FIFTH DIVISION
June 24, 2011

No. 1-09-2464

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County, Illinois.
	)	
v.	)	No. 03 CR 22909
	)	
ANDREW PULIDO,	)	Honorable
	)	Stanley Sacks,
Petitioner-Appellant.	)	Judge Presiding.

JUSTICE JOSEPH GORDON delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

ORDER

HELD: Following the affirmance of his conviction for first degree murder, defendant petitioned for postconviction relief, claiming ineffective assistance of counsel at both the trial and appellate level. The circuit court summarily dismissed his petition, and defendant appealed. We held that under *People v. Porter*, 122 Ill. 2d 64, 77 (1988), defendant's attorney-prepared petition would be reviewed under the same standard as a *pro se* petition. We then affirmed the dismissal of his petition, holding that: (1) failure to rebut DNA evidence was not ineffective assistance; (2) failure to present mental health issues was not ineffective assistance; (3) failure to investigate unnamed witnesses was not ineffective assistance; (4) failure to discuss unnamed defenses with defendant was not ineffective assistance; (5) failure to inform defendant of his right to testify was not ineffective assistance where he was clearly informed of this right by the by trial court; (6) failure to file motion to reconsider sentence was not ineffective assistance where court considered merits of sentencing issue on direct appeal; (7) appellate counsel was not ineffective for failing to argue ineffectiveness of trial counsel; and (8) appellate counsel was not ineffective

for failing to challenge admission of other crimes evidence.

Petitioner Andrew Pulido appeals the first-stage dismissal of his petition for postconviction relief.

Petitioner's wife, Dana Wolf-Pulido, was found strangled to death in her home on September 10, 2002. Petitioner was subsequently convicted of first degree murder and sentenced to 57 years in the Department of Corrections. The State's theory of the crime was that the petitioner and the victim, who were separated but still saw each other on occasion, had consensual sex on the morning of the murder, they later quarreled, and the petitioner strangled her.

Petitioner's conviction was affirmed on direct appeal. *People v. Pulido*, 1-05-3479 (2008) (unpublished order under Supreme Court Rule 23) (*Pulido I*). Petitioner then filed the postconviction petition that is the subject of the instant appeal, alleging ineffective assistance of counsel at both the trial and appellate level. Specifically, he contended that his trial counsel was ineffective for failing to rebut the State's DNA evidence at trial, failing to investigate and present issues regarding the petitioner's mental health condition, failing to investigate or interview witnesses, failing to inform petitioner of his right to testify, failing to discuss possible defenses with petitioner, and failing to present a motion to reconsider his sentence so as to preserve the issue of excessive sentence on appeal. He additionally contended that his appellate counsel was ineffective for failing to challenge the admission of other crimes evidence and failing to argue the ineffectiveness of his trial counsel.

The trial court dismissed his petition at the first stage of postconviction proceedings as frivolous and patently without merit. Petitioner now appeals. For the reasons that follow, we

affirm.

I. BACKGROUND

Since the facts of this case have been fully set forth in our previous order, *Pulido I*, 1-05-3479 (2008) (unpublished order under Supreme Court Rule 23), we shall discuss them only as they are pertinent to the instant appeal.

Prior to trial, the State moved to allow the admission of other crimes evidence against petitioner – specifically, an incident occurring on May 31, 2002, approximately three months before the murder, in which petitioner allegedly tried to kill the victim and her ex-boyfriend. On that date, the victim was attending a school recital with her two daughters, Alyssa and Danielle. Alexander Dee, her ex-boyfriend and the father of her daughters, was also attending the recital. Both of their vehicles were parked in the school parking lot. When Dee left the recital, he saw that the brake lines on both vehicles had been cut. According to the State, Dee observed a suspicious van driving away and recorded its license plate number. Police later discovered that the petitioner had borrowed that van on that date.

Counsel for petitioner objected to the admission of testimony regarding this incident, contending that it was impermissible propensity evidence. However, the trial court granted the State's motion, finding that the incident was relevant evidence of petitioner's intent.

The testimony at trial showed that the victim began dating the petitioner in 2001, and they were married on February 16, 2002. They separated in or around April 2002, and the victim filed for divorce in June 2002. On the morning of September 10, 2002, the victim took her daughters Alyssa and Danielle to school. When the school day ended, the victim did not arrive to pick

them up. A parent of a classmate brought the girls to Dee's office. Dee attempted to reach the victim by telephone throughout the evening but received no response. That night, he went to the victim's apartment and found it dark. He called the police, who responded and discovered the victim dead inside the apartment.

Detective Tony Villardita of the Chicago Police Department testified that he arrived at the victim's apartment shortly after 10 p.m. on September 10, 2002, in response to Dee's call. He inspected the victim's cell phone and found that she had received a phone call at 10:13 that morning from petitioner's business, Andrew's Painting. He said that there was no evidence of theft in the apartment; he found a TV and VCR in her living room and money in her purse that was lying on the floor. He further stated that there was no sign of forced entry. Every window in the house was closed and secured, and all the blinds were down. Forensic investigator Leonard Stocker of the Chicago Police Department likewise testified that there was no sign of forced entry through the doors and windows of the apartment.

The State presented both eyewitness testimony and DNA expert testimony linking petitioner to the crime. Regarding the former, Rosa Ramirez, one of the victim's neighbors, testified that around 11 a.m. on the date of the murder, she saw a man walking towards her building and looking into the windows of nearby buildings. She identified that man as petitioner from an array of photos shown to her by detectives, and she subsequently also identified him in a lineup at the police station.

Regarding the latter, the State called Amy Rehnstrom, a former employee of the Illinois State Police crime lab, as an expert in the field of forensic DNA analysis. Rehnstrom testified

that she conducted an analysis of a semen stain found on the victim's panty liner and found it to contain DNA from two people. She stated that "a male DNA profile was identified that matches the DNA profile of Andrew Pulido." She later clarified that the semen "is consistent with having originated from Andrew Pulido." Rehnstrom explained that DNA samples are compared by examining 13 specific areas of DNA that vary from person to person. She indicated that, in this case, all 13 areas in the DNA recovered from the semen stain were consistent with DNA from petitioner. As for the second set of DNA found on the panty liner, Rehnstrom opined that it belonged to the victim, since the sample was recovered from her person.

Davere Jackson of the Illinois State Police forensic science center also testified as an expert in DNA analysis. Jackson testified that in order to obtain a "full DNA profile," analysts look at 13 different "signals" in the genetic code. She stated that genetic material found under the victim's fingernails "matched" the petitioner's DNA.

The State also attempted to show petitioner's intent to kill the victim through the testimony of his friend Patricia Taggart as well as through testimony regarding the incident on May 31, 2002, in which the victim's brake lines were cut. Taggart testified that in the summer of 2002, petitioner told her on several occasions that he was thinking of ways to kill the victim. On the afternoon of the day that the victim was killed, Taggart spoke to petitioner. She stated that he sounded sad and depressed, telling her that his life was over, "everything has changed," and nothing was ever going to be the same.

With regard to the brake line incident, Dee testified about recording the license plate number of the suspicious-looking van and giving the number to a detective a few days after the

incident. Isriel Garcia, the owner of that van, testified that on May 31, 2002, he was working for petitioner as a painter. That afternoon, petitioner borrowed his van for approximately an hour. When he returned, he looked nervous, and he told Garcia that if the police asked about him, Garcia should tell them that he had been at the job site for the entire day. Michael Kirby, another painter who was working with Garcia on that day, corroborated this account of events.

The State then presented evidence of an alleged suicide attempt by petitioner six days after the murder. (In opening remarks, the prosecutor argued that this incident was evidence that petitioner was feeling guilty.) Omar Ahmad, a resident physician at Illinois Masonic Hospital, testified that he treated petitioner on September 16, 2002. The emergency triage record stated that he had overdosed on Xanax, a drug for anxiety and depression. Petitioner was given a drug to counteract the effects of the overdose and released that same day. During cross-examination, counsel for petitioner asked Ahmad if he was aware that petitioner had previously been hospitalized on July 20 of that same year. The State's objection to this question was sustained. Counsel for petitioner then asked, "Were you aware of the fact that Andrew Pulido, he had a past history of depression?" The State's objection to this question was sustained as well.

The jury found petitioner guilty of first degree murder, and the court sentenced him to 57 years in the Department of Corrections. No motion to reconsider sentence was filed.

Petitioner appealed his conviction to this court. As is fully set forth in our decision in *Pulido I*, his appellate counsel raised three contentions of error, namely, (1) that the trial court improperly precluded cross-examination of Rehnstrom, the State's DNA expert, regarding her prior theft conviction, (2) that the trial court erred in excluding evidence that Alexander Dee

committed domestic violence against the victim in March 1997, five years before the murder, and (3) that the trial court placed improper weight on a victim impact statement during the sentencing hearing. *Pulido I*, 1-05-3479 (2008) (unpublished order under Supreme Court Rule 23). We affirmed petitioner's conviction. Petitioner then sought leave to appeal to the Illinois Supreme Court, but his petition was denied. *People v. Pulido*, 229 Ill. 2d 686 (2008).

On May 26, 2009, petitioner timely filed the postconviction petition that is the subject of the instant appeal, claiming ineffective assistance of counsel at both the trial and the appellate level. The specific allegations of his petition, which have been broadly described above, shall be discussed in full when we review the propriety of the circuit court's decision.

The circuit court summarily dismissed Pulido's petition at the first stage of postconviction proceedings. It is from this judgment that petitioner now appeals.

II. ANALYSIS

On appeal, petitioner contends that the circuit court erred in summarily dismissing his postconviction petition. He therefore requests that we reverse the circuit court's dismissal and remand for second-stage proceedings on his petition.

A postconviction petition brought under the Illinois Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2004)) in a non-death-penalty case is adjudicated in three stages. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). At the first stage, as shall be examined in greater detail below, the circuit court independently reviews the petition within 90 days of its filing and summarily dismisses the petition if it finds it to be "frivolous or *** patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010). If the circuit court does not dismiss the

postconviction petition at the first stage, it advances to the second stage, where counsel is appointed to represent the petitioner and the State is allowed to file a responsive pleading. *Edwards*, 197 Ill. 2d at 245-46. A petition will be dismissed at this stage if it fails to make a substantial showing of a constitutional violation. *Edwards*, 197 Ill. 2d at 246; see *People v. Coleman*, 183 Ill. 2d 366, 380 (1998). Finally, if such a showing is made, the petition advances to the third stage, where the circuit court will conduct an evidentiary hearing on its allegations. *Edwards*, 197 Ill. 2d at 246.

In the case at hand, the trial court dismissed Pulido's petition at the first stage of postconviction proceedings. At this stage, because petitioner has not yet been afforded an evidentiary hearing, we are to take all well-pleaded allegations in the petition as true and liberally construe them in favor of petitioner. *People v. Brooks*, 233 Ill. 2d 146, 153 (2009); *Coleman*, 183 Ill. 2d at 380-81 (discussing standard for dismissal hearings under section 122-2.1). We review the summary dismissal of a postconviction petition *de novo*. *Coleman*, 183 Ill. 2d at 388-89.

A. Standard for Summary Dismissal of Postconviction Petition Prepared By Counsel

At the outset, the parties dispute the proper threshold for summary dismissal of a postconviction petition that is not prepared *pro se* but, instead, by counsel. Petitioner contends that, regardless of whether the petitioner is *pro se* or is represented by counsel, the standard for first-stage dismissal is the same, namely, that a petition is only subject to first-stage dismissal if it fails to present the " 'gist of a constitutional claim' " that is not frivolous or patently without merit. *Edwards*, 197 Ill. 2d at 244, quoting *People v. Gaultney*, 174 Ill. 2d 410, 418 (1986). The

State, on the other hand, contends that the "gist" standard should only apply to *pro se* petitioners, whereas a higher standard should apply to petitioners who are represented by counsel. According to the State, such petitioners should be required to make a substantial showing of a constitutional violation – the same standard applied at the second stage of postconviction proceedings – in order to avoid summary dismissal at the first stage of postconviction proceedings.

The summary dismissal standard is set forth in section 122-2.1 of the Act, which provides:

> "If the petitioner is sentenced to imprisonment and the court determines the petition is frivolous or is patently without merit, it shall dismiss the petition in a written order, specifying the findings of fact and conclusions of law it made in reaching its decision." 725 ILCS 5/122-2.1(a)(2) (West 2010).

Our supreme court has held that in order to survive the summary dismissal stage under section 122-2.1, the allegations of a *pro se* postconviction petition, taken as true and liberally construed, need only to allege the "gist" of a constitutional claim that is not frivolous or patently without merit. *People v. Brown*, 236 Ill. 2d 175, 184 (2010); see *People v. Porter*, 122 Ill. 2d 64, 73 (1988). Although the Act does not define the terms "frivolous" or "patently without merit" (see 725 ILCS 5/122-2.1(a)(2) (West 2010)), our supreme court recently clarified this standard in *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009), with respect to *pro se* petitioners, holding that "a *pro se* petition seeking postconviction relief under the Act for a denial of constitutional rights may be summarily dismissed as frivolous or patently without merit only if the petition has no

arguable basis either in law or in fact." The court defined a petition with no arguable basis in law or in fact as one that is based upon an "indisputably meritless legal theory," such as one that is completely contradicted by the record, or based upon a "fanciful factual allegation," including allegations that are "fantastic or delusional." *Hodges*, 234 Ill. 2d at 16-17.

As noted, the State argues that the lenient "gist" standard as stated in *Brown* and *Hodges* should only apply to *pro se* petitioners, and a higher standard should apply to petitioners who have the benefit of counsel at the first stage of postconviction proceedings. However, the Act itself, by its plain language, does not purport to make any such distinction but appears to impose the same standard upon all petitioners. 725 ILCS 5/122-2.1(a)(2) (West 2010). More overridingly, our supreme court rejected any such distinction in *Porter*, where it stated:

> "[W]e note that '*there is no disparate treatment between indigent and nonindigent post-conviction petitioners* as all are subject to dismissal regardless of whether they are represented by counsel if their petitions are found to be frivolous and patently without merit.' " (Emphasis added.) *Porter*, 122 Ill. 2d at 77, quoting *People v. Mason*, 145 Ill. App. 3d 218, 226 (1986).

Cf. Gaultney, 174 Ill. 2d at 418 (setting forth the general standard for summary dismissal of a postconviction petition under section 122-2.1 without reference to whether the petitioner is represented by counsel). At issue in *Porter* was an equal protection challenge to the summary dismissal procedure set out in section 122-2.1 of the Act. The *Porter* petitioners contended that it was a violation of equal protection guarantees for indigent postconviction petitioners not to be entitled to appointed counsel under section 122-2.1 while indigent direct appellants are

automatically entitled to assistance of counsel. *Porter*, 122 Ill. 2d at 77. The court rejected this contention, holding that there was a rational basis for treating the two situations differently. *Porter*, 122 Ill. 2d at 77. The court then proceeded to issue the statement quoted above. *Porter*, 122 Ill. 2d at 77.

Although that statement was issued in the context of an equal protection challenge and would thus be considered *obiter dictum* with respect to its application to this case, we would still be compelled to follow it in the absence of a contrary decision. See *Cates v. Cates*, 156 Ill. 2d 76, 80 (1993) ("Even *obiter dictum* of a court of last resort can be tantamount to a decision and therefore binding in the absence of a contrary decision of that court"). In this case, the State has not provided, nor has our research disclosed, any decisions of our supreme court that would directly contradict the statement of the *Porter* court that postconviction petitions prepared with the aid of counsel are subject to the same standard as *pro se* postconviction petitions at the summary dismissal stage. The State cites various cases for the proposition that the purpose behind the creation of the lenient "gist" standard was our supreme court's desire to give a liberal construction to petitions drafted by defendants with little knowledge of the law. See *Hodges*, 234 Ill. 2d at 16 (supporting its interpretation of the terms "frivolous" and "patently without merit" by citing a long line of federal *habeas corpus* decisions reflecting the concern that *pro se* petitions should be given a liberal construction); *People v. Delton*, 227 Ill. 2d 247, 254 (2008) ("Owing to the fact that most petitions are drafted at this stage by petitioners with little legal knowledge or training, this court has viewed the threshold at this stage of the proceedings to be low"); *Porter*, 122 Ill. 2d at 73 (" 'While it is obvious that counsel should be better able to more

artfully draft a petition than an indigent petitioner unschooled in legal drafting, it is certainly not clear that an indigent petitioner could not present the gist of his claim so that the trial court could make an initial determination as to whether * * * the claim is frivolous' "), quoting *People v. Baugh*, 132 Ill. App. 3d 713, 717 (1985). However, none of these cases purport to set up a higher standard for petitions that have been prepared by counsel, even in *dicta*; rather, they deal exclusively with the standard for *pro se* petitions, a standard which is not at issue in the instant case. Thus, since we are compelled to abide by the *dicta* of our supreme court in the absence of a contrary decision (*Cates*, 156 Ill. 2d at 80), we cannot accept the State's contention that indigent and nonindigent petitioners should be subject to different standards at the summary dismissal stage.

The State nevertheless argues that, if the lenient *Hodges* standard were held to apply to attorney-prepared petitions at the first stage of postconviction proceedings, then initial review of attorney-prepared petitions in non-capital cases would be conducted under a more lenient standard than initial review of attorney-prepared petitions in capital cases. The State implies that petitioners in capital cases would thereby receive less protection than petitioners in non-capital cases. However, a comparison of postconviction procedure for petitions in capital and non-capital cases shows this argument to be without merit. The Act provides that a postconviction petition in a capital case may not be summarily dismissed. 725 ILCS 5/122-2.1 (West 2010). Rather, counsel must be appointed for the petitioner upon request (725 ILCS 5/122-2.1 (West 2010)), and the court will then determine whether the petition sets forth a substantial showing of a violation of constitutional rights, so as to warrant an evidentiary hearing. *People v. Smith*, 195

Ill. 2d 179, 187 (2000). Thus, in essence, a petition filed by a defendant in a capital case bypasses the first stage of postconviction proceedings, *i.e.*, the summary dismissal stage, and proceeds straight to the second stage, with its higher standard of review. A petition filed by a defendant in a non-capital case that survives the summary dismissal stage must still meet the substantial showing standard at the second stage. See *Edwards*, 197 Ill. 2d at 246 (at second stage of postconviction proceedings in a non-capital case, petitioner must make a substantial showing of a constitutional violation). Consequently, attorney-prepared petitions in capital and non-capital cases alike must meet the same standard in order to be granted an evidentiary hearing, regardless of whether a more lenient standard is applied to non-capital petitions at the summary dismissal stage. See *Smith*, 195 Ill. 2d at 187; *Edwards*, 197 Ill. 2d at 246. In any event, even if the State's argument in this regard was meritorious, it could not override the statement of our supreme court in *Porter* which explicitly equalizes the treatment of *pro se* postconviction petitions to those prepared by counsel.

However, as shall be fully discussed below, our resolution of this issue would have no bearing on the instant case, because even under the more lenient *Hodges* standard, the circuit court properly dismissed Pulido's petition as frivolous and patently without merit.

B. Summary Dismissal of Pulido's Petition

We therefore proceed to consider the substantive claims in Pulido's petition. As noted, petitioner raises claims of ineffective assistance of counsel at both the trial and appellate level. Under the sixth and fourteenth amendments to the United States Constitution and article I, section 8 of the Illinois Constitution, the petitioner in any criminal case has a right to effective

assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685 (1984); *People v. Jackson*, 205 Ill. 2d 247, 258-59 (2001). This right to effective counsel extends not only to the trial, but also to direct appeal. *Flores*, 153 Ill. 2d at 277, citing *Evitts v. Lucey*, 469 U.S. 387, 393-97 (1985); see *People v. Enis*, 194 Ill. 2d 361, 377 (2000) (claims of ineffective assistance of appellate counsel evaluated under the same standard as claims of ineffective assistance of trial counsel). In assessing a petitioner's claim of ineffectiveness, the critical question is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *People v. Albanese*, 104 Ill. 2d 504, 525 (1984), quoting *Strickland*, 466 U.S. at 686. Under the test articulated in *Strickland*, in order to properly plead the gist of a constitutional claim for ineffective assistance of counsel at the first stage of postconviction proceedings, a petitioner must allege facts which, if true, would demonstrate that (1) counsel's performance fell below an objective standard of reasonableness, and that (2) this deficiency in counsel's performance was prejudicial to the defense. *Strickland*, 466 U.S. at 687, 692; see *People v. Petrenko*, 385 Ill. App. 3d 479, 482 (2008); *People v. Torres*, 228 Ill. 2d 382, 394-95 (2008) (first-stage dismissal of postconviction petition proper where petition was premised upon ineffective assistance of counsel claim but petitioner failed to satisfy the first prong of the *Strickland* test); *People v. Robinson*, 217 Ill. 2d 43, 61-63 (2005) (petitioner failed to state the gist of an ineffective assistance of counsel claim where petitioner was not prejudiced by the claimed error).

As noted, petitioner raises six claims of ineffective assistance of trial counsel, namely, that his trial counsel failed (1) to rebut the State's DNA evidence at trial, (2) to investigate and

present issues regarding the petitioner's mental health condition, (3) to investigate or interview witnesses, (4) to discuss possible defenses with petitioner, (5) to inform petitioner of his right to testify, and (6) to present a motion to reconsider sentence so as to preserve the issue of excessive sentence on appeal. Furthermore, he raises two claims of ineffective assistance of appellate counsel, claiming that counsel was ineffective for (1) failing to argue the ineffectiveness of trial counsel and (2) failing to challenge the admission of other crimes evidence. We analyze each of these claims in turn.

1. Trial Counsel's Alleged Failure to Rebut DNA Evidence

Petitioner's first claim is that his trial counsel is ineffective for failing to "rebut or take issue with" the DNA evidence presented by the State at trial, even though expert testimony questioning that evidence was available. In support, petitioner presents an affidavit from Forensic Bioinformatics, Inc. (FB). In that affidavit, FB states that petitioner's trial counsel retained FB to review the DNA data in petitioner's case. Trial counsel tendered material and reports from the Illinois State Police Crime Lab and various police reports to FB. Based upon this information, FB sent a report to petitioner's trial counsel on December 29, 2004, stating that there were "issues" regarding the conclusions being drawn from the analysis of the victim's panty liner. In particular, according to FB, "From the bench notes provided by the Illinois State Police Crime Laboratory, it appeared that the laboratory conducted only a presumptive test for semen on the panty liner. No notes were provided that would indicate that a confirmatory test for semen was conducted on any part of that sample."

FB further avers that it indicated in its report that a FB representative would be available

to discuss the implications and significance of its findings. However, FB states that it did not hear from petitioner's trial counsel until August 15, 2005, when he contacted a representative of FB and "insisted" that an expert from FB be in Chicago on August 22, 2005, to testify as to its findings. FB informed counsel that it could not satisfy that request on such short notice due to prior commitments.

Petitioner also attaches copies of two articles from the Internet which cast doubt on the accuracy of DNA evidence as used in criminal investigations. Both articles discuss the findings of Arizona state lab crime analyst Kathryn Troyer. According to the articles, Troyer was searching through the Arizona state genetic database in 2001 when she found two unrelated criminals with genetic profiles that matched at nine of the 13 locations on chromosomes, known as "loci," which are commonly used to differentiate between genetic samples from different individuals. The articles state that hundreds of similar examples have since been found. The articles further state that, at the time of Troyer's discovery, many states allegedly only considered nine or fewer loci for comparison purposes when using DNA evidence to search for suspects, although most also attempted to compare all 13 when evidence was available.

As noted, the *Hodges* court set forth a two-pronged analysis for whether a postconviction petition is subject to summary dismissal, defining a petition that is frivolous or patently without merit as one that "has no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 16; see *Brown*, 236 Ill. 2d at 185-86 (applying the *Hodges* analysis). We begin by considering whether petitioner's allegations set forth an arguable basis in fact for his claim of ineffective assistance.

At the first stage of postconviction proceedings, a petitioner only needs to present a

"limited amount of detail" in his petition regarding the alleged constitutional violation. *Brown*, 236 Ill. 2d at 188; *Gaultney*, 174 Ill. 2d at 418. However, this does not mean that he is excused from providing any factual detail at all. *People v. Delton*, 227 Ill. 2d 247, 254 (2008). Rather, section 122-2 of the Act provides that the petition must "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 (West 2010); see *Delton*, 227 Ill. 2d at 256-59 (affirming summary dismissal of postconviction petition where petitioner failed to provide the requisite factual support for his allegations under section 122-2). The purpose of this requirement is to establish that the allegations of the petition are capable of " 'objective or independent corroboration.' " *Hodges*, 234 Ill. 2d at 10, quoting *Delton*, 227 Ill. 2d at 254, quoting *People v. Hall*, 217 Ill. 2d 324, 333 (2005). Thus, although a first-stage petition "is not expected to set forth a complete and detailed factual recitation, it must set forth some facts which can be corroborated and are objective in nature or contain some explanation as to why those facts are absent." *Delton*, 227 Ill. 2d at 254-55.

In this case, FB's affidavit, taken as true and construed liberally in favor of petitioner (*Brooks*, 233 Ill. 2d at 153; *Coleman*, 183 Ill. 2d at 380-81), establishes that petitioner's trial counsel was unable to have a representative of FB testify at trial on behalf of the petitioner because counsel failed to give FB adequate advance notice of the trial date. Nevertheless, petitioner has not alleged facts that would show that such testimony would have served to "rebut" the State's testimony that DNA evidence suggested that petitioner had contact with the victim on the date of the crime. The FB affidavit indicates that the Illinois State Police crime lab

merely conducted a "presumptive test for semen" rather than a "confirmatory test for semen" on the victim's panty liner. FB does not explain the difference between a presumptive test and a confirmatory test in its affidavit, nor does petitioner explain these terms in his postconviction petition or in his brief before this court. However, according to the National Forensic Science Technology Center:

> "Screening or *presumptive tests* make use of a target chemical to establish the possibility that a specific body tissue or fluid is present. *Confirmatory tests* are then used to identify the specific biological material, which can then be typed. *** For example, while examining the clothing of a suspect, a forensic biologist might visually locate a brown stain that presumptively tested positive for blood and was then DNA typed. The DNA type is found to match the victim. *** The only unqualified conclusion that can be offered is that the stain contains DNA that matches the victim. It has not been proven to be blood." (Emphasis in original.) National Forensic Science Technology Center, *Presumptive v. Confirmatory Tests*, DNA Analyst Training (June 8, 2011), http://www.nfstc.org/pdi/Subject02/pdi_s02_m02_01_a.htm.

Applying this explanation to the allegations contained in FB's affidavit, which we take as true at this stage in the proceedings (*Brooks*, 233 Ill. 2d at 153; *Coleman*, 183 Ill. 2d at 380-81), it is apparent that the substance recovered from the victim's panty liner was not proven to be semen. However, this does not undermine the State's testimony that the substance contained DNA that matched the petitioner – which was the crux of the State's case in this regard. The State's purpose in introducing DNA evidence was to show that petitioner had close physical

contact with the victim prior to her death. To this end, Amy Rehnstrom testified that genetic material found on the victim's panty liner was consistent with the petitioner's DNA. Similarly, Davere Jackson testified that genetic material found under the victim's fingernails was consistent with the petitioner's DNA. The fact that the substance on the victim's panty liner may or may not actually have been semen, as opposed to some other substance containing human genetic material, is largely collateral to the State's case. Consequently, FB's affidavit does not support the proposition that, if a representative of FB had testified on defendant's behalf, he would have been able to rebut the State's DNA evidence insofar as it incriminated the petitioner in the murder of the victim.

Nor is this proposition supported by the Internet articles presented by petitioner. These articles show that DNA analysis can be unreliable if it only takes into account nine of the 13 loci typically used to distinguish one person's genetic code from another. However, petitioner does not assert, nor does the record indicate, that the method being challenged in these articles is the method that was used for the DNA analysis at issue in this case. On the contrary, Rehnstrom testified that "the values from the different 13 areas from the pantie stain *** matched Mr. Pulido," indicating that she performed a test on all 13 areas, not only nine. Similarly, in explaining the process of DNA analysis, Jackson testified, "So I looked at 13 different signals, and this is what constitutes a full DNA profile." Petitioner does not allege that their testimony in this regard is false, nor does he present any evidence to that effect; he only makes a vague assertion that the use of the word "match" with regard to DNA testing "is under severe challenge by the defense bar." Such a sterling generality, not linked to petitioner's case by facts which are

capable of corroboration, is insufficient to provide a reasonable basis in fact for his claim of ineffective assistance of counsel. See *Delton*, 227 Ill. 2d at 254.

2. Trial Counsel's Alleged Failure to Investigate and Present Mental Health Issues

Petitioner's second claim is that his trial counsel was ineffective for failing to consider, investigate, or present evidence of the petitioner's mental state and ingestion of psychotropic drugs, both at the time of the murder and at the time of trial. He contends that counsel's failure in this regard prejudiced him in three ways. First, he argues that evidence of his mental state at the time of the murder would have "impacted" on "the existence of an affirmative defense." (He does not elaborate on what this affirmative defense would have been.) Second, he argues that evidence of his mental state at the time of the murder could have constituted "mitigating circumstances." Third, he implies that, if counsel had made reasonable inquiry into his mental state at the time of trial, there is a reasonable probability that he would have been found unfit to stand trial.

In support of this claim, petitioner avers in his attached affidavit that his trial counsel was in possession of "all relevant material on the subject." He also attaches a number of medical records that he claims should have put his trial counsel on notice that further investigation into his mental state was required. First, he attaches medical records of three emergency room visits, two of them occurring before the murder and one after. The first such visit was on July 20, 2002, approximately a month and a half before the murder. According to hospital records, he arrived at the emergency room complaining of overwhelming anxiety, depression, and inability to sleep.

He told hospital staff, "I can't go on like this any more" but denied having any suicidal intent. He was diagnosed with depression and released the following day. He is listed in the records as presenting "Low or no risk" of harm to himself or others.

Petitioner's second emergency room visit was on August 6, 2002, approximately a month before the murder. Hospital records state that he was brought to the emergency room after calling a crisis hotline for depression. He denied having any homicidal intent or suicidal intent. His medications are listed as Neurontin and Xanax. As with the previous visit, he was released the following day.

Petitioner's third emergency room visit was on September 16, 2002, six days after the murder. Hospital records state that he was brought to the emergency room because of a drug overdose but was released later that same day.

Petitioner additionally attaches two psychiatric evaluations of him conducted by Dr. R. Craig McKenna. On July 22, 2002, Dr. McKenna conducted an initial psychiatric evaluation of petitioner and diagnosed him with major depression as well as generalized anxiety disorder with panic attacks. He recommended the drugs Effexor, Valium, and Neurontin for petitioner. On February 13, 2003, Dr. McKenna conducted a followup assessment. He characterized petitioner as "extremely anxious." He noted that petitioner had been taking Xanax and Halcion, and he recommended that petitioner also begin taking Effexor for his anxiety.

Under the *Hodges* standard, we find that petitioner has presented a reasonable basis in fact for his claim that he was suffering from depression and taking psychotropic drugs at the time of the murder. The medical records show that he was hospitalized twice for depression that

summer and was prescribed psychoactive drugs for his condition. Furthermore, for purposes of this appeal, since we are to take all well-pleaded allegations in the petition as true and liberally construe them in favor of petitioner at the summary dismissal stage (*Brooks*, 233 Ill. 2d at 153; *Coleman*, 183 Ill. 2d at 380-81), we also accept petitioner's assertion in his affidavit that counsel was in possession of all relevant material on this subject. The record unambiguously shows that trial counsel was aware of petitioner's history of depression and, at the very least, he was also aware that petitioner had been hospitalized on July 20, 2002. Moreover, he attempted to ask State witness Ahmad about these things, but the trial court sustained the State's objections to this line of questioning. (The record does not disclose on what ground these objections were sustained.)

However, petitioner has not presented a reasonable basis in law for his assertion that counsel was ineffective for failing to investigate or present evidence of his depression and psychotropic drug usage. At the outset, we note that petitioner does not provide an explanation of how he was prejudiced by his counsel's failure in this regard, except for vague assertions that this information would have "impacted" upon an unnamed affirmative defense and that it could potentially have constituted "mitigating circumstances." Furthermore, petitioner has failed to set forth the gist of a claim that his trial counsel was deficient for failing to pursue his mental state as an avenue of defense. Decisions concerning which witnesses to call at trial and what evidence to present on behalf of a defendant are matters of trial strategy, and, as such, they are generally immune from claims of ineffective assistance of counsel. *People v. Reid*, 179 Ill. 2d 297, 310 (1997). The only exception to this rule is when counsel's chosen strategy "is so unsound that

counsel entirely fails to conduct any meaningful adversarial testing." *Reid*, 179 Ill. 2d at 310. In this case, it is apparent from the record that petitioner's trial counsel was aware of his history of depression and his hospitalization and, in fact, attempted to cross-examine State witness Ahmad about these matters. The record also shows that trial counsel chose to strategically downplay the significance of petitioner's alleged suicide attempt six days after the murder, eliciting testimony from Ahmad that petitioner never told him that he wanted to die or that he was trying to kill himself. Thus, it cannot be said that he failed to conduct any meaningful adversarial testing in this regard, or that his strategy was so unsound that it would constitute ineffective assistance of counsel. See *Reid*, 179 Ill. 2d at 310.

Moreover, petitioner has not presented a reasonable basis in fact or in law to show that his counsel was ineffective for failing to request a fitness hearing. With regard to the facts, petitioner has not provided any evidence that he was depressed and under the effects of psychotropic drugs at the time of trial, which took place in August 2005. All of petitioner's medical records pertain to 2002, except for the followup assessment conducted by Dr. McKenna in February 2003. Petitioner does not even assert in his affidavit that he was depressed or taking psychotropic drugs at the time of trial. Furthermore, petitioner does not assert that his condition in any way affected his ability to understand the proceedings at trial, nor does he present any documentation from which such a conclusion might be inferred. A defendant is unfit to stand trial if, due to a mental or physical condition, he or she is unable to understand the nature and purpose of the proceedings or to assist in the defense. 725 ILCS 5/104-10 (West 2010); see *People v. Easley*, 192 Ill. 2d 307, 320 ("A defendant can be fit for trial although his or her mind

may be otherwise unsound"). The trial court is only required to order a fitness hearing if a *bona fide* doubt is raised as to the defendant's fitness. 725 ILCS 5/104-11(a) (West 2010). Absent any indication that petitioner had a diminished capacity to understand the proceedings at trial, there is no reasonable basis in law for his implication that his trial counsel was ineffective for failing to inquire further into his mental condition and request a fitness hearing.

Brown, 236 Ill. 2d 175, cited by petitioner on this point, is inapposite. After being convicted of attempted first degree murder of a peace officer, the defendant in *Brown* filed a petition for postconviction relief, alleging that his trial counsel was ineffective for failing to request a fitness hearing. *Brown*, 236 Ill. 2d at 178. The evidence at trial showed that defendant threatened two officers with a butcher knife and then lunged at one of them. *Brown*, 236 Ill. 2d at 180. In his postconviction petition, defendant alleged that he had a history of attempted suicide and had been taking psychotropic medication to treat bipolar disorder and depression. *Brown*, 236 Ill. 2d at 181. He claimed that on the day of the offense he was attempting "suicide by police." *Brown*, 236 Ill. 2d at 181. During trial, he said, he was taking heavy psychotropic medication that prevented him from understanding the proceedings. *Brown*, 236 Ill. 2d at 181. He further alleged that his trial counsel was aware that he had attempted suicide on several occasions and that he was taking psychotropic medication at trial. *Brown*, 236 Ill. 2d at 181. In support, he attached medical records documenting his bipolar disorder and his medications, as well as affidavits from his mother and aunt variously stating that his mother had informed trial counsel of his prior suicide attempts and his medication. *Brown*, 236 Ill. 2d at 181.

Under these facts, the *Brown* court held that defendant's petition was not frivolous or

patently without merit and reversed the circuit court's summary dismissal. *Brown*, 236 Ill. 2d at 178. His petition had an arguable basis in fact, since the attached medical records and affidavits corroborated the allegations in his petition. *Brown*, 236 Ill. 2d at 186. Moreover, his petition had an arguable basis in law, since his allegations, taken as true and liberally construed (see *Brooks*, 233 Ill. 2d at 153), were sufficient to create a factual dispute as to whether there was a *bona fide* doubt of petitioner's fitness to stand trial. *Brown*, 236 Ill. 2d at 191, 193.

Brown is distinguishable from the instant case because the defendant in *Brown* specifically alleged that he was taking psychotropic medicine at trial and that it interfered with his understanding of the proceedings. *Brown*, 236 Ill. 2d at 181. By contrast, in the instant case, any such allegations are conspicuously absent from Pulido's petition, nor are they supported by the attached documentation.

3. Trial Counsel's Alleged Failure to Interview or Investigate Witnesses

Petitioner's third claim is that his trial counsel was ineffective for failing to interview or investigate witnesses. However, petitioner does not name any of these witnesses, nor does he state what their testimony would have been or how it might have affected his defense. Instead, he merely asserts that "There exists not a single note, memo or report of any witness interview or investigative report in trial counsel's file."

Such a claim amounts to nothing more than a broad, unsupported, conclusory allegation of ineffective assistance of counsel, which is insufficient to withstand scrutiny under the Act. *People v. Blair*, 215 Ill. 2d 427, 453 (2005); *Coleman*, 183 Ill. 2d at 381. In this regard, we are guided by *Delton*, 227 Ill. 2d at 258, in which our supreme court affirmed the summary dismissal

of a postconviction petition. The defendant in *Delton* was convicted of two counts of aggravated battery to a police officer for attacking two policemen during a traffic stop. *Delton*, 227 Ill. 2d at 250. In his postconviction petition, he claimed that his counsel was ineffective for, among other things, failing to investigate witnesses. *Delton*, 227 Ill. 2d at 252. He alleged that the policemen had been the aggressors and "someone living within ear shot surely could have *** either looked outside their window to see what went on or, overhead [*sic*] the conversations of the incident." *Delton*, 227 Ill. 2d at 252. However, defendant did not name or attach any affidavits from such witnesses, nor did he even allege that someone actually saw or heard the incident. *Delton*, 227 Ill. 2d at 258. Accordingly, our supreme court affirmed the summary dismissal of defendant's petition, finding his claim to be nothing more than a "broad conclusory allegation of ineffective assistance of counsel." *Delton*, 227 Ill. 2d at 258. Petitioner's claim in the instant case is even more deficient than the claim that our supreme court rejected in *Delton*, since petitioner makes no explanation of what testimony the unnamed and un-interviewed witnesses might have given, much less how it might have helped his case. Consequently, petitioner has failed to satisfy the requirements of the Act. *Delton*, 227 Ill. 2d at 254-55 (at first stage of postconviction proceedings, petitioner "must set forth some facts which can be corroborated and are objective in nature or contain some explanation as to why those facts are absent").

4. Trial Counsel's Alleged Failure to Discuss Defenses With Petitioner

Petitioner's fourth claim is that his trial counsel is ineffective because he did not communicate or discuss any possible defenses with petitioner. However, as with the previous claim, petitioner does not explain what these possible defenses would have been, much less

whether they would have been successful. Since broad, unsupported, conclusory allegations of ineffective assistance of counsel are not permitted under the Act (*Blair*, 215 Ill. 2d at 453; *Coleman*, 183 Ill. 2d at 381), petitioner's claim in this regard was correctly found to be frivolous and patently without merit.

5. Trial Counsel's Alleged Failure to Inform Petitioner of His Right to Testify

Petitioner's fifth claim is that his trial counsel was ineffective for failing to inform him of his right to testify. In support, he cites his own affidavit, in which he states that his trial counsel did not communicate this right to him.

However, petitioner cannot claim he was prejudiced by his counsel's omission, because the record clearly shows that the trial court fully and explicitly admonished him regarding his right to testify:

> "THE COURT: Mr. Pulido.
>
> MR. PULIDO: Yes, sir.
>
> THE COURT: At sometime before a long time from now–
>
> MR. PULIDO: Uh-huh.
>
> THE COURT: –you have to make a decision whether you wish to testify or not.
>
> MR. PULIDO: Okay.
>
> THE COURT: You can talk to your lawyer Mr. Garfinkel all you like about that issue.
>
> MR. PULIDO: Okay.
>
> THE COURT: But whether you testify or not, that is solely and entirely up to you.

Do you understand that?

MR. PULIDO: I understand.

THE COURT: I will, therefore, assume that if you do, in fact, testify, it was your free and voluntary decision that you want to testify. Do you understand that?

MR. PULIDO: Yes, I do, sir.

THE COURT: I will assume that if you do not testify, that it was your free and voluntary choice that you did not want to testify. Do you understand that?

MR. PULIDO: Yes, I do, sir."

Our supreme court has consistently upheld dismissals of postconviction petitions when their allegations are contradicted by the record from the original trial proceedings. *Coleman*, 183 Ill. 2d at 382, citing *People v. Arbuckle*, 42 Ill. 2d 177, 181-82 (1969). In this case, petitioner's claim that he was prejudiced by his counsel's alleged failure to inform him of his right to testify is affirmatively rebutted by the trial transcript. See *Strickland*, 466 U.S. at 692 (ineffective assistance of counsel requires that deficiency in counsel's performance was prejudicial to the defense). Nor does petitioner make any argument on appeal as to how he could have been prejudiced in light of the trial court's explicit admonition. Accordingly, petitioner's claim in this regard is patently without merit. *Robinson*, 217 Ill. 2d at 61-63 (petitioner failed to state the gist of an ineffective assistance of counsel claim where claimed error did not prejudice petitioner).

6. Trial Counsel's Failure to File Motion to Reconsider Sentence

Petitioner's sixth ineffective assistance claim, and his final one with regard to his trial counsel, is that his trial counsel failed to file a motion to reconsider his sentence, thus causing

any sentencing claim to be waived on direct appeal.

However, any claim of prejudice in this regard is directly contradicted by the text of our order on direct appeal. As noted, on direct appeal, Pulido argued that he was deprived of a fair sentencing hearing because the trial court placed improper weight on a victim impact statement. In rejecting this claim, we did not rely upon the doctrine of waiver but instead stated that "Waiver aside, if we were to review this issue on the merits, we need not find that the trial court gave undue weight to any victim's impact statement." We then explained that petitioner's 57-year sentence was within the applicable statutory guidelines and did not constitute an abuse of discretion on the part of the trial court. Thus, petitioner's claim of ineffective assistance in this regard is without merit under *Strickland* where the record affirmatively rebuts his claim that he was prejudiced by trial counsel's failure to file a motion to reconsider sentence. See *People v. Bailey*, 364 Ill. App. 3d 404, 408 (2006) (counsel's failure to raise an issue in motion to reconsider sentence only constitutes ineffective assistance where such failure prejudices defendant).

7. Appellate Counsel's Failure to Argue Ineffectiveness of Trial Counsel

In addition to the foregoing, petitioner also raises two claims of ineffective assistance of appellate counsel. Petitioner first claims that his appellate counsel was ineffective for failing to argue that his trial counsel was ineffective. However, for the reasons discussed above, we have found that petitioner's claims of ineffective assistance of trial counsel are frivolous and patently without merit. Consequently, he could not have incurred any prejudice from appellate counsel's failure to raise those claims on direct appeal. See *Enis*, 194 Ill. 2d at 381 (postconviction

petitioner's claim of ineffective assistance of counsel necessarily failed where underlying issue had no merit); *Petrenko*, 385 Ill. App. 3d at 482 (stating that "if defendant's ineffective assistance of counsel claim against trial counsel is nonmeritorious, then clearly appellate counsel was not deficient for refraining to address it").

8. Appellate Counsel's Failure to Challenge Admission of Other Crimes Evidence

Petitioner's final claim is that his appellate counsel was ineffective for failing to challenge the admission of other crimes evidence. He argues that this evidence was "too prejudicial" and "succeeded in poisoning the trier of fact against the petitioner." Although he does not specify what other crimes evidence he is referring to, either in his petition or on his brief on appeal, it can be presumed that he is referencing the incident three months prior to the murder in which he cut the brake lines on the victim's vehicle, since he highlights the admission of this evidence in the statement of facts attached to his petition as well as in the statement of facts in his appellate brief. The State contends that there is no arguable legal basis for defendant's claim in this regard because the incident at issue was properly admitted as evidence of defendant's intent to kill the victim. We agree with the State.

In general, evidence of other crimes that have been committed by a defendant is not admissible to show the defendant's propensity to commit crime. *People v. McCarthy*, 132 Ill. 2d 331, 343 (1989). However, it is well established that such evidence may be admitted if it is offered for a purpose other than showing the defendant's propensity to commit crime. *People v. Illgen*, 145 Ill. 2d 353, 365 (1991); *McCarthy*, 132 Ill. 2d at 344; McCormick, Evidence § 404.5, at 222 (7th ed. 1999). In particular, such evidence is admissible to show motive and criminal

intent. *People v. Tomes*, 284 Ill. App. 3d 514, 523-24 (1996); see *People v. Robinson*, 167 Ill. 2d 53, 62-63 (1995) ("other-crimes evidence may be relevant to prove *modus operandi*, intent, identity, motive or absence of mistake"). In *Tomes*, defendant was convicted of aggravated discharge of a firearm. *Tomes*, 284 Ill. App. 3d at 518. On appeal, he contended that the trial court erred in allowing evidence of an earlier assault that he committed on the victim. *Tomes*, 284 Ill. App. 3d at 523. The *Tomes* court rejected this argument, stating,

> "The trial court allowed evidence of the prior battery under theories of motive – hostility showing defendant likely to do further violence – and criminal intent. These are acceptable grounds upon which to admit evidence of defendant's prior battery, and the trial court specifically found that the probative value of such evidence outweighed any prejudicial effect." *Tomes*, 284 Ill. App. 3d at 523-24.

Likewise, in the instant case, the trial court explained that it was allowing evidence of the brake line incident because it was "clearly relevant to show intent and/or motive" and that it also showed petitioner's "hostile attitude" toward the victim. Admission of such evidence was within the discretion of the trial court. See *Robinson*, 167 Ill. 2d at 63 (admissibility of other-crimes evidence rests within the sound discretion of the trial court and its decision will not be overturned absent a clear abuse of that discretion). Thus, appellate counsel was not ineffective for failing to raise this issue on direct appeal. See *Enis*, 194 Ill. 2d at 381; *Petrenko*, 385 Ill. App. 3d at 482.

Accordingly, we affirm the judgment of the circuit court dismissing Pulido's postconviction petition. As part of this judgment, pursuant to *People v. Nicholls*, 71 Ill. 2d 166,

174 (1978) (the State is authorized by statute to recover attorney fees as costs in the appellate court against "an unsuccessful criminal appellant upon affirmance of his conviction") and the Counties Code (55 ILCS 5/4-2002.1 (West 2010)), we grant the State's request that petitioner be assessed $100 as costs for the State's defense of this appeal.

Affirmed.