SIXTH DIVISION
September 14, 2018

No. 1-15-1204

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County
	)	
v.	)	No. 99 CR 21398 (02)
	)	
SHAUN FOGLE,	)	Honorable
	)	Thomas P. Fecarotta, Jr.,
Petitioner-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Delort and Justice Connors concurred in the judgment.

ORDER

¶ 1 ***Held:*** We affirm the dismissal of petitioner-appellant's postconviction petition because it is untimely and he has failed to demonstrate the failure to timely file was not the result of his culpable negligence. Even if timely filed, petitioner's trial attorney was not ineffective for failing to call Sosa and Perez.

¶ 2 Petitioner-appellant, Shaun Fogle, was arrested and ultimately convicted of first degree murder and armed robbery stemming from the beating death of Emil Risenzon in 1999. The trial court sentenced petitioner to 30 years' imprisonment for the murder and six years on the armed

robbery. The sentences run consecutively. On direct appeal, this court affirmed both his conviction and sentence.

¶ 3 In December 2007, petitioner filed a *pro se* postconviction petition. The trial court appointed postconviction counsel and an amended postconviction petition was filed in April 2013. The State moved to dismiss the amended postconviction petition, which the trial court granted in March 2015. This appeal follows.

¶ 4 Petitioner raises three issues on appeal. He argues (1) that he was not culpably negligent for the late filing of his petition, (2) the trial court erred in dismissing his petition based on a lack of affidavits, and (3) the trial court erred in granting the State's motion to dismiss where his amended postconviction petition made a substantial showing his trial counsel was constitutionally ineffective for failing to call two exculpatory witnesses.

¶ 5 After reviewing the record and relevant case law, we affirm the dismissal of petitioner's amended postconviction petition. The postconviction petition was not timely filed and petitioner fails to establish the late filing was not the result of culpable negligence. Even if properly filed, the attached witness statement and testimony do not demonstrate trial counsel was constitutionally ineffective.

¶ 6 JURISDICTION

¶ 7 The trial court dismissed petitioner's amended postconviction petition on March 27, 2015. A notice of appeal was filed on April 15, 2015. Accordingly, this court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution and Illinois Supreme Court Rule 651(a). Ill. Const. 1970, art. VI, § 6; Ill. S. Ct. R. 651 (eff. Feb. 6, 2013).

¶ 8 BACKGROUND

¶ 9 Petitioner was arrested and charged along with two other individuals for the murder of Emil Risenzon and robbery of Emil's store, Wheeling Jewelry and Repair. All three individuals were tried separately with petitioner electing to be tried by a jury. At trial, the State presented the testimony of 13 witnesses to establish that petitioner, along with Rayon Sampson and Raymond Benavidez, were responsible for the murder and robbery in August 1999.

¶ 10 Danny Chatman testified that in 1999, he had been a member of the Gangster Disciples for three years. Chatman was a "bill collector" for the gang. He explained that on August 14, 1999, the "regent" of the Gangster Disciples, Myron Hall, was arrested along with Chatman's brother, Allen Chatman, for "some car burglaries." Hall was given a $20,000 D Bond, so the gang needed to raise $2000 to bond Hall out of Cook County jail.

¶ 11 On August 16, 1999, some of the gang members met at Tim Tincher's apartment to discuss how to raise Hall's bond money. The gang typically gathered at Tincher's apartment and kept weapons there. Chatman, Tincher, petitioner, Raymond Benavidez, Rayon Sampson, Dina Konienczny (Hall's girlfriend), and other gang members were present at this meeting. At the meeting, Chatman suggested they rob his classmates from Niles School of Cosmetology. Chatman admitted that his classmate David Capella and Samuel Ur were robbed on August 18. Chatman admitted that he was charged in connection with the August 18 armed robbery of the pair and that he pled guilty in exchange for a lesser charge and a sentence of probation. As part of the deal he agreed to testify against petitioner.

¶ 12 On August 17, 1999, Chatman went to Tincher's apartment and noticed a lot of police nearby. Chatman, petitioner, Benavidez, Sampson, Tincher, Konienczny, and other gang members were present. According to Chatman, he asked the group what happened and Fogle said

that Hall wanted to get out of jail and that he did not care how it happened. Chatman asked, "Is that why there's all that police out there?" to which petitioner responded affirmatively. Fogle then claimed, "We hit a lick at the jewelry store," which Chatman understood to be gang parlance meaning someone had robbed a jewelry store. Chatman asked if that was why the police were outside and petitioner responded "yes." Chatman testified that he saw a Crown Royal bag inside Tincher's bedroom closet that contained "a couple of diamond cut necklaces, a broach [sic], couple of silver chains, and some diamond studs." Petitioner told Chatman that they sold some jewelry at a store on Wolf Road.

¶ 13 Detective Steffan Johnson testified that he interrogated petitioner on August 25, 1999, along with Detectives Norm Stromberg and Matt McConnell. After talking for five minutes, petitioner requested Stromberg and McConnell leave the room. Petitioner then told Johnson about an unrelated armed robbery that occurred on August 18. Johnson exited the interrogation room and told the other detectives. Petitioner was then arrested.

¶ 14 Later that day, Johnson, McConnell, and Detective Mark Porlier interrogated petitioner. After the interrogation, Porlier wrote up petitioner's statement about the August 18 armed robbery and petitioner signed it. Johnson then began looking for Sampson and Benavidez. They were located and arrested.

¶ 15 On August 26, at 8:20 p.m., Sergeant Kevin Baltazar and Detective Nellis interrogated petitioner. After advising petitioner of his *Miranda* rights, they told petitioner that Benavidez had spoken to the other detectives about Risenzon's death. Petitioner put his head down and cried. Petitioner admitted to being a Gangster Disciple. According to petitioner, on August 16, he and several other members met at Tincher's apartment to try to raise money to pay for Hall's bond. Sampson came up with the idea to do a "grab and go" at Risenzon's store. A "grab and go" is

where someone gets the store worker to place merchandise on the counter which they grab and run out of the store without paying. Petitioner told the detectives that he slept at Tincher's apartment the evening of August 16. He awoke on the 17th at 10 a.m., and he, Benavidez, and Sampson went to the jewelry store. Petitioner and Sampson walked to the counter while Benavidez stood at the doorway. Sampson asked to see several pieces of jewelry. When he tried to grab the items, Risenzon grabbed Sampson's arm. Sampson reached into his pants leg and pulled out a metal pipe. He struck Risenzon in the head with the pipe. The three then grabbed the jewelry and fled.

¶ 16 Baltazar, Nellis, and Assistant State's Attorney Ketki Shroff Steffen interrogated petitioner on August 27, at 3:21 a.m. Steffen testified that she then interviewed petitioner a second time at 6:45 a.m., where she took petitioner's handwritten statement. Detectives Benbow and Baltazar were also present. Petitioner's statement was then published to the jury.

¶ 17 Alla Risenzon, the widow of the deceased, testified that she last saw Emil when she left for work about 8:30 a.m. on August 17, 1999. He was eating breakfast at the kitchen table. Once she arrived at work, Alla called Emil at the store several times, but no one answered. In the afternoon, she called her sister, Paula Gudnik, who agreed to check on Emil. Gudnik testified that she arrived at the store between 4:30 p.m. and 4:45 p.m. The lights in the store were off and the sign on the front door indicated "closed" even though the door was unlocked. When she went inside, she saw empty display and jewelry boxes on the counter and discovered Emil lying on the floor between the cash register and the wall. Emil was cold to the touch and had no pulse.

¶ 18 Assistant Chief Medical Examiner Mitra Kalelkar performed the autopsy. Emil had seven blunt force injuries to his head, some of which fractured his skull. The injuries were consistent

with being struck by a metal pipe or a bar. Dr. Kalelkar formed the opinion that Emil died from multiple cranial cerebral injuries due to blunt force.

¶ 19 Officer Mike Kirby, an evidence technician, testified that he searched a common basement utilized by the occupants of Tincher's apartment complex. He recovered a plastic bag containing 38 items of jewelry and a shotgun from the ventilation shaft of the basement. Petitioner's fingerprints were not found on any of the items. The State showed Gudnik the jewelry found in the basement and she testified that it closely resembled the items sold in the store. However, she could not be entirely sure because the items did not have any specific markings and were "generic stuff that a lot of jewelers keep." She stated that the jewelry store sold bracelets, necklaces, earrings, pendants, rings, and Russian gift boxes.

¶ 20 Louis Su owns a jewelry store at 101 North Wolf Road in Wheeling, Illinois. Officers came to his store on August 27 and had him view a photo array. Su recognized petitioner because petitioner had been in the store in the past few days. Su testified that petitioner was in the store the day after the murder. Petitioner came in with a "white girl." Su paid $30 for some ten karat rings that were "broken" and "not in decent shape."

¶ 21 Richard Collins testified that he worked as a deputy clerk for the Circuit Court of Cook County. On August 19, 1999, he was working as a bond manager and at 3:25 p.m. Allen Chatman deposited $2000 to bond Myron Hall out of jail. On August 27, 1999, Sergeant Williams Stutzman searched petitioner's bedroom at his mother's apartment. In the bedroom, Stutzman discovered a pair of blue jeans as well as three pages of handwritten notes along with the rules and regulations of the Gangster Disciples.

¶ 22 The defense called four witnesses: Nikita Fogle (petitioner's sister), Markellie Fogle (petitioner's mother), Susan Sersi (petitioner's friend), and petitioner. Nikita Fogle testified that

she lived at her mother's apartment with petitioner, their brother, their mother and her daughter. She saw petitioner the morning of August 17 at 8:40 a.m. She gave petitioner four dollars and asked him to babysit her daughter. Markellie testified that petitioner returned home at 8 a.m. on August 17. Markellie testified that her daughter asked petitioner to babysit. Petitioner left the apartment around 9:25 a.m. and returned at 10:20 a.m. Petitioner changed clothes and then departed again. Sersi testified that she lived in the same apartment complex as petitioner and knew him for about six months prior to the incident. On August 17, Sersi was in the apartment complex laundry room, where she and petitioner talked for 10-15 minutes. About an hour later, petitioner came over to Sersi's apartment and watched television with her for an hour and a half.

¶ 23 Petitioner testified that he did not enter the Wheeling jewelry store on August 17, 1999. Petitioner admitted he became a Gangster Disciple three months before the August 1999 offense. On August 23, Detective Johnson questioned Fogle at the police station about the murder. Petitioner admitted that he lied to Johnson and denied being a gang member. After his release, he told his mother and sister that he "briefly" went to the police station. Petitioner explained that Myron Hall had been arrested for car burglaries and the gang needed $2000 to bond Hall out. He admitted to spending the night at Tincher's apartment.

¶ 24 On August 23, petitioner agreed to go to the police station with detectives. Petitioner told the police about the August 18 armed robber of the cosmetology student and was arrested. He repeatedly denied participating in the murder. Petitioner claimed he had repeatedly asked for an attorney while in custody. He eventually told Sergeant Baltazar that he was in the store with Benavidez and Sampson. Petitioner could not recall many of the details of his statement to police and claimed he only signed it because he was scared.

¶ 25 On November 19, 2002, after hearing the evidence presented by both the State and defendant, a jury found petitioner guilty of first degree murder and armed robbery. On March 20, 2003, the trial court sentenced petitioner to 30 years in prison on the first degree murder conviction with a consecutive six-year sentence for the armed robbery. Petitioner filed a direct appeal to this court in which he argued: (1) his trial counsel provided ineffective assistance; (2) the trial court erred by admitting evidence of other crimes but failing to instruct the jury regarding the limited purpose of such evidence; (3) his sentence of 30 years' imprisonment was excessive; and (4) cumulative error denied him his due process right to a fair trial. In affirming his convictions, this court found trial counsel was not ineffective and the trial court did not err in failing to provide a limiting instruction. We also concluded his sentence was not unconstitutionally excessive.

¶ 26 Petitioner timely filed a petition for rehearing with this court on December 1, 2005. On December 14, 2005, this court denied his petition for rehearing. On May 18, 2007, he sought leave to file a late petition for leave to appeal to the Illinois Supreme Court. Our supreme court denied this on September 14, 2007.

¶ 27 On December 28, 2007, petitioner placed a *pro se* postconviction petition in the Menard Correctional Center mail. In his *pro se* petition, petitioner raised several claims, arguing, *inter alia*, that trial counsel was ineffective for several reasons. First, petitioner argued his trial counsel should have subpoenaed Eric Sosa, who testified in the other two trials stemming from the murder and robbery. Petitioner claimed Sosa would have testified that he saw Risenzon alive after the time the murder is alleged to have occurred. Petitioner attached Sosa's testimony from the other two trials to his petition. The petition also alleged his attorney was ineffective for failing to call Dina Konieczny, who would have testified that the pawned jewelry alleged to have

been taken from decedent's business actually belonged to Konieczny. Her testimony was also attached to the petition.

¶ 28 On May 16, 2008, the circuit court appointed the public defender to represent petitioner. On April 5, 2013, postconviction counsel filed an amended petition for postconviction relief. The amended petition raised two additional claims: "(1) trial counsel was ineffective for failing to investigate Fogle's case fully and to call Eric Sosa and Romero Perez to testify, and (2) Fogle was denied a fair trial where the State's case consisted only of Fogle's own coerced confession and the unreliable and compromised testimony of other alleged participants to the offense."

¶ 29 Attached to the amended petition were the affidavits of Nikita Fogle (petitioner's sister) and Bryan Gilzene. In her affidavit, Nikita Fogle averred that she asked trial counsel if they could bring in witnesses that could help Fogle's defense and counsel replied "we want to limit witnesses that there will be little room for conflicting testimonies." In Gilzene's affidavit, he swore that he spoke with Danny Chatman in July 2003. Gilzene claimed that Chatman had told him that "he knew they [Fogle and Sampson] did not do the jewelry store murder and armed robbery but that he lied so that he could get probation. Chatman stated that he knew he did a bad thing by lying on petitioner and Sampson but that he did to take a deal and avoid prison." The police interview of Romero Perez and the trial testimonies of Eric Sosa were also attached to the petition.

¶ 30 On November 22, 2013, the State filed a motion to dismiss the petition. After hearing arguments, the circuit court granted the State's motion to dismiss. In granting the motion, the court noted that the petition lacked affidavits from Sosa and Perez "as to what they would testify to or what information even they would be giving on the case" making the petition "a blank

allegation by the petitioner that there are witnesses that should have been called." The court also found many of the claims barred by *res judicata* as they had been raised on direct appeal.

¶ 31 This timely appeal followed.

¶ 32 ANALYSIS

¶ 33 The Post-Conviction Hearing Act creates a procedural instrument allowing a criminally convicted individual to assert a substantial denial of his constitutional rights in the proceedings which resulted in the conviction. 735 ILCS 5/122-1 (West 2016). A postconviction action represents a collateral attack on a conviction and sentence (*People v. Brisbon*, 164 Ill. 2d 236, 242 (1995)) and, as such, does not act as a replacement for a direct appeal (*People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994)). Illinois case law holds that a postconviction proceeding is limited to "constitutional matters that have not been, nor could have been, previously adjudicated." *People v. Rissley*, 206 Ill. 2d 403, 412 (2003).

¶ 34 A postconviction proceeding progresses in three distinct stages. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). Within 90 days of an individual filing a postconviction petition, a first stage proceeding occurs during which the circuit court reviews the petition, taking all allegations as true, and determines whether "the petition is frivolous or is patently without merit." *People v. Hodges*, 234 Ill. 2d 1, 11 (2009) quoting *Edwards*, 197 Ill. 2d at 244. If the circuit court determines the petition as frivolous or patently without merit, then the court will dismiss it via a written order. 725 ILCS 5/122-2.1(a)(2) (West 2016). If the petition is not dismissed at this stage, the circuit court advances it to the second stage, where it will appoint counsel to represent an indigent individual (725 ILCS 5/122-4 (West 2016)) and the State will either move to dismiss or answer (725 ILCS 5/122-5 (West 2016)). At the second stage, the circuit court takes "all well-pled facts that are not positively rebutted by the trial record" as true. *People v. Pendleton*, 223 Ill

2d 458, 473 (2006). The petition must make a substantial showing that a constitutional right was violated in order to proceed to a third stage evidentiary hearing. 725 ILCS 5/122-6 (West 2016). The petition at issue in this case was dismissed at the second stage and we review a second stage dismissal of a petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 389 (1998).

¶ 35 Before addressing the substantive claims raised in the postconviction petition, we must address whether petitioner's initial petition was timely filed. The following dates are relevant to the timeliness argument: (1) this court affirmed petitioner's conviction and sentence in a Rule 23 order dated November 10, 2005; (2) on December 1, 2005, appellate counsel filed a petition for rehearing; (3) on December 14, 2005, this court denied the petition for rehearing; (4) in April 2007 petitioner inquired about the status of his petition for rehearing and was informed by the appellate clerk it had been denied in December 2005; and (5) on December 28, 2007, petitioner placed his *pro se* postconviction petition in the institutional mail.

¶ 36 The limitation period in the Act states:

> "When a defendant has a sentence other than death, no proceedings under this Article shall be commenced more than 6 months after the conclusion of proceedings in the United States Supreme Court, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence. If a petition for certiorari is not filed, no proceedings under this Article shall be commenced more than 6 months from the date for filing a certiorari petition, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence. If a defendant does not file a direct appeal, the post-conviction petition shall be filed no later than 3 years from the date of conviction, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence.
>
> This limitation does not apply to a petition advancing a claim of actual innocence."

725 ILCS 5/122-1(c) (West 2016). Based on the language of the statute, the right to file a postconviction action expired when any of the listed time periods elapsed.

¶ 37 Petitioner acknowledges his postconviction petition was not timely filed. Pursuant to Supreme Court Rule 315(b), he would have had 35 days after this court denied his petition for rehearing on December 14, 2005, or until January 18, 2006, to file his petition for leave to appeal to the supreme court. Pursuant to the Act, petitioner's postconviction should have been filed six months from January 18, 2006 or by July 18, 2006. The petition is this case was not filed until December 28, 2007.

¶ 38 In order to overcome the untimely filing, petitioner must demonstrate the failure to timely file was not the result of "culpable negligence." *Id.* Our supreme court has recognized that the term "culpable negligence" in the Act means " 'something greater than ordinary negligence and is akin to recklessness." *People v. Rissley*, 206 Ill. 2d 403, 420 (2003) quoting *People v. Boclair*, 202 Ill. 2d 89, 106-08 (2002). It has also been held that "[i]gnorance of the law or legal rights will not excuse delay in bringing a lawsuit." (Internal quotation marks omitted.) *Boclair*, 202 Ill. 2d at 105-06. "A petition that is untimely will not be dismissed if the petitioner alleges facts showing that the delay in filing the petition was not due to his or her culpable negligence." *People v. Johnson*, 2017 IL 120310, ¶ 26

¶ 39 Before this court, petitioner argues he is not culpably negligent because appellate counsel never informed him of the denial of his petition for rehearing before this court. Accepting this as true, petitioner provides no explanation for his inaction during the time period between the filing of his petition for rehearing on December 1, 2005 and his sending a letter to the appellate clerk in April 2007. Petitioner does not allege he took any action during this timeframe to find out about the status of his petition for rehearing nor does he allege that his incarceration prevented him from taken affirmative steps to learn the status of his petition for rehearing.

¶ 40 In *People v. Upshaw*, this court recently found petitioner's postconviction petition was not untimely due to his own culpable negligence based on the fact "he had limited access to the law library, he began to work on his petition within days of the denial of his PLA, he was unable to retrieve his lost trial records, and his petition was only eight months late." 2017 IL App (1st) 151405, ¶ 31. In *People v. Rissley*, our supreme court found the delay in filing was not the result of the defendant's culpable negligence because that defendant, in part, "remained in constant contact with his direct appeal counsel" whose advice defendant had relied on regarding the postconviction process. *Rissley*, 206 Ill. 2d 403, 421 (2003). Unlike the petitioners in *Upshaw* and *Rissley*, our petitioner fails to explain his inaction between filing of his petition for rehearing before this court and his inquiry with the appellate clerk (a 16-month gap). His failure to take any action during this period constitutes "recklessness." See *People v. Lander*, 215 Ill. 2d 577, 586 (2005) (noting that culpable negligence involves a disregard of the consequences likely to flow from one's actions).

¶ 41 Even if not barred by the Act's limitation period, a review of the petition demonstrates that the circuit court did not err in dismissing it at the second stage. Petitioner's postconviction petition is based on a claim that his trial counsel was ineffective for failing to call Eric Sosa and Romero Perez, who would have testified that Emil Risenzon was alive and working in his store after 10 a.m. on August 17, 1999.[1] The State responds that this claim is barred by the doctrine of *res judicata* and even if not barred, it lacks merit.

¶ 42 The doctrine of *res judicata* applies to postconviction proceedings. "[D]eterminations of the reviewing court on direct appeal are *res judicata* as to issues actually decided and issues that

[1] Petitioner's original postconviction petition and the amended petition filed by counsel raised several other claims, but petitioner only raises and argues the issue of failing to call Sosa and Perez. Petitioner has therefore forfeited all other postconviction issues raised below but not argued in this court. *People v. Munson*, 206 Ill. 2d 104, 113 (2002) (concluding that the petitioner abandon several postconviction claims by failing to raise them on appeal).

could have been raised on direct appeal but were not are waived." *People v. Coleman*, 168 Ill. 2d 509, 522 (1995). On direct appeal, petitioner argued his trial counsel was ineffective for several reasons. In rejecting all the claims, we found trial counsel's actions were not deficient. Even if some aspect of his performance was deficient, we also concluded petitioner could not establish the prejudice prong of his claim because the evidence of his guilt was overwhelming. *People v. Fogle*, No. 1-03-1434 (unpublished order under Illinois Supreme Court Rule 23). While no ineffective claims on direct appeal dealt with the failure to call a particular witness, the record from petitioner's trial demonstrates he could have raised the failure to call Sosa as part of his direct appeal. In his motion for judgment notwithstanding the verdict or in the alternative a new trial, petitioner alleges, in part, that his trial counsel's inaction led to the loss of Sosa's testimony. Since he could have raised the failure to call Sosa as part of his direct appeal, petitioner has forfeited his ineffective assistance of counsel claim related to Sosa.

¶ 43 Petitioner argues his ineffective assistance claim related to the failure to call Perez is not barred by *res judicata* because the police report was never disclosed. Our supreme court has recognized that, "in the interests of fundamental fairness, the doctrine of *res judicata* can be relaxed if the defendant presents substantial new evidence." *People v. Patterson*, 192 Ill. 2d 93, 139 (2000). In order for new evidence to be sufficient to warrant a new trial and relax doctrine or *res judicata*: (1) it must be material and not merely cumulative, (2) it must be of such conclusive character that it will probably change the result on retrial, and (3) the evidence must not have been discovered or discoverable through the defense's due diligence prior to the original trial. *Id.*

¶ 44 Perez's statement does not qualify as "substantial new evidence" because petitioner cannot satisfy element two and three. Perez was not sure who he saw that morning, "[h]e assumed he saw RISENZON but did not get a good look at the person." The record indicates that

defense counsel made a discovery request for all statements made to the police. Additionally, the State listed Perez a possible witness. The statement was therefore discoverable through defense counsel's due diligence. Based on inability to meet elements two and three, petitioner cannot meet the threshold for relaxing the doctrine of *res judicata*.

¶ 45 Even if petitioner's claim was timely and not barred by *res judicata*, we would still find no error below because petitioner cannot satisfy the two prong *Strickland* test. To establish a claim of ineffective assistance of counsel, a defendant must satisfy the two prongs of the *Strickland* test: deficiency and prejudice. *People v. Griffin*, 178 Ill. 2d 65, 73 (1997). Deficiency means the error committed by trial counsel was so grievous that trial counsel ceased operating as "counsel" guaranteed by the sixth amendment. *People v. Coleman*, 168 Ill. 2d 509, 528 (1995). To establish prejudice, a defendant must show the error was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* Every defendant must make a showing as to both deficiency and prejudice, but if a court finds no prejudice then it does not need to decide whether counsel's performance was constitutionally deficient. *People v. Mahaffey*, 165 Ill. 2d 445, 458 (1995). A trial counsel's decision to call a witness to testify is "within the realm of strategic choices that are generally not subject to attack on the grounds of ineffectiveness of counsel." *People v. King*, 316 Ill. App 3d 901, 913 (2000). The decision may be deemed ineffective when the decision results in the failure to present exculpatory evidence, "including the failure to call witnesses whose testimony would support an otherwise uncorroborated defense." *Id.*

¶ 46 Petitioner argues that had his trial counsel called Eric Sosa and Romero Perez, they would have directly contradicted the State's theory that petitioner and his two co-defendants murdered Risenzon around 10 a.m. Petitioner claims Sosa and Perez would have testified to

seeing Risenzon alive in his store after 10 a.m. Petitioner attached the testimony of Sosa from Benavidez and Sampson's trials. He attached the statement Perez gave to police.

¶ 47 Before turning to the merits of this argument, petitioner argues the trial court erred rejecting the attached records because they were not in the form of an affidavit. The transcript from the hearing indicates the trial court's dismissal was based in part on Sosa and Perez's statements not being in the form of an affidavit. Normally, this raises a question of statutory interpretation, but the State does not respond to this argument. In not responding, the State has forfeited the issue and we review the substance of Sosa and Perez's statements without concern for the form in which they are presented.

¶ 48 After reviewing the attached trial testimonies of Sosa and the statement of Perez, it is evident the decision to not call Sosa or Perez was the result of trial counsel's strategic choice. While petitioner claims Perez's statement would support the decedent being alive, Perez told the police he was not sure who he actually saw in the back of the store. While he identified the decedent from a photo, "[w]hen asked if it was RISENZON that he saw on 8-17-99, PEREZ was unsure. He assumed it was RISENZON but did not get a good look at the person." This statement positively rebuts petitioner's claim that Perez would testify to seeing the decedent alive after 10 a.m.

¶ 49 Comparing Sosa's testimony from both co-defendants' trials reveals it is replete with inconsistencies regarding critical facts of this case.[2] At the trial of Benavidez, Sosa testified that he saw the victim alive at 10 a.m. on August 17, "[o]kay. I saw him at about 10:00 in the morning. I saw him working within his workshop as I always do." However, at Sampson's trial, Sosa denied seeing the victim that morning:

[2] While neither transcript is marked, the testimony itself reveals that Sosa testified first at the trial of Benavidez and then at Sampson's trial. Petitioner's motion for a new trial indicates that trial counsel spoke with Eric Sosa.

"Q. Now, on the date of August 17, 1999, you came around 10:00 o'clock in the morning to work?

A. That's correct.

Q. Were you able to see Mr. Risenzon on that date at that time, sir?

A. **I did not see him at that time, sir.**"

Sosa also contradicted himself in regards to his whereabouts that afternoon. At Benavidez's trial, Sosa claimed to be at a local Best Buy "around, maybe 12:30, 12:45, around that time." Yet at Sampson's trial, Sosa claimed he left his father's store around 12:30 to go home and eat lunch.

"Q. Did you leave that premises at any point?

A. Yes, I did.

Q. What time did you leave that premises?

A. I left around lunch time, which was at 12:30.

Q. Where did you go, sir?

A. I went home."

Given Perez's statement that he was unsure who he saw and Sosa's contradictions on key facts and his own whereabouts, trial counsel's decision not to call either one was not "irrational and unreasonable in light of the circumstances that defense counsel confronted at the time." *People v. Faulkner*, 292 Ill. App. 3d 391, 394 (1997). The decision not to call either Perez or Sosa did not represent an error so serious it deprived petitioner of "counsel" guaranteed by the sixth amendment. Accordingly, we reject petitioner's ineffective assistance of counsel claim and his amended postconviction petition fails to make a substantial showing that a constitutional right was violated.

¶ 50 CONCLUSION

¶ 51 For the foregoing reasons, we affirm the dismissal of petitioner's amended postconviction petition at the second stage.

¶ 52 Affirmed.