

No. 1-11-0584

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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. 02 CR 23680 (02)
	)	
EIAD BARGHOUTI,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge Presiding.
	)	

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JUSTICE STERBA delivered the judgment of the court.  
Presiding Justice Neville concurred in the judgment.  
Justice Hyman dissented.

**ORDER**

*Held:* The trial court erred in dismissing defendant's first-stage *pro se* postconviction petition where defendant's claim of ineffective assistance of counsel based on a failure to investigate impeachment witnesses was arguable in both fact and law.

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¶ 1 Defendant Eiad Barghouti,<sup>1</sup> along with his brother and codefendant Jamal Barghouti, was charged with aggravated criminal sexual assault and aggravated kidnapping of the victim K.M. Following a bench trial, defendant was convicted of both crimes and sentenced to 45 years in prison. On direct appeal, this court affirmed his conviction (*People v. Barghout*, Nos. 1-06-3448 and 1-06-3465 (consolidated) (2009) (unpublished order under Supreme Court Rule 23)). On October 27, 2010, defendant filed a postconviction petition *pro se*, raising 25 claims related to ineffective assistance of trial and appellate counsel and judicial bias. The trial court dismissed his petition as frivolous and patently without merit, and defendant appeals on the grounds that his petition stated a claim arguable in fact and law that he received ineffective assistance of trial counsel where his attorney failed to call and investigate witnesses who could impeach the credibility of the victim as well as witnesses who could testify in mitigation at his sentencing hearing. In addition, defendant contends that his petition presented an arguable claim of judicial bias. For the reasons that follow, we reverse the judgment of the trial court and remand for further proceedings.

¶ 2

## BACKGROUND

¶ 3 The facts of this case were set forth in detail on direct appeal, and we repeat only those germane to defendant's postconviction petition. At trial, K.M. testified that on August 17, 2002, at approximately noon, she received a phone call from Jamal, whom she had met for the first time approximately one month prior. Jamal invited her to a picnic, and she agreed to accompany

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<sup>1</sup> At various times during trial and on direct appeal, defendant's last name was spelled either "Barghouti" or "Barghout." We refer to defendant as "Eiad Barghouti," as this is the name used in defendant's filings before this court.

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him. Jamal and his friend, Jose Garcia, whom she had never met before, arrived at K.M.'s parents' house in Westmont, Illinois, in a white Cadillac at approximately 3 or 4 p.m. to take her to the picnic. Because she did not have permission to go out with Jamal, she told her parents she was going out with her friend. She also told Jamal that she needed to be home by 10 p.m.

¶ 4 Once she entered the Cadillac, Jamal offered her marijuana, which she declined because she was taking medication for epilepsy. The ride to the picnic took approximately 40 minutes, during which time K.M. saw Jamal "throwing up gang signs," contorting his fingers in the shape of a crown, and saying "king love."

¶ 5 When they arrived at the picnic, K.M. saw approximately 15 other people there, standing around and drinking beer. She was the only female present. K.M. did not smoke, eat, or drink anything while at the picnic; rather, she spent time talking to Jamal, who introduced her to his brother, Eiad. She saw Jamal, Eiad and Jose make gang signs and heard them say "king love" on various occasions while they were at the picnic. At approximately 7:30 p.m., K.M. told Jamal she wanted to go home, and he agreed to take her. K.M. tried to call home from her cell phone in order to let her parents know she was on her way, but no one answered. Later, K.M. testified that Eiad took her phone from her before they left the picnic.

¶ 6 K.M. and Jamal then went to the car with Jose and Eiad. K.M. sat next to Jamal in the back seat, Jose drove, and Eiad sat in the front passenger seat. About 10 minutes later, Jamal told her they needed to change vehicles. Jose stopped the vehicle in an alley, and everyone got out of the white vehicle and entered a black two-door SUV. K.M. again sat in the back seat with Jamal, and Jose sat in the front.

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¶ 7 While Jose drove, Eiad reached behind him, pinched K.M.'s nipple and punched her in the stomach. She asked him to stop, but he laughed and slapped her lightly in the face. Jamal then tried to kiss her on the neck and placed his hand in between her legs. K.M. asked Jamal to stop and tried to close her legs. Jose then parked the SUV in another alley, and he and Eiad subsequently got out of the car. Once they were alone, Jamal pushed K.M. down on the back seat and took her pants off. He handed K.M.'s jeans through the car window to Eiad, who threw them onto a telephone wire. Jamal then removed K.M.'s underwear and began having sexual intercourse with her. K.M. was crying and telling him to stop, but he said "shut up, bitch" in a loud voice. After a while, Eiad pushed Jamal off K.M. and informed her that he would "make [her] a queen." He then commenced oral sex with her, placing his lips on her vagina. K.M. continued crying and tried unsuccessfully to keep her legs together. Jamal then asked Eiad why he was "going down on a dirty bitch," and Eiad stopped performing oral sex on her and placed his penis inside of her vagina. K.M. continued screaming and crying and saying no, and Eiad ordered her to "shut up." He informed her that he was going to put a gun to her head and shoot her if she did not stop making noise. Once Eiad was finished, Jose got on top of her and had sexual intercourse with her, while Eiad held her down by her shoulders. K.M. believed Jose ejaculated inside of her because he made a sound before he got off of her and exited the vehicle. Eiad then got on top of K.M. once again and had sex with her. She was screaming and telling him to stop when she saw lights outside of the car and heard voices saying "get out of the car." K.M. saw police officers apprehend Jose and Jamal. An officer then pulled defendant off of her, and she informed him she had been raped. Thereafter, an ambulance arrived in the alley, and

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K.M. was taken to St. Anthony's Hospital where she received treatment.

¶ 8 When K.M. arrived at the emergency room at approximately 11:45 p.m., she was examined by registered nurse Patricia Salgado. Salgado testified that K.M., who was crying when she arrived, was taken to a special exam room for sexual assault victims. K.M.'s blood pressure and pulse were slightly elevated, and she told Salgado she had been raped by three men in a car. K.M. did not report any pain or injuries to her breasts or genitalia, and Salgado testified she had no signs of redness, bruising or scratching. Salgado did not performed a toxicology test on K.M., because there was no evidence she was intoxicated.

¶ 9 Salgado was present for the preparation of the sexual assault kit, along with Dr. Kamran Hashemi, who was K.M.'s treating physician. Dr. Hashemi testified that he performed a vaginal swab on K.M. The kit also contained her blood specimen and combings of pubic and head hair. Dr. Hashemi testified that he did not find any evidence of vaginal trauma, but explained it is not uncommon to see no evidence of such trauma in victims of sexual assault because the vagina possesses elasticity and is designed for intercourse. He also testified that he observed sperm at K.M.'s cervix.

¶ 10 Other witnesses who testified for the State regarding the events of August 17 were Marcelle Garcia and Chicago police officer Vincent Francone. Garcia lives in the 2400 block of South Sawyer with her husband, Alejandro (Alex) Jaime and his aunt. She testified that sometime after 11 p.m. she went into her backyard and heard a female voice saying "stop" and a male voice saying "shut up." She believed the voices were coming from the alley behind her house. When she investigated, she saw a truck parked in front of an auto shop behind her

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residence. Garcia realized the voices were coming from the truck, and promptly called 911.

¶ 11 Officer Francone testified that at approximately 11 p.m. on August 17, 2002, he and his partner were called to the alley behind 2429 South Sawyer in Cicero, Illinois. When they arrived at that location, they saw a parked Ford Bronco and Officer Francone heard a female's voice in distress. He then saw a shirtless man, who was later identified as Jose Garcia, exit the driver's side of the vehicle. Garcia's shorts were unbuttoned, but he was attempting to button them up. As Officer Francone exited the squad car, he heard a female voice scream "stop, stop." Officer Francone's partner, Officer Perez, detained Garcia as Officer Francone continued to approach the vehicle. Officer Francone noticed a shirtless man in the passenger side of the vehicle, who was later identified as Jamal Barghouti. When Jamal exited the car pulling up his shorts, Officer Francone handcuffed him for safety reasons. When he got closer, he saw a nude man, whom he identified in court as defendant, in the back row of the vehicle moving on top of somebody who had their leg up. When Officer Francone opened the door and took defendant out of the vehicle, he saw the nude girl who had been underneath him. She was crying hysterically and said "they raped me." The victim was covered with a blanket and transported to St. Anthony's Hospital.

¶ 12 Chicago police officer Anthony Hernandez was working as an evidence technician in 2002 and was assigned to process the crime scene. On August 18, he took photographs, dusted the truck for fingerprints, and collected physical evidence. Specifically, Officer Hernandez recovered a box of condoms, two opened condoms and their wrappers, two open beer bottles, and two basketball jerseys from the vehicle. Near the vehicle he found two additional beer bottles, a used condom, and K.M.'s jeans, which were hanging from a nearby telephone wire. Officer

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Hernandez did not find semen stains inside the vehicle.

¶ 13 Bob Buris, a former forensic scientist and latent fingerprint examiner, testified that he recovered one latent fingerprint impression belonging to Jamal from one sealed condom package.

¶ 14 Before the conclusion of the State's case, the parties stipulated that one of the vaginal samples in K.M.'s sexual assault kit tested positive for the presence of sperm, but that sperm did not match the DNA profile of defendant.

¶ 15 Detective Gregory Andras of the Chicago police department was called to testify for defendants. He testified that he was assigned to investigate the August 17 incident. He first spoke to K.M. regarding the incident on August 18 at 3:00 a.m. His notes from that interview do not indicate that K.M. said anything about oral sex. K.M. also told him that Jamal and Eiad held her down while each assailant assaulted her.

¶ 16 Jamal testified on his own behalf. He stated that he first met K.M. in mid-July 2002 and subsequently called her several times. On August 17, 2002, he received a phone call from a friend about a picnic later that day and told his brother. Jamal drove to the picnic with his friend Victor in Victor's blue Pontiac Bonneville. On their way, Jamal called K.M. to invite her along. K.M. agreed to go but told Jamal she needed to be home by 1:30 a.m. When Jamal and Victor arrived at K.M.'s house, he called K.M. to let her know they were waiting, and she told Jamal to park off to the side so her dad would not see him. After about five minutes, she came outside and got into the back of the car. Victor was driving and Jamal was in the passenger seat. While in the vehicle, K.M. rubbed the back of Jamal's head. Jamal denied making gang signs while in Victor's car.

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¶ 17 At the picnic, Jamal offered K.M. something to eat or drink, and K.M. requested a drink. Jamal got them both a bottle of beer. Jamal and K.M. consumed two more beers over the course of a two-hour softball game, in which K.M. was the catcher. After the game, Jamal gave K.M. another beer and she thanked him and kissed him on the mouth. When the picnic ended an hour and a half later, Jamal stated he planned to attend a party in Cicero, and K.M. indicated she wanted to go as well. The two then left the picnic with Victor in Victor's car. On the way to the party, they stopped at a restaurant so K.M. could go to the bathroom. They then went to a nearby store, La Justicia, to meet friends who were also going to the party. Jamal saw his mother there and spoke to her for a few minutes. Shortly thereafter, Eiad arrived with friends Efran, Jose and Roy. Eiad also spoke to their mother.

¶ 18 Everyone got into Efran's car, and K.M. sat on Jamal's lap because there was no room for her to have her own seat. Jose suggested they pick up his truck which was parked nearby. Defendant, Jose and Roy then went in Jose's car, while Jamal, K.M., and Victor remained in Efran's car. Once Efran started driving, Jamal and K.M. began kissing. Jamal rubbed K.M.'s breasts over her clothing as K.M. continued kissing him, giving no indication that she wanted him to stop. He then began touching her vagina, and eventually unbuckled her belt, unzipped her pants, rubbed her vagina, and put his finger inside of her, all while K.M. continued kissing him. Efran eventually stopped at a liquor store to pick up alcohol to take to the party. After the group bought two 12 packs of Corona, however, Efran, Victor and Roy decided they no longer wanted to attend the party. Jamal and K.M. then joined Eiad in the back of Jose's truck.

¶ 19 They stopped at a gas station where Jamal bought a box of condoms because he thought

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he and K.M. might engage in sexual activity later. They then went to pick up Jamal's friend, Alex, who lived at 2429 South Sawyer and parked in the alley behind his house. Jose honked the horn to let Alex know they had arrived, and Jose and Eiad exited the car to wait for Alex, who came out of his garage shortly thereafter. While Jose and Eiad were chatting with Alex in the garage, Jamal and K.M. smoked marijuana. They then began kissing, and Jamal touched K.M.'s breasts and vagina over her clothes. They continued to kiss, and Jamal again unbuckled her pants and placed his fingers in her vagina. K.M. then took her pants off, and Jamal opened the condom box, removed a condom, threw the wrapper out of the open car window, and put the condom on his penis, which was not fully erect. He then began rubbing his penis against her vagina in order to achieve a full erection. After a few minutes, Jamal was unable to obtain a full erection, so he removed the condom and threw it out of the car window. He then exited the car to urinate near some garbage cans in the alley. When he returned, he saw Jose and K.M. kissing in the backseat. He was "shocked" and "embarrassed," so he got a beer and went to talk to Alex and Eiad. Alex then decided he did not want to attend the party, so he returned to his house.

¶ 20 Jamal continued to talk to Eiad when he heard a scream from the car and K.M. saying "stop, stop." Jose then called K.M. a "stupid bitch." Jose exited the vehicle holding his penis and his pants in his left hand and K.M.'s pants in his other hand. Jose told Jamal and Eiad that K.M. had cut him and he then threw her jeans over a telephone wire. Jamal and Eiad entered the vehicle to check on K.M., who was upset and told them that Jose had "nuttied in [her.]" Jose then yelled that the police were coming, which caused K.M. to become more upset. She began to cry and said: "Oh, no, I can't get caught like this; my dad will kill me." Several officers approached

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the vehicle with their guns drawn and handcuffed Jamal, Eiad and Jose and put them in a squad car.

¶ 21 Jamal testified that he did not see Eiad hit or have sex with K.M. He also did not hear Eiad say he would make K.M. a Latin Queen. Jamal admitted that Eiad has a tattoo of a crown on his chest, but he did not know if it was a Latin King crown. Jamal did not know if his brother was a Latin King gang member. Jamal testified that K.M. had her cell phone the entire time he was with her.

¶ 22 Jamal also denied that K.M. told him to stop and denied ejaculating inside her. He explained that he was shot in his spine in December 2001, which resulted in various physical problems, including problems maintaining an erection. This testimony was corroborated by his treating physician, Dr. Robert Richardson, who testified that he diagnosed Jamal with Brown Sequard Syndrome after his gunshot wound in December. Brown Sequard Syndrome is the result of an incomplete spinal cord injury and causes the sufferer to experience diminished sexual functioning, among other things. Dr. Richardson explained that Jamal had difficulty obtaining and maintaining an erection following his injury and had to stimulate himself manually in order to achieve an erection. Though the syndrome does not prevent a man from obtaining an erection and having sexual intercourse, it can make it more difficult for him to do so.

¶ 23 Eiad also testified on his own behalf. He stated that he met K.M. for the first time at the picnic, and he saw her drinking beer. Eiad left the picnic at 8:15 p.m. with Efran to see his wife. After having a short conversation with his wife, he received a call from his mother, who wanted to see him. He and Efran then went to La Justicia, where Eiad spoke to his mother and saw

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Jamal, Victor and K.M. Eiad corroborated Jamal's account of how the group arrived at Alex's house and parked in the alley which was located behind 2429 South Sawyer. Once they arrived at that location, Eiad testified that he and Jose got out of the vehicle and talked with Alex. He returned to the vehicle to get beers and saw Jamal and K.M. kissing. After getting the beers, Eiad returned to the alley and continued talking with Alex. Shortly thereafter, Alex's wife came out of the house and told him that dinner was ready, so he decided not to attend the party. After Alex left, Eiad heard K.M. say "stop, stop" and Jose say "you stupid bitch." When he and Jamal went to the vehicle to investigate, they ran into Jose who said "Fuck this bitch, she cut me." Jose was holding his penis with one hand and a pair of jeans in the other hand, which he tossed into the air. Eiad got in the car and spoke to K.M. who told him that Jose had "nuttled in [her]." Police then arrived in the alley. They handcuffed Jose and Jamal and pulled him out of the front passenger seat of the car.

¶ 24 Eiad denied having sexual contact of any kind with K.M. He further denied holding K.M. down while Jose and Jamal had sex with her. Eiad acknowledged that he had a tattoo of the Latin King crown on his chest but denied telling K.M. he would make her a queen. Eiad denied he was a Latin King gang member, and he did not see anyone at the picnic making gang signs.

¶ 25 At the conclusion of Jamal and Eiad's testimony, the State called Alejandro (Alex) Jaime as a rebuttal witness. Alex testified that he met Eiad and Jamal in high school, and they spoke to him about eight times about trial testimony. During those conversations, Eiad instructed him to testify that on the night in question he had a beer with Eiad by his garage and then saw Jamal get out of the truck and urinate in front of it. Eiad further instructed him to say that Jamal then

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joined their conversation, and that he saw Jose enter the vehicle before he left to return to his residence. Alex was then told to testify that he heard yelling while he was inside his house, and he went back to the alley and found Jose holding his penis. However, Alex testified he never saw any of these events occur. Nevertheless, when he was approached by Eiad and Jamal he did not contact the police or the State's attorney because he knew that they were "old-time, old school Kings" and was afraid he would be harmed if he did not follow their instructions.

¶ 26 After hearing closing arguments, the court found K.M. to be more credible than defendants and found both Jamal and Eiad guilty of several counts of aggravated criminal sexual assault and aggravated kidnapping. At the sentencing hearing, K.M. read her statement to the court, in which she stated she had trouble sleeping after the rape, suffered from nightmares, stopped talking to people and stayed in her room. Neither defendant called any witnesses or made a statement. Ultimately, the court sentenced Eiad to 45 years' imprisonment.

¶ 27 Jamal's attorney made a motion to reconsider sentence at which he presented the affidavit of Christopher Dewey, who had introduced Jamal to K.M. Dewey averred that he and K.M. became involved in a sexual relationship in September 2002 which continued for two to three weeks. The relationship ended when, after Dewey refused to give K.M. money, K.M. threatened to make a sexual assault complaint against him. Dewey ultimately gave K.M. some money and never spoke to her again. Eiad joined in this motion, which the court denied.

¶ 28 On direct appeal, defendant argued that the State failed to prove him guilty beyond a reasonable doubt, the trial court was biased against him, the trial court denied him his sixth amendment right to confront the witnesses against him, and the trial court improperly sentenced

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him on a count of which he was acquitted. This court affirmed defendant's conviction (*People v. Barghout*, Nos. 1-063448 and 1-06-3465 (consolidated) (2009) (unpublished order under Supreme Court Rule 23)).

¶ 29 Defendant timely filed the instant postconviction petition *pro se* on October 27, 2010, alleging ineffective assistance of trial and appellate counsel and judicial bias. Specifically, defendant alleged, among other things, that trial counsel was ineffective for failing to call and investigate witnesses who would have called into question K.M.'s credibility. As support, defendant offered his own affidavit, in which he stated that he provided his attorney with the names and contact information of over nine witnesses he could interview. He also attached the signed affidavits of Graciela Chavez, Edward Chavez, Luis A. Jaime, Juan Palma and Laura Carillo.

¶ 30 Graciela, defendant's mother, averred that she would have corroborated Jamal and Eiad's testimony that she met them at La Justicia following the picnic. She further would have testified that Jamal was with K.M. and K.M. appeared to be "happy" with Jamal. Edward would have testified that he organized the picnic for employees of Smart Mail, where he was a supervisor. He went to the picnic in Jose's Cadillac, while Jamal and Victor went in Victor's car. At the picnic, he saw K.M. drinking, kissing Jamal and playing softball. Both Luis and Juan would have testified that Jamal and Victor left the picnic to pick up K.M. Just as Edward, they saw K.M. drinking and playing softball at the picnic. Both of them also averred that they heard K.M. express an interest in attending the party in Cicero. Finally, Laura would testify that Eiad met her after the picnic to give her some money.

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¶ 31 In conjunction with this argument, defendant maintained that his attorney was also ineffective for failing to investigate Christopher Dewey earlier so that his testimony could have been elicited at trial.

¶ 32 Defendant further argued that his attorney at sentencing was ineffective for failing to call witnesses to testify in mitigation. In support, defendant offered the affidavits of Laura Carrillo, Jamal Barghouthi, Sr., Graciela Chavez, Edward Chavez, Maria Chavez, Erma Chavez, and Luis A. Jaime, all of whom averred they were able and willing to testify to his kind nature and good character.

¶ 33 Finally, defendant argued that the trial court's gestures and facial expressions during trial were indicative of its bias towards him. Defendant and his brother averred that the trial court made noises of disbelief during defendant's testimony and gestures reflecting impatience.

¶ 34 The trial court summarily dismissed defendant's petition as frivolous and patently without merit in an oral ruling. Defendant timely filed this appeal.

¶ 35 ANALYSIS

¶ 36 The Post-Conviction Hearing Act (Act) allows a defendant who is imprisoned in a penitentiary to challenge his conviction or sentence for violations of his federal or state constitutional rights. 725 ILCS 5/122-1 (West 2010); see also *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005). A defendant electing to proceed under the Act must first file a petition, verified by affidavit, in the circuit court in which the original proceeding occurred. 725 ILCS 5/122-1(b) (West 2010). Because a postconviction proceeding is a collateral attack on the conviction, the petition must be limited to constitutional issues that have not been, nor could have been,

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adjudicated on direct appeal. *People v. Pitsonbarger*, 205 Ill. 2d 444, 456 (2002). Moreover, issues that were raised and decided on direct appeal are barred from consideration by the doctrine of *res judicata*. *People v. Towns*, 182 Ill. 2d 491, 502-03 (1998).

¶ 37 The Act establishes a three-stage process for adjudicating a postconviction petition in non-capital cases. 725 ILCS 5/122-1 (West 2010). At the first stage, the circuit court may dismiss a petition only if it is frivolous or patently without merit. *People v. Harris*, 224 Ill. 2d 115, 125-26 (2007). A frivolous petition is one that is based on an "indisputably meritless legal theory or a fanciful factual allegation." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). Stated differently, a petition must have an arguable basis either in law or fact in order to survive summary dismissal. *Id.* This presents a pleading question in the sense that all well-pled facts not positively rebutted by the trial record must be liberally construed and taken as true, and the court must refrain from addressing substantive questions or making credibility determinations. *People v. Coleman*, 183 Ill. 2d 366, 380 (1998). If the petition survives dismissal at this initial stage, it advances to the second stage, where counsel may be appointed to an indigent defendant and the State may move to dismiss the petition. *Harris*, 224 Ill. 2d at 126. The defendant must make a substantial showing of a constitutional violation in order to proceed to an evidentiary hearing, which is the third and final stage of the postconviction process. *Id.*, citing 725 ILCS 5/122-6 (West 2004).

¶ 38 In the case *sub judice*, only the first stage is at issue. Our review of the trial court's first-stage summary dismissal is *de novo*. *People v. Davis*, 403 Ill. App. 3d 461, 464 (2010).

¶ 39 On appeal, defendant's petition is premised primarily on the ineffectiveness of his trial

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counsel. The two-pronged test to establish ineffective assistance of counsel sets a high standard. *People v. Baines*, 399 Ill. App. 3d 881, 887 (2010). Defendant must demonstrate that his representation was so unprofessional as to fall below an objective standard of reasonableness and that this deficient performance resulted in prejudice to defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). When reviewing the summary dismissal of a postconviction petition alleging ineffective assistance, we must determine whether it is arguable that counsel's performance fell below an objective standard of reasonableness and whether it is arguable that defendant was prejudiced by this failure. *Hodges*, 234 Ill. 2d at 17.

¶ 40 We first address defendant's claim that he did not receive effective assistance of counsel where his attorney failed to investigate and call certain witnesses who could have impeached K.M.'s testimony. As a preliminary matter, we note that in his *pro se* postconviction petition, defendant attached statements of 11 witnesses who would have corroborated his testimony, but only 5 of these statements were signed and notarized in the form of affidavits. We limit our consideration to these latter five statements by Graciela Chavez, Edward Chavez, Luis Jaime, Juan Palma, and Laura Carrillo. See *Harris*, 224 Ill. 2d at 142 (no error to refuse to consider unsigned 'affidavits' purporting to set forth witness testimony); see also 725 ILCS 5/122-2.

¶ 41 Turning to the merits of defendant's claims, ordinarily, the decision of whether to call certain witnesses is a matter of trial strategy within trial counsel's discretion. *People v. Enis*, 194 Ill. 2d 361, 378 (2000). As a result, such decisions are generally immune from claims of ineffective assistance of counsel. *Id.* Importantly, though, in order to enjoy immunity, these strategic decisions must be based on a "thorough investigation of all matters relevant to plausible

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options." *Strickland*, 466 U.S. at 690; see also *People v. Morris*, 335 Ill. App. 3d 70, 79 ("[d]efense counsel has a professional obligation, both legal and ethical, to explore and investigate a client's alibi defense"). It follows that a complete failure to investigate a viable defense may support an ineffective assistance claim. *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 36.

¶ 42 In the case *sub judice*, Jamal averred that although he and defendant gave their attorneys a list of names and contact information of witnesses who could "prove [their] innocence," the attorneys never contacted or interviewed any of these witnesses. This statement was corroborated by both Edward and Juan, who each averred that they were never contacted or interviewed by defendant's attorney. Taking these allegations as true, as we must for purposes of evaluating a postconviction petition at its initial stage (*Coleman*, 183 Ill. 2d at 380), it is at least arguable that this failure to investigate fell below an objective standard of reasonableness that prejudiced defendant. See *Hodges*, 234 Ill. 2d at 22 (failure to investigate and interview three alibi witnesses arguably supported a claim of ineffective assistance of counsel for purposes of first stage postconviction review); see also *People v. Truly*, 230 Ill. App. 3d 948, 955 (1992) (finding ineffective assistance where defense counsel did not investigate four witnesses whose contact information was provided to him, and who could testify to an alibi and to the defendant's physical incapacity for committing the crime).

¶ 43 The State maintains that this failure to investigate was not arguably unreasonable because the testimony these witnesses would have provided was irrelevant and cumulative. We disagree. While none of the witnesses were present during the sexual assault, and so could not shed light

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on those events, their testimony could have impeached K.M.'s testimony that she was kidnapped. Specifically, Juan and Luis were prepared to testify that as the picnickers dispersed, K.M. did not express a desire to go home as she testified at trial, but instead stated that she wanted to attend the party in Cicero. Graciela was also prepared to testify that she saw K.M. with Jamal at La Justicia following the picnic, and that K.M. appeared happy to be with him. This testimony arguably goes to an element of the aggravated kidnapping charge brought by the State; namely, whether defendant lured K.M. to go from one place to another by means of deceit or enticement. See 720 ILCS 5/10-1(a)(3) (West 2010); 720 ILCS 5/10-2(a)(3) (West 2010).

¶ 44 Nor do we agree with the State that the testimony was cumulative. Evidence is cumulative if it adds nothing to what is already before the trier of fact. See *People v. Ortiz*, 235 Ill. 2d 319, 335 (2009). In the case *sub judice*, Eiad and Jamal were the only witnesses to testify to the version of events the uncalled witnesses would have put forth. The court could more easily have dismissed the defendants' testimony as self-serving because it went uncorroborated by disinterested third parties. Our supreme court reached the same conclusion in *People v. Molstad*, 101 Ill. 2d 128 (1984). There, defendant sought a new trial based in part on previously unavailable testimony from codefendants that defendant was not present when the crime was committed. *Id.* at 132-33. Although defendant himself had testified to this, we nevertheless held that the testimony was not cumulative, as it "raise[d] additional questions concerning the trial court's verdict." *Id.* at 135. Likewise, here, the testimony of Juan, Luis, and Graciela, among others, could have raised questions as to the veracity of K.M.'s testimony that defendant deceitfully enticed her to travel with him by agreeing to take her home.

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¶ 45 Next, we turn to whether counsel's performance arguably prejudiced defendant. Contrary to the State's contention, defendant need not prove the outcome would necessarily have differed in order to establish arguable prejudice. Instead, a court may find prejudice where there is a *reasonable probability* that but for counsel's errors, the result would have been different. *Strickland*, 466 U.S. at 694. This probability may be significantly less than 50%. *People v. McCarter*, 385 Ill. App. 3d 919, 935 (2008). For purposes of evaluating a summary dismissal of a postconviction petition, the standard is even lower, as all that a defendant must establish is *arguable* prejudice. See *People v. Tate*, 2012 IL 112214, ¶ 19. Defendant has met this low burden here. It is at least arguable that defendant was prejudiced where his attorney failed to investigate or call witnesses who would have testified that K.M. was not secreted to an isolated location by means of deceit, but instead willingly accompanied defendant, Jamal and Jose as they made their way to a party. For these reasons, we find defendant has made an arguable claim of ineffective assistance of counsel based on a failure to investigate impeachment witnesses.

¶ 46 Because we find this allegation of ineffective assistance survives summary dismissal, we do not address defendant's remaining claims that the court exhibited bias against him or that his counsel was also ineffective for failing to investigate Christopher Dewey as a potential witness and failing to present testimony in mitigation at defendant's sentencing hearing, as it is well settled that partial summary dismissals are not permitted under the Post-Conviction Hearing Act. See *People v. Rivera*, 198 Ill.2d 364, 374 (2001). Thus, we remand the entire petition for further proceedings, regardless of the merits of these other claims. *People v. Cathey*, 2012 IL 111746, ¶ 34.

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¶ 47 Importantly, nothing in our decision today is intended to express an opinion regarding whether defendant has made a substantial showing of a constitutional violation and is entitled to proceed to an evidentiary hearing, as such a determination is properly reserved to the lower court on remand for second-stage postconviction proceedings. *Cathey*, 2012 IL 111746, ¶ 32.

¶ 48 All that remains to be addressed is whether this case should be assigned to a different judge on remand as defendant urges. At the outset, we note that there is no absolute right to a substitution of judge in a postconviction proceeding. *People v. Harvey*, 379 Ill. App. 3d 518, 522 (2008). To the contrary, the judge who presided over the trial *should* hear the postconviction petition unless it is shown that he is substantially prejudiced. *Id.* Substantial prejudice may exist if the defendant can demonstrate " 'animosity, hostility, ill will, or distrust' [citation]" or " 'prejudice, predilections or arbitrariness' [citation]" on the part of the trial judge. *People v. Reyes*, 369 Ill. App. 3d 1, 25 (2006); see also *People v. Vance*, 76 Ill. 2d 171, 179 (1979) ("[t]o conclude that a judge is disqualified because of prejudice is not, of course, a judgment to be lightly made"). No such showing has been made here.

¶ 49 Instead, defendant alleges only that the trial court made "bias [sic] gestures and face impressions" during defendant's answers to questions on direct examination. This, standing alone, does not establish the sort of "substantial prejudice" required for substitution of judge on remand. Where we have found such prejudice to exist, there has been evidence that the trial court improperly prejudged the merits of an issue defendant raised in his postconviction petition. See, e.g., *Reyes*, 369 Ill. App. 3d at 25-26. As there is no indication the court in the instant case exhibited similar behavior, we decline to assign this case to a different judge upon remand.

¶ 50

CONCLUSION

¶ 51 For the reasons stated, we reverse the judgment of the trial court and remand for second-stage postconviction proceedings and the appointment of counsel.

¶ 52 Reversed and remanded.

¶ 53 JUSTICE HYMAN, dissenting:

¶ 54 I respectfully dissent from the majority's conclusion that Barghouti made an arguable claim of ineffective assistance of counsel under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, I find frivolous and patently without merit Barghouti's claim that his trial counsel was ineffective for not interviewing or calling witnesses to try to impeach K.M.'s testimony that she was kidnapped.

¶ 55 As the majority acknowledges, a finding of prejudice resulting from an alleged error is required if a defendant is to establish ineffective assistance of counsel. *Strickland*, 466 U.S. at 687. To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Id.* at 687. If it is easier to decide an ineffective assistance of counsel claim on the ground of lack of sufficient prejudice rather than on the issue of whether counsel's performance was constitutionally deficient, a court should do so. *Id.* at 697.

¶ 56 As the majority notes, Barghouti attached to his *pro se* postconviction petition signed and notarized affidavits from five witnesses to corroborate his own testimony and to raise doubts about K.M.'s testimony that she was kidnapped. Barghouti also submitted his own affidavit averring that he provided his attorney with the names and contact information for these

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witnesses, and that his attorney failed to interview them. The majority acknowledges that "none of these witnesses were present during the sexual assault, and so could not shed light on those events" but agrees with Barghouti that "their testimony could have impeached K.M.'s testimony that she was kidnapped." Specifically, the majority points to statements by Juan Palma and Luis Jaime that they saw K.M. at the picnic and heard her express an interest in going to the party in Cicero. Edward Chavez, Barghouti's uncle, could testify he saw K.M. at the picnic drinking beer, kissing Jamal, and playing softball. Laura Carrillo, Barghouti's wife, could testify that Barghouti met her after the picnic to give her money. Graciela Chavez, Barghouti's mother, could testify that she saw K.M. with Jamal at La Justicia and that K.M. appeared to be happy. According to the majority, this testimony would go to an element of the aggravated kidnapping charge, namely whether Barghouti lured K.M. from one place to another by means of deceit or enticement. Therefore, the majority finds that defense counsel's failure to investigate or call these five witnesses meets the standard of "arguable prejudice" for purposes of evaluating a summary dismissal of a postconviction petition. *People v. Tate*, 2012 IL 112214, ¶ 19.

¶ 57 For the same reason the five potential witnesses do not shed light on the sexual assault, I would contend they also do not shed light on the aggravated kidnapping. A person commits the offense of kidnapping when by deceit or enticement, with the intent to secretly confine the victim against her will, he induces her to go from one place to another. 730 ILCS 5/10-1(a)(3) (West 2002). The element of confinement must be proven beyond a reasonable doubt and is satisfied by showing that the victim was enclosed within something such as a house or a car. *People v. Reeves*, 385 Ill. App. 3d 716, 726 (2008).

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¶ 58 Even assuming the five witnesses' statements were true, they attest to events that occurred *before* the sexual assault and kidnapping. One of the witnesses, Barghouti's uncle only saw the victim at the picnic. Barghouti's wife never mentioned the victim and only said she saw Barghouti when he gave her money after the picnic. Barghouti's mother averred that K.M. appeared to be happy when she saw her at La Justicia. The two other potential witnesses, Jaime and Palma, saw Barghouti after the picnic, at the liquor store, but do not mention K.M.. The evidence shows that after leaving La Justicia, the car in which K.M. was riding stopped to pick up a car, went to a liquor store to pick up alcohol, stopped at a gas station, went to pick up Jamal's friend, and then parked in an alley. None of the five witnesses could testify as to what occurred in the car from after it left La Justicia and proceeded to make several stops or what was said by Barghouti or K.M. Contrary to the majority's conclusion, the five potential witnesses could not shed any light on whether Barghouti used deceit or enticement when he took K.M. to the liquor store or the gas station or whether she was being held against her will when she was sexually assaulted in the car while it was parked in the alley. Conversely, the testimony of Marcelle Garcia, who heard a woman saying "stop, stop" and a male saying "shut up, shut up" and the testimony of Chicago police officer Francone, that he heard K.M. making sounds of distress and screaming "stop, stop" and then saw Barghouti on top of a crying K.M. support the conclusion that she was being confined against her will. As a result, I would contend it is not arguable the outcome would have been different had the five witnesses testified. Therefore, I would affirm the trial court's summary dismissal of defendant's postconviction petition.

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