2018 IL App (1st) 153178-U
No. 1-15-3178
Order filed February 5, 2018

First Division

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. BRIAN HARGARTEN, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County. No. 09 CR 1428 Honorable Charles P. Burns, Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

ORDER

¶ 1 *Held*: Where defendant's *pro se* postconviction petition raised an arguable claim of ineffective assistance of trial counsel for failing to investigate and call an alibi witness, we reverse the summary dismissal of the petition and remand for second-stage proceedings.

¶ 2 Defendant Brian Hargarten, who was convicted of first degree murder, appeals from the trial court's summary dismissal of his petition for relief pursuant to the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2014). On appeal, defendant contends that his petition should not have been summarily dismissed because it presented the gist of a meritorious claim of ineffective assistance of counsel. Specifically, he asserts that the petition included an arguable

claim that trial counsel was ineffective (1) for failing to present an alibi witness he promised in opening statements but did not secure, even after the trial court "prodded" him to subpoena her, and (2) for failing to investigate and call a second alibi witness who was available and known to trial counsel. Defendant argues that he was arguably prejudiced by counsel's failures, as it is reasonably possible that the result of the trial would have been different had either or both of the alibi witnesses testified, given the lack of physical evidence against defendant and the State's witnesses' admitted marijuana use, rival gang membership, and motives to lie. Finally, defendant asserts that to the extent the first alibi witness's potential testimony is clear from the record, appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness regarding her on direct appeal.

¶ 3 For the reasons that follow, we reverse and remand for second-stage proceedings.

¶ 4 Defendant's conviction arose from the December 3, 2008, shooting death of Eduardo Toledo in Chicago. After his arrest, defendant was charged with six counts of first degree murder and two counts of unlawful use of a weapon by a felon. Following a jury trial, defendant was convicted of first degree murder and sentenced to 62 years' imprisonment. On direct appeal, this court affirmed defendant's conviction and sentence and corrected the mittimus. *People v. Hargarten*, 2014 IL App (1st) 122600-U. In our order, we summarized the underlying facts of the case. Due to the nature of defendant's current claim, those facts will be repeated here in more detail. We will also review relevant pretrial proceedings.

¶ 5 Shortly after defendant was indicted, attorney Travis Richardson filed his appearance for defendant. In the ensuing years, counsel made a number of pretrial references to one or more alibi witnesses. On September 14, 2010, counsel informed the trial court that defendant had

alerted him to "several" alibi witnesses, and that he was in the process of locating and interviewing them. On March 15, 2011, counsel filed defendant's answer to discovery, in which he stated that "as alibi witnesses, Defendant may call Renee Rains, Beverly Rains and Rosie Rains to testify in this matter." In court on that date, counsel indicated that he had spoken with the prosecutor about the alibi witnesses and "we'll be having some continuing discussions about them in terms of contacting them." On February 3, 2012, in the course of arguing for a continuance, counsel mentioned to the court that "one of the people that we listed in our answer may be back around and []available."

¶ 6 On Wednesday, February 8, 2012, after a jury was chosen but before it was sworn, defense counsel reported that he had spoken with Renee Rains that morning and that she told counsel she "would be here on Friday." Counsel stated that Rains had not been subpoenaed, explaining as follows:

> "I do have an address for her for that; however, it is a secure building that you cannot get into unless someone lets you in. And she has expressed some equivocation about the subpoena issue. I explained to her that what it does is it insures that she will be there. And if we are in a situation where this matter goes beyond Friday, we still don't expect it to, but that that would protect her in terms of her job if she is supposed to be at work and she has to be here and testify."

When the trial court offered to "facilitate" with an order or summons, counsel declined, stating, "I certainly, to be completely forthcoming, I don't want to quote-unquote spook her because she has no experience with the court system, so I don't want her to think anything negative about the system and [have] that run her away."

¶ 7 In opening statements, defense counsel asserted that the State could not prove defendant guilty beyond a reasonable doubt, noted the lack of physical evidence connecting defendant to the crime, and questioned the credibility of the State's eyewitnesses. Counsel then made the following argument:

> "Now, while the defendant in criminal cases is not required to prove anything and the State keeps that burden even when they rest and it's our turn, they still have the burden.
>
> We intend to present a witness to you and you will hear from that witness regarding [defendant's] actual location at the time that this crime was committed. Now, unless there's some way for [defendant] to defy the laws of physics or there's a doppelganger out there, meaning a copy, he didn't do it.
>
> The evidence will show that the witness that we will be presenting has no nefarious affiliation, has not had the unfortunate entanglements with the law as the State's witnesses have had. And so you are going to be left to make a decision. And you will receive when this is all over, some jury instructions regarding who to believe or how to come to your decision in terms of who you are going to believe.
>
> Just because one side floods you with witnesses regarding an issue does not in and of itself outweigh the person who comes to you with credibility and evidence and reliability that the group does not possess. So, you are going to be in a position where you have to ask yourself do I believe someone who has not given me any reason whatsoever to disbelieve him or these guys?

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So, I believe the evidence will show that based on information that you are going to receive from the witnesses, the State will not be able to make that burden. Thank you."

¶ 8 The State's first witness was Chicago police officer James Vins, who was deemed by the court to be an expert in the field of gang recognition and gang investigations. Vins testified that in December 2008, several street gangs existed in the area of 60th Street and Sacramento Avenue. Vins explained that the intersection was a "dividing line" between two gangs, the Ambrose and the Satan Disciples. Specifically, the Ambrose gang held territory south of 60th Street, and the Satan Disciples held territory to the north.

¶ 9 Jose Rivera testified that on the night of December 3, 2008, he and a group of eight other men gathered in his basement apartment at 6024 South Sacramento Avenue to play video games and smoke marijuana. The group of men consisted of his brother, Sergio Rivera; his cousin, Ramon Rivera; his friend, Orlando Ortega; the victim, Eduardo Toledo; and four brothers who lived upstairs, Erik, Jose, Allen, and Alejandro Macias. At some point that night, eight of the men left the apartment and split into two groups to run different errands. Jose Rivera, Orlando Ortega, and Jose, Erik, and Allen Macias headed to a grocery store on the corner of 59th Street and Sacramento to buy food, while Eduardo Toledo, Sergio Rivera, and Alejandro Macias followed behind, heading to the "same building" to pick up an iPod.

¶ 10 As Jose Rivera and his group crossed the intersection of 60th Street and Sacramento, he saw a man holding a handgun run up to them. The gunman, who was wearing a ski mask that covered his nose and chin, pointed the gun at them. Apparently recognizing the group, the

gunman lowered his gun, pulled down his mask, and told them to start "dropping forks" or "dipping forks," which Jose Rivera explained was a gang sign used to show disrespect. Jose Rivera recognized the gunman as defendant, whom he knew from the neighborhood as "Brian" or "Crazy," and whom he identified in court. Jose Rivera testified that defendant was a member of the Ambrose gang. He himself was a former member of the Maniac Latin Disciples, who were friendly with the Satan Disciples. Both the Maniac Latin Disciples and the Satan Disciples were enemies of the Ambrose.

¶ 11 According to Jose Rivera, defendant ran toward the alley, which brought him face-to-face with Toledo. Jose Rivera heard defendant ask Toledo what gang he was in, and heard Toledo respond. Jose Rivera testified that when he saw defendant and Toledo talking to each other, he "tried to run towards him and stop him and that's when he pulled out the gun and shot him." When asked for details, Jose Rivera stated that defendant put the gun to Toledo's face, shot him once, and ran to the alley, and that Toledo fell to the ground. Jose Rivera immediately called 911. In court, the State played a recording of the 911 call, which was time stamped 10:21 p.m. Jose Rivera stayed with Toledo until he heard sirens and then went home. Five days later, police officers came to his home and showed him a photo array from which he identified defendant as the man who shot Toledo.

¶ 12 Jose Rivera acknowledged that he was currently in custody on a pending contempt of court case for a prior failure to appear on the instant case. He also had been arrested on a domestic battery charge in 2011, but that case had been dropped. Jose Rivera stated that no deals or promises had been made on those cases in exchange for his current testimony.

¶ 13 Erik Macias testified that on the evening in question, he was hanging out in Jose Rivera's basement apartment with the group of men described by Jose Rivera, playing video games. Erik Macias's brothers Jose, Allen, and Alejandro were smoking marijuana. At some point, Erik Macias and his brothers Jose and Allen decided to go to a gas station to buy food, and Alejandro Macias, Eduardo Toledo, Orlando Ortega, Sergio Rivera, and Jose Rivera decided to go to a "girl's house" to pick up an iPod. All the men walked toward 60th Street, with brothers Erik, Jose, and Allen Macias in the lead, Jose Rivera and Orlando Ortega in the middle, and Eduardo Toledo, Alejandro Macias, and Sergio Rivera in the rear.

¶ 14 Erik Macias testified that when he crossed 60th Street, he heard the brakes of a car coming from the alley. He turned and saw a man wearing a ski mask and holding a handgun running toward them. The man was "aiming at everybody" and directing them to start "dipping forks." At some point, the gunman slid his ski mask down and Erik Macias could see his entire face. In court, he identified defendant as the gunman. Jose Rivera gave some indication he knew defendant and said something to him. Defendant responded, "[Y]ou all got to start dipping them forks, man." Defendant then turned to Toledo, aimed his gun at him, and asked, "You got a shag, what you is?" Toledo did not answer and defendant shot him in the face. When Toledo fell, Erik Macias ran away. A few minutes later, he returned to the scene so he could tell the police what happened. Eleven days later, he went to the police station and identified defendant in a lineup.

¶ 15 Erik Macias acknowledged that in 2011, he was arrested for driving without a license, and that the case was dismissed. He stated that he did not engage in any deals to have that case dropped in exchange for his testimony in the instant case.

¶ 16 Jose Macias testified that in 2008, he was a member of the Krazy Get Down Boys gang, also known as the KGB, which was friendly with the Ambrose gang. In addition, he was "cool with" the Satan Disciples because his brother Allen hung out with them and eventually became a member. On the night in question, Jose Macias was in the basement with a group of people he did not name in court. According to Jose Macias, "mostly everybody" was smoking marijuana, except Erik Macias. At some point, Jose Macias talked on the phone with a girl and made a plan to walk to her house to borrow an iPod. Jose Macias left the basement with his brothers Allen and Erik. They were followed by a group that was going to a store and which consisted of Alejandro Macias, Jose Rivera, and Eduardo Toledo. Orlando Ortega and Sergio Rivera followed behind. As Jose Macias crossed Sacramento Avenue near 60th Street, a man in a ski mask "came out" and pointed a gun at him and his brothers Allen and Erik. The gunman said, "What's up, Folks," and threw a pitch fork gang sign. The gunman also pulled down his mask, allowing Jose Macias to see his entire face. In court, Jose Macias identified defendant as the gunman.

¶ 17 Jose Macias testified that at this point, Jose Rivera recognized defendant and said something to him. In reply, defendant lowered his gun, called Jose Rivera by his nickname, and said, "[I]t's you all, you all start dippin forks." Jose Macias explained that "dipping forks" meant to throw the Satan Disciples' gang sign upside down as a show of disrespect. According to Jose Macias, defendant then started walking away. As defendant passed Eduardo Toledo, he and Toledo exchanged words. Jose Macias could not hear what Toledo said, but heard defendant say, "[Y]ou got a shag." Jose Macias testified that he had turned around to continue toward his destination when he heard a shot. He looked back and saw defendant "putting [the gun] right back down," Toledo falling to the ground, and defendant fleeing.

¶ 18 Jose Macias ran home, but returned to the scene shortly thereafter and spoke with the police. Later, back at "the house," Jose Rivera told Jose Macias and others in their group that defendant was the shooter. Jose Macias acknowledged that over the next week or two, he discussed what happened with his brothers and Jose Rivera. Eventually, Jose Macias went to the police station and identified defendant in a lineup.

¶ 19 Jose Macias acknowledged that he was currently in custody on a felony gun case, had a pending marijuana possession case, had been arrested for reckless conduct, and had a violation of bail bond "on the books." He testified that the State had not offered him anything on those cases in exchange for his testimony in the current case.

¶ 20 Following Jose Macias's testimony, the trial court spoke with the attorneys regarding scheduling and asked whether they were going to argue over the jury instructions. Defense counsel answered, "I'm assuming we're going to have a jury instruction regarding one witness versus a great number of witnesses and the jury is free to make a decision without deciding that a great number of witnesses automatically is more credible than one or two witnesses." In response, the trial court indicated that it did not know of a particular IPI instruction to that effect, and advised counsel that if it was a non-IPI instruction, he would "need a case with it." Counsel responded that he would "see if we have something for Illinois."

¶ 21 Allen Macias testified that on the night in question, he was in Jose Rivera's basement apartment, playing video games with his brothers, Erik, Jose, Alejandro, and Anthony, as well as with Jose Rivera, Eduardo Toledo, and Orlando Ortega. According to Allen Macias, everyone except his brothers Erik and Alejandro was smoking marijuana. At some point, Allen Macias, Erik Macias, and Jose Macias decided to go to a nearby gas station to buy candy and chips.

Another group, which included Jose Rivera and Orlando Ortega, left at the same time to go the same direction to a girl's house to pick up an iPod. A third group consisting of Alejandro Macias and Eduardo Toledo followed. As Allen Macias crossed the intersection at 60th Street and Sacramento Avenue, he saw a man wearing a ski mask and carrying a handgun come out of an alley and start running toward him and his group. The gunman pointed the gun at the group and said "disciple." He then looked at Jose Rivera and Orlando Ortega, said, "ah, it's you's [*sic*]," and lowered his mask. At this point, Allen Macias could see the entirety of the gunman's face. In court, Allen Macias identified defendant as the gunman.

¶ 22 Allen Macias testified that defendant told the group, "Y'all got to start dipping the forks." Defendant also said "Y'all fixin' to get murdered," or "Y'all were fixin' to get shot." According to Allen Macias, defendant lowered his gun and walked over to Eduardo Toledo and Alejandro Macias. Allen Macias heard defendant say to Toledo, "Oh, you got a shag," to which Toledo did not respond. Defendant then shot Toledo in the head. As Toledo fell, defendant ran toward the alley, and Allen Macias ran home. About ten minutes later, Allen Macias returned to the scene. He did not speak with the police there, but went to the police station eleven days later and identified defendant in a lineup. Allen Macias acknowledged that between the time of the shooting and his viewing of the lineup, he discussed the incident with his brothers and with Jose Rivera.

¶ 23 Alejandro Macias testified that in December 2008, he was a member of the KGB gang. He stated that Eduardo Toledo was a member of the Satan Disciples, and explained that although their gangs did not get along, he would hang out with Toledo, who was like a big brother to him. On the night in question, Alejandro Macias was hanging out in the basement of his building with

his brothers, Erik, Jose, Allen, and Anthony, as well as Jose Rivera, Sergio Rivera, Orlando Ortega, and Eduardo Toledo. The men were playing video games, and "Allen and Sergio and the rest" were smoking marijuana. At some point, most of the men left the basement. Alejandro Macias left with Eduardo Toledo to walk to a friend's house to pick up an iPod, while a separate group, which included Jose Rivera, Orlando Ortega, Erik Macias, Jose Macias, and Allen Macias, walked ahead of them to go to a gas station to buy chips.

¶ 24 Alejandro Macias testified that after the group ahead of him crossed the intersection at 60th Street, he saw a man in a ski mask approach and aim a handgun at them. The gunman then appeared to recognize Jose Rivera and Orlando Ortega and had a conversation with them, during which the gunman lowered his mask to his neck and said, "Oh, you better start dipping forks." When the conversation ended, the gunman lowered his gun and continued along Sacramento Avenue to the area where Alejandro Macias and Eduardo Toledo were standing.

¶ 25 At this point, Alejandro Macias could see the gunman's face clearly. In court, he identified defendant as the gunman. Alejandro Macias testified that defendant "checked" Toledo's gang affiliation by asking him, "Oh, you got a shag? Oh, what you is?" When Toledo did not respond, defendant said, "What you is? Oh, you a donor, right?" and shot Toledo in the face. Toledo fell to the ground and defendant took off. Alejandro Macias ran home, but went back to the scene shortly thereafter and spoke with the police. When he went back home, he discussed what happened with his brothers. Eleven days later, he went to the police station and identified defendant in a lineup.

¶ 26 Alejandro Macias acknowledged that he had a pending case on a charge of criminal damage to property. He testified that no offer or promise had been made to him regarding his

pending charge in exchange for his testimony in the instant case. He also explained that a "shag" is a hairstyle that indicated affiliation with the Satan Disciples.

¶ 27 A forensic investigator testified that he recovered a fired cartridge case at the scene. The parties stipulated that a forensic scientist was unable to recover any fingerprint impressions suitable for comparison from that cartridge. The parties also stipulated that the medical examiner who conducted Toledo's autopsy would have testified that the cause of death was a gunshot wound to the eye.

¶ 28 Outside the presence of the jury, the trial court and attorneys discussed the jury instructions. Defense counsel proposed the following instruction, which he indicated was based on a 7th Circuit civil pattern jury instruction: "You may find the testimony of one witness or few witnesses more persuasive than the testimony of a larger number. You need not accept the testimony of the larger number of witnesses." Counsel argued that the instruction should be given because "we're going to have one witness on behalf of the defendant versus nearly all *** for the State." Following discussion with the attorneys, the trial court delayed determining whether to give the instruction, stating, "I'll put it off to the side. We can argue it later, but I don't believe it's going to apply."

¶ 29 Chicago police detective Jessica Jones testified that she interviewed Erik Macias and Alejandro Macias at the scene, while her partner, Detective Tim Nolan, interviewed Jose Macias. Following these interviews, the detectives began a search for an armed 5'6" or 5'7" Hispanic male in his 20s wearing a dark hat, a black jacket, and a ski mask. Days later, after speaking with Toledo's parents, the detectives arranged a photo array, which they showed to Jose Rivera, who immediately identified defendant as the shooter. Defendant was arrested the following day,

December 14, 2008. Later that day, Alejandro, Allen, Erik, and Jose Macias identified defendant in a lineup.

¶ 30 After the State rested, and outside the presence of the jury, the judge discussed the admissibility of various exhibits with the attorneys. Defense counsel then addressed the court regarding the potential alibi witness as follows:

> "[DEFENSE COUNSEL]: Yes. I have to - - The first is, Judge, that I am going to be requesting a continuance because we have - - I have talked to [the prosecutor] earlier today about our alibi witness. She is not coming. There is a problem that has developed, and so we are requesting respectfully a continuance so that we can re-track her down.
>
> THE COURT: Let's address that a little bit first. I know we talked about this witness several times during the course of the trial. It's my understanding that this witness is not under subpoena.
>
> [DEFENSE COUNSEL]: No.
>
> THE COURT: The reason being is what? What relation is this witness to this particular defendant?
>
> [DEFENSE COUNSEL]: The witness is the defendant's ex-girlfriend. At the time that she agreed to be a witness sometime ago, they were still involved, and they have not been involved for - - according to what I have been informed - - well over a year.
>
> My understanding, as the Court may recall, from this last Monday, she popped up and indicated that she was willing to come to court. She had been

disclosed to the State some time ago. However, I received information yesterday that she was not going to be coming.

THE COURT: Okay. Is there a reason why she was not subpoenaed?

[DEFENSE COUNSEL]: Excuse me?

THE COURT: Is there a reason why she was not subpoenaed?

[DEFENSE COUNSEL]: I am sorry, Judge?

THE COURT: Is there a reason why you didn't drop a subpoena on her?

[DEFENSE COUNSEL]: Because she was a friendly witness, had agreed to come and had indicated - - and I spoke with my client regarding this - - a subpoena that would compel her to come to court would be met with a negative reaction.

THE COURT: Well, you know we talked about her whether or not her work was a secure location where a subpoena could be served. I don't know what her home is - -

[DEFENSE COUNSEL]: It is secured.

THE COURT: I don't know how cooperative she is with members of her own family, but you know, this case probably should have gone out on Friday, but for reasons - - but for whatever reason it did not go out on Friday and we held this case over. We have had a three day weekend, and now we don't have this witness here. Did you speak directly to this witness?

[DEFENSE COUNSEL]: I received an electronic communication with her, Judge. I spoke to her directly on Friday. And then when it was clear that she

would be coming in to testify, I believe I left a message to her to that effect as well as an electronic communication to her regarding the fact that she would be up Tuesday. I did not receive any word from her one way or the other until yesterday. My presumption was that based on the last conversation I had with her, Tuesday would be fine.

THE COURT: Well, you kind of lost me there. The communication you had with her, did that indicate she was not going to come in or was going to come in?

[DEFENSE COUNSEL]: On Friday the indication was that she would be fine with Tuesday. The communication I received yesterday was that she was not going to be coming in.

THE COURT: So, in the meantime what have you done to try to compel her appearance? Have you tried to send an investigator out to subpoena her so if she doesn't come in, I can issue a body attachment, or were you just leaving it to happenstance that she would come through the door?

[DEFENSE COUNSEL]: I am not leaving it to happenstance, Judge. I received that communication from her sometime yesterday afternoon, and by the time I received it, it was really nothing that I could do. I mean, it wasn't like I received it Friday evening, or Saturday, or even Sunday. I received it Monday afternoon.

THE COURT: In our prior conversations I got the impression that this person may not be cooperative, but in any event, if the person is not subpoenaed,

what's the assurance that if I hold this case until 3:30 instead of, you know, 20 to 3:00, or tomorrow, or Thursday, or Friday that she is going to appear? She is not under compulsory process.

This jury has been sitting on this case for three days. I mean, what's the likelihood we are going to get her in here? Number one, get her served and number 2, get her in here.

[DEFENSE COUNSEL]: I am not confident of that, Judge.

THE COURT: You are not confident?

[DEFENSE COUNSEL]: I am not confident at this point, Judge because of the history of the disappearing acts. And then with her indicating yesterday afternoon that she wasn't going to be coming, I am not confident quite frankly that we would be able to one, serve her because of the secure nature of her building. I do not know where she works. I do have an address, but you can't get in that building without someone letting you in.

THE COURT: Sure you can get in the building. If you need to get into the building, you can get in the building. Does she work for the Department of Defense? What kind of building is it?

[DEFENSE COUNSEL]: Well, it's not the Pentagon, Judge, but it's one of those building where you have to ring - - you would literally have to sit outside and wait until someone comes out, and hope that she is there and go up the stairs and so forth to get her.

THE COURT: Well, what are you asking specifically? You said you need a continuance. What are you asking for?

[DEFENSE COUNSEL]: What I am doing, Judge, is basically making my record regarding the fact that she is not here and asking for a continuance to attempt to get her here. That doesn't mean I am confident that it will happen.

THE COURT: Okay. You have no assurance that you will have her later on in the day or tomorrow morning or you are going to get her in?

[DEFENSE COUNSEL]: No.

THE COURT: You know, we are on trial here. I understand that the defense is entitled to put on whatever defense they want to or rely on the State's ability to prove the defendant guilty beyond a reasonable doubt. If they want to present a defense, they can do so. This witness is not under subpoena. It does not appear that this witness is sick or has car trouble or will come in if in fact a continuance is granted.

Apparently this witness is either intentionally or unintentionally not cooperative. Respectfully I don't know what a continuance is going to do in this matter. I will give you until after lunch. If you can come up with something else and you can make any progress on this, [defense counsel], I will listen to you again, but this is the fourth day of trial and the jury should be getting this case today.

So, I am inclined to deny that continuance based on the information I have right now.

[DEFENSE COUNSEL]: Thank you, Judge."

¶ 31 The attorneys and the court thereafter discussed the jury instructions. The court stated it would not be giving defense counsel's proposed instruction regarding the jury's ability to "find the testimony of one witness or a few witnesses more persuading than the testimony of a large number," as it did not believe such an instruction would be applicable. Defendant made a motion for a directed verdict, which the trial court denied.

¶ 32 The trial court spoke with defendant regarding defense witnesses as follows:

> "THE COURT: [Defendant], you understand that it's my understanding that you are going to rest your case in chief. But for the argument made by [defense counsel] with regard to that one witness, have you talked to [defense counsel] regarding any witnesses you may want to call in this matter?
>
> THE DEFENDANT: Yes, sir, I have.
>
> THE COURT: And you understand by resting right now there will be no witnesses called? Do you know that?
>
> THE DEFENDANT: Yes, sir."

Defendant thereafter confirmed that he would not be testifying, and the defense rested.

¶ 33 The jury deliberated from 6 p.m. until about 9:30 p.m. on February 14, 2012, when it sent out a note stating that it was "currently at 2 to 10" and could not reach a verdict. The court sequestered the jury overnight. The next morning, the jury found defendant guilty of first degree murder. It also found that he had personally discharged a firearm that proximately caused Toledo's death.

¶ 34 Defendant filed a motion for a new trial, arguing, among other things, that "Defendant's alibi witness, at one point, was prepared to testify. Defendant was not granted a continuance for her to appear." Following extensive argument on the motion, which did not include discussion of the alibi issue, the trial court denied defendant's motion for a new trial. The trial court subsequently sentenced defendant to 37 years' imprisonment for murder, with a 25-year firearm enhancement, for a total sentence of 62 years in prison. Defendant's motion to reconsider sentence was denied.

¶ 35 Defendant appealed, contending that he was denied a fair trial where the trial court admitted autopsy photographs and an audio recording of Jose Rivera's 911 call. We rejected defendant's arguments, affirmed his conviction and sentence, and corrected the mittimus. *People v. Hargarten*, 2014 IL App (1st) 122600-U.

¶ 36 On February 13, 2015, defendant filed a *pro se* postconviction petition. As relevant to this appeal, he made the following allegations: that "the alibi witness(es) failed to show [at trial] due to inadequate notice and scheduling"; that trial counsel failed to secure the appearance of Renee Rains at trial; that trial and appellate counsel were both ineffective for failing to properly raise and preserve "the issue of the alibi witness Renee Rains"; that "attached and incorporated herein as Defendant's Exhibit A is the sworn affidavit of Jasmine Solis who was present with Defendant and Renee Rains on the night of the murder"; and that he was at Rains's residence with Solis from 7 p.m. on December 3, 2008, to 11 a.m. on December 4, 2008, uninterrupted. Defendant further alleged:

> "Counsel's performance was unreasonable based on the fact that an alibi witness or witnesses who were deemed credible / reliable would have resulted in a

> different outcome at trial. The jury would have weighed the testimony of several rival street gang members who were under the influence of a mind-altering drug at the time of the murder against that of a law-abiding sober girlfriend / fiancé and her best friend. At the least based on the total absence of any physical evidence linking the Defendant to the crime scene/murder, the testimony of the alibi witness(es) would have raised the necessary reasonable doubt to change the outcome of the proceedings. Without the benefit of the alibi witness' testimony, Defendant was unable to present any evidence in his defense and was prejudiced substantially by the People's witnesses' testimonies identifying Defendant as the shooter. Defense counsel should have had a subpoena issued for the appearance of Renee Rains based on the necessity and strength of her testimony. To forego her testimony was not reasonable trial strategy but a deficient performance by counsel in preparing for trial. And Defendant was prejudiced by the denial of Renee Rains' testimony which is / was exculpatory evidence not considered by the jury."

¶ 37 Defendant alleged that his mother, Barbara Hargarten, "became aware of the alibi witnesses" on the day defendant was arrested, and that she "relayed information of the existence of alibi witnesses to the Chicago Police Department, Assistant State's Attorneys for Cook County, and Mr. Richardson, et al. – Defendant's counsel – all to no avail." He further alleged that although the posttrial motion mentioned "the denial of the alibi witness, Renee Rains," and "although the weight and significance of the alibi witnesses was blatantly obvious," appellate counsel failed to properly review and investigate the trial record and present "the issue" on direct appeal.

¶ 38 Defendant attached two affidavits to his petition. One was executed by Jasmine Solis, who averred that from 7 p.m. on December 3, 2008, to 11 a.m. on December 4, 2008, she was at Renee Rains's residence with Rains and defendant "at all times." Solis further averred that on December 14, 2008, she learned defendant had been arrested for a murder that was committed on the night she was with Rains and defendant. Solis stated:

> "[F]rom December 17, 2008, to February 1, 2012, I consistently contacted Mr. Travis Richardson, et al., concerning my willingness to testify at [defendant's] trial concerning his alibi, as set forth above, and the physical impossibility of him being in two places at once and thus not guilty of the commission of the alleged offense of murder."

Solis stated that "upon information and belief," both defendant and his mother notified the Cook County State's Attorney's office of her knowledge of defendant's whereabouts at the time of the murder and her willingness to testify. Solis averred that she was never called or interviewed as a witness by the Cook County State's Attorney's office or by defendant's attorneys, even "though both parties knew of my knowledge of the facts related to [defendant's] whereabouts at the time of the murder of Eduardo Toledo on December 3, 2008." Finally, Solis stated that she was still willing to testify as to defendant's whereabouts on the night in question.

¶ 39 In the second affidavit, defendant's mother, Barbara Hargarten, averred that "upon information and belief," both defendant and Solis notified the Cook County State's Attorney's office and Travis Richardson, et al., about Solis's and Rains's knowledge of defendant's whereabouts on the night of Toledo's murder. Barbara Hargarten further averred that she was

never called or interviewed as a witness by the police, the State's Attorney's office, or her son's attorney, and that she was still willing to testify.

¶ 40 The trial court summarily dismissed defendant's petition as frivolous and patently without merit.

¶ 41 This appeal followed.

¶ 42 As an initial matter, we note the State's argument that summary dismissal of the *pro se* petition was warranted because defendant failed to attach a notarized verification affidavit. In *People v. Hommerson*, 2014 IL 115638, ¶ 11, our supreme court held that a petition may not be dismissed at the first stage of postconviction proceedings on the basis that it lacks a verification affidavit. As such, the State's argument fails.

¶ 43 On appeal, defendant contends that his petition should not have been summarily dismissed because it presented the gist of a meritorious claim of ineffective assistance of counsel. Specifically, he asserts that the petition included an arguable claim that trial counsel was ineffective (1) for failing to present an alibi witness, Rains, whom he promised in opening statements but did not secure, even after the trial court "prodded" him to subpoena her, and (2) for failing to investigate and call a second alibi witness, Solis, who was available and known to him. Defendant argues that he was arguably prejudiced by counsel's failures, as it is reasonably possible that the result of the trial would have been different had either or both of the alibi witnesses testified, given the lack of physical evidence against defendant and the State's witnesses' admitted marijuana use, rival gang membership, and motives to lie. Finally, defendant asserts that to the extent that Rains's potential testimony is clear from the record, appellate

counsel was ineffective for failing to raise trial counsel's ineffectiveness regarding Rains on direct appeal.

¶ 44 In cases not involving the death penalty, the Post-Conviction Hearing Act provides a three-stage process for adjudication. 725 ILCS 5/122-1 (West 2014); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). The instant case involves the first stage of the process, during which the trial court independently assesses the petition, taking the allegations as true. *Hodges*, 234 Ill. 2d at 10. Based on this review, the trial court must determine whether the petition "is frivolous or is patently without merit," and, if it so finds, dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2014).

¶ 45 A petition may be dismissed as frivolous or patently without merit "only if the petition has no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 16. A petition has no arguable basis in law when it is founded in "an indisputably meritless legal theory," for example, a legal theory that is completely belied by the record. *Id.* A petition has no arguable basis in fact when it is based on a "fanciful factual allegation," which includes allegations that are "fantastic or delusional" or contradicted by the record. *Id.* at 16-17; *People v. Morris*, 236 Ill. 2d 345, 354 (2010). Our review of a first-stage dismissal is *de novo*. *Hodges*, 234 Ill. 2d at 9. Pursuant to this standard, we review the trial court's judgment, not the reasons given for it. *People v. Jones*, 399 Ill. App. 3d 341, 359 (2010).

¶ 46 Traditionally, to establish ineffective assistance of counsel, a defendant must show (1) that counsel's representation fell below an objective standard of reasonableness; and (2) but for counsel's errors, there is a reasonable probability that the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). However, our supreme court has

indicated that in the context of first-stage postconviction proceedings, a defendant need not conclusively establish these factors; in *Hodges*, our supreme court held that "a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Hodges*, 234 Ill. 2d at 17.

¶ 47 We find that defendant has stated an arguable claim that trial counsel was ineffective for failing to investigate and call Solis as an alibi witness. It is true that in general, an attorney's decision regarding which witnesses to call is a matter of trial strategy that is immune from claims of ineffective assistance of counsel. *People v. West*, 187 Ill. 2d 418, 432 (1999). However, counsel may be deemed ineffective for failing to present exculpatory evidence of which he is aware, including failing to call a witness whose testimony would support an otherwise uncorroborated defense. *People v. Tate*, 305 Ill. App. 3d 607, 612 (1999). More important, questions of trial strategy are inappropriate at the first stage of postconviction proceedings. *People v. Tate*, 2012 IL 112214, ¶ 22.

¶ 48 Here, the defense's theory of the case was that defendant was misidentified as the person who shot and killed Toledo. Defense counsel noted in opening statements that there was no physical evidence connecting his client to the shooting, argued that the State's eyewitnesses were not trustworthy or credible, and stated that he intended to present an alibi witness who was credible, reliable, and lacked any "nefarious affiliation" or "unfortunate entanglements with the law." He stated that this witness would testify as to defendant's "actual location" at the time of the shooting and thus show that "he didn't do it." Solis's proposed testimony that defendant was

with her and Rains on the night of the shooting would have provided defendant an alibi and, therefore, would have corroborated the defense theory of misidentification.

¶ 49 The averments made by Solis in her affidavit – which we must consider as true in this point of the proceedings (see, *e.g.*, *People v. Lewis*, 2017 IL App (1st) 150070, ¶ 14) – support the defense theory that defendant was misidentified and support defendant's claim that counsel was aware of Solis's existence. As such, we find it arguable that trial counsel performed unreasonably by failing to investigate and call Solis as an alibi witness. See *Tate*, 2012 IL 112214, ¶ 24.

¶ 50 We further find it arguable that defendant was prejudiced by Solis's absence on the witness stand. On this issue, we find *Tate*, 2012 IL 112214, instructive. In *Tate*, the Illinois Supreme Court reversed the summary dismissal of a postconviction petition because it was arguable that the defendant was prejudiced by his trial counsel's failure to investigate or call four witnesses, two of whom could have provided the defendant with an alibi defense. *Id.* ¶¶ 4, 24-25. The State's case against the defendant had consisted of the testimony of four eyewitnesses. *Id.* ¶ 24. No murder weapon was recovered, no fingerprints or DNA linked the defendant to the crime, and there was no confession. *Id.* The defendant attached four affidavits to his petition: two affiants provided the defendant with an alibi; a third affiant stated he did not see the defendant anywhere near the shooting; and the fourth affiant averred he was five feet from the victim at the time of the shooting, he witnessed the shooting, he had known the defendant for years, and he was sure the defendant was not the shooter. *Id.* ¶ 5. Our supreme court observed that the fourth affiant's testimony, which it characterized as "illustrative," would have provided a first-person account of the incident which directly contradicted the prior statements of the State's

eyewitnesses. *Id.* ¶¶ 23, 24. The court concluded that "the affidavits attached to [the defendant's] postconviction petition meet the 'arguable' *Strickland* test for first-stage petitions" and that the "affidavits are sufficient for his petition to advance to the second stage of postconviction proceedings." *Id.* ¶¶ 23, 25.

¶ 51 Here, as in *Tate*, the State's case rested on eyewitness testimony. Also as in *Tate*, no gun was recovered, no physical evidence linked defendant to the crime, and defendant did not confess. Solis's proposed testimony was that she was with defendant at Rains's residence during the time frame in which the shooting occurred. As in *Tate*, this proposed testimony would have directly contradicted the testimony of the State's witnesses, who identified defendant as the shooter. In these circumstances, we find, as our supreme court did in *Tate*, that it is at least arguable that defendant was prejudiced by the lack of Solis as a witness. See *id.* ¶ 24.

¶ 52 Having concluded that defendant has established an arguable constitutional claim of ineffective assistance of trial counsel for failure to investigate and call Solis, we reverse the summary dismissal of defendant's petition. Because partial dismissals of postconviction petitions are not allowed at the first stage of proceedings, we need not consider the remainder of defendant's arguments, or the State's responses to those arguments, and remand the entire postconviction petition for second-stage proceedings. See *People v. Rivera*, 198 Ill. 2d 364 (2001).

¶ 53 For the reasons explained above, we reverse and remand for further proceedings.

¶ 54 Reversed and remanded.