FIFTH DIVISION
June 30, 2016

No. 1-14-0726

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. 09 CR 4986
	)	
TIMOTHY BROWN,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE Burke delivered the judgment of the court.
Justice Gordon and Justice Lampkin concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's *pro se* postconviction petition presented a claim of ineffective assistance of trial counsel sufficient to survive first-stage postconviction proceedings; where the State's participation in a post-trial *Krankel* inquiry on defendant's *pro* se motion for new trial improperly converted the inquiry into an adversarial hearing, fundamental fairness requires that defendant's postconviction claim not be barred by *res judicata*; summary dismissal of defendant's *pro se* postconviction petition is reversed and remanded for second-stage postconviction proceedings.

¶ 2 Defendant Timothy Brown appeals from the circuit court's summary dismissal of his *pro se* postconviction petition, which challenged his conviction for first-degree murder on the basis

of ineffective assistance of trial counsel. Defendant contends the circuit court erred in summarily dismissing his *pro se* postconviction petition where its claim of ineffective assistance of trial counsel was sufficient to advance the petition to second-stage proceedings and that the doctrine of *res judicata* is inapplicable to defeat his ineffective assistance claim. He maintains that this court's holding on direct appeal, that the inquiry on his *pro* se posttrial motion was properly conducted, was error in light of our supreme court's subsequent decision in *People v. Jolly*, 2014 IL 117142. We reverse the circuit court order summarily dismissing defendant's *pro se* petition and remand for further proceedings.

¶ 3 Defendant was arrested on February 12, 2009, and he and codefendant Terrell "Rello" Outlaw were indicted for the first-degree murder and armed robbery of Anthony Murdock that occurred on November 4, 2008. Prior to defendant's trial, Outlaw pled guilty to reduced charges of armed robbery and conspiracy to commit murder in exchange for his testimony as a State witness at defendant's trial. A jury found defendant guilty of first-degree murder and of personally discharging the firearm that proximately caused the death of Anthony Murdock and was sentenced to consecutive prison terms of 39 years and 25 years respectively. The evidence presented at trial included the following testimony.

¶ 4 Alan Murdock (Alan), cousin of the murder victim Anthony Murdock (Anthony), testified that on the evening of November 4, 2008, he, Anthony, John McQuarter, Michael Jefferson, and Jonathan Ray (Jonathan) drove from Round Lake to an apartment building at 7013 South Perry in Chicago. There they met Jonathan's twin brother, Joseph Ray (Joseph), and stayed to observe a dice game in progress on the second floor of the building's stairwell. During the game, Alan observed one of the participants take a gun from his pocket and pass it around among

the group. Defendant, whom Alan knew as "Timbo," was present at the game, and Alan testified that defendant was the last person he observed in possession of the gun. Alan noticed defendant leaving the game.

¶ 5 About 15 minutes later, defendant came up the stairs while holding a gun to the back of a second individual whom Alan did not know. The gun was the same one Alan had observed being passed around earlier. Defendant pushed the other person to the side, waved the gun at the group, and announced, "Don't move, give me ***." At that point, Anthony and Jefferson ran through the open door of a nearby apartment; Jefferson entered the apartment first. Defendant fired the gun in the direction of the apartment door. Defendant waved the gun at Alan and took money from his pockets. Then defendant waved the gun at the other people present.

¶ 6 Alan entered the apartment where Anthony and Jefferson had gone, and he ran to the back door. He observed Anthony run down the back stairs and jump over a gate, then he observed Anthony fall. Alan ran down the stairs and jumped over the gate. Anthony was back up and told Alan, "I'm shot, I'm shot." The two began to run away, but Anthony fell down again, repeating that he had been shot. Alan observed defendant and another man jump the gate. Alan knew the second man by his nickname, Rello. Defendant pointed the gun at Alan, who grabbed Anthony's phone and ran. Alan turned and observed defendant and Rello going through Anthony's pockets, and he yelled at them, "Get off. Get off." Then he ran away. Defendant and Rello eventually left the scene and defendant fired the gun one more time as he walked away.

¶ 7 On February 12, 2009, three months after the shooting, Alan tentatively identified defendant in a police lineup. However, Alan was unsure of his identification because defendant's appearance had changed in the intervening months. Four days later, Alan tentatively identified

Rello in a second lineup. On cross-examination, Alan admitted that he was drinking alcohol at the dice game and that he had two prior felony convictions, for aggravated robbery in 2006 and unlawful use of a weapon by a felon in 2009.

¶ 8 Michael Jefferson testified to substantially the same sequence of events leading up to the shooting as Alan Murdock. Jefferson testified that defendant left the dice game before the shooting and was the last person Jefferson observed with the gun. Jefferson identified the person acting as defendant's hostage as Outlaw and the gun defendant was holding as the same chrome and black gun he had observed being passed around. When Jefferson and the victim ran into the nearby apartment, the victim ran to the left while Jefferson ran to the right into someone's room and hid in a closet. Jefferson heard a gunshot but did not actually observe the shooting. A few minutes later, Jefferson ran out of the apartment and entered an automobile with John McQuarter. They drove the victim to a hospital. In February 2009, Jefferson viewed a lineup but did not identify anyone. Jefferson admitted he had been convicted of aggravated battery in 2006. On cross-examination he acknowledged he observed Outlaw holding the same gun he had seen being passed around the group.

¶ 9 Jonathan Ray also testified substantially to the same sequence of events as Alan. Jonathan observed defendant and Outlaw at the dice game and later observed them come up the stairs. Defendant was living in the third floor apartment of the building on that date, and Jonathan recognized defendant and Outlaw even though they had shirts tied around their faces. Defendant pointed a gun at the group and said, "don't nobody move." After Jefferson and the victim ran into the second-floor apartment, Jonathan observed defendant point a gun toward that apartment and fire a shot. Jonathan approached defendant, pushed the gun down, and said, "what you doing?

These my guys." Defendant and Outlaw left the building by the front stairs. Jonathan followed them outside and ran to the back of the building, where he observed the victim fall down. Defendant and Outlaw were holding guns as they ran to the victim and went through his pockets. Jonathan yelled, "no, no, that's my brother, don't do that." Defendant and Outlaw fled. Jonathan ran to the victim and observed that he had been shot. Later Jonathan went to the hospital to check on the victim and spoke to detectives. On the following morning, a detective showed Jonathan a photo of defendant. He told the police what had happened the previous night and that defendant did the shooting. Jonathan acknowledged he was convicted of retail theft in 2009.

¶ 10 John McQuarter testified that he knew the victim was carrying cash during the dice game because he observed the victim pull money out of his pocket. The victim asked McQuarter to go to the store. McQuarter agreed and went outside to the truck with Joseph. When McQuarter heard someone order him to turn around, he turned and observed defendant pointing a gun at his chest. Joseph pushed the gun away and asked defendant, "what is you doing." Defendant entered the building through the front door. McQuarter called the victim's phone to let him know defendant was coming upstairs with a gun, but the victim did not answer. McQuarter then called Alan, who told him that "they shot Tony." McQuarter acknowledged he observed another person with a gun at the dice game and that he did not witness the shooting because he was outside. He positively identified defendant in a lineup. McQuarter admitted he was convicted of aggravated robbery in 2006 and had two other prior felony convictions.

¶ 11 Joseph Ray testified that he had been playing dice at the apartment building with five or six other people when a group of men from Round Lake arrived and joined the game. Joseph had grown up with both defendant and Outlaw and observed the two men watching the game. Joseph

observed someone named Sherman pass around a 9-millimeter handgun. Joseph left to go to the store. When he returned, he observed defendant and Outlaw running from the back of the building to the front while holding guns. They pointed their guns and said something to someone and then ran into the building. Joseph followed them, heard a shot, and ran inside. When he reached the second floor, he observed his brother Jonathan push down the gun defendant was holding and ask defendant "what the f*** are you doing?" Joseph and Jonathan ran outside to the rear of the building. Joseph observed the victim lying on the ground and observed defendant and Outlaw going through his pockets. Joseph ran toward the victim while yelling at defendant and Outlaw to leave him alone. Defendant and Outlaw fled.

¶ 12 Co-defendant Terrell "Rello" Outlaw also testified as a State witness. Outlaw had been indicted with defendant for multiple counts of armed robbery and the first-degree murder of Anthony Murdock. Prior to defendant's trial and pursuant to a plea agreement, Outlaw pled guilty to armed robbery and the reduced charge of conspiracy to commit murder. He was sentenced to concurrent sentences of 18 years for armed robbery and 7 years for conspiracy to commit murder in exchange for his testimony at trial.

¶ 13 Outlaw testified that on the night of the shooting, defendant was living with his family in the apartment building where the shooting occurred. Outlaw and defendant were shooting dice on the second floor of the building when they were joined by the group from Round Lake. While defendant was shooting dice, he gave his gun to Outlaw for safe-keeping. After losing their money in the game, defendant and Outlaw went up to the third floor. Outlaw was still holding the gun defendant gave him. Defendant told Outlaw "we fittin' to rob the dice game" and instructed Outlaw to make sure "don't nobody come in." After telling Outlaw to go downstairs,

defendant entered the third-floor apartment where he lived. Outlaw went down to the front porch of the building. Defendant and another friend came through a side gangway to the front of the building. Defendant was holding a 9-millimeter gun and Outlaw still had the gun defendant had given him. Defendant said he would go upstairs and would tell everyone to lie down and give him everything. He told Outlaw to "watch the person in the car" and make sure that nobody entered the building. Defendant entered the building and, 10 or 20 minutes later, Outlaw heard defendant say "get down," followed by a gunshot coming from upstairs. Outlaw ran upstairs and observed a group of people coming downstairs, including defendant with his gun.

¶ 14 Defendant and Outlaw went around to the back of the building, where Outlaw observed the victim being carried down the stairs by another person. Defendant ran to the victim and the person carrying him, pointed his gun at them, and said, "don't move." Outlaw did not point his gun at anyone. The person carrying the victim ran and the victim fell to the ground. Defendant and Outlaw went through the victim's pockets. The victim said, "don't shoot. Don't kill me." Defendant took some money from the victim's pockets and hit him on the head with his gun. Jonathan came running toward them, yelling, "Timothy, what you doing; Timothy, what you doing?" Defendant pointed his gun at Jonathan and told him to stop calling his name. Then defendant's mother yelled from her outside porch, "Timothy, what you doing?" Defendant and Outlaw ran back through the gangway. About 15 minutes later, they arrived at the nearby house of Taeshia[1], the mother of defendant's baby. Defendant gave someone their guns to dispose of and gave money to "Prince" to find out what was happening at defendant's building. Outlaw asked defendant about the shooting, and defendant replied that "he was reaching for a gun."

[1] Her name is also spelled Tiesha elsewhere in the record.

¶ 15 Outlaw testified about the details of the plea agreement he had entered that reduced his charge to armed robbery and conspiracy to commit murder. He acknowledged he had a prior conviction for aggravated unlawful use of a weapon involving a handgun. Outlaw testified that when he was arrested in February 2009 for the shooting, he originally told the police that three guys had approached the game with a gun and said, "don't move." Outlaw then changed his story to the police and implicated defendant. The State was given permission to play for the jury the video recording of Outlaw's statement to rebut the defense's allegations of recent fabrication and motivation to lie.

¶ 16 The State presented the testimony of several law enforcement officers, including Detective Robert Garza who had interviewed Outlaw at the police station on February 14, 2009. In a videotaped interview, Outlaw initially denied involvement in the shooting. In a second videotaped statement later that evening, however, Outlaw changed his story and implicated himself in the murder and named defendant as the offender who shot and killed the victim. A DVD of Outlaw's inculpatory second statement was played at trial.

¶ 17 An assistant medical examiner testified she performed the postmortem examination on the body of the victim, which revealed a bullet had entered his left back and exited his lower right chest. The cause of his death was the gunshot wound; the manner of death was homicide.

¶ 18 After the State rested its case in chief, defendant called his mother, Sherry Brown, to testify on his behalf. On November 4, 2008, she arrived home from work at about 6:30 p.m. Defendant was not living with her at the time and was not home on that day. She did not go outside and yell at defendant on the evening of the shooting and did not observe him inside or outside her building at any time on that date.

¶ 19 The jury returned verdicts finding defendant guilty of murder and personally discharging the firearm that proximately caused the victim's death.

¶ 20 Defendant's trial counsel filed a written motion for new trial. Prior to the sentencing hearing, defendant presented a *pro se* motion for new trial which alleged ineffective assistance of counsel, together with an accompanying explanatory letter to the court. Defendant stated that he wanted new counsel to represent him on the posttrial motions and that he had attempted to secure new counsel. The court proceeded with defendant's sentencing hearing and imposed consecutive prison sentences of 39 and 25 years.

¶ 21 The court continued defendant's *pro se* motion to the following day, at which time defendant did not have private counsel to represent him and did not ask for more time to retain counsel. Proceeding *pro se*, defendant was allowed to read his explanatory letter and present his *pro se* motion's numerous claims of allegedly deficient representation, which included the allegation that his trial counsel failed to subpoena an exculpatory eyewitness. Defendant also argued that the evidence did not establish his guilt beyond a reasonable doubt because the identification testimony was doubtful and uncertain.

¶ 22 At the end of defendant's presentation of his claims, the court asked the assistant State's Attorney (ASA) to proceed with a hearing. The ASA called defendant's trial counsel to the witness stand, allowing counsel the opportunity to reply to defendant's allegations in response to questions posed by the ASA. The ASA asked counsel 35 questions, going through each one of defendant's complaints *seriatim* and eliciting a response to each from counsel.

¶ 23 With respect to defendant's claim that his trial counsel had failed to subpoena an exculpatory witness, the ASA asked counsel whether she was aware who that witness was, as

defendant's *pro se* motion had not named the witness. When counsel replied that she was not sure who the witness was, the trial court asked defendant the name of that witness. Defendant replied, "His name is Pierre Rufus." Counsel testified that her investigator "tried to make contact with Pierre Rufus and he indicated he didn't want to have anything to do with it." Counsel then volunteered: "There was another witness, Jamal[2] Jackson, who was under subpoena, came to court." Jackson was "present outside the courtroom during trial. We did not call him to the stand because in my preparation of him to testify, he placed Mr. Brown at the address of the shooting within an hour to two hours prior to the shooter [*sic*]."

¶ 24 Then the ASA stated that an individual named Tiesha Carter, defendant's girlfriend, was also mentioned in the police reports and asked counsel whether she had determined whether to call Tiesha as a witness. Counsel replied that she spoke to Tiesha by telephone and her investigator spoke to Tiesha personally. After Tiesha indicated to them that defendant and Outlaw came to her home late on November 4, corroborating a statement of Outlaw, Tiesha was not called as a defense witness.

¶ 25 Defendant, acting *pro se*, asked his trial counsel seven questions at the hearing, none of them pertaining to Jackson or to counsel's failure to subpoena or call witnesses.

¶ 26 In announcing its findings at the conclusion of the hearing, the trial court addressed most of defendant's issues with specificity but did not address either defendant's claim that his trial counsel had failed to subpoena an exculpatory witness (Pierre Rufus) or counsel's testimony about her decision not to call Jackson or Tiesha Carter as witnesses at trial. The court stated to

[2] The record on appeal contains variations of the spelling of Jackson's first name, including Jaleel and Jalieel.

defendant: "Concerning representation, the things that you have pointed out *** that are true would be trial strategy." The court denied defendant's *pro se* posttrial motion for new trial, ruling that defendant had failed to satisfy the two-pronged test of *Strickland v. Washington*, 466 U.S. 668 (1984), and that the evidence of guilt was overwhelming.

¶ 27 Defendant appealed to this court. *People v. Brown*, 2012 IL App (1st) 102624-U. Defendant raised four contentions on direct appeal, two of which are relevant to the instant appeal. One of defendant's contentions was that he received ineffective assistance of trial counsel. The second was that the trial court erred in response to his *pro se* posttrial motion for new trial by holding a full adversarial hearing where he was forced to represent himself while his trial counsel was called to testify against him. We began our resolution of the latter contention by noting that *People v. Krankel*, 102 Ill. 2d 181 (1984), and its progeny require that the trial court conduct a preliminary inquiry to determine whether a defendant should be appointed new counsel for a hearing on the defendant's *pro se* motion alleging ineffective assistance of counsel. *Brown*, 2012 IL App (1st) 102624-U, ¶ 57. We held that the trial court conducted a proper preliminary inquiry into defendant's *pro se* posttrial motion. *Id.* ¶ 60. We noted that defendant was given the opportunity to specify and support his complaints when he was allowed to distribute to the court his written motion and an accompanying explanatory letter, give an oral presentation of his complaints, and question his trial counsel. *Id.* We further held that the posttrial proceeding "was not an adversarial hearing, but rather, a preliminary *Krankel* inquiry. The fact that defense counsel was called by the State as a witness does not change the nature of this inquiry. [Citation.]" *Id.* Our order concluded that the trial court properly complied with the requirements of *Krankel* and its progeny in denying defendant's *pro se* motion for new trial

alleging ineffective assistance of counsel. *Id.* ¶ 61. After considering all of the arguments defendant raised on direct appeal, we affirmed the judgment of the circuit court after directing that the mittimus be corrected. *Id.* ¶ 65.

¶ 28 Subsequently, defendant filed a *pro se* postconviction petition alleging that he received ineffective assistance of trial counsel. First, defendant alleged that his trial counsel failed to investigate and interview two people, Edward Ross and Eric Ross, whose affidavits were appended to the petition. Eric Ross's affidavit averred he was present at the shooting in November 2008, and that Terrell Outlaw was the actual shooter. Eric did not then talk to his family about what he observed. In February 2009, after learning the police had arrested defendant for the shooting, Eric told his father that he had witnessed the shooting and that Rello was the shooter. His father called the police and told them his son Eric had information about the shooting, but no one ever called his father back. Eric was never contacted or interviewed by a prosecutor or a defense attorney during or prior to defendant's trial. If Eric had been contacted, he would have been more than willing to testify. Edward Ross's affidavit stated that after his son Eric told him about witnessing the shooting, he phoned the police and told them his son had information about the shooting, but no one called him back.

¶ 29 Second, defendant's petition alleged his trial counsel failed to secure the trial testimony of an eyewitness to the shooting, Jalieel Jackson. Prior to trial, defendant informed his trial counsel that Jackson was an eyewitness to the offense. Outlaw had told ASA James Murphy that Jackson was present at the dice game. Trial counsel interviewed Jackson but she testified at the *Krankel* hearing that she did not call him as a witness at trial because he placed petitioner at the shooting

address two hours before the shooting. Defendant's petition alleged that, not including Outlaw, four out of five State witnesses were unable to positively identify petitioner as the shooter.

¶ 30 Appended to the postconviction petition was the affidavit of Jalieel Jackson, in which he averred that in November 2008, he had known defendant for about three years, and defendant never had a tattoo on his hand. On November 4, 2008, at about 11 p.m., Jackson came to the dice game on the second floor and knew most of the people there. About 30 or 40 minutes later, he observed a man with a shirt wrapped around his face coming up the stairs. He was pointing a gun while holding Pierre by the back of his shirt. The gunman was about five feet five inches tall and had the word "Young" tattooed on his right hand, the same hand holding the gun. The gunman told them not to move. Two men from the dice game ran into the second floor apartment. The gunman shot in their direction, then turned and ran out of the building. In May 2010, Jackson was contacted by defendant's attorney, and he told her what he had observed. He told her he would be willing to testify on Timothy's behalf. She told him to appear in court on June 22, 2010, when defendant's trial was going to start, and she said she was going to call him to testify. She never called him as a trial witness. Defendant also appended to his postconviction petition the Probation Department pretrial investigation report on Terrell Outlaw. The first page of Outlaw's criminal history report indicated he had the word "Young" tattooed on his right hand.

¶ 31 Third, the postconviction petition alleged that defendant's trial counsel was ineffective for failing to subpoena Pierre Rufus. Trial counsel testified at the hearing that Rufus told her investigator he "did not want anything to do with it." However, because defendant had told counsel that Pierre was an eyewitness, he contended Rufus should have been subpoenaed.

¶ 32 The trial court found that defendant's postconviction claim of ineffective assistance of trial counsel was an attempt "to re-litigate issues at his trial's adversarial hearing" and that because defendant "raised the same issues at his adversarial hearing, and this court already addressed his claim, it is barred by the doctrine of *res judicata*." The court rejected defendant's *pro se* petition as "frivolous and patently without merit" and summarily dismissed the petition.

¶ 33 In this appeal, defendant argues that the court erred in summarily dismissing his *pro se* postconviction petition where it asserted an arguable claim that his trial counsel was ineffective in failing to interview Edward and Eric Ross about what Eric observed at the time of the shooting, and failing to call an eyewitness to the shooting, Jalieel Jackson, to testify for the defense at trial. Defendant asserts that his petition had at least an arguable basis both in fact and in law.

¶ 34 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2012)) enables criminal defendants to initiate collateral proceedings to challenge prior convictions on grounds of a substantial denial of constitutional rights. *People v. Ross*, 2015 IL App (1st) 120089, ¶ 30; *People v. Barrow*, 195 Ill. 2d 506, 518-19 (2001). Proceedings under the Act consist of three stages. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). To survive the first stage, a *pro se* litigant's petition need present only the gist of a constitutional claim. 725 ILCS 5/122-2.1 (West 2012). This is a low threshold. *People v. Jones*, 213 Ill. 2d 498, 504 (2004). However, the Act allows the trial court at the first stage to summarily dismiss any petition it finds frivolous or patently without merit. 725 ILCS 5/122-2.1 (West 2012); *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). A petition is frivolous or patently without merit only if it has no arguable basis either in law or in fact. *People v. Tate*, 2012 IL 112214, ¶ 9. A claim has no arguable basis when it is

based on an indisputably meritless legal theory (for example, one completely contradicted by the record) or a fanciful factual allegation (*i.e.*, an allegation that is fantastic or delusional). *Hodges*, 234 Ill. 2d at 11-12; *People v. Brown*, 236 Ill. 2d 175, 185 (2010).

¶ 35 Defendant contends in the instant appeal that he was denied effective assistance of counsel at his trial. Claims of ineffective assistance of counsel are evaluated under the two-prong test established in *Strickland*, 466 U.S. at 687, 694. Under that test, the defendant must demonstrate that counsel's performance was objectively unreasonable compared to prevailing professional standards, and that a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Patterson*, 2014 IL 115102, ¶ 81. At the first stage of proceedings under the Act, a petition alleging ineffective assistance of counsel may not be summarily dismissed if (1) it is arguable that counsel's performance fell below an objective standard of reasonableness, and (2) it is arguable that the defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17. Our review of a summary dismissal is *de novo*. *Tate*, 2012 IL 112214, ¶ 10.

¶ 36 Defendant argues that he was denied the effective assistance of counsel when, *inter alia*, trial counsel failed to call Jackson as a witness. Defendant supported his petition with an affidavit setting forth the proposed testimony. That testimony, if accepted by the jury, would implicate someone else (Terrell Outlaw) as the shooter and undermine the State's case against defendant. Viewed in isolation, these allegations would meet the arguable standards of *Hodges* to avoid first-stage summary dismissal of the petition.

¶ 37 The State argues, however, that we may not simply consider these allegations in isolation, but instead, that we must view them as barred by the doctrine of *res judicata*, because the same

issue was raised by defendant on direct appeal and rejected by this court. Defendant responds that, although the issue was considered on direct appeal, it arose from a *Krankel* hearing that was not conducted in accordance with *Jolly*. Defendant further argues that, although this court on direct appeal upheld the *Krankel* procedure employed by the trial court, it was clearly improper when considered in light of the supreme court's guidance provided in its subsequent decision in *Jolly*.

¶ 38 We previously found in the direct appeal of this matter that the trial court held a proper preliminary *Krankel* inquiry, which "was not an adversarial hearing." *People v. Brown*, 2012 IL App (1st) 102624-U, ¶ 60. After the Rule 23 order was entered on August 17, 2012, our Illinois Supreme Court decided *People v. Jolly*, 2014 IL 117142, on December 4, 2014, which reversed the appellate court, which had found harmless error. *Jolly*, 2014 IL 117142, ¶ 3. The trial court extensively reviewed each of defendant's claims and allowed defendant to explain each claim, but stopped defendant from making any argument on his claims. *Jolly*, 2014 IL 117142, ¶ 18. The trial court then offered the State the opportunity to "rebut" defendant's claims. The State called defendant's attorney as a witness but the trial court prohibited defendant from cross-examining his attorney. The trial court then permitted the parties to present arguments on whether a full evidentiary hearing under *Krankel* was necessary. Our supreme court stated in *Jolly*:

> "Here, the circuit court permitted the State to question defendant and his trial counsel extensively in a manner contrary to defendant's *pro se* allegations of ineffective assistance of counsel and to solicit testimony from his trial counsel that rebutted defendant's allegations. In other words, the circuit court allowed the State to confront and

> challenge defendant's claims directly at a proceeding when defendant was not represented by counsel. The State also presented evidence and argument contrary to defendant's claims and emphasized the experience of defendant's trial counsel. Thus, as in [*People v. Fields*, 2013 IL App (2d) 120945], the State and defendant's trial counsel effectively argued against defendant at a proceeding when he appeared *pro se*. As we explained above, this is contrary to the intent of a preliminary *Krankel* inquiry. Cognizant of the rationale of *Krankel* and its progeny, we cannot conclude that the circuit court's error in this case was harmless beyond a reasonable doubt.

* * *

¶ 39 Finally, we address the remedy in this case. As we have explained, the purpose of *Krankel* is best served by having a neutral trier of fact initially evaluate the claims at the preliminary *Krankel* inquiry without the State's adversarial participation, creating an objective record for review. Here the State's improper adversarial participation at that inquiry effectively thwarted that purpose. We thus believe the appropriate remedy is to remand for a new preliminary *Krankel* inquiry before a different judge and without the State's adversarial participation. *Fields*, 2013 IL App (2d) 120945, ¶ 42." *Jolly*, 2014 IL 117142, ¶¶ 40, 46. Black's Law Dictionary (10th ed. 2014) defines "adversarial" as "[i]nvolving or characterized by dispute or a clash of interests."

¶ 40 Generally, *res judicata* is a bar applicable to first-stage postconviction proceedings. *People v. Blair*, 215 Ill. 2d 427, 443 (2005). However, it is subject to several significant exceptions including, as relevant here, fundamental fairness. *People v. King*, 192 Ill. 2d 189, 193 (2000). In this case, there is evidence in the record that trial counsel made a strategic decision not

to call the witness and this court accepted that explanation on appeal. However, fundamental fairness dictates that we not apply *res judicata* to bar defendant's claim.

¶ 41 First, the hearing at which the trial strategy defense was disclosed was not conducted in accordance with the subsequent decision in *Jolly*. If the law has changed since defendant's direct appeal was decided, then fundamental fairness dictates that defendant may raise issues in his postconviction petition that were rejected on direct appeal. *People v. Sanders*, 393 Ill. App. 3d 152, 162 (2009). This court has held that the supreme court's holding in *Jolly* should be applied retroactively. *People v. Robinson*, 2015 IL App (1st) 130837, ¶ 79. Since our decision in this case, the supreme court has made it clear that "it is critical that the State's participation at the [*Krankel*] proceeding, if any, be *de minimis*." *Jolly*, 2014 IL 117142, ¶ 38. Regardless of this court's decision on direct appeal, it is clear that under the currently enunciated standards, the State's adversarial role against the *pro se* defendant at the *Krankel* hearing was improper. The State argues that *res judicata* applies with equal force regardless of the correctness of the trial court's reasoning. See *People v. Kidd*, 398 Ill. 405, 410 (1947). However, the error which occurred in the earlier proceedings was not simply an error in reasoning or a misapplication of the law. Rather, what occurred here was a procedural violation which affected a core constitutional concern involving the right to the assistance of counsel. Accordingly, we conclude that under the unique facts of this case, fundamental fairness dictates that we relax the bar of *res judicata.*

¶ 42 Second, questions of trial strategy are generally reserved for second-stage proceedings, where a defendant has the assistance of counsel in responding to the State's arguments against a finding of ineffective assistance. *Tate*, 2012 IL 112214, ¶ 22. By contrast, at the first stage of

postconviction proceedings, a petition alleging ineffective assistance may not be summarily dismissed if it is arguable that counsel's performance fell below an objective standard of reasonableness and that the defendant was prejudiced. *Id.* ¶ 19. Here, as in *Tate*, the State's entire case was identification testimony. Here, as in *Tate*, there was no confession, no murder weapon was recovered, and no fingerprint or DNA evidence linked defendant to the crime. Several prosecution witnesses placed defendant at the scene of the shooting, but only two State witnesses actually testified they observed defendant shoot in the direction of the victim. One of them was Alan Murdock, whose identification of defendant in a lineup three months after the shooting was tentative. The other was Jonathan Ray, who spoke to police the night of the shooting but at that time stated he did not observe the offender who fired the shot. Jackson's postconviction petition affidavit identified him as a witness who would have provided a first-person account of the incident which directly contradicted the prior statements of the State's witnesses. Here, as in *Tate*, "it is at least arguable that [defendant] was prejudiced by the lack of this witness, and that defense counsel's performance, or lack thereof, fell below an arguable standard of reasonableness." *Tate*, 2012 IL 112214, ¶ 24.

¶ 43 We conclude that defendant's postconviction claim concerning the failure to call Jackson, supplemented with Jackson's affidavit, was sufficient for defendant's petition to advance to the second stage of postconviction proceedings. We express no opinion as to whether Jackson's affidavit will support a substantial showing of a constitutional violation, as that is a second-stage issue. We also express no opinion as to the remaining claims in defendant's petition, as the entire postconviction petition must be docketed for second-stage proceedings. *People v. Johnson*, 377 Ill. App. 3d 854, 858 (2007), citing *People v. Rivera*, 198 Ill. 2d 364, 370-71 (2001).

¶ 44 We do not find that the manner in which the assistant State's attorney in this case examined defendant and his attorney was in any way unfair, nor do we find that this experienced trial judge conducted an unfair *Krankel* inquiry. However, our supreme court has provided instructions in *Jolly* that were first found in *People v. Fields*, 2013 IL App (2d) 120945, that the State's participation, if any, be *de minimis* and that the *Krankel* inquiry should operate as a neutral and non-adversarial proceeding. Under our supreme court's definition of "non-adversarial," we believe that means that the assistant State's attorney cannot examine the witnesses, especially the defendant, and that the entire inquiry be conducted by the trial court.

¶ 45 As a result, this case must be remanded for a new preliminary *Krankel* inquiry and must be reversed and remanded to the presiding judge of the criminal division for assignment before a different trial judge.

¶ 46 Accordingly, we reverse the judgment of the trial court summarily dismissing defendant's *pro se* postconviction petition and remand to that court for further proceedings.

¶ 46 Reversed and remanded.