

(methamphetamine) (720 ILCS 570/401(a)(6.5)(D) (West 2000)) and unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2000)). The defendant was sentenced to a 25-year prison term on the controlled substance offense and a concurrent 5-year term on the weapon offense. On appeal, we determined that defense counsel's failure to seek a severance of the controlled substance charge from the weapon charge was not a reasonable trial strategy and resulted in unfair prejudice, and we granted the defendant a new trial on the controlled substance charge. *People v. Grames*, No. 5-02-0433 (2003) (unpublished order pursuant to Supreme Court Rule 23 (eff. July 1, 1994)).

¶ 5 In the second trial, a jury found that the defendant was guilty of unlawful possession with intent to manufacture a controlled substance. The trial court sentenced the defendant to a 20-year term of imprisonment and ordered him to pay a \$1,000 fine and a \$3,000 assessment. On direct appeal, we affirmed the conviction but modified the credit for time served against the fine and assessment. *People v. Grames*, No. 5-04-0695 (2006) (unpublished order pursuant to Supreme Court Rule 23).

¶ 6 The defendant filed a *pro se* petition under the Post-Conviction Hearing Act (725 ILCS 5/122-1 (West 2006)). The defendant alleged that he was denied due process and a fair trial when the prosecutor revealed new, inculpatory information during his opening statement in the second trial. The defendant also alleged that he was denied the effective assistance of counsel where his trial attorney failed to request a continuance in order to investigate the new information and where appellate counsel failed to raise either the discovery violation or trial counsel's failure to request a continuance in the direct appeal.

¶ 7 The circuit court reviewed the defendant's *pro se* petition, determined that the

claims were not frivolous or patently without merit, and appointed counsel to assist the defendant. Postconviction counsel filed an amended petition, and subsequently a second amended petition, and the State filed a motion to dismiss the second amended petition. After considering the briefs and arguments, the circuit court granted the State's motion to dismiss.

¶ 8

B. FACTUAL BACKGROUND

¶ 9

A brief description of the facts pertinent to the issues on appeal follows. A more detailed recitation of the facts underlying the defendant's conviction in the second trial is set forth in our Rule 23 order issued in the direct appeal from that conviction. See *People v. Grames*, No. 5-04-0695 (2006).

¶ 10

Shortly after midnight on August 22, 2001, Sergeant Fred Bray, Deputy Kelvin Worker, and additional law enforcement officers executed a search warrant at the defendant's residence. The search warrant was issued based in part on information that Deputy Worker received from a confidential informant called Darel Rhodes. Rhodes had a deal with authorities wherein he agreed to make five drug buys from known dealers in exchange for some consideration on cases that had not yet been filed against him.

¶ 11

During the summer of 2001, Darel Rhodes went to the defendant's property. While there, Rhodes observed the defendant make or attempt to make methamphetamine in or around a travel trailer. Rhodes also observed that the defendant had a book about making methamphetamine. Rhodes returned to the defendant's residence on August 21, 2001, and he and the defendant went into the defendant's travel trailer. While inside the trailer, Rhodes observed the defendant remove a glass jar with a white top from an overhead cabinet in the travel trailer. Rhodes noted that the jar was almost full of liquid. Rhodes watched the defendant

pour a small quantity of the liquid into a dish and attempt to "smoke off" some methamphetamine from the liquid. Rhodes noted that a very small quantity of methamphetamine was produced during the process. The defendant informed Rhodes that he would try to produce more later. Rhodes watched the defendant place the white top back onto the jar and put the jar back into the overhead cabinet. Rhodes provided this information to Worker. He also testified to his observations during the defendant's initial trial and his second trial.

¶ 12 When the police searched the defendant's travel trailer on August 22, 2001, they discovered a square glass jar with a white top in an overhead cabinet and a round jar on a lower shelf. The square jar contained a liquid substance that nearly filled the jar. The liquid inside the square jar weighed 1,143.5 grams. A sample of the liquid was sent to the crime lab. The sample tested positive for methamphetamine. The remainder of the liquid was disposed of in accordance with proper protocol for hazardous substances. The round jar contained a very small amount of liquid. The liquid was removed from the round jar and sent to the lab. The liquid did not test positive for methamphetamine. Each empty jar was packaged in an individual evidence bag and labeled with an exhibit number. Later, the jars were processed for fingerprints. The fingerprint analysis revealed that the defendant's fingerprints were found on the square jar and that partial prints were found on the round jar, but none could be identified. A book on manufacturing methamphetamine, a trash pile containing discarded items used to manufacture methamphetamine, and coffee filters were also discovered during the search.

¶ 13 During the defendant's first trial, Sergeant Bray and Deputy Worker testified that the defendant's fingerprints were found on exhibit 15 and that exhibit 15 was found in the overhead cabinet in the defendant's travel trailer. But as Bray and

Worker reviewed the scene photographs while preparing for the second trial, they realized that the evidence bags containing the round jar and the square jar had been mislabeled after the jars were sealed in them. Bray and Worker noted that the square jar containing methamphetamine, marked as exhibit 16, had been erroneously described as the glass jar found on the window shelf and that the round jar, marked as exhibit 15, had been erroneously described as the glass jar found in the overhead cabinet. Both officers realized that they had relied on the description on the exhibit tags rather than the actual pieces of evidence when they testified in the first trial.

¶ 14 During the second trial, Bray and Worker each acknowledged that their testimony in the earlier hearing was incorrect. Bray explained that several items were seized during the search and that the two glass jars were mislabeled at the time they were packaged as evidence. Both officers testified that the square jar containing methamphetamine was found in the overhead cabinet, that the defendant's fingerprints were identified on the square jar, that the round jar was found on a window shelf, and that unidentifiable, partial prints were found on the round jar. The officers' testimony with regard to the location of the jars and the amount of liquid in each was corroborated by photographs taken during the search and the testimony of the confidential informant, Darel Rhodes. The defendant's attorney extensively cross-examined both officers on the point and attempted to impeach them with the transcripts of their prior testimony. He again challenged the officers when he recalled them as witnesses in the defense case.

¶ 15 The defendant testified in his own behalf. He stated that he did not know how to make methamphetamine and that he had never seen anyone make it. The defendant called friends and relatives who testified that they had visited the defendant's residence during the summer of 2001 and that they had never seen

methamphetamine on the premises.

¶ 16

C. ANALYSIS

¶ 17

The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)) provides a means by which a defendant may collaterally challenge his conviction or sentence based on a substantial deprivation of his federal or state constitutional rights in the proceeding that produced that conviction or sentence. *People v. Whitfield*, 217 Ill. 2d 177, 183, 840 N.E.2d 658, 663 (2005). The postconviction proceeding is limited to constitutional matters that were not and could not have been previously adjudicated. *Whitfield*, 217 Ill. 2d at 183, 840 N.E.2d at 663. Any issues that could have been raised on direct appeal, but were not, are procedurally defaulted, and any issues which had been previously decided by a reviewing court are barred by the doctrine of *res judicata*. *Whitfield*, 217 Ill. 2d at 183, 840 N.E.2d at 663.

¶ 18

At the first stage of the postconviction proceeding, the circuit court conducts an independent review of the petition within 90 days of its filing to determine whether its allegations are frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2000). If the matter advances to a second stage, the circuit court may appoint counsel to consult with an indigent defendant, to review the claims in the petition, and if necessary, to amend the petition. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984); 725 ILCS 5/122-4 (West 2000). The State must then file an answer or move to dismiss the petition and any amendments thereto. 725 ILCS 5/122-5 (West 2000). If the State's motion to dismiss is denied, the State must file an answer and the case proceeds to a third stage, where the defendant may present evidence in support of his claims. 725 ILCS 5/122-5, 122-6 (West 2000).

¶ 19

A defendant is not entitled to an evidentiary hearing on a postconviction

petition as a matter of right. *People v. Barrow*, 195 Ill. 2d 506, 519, 749 N.E.2d 892, 901 (2001). An evidentiary hearing is warranted only where the allegations in the postconviction petition, supported when necessary by the trial record or accompanying affidavits, make a substantial showing that the defendant's constitutional rights have been violated. *Barrow*, 195 Ill. 2d at 519, 749 N.E.2d at 901. In determining whether to grant an evidentiary hearing, all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true. *Barrow*, 195 Ill. 2d at 519, 749 N.E.2d at 902. A circuit court's decision to dismiss a postconviction petition without a hearing is subject to *de novo* review. *Barrow*, 195 Ill. 2d at 519, 749 N.E.2d at 902.

¶ 20 In the first point on appeal, the defendant contends that the circuit court erred in dismissing his postconviction petition without an evidentiary hearing where his trial counsel was ineffective in failing to ask for a continuance upon learning of new, inculpatory evidence on the first day of his new trial; that appellate counsel was ineffective in failing to argue on direct appeal that the defendant was deprived of effective assistance of trial counsel where counsel failed to ask for a continuance; and that the defendant was deprived of due process where the State failed to disclose new, inculpatory evidence prior to the trial.

¶ 21 A review of the record shows that the alleged discovery violation and trial counsel's failure to request a continuance were not raised as issues in the direct appeal. Ordinarily, issues that could have been raised in a direct appeal, but were not, are considered forfeited. *People v. Coleman*, 168 Ill. 2d 509, 522, 660 N.E.2d 919, 927 (1995). But the Illinois Supreme Court has said that the doctrine of forfeiture should not bar the consideration of an issue where the alleged forfeiture stems from the incompetency of appellate counsel. *Coleman*, 168 Ill. 2d at 522-23, 660 N.E.2d

at 927. Because the defendant has alleged that his appellate counsel was ineffective in failing to raise these issues in the direct appeal, the doctrine of forfeiture does not bar our consideration of them. *Coleman*, 168 Ill. 2d at 522-23, 660 N.E.2d at 927.

¶ 22 A criminal defendant has a constitutional right to the effective assistance of both trial counsel (*Strickland v. Washington*, 466 U.S. 668, 687 (1984)) and appellate counsel (*Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985)). Ineffective assistance of counsel is established where (1) the attorney's representation fell below an objective standard of reasonableness and (2) there is a reasonable probability that but for the attorney's unprofessional errors, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 687-88; *People v. Albanese*, 104 Ill. 2d 504, 526-27, 473 N.E.2d 1246, 1255 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding. *Strickland*, 466 U.S. at 694; *Barrow*, 195 Ill. 2d at 520, 749 N.E.2d at 902. A court need not decide whether counsel's performance was deficient before considering the prejudice resulting from the alleged deficiencies. *Strickland*, 466 U.S. at 697; *Albanese*, 104 Ill. 2d at 527, 473 N.E.2d at 1256. If the ineffective-assistance claim can be resolved on the ground that the defendant did not suffer prejudice, a court need not decide whether counsel's performance was constitutionally deficient. *Strickland*, 466 U.S. at 697; *Albanese*, 104 Ill. 2d at 527, 473 N.E.2d at 1256.

¶ 23 Claims of ineffective assistance of appellate counsel are also reviewed under the *Strickland* standard. *Barrow*, 195 Ill. 2d at 522, 749 N.E.2d at 903; *Coleman*, 168 Ill. 2d at 523, 660 N.E.2d at 927. A defendant must show both deficient performance by appellate counsel and resulting prejudice. If an underlying issue lacks merit, a defendant cannot establish that he suffered prejudice due to appellate counsel's failure to raise that issue in the direct appeal. *Barrow*, 195 Ill. 2d at 522,

749 N.E.2d at 903; *Coleman*, 168 Ill. 2d at 523, 660 N.E.2d at 927.

¶ 24 The defendant claims that his trial attorney was ineffective because he failed to request a continuance after learning during the prosecutor's opening statement that Officers Bray and Worker would testify that the defendant's fingerprints were identified on the glass jar that contained a methamphetamine solution and that his appellate attorney was ineffective for failing to raise the ineffectiveness of trial counsel in the direct appeal. After reviewing the record, we have concluded that we do not need to decide whether the performance of the defendant's counsel was constitutionally deficient because the defendant has not shown that he was unfairly prejudiced as a result of the alleged deficiencies.

¶ 25 As previously noted, the prosecutor first made mention during his opening statement in the second trial that Bray and Worker, during their preparation for the trial, realized that the evidence bags containing the glass jars had been mislabeled and that both officers would amend their testimony and state that the defendant's fingerprints were found on the square jar that contained the methamphetamine solution. The record reveals that the defendant's attorney objected to the new information, but when the objection was overruled, he did not ask for a continuance or other relief. The record shows that the defendant's attorney extensively cross-examined Bray and Worker, and other State's witnesses, in areas where their testimony in the second trial differed from that in the first trial. The record indicates that the defendant's attorney studied the transcripts from the defendant's first trial, that he was familiar with the physical evidence and the testimony of each witness, and that he was well prepared to impeach the State's witnesses, and in particular Bray, Worker, and confidential informant Rhodes, using excerpts of testimony given in the first trial. It was within the province of the jury to decide whether the witnesses were

credible and what weight should be given the testimony and physical evidence. Apparently, the jury determined that the officers were credible and accepted that a mistake had been made in the labeling of two pieces of evidence. The defendant has not shown what more could have been gained had a continuance been requested and granted. The defendant has not established unfair prejudice as a result of appellate counsel's failure to raise the issue in the direct appeal.

¶ 26 The defendant also claims that appellate counsel was ineffective in that he failed to raise the State's discovery violation as an issue in the direct appeal. The defendant claims that he was denied due process and a fair trial because the State failed to disclose new, inculpatory evidence before the second trial commenced. If we assume for the sake of this argument that the facts establish a discovery violation, the defendant has not shown unfair prejudice resulting from the alleged violation. The failure to comply with discovery requirements does not in all instances result in a new trial. A new trial is granted if the defendant is prejudiced by the discovery violation and the prejudice is not eliminated. *People v. Cisewski*, 118 Ill. 2d 163, 172, 514 N.E.2d 970, 974 (1987); *People v. Lipscomb*, 215 Ill. App. 3d 413, 437, 574 N.E.2d 1345, 1360 (1991). Factors to be considered in determining whether a new trial is warranted include the closeness of the evidence, the strength of the undisclosed evidence, and the likelihood that prior notice could have helped the defendant discredit the evidence. *Cisewski*, 118 Ill. 2d at 172, 514 N.E.2d at 974; *Lipscomb*, 215 Ill. App. 3d at 437, 574 N.E.2d at 1360-61.

¶ 27 In this case, the revised testimony by Bray and Worker, stating that the defendant's fingerprints were found on the square jar containing the methamphetamine, strengthened the State's case. But even without that evidence, the testimony given by the confidential informant, Darel Rhodes, coupled with the

photographs, the analysis of the liquid contents in each jar, and the presence of other drug paraphernalia in the travel trailer, was sufficient to support the jury's finding that the defendant was guilty beyond a reasonable doubt of possession with intent to manufacture methamphetamine. The defendant has not shown that prior notice would have helped discredit the fingerprint evidence. The record shows that the defendant's attorney aptly challenged the State's evidence and attempted to impeach Bray and Worker with their testimony from the first trial. The defendant has failed to establish what more could have been done than was done during the trial to discredit the evidence. The defendant claims that his postconviction counsel was ineffective for failing to add an issue to the defendant's *pro se* petition. The defendant contends that postconviction counsel should have included in the amended petition a claim that appellate counsel was ineffective for failing to argue on direct appeal that evidence indicating that firearms were found in the travel trailer was irrelevant and unfairly prejudicial.

¶ 28 A defendant in a postconviction proceeding is entitled to a reasonable level of assistance, and not that which is afforded by the federal or state constitutions. *People v. Pendleton*, 223 Ill. 2d 458, 472, 861 N.E.2d 999, 1007 (2006). Postconviction counsel is only required to investigate and properly present the claims raised in the petitioner's *pro se* postconviction petition. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007. Postconviction counsel has no obligation to raise issues beyond those raised in the postconviction petition. *Pendleton*, 223 Ill. 2d at 475, 861 N.E.2d at 1009.

¶ 29 In this case, the defendant cannot show that his postconviction counsel provided deficient assistance where the defendant did not raise the firearms issue in his *pro se* petition. Appointed counsel was only required to investigate and review

the claims raised by the defendant. The defendant forfeited the issue by failing to raise it in his postconviction petition. See *Pendleton*, 223 Ill. 2d at 474-75, 861 N.E.2d at 1009.

¶ 30 The defendant has failed to establish prejudice resulting from the alleged deficiencies in the performance of trial counsel and appellate counsel. Additionally, the defendant has failed to show that postconviction counsel provided deficient assistance.

¶ 31 D. CONCLUSION

¶ 32 Accordingly, the judgment of the circuit court is affirmed.

¶ 33 Affirmed.