5/2-1401 and the Post-Conviction Hearing Act, 725 ILCS 5/122-1 *et seq.* (LEXIS 2011).

On December 23, 2011, the court docketed the petition for further proceedings. On April 16, 2015, petitioner, through counsel, filed a supplemental post-conviction petition. On April 28, 2016, the State filed a motion to dismiss. On July 21, 2016, petitioner filed a response to the State's motion. On September 27, 2016, the State filed a reply to petitioner's response. On November 29, 2016, this Court heard arguments from the parties and took the matter under advisement.

ANALYSIS

Petitioner raises his various claims pursuant to 735 ILCS 5/2-1401 and the Post-Conviction Hearing Act, 725 ILCS 5/122-1 *et seq.*

735 ILCS 5/2-1401

Section 2-1401 of the Code of Civil Procedure establishes a process by which a defendant may seek relief from a judicial order more than thirty days after its entry. Although a Section 2-1401 petition is usually a civil matter, relief under this section also extends to criminal cases. *People v. Gostier*, 205 Ill. 2d 198, 206 (2004). In a criminal case, Section 2-1401 is the forum to bring facts to the attention of the court, which, if known at the time of judgment, would have precluded its entry. *People v. Haynes*, 192 Ill.2d 437, 463 (2000). A 2-1401 petition does not address errors of law. *People v. Lawton*, 335 Ill. App. 3d 1085, 1087 (1st Dist. 2002). Section 2-1401 is not the proper venue to make a collateral attack based on the alleged denials of constitutional rights. *In re Charles S.*, 83 Ill. App. 3d 515, 517 (1st Dist. 1980). A petitioner may also use Section 2-1401 to attack a void judgment. 735 ILCS 5/2-1401(f) (LEXIS 2015). A judgment is void (1) if the court lacked personal or subject matter jurisdiction or (2) the judgment is based on a facially unconstitutional statute that is void *ab initio*. *People v. Thompson*, 2015 IL 118151, ¶¶ 31-32. The circuit court is a court of general jurisdiction, which

need not look to a statute for its jurisdictional authority. *People v. Castleberry*, 2015 IL 116916, ¶ 19 (citing *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 530 (2001)). Failure to satisfy a statutory sentencing requirement or prerequisite does not deprive the circuit court of jurisdiction. *Id.* at ¶ 1. When a 2-1401 petition is insufficient as a matter of law to entitle the petitioner to relief, the trial court may dispose of it without waiting for the State's responsive pleading or providing notice of the impending ruling to the petitioner. *People v. Vincent*, 226 Ill. 2d 1, 8-9 (2007). Generally, a 2-1401 petition must be filed within two years after the entry of the judgment unless they allege the judgment itself is void.

The instant petition was filed just over three years after the entry of judgment. Petitioner does not assert that the judgment against him is void. Accordingly, petitioner may not seek relief pursuant to Section 2-1401 because his petition is untimely. Petitioner attempts to circumvent the two-year filing period by alleging fraudulent concealment. This argument is unavailing. "To make a successful showing of fraudulent concealment, the defendant must 'allege facts demonstrating that his opponent affirmatively attempted to prevent the discovery of the purported grounds for relief and must offer factual allegations demonstrating his good faith and reasonable diligence in trying to uncover such matters before trial or within the limitations period.'" *People v. Coleman*, 206 Ill. 2d 261, 290 (2002). Petitioner has failed to allege any facts which demonstrate that the State fraudulently concealed the evidence upon which petitioner has based his various claims or that petitioner exercised reasonable diligence in trying to locate evidence. Petitioner's conclusory statements are insufficient to relax the procedural requirements for filing a petition pursuant Section 2-1401. Accordingly, petitioner's claims will only be considered pursuant to the Post-Conviction Hearing Act.

725 ILCS 5/122-1

The Illinois Post-Conviction Hearing Act ("Act"), 725 ILCS 5/122-1, *et seq.*, provides a remedy for defendants who have suffered substantial violations of their constitutional rights. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). The Act sets forth three stages of review. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). At the second stage, the court must determine whether the petition and any accompanying documents make a substantial showing of a constitutional violation. *Id.* at 246. When making this determination, the trial court must assume that the allegations in affidavits or other documents are true. *People v. Ward*, 187 Ill. 2d 249, 255 (1999) (citing *People v. Caballero*, 126 Ill. 2d 248, 259 (1989)). If the petitioner makes a substantial showing of a constitutional violation, the petition is advanced to the third stage, where the court conducts an evidentiary hearing. 725 ILCS 5/122-6 (LEXIS 2010); *People v. Johnson*, 191 Ill. 2d 257, 268 (2000). A substantial showing of a constitutional violation is "a measure of legal sufficiency of the petition's well-pled allegations of a constitutional violation, which if proven at an evidentiary hearing, would entitle petitioner to relief." *People v. Domagala*, 2013 IL 113688, ¶ 35. Unsupported conclusional allegations in a petition are not sufficient to require a post-conviction evidentiary hearing under the Act. *People v. Pierce*, 48 Ill. 2d 48, 50 (1971); *People v. Hysell*, 48 Ill. Ed 522, 527 (1971). Post-conviction review is limited to constitutional issues that were not and could not be previously raised on direct appeal or in prior post-conviction proceedings. *People v. McNeal*, 194 Ill. 2d 135, 140 (2001); *People v. King*, 192 Ill. 2d 189, 192 (2000). Rulings on issues that were previously raised at trial or on direct appeal are *res judicata*, and issues that could have been raised, but were not, are waived. *People v. Miller*, 203 Ill. 2d 433, 437 (2002).

I. Actual Innocence

Petitioner claims he is actually innocent based on newly discovered evidence. In support of this claim, petitioner has attached affidavits from (a) Shardell Green, (b) Lavelle Green, and (c) Irineo Barbosa. A claim of actual innocence must raise the probability that it is more likely than not that no reasonable juror would have convicted the petitioner in light of the new evidence. *Id.* at ¶ 24. The touchstone of actual innocence is "total vindication" or "exoneration." *People v. Barnslater*, 373 Ill. App. 3d 512, 520 (1st Dist. 2007). The petitioner cannot meet this burden easily. The United States Supreme Court has stated that a claim of actual innocence must be supported by "new, reliable evidence—whether it be exculpatory, scientific, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schulp v. Delo*, 513 U.S. 298, 324 (1995). "Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful." *Id.* The evidence in support of the claim must be: (1) newly discovered; (2) material and not merely cumulative; and (3) of such a conclusive character that it would probably change the result on retrial. *People v. Ortiz*, 235 Ill. 2d 319, 331 (2010). Evidence is "newly discovered" if: (a) it has been discovered since the trial; and (b) the defendant could not have discovered it sooner through due diligence. *Id.* at 334. Evidence is not "newly discovered" when it presents facts already known to a defendant at or prior to trial, even if the source of these facts may have been unknown, unavailable, or uncooperative. *People v. Jarrett*, 399 Ill. App. 3d 715, 723-24 (1st Dist. 2010). Evidence is material if it is relevant and probative of the petitioner's innocence. *People v. Coleman*, 2013 IL 113307, ¶ 96. Evidence is non-cumulative if it adds to what the jury heard. *Id.*

A. Shardell Green

In his affidavits dated July 30, 2009, and August 14, 2014, Shardell Green attests that on June 4, 2003, he was at a barbershop located at Roosevelt Road and Sacramento Boulevard. He heard gunshots and observed a skinny, medium-complexioned man run from the barbershop while firing a gun. Shardell saw police chase the man down Roosevelt Road. In September of 2007, petitioner's defense counsel met with Shardell and Shardell told counsel what he witnessed. Defense counsel showed Shardell a picture of petitioner and Martise Nunnery, and Shardell told counsel that neither picture matched the man he observed running from the barbershop.

Shardell's affidavits do not support a claim of actual innocence. First, this evidence is not newly discovered because it could have been obtained sooner through due diligence. Shardell was listed as a potential witness in the police reports. Shardell also avers that he met with counsel prior to trial and recounted his observations. Next, this evidence is not material to petitioner's guilt or innocence. Shardell did not see who shot Rangel and he is unable to provide the "total vindication" or "exoneration" necessary for an actual innocence claim. Finally, this evidence is not so conclusive that it would change the result on retrial. The State presented overwhelming evidence of petitioner's guilt including the testimony of petitioner's co-defendant, occurrence witnesses who saw petitioner shoot Rangel, and petitioner's own inculpatory statements. Shardell's observations that he saw someone other than petitioner flee the barbershop are insufficient to outweigh the evidence presented at trial.

B. Lavelle Green

In his affidavit dated August 14, 2014, Lavelle Green attests that on June 4, 2003, he was at a barbershop. He avers that he observed someone shoot Rudy Rangel. Lavelle states that he gave

police a description of the shooter. Police had Lavelle view a man in lockup, but it was not the shooter. Police later wrote out a statement and had Lavelle sign it. Lavelle also asserts that police made Lavelle pick petitioner out of a photo array, even though petitioner was not the person Lavelle observed perform the shooting. Lavelle claims he never saw petitioner before he was made to pick him out of a photo array.

Lavelle's affidavit does not support a claim of actual innocence. Lavelle's testimony is not newly discovered because he testified at trial and was cross-examined extensively. Additionally, parts of Lavelle's affidavit are cumulative to his testimony at trial. Finally, Lavelle's testimony is not so conclusive that it would change the result on retrial. Setting aside the fact that any changes in Lavelle's account from trial raise serious questions about his credibility, his affidavit is severely outweighed by the testimony of multiple witnesses and petitioner's own inculpatory statements.

C. Irineo Barbosa

In his affidavit dated March 9, 2012, Irineo Barbosa attests that on December 3, 2003, he was in jail with Labar Spann. Barbosa avers that Spann told him he had someone named Post-man shoot Kato (Rangel). Barbosa furthered claimed that Spann stated he and others would lie about who was responsible for the crime.

Barbosa's affidavit does not support a claim of actual innocence. The affidavit consists solely of inadmissible hearsay statements. Even if it were admissible, it is not material to petitioner's guilt or innocence because Barbosa cannot provide any firsthand knowledge concerning the identity of the person who shot Rangel or provide an alibi for petitioner. Furthermore, this evidence is not so conclusive that it would change the result on retrial. As noted previously, there was overwhelming evidence of petitioner's guilt presented at trial.

II. Perjury

Petitioner claims the State knowingly used perjured testimony during the course of proceedings.

A. Sergeant Daly

Petitioner asserts that Sergeant Daly committed perjury during the hearings on the motion to quash arrest and suppress statements. In support of this claim, petitioner relies on various sections of the report of proceedings. This claim is meritless because it is based solely on petitioner's unsupported, self-serving, and conclusory statements that Sergeant Daly provided false testimony. *Pierce*, 48 Ill. 2d at 50. An allegation of perjury deals with falsity, not inconsistency. *People v. Laboy*, 227 Ill. App. 3d 654, 662 (1st Dist. 1992). At best, any alleged inconsistencies in Sergeant Daly's testimony are a matter of witness credibility and constitute a conflict in the evidence that is left to the fact finder to resolve, not perjury. *See People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009).

B. John Coleman

Petitioner asserts that John Coleman, also known as Marcus Ware, committed perjury at trial. In support of this claim, petitioner relies on (i) sections of the report of proceedings and (ii) affidavits from Larry Chatman dated December 17, 2009, and November 18, 2014. Chatman attests that he was cellmates with Coleman from late 2006 until early 2007. Chatman states that Coleman told him about his case and that the State offered him a plea if he lied. This claim is meritless. First, petitioner's arguments based on the record concern allegations of inconsistency at most, which is a matter of witness credibility and not perjury. *Id.* Petitioner's self-serving analysis of Coleman's testimony and the testimony of other witnesses is not a demonstration of falsity. Second, petitioner's reliance on Chatman's affidavit is misplaced because it consists

solely of inadmissible hearsay statements. Additionally, the content of Chatman's affidavit is nonspecific. At best, Chatman's affidavit could serve to impeach Coleman, but even then, evidence that merely impeaches a witness does not serve as sufficient a basis for post-conviction relief. *People v. Barnslater*, 373 Ill. App. 3d 512, 523 (1st Dist. 2007) (citing *People v. Chew*, 160 Ill. App. 3d 1082, 1086 (1st Dist. 1987)).

III. *Miranda* Rights

Petitioner claims the police did not provide his *Miranda* rights properly. Petitioner asserts that he was not advised that he could cease questioning at any time to speak with counsel. This claim is meritless because it is rebutted by the record. Detective O'Donovan testified credibly that he advised petitioner of his *Miranda* rights, including the aforementioned right to cease questioning and consult with counsel. Report of Proceedings, December 12, 2006, pgs. 11-17.

IV. Arrest

Petitioner claims the police lacked probable cause for his arrest. In support of this claim, petitioner has attached an affidavit from Darren McCline dated January 15, 2015. McCline attests that petitioner did not tell him he committed a murder. McCline states that police pressured him to provide information. Petitioner asserts that without McCline's testimony, police did not have grounds to arrest him. This claim is meritless. McCline's affidavit consists of nonspecific allegations that he was pressured to provide information but does not give any necessary details to demonstrate that he was coerced by police. However, even if McCline's original testimony to police was discounted in light of the instant affidavit, the police still had probable cause to conduct a warrantless arrest. A warrantless arrest is lawful where police have knowledge of facts which would lead a reasonable person to believe that a crime has occurred and that the person has committed the crime. *People v. Buss*, 187 Ill. 2d 144, 204 (1999). "When

officers are working in concert, probable cause can be established from all information collectively received by the officers, even if that information is not specifically known to the officer who makes the arrest." *People v. Bascom*, 286 Ill. App. 3d 124, 127 (2d Dist. 1997). Sergeant Daly testified that he had probable cause to believe that petitioner committed a crime based on the statements of multiple witnesses, which included Mario Young, Lee Turner, Martise Nunnery, Labar Spann, and John Coleman. The State's probable cause did not hinge solely on McCline's testimony.

Petitioner also argues, that even if police had probable cause for his arrest, his statement should have been suppressed because the warrantless arrest violated his expectation of privacy. Petitioner was at Cletus Hampton's home when he was arrested. During pre-trial proceedings petitioner testified that he was at Hampton's home to do drugs and was waiting for Hampton's mother to escort him home. Report of Proceedings, January 25, 2007, pg. 47-48. While an overnight guest in a home may claim the protection of the Fourth Amendment, one who is merely present with the consent of the household may not. *Minnesota v. Carter*, 525 U.S. 83, 90 (1998). Petitioner's testimony rebuts the argument that he was an overnight guest at Hampton's home and was therefore entitled to a reasonable expectation of privacy.

Finally, petitioner argues that there was insufficient evidence in the record to demonstrate that the arresting officer had probable cause for his arrest, even if the investigating officer did. In support of this claim, petitioner relies on *People v. Bramlett*, 341 Ill. App. 3d 638 (1st Dist. 2003), which held that that the State had failed to demonstrate probable cause where the investigation lasted 12 hours and there was no evidence to indicate that the officers who obtained a statement linking the defendant to the arrest did so before his arrest. As mentioned, probable cause does not rest solely on the personal knowledge of the arresting officer but can be imputed

based on all of the information gathered by police during the investigation. *Bascom*, 286 Ill. App. 3d at 127. *Bramlett* is distinguishable from the case at hand. In *Bramlett*, the prosecution failed to establish that the investigating officers linked the defendant to the crime prior to his arrest. Here, the investigation was much more extensive and the evidence that linked petitioner to the crime was clearly obtained prior to his arrest. See *People v. Stroud*, 392 Ill. App. 3d 776, 805 (1st Dist. 2009). The State provided sufficient information to establish that the collective information gathered by the police was sufficient to establish probable cause for the arresting officers, regardless of their personal knowledge.

V. Ineffective Assistance of Trial Counsel

Petitioner claims he received ineffective assistance of trial counsel where counsel (a) did not properly argue the motion to quash his arrest, (b) did not allege that Sergeant Daly committed perjury, (c) did not call an expert witness to testify at the hearing on the motion to suppress, (d) did not allege that an alternate suspect committed the crime, (e) coerced him to waive his right to a jury, (f) did not order DNA testing on a certain evidence, (g) did not call various witnesses at trial. In examining petitioner's claim of ineffective assistance of trial counsel, the court must follow the two-pronged test of *Strickland v. Washington*, 466 U.S. 668 (1984). Petitioner must show that counsel's representation fell below an objective standard of reasonableness, and that but for this deficiency, there is a reasonable probability that the outcome of the litigation would have been different. *Id.* at 694. Petitioner must satisfy both prongs of the *Strickland* test to prevail on a claim of ineffective assistance of counsel. *People v. Morgan*, 187 Ill. 2d 500, 530 (1999). Effective assistance of counsel means competent, not perfect, representation. *People v. Palmer*, 162 Ill. 2d 465, 476 (1994). The court makes a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at

689. Challenges to trial counsel's representation concerning matters outside the record ordinarily are not cognizable under the Post-Conviction Hearing Act, *People v. Coleman*, 267 Ill. App. 3d 895, 898-99 (1st Dist. 1994), and "[m]atters relating to trial strategy are generally immune from claims of ineffective assistance of counsel." *People v. Lopez*, 371 Ill. App. 3d 920, 929 (1st Dist. 2007).

A. Motion to Quash

Petitioner claims he received ineffective assistance of counsel where counsel did not properly argue that police lacked probable cause for his arrest. This Court has found petitioner's underlying claim that the police lacked probable cause to arrest him meritless. This claim is likewise meritless. Petitioner was not prejudiced by any alleged deficiencies in counsel's performance during the hearing on the motion to quash.

B. Perjury

Petitioner claims he received ineffective assistance of counsel where counsel did not challenge the allegedly perjured testimony of Sergeant Daly at the hearing on the motion to suppress statements. This Court has found petitioner's underlying claim that Sergeant Daly committed perjury meritless. This claim is likewise meritless.

C. Expert Testimony

Petitioner claims he received ineffective assistance of counsel where counsel did not call an expert witness to testify that he was too intoxicated to voluntarily waive his *Miranda* rights. In support of this claim, petitioner has attached a report by Doctor James O'Donnell dated June 12, 2014. Doctor O'Donnell opines that petitioner's claim of intoxication and the Detective's testimony that petitioner gave no external indications of intoxication are not mutually exclusive

based on the effects of PCP. Doctor O'Donnell further states that petitioner's drug use could have influenced whether he was able to voluntarily waive his *Miranda* rights.

This claim is meritless. The decision whether to call a witness is a matter of trial strategy, which does not give rise to a claim of ineffectiveness. *People v. Flores*, 128 Ill. 2d 66, 85-6 (1989) (citations omitted). Even if it did, petitioner has not demonstrated that he was prejudiced by counsel's decision not to call an expert witness. Doctor O'Donnell's report amounts to nothing more than pure speculation and does not rebut the observations of multiple officers and an assistant State's attorney, all of whom testified credibly that petitioner did not demonstrate that he was intoxicated when he was given his *Miranda* rights. Furthermore, even if Doctor O'Donnell provided sufficient evidence to establish that petitioner was still intoxicated, the mere fact that a defendant was under the influence of alcohol or drugs at the time of his inculpatory statements does not automatically render his statements inadmissible. *People v. Hills*, 78 Ill. 2d 500, 506 (1980). Petitioner must still show that his intoxication was so severe that his will was overborne at the time of his statements. *People v. Foster*, 168 Ill. 2d 465, 475-76 (1995). The attendant circumstances of petitioner's inculpatory statement rebut petitioner's self-serving statements that he was unable to voluntarily waive his *Miranda* rights.

D. Alternative Suspect

Petitioner claims he received ineffective assistance of counsel where counsel did not investigate or present a defense that someone else committed the offense. This claim is meritless. Counsel only has a duty to make reasonable investigations or make a reasonable decision that makes a particular investigation unnecessary. *Strickland*, 466 U.S. at 691. A decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. *Id.* Petitioner's claim that counsel should

have investigated an alternative suspect is wholly unsupported by any evidence, conclusory, and insufficient to merit relief. *Pierce*, 48 Ill. 2d at 50. Counsel's performance was not deficient for declining to investigate a meritless line of inquiry and petitioner was not prejudiced by that decision.

E. Right to a Jury

Petitioner claims he received ineffective assistance of counsel where counsel coerced him to waive his right to a jury. This claim is meritless because it is rebutted by the record. Petitioner waived his right to a jury before the court and executed a valid waiver form. Report of Proceedings, June 2, 2008, pgs. 6-7. Additionally, petitioner's only assertion that he was coerced is based on nothing more than counsel's purported recommendation he seek a bench trial. Counsel's advice in this regard is a matter of trial strategy that cannot support a claim of ineffectiveness. *People v. Elliott*, 299 Ill. App. 3d 766, 774 (4th Dist. 1998)

F. DNA Testing

Petitioner claims he received ineffective assistance of counsel where counsel did not order DNA testing of a hat recovered from the crime scene. This claim is meritless. Petitioner has failed to attach any evidence to establish that DNA testing of the hat would produce exculpatory evidence, which is fatal to this claim. *Pierce*, 48 Ill. 2d at 50. Furthermore, the suggestion that it would produce exculpatory evidence is rebutted by petitioner's pre-trial inculpatory statement that he had dropped the hat while fleeing. Petitioner fails to demonstrate that counsel's decision not to have DNA testing performed on the hat prejudiced the outcome of his case.

G. Failure to Call Witnesses

Petitioner claims he received ineffective assistance of counsel where counsel did not sufficiently investigate or call witnesses in his defense. Petitioner asserts that counsel should

have called: (i) Cletus Hampton to testify at the hearing on the motion to suppress, (ii) Shardell Green to testify at the trial, and (iii) Lavelle Green to testify at trial. In support of this claim, petitioner has attached affidavits from the respective witnesses. This claim is meritless. The decision whether to call a particular witness is a matter of trial strategy, which does not normally support a claim of ineffective assistance of counsel. *Flores*, 128 Ill. 2d at 85-6. Even if it were not a matter of strategy, petitioner was not prejudiced by the decision not to call these witnesses.

i. Cletus Hampton

In support of this claim, petitioner has attached an affidavit from Cletus Hampton dated August 18, 2011. Hampton attests that he was with petitioner on November 22, 2003. They were drinking alcohol and smoking marijuana for approximately an hour before police arrived. Hampton avers that he spoke with defense counsel before trial, but was not called to testify.

Petitioner was not prejudiced by the decision not to call Hampton at the hearing on the motion to suppress. Hampton only provides non-specific testimony which is cumulative to testimony already presented at the hearing. Furthermore, Hampton's general observations that petitioner had been drinking alcohol and smoking marijuana are insufficient to establish that petitioner was unable to knowingly and voluntarily waive his *Miranda* rights prior to questioning. As previously noted, the fact that petitioner was under the influence of alcohol does not render his statement involuntary, *Hills*, 78 Ill. 2d at 506 (1980), petitioner must show that his will was overborne by the intoxicants at the time he made his statement. *Foster*, 168 Ill. 2d at 475-76. Hampton cannot provide relevant testimony concerning the immediate circumstances leading to petitioner's inculpatory statement and would not have changed the outcome of the hearing.

ii. Shardell Green

In support of this claim, petitioner has attached an affidavit from Shardell, which was discussed in this Court's analysis of petitioner's actual innocence claim. Petitioner was not prejudiced by the decision not to call Shardell at trial because he does not provide relevant testimony which would have had any bearing on the outcome of the trial. Shardell states that he did not observe the shooting and therefore cannot exonerate petitioner. Furthermore, Shardell's testimony is vastly outweighed by the multiple occurrence witnesses at the scene and petitioner's own inculpatory statements.

iii. Lavelle Green

In support of this claim, petitioner has attached an affidavit from Lavelle, which was discussed in this Court's analysis of petitioner's actual innocence claim. This claim is meritless because Lavelle testified at trial.

VI. Ineffective Assistance of Appellate Counsel

Petitioner claims he received ineffective assistance of appellate counsel where counsel failed to raise various meritorious issues. In examining petitioner's claim, the court must once again follow the two-pronged test of *Strickland v. Washington*. *People v. Williams*, 209 Ill. 2d 227, 243 (2004). To succeed on a claim of ineffective assistance of appellate counsel, petitioner must show that the failure to raise a particular issue was objectively unreasonable and that the omission prejudiced him. *Id.* "Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong." *People v. Easley*, 192 Ill. 2d 307, 329 (2000); *See Williams*, 209 Ill. 2d at 243. Appellate counsel's choices concerning which issues to pursue are entitled to substantial deference. *People v. Rogers*,

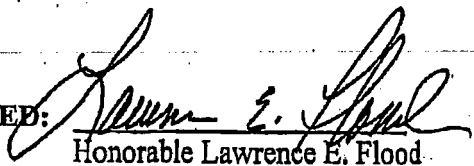
197 Ill. 2d 216, 223 (2001). This Court has considered petitioner's underlying claims and found them meritless. Accordingly, appellate counsel's performance was not deficient for declining to raise these issues and petitioner was not prejudiced by that decision.

VII. Cumulative Error

Petitioner claims he should receive relief based on cumulative error at trial. Petitioner's specific examples of error all concern the sufficiency of the evidence at trial. Questions as to the sufficiency of evidence are not cognizable pursuant to the Act because they do not present a constitutional issue. *People v. Dunn*, 52 Ill. 2d 400, 402 (1972) (citing *People v. Vail*, 46 Ill. 2d 589, 591 (1970)). Additionally, while certain errors may have a cumulative effect when they are considered in the aggregate. See *People v. Killian*, 42 Ill. App. 3d 596, 599 (4th Dist. 1976), but petitioner has failed to establish a cumulative effect here. Each of petitioner's underlying claims has been considered and have either been dismissed or advanced on their own merits.

CONCLUSION

This Court has considered all of the allegations before it. Based upon the foregoing discussion, this Court finds: (1) that petitioner is barred from raising his claims pursuant to 735 ILCS 5/2-1401, (2) that petitioner has failed to demonstrate a cognizable claim of actual innocence, and (3) that petitioner has failed to demonstrate a substantial violation of his constitutional rights. Accordingly, the State's motion to dismiss the petition is GRANTED and the petition is DISMISSED.

ENTERED: 

Honorable Lawrence E. Flood
Circuit Court of Cook County
Criminal Division

DATED: 2/21/17

STATE OF ILLINOIS)

COUNTY OF Cook)

SS

AFFIDAVIT

(L)

I, Cletus Hampton being first duly sworn under oath depose and state that the foregoing is true and correct and made upon my personal knowledge and I am competent to testify thereto.

① In November 2003, police officers forced their way into my residence and arrested Donell Simmons, also known as "Squeaky".

② I, nor anyone at the residence consented for the police to enter the residence. I was too frightened to try and stop the police from entering and searching my residence.

③ Since I have known "Squeaky" he has always come to my residence at 4223 West Wilcox. Even in 2003 he slept nights there, sometimes with his girlfriend. He also washed his clothes, cooked his meals and showered there.

④ I never filed a complaint about the police entering my residence because I didn't know that I could have.

OVER >

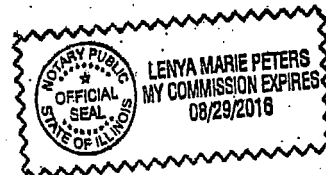
#5 I Am willing to come to court
and testify to the above At my
own free will.

Cletus Hampton

AFFIANT

SUBSCRIBED AND SWORN TO BEFORE ME
THIS 09 DAY 23 2014

Lenya Peters
NOTARY PUBLIC



(M)

STATE OF ILLINOIS)
) SS
COUNTY OF WILL)

AFFIDAVIT

I, Donell Simmons, hereby state, under oath:

1. I am the post-conviction petitioner in No. 03 CR 27277-01.
2. I was a close friend of the Hampton family my whole life.
3. Beginning in the summer of 2003, and continuing through the time of my arrest, I would sleep over at the Hamptons' 2-3 nights a week. My girlfriend, Tia, would often spend the night there with me. Tia and I were waiting for an apartment that was being renovated and we were expecting to move into it soon.
4. I kept several changes of clothes in the back of the Hamptons' apartment. I would take baths there and use the phone, and cook and clean. A few times, I was there alone, without the Hamptons. There was a bed in the back room where I was welcome to sleep. This was in the rear unit of two conjoined apartments and I would stay in the rear, where Cletus Hampton and his mother lived.
5. At the hearing on the motion to suppress (Tr. PP-48), I testified that I was waiting for Cletus's mother "to escort me home but at that particular time --" I was cut off by my attorney who refocused on the drug use. But if I could have completed what I was going to say, I would have explained that since Cletus's mother (who sometimes dropped me off at my mother's) was intoxicated and it was very late, she was not going to drive me to my mother's after all, and Tia and I were going to stay. Also, Tia, who was pregnant, was not feeling well that night and was already lying down, planning to stay.
6. Before my arrest, the officers kicked through the back door without knocking, and entered the rear unit. I had been in the rear unit playing video games. I fled to the front unit, which was connected by a door to the rear unit. One of the officers opened the door to the front unit to let other officers in. The police officers did not ask permission of those in the first floor joined apartments to enter those apartments.

Donell Simmons R1283
Signature

Signed and Sworn to before me this
2nd day of December, 2014

David Mansfield
Notary Public

"OFFICIAL SEAL"