2015 IL App (1st) 122003-U

THIRD DIVISION
November 18, 2015

No. 1-12-2003

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, v. OTIS BLACKMON, Petitioner-Appellant.	)	Appeal from the Circuit Court of Cook County, Illinois. No. 02CR24112 The Honorable Jorge Luis Alonso, Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Mason and Justice Lavin concurred in the judgment.

ORDER

¶ 1 Held: (1) Petitioner's postconviction petition was erroneously dismissed at the second stage of proceedings where it adequately asserted a constitutional claim of ineffective assistance of trial counsel at his trial for first degree murder where his counsel allegedly refused his request to ask that the jury be instructed on second-degree murder; and (2) petitioner's claim of the ineffective assistance of postconviction counsel was properly dismissed. Reversed and remanded in part; affirmed in part.

¶ 2 Petitioner Otis Blackmon filed an attorney-drafted postconviction petition for relief from judgment under the Post-Conviction Hearing Act (Act), 725 ILCS 5/122-1 *et. seq*. (West 2012), relating to his conviction for first degree murder and unlawful use of a weapon by a felon (UUWF), for the August 30, 2002, shooting death of victim Mark Harris. The trial court advanced his petition to the second stage of proceedings. The State filed a motion to dismiss, to which petitioner filed a response. After a hearing, the trial court granted the State's motion to dismiss, and dismissed petitioner's postconviction petition. Petitioner appeals, contending that the trial court erred in dismissing the petition where the petition made a substantial showing that he was: (1) deprived of the effective assistance of trial counsel where trial counsel refused his request to tender a second-degree murder instruction after petitioner informed counsel that he wanted this instruction given; and (2) deprived of the effective assistance of postconviction counsel where postconviction counsel did not attach the necessary evidentiary support for particular claims in petitioner's postconviction petition. For the following reasons, we affirm in part and reverse in part.

¶ 3 I. BACKGROUND

¶ 4 The record before us reveals the following facts and procedural history. At trial, Kenneth Smith testified that he worked at a gas station located at Cicero Avenue and 43rd Street in Chicago on August 30, 2002. While at the gas station at approximately 3 a.m., he saw Larry Monroe, whom he knew from the neighborhood, and another man he did not know but whom he later identified as petitioner, drive away from the gas station together. Later that morning, Smith saw Monroe, Elijah Parker, and Mark Harris standing near the LeClaire Courts circle. LeClaire Courts is a housing projected near the gas station. Smith knew Parker and Harris from the neighborhood. From the group's body language, Smith believed

they were having an argument. At approximately 6:30 a.m., Smith heard what sounded like gunshots coming from the direction of LeClaire Courts. He heard two to three shots, then a pause, and then several more shots. While admitting he was not an "expert," Smith testified he believed the two sets of gunshots were from two different guns because "one was louder than the other one. Second set was louder than the first." He did not see anyone actually shooting a gun.

¶ 5 Eye witness Loren Robertson testified he was selling newspapers at the intersection of Cicero Avenue and 42nd Street on the morning of August 30, 2002. He heard two gunshots. Then, he looked toward the sound and saw petitioner fire a gun two times. Robertson could not see what petitioner was shooting at. He could see another man standing near petitioner, but could not identify that man. Robertson fled. As he ran, he heard 3 or 4 more gunshots. He saw petitioner flee, throw a gun into a puddle, and get apprehended by the police. On cross-examination, Robertson clarified that he did not see who fired the first two gunshots he heard, but did see petitioner shoot the next set of two gunshots.

¶ 6 Petitioner's friend Larry Monroe[1] testified at trial that, in the early morning of August 30, 2002, he asked petitioner to help him recover $500 that had allegedly been stolen from him during a disputed dice game. Monroe had previously attempted to get the money back from the alleged robbers, victim Mark Harris and Elijah Parker, to no avail. On those previous attempts, Monroe fled empty handed when Harris and Parker drew their guns. This time, Monroe asked petitioner to come with him as "surveillance" to "watch his back" when he confronted the pair at LeClaire Courts. Petitioner agreed to do so.

[1] Monroe pled guilty to conspiracy to commit murder in exchange for a seven-year sentence. He is not a party to this appeal.

¶ 7 Petitioner went home to retrieve a .9 millimeter semi-automatic pistol with a broken safety and a laser sight. He and Monroe, who was also armed, drove together to LeClaire Courts. Monroe testified that he spotted Harris and Parker in the LeClaire Courts "circle." Then, Monroe dropped petitioner off at the gas station across the street to "find a surveillance area so he could keep me in his view."

¶ 8 Monroe approached Harris and asked him about the money. Monroe testified that, as he did so, he saw Parker looking toward where petitioner was hiding. Parker began to walk toward petitioner. Meanwhile, Harris and Monroe talked about the money. A little while later, Monroe heard petitioner calling his name. Monroe looked at petitioner, who was motioning toward Parker. Monroe then looked at Parker and saw him shoot a gun. Monroe also saw petitioner shooting a gun. Once Parker stopped shooting, Monroe fled. Monroe was unaware at the time that Harris had been shot.

¶ 9 Petitioner testified that he agreed to go with Monroe to LeClaire Courts while Monroe went to confront Parker and Harris in order to "watch his back" and "[j]ust act as some security for [Monroe] while he talk to those guys about the problem." Petitioner testified that Monroe owed him $300, but he knew Monroe would pay him back because Monroe had a job. Petitioner did not know Parker or Harris.

¶ 10 Similar to Monroe's testimony, petitioner testified he and Monroe first stopped to retrieve their guns before going to LeClaire Courts. Once in the area of LeClaire Courts, petitioner and Monroe saw Harris and Parker. Monroe dropped petitioner off at the gas station so that petitioner could act as surveillance while Monroe talked with Harris and Parker. Petitioner watched Monroe and Harris talk from his hiding spot across the street at the gas station. He also saw Parker walk away from Monroe and Harris and approach the gas

station. Petitioner tried to see where Parker was going, and followed him. Petitioner could see Monroe and Harris walking and talking. As Monroe and Harris approached some row houses where petitioner thought Parker was hiding, petitioner came out from hiding and yelled a warning at Monroe. Harris "backed away from" Monroe. Petitioner testified that Parker then started shooting. In return, petitioner kneeled down and fired two shots back at Parker. Once Parker began shooting, Harris ran in his direction. Petitioner testified he did not intend to shoot Harris. Petitioner also testified that he was not trying to actually shoot Parker, but only to scare him so that he would "run for cover and stop shooting in the direction of me and [Monroe and Harris]" and to "protect me and [Monroe] because [Parker] was shooting in our direction."

¶ 11 After the shooting, petitioner fled, discarding the gun along the way. He was soon apprehended by the police. He denied having tried to get into a motorist's car to escape, explaining that he was only ducking down behind the vehicle. Petitioner admitted that he told a detective that he did not have a gun.

¶ 12 Harris died later that day of a gunshot wound to the head. He had also been shot in the hand.

¶ 13 Soon after he was apprehended, petitioner's gun was recovered from the puddle into which he had thrown it. A few days after the shooting, a semiautomatic handgun was recovered from Parker's possession.

¶ 14 Forensic evidence was presented at trial that the bullet recovered from the victim's head was fired from petitioner's gun. Six bullet casings were recovered from the scene: two from petitioner's gun and four from Parker's gun. The two casings from petitioner's gun were

found near the area where the newspaper salesman saw petitioner shooting. The four casings from Parker's gun were found near where Parker was standing.

¶ 15 The jury was instructed on first degree murder, the additional fact that petitioner personally discharged a firearm that proximately caused the death, unlawful use of a weapon by a felon, and self-defense. Defense counsel had also tendered instructions on involuntary manslaughter and recklessness, but the court refused those instructions, finding that petitioner's testimony that he shot the gun in Parker's direction was deliberate and not reckless. Trial counsel did not request a second-degree murder instruction.

¶ 16 After deliberation, the jury found petitioner guilty of first degree murder and unlawful use of a weapon by a felon. Petitioner was later sentenced to 40 years' incarceration for first degree murder, plus an additional 25 years for personally discharging a firearm which caused death. The trial court also sentenced him to a concurrent five-year term for the unlawful use of a weapon conviction.

¶ 17 On appeal, petitioner argued that: (1) the trial court erred when it refused to instruct the jury on involuntary manslaughter and recklessness; and (2) his mittimus should be corrected to properly credit him for time spent in presentencing custody. *People v. Blackmon,* No. 1-06-1511 (2008) (unpublished order under Supreme Court Rule 23). We affirmed the judgment and corrected the mittimus. *People v. Blackmon,* No. 1-06-1511 (2008) (unpublished order under Supreme Court Rule 23).

¶ 18 In November 2009, petitioner filed an attorney-drafted postconviction petition.[2] By that petition, petitioner alleged, in part, that: (1) trial counsel was ineffective for failing to request a second-degree murder instruction; (2) he was denied a fair trial when a juror who

[2] Defendant's attorney died during the course of these proceedings. Defendant is now represented by the Office of the State Appellate Defender.

worked as a jail guard and "surely knew [petitioner]" was chosen over petitioner's objection and "talked to other officers about petitioner's trial;" (3) trial counsel was ineffective for failing to raise the jail guard issue in his motion for a new trial; and (4) trial counsel was ineffective for failing to call Elijah Parker as a defense witness to support petitioner's claim of self-defense.

¶ 19 Petitioner supported this petition by attaching his own affidavit in which he averred:

> "1. I never consented to my counsel not submitting a second degree murder instruction.
>
> 2. I told counsel that prospective juror Moore was a prison guard at the jail and knew me.
>
> 3. I also told my attorney that prison guard/juror Moore was speaking during trial about the case with other guards."

Also in support of the petition, petitioner attached: a journal article regarding a presumption of prejudice in pursuit of a defense over a client's objection; the transcript from Moore's *voir dire*; and the transcript showing that the court asked the venire if anybody knew petitioner and nobody volunteered that they did.

¶ 20 In January 2010, petitioner's petition was advanced to the second stage of proceedings. The State then filed a motion to dismiss the petition, and defense counsel filed a response to the State's motion to dismiss.

¶ 21 In April 2012, defense counsel amended the petition with a new affidavit from petitioner. By that affidavit, petitioner averred:

> "1. I am the defendant in this case.
>
> 2. My defense at trial was self-defense.

3. I desired an instruction to be given to the jury on self-defense and second-degree murder.

4. My counsel never asked me if I wanted an instruction on second degree murder.

I told my counsel I wanted an instruction on second degree murder."

¶ 22 The court heard arguments from the parties in May 2012, after which it granted the State's motion to dismiss.

¶ 23 Petitioner appeals.[3]

¶ 24 II. ANALYSIS

¶ 25 We begin by noting the well-established principles regarding postconviction proceedings. The Post-Conviction Hearing Act (725 ILCS 5/122-1 et seq. (2012)) provides a means by which a criminal defendant may challenge his conviction for "substantial deprivation of federal or state constitutional rights." *People v. Tenner*, 175 Ill. 2d 372, 378 (1997); *People v. Jones*, 213 Ill. 2d 498, 503 (2004); see also *People v. Coleman*, 206 Ill. 2d 261, 277 (2002). A postconviction action is a collateral attack on a prior conviction and sentence and " 'is not a substitute for, or an addendum to, direct appeal.' " *People v. Simmons*, 388 Ill. App. 3d 599, 605 (2009) (quoting *People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994)).

¶ 26 Proceedings under the Act are commenced by the filing of a petition in the circuit court in which the original proceeding took place. *Jones*, 213 Ill. 2d at 503. The Act creates a

[3] After the court granted the State's motion to dismiss, defendant's counsel filed a notice of appeal and, later, an opening brief of defendant's behalf. Defense counsel subsequently passed away. The Officer of the State Appellate Defender was then appointed to represent defendant, and does so in this appeal. The initial opening brief, filed by original defense counsel, has been withdrawn.

three-stage process. *People v. Makiel*, 358 Ill. App. 3d 102, 104 (2005). At the first stage of postconviction proceedings, the circuit court must determine whether the petition is "frivolous and patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012); *People v. Boclair*, 202 Ill. 2d 89, 99 (2002). At this stage, to proceed further, the allegations of the petition, taken as true and liberally construed, need only present the gist of a constitutional claim. *People v. Harris*, 224 Ill. 2d 115, 126 (2007). This standard presents a "low threshold" (*Jones*, 211 Ill. 2d at 144) requiring only that the petitioner plead sufficient facts to assert an arguably constitutional claim (*People v. Hodges*, 234 Ill. 2d 1, 9 (2009)).

¶ 27 Where, as here, a petition advances to the second stage of the postconviction process, the State may file a motion to dismiss. 725 ILCS 5/122-5 (West 2012). To survive such motion, a petitioner must make a "substantial showing" that his constitutional rights were violated by supporting his allegations with the trial record or appropriate affidavits. *People v. Domagala*, 2013 IL 113688, ¶ 33 (quoting *People v. Edwards*, 197 Ill. 2d 239, 258 (2001) ("At this stage, the circuit court must determine whether the petition and any accompanying documentation make a 'substantial showing of a constitutional violation.' ")); *People v. Simpson*, 204 Ill. 2d 536, 546-47 (2001). At the second stage of proceedings, all well-pleaded facts that are not positively rebutted by the trial record are taken as true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006); see also *People v. Towns*, 182 Ill. 2d 491, 501 (1998) ("In determining whether to grant an evidentiary hearing, all well-pleaded facts in the petition and in any accompanying affidavits are taken as true."). In addition, the trial court may not "engage in fact-finding or credibility determinations," and any factual disputes raised by the pleadings must be advanced to and resolved at an evidentiary hearing. See *People v. Childress*, 191 Ill. 2d 168, 174 (2000); *Domagala*, 2013 IL 113668, ¶ 35. A

petitioner's nonfactual assertions which amount to conclusions are insufficient to require an evidentiary hearing. *People v. Rissley*, 206 Ill. 2d 403, 412 (2003). Our supreme court has stated:

> "The second stage of postconviction review tests the legal sufficiency of the petition. Unless the petitioner's allegations are affirmatively refuted by the record, they are taken as true, and the question is whether those allegations establish or 'show' a constitutional violation. In other words, the 'substantial showing' of a constitutional violation that must be made at the second stage [citation] is a measure of the legal sufficiency of the petition's well-pled allegations of a constitutional violation, *which if proven* at an evidentiary hearing, would entitle petitioner to relief." *Domagala*, 2013 IL 113688, ¶ 35.

¶ 28 A third stage evidentiary hearing is only required when the allegations of the petition, supported by the trial record and accompanying affidavits, make a substantial showing of a violation of a constitutional right. *People v. Hobley*, 182 Ill. 2d 404, 427-28 (1998). We review a circuit court's dismissal of a postconviction petition at the second stage, as here, *de novo*. *Pendleton*, 223 Ill. 2d at 473; *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 28.

¶ 29 i. The Ineffective Assistance of Trial Counsel

¶ 30 On appeal, petitioner first contends that his postconviction petition makes a substantial showing that trial counsel rendered ineffective assistance. According to petitioner, he was denied his constitutional right to effective representation of trial counsel where trial counsel failed to request a jury instruction on second-degree murder. He argues that: (1) counsel performed unreasonably when he refused to request this instruction; and (2) counsel's

conduct prejudiced him where, had counsel requested the instruction, the court would have given a second-degree murder instruction and, "in light of the evidence" presented at trial, "there was a reasonable probability" that defendant would have been convicted of second-degree murder rather than first degree murder. We agree.

¶ 31 Claims of ineffective assistance of trial counsel are evaluated under the two-prong test established in *Strickland v. Washington*, 466 U.S. 668, 690 (1984); *People v. Albanese*, 104 Ill. 2d 504 (1984) (adopting *Strickland*). Under that test, a defendant must demonstrate that (1) counsel's performance was objectively unreasonable compared to prevailing professional standards; and (2) he was prejudiced by counsel's conduct, *i.e.*, that but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *People v. Patterson*, 2014 IL 115102, ¶ 81; see also *Domagala*, 2013 IL 113688, ¶ 36 (quoting *Strickland*, 466 U.S. at 694) ("a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' "). Failure to establish either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. See *People v. Henderson*, 2013 IL 114040, ¶ 11; *Patterson*, 217 Ill. 2d at 438.

¶ 32 To satisfy the first prong, a defendant must overcome the presumption that contested conduct which might be considered trial strategy is generally immune from claims of ineffective assistance of counsel. *People v. Martinez*, 348 Ill. App. 3d 521, 537 (2004); *People v. Burks*, 343 Ill. App. 3d 765, 775 (2003). Establishing the prejudice prong of *Strickland* requires a "showing of actual prejudice and not simply speculation that the defendant may have been prejudiced." *Patterson*, 2014 IL 115102, ¶ 81. A petitioner must

show a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Patterson*, 2014 IL 115102, ¶ 81. A "reasonable probability" is defined as a demonstration sufficient to undermine confidence in the outcome of the trial, rendering the result unreliable or fundamentally unfair. *Martinez*, 348 Ill. App. 3d at 537 (citing *People v. Evans*, 209 Ill. 2d 194, 220 (2004)).

¶ 33 Effective assistance of counsel in a constitutional sense means competent, not perfect, representation. *People v. Easley*, 192 Ill. 2d 307, 344 (2000). Courts indulge in the strong presumption that counsel's performance fell within a wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 690; *People v. McGee*, 373 Ill. App. 3d 824, 835 (2007).

¶ 34 "Based on the second-stage [postconviction] procedural posture of the instant case, the relevant question is whether the allegations of the petition, supported by the trial record and the accompanying affidavits, demonstrate a substantial constitutional deprivation which requires an evidentiary hearing." *Makiel*, 358 Ill. App. 3d at 106 (citing *Coleman*, 168 Ill. 2d at 381).

¶ 35 Jury instructions convey to the jury the correct principles of law applicable to the evidence presented at trial so that the jury may arrive at the correct conclusion according to the law and the evidence. *People v. Mohr*, 228 Ill. 2d 53, 65 (2008); *People v. Hudson*, 222 Ill. 2d 392, 399 (2006). A defendant is entitled to an instruction on his theory of the case where there is some evidence to support the giving of the instruction. *People v. Jones*, 219 Ill. 2d 1, 31 (2006); *People v. DiVencenzi*, 183 Ill. 2d 239, 249 (1998). Slight evidence is sufficient to meet the evidentiary requirement. *People v. Couch*, 387 Ill. App. 3d 437,443-44 (2008). Instructions not supported by either the evidence or the law should not be given. *Mohr*, 228 Ill. 2d at 66.

¶ 36 "[W]hen the trial court gives an instruction on the justifiable use of force, the court has determined that the record contains evidence of the defendant's subjective belief that the use of force was necessary to defend himself. As [*People v.*] *Lockett* noted, it is not the trial judge's role to weigh the evidence and decide whether that belief was reasonable or unreasonable." *People v. Washington*¸ 2012 IL 110283, ¶ 43 (citing *People v. Lockett*, 82 Ill. 2d 546, 553 (1980).

¶ 37 When a court has determined that the giving of an instruction on self-defense is warranted and the defendant has requested a second-degree murder instruction, the court must also provide the jury with an instruction on second-degree murder. *Washington*, 2012 IL 110283, ¶ 56. Where a defendant requests a second-degree murder instruction, our supreme court has specifically held:

> "We today reiterate *Lockett's* holding that when the evidence supports the giving of a jury instruction on self-defense, an instruction on second degree murder must be given as a mandatory counterpart. A failure to do so deprives the jury of the ability to make a factual determination as to whether the defendant had a subjective belief in the necessity for the use of force in self-defense but that belief was unreasonable." *Washington*, 2012 IL 110283, ¶ 56.

¶ 38 The decision about whether to submit instructions on a lesser charge is a defendant's to make. *People v. Brocksmith*, 162 Ill. 2d 224, 229 (1994); *People v. Dupree*, 397 Ill App. 719, 734-35 (2010) (even though, technically, second-degree murder is not a lesser included offense of first degree murder, the considerations that apply in deciding whether to tender a lesser included offense instruction apply in determining whether to tender a second-degree

murder instruction in addition to a first-degree murder instruction and, therefore, the decision belongs to the defendant).

¶ 39 With these principles in mind, we determine that it is at least arguable that petitioner was prejudiced when a second-degree murder instruction was not tendered to the jury. That is, there was slight evidence that supported the giving of a second-degree murder instruction where a self-defense instruction was given, and arguably a reasonable probability that petitioner would have been convicted of that offense.

¶ 40 We first consider whether defendant has made a substantial showing that his trial counsel's performance was objectively unreasonable compared to prevailing professional standards. See *Patterson*, 2014 IL 115102, ¶ 81. We find that it was. Defendant claims in his supporting affidavit that he "desired an instruction to be given to the jury on self-defense and second-degree murder." He also claims: "My counsel never asked me if I wanted an instruction on second degree murder. I told my counsel I wanted an instruction on second degree murder." Nothing in the record refutes this assertion. See *Pendleton*, 223 Ill. 2d at 473 (At the second stage of proceedings, all well-pleaded facts that are not positively rebutted by the trial record are taken as true); see also *Towns*, 182 Ill. 2d at 501 ("In determining whether to grant an evidentiary hearing, all well-pleaded facts in the petition and in any accompanying affidavits are taken as true."). In addition, because the trial court instructed the jury on self-defense, it would also have instructed the jury on second-degree murder if defendant's counsel had so requested. See *Washington*, 2012 IL 110283, ¶ 56 (When a court determines that the giving of an instruction on self-defense is warranted and the defendant also requests a second-degree murder instruction, the court must also provide the jury with the second-degree murder instruction). The decision to request a second-degree

murder instruction belonged to defendant and not to counsel. See *Dupree*, 397 Ill. App. 3d at 734-35 (the decision whether to request a second-degree murder instruction belongs to the defendant).

¶ 41 Given the above, we determine that the record does not refute petitioner's claim in his petition and on appeal that his attorney alone made the decision not to tender a second-degree murder instruction. Because petitioner, and not counsel, had the right to decide whether to tender that instruction, we find that counsel's performance in this regard arguably fell below an objective standard of reasonableness.

¶ 42 We also find that defendant was prejudiced by counsel's unreasonable assistance. A defendant is guilty of second-degree murder if the elements of first-degree murder are established in addition to a statutory mitigating factor. See 720 ILCS 5/9-2(a) (West 2012). One of those mitigating factors, which applies in this case, is that defendant was acting in defense of himself or others when the victim was killed, but defendant's belief that deadly force was necessary was unreasonable. See 720 ILCS 5/9-2(a); 720 ILCS 5/9-1(a) (West 2012). In other words, to obtain a conviction on the lesser charge of second-degree murder, defendant would have had to prove by a preponderance of the evidence (see 720 ILCS 5/9-2(c) (West 2012)) that, at the time of the killing of Harris, he unreasonably believed that the circumstances were such that, had they existed, would have justified or exonerated the killing under article 7 of the Code (720 ILCS 5/7-1 *et seq.* (West 2012)). The evidence at trial was sufficient to create the reasonable probability that defendant would have carried this burden.

¶ 43 Here, the justification presented to the jury was self-defense (720 ILCS 5/7-1 (West 2012)). In finding petitioner guilty of first-degree murder, the jury rejected the theory of self-defense, that is, the jury rejected petitioner's affirmative defense that he shot Harris out

of a *reasonable* belief that he needed to defend himself or another against Harris' imminent use of force (720 ILCS 5/7-1 (West 2012)). Regardless, we think there was sufficient evidence presented at trial from which the jury could have found that petitioner shot Harris because he *unreasonably* believed that doing so was necessary in self-defense or in defense of another.

¶ 44 Specifically, witness Kenneth Smith testified he heard two or three gunshots, then a pause, and then another series of several more shots. Smith believed the two sets of gunshots to be from two different guns because the first set was louder than the second set. He did not actually see anybody shooting a gun. Additionally, witness Loren Robertson testified that he heard two gunshots but did not see the shooter of the first two gunshots. Then, Robertson looked toward the sound and saw petitioner fire two shots. Robertson could not see what petitioner was shooting at. As Robertson ran away, he heard another 3 or 4 shots ring out. Forensic evidence was admitted at trial showing that six bullet casings were found at the crime scene, two from petitioner's gun and four from the gun recovered from Parker. The two casings determined to have come from petitioner's gun were found near the area where Robertson saw petitioner shooting. The four casings from Parker's gun were found near where Parker was standing. Petitioner testified that he did not intend to shoot Harris. Rather, petitioner only returned fire after Parker started shooting at him. Harris ran toward Parker at that time. Petitioner testified he was only shooting to scare Parker so that Parker would "run for cover and stop shooting the direction of me and [Monroe and Harris]" and to "protect me and [Monroe] because [Parker] was shooting in our direction."

¶ 45 There is arguably a reasonable probability that defendant would have been convicted of second-degree murder had the jury been so instructed. This is so because, when

considering the evidence presented as a whole, including witness testimony that there were at least two sets of shots from different guns, that defendant was seen firing the second set of two shots, that only two of the six recovered bullet casings were fired from defendant's gun, and that the other four recovered casings were fired from a weapon recovered from Parker, as well as defendant's own testimony that he was returning fire in order to protect himself and others, the jury could reasonably have found that, at the time of the killing of Harris, defendant unreasonably believed the circumstances were such that, if they existed, would have justified or exonerated the killing where defendant was acting in defense of himself or others when he killed Harris. See 720 ILCS 5/9-2 (West 2012); 720 ILCS 5/7-1 *et seq*. (West 2012).

¶ 46 If at an evidentiary hearing petitioner can show that he, in fact, asked his trial counsel to request a second-degree murder jury instruction, and counsel, in fact, determined on his own not to request such instruction, petitioner will have shown he was deprived of the effective assistance of trial counsel where: (1) trial counsel's performance was insufficient because the decision to request a second-degree jury instruction belongs to the defendant; and (2) petitioner was prejudiced because, if requested, the court would have instructed the jury on second-degree murder because it was also instructing on self-defense, and, had the jury been so instructed, there was a reasonable probability that, on the evidence before it, it could have determined petitioner had an unreasonable belief that the force was necessary.

¶ 47 For these reasons, we reverse the decision of the trial court as to the ineffective assistance of trial counsel issue and remand for a third-stage evidentiary hearing.

¶ 48 ii. The Ineffective Assistance of Postconviction Counsel

¶ 49 Next, petitioner contends his privately retained postconviction counsel rendered ineffective assistance because he failed to attach the necessary evidentiary support for particular claims to petitioner's postconviction petition. Specifically, petitioner argues that, because postconviction counsel[4] failed to support petitioner's claims that a juror was prejudiced against him by obtaining the necessary affidavits, and because postconviction counsel failed to obtain an affidavit from the other shooter in support of defendant's claim of self-defense admitting that he shot first, this court should remand for new second-stage proceedings. We disagree.

¶ 50 The right to representation in the postconviction context is statutory. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). In Illinois, " 'the right to counsel at post-conviction proceedings is a matter of legislative grace and favor which may be altered by the legislature at will.' " *People v. Porter*, 122 Ill. 2d 64, 72 (1988) (quoting *People v. Ward*, 124 Ill. App. 3d 974, 978 (1984)). Because the right to counsel in such proceedings is wholly statutory (see 725 ILCS 5/122-4 (West 2012)), petitioners are entitled only to the level of assistance provided by the Act, which has been determined to be a " 'reasonable level of assistance.' " *People v. Turner*, 187 Ill. 2d 406, 410 (1999) (quoting *People v. Owens*, 139 Ill. 2d 351, 364 (1990)).[5] "[T]he absence of affidavits, records or other evidence in support of the post-conviction petition renders the petition insufficient to require an evidentiary hearing." *People v. Johnson*¸ 154 Ill. 2d 227, 240 (1993). "In the ordinary case, a trial court ruling

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[4] The postconviction counsel in question, who was a different attorney than trial counsel, is now deceased.

[5] Petitioner points out that *People v. Cotto*, in which this division of this court recently held that the Act does not grant a defendant the right to effective assistance of retained postconviction counsel has been accepted by our supreme court for review. *People v. Cotto*, 2015 IL App (1st) 123489 (petition for leave to appeal granted, No. 119006, May 27, 2015). This fact does not change our decision in this cause.

upon a motion to dismiss a post-conviction petition which is not supported by affidavits or other documents may reasonably presume that post-conviction counsel made a concerted effort to obtain affidavits in support of the post-conviction claims, but was unable to do so." *Johnson*, 154 Ill. 2d at 241.

¶ 51 Illinois Supreme Court Rule 651(c) imposes specific duties on postconviction counsel to ensure he provides effective assistance. *People v. Suarez*, 224 Ill. 2d 37, 42 (207). Under Rule 651(c), postconviction counsel is required to: (1) consult with the defendant to ascertain his allegations of how he was deprived of his constitutional rights; (2) examine the record of proceedings from the trial; and (3) amend the defendant's *pro se* petition as necessary to adequately present his contentions. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). Where a Rule 651(c) certificate is filed, the presumption is raised that the postconviction petitioner received the required representation by counsel during second-stage proceedings. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23. Both parties in the case at bar recognize that Rule 651(c) does not apply here because the defendant did not file a *pro se* postconviction petition. See *People v. Richmond*, 188 Ill. 2d 376, 383 (1999) (Rule 651(c) only applies when a defendant initially filed a *pro se* postconviction petition).

¶ 52 The allegations regarding Juror Moore in petitioner's postconviction petition are the following:

> "10. Defendant was denied due process and the right to a fair jury when selected without objection was a juror, Christopher Moore. *** This denied defendant due process and the right to a fair jury because this juror who worked as a jail guard worked at same division where defendant was incarcerated and

surely knew defendant. This juror worked in Division 11 when defendant was a prisoner there.

At the beginning of the jury process, the court asked prospective jurors whether they knew defendant. What occurred is as follows:

> 'The Court: All right. Good afternoon, everyone. My name is Judge Bertina Lampkin. You're in Courtroom 506, and you are here today to sit as prospective jurors in the case of the People of Illinois versus Otis Blackmon
>
> Mr. Blackmon, if you could just stand up for a moment.
>
> If anyone knows Mr. Blackmon, please raise your hand. All right. The record should reflect that no one has raised their hand. ***'

For the juror to misadvise the court denied defendant his constitutional rights.

11. During jury selection, defendant recognized one of the many jurors brought in to be questioned. Defendant then told defense attorney, John W. Wyatt. Mr. Wyatt then asked defendant which one. Defendant then pointed to Officer Moore. Mr. Wyatt said, 'the black guy?' Defendant said 'Yes.' Mr. Wyatt then asked defendant, 'Where do you know him from?' Defendant then said 'From the jail. He worked Div. 11 where I'm at.'

12. Defendant was denied the right to a fair jury because during trial Officer Moore talked to other officers about defendant's trial.

13. Defendant also was denied effective assistance of counsel when counsel being informed of action of Officer Moore during defendant's jury trial took no action to raise that issue in a Motion for a New trial."

Additionally, by the affidavit attached to the petition, defendant attested:

"2. I told counsel that prospective juror Moore was a prison guard at the jail and knew me.

3. I also told my attorney that prison guard/juror Moore was speaking during trial about the case with other guards."

Petitioner also attached a transcript of *voir dire* in which Moore informed the court that he was employed by the Cook County Department of Corrections.

¶ 53 On appeal, defendant now argues that postconviction counsel should have substantiated his allegations with more documentation, including: Juror Moore's affidavit stating that he knew petitioner and that he spoke about petitioner's case during trial; and affidavit from Cook County Department of Corrections verifying Moore's employment; and affidavits from "other officers" that worked at the Department of Corrections at the same time as Moore "stating that Moore talked to them about Blackmon's case." All of this evidence that petitioner believes exists and should have been brought in is based on pure speculation. Other than petitioner's own statement, there is no evidence that Moore actually knew defendant. Even taking as true that Moore worked in the Department of Corrections at the time petitioner was housed there, and taking as true that petitioner recognized Moore as a jail guard, there is nothing before the court that shows Moore himself recognized or knew petitioner. In fact, the trial court asked the venire if they recognized petitioner, and none of them—including Moore—indicated that they did. There is no reason to believe

postconviction counsel could have obtained an affidavit from Juror Moore stating that he knew petitioner and admitting that he talked about the case to other officers during petitioner's trial.

¶ 54 Additionally, there is no reason to believe postconviction counsel could have obtained affidavits from the unnamed prison guards with whom Juror Moore allegedly spoke during defendant's trial. Petitioner does not name them in his petition, nor attempt to describe them. Petitioner does not claim in his petition or his affidavits that these parties would attest to any of this information. Nor does petitioner explain how he came to find out about Juror Moore's alleged wrongdoing, or offer a name of the person from whom he received this information. Petitioner merely speculates as to what Juror Moore may have said or done or known, and does not provide the court with any information as to how he allegedly came about this information.

¶ 55 Petitioner also argues on appeal that postconviction counsel should have provided Elijah Parker's affidavit to support petitioner's claim that he was denied the effective assistance of trial counsel when counsel failed to call Parker as a defense witness at trial to support his claim for self-defense. Petitioner's pertinent argument in his petition is:

> "14. Defendant was denied effective assistance of counsel when defense counsel failed to call as a defense witness Elijah Parker. His testimony would have supported defendant's self-defense claim. This was recognized by the Appellate Court when it stated:
>
> > 'After driving around looking for Parker and Harris, Monroe dropped defendant off at a gas station across the street from the project so defendant could maintain "surveillance." Monroe found

> Harris and asked him about the money when defendant spotted Parker coming toward Monroe. Defendant crossed the street and pulled out his gun. Parker fired at least four shots toward Monroe and defendant, striking Harris in the hand. Defendant fired two shots into the courtyard in Parker's direction. As Harris ran across the courtyard, defendant shot him in the back of the head.' (Order, p. 2)
>
> 15. Counsel did not put Parker on the list of defense witnesses. That is why Parker was not called."

Defendant does not allege in his petition or his affidavits that Parker would have testified accordingly at trial. Again, there is no reason to believe Parker, who was petitioner's enemy and with whom there was an escalating dispute that culminated in a fatal shoot-out, would have provided an affidavit supporting defendant's position at trial.

¶ 56 Petitioner's argument regarding the ineffective assistance of postconviction counsel is based on pure speculation. The record, when considered as a whole, demonstrates that postconviction counsel adequately represented defendant such that petitioner is unable to overcome the presumption that postconviction counsel provided petitioner with a reasonable level of assistance. See, *e.g.*, *Johnson*, 154 Ill. 2d at 241 ("a trial court ruling upon a motion to dismiss a post-conviction petition which is not supported by affidavits or other documents may reasonably presume that post-conviction counsel made a concerted effort to obtain affidavits in support of the post-conviction claims, but was unable to do so"). Accordingly, we cannot say that postconviction counsel provided inadequate representation for failing to obtain additional affidavits to support petitioner's postconviction petition.

¶ 57 III. CONCLUSION

¶ 58 For all of the foregoing reasons, this cause is reversed and remanded to the trial court for further proceedings as to the claim of the ineffective assistance of trial counsel, and affirmed as to the claim of the ineffective assistance of postconviction counsel.

¶ 59 Affirmed in part; reversed and remanded in part.