

postconviction petition, which the trial court dismissed during the second stage of the postconviction proceeding.

¶ 3 Defendant appeals, arguing the trial court erred in dismissing his petition where (1) he received ineffective assistance of trial counsel during plea negotiations; (2) his appellate counsel was ineffective for failing to raise that issue on direct appeal; (3) postconviction counsel provided less than a reasonable level of assistance by omitting that issue from the amended postconviction petition; and (4) he made a substantial showing regarding his trial counsel's ineffectiveness in advising him whether to testify. We affirm.

¶ 4

I. BACKGROUND

¶ 5 During defendant's December 2002 jury trial, Marcus Adams testified he was home at 1304 East William Street in Decatur on January 30, 2002, sitting on the couch, watching television with his brother Ira Adams and Ira's girlfriend, Sheena Brown. At some point Marcus fell asleep. Around 2:30 a.m. he was awakened when someone kicked in the door and began shooting. Marcus ducked behind the couch and scrambled for the bathroom. He never got a look at the intruders but estimated two or three guns were being fired based on the number of shots he heard. After the shooting stopped, he returned to the living room and found Ira lying by the front door, bleeding from a bullet wound to the neck. A pistol lay on the floor, near Ira's right hand. Ira was transported to the hospital and placed on life support. The State did not call him at trial because he was still incapacitated and on a ventilator.

¶ 6 Brown testified Ira grabbed a pistol, sprang from the couch, and ran toward the intruders, firing when they kicked in the door. The intruders were wearing black masks and black sweaters. Brown took cover in the bathroom. When Brown heard something fall, she

came out of the bathroom and saw Ira lying on the floor. Brown did not see any of the intruders' faces because they were wearing masks.

¶ 7 Jon Quell, a Decatur police officer, testified he was dispatched to Decatur Memorial Hospital at 3:18 a.m. on January 30, 2002, to investigate a gunshot victim named Marcus Taylor, *i.e.*, defendant. Quell spoke with defendant, who had suffered "a gunshot wound to his right chest, [the bullet] enter[ing] on the right side [and] going superficially under the skin, approximately [one] to [two] inches." He asked defendant what happened. Defendant replied he was in the backyard of his mother's house at 1228 East Main Street, letting his dogs out, when he heard a couple of gunshots and realized he had been shot. Defendant saw no vehicles or persons. Ira Adams's house was two blocks away from defendant's mother's house. The doctor extracted the bullet from defendant's chest and gave it to Quell, who in turn gave it to the evidence custodian. Defendant told Quell when he was shot, he was wearing a black hoodie. He did not have the hoodie with him at the hospital but turned it over to the police later.

¶ 8 Ballistic analysis revealed the bullet came from the pistol Ira Adams used in the shootout, a semiautomatic .22-caliber pistol. The police found no shell casings outside Ira Adams's residence; all of the bullets and spent casings were inside the residence. The police collected particles from defendant's hands using strips of tape. Mary Wong, a forensic scientist, testified she analyzed the particles from these strips. Two unique microscopic particles associated with gunshot residue were found on one of defendant's hands. Only one such particle was found on his other hand. Because of the laboratory's policy of requiring a minimum of three particles *on the same hand* to support a finding of gunshot residue, Wong could not opine, to a reasonable degree of scientific certainty, defendant had discharged a firearm, nor could she rule it

out.

¶ 9 After deliberating for 6 1/2 hours, the jury sent the trial court a note stating it was deadlocked. The court gave the jury a *Prim* instruction (*People v. Prim*, 53 Ill. 2d 62, 289 N.E.2d 601 (1972)) and ordered it to deliberate further. Three hours later, the jury found defendant guilty of both counts.

¶ 10 During defendant's January 10, 2003, sentencing hearing, defendant's trial counsel argued against consecutive sentences as follows: "[J]ust like *Apprendi* [(*Apprendi v. New Jersey*, 530 U.S. 466 (2000)),] rules out the other enhancements, we suggest that the lack of specificity in the charges, the lack of clear cut evidence in this case prohibits the Court from opposing [*sic*] mandatory consecutive sentences. *** [W]e ask the Court not to impose consecutive sentences. We ask the Court to impose the minimum sentence of 6 years in Department of Corrections."

¶ 11 In his statement in allocution, defendant remarked: "[My trial counsel,] Mr. Massey[,] just came and informed me 30 minutes before my sentencing that my charges, which the public defender nobody ever informed me of that and the state offered me a plea that I didn't accept, but I would reconsider something, thought about it different if I knew my charges would [run consecutively]."

¶ 12 Thereafter, the trial court sentenced defendant to 20 years' imprisonment for home invasion and to another 20 years' imprisonment for attempt (murder), ordering the prison terms run consecutively, as required by statute, given the seriousness of Ira's bodily injury (see 730 ILCS 5/5-8-4(a)(i) (West 2002)).

¶ 13 Defendant took a direct appeal, in which he made five arguments. First, he argued his trial counsel rendered ineffective assistance by failing to file a motion for discharge on

speedy-trial grounds. *People v. Taylor*, No. 4-03-0067, slip order at 12 (Aug. 24, 2006) (unpublished order under Supreme Court Rule 23). We concluded such a motion would have been unmeritorious and his attorney therefore had not rendered ineffective assistance by refraining from filing such a motion. *Id.* at 32-33. Second, defendant argued the trial court erred by admitting the evidence of gunshot residue. *Id.* at 33. We held defendant forfeited that issue by failing to make an objection at trial. *Id.* Third, defendant argued his trial was unfair because, during a recess and before the time for deliberations, one juror was heard to remark to another juror he suspected the case was drug-related. *Id.* at 36. We found no prejudice from this misconduct, considering, in his opening statement, defendant's trial counsel himself suggested the shooting was drug-related (" 'a bullet whizzing through the night[,] in this rough, worn[-]down neighborhood where drugs, guns are prevalent' "). *Id.* Fourth, defendant argued the trial court had coerced a holdout juror by giving the *Prim* instruction instead of declaring a mistrial. *Id.* at 37. We found no abuse of discretion in the court giving the jury a *Prim* instruction and ordering the jury to deliberate further. *Id.* Fifth, defendant argued the evidence was insufficient to support the convictions. *Id.* at 39. In rejecting that argument, this court reasoned as follows:

"[Defendant] offered an innocent explanation for having Ira Adams's bullet in his chest: he was standing in his mother's backyard at 2:30 a.m., when, two blocks away, Ira Adams pointed a small-caliber pistol out the front door of his house (in such a way that the spent casing was ejected into the interior of the house), and fired a round. The .22-caliber bullet sailed over the roofs of houses and through the

branches of trees (shown in the aerial photograph), came down, and struck [defendant] precisely where he stood, punching through his black hooded sweatshirt and burrowing two inches through his flesh.

The jury did not *have* to accept that explanation. It is unclear from the record that such a small-caliber bullet could do that sort of damage at a distance of two blocks—or that the trajectory that [defendant] postulates was physically possible. Given our deferential standard of review, we find the evidence to be sufficient to support the conviction." (Emphasis in original.) *Id.* at 39-40.

¶ 14 On March 4, 2011, defendant filed an amended petition for postconviction relief. One of the claims in defendant's amended petition was his trial counsel had rendered ineffective assistance by failing to explain to defendant the necessity he testify on his own behalf during trial.

¶ 15 According to the amended petition, supported by his own affidavit, defendant originally planned to testify. However, after his mother and brother testified and after an inmate in the county jail told him he could hurt his case by testifying, defendant changed his mind and decided against testifying. According to defendant, his counsel did not ask him why he had changed his mind or explain to him, without his testimony, "there would be no affirmative evidence that he was shot at the end of the alley" and the police officers' testimony defendant said he was shot in his backyard would be un rebutted. The amended petition quoted defendant's affidavit:

" [']On the night when I was shot, I was sleeping at my

mother's house and had gotten up from bed to let the dogs outside. I opened the basement door and the dogs ran into the backyard. The fence between the backyard and the alley was down and the dogs ran into the alley behind my mother's house. The dogs turned right when they left the backyard and ran toward the end of the alley where the alley meets Witt Street. The dogs always ran in that direction down the alley when they left the backyard. I followed the dogs to the end of the alley near Witt Street. When I reached the end of the alley, I heard a couple of gunshots in the distance. I felt a pain in my chest that felt like I had been stung. I then realized that I had been shot. I returned to the house and could see the bullet just under my skin in my upper right chest. I tried to move the bullet with my fingers, but it began to hurt more. I called my cousin Roxie and she took me to the hospital emergency room.["] "

According to defendant, had his attorney explained to him "the defense theory hinged on being able to establish that he was hit by the bullet while in the alley rather than the backyard," defendant would have testified he was in the alley, not in the backyard, when the bullet hit him and he never told the police otherwise.

¶ 16 According to the amended petition, a "post-conviction investigation confirmed that there is a clean line of sight between Ira Adams' front door and the end of the alley, at a distance of 774 feet or 258 yards. [Citation to exhibit.] A 40 grain 22 Long Rifle bullet fired from a Stoeger Luger can easily travel this distance, though to accurately shoot at a target from such a

distance 'would be a Hail Mary shot, especially since any breeze or crosswind would change the trajectory of the bullet.' [Citation to exhibit.]"

¶ 17 On October 12, 2011, the trial court granted the State's motion to dismiss the amended petition for postconviction relief. In paragraph 7 of its dismissal order, the court stated:

"Defendant claims ineffective assistance of counsel based upon a failure to explain the need for him to testify in his own defense. As a general rule, advice not to testify is a matter of trial strategy that does not amount to ineffective assistance of counsel unless counsel refused to allow the defendant to testify. *People v. Youngblood*, 389 Ill. App. 3d 209. Here the court record affirmatively shows that defendant was in no way coerced by anyone, including his attorney, in making the decision not to testify. Counsel's performance was not objectively deficient nor was defendant prejudiced."

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 On appeal, defendant argues (1) he received ineffective assistance of trial counsel during plea negotiations; (2) his appellate counsel was ineffective for failing to raise that issue on direct appeal; (3) postconviction counsel provided less than a reasonable level of assistance by omitting that issue from the amended postconviction petition; and (4) he made a substantial showing regarding his trial counsel's ineffectiveness in failing to advise him whether to testify.

¶ 21 A. Standard of Review

¶ 22 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010)) establishes a three-stage process for adjudicating a postconviction petition. *People v. Beaman*, 229 Ill. 2d 56, 71, 890 N.E.2d 500, 509 (2008). Here, defendant's petition was dismissed at the second stage of postconviction proceedings. To overcome the State's motion for dismissal and advance the proceeding for an evidentiary hearing, defendant had to make a "substantial showing" his imprisonment violated the federal or state constitution. *People v. Coleman*, 183 Ill. 2d 366, 382, 701 N.E.2d 1063, 1072 (1998). The showing is "substantial" if the petition's allegations of fact have support in the record or in accompanying affidavits. *People v. Wilson*, 191 Ill. 2d 363, 384, 732 N.E.2d 498, 509 (2000) (McMorrow, J., dissenting); *People v. Britz*, 174 Ill. 2d 163, 191, 673 N.E.2d 300, 313 (1996). We review a trial court's dismissal of a postconviction petition at the second stage *de novo*. *People v. Pendleton*, 223 Ill. 2d 458, 473, 861 N.E.2d 999, 1008 (2006).

¶ 23 B. Ineffective Assistance of Counsel

¶ 24 In determining whether a defendant was denied the effective assistance of counsel, we apply the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show counsel's performance was deficient and the deficient performance prejudiced the defendant such that he was deprived of a fair trial. *Strickland*, 466 U.S. at 687; *People v. Patterson*, 217 Ill. 2d 407, 438, 841 N.E.2d 889, 907 (2005). The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Brown*, 236 Ill. 2d 175, 185, 923 N.E.2d 748, 754 (2010).

¶ 25 1. *Defendant's Claim Trial Counsel Failed, During Plea Negotiations, To Advise the Prison Sentences Would Run Consecutively*

¶ 26 Defendant argues his trial counsel provided him ineffective assistance by failing to advise him during plea negotiations the prison sentences would have to be consecutive and could not be concurrent if he were found guilty. Defendant also contends his counsel on direct appeal provided ineffective assistance by omitting this issue from the appellate brief. Finally, defendant argues his postconviction counsel provided less than a reasonable level of assistance by excluding this issue from the amended petition.

¶ 27 Failing to advise a defendant during plea negotiations any prison sentences would be mandatorily consecutive qualifies as deficient performance within the meaning of *Strickland*. *People v. Curry*, 178 Ill. 2d 509, 529, 687 N.E.2d 877, 887 (1997). A defendant has a right to effective assistance of counsel when deciding whether to accept or reject a plea offer, even if the defendant subsequently receives a fair trial. *Curry*, 178 Ill. 2d at 518, 687 N.E.2d at 882. In order for defense counsel's performance to satisfy the standard of objective reasonableness, counsel must inform the defendant of "the comparative sentence exposure between standing trial and accepting [the] plea offer." (Internal quotation marks omitted.) *Curry*, 178 Ill. 2d at 528, 687 N.E.2d at 887. Defense counsel fails to provide a defendant an adequate explanation of the potential exposure if he neglects to inform the defendant multiple convictions carry mandatory consecutive prison sentences. *Curry*, 178 Ill. 2d at 529, 687 N.E.2d at 887. A vast difference exists between consecutive prison sentences and concurrent prison sentences, and failing to point out the inevitability of consecutive sentencing would be a significant omission.

¶ 28 Deficient performance, however, is only half of an ineffective-assistance claim.

The other half is prejudice. *Curry*, 178 Ill. 2d at 529, 687 N.E.2d at 887. If defense counsel misadvised the defendant during plea negotiations and the defendant rejected the State's plea offer, was convicted, and received a sentence more severe than the one contemplated by the plea offer, then the defendant must establish a reasonable probability the defendant would have accepted the plea offer but for the inadequate advice. *Curry*, 178 Ill. 2d at 533, 687 N.E.2d at 889. A defendant's testimony "he would have accepted the plea offer if he had been told that consecutive sentences were mandatory" is insufficient to establish this element of prejudice. *Curry*, 178 Ill. 2d at 531, 687 N.E.2d at 888. "Standing alone, this testimony is subjective, self-serving, and *** insufficient to satisfy the *Strickland* requirement for prejudice." (Internal quotation marks omitted.) *Curry*, 178 Ill. 2d at 531, 687 N.E.2d at 888.

¶ 29 Thus, the positive statement "I would have accepted the plea offer but for the bad advice" is insufficient. On the record before us, it is unclear we have even that much. Defendant told the trial court, during the sentencing hearing: "[T]he state offered me a plea that I didn't accept, but I would reconsider something, thought about it different if I knew my charges would [run consecutively]." He did not actually say he would have accepted the plea offer; rather, he seemed to say he would have reconsidered the offer in a different light.

¶ 30 However, we do not know what the State's plea offer was nor whether a plea offer was actually made. The State contends no offer was made, no offer expired, no offer was rejected, and defense counsel did not fail to convey any offers because no offers were made. However, the State does not cite any page of the record to support its claim. Concomitantly, defendant claimed if he had known he was facing mandatory consecutive sentences, he would have reconsidered the plea offer in a different light. He never disclosed what the plea offer

purportedly entailed. We cannot sensibly find prejudice—a reasonable probability defendant would have accepted the plea offer—if we do not know what the offer was. Because case law forbids us from simply taking a defendant's word he would have accepted the plea offer, we would have to consider the attractiveness of the plea offer from an objective point of view, which we are unable to do in this case. In short, the record does not offer the means to make even a basic showing of prejudice. Without prejudice, defendant has no viable claim of ineffective assistance during the plea negotiations. See *Curry*, 178 Ill. 2d at 531, 687 N.E.2d at 888.

¶ 31 Because we find defendant's trial counsel did not render ineffective assistance, we likewise disagree (1) defendant's appellate counsel provided ineffective assistance by not raising this claim on direct appeal and (2) defendant's postconviction counsel provided a less than reasonable level of assistance by omitting this claim in the amended petition. Neither on direct appeal nor in a postconviction proceeding is an attorney obliged to assert a meritless claim.

People v. Greer, 212 Ill. 2d 192, 205, 817 N.E.2d 511, 519 (2004); *People v. Mitchell*, 189 Ill. 2d 312, 333, 727 N.E.2d 254, 267 (2000); *People v. Hanks*, 335 Ill. App. 3d 894, 900, 781 N.E.2d 601, 607 (2002).

¶ 32 *2. Defendant's Claim Trial Counsel was Ineffective
in Advising Him Whether To Testify*

¶ 33 Defendant argues the trial court erred in dismissing his petition where he made a substantial showing his trial counsel was ineffective in advising him whether to testify.

Specifically, defendant contends his trial counsel was ineffective by failing to sufficiently explain to him the necessity he testify at trial. We disagree.

¶ 34 " 'A defendant's right to testify at trial is a fundamental constitutional right, as is his

or her right to choose not to testify.' " *People v. Weatherspoon*, 394 Ill. App. 3d 839, 855, 915 N.E.2d 761, 776 (2009) (quoting *People v. Madej*, 177 Ill. 2d 116, 145-46, 685 N.E.2d 908, 923 (1997)). A defendant's waiver of the right to testify must be knowing and voluntary. *Frey v. Schuetzle*, 151 F.3d 893, 898 (8th Cir. 1998)). While the decision whether to testify should be made with the advice of counsel (*People v. Smith*, 176 Ill. 2d 217, 235, 680 N.E.2d 291, 303 (1997)), that decision ultimately rests with the defendant alone. *People v. Brown*, 336 Ill. App. 3d 711, 719, 784 N.E.2d 296, 302 (2002).

¶ 35 In this case, the record shows defendant was aware of his right to testify and voluntarily waived that right. Prior to resting, defendant's trial counsel informed the trial court as follows:

"MR. MASSEY [(defendant's attorney)]: *** I have been representing [defendant] for a while. We have discussed the reports, and obviously he has been here for the trial. It would be at this stage that I would call him as a witness. He has indicated to me that he has no desire to testify, and he understands what he is doing. I wanted to bring it to the court's attention, if you have any questions."

At that point, the following colloquy took place between the court and defendant:

"THE COURT: [(addressing defendant)] [L]et me explain this to you. Your lawyer can advise you. But it is your decision whether or not you want to testify. It is up to you. You don't have to testify if you don't want to, but I want to know is it your decision that you do not want to testify."

[DEFENDANT:] Yes, it is my decision. I don't want to testify."

We note the record indicates defendant originally intended to take the stand and testify but then changed his mind. According to defendant's affidavit accompanying his postconviction petition,

"I thought my mother and brother were made to look foolish when they testified. One of the inmates at the jail told me I could hurt my case if I testified. *I told my attorney that I wanted to change my mind and I did not want to testify.*" (Emphasis added.)

¶ 36 Here, the question is not whether his trial counsel failed to advise him regarding his right to testify. In fact, defendant does not dispute his attorney advised him to take the stand and testify. Instead, the issue is whether his attorney was sufficiently persuasive when defendant told him he no longer wished to testify. Defendant's petition alleged his attorney did not ask him why he changed his mind and did not attempt to convince him otherwise. According to defendant's petition, "[h]ad counsel explained the defense theory hinged on being able to establish that he was hit by the bullet while in the alley rather than in the backyard, [defendant] would have testified." Thus, defendant attempts to draw a connection between changing his mind and deciding not to testify and his trial counsel's failure to adequately inform him his testimony was necessary to achieve acquittal. However, defendant does not cite a case for the proposition his trial counsel needed to convince him to testify and our own research reveals no such case. We note such a standard would likely prove problematic. Indeed, we can easily envision situations where trial counsel is able to persuade a defendant to testify only to have him argue on appeal he would not have testified but for counsel's coercion.

¶ 37 In addition, we note defense counsel's strategy during opening statement and cross examination of the State's witnesses included his theory defendant probably did not stay with the dogs in the backyard but likely moved toward the alleyway into a position where he could have been shot. Prior to defendant's waiver of his right to testify, counsel informed the trial court he had discussed the reports with defendant and noted defendant had been present throughout the trial. Counsel then told the court defendant had no desire to testify and further defendant told counsel he understood what he was doing. Defendant did not dispute counsel's statements. Based on this record, defendant is unable to support his claim his right to testify was violated by counsel's ineffectiveness in failing to explain why defendant's testimony was important. Counsel did the best he could with his theory defendant had made his way from the backyard to the alley to be in a position to have been shot accidentally—despite defendant's failure to take his advice and testify. It is fair to infer such would be the subject of defendant's testimony, given his counsel's opening statement and the way defense counsel questioned the witnesses throughout the trial. It is disingenuous now for defendant to claim, "Well, it's true I did not want to testify, it's true I took the advice of an inmate I should not testify, rather than the advice of my attorney I should testify, it's true I felt my mother and brother were made to look foolish when they testified, and it's true counsel reviewed the reports with me and I sat through the trial and heard the State's witnesses testify it would be impossible for me to have been shot by a stray bullet if I had been standing in the backyard. However, if counsel had just told me explicitly no one else but me could testify I was standing in the alley when I was shot, I would have testified in my case."

¶ 38 In this case, (1) defendant was aware the decision to testify was his alone, (2) his

trial counsel recommended he testify, (3) he heard counsel's opening statement and observed the examination of the witnesses at trial, (4) he originally decided to testify based on his counsel's recommendation, and (5) he later rejected his counsel's advice and voluntarily changed his mind for the reasons articulated in his affidavit. According to his affidavit, defendant's decision not to testify had nothing to do with his counsel's performance, but rather with defendant's perception of his witnesses' testimony, the fact they were made to look foolish on cross-examination, and the advice of an inmate.

¶ 39 In other words, defendant's decision not to testify was not due to any action or inaction on the part of his attorney. A postconviction petition may be dismissed where its allegations are rebutted by the record. See *People v. Torres*, 228 Ill. 2d 382, 394, 888 N.E.2d 91, 100 (2008) (supreme court "has consistently upheld the dismissal of a post[]conviction petition when the allegations are contradicted by the record from the original trial proceedings"); *People v. Barnslater*, 373 Ill. App. 3d 512, 519, 869 N.E.2d 293, 299 (2007) (we will not credit allegations that are positively rebutted by the record). Defendant failed to make a substantial showing he received ineffective assistance of counsel. The trial court did not err in dismissing defendant's postconviction petition.

¶ 40 III. CONCLUSION

¶ 41 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 42 Affirmed.

¶ 43 JUSTICE APPLETON, dissenting.

¶ 44 I respectfully dissent because, although I agree with the analysis in ¶¶ 25 to 31 of the majority's decision, I disagree with the analysis in ¶¶ 32 to 39. In other words, I agree that defendant failed to show prejudice from defense counsel's alleged neglect, during plea negotiations, to advise him that prison sentences would run consecutively. I disagree, however, with the conclusion that defendant failed to make a substantial showing of ineffective assistance with regard to defense counsel's advice on whether to testify.

¶ 45 In my dissent, I will begin by pointing out what I perceive to be two errors in ¶¶ 32 to 39. The first error is to misstate the argument that defendant is making in this appeal. According to the majority, defendant seeks to impose upon defense counsel a duty to *persuade* the defendant either to testify or not to testify. As I will explain, however, defendant makes a quite different, more reasonable argument: that defense counsel has a duty to *fully advise* the defendant by laying out for him or her the considerations underlying defense counsel's recommendation either to testify or not to testify. The persuasive effect of this advice would be up to the defendant, not defense counsel.

¶ 46 The second error in ¶¶ 32 to 39 is a determination of defendant's credibility. The majority declares him to be unbelievable ("disingenuous" *supra* ¶ 37)). Determinations of credibility are forbidden in the second stage of a postconviction proceeding.

¶ 47 After discussing these crucial errors, I will argue that, when advising a defendant whether to testify, defense counsel should explain to the defendant the strategic implications of testifying and not testifying, so that the defendant can make an intelligent or adequately informed decision. In this case, defendant has made a substantial showing that defense counsel failed to

advise him of the strategic implications of not testifying and that prejudice resulted to the defense.

¶ 48 A. The Nonissue of Whether Defense Counsel Has a Duty To "Persuade" the Defendant To Testify or Not To Testify

¶ 49 The majority says:

"Here, the question is not whether [defendant's] trial counsel failed to advise him regarding his right to testify. In fact, defendant does not dispute his attorney advised him to take the stand and testify. Instead, the issue is whether his attorney was sufficiently persuasive when defendant told him he no longer wished to testify. *** [D]efendant does not cite a case for the proposition his trial counsel needed to convince him to testify and our research reveals no such case." *Supra* ¶ 36.

¶ 50 I do not think that, in this quoted passage, the majority fairly states defendant's argument. Defendant does not argue that defense counsel had a duty to *persuade* him to testify. To be sure, defendant avers that if defense counsel had explained to him why, given the evidence, it was important for him to testify, he *would have been persuaded* to testify, notwithstanding his fear of being made to look ridiculous on cross-examination. But that is not the same as contending that defense counsel had a duty to "persuade" him or to "convince" him. Instead, defendant's position is this: when it comes time for a defendant to decide whether to testify, defense counsel has a duty to lay out for the defendant the considerations material to that decision, so that the defendant can make an adequately informed decision—and if the defendant

is unpersuaded by the considerations that defense counsel lays out for him and ends up being convicted, so be it; that is the defendant's problem. Defendant does not blame Massey for failing to persuade him to testify; rather, he blames Massey for failing to explain to him why it was necessary for him to testify. There is a difference.

¶ 51 Evidently, the majority holds that the only advice defense counsel must give a defendant on the question of whether to testify is a bare recommendation either to testify or not to testify. It is inconceivable to me that, in the circumstances of this case, any conscientious defense counsel would be content to be so perversely unhelpful. The decision whether to testify should be "made by the accused after *full consultation* with counsel." (Emphasis added.) ABA Standards for Criminal Justice 4-5.2(a)(iv) (2d ed. 1980). See *Strickland*, 466 U.S. at 688 ("Prevailing norms of practice as reflected in the American Bar Association standards and the like *** are guides to determining what is reasonable, but they are only guides."). A bare recommendation is not "full consultation" in any meaningful sense of that term. The ideal is that when a defendant waives a constitutional right, such as the right to testify, he or she do so knowingly and intelligently, "with sufficient awareness of the relevant circumstances and likely consequences." (Internal quotation marks omitted.) *People v. McClanahan*, 191 Ill. 2d 127, 137 (2000). If, as the majority apparently holds, defendants are expected to advise themselves of these relevant circumstances and likely consequences, their attorneys serve no purpose. A bare recommendation would not achieve the ideal in *McClanahan*. Ignorantly following the bare recommendation of defense counsel would not be a knowing and intelligent decision on the defendant's part; rather, it would be blind faith. To a thinking person, a recommendation is only as good as its reasons. It is defense counsel's job to make the defendant aware of the relevant

underlying considerations so that the defendant can make the decision with open eyes.

¶ 52 B. An Improper Determination of Defendant's Credibility

¶ 53 After presenting defendant's case, Massey told the trial court, outside the jury's presence:

"MR. MASSEY: *** I have been representing this young man for awhile. We have discussed the reports, and obviously he has been here for the trial. It would be at this stage that I would call him as a witness. He has indicated to me that he has no desire to testify, and he understands what he is doing. I wanted to bring it to the court's attention, if you have any questions.

THE COURT: Mr. Taylor, let me explain this to you. Your lawyer can advise you. But it is your decision whether or not you want to testify. It is up to you. You don't have to testify if you don't want to, but I want you to know is it your decision that you do not want to testify.

MR. TAYLOR: Yes, it is my decision. I don't want to testify."

¶ 54 The majority says:

"It is disingenuous now for defendant to claim, 'Well, it's true I did not want to testify, it's true I took the advice of an inmate I should not testify, rather than the advice of my attorney I should testify, it's true I felt my mother and brother were made to look foolish when they

testified, and it's true counsel reviewed the reports with me and I sat through the trial and heard the State's witnesses testify it would be impossible for me to have been shot by a stray bullet if I had been standing in the backyard. However, if counsel had just told me explicitly no one else but me could testify I was standing in the alley when I was shot, I would have testified in my case.' " *Supra* ¶ 37.

¶ 55 Actually, the final sentence in this quoted passage is an oversimplification of defendant's argument. It was not just a matter of telling him that only he could testify to where he was standing when he was shot. Instead, as I understand defendant's argument, he needed advice along these lines. Although defense counsel could, and would, argue to the jury that defendant was standing at the end of the alley when he was shot, arguments of counsel would not count as evidence, as the trial court no doubt would instruct the jury. It therefore was necessary for defendant to take the stand and to testify he was standing at the end of the alley when he was shot. Without such testimony by defendant, the police officers' inaccurate testimony that he had told them he was standing in his mother's backyard when he was shot would be unrebutted by any evidence. Because, given the obstructions shown in the aerial photo, it was physically impossible for the bullet to reach him in his mother's backyard, the jury might receive the impression that he had lied to the police, leading the jury to infer he had a consciousness of guilt.

¶ 56 This, I think, is a fair summary of defendant's petition and affidavit, and the record does not positively rebut his allegations. Just because Massey discussed the police reports with him and just because Massey remarked, in a vague and conclusory way, that defendant "underst[ood] what he [was] doing," it does not necessarily follow that Massey explained to him

why it was important that he testify. At the second stage of a postconviction proceeding, all well-pleaded facts that are not positively rebutted by the record are taken as true. *People v. Marino*, 397 Ill. App. 3d 1030, 1033 (2010).

¶ 57 The majority, however, simply does not believe defendant; the majority thinks he is being "disingenuous." *Supra* ¶ 37. What might be obvious to lawyers is not necessarily obvious to defendants. More to the point, it is irrelevant whether the majority believes or disbelieves defendant. Determinations of credibility are improper in the second stage of a postconviction proceeding. *People v. Coleman*, 183 Ill. 2d 366, 385 (1998); *People v. Knight*, 405 Ill. App. 3d 461, 471 (2010); *People v. Dodds*, 344 Ill. App. 3d 513, 523-24 (2003). Such determinations should be reserved for the third-stage evidentiary hearing. *Coleman*, 183 Ill. 2d at 385; *Knight*, 405 Ill. App. 3d at 471.

¶ 58 C. Defense Counsel's Duty To Explain to the Defendant
the Strategic Implications of Testifying and Not Testifying

¶ 59 It is defense counsel's job, it is a sixth-amendment task, to inform the defendant of the considerations material to his or her personal decision whether to testify. See ABA Standards for Criminal Justice 4-5.2(a)(iv) (2d ed. 1980) (the decision whether to testify should be "made by the accused after full consultation with counsel"). In *United States v. Teague*, 953 F.2d 1525, 1533 (11th Cir. 1992), the Eleventh Circuit said: "Defense counsel bears the primary responsibility for advising the defendant of his right to testify or not to testify, *the strategic implications of each choice*, and that it is ultimately for the defendant himself to decide." (Emphasis added.) Courts across the country have adopted *Teague's* requirement that defense counsel advise the defendant of the "strategic implications" of testifying and not testifying. See,

e.g., *Cannon v. Mullin*, 383 F.3d 1152, 1171 (10th Cir. 2004); *Rayborn v. United States*, 489 Fed. App'x. 871, 880 (6th Cir. 2012); *Wogan v. United States*, 846 F. Supp. 135, 140 (D. Me. 1994); *United States v. Lively*, 817 F. Supp. 453, 461 (D. Del. 1993); *Lee v. Clarke*, 806 F. Supp. 1421, 1430 (D. Neb. 1992); *Reeves v. State*, 974 So. 2d 314, 322 (Ala. Ct. Crim. App. 2007); *Beasley v. State*, 18 So. 3d 473, 495 (Fla. 2009); *State v. Nejad*, 690 S.E.2d 846, 848 n.2 (Ga. 2010); *State v. Iromuanya*, 806 N.W.2d 404, 421 (Neb. 2011); *People v. Roman*, 658 N.Y.S.2d 196, 199 (N.Y. Sup. Ct. 1997).

¶ 60 Failing to discuss with the defendant the strategic implications of testifying or not testifying can amount to substandard performance by defense counsel if it prevents the defendant from making a knowing and intelligent decision. *Rayborn*, 489 Fed. App'x. at 880. See also *McClanahan*, 191 Ill. 2d at 137. In *Rayborn*, for example, the defense attorneys failed to warn the defendant that, if he took the stand, they intended to pursue a strategy of "limited examination," in which they would ask him very few questions on direct examination. *Rayborn*, 489 Fed. App'x. at 786. Their reason for pursuing this strategy was that, in the first trial, which ended in a mistrial, they did not think that the defendant came across as a good witness and thus, in the second trial, they wanted to minimize his time in the stand. *Id.* The defense attorneys neglected to explain to the defendant, however, that "limiting the direct examination would not curtail the scope or length of the prosecutor's examination" (*id.*), which probably would be enriched by selective references to the defendant's testimony in the first trial (*id.* at 880). If the defendant's attorneys had advised him that, just because their direct examination of him would be limited, it did not necessarily follow the prosecutor's cross-examination would be limited, he would have chosen not to testify in the second trial. *Id.* at 876.

¶ 61 In the second trial, a defense attorney asked the defendant only two questions—" 'Did you burn the Mt. Sinai Church?' " and " 'Did you [] get anybody else to burn it?' "—and then rested. *Id.* at 874. The prosecutor followed up with a lengthy, hostile, and vigorous cross-examination, "fashioned so as to elicit incriminating responses, while avoiding exculpatory explanations." *Id.* "This series of events left the jurors with the unmistakable impression that [the defendant] was a liar, a cheat, a fraudster, and an arsonist." *Id.* at 872.

¶ 62 Admittedly, the defense attorneys in *Rayborn* made another big mistake besides failing to adequately advise the defendant of the strategic implications of taking the stand. They also failed to conduct a redirect examination of the defendant, passing up an opportunity to rehabilitate him after the prosecutor's devastating cross-examination. *Id.* at 879. Even so, failing to advise the defendant of the strategic implications of taking the stand was one of the instances of ineffective assistance that the Sixth Circuit identified in *Rayborn*. In this connection, the Sixth Circuit said:

"To ensure that a defendant receives adequate counsel, defense counsel must do more than merely inform the defendant of his right to testify and his option to waive that right. Assuring that the defendant's decision is an informed one also necessitates that counsel discuss the strategic implications involved in the decision to testify. *Cannon v. Mullin*, 383 F.3d 1152, 1171 (10th Cir. 2004); see also *Harrison v. Motley*, 478 F.3d 750, 756 (6th Cir. 2007) ('[D]efense counsel has an obligation to discuss potential strategies with [the defendant],' including whether or not to testify.). Although

counsel's advice typically includes a recommendation one way or the other, see *Cannon*, 383 F.3d at 1171, for purposes of our collateral review, the substantive recommendation matters less than whether the options and underlying considerations were adequately laid out for the defendant's personal deliberation. See *Hutchins v. Garrison*, 724 F.2d 1425, 1436 (4th Cir. 1983)." *Id.* at 880.

See also *Credell v. Bodison*, 818 F. Supp. 2d 928, 936 (D.S.C. 2011) ("Trial counsel clearly did not provide competent professional advice concerning whether [the defendant] should testify," in that she failed to advise him that, if he did not testify, the jury would remain unaware of his criminal record); *Wogan*, 846 F. Supp. at 136, 140 (defense counsel rendered ineffective assistance in that, when advising the defendant not to testify—advice the defendant followed—defense counsel neglected to inform the defendant of the risk he ran by not testifying, namely, that, in the absence of testimony by him that the 750-gram allegation was erroneous and exaggerated, the government could appeal the district court's downward-departure sentence and obtain a resentencing based on a higher amount of heroin).

¶ 63 In my view, this case is analogous to *Rayborn*, *Credell*, and *Wogan* in that Massey failed to explain to defendant the strategic implications of not testifying. As those cases demonstrate, there is such a thing as a sin of omission when advising the defendant on whether to testify.

¶ 64 The omitted advice in this case was this: unless defendant testified, there would be no evidence that, at the time of the shootout, he was standing at a location where he could have been innocently shot, and the police officers' un rebutted account of what he had told them would

make him look like a guilty liar. As defendant notes, there basically was one simple question for the jury to decide in the trial: where he was standing when the bullet from Ira Adams's pistol struck him in the chest. Even *without* defendant's testimony that he was in fact standing where the alley intersected with North Witt Street, where he had a direct line of sight to the Adams house, the jury took nearly 10 hours to decide that question, and the jury twice sent out a note that it was deadlocked, leading the court to give a *Prim* instruction. Defendant argues, reasonably enough, that the length of the deliberations and the jury's notes indicate that this was a close case. See *People v. Aguirre*, 291 Ill. App. 3d 1028, 1035 (1997); *People v. Preatty*, 256 Ill. App. 3d 579, 590 (1994).

¶ 65 The closer the evidence is, defendant argues, the more likely it is that a serious error by defense counsel affected the outcome. See *Strickland*, 466 U.S. at 696 ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."). Defendant claims that Massey erred in the trial by failing to give him complete and competent advice on the all-important question of whether he should take the stand and testify on his own behalf. The only way to prove that, contrary to the State's secondhand evidence, he was in fact standing at the end of the alley contiguous to his mother's backyard was to have him testify to that effect, but Massey "failed to advise him of the necessity of taking the stand and testify as to that for the jury." If, as the State claimed, defendant were standing in his mother's backyard, it would have been "physically impossible for the bullet to strike him," but a bullet could have struck him at the end of the alley, at its intersection with North Witt Street. According to defendant, the police got his statement wrong: he told them he no longer was in the backyard, but that he had followed the dogs to the end of the alley, when the

bullet struck him. He argues that if he had testified, "the jury could have easily concluded that the superficial wound [he] received when the bullet entered his chest was the result of being shot from nearly two blocks away, in which case there is a reasonable probability the jury might have voted to acquit." He avers, under oath, that he would have testified if Massey had explained to him why his testimony was indispensable. I would hold this is a substantial showing of substandard performance and resulting prejudice: the elements of a claim of ineffective assistance (*Strickland*, 466 U.S. at 687).

¶ 66 This is not to say that, in every case, defense counsel necessarily renders ineffective assistance by making a bare recommendation to testify or not to testify, without explaining to the defendant the underlying reasons for that recommendation. Maybe in some cases the only reason defense counsel can come up with is an intuitive gut feeling. Maybe in some cases the defendant has enough legal expertise, or is intelligent enough, that he or she obviously already knows the pros and cons of testifying. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland*, 466 U.S. at 688-89. I contend only that, in the circumstances of this case, it simply is inexplicable that defense counsel would fail to advise defendant of the strategic implications of not testifying: that, unless he testified, no evidence would contradict the police officers' (supposedly inaccurate) testimony of what he had told them. It would be unrebutted that he had told the police a story that was physically impossible, leading in turn to the inference that he was lying and hence was guilty. For that reason, I would reverse the trial court's judgment and remand this case for further proceedings.