THIRD DIVISION
July 20, 2016

No. 1-14-1376

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, v. DANIEL OLIVARES, Petitioner-Appellant.	)	Appeal from the Circuit Court of Cook County, Illinois. No. 07CR11620 The Honorable Stanley J. Sacks, Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices Lavin and Pucinski concur in the judgment.

ORDER

¶ 1 Held: Summary dismissal of postconviction petition affirmed where defendant is unable to state the gist of a meritorious claim of the ineffective assistance of trial counsel. Affirmed.

¶ 2 Following a jury trial, defendant Daniel Olivares was found guilty of first degree murder, attempted first degree murder, and aggravated discharge of a firearm. He was sentenced to 50 years' imprisonment on the first degree murder conviction and 10 years' imprisonment on the aggravated discharge of a firearm conviction, to run consecutively.

Defendant appealed, arguing that: (1) the trial court abused its discretion when it allowed the State to present evidence of a witness' grand jury testimony; (2) he was deprived a fair trial when the State made improper and prejudicial remarks; (3) he received ineffective assistance of trial counsel; and (4) the State presented insufficient evidence upon which to prove him guilty beyond a reasonable doubt of all three convictions. *People v. Olivares*, No. 1-08-3491 (2009) (unpublished order under Supreme Court Rule 23). This court affirmed defendant's conviction. *People v. Olivares*, No. 1-08-3491 (2009) (unpublished order under Supreme Court Rule 23).

¶ 3 In 2013, defendant filed a *pro se* postconviction petition for relief from judgment under the Post-Conviction Hearing Act (Act), 725 ILCS 5/122-1 *et seq.* (West 2012). By that petition, defendant argued, in pertinent part, that counsel was ineffective for: (1) failing to cross-examine a witness with leading questions, and consequently eliciting damaging testimony; (2) failing to call specific alibi witnesses; (3) failing to inform the jury that the weapon used in the shooting was recovered from a different individual; and (4) failing to call a specific witness who would have testified that a main witness against defendant had a personal motive to implicate defendant. The State moved to dismiss the petition, and the trial court granted the motion. Defendant appeals, contending that the trial court erred in summarily dismissing his petition where he presented the gist of a meritorious constitutional claim that his trial counsel was ineffective. Defendant asserts that this court should remand his postconviction petition for second-stage proceedings with the assistance of counsel. For the following reasons, we affirm.

¶ 4 I. BACKGROUND

¶ 5 The facts relevant to defendant's conviction and sentencing are discussed at length in the previous order, *People v. Olivares*, No. 1-08-3491 (2009) (unpublished order under Supreme Court Rule 23). We therefore set forth here only those facts relevant to the current appeal.

¶ 6 On March 18, 2005, Fernando Soto was driving a car near 48th Street and Komenski Avenue in Chicago with passengers Kris Sanchez, Emanuel Barrios, and Jesus Barrios when he was shot and killed. Defendant's convictions in this case stem from this incident. Defendant was arrested two years later and charged with multiple counts of first degree murder, attempted first degree murder, and aggravated discharge of a firearm for personally discharging a firearm which killed Soto and for firing a firearm in the direction of Sanchez, Emanuel Barrios, and Jesus Barrios.

¶ 7 The only eye witness to testify at trial was Sanchez, who was 15 years old at the time of the shooting. Sanchez denied being a gang member, but acknowledged that he had "heard" that Soto was a Satan Disciples street gang member. Sanchez was riding in a car with the victim and two other friends on the evening of March 18, 2005, in an area populated with Satan Disciples street gang members when a white pickup truck blocked their way. The truck's passengers yelled "disciple killer" and exhibited gang hand signs. He saw the front seat passenger of the truck draw a black handgun. Sanchez ducked and then heard approximately six gunshots. He also heard gunshots coming from a car behind them. He testified he saw the shooter's face when the shooter was "throwing gang signs," as well as when he drew the gun. Sanchez testified that the shooting continued for three or four minutes, after which the truck and the other car drove away.

¶ 8 Sanchez ducked to the floor of the car during the shooting while Emanuel and Jesus got out of the car and lay on the ground. After the shooting, Sanchez realized Soto, who was still in the driver's seat, had been shot in the side of the head. Sanchez and the Barrios drove Soto to the hospital where he died the following day. The cause of death was determined to be from multiple gunshot wounds.

¶ 9 Sanchez described the shooter to the police as male, "light, kind of chunky from the face," and Hispanic. He could only see the shooter's face, as the shooter was wearing a black hoodie. Sanchez did not know the shooter prior to the shooting. The week after the shooting, Sanchez viewed a lineup of four different men at the police station. He identified defendant as the shooter. He again identified defendant in open court as the shooter.

¶ 10 Police investigators at the scene of the shooting found six .9 millimeter shell casings on the street and determined that a .9 millimeter semiautomatic handgun was used in the shooting. Police investigators also examined the victim's car at the hospital, finding firearm damage to the driver's side door and window, the windshield, trunk, and rear window. The investigators recovered a copper bullet fragment from the driver's seat. A fired bullet fragment was also recovered from the victim's hair at the hospital and turned over to the police. The police investigators were unable to determine whether the bullets had been fired from different weapons.

¶ 11 The parties stipulated to the testimony of forensic scientist Moira McEldowney, an expert in latent print identification. She examined the six discharged cartridge cases recovered at the crime scene and found no latent impressions suitable for comparison.

¶ 12 Juan Rodriguez testified for the State, agreeing that he did not want to be in court testifying and agreeing that the Latin Kings street gang discourages members from testifying

against one another. He was a 17 year-old Latin Kings gang member when the shooting occurred. He knew defendant by the nickname "Dough Boy" and he knew the victim, Soto, by the nickname "Rascal." He identified defendant in court as the person he knew as Dough Boy. He also knew a girl named Yesenia Jaramillo. According to Rodriguez, defendant was a Latin Kings gang member and Soto was a Satan Disciples gang member. In 2005, Rodriguez and defendant were friends. The Latin Kings and Satan Disciples were rivals. Rodriguez explained that Latin Kings show disrespect for Satan Disciples by saying "disciple killer" and displaying the Satan Disciple gang hand sign upside down.

¶ 13 On the night of the shooting, Rodriguez was in police custody on an unrelated misdemeanor. When he got out of jail the next day, he called defendant to ask for a ride home, but defendant did not answer the telephone. A few days later, Rodriguez was with defendant in Armour Park in Chicago when Rodriguez received a call from Yesenia Jaramillo. With defendant standing 10 or 15 feet away, Rodriguez and Jaramillo talked about the shooting. Rodriguez initially testified that defendant "said nothing" during the conversation with Jaramillo. The State then introduced his grand jury testimony in which he said defendant was laughing while Rodriguez and Jaramillo discussed Soto's killing. The following colloquy between the grand jury and Rodriguez was read aloud in court:

"Q. What happened as you were taking to Yesenia about Rascal being killed.

A. Dough Boy approached and he was laughing. He was like yeah, that's what he deserved.

Q. Did Dough Boy say anything else.

A. Naw, he was just laughing.

Q. Did Dough Boy make any reference as to how or where Rascal was killed.

A. Yeah. He told me that a dome shot was used, a head shot?"

Defense counsel then made an objection, which was overruled. The State continued reading from the grand jury testimony:

"Q. When you say head shot, do you mean he got shot in the head?

A. Right.

Q. What were the words that Dough Boy used.

A. He got merked, m-e-r-k-e-d.

***

Q. What did you understand merked to mean.

A. He got killed."

¶ 14 The State then asked Rodriguez if he told the State's Attorney in a handwritten statement in April of 2007 that, when defendant told him he "got" the victim, Rodriguez believed that to mean he had personally killed the victim. Rodriguez responded, "[n]ot really. Just thought somebody else did." The State then asked Rodriguez if he told the State's Attorney and a detective that defendant was bragging about "getting Rascal." Rodriguez responded that he was not bragging, but rather just laughing.

¶ 15 A few days after the conversation in the park, defendant and Rodriguez met up again and smoked marijuana. They talked and laughed about the shooting, and defendant said, "somebody had just got [Soto], shot him in the head." Again confronted with his grand jury testimony, Rodriguez admitted that defendant told him "he merked [Soto]." At trial, however, Rodriguez said he believed defendant meant somebody else did the shooting.

¶ 16 On cross-examination, Rodriguez admitted that, during the telephone conversation with Jaramillo, defendant laughed and said he was glad the victim was dead. However, Rodriguez denied that defendant actually admitted to the killing, saying:

"[DEFENSE ATTORNEY:] Q. Did [defendant] say he killed Fernando Soto at [the time of the phone call with Jaramillo]?

[WITNESS RODRIGUEZ:] A. He was just laughing saying yeah, he was glad, but yeah.

Q. Did he say he killed him?

A. No he didn't say he killed him. But I took it like he did. He said different words.

Q. I'm sorry? What?

A. It seemed like he knew he killed him but he didn't say who did it. Like he was glad.

Q. Okay.

A. I think he's being a rival gang, we were all glad.

Q. You were laughing too?

A. Not laughing but I was kind of like shocked, you know."

Later, defense counsel asked more questions regarding Rodriguez and defendant's conversation in the park:

"[DEFENSE COUNSEL:] Q. Did [defendant] tell you that he killed or murdered [Soto]?

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[WITNESS RODRIGUEZ:] A. I brought it up and told him about the incident because I assumed after that date and he told me that he got shot.

Q. Okay.

A. He told me he got shot in the head.

Q. Did he tell you that he did it. [Defendant] did it?

A. He told me he did it.

Q. I'm sorry?

A. He said he probably knew who did it, like he did it. He said it in different words.

Q. Well, tell us the words he said?

A. Like, we got him but he didn't say like me, he said both got him."

Defense counsel pursued this questioning, asking Rodriguez:

"[DEFENSE COUNSEL:] Q. Did [defendant] say that I murdered [Soto]?

[WITNESS RODRIGUEZ:] A. Yes.

Q. He did say that?

A. Saying like we murdered him, yeah, that.

Q. I'm sorry. I didn't hear that?

A. Like we all murdered him, not only one.

Q. I know. But did [defendant] tell you that he was the shooter, that he shot?

A. Told me he was the shooter, he said he knew who did it.

Q. He said he knew?

A. Yes.

Q. But in your Grand Jury testimony, you tell the grand jurors that [defendant] says that he murdered him?

A. Yes.

Q. That didn't happen that way?

A. He didn't tell me it was him. He told me like we murdered him."

Defense counsel continued questioning Rodriguez, asking:

"[DEFENSE COUNSEL:] Q. Did [defendant] tell you that he merked [Soto], that he killed him himself?

[WITNESS RODRIGUEZ:] A. Yes.

Q: He did?

A. Yes. He never told me he's the one that shot.

Q. What's the difference?

A. I don't know.

Q. Well, did you ask him did you kill him, did you shoot him?

A. I didn't ask him."

Rodriguez then explained that he did not know if defendant had told him he killed Soto, but only told the police he had because the "[c]ops were making me do it." Finally, defense counsel asked again:

"[DEFENSE COUNSEL:] Q. Did [defendant] really tell you that he merked [Soto]?

[WITNESS RODRIGUEZ:] A. Not in those words, but- -

Q. What did he tell you?

A. He knew who did it.

Q. What?

A. He knew who did it.

Q. He said he knew who did it?

A: (No audible response.)

Q. Did he say it was me that did it?

A. No.

Q. I'm sorry, what?

A. No.

Q. You told the Grand Jury that he said he shot him. Did he say that to you?

A. Excuse me?

Q. You told the Grand Jury in this building that [defendant] told you that he shot him. Did you really - -

A. Yeah, I did tell them.

Q. You told that to the Grand Jury. You know that?

A. Yes.

Q. Did [defendant] tell you that he shot [Soto]?

A. Yes. He told me he knew who shot him.

Q. I'm sorry?

A. He knew who shot him.

Q. He said he knew who shot him?

A. Yes.

Q. Did he say that he shot him?

A. I believe so. He did."

¶ 17 At the end of cross-examination, the following colloquy took place about the conversation between defendant and Rodriguez:

"[DEENSE COUNSEL:] Q. You said you were laughing about Soto being killed and he told me somebody got him and he got shot in the head. Now which was it. Somebody got him or I got him. What did [defendant] tell you?

A. He told me he got shot in the head, is what he told me. He got shot in the head.

Q. Did he say he did it?

A. I don't remember. I was high too."

¶ 18 Rodriguez explained that he had been drinking for hours before the telephone call with Jaramillo and, because he was so drunk, could only remember parts of the conversation. He also testified he smoked marijuana when he met with defendant a few days later. Chicago Police detective John Foster testified that he interviewed Rodriguez in March 2007 and Rodriguez never told him he was intoxicated when he spoke with Jaramillo on the telephone, nor high when he met with defendant. He testified Rodriguez never indicated he had any trouble recalling portions of either conversation.

¶ 19 Yesenia Jaramillo testified that she went to high school in 2005 with defendant and Rodriguez and knew them to be Latin King gang members. She was also in school with Soto, whom she knew to be a Satan Disciple gang member. She described a telephone conversation she had with Rodriguez a few days after the shooting. During the conversation, she could hear defendant in the background saying "he had shot [Soto]. He merked him, he's

gone, he's dead." She knew it was defendant speaking because she recognized his voice. She explained that "merked" means a "dome shot" or "a shot to the head." In her opinion, Rodriguez did not sound inebriated. Jaramillo testified that, when she spoke with the police in 2005, she denied any knowledge of the shooting because she was afraid. When she talked to them in 2007, however, she told them about the conversation with Rodriguez and the statements she heard defendant make in the background. Jaramillo gave a handwritten statement to an Assistant State's Attorney and testified before the grand jury. She admitted that she and defendant kissed one time in 2003. On cross-examination, Jaramillo admitted that she and defendant exchanged several letters in high school that included statements of a loving nature. She denied being involved with a gang.

¶ 20 After the State rested, defense counsel made a motion for a directed verdict, which the court denied.

¶ 21 During closing arguments, the State suggested that Rodriguez's trial testimony differed from his previous statements because he was afraid of the pressure and retribution that might come from being a Latin King gang member and making statements against another Latin King. Following closing arguments, the jury found defendant guilty of first degree murder, attempted first degree murder, and aggravated discharge of a firearm. Defendant was sentenced to a 50-year and a 10-year term of imprisonment, to run consecutively.

¶ 22 Defendant filed a direct appeal by which he argued: (1) the trial court abused its discretion when it allowed the State to present evidence of a witness' grand jury testimony; (2) he was deprived of a fair trial when the State made improper and prejudicial remarks; (3) he received ineffective assistance of counsel where, in pertinent part, defense counsel elicited damaging testimony from Rodriguez on cross-examination, failed to object to the

introduction of Rodriguez's grand jury testimony into evidence, and failed to object to leading and hearsay questioning of Rodriguez; and (4) there was insufficient evidence upon which to prove him guilty beyond a reasonable doubt of all three convictions. *People v. Olivares*, No. 1-08-3491 (2009) (unpublished order under Supreme Court Rule 23). We affirmed defendant's convictions. *People v. Olivares*, No. 1-08-3491 (2009) (unpublished order under Supreme Court Rule 23).

¶ 23 In December 2013, defendant filed a *pro se* postconviction petition alleging, *inter alia*, that trial counsel was ineffective for: (1) failing to cross-examine Rodriguez with leading questions, and consequently eliciting damaging testimony; (2) failing to call alleged alibi witnesses Melissa Dominguez and Elisco Lara; (3) failing to inform the jury that the gun used in the shooting was recovered from a different individual; and (4) failing to call Janely Herrera, who would have supplied a motive for Yesenia Jaramillo to implicate defendant. Defendant attached several documents to his petition, including several affidavits and documents relating to defense counsel's suspended law license.

¶ 24 In his affidavit, defendant averred, in pertinent part:

> "3. *** [M]y family and I retained [trial counsel Raymond] Prusak to help fight these unwarranted charges. Not knowing the full extent of what I was up against, both my family and I alerted Mr. Prusak that I had previously been placed under investigation at Area 1 police station a week after the incident happened in 2005.
>
> 4. That my family and I also made Mr. Prusak aware that during this previous holding, I gave Area 1 detectives my alibi for the night in question. Upon investigating my alibi and after taking down my statements of my location

from multiple people who saw me that night, the detectives let me go. I explained all this to Mr. Prusak so he could talk to my alibi witnesses and clear my name, but that never happened.

5. That during the entire time of being represented by Mr. Prusak, his trial tactics were not relied on as having produced just and reliable results. Also during this period, Mr. Prusak instructed me not to talk to anyone about my case, that he would be there at every step of the way.

6. Mr. Prusak always promised that he would come see me and go over strategy but instead we never met to discuss anything. In fact, Mr. Prusak would send his assistant Dylan, but Dylan didn't know my case.

7. In that my family would constantly call and drop by his office in hopes of receiving any type of information concerning my case, but Mr. Prusak would be more interested in getting paid than working on my case. (See attached affidavits).

8. During the time frame consistent with my case, my family and I had found out that there had been statements made against me from Juan Rodriguez and Yesenia Jaramillo, (an ex-girlfriend I dated that had a motive in my conviction regarding another woman I dated with whom Yesenia disapproved). Juan Rodriguez reached out to me and said that he had been pressured into making the statement against me, and that he would go talk to my attorney and attempt to fix things. Juan went to go talk to Mr. Prusak but he refused to speak to him. My family also made Mr. Prusak aware that the other statement made by

Yesenia was a biased individual with a history of problems against my then ex-girlfriend Janely Herrera. (See Janely Herrera's attached affidavit).

9. My family and I also requested Mr. Prusak to go speak to my teachers and counselors at an alternative high school (Latino Youth Alternative) to use as character witnesses but he refused. (See attached affidavit of Sonia Garcia).

10. I pleaded with Mr. Prusak to come to see me before I went to trial, and when he showed up he acted surprised when I asked him if he spoke to any of my alibi witnesses, or other witnesses that I gave him notice on. Mr. Prusak stated, 'In this case, it was the State's job to prove me guilty and that we didn't have to prove anything.['] I was really worried about this and told Mr. Prusak to go speak with them anyway and he said he would but never did.

11. My family and I also provided Mr. Prusak with old letters from Yesenia Jaramillo and he showed disinterest and gave them back without ever reading them.

12. The day of my trial, not only was Mr. Prusak not prepared, but he appeared tired, and worn down. I had to ask him multiple times was he O.K. and he would just slouch in the chair half asleep. I told my family about this and they mentioned that when they arrived at court and spoke to him, Mr. Prusak's breath reeked of liquor.

13. During my trial I discovered Mr. Prusak never talked to any of my witnesses. In fact, his deficient performance during my trial infected the entire proceeding. Mr. Prusak never put on a defense, never called any witnesses for the defense, never challenged the State's evidence adequately and thoroughly, didn't

vigorously attack the State's witnesses, never raised the fact that the murder weapon used in my case was recovered by Chicago Police off an unknown subject, failed to file any meaningful motions to suppress, motion in limine, etc., never conducted no kind of investigations, or interviews, and I barely spoke to him. We never discussed trial strategy or how we would overcome these frivolous charges against me.

14. After I was convicted, Mr. Prusak did reiterate that I shouldn't talk to anyone and that he would take care of everything. My family didn't agree with Mr. Prusak so once my sentence was handed down, my family retained the services of [another attorney].

15. [Later,] I made several attempts to try and contact [Mr. Prusak] and he was unresponsive to my letters."

¶ 25 Also attached was an affidavit from Paul Smith, defendant's cellmate, in which he averred in part:

"3. I began listening tentatively as [defendant] began telling me all what he has gone through in his case, how he was represented by his attorney, all the mistakes he made, and about him not knowing what to do next. Some of what he said his lawyer didn't do was call a number of witnesses in his behalf, failed to put on a defense, and misguide he and his family.

4. [Defendant] however, did say his attorney was in trouble with the Attorney Registration & Disciplinary Commission (ARDC), before his attorney agreed to take his case and afterwards, he [defendant] and his family never knew about. [Defendant] did also mention that there were times his attorney didn't

communicate with them and that the last time they really talked was when his attorney said not to talk to anyone about his case and that he would take care of everything."

¶ 26 Defendant also attached a notarized letter from Ana Olivares in which she stated, in pertinent part:

"Prior to the trial taking place, Raymond Prusak assured my family and I that he was reviewing the discovery that was slowly being provided to him by the prosecution and informed us that this case was an easy one to solve; however, his statements regarding his review proved to be false. In many instances, he opened the sealed packages in front of us and actually read the documents out loud to us. My family and I made it a point to visit him on a bi-weekly basis since we realized that this seemed to be the only time that he would actually read the discovery information. We provided him with the names, phone numbers and addresses of individuals that could possibly be helpful to [defendant's] case and although he stated that he would follow-up with said individuals, this never happened. Several times, we resorted to bringing these individuals to him so that he could 'interview' them.

Throughout this entire ordeal, [defendant] instructed us to inform Raymond Prusak that he was requesting an attorney-client visit at Cook County Jail so that they could discuss specific aspects of the case that the detectives had not documented. After about four months of badgering Raymond Prusak, he finally agreed to visit [defendant] when we threatened to withhold further payments.

> Prior to the trial being set but during [defendant's] scheduled court appearances, Raymond Prusak would be constantly tardy, show up looking disheveled and reeking of alcohol or not show up at all and send his associate in his place. As I stated before, with the trial being set for only a few months ahead, and with his constant reassurances that this would not be as difficult as I was making it out to seem, we continued with Raymond Prusak. The trial was a catastrophe. Raymond Prusak showed up in court unprepared and uninterested and the result was an undesirable one. Furthermore, we later found that both my family and [defendant] had requested that he select a bench trial and he opted for a jury trial, all the while telling each of us that this was what the other one requested. Weeks, perhaps a month or two after the trial, I looked up information regarding Raymond Prusak so that I could file a formal complaint with the ARDC, the Bar Association, etc. During this search, I found that several similar complaints had been filed against Raymond Prusak and that, furthermore, his license had been suspended due to these founded complaints!"

¶ 27 Defendant also attached an affidavit from his mother, Juana Olivares, by which she averred, in part:

> "From the very beginning, Prusak showed signs of inadequacy, he did not keep us informed and did not contact us with any information. We'd call him and visit his office frequently only for his assistant to tell us that everything with the case was going well and gave the empty promise that [defendant] would be home with us by the end of that year. On the rare occasion that Prusak was available to meet with us, he would take calls in the middle of the appointment and would act

very strange. Prusak took advantage of our inexperience [with the legal system] and went as far as to suggest that we look for witnesses ourselves and bring them to him. This is when we realized that Prusak was not doing the job we had paid him to do. He had not been in contact with any witnesses nor had he conducted any interviews with them and there are no document[s] that state otherwise.

When [defendant] had his court dates, Prusak was often late, would cancel or would send someone else in his place to let the judge know that he was unavailable. The extent of his tardiness was so repetitive that the judge had to chastise him for it. During the hearings that he would be present for Prusak always seemed distracted and unorganized.

During [defendant's] trial, Prusak was a compete disappointment. His performance was terrible and he made no clear attempt at defending [defendant]. The last day of the trial Prusak was slumped in his chair, almost half-asleep. It was odd and disconcerting to see this type of behavior in an attorney. Earlier that same day we gave Prusak valuable letters for his defense. The letters were to be used as evidence against Yesenia Jaramillo, the prosecution's key witness. He knew about these letters way before the actual trial but never bothered to ask for them until the very last day.

We had no idea what we had gotten ourselves into back then, we were clearly naïve. But, it was not just our fault. Prusak has been sued by several families who have gone through the same experience that we have. Now we know why Prusak was such a negligent, uninterested, and incompetent attorney. He was an alcoholic. His personal demons affected the outcome of [defendant's]

trial. The evidence pointing to the innocence of my son Daniel was there on the table and Prusak failed to use it. [Defendant] never stood a chance with him as a lawyer. Had my son been given the chance to stand trial with a competent lawyer then he would not be in prison."

¶ 28 The filings also included an affidavit from defendant's father, Marcelino Olivares, by which he averred, in part:

"Raymond Prusak was a negligent lawyer. He only sought to receive money without having to lift a finger for my son, his client, Daniel A. Olivares. He did nothing to defend my son in court and because of him my son is now in prison. Had Prusak been the responsible lawyer he should have been, then my son would not be in the situation he is in today.

Raymond Prusak let his personal problems get in the way of doing his job. He was an alcoholic who took our money and made us empty promises. He did not conduct any interviews with witnesses, he did not put any witnesses on the stand, he did not investigate the detectives who arrested Daniel, he did not show up for court hearings, and he did not let [defendant] speak in court. All of the things set up [defendant] for failure. He was never given the chance to have a trial with a competent lawyer. I plead that you take these actions into consideration. Prusak has no[w] been suspended from practicing law by the ARDC. Many other families have suffered the same fate we have because of Prusak's irresponsible actions."

¶ 29 In her affidavit, also attached to the petition, Janely Herrera described being defendant's schoolmate at Curie High School in 2003. They had a group of friends in

common, which group included Yesenia Jaramillo. Hererra averred that defendant and Jaramillo were "pretty close," and Jaramillo "saw him [as] more than just a friend." After some time, Herrera and defendant began to have a relationship, which they kept secret so as not to hurt Jaramillo's feelings. Eventually, they told Jaramillo, who got angry. Herrera describes this in her affidavit:

> "[Jaramillo] made it known to everyone within our group of friends how enraged and hurt she was. Several times I tried to keep things at peace with her but she did not want to give me the time of day. She even began to miss the class that we had together quite often and I believe it was to avoid me. At this point problems arose from every angle. The trouble now was not only with her but with the entire group of [friends]. I was threatened practically every day to the point where I could not leave school grounds alone. This led to a terrible physical confrontation fight between [Jaramillo] and I. We were both arrested and as a result this became part of my juvenile record. To make matters worse, days after the fight the windows on my mother's truck were broken. In addition due to the fight, I had to attend numerous courts at The Juvenile Detention Center and I was sentenced to two years of probation in the fall of 2004.
>
> It became hard to maintain a steady relationship with [defendant] considering all the trouble I felt I caused myself and to my family, so we had a lot of on and off time up until his incarceration. Around this time he mentioned that [Jaramillo] might have something to do with his arrest. I had no doubt in my mind that she would try to drag his name through the mud. [Defendant] told me that he mentioned his history with [Jaramillo] to his attorney and had told him to

> contact me so we can unravel the truth. Sadly his attorney for whatever reason did not see a connection or simply did not uncover the significant amount of importance this had. Everything stood hidden, outside of any court document.
>
> Though my relationship with [defendant] has notably decreased over the years I still hold on to the fact that he is innocent of this crime. I believe he was lied on as revenge from past mistakes. We were all very young at the time, but those actions that took place then play a big role in what happened in [defendant's] case now. As I mentioned before, I always thought I'd be able to help out and although the first attorney never came in contact with me, hopefully this time around everything that led to this can finally come to light."

¶ 30 Also attached to the postconviction petition are documents relating to Prusak's public disciplinary record regarding his law license. The ARDC found that Prusak had an alcohol and cannabis problem that affected his representation of clients. He was initially suspended for three years and until further order of court, with the suspension stayed after six months and subject to probation for the remainder. However, he failed to comply with the conditions of his probation and is now suspended until further order of the court. The final allegation in the ARDC complaint occurred on July 14, 2006. Defendant was convicted on August 15, 2008. The petition to impose discipline on consent was filed November 18, 2008, and allowed on December 9, 2008. Prusak is still not allowed to practice law.

¶ 31 Attached to the petition is an ARDC document titled: "Lawyer Search: Attorney's Registration and Public Disciplinary Record." It reflects that, as of the date of the printout on August 15, 2013, Prusak was "Not authorized to practice law due to discipline and has not

demonstrated required MCLE compliance." It then provides a history of disciplinary actions against Prusak.

¶ 32 Also attached to the petition is the ARDC petition to impose discipline on consent, which was filed on November 18, 2008, and allowed December 9, 2008. This document describes Prusak as a criminal defense lawyer who:

> "provided ineffective assistance of counsel and engaged in a conflict of interest when he represented two co-defendants in one criminal case, neglected three criminal appeals of three clients, neglected the matters of five other different clients, inadequately supervised his associates in three matters, did not refund unearned fees in three matters, and made misrepresentations to clients and to the Commission. In aggravation, Respondent [Prusak] committed serious misconduct in nine criminal cases, demonstrating a pattern. In mitigation, Respondent [Prusak] has made restitution to all but three of those clients and has agreed to make full restitution to those three before the beginning of the period of probation. In addition, for more than two years, Respondent has received treatment for substance abuse and other disorders, which are causally connected to his misconduct."

¶ 33 The document then describes specific cases in which Prusak was found ineffective and determines that Prusak "engaged in serious misconduct in nine criminal cases, demonstrating a pattern of misconduct and use of inappropriate language to his clients and their families between May 2002 and June 2006." It then describes Prusak's June 2006 diagnoses of alcohol and cannabis dependence, a depressive disorder, and anxiety disorder, and attention deficit hyperactivity disorder. He was admitted to an "evening intensive outpatient

rehabilitation program" between June 2005 and August 3, 2006, with recommendations "including abstinence, aftercare, attendance at Alcoholics Anonymous meetings three times weekly, individual counseling concurrent with aftercare, and continued use of prescription psychiatric medication." The treating physician opined that Prusak's misconduct "was causally related to his ADHD, substance abuse, and psychiatric problems." Prusak was found "currently stable" in July 2007, and the treating hospital recommended "that he should maintain treatment as a condition of practicing law."

¶ 34 The court summarily dismissed defendant's petition as frivolous and patently without merit, finding that: (1) defendant's claim regarding the purported alibi witnesses failed because defendant did not attach the requisite affidavits; (2) defendant's claim regarding counsel's elicitation of damaging testimony while cross examining Rodriguez was barred by *res judicata*; (3) defendant's claim regarding the proposed testimony of character witness Janely Herrera failed because it was speculative and it would not have changed the outcome of trial; and (4) defendant's claim regarding Prusak's ineffectiveness based on his disciplinary history failed because "counsel's issues with the ARDC in unrelated matters do not establish ineffectiveness in this case." It also found that defendant's family affidavits "do not warrant discussion." The court did not expressly address the recovery of the murder weapon.

¶ 35 Defendant appeals.

¶ 36 II. ANALYSIS

¶ 37 On appeal, defendant contends the court erred in summarily dismissing his postconviction petition where he properly asserted the gist of a meritorious claim of the ineffective assistance of trial counsel. Defendant very specifically acknowledges that Prusak's ARDC discipline does not constitute *per se* ineffectiveness in his own case. In fact,

there was no ARDC complaint pending against Prusak at the time of defendant's trial.[1] He argues, however, that "at the time Daniel Olivares was on trial for murder, his trial attorney was about to be suspended indefinitely for letting his alcoholism and incompetence affect his representation of his clients," and therefore, he contends that Prusak's pattern of neglect and incompetence in other, unrelated criminal cases during the approximate time period when Prusak was representing defendant corroborates defendant's claim that Prusak was ineffective during defendant's trial. Defendant asks us to consider his claims in this context, and argues that Prusak's specific trial errors, lack of investigation, and alcohol abuse during his own trial raise at least an arguable claim that Prusak was ineffective.

¶ 38 As to the specific errors raised, defendant contends counsel was ineffective for: (1) cross-examining Rodriguez in such a way that he elicited statements that were more harmful to defendant than any statements elicited on direct examination; (2) failing to call Herrera to explain Jaramillo's motive to lie against defendant; (3) failing to inform the jury that the only gun connected to the shooting was recovered from an uncharged third party; and (4) failing to call alibi witnesses Elisco Lara and Melissa Dominguez. Defendant argues that these trial errors, combined with the State's "underwhelming" evidence of his guilt and his "represent[ation] at trial by a lawyer who would soon be suspended from the practice of law in order to protect the public" make a substantial showing of the ineffective assistance of counsel for purposes of a first stage postconviction petition.

¶ 39 The Post-Conviction Hearing Act provides a remedy for defendants whose constitutional rights were substantially violated in their original trial or sentencing hearing

[1] Defendant was convicted in August 2008. The petition to impose discipline on consent was filed against Prusak in November 2008 and allowed in December 2008. None of the instances considered by the ARDC involved defendant.

when such a claim was not, and could not have been, previously adjudicated. *People v. Enis*, 194 Ill. 2d 361, 375 (2000). An Action for postconviction relief is a collateral attack upon a prior conviction and sentence, rather than a surrogate for a direct appeal. *People v. Tenner*, 206 Ill. 2d 381, 392 (2002).

¶ 40 The summary dismissal of a postconviction petition is appropriate at the first stage of postconviction review where the circuit court finds that it is frivolous and patently without merit (725 ILCS 5/122-2.1(a)(2) (West 2012)), *i.e.*, the petition has no arguable basis in either law or fact. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). To have no arguable basis, the petition must be based on an "indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. In order for a defendant to circumvent dismissal at the first stage, he must allege the "gist" of a constitutional claim, which is a low threshold. *Hodges*, 234 Ill. 2d at 9-10. This standard requires only that a defendant plead sufficient facts to assert an arguable constitutional claim. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). The summary dismissal of a postconviction petition is a legal question which we review *de novo*. *Hodges*, 234 Ill. 2d at 9; *People v. Edwards*, 197 Ill. 2d 239, 247 (2001). "Although the trial court's reasons for dismissing [the] petition may provide assistance to this court, we review the judgment, and not the reasons given for the judgment." *People v. Jones*, 399 Ill. App. 3d 341, 359 (2010).

¶ 41 To establish a claim of ineffective assistance of counsel, a defendant must show that his attorney's representation fell below an objective standard of reasonableness and that he was prejudiced by this deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *People v. Coulter*, 352 Ill. App. 3d 151, 157 (2004). Failure to make the requisite showing of either deficient performance or sufficient prejudice defeats the claim. *People v.*

Palmer, 162 Ill. 2d 465, 475-76 (1994). To satisfy the first prong, a defendant must overcome the presumption that contested conduct which might be considered trial strategy is generally immune from claims of ineffective assistance of counsel. *People v. Martinez*, 342 Ill. App. 3d 849, 859 (2003). To establish prejudice, a defendant must show there is a reasonable probability that, but for counsel's insufficient performance, the result of the proceeding would have been different. *People v. Easley*, 192 Ill. 2d 307, 317 (2000). Specifically, the defendant must show that counsel's deficient performance rendered the result of the proceeding unreliable or fundamentally unfair. *Easley*, 192 Ill. 2d at 317-18. A court reviewing the summary dismissal of a postconviction petition which alleges the ineffective assistance of counsel must determine whether it is arguable that counsel's performance fell below an objective standard of reasonableness and whether it is arguable that defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17.

¶ 42 Courts take all well-pleaded facts in the petition and affidavits as true. *People v. Rissley*, 206 Ill. 2d 403, 412 (2003) ("[A]ll well-pleaded facts in the petition and affidavits are taken as true, but nonfactual and nonspecific assertions which merely amount to conclusions are not sufficient to require a hearing under the Act").

¶ 43 Defendant relies heavily on *People v. Williams*, 93 Ill. 2d 309 (1982), to support his argument that an attorney's documented pattern of neglect and incompetence should inform an ineffective assistance of counsel analysis. In that case, the defendant was convicted of murder, aggravated kidnaping, and rape, and was sentenced to death. He appealed his conviction, arguing, in pertinent part, that his trial counsel was ineffective. Our supreme court affirmed his conviction and sentence. While the defendant's petition for rehearing was pending, a disciplinary case involving his trial attorney was argued in front of the court and

his trial attorney was disbarred. *Williams*, 93 Ill. 2d at 312. Specifically, the disciplinary action in question arose from the attorney's misconduct regarding the handling of the estate of one of his clients. The ARDC Hearing Board found that the attorney neglected legal matters entrusted to him, committed acts prejudicial to the administration of justice, and commingled and converted a client's funds. *Williams*, 93 Ill. 2d at 314.

¶ 44 The *Williams* defendant then argued that the matters disclosed in his attorney's disciplinary proceedings supported his contention that he was denied the effective assistance of counsel. Although our supreme court recognized that, in most cases, the record of counsel's performance at the trial in which his performance is questioned is the only relevant consideration in determining whether his client was afforded the effective assistance of counsel, based on the unique circumstances of that capital case, the court held that fundamental fairness required it to examine the additional information to determine whether it had any bearing on the quality of that representation. *Williams*, 93 Ill. 2d at 315.

¶ 45 Ultimately, our supreme court held that the defendant was entitled to a new trial, stating:

> "It is apparent to us that the unique facts in this case require that we forego application of either of the established tests, normally applied in determining whether a defendant has been deprived of his constitutional right to the assistance of counsel. [Citations.] As we originally indicated, the voluminous record here shows that there were many instances where counsel made able and vigorous objections and presentations, and we cannot characterize his performance as actual incompetence or as of such a low caliber as to reduce the trial to a farce or sham. We believe, however, considering the unique circumstances and sequence

> of events in this capital case, which will rarely, if ever, be duplicated, that the interests of justice require that [the defendant] be granted a new trial." *Williams*, 93 Ill. 2d at 325.

¶ 46 In *People v. Szabo*, 144 Ill. 2d 525, 629 (1991), the defendant cited *Williams* in support of his position that he should be granted a new trial based on the disciplinary problems his attorney faced at the time of trial. However, the court found that "*Williams* was an aberration peculiar to the facts of that case," and the court declined to follow it. *Szabo*, 144 Ill. 2d at 629. The court distinguished its case from that of *Williams*, noting that while the defendant in *Williams* "offered 'numerous instances of inaction by counsel to demonstrate that he was denied the effective assistance of counsel' " (*Szabo*, 144 Ill. 2d at 629 (quoting *Williams*, 93 Ill. 2d at 324)), the defendant in its case offered only "vague allegations" that did "not compare favorably with the extensive list" presented in *Williams*. *Szabo*, 144 Ill. 2d at 529-30.

¶ 47 Recognizing, then, that circumstances do exist wherein an attorney's disciplinary record regarding cases outside the case at bar may, in unique circumstances, come to bear on the attorney's effectiveness in the case at bar, we address defendant's specific arguments.

¶ 48 a. The Cross-Examination of Juan Rodriguez

¶ 49 We first consider defendant's argument regarding the cross-examination of Rodriguez. Defendant contends that counsel was ineffective for his method of cross-examining Rodriguez because he failed to cross-examine with leading questions, thereby eliciting damaging testimony that defendant essentially admitted to being the shooter. Defendant admits that this issue was previously raised and decided on direct appeal, but urges us to consider it once again for two reasons: (1) on direct appeal, we "focused [our] analysis on

one 'exerpt' of Prusak's cross-examination, but [defendant's] petition maintains that, taken as a whole, the entire cross-examination was unreasonable"; and (2) on direct appeal, we did not "have the benefit of the illuminating context offered by the ARDC file."

¶ 50 The State responds that the postconviction court did not, in fact, err in dismissing defendant's claim where defendant's contention was barred by *res judicata*. Specifically, the State posits that defendant brought this precise claim on direct appeal and now seeks to bring an identical claim in this petition. We agree with the State that this claim is barred by *res judicata* because the substantive issue was previously addressed and denied.

¶ 51 An action for postconviction relief is a collateral attack upon a prior conviction and sentence, rather than a surrogate for a direct appeal. *Tenner*, 206 Ill. 2d at 392. Any issues which were decided on direct appeal are barred by *res judicata*; any issues which could have been raised on direct appeal are defaulted. *Tenner*, 206 Ill. 2da t 392; *People v. West*, 187 Ill. 2d 418, 426 (1999). Under the principles of *res judicata*, " 'a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.' " *People v. Creek*, 94 Ill. 2d 526, 533 (1983) (quoting *People v. Kidd*, 398 Ill. 405, 408 (1947). A postconviction petition is frivolous or patently without merit if the claims are barred by *res judicata* or forfeiture. *People v. Blair*, 215 Ill. 2d 427, 226 (2005) ("[T]he legislature intended to allow a judge to summarily dismiss [postconviction] petitions where facts ascertainable from the record reveal the petition's claims have already been decided, waived or forfeited.").

¶ 52 On direct appeal to this court, defendant argued that defense counsel Prusak rendered ineffective assistance because he "elicited damaging testimony from Rodriguez during cross-

examination." *People v. Olivares*, No. 1-08-3491 (2009) (unpublished order under Supreme Court Rule 23). We addressed defendant's argument in regards to the following colloquy between Prusak and Rodriguez:

"[DEFENSE COUNSEL PRUSAK:] Q. Did [defendant] tell you that he merked him, that he killed him himself?

[WITNESS RODRIGUEZ:] A. Yes.

Q. He did?

A. Yes. He never told me that he's the one that shot.

Q. What is the difference.

A. I don't know.

***

Q. Did [defendant] tell you that he shot him?

A. Yes. He told me he knew who shot him.

Q. I'm sorry?

A. He knew who shot him.

Q. He said he knew who shot him?

A. Yes.

Q. Did he say that he shot him?

A. I believe so. He did."

¶ 53 In our consideration of this issue, we stated:

"Defendant claims that defense counsel 'could have asked leading questions which would have further demonstrated Rodriguez's inability to accurately

recount his conversations with [defendant].' However, defendant must prove that defense counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the sixth amendment. *People v. Steels*, 277 Ill. App. 3d 123, 127 (1995). A defendant claiming ineffective assistance of counsel faces a formidable hurdle and must overcome a strong presumption that counsel's complained of action or inaction was merely trial strategy. *Steels*, 277 Ill. App. 3d at 127. Generally, the decision whether or not to cross-examine or impeach a witness is a matter of trial strategy which will not support a claim of ineffective assistance of counsel. *People v. Pecoraro*, 175 Ill. 2d 294, 326 (1997). The manner in which to cross-examine a particular witness involves the exercise of professional judgment which is entitled to substantial deference from a reviewing court. *Pecoraro*, 175 Ill. 2d at 326-27. Defendant can only prevail on an ineffectiveness claim by showing that counsel's approach to cross-examination was objectively unreasonable. *Pecoraro*, 175 Ill. 2d at 327.

We cannot say that the above excerpt of defense counsel's cross-examination of Rodriguez was objectively unreasonable. Rather, when viewed in the context of the entire cross-examination, defense counsel was attempting to find out from Rodriguez what he remembered about his conversation with defendant, and what precisely was said. Defendant cites to no case where counsel has been held to be ineffective for failure to anticipate the unresponsive answers of a hostile witness. See *People v. Vasser*, 331 Ill. App. 3d 675, 685 (2002) ('Effective counsel is not required to be clairvoyant.') The record reveals that after receiving an unfavorable answer from Rodriguez, defense counsel sought to

discredit him by eliciting testimony that he had been under the influence of drugs at the time of his conversation with defendant, and that he could not remember portions of the conversation. In our view, counsel's performance did not fall below an objective standard of reasonableness." *People v. Olivares*, No. 1-08-3491 (2009) (unpublished order under Supreme Court Rule 23).

¶ 54 In the instant appeal, defendant asserts that his trial counsel, Prusak, was ineffective for failing to adequately cross-examine Rodriguez with leadings questions, thereby eliciting "damaging testimony that [defendant] admitted being the shooter." This claim is identical to the claim made and rejected on direct appeal and, to the extent, defendant is challenging other portions of the Rodriguez' cross-examination testimony, is still barred by *res judicata* because a defendant cannot avoid the doctrine of *res judicata* by simply reframing an issue from the direct appeal in his postconviction petition. See, *e.g.*, *People v. Simpson*, 204 Ill. 2d 536, 567 (2001) ("Although defendant's claim in the amended post-conviction petition is framed slightly differently, the doctrine of *res judicata* still applies. As this court has emphasized, the Act was not intended to be used as a tool to gain access to another hearing upon a claim of denial of constitutional rights when there had already been a full review of the issue raised."). Additionally, although defendant here asks this court to reassess this claim because new information has been presented regarding his attorney and the ARDC, he provides no legal support that would relax the preclusion doctrine of *res judicata* and permit such reassessment. See *e.g.*, *People v. Fair*, 193 Ill. 2d 256, 267 (2000) ("A post-conviction petitioner cannot avoid the bar of *res judicata* simply by rephrasing claims raised on direct appeal"). Defendant's claim regarding the cross-examination of Rodriguez is barred by *res judicata* and was properly dismissed below.

¶ 55 b. Failure to Call Janely Herrera as a Witness

¶ 56 Next, defendant contends that trial counsel was ineffective for failing to call Janely Herrera to testify, as she would have shown that Yesenia Jaramillo was biased against defendant and had reason to lie at trial. Defendant argues that, had counsel called Herrera, she would have testified to how defendant and Herrera had a relationship that angered Jaramillo and, ultimately, Jaramillo "was so jealous and bitter about being jilted by [defendant] that she physically assaulted" Herrera over it. In addition, defendant argues that impeachment would have been effective because Jaramillo's testimony was weak.

¶ 57 First, we note that, according to Herrera's affidavit in which she averred, "[Defendant] told me that he mentioned his history with [Jaramillo] to his attorney and had told him to contact me so we can unravel the truth," trial counsel was aware of her potential testimony. Generally, counsel's decision regarding whether to present a particular witness is a matter of trial strategy, which enjoys a strong presumption that it is the product of sound trial strategy and not incompetence, and will not support a claim of ineffective assistance of counsel. *Enis*, 194 Ill. 2d at 378. The decision as to whether "to call a witness is a tactical and strategic decision in which defense counsel is given wide latitude in making decisions." *People v. Davis*, 228 Ill. App. 3d 123, 130 (1992). However, counsel may be deemed ineffective for failure to call a witness who could corroborate an otherwise uncorroborated defense. *People v. Brown*, 336 Ill. App. 3d 711, 718 (2002) (although counsel's decision whether to present a particular witness is generally not subject to an ineffective assistance claim, "counsel's tactical decisions may be deemed ineffective when they result in counsel's failure to present exculpatory evidence of which he is aware, including the failure to call witnesses whose testimony would support an otherwise uncorroborated defense"). Decisions that counsel

makes regarding trial strategy are " 'virtually unchallengeable.' " *People v. McGee*, 373 Ill. App. 3d 824, 835 (2007) (quoting *Palmer*, 162 Ill. 2d at 476. In fact, even mistakes in trial strategy or tactics will not, of themselves, establish that counsel was ineffective. *Palmer*, 162 Ill. 2d at 476. There is a strong presumption that counsel's conduct falls within the range of reasonable assistance. *McGee*, 373 Ill. App. 3d at 835.

¶ 58 Defendant's claim fails because he cannot establish that he was arguably prejudiced by counsel's failure to call Herrera. See *Hodges*, 234 Ill. 2d at 17 (A court reviewing the summary dismissal of a postconviction petition which alleges the ineffective assistance of counsel must determine whether it is arguable that counsel's performance fell below an objective standard of reasonableness and whether it is arguable that defendant was prejudiced). Jaramillo testified she and defendant were classmates and described their romantic history. Jaramillo admitted that she and defendant had shared a kiss and exchanged love letters in high school. The record also shows that counsel cross-examined Jaramillo at trial. He asked her if she had told defendant she loved him, and she answered that she had told him that as a friend. He showed her several letters she had written to defendant in high school, one of which says "you know I love you so." She claimed she had said it as a friend.

¶ 59 According to Herrera's affidavit, had she testified at trial, she would have described how she and defendant began a secret relationship while in high school, keeping it secret for some time because they knew Jaramillo "saw him [as] more than just a friend." She then described how, once the relationship was revealed, Jaramillo was angry. Eventually, Jaramillo and Herrera had a physical altercation that ended in Herrera being put on probation. The record shows that trial counsel attempted to impeach Jaramillo and cross-examined her with several love letters. This cross-examination suggested that Jaramillo, as defendant's

jilted lover, may have had other motives when she testified against defendant. Even if trial counsel had called on Herrera to testify, her testimony would not have changed the result of the trial. This claim was properly dismissed.

¶ 60 c. Failure to Call Elisco Lara and Melissa Dominguez as Alibi Witnesses

¶ 61 Next, defendant contends he suffered from the ineffective assistance of trial counsel where counsel failed to call Elisco Lara and Melissa Dominguez as alibi witnesses who would have testified that defendant was with them at their apartment at the time of the shooting. Defendant explains that Lara and Dominguez were both interviewed by police shortly after the shooting and both stated that defendant was at their apartment at the time of the shooting. Two years later, however, they testified to the grand jury that they had been mistaken and could no longer remember if defendant was with them or not. Lara also testified at the grand jury that, when he told the police defendant was at his house on the night of the shooting, he was actually referring to a different night when defendant attended a party at his house. Defendant on appeal argues, "[a]lthough their testimony may be equivocal in light of their later lack of memory, it certainly was not harmful to [defendant], and counsel should have introduced it."

¶ 62 A postconviction petition must include supporting "affidavits, records, or other evidence" or state why this information is not attached. 725 ILCS 5/122-2 (West 2012); *People v. Johnson*, 183 Ill. 2d 176, 192 (1998) (to support a claim of the ineffective assistance of trial counsel for failure to call a witness, a defendant must provide an affidavit from the individual who would have testified). Without an affidavit, we cannot determine whether the proposed witness could have provided information or testimony favorable to defendant. *Johnson*, 183 Ill. 2d at 192; *People v. Guest*, 166 Ill. 2d 381, 402 (1995)

("because defendant has failed to submit affidavits from these proposed witnesses, we will not consider them further"); *Enis,* 194 Ill. 3d at 380 (In the absence of such an affidavit, a reviewing court cannot determine whether the proposed witness could have provided testimony or information favorable to the defendant, and further review of the claim is unnecessary).

¶ 63 Here, there are no affidavits from either Lara or Dominguez, and defendant fails to state in his petition why he did not attach those documents. See 725 ILCS 5/122-2 (West 2012). Instead, defendant merely indicated in his petition that Lara and Dominguez would supply an alibi. On appeal, defendant acknowledges that these documents were not attached to the petition, but he encourages this court to consider the claim nonetheless. In support thereof, he attaches to the reply brief documents that appear to be transcripts of grand jury testimony provided by Lara and Dominguez. However, we cannot and do not consider these transcripts because they are not a part of the record on appeal. *People v. Williams*, 2012 IL App (1st) 100126, ¶ 27 (inclusion of evidence in the appendix of brief was improper supplementation of record with information *dehors* the record).

¶ 64 We therefore find that the postconviction court did not err in summarily dismissing this claim, which was unsupported by the requisite affidavits or any explanation as to why the affidavits were not attached. See *Enis,* 194 Ill. 3d at 380.

¶ 65 d. Testimony Regarding the Recovery of the Murder Weapon

¶ 66 Finally, defendant contends trial counsel was ineffective for failing to introduce exculpatory evidence that the gun connected to the crime was recovered from an uncharged third party and not from defendant himself. He argues that police reports exist showing that "all six cartridge casings recovered from the scene were fired from a single gun, and that gun

was recovered several months after the shooting in the possession of a tall, heavy, light complected, Latin King gang member who is not Daniel Olivares. *** That gang member stated that he obtained the gun from another person, who was not Daniel Olivares." Defendant argues counsel erred because he "should have made clear to the jury that the only gun linked to the shooting was recovered from a third party apparently unrelated to [defendant. That person *** matched the physical description given by Sanchez, although Sanchez failed to identify him in a lineup. Moreover, that third party was an admitted Latin King whose brother [was killed]" around the time of the Soto killing." Defendant acknowledges that this is "not ironclad proof of his innocence," but that this evidence weakens the State's case against defendant, making it "at least arguable that counsel performed deficiently in failing to introduce" it.

¶ 67 Defendant admits he did not attach affidavits or police reports containing the proposed evidence. He argues, however, that this court should excuse this mistake because he was incarcerated and, at times, held in isolation while he was preparing his postconviction petition. He asks us to consider the police report attached as an appendix to his opening brief on appeal. This report, which was never presented to the trial court, is an altered, excerpted, and incomplete "report" consisting of 4 pages, one of which is not numbered, another of which is "Page: 13 of 15," and two more of which are "Page: 8 of 9" and "Page: 9 of 9."

¶ 68 We at this court are constrained by rules and procedure, and we cannot consider evidence "for the first time on appeal without it first being attached to defendant's postconviction petition for initial scrutiny and evaluation at the trial court level." *People v. Anderson*, 375 Ill. App. 3d 121, 139 (2007); *People v. Heaton*, 266 Ill. App. 3d 469, 477 (1994) (A reviewing court must determine the issues presented solely on the basis of the

record made in the trial court and will not consider evidentiary material which is not presented at trial or made part of the record). We will not consider this report, attached as an appendix to the appellant brief and never presented to the trial court, as it is not a part of the record on appeal. See also *Williams*, 2012 IL App (1st) 100126, ¶ 27 (inclusion of evidence in the appendix of brief was improper supplementation of record with information *dehors* the record).

¶ 69 We therefore find that the postconviction court did not err in summarily dismissing this claim which was based solely on records that were never presented to the court.

¶ 70 III. CONCLUSION

¶ 71 We find no error in the summary dismissal of defendant's postconviction petition.

¶ 72 For all of the foregoing reasons, the decision of the circuit court of Cook County is affirmed.

¶ 73 Affirmed.

¶ 74