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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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THE PEOPLE OF THE STATE OF	)	Appeal from the
ILLINOIS,	)	Circuit Court of
	)	Cook County.
Respondent-Appellee,	)	
	)	No. 04 CR 4297
v.	)	
	)	Honorable
MICHAEL EDGLESTON,	)	Thaddeus L. Wilson,
	)	Judge, presiding.
Petitioner-Appellant.	)	

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JUSTICE COBBS delivered the judgment of the court.  
Presiding Justice Fitzgerald Smith and Justice Lavin concurred in the judgment.

**ORDER**

¶ 1 *Held:* Trial court erred in summarily dismissing defendant's postconviction where defendant's petition stated an arguable claim for constitutional violations.

¶ 2 This appeal arises from the summary dismissal of defendant Michael Edgleston's postconviction petition. The trial court dismissed defendant's petition as frivolous and patently without merit. On appeal, defendant contends that the court erred because he stated arguable claims that (1) his trial counsel was ineffective for failing to file a motion to suppress his confession; and (2) his appellate counsel was ineffective for failing to challenge

the trial court's ruling admitting inadmissible hearsay evidence and his trial counsel was ineffective for opening the door to the otherwise inadmissible hearsay evidence. For the following reasons, we reverse and remand.

¶ 3

### BACKGROUND

¶ 4

Following a jury trial, defendant was convicted of three counts of felony murder for the deaths of three brothers, Rashawn, Washawn, and Vincent Austin. At trial, Chicago police officer Daniel Stuck testified that on December 9, 2003, he received a call to respond to multiple shots fired at 1440 West 13th Street. Stuck went to the lobby of the building, which was "unusually vacant of pedestrians," and observed three victims lying on the floor. Although two of the victims were conscious, they did not inform Stuck who had shot them. Approximately five to ten minutes later the paramedics arrived. As the officers were helping the victims exit the building, people began to gather in the lobby. Stuck asked the crowd if anybody had seen anything related to the shootings but he did not receive any information.

¶ 5

Chicago police officer Giovanni Crespo testified that at approximately 7:34 p.m. on December 9, 2003, he received a call of shots fired at 1440 West 13th Street, one of the Chicago Housing Authority Alba Homes. Crespo entered the back entrance of the building where the lobby was located. He observed people coming into and out of the lobby and three "kids" lying on the ground. Crespo looked around and saw some shell casings. After the victims were taken to the hospital, Crespo remained at the scene. He and his partner were responsible for making a canvass report and they attempted to talk to people who were coming and going from the building but they did not receive any information. Crespo testified that although at least one of the victims was conscious at the scene, he was not able

to receive information about the shooter. In fact, one of the victims told him "Leave me alone, I'm dying."

¶ 6 Prior to the next witness' testimony, the State sought clarification from the court regarding what evidence of the investigation would be admissible. The State informed the court that police officers showed witnesses a photo array and had conducted a lineup from which witnesses identified defendant, however, none of those witnesses would be testifying. Although the actual identifications could not be introduced, the State wanted to ask Climack questions that would show that witnesses were interviewed and were shown a photo array that included defendant. Defense counsel objected, arguing that testimony that defendant was in a photo array and then was charged would amount to showing the jury that non-testifying witnesses had identified him. The court concluded that the State could not ask that series of questions on direct, however, if defense counsel argued that the detectives did not properly investigate this case or that they did not have any evidence, then the court would allow the State to question witnesses about the photo array and lineup on re-direct examination.

¶ 7 Detective John Climack testified that on December 10, 2003, he was assigned to follow up on the investigation of the Austin brothers' deaths. Climack went to the scene of the shooting and attempted to find witnesses but was unable to find any. Climack was then notified that there was a woman in police custody on another matter who had information regarding the shooting. Climack interviewed her and determined that she was not actually at the scene of the shooting. However, the interview led Climack to seek an interview with a woman named Helena Freeman, which led him to subsequent interviews with Lola Baggett, Bohannon Walker, and Terry West. As a result of these interviews, Climack issued an investigative alert for defendant.

¶ 8 Detective Roger Sandoval testified that on December 13, 2003, he obtained an arrest warrant for defendant and defendant was subsequently arrested on January 18, 2004. When defendant was arrested, Sandoval advised him of his *Miranda* warnings and defendant indicated that he understood his rights. At approximately 8 p.m., defendant was then taken to the Area 4 police headquarters. Sandoval's partner Gene Slater read defendant his rights and defendant again indicated that he understood. Slater then interviewed defendant for approximately 15 minutes. At some point defendant stated that he was hungry and Sandoval brought him some food. Sandoval testified that when defendant needed something he would knock on the door, which he did a few times to use the bathroom.

¶ 9 Around midnight Sandoval had another conversation with defendant. Sandoval read defendant his *Miranda* rights for a third time and defendant stated that he understood his rights and was willing to talk to him. During that conversation defendant told Sandoval that he wanted to be truthful. He said that he was aware that the police were looking for him because he had seen himself on the news. Defendant said that the police only had one side of the story and he wanted to tell them his side. Then defendant told Sandoval that on December 9, 2003, he walked into the rear entrance of 1440 West 13th Street wearing a bullet proof vest and carrying a .40-caliber handgun intending to rob people in the lobby. However, when he walked into the lobby he saw Rashawn, whom he knew, selling drugs. Defendant asked Rashawn if he was armed and Rashawn told him that he was not. Defendant then told Rashawn to give him his money, and took approximately \$100 and a couple of bags of crack cocaine. Shortly afterwards, Vashawn and Vincent walked up to the men. Rashawn asked Vashawn if he had a gun and Vashawn said "yes" and lifted his jacket showing a handgun tucked into his waistband. Vincent then approached defendant and told him to give the

money back to Rashawn. The brothers lined-up facing defendant and Vincent continued to ask defendant to give back the money but defendant refused. At some point Vincent placed his hand in his pocket and defendant believed he was reaching for a gun so he shot Vincent. The two other brothers began to run away but defendant shot them. When he saw the bodies drop to the ground he ran out of the building. He called someone to pick him up and then sold the gun in a different neighborhood so that it "wouldn't come back."

¶ 10 After defendant confessed, Sandoval called the State's Attorney's Felony Review Unit. Assistant State's Attorney Ted Lagerwall arrived at the Area 4 police headquarters and interviewed defendant again. Lagerwall explained that he was an assistant state's attorney and advised defendant of his constitutional rights. Defendant indicated that he understood. Defendant then told Lagerwall essentially the same story that he had told Sandoval regarding the deaths of the Austin brothers. Defendant added that he was a member of the New Breeds gang and that the Austin brothers were also members of the gang. He explained that the gang had a rule that if one of their members was selling drugs he was supposed to have a gun. Therefore, defendant had a right to take Rashawn's money when he found him selling drugs without a gun.

¶ 11 The next day, at approximately 7 p.m., Assistant State's Attorney James Papa was called to the Area 4 police headquarters. After being apprised of the situation, Papa interviewed defendant again at approximately 3:45 a.m. Papa gave defendant his *Miranda* warnings and defendant relayed essentially the same story of the Austin brothers' deaths to Papa. Papa told defendant that he had a few options for how his statement could be memorialized, including in a handwritten statement, in a video recording, by a court reporter, or it could remain an oral statement. Defendant chose to have his confession remain an oral statement.

¶ 12 On cross examination Sandoval admitted that they never showed defendant his *Miranda* rights in written form or asked him to sign a waiver indicating that he understood his rights. Defense counsel asked Sandoval whether Lagerwall had approved charges after defendant had confessed to him and Sandoval answered that Lagerwall did not approve charges. Later in the cross examination, defense counsel asked whether Papa had approved charges after hearing defendant's confession, and Sandoval answered that Papa did not approve charges and the investigation was incomplete at that time. Defense counsel also asked Sandoval if he took any pictures of defendant while he was at Area 4 police headquarters. Sandoval answered "I don't believe any pictures were taken."

¶ 13 Prior to redirect examination of Sandoval, the State argued in a sidebar that defense counsel had opened the door to questions regarding the lineup. He asserted that defense counsel's questioning suggested that something was wrong with defendant's confession because charges were not approved after Lagerwall and Papa interviewed defendant. The assistant state's attorney explained that the reason charges were not approved at that time was because the officers were waiting to bring individuals in to view a lineup. The assistant state's attorney further argued that defense counsel opened the door to having the photo of the lineup, which included defendant, introduced because she specifically asked Sandoval whether any photos were taken. Sandoval had to answer negatively in order to comply with the court's ruling on a motion *in limine* barring the photo. Over defense counsel's objection, the court allowed the assistant state's attorney to ask some additional questions regarding the investigation. In doing so it reasoned:

"the defense did inquire as to whether or not this investigation was continued at the request of the State's Attorneys and that charges were not approved. There is an implication that something else had occurred.

I believe this defense has opened the door to some extent, however, I do not believe that it is still appropriate to bring out that the defendant was included in any photo array.

You may inquire about what has gone on in the investigation in the meantime based on their question, but you can not [*sic*] at this time bring out the fact that there were photo arrays that included the defendant."

The court also found that defense counsel had opened the door in regard to the lineup photo and allowed it to be admitted. Thereafter, on re-direct examination, Sandoval was asked whether a lineup was conducted. Sandoval answered "Yes." The assistant state's attorney then asked whether charges were approved later that day and Sandoval answered "Yes." The photo of the lineup with defendant and other individuals was then introduced and admitted into evidence.

¶ 14 Papa testified consistently with Sandoval's testimony. He additionally stated that defendant told him that it was the New Breeds' policy that if a member was found selling drugs without a gun that you could take his money and his drugs. Defendant also stated that one of the brothers had asked him if defendant was going to give back the money because they were all in the same gang, and it was at that point that defendant realized he needed to shoot all three of them or they would kill him.

¶ 15 No eyewitnesses testified and the only evidence presented against defendant was his oral confession. His confession was not videotaped, was not written, and he did not sign any documents that indicated that he was waiving his right to counsel. Defendant did not testify

and did not present a case in chief. A jury convicted defendant of three counts of felony murder and he was sentenced to natural life in prison.

¶ 16 On direct appeal, defendant argued that the State failed to prove the charges beyond a reasonable doubt, the prosecutor made improper remarks during rebuttal closing argument, and the trial court erred when it prevented defense counsel from questioning the venire about the credibility of prosecutors. *People v. Edgleston*, 2011 IL App (1st) 080964-U. The appellate court affirmed defendant's convictions. *Id.* Thereafter, defendant filed a *pro se* postconviction petition with 70 pages of supporting documentation. The court summarily dismissed defendant's petition at the first stage of postconviction proceedings. In doing so the court explained that defendant's claims fail because he was unable to overcome the presumption that his counsel's decision against filing a motion to suppress and questioning on cross-examinations were matters of sound trial strategy.

¶ 17

## II. ANALYSIS

¶ 18

### A. Claim that Trial Counsel was Ineffective

¶ 19

Defendant first contends that his postconviction petition should not have been dismissed at the first stage of postconviction proceedings because he stated an arguable claim that trial counsel was ineffective for failing to move to suppress his confession. Specifically, he argues that he repeatedly asked for an attorney and medical treatment for a sexually transmitted disease during interrogation. He further alleges that he told his trial attorney this information but his trial attorney nevertheless failed to file a motion to suppress. Defendant asserts that this failure was unreasonable and he was prejudiced because his confession was the only evidence against him at trial. The State responds that the court did not err in dismissing the petition because his factual allegations were "delusional," unsupported, and affirmatively



rebutted by the record. The State further argues that defendant consented to the "strategic decision" not to seek suppression because he stated that he "was happy" with his representation at trial.

¶ 20 The Postconviction Hearing Act (Act) provides a procedural mechanism by which a convicted criminal can assert that there was a substantial denial of his or her federal or state constitutional rights in the proceedings that resulted in the defendant's conviction. 725 ILCS 5/122-1(a) (West 2012); *People v. Coleman*, 183 Ill. 2d 366, 378 (1998). In non-capital cases, a postconviction proceeding has three distinct stages. 725 ILCS 5/122-1; *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). At the first stage, the circuit court independently reviews the petition to determine whether it is "frivolous or patently without merit." *Id.* A claim is "frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." *Id.* at 12. Thus, at the first stage the defendant need only meet the "low threshold" of stating a "gist" of a claim. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). At this stage, all factual allegations are taken as true as long as they are not affirmatively rebutted by the record. *People v. White*, 2014 IL App (1st) 130007, ¶ 18. However, a claim based on an unquestionably meritless legal theory that is disputed by the record is not sufficient to withstand first stage review. *Id.* If a petition is found to be frivolous or patently without merit it must be dismissed. *Hodges*, 234 Ill. 2d at 10. A petition that is not dismissed advances to the second stage where the defendant may be appointed counsel and where the State may file a motion to dismiss or an answer to the petition. *Id.* at 10-11. "It is at this point, not the first stage, where the postconviction petition can be said to be at issue, with both sides engaged and represented by counsel." *People v. Tate*, 2012 IL 112214, ¶ 10. We review the dismissal of a postconviction petition at the first stage *de novo*. *White*, 2014 IL

App (1st) 130007, ¶ 18. If the petition states an arguable claim on one of the alleged errors, the entire petition must be remanded for further proceedings, regardless of the merits of any other claims. *People v. Cathey*, 2012 IL 11746, ¶ 34.

¶ 21 For a successful claim alleging ineffective assistance of counsel, a defendant must show both that counsel's performance was objectively unreasonable and that the defendant was prejudiced by the unreasonable representation. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). However, a postconviction petition cannot be summarily dismissed at the first stage "if (i) it is *arguable* that counsel's performance fell below an objective standard of reasonableness and (ii) it is *arguable* that the defendant was prejudiced." (Emphasis in original.) *Tate*, 2012 IL 112214, ¶ 19 (quoting *Hodges*, 234 Ill. 2d at 17). Here, defendant alleged, *inter alia*, that his trial counsel was ineffective for failing to file a motion to suppress his confession. He asserts quite clearly in his postconviction petition that he told his trial attorney that while he was being interrogated he had asked for an attorney and for medical treatment and was denied both. These allegations, taken as true, would have provided sufficient grounds for counsel to have filed a motion to suppress the confession as involuntary. See *People v. Schuning*, 399 Ill. App. 3d 1073, 1082 (explaining that an accused's statement is presumed involuntary if questioned after right to counsel has been invoked); *People v. Hughes*, 2015 IL 117242, ¶ 31 (noting that to determine whether a confession was voluntary the court weighs, among other things, defendant's physical condition). Thus, because counsel could have filed a motion to suppress the confession and did not do so when it was the only evidence against defendant, defendant stated an arguable basis that his counsel's performance fell below an objective standard of reasonableness. In

addition it is arguable that failure to file the motion prejudiced defendant because the confession was the only evidence presented against him at trial.

¶ 22 The State contends that the court properly dismissed defendant's petition at the first stage because the record rebuts defendant's claim that counsel was ineffective. The State specifically argues that the record affirmatively demonstrates the strategic nature of counsel's decisions, and consequently defendant's claims are rebutted. Defendant asserts that our supreme court made clear in *People v. Tate*, 2012 IL 112214, that trial strategy is an inappropriate consideration at first stage postconviction proceedings.

¶ 23 In *Tate*, the court clarified that under the first stage of postconviction proceedings a defendant's claims of ineffective assistance of counsel are judged under a lower pleading standard than at the second stage. *Id.* ¶ 20. The court rejected the State's argument that the defendant's petition had no arguable basis in law or fact because his counsel had a strong strategic reason for the alleged ineffective representation. *Id.* ¶ 21. The court explained that arguments regarding trial strategy are "more appropriate for the second stage of postconviction proceedings, where both parties are represented by counsel, and where the petitioner's burden is to make a substantial showing of a constitutional violation." *Id.* ¶ 22. The court further admonished that "[t]he State's strategy argument is inappropriate for the first stage, where the test is whether it is arguable that counsel's performance fell below an objective standard of reasonableness and whether it is arguable that the defendant was prejudiced." *Id.*

¶ 24 Thus, according to *Tate*, although a claim of alleged ineffective assistance may ultimately be dismissed at the second stage because the attorney's conduct was reasonable trial strategy, a defendant's petition should not be dismissed at the first stage for this reason. Nevertheless,

the State maintains that *Tate* does not control this case because here the record "affirmatively demonstrates the strategic nature of counsel's decision" whereas in *Tate*, "the record provided only *possible* strategic reasons for counsel's conduct." The State's argument is completely without merit. *Tate* is clear that trial strategy is an inappropriate consideration at the first stage when the court is not considering substantive arguments but merely reviewing the petition for whether it is frivolous and patently without merit.

¶ 25 Additionally, the State contends that defendant's claims are rebutted by the record because it demonstrates that defendant consented to his counsels' decision to not seek suppression of the statement. Without legal support, the State merely points to defendant's statement that he was "happy" with his trial counsel when the court admonished him regarding the concerns of not presenting a case in chief. We disagree with the State's contention. Defendant's confirmation that he was satisfied with his counsels' representation in relation to their decision to not present a case in chief does not affirmatively rebut his claim in his petition that he told his attorneys that he had asked for counsel and medical treatment and they did not file a motion to suppress. In addition, the fact that he stated he was satisfied in that context does not prevent him from asserting in a postconviction petition that his attorneys were ineffective in other matters. Moreover, after review of the record we do not find evidence that his allegations were otherwise affirmatively rebutted. We note that the State does not argue that defendant's assertions are rebutted by the officers' testimony. Nevertheless, we find that, although their testimony may imply defendant did not ask for an attorney or medical treatment, it does not affirmatively demonstrate whether defendant had ever asked for these things.

¶ 26 We also disagree with the State's contention that defendant's claim is "delusional" because he simultaneously alleges that defense counsel told him that he would need to further investigate the alleged misconduct during interrogation before he filed a motion to suppress and that defendant did not need to worry about the confession because it could not be used against him if it was not signed or in writing. These allegations are not so inherently contradictory that it is "delusional" for defendant to assert them both, even if they suggest his attorney misunderstood the law on the admissibility of oral confessions.

¶ 27 We now turn to the State's contention that defendant's claims are not sufficiently supported. The State asserts that defendant did not sufficiently support his claim that his counsel was ineffective for failing to file a motion to suppress because the letters he attached to his petition only demonstrate that he requested his medical records from the Illinois Department of Corrections and Ceramak Health Services at some point in 2010, but they do not indicate that the medical records actually exist or that he made a request for treatment while he was being interrogated. The State further argues that the letters show that defendant had sufficient time to obtain the medical records if they exist. Defendant maintains that he supported his claim to the extent possible by providing trial transcripts and letters indicating that he sought his medical records for the purpose of showing that he had asked for treatment of an STD while he was being interrogated. Defendant also points out that he explained in his petition that additional support would need to be obtained from his trial attorney.

¶ 28 The Act requires that a petition "have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (2012). The purpose of this requirement is to ensure that the allegations in the petition are capable of objective or independent corroboration. *People v. Delton*, 227 Ill. 2d

247, 254 (2008). If a defendant cannot provide supporting documentation, he must explain the reason for its absence. *Id.* Failure to attach the necessary affidavits, records, or other evidence or explain their absence is fatal to the petition and justifies summary dismissal. *Id.* at 255. However, "[f]ailure to attach independent corroborating documentation or explain its absence may, nonetheless, be excused where the petition contains facts sufficient to infer that the only affidavit the defendant could have furnished, other than his own sworn statement, was that of his attorney. *People v. Hall*, 217 Ill. 2d 324, 333, (2005) (citing *People v. Collins*, 202 Ill. 2d 59, 68 (2002)).

¶ 29 Here, defendant attached to his petition: (1) his own affidavit, (2) a response letter dated December 1, 2010, from the Illinois Department of Corrections indicating that defendant had requested his medical records, (3) a letter dated December 4, 2010, to Cermak Health Services seeking his medical records for the purpose of collecting evidence that he "told the arresting officer that [he] was infected with a S.T.D. and needed to see a doctor and was denied," (4) the appellate court order, and (5) trial transcripts. Additionally, defendant stated in his petition:

"I have provided as much objective and independent documentation that I am able to provide at this time. In presenting this affidavit and references to the attached trial records, but request that in light of any other supportive documentation being needed or required, that such other affidavits would have to come from trial counsels and/or their testimony relevant to this matter, therefore, I respectfully request that this Court will grant me an evidentiary-hearing and that Counsel is appointed to assist me in developing the asserted facts governing this claim further."

We agree with the State that even if defendant had obtained his medical records it would not necessarily show that he had asked for treatment while he was interrogated. The corroborating evidence defendant needs to support his claim would need to come from his trial attorneys because it is based on his assertion that he told them that he had asked the police officers for an attorney and medical attention but the requests were ignored. In fact, defendant specifically explains in the petition that evidence corroborating this conversation would need to be provided by his trial counsel and that is why it is absent from his petition. Defendant does not mention, and the record does not otherwise suggest, that there was anyone else present for these conversations who could provide an affidavit substantiating his allegations. The difficulty in obtaining an affidavit from the alleged ineffective counsel is "self-apparent." *Hall*, 217 Ill. 2d at 333-34. Accordingly, we find the documentation attached to defendant's petition sufficient to comply with the Act.

¶ 30 B. Claim that Appellate Counsel Was Ineffective

¶ 31 Defendant next contends that his appellate counsel was ineffective for failing to challenge the trial court's rulings admitting highly prejudicial testimony of non-testifying, out-of-court witness identifications. Specifically, defendant argues that trial counsel's cross examination of Sandoval did not raise issues of whether the police properly investigated the case or committed "malfeasance." Thus, the court should not have allowed the State to introduce evidence that three individuals identified defendant out-of-court. The State asserts that defendant forfeited his claim because defendant did not allege error on behalf of the trial court in his postconviction petition. Alternatively, the State maintains that the public defender's questioning was strategic.

¶ 32 A defendant may not raise a claim for the first time on appeal. *People v. Jones*, 211 Ill. 2d 140, 148 (2004). Thus, to preserve a claim for appellate review, a defendant must raise the claim in his postconviction petition. *People v. Torres*, 228 Ill. 2d 382, 399 (2008). We find that defendant has done so here. In his petition, defendant alleges:

"Clearly Appellate Counsel had an appropriate trial-record to argue ineffective assistance of trial counsel and/or "Alternative" that the trial court abused its discretion and erred when ruling to allow the prosecution to introduce the elicited hearsay in on the theory that trial counsel's had invited the error and opened the door for the inadmissible evidence to be used as a sword to advance the prosecution's case."

We reiterate that the pleading standard at the first stage is low because the petitions are often filed by *pro se* defendants with little knowledge of the law. *Delton*, 227 Ill. 2d at 254. Although a defendant must provide a factual basis for his claims, he "need only present a limited amount of detail \*\*\* and need not make legal arguments or cite to legal authority." *Id.* Accordingly, defendant's statement in his postconviction petition was sufficiently pled to preserve the claim.

¶ 33 Ineffective assistance of appellate counsel is a cognizable claim in a postconviction petition. *People v. Smith*, 326 Ill. App. 3d 831, 851-51 (2001). As noted above, to survive first stage postconviction proceedings, defendant must state a claim that appellate counsel arguably fell below an objective standard of reasonableness and that he was arguably prejudiced. *Tate*, 2012 IL 112214, ¶ 19. Under the doctrine of curative admissibility "where the door to a particular subject is opened by defense counsel on cross-examination, the State may, on redirect, question the witness to clarify or explain the matters brought out during, or remove or correct unfavorable inferences left by, the previous cross-examination." *People v.*



*Manning*, 182 Ill. 2d 193, 216 (1998). The rule does not allow a party to introduce otherwise inadmissible evidence merely because the defendant introduced evidence on that subject. *Id.* Rather, the curative evidence is protective and may only be used to negate adverse inferences. *Id.* at 216-17.

¶ 34 In this case, the record indicates that the trial court allowed the State to present evidence that the police conducted a lineup and that defendant was subsequently charged with the murders of the Austin brothers. The court initially found this evidence to be inadmissible hearsay and prejudicial to defendant. Nevertheless, it allowed the evidence to be admitted under the doctrine of curative admissibility on redirect examination of Sandoval because the court found that defense counsel had opened the door when she asked if the assistant state's attorneys had charged defendant after they interviewed him. It is arguable that defense counsel's questions about whether defendant had been charged after his interviews with the assistant state's attorneys did not actually open the door to allowing evidence of the lineup because merely asking these questions did not unquestionably suggest that there was something wrong with defendant's confession. It is also arguable that the curative evidence went beyond its protective purpose and significantly bolstered the State's case because the State was able to imply that witnesses had identified defendant. Therefore, appellate counsel's representation arguably fell below an objective standard of reasonableness when he failed to argue on appeal that the court erred in allowing this evidence. Additionally, it is arguable that defendant was prejudiced by appellate counsel's failure because the only evidence against defendant was his confession. Therefore, although we make no judgment as to whether defendant's claim would be successful on its merits, it was sufficiently pled to advance to second stage postconviction proceedings.

¶ 35 Defendant alternatively argues that his appellate counsel was ineffective for failing to argue on appeal that his trial counsel was ineffective for opening the door to prejudicial evidence that would have otherwise been barred. Specifically, defendant asserts that "the multiple sidebars in this case should have alerted trial counsel not to open the door to such testimony through cross examination." The State responds that defendant's claim must fail because it was not objectively unreasonable for the public defender to ask the questions that ultimately opened the door and "the strategy behind [the public defender's] questions was abundantly clear."

¶ 36 Similar to our discussion above, we find that defendant stated an arguable claim that appellate counsel's failure to argue ineffective assistance of trial counsel fell below and objective standard of reasonableness and it is arguable that defendant was prejudiced. It is apparent from the record that prejudicial evidence was admitted as a result of trial counsel opening the door. Specifically, evidence was admitted that a lineup was conducted and then defendant was charged even though the court had initially ruled that it was inadmissible hearsay and was prejudicial to defendant. As defendant points out, defense counsel had been warned by the court that her questioning could potentially open the door to this evidence. It is uncertain what the result of trial would have been had it not been admitted because the only other evidence against defendant was his oral confession. Additionally, we note that the State's arguments on appeal relate to the public defender's strategy. As discussed above, trial strategy is an inappropriate reason to dismiss a claim at the first stage of post conviction proceedings. *Tate*, 2012 IL 112214, ¶ 22. Therefore, we conclude that defendant stated an arguable claim of ineffective assistance of appellate counsel and that defendant's petition should be remanded to the circuit court for second stage proceedings.

¶ 37 Finally, defendant requests that this court appoint counsel other than the Cook County Public Defender's Office to represent him on remand to avoid the appearance of conflict because one of his trial attorneys, Amy Campanelli, is now the Public Defender. Citing *People v. Cano*, 220 Ill. App. 3d 725, 730-32 (1991), he maintains that the attorneys in that office cannot be expected to allege the ineffectiveness of their employer. No *per se* conflict arises when one public defender must argue the ineffectiveness of another public defender. *People v. Hardin*, 217 Ill. 2d 289, 302-03 (2005). Rather, whether there is a conflict between two public defenders is a fact dependent analysis. *Id.* Thus, determining whether there is an actual conflict here is premature as defendant's postconviction petition was dismissed at the first stage and he was not appointed counsel below. Accordingly, we decline defendant's invitation to appoint private counsel.

¶ 38 III. CONCLUSION

¶ 39 For the following reasons we reverse and remand this cause for second stage postconviction proceedings.

¶ 40 Reversed and remanded.