THIRD DIVISION
March 14, 2018

No. 1-14-3712, 15-2876 cons.

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the Circuit Court
Respondent-Appellee,	)	of Cook County, Illinois,
	)	County Department, Criminal
v.	)	Division.
	)	
DEANDRE CRAWFORD,	)	No. 08 CR 5265
	)	
Petitioner-Appellant.	)	The Honorable
	)	Neera Lall Walsh,
	)	Judge Presiding.
	)	
	)	

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Cobbs and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court properly dismissed the petitioner's *pro se* postconviction petition where the petitioner's claims had no arguable basis in either law or fact. The circuit court also properly denied the petitioner's request for fingerprint testing because the requested test would not have produced any new, noncumulative evidence material to the petitioner's assertion of actual innocence. Furthermore, the *mittimus* must be corrected to reflect that the petitioner's conviction for attempt murder is a Class X and not a Class M offense.

¶ 2 In this consolidated appeal, the petitioner, Deandre Crawford, appeals from the circuit court's

summary dismissal of his *pro se* postconviction petition filed pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2008)), and the circuit court's denial of his motion for fingerprinting testing pursuant to section 116-3 of the Code of Criminal Procedure of 1963 (Criminal Code) (725 ILCS 5/116-3 (West 2008)). The petitioner contends that the circuit court erred in dismissing his *pro se* postconviction petition where he stated an arguable claims that: (1) the police violated his constitutional rights when they refused to stop his interrogation once he invoked his right to counsel, both under the federal and state constitutions; (2) his statement to police was involuntary; and (3) his trial counsel was ineffective for failing to raise these issues in a motion to suppress. The petitioner further contends that the trial court erred in denying his section 116-3 (725 ILCS 5/116-3 (West 2008)) motion for fingerprint testing because the requested test had the potential to advance his claim of actual innocence. Finally, the petitioner contends, and the State concedes, that his *mittimus* should be corrected to reflect that his attempt murder conviction is a Class X and not a Class M offense. For the reasons that follow, we affirm, and order the *mittimus* corrected.

¶ 3 I. BACKGROUND

¶ 4 The record reveals the following pertinent facts and procedural history. On March 14, 2008, the petitioner was charged in a 34-count indictment with, *inter alia*, 24 counts of first degree murder for shooting and killing his ex-girlfriend, Elena Anderson (Anderson) and 5 counts of attempt first degree murder for shooting and paralyzing Anderson's new paramour Ronald Harris (Harris). The State proceeded only on four counts: two counts of first degree murder, and two counts of attempt first degree murder, with the remaining counts *nolle prossed*.

¶ 5 A. Motion to Quash Arrest and Suppress Evidence

¶ 6 Prior to trial, the petitioner's defense counsel filed a motion to quash arrest and suppress

evidence, contending that the police lacked probable cause to arrest the petitioner without a warrant. That motion sought to suppress any evidence that had resulted directly or indirectly from the petitioner's warrantless arrest, including, *inter alia*: any physical evidence, the petitioner's statements and utterances, reports of his gestures and responses, discovered witnesses, and in-court or out-of-court identifications of the petitioner.

¶ 7 At the hearing on the petitioner's motion to quash arrest and suppress evidence, held on October 6, 2010, the State called Chicago Police Officer Brian McKendry (Officer McKendry). Officer McKendry testified that on February 12, 2008, he worked in the Fugitive Apprehension Division and his job was to assist detectives in locating wanted offenders. At about 9 a.m., that morning, he was monitoring a radio call, indicating that people had been shot at 6722 Halsted Street. Officer McKendry was too far away from the scene to respond, so he continued to listen to the radio call and heard that responding units had arrived at the scene. The radio call identified the petitioner as the offender.

¶ 8 Officer McKendry testified that later that day he became actively involved in the investigation. Once the petitioner had been named as the offender, Officer McKendry searched the Secretary of State database using the petitioner's name, retrieved his state identification card, and discovered his residence listed as: 1408 Park Lane, Ford Heights. Together with at least 12 other officers, at about 2 p.m., Officer McKendry proceeded to the address, where they were allowed inside by a female, whom the officer later learned was Natasha Freeman (Freeman). The police located the petitioner in a rear bedroom of the basement, sitting on the bed. Officer McKendry handcuffed the petitioner and placed him into custody. He then took the petitioner to the police station, advised him of his rights and placed him into a holding cell.

¶ 9 Officer McKendry acknowledged that the police neither had a warrant to enter the residence,

nor a warrant to arrest the petitioner. Officer McKendry also admitted that it was only once the petitioner had been arrested, that the police found the owner of the residence, and obtained a written consent from her to search the premises. He stated, however, that nothing was recovered during this search either from the house or from the petitioner's person.

¶ 10 Chicago Police Detective Paulette Wright (Detective Wright) next testified that after the petitioner was arrested she interviewed the petitioner's mother, stepfather, Freeman, Yolanda Horns (Horns), and Horns' son, as well as recovered a peacoat from Horns' residence and physical evidence on the peacoat itself. Detective Wright acknowledged that she did not have any information about the peacoat before the petitioner's arrest.

¶ 11 After the witness testimony, defense counsel argued that the police needed a warrant to arrest the petitioner and that any evidence that was recovered after the petitioner's arrest, including, *inter alia*, the peacoat, and Freeman's interview, should be suppressed as products of an illegal arrest. The trial court disagreed, and denied the petitioner's motion. In doing so, the court found that the police had consent to search the residence where the petitioner was arrested, and that the recovered evidence was not connected to the petitioner's arrest.

¶ 12 On December 2, 2010, defense counsel filed a motion to reconsider, again arguing that the recovered evidence, including witness interviews and the peacoat were fruits of an illegal arrest. The trial court denied the motion, noting that the petitioner was identified as the shooter, which provided probable cause for the arrest, and that the evidence was not recovered from the location of the arrest.

¶ 13 B. Jury Trial

¶ 14 On May 8, 2012, the petitioner's cause proceeded to a jury trial at which the following

relevant evidence was adduced. Chicago Police Officer Don Aaron Hoard, Jr. (Officer Hoard), testified that at about 9:40 p.m. on February 12, 2008, together with his partner, Officer Luther Haynes (Officer Haynes), he was patrolling the area near 67th and Halsted Streets, when he received a radio transmission of a person shot at 6722 South Halsted Street. The officers proceeded to the scene, and once there, entered the building, which was unlocked. The officers knocked on several apartment doors in an attempt to determine where the shooting had occurred. Once on the second floor, Officer Hoard smelled gunpowder. Officer Hoard followed the smell of gunpowder to the third floor, where he saw an apartment door ajar and went inside.

¶ 15 Officer Hoard stated that once inside he saw a woman, later identified as Anderson, lying on the couch in the living room, flailing, screaming in pain, panicked and asking for help because she could not breathe. Officer Hoard walked over to Anderson to help her and noticed that she was bleeding from a gunshot wound to her "right side." The officer asked Anderson whether the person who hurt her was still inside the apartment, and Anderson answered that he "was gone." Officer Hoard asked Anderson whether she knew the person that had shot her, and she responded that it was "Deandre."

¶ 16 At that point, Officer Hoard heard a noise from the back of the apartment and proceeded to the back room, where he found the second victim, later identified as Harris, lying on the floor, not moving. The officer called an ambulance for help and said that Harris "might be a DOA" (dead on arrival), to which Harris stated, "I'm not dead."

¶ 17 Officer Hoard returned to the living room where there were now numerous other police officers, including Officer Oscar Daily (Officer Daily). According to Officer Hoard, Anderson was speaking to his partner, Officer Haynes, and Officer Daily, when he clearly heard her say

that she was shot by "Deandre Crawford," "her oldest baby's daddy," and that "Deandre" had left using the rear door.

¶ 18 Chicago Police Officer Daily next testified consistently with Officer Hoard. He stated that together with his partner, at about 9:47 a.m., on February 12, 2008, he proceeded to the building located at 6722 South Halsted Street. Once inside the third floor apartment, Officer Daily observed the victim, whom he later learned was Anderson, lying on the ground and a small child sitting on the couch. Officers Haynes and Hoard were also at the scene. Officer Daily testified that he approached Anderson and told her to sit still and calm down while the ambulance arrived. Anderson told Officer Daily that she had been shot in the chest. Officer Daily asked her if she knew the person that shot her, and she stated that it was "Deandre Crawford," her "oldest baby daddy."

¶ 19 Officer Roman Torres (Officer Torres) next testified that on February 12, 2008, he was on routine patrol, when at about 9:45 a.m., he heard a radio call of shots fired. Officer Torres proceeded to the scene at 6722 South Halsted Street, where he observed other officers and an ambulance. Officer Torres saw the paramedics bringing Anderson on a stretcher. Officer Torres asked Anderson what had happened, and Anderson responded that her oldest son's father, the petitioner, had shot her. Officer Torres asked Anderson if she could give him the petitioner's birthday, but Anderson did not respond and looked very weak. Immediately thereafter, Officer Torres proceeded to the police station where he used the information Anderson had given him to find photographs of the petitioner, as well as transmit the petitioner's name and date of birth over the police radio. Officer Torres stated that before speaking to Anderson he did not talk to any of the other officers at the scene.

¶ 20 Chicago Police Officer and 911 operator Maureen Lanham (Officer Lanham) next testified

that at about 9:44 a.m., on February 12, 2008, she received a 911 call from a female regarding a shooting. She testified that all calls are automatically recorded and saved and then identified the recording of the phone call she received that morning. The 911 phone call was then played for the jury. While the recording is garbled and hard to understand in parts because the caller is distressed, it reveals the caller saying "my boyfriend," and "shot me," and "I'm dying."

¶ 21 The surviving victim, Harris, next testified that in February 2008 he was living with Anderson, Anderson's toddler son, D., and their two-month daughter, E., at 6722 South Halsted Street.

¶ 22 On the morning of February 12, 2008, Harris, who worked as a store manager for Home Depot, left the apartment to go to Algonquin, for a work meeting. On the way there, his car got a flat tire, so he returned home.

¶ 23 When Harris entered the apartment, Anderson was inside the living room with a man that Harris did not know. According to Harris, the man was short and was wearing a dark peacoat. Anderson and the man were speaking about their child, and according to Harris the tone of their conversation was "calm but angry." Harris stated that he did not know who D.'s father was. Harris excused himself and went into the bedroom, which was separated from the rest of the apartment with a bed sheet, and where E. was lying inside her crib. D., who was around one-years-old at the time, kept walking in and out of the bedroom. Harris sat at the computer next to E.'s crib to work. Soon thereafter, Anderson walked into the bedroom, but the man followed her inside, said "I'm leaving with my son and neither one of you mother f*****s are going to do anything about it," and then shot Harris.

¶ 24 Harris testified that he blacked out. When he came to, he was on the floor and grabbed the

cell phone to call 911. Harris stated that he was shot three times in his arm, once through his back and twice through his mouth, and therefore had difficulty talking. He averred that as he called 911, he had no idea where Anderson or the children were.

¶ 25 Harris testified that once the paramedics and police arrived, they took him to the hospital, where he had surgery on his spine, face and mouth. Harris spent two months in rehabilitation and has not been able to walk since.[1]

¶ 26 Harris next admitted at trial that when the police arrived on the scene he told them that he had been shot by "a guy named Tony." He explained, however, that "Tony" was a police officer in his family, and that he must have been thinking of "Tony" as someone who could come and save him, which is why he kept repeating his name. Harris affirmatively testified that "Tony" was not the person that shot him and that, in fact, he did not know shooter. On cross-examination, however, Harris acknowledged that before January 2012 (four years after the incident) he never told anyone that "Tony" was a police officer in his family.

¶ 27 Harris also admitted that at some point he told the police that he was shot by a man named "Ernest." He explained that he did so because he remembered seeing that name tattooed on Anderson's leg. Harris knew that Anderson had two other children, who lived with Anderson's mother, but just as he had never met D.'s father, he had never met the fathers of those two other children. He therefore believed that "Ernest" might be the name of one of them.

¶ 28 Harris was next asked to listen to Anderson's 911 call and identified Anderson's voice as that of the caller. Afterwards, Harris was asked to identify a tape recording of the 911 call he made after he was shot. That tape was also played to the jury.[2]

[1] Dr. Michael Shapiro, an expert in the field of general surgery and trauma, confirmed that Harris's chest wounds caused both of Harris's lungs to collapse and that the bullet that entered his shoulder severed his spinal cord, permanently disabling him.

¶ 29 On cross-examination, Harris acknowledged that Anderson never introduced him to the man she was arguing with, and that he never had an opportunity to get a good look at the man's face.

¶ 30 Chicago Police Sergeant John Higgins (Sergeant Higgins) next testified that about 10 a.m., on February 12, 2008, he received an assignment to immediately proceed to 6722 South Halsted Street because there had been a double shooting and the police had information about a potential suspect. Sergeant Higgins arrived at the scene between 10:15 and 10:20 a.m., where he spoke to officers and learned the name of the suspect. Sergeant Higgins subsequently returned to the police station and ran the petitioner's name through several computer databases in an effort to locate him. Sergeant Higgins found the petitioner listed as a victim in an unrelated police report, which also included the petitioner's phone number. Sergeant Higgins called that phone number, but it went to voicemail, so he hung up. A minute later, the sergeant's phone rang and the call was from the number he had just dialed. The person on the other line identified himself as the petitioner, and when the sergeant asked him to come to the police station, the petitioner agreed. Sergeant Higgins averred, however, that 15 minutes later, the petitioner called again and said he would not come to the police station. Sergeant Higgins then began touring the area looking for the petitioner, but never found him.

¶ 31 On cross-examination, Sergeant Higgins acknowledged that he never informed the petitioner that the reason he wanted him to come to the police station was because he was a suspect in Anderson's shooting. Sergeant Higgins also admitted that when the petitioner called to say he could not come to the police station, he told the sergeant he had to go to Prairie State University for a class. The sergeant did not attempt to find the petitioner at the university.

¶ 32 Office McKendry next testified consistent with his testimony at the hearing on the motion to

[2] We note that Harris' 911-call is not part of the record on appeal.

quash arrest and suppress evidence. He stated that at about 9:45 a.m., on February 12, 2008, he received a call regarding a shooting at 6722 South Halsted Street, identifying the shooter as the petitioner. Officer McKendry proceeded to his office and using several databases found the petitioner's date of birth, and the address of his residence.

¶ 33 Officer McKendry stated that at about 1:30 p.m., together with about 12 other officers he proceeded to the petitioner's address, at 1408 Park Lane in Ford Heights, where he initially set up surveillance of the building. After about 20 to 30 minutes, Officer McKendry approached the building with the other officers and knocked on the door. A woman, who identified herself as Freeman, opened the door and allowed the officers entry. Officer McKendry located the petitioner in the basement bedroom. The petitioner's car was located about 150 to 200 feet away from the house. Officer McKendry stated that he placed the petitioner under arrest and advised him of his rights using a Fraternal Order of Police (FOP) book.

¶ 34 On cross-examination, Officer McKendry admitted that between about 10 a.m. when he learned about the petitioner's involvement in the shooting and about 2 p.m., when the petitioner was arrested in his residence, he did not attempt to, and in fact, did not obtain an arrest warrant.

¶ 35 Chicago Police forensic investigator Stephen Strzepek (Strzepek) next testified that he was assigned to investigate the scene in the third floor apartment of 6722 South Halsted Street. Strzepek stated that once there, among other things, he collected three .45 caliber fired bullets and five .45 caliber cartridge cases from the front bedroom. At trial, he opened two exhibits, a fired bullet and a cartridge case and showed them to the jury.

¶ 36 Chicago Police Detective Timothy Creven (Detective Creven) next testified that together with two of his partners, at about 10 a.m. on February 12, 2008, he was assigned to the investigation. Once the detectives arrived at the scene they learned from other officers that one

of the victims was dead and that the other had been transported by the paramedics in serious condition and was now in surgery. The detective also learned that the petitioner was identified as the shooter. Detective Creven testified that he searched the apartment for a gun, but did not locate one. He also observed that the back door to the apartment was locked form the inside, and that the door was not broken.

¶ 37 Detective Creven further averred that later that day, he learned that the petitioner had been arrested in a house in Fort Heights. He also learned from Officer McKendry that there were other individuals at that residence, including Freeman. As part of his investigation, Detective Creven contacted Freeman and met her on February 13, at the petitioner's mother's house. Later that day, Freeman, the petitioner's mother, stepfather, and uncle all came to the police station to speak with the police. Freeman also gave Detective Creven Horns' name, and the detective's partners went to speak to Horns at her home. When they returned they showed Detective Creven a blue peacoat and a piece of lint roll.

¶ 38 Detective Creven also stated that as part of his investigation, on March 21, 2008, he spoke with Marquita Powell (Powell), who gave him a letter. Detective Creven identified that letter, and the letter was admitted into evidence at trial.

¶ 39 Powell next testified that in November 2007, she was living in Dolton, Illinois, with her six-year-old daughter. At that time, she began dating the petitioner and he moved into her home. Powell stated that she was aware that the petitioner had a son, D., with Anderson. She averred that although the petitioner had told her that he had physical custody of his son, D. never lived with Powell and the petitioner.

¶ 40 Powell further averred that shortly before December 24, 2008, she discovered a thin bag with

a silver and black gun on her bookshelf. Powell put the gun under her mattress so her daughter would not see it. Later that day, she confronted the petitioner about keeping a gun inside her house and refused to tell him where she hid it.

¶ 41 Powell also testified that in December, she was with the petitioner when he attempted to see D., who was with Anderson. Together they drove to Anderson's house on the corner of 67th and Halsted Streets, and while she remained in the car, the petitioner knocked on the door. No one answered the door, so the petitioner returned to the car and started blowing the horn. They remained in the car in front of the building, honking the horn for about an hour before leaving. The petitioner was very upset when they left. Powell stated that once they returned to her house, the petitioner asked her for his gun, so that he could go to Anderson's house and scare her to give him D. Powell told the petitioner that this was not a good idea, and after a while he calmed down.

¶ 42 Powell further averred that in late December, or early January the petitioner showed her a custody agreement he had created. Powell noticed that the end of the agreement had Anderson's name misspelled. According to Powell, the petitioner planned to use this document as proof that he had legal custody of D.

¶ 43 Powell also testified that in December, she bought the petitioner a navy blue wool peacoat from Old Navy for Christmas. When she ended her relationship with the petitioner in January 2008, he took the blue peacoat with him.

¶ 44 In March 2008, Powell received a letter from the petitioner, which was introduced at trial. Powell acknowledged that in that letter the petitioner asked her if she remembered the "nine" that they had argued about "being in her home." She testified at trial, that by "nine" the petitioner was referring to the nine-millimeter gun the petitioner had left on her bookshelf. The letter also

asked Powell if she remembered the lawyer that the petitioner had hired to help him with his custody case. Powell testified, however, that to her knowledge the petitioner had never hired such a lawyer. Powell also averred that as soon as she received this letter she contacted the police on March 20, 2008.

¶ 45 The State next called Horns. She testified that on February 12, 2008, she lived at 2404 Saulk Trail, in Saulk Village, with her husband and five children. Sometime before 1 p.m., that day, the petitioner came to her home unannounced. Horns had known the petitioner for about three years because he was dating her best friend, Freeman.

¶ 46 Horns had a dentist appointment at 1:45 p.m., and was busy around the house, when the petitioner came inside. The petitioner used her restroom and asked to use the telephone to call his mother, and Freeman. Horns testified that he appeared "normal" and "calm," but was not very conversational.

¶ 47 Before leaving, the petitioner asked Horns if she wanted a coat, and she stated that she did. The petitioner went to the trunk of his car and brought her a blue peacoat. Horns wore the peacoat to the dentist that day, and gave it to her son in the evening. She purchased a lint brush and cleaned the coat out before she gave it to her son. Horns identified the peacoat at trial and it was shown to the jury.

¶ 48 Horns further testified that on the following morning, she spoke to Detective Wright and gave her the blue peacoat, as well as a lint brush.

¶ 49 On cross-examination, Horns acknowledged that when the petitioner appeared at her door on February 12, 2008, he did not have any blood on his clothes or hands. The peacoat the petitioner gave Horns also had no blood on it.

¶ 50 Detective Wright testified consistent with her testimony at the motion to suppress hearing.

She stated that she spoke to Horns on February 13, 2008, and acknowledged that Horns gave her an "Old Navy, size large, men's pea-style coat" and "lint tape from a tape roller." Detective Wright inventoried both items.

¶ 51 Illinois State Police forensic scientist Ellen Chapman (Chapman) next testified that she sampled the blue peacoat recovered from Horns for gunshot residue. She discovered that the inside of the right hand pocket on the coat tested positive for gunshot residue, while the cuffs of the clothing contained none.

¶ 52 The parties further stipulated that on July 16, 2008, a thumb fingerprint and buccal swab were collected from the petitioner, properly inventoried and sent to the Illinois State Police Crime Lab for DNA testing. In addition, "cellular material" collected from the collar and cuff areas of the peacoat were sent to the Crime Lab.

¶ 53 Illinois State Police forensic biologist and DNA analysis expert, Janice Youngsteadt (Youngsteadt) testified that she received the buccal swab taken from the petitioner and the swabs taken from the blue peacoat. She was able to generate a buccal swab standard that was suitable for comparison, and a mixture of profiles from the swabs taken from the blue peacoat. "There was one [male] individual within the mixture that contributed a significantly larger amount of DNA than the other individuals," and that "male profile" matched the DNA profile of the petitioner.

¶ 54 The parties next stipulated that if called to testify, Cook county medical examiner, Dr. Valerie Arangelovich (Dr. Arangelovich) would state that she performed the autopsy on Anderson on February 14, 2008 at 7:30 a.m. The autopsy revealed one gunshot wound to the right chest, and one gunshot wound to the right breast. In Dr. Arangelovich's expert opinion Anderson died as a result of those gunshot wounds and the manner of death was homicide.

¶ 55 The parties also stipulated that during Anderson's autopsy, a bullet was recovered from her body, inventoried and sent to the Illinois Police Lab for forensic firearms testing.

¶ 56 Illinois State Police forensic firearms examiner Jennifer Sher (Sher) testified that she received the bullet recovered from Anderson's body, and three fired bullets and five cartridge cases recovered at the scene of the crime. After her analysis, Sher concluded that the bullets and cartridges found at the scene of the crime and the bullet found in Anderson's body were all fired from the same weapon, which was a .45 caliber gun.

¶ 57 Chicago Police Officer Gerardo Guevara (Officer Guevara) next testified that there was a Chicago Police Department camera located on the northeast corner of 69th and Halsted Streets on February 12, 2008. Upon receiving a request for that footage from that camera, Officer Guevara downloaded the video from the camera and reviewed it. He identified the video at trial, and clips of the video were admitted into evidence and published to the jury. They show a red vehicle parked in the Burger King parking lot on the corner of 69th and Halsted Streets between about 9:20 a.m. and 9:50 a.m.

¶ 58 Freeman, the petitioner's wife, who was in police custody at the time of trial, as a result of failing to appear in court pursuant to a subpoena, next testified that she has known the petitioner since 2005, and that they have been married since 2009. In 2008, Freeman lived at 1408 Park Lane Avenue, Ford Heights, with her six children, the petitioner, and another family, including Freeman's friend Lyndette (Lyndette). Freeman stated that the petitioner's son, D., also lived with them. She explained that D.'s mother, Anderson, had legal custody of the child, but that D. had lived with her and the petitioner since he was two weeks old. In February 2008, Anderson took D. to stay with her for a couple of days so that he could meet his new baby sister.

¶ 59 According to Freeman, at about 8:20 a.m., on February 12, 2008, she and the petitioner left

their home in the petitioner's red car to visit the petitioner's mother. After first stopping at a gas station, however, the petitioner, who was driving, instead proceeded to Anderson's house. The petitioner pulled in front of Anderson's building and blew the horn, but there was no response. After a few minutes, the petitioner blew the horn again. After that, the petitioner exited the car, and Freeman drove off. She stated that this was not unusual because whenever the petitioner wanted to visit Anderson, she would drop him off in front of Anderson's building, and go somewhere to get coffee. The petitioner would then call her when he was ready to get picked up.

¶ 60 Freeman drove to the nearby Burger King on 69th and Halsted Streets, but did not have a chance to go inside because the petitioner called her and told her he was ready to be picked up. Freeman had remained inside the car talking to her friend on the telephone and had not expected the petitioner to call her that quickly. Freeman was asked to view the videotapes identified by Officer Guerra and identified the petitioner's car in which she sat, in the Burger King parking lot, between 9:20 and 9:50 a.m. that morning.

¶ 61 Freeman further testified that when she returned to pick up the petitioner, he was already half way up the block on Halsted Street. He entered the car, and was normal and talkative. Freeman drove to the petitioner's mother's house and they remained there for about an hour. After that, the petitioner and Freeman drove home. The petitioner dropped Freeman off at a corner near their house and drove to school. Later that day, Freeman received a telephone call from her best friend, Horns. That afternoon, the police went to Freeman's home, and asked if they could search the house for the petitioner. Freeman told them that they would have to ask the owner, and she called Lyndette. Lyndette allowed the police into her home, whereupon the petitioner was arrested.

¶ 62 Freeman testified that later that day, she talked to the petitioner's mother, and they went to

the police station together to try and obtain information about the petitioner. After that, Freeman spent the night at the petitioner's mother's home.

¶ 63 The following day, Freeman and the petitioner's mother went back to the police station, and Freeman spoke to the detectives and told them where she and the petitioner had been the day before. She testified that the petitioner was wearing a peacoat when he left their house and that he had taken off the coat at some point after the gas station, but that he had it on when he went into Anderson's building, and after Freeman picked him up.

¶ 64 On cross-examination, Freeman stated that she told the petitioner to get rid of the peacoat before he even went into Anderson's apartment because the coat was too small and fit him poorly. She also averred that on the day of the shooting she never saw the petitioner with a gun or a bulge in his pocket that would reveal the presence of a gun. She further testified that when she picked the petitioner up from Anderson's home, he did not look nervous, or scared, he was not breathing heavily or perspiring, and he had no blood on his coat.

¶ 65 After the State rested, the defendant proceeded with his case-in-chief. The defendant first recalled Detective Wright. She testified that on February 27, 2008, she went to Northwestern Hospital to speak with Harris and showed him a photo array with the petitioner's photograph, but Harris was unable to identify his shooter. Detective Wright also admitted that during this interview she asked Harris about his reference to "Tony" having shot him. Harris told the detective that he did not remember mentioning a "Tony" and in fact "did not know a Tony."

¶ 66 The defendant next called Chicago Fire Department paramedic Wesley Metcalf (Metcalf). Metcalf testified that at about 9:50 a.m., on February 12, 2008, in responding to a call about gunshots, he entered the apartment where the shooting had occurred, and found a male victim, whom he later learned was Harris, sitting on the floor with a gunshot wound to his neck. The

building and the apartment were full of police officers, and Metcalf immediately began treating Harris's injuries.

¶ 67 Once Metcalf transported Harris into the ambulance he attempted to speak with him. Because Harris kept mumbling and appeared to have an altered mental state, Metcalf applied the Glasgow Coma Scale consciousness test to Harris, and scored Harris's alertness at about 14 out of 15, which is just one below normal. Metcalf averred that Harris told him that he knew his shooter and described him as male, between 5'8" and 5'10" with brown eyes and a low haircut. Harris also gave Metcalf the name of his shooter, but Metcalf could not recall the name. Metcalf noted this information into the ambulance computer and once at the hospital sent an email with the information to the police.

¶ 68 On cross-examination, Metcalf admitted that he did not know why Harris said the name "Tony," and whether it was a person he just wanted Metcalf to contact for him.

¶ 69 The petitioner's mother, Katherine Crawford-Hayes (Katherine), next testified that she saw the petitioner and Freeman when they visited her at her home between 9:30 a.m. and 10 a.m. on February 12, 2008. She testified that the petitioner appeared normal, was not upset, and not nervous. The petitioner was not jittery or jumpy, and was not sweating.

¶ 70 On cross-examination, Katherine admitted that she made the petitioner tea, and hot cocoa and gave him some Benadryl, but explained that she did so only because he was coughing and appeared to have a cold.

¶ 71 Chicago Police Detective Chester Bach (Detective Bach) next testified that on February 12, 2008, he was assigned to assist in the investigation of the shooting at 6722 South Halsted Street. When Detective Bach arrived at the scene between 9:30 a.m. and 10 a.m., Detectives Wright and Creven were already there. After speaking to them, Detective Bach proceeded to the police

station. He acknowledged that on his way there, from his vehicle radio, he contacted and spoke to an investigator in the medical examiner's office. Detective Bach, however, denied that the person he spoke to was investigator Denise Denson (Denson). He further denied having told Denson that after speaking to Anderson at the scene of the crime, she recanted her identification of the petitioner as her shooter.

¶ 72 The defense next called investigator Denson, from the Cook County Medical Examiner's Office, who testified that Detective Bach told her that Anderson identified petitioner as the shooter then immediately retracted her statement. On cross-examination, Denson admitted that she had no independent recollection of speaking with Detective Bach but was testifying based on what she had written in her report. On redirect, however, she testified that her reports are accurate and often relied upon by the Chicago police.

¶ 73 Chicago Police Captain Edward J. Kulbida (Captain Kulbida) next testified that he was responsible for overseeing the investigation of the shooting at 6722 South Halsted Street. The shooting occurred at about 9:47 a.m., and he arrived at the scene at about 10 a.m. Using the 911 radio communication system, he relayed information that Anderson had changed her story regarding the identity of the shooter. Captain Kulbida's 911 radio call, which was made at around 10:12 a.m., was played for the jury, and Captain Kulbida acknowledged that he said "the female [victim] had changed her stories, that the subject we're looking for is [the petitioner]" and that the description now was "male black" and "a big guy with a beard."

¶ 74 On cross-examination, Captain Kulbida explained, however that he did not know where this information came from and that it was "second or third hand" information. He further stated that he never spoke to either Anderson or Harris and was not present when the other officers spoke to them.

¶ 75 After the defendant's case-in-chief, the parties proceeded with closing arguments. In closing, the State, argued, *inter alia*, that the physical evidence "le[d] directly" to the petitioner, noting that the petitioner was wearing a peacoat and that Harris testified that the person who shot him was "wearing a blue style peacoat." The State also argued that the petitioner's DNA was on the peacoat, and there was gunshot residue in the pocket. In her closing, defense counsel argued, *inter alia*, that the State's theory of the case was nonsensical: if the purpose of the shooting was to get custody, there was no way "you're going to leave this child that you love *** with two people that presumably are dead." Defense counsel also argued that Anderson had changed her story, that Harris named "Tony" as the shooter, and that there were no fingerprints or other physical evidence connecting the petitioner to the scene of the crime.

¶ 76 After deliberations, the jury found the petitioner guilty of first degree murder and attempt murder. The court denied the petitioner's posttrial motions and sentenced him to 80 years' imprisonment (24 years' on the murder conviction, plus a 25-year firearm enhancement, and 6 years' for the attempt murder conviction, plus a 25-year firearm enhancement).

¶ 77 C. Posttrial Proceedings

¶ 78 The petitioner timely filed a direct appeal. He subsequently agreed to a summary disposition of that appeal correcting his *mittimus* to reflect the proper amount of presentence custody credit.

¶ 79 On July 29, 2014, the petitioner filed a *pro se* postconviction petition, alleging, *inter alia*, that he was denied his right to a fair trial where, after invoking his right to an attorney, in violation of his constitutional rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), he was denied counsel and thereafter harassed by the police. Specifically, the petitioner alleged that at the time of his arrest, in response to questioning by Detective McKendry, he invoked his *Miranda* right to counsel by asking for a lawyer and a phone call, but the police subjected him to

"several hours of harassment" before they finally "again asked if he wanted to talk to them." The petitioner then agreed to talk to the police, as a result of which the "[d]etectives learned of Natasha Freeman and a [pea]coat from [his] alibi statement," both of which were later introduced as evidence at his trial. The petitioner therefore alleged that his trial counsel was ineffective for failing to raise this issue at a motion to suppress hearing, and that his appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on direct appeal. The petitioner also alleged actual innocence. In support of these allegations, the petitioner attached transcripts from his trial.

¶ 80 On October 14, 2014, the trial court summarily dismissed the petitioner's *pro se* petition, finding that it was frivolous and patently without merit. Specifically, the court found that the petitioner's claim regarding any *Miranda* violations was "entirely conclusory" because the petitioner never made any incriminating statements to police, so as to trigger the application of *Miranda*. The petitioner timely appealed.

¶ 81 On April 15, 2015, the petitioner filed a motion for fingerprint testing pursuant to section 116-3 of the Criminal Code (725 ILCS 5/116-3 (West 2012)) seeking testing of the five spent shell casings and four fired bullets recovered from the scene. In that motion, the petitioner argued that because the identity of the shooter was an issue at trial and all the evidence had been in the custody of the State, the requested testing had the potential to produce new, non-cumulative evidence that would be materially relevant to his claim of actual innocence.

¶ 82 In a written response to the petitioner's motion for fingerprint testing, the State argued that the testing would not produce any newly discovered evidence that was material to the petitioner's claim of actual innocence because "[t]he manner in which this type of evidence is typically processed for firearms comparison and IBIS database evaluation is likely to have altered, if not

obliterated, any latent impression that may have been on the bullets and casings prior to examination." Specifically, the State argued "[t]he analyst's notes indicate[d] [that] the cartridge casings were cleaned with acetone and that the fired bullets were decontaminated with a 10% bleach solution." The State further asserted that firearm examiners are normally not required to wear gloves and that this specific evidence "was admitted at trial and allowed to go back to the jury room." Therefore, the State argued, the presence of unidentified fingerprints "would not be significant as there is no way to know how and when they were made."

¶ 83 After a hearing on August 18, 2015, the trial court denied the petitioner's motion for fingerprint testing. The court found that the petitioner had not met his burden of showing that the testing would produce evidence materially relevant to his claim of actual innocence, and noted that the evidence had been cleaned, decontaminated and handled by other people. The petitioner now appeals both from the summary dismissal of his *pro se* postconviction petition and from the denial of his section 116-3 motion for fingerprint testing (725 ILCS 5/116-3 (West 2008)).

¶ 84 II. ANALYSIS

¶ 85 A. Postconviction Petition

¶ 86 We begin by addressing the dismissal of the petitioner's *pro se* postconviction petition. It is well-settled that the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2012)) provides a three-step process by which a convicted defendant may assert a substantial denial of his or her constitutional rights in the proceedings that led to the conviction. *People v. Edwards*, 2012 IL 111711, ¶ 21; *People v. Tate*, 2012 IL 112214, ¶ 8; see also *People v. Walker*, 2015 IL App (1st) 130530, ¶ 11 (citing *People v. Harris*, 224 Ill. 2d 115, 124 (2007)). A proceeding under the Act is a collateral attack on a prior conviction and sentence and is therefore "not a

substitute for, or an addendum to, direct appeal." *People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994); see *Edwards*, 2012 IL 111711, ¶ 21; *People v. Barrow*, 195 Ill. 2d 506, 519 (2001). Accordingly, any issues that were decided on direct appeal are *res judicata*, and any issues that could have been presented on direct appeal, but were not, are waived. *Edwards*, 2012 IL 111711, ¶ 21; see also *People v. Reyes*, 369 Ill. App. 3d 1, 12 (2006).

¶ 87 At the first stage of a postconviction proceeding, such as here, the trial court must independently review the petition, taking the allegations as true, and determine whether " 'the petition is frivolous or is patently without merit.' " *People v. Hodges*, 234 Ill. 2d 1, 10 (2009) (quoting 725 ILCS 5/122–2.1(a)(2) (West 2006)); see also *Tate*, 2012 IL 112214, ¶ 9; *People v. Ross*, 2015 IL App (1st) 120089, ¶ 30 ("To survive the first stage, a *pro se* litigant's petition need only present the gist of a constitutional claim.") (citing *People v. Jones*, 213 Ill. 2d 498, 504 (2004)). At this stage of postconviction proceedings, the court may not engage in any factual determinations or credibility findings. See *People v. Plummer*, 344 Ill. App. 3d 1016, 1020 (2003) ("The Illinois Supreme Court *** [has] recognized that factual disputes raised by the pleadings cannot be resolved by a motion to dismiss at either the first stage *** or at the second stage *** [of postconviction proceedings], rather, [they] can only be resolved by an evidentiary hearing ***.") Instead, the court may summarily dismiss the petition only if it finds the petition to be frivolous or patently without merit. See *Jones*, 213 Ill. 2d at 504; *Ross*, 2015 IL App (1st) 120089, ¶ 30; see also *Hodges*, 234 Ill. 2d at 10. A petition is frivolous or patently without merit only if it has no arguable basis either in law or in fact. *Tate*, 2012 IL 112214, ¶ 9. Our supreme court has explained that a petition lacks an arguable basis where it "is based on an indisputably meritless legal theory or a fanciful factual allegation"—in other words, an allegation that is "fantastic or delusional," or is "completely contradicted by the record." (Internal quotation marks

omitted.) *Hodges*, 234 Ill. 2d at 13, 16; *People v. Brown*, 236 Ill. 2d 175, 185 (2010); see also *Ross*, 2015 IL App (1st) 120089, ¶ 31. We review the summary dismissal of a petition *de novo*. *Tate*, 2012 IL 112214, ¶ 10.

¶ 88 In the present case, the petitioner first contends that the trial court erred in summarily dismissing his petition because he presented arguable claims that (1) the police violated his constitutional rights when they refused to stop his interrogation once he invoked his right to counsel pursuant to *Miranda*; (2) his statements to police were involuntary; and (3) his trial counsel was ineffective for failing to raise these issues in a motion to suppress the "fruit" of the illegal interrogation.

¶ 89 The State, on the other hand, asserts that the petitioner's claims have no arguable basis in either law or fact, because taking all of the petitioner's allegations as true, any evidence that was obtained from alibi statements he made to police in violation of *Miranda*, was nonetheless admissible at trial pursuant to our supreme court's decision in *People v. Winsett*, 153 Ill. 2d 335 (1992). For the reasons that follow, we agree with the State.

¶ 90 We begin by setting forth the relevant jurisprudence surrounding *Miranda*. The Fifth Amendment of the United States Constitution provides that "no person *** shall be compelled in any criminal case to be a witness against himself.'" U.S. Const., amend V. To protect the privilege against self-incrimination during custodial interrogations, in *Miranda*, the United States Supreme Court held that police interrogators must provide suspects with certain warnings, known as *Miranda* warnings, including, relevant to this appeal, informing the suspect of his right to appointed or privately retained counsel during questioning, and terminating interrogation as soon as the suspect invokes that right. *Miranda*, 384 U.S. at 469, 474. The Court in *Miranda*

therefore "fashioned *** the rigid rule that an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights." *Fare v. Michael C.*, 442 U.S. 707, 719 (1979)

¶ 91 In *Edwards v. Arizona*, 451 U.S. 447, 484-85 (1981), the United States Supreme Court reaffirmed the principles articulated *Miranda* and further held that when a suspect requests counsel not only must the current interrogation cease, but the suspect may not be approached for further interrogation "until counsel has been made available to him." If the police do subsequently initiate an encounter, the suspect's statements are presumed involuntary and are inadmissible as substantive evidence at trial. *Edwards*, 451 U.S. at 484-85. Under the *Edwards* exclusionary rule, the State may not use *statements* obtained after a defendant invokes his right to counsel, unless the State can establish: (1) the accused initiated further discussions with the police; and (2) that he knowingly and intelligently waived the right he had invoked. *Edwards*, 451 U.S. at 484-85.

¶ 92 In *Winsett*, our supreme court addressed the application of the "fruit of the poisonous tree" doctrine to violations of the principles articulated in *Miranda* and *Edwards*, and held that because the "right" to receive *Miranda* warnings is not a constitutional right, but, rather, a prophylactic rule designed to protect a suspect's constitutional right against compelled self-incrimination, any evidence discovered by virtue of statements obtained in violation of *Miranda*, was not automatically excludable under that doctrine. *Winsett*, 153 Ill. 2d at 351-64.

¶ 93 In *Winsett*, during a custodial interrogation, the police *Mirandized* the defendant but then continued to question him, even after he invoked his fifth amendment right to counsel. *Winsett*, 153 Ill. 2d at 339. During that interrogation, the defendant asked to speak with his attorney on three separate occasions. *Winsett*, 153 Ill. 2d at 339. The defendant eventually made inculpatory statements and identified Glen Spruille as his accomplice. *Winsett*, 153 Ill. 2d at

339-40. After a hearing on the defendant's motion to suppress his statement, the trial court granted the defendant's motion because his statements were given after he had requested counsel. *Winsett*, 153 Ill. 2d at 340. The defendant then filed a motion *in limine* to prohibit the State form presenting Spruille's testimony at trial, arguing that Spruille's testimony and identity were the "fruit of the poisonous tree" since they were both obtained as a result of the defendant's statements. *Winsett*, 153 Ill. 2d at 341. The trial court denied the motion *in limine*. *Winsett*, 153 Ill. 2d at 341.

¶ 94 Just like the petitioner in this case, after he was convicted, the defendant in *Winsett* subsequently filed a postconviction petition, arguing that Spruille's testimony should have been excluded and that his appellate counsel was ineffective for failing to raise the trial court's denial of the motion *in limine* as an issue on direct appeal. *Winsett*, 153 Ill. 2d at 344, 347. The defendant argued that any "evidence obtained as a result of statements taken in violation of *Miranda* is subject to exclusion under the fruit of the poisonous tree doctrine." *Winsett*, 153 Ill. 2d at 351.

¶ 95 Our supreme court disagreed and held that the "fruit of the poisonous tree" doctrine does not apply to exclude the fruit of a *Miranda* violation. *Winsett*, 153 Ill. 2d at 351. In doing so, the court noted the distinction between a violation of a constitutional right, such as the fourth amendment right against searches and seizures, and a violation of the prophylactic rules announced in *Miranda*, which were developed to safeguard a suspect's fifth amendment rights. *Winsett*, 153 Ill. 2d at 351-64. As the court explained:

> "The *Miranda* exclusionary rule differs in several significant respects *** from the Fourth Amendment exclusionary rule. First, and foremost, the *Miranda* exclusionary rule is intended to safeguard a suspect's rights under the Fifth Amendment, rather than the Fourth

> Amendment. More importantly, however, the Fourth Amendment exclusionary rule is applied where the defendant's constitutional rights are violated by an unlawful search and seizure. The *Miranda* exclusionary rule, on the other hand, applies even if the defendant's constitutional rights under the Fifth Amendment were not violated. The Supreme Court has explained that the Fifth Amendment bars only the use of statements which are compelled. Compelled or involuntary statements are excluded under the Fifth Amendment, not as a means of deterring unlawful police conduct, but because such statements are regarded as inherently untrustworthy and, thus not probative." *Winsett*, 153 Ill. 2d at 352.

¶ 96 The court therefore concluded that "[w]here the police violate the prophylactic rules developed in *Miranda*, but do not actually violate the defendant's fifth amendment privilege against self-incrimination, the fruit of the poisonous tree doctrine will not be applied to exclude physical or testimonial evidence derived from the defendant's statements." *Winsett*, 153 Ill. 2d at 353-54. Accordingly, the court held that the admission of Spruille's testimony at trial was proper and could not have been excluded as fruit of an illegal interrogation. *Winsett*, 153 Ill. 2d at 360.

¶ 97 Applying *Winsett* to the facts of this case, we are similarly compelled to conclude that neither the peacoat nor Freeman's testimony, would have been excluded under the fruit of the poisonous tree doctrine. As such, the petitioner's claim has no arguable basis in law or fact.

¶ 98 In coming to this conclusion, we further reject the petitioner's attempt to qualify his alibi statement to police as an involuntary confession so as to implicate his fifth amendment right against compelled self-incrimination. Contrary to the petitioner's assertion, his own *pro se* petition nowhere alleges that he confessed or gave incriminating statements to police. Rather, it states that the police learned of the peacoat and Freeman as a result of his "alibi statement." See *People v. Mullins*, 242 Ill. 2d 1, 24, fn. 6 (2011) (an alibi is "[a] defense based on the physical

impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time.") (quoting Black's Law Dictionary 84 (9th ed. 2009)). The petitioner's *pro se* petition, also fails to attach the petitioner's affidavit attesting to and detailing the type of police "harassment" that he alleges in his petition preceded his decision to speak to police and provide them with an alibi, so as to render it involuntary; nor does it explain the reason for his failure to provide his affidavit detailing those circumstances. See *People v. Gonzalez*, 2016 IL App (1st) 141660, ¶ 31 ("A petitioner's failure to either attach the necessary "affidavits, records, or other evidence or explain their absence is fatal to a post-conviction petition [citation] and by itself justifies the petition's summary dismissal." (Internal quotation marks omitted.) (*People v. Delton*, 227 Ill. 2d 274, 254, ¶ 31.) Moreover, the record positively establishes, and the petitioner concedes in his brief, that *no* statement that he gave to police while at the police station was ever used in his trial, so as to implicate his right against self-incrimination. See *United States v. Patane*, 542 U.S. 630, 641 (2004) ("Potential [fifth amendment] violations occur, if at all, only upon the admission of unwarned statements into evidence at trial."); see also *Winsett*, 153 Ill. 2d at 360 (noting that the *Edwards* exclusionary rule applies only to "*statements* obtained after a defendant has invoked his right to counsel" to prevent their admission "as substantive evidence in the prosecution's case-in-chief, unless the defendant initiated the subsequent contact and made an intelligent and knowing waiver of his *Miranda* rights.") Accordingly, the petitioner's claim that his fifth amendment right against self-incrimination was violated when he gave an involuntary statement to police has no arguable basis in law or fact.

¶ 99 The petitioner nonetheless attempts to circumvent *Winsett* by citing to *People v. McCauley*,

163 Ill. 2d 414 (1994) to argue that the Illinois Constitution provides "broader protections" of due process and against self-incrimination (see Ill. Const. 1970, art I, §§ 2, 10). We disagree, and find that case inapposite.

¶ 100 In *McCauley*, the defendant was brought to the police station for questioning about a murder, was advised of his *Miranda* rights, and did not request an attorney. *McCauley*, 163 Ill. 2d at 417–18. Unbeknownst to the defendant, his family had retained an attorney for him, and the attorney had gone to the police station and asked to speak with him. *McCauley*, 163 Ill. 2d at 418–19. The police refused to allow the attorney access to the defendant and failed to inform the defendant that his attorney was present at the police station asking to speak with him. *McCauley*, 163 Ill. 2d at 419. The defendant subsequently gave a statement to the police in response to their questioning, but later filed a motion to suppress the statement. *McCauley*, 163 Ill. 2d at 420. The trial court suppressed the statement, and our supreme court affirmed.

¶ 101 In doing so, our supreme court noted that in *Moran v. Burbine*, 475 U.S. 412 (1986), the United States Supreme Court had rejected the argument that similar police conduct violated a defendant's right to counsel under the fifth amendment to the United States Constitution. *McCauley*, 163 Ill. 2d at 422–23. Our supreme court then considered whether such conduct violated the defendant's right to counsel under article I, section 10, of the Illinois Constitution of 1970, which provides, in pertinent part, that "[n]o person shall be compelled in a criminal case to give evidence against himself" (Ill. Const. 1970, art. I, § 10). *McCauley*, 163 Ill. 2d at 423. In holding that the police conduct in *McCauley* violated the defendant's rights under the Illinois Constitution, our supreme court stated:

> "In this case, we determine that our State constitutional guarantees afforded defendant a greater degree of protection [than their federal counterparts]. Our State constitutional

guarantees simply do not permit police to *delude* custodial suspects, exposed to interrogation, *into falsely believing they are without immediately available legal counsel and to also prevent that counsel from accessing and assisting their clients during the interrogation*." (Emphasis added.) *McCauley*, 163 Ill. 2d at 423-24.

¶ 102 The court then held that, under Illinois law, "when police, prior to or during custodial interrogation, refuse an attorney appointed or retained to assist a suspect access to the suspect, there can be no knowing waiver of the right to counsel if the suspect has not been informed that the attorney was present and seeking to consult with him." (Internal quotation marks omitted). *McCauley*, 163 Ill. 2d at 424–25. The court also found that "due process is violated when police interfere with a suspect's right to his attorney's assistance and presence by *affirmatively* preventing the suspect, exposed to interrogation, from receiving the immediately available assistance of an attorney hired or appointed to represent him." (Emphasis added.) *McCauley*, 163 Ill. 2d at 444; see also Ill. Const. 1970, art. I, § 2 ("[n]o person shall be deprived of life, liberty or property without due process of law"). Thus, the court concluded that the police conduct under that particular set of circumstances violated the defendant's state privilege against compelled self-incrimination and his right to due process. *McCauley*, 163 Ill. 2d at 446.

¶ 103 Contrary to the petitioner's contention, *McCauley* does not aid in advancing his cause to the second stage of postconviction proceedings. Since *McCauley*, our supreme court has made clear that its holding in that case "did not eschew the *Miranda* regime itself," but rather "superimposed a state-specific right onto the existing *Miranda* framework." *People v. Hunt*, 2012 IL 111089, ¶ 40.

¶ 104 Moreover, *McCauley* is fact-specific and clearly distinguishable. Unlike *McCauley* where

the defendant gave incriminating statements, in the present case, the petitioner never made any incriminating statements to police, but rather provided them with an alibi. As such, the right against self-incrimination, whether under the federal or state constitutions, was not implicated. Moreover, in the instant case, no attorney had been retained or appointed for petitioner, so that there was no attorney affirmatively being refused access to petitioner or information being withheld by the police, which would have triggered the "greater" protections of our constitution. Accordingly, we reject the petitioner's invitation to apply *McCauley* to the instant case.

¶ 105 For these same reasons, we further find that the petitioner has failed to state an arguable claim of trial counsel's ineffectiveness for failing to make the aforementioned arguments at a motion to suppress hearing. It is well settled that claims of ineffective assistance of counsel are resolved under the two-prong standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Lacy*, 407 Ill. App. 3d 442, 456 (2011); see also *People v. Colon*, 225 Ill. 2d 125, 135 (2007) (citing *People v. Albanese*, 104 Ill. 2d 504 (1984) (adopting *Strickland*)). Under *Strickland*, the petitioner must establish both: (1) that his counsel's conduct fell below an objective standard of reasonableness; and (2) that he was prejudiced as a result of counsel's conduct. See *Lacy*, 407 Ill. App. 3d at 456; see also *People v. Ward*, 371 Ill. App. 3d 382, 434 (2007) (citing *Strickland*, 466 U.S. at 687-94)).

¶ 106 Under the first prong of *Strickland*, the petitioner must overcome the strong presumption that the challenged action or inaction might have been the product of sound trial strategy. *Lacy*, 407 Ill. App. 3d at 456-57.

¶ 107 Under the second prong of *Strickland*, the petitioner must show that "but for" counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Lacy*, 407 Ill. App. 3d at 457; see also *Colon*, 225 Ill. 2d at 135; *Evans*, 209

Ill. 2d at 220. "[A] reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome--or put another way, that counsel's deficient performance rendered the result of [the proceedings] unreliable or fundamentally unfair." *Evans*, 209 Ill. 2d at 220; see also *Plummer*, 344 Ill. App. 3d at 1019 (citing *Strickland*, 466 U.S. at 694)).

¶ 108 In the context of a first stage postconviction proceeding, a petition will sufficiently allege ineffective assistance of counsel so as to proceed to the second stage only where: (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; *Brown*, 236, Ill. 2d at 185; see also *Lacy*, 407 Ill. App. 3d at 456.

¶ 109 In the present case, the record establishes that defense counsel filed a motion to suppress on the basis of fourth amendment violations, namely that the police had no probable cause and no warrant to arrest the petitioner. This motion sought to exclude all evidence obtained as a result of the allegedly illegal arrest, including the peacoat and Freeman's testimony. Since we have already explained that under *Winsett* the fruit of the poisonous tree doctrine would have applied to exclude such evidence only if it resulted from a constitutional violation, such as, a fourth amendment search and seizure violation, but not if it resulted from a mere *Miranda* violation, the petitioner has failed to make an arguable claim that counsel's decision to file a motion to suppress on the basis of a warrantless arrest, rather than a *Miranda* violation, was not the product of sound trial strategy. See *People v. Sims*, 374 Ill. App. 3d 231, 267 (2007) (defense counsel's decision to "rely on one theory of defense, to the exclusion of others, is a matter of trial strategy.")

¶ 110 For this same reason, the petitioner has failed to make an arguable claim of prejudice based

on counsel's allegedly deficient performance. Since under *Winsett*, such a motion would have been unsuccessful, the petitioner cannot make an arguable claim that there was a reasonable probability that the result of his proceedings would have been different. In addition, even if that motion had been successful and the peacoat and Freeman's testimony were excluded, the evidence of the petitioner's guilt at trial was overwhelming. The petitioner was identified as the shooter by Anderson's dying declarations to numerous police officers at the scene. Harris and Powell testified to the petitioner's motive for the shooting, namely his desire to have custody of D., and Powell averred that the petitioner owned a gun and had previously planned on using it against Anderson to take the child away from her. Accordingly, under this record, the petitioner has failed to make an arguable claim of prejudice.

¶ 111 B. Motion for Fingerprint Testing

¶ 112 The petitioner next contends that the trial court erred when it denied his section 116-3 motion (725 ILCS 5/116-3 (West 2012)) for fingerprint testing of the five spent shell casings and four fired bullets, which were recovered from the scene of the shooting. The petitioner contends that because the identity of the shooter was an issue at trial, this testing had the potential to produce noncumulative evidence materially relevant to his claim of actual innocence. For the reasons that follow, we disagree.

¶ 113 Section 116-3 of the Code delineates the prerequisites the petitioner must meet in order to establish that he is entitled to, *inter alia*, postconviction forensic DNA testing. 725 ILCS 5/116–3 (West 2010). In relevant part, the petitioner must first show that his request for forensic testing relates to evidence that was secured in relation to the trial, which resulted in his conviction, and that this evidence was (1) not subject to the testing which is now requested at the time of trial, or (2) although previously subjected to testing, that it can now be subjected to additional testing

utilizing a method that was not scientifically available at the time of trial. 725 ILCS 5/116–3(a)(1), (2) (West 2012); see also *People v. Smith*, 2014 IL App (1st) 113265, ¶ 19.

¶ 114 The petitioner must next present a *prima facie* case that identity was at issue at trial and that an adequate chain of custody has been established, so that the evidence has not been substituted, tampered with, replaced or altered in any material respect. 725 ILCS 5/116–3(b) (West 2012); *Smith*, 2014 IL App (1st) 113265, ¶ 22. If the petitioner does so, the trial court must allow the requested testing, provided that it determines that: (1) the result of the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the petitioner's assertion of actual innocence though the results may not completely exonerate him, and (2) the requested testing is generally accepted in the scientific community. 725 ILCS 5/116-3(c) (West 2012); *Smith*, 2014 IL App (1st) 113265, ¶ 22. We review the trial court's ruling on a section 116-3 motion *de novo*. *People v. Shum*, 207 Ill. 2d 47, 65 (2003).

¶ 115 In the present case, the State concedes that the fingerprint testing sought by the petitioner is generally accepted in the scientific community, and that based upon the record on appeal, it does not appear that the shell casings or bullets were tested for fingerprints at the time of trial. The State, nonetheless, asserts that the petitioner cannot meet his burden in establishing that a proper chain of custody was maintained over the evidence, so as to permit the court to determine that such testing has the potential to produce new, noncumulative evidence materially relevant to the petitioner's assertion of actual innocence. In this respect, the State argues that the record affirmatively establishes that the evidence was materially altered. For the reasons that follow, we agree.

¶ 116 While the petitioner is correct that the evidence he seeks to test was in the State's possession

and subject to a proper chain of custody at all times, the record also establishes that this evidence was materially altered, so that the result of the requested test could not produce any new and materially relevant evidence that could significantly advance the petitioner's claim of innocence. In that respect, the ballistic analyst's notes reveal that the discarded cartridge casings were "cleaned with acetone" and that the fired bullets "were decontaminated with a 10% bleach solution," both of which would have materially altered, if not "completely obliterated" any fingerprint evidence that may have been on them prior the ballistic testing. In addition, it is undisputed that the shell casings and bullets were admitted into evidence at trial and "allowed to go back to the jury room," where they could have been handled by twelve different jurors. Therefore, even if fingerprints could now be obtained from the shell casings and bullets, the evidence would not be materially relevant to the petitioner's claim of actual innocence, since it would be impossible to determine when those additional fingerprints were made. *People v. Savory*, 197 Ill. 2d 203, 213 (2001) ("evidence which is 'materially relevant' to a defendant's claim of actual innocence is simply evidence which tends to significantly advance that claim.") In addition, we further note that the State never argued at trial that the petitioner himself loaded the bullets and shell casings into the gun he used to shoot Anderson, so that additional fingerprints on those two pieces of evidence would not tend to significantly advance his claim. Under this record, we find no error in the trial court's decision to deny the petitioner's request for fingerprint testing.

¶ 117 C. *Mittimus*

¶ 118 The petitioner finally contends, and the State rightly concedes, that his *mittimus* must be corrected to reflect that his conviction for attempt murder should be classified as a Class X offense, rather than a Class M offense. We agree, and because we have the authority to correct

the *mittimus* at any time without remanding the matter to the trial court (*People v. Harper*, 387 Ill. App. 3d 240, 244 (2008)), we order that the *mittimus* be corrected to reflect that the petitioner's attempt murder conviction is a Class X offense. 720 ILCS 5/8-4(c)(1) (D); *People v. Decatur*, 2015 Ill App (1st) 130231, ¶ 14.

¶ 119 III. CONCLUSION

¶ 120 For the aforementioned reasons, we affirm the judgment of the circuit court and order the *mittimus* corrected.

¶ 121 Affirmed; *mittimus* corrected.