2015 IL App (1st) 13-2354

FOURTH DIVISION
June 30, 2015

No. 1-13-2354

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the Circuit Court
Respondent-Appellee,	)	of Cook County, Illinois,
	)	County Department, Criminal
v.	)	Division
	)	
GARLAND PENNINGTON,	)	No. 98 CR 29068
	)	
Petitioner-Appellant.	)	The Honorable
	)	Thomas V. Gainer, Jr.,
	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices Howse and Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in part in dismissing the petitioner's second stage postconviction petition on the basis of counsel's ineffectiveness. The petitioner made a substantial showing that counsel was ineffective: (1) for failing to investigate an occurrence witness who would have testified that the petitioner was not the shooter; and (2) for erroneously advising the petitioner about the consequences of his choosing to testify at trial. The petitioner made a substantial showing that but for these errors of counsel the outcome of his proceedings would have been different.

¶ 2 After a jury trial in the circuit court of Cook county, the petitioner, Garland Pennington, was

convicted of one count of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 1998)) and sentenced to 18 years' imprisonment. The petitioner now appeals from the second-stage dismissal of his petition for relief under the Post-Conviction Hearing Act. 725 ILCS 5/122-1 *et seq*. (West 2010). He contends that the circuit court erred in not permitting his petition to proceed to an evidentiary hearing because he made a substantial showing that his constitutional rights were violated where his trial counsel: (1) was ineffective for failing to call witnesses at his trial who would have contradicted the State's witnesses by showing he was not the shooter; and (2) usurped his fundamental right to testify on his own behalf by providing him with erroneous information and threats. In the alternative, the petitioner argues that his postconviction counsel failed to provide a reasonable level of assistance by failing to supplement his *pro se* petition and affidavit to properly articulate how by the actions of his trial counsel he was denied his constitutional right to testify at trial. For the reasons that follow, we affirm in part and reverse and remand with instructions in part.

¶ 3 I. BACKGROUND

¶ 4 The record before us reveals the following facts and procedural history. On October 28, 1998, the petitioner was charged, *inter alia*, with four counts of aggravated battery with a firearm (720 ILCS 5/12-4.2 (West 1998)), against four victims, Rodney Blalock (hereinafter Blalock), Jamail Cowens (hereinafter Cowens), Pernorise Brownridge (hereinafter Brownridge) and Emmett Travis, Jr. (hereinafter Travis) stemming from a shooting that took place on October 25, 1998, in a church gymnasium. Three years later, in December 2001, the petitioner proceeded with a jury trial at which the following evidence was adduced.

¶ 5 On October 25, 1998, the petitioner, and all four victims attended a Halloween party in the

gymnasium of St. Margaret of Scotland Church, hosted by the Sweet Dukes Van Club. The club was for men who drove vans, but attendance at the party was open to non-members and the admission fee was $10. Although food and alcohol were sold at the party, attendees were permitted to bring their own alcohol. Entertainment was provided by a "disk jockey" and a stripper.

¶ 6 Emmett Travis Jr., one of the victims, testified that he entered the gymnasium at about midnight and observed that the party was "pretty full." On cross-examination he explained there were hundreds of people in attendance and that the room was very crowded and loud. At the party, Travis saw several long-time friends, including the three remaining victims, Blalock, Cowens, and Brownridge, as well as Melvina Williams (hereinafter Melvina), and her sister Carmel Williams (hereinafter Carmel). Travis stated that he brought a bottle of whiskey with him to the party, and admitted that he drank about a pint of that whiskey during the night.

¶ 7 Travis testified that at about 2 a.m., he was at the food table and bar, near the front of the gymnasium when he was asked by the club president to join him in the kitchen, near the back of the gymnasium. Travis began walking back to the kitchen, but did not reach far when he saw the petitioner coming towards the front of the gymnasium, with a "whole crowd" following behind him, including Jimmy Moore (hereinafter Moore), Melvina's fiancé. A commotion started and Travis was stopped by the petitioner's mother, who said "that is my son." Travis then saw Moore swing at the petitioner, striking him on the side of the head or face. Travis "grabbed the petitioner [and] tried to cover him up" from Moore's blows, but then heard a gunshot pass close by his head, grazing his ear. Travis released the petitioner and turned away briefly to look at the crowd that began running towards the doors. When he turned around, the petitioner was pointing a pistol at or above his head. Travis then told the petitioner, "Fool, I'm trying to help you. I

know your mother," but the petitioner did not respond. Instead, he fired two shots at Travis, grazing Travis's right eyebrow and eye. Travis was "shocked" so he just turned around and left, following the stampede of people fleeing the gymnasium. He did not see what the petitioner did after that.

¶ 8 Travis testified that about five minutes later, he reentered the gymnasium to find his friends. He first observed Blalock with a wound on top of his head. Blalock told him that both Cowens and Brownridge had been shot. Travis then found Cowens lying on the floor with blood nearby and Brownridge holding bloody rags to his throat. Travis explained that the police arrived soon thereafter, and that he was taken to a hospital for treatment. A few days after the incident, Travis was taken to a police station, where he identified the petitioner as the shooter from a lineup of four men.

¶ 9 On cross-examination, Travis admitted that the petitioner was the shortest man in the lineup and the only one with long hair. Travis also admitted that the petitioner was the only man in the lineup wearing brown and that Travis had told police before the lineup that during the incident the man who shot him was wearing brown.

¶ 10 The Sate next called Jamail Cowens, who testified that he arrived at the party between 10:30 and 11 p.m., with a bottle of cognac and half a case of beer. Cowens stated that he saw his neighborhood friends, Travis, Blalock and Brownridge at the party. Cowens averred that he was drinking and listening to music when he noticed Melvina arguing with the petitioner because the petitioner had hit her "on the bottom." Cowens had not met the petitioner before but had recognized him as someone he had seen occasionally in the neighborhood. Cowens told the petitioner not to hit Melvina, but when the petitioner "started talking jazzy," he walked away.

¶ 11 Cowens testified that about an hour later, he was standing next to the photographer's booth in

the gymnasium, when he saw a crowd fleeing. His next memory was of waking up in the hospital four days after the party. Cowens testified that a bullet had struck him behind the left ear, and as a result he was rendered deaf in one ear and would "blank out" about once a month. At the time of the trial, there were still fragments of the bullet inside his jaw and he was still being treated for his injuries.

¶ 12 Cowens admitted that in 1997 he was convicted for possession of a controlled substance with intent to deliver, for which he was sentenced to probation.

¶ 13 On cross-examination, Cowens testified that he could not recall exactly where Melvina and the petitioner were standing when he observed them arguing. Cowens also admitted that after the incident he never contacted the police. He acknowledged, however, that after the incident he contacted a lawyer in order to pursue a civil action against the petitioner, the parish church, and the van club.

¶ 14 Rodney Blalock next testified that he arrived at the party between 11 and 11:30 p.m. with a bottle of cognac. He stated that the "party was in full force" and the "music was playing very loudly." Blalock saw long-time friends Cowens, Brownridge, and Travis, but spent most of the first few hours at the party with two women near the front of the gymnasium. At about 2:30 a.m., he joined Brownridge and Cowens, near the photographer's booth to take photographs "for a couple of friends of [theirs who] were locked up at that time." After taking a few photographs, Blalock looked up and saw "a gathering or argument" in the back of the gymnasium near the "disk jockey." Blalock did not pay much attention to it, and instead turned to the table to focus on picking out a picture frame. As he turned around to find the photographer, Cowens saw something metallic near the left side of his head, at his temple. He turned around and saw the petitioner holding the object in his hand. Blalock explained that he did not know the petitioner at

that time, but that he identified him a day after the party from a lineup conducted by the police. Blalock also made an in court identification of the petitioner.

¶ 15 Blalock further testified that he believed the metal object was a firearm, so he grabbed the petitioner's hand and spun him around. As he did so, Blalock fell to the floor and heard a gunshot over his head. Blalock stated that a bullet then struck the top of his head, and he felt a gunpowder burn on his face. Blalock fled and heard four more gunshots before he left the building.

¶ 16 Blalock testified that at some point, he reentered the gymnasium, and saw Brownridge and Cowens lying on the ground. He also saw Travis, who told him that he had a wound on top of his head. Blalock stated that this was the first time he realized he had been shot. Blalock then passed out and woke up in the hospital. When he realized that he was in the hospital, Blalock did not know what had happened, and was afraid for his life. Accordingly, he signed himself out of the hospital and had his mother pick him up and take him to her home.

¶ 17 Blalock next testified that on October 26, 1998, he identified the petitioner as the shooter in a lineup. On cross-examination, he admitted that the shooter was about five feet, seven inches tall with long hair and that the petitioner was the shortest man in the lineup and the only one with long hair. On redirect examination, Blalock, however, explained that he selected the petitioner from the lineup by his face.

¶ 18 Blalock admitted that he drank alcohol during the course of the party and that he was "drunk" by the time of the shooting. He also admitted to a 1994 conviction for burglary, for which he received probation, and a 1991 conviction for possession of a controlled substance, for which he went to prison. On cross-examination, Blalock also admitted that together with Brownridge and

Cowens, he had filed a civil law suit against the petitioner, the van club, the parish and the Archdiocese.

¶ 19 Pernorise Brownridge next testified that he arrived at the party at about 11:30 p.m. and began talking to his friends Travis, Blalock and Cowens. Brownridge testified that at some point, Melvina, whom he had known from the neighborhood for over ten years, came up to him and complained that the petitioner had been "feeling her on her behind." Brownridge averred that he had never seen the petitioner before the party. Nevertheless, he walked over to the petitioner and told him to leave Melvina alone. The petitioner retorted that Melvina was "his woman" and that Brownridge should mind his own business. Brownridge knew that Melvina was engaged to Moore, but decided to "leave it alone" and walked away.

¶ 20 Brownridge testified that he then proceeded to the photo booth. About 15 minutes later, he saw a crowd of people coming form the back of the gymnasium, arguing loudly. Suddenly, the crowd started running and Brownridge was knocked to the ground. As he was attempting to get up, he saw the petitioner standing over him, about two feet away, with a pistol in his hand. According to Brownridge, the petitioner fired his pistol and the bullet struck Brownridge in the left eye and lodged itself into his throat. Brownridge passed out, and awoke at the hospital, where he discovered that he no longer had his left eye. While in the hospital, Brownridge selected the petitioner as the shooter from five photographs provided by the police.

¶ 21 On cross-examination, Brownridge acknowledged that he had been drinking alcohol at the party, but denied being intoxicated. He also admitted to a 1987 conviction for burglary, for which he served prison time, and a 1991 conviction for possession of a controlled substance.

¶ 22 On cross-examination, Brownridge also acknowledged that during the photo array

identification he had a tracheotomy tube in his throat and could not speak to the police. Of the five photographs shown to him by the police, Brownridge recognized only the petitioner as someone who had been present at the party. The remaining four photographs were not individuals that he had seen in the church gymnasium. Brownridge further acknowledged that after he regained his speech through the help of a speech therapist, the police never contacted him again to speak to him about the incident, and never asked him to view a lineup.

¶ 23 Chicago police detective William Halloran (hereinafter Detective Halloran) next testified that in the early morning hours of October 25, 1998, he was assigned to investigate an aggravated battery at the Saint Margaret of Scotland Catholic church. Once at the scene, Detective Halloran began interviewing witnesses, including Travis. Soon thereafter, the detective received a radio call providing the license plate number of "a van that might be involved in the shooting." After checking the plate's registration, Detective Halloran proceeded to the petitioner's home, but found no one there. Later that morning, Detective Halloran proceeded to interview several more witnesses, including Melvina and Moore.

¶ 24 Detective Halloran testified that later that day, he identified the petitioner as a possible suspect to Detective James Fitzmorris. At about 3 p.m. on October 25, 1998, he observed Detective Fitzmorris accompanying the petitioner into the police station.

¶ 25 On cross-examination, Detective Halloran admitted that a police report of his interview of Travis revealed that Travis told him he did not know the shooter's name or who had done the shooting.

¶ 26 Chicago police detective Alejandro Almazon next testified at approximately 4:30 p.m. on October 25, 1998, he took over the investigation from Detective Halloran. At this point, the petitioner, who was a suspect, was already in custody.

¶ 27 Detective Almazon conducted his first lineup on October 26, 1998 for Blalock. That lineup included the petitioner and three other men, whom Detective Almazon explained were "the closest matching [the petitioner] at the time that we had in the lockup." According to Detective Almazon, Blalock identified the petitioner as the shooter from the lineup.

¶ 28 Detective Almazon testified that two days after the shooting, he also conducted a photographic array for Brownridge in his hospital room. Brownridge selected a photograph of the petitioner from among five photographs as the shooter. That same day, the detective conducted a second lineup for Travis. The lineup again included the petitioner and three men from the lockup, and Travis selected the petitioner as the shooter.

¶ 29 On cross-examination, Detective Almazon admitted that the petitioner was the shortest participant and the only one with long hair in the lineup viewed by Blalock. With respect to the photo array identification, Detective Almazon admitted that when he visited Brownridge in the hospital, Brownridge was unable to speak and communicated with him only by nodding his head "yes" or "no." Detective Almazon admitted that he did not ask Brownridge to write down a description of his shooter prior to giving him the photographs. The detective further admitted that of the five photographs, three of those contained photographs of men with short hair. Of the remaining two photographs, the petitioner's photograph was the one with longer hair (below the ears).

¶ 30 After the State rested its case-in-chief, the defense first called Jimmy Moore to the stand. Moore testified that he was Melvina's fiancé. He and Melvina arrived at the party together at about 10:30 p.m., and sat near the back of the gymnasium. According to Moore, there were about 200 or 300 people at the party. Moore averred that at some point in the evening, Melvina

told him that she "had *** some problem" with the petitioner. Moore had not met the petitioner before and had not seen what had transpired between Melvina and Moore.

¶ 31 Moore testified that later that night as he was leaving the party, he encountered the petitioner, Cowens, and the petitioner's mother (or aunt). According to Moore, at that point, he and the petitioner "exchanged words," then grabbed each other by their shirts and fell to the ground. Moore then saw, "out of the corner of [his] eye" a woman swing a bottle at his head. The blow was blocked by another woman, but fragments of the bottle struck Moore in the ears. While Moore was on top of the petitioner on the floor holding the petitioner's chest (and his red jacket), he heard a gunshot from above. Moore let go of the petitioner and ran to the back of the gymnasium. He heard one more shot before leaving by breaking a window and climbing over a gate.

¶ 32 On cross-examination, Moore acknowledged that at some point in the evening, he was present when Melvina, and her sister, Carmel, argued with the petitioner after the petitioner had been disrespectful to both of them. Moore stated that some of his friends then "had words with the petitioner," and that the petitioner reached inside his red jacket pocket trying to create the impression that he had a gun. Moore testified on redirect examination, however, that the petitioner never pulled anything out of his jacket, and instead walked away. In fact, Moore never saw the petitioner with a gun.

¶ 33 On cross-examination, Moore also admitted to four prior convictions for drug offenses.

¶ 34 The defense next called Corey Shores (hereinafter Shores), who testified that he arrived at the party by 11 p.m. at the invitation of a friend. Except for that friend, Shores knew no one at the party. Shores brought a six pack of beer with him and consumed four or five cans over the course of the evening. At about 2:30 a.m., Shores was sitting down when he saw a man "come in

and just start[] shooting into the crowd." According to Shores, the shooter was between five feet, nine inches and six feet tall, with a fair complexion and shoulder-length braided hair. Shores averred that when the man finished shooting, a group of people grabbed him and rushed him out of the gymnasium.

¶ 35 Shores testified that after the incident he remained in the gymnasium and spoke to police. He told the officer on the scene what he saw and described the shooter as a slim black male, wearing a blue or black jacket. Soon afterwards, Shores received a telephone call from the police and was asked to come to the police station to view a line up. However, when on the date in question, Shores arrived at the police station, he was told that he was no longer needed and therefore never viewed a lineup.

¶ 36 The parties next stipulated to the testimony of several physicians and nurses, who would testify to the wounds of Brownridge, Travis and Blalock. In addition, they would testify that Travis smelled of alcohol while Brownridge and Blalock each had a blood alcohol level over 0.2 It was also stipulated that Detective Duckhorn would testify that he interviewed Blalock in the hospital and did not believe him to be intoxicated. In addition, if called to testify, Detective Duckhorn also would have stated that when he interviewed Travis, Travis told him he did not know who did the shooting and provided no description of the shooter.

¶ 37 Subsequently, prior to the close of the defendant's case-in-chief, the defense informed the court that the petitioner would not testify. The court then addressed the petitioner:

"THE COURT: Mr. Pennington, your attorney has advised the court that you do not wish to take the witness stand and testify in your own behalf, is that correct?

THE PETITIONER: Yes, your Honor.

THE COURT: And do you understand that whether or not you take the witness stand in this trial and testify on your own behalf is your own decision and yours alone to make?

THE PETITIONER: Yes.

THE COURT: Have you discussed your decision not to testify with your attorney?

THE PETITIONER: Yes.

THE COURT: Has anyone promised you anything or threaten[ed] you in any way to cause you to not want to testify?

THE PETITIONER: No, your Honor.

THE COURT: And are you choosing not to testify of your own free will?

THE PETITIONER: Yes I am.

THE COURT: All right. And it is your decision not to testify, is that correct?

THE PETITIONER: Yes, Judge.

THE COURT: Then this court finds that the [petitioner's] decision not to testify in this case is made after thoughtful discussion with his attorney and is knowingly and voluntarily made of his own free will and this is not the conduct of any promise duress or coercion of any kind."

¶ 38 After hearing all of the evidence, the jury found the petitioner guilty of aggravated battery with a firearm solely as to Brownridge. The jury acquitted the petitioner of the charges of aggravated battery as to the remaining three victims: Travis, Cowens, and Blalock. The petitioner was subsequently sentenced to 18 years imprisonment.

¶ 39 On direct appeal, the petitioner argued: (1) that the evidence was insufficient to prove him

guilty beyond a reasonable doubt; and (2) that the circuit court abused its discretion during sentencing by failing to consider his rehabilitative potential and by improperly considering his assertion of innocence and failure to furnish a motive for the offense in aggravation. The appellate court affirmed. See *People v. Pennington*, No. 1-02-1521 (January 16, 2004) (unpublished order pursuant so Illinois Supreme Court Rule 23).

¶ 40 On November 12, 2004, the petitioner filed a *pro se* postconviction petition, alleging, *inter alia*, that he received ineffective assistance of trial counsel because counsel failed to contact, interview or call, Yolanda Black, as a witness at trial. The petitioner asserted that Black would have testified that she was present at the scene of the incident and that "she saw the person who did the shooting, and it was not the person they arrested." In addition, the petitioner alleged that his trial counsel was ineffective because she "persistently badgered him into not testifying in his own behalf, by feeding him erroneous information and threatening to withdraw as his counsel."

¶ 41 In support of his *pro se* petition, the petitioner attached two sworn affidavits, both signed by him. In his first affidavit, the petitioner stated that he gave his counsel "the following [five] names to contact as witnesses" but that counsel "never attempted to contact any" of them: (1) James Coleman; (2) Emmitt Davis; (3) Stacy Patterson; (4) Yolanda Black: and (5) D. Noble. In his second affidavit, the petitioner attested that when he informed his trial counsel that he intended to testify she informed him that "it was the wrong thing to do" because the prosecution would introduce his juvenile record at trial as well elicit the testimony of his former grade school teacher, who would state that the petitioner was "incorrigible." In addition, the petitioner attested that trial counsel explicitly warned him that if he chose to testify she would withdraw as his counsel.

¶ 42 On December 22, 2004, in a written order, the circuit court summarily dismissed the

petitioner's *pro se* postconviction petition. On appeal, we reversed that dismissal, finding that the petition stated the gist of a meritorious constitutional claim of ineffective assistance of counsel, and remanding the cause for second stage proceedings. *People v. Pennington*, No. 1-05-0230 (July 28, 2006) (unpublished order pursuant to Illinois Supreme Court Rule 23). In doing so, we only addressed the petitioner's claim that counsel was ineffective for giving the petitioner "erroneous information regarding the consequences" of his choosing to testify, and found that the petitioner's "documents attached to the *pro se* petition were sufficient to comply with the Act" so as to state the gist of a meritorious claim. *People v. Pennington*, No. 1-05-0230 (July 28, 2006) (unpublished order pursuant to Illinois Supreme Court Rule 23), at 4-5. In that respect, we explicitly rejected the State's contention that the petitioner's ineffective assistance of counsel claim was rebutted by the record because the petitioner was admonished by the circuit court of his right to testify, stating:

> "While this may rebut [the] petitioner's claim of ineffective counsel based on counsel's threat to withdraw if petitioner testified, it does not rebut [the] petitioner's claim of ineffective counsel based on erroneous information about the consequences of his testimony." *People v. Pennington*, No. 1-05-0230 (July 28, 2006) (unpublished order pursuant to Illinois Supreme Court Rule 23), at 5.

¶ 43 Having found that the petitioner's claim of ineffectiveness of counsel on the basis of her interference with the petitioner's right to testify was not frivolous or patently without merit, we noted that the entire petition needed to advance to the second stage. *People v. Pennington*, No. 1-05-0230 (July 28, 2006) (unpublished order pursuant to Illinois Supreme Court Rule 23), at 5. We therefore we did not address the petitioner's second contention that counsel was ineffective

for failing to investigate and present additional witnesses at his trial. *People v. Pennington*, No. 1-05-0230 (July 28, 2006) (unpublished order pursuant to Illinois Supreme Court Rule 23), at 5.

¶ 44 After the cause was remanded to the circuit court for second stage proceedings, and the Public Defender's Office was assigned to the case, over six years later, on January 26, 2012, the public defender finally filed a supplemental postconviction petition with supporting affidavits. The record provides no basis or justification for such a delay. On that same day, the public defender also filed a certificate of compliance pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb.6, 2013) stating that she had consulted with the petitioner, reviewed the transcripts, and "prepared a supplemental petition for post conviction relief augmenting the petitioner's previously filed petition for post conviction relief."

¶ 45 The supplemental petition alleged that trial counsel was ineffective for failing to present two exculpatory witnesses, DeAndre Nobles (hereinafter Nobles) and Anita Pennington (hereinafter Anita), the petitioner's mother, to corroborate the petitioner's theory that Brownridge mistakenly identified him as the shooter. In support, the supplemental petition attached affidavits of both Nobles and Anita.

¶ 46 In her affidavit, the petitioner's mother, Anita, averred that she was at the party when the shooting started. When she heard the shots, Anita looked for her son. She saw him on her right, struggling with a tall African American man who she knew as "Big Sam." Anita averred that the petitioner had no gun in his hand. Anita further averred that she then turned to her left, because that is where the shots were coming from and she saw the shooter--her nephew Deveon Pennington, called "Bowie." Anita stated that she approached "Bowie" while he was shooting and yelled and screamed at him to please stop. Anita explained that apart from height, Deveon and the petitioner looked alike. After Deveon stopped shooting, Anita picked up her

things and started heading outside of the gymnasium. She then saw her son leave with his friends, before heading home herself. Anita further averred in her affidavit that she spoke to her son's trial attorney prior to trial and told her all of the aforementioned facts. The trial attorney, however, informed Anita that she would not call her as a witness because the jury would not believe her testimony since she was the petitioner's mother. Anita also averred that after the trial she spoke to Nobles, who told her that he was too scared to testify at her son's trial because "guys in the hood who were friends of the persons shot would retaliate."

¶ 47 In his affidavit, Nobles averred that he too was at the party on the night of the incident. He saw the petitioner in his red leather coat at the party, but never saw him with a gun. When Nobles heard the shots, he saw the petitioner on the floor without a gun in his hands. Nobles further averred that although he does not know who the shooter was, he knows that the petitioner did not fire the shots that night. In addition, in his affidavit Nobles stated that the petitioner's cousin, "Boowee," was at the party and that he looked liked the petitioner, just taller. Nobles further explained in his affidavit that he left the party before the police arrived and did not want to become involved in the cause because he was "afraid something could happen to him or his family [wife and now five children] by retaliation by friends of the persons shot." Nobles averred, however, that if he had been subpoenaed to testify at the petitioner's trial he would have testified to the facts in his affidavit.

¶ 48 On October 16, 2012, the State filed a motion to dismiss the petitioner's supplemental postconviction petition, arguing that the petitioner failed to make a substantial showing that trial counsel was ineffective. On November 29, 2012, the petitioner's postconviction counsel filed a response to the State's motion to dismiss.

¶ 49 After hearing arguments on the State's motion to dismiss, on July 11, 2012, the circuit court

granted the State's motion. The petitioner now appeals.

¶ 50 At the outset, we note that before the appeal in this cause was filed,[1] the petitioner was released from the Illinois Department of Corrections (IDOC) and is currently serving parole. According to the IDOC website, which we may judicially notice, the petitioner was released and paroled on January 16, 2014. The projected date for the discharge of his sentence is January 16, 2017. See *People v. Gipson*, 2015 IL App (1st) 122451, ¶ 66 (holding that the appellate court may take judicial notice of the IDOC's website because it is an official public record); see also *People v. Sanchez*, 404 Ill. App. 3d 15, 17 (2010) (finding that this court can take judicial notice of the IDOC's website).

¶ 51 II. ANALYSIS

¶ 52 On appeal, the petitioner makes two assertions: (1) that he made a substantial showing that his trial counsel was ineffective so as to be permitted to proceed to an evidentiary hearing with his postconviction petition; and (2) in the alternative, that postconviction counsel failed to comply with Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013), so as to provide him a "reasonable level" of assistance in articulating his postconviction claims. We will address each contention in turn.

¶ 53 We begin by noting the familiar principles regarding postconviction proceedings. The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2012)) provides a means by which a criminal defendant may challenge his conviction on the basis of a "substantial deprivation of federal or state constitutional rights." *People v. Tenner*, 175 Ill. 2d 372, 378 (1997); *People v. Haynes*, 192 Ill. 2d 437, 464 (2000). A postconviction action is a collateral

[1] The petitioner filed his appeal on October 10, 2014.

attack on a prior conviction and sentence, and "is not a substitute for, or an addendum to, direct appeal." *People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994).

¶ 54 In a noncapital case, the Act creates a three-stage procedure of postconviction relief. *People v. Makiel*, 358 Ill. App. 3d 102, 104 (2005); see also *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). At the second stage of postconviction proceedings, such as here, the circuit court must determine whether the petition and any accompanying documentation make a substantial showing of a violation of constitutional rights. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). At this stage, all well-pled facts in the petition are taken as true unless positively rebutted by the record. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006); see also *People v. Towns*, 182 Ill. 2d 491, 501 (1998) ("In determining whether to grant an evidentiary hearing, all well-pleaded facts in the petition and in any accompanying affidavits are taken as true."). In addition, the trial court may not "engage in fact-finding or credibility determinations." See *People v. Childress*, 191 Ill. 2d 168, 174 (2000). Rather any factual disputes raised by the pleadings must be advanced to and resolved at an evidentiary hearing. See *People v. Domagala*, 2013 IL 113668, ¶ 35; see also *People v. Plummer*, 344 Ill. App. 3d 1016, 1020 (2003) ("The Illinois Supreme Court *** [has] recognized that factual disputes raised by the pleadings cannot be resolved by a motion to dismiss at either the first stage *** or at the second stage *** [of postconviction proceedings], rather, [they] can only be resolved by an evidentiary hearing"); see also *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998) ("[A]t the dismissal stage of a post-conviction proceeding, whether under section 122-2.1 or under section 122-5, the circuit court is concerned merely with determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity which would necessitate relief under the Act. Moreover, our past holdings have foreclosed the circuit court from engaging in any fact-finding at a dismissal hearing because all well-pleaded

facts are to be taken as true at this point in the proceeding."). Our review of the trial court's dismissal of a postconviction petition at the second stage is *de novo*. *Pendleton*, 223 Ill. 2d at 473.

¶ 55 A. Ineffective Assistance for Failure to Investigate and Call Witnesses

¶ 56 The petitioner first asserts that he made a substantial showing that he was denied his constitutional right to effective representation of trial counsel when counsel failed to investigate and call two witnesses to the stand, his mother, Anita, and Nobles. [2]

¶ 57 It is well settled that claims of ineffective assistance of counsel are resolved under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Lacy*, 407 Ill. App. 3d 442, 456 (2011); see also *People v. Colon*, 225 Ill. 2d 125, 135 (2007) (citing *People v. Albanese*, 104 Ill. 2d 504 (1984) (adopting *Strickland*)). Under the two-prong test set forth in *Strickland*, a petitioner must establish both: (1) that his counsel's conduct fell below an objective standard of reasonableness; and (2) that he was prejudiced by counsel's conduct. See *Lacy*, 407 Ill. App. 3d at 456; see also *People v. Ward*, 371 Ill. App. 3d 382, 434 (2007) (citing *Strickland*, 466 U.S. at 687-94).

¶ 58 Under the first prong of *Strickland*, the petitioner must prove that his counsel's performance was deficient because it fell below an objective standard of reasonableness " 'under prevailing professional norms.' " *Lacy*, 407 Ill. App. 3d at 456-57 (citing *Colon*, 225 Ill. 2d at 135); see also *People v. Evans*, 209 Ill. 2d 194, 220 (2004). In this respect, it is the petitioner's burden to

[2] In his original *pro se* postconviction petition filed in November 2004, the petitioner included a list of five witnesses trial counsel allegedly neglected to call. On appeal, however, the petitioner only argues that trial counsel was ineffective for failing to call Anita and Nobles.

overcome the strong presumption that the challenged action or inaction might have been the product of sound trial strategy. *Lacy*, 407 Ill. App. 3d at 456-57.

¶ 59 Under the second prong of *Strickland*, the petitioner must show that "but for" counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Lacy*, 407 Ill. App. 3d at 457; see also *Colon*, 225 Ill. 2d at 135; *Evans*, 209 Ill. 2d at 220. "[A] reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome--or put another way, that counsel's deficient performance rendered the result of [the proceedings] unreliable or fundamentally unfair." *Evans*, 209 Ill. 2d at 220; see also *Plummer*, 344 Ill. App. 3d at 1019 (citing *Strickland*, 466 U.S. at 694).

¶ 60 1. Anita Pennington

¶ 61 In the instant case, the petitioner first contends that he made a substantial showing that his trial counsel was ineffective for failing to call his mother, Anita, to the stand. The State, on the other hand, asserts that counsel's decision not to call Anita to the stand was strategic and that therefore the petitioner cannot make a substantial showing of deficient performance. We agree.

¶ 62 Our courts have repeatedly held that "decisions concerning whether to call certain witnesses on a defendant's behalf are matters of trial strategy, reserved to the discretion of trial counsel." *People v. Enis*, 194 Ill. 2d 361, 378 (2000) (citing *People v. West*, 187 Ill. 2d 418, 432 (1999)); see also *People v. Reid*, 179 Ill. 2d 297, 310 (1997); see also *Lacy*, 407 Ill. App. 3d at 466. As our supreme court has explained:

> "Such decisions enjoy a strong presumption that they reflect sound trial strategy, rather than incompetence [citation] and are, therefore, generally immune from claims of ineffective assistance of counsel [citation]." *Enis*, 194 Ill. 2d at 378.

¶ 63 In the present case, we cannot find that the petitioner has overcome this presumption and made a substantial showing that counsel's decision not to call Anita to the stand was objectively unreasonable. The record below reflects that trial counsel was aware of Anita's testimony. Counsel listed Anita on her discovery response as a prospective witness. Anita's own affidavit confirms that trial counsel spoke to her prior to trial and discussed her potential testimony with her. According to Anita's own affidavit, trial counsel chose not the use Anita as a witness, explaining to her that the jury would likely not believe her testimony because she was the petitioner's mother. There is nothing objectively unreasonable in this reasoning of counsel. See *e.g.*, *Lacy*, 407 Ill. App. 3d at 466 (holding that trial counsel's conduct was not objectively unreasonable where counsel chose not to call the defendant's relative to the stand, since the relationship between the defendant and the relative "could cause the jury to afford that testimony less weight"); *People v. Deloney*, 341 Ill. App. 3d 621, 635 (2003) (rejecting ineffectiveness of counsel claim for failure to call alibi witnesses because the witnesses were the "defendant's cousins and, as such, their credibility may have carried little weight"); *People v. Dean*, 226 Ill. App. 3d 465, 468 (1992) (affirming dismissal of claim of ineffective assistance of counsel and holding that counsel's decision not to offer three potential alibi witnesses was trial strategy where "[a]ll three of the potential alibi witnesses may have been related to codefendant *** and thus, their credibility may have carried little weight").

¶ 64 In coming to this conclusion, we have considered the decision in *People v. Tate*, 305 Ill. App. 3d 607, 612 (1999), cited to by the petitioner for the proposition that failure to call an exculpatory witness, of which counsel is aware, may amount to unreasonable representation. We, however, find that case inapposite. In *Tate*, the defendant was charged and convicted of murder after several witnesses identified him at trial as the shooter. *Tate*, 305 Ill. App. 3d at 608-

9. At trial, defense counsel argued that the defendant had been misidentified, by drawing the jury's attention to various weaknesses in the State's case, but without presenting any testimony that the defendant was not the shooter. *Tate*, 305 Ill. App. 3d at 612. After the defendant's case was affirmed on appeal, he filed a postconviction petition, offering affidavits of three alibi witnesses (including his mother) who averred that they spoke to defense counsel prior to trial and informed him that they had been with the defendant during the shooting, so that he could not have been the shooter. *Tate*, 305 Ill. App. 3d at 610. After the circuit court dismissed the defendant's petition, on appeal, we reversed and remanded for a third- stage evidentiary hearing, finding that "there was no apparent strategic reason for not calling [the witnesses] to testify." *Tate*, 305 Ill. App. 3d at 612. In doing so, we noted that the record itself did not "reflect whether counsel made a professionally reasonable tactical decision not to call the witnesses or whether *** counsel failed to call them as the result of incompetence." *Tate*, 305 Ill. App. 3d at 612.

¶ 65 Unlike in *Tate*, the record before us affirmatively establishes counsel's reasoning for not calling Anita as a witness. As already noted above, Anita's own affidavit, which we must take as true, reveals that counsel chose not to call her to the stand because of her relationship with the petitioner. What is more, unlike in *Tate*, defense counsel here called two occurrence witnesses to the stand to counter the testimony of the State's identification witnesses. In addition, counsel stipulated to the testimony of several treating physicians and nurses as to the blood alcohol content of the State's identification witnesses in an attempt to discredit their testimony. Accordingly, under the record in the instant case the petitioner has failed to make a substantial showing that counsel's decision not to call Anita was not the product of sound trial strategy. *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 81 (counsel's conduct was not " 'so irrational and

unreasonable that no reasonably effective defense attorney, facing similar circumstances, would [have] pursue[d] such a strategy.' ") (quoting *People v. King*, 316 Ill. App. 3d 901, 916 (2000)).

¶ 66 2. DeAndre Nobles

¶ 67 For the reasons that shall be more fully articulated below, however, we cannot reach the same conclusion regarding trial counsel's failure to investigate and call Nobles as a witness at trial.

¶ 68 Our supreme court has repeatedly held that trial counsel has a professional and ethical duty to conduct reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Domagala*, 2013 IL 113688, ¶ 38. This duty derives from counsel's basic function "to make the adversarial testing process work in the particular case." (Internal quotation marks omitted.) *Domagala*, 2013 IL 113688, ¶ 38. This duty includes the obligation to independently investigate any possible defenses and witnesses who can corroborate them. *Domagala*, 2013 IL 113688, ¶ 38. In that regard, our courts have repeatedly held that an attorney provides ineffective assistance when she fails to investigate or interview witnesses potentially helpful to the defense. See *Makiel*, 358 Ill. App. 3d at 107-08 ("An attorney who fails to conduct reasonable investigation, fails to interview witnesses, and fails to subpoena witnesses cannot be found to have made decisions based on valid trial strategy. [Citations.] *** Attorneys have an obligation to explore all readily available sources of evidence that might benefit their clients. *** Failure to conduct investigation and develop a defense has been found to be ineffective assistance. [Citations.] Failure to present available witnesses to corroborate a defense has been found to be ineffective assistance. [Citations.]"); see also *People v. Bell*, 152 Ill. App. 3d 1007, 1012-13 (1987) ("failure to interview witnesses may indicate incompetence when trial counsel knows of the witnesses and their testimony may be exonerating"). Whether trial counsel

was ineffective for failure to investigate is determined by the value of the evidence that was not presented at trial and the closeness of the evidence that was presented. *Makiel*, 358 Ill. App. 3d at 107.

¶ 69 In the instant case the petitioner has made a substantial showing that counsel's failure to interview and call Nobles as a witness was unreasonable. In his affidavit, which we must accept as true, the petitioner attested that prior to trial he provided his trial counsel with "a list of names to contact as witnesses as to what transpired at Saint Margaret's Catholic School, on October 25, 1998," including Nobles, but that counsel never did so. The value of Nobles's testimony is apparent from his affidavit, wherein he attested that when he heard the shots in the gymnasium, he saw the petitioner on the floor without a gun in his hands. Nobles further stated that although he does not know who the shooter was, he knows that the petitioner did not fire the shots that night. In addition, in his affidavit Nobles stated that the petitioner's cousin, "Boowee," was at the party and that he looked liked the petitioner, just taller. Contrary to the State's assertion, Nobles's affidavit does not affirmatively establish that he would have been reticent to testify at trial. In his affidavit, Nobles explicitly averred that although at the time he feared getting involved with the police because of threats made by certain people in the neighborhood, if he had been subpoenaed to testify at the petitioner's trial, he *would have testified to the facts in his affidavit*.

¶ 70 What is more, there can be no doubt that the evidence presented at the petitioner's trial was closely balanced. Although the State presented the testimony of four victims, who identified the petitioner as the shooter at the party, the jury did not believe the testimony of three of those witnesses, and acquitted the petitioner of all charges against them. The jury therefore relied entirely on Brownridge's identification of the shooter. The record reveals, however, that this

identification was at best questionable. First, Brownridge did not have an opportunity to adequately observe the shooter. Brownridge himself testified that when he heard the shooting he began to run away, was knocked to the ground, and when he looked up saw the shooter for only a split second before he was shot and lost unconsciousness. Medical evidence introduced at trial unequivocally established that when he observed the shooter, Brownridge was highly intoxicated with a blood alcohol content level of 0.2. In addition, Brownridge never gave the police a description of the shooter. Instead, a few days later, he identified the petitioner from five photographs shown to him by the police while in his hospital bed and recuperating from numerous serious injuries, including the loss of an eye, and being unable to speak because of a tracheotomy. What is more, the record reveals that the photo array itself was somewhat suggestive. Brownridge acknowledged that of the five photographs shown to him he recognized only the petitioner as someone who had been present at the party on the night of the shooting. Similarly, Detective Almazon admitted that of those five photographs only two showed individuals with longer hair, and of the two, the petitioner's was the longest.

¶ 71 Under this record and the value of Nobles's testimony, we find no trial strategy that would support counsel's failure to investigate and call Nobles to the stand. *Makiel*, 358 Ill. App. 3d at 107. Accordingly, the petitioner has made a substantial showing of ineffectiveness so as to overcome the first prong of *Strickland*. See *e.g.*, *People v. Stepheny*, 46 Ill. 2d 153, 155-59 (1970) (holding that a postconviction petitioner's claim that trial counsel was ineffective for failing to locate or interview available exculpatory witnesses was sufficient to merit an evidentiary hearing); *People v. Morris*, 335 Ill. Ap. 3d 70, 80-82 (2002) (holding that the petitioner had made a substantial showing of ineffective assistance of counsel based upon the

defendant's affidavit, which stated that he told his trial counsel about three alibi witnesses, but to his knowledge counsel never contacted any of them).

¶ 72 For these same reasons, we find that Nobles's testimony would have made a difference in the outcome of the petitioner's proceeding, so as to permit him to overcome the second prong of *Strickland* and proceed to an evidentiary hearing on this issue. See *People v. McCarter*, 385 Ill. App. 3d 919, 935-36 (2008). In that respect, as already noted above, our courts have repeatedly held that:

> "It is not necessary for [the petitioner] to prove by a preponderance of the evidence that the outcome would have been different; rather, [he] need only demonstrate that " 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " [Citations.] Indeed, prejudice may be found even when the chance that minimally competent counsel would have won an acquittal is 'significantly less than 50 percent,' as long as a verdict of not guilty would be reasonable. In weighing the impact of counsel's errors, the reviewing court should consider the totality of the evidence before the finder of fact. [Citation.] That is, instead of viewing the improper evidence in isolation, the reviewing court must look to the ramifications the improper evidence might have had on the fact finder's overall picture of events." *McCarter*, 385 Ill. App. 3d at 935-36 (quoting *Strickland*, 466 U.S. at 694).

Where, as here, trial counsel's strategy was to cast doubt on the victim's identifications of the petitioner as the shooter, Nobles statement that at the time of the shooting he observed the petitioner on the ground without a gun, would have directly supported the testimony of two other occurrence witnesses (Moore and Shores) and bolstered the defense's theory of misidentification. Accordingly, there is a high probability that Nobles's testimony could have produced a different

result at trial. See *e.g.*, *Stepheny*, 46 Ill. 2d at 158 ("Testimony of such witnesses would have been relevant and, again, corroborative of defendant's testimony regarding the shooting. *The cumulative effect of such testimony*, if available at the time of trial, could well have produced a different result") (Emphasis added)). As such, the petitioner has made a substantial showing of counsel's ineffectiveness on the basis of failing to investigate Nobles, and is therefore entitled to an evidentiary hearing on this issue.

¶ 73 B. Ineffective Assistance of Counsel for Usurping the Petitioner's Right to Testify at Trial

¶ 74 The petitioner also asserts that his postconviction petition made a substantial showing of ineffectiveness on the basis of counsel's erroneous advice regarding the consequences of the petitioner testifying at trial and her direct threats to him that she would withdraw as his counsel if he chose to testify. We agree.

¶ 75 In doing so, however, we must initially reject the petitioner's argument that we may not relitigate this issue pursuant to the "law of the case doctrine," because in reversing the dismissal of the first-stage postconviction petition, we already found that that while the fact that petitioner was admonished by the circuit court of his right to testify "may rebut [his] claim of ineffective assistance of counsel based on counsel's threat to withdraw if the petitioner testified, it does not rebut [the] petitioner's claim of ineffective counsel based on erroneous information about the consequences of his testimony."

¶ 76 Contrary to the petitioner's position the law of the case doctrine only bars relitigation of an issue already decided in the same case. *People v. Tenner*, 206 Ill. 2d 381, 395 (2003) (citing *People v. Patterson*, 154 Ill. 2d 414, 468 (1992)); see also *Preferred Personnel Services, Inc. v. Meltzer, Purtill and Stelle, LLC*, 387 Ill. App. 3d 933, 947 (2009) ("[t]he law-of-the-case doctrine prohibits the reconsideration of issues that have been decided by a reviewing court in a

prior appeal"). The law of the case doctrine certainly does not apply in a subsequent stage of litigation involving different issues. *Preferred Personnel Services, Inc.*, 387 Ill. App. 3d at 947. Here, there can be no doubt that the issues are not the same because the standards applied to petitions at the first and second stages of the postconviction process differ greatly. See *People v. Tate*, 2012 IL 112214, ¶ 18-20 (noting that at the first stage of postconviction proceedings the standard is whether the claim was "frivolous or patently without merit" *i.e.*, that it lacked an "arguable basis either in fact or in law", while the standard at the second stage is more taxing and requires the petitioner to make a "substantial showing of each claim."); *c.f.*, *Tenner*, 206 Ill. 2d at 395 (holding that the law of the case doctrine did not apply to a case involving the defendant's second postconviction petition because that petition was "not the same case as *** that involving his first postconviction petition or that involving his federal *habeas corpus* petition."). The only issue decided by this appellate court in reversing the dismissal of the petitioner's first stage postconviction petition was whether the petitioner had made an arguable claim of ineffective assistance of counsel predicated on counsel's advice that he not testify at trial. The court never resolved the present issue of whether the petitioner made a "substantial showing" of ineffectiveness on that same basis so as to survive dismissal at the second stage of postconviction proceedings. Accordingly, the law of the case doctrine does not apply.

¶ 77 Turning to the merits of the petitioner's claim, we nevertheless find that the petitioner has made a substantial showing that counsel deprived him of his constitutional right to testify at trial. In that respect, we begin by noting that it is well settled that a criminal defendant has a fundamental right to decide whether to testify. Although an attorney may properly advise a defendant whether to testify, the decision is ultimately for the defendant to make. *People v. Madej*, 177 Ill. 2d 116, 145 (1997); *People v. Weatherspoon*, 394 Ill. App. 3d 839, 855 (2009);

see also *People v. Bannister*, 32 Ill. 2d 52, 75 (2008) (in making this decision " 'the accused should have the full and careful advise of counsel. Although it is highly improper for counsel to demand that the defendant follow what counsel perceives as the desirable course or for counsel to coerce a client's decision through misrepresentation or undue influence, counsel is free to engage in persuasion and to urge the client to follow the proffered professional advice. Ultimately, however, because of the fundamental nature of decisions such as these, so crucial to the *accused's fate*, the accused must make the decision himself or herself." ' (Emphasis in original.) (quoting ABA Standards for Criminal Justice 4-5.2, at 199-200 (3d ed. 1993)). As such, a defendant's choice to testify is not a matter of trial strategy, and counsel's undue interference with that right can constitute ineffective representation. *People v. Youngblood*, 389 Ill. App. 3d 209, 217 (2009); *People v. Brown*, 336 Ill. App. 3d 711, 719 (2002) ("It is generally recognized that a defendant's prerogative to testify is a fundamental right, which only the defendant may waive; whether to exercise that right is not one of those matters that is considered a strategic or tactical decision best left to trial counsel.").

¶ 78 In the present case, the petitioner points to three statements made by counsel that ultimately deprived him of his constitutional right to testify at trial, namely: (1) that the State would introduce his juvenile record as evidence of his violent character; (2) that the State would call one of his former grade school teachers to testify that he was "incorrigible"; and (3) that counsel herself would withdraw.

¶ 79 While we agree with the State that the record affirmatively rebuts the petitioner's assertion that trial counsel threatened him that she would withdraw as his counsel if he chose to testify at trial, the record is devoid of any evidence that would affirmatively rebut the petitioner's claim that counsel inappropriately advised him not to testify because his juvenile record would be

admitted and a grade school teacher would be called to question his character. In fact, the record supports these allegations. The transcript of the petitioner's trial reveals that when the petitioner informed the court that he would not be testifying, the court specifically inquired from the petitioner whether he had been promised anything or threatened in any way so as to "cause [him] not to testify," and the petitioner responded in the negative. The record, however, also reveals that the court asked the petitioner whether he had discussed his decision not to testify with his trial counsel, and the petitioner answered in the affirmative. The court then specifically found, *inter alia*, that the petitioner's "decision not to testify in this case is made after thoughtful discussion with his attorney." Accordingly, the record supports the petitioner's allegation that he had discussed his decision to testify with his trial counsel.

¶ 80 Because this discussion was presumably made during a private consultation, the only affidavit the petitioner could have furnished to support his allegations as to what transpired during this consultation was his own. See *e.g.*, *People v. Hall*, 217 Ill. 2d 432, 333-34 (2005) (holding that a petitioner's own affidavit describing what transpired between him and counsel was sufficient for purposes of postconviction petition pleading requirements; recognizing that in making allegations about misrepresentations made by a trial attorney "the only affidavit defendant could have furnished to support his allegations, other than his own, was that of his attorney," and the " 'difficulty or impossibility of obtaining such an affidavit is self-apparent. ' ") (quoting *People v. Williams*, 47 Ill. 2d 1, 4 (1970)). Accordingly, taking as we must the allegations in the petitioner's affidavit as true, we must accept that trial counsel advised the petitioner that it would be "wrong" for him to testify because the State would introduce into evidence: (1) his juvenile record; and (2) the testimony of one of his grade school teachers that he was "incorrigible."

¶ 81 Therefore, the question that remains is whether this advice by counsel was erroneous and if so, whether it prejudiced the petitioner. See *e.g.*, *People v. Nix*, 150 Ill. App. 3d 48, 51 (1986) (holding that an attorney's incomplete or inaccurate information to the defendant regarding the defendants' right to testify is a relevant factor in determining whether counsel was ineffective); see also *People v. Lester*, 261 Ill. App. 3d 1075, 1079-80 (1994).

¶ 82 We first address counsel's statements that if the petitioner chose to testify at trial, the State would introduce character testimony by one of the petitioner's grade school teachers that the petitioner was "incorrigible."

¶ 83 It is well accepted that character evidence is generally neither relevant nor admissible. *People v. Mandarino*, 2013 IL App (1st) 111772, ¶ 32; see also *People v. Sandham*, 276 Ill. App. 3d 86, 92 (1995), *rev'd on other grounds*, 174 Ill. 2d 379 (1996). The State may not introduce evidence of an accused's bad character unless and until the accused puts character at issue by giving evidence of good character. See *e.g.*, *Mandarino*, 2013 IL App (1st) 111772, ¶ 32; *People v. Lucas*, 151 Ill. 2d 461, 484 (1992); see also *People v. Lewis*, 25 Ill. 2d 442, 445 (1962) ("Once the accused offers proof of his good character, the prosecution may cross-examine and offer evidence of bad character in rebuttal."); see also Ill. R. Evid. 404(a)(1) (eff. Jan. 1, 2011) ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: (1) Character of Accused. In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same."). In addition, where it is admissible, evidence of character is confined to proof of general reputation at or prior to the alleged offense. See *Lucas*, 151 Ill. 2d at 484 ("It should *** be confined to a time not very remote from the date of the alleged

offense."). What is more, in introducing character evidence, "[t]he personal opinion of a witness and evidence of specific acts are not proper." *Lucas*, 151 Ill. 2d at 484.

¶ 84 In the present case, there can be no doubt that testimony by the petitioner's grade school teacher that the petitioner was "incorrigible" would have constituted inadmissible character evidence. There is nothing in the record to suggest that petitioner would have opened the door to such character evidence by testifying to his own good character. The theory of defense was that the petitioner was misidentified as the shooter, not that he had acted in fear or in self-defense. In addition, the grade school teacher's statement that the petitioner was "incorrigible" is a statement of personal opinion. What is more, any such testimony about the petitioner's character as a grade school student would have been far too attenuated to the petitioner's character as an adult to be relevant. Accordingly, counsel's erroneous advice to the petitioner regarding the admissibility of such evidence if he chose to testify constituted ineffective representation.

¶ 85 We have similar qualms about counsel's statements to the petitioner regarding the State's ability to introduce his juvenile record into the evidence.

¶ 86 At the time the petitioner was charged in the instant matter, juvenile adjudications were inadmissible for purposes of impeachment. Specifically, the Juvenile Court Act provided that juvenile adjudications "shall be admissible *** in criminal proceedings in which anyone who has been adjudicated delinquent *** is to *be a witness,* and then only for purposes of impeachment and pursuant to the rules of evidence for criminal trials." (Emphasis added.) Pub. Act. 85-6-1 (eff. Jan. 1, 1988); Ill. Rev. Stat. 1987, ch. 37, ¶ 801-10(1)(c). Our appellate courts construed this statutory language in concert with our supreme court's decision in *People v. Montgomery*, 47 Ill. 2d 510, 516-17 (1971). In *Montgomery*, our supreme court held that the credibility of a witness could be attacked with evidence of a prior conviction where the crime was punishable by

death or imprisonment in excess of one year, or involved dishonesty or a false statement regardless of the punishment. *Montgomery*, 47 Ill. 2d at 516. Regardless, the evidence was admissible only if the trial court determined that the probative value substantially outweighed the danger of unfair prejudice. *Montgomery*, 47 Ill. 2d at 516. Accordingly, applying the holding in *Montgomery* to the language of the Juvenile Court Act, our appellate courts repeatedly held that juvenile adjudications were inadmissible for use in impeachment of a criminal defendant. See *e.g.*, *People v. Kearns*, 229 Ill. App. 3d 938, 941 (1992) (holding that under *Montgomery* juvenile adjudications are not admissible for impeachment against a testifying defendant); *People v. Sneed*, 274 Ill. App. 3d 287, 295 (1995) (stating that the court has no discretion to admit juvenile adjudications against a testifying defendant, citing proposed Federal Rule of Evidence 609(d) as adopted in *Montgomery*); *People v. Massie*, 137 Ill. App. 3d 723, 731 (1985) (same holding interpreting prior but identical version of statute); see also *People v. Bunch*, 159 Ill. App. 3d 494, 513 (1987) (same); see also *People v. Allen*, 151 Ill. App. 3d 391, 394 (1986) (stating that under *Montgomery*, defense counsel's advice to defendant not to testify because the State would impeach him with his juvenile adjudications was incorrect).

¶ 87 Before the petitioner proceed to trial in 2001, however, the Juvenile Court Act was amended to state that juvenile adjudications "shall be admissible *** in criminal proceedings in which anyone who has been adjudicated delinquent *** is to be a witness including the minor or defendant if he or she testifies, and then only for purposes of impeachment and pursuant to the rules of evidence for criminal trials." Pub. Act 90-590 (§2001-10) (eff. Jan. 1, 1999). A few years later, as the State correctly points out, a split of authority arose in our appellate courts as to whether juvenile adjudications were admissible for impeachment against a testifying defendant, as the amended language of the Juvenile Court Act seemed to suggest, or whether, such

adjudications were inadmissible, as instructed by prior case law and *Montgomery*. *People v. Villa*, 2011 IL 110777, ¶ 31. Our supreme court did not decide this issue until 2011, when it held that despite the amendments, the Juvenile Court Act did not place "juvenile adjudications on an equal footing with criminal convictions for impeachment purposes." *Villa*, 2011 IL 110777, ¶ 40 (interpreting 705 ILCS 405/5-150 (1)(c) (West 2010)). The court held that juvenile adjudications could only be admitted for purposes of impeachment in accordance with *Montgomery* where the defendant's testimony "opened the door" to the use of his prior adjudications by testifying in direct examination about some aspect of his criminal record. See *Villa*, 2011 IL 110777, ¶ 43-53.

¶ 88 In the present case, the State would have us find that because of the "uncertainty" that existed in the law in 2001 as to whether the petitioner's juvenile record was admissible, and the uncertainty as to what the petitioner would have testified to at trial (*i.e.*, whether such testimony would have "opened the door" to impeachment by the prior juvenile record) the advice of counsel that petitioner not testify was presumptively sound. We, however, decline the State's invitation to engage in such speculation. Although we acknowledge that the amendments to the Juvenile Court Act became effective in 1999, the State cites to no case law that establishes a split in jurisdictions arising from those amendments existed at the time of the petitioner's trial. Rather, the State cites to cases that were decided many years later. Moreover, contrary to the State's invitation, we are not at liberty to hypothesize about what type of testimony the petitioner would have offered about the lack of his prior criminal record so as to "open the door" to the introduction of his juvenile adjudications and justify counsel's advice. Accordingly, we believe that this question is better answered at an evidentiary hearing where, at the very least, counsel will be able to explain the reasoning behind her advice to the petitioner, and the trial court will

be able to weigh the credibility of both counsel and the petitioner. See *Lester*, 261 Ill. App. 3d at 1079-80 (holding that an evidentiary hearing is the "appropriate forum" to explore whether counsel had some rationale for his strategy in advising the petitioner not to testify at trial); see also *Allen*, 151 Ill. App. 3d at 394.

¶ 89 Having found that the petitioner has made a substantial showing of counsel's ineffectiveness on the basis of her advice to the petitioner not to testify at trial, we must next determine whether the petitioner was prejudiced by such advice. In that respect, we reiterate that a petitioner who asserts a claim of ineffective assistance of counsel must demonstrate both that his counsel's representation fell below an objective standard of reasonableness and that he was prejudiced by the deficient performance. *Lacy*, 407 Ill. App. 3d at 456-57. The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *Enis*, 194 Ill. 2d at 377 (citing *Strickland*, 466 U.S. at 697.)

¶ 90 As already articulated in more detail above, the petitioner has made a substantial showing of prejudice under *Strickland* because the evidence in this case was closely balanced, so that any additional information benefiting his cause, including his own testimony about what transpired at the party, could have tipped the scales in his favor.

¶ 91 The State nevertheless argues that the petitioner cannot meet the second prong of *Strickland* because he did not state in his affidavit what he would have testified to at trial. While this may be true, the record before us affirmatively establishes what the petitioner's testimony would have been. At the sentencing hearing, the petitioner read a statement to the court reiterating his innocence, and explaining that while he did "play a part [in] the rumble, the fight and everything that led up to the shooting," he never brought or had a gun at the party and never shot anyone. On direct appeal in affirming the petitioner's sentence we noted that the petitioner had made such

statements to the court, specifically that "he was innocent, in that he participated in the fight but had no firearm and was not the shooter." *People v. Pennington*, No. 1-02-1521 (January 16, 2004) (unpublished order pursuant to Illinois Supreme Court Rule 23). Under this record, we decline the State's invitation to penalize the petitioner for any oversight on the part of his postconviction counsel in amending his affidavit to explicitly include these statements. Accordingly, we find that the petitioner has met his burden in establishing the second prong of *Strickland* and may proceed to an evidentiary hearing on this issue. See *Nix*, 150 Ill. App. 3d at 51; *Lester*, 261 Ill. App. 3d at 1079-80.

¶ 92 Since we find that the petitioner may proceed to the evidentiary hearing on this issue, we need not address his alternative claim that postconviction counsel did not provide a reasonable level of assistance in amending his postconviction petition to articulate this claim sufficiently.

¶ 93 III. CONCLUSION

¶ 94 For the foregoing reasons, we affirm that part of the circuit court's order dismissing the petitioner's claim of ineffective assistance of counsel on the basis of counsel's failure to call the petitioner's mother as a witness at trial. We, however, reverse that part of the circuit court's order dismissing the petitioner's ineffective assistance of counsel claim based upon: (1) counsel's failure to investigate and call Nobles to the stand; and (2) counsel's improper and erroneous advice to the petitioner not to testify because the State would introduce his juvenile record and testimony of a grade school teacher regarding his character at trial. We remand these issues to the trial court for a third stage evidentiary hearing.

¶ 95 In doing so, we remain cognizant of the fact that it has already unaccountably taken over

six years between this court's reversal and remand of the dismissal of the petitioner's first stage postconviction petition and the filing and dismissal of his instant supplemental petition. What is more, as we judicially noticed above, the petitioner, who is currently serving his sentence on parole, will have completed that sentence on January 16, 2017, upon which date he will lose standing to continue with his postconviction claims. See *People v. Henderson*, 2011 IL App (1st) 090923, ¶ 11 (holding that a defendant loses standing under the Act to pursue his postconviction petition where he has completed his sentence, including the mandatory supervised release (MSR)); see also *People v. Steward*, 406 Ill. App. 3d 82, 90 (2010) ("In the context of the Post-Conviction Hearing Act[] a defendant who has completed his parole does not have standing to file a postconviction petition."). Accordingly, under these circumstances, we instruct the circuit of court on remand to proceed in this matter with the utmost expedience.

¶ 96 Affirmed in part; reversed and remanded in part with instructions.