

No. 1-09-2199

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 06 CR 20692
	)	
DAMON SIMON,	)	Honorable
Defendant-Appellant.	)	Frank Zelezinski,
	)	Judge Presiding.

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JUSTICE ROBERT E. GORDON delivered the judgment of the court.  
Presiding Justice Garcia and Justice McBride concurred in the judgment.

**ORDER**

*Held:* Where there was no arguable basis for either of defendant's ineffective assistance of counsel claims, the dismissal of defendant's postconviction petition at the first stage was affirmed.

Following a bench trial, defendant Damon Simon was convicted of first degree murder for the shooting death of Robert Hill and sentenced to 50 years in the Illinois Department of Corrections. Defendant filed a direct appeal<sup>1</sup> and, while the appeal was pending, filed a *pro se*

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<sup>1</sup> Defendant's direct appeal is considered in our opinion in *People v. Simon*, No. 1-09-1197 (Ill. App. May 27, 2011), where we affirm defendant's conviction.

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petition for postconviction relief in which he claimed ineffective assistance of counsel. The postconviction petition was summarily dismissed at the first stage of the proceedings, and defendant appeals. We affirm.

### BACKGROUND

A detailed recitation of the events at defendant's trial are included in our opinion on direct appeal. *Simon*, No. 1-09-1197, slip op. at 2-21. Here, we relate only those facts necessary for a decision on defendant's postconviction petition. On August 14, 2006, defendant was arrested and subsequently indicted for first degree murder (720 ILCS 5/9-1(A)(1) (West 2004)) for the July 21, 2006, shooting death of Robert Hill (the victim). In his answer to the State's motion for pretrial discovery, defendant stated that he would assert the affirmative defense of self defense. Defendant waived a jury trial and proceeded with a bench trial on November 12, 2008.<sup>2</sup>

During the State's case-in-chief, the State presented four witnesses who testified to the circumstances of the shooting. Aaron Jackson testified that he was attempting to purchase marijuana from defendant, who was sitting in the passenger seat of a vehicle parked in the parking lot of Corona's Food Mart in Calumet Park, when defendant turned to reach behind his seat. Defendant turned around quickly to face forward, looking surprised, and left the vehicle, removing a gun from his waistband. Jackson observed the victim approaching, riding a bicycle in the direction of the vehicle. Defendant walked up to the victim, pointing the gun at him.

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<sup>2</sup> The bench trial began on November 12, 2008, but extended over four dates due to witness unavailability. The dates of the trial were November 12, 2008, December 22, 2008, January 30, 2009, and March 5, 2009.

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Jackson heard defendant tell the victim, “talk that shit now,” to which the victim responded “what, what,” while holding up his hands with his palms facing out; the victim was not holding anything in his hands and appeared surprised. Defendant stood in place and shot the victim twice. After Jackson observed defendant shoot the victim, Jackson “[t]ook off,” but heard an additional four gunshots. Jackson later testified that after the shooting, he observed defendant “tak[ing] off” in the vehicle.

Anthony Green testified that approximately five minutes before the shooting, he was standing with defendant in front of the home of the victim’s girlfriend, Star Gardner. Green observed the victim come out from the home with a handgun in his back pocket. When defendant observed the gun, he “disappeared.” Green ran up to the victim and told him to put the gun away because both the victim and defendant were Green’s friends and he did not want to see either killed. The victim then went back to Gardner’s home; when he emerged from the home, Green no longer observed the gun.

Green further testified that he was present in the store’s parking lot and spoke to defendant through the vehicle’s passenger window when defendant pushed Green back and drew a gun. Green backed up, turned around, and observed the victim on a bicycle. Defendant opened the door, left the vehicle, and fired at the victim while he was on the bicycle. Green testified that once he observed the victim being shot the first time, “it was like, I blanked out.”<sup>3</sup>

Green testified that he observed the victim “pistol whip” defendant several days before

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<sup>3</sup> Green’s testimony did not include any references to Jackson, and Jackson’s testimony did not include any references to Green.

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the shooting. Green also testified that he had heard about the victim previously shooting defendant and when the State objected, and the trial court sustained the objection.

The State also presented a statement that Green gave police a few days after the shooting. In the statement, Green said that on the day of the shooting, he observed the victim leaving his girlfriend's house and further observed the handle of a gun protruding from the victim's back pocket. Since Green knew the victim well, he told the victim to "cool out" and put the gun away because there were children nearby. At the time, defendant was outside, one building away, and at some point, defendant went inside.

A short time later, as Green left Corona's Food Mart after a brief visit, he observed defendant sitting in the passenger seat of the vehicle and walked over and spoke with defendant. Green observed a handgun in defendant's lap. Defendant looked around Green "like he saw someone," and Green turned and observed the victim on a bicycle. Defendant pushed Green away and exited the vehicle. Defendant was a few feet from the victim and walked toward him with a pointed gun. Green did not observe the victim with a weapon and the victim never moved toward defendant. The victim attempted to get off of his bicycle as defendant "got right up on him" and said something like, "what's that shit you was talking about." The victim laid his bicycle on the ground and stood with his hands in the air, saying something like, "are you going to do this in broad daylight," and partially turned his back on defendant.

Defendant began shooting the victim from a foot or two away. After the first or second shot, the victim "went down" and defendant stood over him and continued shooting "maybe five or six or seven times altogether." Green said that at some point, Jackson or someone named

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Moonie had ridden in on a bicycle and observed the scene as well. Green attempted to walk away from the scene and observed defendant “jump” into the vehicle and drive away, yelling “GDK” from the vehicle, which meant “Gangster Disciple killer.”

The State additionally called Antrelle Clayborn as a witness, who testified that on July 21, 2006, he was driving his automobile when he received a cell call from defendant. Defendant told Clayborn that he had just observed Clayborn driving down the street and asked Clayborn to pick him up in the alley behind defendant’s house. Clayborn complied and defendant entered Clayborn’s vehicle with a 40-ounce beer and began talking about an incident that had occurred between defendant and someone else. Clayton attempted to testify that “[defendant] said it was somebody on the front that he thought had a gun who was going to shoot him,” but the court sustained the State’s objection on hearsay grounds.

Defendant asked Clayborn to drive to Corona’s Food Mart. Clayborn parked the vehicle and defendant exited the vehicle and entered the store while Clayborn waited. Defendant exited the store four or five minutes later and entered the vehicle. Anthony Green walked up to the passenger side of the vehicle and spoke with Clayborn.

Clayborn testified that the victim came “riding up” on his bicycle, not riding at a fast speed, and was riding toward the store, which was in the same direction as the vehicle; Clayborn opined that “[h]e wasn’t never close to us or nothing.” The victim was alone when he entered the parking lot.

Clayborn testified that defendant lifted his shirt and Clayborn observed the handle of a handgun in defendant’s waistband and defendant told Green to move out of the way so that

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defendant could open the door. Defendant jumped out of the vehicle while pulling out his gun, “said a few words” that Clayborn was unable to hear, and shot the victim while he was still on his bicycle. Clayborn was able to see both of the victim’s hands when he was riding up to the store and testified that both of his hands were on the handlebars of the bicycle and he was not holding anything else; Clayborn further testified that the victim’s hands never left the handlebars.

Clayborn was preparing to leave after the shooting when defendant opened the door and jumped into the vehicle. Defendant told Clayborn that the victim “ ‘had to get it.’ ”

The State also called Mohammed Suleiman as a witness. Suleiman was working at Corona’s Food Mart on the day of the shooting and observed defendant enter the store, make a purchase, and leave. Defendant entered a vehicle, sitting on the passenger side. A man named Yale was standing near the passenger side door of the vehicle. Suleiman was sweeping the rug near the store’s glass front door and observed the victim riding on his bicycle alone, coming from the opposite side of the parking lot. The victim did not have a gun in his hand and Suleiman did not observe the victim reaching for his waistband; while he was riding his bicycle, the victim’s hands were on the handlebars.

Suleiman turned around to roll up the store’s rug and heard several shots. He turned back and observed the victim on the ground and defendant entering the vehicle and leaving. Suleiman noticed a gun in defendant’s hand. Suleiman testified that he never actually saw defendant shoot the victim because by the time he turned around, defendant was running toward the vehicle. Suleiman was able to see the victim lying on the ground with blood “all over his shirt” while he

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was calling police. No one approached the victim or took anything from him. Suleiman observed the fallen victim until the police arrived within a matter of seconds.

The State also called a Calumet Park police officer as a witness, who testified that there was no weapon recovered from the scene.

After presenting its witnesses, the State made an oral motion *in limine* to preclude a portion of Star Gardner's expected testimony in which she would testify that the victim told her that he had previously "slapped the defendant around" on the basis of hearsay. The trial court made a preliminary ruling that the testimony would not be allowed.

The parties stipulated that Dr. Nancy Jones, a forensic pathologist with the Cook County medical examiner's office, would testify that she performed a postmortem examination of the victim on July 22, 2006, in which she found a "through-and-through" gunshot wound to the victim's lateral chest, which she classified as an entrance wound. There were also three gunshot wounds to the left back, from which medium caliber, partially copper jacketed, lead bullets were recovered. None of the gunshot wounds included evidence of close-range fire. Dr. Jones would further testify that in her expert opinion, the cause of the victim's death was multiple gunshot wounds and the manner of death was homicide.

The parties also stipulated that Illinois State Police forensic scientist William Anselme would testify that the three bullets were fired from the same firearm. The parties further stipulated to the fact that defendant was arrested on August 14, 2006, and that there was probable cause for his arrest.

In his case-in-chief, defendant called Patricia Simms to testify on his behalf. Simms was

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visiting her daughter on July 21, 2006, when defendant knocked on the door. After defense counsel asked Simms what happened when she answered the door, the State objected and the trial court sustained the objection.

Prior to defendant knocking on the door, Simms had seen the victim and another man called Yayo outside. Simms answered the door and defendant asked if he could come in. The State objected and the court sustained the objection, instructing Simms: “Ma’am, you can’t testify as to anything that he told you.” Simms testified that defendant appeared scared. He made a telephone call for someone to pick him up and left through the back door; defendant was in the house for less than five minutes.

Defendant also testified on his own behalf. On July 21, 2006, defendant was walking down the street with Green when the victim came out of an apartment. Defendant observed a pistol in the victim’s back pocket. The victim was approximately 10 feet from defendant and told defendant, “ ‘I got you now; I’m going to kill you.’ ” Green told the victim, “ ‘Man, hold on. Man, you don’t need to be doing this out here.’ ”

Defendant testified that it was not the first occasion in which the victim had threatened him with the same gun. Approximately two or three days earlier, defendant was with Green when the victim and three of his friends approached. The victim told defendant that “he didn’t want to see [defendant] around there no more.” The victim’s friends held defendant down and the victim “pistol whipped” defendant, hitting him across the head several times with the butt of the gun. Green told them to stop and ran away. Defendant did not have a gun during the incident and thought that the victim was going to kill him.

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On July 21, when the victim threatened to kill defendant, defendant did not have a gun. After the victim threatened him, defendant testified that “I felt he was going to kill me. I was in fear of my life. He said he was going to kill me. He said he was going to kill me. I was in fear of my life.” Defendant ran next door to Simms’ house and “asked her please let me come in the house ‘cause somebody out there got a gun; he talking about he gonna kill me.” Simms opened the door and allowed defendant to come inside. Defendant viewed Clayborn driving past the window and called him to ask him to pick defendant up. At the time, the victim was still in front talking with Green. When Clayborn arrived, defendant ran to his vehicle and they drove away. Clayborn asked defendant why he was running our of the back door of Simms’ house, and defendant told him “ ‘This guy in the front, he got a gun, man; he just told me he gonna kill me, man, just get me away from the area.’ ”

They stopped at the store and both went inside, where defendant purchased potato chips. Defendant did not have a gun when he went into the store, nor did he have a gun at Simms’ house or when exiting the store. When they came out, defendant jumped into the passenger seat. Green was walking past and stopped at the passenger side of the vehicle, where he said that he wanted a ride to work. Clayborn told Green that he could not have a ride unless he had money for gas. While they were talking, defendant looked to the right and saw the victim approaching on a bicycle at a fast pace toward the vehicle with some friends following him on foot; defendant testified that the friends were the same three friends as in the pistol whipping incident.

Defendant had been leaning back in the passenger sear and when he turned, he and the victim caught each other’s attention. Defendant testified that “[o]ur face[s] saw each other, and I

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just -- he just pointed at me and I looked back at [Clayborn] and I told him, man, we got to go, man, this is the same guy that just had a gun on me.” Defendant first noticed the victim when he was 30 to 35 feet away and the victim rode his bicycle to within a few feet of the passenger side of the vehicle. While the victim was riding his bicycle, defendant observed him reach into his back pocket, where defendant had previously seen his gun. The victim dismounted the bicycle and pulled his gun, stating “ ‘I got you now,’ ” and Clayborn passed defendant a gun. Defendant did not have a gun before that time, and the gun that Clayborn passed to him did not belong to defendant; defendant did not know whether the gun was loaded.

Defendant exited the vehicle; he testified that he was “trapped.” The victim pointed his gun at defendant and said that he was going to kill him. Defendant fired his gun because he was afraid that the victim would kill him; he did not know how many times he shot the victim, but “just kn[e]w the gun went off.” Defendant testified that he never shot the victim in the back. The victim did not fire his gun. Defendant then entered the vehicle and Clayborn drove away; defendant did not say anything after the shooting. Defendant was scared after the shooting and did not know what to do. Defendant did not tell Clayborn to drive away, did not force Clayborn to drive him to Clayborn’s family’s house, and did not ask anyone to dispose of the gun because the gun was not his.

Defendant testified that he had only had a few interactions with the victim over several years and did not know him very well, but that “[f]or some reason,” the victim did not like him. Defendant also testified that the victim robbed him several years ago. However, defendant testified that “I ain’t wanna kill him. I ain’t have no plans on seeking no revenge on him.”

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Defendant testified that he was defending himself.

After defendant testified, the defense rested its case-in-chief and the parties presented their closing arguments. During closing argument, the State argued that defendant was not guilty of second degree murder:

“The question is whether or not it was a lawful justification for the shooting, whether it’s first degree, second degree or not guilty. And I submit to you that it’s first degree and not self-defense nor second degree.

\* \* \*

We also know that this is first degree and not self-defense because as you know the law, the defendant has to have a reasonable belief that he is in imminent danger of loss of life or great bodily harm. For second degree it has to be an unreasonable belief.”

In its rebuttal, the State again referred to second degree murder:

“Your Honor, we would submit to you that in this case it comes out in the defendant’s testimony, either you believe it or you don’t. And if you believe the defendant’s testimony, second degree murder is not even a legal option. Second degree murder is not a legal option if you believe the defendant’s testimony. And what I mean by that, Judge, he stated the victim got off the bike, pulled a

gun, told him he was going to kill him and then the defendant shot him.

Well, your Honor, the only second degree option is whether you believe that belief was unreasonable. If you buy the defendant's testimony, it's not unreasonable, but that's where the problems lie, Judge. His testimony is absolutely incredible. So then you're left with no other option than to find the defendant guilty of first degree murder if you believe we've proven our case beyond a reasonable doubt."

The court found that both sides agreed that defendant was the person who killed the victim and that the only question was whether he was justified in doing so by acting in self defense. The court found that defendant and the victim had "history behind them," including defendant's testimony that the victim robbed and pistol whipped defendant. However, the history did not justify the shooting. The court found that accepting defendant's testimony would result in a finding that the shooting was justified by self defense but noted that other testimony needed to be considered as well. After recounting the other witnesses' testimony, the court concluded that it did not accept defendant's testimony and did not find it credible, including a consideration of second degree murder:

"Defense testimony I heard, and I listened very deeply to find if he acted in self-defense or even unreasonably acted in self-defense. I do not accept the defendant's testimony. I do not find it

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credible, and on that basis I believe the State has established their burden here.”

The court found defendant guilty of first degree murder.

On May 4, 2009, the parties came before the trial court for sentencing and defendant’s motion for a new trial. The court denied the motion for a new trial and sentenced defendant to 50 years in the Illinois Department of Corrections. Defendant filed a notice of appeal the same day.

On direct appeal, defendant argued that his conviction should be reduced to second degree murder and remanded for resentencing because he acted with an actual, though unreasonable, belief in self defense. Alternatively, defendant claimed that he was entitled to a new trial because: (1) the trial court erred in barring evidence that supported defendant’s theory of self defense, (2) the trial court relied on an erroneous recollection of the evidence in weighing witness credibility, and (3) the State failed to disclose a witness’ felony conviction and allowed the witness to provide perjured testimony when it failed to correct the witness’ misstatement of his criminal history. We affirmed defendant’s conviction.

On June 12, 2009, defendant filed a *pro se* petition for postconviction relief. In the petition, defendant raised a number of arguments, including the claim that his trial counsel was ineffective for (1) filing a posttrial motion without reviewing trial transcripts after requesting that defendant pay additional funds to obtain the transcripts and (2) failing to argue for second degree murder despite defendant’s specific request for him to do so. On the same day, defendant filed a *pro se* motion to reconsider his sentence. On June 19, 2009, defendant filed a *pro se* motion to convert the petition for postconviction relief into a motion for a new trial. On July 10, 2009, the

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trial court denied defendant's motion for a new trial and his motion to reconsider his sentence "for untimeliness and for lack of jurisdiction due to a notice of appeal being filed." The court further denied defendant's postconviction petition, finding it to be frivolous and patently without merit. Defendant appeals the denial of his postconviction petition.

#### ANALYSIS

On appeal, defendant claims that he set forth an arguable basis of a constitutional claim and that his postconviction petition should be allowed to proceed to the second stage. We affirm.

##### *Stages of a Postconviction Proceeding*

The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2000)) provides a means by which a defendant may challenge his or her conviction or sentence for violations of federal or state constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006) (citing *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005)). To be entitled to postconviction relief, a defendant must show that he or she has suffered a substantial deprivation of his federal or state constitutional rights in the proceedings that produced the conviction or sentence being challenged. 725 ILCS 5/122-1(a) (West 2000); *Pendleton*, 223 Ill. 2d at 471 (citing *Whitfield*, 217 Ill. 2d at 183).

In noncapital cases, the Act provides for three stages. *Pendleton*, 223 Ill. 2d at 471-72. At the first stage, the trial court has 90 days to review a petition and may summarily dismiss it, if the trial court finds that the petition is frivolous and patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2000); *Pendleton*, 223 Ill. 2d at 472. If the trial court does not dismiss the petition within that 90-day period, the trial court must docket it for further consideration. 725

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ILCS 5/122-2.1(b) (West 2000); *Pendleton*, 223 Ill. 2d at 472.

The Illinois Supreme Court has held that, at this first stage, the trial court evaluates only the merits of the petition's substantive claim, and not its compliance with procedural rules. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). The issue at this first stage is whether the petition presents “ ‘the gist of a constitutional claim.’ ” *Perkins*, 229 Ill. 2d at 42 (quoting *People v. Boclair*, 202 Ill. 2d 89, 99-100 (2002), quoting *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996)). As a result, “[t]he petition may not be dismissed as untimely at the first stage of the proceedings.” *Perkins*, 229 Ill. 2d at 42.

In the case at bar, defendant's petition was dismissed at the first stage. However, if it had proceeded to the second stage, the Act provides that counsel may be appointed for defendant, if defendant is indigent. 725 ILCS 5/122-4 (West 2000); *Pendleton*, 223 Ill. 2d at 472. After an appointment, Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) requires the appointed counsel: (1) to consult with petitioner by mail or in person; (2) to examine the record of the challenged proceedings; and (3) to make any amendments that are “necessary” to the petition previously filed by the *pro se* defendant. *Perkins*, 229 Ill. 2d at 42. Our supreme court has interpreted Rule 651(c) also to require appointed counsel “to amend an untimely *pro se* petition to allege any available facts necessary to establish that the delay was not due to the petitioner's culpable negligence.” *Perkins*, 229 Ill. 2d at 49.

The Act provides that, after defense counsel has made any necessary amendments to the petition, the State may move to dismiss it. *Pendleton*, 223 Ill. 2d at 472 (discussing 725 ILCS 5/122-5 (West 2000)). See also *Perkins*, 229 Ill. 2d at 43. If the State moves to dismiss, the trial

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court may hold a dismissal hearing, which is still part of the second stage. *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998). A trial court is foreclosed “from engaging in any fact-finding at a dismissal hearing because all well-pleaded facts are to be taken as true at this point in the proceeding.” *Coleman*, 183 Ill. 2d at 380-81.

At a third-stage, evidentiary hearing, the trial court “may receive proof by affidavits, depositions, oral testimony, or other evidence,” and “may order the petitioner brought before the court.” 725 ILCS 5/122-6 (West 2000). In the case at bar, defendant asks us to reverse the trial court’s dismissal of his petition as frivolous and remand for second-stage proceedings.

#### *Standard of Review*

The question of whether a trial court’s summary first-stage dismissal was in error is purely a question of law, which an appellate court reviews *de novo*. *Petrenko*, 237 Ill. 2d at 496; see also *Pendleton*, 223 Ill. 2d at 473.

Our supreme court has held that a trial court may summarily dismiss a petition as frivolous only if it has no arguable basis either: (1) in law; or (2) in fact. *Petrenko*, 237 Ill. 2d at 496 (citing *People v. Hodges*, 234 Ill. 2d 1, 16 (2009)). Our supreme court has explained that (1) a petition lacks an arguable basis in law “if it is based on an indisputably meritless legal theory, such as one that is completely contradicted by the record”; and that (2) it lacks an arguable basis in fact “if it is based upon a fanciful factual allegation, such as one that is clearly baseless, fantastic or delusional.” *Petrenko*, 237 Ill. 2d at 496 (citing *Hodges*, 234 Ill. 2d at 16-17).

#### *Ineffective Assistance of Counsel Standard*

The Illinois Supreme Court has held that, to determine whether a defendant was denied

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his or her right to effective assistance of counsel, an appellate court must apply the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Colon*, 225 Ill. 2d 125, 135 (2007) (citing *People v. Albanese*, 104 Ill. 2d 504 (1984) (adopting *Strickland*)). Under *Strickland*, a defendant must prove both (1) his attorney's actions constituted errors so serious as to fall below an objective standard of reasonableness; and (2) absent these errors, there was a reasonable probability that his trial would have resulted in a different outcome. *People v. Ward*, 371 Ill. App. 3d 382, 434 (2007) (citing *Strickland*, 466 U.S. at 687-94).

Under the first prong of the *Strickland* test, the defendant must prove that his counsel's performance fell below an objective standard of reasonableness "under prevailing professional norms." *Colon*, 225 Ill. 2d at 135; *People v. Evans*, 209 Ill. 2d 194, 220 (2004). Under the second prong, the defendant must show that, "but for" counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Colon*, 225 Ill. 2d at 135; *Evans*, 209 Ill. 2d at 220. "[A] reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome—or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair." *Evans*, 209 Ill. 2d at 220; *Colon*, 225 Ill. 2d at 135. In other words, the defendant was prejudiced by his attorney's performance.

To prevail, the defendant must satisfy both prongs of the *Strickland* test. *Colon*, 225 Ill. 2d at 135; *Evans*, 209 Ill. 2d at 220. "That is, if an ineffective-assistance claim can be disposed of because the defendant suffered no prejudice, we need not determine whether counsel's performance was deficient." *People v. Graham*, 206 Ill. 2d 465, 476 (2003). We do not need to

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consider the first prong of the *Strickland* test when the second prong cannot be satisfied.

*Graham*, 206 Ill. 2d at 476.

Combining the standard for a first-stage summary dismissal with the standard for ineffective assistance of counsel, our supreme court has held that a postconviction petition alleging ineffective assistance of counsel may not be summarily dismissed, if: “(i) it is arguable that counsel’s performance fell below an objective standard of reasonableness and (ii) it is arguable that defendant was prejudiced.” *Petrenko*, 237 Ill. 2d at 497 (citing *People v. Golden*, 229 Ill. 2d 277, 283 (2008)).

#### *Failure to Order Transcripts*

Defendant first argues that trial counsel was ineffective when he requested that defendant pay him additional money after the trial to order trial transcripts and, when defendant was unable to provide the money, filed a motion for a new trial without ordering or consulting the transcripts. Defendant claims that he was prejudiced by trial counsel’s conduct because trial counsel’s motion for a new trial failed to include two “key” issues that were thereby forfeited on appeal: (1) the trial court’s preclusion of evidence of the victim’s prior violent acts toward defendant and (2) the trial court’s preclusion of defendant’s statements to two witnesses immediately after being threatened with a gun by the victim.

On direct appeal, defendant raised the issues concerning the victim’s violent acts and defendant’s statements, and we analyzed these issues for plain error. Our analysis in our opinion on direct appeal is dispositive of defendant’s claims on this postconviction appeal. The first step in a plain error analysis is to determine whether any error occurred at all. *People v. Piatkowski*,

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225 Ill. 2d 551, 564 (2007) (“the first step is to determine whether error occurred”).

Accordingly, in our opinion on direct appeal, we considered the merits of each of defendant’s claims and determined there was no error at all in the trial court’s decision. *Simon*, No. 1-09-1197, slip op. at 29-39. It follows that, if we already determined on direct appeal that there was no error in defendant’s underlying claim, there can be no error in trial counsel’s failure to raise these claims in defendant’s posttrial motion. Raising these claims would have been fruitless. Defendant has failed to show us how he was prejudiced by trial counsel’s failure to consult the trial transcripts before drafting the posttrial motion. Finally, since there was no prejudice to defendant from trial counsel’s failure to consult the trial transcripts, there is no arguable basis for defendant’s ineffective assistance claim on this postconviction appeal. See *Graham*, 206 Ill. 2d at 476 (“[I]f an ineffective-assistance claim can be disposed of because the defendant suffered no prejudice, we need not determine whether counsel’s performance was deficient.”). Therefore, we affirm the dismissal of defendant’s postconviction petition.

*Failure to Argue for Second Degree Murder*

Defendant’s other claim of ineffectiveness is that trial counsel was ineffective for failing to argue for a second degree murder finding despite defendant making a specific request for him to do so. Defendant claims that trial counsel’s conduct prejudiced him because he was denied the opportunity to present argument concerning his unreasonable belief in self defense. Specifically, defendant argues that had trial counsel argued in favor of second degree murder, he would have been able to counter the State’s reliance on the lack of a gun found on the victim by emphasizing that the lack of a weapon does not *per se* defeat a finding of second degree murder.

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We find that there is no arguable basis for an ineffective assistance claim. The record affirmatively indicates that defendant was not prejudiced by trial counsel's failure to raise the issue of self defense because the trial court nevertheless considered whether second degree murder was applicable. In a bench trial, despite the fact that second degree murder is a lesser mitigated offense of first degree murder and not a lesser included offense, the trial court may *sua sponte* convict a defendant of second degree murder. *People v. Walton*, 378 Ill. App. 3d 580, 588 (2007); *People v. Rogers*, 286 Ill. App. 3d 825, 830 (1997). In the case at bar, the trial court considered whether second degree murder was appropriate, and the State argued that it was not.

During closing argument, the State argued that defendant was not guilty of second degree murder:

“The question is whether or not it was a lawful justification for the shooting, whether it's first degree, second degree or not guilty. And I submit to you that it's first degree and not self-defense nor second degree.

\* \* \*

We also know that this is first degree and not self-defense because as you know the law, the defendant has to have a reasonable belief that he is in imminent danger of loss of life or great bodily harm. For second degree it has to be an unreasonable belief.”

In its rebuttal, the State again referred to second degree murder:

“Your Honor, we would submit to you that in this case it comes out in the defendant’s testimony, either you believe it or you don’t. And if you believe the defendant’s testimony, second degree murder is not even a legal option. Second degree murder is not a legal option if you believe the defendant’s testimony. And what I mean by that, Judge, he stated the victim got off the bike, pulled a gun, told him he was going to kill him and then the defendant shot him.

Well, your Honor, the only second degree option is whether you believe that belief was unreasonable. If you buy the defendant’s testimony, it’s not unreasonable, but that’s where the problems lie, Judge. His testimony is absolutely incredible. So then you’re left with no other option than to find the defendant guilty of first degree murder if you believe we’ve proven our case beyond a reasonable doubt.”

In its findings, the trial court considered second degree murder:

“Defense testimony I heard, and I listened very deeply to find if he acted in self-defense or even unreasonably acted in self-defense. I do not accept the defendant’s testimony. I do not find it credible, and on that basis I believe the State has established their burden here.”

Defendant acknowledges that second degree murder was considered by the trial court, but argues that trial counsel's decision not to pursue the second degree murder claim nevertheless "prevented [defendant] from effectively presenting the mitigating factors needed to support a finding of second degree murder." For a defendant to be guilty of second degree murder instead of first degree murder, the defendant must prove that "at the time of the killing he or she believes the circumstances to be such that, if they existed, would justify or exonerate the killing \*\*\*, but his or her belief is unreasonable."<sup>4</sup> 720 ILCS 5/9-2(a)(2) (West 2004).

On direct appeal, defendant argued that he should have been found guilty of second degree murder rather than first degree murder because he had an actual, though unreasonable, belief that he was acting in self defense. The same facts used during trial to support a finding of self defense were presented on direct appeal in support of defendant's unreasonable belief in the need to use self defense, including defendant's prior history with the victim, defendant's demeanor shortly before the shooting, the circumstances of the shooting itself, and defendant's own testimony about his subjective beliefs. In our opinion on direct appeal, we found that the trial court properly could have rejected a charge of second degree murder and affirmed its finding of first degree murder.

Additionally, in this postconviction appeal, defendant lists a single aspect of his defense

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<sup>4</sup> Section 9-2(a)(1) also allows for a finding of second degree murder in the case of "a sudden and intense passion resulting from serious provocation" (720 ILCS 5/9-2(a)(1) (West 2004)), but defendant does not argue, either here or on direct appeal, that his killing the victim would be justified on this basis.

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that may have been different: defendant claims that had trial counsel argued in favor of second degree murder, he would have been able to argue that evidence of the victim being unarmed did not necessarily preclude a finding of second degree murder; defendant raised the same argument on direct appeal. In our opinion on direct appeal, we agreed that all of the facts should be considered in determining whether defendant proved an unreasonable belief in self defense. However, we presume that the trial court knows and follows the law unless the record indicates otherwise. *Gaultney*, 174 Ill. 2d at 420. Since the record does not indicate otherwise, we presume that the trial court considered all of the evidence in the record before determining that second degree murder was inapplicable and did not adopt a rule that the absence of a weapon precluded a finding of second degree murder. Thus, in light of the fact that the trial judge affirmatively considered second degree murder, and we cannot find the evidence warranted a finding of second degree murder, we cannot find that trial counsel's failure to present it prejudiced defendant. Since there was no prejudice, there is no arguable basis for an ineffective assistance claim and we affirm the dismissal of defendant's postconviction petition.

#### CONCLUSION

Since there was no arguable basis for either of defendant's ineffective assistance of counsel claims, we affirm the dismissal of defendant's postconviction petition at the first stage.

Affirmed.