Nos. 1-09-2663 and 1-10-0849, Consolidated

FIFTH DIVISION
June 30, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 01 CR 17920(01)
	)	
FERNANDO GOMEZ,	)	Honorable
	)	Mary M. Brosnahan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.

Presiding Justice Fitzgerald Smith concurred in the judgment.

Justice Epstein dissented in the judgment.

O R D E R

HELD: Because defendant failed to establish a substantial showing of a constitutional depravation based on his claims of ineffective assistance of trial and appellate counsel, we affirm the trial court's dismissal of his *pro se* and supplemental post-conviction petitions at the second stage of review.

Following a jury trial, defendant Fernando Gomez was convicted of first degree murder and sentenced to 40 years in prison. Defendant's conviction was affirmed on direct appeal. *People v. Gomez*, No. 1-04-0190 (2005) (unpublished order under Supreme Court Rule 23). Defendant subsequently filed a supplemental petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et* seq. (West 2006)), which the trial court dismissed at the second stage of review without granting an evidentiary hearing. Defendant appeals, contending the trial court erred in finding his ineffective assistance of trial counsel and appellate counsel claims did not constitute a substantial showing of a constitutional deprivation. For the reasons that follow, we affirm the trial court's judgment.

BACKGROUND

The evidence adduced at trial established that on June 17, 2001, Juan Avalos, a "Latin Count" gang member, was shot and killed. Defendant, a "Latin King" gang member, was arrested at his place of employment, a UPS facility, and taken to Area 2 for questioning. Defendant told the police he was with co-defendant Raul Ramirez at the time of the shooting, but denied any involvement in it. After defendant was told that his brother, Jose Gomez and Ramirez were in custody, and that both Ramirez and Joel Villasenor had implicated defendant in the victim's murder,

defendant made an oral statement that he acted as the lookout while Ramirez shot at the Latin Counts. Defendant's videotaped statement to Assistant State's Attorney Kent was essentially the same as his earlier oral statement. Following a hearing, defendant's pretrial motion to suppress his confession was denied by the trial court.

Villasenor testified at trial that he was formerly a member of the Latin Kings with defendant. He admitted he was currently incarcerated because of his involvement in the victim's murder, and that he was testifying as part of a plea agreement. Villasenor said that on June 17, 2001, defendant asked him if he knew where defendant could get a gun. Villasenor testified he met defendant and three other guys at his house. When defendant exited from a car parked in front of Villasenor's house, Villasenor went over to the car and placed a gun on the backseat next to where defendant had been sitting. Later that evening, defendant called Villasenor and told him someone had been shot around defendant's sister's house. Villasenor testified he thought defendant's call meant defendant had shot a Latin Count.

Defendant testified on his own behalf. Defendant admitted to speaking with Villasenor on June 17, but denied asking for a gun. Defendant confirmed the events that occurred at Villasenor's house. With regards to the events surrounding the

shooting, defendant said he and Ramirez exited the car and started to walk down a gangway. Defendant stopped at some point because he was "messed up" and "couldn't go" through with "what I had intended to do at first," *i.e.*, shoot at the Latin Counts. According to defendant, Ramirez told him to give him the gun. Defendant said no because he did not "want to look like a pussy." Defendant said Ramirez then took the gun from him and continued to walk down the gangway. Defendant turned around and walked back to the car, at which point he heard shots fired and started to run. Ramirez ran back to the car and the group left the scene. Defendant admitted he called Villasenor later that night and told him someone had been shot.

On cross-examination, defendant admitted asking Villasenor for the gun. He also admitted Villasenor gave him the gun so defendant could shoot at the Latin Counts, and that, when Ramirez took the gun, he knew what Ramirez was going to do. Defendant said that in his mind, it was better to be a proud Latin King than a "pussy." Defendant again admitted that it was his idea to shoot a Latin Count, and that the shooting would not have happened without him. On redirect examination, defendant said that after he exited the car, he became scared and did not want to go through with his plans. He said he tried to stop Ramirez by holding onto the gun.

On direct appeal, defendant contended the trial court erred in denying his motion to suppress his confession. We affirmed defendant's conviction and sentence in *People v. Gomez*, No. 1-04-0190 (2003) (unpublished order under Supreme Court Rule 23).

Defendant filed a *pro se* post-conviction petition on May 12, 2006, alleging, in pertinent part, that his trial counsel was ineffective for failing to investigate and present mitigating evidence and for failing to object to the prosecutor's inflammatory remarks during closing argument. In addition to his own affidavit, defendant attached affidavits from his mother, sister, father and fiancee indicating they were present and would have testified as mitigation witnesses if called by counsel at defendant's sentencing hearing. The trial court appointed counsel to represent defendant on August 11, 2006.

In his affidavit attached in support of his petition, defendant averred that his attorney never told him that his family could speak on his behalf during the sentencing hearing. Defendant said that had he known his family could testify, he would have made them aware of this and had them testify on his behalf during the hearing.

Lucina Gomez and Vittorio Gomez, defendant's mother and father, submitted separate affidavits in support of the petition. In her affidavit, Lucina said that if she had known she could

have testified at defendant's sentencing hearing, she would have testified that defendant is "a good son and a respectful son." Lucina said she would have testified at the hearing that when defendant came home from juvenile prison, "he took his responsibility seriously, where he developed a skill as a painter and gained employment in three different places, part time, and [defendant] was really trying to do better in life." She would have testified that defendant was a "significant factor" in her and her husband's daily lives, that defendant would take her to church and run errands for her, that defendant aided in their mortgage payments, and that defendant had become family oriented and "would help strangers if needed to be." She said she also would have apologized to the victim's family for their loss and asked the court to sentence defendant to the minimum in light of the fact that he had not shot anyone. Victorio's affidavit contained substantially similar statements regarding what he would have testified to at the sentencing hearing.

Patricia Serna, defendant's sister, provided an affidavit in support of the petition. Serna averred in her affidavit that if she had been allowed to testify, she would have said defendant had secured several part-time jobs and was enrolled in a G.E.D. program after he returned from juvenile prison. Serna would have testified that defendant helped her parents with whatever they

needed, and that he was very good with her kids. She also would have testified that defendant "had slow down from hanging with his so called friends *** and he was trying to make an transition in his life." She would have asked the court to sentence defendant to the minimum sentence in light of the fact that a lengthy sentence would negatively impact her parents' health, and that defendant was not the actual shooter.

Ana Camacho, defendant's fiancee, also provided an affidavit in support of the petition. Camacho averred in her affidavit that if she had been called to testify at the hearing, she would have said she and defendant planned to get married and start a family before the incident occurred. She would have testified that because of defendant's help and support, she was able to raise her G.P.A. at school, gain employment in a condominium management office, and work towards obtaining her real estate license. She would have testified that defendant was in the process of changing his life around before the incident, and that defendant was a wonderful person whom she loved very much.

Defendant's post-conviction counsel filed a supplemental petition for post-conviction relief on February 11, 2009. Counsel's supplemental petition focused solely on two arguments: trial counsel's alleged ineffectiveness for not challenging the illegality of defendant's arrest based on lack of probable cause;

and trial counsel's alleged ineffectiveness for failing to submit a conspiracy to commit murder jury instruction. The State filed a motion to dismiss, which the trial court granted in a written order on September 17, 2009. The written order only addressed the two issues defendant's post-conviction counsel raised in the supplemental petition.

In a motion to reconsider and a supplemental petition for post-conviction relief filed after defendant's counsel filed a notice of appeal, defendant argued the court did not address all of the issues raised in his *pro se* petition and raised two additional issues. The court dismissed the motion and supplemental petition, finding they were not timely filed. Defendant appeals.

ANALYSIS

Defendant contends the trial court erred in dismissing his post-conviction petition without an evidentiary hearing. Specifically, defendant contends his ineffective assistance of counsel claims based on trial counsel's failure to either call any witnesses in mitigation during defendant's sentencing, or object to the prosecutor's allegedly improper remarks during closing argument, constituted a substantial showing of a constitutional deprivation, triggering the need for the petition to pass to the third stage of review. Defendant also contends he

made a substantial showing that his appellate counsel provided ineffective assistance by failing to challenge the improper prosecutorial remarks during defendant's direct appeal. We address each of defendant's contentions in turn.

A petition filed under the Act must "clearly set forth the respects in which petitioner's constitutional rights were violated." 725 ILCS 5/122-2 (West 2006). The petition must have attached "affidavits, records, or other evidence" as required by section 122-2 of the Act "supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2006); *People v. Collins*, 202 Ill. 2d 59 (2002). Because post-conviction relief is a collateral proceeding, not an appeal from an underlying judgment, all issues decided on direct appeal are *res judicata*, and all issues that could have been raised in the original proceeding but were not are waived. *People v. Evans*, 186 Ill. 2d 83, 89 (1999). If a claim of ineffective assistance of counsel is based on matters outside the record, as is true in this case, then the issue could not have been raised on appeal and consequently is not procedurally barred from being in a post-conviction petition. *People v. Owens*, 129 Ill. 2d 303 (1989); *People v. Morris*, 335 Ill. App. 3d 70, 76 (2002).

At the second stage of proceedings under the Act, post-conviction counsel is appointed to the defendant, and the State

is either required to answer the pleading or move to dismiss the petition. 725 ILCS 5/122-2.1, 122-5 (West 2006). The trial court must then rule on the legal sufficiency of the defendant's allegations, taking all well-pled facts not positively rebutted by the trial record as true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006); *People v. Childress*, 191 Ill. 2d 168, 174 (2000). The relevant question becomes whether the allegations in the petition, supported by the record and accompanying documents, demonstrate a substantial showing of a constitutional violation. *Morris*, 335 Ill. App. 3d at 76, citing *People v. Edwards*, 197 Ill. 2d 239, 245-46 (2001). The inquiry into whether a post-conviction petition contains a sufficient allegation of a constitutional deprivation does not require the trial court to engage in any fact-finding or credibility determinations, however. *Childress*, 191 Ill. 2d at 174. Notwithstanding, throughout the second stage of review "the defendant bears the burden of making a substantial showing of a constitutional violation." *Pendleton*, 223 Ill. 2d at 473. We review a trial court's dismissal of a post-conviction petition at the second stage of review *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998).

To establish a claim of ineffective assistance, a defendant must prove: (1) counsel's performance was deficient or fell below

an objective standard of reasonableness; and (2) the defendant suffered prejudice as a result of the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Ford*, 368 Ill. App. 3d 562, 571 (2006). "Prejudice is shown when there is 'a reasonable probability' that, but for counsel's ineffectiveness, the defendant's sentence or conviction would have been different." *Ford*, 368 Ill. App. 3d at 571, citing *People v. Mack*, 167 Ill. 2d 525, 532 (1995). A reasonable probability is defined as "a probability sufficient to undermine confidence in the outcome" of the proceeding. *Strickland*, 466 U.S. at 694.

In assessing an ineffectiveness claim, the court must give deference to counsel's conduct within the context of the trial and without the benefit of hindsight. *People v. King*, 316 Ill. App. 3d 901, 913 (2000); *People v. Tate*, 305 Ill. App. 3d 607 (1999). "As such, 'a defendant must overcome the strong presumption that the challenged action or inaction of counsel was the product of *sound* trial strategy and not incompetence.' " (Emphasis in original.) *King*, 316 Ill. App. 3d at 913, quoting *Coleman*, 183 Ill. 2d 366, 397 (1998).

I. Failure to Present Mitigating Evidence

Defendant contends he made a substantial showing that his

constitutional right to the effective assistance of trial counsel was violated by counsel's failure to call any of his family members--all of whom attested in affidavits in support of his post-conviction petition that they were present in court and willing to testify--as mitigation witness during defendant's sentencing hearing.

Initially, the State counters defendant forfeited his claim that he received ineffective assistance based on counsel's failure to present mitigation witnesses because defendant could have raised the issue in his direct appeal. See *People v. Petrenko*, 237 Ill. 2d 490, 499 (2010). Forfeiture aside, we find the trial court properly dismissed defendant's *pro se* and successive petitions at the second stage of review.

Even where counsel's performance can be viewed as arguably deficient due to a failure to investigate mitigating evidence and present it to the court, the defendant must still demonstrate prejudice in order to sustain such a claim. *People v. Pulliam*, 206 Ill. 2d 218, 239 (2002).

During defendant's sentencing hearing in this case, defense counsel specifically argued in mitigation that:

> "Fernando is 22 years of age. And throughout all these proceedings, the court has always been aware of the fact that the sister, his

mother and father have always been present. They're here today. In fact, the court heard from Fernando's sister and brother during the [suppression] motion. He comes from a very good family. A hard working family. And, in fact, at the time, the evidence supported the fact Fernando was taken from his job at UPS. He was working the night shift. He was working there for a period of time. And that's where Fernando was when he was arrested. He was at work.

Judge, he admitted that at the time he was still involved, although not as actively, but was involved with the Latin Kings. That subsequently he removed himself from that group. He no longer is active. He no longer is involved. And Fernando now realizes that he is going to be losing his freedom for a lengthy period of time. ***

*** The fact that Fernando was not the shooter, the fact that Fernando attempted to separate himself from the crime prior to the crime taking place, the fact that Fernando's

history, as they say, from when he was 14 years of age and again he was not -- he was there. He was present. He was not the shooter, and he was cooperative. ***

*** Judge, I have now had the opportunity to visit with Fernando over the last several years while this case has been pending. And I've seen an individual that in a couple years has matured. He is standing here now ready to accept whatever penalty this court deems is appropriate.

And it's my position, Judge, that when our legislature decided to double the sentence and say that an individual should be sentenced to 20 years and do 20 years for the offense of first degree murder, I believe they had in mind the situation such as this; an individual, although held accountable, was not the perpetrator in this case. And that would be an appropriate sentence in this case, Judge."

In determining defendant's sentence, the trial court noted it had "taken into consideration what the State has presented in

aggravation, what your attorney has presented in mitigation." Notwithstanding the mitigating factors presented, the court determined the case did not fall "into a point of being a minimum sentence." In reaching its sentencing decision, the court noted:

> "Although they're juvenile offenses, you were charged with having a gun and that probation was terminated unsatisfactorily with murder that involved the statement where you were, as the State has pointed out, this is one with retaliation once again between gangs. ***And then within two months of being released on that murder, you're now charged with this murder. As part of the argument for aggravation as to keep others from doing this, it's a sign of what our justice system is. You can't decide that you're going to go out, have a few beers, and find a gun and shoot at somebody. And in this case, kill them."

The court determined the proper sentence in the case was a 40-year prison term.

In support of his contention that his claim should advance to an evidentiary hearing, defendant cites *People v. Harris*, 206

Ill. 2d 293, 321 (2002), and *People v. Ruiz*, 132 Ill. 2d 1, 27 (1989). In *Harris*, our supreme court noted defense counsel was woefully unprepared for the defendant's sentencing hearing. Defense counsel had provided an affidavit in support of the defendant's post-conviction claims, admitting he negligently failed to investigate or present evidence in mitigation because he did not think defendant would be eligible for the death penalty. *Harris*, 206 Ill. 2d at 320. Finding defense counsel's failure to present mitigating evidence was not a strategic choice, but rather an omission due to his own lack of preparation, the court determined the defendant's ineffective assistance claim deserved an evidentiary hearing. *Harris*, 206 Ill. 2d at 322.

In *Ruiz*, our supreme court determined the defendant's post-conviction ineffective assistance claim based on defense counsel's alleged failure to consult with the defendant and his family in preparation for a death penalty sentencing hearing deserved an evidentiary hearing. The court noted "the favorable testimony from the defendant's family members and friends might have supported the defense theory at the sentencing hearing that the defendant was not an active or willing participant in the offenses." *Ruiz*, 132 Ill. 2d at 26. The court also noted that, for the most part, "the testimony would not have been cumulative

of evidence already presented at trial or sentencing; the only information that might have been repetitious would have concerned the defendant's expression of remorse for the present offense." *Ruiz*, 132 Ill. 2d at 26. The court concluded testimony from the defendant's family members would have provided a portrayal of the defendant that was not apparent from the evidence already presented to the sentencer. *Ruiz*, 132 Ill. 2d at 26. The court further determined that in the absence of an evidentiary hearing on the post-conviction petition, it could not say whether such testimony would have produced any advantage. *Ruiz*, 132 Ill. 2d at 26.

We find both *Ruiz* and *Harris* distinguishable because the supreme court's decisions in those cases were clearly based on the fact that the record reflected defense counsel had presented little to no mitigating evidence on defendant's behalf during sentencing, something we cannot say based on the totality of the record before us here. See *People v. Peeples*, 205 Ill. 2d 480, 555 (2002) (distinguishing *Ruiz* on the basis that the record in the case before the supreme court reflected the sentencer "was presented with evidence and argument in several areas of mitigation absent from the decisions relied upon by defendant.")

In this case, unlike *Ruiz* and *Harris*, the record reflects counsel had already argued to the court in mitigation that

defendant was from "a very good" and "hard working" family, that the court had already heard testimony from defendant's brother and sister on defendant's behalf during the pre-trial suppression hearing, and that defendant's family had been present throughout the trial proceedings and at the sentencing hearing itself. Counsel also highlighted to the court that defendant had been gainfully employed for a period of time prior to the incident, that defendant had broken off all ties with the street gang after the shooting, that defendant had "matured" in the couple years since the shooting had occurred, and that defendant deserved the minimum sentence because he was not the actual shooter and had cooperated with the police during their investigation of the crime. After carefully reviewing the proposed additional mitigation evidence outlined in defendant's post-conviction petition with that offered by trial counsel during the hearing in this case, we find the family's proposed additional mitigating testimony is largely cumulative of what was already presented to the court by defense counsel.

While one could certainly argue in hindsight that presenting the family's testimony at the hearing--rather than simply reciting several of those mitigating factors to the court himself--might have been a more prudent strategic decision on counsel's part, we simply cannot say the additional mitigating

evidence defendant identifies here gives rise to the type of reasonable probability necessary to show the outcome of the sentencing hearing would have been different had the family testified. We find this especially true here given the largely cumulative nature of the proposed testimony to mitigating factors defense counsel had already made the court aware of, and given the court's dismissal of those mitigating factors as justifying a minimum sentence based on the overwhelming aggravating factors surrounding the offense. See *Pulliam*, 206 Ill. 2d at 242-43 ("Here, we conclude that in light of the overwhelming evidence in aggravation, including the heinous nature of the offenses, there is no reasonable probability that the introduction of the potentially mitigating evidence set forth by defendant's amended post-conviction petition would have altered the jury's sentencing decision."); *People v. Easley*, 192 Ill. 2d 307, 344 (2000)("defendant's trial counsel presented to the jury evidence or argument in several major areas of mitigation. *** True, defendant's trial counsel failed to present additional available evidence in the above-mentioned areas. However, considering the proffered evidence in light of the aggravating circumstances, we conclude that this additional evidence would probably not have precluded defendant's death sentence.").

Because defendant cannot demonstrate he was prejudiced by

trial counsel's alleged failure to investigate and present additional mitigating evidence in the form of testimony from defendant's family and friends, we find defendant's ineffective assistance claim does not establish a substantial showing of a constitutional violation.

II. Prosecutorial Misconduct

Defendant contends he made a substantial showing that his constitutional right to the effective assistance of trial counsel was violated by counsel's failure to object to several improper prosecutorial remarks during closing argument. Defendant also contends he made a substantial showing that his constitutional right to the effective assistance of appellate counsel was violated by appellate counsel's failure to raise the issue during defendant's direct appeal.

A court also uses the *Strickland* analysis to determine the adequacy of appellate counsel. *People v. Easley*, 192 Ill. 2d 307, 328-29 (2000). Moreover, we note "[a]ppellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong." *Easley*, 192 Ill. 2d at 329. Therefore, unless the underlying issue is meritorious, a defendant has suffered no prejudice from appellate

counsel's alleged failure to raise it on appeal. *Easley*, 192 Ill. 2d at 329, citing *People v. Childress*, 191 Ill. 2d 168, 175 (2000).

Prosecutors are afforded wide latitude in closing arguments. *People v. Brooks*, 345 Ill. App. 3d 945, 951 (2004); *People v. Walker*, 262 Ill. App. 3d 796, 804 (1994). Improper comments or remarks are not reversible error unless they are either a material factor in the conviction or cause substantial prejudice to the defendant. *Brooks*, 345 Ill. App. 3d at 951. A trial court can also generally correct any error resulting from an improper remark by sustaining an objection or instructing the jury. *Brooks*, 345 Ill. App. 3d at 951. Our supreme court has pointed out, however, that "a criminal defendant, regardless of guilt or innocence, is entitled to a fair, orderly, and impartial trial." *People v. Wheeler*, 226 Ill. 2d 92, 122 (2007), citing *People v. Blue*, 189 Ill. 2d 99, 138 (2000).

During closing argument, the prosecutor referred to defendant as a "coward" and the "cowardly lion king" several times. The prosecutor also stressed to the jury that if they were sick of street gangs and street gang violence, now was their chance "to stand up to the Latin Kings, to tell them there's nothing noble about what they do."

When viewing the context of the closing arguments as a whole

and the overwhelming evidence presented at trial to establish defendant's guilt, we cannot say the prosecutor's remarks--even if considered improper--rose to a level sufficient to either cause defendant substantial prejudice or constitute a material factor in his conviction. Moreover, we note the jury received the standard instruction from the trial court concerning the role of closing arguments, further minimizing any alleged error committed by the State. See *People v. Howard*, 147 Ill. 2d 103, 150 (1991). Accordingly, we find any challenge raised on direct appeal regarding trial counsel's failure to object to the allegedly improper prosecutorial remarks would not have constituted reversible error.

Because defendant is unable to show the underlying issue would have ultimately been meritorious if raised on direct appeal, we find defendant has failed to make a substantial showing that his constitutional right to the effective assistance of counsel was violated.

CONCLUSION

We affirm the trial court's dismissal order.

Affirmed.

JUDGE EPSTEIN, dissenting:

I respectfully dissent.

I believe defendant made a substantial showing that his constitutional right to effective assistance of counsel was violated where his counsel failed to investigate mitigation evidence and failed to call any mitigation witnesses. I, therefore, believe that the trial court erred in dismissing defendant's post-conviction petition without an evidentiary hearing.

As the majority correctly notes, with respect to a challenged inaction of counsel, a defendant must overcome the strong presumption that counsel's decision was the product of sound trial strategy and not incompetence. (Op. at 10). Although courts are highly deferential in reviewing counsel's strategic decisions whether to present mitigating evidence, our supreme court has explained that this judicial deference is not warranted when the lack of mitigating evidence is the result of counsel's failure to properly investigate mitigation evidence. See *People v. Harris*, 206 Ill. 2d 293, 321 (2002); *People v. Peeples,* 205 Ill. 2d 480, 545 (2002).

Defense counsel called no witnesses in mitigation for a sentencing hearing on a first degree murder charge. Defendant stated in his affidavit that his attorney never told him that he could have family members testify on his behalf at his sentencing hearing. Three of these witnesses - defendant's mother, father, and sister were present at the sentencing hearing. All three submitted affidavits in support of defendant's post-conviction petition stating that they would have testified on defendant's behalf at the sentencing hearing. A fourth witness, defendant's fiancée , submitted an affidavit stating that she would have testified at defendant's sentencing hearing if she had known she could have. "For the purpose of determining whether to

grant an evidentiary hearing, all well-pleaded facts in the post-conviction petition and any accompanying affidavits are taken as true. *People v. Peeples*, 205 Ill. 2d 480, 510 (2002). Counsel's failure to properly investigate mitigation evidence, precludes any deference to that decision or a presumption that it was a sound strategy. I conclude that defendant has made a substantial showing that his counsel's performance in failing to investigate mitigating evidence and present it to the court fell below a minimal professional standard. The majority does not expressly disagree but concludes that defendant cannot establish that he was prejudiced by this alleged failure. I respectfully disagree.

Defendant was convicted of the first-degree murder of Juan Avalos after the evidence showed that co-defendant, Raul Ramirez, was the person who shot Jaun. Although defendant was not the shooter, the trial court sentenced him to 40 years in prison, which is twice the minimum sentence for first-degree murder.

Defendant argues that without the testimony of defendant's family and his fiancée at his sentencing hearing, the trial court likely saw defendant "as nothing more than a gang banger." Defendant also contends that, had this additional testimony been presented, "the trial judge would have seen another side of Mr. Gomez that was not reflected in the pre-sentence investigation report, as someone trying to improve his life and helping to take care of his family." Presentation of this evidence through witnesses present and willing to testify may have made an impact on the length of the sentence imposed. Those witnesses were not heard. I respectfully disagree with the majority's conclusion that the additional mitigation evidence presented in the affidavits of defendant's mother, father, sister, and fiancée, was merely cumulative of the

evidence presented in defense counsel's "argument" at the sentencing hearing. (Op. at 17). There is substantial difference between merely saying that people are present in court, as occurred here, and actually presenting them as witnesses offering mitigation testimony.

In postconviction proceedings, where the trial judge serves as the finder of fact, "it is the function of the trial court to determine the credibility of witnesses, decide the weight to be given their testimony, and resolve any conflicts in the evidence." *People v. Chatman*, 357 Ill. App. 3d 695, 704 (2005). Here, there was no evidentiary hearing and the trial court never considered mitigation evidence in the first instance. Additionally, the trial court's seven-page written order dismissing defendant's petition for post-conviction relief does not address defendant's claim regarding his counsel's failure to properly investigate mitigation evidence or call witnesses.

The majority has outlined some of the evidence that would have been presented in mitigation, had defendant's attorney not failed to present it. Unfortunately, as a result of defense counsel's failure, none of the following testimony was heard, or considered, by the trial court before it imposed the 40-year sentence.

In her affidavit , Lucina Gomez, defendant's mother stated that she would have testified as follows:

> "3. Fernando Gomez is my son whom I care and love a great deal. Fernando is a good son and a respectful son.
>
> 4. When Fernando came home from juvenile prison he took his responsibility seriously, where he developed a skill as a painter and gained employment in three different places, part time, and Fernando was really trying to do better in life.

5. Fernando resided with me and his father, Victorio. Fernando was a significant factor in [my husband's and my] daily life. Fernando would take me to Church, he aided me with the mortgage payments, and he ran errands for us whenever we needed, if he could. Fernando had become family oriented and of course, he has a good heart, and he would help strangers if need be, he was good with his nieces and nephews.

6. Had I known I could have testified at my son's sentencing hearing, I would have, and I would have pleaded with the Judge to give my son, the minimum, because my son is important to me and my family.

7. I would have asked the judge to consider the fact that the actual shooters in my son's case, [were sentenced to seven years] and to sentence Fernando to 40, 50 or even 60 years would be unfair because Fernando did not shoot anyone. There's so much I would have liked to say to the sentencing judge.

8. My son's lawyer never told me and my family we could have testified in Fernando's behalf; we were present throughout my son's trial and sentencing. Had I known I could have testified in my son's behalf, I would have."

Mr. Gomez's father, Victorio Gomez, would have testified similarly. Additionally, according to his affidavit, he would have testified that Fernando "worked at the family store part time selling clothes, and he worked with his brother Jose, as a painter, part time."

Mr. Gomez's sister, Patricia Serna, stated in her affidavit that her brother was trying to change his life after he returned from juvenile detention. She provided evidence of that desire to

change by noting that he worked two jobs, helped out at the family store, enrolled in a G.E.D. program, and helped her children with their homework."

Ana Camacho, Mr. Gomez's fiancée stated in her affidavit that she and defendant had planned to get married and start a family, but the two had agreed she would finish school first. She also stated that, because of Mr. Gomez's support and encouragement, her "G.P.A. went up to an A average," she was able to get a job at a condominium management office and would be receiving her real estate license.

I respectfully disagree with the majority's characterization of this proposed evidence as merely "cumulative" of that presented in counsel's argument at the sentencing hearing. (Op. at 17). I believe defendant has established that this mitigation evidence, had it been presented to the trial court, and if it had been credited by the trial court, could have affected the trial court's sentencing decision.

The Illinois Post-Conviction Hearing Act should be " 'liberally construed to afford a convicted person an opportunity to present questions of deprivation of constitutional rights.' [Citation.]" *People v. Pack*, 224 Ill. 2d 144, 150 (2007). In view of the undisputed facts from the record, as well as the well-pleaded facts in defendant's postconviction petition and the accompanying affidavits, I believe defendant could potentially establish that he was prejudiced by his counsel's failure to present mitigation evidence at his sentencing hearing.

Defendant has made a substantial showing that his constitutional right to effective assistance of counsel was violated, and therefore I would reverse and remand for a hearing on defendant's postconviction petition. Defendant was entitled to a hearing. It is for that reason,

that I dissent.