2011 IL App (1st) 093098-U
No. 1-09-3098

SIXTH DIVISION
July 22, 2011

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS	)	Appeal from the Circuit Court
	)	of Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	97 CR 2542
	)	
RICARDO LIMA	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Justices Cahill and R.E. Gordon concurred in the judgment.

O R D E R

HELD: Defendant presented an arguable claim of ineffective assistance of counsel sufficient to advance to the second stage of postconviction proceedings under the Post-Conviction Hearing Act.

¶ 1 Defendant Ricardo Lima appeals the first-stage dismissal of his postconviction petition, arguing that the trial court erred in finding the petition to be frivolous and patently without merit because he raised the gist of a meritorious claim of ineffective assistance of trial counsel and a

claim of actual innocence. Specifically, he argues that he presented a cognizable claim of actual innocence based on an affidavit from Juan Ocon, one of the attempted first degree murder victims, stating that he falsely testified at trial and now supported defendant's claim of self-defense and that his trial counsel was ineffective for failing to interview or subpoena witnesses to testify in support of defendant's claim of self-defense and his appellate counsel was ineffective for failing to assert the trial counsel's ineffectiveness on direct appeal.

¶ 2 Because this is defendant's second appeal, we will discuss only those facts relevant to defendant's postconviction petition. A detailed discussion of defendant's trial can be found in his direct appeal. *People v. Lima*, 328 Ill. App. 3d 84 (2002).

¶ 3 Following a jury trial, defendant was convicted of one count of first degree murder and three counts of attempted first degree murder. Ruben Martinez, Rocky Salazar and Juan Ocon each gave similar testimony about the circumstances surrounding the shooting. On December 22, 1996, Martinez, Salazar and Ocon were riding in a van with Armando Rodriguez. Martinez was driving, Salazar was in the passenger seat, Ocon sat in the middle bench seats and Rodriguez was seated on the back bench. Martinez, Salazar and Rodriguez were all members of the Satan Disciples gang while Ocon was a member of the Latino Jivers. The Satan Disciples and Latino Jivers were on friendly terms. Martinez, Salazar and Ocon each testified that there were no weapons in the car, but each admitted to smoking marijuana that night.

¶ 4 At around 9 p.m., the men were going to drop Martinez off at his girlfriend's house and then continue on to play laser tag. Martinez's girlfriend lived on the 2200 block of West Erie Avenue in Chicago. Martinez drove by the house heading west to see if his girlfriend's mother's

car was in the driveway. Martinez's girlfriend's house was on the border of rival gang territory. He circled around the neighborhood and returned to the block driving east on Erie where several people were on the sidewalk.

¶ 5 Salazar testified that the people were members of the C-Notes gang. The Satan Disciples and C-Notes were involved in an ongoing conflict at the time. Salazar recognized defendant as one of the C-Notes. Salazar stated that defendant left the sidewalk and walked into the street near the passenger side of the van. Salazar said he told Martinez to drive away. He then heard five or six gunshots from behind the van and one of the bullets traveled past Salazar to strike part of the window. Through the rearview mirror, Salazar saw defendant standing by himself in the street.

¶ 6 Ocon testified that he could not see the face of the shooter, but saw someone jump into the street and shoot at them with a chrome gun. He heard six shots fired . He described the shooter as wearing a "hoodie" and a black coat.

¶ 7 Martinez testified that he had been smoking marijuana that night and did not know what was going on. He remembered seeing several people on the sidewalk and then he accelerated when he heard gunshots. When they realized Rodriguez had been shot in the head, Martinez drove to Norwegian American Hospital. They dropped Rodriguez off, but left to get Rodriguez's parents and bring them to the hospital. Martinez admitted that he identified defendant in the lineup and before the grand jury, but at trial, he denied that defendant was the shooter.

¶ 8 An evidence technician testified that on December 22, 1996, he recovered six .9 millimeter cartridge cases between 2213 and 2209 West Erie. He also recovered a fired bullet

near 2204 West Erie. Later, the evidence technician processed the van and found a fired bullet on the front passenger seat, noticed holes in the exterior of the van, and saw that the rear window was shattered and a brake light had a bullet hole through it. The parties stipulated at trial that the cartridge cases came from the same gun. The stipulation also stated that the recovered bullets, including one from Rodriguez's head were fired from the same weapon.

¶ 9 The State also presented a stipulation from the medical examiner indicating that Rodriguez died as the result of single gunshot wound to the back of his head.

¶ 10 Detective Thomas Flaherty testified that he was assigned to investigate the shooting. He, along with his partners, spoke with Martinez at Norwegian American Hospital. Martinez informed the detectives that defendant was the shooter. Detective Flaherty later received a flash message that defendant had been arrested and taken to the Area Four police station. At the station, Detective Flaherty was present when defendant was identified by Martinez and Salazar in a lineup. Ocon was unable to make an identification.

¶ 11 Assistant State's Attorney (ASA) Michael O'Malley testified that he was assigned to the felony review unit in December 1996 and received the assignment for defendant's case. ASA O'Malley spoke with defendant at Area Four. He advised defendant of his *Miranda* rights and defendant agreed to speak with him. Detective Dennis Walsh and youth officer Mihajlov were also present. After speaking with ASA O'Malley, defendant agreed to give a handwritten statement. He also stated that defendant was given time alone with his mother at the police station.

¶ 12 In the statement, defendant admitted that he was a member of the C-Notes gang and had

been a member since he was 10 years old. Defendant was 16 years old in December 1996. He bought a .9 millimeter gun about two months before the shooting. He has known Martinez since he was five years old. He stated that Martinez was a member of the Satan Disciples, which is a rival gang to the C-Notes.

¶ 13 On December 21, 1996, defendant slept at his girlfriend's house, who lived near Ohio and Oakley. He put his gun under a garbage can behind his girlfriend's house. The next day, he took the gun from under the garbage can and put it in his waistband. He went to a friend's house at 2308 West Grand. He left the friend's house in the later afternoon to hang out on Oakley, which is C-Note territory. There, he met five of his friends and fellow C-Notes. They decided to go to another friend's house on Erie, near Hoyne. He and his friends were walking on Erie near Leavitt when one of defendant's friends yelled, "Ruben."

¶ 14 Defendant stated that he and Martinez had fought twice in the past month. When defendant heard his friend call "Ruben," defendant turned and saw a van he knew was Martinez's van. Defendant saw Martinez driving and another boy in the passenger seat. The passenger yelled, "f*** you," from the window and one of defendant's friends yelled, "p***" in response. Defendant then "stepped into the street, took the loaded gun from his waistband and shot towards the back of the van about six times." Defendant was approximately three or four houses west of Leavitt and the van was driving east on Erie. The van then sped off on Erie.

¶ 15 Defendant ran toward Leavitt with the gun. He ran south on Leavitt and then through an alley. He went by the Holy Rosary Church on Erie, near Western. He lifted the sewer cover near the church and threw the gun into the sewer. He threw the gun in the sewer because he wanted to

get rid of it after having shot it at someone. He replaced the sewer cover and returned to his friend's house on Grand and was there when the police arrived about 15 minutes later.

¶ 16 Defendant testified on his own behalf. Defendant admitted to being a member of the C-Notes gang since he was 11 years old. Defendant testified about previous encounters with Martinez. A year earlier, defendant stated that he was standing on Oakley when Martinez started shooting at him. In an incident the previous month, defendant said that he was walking down Oakley when Martinez drove by in a van. They exchanged obscene gestures and then Martinez got out of the van and they got into a fight. The week before the shooting, defendant stated that he was standing on Ohio when Martinez and his friends pulled up in a van, got out, and chased defendant with baseball bats. He did not report these incidents to the police because that is not allowed in the gang. He testified that he knew Martinez was always armed because Martinez's girlfriend lived in rival gang territory.

¶ 17 Defendant stated that on December 22, 1996, he and several other C-Note members were walking down Erie when they saw the van. Defendant said he saw Martinez and Salazar in the van. Defendant was walking a little bit ahead of the group. The van passed them. Defendant started to cross Erie. When he was in the middle of the street, the van started to reverse in his direction at a high rate of speed. Defendant then pulled out his gun and fired at the van to stop them from running him over. Defendant started to run backwards while shooting his gun. The van stopped and drove eastbound on Erie.

¶ 18 Defendant testified that he tried to tell ASA O'Malley about the van reversing toward him, but was cut off and not allowed to respond. He said he refused to sign the handwritten

statement, but Detective Walsh threw him against a wall and threatened to arrest his brothers. Defendant stated that he was not able to see his mother until after he signed the handwritten statement. Defendant testified on cross-examination that he gave the names of the friends with him that night to Detective Walsh.

¶ 19 Pamela Stiglich testified for the defense that she witnessed the incident in which defendant was chased by other people with baseball bats. She did not report the incident to the police. Defendant's mother and aunt also testified that defendant's mother was not permitted to speak with defendant until after he gave the statement, though they had been waiting at the police station for several hours.

¶ 20 In rebuttal, Detective Walsh and youth officer Mihajlov testified that defendant was able to speak to his mother and defendant was not threatened physically and verbally to sign the handwritten statement. Mihajlov and Detective Walsh also testified that defendant refused to disclose the names of his friends present at the shooting.

¶ 21 Following deliberations, the jury found defendant guilty of the first degree murder of Rodriguez and the attempted first degree murders of Martinez, Salazar and Ocon. The trial court subsequently sentenced defendant to a term of 60 years' imprisonment for the first degree murder and to concurrent terms of 10 years for the attempted murder counts. After a hearing on defendant's motion to reconsider his sentence, the trial court reduced his sentence for first degree murder to 50 years, to run consecutive to the concurrent 10 year sentences for attempted murder.

¶ 22 On direct appeal, defendant argued that the trial court erred in denying his motion to suppress, that the State violated the trial court's ruling on a motion *in limine* by introducing

evidence of another crime for which defendant was not on trial, that the State's rebuttal argument inappropriately invoked the integrity of the prosecution to attack the credibility of the defendant, that his sentence was excessive, and that he was entitled to day-for-day good conduct credit. The reviewing court affirmed defendant's conviction, but modified defendant's 10-year sentences to run concurrent with the 50 year sentence for first degree murder. See *People v. Lima*, 328 Ill. App. 3d 84 (2002).

¶ 23 On July 10, 2009, defendant filed his *pro se* postconviction petition with the trial court. Defendant acknowledged that his petition was untimely, but claimed that this was due to the "lack of financial support in hiring an attorney or investigator." Defendant also stated that the lack of access to computers and directories to locate witnesses contributed to the late filing. Defendant further alleged that he was raising a free standing claim of actual innocence based on newly discovered evidence.

¶ 24 Defendant raised numerous claims of ineffective assistance of trial counsel, including claims that defendant's trial attorney failed to interview or subpoena known witnesses to support his claim of self-defense. Defendant attached seven affidavits from his brothers, some friends and a resident of the 2200 block of West Erie, each stating that the van reversed toward defendant. One witness, Edwin Acietuno, specifically said that he had not been interviewed while Tammie Mayfield and Francis Hoyt stated that if they had been questioned or interviewed, then they would have related the same statement. The remaining four potential witnesses did not indicate whether they had been questioned by the State or the defense, but simply stated that they were competent to testify about their statements. Defendant also alleged that his appellate

counsel was ineffective for several reasons, including the failure to raise the ineffectiveness of his trial counsel. Defendant also asserted a claim of actual innocence based on an affidavit from Ocon in which Ocon stated that he lied to authorities and Martinez reversed the van with the intention of hitting defendant.

¶ 25 On September 29, 2009, the trial court dismissed defendant's postconviction petition in a written order. The court found defendant's *pro se* postconviction petition to be frivolous and patently without merit. In considering defendant's claim of ineffective assistance of trial counsel for failure to interview witnesses, the court stated:

> "Here, petitioner has failed to assert sufficient facts to pass the *Strickland* standard. The jury was able to hear petitioner's version of events from petitioner himself. The affidavits attached to the instant petition offer no new or enlightening testimony. Petitioner cannot say that counsel's decision not to call the witnesses was 'so unsound that counsel can be said to have entirely failed to conduct any meaningful adversarial testing of the State's prosecution.' "

¶ 26 The trial court similarly rejected defendant's claim of actual innocence.

> "In the instant case, petitioner has failed to present a freestanding innocence claim based on newly discovered evidence. The affidavits are not new and were available at his trial. Petitioner himself acknowledges that the witnesses were listed in police reports. Thus, this evidence is not new and cannot support

> an actual innocence claim based on newly discovered evidence. Further, petitioner testified that the van reversed and sped towards him prior to him shooting at the van. Thus, the jury had a chance to hear this evidence, and the affidavits are cumulative. As such, petitioner's newly discovered evidence claim will be dismissed for lack of merit."

¶ 27 This appeal followed.

¶ 28 On appeal, defendant argues that the trial court erred in summarily dismissing his postconviction petition as frivolous and patently without merit because he raised arguable claims of ineffective assistance of trial counsel and actual innocence.

¶ 29 The Illinois Post-Conviction Hearing Act (Post-Conviction Act) (725 ILCS 5/122-1 through 122-8 (West 2008)) provides a tool by which those under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both. 725 ILCS 5/122-1(a) (West 2008); *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). Postconviction relief is limited to constitutional deprivations that occurred at the original trial. *Coleman*, 183 Ill. 2d at 380. "A proceeding brought under the [Post-Conviction Act] is not an appeal of a defendant's underlying judgment. Rather, it is a collateral attack on the judgment." *People v. Evans*, 186 Ill. 2d 83, 89 (1999). "The purpose of [a postconviction] proceeding is to allow inquiry into constitutional issues relating to the conviction or sentence that were not, and could not have been, determined on direct appeal." *People v. Barrow*, 195 Ill. 2d 506, 519 (2001). Thus, *res judicata* bars

consideration of issues that were raised and decided on direct appeal, and issues that could have been presented on direct appeal, but were not, are considered forfeited. *People v. Blair*, 215 Ill. 2d 427, 443-47 (2005); *Barrow*, 195 Ill. 2d at 519. The standard of review for dismissal of a postconviction petition is *de novo*. *Coleman*, 183 Ill. 2d at 389.

¶ 30 At the first stage, the circuit court must independently review the postconviction petition within 90 days of its filing and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2002). A petition is frivolous or patently without merit only if it has no arguable basis in law or fact. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). A petition lacks an arguable basis in law or fact if it is "based on an indisputably meritless legal theory," such as one that is "completely contradicted by the record," or "a fanciful factual allegation," including "those which are fantastic or delusional." *Hodges*, 234 Ill. 2d at 16-17.

¶ 31 If the court determines that the petition is either frivolous or patently without merit, the court must dismiss the petition in a written order. 725 ILCS 5/122-2.1(a)(2) (West 2002). At the dismissal stage of a postconviction proceeding, the trial court is concerned merely with determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity that would necessitate relief under the Act. *Coleman*, 183 Ill. 2d at 380. At this stage, the circuit court is not permitted to engage in any fact-finding or credibility determinations, as all well-pleaded facts that are not positively rebutted by the original trial record are to be taken as true. *Coleman*, 183 Ill. 2d at 385. Further, a postconviction petition may not be dismissed as untimely at the first stage of postconviction proceedings. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007).

¶ 32 The "gist" standard is a low threshold. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). To set forth the "gist" of a constitutional claim, the postconviction petition need only present a limited amount of detail and hence need not set forth the claim in its entirety. Further, the petition need not include legal arguments or citations to legal authority. *Edwards*, 197 Ill. 2d at 244. However, the supreme court in *Hodges* clarified that "gist" does not refer to the legal standard used in our review. "[O]ur use of the term 'gist' describes what the defendant must allege at the first stage; it is not the legal standard used by the circuit court to evaluate the petition, under section 122-2.1 of the Act, which deals with summary dismissals. Under that section, the 'gist' of the constitutional claim alleged by the defendant is to be viewed within the framework of the 'frivolous or *** patently without merit' test." *Hodges*, 234 Ill. 2d at 11.

¶ 33 If the circuit court does not dismiss the postconviction petition as frivolous or patently without merit, then the petition advances to the second stage. Counsel is appointed to represent the defendant, if necessary (725 ILCS 5/122-4 (West 2002)), and the State is allowed to file responsive pleadings (725 ILCS 5/122-5 (West 2002)). At this stage, the circuit court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. See *Coleman*, 183 Ill. 2d at 381. If no such showing is made, the petition is dismissed. If, however, a substantial showing of a constitutional violation is set forth, then the petition is advanced to the third stage, where the circuit court conducts an evidentiary hearing. 725 ILCS 5/122-6 (West 2002).

¶ 34 Defendant contends that the trial court erred in dismissing his postconviction petition because he presented arguable claims of ineffective assistance of counsel and actual innocence.

¶ 35 We first consider defendant's claims of ineffective assistance of counsel. Claims of ineffective assistance of counsel are resolved under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court delineated a two-part test to use when evaluating whether a defendant was denied the effective assistance of counsel in violation of the sixth amendment. Under *Strickland*, a defendant must demonstrate that counsel's performance was deficient and that such deficient performance substantially prejudiced defendant. *Strickland*, 466 U.S. at 687. To demonstrate performance deficiency, a defendant must establish that counsel's performance fell below an objective standard of reasonableness. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). In evaluating sufficient prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. If a case may be disposed of on the ground of lack of sufficient prejudice, that course should be taken, and the court need not ever consider the quality of the attorney's performance. *Strickland*, 466 U.S. at 697.

¶ 36 In order to prove ineffective assistance of counsel, defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy under the circumstances. *People v. Giles*, 209 Ill. App. 3d 265, 269 (1991). Neither mistakes in strategy nor the fact that another attorney with the benefit of hindsight would have handled the case differently indicates the trial lawyer was incompetent. *People v. Young*, 341 Ill. App. 3d 379, 383 (2003). A decision that involves a matter of trial strategy will typically not support a claim

of ineffective representation. *People v. Simmons*, 342 Ill. App. 3d 185, 191 (2003).

¶ 37 At the first stage of postconviction proceedings, a petition alleging ineffective assistance of counsel may not be dismissed if: (1) counsel's performance arguably fell below an objective standard of reasonableness; and (2) the petitioner was arguably prejudiced as a result. *Hodges*, 234 Ill. 2d at 17.

¶ 38 In the instant case, defendant asserts that his trial counsel was ineffective for failing to interview or subpoena several witnesses who saw the shooting and stated in affidavits that the van reversed toward defendant and defendant fired a gun in response. In support, defendant has appended seven affidavits to his postconviction petition from these potential witnesses. Defendant further contends that his appellate counsel was ineffective for failing to raise claims of ineffective assistance of trial counsel on direct appeal.

¶ 39 Edwin Acietuno and Tammie Mayfield stated in their affidavits that they were standing on the porch of their residence, located at 2118 West Erie, waiting for defendant and other friends to arrive for a party. They saw defendant and other guests walking toward their house when a van passed them. Defendant was crossing the street when the minivan started to reverse at a high rate of speed toward defendant. They saw defendant reach for what appeared to be a gun and then defendant shot at the van while running backwards. The van stopped and sped forward. Acietuno stated that he was not interviewed "by an officer of the Court" and was willing to testify at trial for defendant. Mayfield also stated that she was willing to testify and "had an investigator or an attorney interviewed [her, she] would have told them the same story."

¶ 40 Francis Hoyt stated in an affidavit that on or about December 22, 1996, he lived at 2213

West Erie. That night, he was sitting on his couch in his apartment when he heard someone scream something. He went to his window that overlooked the street and saw a man, who he later learned was defendant, running backwards while a van was reversing at a high rate of speed toward him "as if trying to run him over." At that point, defendant pulled a gun from his waistband and began shooting. Hoyt also said that he would have said something earlier, but did not want to get involved. He would have stated these facts if questioned by detectives or attorneys and could attest to these matter if called to testify.

¶ 41 Sebastian Mendez, Franco Martinelli, Anthony Diaz and Rafael Lima stated in their affidavits that they were with defendant on Erie and were on their way to a party. Diaz and Lima stated that they are defendant's brothers. The men each said that they were walking on Erie when a van passed them. Martinelli stated that defendant was walking ahead of them with a few girls while Lima stated that defendant was walking in front of them. Diaz said he recognized the van as Martinez's van. The men stated that words were exchanged with the men in the van. Defendant was crossing the street when the van stopped and began to reverse toward defendant. They saw defendant pull out a gun and shoot while running backwards away from the van. Each of the men stated that they were competent to testify as to these facts.

¶ 42 Defendant also presented the affidavit of one of the passengers of the van. Juan Ocon stated that he "gave false information to the Chicago police detectives and State's attorney's [*sic*] and [he] testified falsely against Mr. Lima out of fear that [he] would be prosecuted on later date if [he] did not comply with detectives and state's attorney's [*sic*]." Ocon admitted in his affidavit that he was presently incarcerated in the Illinois Department of Corrections.

¶ 43 Ocon further stated that on December 22, 1996, he with Martinez, Salazar and Rodriguez "decided to look for trouble against rival gang members." When they drove on Erie, they passed some rival gang members and noticed one in the middle of the street. They decided to start trouble and Martinez "placed the van on reverse [*sic*] and began to pick up a high velocity of speed." Ocon said Martinez's intentions were to run over the guy in the street, who was identified as defendant by Salazar, Martinez and Rodriguez. The guy then began firing a gun toward them in his defense. Martinez stopped the van to avoid gun fire and for them to shoot their guns at the rival gang members. However, they noticed that Rodriguez had been shot and left to take him to the hospital.

¶ 44 Ocon stated that they agreed to "cover up our own tracks." After dropping Rodriguez off at the hospital, they went back to their neighborhood "to drop off [their] own guns and weed." Ocon, Martinez and Salazar agreed to lie to the police and tell them "a fake story about what happened. So when questioned we all lied and said we were minding out own bussiness. [*sic*]" They agreed "to point out the first rival gang member that was shown to us that he could pay for [Rodriguez's] death!!"

¶ 45 We find the circumstances of this case to be similar to the issue considered by the supreme court in *Hodges*. There, the defendant raised a claim of ineffective assistance of counsel in his postconviction petition for failing to investigate and present testimony from three witnesses who would have supported the defendant's claim of self-defense or second-degree murder. The defendant was convicted of first-degree murder for the shooting death of Christopher Pitts. A codefendant got into an argument with Pitts at a gas station and chased Pitts

with the defendant joining the chase. The State's evidence at trial asserted that Pitts was unarmed and the recovered shell casings matched weapons used by the defendant and codefendants. The defendant's testimony was that he fired after seeing and hearing gunfire coming from Pitts' direction. *Hodges*, 234 Ill. 2d at 4-5. In his postconviction petition, the defendant contended that his attorney failed to investigate three potential witnesses that corroborated his theory of defense and would have testified that Pitts was armed. The defendant supported this claim with affidavits from the potential witnesses. The defendant also asserted that more shell casings were recovered from the scene that did not match the defendant or codefendants' weapons. The trial court dismissed the petition as frivolous and patently without merit, which the appellate court affirmed. *Hodges*, 234 Ill. 2d at 6-8.

¶ 46 The supreme court considered whether the defendant presented an arguable claim of ineffective assistance of counsel. The court found that they could not say that the defendant failed to set forth sufficient facts to raise a constitutional violation. In finding that the petition did not lack an arguable basis in fact, the court noted that the defendant's petition identified three witnesses to support his theory of defense and supported his allegations with affidavits from those witnesses. *Hodges*, 234 Ill. 2d at 18. The supreme court then considered whether the defendant's postconviction petition presented an arguable legal basis. The court concluded that the witnesses' testimony would not have supported a claim of self-defense as the testimony did not demonstrate that the defendant was not the aggressor. *Hodges*, 234 Ill. 2d at 20. However, the supreme court did find that it was arguable that the witnesses' testimony would have supported second-degree murder, in that the defendant was unreasonable in his belief of self-

defense. *Hodges*, 234 Ill. 2d at 20-21. The supreme court concluded that the defendant's claim of ineffective assistance of counsel was not indisputably meritless and it was at least arguable that his trial counsel's performance fell below an objective standard of reasonableness and prejudiced the defendant. *Hodges*, 234 Ill. 2d at 22.

¶ 47 In the instant case, defendant contends that his trial counsel's performance arguably fell below an objective standard of reasonableness because these witnesses were listed on the State's answer to discovery and some were included in the State's list of potential witnesses. However, defense counsel did not interview or subpoena these witnesses to testify in support of defendant's theory of the case; *i.e.*, that he fired the gun after the van reversed in his direction.

¶ 48 While matters of trial strategy typically cannot support a claim of ineffective assistance of counsel, defendant's petition has set forward an arguable claim that his trial attorney's performance was deficient. At trial, evidence was presented that defendant was a member of the C-Notes gang, but the occupants of the van were in a rival gang. Defendant testified about prior confrontations between himself and Martinez. His handwritten statement also noted that defendant and Martinez had previously fought. The defense offered the testimony of Pamela Stiglich to corroborate one prior encounter between defendant and Martinez, in which Stiglich saw defendant chased by Martinez and others carrying baseball bats. Additional testimony from at least one of the occurrence witnesses would have corroborated defendant's testimony that he fired the gun in response to the van reversing in his direction such that, at a minimum, it supported defendant's theory of second-degree murder that his belief was unreasonable that circumstances existed to justify the use of deadly force.

¶ 49 Hoyt, an unbiased occurrence witness, stated in his affidavit that he observed the encounter from inside his apartment and would have testified that the van reversed toward defendant. The State attempts to challenge Hoyt's credibility, but this is premature because at this stage we presume all well-plead facts are true. The additional witnesses made similar statements in their affidavits. It is at least arguable that the failure to present at least one witness to corroborate defendant's testimony in response to the three witnesses who testified for the State was unreasonable and not sound trial strategy.

¶ 50 Further, defendant was arguably prejudiced by this failure to interview or subpoena corroborating witnesses. While defendant did testify in his own defense, his testimony was the only evidence that defendant fired the gun in response to the van reversing in his direction. In contrast, the State presented testimony from Salazar, Martinez and Ocon that defendant fired gunshots at the van without provocation. The addition of at least one witness to corroborate defendant's theory of the case could have resulted a finding of guilty for the lesser offense of second-degree murder based on a finding that defendant was unreasonable to act in self-defense. Given the low threshold for review at the first stage of postconviction proceedings, we conclude that defendant's petition with the attached affidavits in support sufficiently set forth an arguable claim of ineffective assistance of trial counsel.

¶ 51 Since we have concluded that defendant's claims of ineffective assistance of counsel does not lack an arguable basis in law or in fact, the trial court should not have dismissed defendant's postconviction petition as frivolous and patently without merit. We make no comment as to whether defendant is entitled to an evidentiary hearing on his claims of ineffective assistance of

trial counsel as defendant's claim of constitutional violation is arguable on its merits See *Hodges*, 234 Ill. 2d at 23. Whether defendant could prevail on the theory of self-defense under these facts is perhaps questionable. However, since we have already concluded that an arguable basis for ineffective assistance of counsel exists for failure to present witnesses to support defendant's theory of second-degree murder, we need not reach defendant's claim of self-defense. Moreover, we need not address defendant's remaining allegations because our supreme court has held that partial summary dismissals are not permitted under the Act at the first stage of postconviction proceedings. *People v. Rivera*, 198 Ill. 2d 364, 374 (2001).

¶ 52 Finally, we need to address an issue involving the judge who considered the postconviction petition, but who was not the trial judge in this case. Our review of the transcripts of defendant's trial reveals a possible reference to the judge presiding over defendant's postconviction proceedings, Judge Charles P. Burns. We note that neither of the parties brought this matter to our attention.

¶ 53 During the testimony of ASA O'Malley at defendant's trial, the following question was asked and answered.

> "MR. BAUMEL [Assistant State's Attorney]: And also, sir, you prepared a memorandum to your then supervisor, Charles P. Burns, who was supervisor of the felony review unit after you took the handwritten statement from the defendant, is that correct?
>
> ASA O'MALLEY: Yes, it is."

¶ 54 This testimony naming "Charles P. Burns" as the supervisor of the felony review unit is

the only reference in the record. Supreme Court Rule 63(C)(1)(b) provides that a judge should disqualify himself or herself in a proceeding "in which the judge's impartiality might reasonably be questioned" in instances where "the judge served as a lawyer in the matter in controversy." Ill. S. Ct. R. 63(C)(1)(b). A postconviction proceedings is sufficiently related to the original case to fall within the scope of Rule 63(C)(1)(b). *People v. Vasquez*, 307 Ill. App. 3d 670, 674 (1999).

¶ 55 Illinois courts have held that recusal is not required when the judge previously acted in a supervisory role. See *People v. Thomas*, 199 Ill. App. 3d 79, 91-92 (1990) (where trial judge previously had been the chief of the criminal division of DuPage County's State's Attorney's office and had supervisory authority over the defendant's case); *People v. Del Vecchio*, 129 Ill. 2d 265, 277-78 (1989) (trial judge previously as a supervisor assigned an unrelated case of the defendant's to another ASA and agreed to expedite the indictment so the defendant could be sentenced as a youth); *People v. Lipa*, 109 Ill. App. 3d 610, 613-14 (1982) (trial judge was in charge of felony trial division at the time of the defendant's indictment and previously as an ASA approved a subpoena in the defendant's case); *People v. Burnett*, 73 Ill. App. 3d 750, 754 (1979) (trial judge had previously served as a supervisor in charge of other ASAs where the defendant's case had been pending and a bond forfeiture hearing was held).

¶ 56 In the present case, we point out that Judge Burns did not preside over defendant's trial and there is no indication in the record that Judge Burns or either party was aware of this prior involvement or what the level of involvement was in the case. Nor is there any indication that the judge was motivated or biased against defendant. See *Vasquez*, 307 Ill. App. 3d at 674. We

also note that nearly 13 years elapsed from when defendant was initially arrested and questioned about the shooting in 1996 and the filing of his postconviction petition in 2009. However, since we have already determined that defendant's postconviction petition should advance to the second stage of proceedings, we alert the parties and Judge Burns of this reference in the record so they can proceed accordingly on remand.

¶ 57 Based on the foregoing reasons, the trial court's dismissal of defendant's postconviction petition is reversed and remanded for further proceedings consistent with this order.

¶ 58 Reversed and remanded.